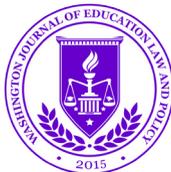


# WASHINGTON JOURNAL OF EDUCATION LAW AND POLICY

APRIL 2015

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*Luke Edwards and Allison Elgart*

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Schools  
*Ellie Canter and Kelsey Kennedy*

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*Maria Malik*



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## THE SCHOOL TO PRISON PIPELINE: HOW IMPLICIT BIAS COLORS DISCIPLINE

Luke Edwards\* & Allison Elgart\*\*

During the 2011–2012 school year, Jamal,<sup>1</sup> a ninth grade African American student, was suspended for 34.5 days, roughly twenty percent of the school year. The school system’s failure to educate Jamal began early in his academic career. In first grade, he was diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD) and for a time received special education services. However, in fourth grade he was inexplicably removed from special education programming, despite scoring in the bottom one percent on the Test of Auditory Reasoning and Processing. After this, Jamal struggled in school, failing most of his classes. The school did not provide interventions or services. Instead, the administration steadily advanced him through grades without addressing his deeper learning issues.

Jamal’s learning struggles resulted in behavioral problems, and he was increasingly disciplined for minor infractions including dress code violations and disruption. These citations resulted in out-of-school suspensions, feeding his academic struggles, eroding his self-image, and alienating him from school. His mother consistently advocated for him, requesting either that he receive special education services, or be placed in an alternative school that could address his needs. The administration refused, stating that alternative education was inappropriate, and re-diagnosed Jamal as having “oppositional defiance disorder,” which was “co-morbid” with his ADHD. The school maintained that this so-called diagnosis did not qualify him for any services or interventions.

Due to his academic struggles and the administration’s failure to provide interventions or aid, Jamal’s disciplinary issues increased. Jamal was disciplined several times for ‘willful defiance’ and ‘disruption,’ both notoriously vague and subjective infractions.<sup>2</sup> These citations resulted in counterproductive out-of-school suspensions. Far from providing Jamal with the tools to deal with his disability and fully engage in school, suspensions only increased his feelings of alienation. One teacher routinely video recorded him in class on her phone and sent his mother constant text messages, sometimes minute by minute, detailing Jamal’s behavior—creating an environment where Jamal felt he was under constant hostile scrutiny.

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\* Luke Edwards is a second year student at Berkeley Law School and was a summer law clerk at the Equal Justice Society.

\*\* Allison Elgart is the Legal Director of the Equal Justice Society in Oakland.

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1. The student’s name has been changed to protect his identity

2. See, e.g., Evie Blad, ‘*Willful Defiance*’ Will No Longer Be Cause for Suspension in San Francisco, EDUC. WEEK, Mar.3, 2014, [http://blogs.edweek.org/edweek/rulesforengagement/2014/03/willful\\_defiance\\_will\\_no\\_longer\\_be\\_cause\\_for\\_suspension\\_in\\_san\\_francisco\\_1.html](http://blogs.edweek.org/edweek/rulesforengagement/2014/03/willful_defiance_will_no_longer_be_cause_for_suspension_in_san_francisco_1.html); Teresa Watanabe, L.A. *Unified Bans Suspensions for ‘Willful Defiance’*, L.A. TIMES, May 14, 2014, <http://articles.latimes.com/2013/may/14/local/la-me-lausd-suspension-20130515>.

In one incident, Jamal's friend took two dollars from another student, and attempted to engage Jamal in a game of "keep away" with the other student. Rather than address this as a schoolyard game that got out of hand, the administration termed this event a 'robbery,' called the police, and excluded Jamal from school for three days. Jamal continued to struggle as a result of the vicious cycle of academic struggles and suspensions, and the school did not intervene in any way.

Later in the year, he pushed a teacher who had confiscated his phone. The administration again involved the police, the police arrested him, and Jamal spent three nights in jail because there was no intake person available to release him over the weekend. While his actions undoubtedly required disciplinary intervention, sending a fourteen-year-old to jail for several days is a gross overreaction, and shows a disregard for the mental health impact of locking up a young person. Throughout his time in school, Jamal's actions were viewed through the lens of the criminal justice system rather than being viewed as the actions of a child with emotional issues. Jamal was denied the special education services he desperately needed, and was eventually transferred to a school equipped to deal with his disabilities—the same school that the administration had previously termed inappropriate. Since then, Jamal has not had any disciplinary issues.

Unfortunately, Jamal's story is not unusual. It falls into a larger pattern of sending youth into what is commonly known as the school to prison pipeline.<sup>3</sup> The process begins when students are excluded from school, either by suspension or expulsion. More than two million students experience exclusionary discipline every year,<sup>4</sup> generally for minor offenses.<sup>5</sup> Students of color, especially Latino and African American students, are disproportionately disciplined and excluded.<sup>6</sup> Indeed, nationally a Latino student is two times more likely to be suspended than a white student, while an African American student is three times more likely to be suspended than a white student.<sup>7</sup> This is not because those students exhibit worse behaviors,<sup>8</sup> or because teachers or administrators

3. See, e.g., *School to Prison Pipeline*, LEGAL DEFENSE FUND, <http://www.naacpldf.org/case/school-prison-pipeline> (last visited June 25, 2014); *What Is The School-to-Prison Pipeline?*, ACLU, <https://www.aclu.org/racial-justice/what-school-prison-pipeline> (last visited June 25, 2014).

4. DANIEL J. LOSEN & TIA ELENA MARTINEZ, UCLA CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, *OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS* 1 (2013).

5. See EMILY MORGAN ET AL., THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM* ix (2014).

6. LOSEN & MARTINEZ, *supra* note 4, at 10.

7. *Id.* at 1.

8. DEP'T OF JUSTICE & DEP'T OF EDUC., *DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE* 4 (2014) (citing Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV 85 (2011); TONY FABELO ET AL., COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* (2011); A. Gregory & A.R. Thompson, *African American High School Students and Variability in Behavior Across*

are all intentionally bigoted. Rather, it appears that implicit biases and unconscious stereotyping play a key role in creating these disparities. Research additionally shows school discipline disparities with respect to disabled students,<sup>9</sup> LGBT students,<sup>10</sup> and other students of color<sup>11</sup>—likely in part because of implicit biases.

Disciplined students are more likely to end up incarcerated because exclusionary discipline pushes them out of school and into the path of the criminal justice system.<sup>12</sup> This process is deeply harmful to students, schools, and communities because it limits students' life chances,<sup>13</sup> negatively impacts school quality,<sup>14</sup> and deprives communities of incarcerated students' potential contributions. Schools must collaborate with communities to stop the school to prison pipeline.

In Section I, we give an overview of the school to prison pipeline. Section II focuses on the role implicit bias plays in school discipline and criminal justice. Section III describes the myriad negative impacts of the pipeline. Finally, in Section IV we discuss several promising avenues for reform.

## I. THE SCHOOL TO PRISON PIPELINE PUSHES STUDENTS DOWN A DISCIPLINARY PATH THAT CULMINATES IN INCARCERATION

The term “school to prison pipeline” describes a process whereby students are pushed out of school, mischaracterized as rule breakers, and channeled into prisons. This process begins when students are suspended and ex *Classrooms*, 38 J. COMMUNITY PSYCHOL. 386 (2010); Russell J. Skiba, et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317 (2002); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?*, 116 AM. J. EDUC. 557 (2010).

9. Disabled students are even more likely to be disciplined and racial disparities are even greater for disabled students. See, e.g., LOSEN & MARTINEZ, *supra* note 4, at 10.

10. Across race, LGBT youth are also disproportionately disciplined. This may potentially be traced back to many of the same issues of bias and discrimination that are the root causes of disproportionate disciplining of students of color. See Emi Himmelstein, K.E.W. & Brückner, H., *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 54 (2010).

11. There are also clear discipline disparities with regard to Native American Students and South Asian students. Discipline statistics differ by geographic location, but studies indicate Native American Students are pervasively over-disciplined. See, e.g., REBECCA GORDON ET AL., EXPOSE RACISM & ADVANCE SCHOOL EXCELLENCE, FACING THE CONSEQUENCES: AN EXAMINATION OF RACIAL DISCRIMINATION IN PUBLIC SCHOOLS 9 (2002). Asian-American students as a whole are the least disciplined group. *Id.* Most reports do not specifically break out South Asian students as a separate subcategory distinct from Asian students, but those that do indicate that South Asian students are among the most over-disciplined groups. See, e.g., Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URBAN EDUC. 536, 546 (2004).

12. See TONY FABELO ET AL., *supra* note 8, at 61.

13. See, e.g., ROBERT BALFANZ ET AL., THE CIVIL RIGHTS PROJECT/ PROYECTO DERECHOS CIVILES, SENT HOME AND PUT OFF-TRACK: THE ANTECEDENTS, DISPROPORTIONALITIES, AND CONSEQUENCES OF BEING SUSPENDED IN THE NINTH GRADE 9, 9 (2012); VERONICA TERRIQUEZ ET AL., THE IMPACT OF PUNITIVE HIGH SCHOOL DISCIPLINE POLICIES ON THE POSTSECONDARY TRAJECTORIES OF YOUNG MEN 3 (2013); TONY FABELO ET AL., *supra* note 8, at xii.

14. Russell J. Skiba et al., African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy, 54 N.Y.L. SCH. L. REV. 1071, 1077-78 (2010).

pelled from school. In the 2009–2010 school year, 2,600 middle and secondary schools suspended at least twenty-five percent of their students at least once, and one in every nine students experienced exclusionary discipline.<sup>15</sup> Because of aggressive discipline strategies and zero tolerance policies, students often face suspension and expulsion for seemingly minor offenses.<sup>16</sup> Students are also frequently suspended or expelled for highly subjective non-threatening infractions such as “willful defiance” or “disruption”—indeed, in many areas half of all suspensions and expulsions are for willful defiance.<sup>17</sup>

After being disciplined, students often come into contact with the justice system. This happens in several ways. Schools regularly and unnecessarily involve police officers in the school discipline process,<sup>18</sup> thereby framing students as criminals. As seen in Jamal’s case, police involvement can sometimes result in students being taken to jail over issues of school discipline. Further, during the time students are excluded from school by suspensions or expulsions they often get into trouble with the law. Students are twice as likely to be arrested during months they are suspended from school than months they are not forcibly removed from school.<sup>19</sup> This relationship is strongest for students without a history of behavioral problems and cannot be explained by individual student characteristics.<sup>20</sup> Students who are suspended and expelled for discretionary violations are three times more likely to be in contact with the juvenile justice system the following year.<sup>21</sup> This is likely in part due to the alienation students feel after suspensions and in part due to the lack of supervision, guidance, or structure for excluded students.<sup>22</sup>

Finally, students are convicted for criminal infractions, pulling them out of school and putting them into juvenile detention. The school to prison pipeline removes students from schools, pushes them into the path of the criminal justice system, and saddles them for life with the consequences of a criminal record.

The school to prison pipeline has intensified over the past few decades. The rates of suspensions and expulsions,<sup>23</sup> racial disparities in school discipline,<sup>24</sup> and rates of incarceration have all dramatically increased since the 1970s.<sup>25</sup> Recently, there have been some promising developments that indicate

15. LOSEN & MARTINEZ, *supra* note 4, at 1, 7.

16. One student was expelled for a violation of the weapons zero tolerance policy when her mother accidentally packed a paring knife in her lunch. See Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1039, 1051 (1999).

17. See, e.g., TERRIQUEZ ET AL., *supra* note 13, at 1.

18. Insley, *supra* note 16, at 1071.

19. Kathryn C. Monahan et al., *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 J. YOUTH ADOLESCENCE 1110, 1116 (2014).

20. *Id.* at 1118.

21. TONY FABELLO ET AL., *supra* note 8, at xi.

22. See Committee on School Health, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003).

23. See LOSEN & MARTINEZ, *supra* note 4, at 1.

24. Suspension rates for Latinos and African Americans have doubled in the past forty years, while suspension rates for white students have increased by less than twenty percent. See LOSEN & MARTINEZ, *supra* note 4, at 1.

25. Incarceration in the U.S. has increased six fold since the 1970s, Becky Pettit & Bruce Western, *Mass*

some school districts are starting to take notice of this issue and address it, but much more remains to be done.<sup>26</sup>

Moreover, the school to prison pipeline disproportionately impacts certain communities. Discipline practices vary greatly from district to district and school-to-school depending on an individual principal's school discipline philosophy and the disciplinary procedures of a district.<sup>27</sup> Affluent students are less likely to be disciplined,<sup>28</sup> while students of color are disproportionately channeled through the school to prison pipeline.<sup>29</sup>

## II. IMPLICIT BIAS CONTRIBUTES TO LATINO AND AFRICAN AMERICAN STUDENTS BEING DISPROPORTIONATELY PUSHED THROUGH THE SCHOOL TO PRISON PIPELINE

Latino and African American students are especially over-disciplined, and the same groups are overrepresented in the prison population. This pattern is prevalent across the country. In the 2009-2010 school year, Latino secondary students were four times more likely to be suspended than white students in Atlanta, Georgia,<sup>30</sup> five times more likely to be suspended than white students in Port Chester, New York,<sup>31</sup> and two and a half times more likely to be suspended than white students in Seattle, Washington.<sup>32</sup>

In the same year, African American secondary students were five times more likely to be suspended than white students in Atlanta,<sup>33</sup> nine times more likely to be suspended than white students in Port Chester,<sup>34</sup> and four times more likely to be suspended than white students in Seattle.<sup>35</sup> On average, Latino students are twice as likely to be suspended as white students, while African American students are three times more likely to be suspended than white students.<sup>36</sup> Similarly, Latinos are three times more likely than whites to be incarcerated, and African Americans are roughly seven times more likely than whites to be incarcerated.<sup>37</sup> These disparities particularly affect men and boys,

*Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 51 (2004).

26. Between the 2011–2012 school year and the 2012–2013 school year, California reduced the use of exclusionary discipline and marginally shrunk racial disparities. See DANIEL J. LOSEN, KEEPING CALIFORNIA'S KIDS IN SCHOOL: FEWER STUDENTS OF COLOR MISSING SCHOOL FOR MINOR MISBEHAVIOR, 1 (2014).

27. Skiba et al., *supra* note 14, at 1075.

28. See TERRIQUEZ ET AL., *supra* note 13, at 1.

29. See LOSEN & MARTINEZ, *supra* note 4, at 1.

30. See *Secondary School Suspension Rates by District: Atlanta City, GA*, UCLA CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, <http://www.schooldisciplinedata.org/results.php>.

31. See *Secondary School Suspension Rates by District: Port Chester-Rye Union Free School District, NY*, UCLA CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, <http://www.schooldisciplinedata.org/results.php>.

32. See *Secondary School Suspension Rates by District: Seattle Public Schools, WA*, UCLA CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, <http://www.schooldisciplinedata.org/results.php>.

33. See *Secondary School Suspension Rates by District: Atlanta City, GA*, *supra* note 29.

34. See *Secondary School Suspension Rates by District: Port Chester-Rye Union Free School District*, *supra* note 30.

35. See *Secondary School Suspension Rates by District: Seattle Public Schools, WA*, *supra* note 31.

36. See LOSEN & MARTINEZ, *supra* note 4, at 1.

37. See *Combating Mass Incarceration*, ACLU, <https://www.aclu.org/combating-mass-incarcera->

who are more likely to be disciplined in school<sup>38</sup> and incarcerated later in life.<sup>39</sup>

*A. Students of Color are More Likely to Receive Harsher Punishment Than White Students for the Same Behavior*

A common misconception is that these disparities are a result of bad behavior on the part of Latino and African American students, but numerous studies show that is not the case.<sup>40</sup> Rather, students of color are more likely to receive harsher punishment than white students for the same behavior.<sup>41</sup> Even controlling for teacher ratings of student misbehavior, African American students are still more likely to be sent to the office than white students for the same infractions.<sup>42</sup> One Texas study found that African American and Latino students receive harsher punishments for discretionary first offenses than white students.<sup>43</sup> Additionally, African American students are disproportionately disciplined for subjective infractions such as “willful defiance.”<sup>44</sup> When offenses are defined by objective criteria (e.g. smoking, vandalism, or leaving without permission), the racial gap dramatically narrows.<sup>45</sup> Instead of student misbehavior, implicit biases appear to be at play in these situations.

*B. Implicit Bias is the Result of Our Unconscious Stereotypes and Associations*

Implicit biases are subconscious associations that alter how we perceive and understand people. These biases are triggered solely by the presence of a member of a group about which we hold preconceptions.<sup>46</sup> Our subconscious stereotypes inform our perceptions of other people, often without our willful participation or even our knowledge.<sup>47</sup> Implicit bias impacts the way we see virtually everyone, and we hold biases based on things as varied as gender identity, race, national origin, sexual orientation, and social status.<sup>48</sup> Everyone is influenced by implicit bias and it is not uncommon for these biases to run counter to the views we consciously hold.<sup>49</sup> Even well-meaning people can act

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tion-facts-0 (last visited June 25, 2014).

38. See LOSEN & MARTINEZ, *supra* note 4, at 10.

39. See Combating Mass Incarceration, *supra* note 37.

40. DEP’T OF JUSTICE & DEP’T OF EDUC., *supra* note 8, at n.7.

41. Catherine P. Bradshaw et al., Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals, 102 J. OF EDUC. PSYCHOL. 508, 514 (2010).

42. *Id.*

43. See TONY FABELO ET AL., *supra* note 8, at 42.

44. See Russel J. Skiba, et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317, 334 (2002).

45. See *id.*

46. John F. Dovidio et al., *Why Can’t We Just Get Along, Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88, 94 (2002).

47. Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006)

48. See John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. IN ORGANIZATIONAL BEHAV. 39, 39-69 (2009).

49. Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV.

in harmful ways because of implicit bias.<sup>50</sup>

*C. Because of Implicit Bias, African Americans and Latinos are Perceived as More Criminal, Violent, and Hostile*

Both Latinos and African Americans are negatively stereotyped in pervasive fashion. Latinos are stereotyped as unintelligent<sup>51</sup> and aggressive.<sup>52</sup> Latino men are additionally perceived as violent, antagonistic, and criminal.<sup>53</sup> Similarly, African Americans are routinely stereotyped as criminal,<sup>54</sup> violent,<sup>55</sup> angry,<sup>56</sup> poor,<sup>57</sup> ape-like,<sup>58</sup> unintelligent,<sup>59</sup> and lazy.<sup>60</sup> These are common biases that people hold irrespective of their own race, gender, conscious beliefs, or intentions.<sup>61</sup> These biases tend to make people perceive Latino and African American people, and especially Latino and African American men and boys, as criminal, violent, and predisposed to break rules and laws.

These conceptions are in part responsible for the overrepresentation of these groups in prisons.<sup>62</sup> When Latinos and African Americans get in trouble with the law, their actions are perceived as especially threatening and they are thus punished more harshly than they otherwise would be. Indeed, in one study, mock jurors perceived low-income Latinos as more blameworthy than whites for the same crimes, likely due to their implicit biases against Latinos.<sup>63</sup>

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945, 946 (2006).

50. Melissa Hart, *Subjective Decision Making and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005).

51. James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. OF BEHAV. SCI. 355, 360-61 (2005).

52. Gerardo Marin, *Stereotyping Hispanics: The Differential Effect of Research Method, Label, and Degree of Contact*, 8 INT'L J. OF INTERCULTURAL REL. 17, 20 (1984).

53. Yolanda F. Niemann, *Use of Free Responses and Cluster Analysis to Determine Stereotypes of Eight Groups*, 20 PERSONALITY AND SOC. PSYCHOL. BULL. 379, 383 (1994).

54. AMERICAN VALUES INSTITUTE, TRANSFORMING PERCEPTION: BLACK MEN AND BOYS \*6 (2013); Jerry Kang, *Bits of Bias*, in IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

55. La Vonne I. Neal et al., *The Effects of African American Movement Styles on Teachers' Perceptions and Reactions*, 37 J. OF SPECIAL EDUC. 49, 50 (2003); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. OF PERSONALITY & SOC. PSYCHOL. 876, 876 (2004); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1327-28 (2002).

56. CHERYL STAATS, THE OHIO STATE UNIVERSITY KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY STATE OF THE SCIENCE IMPLICIT BIAS REVIEW 2013 \*45 (2013).

57. AMERICAN VALUES INSTITUTE, *supra* note 54, at \*\*6-7.

58. Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 294, 296 (2008).

59. John Aronson, Carrie B. Fried & Catherine Good, *Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence*, 38 J. OF EXPERIMENTAL SOC. PSYCHOL. 113, 114 (2002).

60. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 802 (2012).

61. See STAATS, *supra* note 56, at \*27.

62. See Charles Ogletree et al., *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 45 (Justin D. Levinson & Robert J. Smith eds., 2012).

63. Cynthia Willis Esqueda et al., *The Effects of Ethnicity, SES, and Crime Status on Juror Decision Making: A Cross-Cultural Examination of European American and Mexican American Mock Jurors*, 30 HISP. J. OF BEHAV. SCI. 181, 195 (2008).

African Americans face similar biases in the criminal justice system.<sup>64</sup>

Teachers, as human beings, are susceptible to the same biases as the rest of us, and these unconscious biases contribute to Latinos and African Americans being overrepresented in school disciplinary procedures.

*D. Implicit Bias Contributes to Discriminatory Disciplinary Practices in Schools*

Teachers are generally good people who want to help students learn, and few would agree with overtly racist statements. Disparities in discipline persist due in large part to implicit bias. As a result of unconscious bias, teachers unknowingly misconstrue and overreact to Latino and African American students' behavior, and subsequently over-discipline those students. Several studies give key insights into how this happens.

In one study, researchers investigated why African American boys frequently faced harsher penalties than their peers.<sup>65</sup> Researchers found that after the age of nine African American boys are perceived as less innocent and older than white or ambiguous race boys.<sup>66</sup> For example, images of 10–13 year old African Americans and images of 14–17 year old whites were given roughly equivalent ratings for innocence, while white boys aged 10–13 were perceived as dramatically more innocent than either group.<sup>67</sup> Tragically, it appears that African American children lose their innocence in the eyes of others even before they hit puberty. Building off this insight into how African American boys are perceived, when teachers discipline African American boys over the age of ten, teachers may unconsciously think of them as less innocent in their misbehavior. Teachers may then be more likely to punish those students harshly because, in the teachers' minds, these students are more culpable.

