DISABLING DISCIPLINE: LOCATING A RIGHT TO REPRESENTATION OF STUDENTS WITH DISABILITIES IN THE ADA

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Data on school discipline reveals significant numbers of students are being suspended and expelled from public schools for a variety of low-level offenses, the so-called school-to-prison pipeline. Additionally, troubling disparities have emerged: Students with disabilities, poor students, and nonwhite students are removed from school at greater rates, and for less significant actions, than are white students. Due process requires a short, informal hearing before students may be suspended or expelled. And current special education law provides some procedural protections before students with disabilities may be removed from school. But these modest protections have proven ineffective.

This Note proposes a novel remedy for the removal of students from schools: the Americans with Disabilities Act (ADA). The ADA requires governmental entities, like schools, to provide reasonable accommodations to individuals with disabilities that participate in government programs. Linking the ADA's accommodation requirement to already-existing due process hearings, this Note argues that students with disabilities are entitled to some kind of representation in hearings before they may be suspended or expelled. Although there are some limitations to this solution, it utilizes an existing federal statute that is applicable in all fifty states without the need for state-by-state legislative reform. As a result, this Note advocates using the ADA as a first step to limiting the pipeline of students out of schools.

INTRODUCTION

Across the nation, school disciplinary policies have become increasingly harsh since the 1990s,[1] creating a pipeline pushing students out of

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1. See, e.g., Russell J. Skiba, Reaching a Critical Juncture for Our Kids: The Need to Reassess School-Justice Practices, 51 Fam. Ct. Rev. 380, 381 (2013) ("[S]chool districts in the late 1980s and early 1990s began reframing their disciplinary policies to increase both the number and length of suspensions and expulsions for an ever-widening range of infractions, including fighting (or witnessing fights), wearing hats, even failure to complete homework."); Sheena Molsbee, Comment, Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies in Texas Schools, 40 Tex. Tech L. Rev. 325, 332–35 (2008) (tracing development of zero-tolerance policies in states and linking their expansion to federal "war on drugs"). See generally Johanna Wald & Daniel J. Losen, Defining and Redirecting a School-to-Prison Pipeline, New Directions for Youth Dev., Autumn (Fall) 2003, at 9, 9–12 (defining school-to-prison pipeline and listing key statistics).

schools.[2] Once this diversion occurs, students are vastly more likely to interact with the juvenile justice system.[3] In turn, contact with the juvenile justice system is associated with a host of negative effects,[4] and likely increases the chances of incarceration as an adult.[5] This pipeline from schools to incarcerative settings particularly affects poor, minority, and disabled students.[6]

Although the school-to-prison pipeline has received increasing attention from parents, advocates, and academics, reforms remain elusive. State and federal laws and policies prioritize strict disciplinary measures, despite some constitutional protections checking school discipline,[7] and each new highly publicized school shooting drives more money into security measures that often end up increasing diversionary punishments for students.[8]

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2. For an explanation of the pipeline concept, see infra notes 13–20 and accompanying text. The relationship between discipline and a student's class, race, and disability is an important and thorny aspect of the school-to-prison pipeline. See infra notes 16–18, 69–72 and accompanying text (discussing these nexuses in greater detail).

3. See Patrick S. Metze, Plugging the School-to-Prison Pipeline by Addressing Cultural Racism in Public Education Discipline, 16 U.C. Davis J. Juv. L. & Pol'y 203, 228–29 (2012) ("[E]ven a single contact with school discipline authorities creates a clear 'threshold effect' that greatly increases a student's chance of a referral to the juvenile justice system . . . .").

4. See, e.g., Ian Lambie & Isabel Randell, The Impact of Incarceration on Juvenile Offenders, 33 Clinical Psychol. Rev. 448, 452–55 (2013) (summarizing wide variety of prior research linking juvenile incarceration with variety of negative educational, social, mental health, and physical health outcomes).

5. See Richard Arum & Irenee R. Beattie, High School Experience and the Risk of Adult Incarceration, 37 Criminology 515, 527 (1999) (finding "[i]ndividuals with 12 years of education who reported being suspended were 2.2 times more likely [to be] incarcerated than students reporting no suspensions," and such increased likelihood is "not the product of . . . selection bias related to an individual's propensity for adolescent delinquency"); Lambie & Randell, supra note 4, at 454 (linking juvenile incarceration with recidivism); Wald & Losen, supra note 1, at 11 (linking contact with juvenile justice or school discipline to adult incarceration). These effects have been found for juveniles incarcerated in juvenile facilities; many juveniles, however, are incarcerated in adult prisons, and the recidivism rate is notably worse for this group. Jeffrey Fagan, The Contradictions of Juvenile Crime and Punishment, Dædalus, Summer 2010, at 43, 45–47.

6. See infra notes 16–18 and accompanying text (outlining data showing disproportionate effects of school discipline and of pipeline on members of these groups).

7. See Goss v. Lopez, 419 U.S. 565, 582 (1975) (requiring public schools to give students notice and opportunity to be heard before schools may remove students); see also infra notes 100–103 and accompanying text (explaining minimal constitutional law backstop to school discipline in more detail).

8. See infra notes 29–36 and accompanying text (making connection between well-publicized school shootings and increasingly punitive school discipline for lower-level disciplinary infractions). This Note focuses on punishments that divert students out of schools—suspension and expulsion—because of their significant connection with the school-to-prison pipeline. See infra notes 38–44 and accompanying text (explaining focus on diversionary discipline).

This Note proposes using the procedural protections of the Americans with Disabilities Act (ADA)[9] to restrict the diversion of disabled students from schools through suspensions and expulsions. The ADA requires certain entities, including public schools, to offer reasonable accommodations to individuals with disabilities.[10] The theory of the claim is that certain students with disabilities require accommodations in disciplinary proceedings to participate meaningfully in those hearings. For a certain class of students whose disabilities limit their ability to fully participate in a potentially contentious disciplinary hearing, this Note argues that the proper accommodation is some kind of representation in the disciplinary hearing. The outcome of this claim depends both on whether courts and administrators will recognize a role for ADA protections in evaluating the appropriateness of diversionary school discipline for disabled youth and on the broader concern that such a solution would overly judicialize schools in service of a partial remedy that leaves nondisabled juveniles behind.

Part I describes the school-to-prison pipeline and the way it pushes students out of classrooms and into the juvenile and criminal justice systems. Section I.A presents social science research on discipline and student outcomes. Section I.B examines the disproportionate effect of school discipline on minority[11] students with disabilities. Section II.A then explains how special education law fails to diminish diversion for disabled youth. In section II.B, this Note considers whether the ADA might be applied to create more robust protections. After describing the development of ADA Title II jurisprudence under the ADA Amendments Act (ADAAA),[12] section III.A lays out the elements of a prima facie ADA claim, and section III.B applies the ADA claim to school disciplinary hearings. Part IV then examines two drawbacks of this approach: the limited protected class and the danger of overly proceduralizing schools.

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9. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

10. See 28 C.F.R. § 35.130(b)(7) (2014) (requiring reasonable modifications in public services for individuals with disabilities); see also infra note 149 and accompanying text (explaining this requirement in more detail).

11. The question of how discipline falls on students of different races is thorny, contested, and hugely important for proposing viable solutions to disproportionate discipline. It is clear that African American students are disproportionately disciplined relative to students of other races; there is limited evidence that, in some states, Hispanic and Asian students are as well. See infra note 72 for a fuller account of the complex data on race and student discipline.

12. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213) (amending Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327).

I. AN OVERVIEW OF CURRENT INEQUITIES IN SCHOOL DISCIPLINE

Several structural factors contribute to the diversion of juveniles from schools to the juvenile justice system. A student's race, class, and disability can predict whether that student is likely to be suspended or expelled, which suggests that some disciplinary infractions are not merited by a student's conduct. In order to demonstrate this disproportionality, section I.A describes the school-to-prison pipeline; section I.B presents social science research regarding the prevalence of minority, poor, and disabled youth among disciplined students. The fact that certain kinds of disability are among those factors that increase the likelihood of discipline further indicates that special education regulations, which are supposed to protect those students from unfair singling out, are failing. Throughout this Note, "school discipline" refers to both expulsion and suspension; these two types of school discipline are the focus of the proposed remedy, discussed in Part III.

A. *Plumbing the Depths of the School-to-Prison Pipeline*

The school-to-prison pipeline generally refers to the set of policies and practices that divert students from schools into the juvenile justice system and, eventually, prison.[13] There are a variety of documented pipeline effects, often interconnected with issues of race, poverty, and disability.[14] This section sketches the contours of the pipeline, drawing on social science research in section I.A to show the ways school disciplinary policies funnel students out of schools into both the juvenile and adult justice systems. Section I.B then focuses the inquiry on the disproportionate discipline received by poor, minority, and especially disabled students.

Social scientists and others who study school discipline refer to the diversion of students out of school and into the justice system as a "pipeline," to capture the way in which students are systematically diverted out of classrooms.[15] This Note does not dispute that student discipline can be

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13. See, e.g., Deborah N. Archer, Introduction: Challenging the School-to-Prison Pipeline, 54 N.Y. L. Sch. L. Rev. 867, 868 (2009/10) ("The school-to-prison pipeline is the collection of education and public safety policies and practices that push our nation's schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system.").

14. See Linda M. Raffaele Mendez, Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation, New Directions for Youth Dev., Autumn (Fall) 2003, at 17, 26–27 (discussing social science research showing correlations between suspension rates and student race, poverty, and disability).

15. See Jessica Feierman et al., The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth, 54 N.Y.L. Sch. L. Rev. 1115, 1116–18 (2009/10) (cataloguing barriers to reentry for juveniles returning from juvenile justice placements); accord Ronnie Casella, Punishing Dangerousness Through Preventive Detention: Illustrating the Institutional Link Between School and Prison, New Directions for Youth Dev., Autumn (Fall) 2003, at 55, 64 (presenting results of qualitative research on Connecticut and New York school discipline, noting "[i]n the vast majority of the cases,

warranted and serve educational ends; indeed, it often does. Instead, this Note focuses on the disproportionate effect of school discipline on poor,[16] minority,[17] and disabled students. The pattern of discipline that emerges from the qualitative and quantitative research summarized in this section suggests perceptions of "dangerousness" or otherness drive some disciplinary decisions, rather than objective disciplinary infractions.[18] It is this kind of discipline, which does not further educational goals,[19] that this Note seeks to challenge, insofar as it is applied to disabled students.[20]

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students who had violated school policies were not permitted to return to the regular day school program"). The systematic or structural aspect is key, because the factors creating the "pipeline" exist on a larger scale than any individual student's experience. See, e.g., Casella, supra, at 68 ("[S]chool personnel in both schools [studied by the author] use[d] the term *prison track* to describe the predicament of some students."). The idea of a *track* is structural in the sense that students are on this track regardless of their individual behavior, due to aspects of the structures that surround them—features of school disciplinary policy that form a pattern across many individual cases, schools, and districts. Understanding the cross-cutting nature of the pipeline is a prerequisite to accepting that any solution to any piece of the pipeline must be equally cross-cutting. For an analysis of the evolution of school discipline through the lens of social history, see Paul J. Hirschfield, Preparing for Prison? The Criminalization of School Discipline in the USA, 12 Theoretical Criminology 79, 88–91 (2008).

16. See Jason P. Nance, Students, Security, and Race, 63 Emory L.J. 1, 41 (2013) [hereinafter Nance, Students, Security] ("[S]chools serving high percentages of low-income students or minority students are more inclined to rely on heavy-handed, justice-oriented measures to control crime . . . .").

17. See, e.g., Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection: Data Snapshot: School Discipline 2 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf [http://perma.cc/3Y4Q-CJ5P] ("Black students represent 16% of the student population, but 32–42% of students suspended or expelled."). Recent research has shown that racial disparities in suspension rates begin extremely early. See id. at 7 ("Racial disparities in out-of-school suspensions also start early; black children represent 18% of preschool enrollment, but 42% of the preschool children suspended once, and 48% of the preschool children suspended more than once."); see also Motoko Rich, Administration Urges Restraint in Using Arrest or Expulsion to Discipline Students, N.Y. Times (Jan. 8, 2014), http://www.nytimes.com/2014/01/09/us/us-criticizes-zero-tolerance-policies-in-schools.html (on file with the *Columbia Law Review*) [hereinafter Rich, Administration Urges Restraint] ("[I]n 10 states . . . more than a quarter of black students with disabilities were suspended in the 2009–10 school year.").

18. See Casella, supra note 15, at 69 ("The narrative data presented here indicate that youths who were having conflicts or were angry were often treated as if they had natural propensities to be dangerous."). Casella compellingly connects the current emphasis on dangerousness in school discipline with historical labels for *otherness*. See id. at 68 ("In some ways, the term *dangerous* is not unlike other classifications—*deviant*, *colored*, *retarded*, *savage*—that have been used historically to cut off certain segments of the population from pathways to success.").

19. Discipline has several meanings in English, encompassing a habit or state of mind, a kind of punishment, and even a field of study. Discipline, Oxford English Dictionary (2015), http://www.oed.com/view/Entry/53744 (on file with the *Columbia Law Review*). Its role as a punishment has a very particular purpose: Discipline-as-punishment is "intend[ed] [to] control[] or correct[] future behaviour; castigation . . . usually with the implication of being salutary to the recipient." Id. In one well-known account of modern European society, the state uses discipline as an educational tool to train unformed indi-

There is a significant relationship between harsh discretionary school discipline and zero-tolerance mandatory discipline.[21] Highly publicized school shootings in the 1990s created social pressure in favor of stricter penalties for students who brought guns to school.[22] As a result,

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viduals into ideal citizen-subjects much in the same way. See generally Michel Foucault, Discipline and Punish 170–94 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) ("The disciplines established an 'infra-penalty'; they partitioned an area that the laws had left empty; they defined and repressed a mass of behaviour that the relative indifference of the great systems of punishment had allowed to escape."). In this reading, discipline is the education and socialization that forms the individual. See id. at 183 ("The perpetual penality that traverses all points and supervises every instant in the disciplinary institutions compares, differentiates, hierarchizes, homogenizes, excludes. In short, it *normalizes*."). Similarly, discipline in schools is educational when teachers, administrators, and other decisionmakers apply it to students who actually violate the rules: Discipline draws the boundaries between normal and deviant behavior. See id. ("[Discipline] traces the limit that will define difference in relation to all other differences, the external frontier of the abnormal . . . ."). The Supreme Court has said as much when it has emphasized the deference due to school officials in administering discipline. See, e.g., Goss v. Lopez, 419 U.S. 565, 580 (1975) ("Suspension is considered not only to be a necessary tool to maintain order but a valuable *educational* device." (emphasis added)); id. at 593 (Powell, J., dissenting) ("Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto . . . . One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life."); see also Morse v. Frederick, 551 U.S. 393, 412 (2007) (Thomas, J., concurring) (observing, in context of early American schools, "[t]eachers instilled . . . values [in students] not only by presenting ideas but also through strict discipline"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) ("[I]t was perfectly appropriate for the school to [suspend a student] to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."); cf. Ingraham v. Wright, 430 U.S. 651, 681 (1977) (noting belief "that corporal punishment serves important educational interests"); id. at 685–86 (White, J., dissenting) ("[S]panking of schoolchildren . . . is imposed for the purpose of rehabilitating the offender[] [and] deterring the offender and others like him from committing the violation in the future . . . ."). Because discipline marks the "frontier of the abnormal," Foucault, supra, at 183, the risk where discipline is *not* applied because of behavior but instead because of a student's status is that it marks a student as deviant for his or her *status*, see supra note 18.

20. It is true that the victims of misapplied noneducational discipline, see supra notes 18–19, are not just students with disabilities, but also students that are poor or members of minority racial groups, see supra note 17. Yet the ADA procedural remedy proposed in this Note is limited by the reach of the ADA itself to students with disabilities, and cannot reach other, nondisabled populations of students. For a discussion of this limitation, see infra section IV.A.