Additionally, researchers have found that teachers often react negatively to young African American students' expressive imaginative play, while they react positively to the same type of play among other children.<sup>68</sup> This may in part account for the fact that African Americans account for 43 percent of those suspended once from preschool and 48 percent of those suspended multiple times from preschool, although African Americans account for only 18 percent of preschoolers overall.<sup>69</sup>

In another study, researchers found that implicit bias caused people to perceive the facial expressions of African Americans as more hostile than the facial expressions of whites.<sup>70</sup> Because of this bias, teachers may perceive

64. See Ogletree et al., *supra* note 62.

65. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY AND SOC. PSYCHOL. 526, 528 (2014).

66. *Id.* at 529-30.

67. *Id.* at 530.

68. Tuppert M. Yates & Ana K. Marcelo, *Through Race-Colored Glasses: Preschoolers' Pretend Play and Teachers' Ratings of Preschooler Adjustment*, 29 EARLY CHILDHOOD RES. Q. 1, 1 (2013).

69. *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, U.S. DEP'T OF EDUC., <http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities> (last accessed June 25, 2014).

70. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of*

African American students as hostile based on their facial expressions, while the identical facial expressions on white students might be read as neutral. Again, based on this biased perception of certain students, teachers may impose harsher punishments on African American students because they perceive them as hostile.

Deeply troubling neuroscience research underlines the realities of implicit bias. Researchers have found that when they took brain scans of people looking at pictures of African American faces, the amygdala—the fear center of the brain—activated.<sup>71</sup> The amygdala is similarly activated when phobic people view images of spiders and snakes.<sup>72</sup> These disturbing results indicate that African Americans are frequently dehumanized and feared at an unconscious neurological level.<sup>73</sup>

Fewer studies have specifically looked at Latinos, perhaps in part because the disparities with respect to Latinos, though pervasive and deeply harmful, are less pronounced. As the same stereotypes of aggressiveness and criminality apply to both groups, it seems likely that the biases against Latino students operate in similar ways as the biases against African American students.

Studies on the abuse of discretion and the impact of subjectivity shed more light on how implicit bias functions to harm students of color. When a person in power evaluates someone else, biases will often play a role in shaping the criteria the person in power uses, and an actor will arbitrarily and unknowingly define criteria to benefit those they are biased towards and disadvantage those they are biased against.<sup>74</sup> This restructuring of criteria leads actors to weigh the same subjective factors in favor of one person that they would weigh against someone from a group they are biased against.<sup>75</sup> In this case, teachers unknowingly appear to be weighing subjective factors against students of color and for white students, abusing their discretion and over-disciplining students of color. This helps explain why students of color are particularly and disproportionately disciplined for subjective and discretionary infractions.

To illustrate these points, consider a student disciplined for willful defiance. There are no clear criteria defining what constitutes willful defiance.<sup>76</sup> Teachers have to define it for themselves on a case-by-case basis, often after the fact, and when they do their biases about students of color come in to play. When a Latino student does not do his homework, a teacher may decide the student looks particularly hostile, has a latent tendency to misbehave, and that it is important to send a strong message about discipline before his behavior

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*Facial Threat*, 14 PSYCHOL. SCIENCE 640, 643 (2003).

71. Elizabeth A. Phelps et al., Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation, 12 J. OF COGNITIVE NEUROSCIENCE 729, 732 (2002).

72. Fedrick Ahs et al., *Disentangling the Web of Fear: Amygdala Reactivity and Functional Connectivity in Spider and Snake Phobia*, 172 PSYCHIATRY RESEARCH: NEUROIMAGING 103, 106 (2009).

73. See Phelps et al., *supra* note 71, at 732.

74. See, e.g., Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria Redefining Merit to Justify Discrimination, 16 PSYCHOLOGICAL SCIENCE 474, 474 (2005).

75. See *id.*

76. See, e.g., Blad, *supra* note 2; Watanabe, *supra* note 2.

escalates. The teacher may then decide, at her discretion, to discipline the student for willful defiance. On the contrary when a white student similarly fails to do his homework, the teacher might think that the student was having a tough week and that disciplining the student would be counterproductive, as this is a minor infraction. The teacher may then have a conversation with the student about the importance of doing his homework, but decline to take any formal disciplinary action. Neither decision in isolation appears overtly biased, but implicit bias creeps in and meaningfully alters the treatment the two students receive.

*E. Teachers and Administrators are Frequently Under Intense Pressures and, Without Intervention or Tools, Are Susceptible to Bias*

Teachers have the primary burden of discipline and, often lacking training or awareness of implicit bias, are handing out discriminatory punishments without even realizing it. There are several factors that can make teachers susceptible to implicit bias

Stress can make teachers especially vulnerable to bias. Teachers are forced to make snap decisions under pressure as they strive to maintain order and deal with the needs of many students. People under stress are more likely to fall back on stereotypes and implicit biases.<sup>77</sup> Without time for either reflection or holistic analytical thinking, and lacking tools to address their biases, teachers are more likely to make biased decisions about discipline.

Teacher demographics also offer insight into the operation of discriminatory discipline. While U.S. student bodies are increasingly diverse, in 2011 eighty-four percent of the teachers in the U.S. were white.<sup>78</sup> Research suggests that people are predisposed to favor members of their own “group.”<sup>79</sup> White teachers are therefore unconsciously predisposed to favor their white students. Studies too have shown teachers reward “white” behaviors and react negatively to behaviors perceived as “black.”<sup>80</sup> Because of a mismatch between teacher understanding and the student’s background, African American and Latino students may face discipline for behaviors that are culturally appropriate for them.<sup>81</sup> Indeed, one administrator remarked that the school discipline disparities in her district were due to “cultural bias” on the part of the teacher and administrators.<sup>82</sup> These effects are demonstrated by what happens when.

77. Diana Burgess et al., *Reducing Racial Bias Among Health Care Providers: Lessons from Social-Cognitive Psychology*, 22 J. OF INTERNAL MEDICINE 882, 884 (2007).

78. See C. EMILY FEISTRITZER, NATIONAL CENTER FOR EDUCATION INFORMATION, PROFILE OF TEACHERS IN THE U.S. 2011, 11 (2011).

79. See, e.g., Sabine Otten & Gordon B. Moskowitz, *Evidence for Implicit Evaluative In-Group Bias: Affect-Biased Spontaneous Trait Inference in a Minimal Group Paradigm*, 36 J. OF EXPERIMENTAL SOC. PSYCHOL. 77 (2000).

80. KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE: IMPLICIT BIAS IS HEAVILY IMPLICATED 3 (2014).

81. La Vonne I. Neal et al., *The Effects of African American Movement Styles on Teachers’ Perceptions and Reactions*, 37 J. OF SPECIAL EDUCATION 49, 50 (2003); CHERYL STAATS, *supra* note 56, at \*33, (citing C.S. Weinstein, S. Tomlinson-Clarke & M. Curran, *Toward a Conception of Culturally Responsive Classroom Management*, 55 J. OF TEACHER EDUCATION, 25-38 (2004)).

82. Paul Bugarino, Antioch *Unified looks at ways to improve achievement for African-American male students*, Contra Costa Times, Oct. 11, 2013, [www.contracostatimes.com%2Fcontra-costa-times%2F-](http://www.contracostatimes.com%2Fcontra-costa-times%2F-)

teachers and students are of the same race; in classes with African American teachers, white and African American students are equivalently disciplined.<sup>83</sup>

Many teachers lack the training and tools to successfully navigate cultural differences and stressful situations to avoid biases. When they act on their biases, they may trigger resentment from their students, creating a hostile classroom environment, and thus further reinforcing the school to prison pipeline.

*F. Students May React to Biases Against Them by Acting Out, Further Perpetuating the Pipeline*

As part of a self-fulfilling prophecy, students who perceive that teachers view them as aggressive and hostile may respond by acting out.<sup>84</sup> A teacher's unconscious biases will often make students feel as though they are in a hostile environment.<sup>85</sup> This in turn can increase student stress and dissatisfaction, leading to poorer performance and causing students to act out.<sup>86</sup> Students may also develop a hypothesis that they do not belong and are not wanted.<sup>87</sup> Once students form this hypothesis, they will pick up on threatening cues they might otherwise overlook as they seek to confirm their hypothesis.<sup>88</sup> This process likely creates strong feelings of displacement and makes students less likely to respond well to discipline or even simple instruction.

Jamal's story again illustrates this. When Jamal first began to have problems at school, he faced discipline for dress code violations and minor behavioral infractions. Over time, as he struggled in school and was continually disciplined, Jamal's behavior escalated, culminating in him pushing his teacher and the school calling the police. The school singled him out and put pressure on him, creating a hostile environment for him. Jamal's feeling of being threatened, in combination with his academic struggles, may then have contributed to him to acting out.

On occasions where African American and Latino students do act out, subjective criteria and zero tolerance policies frequently lead to their suspension and expulsion.<sup>89</sup> Once these students are pushed out of school, they will often end up in the criminal justice system, where the same biases cause them to face harsher criminal penalties.<sup>90</sup>

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83. KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *supra* note 80, at 2.

84. Catherine M. Bradshaw et al., *supra* note 41, at 509 (internal citation omitted).

85. David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. Rev. 506, 550 (2014).

86. *See id.*

87. *See id.*

88. *See id.*

89. KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *supra* note 80, at 4.

90. *See* Charles Ogletree et al., *supra* note 65, at 47.

### III. DISCRIMINATORY DISCIPLINARY PRACTICES ARE DEEPLY HARMFUL TO STUDENTS, SCHOOLS, AND COMMUNITIES

Not only are African American and Latino students discriminated against and harmed, but aggressive disciplinary practices also have deeply negative consequences for schools and communities. Students with disciplinary records in school are more likely to drop out,<sup>91</sup> less likely to go to college,<sup>92</sup> more likely to have criminal records later in life,<sup>93</sup> and likely to suffer negative mental health consequences.<sup>94</sup> Students who are suspended just once in ninth grade are twice as likely to drop out as students who do not experience exclusionary discipline, and each additional suspension reduces the odds by twenty percent that a student will graduate.<sup>95</sup> After three suspensions, a student's odds of graduation are roughly 50-50.<sup>96</sup> A nationwide study found low-income young men who experience exclusionary discipline are half as likely to enroll in four-year colleges as other low income young men with similar GPAs.<sup>97</sup> Similar though less dramatic disparities exists for middle and high income young men.<sup>98</sup>

Suspensions and expulsions additionally have been shown to strongly correlate with juvenile justice involvement.<sup>99</sup> A Texas study found that a student who was suspended or expelled was three times more likely to be involved with the juvenile justice the following year, even when controlling for campus and student characteristics.<sup>100</sup> Students who experience exclusionary discipline are more likely to feel negatively about school and alienated from their environments.<sup>101</sup> Furthermore, suspensions and expulsion can spur suicidal thoughts as they increase students' isolation.<sup>102</sup> Far from having a positive impact on student behavior, suspensions deeply negatively impact students' lives.

School discipline advocates might argue that these consequences are worthwhile when weighed against the benefits received by students who are not disciplined. This is not true. Schools with high levels of student discipline are perceived as less interested in creating a positive climate, receive worse evaluations of school governance, and have lower test scores.<sup>103</sup> These results persist even when controlling for demographics and economic levels.<sup>104</sup> All of these statistics suggests that harsh discipline actually makes schools worse for

91. BALFANZ ET AL., *supra* note 13, at 9.

92. TERRIQUEZ ET AL., *supra* note 13, at 1.

93. TONY FABELO ET AL., *supra* note 8, at xi.

94. HUMAN IMPACT PARTNERS, HEALTH IMPACT ASSESSMENT OF SCHOOL DISCIPLINE POLICIES 2 (2013), available at <http://www.cadre-la.org/core/wp-content/uploads/2013/07/HIA-Summary-English.pdf>.

95. BALFANZ ET AL., *supra* note 13, at 9.

96. *Id.*

97. See TERRIQUEZ ET AL., *supra* note 13, at 1.

98. *See id.*

99. *See, e.g.,* TONY FABELO ET AL., *supra* note 8, at xii.

100. *Id.*

101. HUMAN IMPACT PARTNERS, *supra* note 94, at 2.

102. Committee on School Health, *supra* note 22, at 1207.

103. Russell J. Skiba et al., *supra* note 14, at 1077-78.

104. *Id.*

all students. Even more concerning in the context of the school to prison pipeline, educational quality and incarceration are negatively correlated.<sup>105</sup> This may mean that school discipline creates a vicious cycle of declining school quality and exclusion, which heightens all students' chances of being incarcerated. Neither fellow students nor schools benefit from these aggressive and discriminatory disciplinary practices.

Exclusionary discipline has serious negative consequences for communities too. As students end up in juvenile detention, tax dollars must go to pay for their incarceration. It costs, on average, \$240 a day to hold a youth in juvenile detention.<sup>106</sup> This diverts money away from much needed services, including education. While students are incarcerated, communities also lose out on the valuable positive contributions those students could have provided had they not been pushed into prison. Overall, given the poorer life outcomes for youth within the juvenile justice system, incarcerating a single student could, over the course of a lifetime, cost a community as much as \$1.7 million.<sup>107</sup>

Everyone is hurt by this cycle. Students are channeled down the path to incarceration. School climates and test scores suffer. And communities lose their youth to prisons. It is also unacceptable that students and communities of color disproportionality bear this burden. In the interests of practicality and fundamental principles of justice, disciplinary discrimination must be addressed.

#### IV. THERE ARE SEVERAL DIFFERENT AVENUES OF REFORM TO ADDRESS BIAS AND THE SCHOOL TO PRISON PIPELINE

As this issue has gained increasing attention, many school districts and education experts have worked to come up with solutions that improve school discipline policies and prevent discrimination against students of color. In some cases, school districts acknowledge the problem and are willing to work with students, parents, and advocates to adopt policies that improve school discipline practices. However, in cases where schools are reluctant to end discrimination and harmful disciplinary practices, there are several strategies that advocates and government actors can employ to advance justice.

##### *A. Schools Can and Should Take Proactive Steps to Help Teachers and Administrators Address Disciplinary Biases and Curb Over-Disciplining*

Ideally, school districts will voluntarily collaborate with other stakeholders to rectify the inequities and irrationalities of current discipline practices. There are several promising strategies school districts can employ to help teachers and administrators handle school discipline. Some school districts

105. See NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE 22 (2011).

106. AMANDA PETTERUTI et al., JUSTICE POLICY INSTITUTE, THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 1, 3 (2009).

107. AMANDA PETTERUTI, JUSTICE POLICY INSTITUTE, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 18 (2011) 18 (citing Mark Cohen, *The Monetary Value of Saving a High Risk Youth*, 14 J. OF QUALITATIVE CRIMINOLOGY 1 (1998)).

have already successfully adopted many of these strategies.

As a starting point, school districts should involve all of the key stakeholders in an ongoing conversation about school discipline.<sup>108</sup> These stakeholders generally should include students, parents, teachers, staff, community members, and service organizations.<sup>109</sup> These groups should collaborate to discuss discipline policies and set expectations for student and adult behavior—including behavior of staff, police officers, and service providers when interacting with students.<sup>110</sup>

Stakeholders should come up with objective criteria for disciplining students to help avoid biases. Several school districts have already abolished “willful defiance” as a disciplinary infraction.<sup>111</sup> Eliminating other subjective infractions and providing more detailed criteria for determining the severity of punishment could also help avoid discrimination in discipline. Furthermore, discipline policies should carefully describe the interventions and steps to take with each student in response to violations of the school conduct code.<sup>112</sup> Additionally there must be strict criteria for the extreme circumstances under which a student should be referred to the juvenile justice system.<sup>113</sup>

This code should also acknowledge that different students require different interventions.<sup>114</sup> For example, interventions for students with disabilities should be tailored to address their needs in order to be effective.<sup>115</sup> Schools should also provide high quality alternative education and support services to suspended students.<sup>116</sup> Timely and well thought out interventions, in combination with support services for disciplined students, can help prevent future disciplinary actions.

School districts, as part of their commitment to fair disciplinary policies, should also keep detailed records of their disciplinary practices and monitor them. The monitoring process should be transparent and the stakeholders should be involved in reviewing data.<sup>117</sup> Policy should be reshaped in response to data and expert recommendations, as school districts and stakeholders determine which policies and interventions best help students succeed.<sup>118</sup> Although experts are expensive, when troubling patterns are clear from the data, it is vital for school districts to hire experts or consultants to help address the problems. Expert intervention is a long term investment in student achievement and educational equity. Schools may need to periodically employ experts on implicit bias and students with disabilities. Schools should additionally hire student counselors who can successfully work with students with diverse

108. See MORGAN AT AL., *supra* note 5, at 83.

109. See EMILY MORGAN ET AL., *supra* note 5, at 83.

110. See *id.* at 89.

111. See Evie Blad, ‘Willful Defiance’ Will No Longer Be Cause for Suspension in San Francisco, EDUC. WEEK, Mar. 3, 2014.

112. See MORGAN AT AL., *supra* note 5, at 150.

113. See *id.* at 279.

114. See *id.*

115. See *id.*

116. See *id.* at 176.

117. See *id.* at 41.

118. See *id.*

identities to address students' challenges.

Trainings that incorporate implicit bias can help give teachers tools to address these issues and be more self-aware. Trainings must be in-depth, as cursory trainings can have negative effects and can actually cause stereotype activation.<sup>119</sup> The Equal Justice Society (EJS) has worked with the California Teachers Association to create a curriculum on implicit bias to help teachers navigate biases. Teachers need and want tools to help them successfully address student misbehavior. Social psychologists continue to work on longer lasting and more effective bias interventions and have found that when participants care about reducing their biases, these interventions are especially effective.<sup>120</sup>

Additionally, schools should attempt to hire more teachers and administrators with the same identities and backgrounds as the students they are teaching. Not only do same-race teachers help eliminate disciplinary disparities,<sup>121</sup> but their presence also serves as a visible representation to students that people who share their identities have a role in running the school. This can reassure students the school will serve people like them and give the students role models who share an identity with them.

Intergroup friendships and interactions can also help reduce bias.<sup>122</sup> Having a diverse staff will help staff members forge relationships with people outside their own groups and will reduce their implicit biases. Hiring teachers who have successfully worked with students of color in the past can also help to create a better environment.

The fact that roughly eighty-four percent of teachers are white<sup>123</sup> indicates that we lack adequate pathways for people of color to become teachers, speaking to major structural issues in the current training and recruitment procedures for educators. Students, too, face structural inequalities as they work to succeed in school and structural racism needs to be considered and addressed as part of any solution to the school to prison pipeline.<sup>124</sup>

Restorative justice also has an increasing following as a potential solution.<sup>125</sup> Restorative justice generally avoids punitive measures and instead looks for solutions that are designed to help the victim and community heal, to help the offender feel reintegrated into the community, and to help offenders

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119. See Kerry Kawakami, *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. OF PERSONALITY & SOC. PSYCHOL. 871, 884 (2000).

120. See, e.g., Patricia G. Devine et al., *Long-term reduction in implicit race bias: A prejudice habit-breaking intervention*, 48 J. OF EXPERIMENTAL SOC. PSYCHOL. 1267, 1267-78 (2012). See also, Lisa Legault, Jennifer N. Gutsell, & Michael Inzlicht, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 PSYCHOL. SCIENCE 1472, 1472 (2011) (presenting data that when interventions emphasize personal motivation to reduce discrimination they can be effective, but that emphasizing the societal pressure not to discriminate can actually increase prejudice).

121. KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *supra* note 80, at 2.

122. Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. OF SOC. PSYCHOL. 335, 344 (2004).

123. FEISTRITZER, *supra* note 78, at 11.

124. For a discussion of structural racism generally, see, e.g., John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2007).

125. See MORGAN AT AL., *supra* note 5, at 83.

avoid reoffending.<sup>126</sup> One way restorative justice programs commonly function is by bringing together students who caused harm and several other members of the community to discuss what happened, why the students acted as they did, and why their actions were harmful.<sup>127</sup> Often other students are trained to serve as advocates and jurors as part of this process.<sup>128</sup> The community representatives will discuss the case with the respondent, the respondent's advocate, and an advocate for the victim, to determine what consequences would best help both the victim and the respondent heal and grow.<sup>129</sup>

Restorative justice processes are already in place around the country. Recently restorative justice has seen more expansive use in the criminal justice system, and the San Francisco District Attorney has been using it as an alternative to the traditional criminal justice system.<sup>130</sup> Several schools already employ restorative justice practices, which avoid suspension and expulsion while seeking to create a stronger school community.<sup>131</sup> Indeed, at a middle school in Oakland a restorative justice program helped the school reduce suspensions by eighty-four percent; after the program was implemented, there were no incidents of physical fighting, no disciplinary expulsion hearings, and greater teacher retention.<sup>132</sup> More schools can and should implement the practice to avoid participating in the school to prison pipeline and to advance educational quality.

Ultimately, school districts need to take a holistic approach to the problems of discrimination and aggressive discipline as they seek to implement fair disciplinary practices and create a school climate where all students can excel.

#### *B. Litigation May be Necessary When School Districts are Unwilling to Address Discriminatory Discipline Policies*

When school districts are reluctant to address their unjust discipline policies, it may be necessary for advocates to file lawsuits on behalf of students of color. Implicit bias is often addressed through disparate impact claims. Under disparate impact, the plaintiffs argue that a policy or practice negatively and disproportionately impacts their protected group and denies them the equal protection of the law. Unfortunately, the United States Supreme Court's decisions in *Washington v. Davis* and *Alexander v. Sandoval* created barriers to equal protection claims, as these cases require plaintiffs to demonstrate intent to discriminate, which may be extremely difficult to prove.<sup>133</sup> However, these barriers are not insurmountable. Litigation focusing on discrimination as de

126. JESSICA ASHLEY & KIMBERLY BURKE, THE ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, IMPLEMENTING RESTORATIVE JUSTICE: A GUIDE FOR SCHOOLS 7 (2009).

127. *See id.* at 13-16.

128. *See id.*

129. *See id.*

130. *Neighborhood Courts*, CITY & COUNTY OF SAN FRANCISCO DISTRICT ATTORNEY, <http://www.sfdistrictattorney.org/index.aspx?page=178> (Last accessed June 26, 2014).

131. *See* MORGAN AT AL., *supra* note 5, at 83.

132. NCCD NOW: RESTORATIVE JUSTICE FOR BETTER OUTCOMES, NATIONAL COUNCIL ON CRIME & DELINQUENCY, <http://nccdglobal.org/blog/nccd-now-restorative-justice-for-better-outcomes>.

133. *See* *Washington v. Davis* 426 U.S. 229 (1976); *Alexander v. Sandoval* 532 U.S. 275 (2001).

fined by the Arlington Heights factors, which take into account circumstantial factors in determining intent, may provide a remedy to students facing disciplinary discrimination.<sup>134</sup>

As courts catch up to modern science, they may become more understanding of implicit bias claims. The Equal Justice Society currently offers trainings on implicit bias for judges and practitioners to help them understand the modern social science on discrimination. Additionally, the Supreme Court in *Planned Parenthood v. Casey* stated that, among other factors, once a factual situation is “so changed, or come to be seen so differently” that a precedent is “irrelevant or unjustifiable in dealing with the issue it addressed,” it is appropriate to reverse the precedent.<sup>135</sup> Perhaps modern science on implicit bias may satisfy the factors laid out in *Casey*, and justify a reversal of Washington.

In the past, the Supreme Court noted advances in science and psychology as part of its rationale in overturning precedent. In *Graham v. Florida*, the Court reversed precedent and prohibited sentences of life without parole for juveniles in cases other than homicide.<sup>136</sup> The Court cited developments in neuroscience and psychology that shed light on young adult development in its ruling.<sup>137</sup> In light of *Casey*, *Graham*, and the increasing body of social science on implicit bias, Washington’s days as a valid precedent may be numbered.

Indeed, the Washington Supreme Court, citing an article co-authored by EJS President and co-founder Eva Paterson, stated the intent standard is not appropriate to deal with modern racism and unconscious bias with respect to discriminatory jury challenges.<sup>138</sup> The court pointed out that “unconscious stereotyping upends the [present] framework” and that current tests for discrimination are inadequate to deal with implicit bias.<sup>139</sup> The court, however, declined to alter the standard, wanting to do so in a case where the parties explicitly challenged the standard.<sup>140</sup> More investigation into this topic is ongoing in Washington, and the state, as well as other jurisdictions, may soon see more jurisprudence addressing the realities of implicit bias.

### C. *Government Actors Can Also Help Create Successful Solutions and Interventions*

Government actors can also be a key part of the solution to the problem of discrimination in school discipline. Government departments can bring a claim that a school district has violated the disparate impact standard under Title VI, and, have in the past, sued school districts with particularly egregious school discipline records.<sup>141</sup> Advocates can also file complaints with the Office

134. See *Vill. Of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252, 266 (1977).

135. *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992).

136. *Graham v. Florida*, 560 U.S. 48 (2010).

137. *Id.* at 68.

138. *State v. Saintcalle*, 309 P.3d 326, 335 (Wash. 2013).

139. See *id.* at 336.

140. *Id.* at 329.

141. See *Justice Department Files Consent Decree to Prevent and Address Racial Discrimination in Student Discipline in Meridian, Miss.*, THE UNITED STATES DEP’T OF JUSTICE, <http://www.justice.gov/opa/pr/2013/March/13-crt-338.html> (Last accessed June 26, 2014).

of Civil Rights, which can make findings on disparate impact and work out solutions with school districts.<sup>142</sup>

Furthermore, the Department of Justice and the Department of Education recently issued a report recognizing the severity of the problem.<sup>143</sup> The report and accompanying letter specifically addressed the issues of race and disability in disproportionate school discipline.<sup>144</sup> The Departments stated they would examine disciplinary criteria and determine if there were safeguards to avoid discrimination in discipline.<sup>145</sup> They added that they would check that staff was properly trained to hand out nondiscriminatory discipline and urged that schools monitor their disciplinary practices.<sup>146</sup> The Departments noted that the costs of discriminatory discipline are too high for this problem to be left unaddressed.<sup>147</sup>

## CONCLUSION

Discriminatory discipline has devastating impacts on students and communities. It dramatically undermines life chances for excluded students and perpetuates the school to prison pipeline. African American and Latino students disproportionately bear the burden of exclusionary discipline. Implicit bias is an underlying cause of the discriminatory discipline that plagues children and communities of color. Because of implicit bias, well-meaning staff may unknowingly impose discriminatory discipline unfairly on students of color. Parents, students, teachers, school districts, advocates, community organizations, and government actors must work together to help reduce instances of exclusionary discipline and pay close attention to strategies that will eliminate the racial gap in discipline. Doing so will benefit all students and will be a step toward finally allowing students like Jamal the same educational access as their peers.

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142. LOSEN & MARTINEZ, *supra* note 4, at 5.

143. DEP'T OF JUSTICE & DEP'T OF EDUC., *supra* note 8, at 20.

144. *Id.*

145. *Id.*

146. *Id.*

147. DEP'T OF JUSTICE & DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE ii (2014).

# **TOWARDS AUTHENTIC ENGAGEMENT: A PROMISING MODEL FOR FAMILY-FRIENDLY SCHOOLS**

Ellie Canter\* & Kelsey Kennedy\*\*

## **I. THE VALUE OF FAMILY ENGAGEMENT**

Last spring, the New York Times publication of an op-ed piece entitled “Parent Involvement is Overrated” caught the attention of staff members at Turning the Page, an educational nonprofit in Washington, D.C. In this piece, Angela L. Harris and Keith Robinson, authors of *The Broken Compass: Parental Involvement With Children’s Education*, make the claim that many of the assumptions we hold about the importance of family engagement are not linked to changes in students’ academic achievement. “The essential ingredient is for parents to communicate the value of schooling, a message that parents should be sending early in their children’s lives and that needs to be reinforced over time. But this message does not need to be communicated through conventional behavior, like attending PTA meetings or checking in with teachers” (Harris & Robinson, 2014). This concept of “conventional behavior” in parent involvement is one that Turning the Page and numerous other family engagement-focused nonprofits attempt to transcend through their work with school communities. Turning the Page has developed a school partnership model that engages public school parents as partners in their children’s education and that provides teachers and administrators with professional development and programming that builds their capacity to engage families effectively. Rather than accepting that parent involvement itself is “overrated,” we argue that instead it is time to champion a new framework for addressing the valued roles of families in school communities. This article will survey the merits of “authentic parent engagement” in challenging traditional parent roles in schools and use the lens of Turning the Page’s work in Washington, D.C.’s Ward 8 to discuss possible implications for schools.

## **II. THE POTENTIAL FOR AUTHENTIC PARENT ENGAGEMENT IN SCHOOL REFORM EFFORTS**

Authentic parent engagement (Olivos, 2007) challenges the traditional limited role of parents as “supporting, not questioning or critiquing, the teachers’ academic efforts in educating their children” (p. 105).

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In its place, authentic engagement posits that underrepresented parents must become partners in the education of their children in order to challenge school practices that solely validate Eurocentric norms (Nieto, 2005; Olivos, 2007; Hartlep & Ellis, 2010). However, non-majority parents’ limited knowledge of dominant cultural norms impacts their treatment in the school sphere and thus their capacity to engage fully as partners alongside educators is questioned (Calabrese Barton, Drake, Perez, St. Louis, & George, 2004, p. 3). The two figures featured below illustrate two models – one in which a school is practices authentic parent engagement and the other in which a school is perpetuates traditional parent involvement which impedes partnerships and relationship-building, particularly amongst non-majority families.

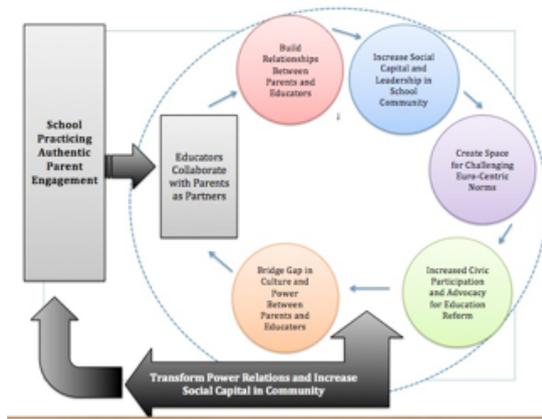


Figure 1: Authentic Parent Engagement

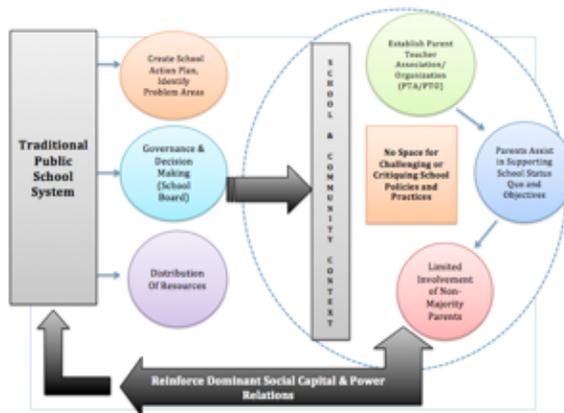


Figure 2: Traditional Parent Involvement

Figure 2 above illustrates the severance of parents and community members from the school context and from reform efforts which are especially

prevalent within low-income communities where students' failure to succeed academically is often attributed to their so-called cultural "deficits" (Olivos, 2007). The blame placed on non-majority families for the struggle of their children removes the responsibility for schools to consider the institutional racism that pervades curriculum, instruction, and school climate (Nieto, 2005). The initiative to authentically engage parents within the school community presents an opportunity to transform both the deficit views of families in low-income communities and the adversarial relationship between parents and educators (Hong, 2011).

*A. The Turning the Page Model of Family and School Partnerships*

The Turning the Page model aligns with existing research that endorses authentic parent engagement among marginalized communities as a means to improving school-community relations and student learning outcomes. The Turning the Page model consists of eight "Community Nights" that take place over the course of a school year. These evenings create a platform for educators and parents to engage in a dialogue about school improvement, home learning practices, and classroom instruction that seeks to override the unequal power dynamic that can impede authentic relationship-building. Parents, educators, and two Turning the Page facilitators are seated in a circle and the group adheres to "community agreements" that are designed to create a safe space for conversation and a shared read-aloud of a children's book that explores the workshop theme for the evening in an inviting and fun way. In addition to creating a space for educators and parents to engage in authentic dialogue, Turning the Page workshop content and teacher trainings are grounded in research that cites the potential for improved school-community relations to impact the academic achievement of students, particularly among underrepresented youth whose families are traditionally less present within the school (Bolívar & Chrispeels, 2010; McNeal, 1998). The research and the Turning the Page case study compiled for this article present an argument in support of efforts to build engagement, leadership capacity, and relationships among low-income, non-majority parents as a means to overriding deficit thinking and the imbalance of power between parents and educators.

Turning the Page currently supports 500 parents and other family members of D.C. public school students in six partner schools in Washington, D.C.'s Ward 8, the most low-income ward in the District. For the past two years, Turning the Page has been executing a dual strategy of increased investment in Ward 8, by adding elementary and middle school partners within the community to provide a continuum of service from pre-K through 8th grade. Turning the Page's investment in Ward 8 also ensures that parents in partner schools have access to a broader network of support so they can connect easily with other leaders across the community. Turning the Page's partner schools are part of the forty lowest performing schools in DC Public Schools - a school

district that continues to produce test scores that are consistently lower than those of public school students in other large U.S. cities (National Assessment of Educational Progress, 2013). In addition, more than 90% of the students in Turning the Page partner schools qualify for the free and reduced lunch program and Ward 8's unemployment rate is often 10 times higher than that of the city's more affluent areas. These factors influence perceptions of families in Ward 8 schools as "hard to reach" and frequently cast them as barriers to their children's education.

*B. Barriers to Authentic Relationships: The Parent-Educator Power Dynamic*

Although parents and teachers are engaged in the complementary task of educating children, their interactions are frequently fraught with tension, particularly in low-income communities (Hong, 2011). This adversarial relationship can be the result of "generational echoes," or parents' prior negative experiences as students, which can increase their reticence to become fully engaged with the schooling of their children (Laurence-Lightfoot as cited in Hong, 2011).

An additional challenge in fostering positive school-community relations resides in the imbalance of power between educators and parents in urban schools, as often the "parents are working class or low-income people of color whose first language may not be English" (Cooper & Christie, 2005, p. 2248). The lack of familiarity with the school context strips parents of their power within the school and impacts their ability to advocate successfully for their children (Cooper & Christie, 2005). Therefore, the imbalanced power dynamic between non-majority parents and educators dictates the capacity for parents to engage as partners in their children's education and relegates them to a low status in the education sphere (Noguera, 2001). In an effort to examine the variables that impede or improve the parent-educator dynamic and schools' capacity to facilitate authentic parent engagement, this article will now explore a case study of parent leaders at one of Turning the Page's partner schools in Washington, D.C. and the factors that define the power struggle between educators and families in this context.

*C. Parent Organizing at Martin Luther King, Jr. Elementary School in Southeast D.C.*

On a humid morning in mid-June, Turning the Page staff members stood outside the front doors of Martin Luther King Jr. (MLK) Elementary School with some trepidation about what would soon take place. It was the final week of the school year, typically a time of closure and reflection, but there was the unshakable feeling that something significant was percolating among families. After multiple attempts to initiate parent-led projects at the school, families

felt frustrated with the administration and eager to speak with someone--anyone--who would listen to their concerns. Fahim Shabazz, a parent leader at the school, recognized this collective sense of disillusionment and stepped in, inviting a former school board representative and community leader to attend an informal meet-and-greet at the school to discuss community issues. Shabazz had been meeting with Turning the Page through “leader mornings” and Community Nights at the school and had begun to build a base of fellow parent leaders with ideas for school improvement. Their ideas for school and community growth had already culminated in a resource fair that connected over 100 MLK families with resources to mitigate the impact of summer learning loss.

Over 30 families gathered in a circle in the school library, several more spilling out into the hallway. Several school staff members—administrators, teachers, paraprofessionals—wandered in, eager to hear parents’ concerns and to engage in a dialogue about the state of the school. What followed was a passionate debate about the climate of MLK Elementary: funding, student behavior policies, the lack of affordable summer programming, and negative stereotypes about the school in the community. A few school administrators jumped in, sharing their own concerns over teacher burnout and the ripple effects of school closures in the area. The conversation did not follow a tight, linear path. It felt like a true conversation, with parents and educators jumping in to challenge and build on each other’s ideas. Parents had carved out a physical and figurative space to engage openly with one another and school staff members.

The proceedings at MLK Elementary School illustrate both the challenges of traditional parent involvement and the power of practicing authentic parent engagement in breaking down social and political barriers between communities and schools. Following this event, Shabazz joined with Turning the Page in initiating several parent-led events for partner schools across Ward 8 during the summer months and instituted a formal PTSA at MLK Elementary last fall.

Shabazz and fellow parent leaders began recruiting new members for the PTSA in September, but were met with some initial skepticism. Shabazz cited the concerns brought forward at the June meeting and the previous disintegration of the former MLK Home and School Association as factors contributing to this sense of disillusionment. “My message to parents is that we’ve got a new spirit going on. Just come out and hear what we have to say,” he said. Clearly, this message resonated with families. In six months, the organization grew from five members to sixty members. In this short time, the PTSA initiated school wide events and conversations with teachers around student achievement and the school budget. In particular, Shabazz drew attention to MLK Elementary’s test scores. MLK Elementary is listed as a D.C. Public Schools “focus school,” with 25% meeting standard (proficient or advanced) in math on the DC CAS assessment and 31% meeting standard in reading during the 2013-14 school year (DC Public Schools, 2014). “We’re not even

close to standard,” he said. “What I’m trying to do is come up with an intervention plan.” In a recent meeting, Shabazz called on parents to create a list of 10 ways they support learning at home as a way to spur conversation about possible places for partnership with teachers. Shabazz also hopes to initiate conversation about district budget allocation. “We’re trying to lobby for better teaching materials, more computers, like a computer lab. If [MLK] is a focus school and you see that it has potential, why not put money into it?”

Shabazz also spoke about his personal development over the last two years of consistent involvement as a parent leader. “I had been wanting to do this for a while, but I had been content kind of just sitting back,” he said. He credits the support of Turning the Page workshops in giving him a space to connect with other parents. “I learned that I want to focus on issues that can be resolved,” he said, rather than personal grievances with particular school leaders. For Shabazz, his daughters keep him focused on concrete, student-centered goals. “My daughters are my motivation. We need to make it about them.” To further his leadership development, Shabazz recently recorded a meeting he led at the school as a way to reflect on his facilitation skills. Additionally, he has continued to connect with parent leaders at other Ward 8 schools and share the best practices of his PTSA. “It takes a village. What good is knowledge to man if they don’t share it? It goes for naught. I want to start an avalanche that won’t ever stop. Every time you look around I want you to see that they’re [MLK Elementary] on the news, they’re getting an award for this, or that. . . .that’s [how] I want the school to be recognized,” he said. While MLK Elementary certainly still faces obstacles in moving parents and educators from traditional to authentic roles, Shabazz’s evolution as a parent leader is a promising indicator of new, family-focused priorities within the school community. The PTSA has proven to be a space for equal partnership among educators and parents, challenging the aforementioned traditional parent-educator power dynamic.

#### *D. Recommendations for Practitioners: The Community-Based Relational Approach*

While MLK Elementary School exemplifies one school in hopes of transitioning to authentic engagement, there are critical barriers in teacher, parent, and community perceptions that can undermine the efforts of leaders such as Mr. Shabazz and partners like Turning the Page. In order to equip practitioners with recommendations for fostering authentic family engagement, we have assembled guidelines garnered from both existing research and the Turning the Page model for building family-friendly schools.

Research conducted by Warren et al. (2009) regarding successful parent engagement strategies in urban schools provides practitioners with a means to achieving authentic engagement through the “community-based relational ap

proach,” a means to incorporating underrepresented families in school reform. This approach centers around three core principles:

- (1) an emphasis on relationship building among parents and between parents and educators,
- (2) a focus on the leadership development of parents, and
- (3) an effort to bridge the gap in culture and power between parents and educators” (p. 2210).

The relational approach therefore furthers the potential for marginalized parents to forge a collective identity through relationship building and instills in them leadership skills that transform the unequal power dynamic they face in their children’s schools. (Noguera, 2001). This approach also removes the emphasis on educators within the school system as possessing greater power and influence than parents and focuses instead on the power generated within the interactions between educators and parents. (Hong, 2011).

The Turning the Page model strives to follow the community-based relational approach by creating spaces that authentically engage parents and educators in dialogue about school improvement. This mission also aligns with the Department of Education’s most recent recommendations for effective family engagement featured in their Dual Capacity Building Framework for Family-School Partnerships released in 2014. The Department of Education’s research asserts the community-based relational approach in that effective family engagement should “build and enhance the capacity of staff and families” in the following areas: “capabilities” or “skills and knowledge”; “connections” or “networks”; “cognition” or “beliefs and values”; and “confidence” or “self-efficacy.” Turning the Page’s program goals can serve as guidelines for practitioners striving to create family-friendly schools that authentically engage parents as partners in their children’s education:

First, Turning the Page strives to both validate and strengthen families’ and educators’ capabilities through ongoing resource-rich programming that equips them with relevant educational resources. Second, Turning the Page seeks to expand families’ connections to one another and to the educators in their children’s schools through relationship building and sharing of effective communication and outreach practices. Third, Turning the Page assesses teachers’ and families’ attitudinal perceptions of parents’ capacity to influence their children’s education and seeks to build understanding and alignment of their beliefs and values to strengthen their partnership. And fourth, Turning the Page aims to grow parents’ confidence in their ability to strengthen their children’s educational experience inside and outside of the classroom through affirmation of their importance in the educational process and provision of educational tools, skills, and strategies to implement at home.

Both the Department of Education’s federal recommendations and grass

roots-level initiatives in Turning the Page partner schools indicate that authentic family engagement has the potential to be a powerful tool in forging critical relationships between schools and their communities. While there are certainly bureaucratic and relational obstacles facing parents hoping to move beyond traditional school roles, the community-based relational approach holds great promise in school reform efforts. Not only do these practices enable parents to become a partner in the education process, but they empower parents to organize for school improvement and address gaps in resources that continue to negatively impact the educational experiences of their children.

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# TEACHING IN A PUBLIC INTERNATIONAL SCHOOL: AGENCY, STRUCTURE, AND CITIZENSHIP EDUCATION

Taylor D. Richman\*

## ABSTRACT

Public K-12 schools across the United States are converting their names and missions to incorporate international education. These schools exist as potential sites for innovative citizenship education. Employing Giddens' (1984) structuration theory, this case study investigated the intersection of international and citizenship education in one school. Findings suggest that (1) multiple teaching practices were used to enact the school's international mission, (2) teachers' personal and professional identities framed their approaches to international education, and (3) the school created a *soft cosmopolitan* approach to citizenship education.

## INTRODUCTION

A growing number of urban school districts in the United States have re-energized the public international schools movement by converting traditional schools into "international schools" (Parker & Camicia, 2009). The designation of a school as international carries implications for its mission statement and the resources available from government agencies and foundations. In an era when terms like "globalization" and "global economy" are commonplace, internationalizing schools sounds, on the surface, like an appropriate goal for public education. However, upon closer inspection, questions flourish about the meaning and intention of the movement. Parker (2008, 2011a), for example, claimed that the movement represents divergent interests, pitting federal agendas against 'closer to the ground' purposes. Dolby and Rahman (2008) explained that the internationalizing of K-12 education has been historically variable, taking the forms of "peace education, global education and multicultural education, human rights education, and environmental education" (p. 699).

When enacted in culturally diverse public schools, international education intersects with citizenship education, including exploration of the explicit and implicit rules and expectations for membership and participation in a community. Citizenship education, like international education, can serve a variety of purposes. Traditionally, American public schools have educated students on the practices and beliefs of mainstream American ideology, promoting unity and the adoption of a national (and nationalistic) identity;

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but the lived experiences of racially, ethnically, and culturally diverse students often are not accurately reflected in the curriculum (Banks, 2004a). International education has re-emerged in public schooling as one approach to addressing this tension between unity and diversity in schools situated in a pluralistic democratic society.