21. See, e.g., Aaron J. Curtis, Note, Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions, 102 Geo. L.J. 1251, 1258 (2014) ("[Z]ero-tolerance policies may contribute to high dropout rates among harshly disciplined students.").

22. See Sasha Polakow-Suransky, America's Least Wanted: Zero-Tolerance Policies and the Fate of Expelled Students, *in* The Public Assault on America's Children: Poverty, Violence, and Juvenile Injustice 101, 102–03 (Valerie Polakow ed., 2000) ("[A]ll states have now introduced some form of zero-tolerance legislation in order to comply with the federal Gun Free Schools Act of 1994 . . . ."). For a comprehensive historical account of the evolution of school discipline policies from the 1950s to the mid-2000s, see Avarita L. Hanson, Have Zero Tolerance School Discipline Policies Turned into a Nightmare?, The American

in 1994, the federal government mandated zero tolerance in the context of guns on school campuses through the federal statute Gun Free Schools Act (GFSA).[23] This policy requires school districts to expel for a minimum of one year any student who brings a gun to or possesses a gun at a school.[24]

However, the GFSA left the details up to the states—the entirety of the federally required policy is one paragraph.[25] As a result, there is substantial variation between states of offenses that merit automatic expulsion.[26] In implementing the GFSA, some state legislatures have swept other actions into the zero-tolerance net, prompting expulsions of children for consuming Tylenol or prescribed birth control medication within schools because the medications fell within the definition of drugs, triggering mandatory statutory discipline.[27] Over the same time period, this "transfer of disciplinary discretion from teachers and school authorities to disciplinary codes that stipulate exclusionary punishments has contributed to a second trend of more frequent suspensions and expulsions" for offenses *not* included in zero-tolerance legislation.[28]

Over the past twenty years, states have also reacted to episodes of school violence by sharply increasing surveillance and security in

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Dream's Promise of Equal Education Opportunity Grounded in *Brown v. Board of Education*, 9 U.C. Davis J. Juv. L. & Pol'y 289, 297–315 (2005); see also Rebecca Morton, Note, Returning "Decision" to School Discipline Decisions: An Analysis of Recent, Anti-Zero Tolerance Legislation, 91 Wash. U. L. Rev. 757, 762–71 (2014) (contrasting recent changes to school discipline policies in Texas with those in North Carolina, Colorado, and Massachusetts).

23. Gun-Free Schools Act of 1994, Pub. L. No. 103-227 §§ 1031–1032, 108 Stat. 125, 270–71 (codified as amended at 20 U.S.C. § 7151 (2012)); see also Polakow-Suransky, supra note 22, at 103 (noting effect of GFSA on state laws).

24. 20 U.S.C. § 7151(b)(1).

25. Id.

26. See Hanson, supra note 22, at 307–09 (noting state differences in scope of law). It is difficult to assess the extent of automatic expulsion and suspension because of the high level of educational decentralization. The GFSA requires states to keep records of zero-tolerance expulsions, but there is evidence that much state recordkeeping is inadequate. See id. at 310 ("The accuracy, consistency, and timeliness of [state] reporting is questionable . . . ."). For an example from one state, see Polakow-Suransky, supra note 22, at 104, reporting Michigan statewide survey of discipline policies had "only *partial* data from *one third* of Michigan school districts" due to shoddy records (emphasis added).

27. Local media abounds with such examples. See, e.g., Michael Alison Chandler, Birth-Control Pill Lands Fairfax Student 2-Week Suspension, Possible Expulsion, Wash. Post (Apr. 5, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/04/04/AR2009040402591.html [http://perma.cc/NTQ5-R5AB] (reporting student faced "mandatory punishment" of "two-week suspension and recommendation for expulsion" for taking birth control pill at lunch); see also Skiba, supra note 1, at 381 (listing examples of offenses meriting suspension or expulsion, including "witnessing fights" and "failure to complete homework"); cf. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368 (2009) (holding unconstitutional search of thirteen-year-old girl's bra and underpants due to suspicion "she had brought forbidden prescription and over-the-counter drugs to school").

28. Hirschfield, supra note 15, at 82.

schools.[29] The federal government additionally began funding wide-ranging, stringent security measures in the 1990s that continue to go far beyond restrictions on guns and other weapons.[30] One example of this expansion of security measures is the use of police officers in schools. School policing is currently the subject of litigation in New York City,[31] and it is a relatively widespread practice nationwide.[32] In at least one school system in Mississippi, before the DOJ sued the district, teachers regularly called the police on students for a variety of low-level disciplinary offenses including "disrespect" and "profanity."[33] When police officers are employed in schools, the connection between school discipline and juvenile courts becomes tighter again: If a police officer arrests a student in school, the diversion from educational setting to juvenile justice setting is immediate.

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29. Jason P. Nance, School Surveillance and the Fourth Amendment, 2014 Wis. L. Rev. 79, 92–94, 93 n.71 (describing phenomenon and giving examples of state legislative reactions to highly publicized 2012 Newtown school shooting).

30. See Nance, Students, Security, supra note 16, at 13–14 (noting federal funding through Department of Justice's (DOJ) Community Oriented Policing Services (COPS) initiative for, inter alia, "metal detectors, locks, lighting, security assessments" in public schools, spending "approximately $913 million" between 1995 and 2013). The "Community Oriented Policing Services" is tellingly referred to as "COPS." Id. COPS was created one year after the passage of the first federal zero-tolerance law. See Gun-Free Schools Act of 1994, Pub. L. No. 103-227 §§ 1031–1032, 108 Stat. 125, 270–71 (codified as amended at 20 U.S.C. § 7151). For a list of the wide variety of security measures in schools, see Hirschfield, supra note 15, at 82–83.

31. See Complaint at 10–14, B.H. v. City of New York, No. CV10-0210 (E.D.N.Y. Jan. 20, 2010) (describing structure of NYC School Safety Division). The New York Civil Liberties Union (NYCLU) brought this suit, alleging a pattern or practice of Fourth and Fourteenth Amendment violations, as well as parallel New York state constitutional violations. See id. at 50–53 (listing causes of action).

32. See Catherine Y. Kim & I. India Geronimo, Am. Civil Liberties Union, Policing in Schools: Developing a Governance Document for School Resource Officers in K–12 Schools 5 (2009), https://www.aclu.org/sites/default/files/pdfs/racialjustice/whitepaper_policinginschools.pdf [http://perma.cc/897Y-R8MM] ("[I]n 2004, 60 percent of high school teachers reported armed police officers stationed on school grounds, and in 2005, almost 70 percent of public school students ages 12 to 18 reported that police officers or security guards patrol their hallways." (footnote omitted)); see also Catherine Y. Kim, Policing School Discipline, 77 Brook. L. Rev. 861, 877–78 (2012) ("Today, nearly half of all public schools have assigned police officers . . . . Jurisdictions lacking the resources to hire full-time police personnel nonetheless may regularly summon the local police department . . . .").

33. Complaint at 11–14, United States v. City of Meridian, No. 4:12CV168HTW-LRA (S.D. Miss. Oct. 24, 2012), http://www.justice.gov/sites/default/files/crt/legacy/2012/10/24/meridian_complaint_10-24-12.pdf [http://perma.cc/V2J2-QZR3] (listing offenses causing arrest and referral to juvenile court, "including disrespect, refusal to follow . . . directions . . . , and profanity" and noting "[s]ometimes [police] officers do not know the basis" for arrest); see also Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Phil Bryant, Governor, State of Miss., et al., 3–5 (Aug. 10, 2012), http://www.justice.gov/crt/about/spl/documents/meridian_findletter_8-10-12.pdf [http://perma.cc/3EFM-XW9Q] (describing mechanism linking school, police, and juvenile court). The Meridian Police Department referred to itself as a "taxi service" ferrying students between school and juvenile court. Id. at 5.

To be sure, guns are dangerous objects, and students who bring them to school present a significant danger that may justify their diversion out of schools. As mentioned above, it is not the purpose of this Note to challenge the appropriateness of all instances of school discipline.[34] However, one effect of the increased focus on school discipline, and of the increased employment of specialized, full-time school security officers, is that students increasingly face suspension for relatively minor offenses, including "insubordination."[35] As noted above, the creation of zero-tolerance gun laws coincided with a large rise in funding for security measures that have also increased discretionary discipline.[36] And it is through discretionary discipline that the significant racial disparities in discipline become striking.[37]

Zero tolerance, surveillance, and security created the mechanism for schools to suspend or expel students who misbehave in any one of a huge number of ways.[38] The pipeline mechanism kicks in as soon as students

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34. See supra notes 18–19 and accompanying text (contrasting discipline serving educational purposes with noneducational discipline, which this Note addresses).

35. See, e.g., N.Y. Civil Liberties Union, A, B, C, D, STPP: How School Discipline Feeds the School-to-Prison Pipeline 12 (2013), http://www.nyclu.org/files/publications/nyclu_STPP_1021_FINAL.pdf [http://perma.cc/46UF-RJ8S] ("Five of the top ten infractions with the most suspensions [in New York City schools], such as 'insubordination' and 'profane language,' are by definition non-violent.").

36. See supra note 30 and accompanying text (discussing simultaneous creation of zero-tolerance discipline and of federal funding for sweeping security and surveillance).

37. See Motoko Rich, Analysis Finds Higher Expulsion Rates for Black Students, N.Y. Times (Aug. 24, 2015), http://www.nytimes.com/2015/08/25/us/higher-expulsion-rates-for-black-students-are-found.html (on file with the *Columbia Law Review*) ("[B]lacks are more likely to be suspended or expelled in situations where teachers or school leaders have discretion in determining how to respond to behavior, such as when a student is deemed disrespectful or defiant or violates a dress code."). In fact, "in situations where laws *require* schools to suspend or expel a student—such as when the student brings a gun or drugs to campus—whites are more likely to be suspended or expelled than blacks." Id. (emphasis added). The disproportionate disciplining of black students is particularly acute and troubling in southern states: A recent study found that 24% of students enrolled in the thirteen southern states studied were black, but black students constituted 48% of students suspended and 49% of students expelled—*double* their proportion of the student population. Edward J. Smith & Shaun R. Harper, Disproportionate Impact of K–12 School Suspension and Expulsion on Black Students in Southern States 5 (2015), http://www.gse.upenn.edu/equity/sites/gse.upenn.edu.equity/files/publications/SOUTHADVANCEDDRAFT24AUG15.pdf [http://perma.cc/WZ8M-HA6D].

38. Several studies have found that "the vast majority of suspensions are for minor infractions of school rules, such as disrupting class, tardiness, and dress code violations, rather than for [the] serious violent or criminal behavior" that is ostensibly the target of the zero-tolerance school security apparatus. Daniel J. Losen & Tia Elena Martinez, Out of School & Off Track: The Overuse of Suspensions in American Middle and High Schools 1 (2013), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutofSchool-OffTrack_UCLA_4-8.pdf [http://perma.cc/QL2Q-V3QA].

are first suspended from school.[39] Out-of-school suspensions or expulsions correlate with an increased risk of arrest and time in juvenile detention and of failure to graduate high school;[40] each of these in turn correlates with an increased risk of arrest and detention as an adult.[41] Aside from the escalation of subsequent school discipline and its mutation into criminal justice referrals, missing more than a handful of school days per year also hurts a student's school performance.[42] Chronically missing school correlates with a higher risk of failing classes, which in turn correlates with a higher risk of dropping out.[43] Dropping out of high school again correlates with arrest as an adult.[44]

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39. See Smith & Harper, supra note 37, at 4 ("[E]xpulsions and out-of-school suspensions are strongly associated with subsequent participation in juvenile and criminal justice systems . . . ."); Sheryl A. Hemphill et al., Does School Suspension Affect Subsequent Youth Non-Violent Antisocial Behaviour? A Longitudinal Study of Students in Victoria, Australia and Washington State, United States, 65 Austl. J. Psychol. 236, 236–37 (2013) (identifying prior findings of increased risk of academic failure, school dropout, failure to graduate on time, social alienation, and drug or alcohol use following student suspension).

40. See Hemphill et al., supra note 39, at 237 ("Suspension has . . . been shown to be a risk factor for delinquency and future imprisonment."); Catherine Y. Kim, Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from *Antoine v. Winner School District*, 54 N.Y.L. Sch. L. Rev. 955, 956 (2009/10) [hereinafter Kim, Public Law Remediation] ("Being suspended or expelled from school increases the likelihood of failing a grade[] [or] dropping out . . . ."); Metze, supra note 3, at 228–29 ("[E]ven a single contact with school discipline authorities creates a clear 'threshold effect' that greatly increases a student's chance of a referral to the juvenile justice system . . . ."). Although much of the literature on the negative effects of school discipline focuses on boys, there is evidence that it is equally harmful to girls. See, e.g., Wald & Losen, supra note 1, at 11 ("The single largest predictor of later arrest among adolescent females is having been suspended, expelled, or held back during the middle school years."). In fact, there is some evidence that the discipline rate for a *school* has similar effects for *all* of its students. See Skiba, supra note 1, at 383 ("School rates of out-of-school suspension are moderately associated with lower graduation or higher dropout rates and greater contact with the juvenile justice system . . . .").

41. See Arum & Beattie, supra note 5, at 527 (finding "[i]ndividuals with 12 years of education who reported being suspended were 2.2 times more likely [to be] incarcerated than students reporting no suspensions," and that such increased likelihood is "not the product of . . . selection bias related to an individual's propensity for adolescent delinquency"); Wald & Losen, supra note 1, at 11 (linking contact with juvenile justice or school discipline to adult incarceration).

42. See, e.g., Elaine M. Allensworth & John Q. Easton, The On-Track Indicator as a Predictor of High School Graduation 22 n.2 (2005), Univ. of Chi. Consortium on Chi. Sch. Research, https://ccsr.uchicago.edu/sites/default/files/publications/p78.pdf [http://perma.cc/N6Z3-XNYD] (reporting negative relationship between number of absences in ninth grade and graduating high school).

43. In fact, one study of Texas high school students found that "a secondary student in Texas who experiences *any* disciplinary contact is more than six times more likely to have to repeat at least one grade and five times more likely to drop-out than . . . students with no disciplinary actions." Metze, supra note 3, at 255 (emphasis added).

44. See Kim, Public Law Remediation, supra note 40, at 956 (noting risk of "later incarceration" among students subject to out-of-school suspensions); Miriam Rokeach & John Denvir, Front-Loading Due Process: A Dignity-Based Approach to School Discipline,

Before a student may be removed from school, however, the school must inform the student of the alleged misbehavior and give the student a chance to respond at a hearing.[45] This Note proposes using the ADA to seek representation at that hearing, before a student has been removed from school for the first time. Providing students with disabilities representatives during these hearings would increase the chance that students whose disabilities prevent them from articulating their version of events clearly receive the help of an advocate capable of doing so. The goal of this intervention is to reduce the disproportionate number of students with disabilities being disciplined for reasons other than their behavior. With the general pipeline framework of school discipline in place, the next section turns to the pipeline's disproportionate effect on already-disadvantaged students.

B. *Discipline and Otherness: Examining the Discipline's Disproportionate Effects on Disadvantaged Populations*

The use of stricter security measures outlined in the previous section correlates with race, poverty, and disability[46] of students. A 2013 empirical study of nearly 2,000 American schools found that, even after controlling for "school crime, neighborhood crime, and school disorder," the number of minority or poor students in a given school is a "strong predictor of whether the school uses a combination of strict security measures."[47] Race and poverty thus appear more predictive of discipline than the problems that discipline is supposed to solve. This correlation suggests that current policies discipline students for factors other than their disruption to the educational environment—precisely the kind of noneducational discipline this Note addresses.[48]

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67 Ohio St. L.J. 277, 286 (2006) ("[A]s much as 80% of the prison population is composed of high school dropouts.").