Existing research on public international schools has focused on the necessity of international education (Kagan & Stewart, 2004; Sanders & Stewart, 2004), agendas within this reform (Parker, 2011a), and the perspectives of “movement intellectuals” on the purpose of international education (Parker & Camicia, 2009). The voices of teachers have been underrepresented in the literature. This qualitative study seeks to address this gap and elicits the perspectives of teachers involved in the public school international education movement. It is conceptually driven by the literature on contemporary public international and citizenship education and theoretically framed by Giddens’s (1984) structuration theory, which considers the interplay of agency and structure within social reform. The following questions guide this study:

1. What are teachers’ perceptions of how their practice and the school climate are affected by international education? What role do teachers play in the development of practices that comprise international education?
2. What are teachers’ perceptions of how international education influences teaching about citizenship? What role do teachers play in the development of these practices?

### *International Education*

The revitalization and growth of the American international education movement has captured the attention of educational researchers, practitioners, and community members. The term international education has been used in American public schools since the mid-1800’s, initially embracing a philosophy of “world mindedness” (Sylvester, 2002, p. 105) which gave way to America’s preoccupation with international competition during the Cold War era. Today, school districts around the country are again reorienting schools to an international agenda and renaming them to include the word “international” (Parker, 2011a). However, the movement to internationalize schools has not been uniform (Parker & Camicia, 2009).

Two dominant themes have emerged in international education: business and communication. International schools “prepare experts and leaders in business, politics, and all major professional fields who are capable of addressing international opportunities and challenges...[and] increase [students’] ability to communicate in languages other than English” (Sanders & Stewart, 2004, p. 201). Alternatively, Parker (2008) described an agenda of economic competitiveness and military intelligence. Kagan and Stewart (2004) claimed there were economic and security “imperatives” to teaching for increased

international knowledge. This conceptual shift, from international business to economic competitiveness and from international communication to military intelligence, suggests that international education's world-minded ideal again might be threatened by nationalistic objectives.

At the local level, a number of different objectives has fueled the reform movement, including teaching for global perspectives, cosmopolitanism, and embracing an international student body (Parker, 2011a). A global perspective juxtaposes "global illiteracy" (Kagan & Stewart, 2004) – a lack of knowledge about the world – with critical thinking about "messy international problems" (Parker, Ninomiya, & Cogan, 1999). It teaches for deep knowledge and understanding of world cultures, beyond so-called multicultural approaches to teaching that emphasizes the "food, fashion, famous people, folklore, and festivals" of foreign cultures (Carber, 2009, p. 103).

Cosmopolitanism calls for people to engage "in pluralist change as an agent... rather than remaining passive or reactive to events" (Hansen, 2010, p. 24). Cosmopolitans subscribe to a global identity above a national identity (Parker, 2008). A school with a cosmopolitan agenda would thus promote unity among humankind and national allegiance, while teaching students how to engage intellectually and as agents of change in issues of international significance.

Embracing an international student body is perhaps the least systematic of the "closer to the ground" agendas. It occurs when schools that already have an international student body elect to acknowledge this diversity – by calling themselves an international school – but do not change their curriculum (Parker, 2008). In these situations, international learning happens during the course of students' daily interactions with one another; global awareness is learned but unplanned (Parker & Camicia, 2009).

### *Citizenship Education*

The public school system is considered an important structure in which youth learn about citizenship (e.g., Parker, 2006; Hess, 2010), and educators have long been considered central to the cohesion of our nation (Mitchell, 2001). In its traditional form in the United States, citizenship education has been a means to transmit the ideals of American democracy. Early American citizenship education theorists were primarily concerned with nation building – concepts of transnationalism were not as prevalent nor as widely relevant to public schools as they are today (Mitchell, 2001). However, this focus on nationalism most often circumvented issues of multiculturalism, instead solely advocating unity among citizens. Banks (1990) criticized this approach as assimilationist and a perpetuation of hegemonic beliefs about full membership in American society.

Contemporary scholars have reconsidered how democratic ideals can and should be taught in the midst of modern globalization, including increased

immigration and international communication (Banks, 2004b). Mitchell (2001) argued that educators must develop methods to teach about democracy without a nationalistic perspective. Progressive theorists have used broad concepts of citizenship to examine how citizens can hold multiple national and cultural allegiances (Banks, 2004a). Mitchell and Parker (2008) called this phenomenon flexible citizenship, and Banks (2004a) explained that “multicultural citizenship... recognizes and legitimizes the rights and needs of citizens to maintain commitments to both cultural communities and national civic culture” (p. 300).

### *Structuration Theory*

Structuration theory (Giddens, 1984) provides a theoretical framework for interpreting the influences on and consequences of social practices. For example, how agents interact with structure and reproduce, create, transform or deconstruct social systems across time and space. Giddens explained that, “one of the main propositions of structuration theory is that the rules and resources drawn upon in the production and reproduction of social action are at the same time the means of system reproduction (the duality of structure)” (p. 19). Structures, therefore, “are not social facts which exist apart from individuals, but sets of ‘rules’ and ‘resources’ which actors draw on, and hence reproduce, in social interaction” (Shilling, 1992, p. 78).

Giddens’s (1984) reconceptualization of the relationship between structure and agency contemplates that these phenomena interact recursively, simultaneously constraining, enabling, and framing one another. He wrote that “all structural properties of social systems...are the medium and outcome of contingently accomplished activities of situated actors” (Giddens, 1984, p. 191). Hacking (1999) – who Parker (2011b) described as a “structurationist” (p. 415) – explained that the interaction between structure and agency is continually in process. Agents, possessing theoretical and practical knowledge of the contexts in which they exist, both respond to and develop structural properties of social systems. Social systems, or structures, likewise exert influence upon individual agency, but are also susceptible to the influence of agency. Put simply, people’s behavior is influenced by societal structures, but their behavior is also integral to developing and carrying forward these same structures.

Conceptualizing teachers as agents and international schools as structures, in this article I explore the process of internationalizing public education, considering teachers’ perceptions of their agency, the ability of international schools to structure teaching practices, and what Hacking (1999) called the “looping effect” between agents and structures (how they influence each other). Drawing on these theoretical ideas, I also explore how the teaching practices that constitute international education come to be and how they are challenged or supported by structure and agency.

### *Research Strategy and Design*

Guided by the traditions of qualitative research (Merriam, 2009), this study was designed to elicit teachers' experiences of working at a public international elementary school during a transitional period when the school was in the process of implementing its international education program. My analysis was informed by teacher interviews, observations, and artifacts, and shaped informally by my experience working as a teacher at the research site during the school year that I collected data.

### *Setting*

This study was conducted at Hilltop International School (all names are pseudonyms), a public elementary school (grades K-5), located in a culturally diverse urban neighborhood in a large Northwestern US city. Almost 90% of the 450 students attending Hilltop were students of color, including a sizeable Pan-Asian and East African immigrant population. 42% of the student body was bilingual.

Hilltop was both a neighborhood school and an international program magnet school. Hilltop's international education program had three official components: academic excellence, global perspectives, and world languages. During Hilltop's transition into international education, each year an additional grade level added a half-day language immersion option in Spanish and Mandarin. At the time of my research, grades K-2 had language immersion classrooms.

### *Participants*

Four classroom teachers participated in this study. Following a maximum variation recruitment strategy (Patton, 2002), this included teachers in grade levels with and without language immersion programs. One teacher at each grade level with immersion (grades K-2) and one fifth grade teacher participated. Each of these participants had significant teaching experience, ranging from six to more than twenty years, and two participants had taught internationally.

In addition, two specialists (the Art and Library teachers) participated in this study. These participants were identified through a chain sampling process (Merriam, 2009) after several teachers discussed the importance of Art and Library to Hilltop's international education programming.

### *Data Collection*

Three methods of data collection (interviews, observations, and artifacts) were used to triangulate findings across multiple methods and participants (Erickson, 1986).

Interviews: I conducted one semi-structured interview with each participant. Interviews addressed how international education affected: (1) the school climate and culture, (2) teachers' practices (curricular, pedagogical, and philosophical), and (3) how teachers taught concepts of citizenship.

Observations: After each interview, I conducted an artifact observation of the teacher's classroom. These observations focused on physical portrayals of concepts related to international and citizenship education (e.g., posters, student work). My interest was in how classrooms were arranged to teach about membership and participation in school and in society. I also engaged in an observation of the shared spaces (e.g., hallways, the auditorium) at Hilltop, exploring the messages about citizenship presented in this context. In addition, I observed one staff meeting as a participant observer (Merriam, 2009). This meeting was facilitated by a panel of teachers who presented their experiences teaching in grade levels that had the language immersion program.

Documents: I collected two existing public documents that pertained to international education at Hilltop. The first document was a diagram of the official components of international education at Hilltop. This document was displayed on the school's website and on a poster in the main entrance to the school. The second document identified teaching practices that addressed these components of international education. It was distributed to teachers during a staff meeting at the beginning of the school year.

### *Data Analysis*

I used a structuration framework (Giddens, 1984) to interpret the teachers' perceptions of (1) how their teaching practices affected and were affected by the structure of an international school and (2) how their conceptualizations of and teaching for citizenship affected and were affected by the international school model. I brought to this analysis the belief that international education and citizenship education are separate, but overlapping, concepts, and that teachers innovate practices and work within existing norms.

I completed the following steps of data analysis. First, I transcribed and then open coded my interviews and field notes (Emerson, Fretz, & Shaw, 1995). Second, I developed a code list that identified a "smaller set of promising ideas and categories to provide the major topics and themes" (Emerson, Fretz, & Shaw, 1995, p. 143), which I used to focus-code the data. Finally, I introduced structuration theory and re-coded the data for instances of agency (e.g., teachers exercising discretion) and structure (e.g., formal and informal school policy that acted to create or prohibit teacher agency).

### *Constructing International Education*

In this section, I present my findings about the construction of international education at Hilltop, describing how it became part of the school's

curriculum and culture. Throughout, I describe a duality of forces: one, the teachers' agency, individually and collectively, to establish and refine teaching practices for international education; the other, structures that came from district- and school-level administration, which attempted to frame the conceptualization and implementation of international education at Hilltop.

### *Locating International Education*

Four aspects of Hilltop's curriculum and school culture engaged the school's international mission. Hilltop presented itself as international through its language immersion program, world region units taught at each grade level, the arts and library curriculum, and by acknowledging its international student body. This section details how and to what extent each of these elements were present.

**Language Immersion:** Hilltop was in its third year as an international school at the time of this study. It officially became an international school and added "international" to its name when it began implementing its language immersion program, in which students spent half the day learning in Mandarin or Spanish and the other half of the day learning in English. This program was described as dual immersion due to a district policy that half the students in immersion classrooms be native speakers of each language.

When the Hilltop teachers talked about the transition to international education, they spoke often about the transition "into immersion." Language immersion "coming to your grade" was a frequent topic of discussion, and visual displays of this were prominent, one example being the diagram that showed the components of Hilltop's international focus that was displayed in the front hall. In fact, several teachers that I asked to participate in this study hesitated because of their lack of knowledge of the immersion program (e.g., their grade level had yet to implement language immersion). Through structural design (e.g., the logistics of reorganizing the school day for immersion) and the emphasis placed on immersion by the teachers, language immersion was central to international education at Hilltop.

**Classrooms:** The staff at Hilltop was influential in bringing international education to the school: "[the district] asked and we overwhelmingly said 'yes'" (Megan). The district gave Hilltop one school year to plan and prepare for its conversion, during which time the staff met regularly to discuss how international education would be implemented. One decision the staff made was to assign each grade level a world region or country on which to focus throughout the year. Each grade level team was "given time to collaborate and create [units on their world region]" (Naomi). Some grade levels were assigned regions that closely aligned with the existing curriculum (e.g., Kindergarten received Mexico, which connected to the social studies focus on neighbors), while others were given regions that were less aligned (e.g., first grade received Asia, which had no particular connection to their curriculum).

The world regions came to be the primary curricular entry point for global perspectives in the English language classrooms. As Keith commented, “[i]f we all do our piece...by the time a child leaves here they should have some information...about the world when they move on to middle school.” The teachers universally referred to their global region when describing how they incorporated international themes and learning into the curriculum. For grades K-2, international learning was taught in units, often interdisciplinary approaches to science, social studies, and literacy, that focused on the languages, animals, foods, people, and geography of a country or region. For example, walls in the hallway adjacent to the first grade pod were pasted with hand drawn maps of Asian countries, identifying geographic features and information about the peoples, animals, and climates of the region.

How the fifth grade region (Europe) fit into the curriculum was less well defined. The emphasis on teaching global perspectives by focusing on Europe challenged Keith, who questioned whether he needed to stop using one of his favorite units where students researched a historical figure of importance to their cultural identity (which meant that many students would not be researching Europeans): “I was thinking, ‘how does my notables project really tie into [international education]?’” Over the course of several years, Keith had developed what he believed was a strong unit that emphasized the multiculturalism in his classroom, but he felt restricted by the expectation that he focus his social studies instruction on the world region his grade was assigned.

**Art and Library:** The teachers discussed their students’ work in Art and Library as central to the school’s international program. Marie, the art teacher, and Megan, the librarian, were described by peers as integrating and deepening international learning through multimedia. Marie “definitely brought in an international arts focus that was related to our theme...[and Megan] read books that related to [the theme]” (Jamey). Thus, the Art and Library curriculum was the second curricular way students were exposed to global perspectives. This work was often done in collaboration with the classroom teachers by extending themes from the world region units. For example, the second graders, whose region was Africa, made papier-mâché masks in Art that represented African fables they read during library.

Each year since the transition to the international program, Megan taught one unit per grade level that explicitly tied into that grade’s assigned world region. Occasionally, other lessons connected with global perspectives, but typically the rest of the year focused on her general library competencies: library awareness, research, and lifelong reading. Teaching more than one unit, Megan said, “becomes too exhausting.” Likewise, Marie focused one unit per year on grade level regions, but also incorporated other international themes throughout the year. These additional lessons evolved in a less systematic fashion, as she “just pick[s] things that I have interest in. I pretty much try to choose...things from different parts of the world, because it interests me.” Additionally, Marie created decorations with her students for the school’s many

cultural celebrations throughout the year (e.g., Lunar New Year and Day of the Child).

While central to the teachers' conceptions of international learning, Art and Library were supplementary subjects, with students attending each for only 40 minutes per week. Thus, this aspect of global perspective can at best be understood as peripheral to the central academic curriculum.

International Student Body: Hilltop had been established as an international school for three years, but many teachers considered it an international learning environment long before that. Marie explained that "[Hilltop] wasn't presented as an international school [when she applied for her job], but obviously the focus was there with the large number of bilingual students and the diversity of the student population." The international and ethnic diversity of the neighborhood around Hilltop had, for years, placed language and cultural diversity at the heart of the school culture.

Various instances of international learning and exchange arose from the international student body. Several teachers talked about intentionally teaching about their students' cultures. In Kindergarten, students and parents with ties to Mexico were encouraged to share their knowledge of cultural traditions and ways of life. Naomi tried "to pull in parents to share with us what their experiences have been." Similarly, in most classrooms, students were encouraged to speak in their native language during class instruction and activities. Parisa explained "they say it in their language and I get to learn a couple of words, too."

More numerous, and more vibrant, than instances of intentionally bringing student culture into the curriculum were stories of how students informally connected across cultures and languages. Stories of students talking about cultural practices, experiencing similarity across cultural and physical differences, and supporting peers in language learning, peppered teachers' description of the Hilltop school culture. The following story highlights the ubiquitous nature of these informal connections:

One day when [students] were doing partner reading I saw one of my English-speaking boys translating an English book into Spanish for another student. I went over to him and said "it's so great that you're doing this for [the other student]" and he says "no big deal, he does the same thing in Spanish class for me"...I [also] see Spanish speaking students [whose] English is pretty good...jump in and explain [the lesson] in Spanish (Parisa).

In total, international education was conceptualized and found in varied physical and intellectual locations at Hilltop. It was centrally located within the language immersion program, modularly included through grade level world regions, peripherally integrated through Arts and Library, and extensively, but informally, incorporated through the students' international diversity.

*The Influence of Teacher Identity*

The six educators who participated in this study offered various ideas about how their personal and professional identities influenced their philosophy and practice of international education. Three themes emerged about how each teacher described her/himself as having been primed for this educational reform.

**Cultural, Ethnic, and Language Identity:** I entered teaching to add a different kind of face, of color, to the profession. I didn't know too many Asian male teachers. So that's one reason the international piece seemed interesting. When you're focused internationally, you're not necessarily focused on the White American Caucasian model. (Keith).

Two teachers, Keith and Naomi, discussed the connection between international education and culturally diverse curriculum. For them, one of the goals of international education was that "it connects with [the students'] culture" (Keith). Keith explained that while he taught a grade level without language immersion and thus had not felt the full impact of the international education model, his curriculum had always been globally oriented and responsive to his student's cultural diversity: "I've tried to incorporate something that can relate to each kid. Like The Notables Project is an opportunity for them to [study] somebody from the Philippines or Latin America, so that's something that I've always kept a perspective on." Naomi described her educational philosophy as based on cultural pluralism. Previous teaching experiences taught her the value of extensively including cultural studies in the school curriculum: "[T]hat's one thing about cultural pluralism; you don't just study a culture during Black History Month. It has to be ongoing."

The connection between identity and curriculum was also personal. Keith explained that teaching with a "global perspective doesn't always have to relate to [the students], but growing up I got very little of that." Disenchanted with his K-12 education, Keith made an effort to incorporate diverse cultures and perspectives into his teaching. Naomi, too, pointed out the influence of her childhood on her teaching about culture and identity. The connection between her philosophy of cultural pluralism and her personal experiences came together at Hilltop, where she saw how Hilltop fostered cultural pride in students and families. She claimed "I never would have put that together until I was immersed in the international program."

Language identity is another component of cultural identity. For Parisa, this was the prominent feature of international education at Hilltop and one that related to her personal experience as an English language learner and her professional expertise as an ELL teacher. Like Keith and Naomi, who conceptualized international education on familiar terms, Parisa claimed that "[international education] really didn't change any of my teaching strategies; I was already doing it."

All three teachers explained that teaching at an international school changed aspects of their job, but each had developed her or his conceptualiza

tion of international education to fit her or his preexisting philosophy of and approach to teaching. From this perspective, through their ethnic, cultural, and language identities and commitment to culturally diverse curriculum, Keith, Naomi, and Parisa had been practicing what they perceived to be the essence of international education prior to the school's official transition.

Bringing a Global Perspective: "I would argue that providing students with a global perspective and helping them think about how they communicate...are things that I've always thought about and tried to incorporate. At this school there is more of an emphasis on a school-wide level...It feels like it is more supported here, but it's not necessarily something that I didn't think about in other schools" (Jamey).

Jamey claimed that she had always been internationally focused – "me personally, I've always had an international bent to thinking about being part of a global community" – which she attributed, in part, to her experience traveling and living abroad. She began working at Hilltop the year it transitioned into international education and said that "in some ways my overarching philosophy of preparing kids to be good global citizens has always been there and I was happy to find [Hilltop]." Jamey had brought beliefs about the purpose of international education with her when she came to Hilltop; beliefs that were framed by concepts of global citizenship and understanding international perspectives on world issues, or in her words: "Thinking about yourself as part of the world population, as not just an American and not thinking solely about what's in our nation's best interest or in your personal best interest."

Content Area Alignment: "For me the nature of art is global...so I've always done a lot of international stuff with the kids. It really hasn't changed too much, just the alignment of art that I do...is more specific to [each grade levels'] social studies [curriculum]" (Marie).

In contrast to a teacher describing her or his identity as aligned with the mission of international education, Marie and Megan considered their subject areas as natural conduits for it. In the quote above, Marie described art as an international medium. Hilltop's mission contributed to the curricular alignment between her work and what went on in the classrooms, but she suggested that the reform had not affected the underlying substance of her teaching. In previous positions, Marie maintained an international component to her instruction, but described her teaching as isolated from the homeroom curriculums. At Hilltop, she capitalized on the grade level regions by developing art projects that furthered students' understanding of the culture, traditions, and artwork typical of that area of the world. For example, Marie read the Kindergarten class a story about a potter from Mexico who worked with clay from his backyard. She explained that artists often use materials from their local environment and had the students make clay pots (in the style of that artist using clay from a local community).

Megan had a similar experience aligning her library curriculum with the classroom curriculum, which she preferred "versus teaching things in isolation where they go back [to their homerooms] and get nothing." While Megan did

not have had an international focus to her teaching prior to Hilltop's transition into international education, she had tried to grow the library's collection of books written in the home languages of Hilltop students. She also believed that her library curriculum was "very open ended. . . I can easily plug in the [international] interests of the school, which is easy to do."

Together, Marie and Megan presented a different take on being primed for this reform, where one's content area is inherently or easily adaptable to international education. Both teachers made changes in their practice as a result of Hilltop's new mission, but neither made fundamental changes to accommodate the international education model. These cases also suggest that teachers were using conceptions of self, through their teaching identity, to interpret the meaning and practice of international education.

### *Citizenship and School Culture*

The teachers understood citizenship education as implicit in their teaching and the school culture. They emphasized relationships between students and the connection between developing a global perspective and being aware of others. As Marie said, "talking about the global perspective, being a good global citizen. . . just being an aware person." Teachers talked about how citizenship education should build community ("so that we can all live in harmony" [Naomi]) and is based on the notions of ownership of place ("when you have ownership of a thing you take better care of it" [Parisha]) and personal behavior ("being a citizen of the world is doing what you can to help" [Megan]).

At the elementary school level, concrete concepts of citizenship were taught through what Naomi called "real basic examples." For example, in second grade the notion of respecting others' ideas was taught through the expectation of being "responsible to help each other [learn]" (Parisha). In Library and Art, places shared by the school community, the teachers emphasized learning "about people and their differences" (Megan) as a means to "get along with other people that are different than you" (Marie), a reflection of the school expectation to teach "human differences and commonalities." Teachers developed a belief about the importance of perceiving and understanding interpersonal and cultural differences and interpreted this as having respect and awareness of diverse perspectives.

The physical appearance of classrooms and the school building was another means of presenting messages about citizenship. In all classrooms I observed, and throughout the school as a whole, there was a general feeling of welcoming students into a diverse community. For example, multiple languages, including Mandarin, Spanish, and other languages spoken by Hilltop students, were extensively used on posters in classrooms and shared spaces around the school; photos of culturally and ethnically diverse Hilltop students appeared in the front office; remnants of cultural celebrations decorated walls; and over 100 world flags hung in the hallways.