45. See Goss v. Lopez, 419 U.S. 565, 582 (1975) (stating general rule). The requirements and inadequacies of these due process hearings are discussed in detail below, see infra notes 100–103 and accompanying text.

46. "Disability" is a very broad term, and one that encompasses many conditions that operate in different ways to affect an individual's ability to see, sense, understand, and participate in the world. The federal special education laws have one definition of disability based on categories like "blindness" and "mental retardation," see infra notes 77–79 and accompanying text, while the ADA has another, based on any condition that restricts a major life activity, see infra section II.B.2. The ADA claim proposed in Part III of this Note could apply to a broad range of possible disabilities that would prevent a student from being able to communicate as fully as their nondisabled peers in suspension or expulsion hearings. This could encompass spectrum conditions such as autism, speech or language processing disabilities, and developmental disabilities. The breadth of possible coverage is in line with the 2008 amendments to the ADA, which expand the definition of disability. See infra notes 114–117 and accompanying text (explaining breadth of ADAAA).

47. Nance, Students, Security, supra note 16, at 41.

48. See supra notes 18–19 and accompanying text (explaining difference between educational and noneducational discipline). For a more exhaustive account of structural racism in school discipline through a critical-race lens, see generally David Simson, Comment,

Disparities generated by harsh school discipline policies extend to "students with disabilities [who] are suspended about twice as often as their non-disabled peers."[49] Even more starkly, researchers estimate one in four black students with disabilities was suspended at least once in the 2009–2010 school year, compared to a suspension rate of twelve percent for white students with disabilities.[50] This racial effect among students with disabilities was in addition to the finding that students with disabilities are suspended about twice as often as students without disabilities, compounding the disproportionate discipline.[51] These disparities continue into the juvenile justice system, where empirical studies have consistently found disability prevalence rates many times greater than in school populations.[52]

Exclusion, Punishment, Racism, and Our Schools: A Critical Race Theory Perspective on School Discipline, 61 UCLA L. Rev. 506, 525–52 (2014). For an explanation of disparities in discipline that seeks to unite both objective-structural and subjective-personal elements, see generally Hirschfield, supra note 15.

49. Daniel J. Losen & Jonathan Gillespie, Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School 13 (2012), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf [http://perma.cc/QD7G-RE8G]; see also NAACP LDF & Nat'l Women's Law Ctr., Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity 15–20 (2014), http://www.naacpldf.org/files/publications/Unlocking%20Opportunity%20for%20African%20American%20Girls_0.pdf [http://perma.cc/CP2N-63B4] (discussing disproportionate effect of discipline on African American female students).

50. Losen & Gillespie, supra note 49, at 13–14 & n.11; see also Rich, Administration Urges Restraint, supra note 17 (reporting this number was true in ten states in 2009–2010 school year).

51. Losen & Gillespie, supra note 49, at 13.

52. See, e.g., Joseph B. Tulman & Douglas M. Weck, Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities, 54 N.Y.L. Sch. L. Rev. 875, 882 (2009/10) ("Studies estimate that the prevalence of youth with disabilities in juvenile corrections is between 30% and 70%, while only 8.8% of public school students have been identified as having disabilities . . . ." (footnotes omitted)). As that enormous range suggests, data collection is highly uncertain in this area: A 2002 literature review commissioned by the Department of Education (DOE) found previous studies estimated juvenile justice disability prevalence to range from twenty to sixty percent. Robert B. Rutherford et al., Youth with Disabilities in the Correctional System: Prevalence Rates and Identification Issues 7 (2002), http://cecp.air.org/juvenilejustice/docs/youth%20with%20disabilities.pdf [http://perma.cc/6KLY-5ER4]. In any case, this is many times greater than the accepted prevalence rates for public school students. See id. at 7 (noting previous study asserting prevalence rate "between 7% and 10%"); Tulman & Weck, supra, at 882 (giving estimate of 8.8% of public school students). The Office of Civil Rights (OCR) within the DOE compiles national and state estimates of students with disabilities who are disciplined at school. The most recent estimate is from 2009–2010, when, out of 5.6 million students covered by the Individuals with Disabilities Education Act (IDEA), over 679,000 received some kind of suspension, and some 22,000 were expelled, or roughly 7.9% of students covered by the IDEA. See Office of Civil Rights, U.S. Dep't of Educ., 2009 Civil Rights Data Collection: Estimated Values for United States, http://ocrdata.ed.gov/downloads/projections/2009-10/2009-10-Estimations-Nation.xls [http://perma.cc/2GV2-EASL].

Evidently recognizing the problem of the over-disciplining of disabled students, the most recent reenactment of the GFSA from 2002[53] contains a cryptic "special rule": "The provisions of [the GFSA] shall be construed in a manner consistent with the Individuals with Disabilities Education Act."[54] In practice, this provision allows the "chief administrative officer" of the "local education agency" (that is, the school district superintendent) to modify student suspensions on a case-by-case basis, in writing, in order to prevent the GFSA from contravening the goal embodied in the federal special education statutes: supporting students with disabilities in schools with services appropriately tailored to their disabilities.[55] It is unclear how, or how often, superintendents make these alterations, and poor recordkeeping makes systematic evaluation impossible.[56] Since this exception dates from 2002, the lack of data on whether it has reduced the disproportion of disabled youth being disciplined is troubling.

The correlation between the disadvantage of diversionary school discipline and students already disadvantaged academically by conditions beyond their control such as race and poverty[57] is especially great and especially troubling in the case of students with disabilities. As a result, this Note focuses on that category of students. A further reason for doing so is to identify a special set of potentially useful protections applying in school suspension and expulsion hearings for students with disabilities that could prevent school infractions from leading to diversion and entanglement in the juvenile court system.[58]

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53. See supra notes 22–24 and accompanying text (describing enactment of GFSA).

54. Gun-Free Schools Act, Pub. L. No. 107-110, § 4141(c), 115 Stat. 1383, 1762 (2002) (codified at 20 U.S.C. § 7151 (2012)). Of course, this only incorporates problems with schools' identification of students as disabled. For further discussion of this limitation on the effectiveness of special education procedural protections in the IDEA, see infra section II.A.

55. See U.S. Dep't of Educ., Report on the Implementation of the Gun-Free Schools Act in the States and Outlying Areas, School Years 2005–06 and 2006–07, at 8 (2010), http://www2.ed.gov/about/reports/annual/gfsa/gfsarp100610.pdf [http://perma.cc/MU4B-A3P7] (explaining chief administrative officers may modify suspensions "to ensure that IDEA and GFSA requirements are implemented consistently"). For more on the IDEA's procedural protections, see infra section II.A.

56. See supra note 26 (discussing poor state recordkeeping).

57. See Jeffrey C. Sun & Philip T.K. Daniel, Math and Science Are Core to the IDEA: Breaking the Racial and Poverty Lines, 41 Fordham Urb. L.J. 557, 572 (2010) ("For many years, educational research has observed the social disadvantage on educational performance based on both race and socioeconomic status.").

58. The systematic collection of data connecting school discipline and contact with the juvenile justice system is still in its early stages. Because of the decentralization of U.S. education, collecting these data faces similar barriers to collecting data on zero-tolerance discipline. Cf. supra note 26 (discussing paucity of zero-tolerance expulsion data). Still, a growing body of state and local studies points toward a strong connection between suspension or expulsion and court referrals. The most comprehensive study, which comes from Texas, found that "when a student was suspended or expelled for a discretionary school disciplinary violation, this action nearly tripled (2.85 times) the likelihood of juvenile justice contact within the subsequent academic year." Council of State Gov'ts Justice Ctr. &

Aggravating the disciplinary plight of black students identified as disabled is a riddle: Why are black students simultaneously overidentified as being disabled[59] and also oversuspended?[60] This is a riddle because, theoretically, identification as disabled entitles students to heightened procedural protections extended to special education students before they may be removed.[61] Still, a study of Delaware public schools found "students who are poor, non-white, male and disabled were more likely to be suspended for over 10 days than other disabled students."[62] In a way, this riddle is not such a riddle at all: The exercise of discretion by school officials results in minority overrepresentation in both disability and discipline.

For instance, "Black students are suspended more often for behaviors that involve subjective or discretionary judgments by school authority figures, such as disrespect, excessive noise and threatening behavior."[63] Similarly, the special education literature distinguishes between hard and soft disabilities.[64] Hard disabilities are conditions for which there are ob-

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Pub. Policy Research Inst., Tex. A&M Univ., Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement 70 (2011), http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf [http://perma.cc/P7XF-N2NW]. A smaller longitudinal study of a mid-Atlantic city school system found a similar correlation between "struggl[ing] profoundly in school," as measured by grades and suspensions, and incarceration as a juvenile. Robert Balfanz et al., High-Poverty Secondary Schools and the Juvenile Justice System: How Neither Helps the Other and How that Could Change, New Directions for Youth Dev., Autumn (Fall) 2003, at 71, 74–78. For a more in-depth discussion of data on this connection, see generally supra notes 38–44.

59. See, e.g., Sun & Daniel, supra note 57, at 572–76 (noting historical overrepresentation of black students in special education whereby thirty-three percent of students enrolled in special education are black despite black students making up only seventeen percent of total school enrollment).

60. See, e.g., Losen & Gillespie, supra note 49, at 13–14 (noting racial disparities in suspension rates among students with disabilities).

61. See infra section II.A (explaining limitations of IDEA).

62. Elizabeth Palley, The Implementation of the Federal Special Education Policy Related to Discipline at the State and Local Level: A Case Study of Delaware Public Schools 133 (Nov. 2002) (unpublished Ph.D. dissertation, Brandeis University) (on file with the *Columbia Law Review*). In the qualitative data of this study, a remarkably candid district administrator confided that "parents' economic resources influenced the extent to which a child would be protected by the IDEA," further linking poverty and a lack of protection. Id. at 140.

63. N.Y. Civil Liberties Union, supra note 35, at 8–9.

64. See, e.g., Thomas Parrish, Racial Disparities in the Identification, Funding, and Provision of Special Education, *in* Racial Inequity in Special Education 15, 24–25 (Daniel J. Losen & Gary Orfield eds., 2002) ("[T]he categories of disability called specific learning disability, mental retardation, and emotional disturbance are sometimes referred to as soft categories because they are more subjectively and less medically determined than categories such as deafness or blindness . . . ."). This Note and the sources cited in this section refer to certain developmental disabilities as "mental retardation," which is the term currently used in IDEA regulations. See 34 C.F.R. § 300.8(c)(6) (2015). In 2010, Congress replaced this term with "intellectual disability" in federal laws including IDEA. Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010); see also S. Rep. No. 111-244, at 1–3 (2010)

jective diagnostic tests, while soft disabilities are more subjectively determined—the difference between diagnosing a child with blindness, for instance, and with emotional disturbance.[65] Tellingly, black students are significantly overrepresented in the "soft" categories.[66]

Further, black students are placed in more restrictive educational settings than white students diagnosed with the same disability.[67] Although rates of restrictive placements for disabled minority students appear greater than disabled white students at the national level, the restrictive placements may actually be even more severe in large, urban school districts serving predominantly minority and low-income populations.[68]

The phenomena just described reveal the problem at the heart of the school-to-prison pipeline: It is a result of wide discretion by school staff that is all too easy to abuse on the basis of stereotypes affecting both disabled and black youth, and especially disabled black youth.[69] The daily decisions of teachers and other school employees operate to funnel black children both into special education and out of schools. The fact that this is observable nationally, even when controlling for other factors like poverty,[70] reinforces the structural racism analysis of minority overrepre-

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(explaining need to change language because mental retardation "developed into colloquial slurs and pejorative phrases used to demean and insult").

65. See Parrish, supra note 64, at 24–25 (explaining differences in diagnostic evaluation between so-called soft and hard disabilities). These categories are not medically relevant but are very useful for understanding one way in which discretion of local actors can disadvantage minority students.

66. See id. at 25, tbl.3 (showing much more significant overrepresentation in "soft" than "hard" categories nationally).

67. See Edward Garcia Fierros & James W. Conroy, Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education, *in* Racial Inequity in Special Education, supra note 64, at 39, 63 fig.4, 66 fig.5, 67 fig.6 (showing lower percentages of black and Hispanic males and females spending more than 20% of school day in regular classroom compared to white males and females, for students receiving services for mental retardation, emotional disturbance, and specific learning disability).

68. See id. at 58, 59 tbl.4, 60 tbl.5, 61 tbl.6 (showing data on restrictive placements for mental retardation, emotional disturbance, and specific learning disability student populations from ten urban school districts, eight of which had restrictive placement rates higher than national average, and noting these rates "were greatly masked in national- and state-level analyses").

69. One is perhaps tempted, when confronted with such staggering data, to say "abuse" rather than "misuse." Perhaps the most troubling aspect of minority disproportionality across juvenile justice and special education is the likelihood that overrepresentation is caused by unconscious bias. Cf. Simson, supra note 48, at 546–49 (outlining role of implicit bias in school discipline). The suspicion that unconscious bias is at work reinforces the view that a nonnegligible amount of suspensions and expulsions are not related to educational ends. See supra notes 18–19 and accompanying text (outlining difference between educational and noneducational discipline).

70. Donald P. Oswald et al., Community and School Predictors of Overrepresentation of Minority Children in Special Education, *in* Racial Inequity in Special Education, supra note 64, at 1, 7 ("[E]ven after accounting for the effects of district sociodemographic characteristics, students' gender and ethnicity are important in determining the likelihood of identification.").

sentation in juvenile justice,[71] and extends it to the special education system, where racial disparities have long been prevalent.[72]

These data present a disturbing picture of the overrepresentation of minority youth, and particularly of black youth, in special education and in disciplinary diversions out of schools and into the criminal justice system. This Note focuses particularly on suspensions and expulsions of students with disabilities for two reasons. First, racial disparities are just as pronounced in the discipline received by students with disabilities as they

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71. See Chauncee D. Smith, Note, Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework, 36 Fordham Urb. L.J. 1009, 1020–40 (2009) (applying structural racism framework to deconstruct aspects of school-to-prison pipeline).

72. There is some ambiguity regarding the extent of minority disproportionality in special education. On the one hand, it is mostly uncontested that black students are disproportionately represented in special education. See, e.g., U.S. Gov't Accountability Off., GAO-13-137, Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education 4 fig.1 (2013) (showing enduring overrepresentation of black students between 2006 and 2010); see also Sun & Daniel, supra note 57, at 559 (calling data on overrepresentation "abysmally clear").

Some scholars, however, have argued that special education *under*-identification increases the prevalence of students with disabilities in the juvenile justice system. Joseph B. Tulman, Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System, 3 Whittier J. Child & Fam. Advoc. 3, 28 (2003) ("A factor fueling the disproportionate representation of children with education-related disabilities in the delinquency system is the failure of some school system personnel to find, evaluate, and serve children with disabilities.").

On the other hand, it seems that Asian students may be underrepresented in special education relative to their proportion of the population. See, e.g., Oswald et al., supra note 70, at 6 tbl.1 (showing low identification odds for Asian and Pacific Islander males and females compared to white females, based on national data from 1994–1995 school year). But this is not uniformly true: In Hawaii, Asian and Pacific Islander students are overrepresented in special education. See Parrish, supra note 64, at 22–23 tbl.1 (showing state-by-state risk ratios of identification in mental retardation, emotional disturbance, and specific learning disabilities of minority students compared to white students, with Asian and Pacific Islander students less likely to be identified in each category in every state *except* Hawaii). Complicating the matter further are the data on Hispanic youth, who are somewhat overrepresented in special education, though not as dramatically as are black youth, but with high variability by state. See id. (showing range in risk ratios for Hispanic student categorization of mental retardation ranging from low of 0.00 (Vermont) and 0.15 (West Virginia) to highs of 3.25 (Connecticut) and 2.01 (Delaware), with similar, though less dramatic, variation for emotional disturbance and specific learning disabilities). Some have argued, based on the case of Hawaii that "[t]he likelihood of overrepresentation in [mental retardation] for a minority group seems to be greater in the states where the minority group is the largest." Id. at 32. But this theory does not explain Hispanic identification rates. The three states with the highest proportion of Hispanics in the 2010 Census were New Mexico, California, and Texas. U.S. Census Bureau, The Hispanic Population: 2010, at 6 tbl.2 (2011). But these states do not show consistent overidentification of Hispanics relative to their proportion of the population. See Parrish, supra note 64, at 22–23 tbl.1.

are for students without disabilities.[73] This disparity is highly problematic, because it appears that discipline is being imposed without valid educational rationales—the further away from the student bringing a gun to school, where dangerousness is most clear, the greater the suggestion that discretionary discipline is being applied without regard to desert.[74] Second, this Note focuses on students with disabilities because this population is most likely to have difficulty communicating their side of the story, especially where a student's disability affects the student's ability to behave in high-pressure suspension or expulsion hearings where an adult decisionmaker confronts the student with accusations of misconduct.

II. CURRENT STATUTORY FRAMEWORKS: IDEA AND ADA

This Part turns from the problem of disproportionately disciplined students and the extremely negative effects such discipline can have on student outcomes to two statutes that operate in the background of school discipline: the Individuals with Disabilities Education Act (IDEA) and the ADA. The IDEA, the federal special education law, seems like an obvious tool to use to stanch the flow of students with disabilities out of school. The IDEA has procedural protections that must be met before a student with a disability can be removed from school. However, the protection only kicks in *after* a student has been adjudicated in violation of school rules and so is inadequate to prevent potentially significant issues in the underlying adjudication. For that reason, this Part turns to the ADA, which can potentially operate in disciplinary adjudications, before students are found eligible for removal from school.

A. *The Wrong IDEA: Why Special Education Law Is Inadequate to Solve These Problems*

For many years, federal law has extended protections to students receiving special education services in public schools. It could seem, therefore, that this Note's solution is unnecessary—aren't these students already protected? The answer is unfortunately no: Special education law protections are inadequate in the disciplinary context because they come too late, kicking in only *after* the school makes a finding that the covered student misbehaved. This section identifies such inadequacies and other limitations of the IDEA that prevent that statute from significantly disrupting the pipeline of disabled students from schools into the juvenile justice system.

The IDEA is the latest iteration of the federal effort to end the stigmatization and exclusion of students with disabilities from public schools,

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73. See supra notes 59–68 and accompanying text (discussing disproportion in discipline faced by minority students with disabilities).

74. See supra notes 18–19 and accompanying text (explaining risk of noneducational discipline and defining grey area of discretionary discipline).

an effort that began in 1975.[75] The statute guarantees and funds services for students with disabilities; perhaps the two key requirements are a free and appropriate public education (FAPE) to each student with disabilities in the least restrictive environment possible.[76] The IDEA also imposes procedural hurdles before a student with disabilities may be removed from school. These removal protections apply to "a child with a disability."[77] To receive that designation, the student must be found (1) to qualify for one of IDEA's ten categories of educational disabilities[78] and (2) to need "special education and related services."[79] Although one of the ten disability categories is "emotional disturbance," which one might expect to correlate with disciplinary issues,[80] the IDEA regulation that defines that disability provides without further elaboration that emotional disturbance "does not apply to children who are socially maladjusted."[81] Be-

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75. See Education for All Handicapped Children Act (EAHCA) of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C. (2012)); see also Jon Romberg, The Means Justify the Ends: Structural Due Process in Special Education Law, 48 Harv. J. on Legis. 415, 421–25 (2011) (detailing history of federal special education law through IDEA). The EAHCA marked a significant break from past practice, in which children with disabilities were ignored and often expressly excluded from schools. See id. at 421 ("Parental rights [before EAHCA] did not extend, however, to guaranteeing . . . the education of their disabled children. State statutes often expressly authorized local authorities to exclude the disabled from attending school.").

76. See 20 U.S.C. § 1412(a)(1), (5) (requiring FAPE in least restrictive environment); see also id. § 1401(9) (defining FAPE); Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982) ("[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction . . . the child is receiving a 'free appropriate public education' . . . .").

77. 20 U.S.C. § 1415(k)(1)(A) (limiting procedural protections to "child[ren] with a disability who violate[] a code of school conduct"); id. § 1415(k)(5)(B) (providing limited exception where "local educational agency shall be deemed to have knowledge that a child is a child with a disability"); see also N.Y.C. Dep't of Educ., Citywide Standards of Intervention and Discipline Measures 7 (2013), http://schools.nyc.gov/NR/rdonlyres/188AF3E2-F12B-4754-8471-F2EFB344AE2B/0/DiscCodebooklet2013final.pdf [http://perma.cc/6R52-GMAD] (noting increased protections for students with disabilities, but limiting this to students for whom parents or school staff have requested services or evaluation); cf. Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools 3 (2012), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.pdf [http://perma.cc/PG6B-NW8G] [hereinafter DOE FAQ] ("[C]overage under . . . Title II of the ADA is not limited to students who meet the IDEA eligibility criteria.").

78. 20 U.S.C. § 1401(3)(A)(i) (listing ten categories under which students may be classified as children with disabilities). For a useful discussion of structural factors favoring identification and labeling of special education students, see Mark C. Weber, The IDEA Eligibility Mess, 57 Buff. L. Rev. 83, 91–97 (2009) [hereinafter Weber, IDEA Eligibility].

79. 20 U.S.C. § 1401(3)(A)(ii).

80. See 34 C.F.R. § 300.8(c)(4)(i)(C) (2015) (listing "[i]nappropriate types of behavior or feelings under normal circumstances" as one characteristic of emotional disturbance); see also Weber, IDEA Eligibility, supra note 78, at 112–16 (noting litigation over boundary of "emotional disturbance" IDEA category); id. at 102–03 (arguing courts unduly "exclud[e] children with behavioral disorders" from IDEA).

81. 34 C.F.R. § 300.8(c)(4)(ii).

cause this limitation lacks any basis in scientific understandings of disability, it likely excludes students who ought to be recognized as having disabilities from the IDEA's procedural protections against removal.[82]

The IDEA extends procedural safeguards to children "with a disability" before these students may be removed from schools for a period of more than ten days. In theory, the protections could provide a procedural brake on removing children identified as disabled from schools.[83] For the following four reasons, however, the effect of these procedural protections is slim.

First, the IDEA's procedural protections apply only to students who already are receiving special education services or students about whom the school has received notice of potential eligibility.[84] This limitation withholds protections from students whose disabilities are manifested for the first time by disruptive behavior that exposes them immediately to harsh discipline.[85] Because wealthier parents are more likely to request and receive special education evaluations for their children than poorer parents, this gap particularly harms children from low-income backgrounds.[86]

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82. See generally Lois A. Weithorn, Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth, 33 Hofstra L. Rev. 1305, 1357 & nn.223–24 (2005) ("Neither term [emotionally disturbed or socially maladjusted] was a diagnostic 'term of art' in the mental health or education fields prior to their use in the [special education] legislation and regulations . . . .").

83. See 20 U.S.C. § 1415(k) (describing procedural safeguards for children with disabilities). The most recent reauthorization of the federal special education framework is the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. §§ 1400–1482); cf. supra note 75 (explaining origins of federal special education laws). For a comprehensive comparison of the IDEA, section 504, and the ADA, see generally Perry A. Zirkel, A Comprehensive Comparison of the IDEA and Section 504/ADA, 282 Educ. L. Rep. 767 (2012).

84. See supra notes 77–82 and accompanying text (discussing IDEA eligibility requirements).

85. Indeed, one of the enumerated categories of disability under the IDEA, 20 U.S.C. §§ 1400–1482, is "emotional disturbance," defined in the regulations as being associated with "[i]nappropriate types of behavior or feelings under normal circumstances." 34 C.F.R. § 300.8(c)(4)(i)(C). There is some indication that this IDEA category is particularly related to likelihood of school discipline. See Council of State Gov'ts Justice Ctr. & Pub. Policy Research Inst., Tex. A&M Univ., supra note 58, at 51 tbl.2 (presenting Texas data showing students in "emotional disturbance" category 23.9% more likely to be subject to discretionary disciplinary action than students without a disability, highest of any IDEA category). For a discussion of zero-tolerance discipline in schools, see supra notes 21–35 and accompanying text.

86. See, e.g., Eloise Pasachoff, Special Education, Poverty, and the Limits of Private Enforcement, 86 Notre Dame L. Rev. 1413, 1435–50 (2011) (describing various factors resulting in disparities in IDEA services between poorer and wealthier families). The problem of wealth gaps in the receipt of services is beyond the scope of this Note and is unlikely to be resolved by any solution that relies on private enforcement of existing statutory rights; this issue is baked into the system, a feature rather than a bug. Eloise Pasachoff has explained that,

> Where a statute shares certain features with the IDEA, heavy reliance on private action can lead to predictable disparities in enforcement to the detriment of people

Aggravating the problem is the second factor, which one commentator has called the IDEA eligibility "mess."[87] As a result of unclear definitions of disability and efforts by the 2004 IDEA amendments to support a wider pool of students than just those designated as disabled, the reach of the IDEA's procedural protections for students who *have* been so designated has been diminished.[88] In other words, by allowing schools to support more students than those formally designated as disabled, the newest version of the IDEA properly focuses on educational needs and outcomes rather than on labels of disability.[89] However, since procedural removal protections only extend to those students who already have disability designations,[90] the reduced pressure on labeling has the unfortunate side effect of denying the protections to students who might need them.

Third, and perhaps most importantly, the IDEA's procedural protections for students with disabilities apply only to suspensions longer than ten days.[91] This limitation hamstrings the usefulness of the IDEA, because school discipline policies are often progressive[92] and early intervention is often key to diverting students before escalating sanctions divert them into the criminal justice system.[93]

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without financial resources. These features include the distribution of resources among a socioeconomically diverse group; an individualized right that depends on bargaining to be effectuated; discretion in determining the contours of the right; and a lack of transparency in that determination.

Id. at 1488.

87. See Weber, IDEA Eligibility, supra note 78, at 84 ("In a word, IDEA eligibility is a mess.").

88. See id. at 97–102 (documenting changes in IDEA funding structure to "directly benefit[] students who have never been . . . identified as students with disabilities," beginning in 1997 and continuing through 2004 IDEA amendments).

89. Id. at 102 (noting lack of "explicit procedural protections" if students are not identified as disabled under IDEA).

90. See supra notes 84–85 and accompanying text (noting restriction of IDEA protections to students identified as disabled under IDEA's definitions).

91. 20 U.S.C. § 1415(k)(1)(C) (2012).

92. See N.Y.C. Dep't of Educ., supra note 77, at 5 (outlining school system's "progressive discipline" policy and providing for "graduated" discipline for "repeated misbehaviors").

93. See, e.g., Balfanz et al., supra note 58, at 77 ("Of the male students who were interviewed prior to incarceration, two-thirds were suspended one or more times in eighth grade. In comparison, one-quarter of nonincarcerated eighth-grade male students in the longitudinal sample were suspended."); see also Council of State Gov'ts Justice Ctr. & Pub. Policy Research Inst., Tex. A&M Univ., supra note 58, at 57 fig.13 (showing student risk of repeating grade or dropping out to more than double after just *one* discretionary disciplinary violation of any kind, compared to students with no discretionary violations); N.Y. Civil Liberties Union, supra note 35, at 13 ("These suspensions are the first 'push' into the school-to-prison pipeline."). The more severe the sanction, the more difficult a student may find it to reenter the educational system, diverting them even more forcefully away from schools. See Casella, supra note 15, at 63–65 (explaining one-way effect of pipeline). The implementing regulations of section 504 of the Rehabilitation Act also guarantee a free and appropriate public education along the same, though less clear-cut, lines as the

Finally, once a student is eligible for IDEA removal protections, any potential remedy is limited. The student has already been adjudicated as having behaved in a way that deserves punishment. All the IDEA entitles a student to is a "manifestation determination" by a school and parent team as to whether the behavior triggering the discipline "was caused by, or had a direct and substantial relationship to, the child's disability."[94] However, the manifestation determination is only triggered *after* the student has been given a suspension of more than ten days; by this point, the student can no longer contest the underlying facts; the adjudication itself is over.[95] If the determination team finds the student's disability caused the misbehavior, the student may not be removed,[96] and his or her individual education program—the document specifying the services the IDEA-eligible student is to receive from the school—must be revised to include a "behavioral intervention plan."[97] Congress further limited the reach of the manifestation determination in the 2004 IDEA reauthorization, making it harder to prove the causal relationship between the behavior creating the disciplinary problem and the student's disability.[98] Among the advocacy community, there is a belief that the manifestation determination has been watered down.[99]

Fundamentally, the IDEA has failed and is continuing to fail to protect students with disabilities, especially poor, minority disabled students, from avoiding punitive school discipline policies. It has not shielded students with disabilities from removal from school. And, even when schools

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IDEA. See 34 C.F.R. § 104.36 (2015) (requiring procedural safeguards for changes in placement without further detail, but specifying compliance with IDEA protections is sufficient). The statute is not explicit on this point, but DOE guidance specifies that procedural protections on removal are not triggered until a student is suspended for more than ten days. See Catherine D. Anderle, Helping Schools Make the Grade, Mich. B.J., Feb. 2001, at 52, 57 ("OCR's policy is that when the exclusion of a child with a disability is permanent . . . or for an indefinite period or for more than 10 consecutive school days, the exclusion constitutes a 'significant change in placement' [requiring procedural safeguards] . . . .").

94. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1)(i). There is a small exemption for incidents involving "weapon[s]," "illegal drugs," or "serious bodily injury." 20 U.S.C. § 1415(k)(1)(G).

95. It may seem strange to refer to informal school disciplinary decisions as "hearings" or "adjudications," but this is essentially how the Supreme Court has defined them in applying Fourteenth Amendment due process protections to these events. See Goss v. Lopez, 419 U.S. 565, 577–83 (1975) (describing school disciplinary decisions as "hearing[s]"); cf. infra notes 100–105 and accompanying text (outlining how school discipline is legally cognizable).

96. 34 C.F.R. § 300.530(f)(2); see also 20 U.S.C. § 1415(k)(1)(F)(iii).

97. 20 U.S.C. § 1415(k)(1)(F)(i).

98. See generally Melinda Baird Jacobs, Manifestation Determinations: The Search for Meaning 3–4 (2009), http://www.ksde.org/Portals/0/SES/legal/conf09/2009-1b%20manifestation%20determinations.outline.pdf [http://perma.cc/ZG6X-9UVY] (giving standard for manifestation determination under 1997 reauthorization of IDEA).

99. See N.Y. Civil Liberties Union, supra note 35, at 54 n.164 ("Before 2004, the special education committee was required to consider more factors during the manifestation review than they do today . . . .").

respect IDEA protections, the procedures are only triggered *after* a student has been adjudicated in violation of a school's policies.

In addition to the IDEA's statutory protections for students with disabilities, constitutional law operates in the background of school discipline. However, it is unlikely to be an effective tool in preventing the diversion of students—with or without disabilities—out of schools. Constitutional due process attaches to suspension hearings[100] but is satisfied by informal hearings.[101] The informality of the hearings means that counsel is not provided, nor is a student entitled to procure counsel: The hearing happens in the moment.[102] This immediacy and informality redounds to the detriment of students whose disabilities impede their ability to participate in the quick verbal exchange envisaged by the Court—the same class of students already disadvantaged by the disproportionate discipline to which they are exposed.[103] Further, the immediacy of the constitutionally sufficient hearing suggests that only the student and the school decisionmaker are involved. The fact that this disadvantage is acute for students with disabilities, and especially for students of color with disabilities, is why this Note focuses on a remedy for this class in particular. In the interest of better protecting this student population from noneducational discipline, this Note proposes using the ADA to obtain some kind of advocate for students with disabilities in these hearings,[104] a right not available under the IDEA.[105]

B. *The ADA and Its Amendments: Toward a Prima Facie Case*

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[106] The ADA was enacted seventeen years

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100. See *Goss*, 419 U.S. at 581 (holding, for "suspension[s] of 10 days or less," due process entitles students to "oral or written notice of the charges against him[,] . . . an explanation of the evidence[,] . . . and an opportunity to present his side of the story").