Collectively, teachers described teaching citizenship as moving beyond oneself and hinted at how citizenship was a global concept. Jamey articulated this connection, helping her students become “part of the greater global fabric” by teaching them to “look beyond just the American perspective.” As this suggests, concepts of citizenship that were developed in the classroom and school community were intended to teach lessons that extended to local, national, and international communities.

### *Agency and Structure in International Education*

Hilltop was an illustrative case of the construction of public international education, a case that depicts the ongoing negotiation between agency and structure in the development of social systems. Parker (2008) wrote that public international education has been implemented in myriad ways through federal and local agendas. Hilltop pulled from both, creating an educational model located in high priority foreign languages (a federal agenda) and an international student body (a local agenda). These central features of Hilltop’s international education were structures that helped frame the teachers’ practices, but structures that were also responsive to the educators’ collective and individual practices. For instance, the language of instruction in the language immersion programs was a structural feature of the school, but the school-wide celebration of and emphasis on world languages was an act of collective agency.

From the start, it was the teachers’ own decision to bring language immersion to Hilltop, electing to adopt the district’s emerging international education programming. Without the staff supporting this conversion, Hilltop may never have (officially) become an international school. Through their agency, the teachers imposed upon themselves a structure of public international education framed by the district’s three-prong model (language immersion, instruction to promote global perspectives, and academic excellence). Yet the staff participated in the construction of the Hilltop international education model beyond their vote to become an international school. One prominent example was the staff’s decision to assign world regions to each grade level. This structure was subsequently the unified way that teachers conceptualized international education in their English language classrooms. However, the extent to which teachers incorporated the grade level world region unit into their curriculum – and the extent to which teachers offered additional internationally themed instruction – were acts of individual agency.

Moreover, as Hilltop internally created and cultivated curriculum and teaching practices that comprised its version of public international education, the district looked to Hilltop as a source of knowledge about international education. For example, during my study, staff members of a newly designated international school in the district came for a daylong observation and discussion with Hilltop staff. Although Hilltop had initially drawn upon the district’s framework, the school was in the process of developing its own model of

public international education and it was simultaneously dispensing this model to other schools in the district.

Operating within a national context, many public schools create a nationalistic school climate (Banks, 2004b). Hilltop, on the other hand, aimed to create an international climate. This was pursued by the teachers' efforts to represent their students in the curriculum and school culture and because their students were multicultural and international. At Hilltop, the use of concepts developed in multicultural education theory (e.g., the relationship between cultural identity and learning) – which Kymlicka (2004) described as traditionally, “a national project of social justice” (p. xvi) – were expanded to reflect the students' international identities. This model of international education encouraged students to establish and maintain membership in multiple cultural and national communities and was fundamental to the teachers' understanding of citizenship education.

### *Soft Cosmopolitanism*

Citizenship education appeared in explicit and implicit ways at Hilltop. Explicit forms of citizenship were concentrated on classroom expectations and promotion of skills for being a member of the classroom community – ideas that are not unique to international education. However, citizenship education was also conceptualized by the teachers as an implicit element of the school-wide culture, an outcome of the practice of recognizing and appreciating the international student body. Here, in the contact between the international student body and the expectations for being respectful and community minded, Hilltop created a form of international citizenship education that I describe as soft cosmopolitanism.

Soft cosmopolitanism, I suggest, appeals to the concept of an overarching responsibility to the global community, but it does not promote this responsibility as superordinate to other allegiances (such as cultural affiliation) and offers scant reference to a nationalistic agenda. Each of these components was present at Hilltop and suggest an opening for international education to be a site of innovative practice in citizenship education. Jamey was, at least in her philosophy of education, a case of this. Her beliefs about teaching students to understand issues from an international perspective (i.e., “look beyond just the American perspective”) demonstrated an appreciation of how complex issues can reasonably be understood from multiple points of view. At Hilltop, global knowledge, including knowledge of diverse international and domestic cultures, languages, and places, was celebrated and valued.

### CONCLUSION

As seen at Hilltop International School, both agents and structures were integral to developing teaching practices that became “international educa-

tion.” More research is needed to understand what teaching practices occur at other sites of public international education and examine how these practices affect what students are actually learning. How are students’ experiences different in public international schools than in traditional schools? At Hilltop, soft cosmopolitanism emerged through the negotiation of agency and structure and became a product of Hilltop’s international education. That soft cosmopolitanism can be found in a public elementary school shows promise for the potential of international education to address the tension between unity and diversity and to develop and promote complex and multifaceted concepts of citizenship.

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# THE REPLACEABLES: LINGUISTIC PRESCRIPTIVISM, THE REGRESSION OF EQUITABLE EDUCATION AND ITS IMPLICATIONS FOR DEMOCRACY

Zion Mengesha\*

## INTRODUCTION

Schools and universities teach students how to operate in an academic culture, but these cultures contain a framework of distinct subcultures. Most notably, academic subcultures are ethnic, and these subcultures sometimes clash with socioeconomic background. Those most assimilated to the language of prestige, i.e. those who employ Standard English phonological features, receive linguistically recast ego development from compulsory school through college. In contrast, non-standard speakers are deemed as improper in elementary school, and minority-speakers become disempowered in high school, if not earlier. African American Vernacular English is most commonly associated with educational deficits. In post-Civil Rights Movement America, the binary residue remains; African Americans have not overcome the barriers set by slavery. Now linguistic binaries stifle educational equity. Works such as Carolyn Temple Adger and Donna Christian's *Sociolinguistic Variation and Education*, John and Angela Rickford's *Variation, Versatility and Contrastive Analysis in the Classroom*, Fay Vaughn-Cooke's *Lessons Learned from The Ebonics Controversy*, Martha Nussbaum's *Education For Profit, Education for Freedom* and Ian Haney-Lopez's *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* all corroborate how colorblindness is illusory, regresses education, and hinders minorities from obtaining socioeconomic prowess.

## BACKGROUND

Compared to Standard English Dialects, which are perceived as civilized, credible, and educated, African American English speakers have experienced disrespect, hostility, and stigmatization in the United States of America. A substratal dialect is one that has lower power and prestige in American society. Dialect subjectivity sends a message of inferiority to African Americans who, unless they speak Standard English, are recognized as less valued members of society.

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This form of prejudice compromises equality, and undermines federal law: “The Equal Opportunity Act identified failure to take ‘appropriate action’ to overcome language barriers impeding equal participation in school as a form of illegal denial of equal educational opportunity” (Parillo, 2009: 563). In *Martin Luther King Jr. v Ann Arbor School District* (1979), eleven children were placed in special education when language assessments failed to take into account their language heritage. Linguists, educators, policymakers, and Judge Charles Joiner corroborated and demanded that teachers administer *appropriate assessment* of Ebonics.

By contrast, California historically has been a national model for education. In recent years in California there has been socioeconomic stratification, separating group demographics based on income. Because wealthy groups have separated from low-income groups, linguistic separation has resulted in dialect discrimination. Language is a key marker of social identity, and is often correlated with economic status; the language of prestige is Standard English while non-Standard dialects of English are perceived as non-prestigious. As a result, California’s education is biased, and additionally, poorly funded districts are disproportionately composed of African American students. Property taxes have affected schools so that in order to get a high caliber education, one must be affluent enough to live in a community where the median cost of a home is high. Schools in these districts invest twice as much in their students than schools in less affluent areas (Reich, 2014). This is gentrification; the districting that supports social exclusion and group degradation of the lower classes. But segregation is inherently unequal. Nowhere is this more true than in Oakland, CA, where the lines dividing economic districts are grossly apparent, e.g. between Oakland and neighboring Berkeley. In Oakland Unified School District, 71% of the students enrolled in special education were African American, suggesting that professionals did not learn anything from the Black English trial in Ann Arbor (Vaughn-Cooke, 2007).

Proposition 13 in California and the Oakland Unified School District’s debate (1996) about this language pathology, described by John Rickford in *The Ebonics Controversy in My Backyard: A Sociolinguist’s Experiences and Reflections*, highlight the heavy inequalities still present in this country. In December 1996, the school board of the Oakland Unified School District’s controversy resolved to recognize Ebonics as the ‘primary language of African American children’ and take it into account in their Language Arts lessons. The press and media were skeptical and hostile of the decision (Rickford, 1999). During this time, linguists’ opinions were heavily sought; Rickford states “my phone began ringing off the hook.” Linguists from all four subfields affirmed that the decision was “linguistically and pedagogically sound.” (Rickford, 1999). Despite widespread media controversy and journalists’ balk, Senator Specter not only supported

the linguists' viewpoint, but provided \$1 million in funding for research on the impact of the home language of African American students on reading Standard English. Despite this, media accounts of Ebonics obscure all professional accounts made by sociolinguists in their reporting and continue to manufacture the misunderstandings of discrimination.

The controversy over Ebonics is an academic case on the surface. Its underlying narrative is one of political subordination, exploitation and disempowerment of Black voices: the rejection of validating AAVE is systemic. AAVE has had such unfavorable reception that lawmakers have impeded AAVE's lawful inclusion with legislative prohibition. Van Cooke asserts "many people believe that federal and state funds should not be used to pay for Standard English instruction for Ebonics speakers" (Van-Cooke, 2007). Linguist Faye Vaughn-Cooke argues that legislative prohibition of contrastive analysis mirrors slave owners' prohibition against teaching slaves to write and read asserting "the dominant group used language as a calculated tool of oppression when they separated slaves who spoke the same language to prevent communication among the slaves [...] Ebonics is indeed the linguistic consequence of the [American] slave trade" (Vaughn-Cooke, 2007).

## LITERATURE REVIEW

Ian Haney-Lopez is a Professor at University of California, Berkeley School of Law where he conducts research about racial justice in American law. *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* is an exegesis of the rhetoric from past U.S. Presidents, policy-makers, and officials about race. Haney-Lopez argues "to challenge Jim Crow, the phrase '[O]ur constitution is color-blind' carried important rhetorical force, for in its simple declarative form it seemed to command an immediate end to all government laws mandating racial segregation" (Haney-Lopez, 2014). Ostensible 'color-blindness' has mutated into a defense slogan for their unjust policies, and has become latently embedded in the larger American consciousness. Race no longer exists, but the American court system, prisons and schools are still steeped in those Black-White binaries. The ideology that post-modern America is 'colorblind' obscures the painful history of slavery, isolates African Americans, blocks equitable education, and withholds overdue reparations.

Racial appeals in the political arena code the larger American society with unremitting appearance-based presumptions about ethnicity. Haney-Lopez argues, "In the United States, race provides such a core story, and strategic racists are master narrators." For instance, coded language such as "welfare queen" sounds off a strategic dog whistle about African

Americans; the term positions African Americans as dirty, lazy, and uneducated, and society unconsciously processes this dog whistle.

Terms like crackhead, whore, baby, thug, and other gang-related terminology trigger moral panic. The “War on Drugs” was invented to stop illicit drug use, yet its coding stirs up underlying fears of domestic terrorism: ‘war’ and ‘terrorist’ are synonymous. The “War on Drugs” positions drug-dealers as dangerous people to be feared, and such coded language conjures peoples’ subconscious feelings about African American males; the term positions African American males as violent, dangerous, domestic terrorists, enemies to the security of the state, subject to dehumanization, and even justifies police homicide. Recently, Eric Garner was asphyxiated by a police officer for ostensibly selling single cigarettes, hardly a ‘drug’, and yet his murder was *justified* by “The War on Drugs.” Linguistic coding extends to government programs, which have been renamed as ‘entitlement’ programs. ‘Entitlement’ program, a dog whistle for public assistance, implies that its recipients are ‘entitled,’ lazy, greedy, and immoral; yet government programs assist most of the struggling Americans trying to make ends meet. University of California, Berkeley Chancellor’s Professor of Public Policy, Robert Reich, asserts “these politicians have no idea what people who are hard up in America are going through [...] almost two-thirds of working Americans are living paycheck to paycheck. And they’re worried sick about whether their kids will ever make it. They need leaders who understand their plight instead of denying it. They deserve politicians who want to fix it rather than blame it on those who have to depend on public assistance, or who need a higher minimum wage in order to get by” (Reich, 2014).

Appearance-based judgments do not take into consideration individuals’ ethnic realities, and gross generalizations have racially- based consequences. Professor Haney-Lopez’s analyses of political language coincide with Northwestern University School of Law Professor Andrew Koppelman. Koppelman contends, “[black] groups suffer the more profound wrongs of exploitation, marginalization, powerlessness, cultural imperialism, and violence that [remains] unaddressed” (Koppelman, 1996). Herein lies the problem with gentrification; the culture of poverty in America brings to bear the social exclusion and degradation of the lower class. The lowest economic quartile is disproportionately made up of African-Americans. In 2007, 22.1% of Black families were considered to be living in poverty while only 5.9% of White families were living in poverty (United States Census, 2007). Black families are four times more likely to get districted into the nation’s poorest neighborhoods. By diminishing educational equality, gentrification manufactures the misunderstandings of discrimination. Similarly, Nussbaum’s article explains how American schools’ focus on bolstering economic power masks democratic sensibility

ities. Martha Nussbaum is a philosopher and Professor at University of Chicago School of Law where she researches ethics and justice. In “Education for Profit, Education for Freedom” she discusses this educational contrast and argues that equal access is not important for economic enrichment, only some people need to have more advanced skills, while a nation can grow very nicely while the rural poor remain illiterate. Children and adults with diverse needs challenge instructional practices, because their needs are not addressed. Nussbaum argues that profitability focuses on one utilitarian question: “How can we produce technically trained people who can hold onto “our” share of the global market?” (Nussbaum, 2009). While schools focus on their outstanding students, many underperforming students get left behind. In other words, unprofitable children are disposable. The students’ performances provide the best insight for what their learning needs are, and should inform teaching pedagogies.

According to Nussbaum, education should teach democratic practices and democratic sensibilities and produce an inclusive citizen, not a better worker. Taking into consideration the country’s dire inequalities, Nussbaum asserts “Specific periods of political and economic insecurity lead to increasing antipathy and even at times violence toward [minorities] who seem to threaten cherished stabilities. Such insecurities make it particularly easy to demonize strangers or foreigners and, of course, that tendency is greatly augmented when the group of strangers is plausibly seen as a direct threat to the security of the nation” (Nussbaum, 2009).

Nussbaum’s approach calls for three specific values that are crucial to decent global citizenship: (1) The capacity for Socratic self-criticism and critical thought about one’s own traditions; (2) The ability to see oneself as a member of a heterogeneous nation and world, and to understand something of the history and character of the diverse groups that inhabit it; (3) *Narrative imagination*, the ability to think about what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person’s story and to understand the emotions and wishes and desires that someone so placed might have. Critically, everyone should learn a foreign language. It is evident that a school program working to produce ethical, not profitable, goals is critical for harmonizing the global community. If education focused on decent global citizenship, changing the identification of groups could close the race gap. Nowhere is there a greater need to counteract inequalities than in segregated districts.

Stanford linguist John Rickford asserts that dialects arise when two groups are separated over time, and different varieties of language grow apart. In the Oakland Unified School District, African American Vernacular English (AAVE) is a distinct dialect through which racial fears exist. According to Rickford, “we know from many studies that people consider speakers of nonstandard varieties of a language more negatively: less

educated, less creative, less competent, and more vulgar” (Rickford, 2013). Elite culture finds AAVE incomprehensible. “The Clinton administration declared that... ‘Black English’ is a form of slang that does not belong in the classroom [...] The administration presumably made this claim without consulting the language professionals who have been awarded millions of federal dollars to conduct research that proves that Ebonics is not slang” (Vaughn-Cooke, 2007). The comprehensibility of AAVE is debatable. Vaughn-Cooke asserts that “there is abundant evidence that mainstream speakers not only understand Ebonics, they often borrow words and phrases from it, especially when these borrowings are economically and socially beneficial,” (Vaughn-Cooke, 2007) e.g. hip hop, R&B, soul. The question remains: how can educators teach Standard English without offending African American Vernacular speakers?

Successful assessments of overcoming the language barriers take into account the home language. Center for Applied Linguistics researchers Carolyn Temple Adger and Donna Christian assert “They are not likely to be successful in overcoming the language barrier caused by their failure to take into account the home language system unless they are helped to recognize the existence of the language system used by the children in their learning community (Temple Adger and Christian, 2007). A body of convincing linguistic research has captured the ways in which contrastive analysis universally raises reading levels for students of any linguistic background (Rickford and Rickford, 2007; Labov, 2010; Temple Adger and Christian, 2007).

In “Variation, Versatility and Contrastive Analysis in the Classroom” by John Rickford and Angela E. Rickford, linguistic versatility is developed through contrastive analysis. Initially developed five decades ago, it involves a comparison of the speaker’s native language and target language to draw the attention of students and teachers to areas in which their systems differ, and to predict and help students avoid errors in the acquisition of the target language resulting from interference or transfer (Rickford and Rickford, 2007). Aurora University conducted a study of African American students from Chicago inner-city areas and divided them into two groups (Taylor, 1990). The control group was taught composition through traditional techniques that have no reference to the vernacular. The experimental group was taught the differences between Black English and Standard English through contrastive analysis. The findings were pioneering. Eleven weeks later, Taylor’s experimental group showed a dramatic decrease of 59% in the use of ten targeted Black English features in their Standard English writing, while the control group showed an increase of 8.5% in their use of such features (Rickford and Rickford, 2007).

## DISCUSSION

The political ideology of colorblindness implies that African Americans' ethnic background is a deficit to learning. It is not. The achievement gap is a manufactured consequence of structured inequality. Gentrification provokes linguistic separation. With lower class families pushed out of the more affluent districts, good education is reserved for the upper class. This divide is regressive, and undermines American law (specifically the Equal Educational Opportunity Act). If the United States implements a contrastive analysis curriculum, it would shape society and reflect the equality which this country once revered, further advance each person's potential, and dignify African Americans.

One counter argument is that a complete overhaul of the United States compulsory curriculum is costly. Here is the retort: which is more consequential, continuing racial subordination of valuable global citizens or the quantifiable measures of spending more money per student? Based on the available research, it is clear what needs to be done to help advance reading levels: educational revitalization.

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# **AN APPROPRIATE TEST FOR “APPROPRIATENESS”; THE TENTH CIRCUIT’S STATUTE-DRIVEN TEST FOR RESIDENTIAL PLACEMENT REIMBURSEMENT IS THE MOST ALIGNED WITH THE LANGUAGE AND PURPOSE OF THE I.D.E.A.**

Kellen Ruwe\*

## INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) mandates that all children with disabilities enrolled in public schools receive a free, appropriate, public education commonly referred to as “FAPE.”<sup>1</sup> To achieve this goal, educators and specialists must create individualized education plans (IEPs) – unique plans of action designed to enable each child with special needs to obtain an education benefit commensurate with his or her capabilities.<sup>2</sup> The individualization of special education represents the IDEA’s key ideal: that children with disabilities need, and are entitled to, specialized education at public expense.<sup>3</sup> For students with highly complex needs, this goal is challenging for the best of educators. In fact, IDEA’s individualization requirements reflect the difficult reality that students with disabilities face vastly varying challenges demanding vastly varying instructional approaches.

In rare but significant cases, a child’s education needs are so extensive as to make a residential placement or program (arguably) the proper method for delivery of FAPE.<sup>4</sup> Residential placements are typically boarding facilities where students’ academic, emotional, physical and mental health needs are addressed in combination. Some residential programs have a clear psychiatric focus.<sup>5</sup> In general, residential programs are extremely restrictive and extremely expensive, costing parents and school districts upwards of \$100,000 per year.<sup>6</sup>

Whether and when residential placement is warranted is often hotly contested between parents and educators, both of whom are legally entitled to an opinion on the subject under the IDEA.<sup>7</sup> The U.S. Supreme Court has recognized a parent’s right to “unilaterally” place his or her child in an alternative residential placement and seek subsequent reimbursement from the public

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school district.<sup>8</sup> The availability of reimbursement depends on a difficult two-part

1. 20 U.S.C. §1412(a)(1)(A) (2004).
2. 20 U.S.C. §1412(a); 1414(d); 1436(d) (2004).
3. 20 U.S.C. §1400(d)(1)(A) (2004).
4. *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359 (1985).
5. United States Department of Education; Office of Special Education and Rehabilitative Services; Memorandum on Educational Expenses for Children in Private Residential Programs. March 17, 2005.
6. *Id.*
7. 20 U.S.C. §1415 (2006).
8. *Burlington*, 471 U.S. at 374.

judicial determination: asking first, whether the school district failed to provide FAPE, and if so, *whether the alternative placement chosen by the parents was “appropriate.”* In the absence of definitive U.S. Supreme Court precedent, circuits are split regarding the proper framework for answering this final, critical question.

The Third, Fifth, and Seventh Circuits attempted to create broadly applicable frameworks for the “appropriateness” determination.<sup>9</sup> These attempts have had mixed results, in large part because the IDEA demands a student-specific, rather than generalized or abstract approach to the analysis. Thus far, the Tenth Circuit has offered the best, albeit imperfect, framework in *Elizabeth E. v. Jefferson County School District*.<sup>10</sup> The Tenth Circuit test properly assesses “appropriateness” as the IDEA conceptualized that term in the context of FAPE: descriptive of the unique supports necessary to meet an individual child’s particular needs.

This article discusses why the Tenth Circuit approach is the most (for lack of a better term) appropriate. Section II discusses the relevant statutory provisions and U.S. Supreme Court precedent, detailing the evolution of the IDEA with respect to residential placement reimbursement. Section III explains the varying circuit approaches to the “appropriateness” analysis, and Section V demonstrates that the Tenth Circuit’s four-part framework is the most effective test articulated thus far.

## I. BACKGROUND

### A. *The Big “IDEA”: Every Student with a Disability is Entitled to a Free, Appropriate Public Education*

The Individuals with Disabilities Education Act (IDEA) represents a landmark legislative acknowledgment of the American public school system’s historical failure to educate children with disabilities.<sup>11</sup> Congress enacted the IDEA “to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs.”<sup>12</sup> In emphasizing students’ “unique needs,” Congress recognized that children with disabilities are unlikely to succeed when instructed with general curriculum alone. Rather, students with disabilities need Individualized Education Plans, or “IEPs” – specially designed and documented educational plans that address each child’s personal strengths, weaknesses, and goals.<sup>13</sup> Creating a

child’s IEP involves a highly complex and collaborative process between teach

9. See *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79 (1st Cir. 2012) (If a state is unable to provide a disabled child with FAPE through a public school placement, it may be obliged under the IDEA to subsidize the child in a private program); *CG ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279 (1st Cir. 2008).

10. *Jefferson County Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227 (10th Cir. 2012).

11. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982) (The IDEA represents an ambitious federal effort to promote the education of handicapped children).

12. 20 USC § 1400(d)(1)(A) (2004).

13. See 20 U.S.C. §1401(14) (“The term ‘individualized education program’, or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed and revised in accordance with section 1414(d) of this title.”)

ers, parents, school therapists and school psychologists.<sup>14</sup> When successful, all of this careful collaboration and consideration should achieve the ultimate end of providing specially designed instruction (SDI) and, most importantly, FAPE, for each and every public school student with an identified disability.<sup>15</sup>

For some students, FAPE is provided by an hour per day of intensive, one-on-one reading instruction in a resource room setting. For others, FAPE is only achieved through both academic and life skills curriculum delivered in a specialized classroom by a large team of teachers, occupational and physical therapists, speech language pathologists and para-educators. The latter type of student would likely need “related services” in order to benefit from specially designed instruction.<sup>16</sup> The IDEA defines “related services” as

...transportation, and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.<sup>17</sup>

This concept of related services brings many non-traditional, yet still educationally necessary, services within the Act’s reimbursement scheme.<sup>18</sup> For example, a child with IEP goals in reading and writing who also had difficulty gripping a pencil would also receive occupational therapy because it would constitute a “related service.” Thus, FAPE as defined by the IDEA consists of both SDI and necessary related services.<sup>19</sup>

*B. When the School’s Effort to Provide FAPE (via Specially Designed Instruction and Related Services) is Inadequate, Who Pays for the Alternative Residential Placement?*

For the most profoundly disabled or behaviorally challenged students, FAPE (even with related services) might not be achieved in the public school at all. The IDEA contemplates rare, but significant, instances in which districts become responsible for the costs of educating children with disabilities in private, residen-

tial settings.<sup>20</sup> Situations in which families and schools contemplate residential

14. See 20 U.S.C. §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E); 34 C.F.R. § 300.345. (Parents have an affirmative right to participate in the IEP process; denial of that right furnishes a due process claim under the Act’s procedural safeguards.)

15. *Id.*

16. 20 U.S.C. §1401(26) (2004).

17. See 20 U.S.C. §1401(26) (2004); (“...transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

18. See *Burlington*, 471 U.S. at 374.

19. 20 U.S.C. §1412(a)(1)(A).

20. See 20 U.S.C. § 1412(a)(1, 5); See also *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79 (1st Cir. 2012) (If a state is unable to provide a disabled child with FAPE through a public school placement,

programs are often fraught, and complicated by the legal significance of both parties’ opinions.

Under the IDEA, the parents must be invited, and have a legally protected right to weigh in on, approve of, or disapprove of, the school’s plan for educating their child.<sup>21</sup> Thus, parents must be invited whenever an IEP team convenes to discuss, adjust, revise, or amend a student’s IEP. Ideally, the legally mandated inclusion of parents in the educational process fosters collaboration, and ultimately benefits the child.<sup>22</sup> Inevitably though, parents are not always in agreement with the other IEP team members (teachers, therapists, school psychologists etc.) as to what instructional program will or will not constitute FAPE.<sup>23</sup>

When parents take issue with the school’s strategies or practices, they can exercise their right to due process under the IDEA by challenging the IEP team’s decisions with a variety of legal tools.<sup>24</sup> In connection with this process, the United States Supreme Court has recognized that parents can “unilaterally” (i.e. without the school’s stamp of approval) move their child to a private setting that they believe will provide an appropriate education, and later seek reimbursement for the cost of that placement from the school district.<sup>25</sup> Parents make this decision at their own financial risk.<sup>26</sup> Once a parent has incurred out of pocket expenses, courts only grant reimbursement for unilaterally chosen private programs when they determine both that the public placement violated the IDEA by failing to provide FAPE, and that the private school placement was “appropriate” under the Act.<sup>27</sup>

Reimbursement is available by virtue of a section of the IDEA providing that courts, in considering how to remedy a school’s failure to provide FAPE, “shall grant such relief as the court determines is appropriate.”<sup>28</sup> In *School Committee Burlington, Mass. v. Department of Educ. of Mass.*, the U.S. Supreme Court held that this section permitted reimbursement of a private school placement as an appropriate remedy in some instances.<sup>29</sup> Finding reimbursement for unilateral parental placements consistent with the IDEA’s central mandate

that students with disabilities be given effective, meaningful instruction, the Court indicated that the IDEA’s FAPE requirement would be incomplete without at least some possibility that children denied FAPE could obtain retroactive reim

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it may be obliged under the IDEA to subsidize the child in a private program); *CG ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279 (1st Cir. 2008).

21. See 20 U.S.C. § 1414(d)(1)(B)(i); The term “individualized education program team” or “IEP team” means a group of individuals composed of – the parents of a child with a disability.

22. See *R.L. v. Miami-Dade County School Bd.*, 757 F.3d 1173, 1177 (11th Cir. 2014) (The IEP is supposed to be the culmination of a collaborative process between parents, teachers, and school administrators outlining the student’s disability and his educational needs, with the goal of providing the student with a free appropriate public education (FAPE)).

23. *Id.* at 1177-78.

24. See 20 U.S.C. § 1415; note that “due process” in this context is an administrative entitlement, not the same kind of “due process” traditionally afforded by the U.S. Constitution.

25. *Florence County Sch. Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 13 (1993); *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359 (1985).

26. *Florence County*, 510 U.S. at 15; See also *Rose v. Chester County Intermediate Unit*, 114 F.3d 1173 (3d Cir. 1997).

27. *Id.* (emphasis added).

28. 20 U.S.C. § 1415(i)(2)(C)(iii) (emphasis added).

29. *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 374 (1985).

bursement.<sup>30</sup> The Court held that, were reimbursement unavailable, “the child’s right to a free appropriate public education... would be less than complete.”<sup>31</sup> The *Burlington* holding firmly established reimbursement as a legal right for parents whose conviction that the public school failed their child is ultimately borne out.

What’s more, the Supreme Court rejected the idea that financial hardship for school districts that fail to provide FAPE constitutes a countervailing argument in *Florence County School Dist. Four v. Carter By and Through Carter*.<sup>32</sup> The Court dismissed the notion that *Burlington* went too far in light of the IDEA’s purpose, explaining

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in the IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free and appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice. This is the IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.<sup>33</sup>

The *Carter* court reaffirmed the reimbursement scheme laid out in *Burlington*, and decidedly rejected the notion that the significant public expense it entailed was more than the IDEA required.<sup>34</sup>

Though it did not limit the Supreme Court’s reimbursement scheme, Congress amended the IDEA in 1997, adding some conditions to the availability of reimbursement, and creating obligations for parents in addition to schools.<sup>35</sup> A new safe harbor provision indicated that reimbursement awarded to parents whose child was “previously enrolled” in some special education program, following a unilateral placement decision “may be reduced or denied” if parents fail to notify the school of their intent to unilaterally remove the student from school, if parents refuse to make their child available for evaluation, or if parents act unreasonably.<sup>36</sup> These provisions did not directly limit the availability of reimbursement, but they did create obligations on the parental end of the bargain.

The U.S. Supreme Court discussed the impact of the safe harbor amendment, creating a “balancing of equities standard” in *Forest Grove Sch. Dist. v. T.A.*<sup>37</sup> The Court addressed the availability of reimbursement for the parents of a

30. *Id.*

31. *See Burlington*, 471 U.S. at 370 (emphasis added). (“...parents who disagree with the proposed IEP are faced with a choice; go along with the IEP to the detriment of their child if it turns out to be inappropriate, or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school’s officials. If that were the case, the child’s right to a free appropriate public education... would be less than complete.”)

32. *Florence County School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7 (1993).

33. *Id.*, 510 U.S. at 15.

34. *Id.*

35. 20 U.S.C. § 1412(a)(10)(C)(iii).

36. 20 U.S.C. § 1412(a)(10)(C)(iii)(I), (II) and (III).

37. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *See also* 152 A.L.R. Fed. 458 (“The 1997 amendments did not change the text of the provision considered in *Burlington*, section 1412(i)(2)(C)(iii), which grants the courts broad authority to grant appropriate relief, including reimbursement to parents for the cost of private special education when a school district fails to provide a FAPE. Absent clear expression of Congress’ intent to repeal some portion of that provision or to supersede the court’s decisions in *Burlington* and *Carter*, the court would continue to read the provision as authorizing relief sought by the parents in the present case.”)

child who had never been enrolled in special education services to begin with.<sup>38</sup> The Court rejected the school district’s contention that the amendment, by its terms, limited the availability of reimbursement only to students “previously enrolled” in a special education program. Emphasizing the general remedial purpose of the IDEA and the 1997 amendments, the court held that reimbursement was to be awarded when “appropriate,” in light of “all relevant factors” bearing on both parental and public school obligations under the Act.<sup>39</sup>

The judicial and statutory evolution of the IDEA’s reimbursement provisions has created a complex legal scheme. The ultimate result, in instances where parents and school professionals disagree, is a highly contentious legal dispute in which Administrative Law Judges and appellate courts attempt to determine 1) whether the school failed to provide FAPE as mandated by the IDEA, and 2) if so, whether the unilaterally chosen parental placement was appropriate, such that parents should be reimbursed for the cost of their child’s education – a cost that the school district should have been financing all along pursuant to its legal obligation to provide FAPE.<sup>40</sup>

Supreme Court interpretation of the reimbursement scheme has clarified which students’ families are eligible for relief. But, the ultimate availability of reimbursement remains uncertain, because the Court has not articulated any meaningful framework for determining whether individual placements are “appropriate.”

## II. IN THE ABSENCE OF A CONTROLLING U.S. SUPREME COURT FRAMEWORK FOR ASSESSING “APPROPRIATENESS,” CIRCUIT OPINIONS ON THE BEST APPROACH ARE SPLIT

The Third, Fifth, and Seventh Circuits, assess “appropriateness” by drawing broadly applicable distinctions between primarily medical and primarily educational programs. The Third Circuit purports to do so by determining whether a child’s educational needs are “inextricably intertwined” with other, non-educational needs.<sup>41</sup> With some variation, the Fifth and Seventh circuits examine the “primary purpose” of the program in question, in order to decide whether it is educational and therefore reimbursable.<sup>42</sup> These approaches are problematic because they are unpredictable. In fact, “depending on which of the . . . federal circuit tests. . . are used to examine reimbursement, the range of possible outcomes is significant.”<sup>43</sup> What’s more, each of these tests is program and purpose driven,

38. *Id.* at 238; *See also* Ralph D. Mawdsley, DIMINISHED RIGHTS OF PARENTS TO SEEK REIMBURSEMENT UNDER THE IDEA FOR UNILATERAL PLACEMENT OF THEIR CHILDREN IN PRIVATE SCHOOLS, *BYU Educ. & L. J.* 303, 304 (2012) (“Forest Grove introduced a balancing-of-equities approach for examining the appropriateness of parental reimbursement – an approach that has served to broaden the scope of judicial inquiry beyond a public school district’s compliance with the IDEA and focus, as well, on the responsibilities of the parents.”)

39. *Id.* at 247; *See also Id.* at 247 (“...courts retain discretion to reduce the amount of a reimbursement award if the equities, so warrant – for instance, if the parents failed to give adequate notice of their intent to enroll the child in a private school.”)

40. *Burlington*, 471 U.S. at 370-71.

41. *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981).

42. *See Dale M. v. Bradley-Bourbonnais High School District No. 307*, 237 F.3d 813 (7th Cir. 2001); *Richardson Independent School District v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009).

43. Mawdsley, 253 Ed. Law Rep. at 534.

as opposed to student driven.<sup>44</sup> For this reason, they are inconsistent with the IDEA's language, and contrary to its individualized purposes.

*A. The Third Circuit's Inextricably Intertwined" Test*

The Third, Fourth, Ninth, and D.C. circuits determine "appropriateness" based on whether or not a child's educational and non-educational needs are "inextricably intertwined" or "segregable."<sup>45</sup> If they are segregable, and the placement in question is necessary to address only a child's non-educational needs, it is not reimbursable.<sup>46</sup> If the child's needs are not segregable, "... a court [can] reimburse parents for the full cost of a residential. . . placement so long as the medical services are necessary for a student to achieve some educational benefit."<sup>47</sup>

The Third Circuit first articulated this test in *Kruelle vs. New Castle County School District*,<sup>48</sup> where it evaluated a profoundly disabled student's private-school program and found that the "residential placement was part and parcel of a specially designed instruction [necessary] to meet the unique needs of [the] handicapped child."<sup>49</sup> Paul, the child in question, had cerebral palsy.<sup>50</sup> He needed assistance with basic skills like speaking, walking, dressing, self-care and eating.<sup>51</sup> While his parents advocated for full time private placement, the district contended that a program of public classroom instruction and respite care would suffice.<sup>52</sup> The Court focused on whether or not Paul's educational needs were "segregable" from his medical, psychological and behavioral needs, ultimately dispensing reimbursement for the entire cost of the program because his academic and non-academic needs were "inextricably intertwined."<sup>53</sup> Under *Kruelle*, if a residential placement is found necessary and appropriate to provide an education, the district is financially responsible for the program in its entirety.<sup>54</sup>

The Third Circuit subsequently clarified, explaining that the *Kruelle* test, while liberal, does not require reimbursement for placements that cannot be fairly characterized as educational at all. In *Mary Courtney T. v. Sch. Dist.*,<sup>55</sup> a high school student named Courtney was unilaterally placed in a psychiatric treat

44. Mawdsley, 253 Ed. Law Rep. at 534 ("The [tests]... are likely to produce different outcomes because they are based on different assumptions.").

45. See *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990); *Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 298 n. 8 (5th Cir. 2009).

46. See *Clovis Unified School Dist. v. California Office of Administrative Hearings*, 903 F.3d 635, 645 (9th Cir. 1990).

47. Mawdsley, 253 Ed. Law Rep. at 534 (emphasis in original).

48. *Kruelle* 642 F.2d 687 (3d Cir. 1981).

49. Ralph. B. Mawdsley. APPLYING THE FOREST GROVE BALANCING TEST TO PARENT REIMBURSEMENT FOR PLACEMENT IN RESIDENTIAL MEDICAL FACILITIES. 253 Ed. Law Rep. 521, 528 (April 14, 2010).

50. *Kruelle*, 642 F.2d. at 688.

51. *Id.*

52. *Id.* at 688.

53. *Id.*

54. *Id.*; See also *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 798 F. Supp. 1177 (D. Colo. 2011) ("Third Circuit Test: Whether Residential Placement is Necessary for Educational Purposes, or Instead is a Response to Medical Problems that are Segregable From the Learning Process.")

55. 575 F.3d 235 (3rd Cir. 2009); Nicole Pedi, BRIGHT "IDEA" OR MISSING THE MARK? THE THIRD CIRCUIT RESTRICTS REIMBURSEMENT FOR RESIDENTIAL PLACEMENT UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 59 Vill. L. Rev. 847, 861 (2014).

ment center when her symptoms became too difficult for her previous residential program to manage.<sup>56</sup> The psychiatric center was not accredited as an educational facility, but provided a range of therapies aimed at returning Courtney to a more mainstream setting.<sup>57</sup> Her parents argued that, “because [the residential placement] utilize[d] some of the same modalities employed by schools it. . . thereby provide[d] special education.”<sup>58</sup> The court rejected this contention, explaining that even under the *Kruelle* standard, there is a legal distinction to be drawn between medical and educational services. The court emphasized that “even with several weeks of extensive support and services at [the residential placement], Courtney was not sufficiently stable to undergo evaluation or receive educational services.” Although completing residential treatment could certainly help Courtney return to school, the treatment itself was not educational, and therefore not reimbursable even under the *Kruelle* standard.<sup>59</sup> In reaching this conclusion, the court pointed out that the center at issue had “no educators on-site, [offered] no educational services, and [was] not accredited with, or regulated by educational authorities.”<sup>60</sup>

The Third Circuit’s clarification of its test reflected a general concern that *Kruelle*’s original iteration was over-inclusive, resulting in reimbursement for too many non-educational services.<sup>61</sup> This concern was again reflected in *Munir v. Potsville Area School District*, where the Third Circuit rejected a student’s claim for reimbursement because “the ‘primary purpose’ of his enrollment at the facility [in question] was the treatment of his mental health issues, as opposed to educational needs.”<sup>62</sup> The holdings in *Mary T.* and *Munir* indicate the Third Circuit is attempting to draw a generalized distinction between medical and educational residential placements. This distinction may prevent school districts from paying for services beyond the scope of the IDEA’s *educational* mandates. However, the “inextricably intertwined” test, as it stands today, is divorced from the IDEA’s requirement that placements be evaluated based on their educational value as to the particular student, not in a generalized sense.<sup>63</sup>

This over-generalization is also evident in the Ninth Circuit’s articulation of *Kruelle*, as abrogated by *Mary T.* and *Munir*. The Ninth Circuit draws the medical versus educational distinction by ascertaining “whether the child’s placement may be considered necessary for educational purposes or whether the placement is a response to medical, social or emotional problems that is necessary quite apart from the learning process.”<sup>64</sup> In *Clovis Unified School District v. California Office of Administrative Hearings*, the Ninth Circuit denied reimbursement for services that were deemed primarily medical in nature.<sup>65</sup> The Court determined

56. *Id.*

57. *Id.*

58. *Id.* at 245.

59. *Id.*; 152 A.L.R. 485 (A parent’s right to unilaterally place a child in a private placement is proper under the IDEA if the placement is “appropriate,” i.e. it provides significant learning and meaningful benefit.)

60. *Mary T.*, 575 F.3d at 248.

61. *Pedi*, 59 Vill. L. Rev. at 855.

62. *Munir v. Potsville Area School District*, 723 F.3d 423 (3d Cir. 2013); *Pedi*, 59 Vill. L. Rev. at 865.

63. *Pedi*, 59 Vill. L. Rev. at 866 (“...the Third Circuit’s new reimbursement standard threatens results that contradict the purpose of the IDEA and ignore the nature of complex physical, mental, and emotional disabilities.”)

64. *Id.* at 643.

65. *Clovis Unified School Dist. v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990) (emphasis added).

that reimbursement for the cost of an acute care psychiatric hospital placement was not appropriate, because the services provided were primarily medical, notwithstanding that one to two hours of academic instruction were provided daily.<sup>66</sup> *Clovis* generally dictates that medically necessary placements are distinct from placements necessary for educational reasons, with only the latter warranting reimbursement.<sup>67</sup>

Subsequent applications of the *Clovis* articulation illustrate the broad-brush approach taken under this test. In *Ashland School District v. Parents of Student R.J.*, the Ninth Circuit refused reimbursement on the basis that the program in question was not necessary to meet the student's educational needs.<sup>68</sup> While the ultimate decision against reimbursement was arguably correct, the Court's analysis under the *Kruelle* standard (as interpreted by *Clovis*), was overly broad.

The downfall in the Third Circuit's "segregability" test (or medical versus educational distinction) is that the line simply cannot be drawn as brightly as the test demands. Put differently, the complexity of a disabled child's education needs often does not lend itself to bright line distinctions. Neither does the IDEA's holistic vision of special education call for "segmenting" of services.<sup>69</sup> The Third Circuit approach is inapt because it depends on bright line distinctions that cannot be tied to the statutory language of the IDEA.

#### B. *The Seventh and Fifth Circuits' "Primary Purpose" Test*

The Fifth and Seventh Circuits have taken a highly restrictive approach to the analysis, examining "appropriateness" through a program-centric perspective.<sup>70</sup> Their standards only permit reimbursement when the program in question is "primarily oriented" toward providing an educational benefit.<sup>71</sup>

The Seventh Circuit articulated its program-centric test in *Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 307*, where it refused reimbursement because the primary purpose of the program in question was confinement, not education or even provision of a related service under the IDEA.<sup>72</sup> The student had serious disciplinary issues, and was placed in a "therapeutic day school" and eventually in a residential facility following his incarceration for burglary.<sup>73</sup> In denying reimbursement, the Court distinguished "between services oriented more toward enabling the disabled child to obtain an education and services oriented more toward enabling the child to engage in non-educational activities."<sup>74</sup> The student's substance abuse, delinquency and anger problems

66. *Id.*

67. *See Id.*; *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 798 F. Supp. 2d 1177 (D. Col. 2011) ("Ninth Circuit Test: Whether Residential Placement is Necessary for Educational Purposes, or Instead is a Response to Medical Problems and is Necessary Quite Apart from the Learning Process.")

68. *Ashland School District v. Parents of R.J.*, 588 F.3d 1004 (9th Cir. 2009).

69. 20 U.S.C. §1400(d)(1)(A).

70. Mawdsley, 253 Ed. Law Rep. at 529.

71. *See Dale M.*, 237 F.3d at 817.

72. *Dale M.*, 237 F.3d at 817; *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 789 F.Supp. 2d 1177 (D. Co. 2011).

73. *Dale M.*, 237 F.3d at 816.

74. *Id.* at 817.; *See also Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 798 F. Supp. 2d 1177, 1186 (D. Col. 2011) ("Seventh Circuit Test: Whether the Services Provided are Primarily oriented Toward Enabling the Child to Obtain an Education, or Are Oriented More Toward Enabling the Child to Engage in Non-Educational Activities.")

were not “academic.” Thus, the residential program designed to treat those problems was not reimbursable.<sup>75</sup>

Under the *Dale M.* test (much like the *Kruelle* test), non-academic programs do not trigger a district’s obligation to reimburse. In other words, when the goals and services provided by the program are primarily non-educational, it is not covered by the IDEA.

This test has not been widely adopted. In fact, only the Seventh Circuit currently follows this standard.<sup>76</sup> This is probably because it is service-oriented, rather than student-oriented. Essentially, the Seventh Circuit test lets courts examine a right to reimbursement based on the goals of the program itself, rather than the likely academic benefits for the student.<sup>77</sup> While the test does not altogether ignore potential academic benefits, it draws a distinction between educational and non-educational programs. This perspective, while logically workable, is arguably contrary to the IDEA’s mandate that districts provide comprehensive, specially designed instruction adequate to impart educational benefit on each child.