101. See id. at 584 (requiring "at least an informal give-and-take between student and disciplinarian" before suspension may be imposed, but no more).

102. Id.

103. See supra section I.A (discussing school-to-prison pipeline).

104. See infra Part III (discussing potential ADA claim).

105. See supra notes 94–99 and accompanying text (explaining manifestation determinations are inadequate because they happen only after students have already been adjudicated as deserving discipline).

106. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 329 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)). For an excellent historical background on the passage of the ADA written at the time of its passage, see generally Robert E. Rains, A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications, 11 St. Louis U. Pub. L. Rev. 185 (1992). For a more recent account of the ADA's enactment written after the Supreme Court's series of narrow interpretations of the ADA, see Michael Selmi, Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Does Not Care, 76 Geo. Wash. L. Rev. 522, 538–47 (2008).

after the Rehabilitation Act of 1973,[107] which provides similar protections,[108] but which applies only to "the federal government, federal grantees and federal contractors, in certain situations."[109] In addition, the Rehabilitation Act has only limited enforcement mechanisms.[110] The ADA "specifically prohibit[s] discrimination in the contexts of employment, public services, and public accommodations operated by private entities."[111] This Note focuses on Title II of the Act, which applies to public services, such as public schools.[112]

Despite the ADA's intended breadth, the Supreme Court initially interpreted the statute's definition of "disability" quite restrictively, limiting the ADA's coverage to individuals with *noncorrectable* disabilities that restrict the ability to perform tasks of *central importance* to most people's lives.[113] In response, Congress amended the ADA by passing the ADAAA in

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107. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered titles of the U.S.C.). The key part of the Rehabilitation Act is section 504. Id. at 394. The Act itself is often referred to simply as "section 504" or even "504." E.g., Selmi, supra note 106, at 532.

108. See Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) ("[W]e treat claims under the two statutes [ADA and Rehabilitation Act] identically.").

109. Rains, supra note 106, at 198.

110. See id. at 190 ("[T]here were no regulations promulgated by the federal government [to implement section 504] until the [federal] government was sued.").

111. Lisa Eichhorn, Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990, 77 N.C. L. Rev. 1405, 1421 (1999) (footnotes omitted).

112. It is generally accepted that the provisions of the ADA and section 504 are the same as applied to state and local government entities receiving federal funding. See *Henrietta D.*, 331 F.3d at 272 ("[W]e treat claims under the two statutes [ADA and section 504] identically."); DOE FAQ, supra note 77, at 2 ("Because Title II essentially extends the antidiscrimination prohibition embodied in Section 504 to all actions of State and local governments, the standards adopted in Title II are generally the same as those required under Section 504."). See generally Mark C. Weber, Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, 36 Wm. & Mary L. Rev. 1089, 1097–116 (1995) (evaluating similarities and differences between Title II and section 504 and noting "Congress intended section 504 and title II to have many more similarities than differences").

113. See, e.g., Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187 (2002) (defining ADA standard for disability as "whether [an individual's] impairments prevent[] or restrict[] her from performing tasks that are of *central importance* to most people's daily lives" (emphasis added)); Sutton v. United Air Lines, Inc., 527 U.S. 471, 488–89 (1999) (holding individuals with correctable disabilities not covered by ADA). Though these cases dealt with employees, the Court's holding was not restricted to Title I suits and so applied to all ADA litigation. See Perry A. Zirkel, Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?, 40 J.L. & Educ. 407, 408 (2011) (noting "lower courts [have] applied" *Williams* and *Sutton* "to students"). Despite these restrictive interpretations, the Court was not uniformly hostile to the ADA during this era. See, for example, Tennessee v. Lane, 541 U.S. 509, 533–34 (2004), where the Court upheld private suits against state and local governments under Title II of the ADA as valid legislation pursuant to Congress's enforcement power under Section Five of the Fourteenth Amendment.

2008,[114] expressly overruling the decisions that had restricted the ability of plaintiffs to prevail on ADA claims[115] dramatically expanding the kinds of disabilities that give rise to ADA claims,[116] and removing much of the onus of proving substantial disability from the plaintiff.[117] Left unclear, however, was whether the Supreme Court would rely on some other provision of the ADA to fulfill the "gatekeeping" function that the ADAAA had seemed to diminish.[118]

Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[119] It further provides that "the Attorney General shall promulgate regulations in an accessible format that implement this part."[120]

The effect of the new ADAAA standards is unclear because the amendments have been interpreted as nonretroactive, and thus as applying only to *conduct* after the amendments' January 1, 2009 effective date,[121] and

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114. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (amending Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327) (codified at 42 U.S.C. §§ 12101–12213 (2012)).

115. See id. sec. 2(b) (expressing purpose of Act to reject "requirement" and "reasoning" from *Sutton*, as well as "standards" of *Williams*); see also James P. Drohan, The Americans with Disabilities Act and Section 504 Update, 26 Touro L. Rev. 1173, 1178–82 (2011) (detailing changes made to ADA by ADAAA).

116. See ADA Amendments Act of 2008 sec. 4, § 3(4)(A) ("The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.").

117. See Kerri Stone, Substantial Limitations: Reflections on the ADAAA, 14 N.Y.U. J. Legis. & Pub. Pol'y 509, 532–33 (2011) [hereinafter Stone, Substantial Limitations] (cataloguing ways ADAAA "dramatically expanded coverage" compared to ADA).

118. Hillary K. Valderrama, Comment, Is the ADAAA a "Quick Fix" or Are We Out of the Frying Pan and Into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA, 47 Hous. L. Rev. 175, 203 (2010) ("Given . . . the likelihood that the ADAAA will result in increased litigation, courts have similar incentives to establish another gatekeeping mechanism." (footnote omitted)).

119. 42 U.S.C. § 12132.

120. Id. § 12134(a). Regulations implementing Title II are found in Part 35 of Title 28 of the Code of Federal Regulations. See 28 C.F.R. § 35.101 (2015).

121. See Reynolds v. Am. Nat'l Red Cross, 701 F.3d 143, 151 (4th Cir. 2012) ("[T]here is no language in the ADAAA indicating that Congress intended to make this law retroactive; in fact, the indication is to the contrary."); Latham v. Bd. of Educ., 489 F. App'x 239, 245 (10th Cir. 2012) ("[F]ederal law would dictate that we presume that the ADAAA does not apply [retroactively] to this case."); Britting v. Sec'y, Dep't of Veterans Affairs, 409 F. App'x 566, 569 (3d Cir. 2011) ("[T]he ADAAA cannot be applied retroactively."); Nyrop v. Indep. Sch. Dist. No. 11, 616 F.3d 728, 734 n.4 (8th Cir. 2010) ("[T]he [ADAAA] is not retroactive . . . ."); Ragusa v. Malverne Union Free Sch. Dist., 381 F. App'x 85, 87 n.2 (2d Cir. 2010) ("[W]e here apply the version of the statute in effect during the time period at issue . . . ."); Becerril v. Pima Cty. Assessor's Office, 587 F.3d 1162, 1164 (9th Cir. 2009) (per curiam) ("[T]he ADAAA does not apply retroactively . . . ."); Thornton v. United Parcel Serv., Inc., 587 F.3d 27, 34 n.3 (1st Cir. 2009) ("[T]he [ADAAA] is not retroactive . . . ."); Lytes v. DC Water & Sewer Auth., 572 F.3d 936, 941 (D.C. Cir. 2009) ("[T]he delayed effective date in the ADAA . . . admits of only one explanation: The Congress in-

because the DOJ has yet to update the Title II implementing regulations based on the ADAAA.[122] These new regulations are unlikely to change much about ADA litigation, as they do little more than incorporate the findings and purpose of the ADAAA.[123] Because of this continuity, pre-ADAAA case law can provide significant guidance.

To establish a prima facie case of discrimination under Title II of the ADA, the plaintiff must first show that he or she is a "qualified individual with a disability."[124] This, in turn, is defined in the existing regulations as "an individual with a disability who, with or without reasonable modifications . . . , meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[125] The "eligibility" requirement, which will not be difficult to prove, is addressed first.[126] Next, the "disability" element is examined.[127] Although this element was formerly the gatekeeper for ADA claims, the

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tended the statute to have prospective only effect."); Milholland v. Sumner Cty. Bd. of Educ., 569 F.3d 562, 567 (6th Cir. 2009) ("[T]he [ADAAA] does not apply to pre–amendment conduct."); Fikes v. Wal-Mart, Inc., 322 F. App'x 882, 883 n.1 (11th Cir. 2009) (per curiam) (noting "presumption against retroactive application" of statutes and concluding "we look to the ADA as it was in effect at the time of the alleged discrimination"); EEOC v. Agro Distrib., LLC, 555 F.3d 462, 470 n.8 (5th Cir. 2009) ("Congress recently enacted the [ADAAA] . . . but these changes do not apply retroactively."); Kiesewetter v. Caterpillar Inc., 295 F. App'x 850, 851 (7th Cir. 2008) ("After the district court entered its judgment, Congress amended the ADA's definition of 'disability' . . . [but] it does not apply to this appeal."). An empirical analysis of district court summary judgment decisions in ADA Title I cases between January 1, 2010 , and April 30, 2013, found only fifty-five cases decided under the ADAAA out of 182 total decisions, barely thirty percent of the total. Stephen F. Befort, An Empirical Examination of Case Outcomes Under the ADA Amendments Act, 70 Wash. & Lee L. Rev. 2027, 2031, 2050 (2013) [hereinafter Befort, Empirical Examination].

122. See Office of the Attorney Gen., Dep't of Justice, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, Fed. Reg. (Jan. 30, 2014), https://federalregister.gov/a/2014-01668 [http://perma.cc/K34F-YU9L] (displaying proposed timeline for promulgation with final action due in March 2015). Although the final rule was due to be promulgated in March 2015, it has yet to be published in the Federal Register as of September 11, 2015. See id. (showing final rule has yet to be published).

123. See Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839, 4857–60 (proposed Jan. 30, 2014) (to be codified at 28 C.F.R. pts. 35, 36) (listing amendments to Title II implementing regulations, all focusing on disability determination). But see William D. Goren, Expect Huge Impact from DOJ Regulations Implementing Titles II and III of ADAAA (July 3, 2014, 12:00 AM), http://www.disabilitycomplianceforhighereducation.com/Article-Detail/expect-huge-impact-from-doj-regulations-implementing-titles-ii-and-iii-of-adaaa.aspx [http://perma.cc/D8NW-YZ4C] (arguing new regulations will significantly change ADA litigation).

124. 42 U.S.C. § 12132.

125. 28 C.F.R. § 35.104.

126. See infra section II.B.1 (discussing program eligibility prong of ADA claim).

127. See infra section II.B.2 (discussing expansiveness of current ADA definition of disability).

ADAAA almost certainly changed this.[128] Last to be discussed is the accommodation–fundamental alteration dyad, which will likely make or break the proposed claim in the post-ADAAA era.[129]

1. *Program Eligibility.* — An individual establishes eligibility under the ADA if he or she meets the requirements to participate in a government program "with or without reasonable modifications."[130] In *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court concluded that this provision applies to government programs regardless of whether participation is voluntary.[131] In *Yeskey*, a disabled prisoner claimed that the state violated the ADA by failing to make the reasonable accommodations necessary to enable him to participate in a boot camp program in the prison.[132] Although participation in the boot camp program was voluntary, the Court held that inmates would be covered under the ADA regardless "because the words [of the statute] do not connote voluntariness."[133] Under this language, mandatory education laws make any child within the requisite age range presumptively eligible for school services through the ADA, notwithstanding the mandatory character of school attendance and suspension hearings.[134]

2. *Defining Disability.* — After demonstrating eligibility, an individual must establish that he or she has "a disability" sufficient to qualify for the ADA's protection. There are three ways to do this: by proving that he or she has "a physical or mental impairment that substantially limits one or more major life activities,"[135] by relying on "a record of such an impairment,"[136] or by proving that he or she is "regarded as having such an impairment" by virtue of "be[ing] subjected to [discrimination] because of an actual or perceived physical or mental impairment."[137]

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128. See supra notes 114–118 and accompanying text (noting how ADAAA expands definition of disability).

129. See infra section II.B.3 (examining limits of accommodation under ADA). Accommodation is addressed first, in section II.B.3.i, followed by necessity in section II.B.3.ii, and finally the fundamental alteration defense is analyzed in section II.B.3.iii.

130. 28 C.F.R. § 35.104.

131. 524 U.S. 206, 211 (1998).

132. See id. at 208.

133. Id. at 211.

134. Cf. Goss v. Lopez, 419 U.S. 565, 572–76 (1975) (explaining how state's compulsory education law, though not required by federal constitution, nonetheless creates each "student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause").

135. 42 U.S.C. § 12102(1)(A) (2012).

136. Id. § 12102(1)(B).

137. Id. §§ 12102(1)(C), 12102(3)(A). Under the ADA as originally enacted, there was a circuit split on whether individuals "regarded as" disabled could claim a reasonable accommodation. See D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005) (noting circuit split and citing cases). However, the ADAAA resolved this by excluding individuals only "regarded as" disabled from reasonable accommodation. 42 U.S.C. § 12201(h).

The ADAAA greatly broadened the scope of both the "substantially limits" and "major life activity" statutory thresholds,[138] in contrast to the IDEA's more limited eligibility restrictions discussed above.[139] Congress expanded the definition of "major life activities" to include such activities as "speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[140] Additionally, Congress expressly incorporated a finding that the Supreme Court had previously defined the "substantially limits" language too narrowly.[141] Finally, the ADAAA specifies that disability "determination[s] . . . shall be made *without* regard to the ameliorative effects of mitigating measures"[142] such as "medications,"[143] "assistive technology,"[144] "reasonable accommodations or auxiliary aids or services,"[145] and "learned behavioral or adaptive neurological modifications."[146] Together, these changes neutralized what had been the main gatekeeper under ADA case law prior to the ADAAA,[147] when defendants typically prevailed by showing that the plaintiff did not qualify as an individual with a disability.[148]

3. *Accommodation and Its Limits.* — Once an individual establishes disability and program eligibility, the final component of an ADA claim is proving that a government entity deprived the plaintiff of access to the

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138. See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b)(5), 122 Stat. 3553, 3554 (noting congressional purpose of emphasizing question of "whether entities covered under the ADA have complied with their obligations" and further specifying "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis"); see also DOE FAQ, supra note 77, at 3 ("The Amendments Act does not alter [the] three elements of the definition of disability . . . . But it significantly changes how the term 'disability' is to be interpreted.").

139. See supra section II.A (discussing IDEA limitations, in part due to eligibility restrictions).

140. ADA Amendments Act of 2008, sec. 4, § 3(2)(A) (codified at 42 U.S.C. § 12102(2)(A)). Importantly, the statute specifies that "major life activities include, but are not limited to" the statutory list, potentially allowing even broader interpretations. Id.

141. See id. § 3(4)(B) (codified at 42 U.S.C. § 12102(4)(B)) ("The term 'substantially limits' shall be interpreted consistently with the findings and purpose of the [ADAAA].").

142. Id. § 3(4)(E)(i) (codified at 42 U.S.C. § 12102(4)(E)(i)) (emphasis added). The only exception is for "ordinary eyeglasses or contact lenses." Id. § 3(4)(E)(ii) (codified at 42 U.S.C. § 12102(4)(E)(ii)).