The Fifth Circuit applies an even more restrictive variation of this approach, requiring both that a placement “must be essential for the disabled student to receive a meaningful educational benefit,” and that the placement must be “primarily oriented toward enabling the child to obtain an education.”<sup>78</sup> This hybrid test was adopted in *Richardson Independent School District v. Michael Z.*<sup>79</sup> There, the Court refused reimbursement for the cost of a private psychiatric facility because the psychiatric facility in question was not “primarily oriented toward enabling the child to receive a meaningful educational benefit.”<sup>80</sup> The *Michael Z.* test’s first prong permits reimbursement only when the child cannot obtain an educational benefit in any alternative setting.<sup>81</sup> In other words, a residential placement must be the only setting in which the child is likely to receive educational benefit.<sup>82</sup> What’s more, the test’s second prong incorporates *Dale M.*’s service-oriented analysis, allowing reimbursement only when the facility in question has a clear educational focus.<sup>83</sup>

Both the *Dale M.* and *Michael Z.* tests demand a program-centric, rather than student-centric, approach to the “appropriateness” analysis inconsistent with the IDEA’s mandate that all students with special needs receive personalized FAPE. The tests result in a disparity between the IDEA’s definition of the term – an educational program “appropriate” as to the student – and the Fifth Circuit requirement that a program be educationally “appropriate” in an abstract sense.

### C. *The Circuit Split Leaves Several Problems Unresolved*

All of these tests, both standing alone and in combination with U.S. Supreme Court precedent, lack clarity. The tests for “appropriateness” call for courts to opine on what services are and are not “segregable” from the learning

75. *Id.*

76. Mawdsley, 253 Ed. Law Rep. at 531.

77. *Id.* at 532.

78. *Richardson Independent School District v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009).

79. *Id.* at 286

80. *Id.*

81. *Id.* at 300.

82. *Id.*

83. *Id.*

process, which programs are “primarily oriented” toward education versus which are primarily medical, and whether any given placement can be characterized as necessary for reasons “quite apart from” the learning process. Each of these distinctions, while facially workable, is confusing. They ignore the basic reality, embraced by the IDEA, that the process of designing an appropriate education is inherently variable from student to student. Second, with rare exception, these standards have developed without reference to the IDEA’s clear statutory language guiding what services are and are not “related” to “specially designed instruction” under the Act, and ignore the reality that SDI is a prerequisite to provision of related services. Finally, the tests, in their confusion and lack of clarity, fail to address the equity concerns articulated in *Forest Grove* and the 1997 Amendments.

### III. THE TENTH CIRCUIT’S FOUR PART TEST: THE MOST STATUTE-ORIENTED, MOST “APPROPRIATE” OPTION OF- FERED THUS FAR

The Tenth Circuit recently proposed a workable, objective approach whereby it makes four key determinations:

- 1) Whether the school district provided FAPE in a timely manner. If it did, the parental placement is not reimbursable.
- 2) Whether the private placement is a state-accredited school. If it is not, the placement is not reimbursable.
- 3) Whether the private placement provides special education, i.e. specially designed instruction under IDEA § 1401(29)(A). If it does not, the placement is not reimbursable.
- 4) Whether any additional services provided by the private placement can be characterized as related services under § 1401(26) of the Act. If they cannot be so characterized, they are not reimbursable.<sup>84</sup>

This framework was articulated in *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*<sup>85</sup> Where the Tenth Circuit examined and rejected each of the previously-existing circuit tests, opting instead for this statute-driven alternative.<sup>86</sup> The Court’s analysis was driven, in large part, by judicial understanding of the term “specially designed instruction” as incorporated in the Act.<sup>87</sup>

Elizabeth E.’s parents sought reimbursement after their daughter’s mental health condition deteriorated, and she was placed in a residential facility specializing in both academic and psychiatric support.<sup>88</sup> Elizabeth had an extensive-history of emotional and behavioral troubles, for which she received a variety of special education services throughout her life.<sup>89</sup> The court found the first two criteria of its test were met and examined the types of services the program offered Elizabeth in relation to her personal needs.<sup>90</sup> Because “the placement. . . provided

84. *Id.* at 1236-1237.

85. *Jefferson County Sch. Dist. R-1 v. Elizabeth E. Ex. rel. Roxanne B.*, 702 F.3d 1277 (10th Cir. 2012).

86. *Elizabeth E.*, 702 F.3d at 1238.

87. *Id.* at 1235-36.

88. *Jefferson County Sch. v. Elizabeth E.*, 702 F.3d 1227 (2012).

89. *Jefferson County Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1229 (2012).

90. *Elizabeth E.*, 702 F.3d 1227, 1239 (“Elizabeth’s time at Innercept included several hours per day of traditional classroom instruction and one to one-and-a-half hours of directed homework. Further, the district court found Innercept provides for one-on-one instruction outside the classroom for times when Elizabeth

both specially designed instruction to meet Elizabeth’s unique needs and services required for her to benefit from that instruction” reimbursement was proper under the IDEA.<sup>91</sup> Ultimately, Elizabeth’s parents were reimbursed for this residential program specializing in “the education of children with significant learning disabilities and emotional and behavioral issues.”<sup>92</sup>

The essential attribute of the Tenth Circuit approach is that it analyzes “appropriateness” in a manner that is consistent with how that phrase is defined by the “A” for “appropriate” in FAPE. Because FAPE, by definition, is prescribed with reference to the child’s individual needs, and because the IDEA conceptualizes unilaterally chosen residential placements as an interim substitute for the public school provision of FAPE, reimbursement for a residential placement is only warranted insofar as it actually provides FAPE (via SDI and related services) for the student in question. The Tenth Circuit’s four-step test reflects this legal structure more accurately than any of the other tests for three main reasons.

First, the *Elizabeth E.* standard offers the critical clarity that the other tests lack. Rather than incorporate new judicial constructs such as “segregability” or “primarily oriented,” the Tenth Circuit standard incorporates the language of the IDEA itself. The *Elizabeth E.* court aptly pointed out that “it is not at all clear that determining whether a placement is primarily oriented toward enabling a child to obtain an education sheds any light on the question of whether a placement provides specially designed instruction to meet a child’s unique needs, or whether additional services provided by a placement are required to assist the child to benefit from such instruction.”<sup>93</sup> By abandoning the “inextricably intertwined” and “primarily oriented” standards, the Court “[avoided] some of the interpretive difficulties provided by the [other] approaches.”<sup>94</sup>

Second, by limiting reimbursement to those placements that provide SDI and related services, the Tenth Circuit test yields more individualized, statute-driven results than the other circuit tests. The *Kruelle* standard “originally addressed only the scope of the term ‘special education’ under the Act, and was silent as to the scope of the term ‘related services.’”<sup>95</sup> As the Tenth Circuit points out, this point of view frequently distorted the IDEA’s textual distinctions.<sup>96</sup> The Fifth and Seventh Circuit tests are similarly indefinite, because they require a distinction between academic and non-academic services that cannot readily be tied to the language of the IDEA.<sup>97</sup> Rather than asking what needs or programs are “educational” in the traditional or generalized sense of the word, the Tenth Circuit test conditions reimbursement on SDI – a condition attuned to the reality that “education” looks different for every student with a disability.

Under prongs three and four of the Tenth Circuit test, courts make two basic determinations tied to the specific text of the IDEA. First, under the third prong, courts must make an objective determination as to whether the program in ques was unable to participate in the classroom. Finally, although not noted by the district court, the record before the IHO also indicates Elizabeth was enrolled in courses such as English, World History, Math Concepts, and Speech.”)

91. *Id.* at 1239.

92. *Id.* at 1230.

93. *Jefferson County Sch. v. Elizabeth E.*, 702 F.3d 1227, 1238 (10th Cir. 2012).

94. *Id.* at 1237.

95. *Id.*

96. *Id.*

97. *Id.* (“The case law is frequently imprecise as to what portion of the Act is being interpreted when a determination is made that a residential placement is reimbursable.”)

tion actually provides the student with specially designed instruction as defined by 20 USC § 1401(29).<sup>98</sup> In other words, is the curriculum, instruction, regimen etc. provided by the residential facility helping the individual child achieve his or her educational IEP goals, with reference to the specific attributes of the child's disability and educational needs? If not, the program cannot be said to provide SDI or FAPE, is therefore not reimbursable under *Burlington and Carter*, and the dispute is resolved without consideration of prong four.<sup>99</sup> If the program does provide SDI however, courts then examine what supports provided in the setting are consistent with the IDEA's statutory definition of "related services" under 20 U.S.C. § 1401(26).<sup>100</sup> In essence, are the ancillary services provided by the placement helping the child obtain his or her unique educational benefit? If so, they are also reimbursable.

This two-part framework produces outcomes consistent with the statutory text and the intent of the Act. It dispenses of the analytically "amorphous, judicially crafted 'primarily oriented' standard of the Fifth and Seventh Circuits," and it brings the analysis back into direct connection with the statutory language of the IDEA.<sup>101</sup> By doing so, it avoids both under and over-inclusiveness, maintaining the fundamental education versus medical distinction that has animated the circuit split.<sup>102</sup>

Reference to *Dale M.* is illustrative.<sup>103</sup> Under the Tenth Circuit approach, the program in which *Dale M.* was enrolled would still not be reimbursable, but for a critically different reason – not because it was "primarily oriented" toward non-academic instruction, but because the instruction it provided Dale was not in fact specially designed instruction tailored to his unique disability.<sup>104</sup> Were *Dale M.*'s claim evaluated under the Tenth Circuit approach, the court would not even reach the fourth prong, because the program failed to provide SDI under prong three.

The Tenth Circuit's reframing also avoids under-inclusiveness, by recasting the analysis with reference to the individual student's needs, rather than the general purpose of the program. And, by requiring genuine provision of SDI, it also avoids the type of over-inclusiveness that occurs under the original *Kruelle* approach, whereby any indication of academic value renders the entire program reimbursable.<sup>105</sup> What's more, because prong four's relevance is contingent on fulfillment of prong three's SDI requirement, the statutory definition of "related

98. 20 U.S.C. §1401(29): The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including – (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.

99. *Elizabeth E.*, 702 F.3d at 1238.

100. 20 U.S.C. §1401(26)(A): The term "related services" means transportation, and such developmental, corrective, and other supportive services... as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

101. *Elizabeth E.*, 702 F.3d at 1238.

102. *Id.* ("In the context of the statutory term "related services," the "primarily oriented" requirement is both under and over-inclusive."); See also 34 C.F.R. § 300.104 (2009) (If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child).

103. The reader will recall, the Fifth Circuit rejected *Dale M.*'s claim for reimbursement because the program in which his parents enrolled him was aimed primarily at confinement and behavioral adjustment, not education.

104. See *Dale M.*, 237 F.3d at 817.

105. See *Kruelle v. Newcastle County School District*, 642 F.3d 687, 688 (3rd Cir. 1981).

services” is also properly applied. This framework reflects the structural reality that related services are only reimbursable insofar as they are actually related to provision of SDI and FAPE. If a program does not provide SDI, there is nothing for supplemental services to “relate to” and they are therefore not reimbursable.<sup>106</sup>

Finally, the Tenth Circuit test has the added virtue of clearly distinguishing the “appropriateness” analysis from the equities analysis raised by *Forest Grove* and the 1997 safe harbor amendments to the IDEA.<sup>107</sup> Its standard does not preclude courts from considering parent conduct. Once a court determines that reimbursement is “appropriate” under the four-prong framework, it can then examine parent conduct to see if any circumstances (i.e. lack of notice to the school district of parents’ intent to move the child, refusal by parents to make the child available for evaluation, or unreasonable parental conduct) abrogate the parent’s right to reimbursement.<sup>108</sup> If instead the placement is deemed inappropriate, this analysis is unnecessary since reimbursement is wholly unwarranted. The fact that this analysis is not explicitly incorporated into any of the four prongs clarifies that it is properly conducted after the court decides “appropriateness.” This makes practical sense, since it would be illogical for the legal appropriateness of a placement, in terms of what it provides to a student, to be tied to parental conduct.

The Tenth Circuit’s “appropriateness” analysis is the most “appropriate” test articulated thus far because it creates a statute-driven framework that produces individualized, student-oriented results under the IDEA.

#### A. *The Imperfections*

The Tenth Circuit test, though comparably superior, is not without its own limits. Most significantly, the determination at prong three that a program provides SDI will be much more difficult to make in situations like the one in *Forest Grove*, where the parent has unilaterally chosen a residential placement because the school did not provide an IEP, or otherwise made no attempt to provide FAPE.<sup>109</sup> In the absence of an IEP or other guiding document by which courts can compare the program’s services to the students’ personal needs, it will be much more difficult for a court to determine whether or not the residential placement provides SDI. In these situations, a court will likely have to defer to the primarily educational or non-educational-type assessments made under *Dale M.* and *Michael Z.*

Additionally, though the SDI determination at prong three avoids generalized determinations as to what types of services are and are not educational, it does not completely avoid this distinction. Courts will still need to make difficult calls regarding the difference between a profoundly disabled student’s educational and medical needs in order to assess whether the residential placement is tailored to provide educational benefit. This distinction is inherently difficult to draw, and does not lend itself to legal differentiation.

106. See *Elizabeth E.*, 702 F.3d at 1238.

107. 20 U.S.C. § 1412(a)(10)(C)(iii)(I), (II) and (III); See *Forest Grove*, 557 U.S. at 247 (“[Courts] must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted...” as opposed to whether the placement itself is appropriate. (emphasis added)).

108. See *Elizabeth E.*, 702 F.3d at 1240-41.

109. See *Forest Grove*, 557 U.S. at 235-36.

## CONCLUSION

Though questions of residential placement reimbursement affect a statistically small number of students, their answers carry enormous financial and emotional consequences for families and school districts. Residential placement represents the far extreme of what special education is potentially provided under the IDEA. It is essential that the circuit courts and the Supreme Court offer definitive guidance on how best to interpret the IDEA in these extreme situations. In *Elizabeth E.*, the Tenth Circuit offered the best test articulated thus far.

Of all the proposed tests for “appropriateness” under the IDEA’s reimbursement provisions, the Tenth Circuit’s is the most workable, the most consistent with the IDEA’s text, and the most true to the Act’s intent. By returning to relatively concrete concepts of specially designed instruction and a traditional understanding of “related services,” the test hews close to the IDEA’s parameters. Under the Tenth Circuit approach, courts need not wade into difficult analyses of what services are “segregable” from, or “inextricably intertwined” with, the learning process, or what placements are “primarily oriented” toward education. Each of these is a judicial construct that generates inconsistent outcomes and strays from the language of the Act. The Tenth Circuit proffers perhaps the most concrete possible approach to a gray area of IDEA law that carries huge financial implications for both districts and families.

Under this test, districts that fail to provide FAPE will remain open to liability, while unilateral parental placements that do not provide SDI (with related services) and thus are not “appropriate” will not invoke district liability. This is the precise outcome the IDEA demands.

## RECENT SKIRMISHES BETWEEN WASHINGTON'S LEGISLATURE AND SUPREME COURT IN THE BATTLE OVER K-12 PUBLIC SCHOOL FUNDING

Sarah Kaltsounis\*

Back in 2007, Stephanie and Matthew McCleary's two children attended second grade and seventh grade in the rural Chimacum School District on Washington's Olympic Peninsula. At the start of that year, Chimacum joined a coalition of school districts, community groups, and education organizations to sue the state for unconstitutionally underfunding public schools. Stephanie McCleary, a Chimacum school administrator frustrated by the lack of supplies and funding for her children's classrooms, agreed to serve as one of the case's lead plaintiffs. McCleary's son is now almost halfway through high school and her daughter has long since graduated and gone off to college. And yet, eight years after it began, the lawsuit bearing the McCleary family's name remains unresolved as the Washington Supreme Court continues to encourage, prod, and even threaten the Washington Legislature into taking meaningful action.

The *McCleary* plaintiffs alleged that the state's K-12 funding allocations violated the Washington Constitution's Article IX, § 1, which declares that the state's "paramount duty" is "to make ample provision for the education of all children residing within its borders[.]" Instead of fully funding public education, the state currently covers only about two-thirds of local districts' needs. To make up for the shortfall, districts are increasingly forced to rely on unpredictable local property-tax levies subject to voter approval. The levy system is inherently unfair to students in poorer communities, since affluent communities with higher real property values can raise local funds more easily. At present, levy funds account for roughly 20% of school district budgets statewide. After a lengthy bench trial that presented data and testimony on these issues, the King County Superior Court ruled in the plaintiffs' favor. The Washington Supreme Court unanimously affirmed, holding that the state violated the constitution by failing to fully and dependably fund transportation, teacher salaries, and other necessities to keep schools operating properly.

Despite these past failures, the Legislature assured the Court that it was on track to increase K-12 funding to full amounts by 2018 under the framework of its recently enacted Engrossed Substitute House Bill 2261, but the Court took the unusual step of retaining jurisdiction in the case to ensure that the State keeps its word, promising "to remain vigilant in fulfilling the State's constitutional responsibility[.]"

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The Court's vigilance has taken the form of requiring the Legislature to submit periodic progress reports after each budget session to summarize "actions taken towards implementing the reforms initiated by . . . ESHB 2261[.]" and to "demonstrate steady progress according to [ESHB 2261's] schedule." The task of reporting to the Court has fallen to the Legislature's Joint Select Committee on Article IX Litigation, a bipartisan, bicameral group established to facilitate communication between the two branches of government.

The Court was—to put it mildly—disappointed in the first report in 2012. The report identified committees and working groups that had been established, but failed to indicate how it would achieve full funding levels. Instead, the report indicated that the Legislature had merely slowed the pace of education funding cuts. The Court ordered the Committee to "set out the State's plan in sufficient detail to allow progress to be measured according to periodic benchmarks between now and 2018."

The 2013 report showed that some progress had been made, but the overall increase in basic education funding was only 6.7% over the previous year (which had been at a constitutionally inadequate level to begin with). As the Court noted, the Legislature was running out of time: "there are not even two full [two-year] budget cycles left to make up the sizeable gap before the school year ending in 2018." To quicken the pace, the Court ordered the Legislature to submit a report by April 2014 that would present a complete plan for fully funding basic education by 2018, including a phase-in schedule for several specific components of K-12 education improvements.

The 2014 report admitted that the Legislature had failed to provide the requested plan. Frustrated by three years' worth of reports showing a marked failure to act, the Court ordered the Legislature to show cause why it should not be held in contempt for not complying with the Court's oversight requirements.

On September 11, 2014, just one week after oral arguments on the show cause order, the Court held the Legislature in contempt for its continuing violations. The Court decided, however, that it would respect the Legislature's claim that education funding has finally become its top priority and that it will take action during the 2015 budget session. Therefore, the Court decided to postpone any decision on sanctions or other remedies until the end of the current session.

The ball is now in the Legislature's court, so to speak. The 2015 legislative session began on January 12, and House and Senate committees are busy considering and passing a wide array of education bills, on topics ranging from all-day kindergarten and support for highly capable learners to cost of living adjustment increases for teacher salaries. Governor Jay Inslee proposed a budget that allocated about \$1.5 billion for *McCleary*-related increases, paid for by new or increased taxes (including a capital gains tax, sales tax on bottled water, an extra cigarette tax, and a "carbon tax" on polluters) along with some cuts in existing programs. However, Washington's Superintendent of Public

Instruction Randy Dorn estimates that an additional \$4.5 billion in funding will be needed to address the State's *McCleary* obligations.

It remains to be seen what progress the Legislature will make in the coming months, but the regular session ends on April 26, 2015. The clock is ticking, and the Court's patience is running out. By the time the state finally meets its obligations—if it manages to do so by 2018—both *McCleary* children will have aged out of the K-12 system. It's too late for them, but the one million other children who attend public school in this state are counting on the Legislature to take its “paramount duty” seriously.

*For more information on this topic:*

Washington Legislature Senate Ways and Means Committee 2015 Citizen's Guide to K-12 Finance (data and explanations about school financing)

Washington Legislature's Joint Select Committee on Article IX Litigation (links to reports and meeting materials)

Washington Supreme Court's *McCleary* page (links to pleadings, reports, opinions, and orders)

Daniel C. Stallings, *Washington State's Duty to Fund K-12 Schools: Where the Legislature Went Wrong and What It Should Do to Meet Its Constitutional Obligation*, 85 Wash. L. Rev. 575, 576 (2010)

Jordan Schrader, *Time running out for McCleary family to benefit from their own case*, The New Tribune (June 27, 2014) (information about the *McCleary* family and the case's impact on their lives)

## BECOMING THE NUMBER ONE PRODUCER

Phillip Garza\*

The data show that 75% of students growing up in the top economic quartile will earn a college degree by age 24. However, if you are a student growing up in the bottom economic quartile, there is only an 8% chance you will earn a college degree by age 24. This is but one of the many examples that capture the achievement and opportunity gaps that exist between low-income students and their higher income peers.

Moreover, we know that the single most effective anti-poverty strategy is a college degree. In his remarks to Congress in 2009, President Barack Obama said, “[I]n a global economy where the most valuable skill you can sell is your knowledge, a good education is no longer just a pathway to opportunity – it is a pre-requisite...the countries that out-teach us today will out-compete us tomorrow.” The economic and social well-being of the United States rests heavily on our ability to teach our nation’s children. Nothing will compromise the health of our democracy more than educational inequity, and nothing will nourish the health of our democracy more than its inverse, educational equity. It is with this in mind that IDEA Public Schools rests its vision, to become the number one producer of low-income college graduates in Texas.

Fifteen years ago Tom Torkelson and JoAnn Gonzalez founded IDEA Academy, the first IDEA Public School, with one hundred 5th grade students on the second floor of a tiny church in Donna, Texas. They had one goal: to prove the impossible possible.

When everyone around them believed that you could not send low-income, first generation, minority students from the border of Texas and Mexico to college, they believed that you could. When the surrounding districts believed a charter school would never work in the region, they believed that it would. When the world around them believed that a rigorous college-preparatory education was not meant for “everyone,” or that it could not be achieved in South Texas, or that it could not compete with the affluent prep-schools or suburban districts in Houston, Austin, San Antonio or Dallas, they believed that it should, that they could, and that they would. Then, they did.

Currently, IDEA Public Schools serves 20,000 students in San Antonio, Austin and the Rio Grande Valley. Since its first graduating class, 99.98% of its graduates have matriculated to college; 90% of them remain in college; IDEA’s college completion rates are seven times the national average for low-income students. Throughout, IDEA has garnered the state’s top academic ratings. In 2014, U.S. News & World Report ranked three of its high schools in the top 1% of high schools in the nation.