143. Id. § 3(4)(E)(i)(I) (codified at 42 U.S.C. § 12102(4)(E)(i)).

144. Id. § 3(4)(E)(i)(II).

145. Id. § 3(4)(E)(i)(III).

146. Id. § 3(4)(E)(i)(IV).

147. See, e.g., Samuel R. Bagenstos, Subordination, Stigma, and "Disability," 86 Va. L. Rev. 397, 404 (2000) ("The 'disability' category thus serves a gatekeeping function in the statute.").

148. See, e.g., John E. Rumel, Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment, 51 Santa Clara L. Rev. 515, 540 (2011) (noting "well-documented" pre-ADAAA "tendency of the Supreme Court and other courts . . . to resolve disability discrimination cases . . . at the summary judgment stage . . . by determining that a plaintiff is not disabled within the meaning of the ADA . . .").

relevant government program by denying the plaintiff a "reasonable modification[]" of the program—a modification that would not have "fundamentally alter[ed] the nature" of the program.[149] Striking this balance between what is reasonable for an individual with disabilities and what is fundamental to a given program will likely become the crux of ADA adjudication in the wake of the ADAAA.[150]

Unfortunately, as a result of the newness and nonretroactivity of the ADAAA,[151] as well as the focus of pre-ADAAA law on the disability threshold, which the ADAAA lowered,[152] the case law interpreting the reasonable accommodation standard is relatively sparse. Guidance is all the sparser because the majority of both pre- and post-ADAAA litigation has been brought under Titles I and III of the ADA, covering private entities and public accommodations, respectively, which word their analogous standards differently from Title II's wording.[153]

In addition to relying on elaborations of these standards in the statute, academic literature, and circuit and Supreme Court case law, this Note pays particular attention to a series of three district court orders from the *Franco-Gonzales v. Holder* litigation. In that case, a class of individuals with mental disabilities successfully claimed that the Board of Immigration Appeals (BIA) violated the Rehabilitation Act by denying them representation in deportation proceedings.[154] The *Franco-Gonzales*

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149. 28 C.F.R. § 35.130(b)(7) (2015).

150. See Befort, Empirical Examination, supra note 121, at 2070 (finding defendant "win rate" on summary judgment motions contesting plaintiff disability status declined from 74.4% in pre-ADAAA cases to 45.9% in post-ADAAA cases). Befort analyzed Title I suits exclusively, and found that post-ADAAA Title I summary judgment motions focused much more heavily on whether the plaintiff was a "qualified individual." Id. at 2070–71. However, as noted above, see supra text accompanying notes 130–133, qualifying for a program is less likely to be at issue in the education context.

151. See supra note 121 and accompanying text (noting nonretroactivity of ADAAA and cataloging cases in each circuit holding this).

152. See supra notes 138–148 and accompanying text (discussing focus on disability as gatekeeper for pre-ADAAA ADA claims compared to broader ADAAA definition).

153. Compare 42 U.S.C. § 12112(b)(5)(A) (2012) (requiring covered entities to provide "reasonable accommodations" in employment unless accommodations would "impose an undue hardship" on entity), and id. § 12182(b)(2)(A)(ii) (requiring "reasonable modifications" to allow individuals with disabilities access to public accommodations unless "such modifications would fundamentally alter the nature of" public accommodations), with id. § 12132 (defining discrimination by public entities as situations where "qualified individual with a disability [is], by reason of such disability, . . . excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity, or [is] subjected to discrimination by any such entity"). While the Supreme Court has not addressed the issues, several circuits have held "the failure-to-accommodate method of proving discrimination . . . appl[ies] to Title II" based on the legislative history. E.g., Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840, 848 (7th Cir. 1999).

154. For a summary of the factual and procedural background of the case, see Franco-Gonzalez v. Holder (*Franco-Gonzalez III*), No. CV 10-02211, 2013 WL 3674492, at *1–3 (C.D. Cal. 2013). The two other orders relevant to this Note are Franco-Gonzales v. Holder (*Franco-Gonzales I*), 767 F. Supp. 2d 1034 (C.D. Cal. 2010), and Franco-Gonzales v. Holder

claim thus mirrors the claim proposed here that schools violate the ADA by denying representation to students with disabilities facing disciplinary hearings.

i. *The Right: Reasonable Accommodation.* — When plaintiffs bring an ADA claim, they must allege discrimination by reason of disability. One of the "[g]eneral prohibitions against discrimination" by public entities is the requirement to "make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program or activity."[155] Regulations define discrimination on the basis of disability in various ways. Most relevant to school disciplinary hearings is the idea that "[a] public entity, in providing any . . . service[] may not . . . on the basis of disability . . . [a]fford a qualified individual with a disability an opportunity to participate in . . . the . . . service that is not equal to that afforded others."[156] The baseline thus is access to services: Schools must provide students with disabilities with an opportunity to participate in suspension and other disciplinary hearings.[157]

In the wake of the ADAAA, the reasonable accommodation analysis presents a statutory concept "as slippery as . . . disability itself," and courts have interpreted the meaning of accommodation inconsistently.[158] Still, it is clear that the standard focuses on the "meaningful access to which [individuals with disabilities] are entitled,"[159] rather than on comparing the individuals with disabilities to "similarly situated individuals given preferential treatment."[160] Thus, claimants need not limit their contention to the level of access enjoyed by a nondisabled class; they can succeed if

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(*Franco-Gonzales II*), 828 F. Supp. 2d 1133 (C.D. Cal. 2011). For an unclear reason, the lead plaintiff's last name is spelled differently in the third order in the case, but all three orders are from the same litigation. For useful case background and a discussion of possible implications, see generally Leslie Wolf, Note, After *Franco-Gonzalez v. Holder*: The Implications of Locating a Right to Counsel Under the Rehabilitation Act, 23 S. Cal. Rev. L. & Soc. Just. 329, 331–35 (2014).

155. 28 C.F.R. § 35.130(b)(7) (2015) (emphasis added).

156. Id. § 35.130(b)–(b)(1)(ii).

157. Deliberate indifference by defendants is required to support a claim for money damages, but if only injunctive relief is sought, the failure to allow meaningful access is sufficient. See Alexander v. Choate, 469 U.S. 287, 301 (1985) ("[A]n otherwise qualified handicapped individual must be provided with meaningful access to [government services].").

158. Note, Three Formulations of the Nexus Requirement in Reasonable Accommodations Law, 126 Harv. L. Rev. 1392, 1392 (2013) [hereinafter Three Formulations of the Nexus Requirement]; see also Stone, Substantial Limitations, supra note 117, at 538 (identifying "persistence of unresolved issues from the previous regime, compounded with certain changes effected by the [ADAAA]" and calling for "further attention" to reasonable accommodation analysis).

159. *Choate*, 469 U.S. at 301. Although *Choate* involved a claim under the Rehabilitation Act, claims under the ADA are evaluated in the same way. See supra notes 107–110 and accompanying text (citing sources explaining overlap of ADA and Rehabilitation Act).

160. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 598 (1999).

they show that, without the accommodation requested, they are unable to meaningfully access the government service to which they are entitled.[161] In fact, even modifications that would provide the class of individuals with disabilities an advantage compared to individuals without disabilities are potentially available under the ADA; as the Supreme Court has noted, "[P]references will sometimes prove necessary to achieve the [ADA's] basic equal opportunity goal."[162]

The precise definition of "meaningful access" is elusive, in line with the ADA's preference for individualized, fact-sensitive determinations, rather than uniform rules.[163] Still, the text of the ADA's implementing regulations gives some insight. The regulations focus on "obtain[ing] the same result" by prohibiting programs that give individuals with disabilities "an opportunity to participate in . . . service[s] that is not equal to that afforded others."[164] The notion of what it means to *participate* fully in a school suspension hearing is essential to the reasonable accommodation inquiry and shall be addressed more fully below.[165]

The *Franco-Gonzales* court's treatment of these issues in the context of deportation hearings is instructive. In that litigation, plaintiffs were individuals with disabilities who sought representation in deportation proceedings before the BIA under the Rehabilitation Act.[166] Defendants claimed that the named plaintiff's father could supply the requisite representation.[167] The court specifically rejected this argument, finding the lead plaintiff's father lacked "adequate knowledge, information, and experience in immigration law and procedure to represent his son."[168] Ultimately, the court concluded that the plaintiffs were entitled to nonfamilial representation at the government's expense if they could not find a

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161. See Henrietta D. v. Bloomberg, 331 F.3d 261, 282 (2d Cir. 2003) ("That others cannot avail themselves of the service does not make . . . minimal access . . . 'meaningful.' . . . [M]eaningful access must be defined with reference to the plaintiff's facial entitlement to benefits . . . . The mere fact that the plaintiffs . . . might not be doing worse than persons without disabilities[] does not render the [service] 'reasonable.'"); cf. Nunes v. Mass. Dep't of Corr., 766 F.3d 136, 145 (1st Cir. 2014) ("Although . . . claims [of denial of meaningful access] can be seen as bearing many of the indicia of disparate impact or disparate treatment, a plaintiff pursuing such a claim need not directly address and satisfy the elements or methods for proving such theories." (footnote omitted)).

162. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

163. See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001) ("[A]n *individualized inquiry* must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration." (emphasis added)).

164. 28 C.F.R. § 35.130(b)(1)(iii), (b)(1)(ii) (2015).

165. See infra section III.C (discussing type of likely accommodations in school discipline context).

166. Franco-Gonzalez v. Holder (*Franco-Gonzales III*), No. CV 10-02211, 2013 WL 3674492, at *1–3 (C.D. Cal. Apr. 23, 2013).

167. Franco-Gonzales v. Holder (*Franco-Gonzales II*), 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011).

168. Id. (internal quotation marks omitted).

pro bono representative.[169] The court drew on a DOJ regulation's definition of "accredited representative" in finding parental representation inadequate and further relied on it as a guideline for the separate "qualified representative" inquiry not defined in the regulations.[170]

This relief was not necessarily a lawyer, but rather a "[q]ualified [r]epresentative," defined as either an attorney, a law student or graduate "directly supervised by a retained attorney," or an "accredited representative" as defined in DOJ immigration-court practice regulations.[171] This fulfilled plaintiffs' request for a representative who would be:

> [O]bligated to provide zealous representation[,] . . . subject to sanction . . . for ineffective assistance[,] . . . free of any conflicts of interest[,] . . . [and who would] have adequate knowledge and information to provide representation at least as competent as that provided by a detainee with ample time, motivation, and access to legal materials[,] . . . [and who would] maintain confidentiality.[172]

ADA claims generally require individualized inquiry, and the treatment of the *Franco-Gonzales* plaintiffs' claims follows this model.[173] However, the court later granted class certification to similarly situated individuals with disabilities subject to deportation proceedings[174] and granted relief to the entire class.[175] This is promising because it means that, even if individualized determinations of disability are necessary, class relief to all similarly situated students is possible, reducing the need to relitigate the issue.[176]

ii. *The Fit: Necessity.* — The governing regulation limits required "modifications [to those that] are *necessary* to avoid discrimination on the basis of disability."[177] Interpreting this "nexus requirement,"[178] the courts have required proof that the requested accommodation solves only the exclusion from the service that arises by reason of disability. In effect, the claimant must show that a program or service is inaccessible due to his or

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169. *Franco-Gonzalez III*, 2013 WL 3674492, at *3, *5–6.

170. Id.

171. Id.

172. Franco-Gonzales v. Holder (*Franco-Gonzales I*), 767 F. Supp. 2d 1034, 1058 (C.D. Cal. 2010).

173. Id. at 1053 (focusing inquiry on "individual characteristics" of two plaintiffs).

174. Franco-Gonzales v. Napolitano, No. 10-02211, 2011 WL 11705815, at *16 (C.D. Cal. Nov. 21, 2011).

175. *Franco-Gonzalez III*, 2013 WL 3674492, at *2, *8 (granting summary judgment on reasonable-accommodation claim to individuals subject to deportation proceedings "in California, Arizona, and Washington" who presently lack counsel and "who have a serious mental disorder or defect that renders them incompetent to represent themselves").

176. For further discussion of possible class relief for students in this proposed claim, see infra text accompanying note 213.

177. 28 C.F.R. § 35.130(b)(7) (2015) (emphasis added).

178. See generally Three Formulations of the Nexus Requirement, supra note 158 (using case law to develop formulations of accommodation–disability nexus requirement).

her disability and that the requested accommodation will eliminate that barrier. The *Franco-Gonzales* plaintiffs addressed this barrier by showing that the disabilities of each plaintiff prevented him or her from engaging in an immigration hearing; the plaintiff class was also limited to individuals whose disabilities would "render[] them incompetent to represent themselves in detention or removal proceedings."[179] Thus, while any given plaintiff would have to show that he or she fit into this class, the class itself was defined in terms of the necessity of the accommodation.

iii. *The Limit: Fundamental Alteration.* — The duty to accommodate individuals with disabilities discussed above[180] is moderated by the "fundamental alteration" affirmative defense: If the public entity can prove the requested accommodation would require it to fundamentally alter the service, there is no duty to accommodate. Several circuits have held that fundamental alteration analysis takes budgetary concerns into account, but money alone cannot be determinative.[181] A plurality of the Supreme Court in *Olmstead v. L.C. ex rel. Zimring* took a similar approach, allowing public entities in addressing the "fundamental-alteration" issue "to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable."[182] Because Justice Stevens rejected this analysis in a separate concurrence that was necessary to establish a majority for the result reached,[183] the plurality's view does not have precedential force.[184] Still, lower courts have generally followed the *Olmstead* plurality in allowing budgetary constraints to play a role in the "fundamental-alteration" analysis while at the same time declining to let "vaguely-defined fiscal constraints" trump the ADA's requirements.[185]

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179. *Franco-Gonzales III*, 2013 WL 3674492, at *2.

180. See supra section II.B.3.i (discussing reasonable accommodation prong of ADA).

181. Pashby v. Delia, 709 F.3d 307, 323–24 (4th Cir. 2013) ("We join the Third, Ninth, and Tenth Circuits in holding that, although budgetary concerns are relevant to the fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense.").

182. 527 U.S. 581, 604 (1999) (plurality opinion).

183. Id. at 607 (Stevens, J., concurring in part and concurring in the judgment) (expressing preference to "affirm the judgment" below fully, including on "fundamental-alteration defense" but concurring "because there are not five votes for that disposition" (internal quotation marks omitted)).

184. See, e.g., Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell & Stevens, JJ.)).

185. Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487, 494, 496 (3d Cir. 2004) ("*Olmstead* directs courts to evaluate the fundamental-alteration defense in light of the state's resources and its responsibility to continue providing services to [other populations] . . . . [But] states cannot sustain a fundamental-alteration defense based solely upon the conclusory invocation of vaguely-defined fiscal constraints."); L.C. ex rel. Zimring v. Olmstead, 138 F.3d 893, 902 (11th Cir. 1998), vacated in relevant part, 527 U.S. 581.

States must prove fundamental alteration by focusing on the nature and purpose of the rule or practice being challenged and by arguing that the modification sought goes against this nature and purpose.[186] The Supreme Court's only foray into fundamental alteration is *PGA Tour, Inc. v. Martin*, in which a professional golfer with a degenerative circulatory disorder sought to use a golf cart as his accommodation during the final round of a tournament to qualify for the PGA golf tournament.[187] Martin argued that he was entitled to use the golf cart as a reasonable accommodation, despite the fact that a rule for this tournament required participants to walk. In support of his argument, the ADA's sponsors in Congress pointed out the "very few examples of the application of the fundamental alteration limitation" in the "[c]ongressional committee reports" indicated that "Congress intended the standard of altering the essential nature of an activity or service to be a stringent one."[188] The Supreme Court ruled that fundamental alterations are those changes "inconsistent with the fundamental character" of the activity, and that walking during a tournament "is not an essential attribute of the game itself."[189] Commentators have noted the fuzziness of this elucidation of the standard, citing the "[c]onfusion in *Martin*'s [w]ake" among lower courts.[190]

Martin was decided in 2001, two years after *Olmstead* and seven years before the ADAAA.[191] Although the *Martin* standard seems to focus on

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186. See PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–83 (2001) (describing fundamental-alteration inquiry as focusing on "essential aspect" of activity, and limiting fundamental alterations to changes "inconsistent with the fundamental character" of activity).

187. Id. at 665–69. Though the claim in *Martin* was brought under Title III of the ADA, the three titles of the ADA are generally interpreted as including identical requirements and defenses. See supra note 153 (noting consistent interpretation of all three ADA titles).

188. Brief Amici Curiae of the Honorable Robert J. Dole et al. in Support of Respondent, *Martin*, 532 U.S. 661 (No. 00-24), 2000 WL 1846087, at *25. Michael Selmi has noted that the ADA was passed in large part thanks to the efforts of its dedicated congressional sponsors with a personal connection to disability in some way. See Selmi, supra note 106, at 538–39, 563–64 (explaining personal connection of sponsors and concluding "focusing on the views of the . . . sponsors would not have provided much more than a general directive . . . to . . . construe[] [ADA] broadly").

189. *Martin*, 532 U.S. at 683, 685.

190. Kerri Lynn Stone, The Politics of Deference and Inclusion: Toward a Uniform Framework for the Analysis of "Fundamental Alteration" Under the ADA, 58 Hastings L.J. 1241, 1258 (2007) [hereinafter Stone, Politics of Deference]; see also id. at 1276 (arguing courts have "struggle[d] to construct a cogent discourse" about fundamental alteration, analyzing issue "in an ad hoc manner" with widely divergent deference granted to defendants); Melissa Ann Resslar, Note, *PGA Tour, Inc. v. Martin*: A Hole in One for Casey Martin and the ADA, 33 Loy. U. Chi. L.J. 631, 688 (2002) ("[T]he *Martin* decision leaves [covered entities] with little guidance in determining whether a requested modification is reasonable . . . .").

191. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213 (2012)) (amending Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327); *Martin*, 532 U.S. 661; Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

the impact of the accommodation relative to the activity at issue, the Court's holding in *Olmstead* allowed ADA claims to be brought that significantly alter residential treatment programs for individuals with disabilities.[192] Thus, large-scale, systemic reform through ADA litigation is not necessarily precluded due to the size of the change sought. Instead, the emphasis is on the characteristics of the program at issue.

Supporting this analysis is *Franco-Gonzales*, which ordered the BIA to provide plaintiffs with advocates in immigration hearings at government expense despite the lack of "a budget, or . . . any established structure" to provide representation.[193] In doing so, the court in *Franco-Gonzales* was emphatic that it was neither extending plaintiffs a new right nor expanding the scope of their existing rights by mandating representation.[194] The plaintiffs were not seeking the right to counsel in deportation proceedings. Rather, they sought an accommodation—representation—that would allow them to access their *existing* right to "meaningfully participate in their removal proceedings" by "examin[ing] the evidence" against them, "present[ing] evidence" on their own behalf, and "cross-examin[ing] witnesses" of the government, rights "beyond Plaintiffs' reach as a result of their mental incompetency."[195] While these formal trial rights do not extend to school discipline hearings, students unquestionably have the right to participate in these hearings,[196] opening the door to a claim parallel in many ways to that of *Franco-Gonzales*.

With this overview of ADA claims in place, the time is ripe to turn to the novel claim proposed by this Note.[197]

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192. See 527 U.S. at 607 (affirming lower court and holding "[s]tates are required [by ADA] to provide community-based treatment for persons with mental disabilities" as modification of state programs).

193. Franco-Gonzalez v. Holder (*Franco-Gonzalez III*), No. CV 10-02211, 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013); see also supra notes 170–172 and accompanying text (explaining nature of representation ordered in *Franco-Gonzales* litigation).

194. See *Franco-Gonzalez III*, 2013 WL 3674492, at *7–8 ("[T]he provision of a Qualified Representative is merely the *means* by which Plaintiffs may exercise the same benefits as other non-disabled individuals, and not the benefit itself.").

195. Id. at *7 (internal quotation marks omitted) (quoting 8 U.S.C. § 1229a(b)(4)(B) (2012)).

196. Goss v. Lopez, 419 U.S. 565, 583 (1975) ("We stop short of . . . requir[ing], countrywide, that hearings in connection with short suspensions must afford the student [various trial rights] . . . . On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action.").

197. In theory, state sovereign immunity could create a bar to the ADA claim proposed in Part III. The Supreme Court has held that Title II is valid prophylactic legislation under Section Five of the Fourteenth Amendment as it relates to the "constitutional right of access to the courts." Tennessee v. Lane, 541 U.S. 509, 531 (2004). In upholding private rights of action against states for access to the courts, *Lane* cited the vast history of "unequal treatment" of disabled people "in the administration of a wide range of public services, programs, and activities, including . . . public education." Id. at 525; see also id. at 525 n.12 (citing cases). While there is no federal constitutional right to education, see San Antonio

III. CONSTRUCTING AN ADA CLAIM FOR STUDENTS WITH DISABILITIES SEEKING ACCOMMODATION IN DISCIPLINARY HEARINGS

Under the ADA, students with disabilities may have a claim for representation during school suspension or expulsion hearings. This Part discusses disabled students' ADA claim for a representative's assistance in school suspension or expulsion hearings. Although the use of the ADA has been proposed as a stepping stone toward a general right to counsel in civil cases for all adults,[198] as well as in necessary accommodation claims for certain individuals in immigration and housing court,[199] the literature has not yet addressed representative-as-accommodation in the school discipline context.[200]

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."), there are two theories under which the proposed ADA claim may proceed. First, the ADA incorporates the remedies of the Rehabilitation Act, see 42 U.S.C. § 12133 (2012) (incorporating "remedies, procedures, and rights set forth in" section 505 of the Rehabilitation Act for violations of Title II of the ADA). The Rehabilitation Act applies to recipients of federal funds, and courts have held that accepting federal money constitutes waiver of sovereign immunity for section 504 claims. See, e.g., Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 280–81 (5th Cir. 2005) (en banc) ("[W]e conclude that the [Rehabilitation Act] validly conditioned Louisiana's receipt of . . . federal funds on its waiver of Eleventh Amendment immunity."); see also id. at 281 n.34 (noting "[e]ight circuits" reached same conclusion as to section 504 and other courts reached same conclusion for "other predicate statutes" of Title VI and for IDEA). While this does leave out some private schools, every public school district receives federal funding. See U.S. Census Bureau, Public Elementary–Secondary Education Finance Data, Individual Unit Tables (2012), http://www.census.gov/govs/school/historical_data_2012.html [http://perma.cc/5MQZ-X34Z]. Second, courts have held that local school districts, which conduct school disciplinary hearings, are "not arms of the state" and thus do not receive sovereign immunity protection under the Eleventh Amendment. See, e.g., Gorton v. Gettel, 554 F.3d 60, 62 (2d Cir. 2009) (noting previous holdings that "local school districts" and "local boards of education" are not arms of the state (citing Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 251 (2d Cir. 2006); Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 27–28 (2d Cir. 1986), overruled on other grounds by Taylor v. Vt. Dep't of Educ., 313 F.3d 768 (2d Cir. 2002))); Black v. N. Panola Sch. Dist., 461 F.3d 584, 598 (5th Cir. 2006) ("[W]e conclude that [the local school district] is not an arm of the state . . . .").

198. See Lisa Brodoff et al., The ADA: One Avenue to Appointed Counsel Before a Full Civil *Gideon*, 2 Seattle J. for Soc. Just. 609, 611–12 (2004) (proposing ADA claim for civil litigants to obtain counsel as ADA accommodation).

199. See Franco-Gonzales v. Holder (*Franco-Gonzales I*), 767 F. Supp. 2d 1034, 1051–58 (C.D. Cal. 2010) (discussing section 504 claim for representation brought by individuals with disabilities subject to deportation); Kevin M. Cremin & Gerald Lebovits, Accommodations and Modifications in the New York City Housing Court for Litigants with Disabilities, 38 N.Y. Real Prop. L.J. 30, 30 (2010) (proposing use of ADA, inter alia, to bring claim for representation in housing court). *Franco-Gonzales* is discussed more extensively in analyzing the reasonable accommodation prong of the claim, see infra section III.C.

200. While the application of section 504 to public schools has been extensively discussed, for example, Mark C. Weber, A New Look at Section 504 and the ADA in Special Education Cases, 16 Tex. J. on C.L. & C.R. 1 (2010) [hereinafter Weber, New Look], this literature has focused on the section 504 regulation guaranteeing a free and appropriate

As a final preliminary note, it is unclear whether administrative exhaustion—whereby a plaintiff is required to pursue nonjudicial remedies before turning to the courts—is a requirement before a student with a disability could sue his or her school under the ADA. IDEA suits have an exhaustion requirement;[201] section 504 and ADA suits do not.[202] Because section 504 contains a requirement to provide students with a free and appropriate public education similar to that assured by the IDEA, courts have had occasion in the education context to consider whether students bringing section 504 claims for relief that could, alternatively, be available under the IDEA must follow the latter's exhaustion requirements.[203] A case for ADA accommodation in school discipline is likely to raise the same exhaustion question because the ADA's accommodation requirement in the educational context looks very similar to IDEA's requirements surrounding special education services. Plaintiffs would have to highlight the fact that the relief sought is *accommodation* in disciplinary proceedings, rather than procedures to assure an appropriate special education for the student.[204]

Students might be successful in avoiding the exhaustion requirement by claiming that the accommodation sought—a representative for

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public education to eligible students with disabilities, 34 C.F.R. § 104.33(a) (2015), rather than on the accommodations provision of section 504.

201. See 20 U.S.C. § 1415(l) (2012) ("[B]efore the filing of a civil action under [the Constitution, ADA, or section 504], the [IDEA hearing procedures] shall be exhausted to the same extent as would be required had the action been brought under [IDEA].").

202. See Weber, New Look, supra note 200, at 24 ("[T]here is no general rule requiring exhaustion of claims under section 504 or Title II of the ADA before filing suit . . . .").

203. See id. at 24–25 (noting courts' insistence on exhaustion before ADA or section 504 suits may proceed when relief is available under IDEA). The covered class is discussed below, see infra section III.B.

204. Some courts have required exhaustion when the remedy sought under section 504 could be available under the IDEA, even when the student, parent, and school agree the student is not IDEA eligible. See Weber, New Look, supra note 200, at 24–25 (noting cases where "courts require exhaustion under IDEA in actions where the defendant school system has determined that the child is not eligible under IDEA and the parents are not contesting that determination"). Other courts have allowed section 504 litigation to proceed without requiring administrative exhaustion when the parties agree that the IDEA does not apply. See id. at 25 ("Where both sides agree that the child is not eligible under IDEA, there is no statutory provision requiring exhaustion . . . ."). An exhaustion requirement is problematic because it requires students' families to be relatively savvy about school disability procedures. This is troubling because it would likely limit ADA claims to wealthier, whiter families who are already favored in special education and discipline. See supra section I.B (discussing disadvantages of poor, disabled, black students in school discipline); see also infra section IV.A (explaining drawback of ADA remedy in terms of limited protected class). Still, this problem exists whenever there is an exhaustion requirement, and it is not unique to the education context. Cf. supra note 86 (noting wealth gap across many statutory rights regimes based on private enforcement). Indeed, in schools, exhaustion may prove beneficial if parties are able to avoid the delay and expense of litigation by agreeing upon accommodations tailored to the student through the administrative process, even if the IDEA, strictly construed, does not require the kind of accommodations sought.

suspension hearings—is not available under the IDEA. However, it is unclear if this is actually true, much less whether a court would buy it. Therefore, plaintiffs should attempt exhaustion of IDEA remedies in circuits that require it, though plaintiffs could seek a preliminary injunction in the meantime.[205]

The following four subsections explain the novel ADA claim for representation in school discipline hearings, suggesting how students would show that they are (A) qualified for school programs, (B) disabled, (C) in need of a reasonable accommodation in the form of a representative to accompany them in school discipline hearings, and (D) not seeking any fundamental alteration in the character of those hearings.

A. *A Qualified Individual*

Proving that the student is qualified to attend school should not present much difficulty because state compulsory education laws, as well as section 504 and the IDEA, make them eligible for public schooling;[206] as noted above, even involuntary participation in a school disciplinary hearing makes students eligible for all of the protections that such hearings are designed to afford.[207] Indeed, it is hard to see how a school district could argue that it has the authority to suspend or expel a student without acknowledging the student's right to school services.

B. *With a Disability*

School districts receiving IDEA funds have a duty to identify students with disabilities.[208] Every student covered by the IDEA will likely be covered by the ADA as well, in addition to an indefinite class of students whose disabilities do not require special education services or do not fit into the IDEA's categories.[209]

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205. Indeed, this was the procedural posture of *Franco-Gonzales I*, which required the court to find a likelihood of irreparable harm and that the balance of hardships favored plaintiffs before granting the injunction. Franco-Gonzales v. Holder (*Franco-Gonzales I*), 767 F. Supp. 2d 1034, 1060 (C.D. Cal. 2010). It is an open judicial question whether a single suspension would cause "irreparable harm," but plaintiffs seeking a preliminary injunction would have a plethora of social science backing their claim. See supra section I.A (discussing social science documenting negative effects of suspension).

206. See supra notes 75–76 and accompanying text (explaining students with disabilities' entitlement to free and appropriate public education guaranteed by IDEA).

207. See supra section II.B.1 (outlining program eligibility prong of ADA). For a history of federal and especially state litigation surrounding the right to public education, see generally Amy L. Moore, When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts, 41 U. Tol. L. Rev. 545, 555–75 (2010).

208. See 20 U.S.C. § 1412(a)(3)(A) (2012) (requiring states to "identif[y], locate[], and evaluate[]" all children with disabilities in the state).

209. See Weber, New Look, supra note 200, at 8 (calling coverage under ADA and section 504 but not IDEA "exceedingly unlikely").

Plaintiffs covered by both the IDEA and the ADA must be identified as disabled by schools, obviating their need for expert testimony to this effect. However, as alluded to above, the ADA's definition of disability is broader than the IDEA's.[210] Thus, students covered by the ADA's more expansive definition of disability—but who are not within the IDEA's definition—will likely still need to present expert testimony showing they are impaired in a major life activity. Although expert testimony often presents a significant financial barrier to parents—on top of the already substantial barrier of litigation[211]—the burden of actually demonstrating disability may not be as difficult under the ADAAA, which specifies that courts are not to push plaintiffs very hard on the proof-of-disability prong of their claim.[212] Once there are plaintiffs willing to bring this claim who are disabled, they could seek class certification to cover all students with disabilities who will become subject to school discipline proceedings, shifting the burden on later students from litigating to simply proving their disability at the time of the alleged infraction.[213] In any event, because the ADAAA greatly moderated the plaintiffs' burden of proving a substantial limitation, brief testimony or even affidavits addressing the limitations caused by the student's disability should be sufficient.

At this point, establishing the extent of the covered class becomes essential. There will likely be a wide range of coverage of students whose disabilities impede their communication skills in ways that prevent them from understanding or responding to the allegations against them triggering school discipline. In terms of the IDEA's enumerated categories, this could cover disabilities from emotional disturbance to the range of conditions on the autism spectrum.[214] As previously discussed, certain students are excluded from the IDEA's "emotional disturbance" category af-

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210. See id. at 7 ("With respect to elementary and secondary students, the expansion of coverage of section 504 and the ADA in the [ADAAA] is momentous."). For a discussion of the eligibility standards of each statute in this Note, compare supra notes 77–86 and accompanying text (IDEA eligibility), with supra notes 138–148 and accompanying text (ADAAA eligibility). Commentators have argued that a nonnegligible percentage of students—for example, students with certain social difficulties—who do not qualify under the IDEA are likely covered by the ADA. See, e.g., Perry A. Zirkel, Section 504 for Special Education Leaders: Persisting and Emerging Issues, 25 J. Special Educ. Leadership 99, 101 (2012) (positing "direct result [of ADAAA] will be significantly more students" covered only by section 504 and ADA and not covered by IDEA "as compared with the pre-ADAAA national average of approximately 1%").