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In that same year, IDEA was recognized for the prestigious Broad Prize, and it continues to out-perform other schools and school systems with similar demographics across the state.

The obvious question is how does IDEA do this? Said simply, we are able to support our students toward extraordinary academic gains through a lot of hard work, adults doing “whatever it takes” to ensure student success. Of course, the foundation of this action is belief, a belief that high academic achievement is not the manifestation of socio-economic status, your parent’s education, or your race or ethnicity. It is an extension of adult capacity to educate, and then the resolve to do so. Baring this in mind, one strategy is to attract, attain, engage and retain extraordinary people, people who share this belief; we are committed to an excellent teacher in every classroom, and an effective principal at every school.

We invest heavily in recruiting, training and developing our people; it is an essential ingredient of our work. Second, we believe in a small school model. No high school will graduate more than 120 seniors. This creates environments where adults can teach, know, care for, nurture and support students, engage families, and make a deep, long-lasting impact. Regarding academics, we seek the intersection between academic, college-preparatory rigor, and individualization. We know when students are engaging material matched to their current academic needs, yet rigorous enough to compete with the elite schools globally, students rise the occasion, work hard, learn, grow, and have fun along the way. Lastly, we understand that college is a finite, niche set of knowledge, knowledge most low-income, first generation, and minority students and families do not have access to. We provide that access.

Through curricula and white-glove college counseling services provided to 100% of students, we support our seniors and their families in the application, financial aid, final selection, and college matriculation process. The totality of this does not mean we are perfect; there are still problems we must solve. Therefore, knowing that learning requires the desire and ability to learn, we aspire to achieve a learning organization where everyone is empowered to master greater levels of skills and knowledge to achieve more in the service of students. It is this mix that has afforded us the success our students have experienced, and therefore what we have committed to as we aim to achieve such results at a larger scale.

Encouraged by this success, and committed to serving more students, IDEA is growing. By 2017 IDEA will operate over 60 schools and serve more than 40,000 students. We aim to achieve a scale that will send more low-income students to and through college than any other public school system in the state. This is because we know that when IDEA is able to produce more low-income college graduates than its peers from a student population of 40,000, including those school districts that are among the largest, 250,000+ students, 300,000+ students, 350,000+ students, Texas will inquire, and then require everyone to do more for students, including college access and com

pletion, because of the success of IDEA Public Schools.

Of course, we do not do this for accolades, we do this because we care deeply for the students we are fortunate enough to serve, and we care deeply for the students we are not fortunate enough to serve. For every single spot at IDEA, there are five students who seek it, and four students who will not attain it; we have a waiting list of over 15,000 students. We know we can never achieve the scale to serve all poor kids, nor is this our goal; we simply wish to incubate innovation that provides all students the academic skills to succeed and complete college, and to replicate and scale these innovations through partnerships and collaboration with all who are committed to educating and serving students. When we partner and collaborate, as we do now, more low-income students will attend a district, a school, a classroom, that believes what IDEA believes, that the achievement gap is a solvable problem, and that if we can solve it, we must. The schools of tomorrow will not believe what the schools of yesterday believed about low-income, first-generation, minority students, and this breadth and depth of belief, and the subsequent action, will have been informed by the leadership of IDEA Public Schools, by the partnership and collaboration amongst all who commit to this work, and by the students and families themselves who grasp their own empowerment, and leverage it to achieve what is necessary for them to live fully in the knowledge economy, therefore advancing our quest of democracy further, faster, and with greater accord.

Indeed, this is a chance to make history. To all who believe in the vision, promise, and moral imperative that is educational equity, be guided by the opportunity, and take on the responsibility with fortitude and grace. At IDEA Public Schools this is our goal, this has always been our goal, to prove the impossible possible, to make history, and then require others to do the same, so that tomorrow's students will benefit from the impact of today's leaders, including an education that delivers on the promises of our democracy, and affords students a chance at the American Dream, by first earning a college degree.

## PARENT VOLUNTEERISM AND STUDENT ACHIEVEMENT

Leeanna Castor\*

I have the privilege of volunteering at both of my children's schools. At one of the schools I volunteer of my own accord, and at the other volunteering is mandatory as it is a cooperative school. I am in each class for about three hours a week. In the classroom, that is free-choice volunteering, there's lots of great learning going on; however, there are 30 students in the class and only one teacher and one para-educator who comes in for less than an hour a day. In the mandatory volunteer classroom there is also lots of great learning happening; however, there are at all times a teacher and at least three parent volunteers. This high adult to child ratio lends itself to one-on-one interactions with each student throughout the school day. The children are often placed in small groups for reading and math with an adult leading each group.

Does this model of mandatory volunteerism in the classroom help the students achieve academically? Looking back at the 2012-2013 MSP test scores for elementary schools in Washington state, the cooperative school ranked 7th of 1023 schools in the state. The other school ranked 523rd of 1023 schools. Of course there are many other factors to consider in comparing these two models, such as socioeconomic status, ELL student percentages, and teacher to student ratio just to name a few. I, however, am convinced that parents being in the classroom does boost student achievement. The parents are naturally more in tune with what's going on in class and can help with homework more easily. Their children see them in class and know that their parents value their education. Also, having that higher adult to child ratio gives more opportunities for the students to get the help they need.

I would like to see this model adopted in more elementary schools. I think it works!

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\*Leeanna Castor is a former educator who continues to volunteer in schools in the Greater Seattle area.

## **FAILING THE FUTURE: TEN YEARS LATER, SCHOOL “CHOICE” REMAINS A PIPE DREAM FOR MOST**

Tracey Hanna\*

When conceived thirteen years ago, No Child Left Behind (NCLB) was going to revolutionize education. Schools were going to be held accountable for students' performance and, if (when) they failed at providing “adequate progress,” parents would be given a choice: their children could leave these failing schools, heading to nearby, adequately performing schools, or parents could keep them in the same neighborhood school and hope it improved the following year. Of course, schools were given time to fix the problems that were causing them to not make adequate progress, but that time was short – three years to turn things around.

In reality, however, the promised “choice” ended up being mere illusion. As NCLB entered its toddling years, problems steadily became apparent. Schools that were already performing well found it difficult to continue to “improve.” After three years of failing scores, students could choose other schools that were not failing... taking with them the money allocated for their education. After three years of “failure,” schools are forced to restructure entirely. However, the delineation between failing and passing is entirely based on a standardized test, which is problematic.

According to Linda Darling Hammond, professor at the Stanford Graduate School of Education, the emphasis on testing as the singular factor determining success is that it “substitutes high-stakes testing for highly effective teaching,” meaning that, to the best schools, teaching students who need more attention and specific teaching styles is not worthwhile. This is reflected by rising dropout rates. In many states, graduation rates are steadily falling.

Each “group” identified within the school needs to also pass the standardized tests independently of the other groups within the school. This further incentivizes looking the other way when students drop out., especially since there is evidence that more homogenous schools, as they do not have as many ethnicities that need to successfully pass the tests in order to be making adequate progress, are less likely to fail. At-risk student populations, such as minorities and those with learning disabilities, become encouraged to drop out instead of lowering the school's testing average, as the dropout rate has become secondary to the school's test scores.

But what about the idea that students from failing schools can switch to other schools? Well, that is only true if there are spaces available in those schools. If there are no seats, there is no way to leave; choice is only possible if your district has a school that is making adequate progress.

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Looking at this mess, it is easy to become discouraged. NCLB expects qualified teachers, but there is no policy, or budget, to support their hiring. However, prioritizing teacher quality, instead of standardizing curriculum, may be one way to approach a workable resolution. Providing incentives and budgetary support to schools that are showcasing fantastic results in the realm of public education might help matters. A focus on true accountability measures, like dropout rates, college graduation rates, and post-graduation career success may help fix some of the inequalities exacerbated by NCLB.

There are many possible avenues to fix the situation. Right now, pressure to teach a test to un-stimulated students holds hostage the futures of too many learners. Being scared to try something new because failing costs too much is an unproductive type of fear. A choice made from fear is no choice at all.

## COMMON CORE IMPLEMENTATION: A PERSPECTIVE FROM A KENNEWICK SCHOOL DISTRICT TEACHER

Valerie Feth\*

Citizens of Washington often hear the terms “education reform,” “No Child Left Behind,” and the newest, “Common Core State Standards,” bandied about in the media, spoken by our legislators, and referred to in school districts across the state. Simply put, since its passage in 2001, our state has been trying to comply with the federal government’s reauthorization of the 1965 Elementary and Secondary Education Act (ESEA), now known as No Child Left Behind. According to the Office of the Superintendent of Public Instruction, “The major focus of No Child Left Behind is to close student achievement gaps by providing all children with a fair, equal, and significant opportunity to obtain a high-quality education.” While this sounds like a noble goal, and one all legislatures, school districts, educators, and parents should like to see come to fruition, the problem lies in the confusion over how this Act should be implemented, who should pay for it, and how it looks in the day-to-day process of education.

In response to this Act, states across the nation were required to ensure all students would be proficient in core subjects, with the focus on reading, writing, math, and communication. In Washington, like other states, a set of learning standards were created with the goal of giving teachers clear learning targets at each grade level which would form their instruction. As well, students, parents, and teachers would understand what “proficiency” looked like, with the hopes that these guidelines would lead to greater success at all grade levels, with the ultimate goal of preparing students for the real world they have to face upon graduation. The original learning standards of Washington State are known as Essential Academic Learning Requirements (EALRs) and Grade Level Expectations (GLEs). These were standards originally created for reading, writing, and math, and progress was assessed by the state’s test, the Washington Assessment of Student Learning (WASL).

Since their inception, students have been required to pass these so-called rigorous tests in order to graduate. I say “so-called” because, while the goal was to make sure ALL students were able to hit the state learning targets, the writing prompts given to students have become simplistic, and even the reading requirements seem to be “dumbed down.” For example, Persuasive Writing is a targeted area in which students must demonstrate proficiency.

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Students received the following prompt:

“Recently, national attention has focused on school safety. Because of this, your school board has proposed that an extra portion of your school’s budget be used to place security cameras in every classroom (set up/context). Take a position on this proposal (topic). Write a multiple – paragraph letter (form) to your school board members (audience) to persuade them to support your position (purpose).”

This type of assessment does not lead to college-ready writing. Additionally, this exam has been given towards the end of the students’ sophomore year, which often leads to less rigorous expectations in junior and senior years since students have proven themselves “proficient” if they have passed the HSPE. Due to this, the public outcry for many years has been for educators to stop “teaching to the test” and instead teach students content that is valid, worthwhile, and that will prepare them for college and careers.

A few years ago, with the election of Randy Dorn to the office of State Superintendent of Public Instruction, changes were made to these tests. For example, the Reading and Writing WASL became the High School Proficiency Exams, or HSPE. In addition to the HSPE in Reading and Writing, there are now End of Course (EOC) exams in Math and Science, and for those students who do not exhibit proficiency the first time through the exams, options such as Collection of Evidence classes have been formed to give students an alternative to testing and provide students with teacher support while preparing their work portfolios. State Superintendent Randy Dorn also introduced the formal adoption of the Common Core Standards in July 2011 (OSPI).

While this adoption caused a lot of grumbling, gnashing of teeth, and trembling among those affected, the standards themselves do provide a pathway to prepare our students for college and careers beyond high school. Unfortunately, along with these new more rigorous learning targets, new standardized tests have been created to make sure students can actually meet the targets. And this is where the confusion and irritation come in. Because the Common Core Standards require students to know and do more than previously expected, they have come under attack from teachers and parents alike.

Over the three and a half years since the adoption of these standards, school districts have been scrambling to prepare teachers for the change to Common Core, which was fully implemented during the 2014-2015 school year. The switch to the new standards is expensive—districts have had to provide professional development, workshops, and trainings to prepare teachers to implement lessons and teaching strategies that will help their students meet the standards. Countless books and manuals have been written on

this subject, and curriculum companies proudly tout that their materials are “Common Core Aligned.” Districts must come up with money to cover these costs, and with education funding already being cut, administrators often scramble to find money to pay for these new materials. Additionally, the new testing procedures are expensive, requiring school districts to have enough technology to administer them, as students will be taking them online. Some districts don’t have enough computer labs to test all their students, while others are experiencing lag-time and slow responses as hundreds of students are trying to test at the same time. Although the goals of Common Core to ready our students for college and careers in the 21st century are excellent, Olympia has done nothing to fund these requirements, and the districts are floundering because of the new standards that the Washington State Legislature implemented.

In fact, this is not a new problem. The legislature has for many years been pillaging or cutting education funding. In 2007, Matthew and Stephanie McCleary and the Network for Excellence in Washington Schools filed a lawsuit against Washington State due to this lack of funding to meet the educational needs of students. They asked “the courts to order the State of Washington to live up to its paramount constitutional duty to make ample provision for the education of all Washington children.” In January 2012, the State Supreme Court ruled in *McCleary v. Washington* that, “Washington State is not amply funding basic education under the State Constitution.” So while the legislature continues to create mandates regarding education, the Court has recognized that the state is not providing enough funds for these mandates to be carried out. Without proper funding, it is virtually impossible to meet the educational needs of all children as set forth in No Child Left Behind, no matter what kind of learning standards the state adopts.

In addition to leaving our districts underfunded to implement the new Common Core curriculum, the legislature has imposed an increasingly ridiculous testing schedule. Weeks are being taken out of regular instruction to allow students to use computers to take practice tests and become familiar with the new format, to have students look at released test items so they are familiar with the new procedures, and to focus on how to pass the tests. This doesn’t include all the weeks that will be tied up in the actual testing. For example, recently, the spring testing schedule for Washington’s Kennewick School District was released, and it is a whopper! Starting in March, various student groups will be taking the “old” HSPE test (11th and 12th graders who did not pass the test as a sophomore; required for graduation), the new SBAC test (all current 11th graders; not required for graduation), the ELA test (current 10th graders; replaces the HSPE; required for graduation), EOC Math (usually in freshman or sophomore year, but any student who has not passed will have to retake and pass in order to graduate), EOC Biology

(same as EOC Math), AP testing (any student who has taken Advanced Placement courses), SBAC Math (current 11th graders), MAP testing (freshmen and sophomores; tests in reading and math), and of course the end of the year finals!

One can see the impact these tests have on instructional time and on preparation and planning, as well as the stress this amount of testing places on our administrators, teachers, and students. Our goal is to prepare our students for their futures, to give them the ability to think and analyze information, and to help them become all they can be. The incredible number of high stakes tests students will be taking over the next three months raise many questions: What will they actually be learning this spring? Is this the best use of use of our limited educational resources? Do our students truly benefit from another test? Could their time at school be put to better use?

The answer to that last question is a resounding “YES,” the students’ time in school can and should be put to better use! The time spent “preparing for the test” should instead be spent making sure students are actually working towards meeting the learning standards in valuable ways that prepare them for college or professional life. They also need to focus not on how to answer multiple-choice questions, but how to think problems through to a logical conclusion, to synthesize information from many resources and create new learning, and to go beyond simplistic answers and apply higher level thinking skills.

This is exactly what the Common Core English Language Arts Standards expect students to do. These standards have two parts, the broader College and Career Readiness Anchor Standards, and the K-12 grade-specific standards. Each year the expectations for each standard increase, as students build on their previous knowledge and skills. At the time they graduate, students should be prepared for whatever types of reading and writing they may encounter. In our state, there is much debate and even whining over these new standards, however the standards themselves are good—it is the test that is the root of the problems. We should not “throw out the baby with the bathwater,” so to speak, but keep the standards and get rid of the testing!

The powers that be need to take a long hard look at what is truly important in education today. While the Common Core Standards’ goals are valid and can lead to increased student success in school and beyond a few areas require clarification. First, our state’s legislature needs to re-focus on its “paramount constitutional duty to make ample provision for the education of all Washington children.” Without funding, districts, schools, and teachers are limited in what they can do to provide quality education for all students and meet the growing needs of students both in and out of the classroom. Additionally, providing rigorous learning standards is essential for our students’ success in this very competitive world. However, is the answer to test,

test, and test again, while making these tests a requirement for graduation? Over-testing leads to “test fatigue,” causing students to perform poorly, thus creating the need for even more testing.

Because of such a crazy test schedule, students are missing out on days and sometimes weeks of classroom instruction and learning opportunities. Since we in education share the common goal of seeing our students succeed, the focus needs to return to taking common-sense measures that ensure this happens. We need high standards and valid learning targets, time and money to implement the new measures, and relief from our test-driven paradigm, which corrupts and taints the actual purpose of education—to educate our young people and to give them skills and knowledge that will ensure success in their future!

## THE PROBLEM WITH THE STIGMATIZATION OF FAILURE

Maria Malik\*

It was June, 2006. I was about nine years old. The summer heat boiled my skin, and the bright sunlight is made my eyes hurt. There was no wind blowing, and the only sound that could be heard was a haze of laughter and shrieks. The concrete ground was as hot as a furnace, and I felt gratitude towards my shoes and clothes for protecting me from it. If I had been in America, I would have dared my siblings to fry eggs on the pavement. But instead, I was in Pakistan – begrudgingly attending a primary school. It was noon, and all the students were having recess. At one o'clock, we were dismissed (in Pakistani schools, dismissal is always – usually – at around one o'clock). As I patiently waited for the bell to ring so I could go home, I opened my backpack and flipped through my English course book to look at the day's homework assignment. I stopped at the poem about summer nights and bird songs and remembered what happened earlier that day...

*In one word, my English classroom can only be described as “gray.” The board is of a dark gray hue. The walls are painted the same shade of gray as an overcast sky. The student uniforms are gray. The wooden desks have been painted over with shiny gray paint. And the pages in our course-books are also light gray. In short, I feel bored as soon as I step into the monochrome classroom. You have to understand, there are no bright posters that emphasize the importance of vowels and consonants or smart boards or baskets full of crayons and markers like there were in my American school in New York. This classroom is a gray box with rows of tables and chairs and a blackboard in the front. There is also a ceiling fan that fails at its job of providing a cool breeze, and in the front corner of the room there is a small garbage can.*

*My classmates and I shuffle around in our seats and then sit up straight when the teacher comes in. The teacher wastes no time to greet us and orders us to take out our English course books and flip to page 5 – to the poem about summer nights and bird songs. Then, she scans the room and calls out the name of a boy sitting two seats in front of me. She asks him to read. He swallows and attempts to read the first line of the poem, “Do y-y-oo hee-ar the coo-coos call-eeng? The? The sum...? Summer? Summer call-eeng too? Has the lo-lo-lori-loree cat? The wish? Wh-wh-wh –”*

*She stops him, snatches the book. Then, she slaps him across his face. Silence. She glares at the boy, “Did I not ask every single person in this class to practice this poem until they knew how to pronounce every word?”*

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\*Maria Malik is a high school senior at the Urban Assembly School for Criminal Justice in Brooklyn, New York.

*No one dares to speak. She still has her attention directed at the boy, "Now, you are getting more homework for tonight. You are to copy this poem 6 times and hand it in to me after school. You will come to me tomorrow during the lunch break and read this poem to me. Understand?"*

*"Yes, Madam," the boy mumbles before some kids in the back snicker at him., The teacher looks at the crowd to call on someone else to read the poem. Her gaze lands on me, and she prompts me to read. I know how to read in English – probably better than anyone else in the entire class since I was taught in America. I proceed to read, "Do you hear the cuckoos calling? It is summer that they call. Hear the Lorikeets sing? They sing and the wind whistles..."*

*When I am finished with the poem, I look up and the teacher is nodding approvingly. She starts to clap and soon, the rest of the class enthusiastically joins in...*

This small moment, taking place eight years ago, gives a demonstration of a way that failure is handled in schools – not just in Pakistan, but countless places across the world. Even in American school systems, failure is stigmatized and treated as a setback to the learning process, rather than a commodity that might actually be advantageous to students. Even if they don't respond with corporal punishment after the student's failed attempt, if teachers just continue on with a lesson without encouraging the student to try again with a different approach, the student will not have learned anything and may absorb a sense of inadequacy.

In 1979, a man named Jim Stigler, (who is currently a professor of psychology at UCLA), went to Japan to research teaching methods in other parts of the world. In a fourth grade math classroom, he observed the teaching environment as the students were learning to draw nets for three-dimensional shapes. Stigler was surprised to see the teacher ask one of the students who was having trouble with drawing the shapes to come up and demonstrate his method on the board for his class to see. In most American classrooms, the student who had success in completing a task would be the one to demonstrate his or her method on the board. As Stigler sat appalled in his chair, watching the child attempting to draw the net of a cube in front of the classroom, he worried that the student might break down and start to cry or feel ashamed for his inability to complete a task his peers were easily able to do. The Japanese student kept trying to draw the net but kept failing. However, when the student was finally able to successfully draw a net for a cube, the class cheered for him and the student went back to his seat with a massive smile on his face. And Stigler, watching this from the back of the classroom, was awed by what he had just witnessed (*Spiegel, 2012*).

In America, if a student who was failing at a task was asked to show his or her work to the rest of the class, he or she would be likely to feel ashamed and embarrassed. Struggling with a task makes some people feel inferior to the people who have had success. In this way, in some classrooms, failure

is hidden away, and students who fail at a task are not given much encouragement to be as successful as others. Intellectual struggle is not viewed as an admirable quality because some think that if you have to struggle to do something “smart,” you are not “smart” to begin with. In fact, students who have success in completing an assignment are applauded, while students who fail are either punished with humiliation and shame or are left looking at the taillights of their peers. Students who are effective in their first attempt should be appreciated and praised, but students who labor should be encouraged and their efforts celebrated. In this way, failure would not seem as a curse that traps students in the confines of inferiority and insufficiency, but rather as a force that shapes the accomplished. Challenging and confronting shortcomings is part of a difficult – but impressive – process of attaining success through determination.

If in the teacher in the Pakistani school that I attended for a few short weeks had asked the boy to read the poem again and again until he had read it perfectly, the boy would not have been the only one to benefit – the rest of the children in the classroom would have seen how by trying and confronting his so-called “weakness,” the boy would succeed in the end. They too would try harder and attempt difficult tasks in the future because they would know that success is attainable – even if there is failure in the beginning. Struggle should be a vital part of the learning process rather than a hindrance. It is a valuable life lesson that encourages students to accept their mistakes and try again. Thus, students might perform better in school if they learned that struggling to complete an assignment is not a dead end and that they should keep trying for better results.

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