211. This limitation is discussed below. See infra section IV.A (discussing limited coverage of ADA representation-as-accommodation in part due to high resources required to validate this right).

212. See supra notes 138–148 and accompanying text (explaining broader ADAAA standard).

213. See supra notes 174–176, 179 and accompanying text (describing class certification's potential to obviate need to repeatedly litigate issue).

214. See 20 U.S.C. § 1401(3)(A)(i) (2012) (listing categories covered by IDEA).

ter the "social maladjustment" exception;[215] they could be included in the ADA's coverage, which has no such exclusion. Since their disability would likely come into play in the highly emotionally charged setting that is a disciplinary hearing, they seem likely to need an adult with them during the hearing to help them explain themselves and respond to the allegations against them. On the other hand, some disabilities that do not impede the communication abilities of students would be unlikely to fall within the class discussed in this Note.[216] An example of this might be a blind student, whose disability does not affect the student's comprehension of or ability to produce spoken language.

C. *Requesting a Reasonable, Necessary Accommodation*

Once their disability status has been established, students must request the accommodation of a representative during school suspension hearings. The crux of disabled students' ADA claims in the context of school disciplinary proceedings will be the contention that representation of some sort at disciplinary hearings that can result in removal from school is a reasonable accommodation for the special obstacles disabled youth face in those hearings. Courts will have to balance that contention against the argument by school officials that such representation would fundamentally alter the character of the hearings, and, perhaps, of schools as well.

Students are not likely to receive the assistance of a lawyer, as analogous case law suggests. For instance, the disabled individuals subject to deportation proceedings in the *Franco-Gonzales* case were not entitled to lawyers.[217] Considering the very severe consequence at issue in *Franco-Gonzales*—deportation—it seems unlikely that suspension or even expulsion from school would guarantee students' access to lawyers.

Finding a comparable standard for juveniles whose disabilities render them unable to participate in school disciplinary hearings may prove difficult, as there is no well-established understanding of competency in such hearings like there are in criminal law. Student plaintiffs should frame their claim by emphasizing the meaningful access they seek in their requested accommodation. Because the plaintiff class will be defined in terms of its inability to participate meaningfully in suspension hearings,[218] plaintiffs should seek an individual who can remedy this by helping them

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215. See supra notes 80–82 and accompanying text (explaining social maladjustment exception).

216. English-language learners would seem to be students who have difficulty communicating in English—because they are language learners—but who would fall outside this class as well, because lack of English fluency is not recognized as a disability. This limitation is discussed further below. See infra section IV.A.

217. See Franco-Gonzales v. Holder (*Franco-Gonzales I*), 767 F. Supp. 2d 1034, 1058 (C.D. Cal. 2010) (granting "Qualified Representative" accommodation but not requiring fully qualified lawyers).

218. See supra section III.B (discussing "with a disability" portion of ADA claim).

overcome their disability. This likely means someone trained or with some experience working with individuals who share the student's disability. A social worker, or perhaps even a social work student under supervision of trained social workers, may present the necessary combination of expertise and availability.[219] Law students under the supervision of either a social worker or a lawyer could be another avenue.[220] These types of individuals could serve as advocates because they would be able to confer with students and present the students' version of the facts to the decisionmaker. Because law students and social work students are trained to represent others' interests, they are likely to be able to perform the necessary functions of an advocate on behalf of disabled students.

School defendants will likely argue that students' parents could serve as adequate representatives. This is truer in education than in immigration, where the *Franco-Gonzales* court rejected parental representation as insufficient, because school disciplinary hearings are likely to be more accessible to laypeople than are deportation proceedings.[221] However, many parents would likely be working during the school day, making it hard to justify compelling their appearance. Even rescheduling hearings to times of parent availability may be insufficient, as a parent does not necessarily possess representational skills adequate to convey his or her child's point of view such that the child can participate in the hearing.[222]

D. *Refuting a Fundamental Alteration Defense*

Once the reasonableness of the accommodation is shown, the plaintiffs must address the defense that representation would fundamentally

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219. This would be analogous to the remedy in *Franco-Gonzales*, which allowed representation by attorneys, representatives accredited by DOJ regulation, or law students under supervision of attorneys. See Franco-Gonzales v. Holder (*Franco-Gonzales II*), 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011) ("The Court therefore finds that a Qualified Representative for a mentally incompetent detainee may be (1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative . . . .").

220. There is already a "Suspension Representation Project" operating in New York City, through which law students represent students in suspension hearings. Suspension Representation Project, http://www.suspensionrepresentation.org/ [http://perma.cc/2YFG-JFL9] (last visited Sept. 8, 2015). These representatives are "not supervised by attorneys, professors, or law schools." Id. Plaintiffs should also specify that the individual not have a conflict of interest, as did the plaintiffs in *Franco-Gonzales*. See *Franco-Gonzales I*, 767 F. Supp. 2d at 1058 (C.D. Cal. 2010) (granting request for qualified representative "free of any conflicts of interest"). It would be inappropriate, for instance, for the teacher seeking to suspend the student to serve as the student's advocate; any teacher would likely be inappropriate, since teachers are subordinate to the suspending authority, usually a school administrator.

221. See *Franco-Gonzales I*, 767 F. Supp. 2d at 1054 (noting courts are unable to compel parents to appear and further noting parents' insufficient knowledge of procedure).

222. Parental representation would also fail to remedy inequities in access to services mentioned earlier, see supra note 86, and may in fact worsen them, as the parents who are wealthier and more educated would be able to secure better outcomes for their children than poorer, less-educated parents.

alter the character of school discipline proceedings. As a preliminary matter, school districts cannot claim this accommodation is barred by an internal rule requiring students to represent themselves, because the ADA can preempt nonfederal rules that purport to ban a requested accommodation.[223]

Requesting a qualified representative in immigration court is, in many ways, easy, because attorneys regularly practice in that setting. This is not the case in school suspension hearings, in which the right to due process is satisfied by an "informal give-and-take between student and disciplinarian."[224] But the ADA claim is premised on students' inability to participate in this give-and-take with teachers or administrators, because of their disabilities. Plaintiffs' counsel should carefully frame the argument so it is clear to courts that the representative sought under the ADA is not a *new* right but the only way students with disabilities can access their existing right to participate informally in suspension hearings. In this way, the students will be able to overcome the fundamental alteration defense just as the *Franco-Gonzales* plaintiffs did.[225]

As a result of this inquiry, students with disabilities whose disabilities impair their ability to participate in suspension or expulsion decisions seem likely to prevail on an ADA claim for representation in school disciplinary proceedings. As long as the class and requested accommodation are framed in terms of students' inability to participate meaningfully in these hearings, students will likely overcome any fundamental alteration defense on the part of school defendants.

IV. TOO LITTLE OR TOO MUCH? ASSESSING THE LIMITS OF THE ADA APPROACH

Two major policy concerns may arise from the proposed application of the ADA to disciplinary proceedings for the students whose disabilities impede their ability to participate. The first concern is that the ADA approach does too little because it protects only some students; the second is that the approach does too much because it will overproceduralize disciplinary hearings and in the process change the nature of schools themselves.

A. *Too Little: A Limited Covered Class*

If the ADA claim proposed above[226] succeeds, it will be a great boon to the set of students with disabilities whose disabilities impede their abil-

223. See, e.g., Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 163 (2d Cir. 2013) (holding Title II "requires preemption of inconsistent state law when necessary to effectuate a required reasonable modification" (internal quotation marks omitted)).

224. Goss v. Lopez, 419 U.S. 565, 584 (1975).

225. See supra notes 193–195 and accompanying text (describing plaintiffs' framing of argument).

226. See supra section II.B (outlining ADA claim for representation in school disciplinary hearings).

ity to function independently in disciplinary hearings. However, the drawback of grounding the protection in the ADA is that it leaves out the large number of nondisabled students subject to school discipline, even under the ADA.[227] As previously discussed, many low-income and minority students face the same disadvantages as their disabled peers in school discipline.[228] The disproportionate discipline each group experiences is quite similar, but the ADA only extends to individuals with disabilities, leaving a wide swath of the students pulled into the school-to-prison pipeline without assistance.

Despite this drawback, the ADA remedy is, as far as it goes, promising. Students with disabilities are a vulnerable population, and will likely struggle more than nondisabled students if they are excluded from school. Because the disabilities of the class of students at issue impact the students' ability to communicate in the disciplinary setting, the give-and-take hearing required before a suspension or expulsion can be imposed is restricted to the school official's version of events, heightening the specter of noneducational discipline. This presents a serious potential for abuse. The fact that this existing statutory tool cannot help all students who face disproportionate discipline is not a reason to abandon the effort as a first step in slowing the flow of the school-to-prison pipeline.

Another version of this objection is that students with disabilities who receive ADA protections will not look noticeably different from students already privileged in other ways in schools. That is, whiter, richer students whose parents are better able to navigate school procedures will continue to benefit more, while poorer, minority students will continue to have worse outcomes.[229] This will especially be true for the first plaintiffs, because the novelty of the claim will require increased resources to take the students' school district to court. In some ways, this objection is true of any legal remedy—access is dependent on some combination of savvy, resources, or the availability of pro bono aid.[230] However, that is an insufficient answer, since the purpose of the remedy is to help disadvantaged students, who are more likely to lack access to precisely the resources required to gain these procedural protections.

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227. In addition to the general student population, this includes other populations like English-language learners. See supra note 216 (noting exclusion of this population from ADA remedy).

228. See generally supra section I.B (discussing school-to-prison pipeline's disproportionate effects on poor, minority, and disabled students).

229. See supra section I.B (discussing failures of IDEA specific to minority students); see also supra note 86 (noting general wealth-gap problem).

230 One of the disadvantages of the IDEA discussed earlier is that its procedural protections are not available to a student with disabilities whose first manifestation of disability is in the conduct for which he or she is being disciplined. See supra notes 84–86 and accompanying text. This problem is avoided with the ADA solution proposed here, because the student's parents are able to seek an accommodation when he or she is being disciplined, regardless of whether he or she previously received services.

B. *Too Much: An Additional Layer of Procedure*

Grant Gilmore once wrote, "In Hell there will be nothing but law, and due process will be meticulously observed."[231] Something similar can be said about schools, where there is a general sense that inflexible rules have multiplied, becoming ever more cumbersome for teachers to satisfy without necessarily helping students' educational development.[232] This section addresses the objection that importing quasi-judicial protections to school discipline via the ADA will negatively affect schools' institutional character. This is a more subtle objection than the fundamental alteration prong of the ADA is designed to address;[233] whereas that legal defense to accommodations protect the "essential attribute[s]" of the activity in which accommodation is sought,[234] this objection is essentially policy-based: What should schools look like?

One response to this criticism is that this is already the world we live in: Due process has attached to these hearings nationally since 1975, when *Goss v. Lopez* was decided.[235] One can criticize the idea that suspension hearings are legally cognizable events to which due process attaches, but one is working against a forty-year history of such protections.[236] The ADA claim is only novel insofar as it has not yet been the basis for this *kind* of procedural protection for all students.

Still, there is a deeply felt view that teachers are too constrained in their treatment of students, and forcing teachers to advocate for their

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231. Grant Gilmore, The Ages of American Law 111 (1977).

232. See Pub. Agenda, Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good? 3, (2004), http://www.publicagenda.org/files/teaching_interrupted.pdf [http://perma.cc/D82M-8N2H] (finding forty-four percent of teachers polled in national survey "say documentation requirements go beyond common sense" and over half of teachers say they lack sufficient school or parental support in disciplinary decisions). This is at odds with the experience of the neediest students, as discussed above, see supra section I.B, and raises the specter of a backlash should students receive more procedural disciplinary protection. For an analysis of a possible current backlash against the ADA in the media, see Casey L. Raymond, Note, A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III, 18 Tex. J. on C.L. & C.R. 235, 236–37 (2013) (discussing accounts of excessive ADA litigation in popular press); see also id. at 249 (concluding "[t]he press accounts" of sharp rise in mass ADA filings "are accurate").

233. This element of the claim is discussed above, see supra section III.D.

234. See PGA Tour, Inc. v. Martin, 532 U.S. 661, 685 (2001).

235. 419 U.S. 565, 584 (1975). For a fuller discussion of the hearing required by *Goss*, see supra notes 100–102 and accompanying text.

236. This is not to say that the Due Process Clause will be the basis of representation for disabled students; as discussed above, representation will be sought under the ADA. See supra Part III (analyzing ADA as basis for procedural protection). *Goss* is invoked here to note that a backlash against students with disabilities arising from the additional layer of procedure seems unlikely. For a full explanation of why this remedy would not fundamentally alter the school disciplinary hearing, see supra section III.D.

disciplinary decisions will further weaken their authority.[237] However, as this Note has already described, the discretion that teachers are able to exercise, in disability determinations and in deciding to refer students to disciplinary hearings, operates to systematically push black and poor students out of mainstream classrooms.[238] It is hard to square claims for increased teacher discretion with the reality that students with disabilities are being pushed out of classrooms.

On the other hand, it is possible that ADA disability determinations will become just as contentious as IDEA eligibility determinations can be currently.[239] With a lot riding on this determination, it will likely become the focus of significant parent and school resources if the proposed ADA suit is successful, thereby diverting some resources away from a focus on student outcomes. This shift in focus would somewhat undermine the purpose of the claim, which is preserving students' full experiences in the classroom. Still, the ADA solution is a preferable outcome to full removal from schools. As discussed above, diverting a student out of school can be extremely damaging for his or her future educational attainment, and increases the likelihood of contact with the juvenile justice system.[240] Compared to the gravity of this potential harm, the ADA presents an existing tool that promises to effectively allow students to resist being pulled into the pipeline, so that they continue to receive appropriate services in schools.

CONCLUSION

Though the effects of the school-to-prison pipeline have been studied, there has been virtually no exploration of how existing statutory regimes can be used to protect students from unnecessary school discipline. This Note contributes to existing scholarship by proposing and detailing the components of a claim under the ADA for representation to accompany students with disabilities in school disciplinary hearings. It con-

237. Cf. Pub. Agenda, supra note 232, at 2–3 (showing polling of both teachers and parents revealing widespread support for view teachers are unduly constrained in disciplinary matters). The worry about a backlash is especially salient when discussing the ADA because the limiting constructions given to the original ADA by the Supreme Court, see supra notes 113–118 and accompanying text, were interpreted by some academics as a judicial backlash against the statute. See, e.g., Linda Hamilton Krieger, Foreword, Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies, 21 Berkeley J. Emp. & Lab. L. 1, 11–12 (2000) (introducing Symposium issue evaluating ADA "backlash" thesis). But see Selmi, supra note 106, at 525, 575 (criticizing backlash theory as "too simple" and arguing restrictive readings are "consistent with the reigning public definition of disability" despite ADA's "effort to transform that definition").

238. See supra section I.A (describing school-to-prison pipeline).

239. This change would be significant but would not constitute a fundamental alteration, because it arises out of individuals' behavior in seeking accommodation rather than from the accommodation itself. Problems with IDEA determinations are discussed above, see supra notes 87–90 and accompanying text.

240. See supra section I.A (explaining how diversionary discipline drives students out of schools).

cludes that students bringing such a claim would likely be successful. There are drawbacks to using the ADA, but this approach would protect an exceptionally vulnerable population from highly damaging removal from schools.