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IN THE  
**Court of Appeals of Maryland**

SEPTEMBER TERM, 2021

**Petition Docket No. 10**

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In Re: S.F.

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ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS

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**BRIEF OF DISABILITY RIGHTS MARYLAND, COUNCIL OF  
PARENT ATTORNEYS AND ADVOCATES, MENTAL HEALTH  
ASSOCIATION OF MARYLAND, MARYLAND DEVELOPMENTAL  
DISABILITIES COUNCIL, MARYLAND CENTER FOR  
DEVELOPMENTAL DISABILITIES AT KENNEDY KRIEGER  
INSTITUTE AND NATIONAL DISABILITY RIGHTS NETWORK  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## **INTEREST OF THE *AMICI CURIAE***

Disability Rights Maryland (DRM), a nonprofit legal advocacy organization, is the federally-mandated Protection and Advocacy agency for the State of Maryland, charged with defending and advancing the rights of persons with disabilities within the state. A leader in Maryland's educational advocacy community, DRM provides legal advocacy on issues including school discipline, juvenile justice, and enforcement of the rights of students with disabilities to a free appropriate public education (FAPE) as mandated by federal law. DRM has significant experience representing students with disabilities statewide who have been suspended from school or who are involved in the juvenile justice system.

Council of Parent Attorneys and Advocates (COPAA), an independent, nationwide nonprofit organization, assists in securing appropriate educational services for children with disabilities, echoing a Congressional finding that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 U.S.C. § 1400(c)(1). COPAA is a national leader on issues regarding school discipline, restraint and seclusion, juvenile justice, and enforcement of the rights of students with disabilities to a FAPE.

Maryland Developmental Disabilities Council (MDDC) is a statewide public policy organization that works with people with developmental disabilities, families, state agencies, organizations, and others to improve the lives of people with disabilities. MDDC



is a statewide leader in policy efforts about suspension and expulsion, restraint and seclusion, and access to education.

Mental Health Association of Maryland (MHAMD) is a nonprofit citizens' organization that brings together consumers, families, professionals, advocates and concerned citizens for unified action in all aspects of mental health and mental illness. MHAMD supports person-centered recovery in the least restrictive environment, and opposes unnecessary restrictions on liberty, independence, choice and self-determination. MHAMD chairs a variety of statewide coalitions, including a coalition focused on the mental health needs of children and youth, and a coalition to address disparities at the intersection of mental health and criminal justice.

The Maryland Center for Developmental Disabilities (MCDD) at Kennedy Krieger Institute is Maryland's University Center for Excellence in Developmental Disabilities (UCEDDs) Education, Research, and Service, part of a national network of UCEDDs. MCDD's mission is to provide leadership that advances inclusion for people with intellectual, developmental, and other disabilities through community-based programs, including Project HEAL (Health, Education, Advocacy, and Law), Maryland's only comprehensive medical-legal partnership. MCDD faculty and staff are leaders in local, state, and national policy efforts that advance the rights of individuals with disabilities. Project HEAL attorneys are members of Maryland's Education Advocacy Coalition and the Maryland Coalition to Reform School Discipline.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

*Amici* have extensive experience enforcing the rights of students with disabilities in Maryland and beyond. The issue presented by this case is of vital importance to *Amici*. *Amici* offer this brief to demonstrate how school suspension practices have a disparate and discriminatory impact on students with disabilities and students of color and why a “no-suspension” condition of probation is contrary to best interest of probationer and the public.<sup>1</sup>

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<sup>1</sup> Pet. Brief at 13-19. All parties to this Appeal have consented to the filing of this *Amicus Curiae* brief in Support of Petitioner.

## SUMMARY OF ARGUMENT

*Amici* urge this Court to reverse the Maryland Court of Special Appeals' ruling, as it is contrary to the interest of youth and the public to bind violations of probation to inequitable, discretionary suspension practices and impose a "no-suspension" requirement as a condition of a student's probation.

### ARGUMENT

#### **I. The Court Should Prohibit "No-Suspension" Conditions of Probation, Which Inequitably and Unfairly Target Students with Disabilities and Students of Color and are Contrary to the Rehabilitative Purpose of Probation.**

It is well-documented that exclusionary discipline practices, including suspension, are harmful to students and have a disproportionate impact on students with disabilities and students of color.<sup>2</sup> This brief focuses on students with disabilities, particularly Black students with disabilities, who, as a group, experience the highest rates of disproportionate suspension, as well as high rates of involvement with the juvenile justice system.<sup>3</sup>

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<sup>2</sup> Pet. Brief at 13-19. *See generally* Daniel J. Losen & Paul Martinez, *Lost Opportunities: How Disparate School Discipline Continues To Drive Differences in the Opportunity To Learn*, Learning Policy Institute; Center for Civil Rights Remedies at the Civil Rights Project, UCLA (February 2021), <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>. (pp. 1-10).

<sup>3</sup> Daniel Losen, et al., *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, *Journal of Applied Research on Children: Informing Policy for Children at Risk*, vol. 5, no. 2 at 1-2 (2014) (finding that Black students accounted for only 19% of students with disabilities, but in correctional institutions, they comprised 50% of students with disabilities ).

Multiple factors contribute to biased, arbitrary, and inequitable suspension practices, including: implicit bias, ineffective classroom behavior management at under-resourced schools, under-and-over identification of students for special education services, and subjective and overly broad codes of student conduct. It is contrary to the best interest of youth and the public for juvenile courts to condition probation on inequitable suspension practices.

“No-suspension” conditions of probation also perpetuate and exacerbate the school-to-prison pipeline. The “school-to-prison pipeline”<sup>4</sup> is the product of the policies of school districts, law enforcement agencies, and courts that criminalize in-school behavior or otherwise push disadvantaged, underserved, and at-risk children from mainstream educational environments into the juvenile justice system, and all too often [into] the criminal justice system.”<sup>5</sup> Exclusionary discipline, such as suspension, is a cause of the school-to-prison pipeline since it *alone* places students at risk for school avoidance, increased school drop-out, and involvement with the juvenile justice system.<sup>6</sup> “No-

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<sup>4</sup> See, e.g., Marilyn Elias, The School-to-Prison Pipeline, Learning for Justice Magazine, no. 43 Spring 2013, <http://www.tolerance.org/magazine/number-43-spring-2013/school-to-prison>.

<sup>5</sup> Ronald K. Lospennato, Multifaceted Strategies to STOP the School-to-Prison Pipeline, 42 Clearinghouse Rev. 528 n.4 (2009); see also 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 (2010); Advancement Project, Test, Punish and Push Out: How “Zero Tolerance” and High Stakes Testing Funnel Youth Into the School-to-Prison Pipeline, 9 (Mar. 2010) (revised); Justice Policy Institute, Education Under Arrest: The Case Against Police in Schools, 1 (Nov. 2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest\\_fullreport.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf).

<sup>6</sup> U.S. Comm’n on Civil Rights, Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with

suspension” conditions of probation could be an even more direct and pernicious cause of the school-to-prison pipeline. They exacerbate the already harmful effects of exclusionary discipline by guaranteeing further entanglement with probation and the juvenile court for what is most often minimal misbehavior that should be solely handled by the school discipline system.<sup>7</sup> Research shows that “responding to common youth behavior with criminalization exacerbates undesirable behavior and causes children to fall behind academically, placing students further at risk.”<sup>8</sup>

The court below opined that “[t]he possibility that a suspension could be imposed too quickly or arbitrarily would, when it happens, represent a failure of execution and an opportunity for the probation officer to decide whether to pursue a violation and the trial court to decide whether to find one.”<sup>9</sup> However, the data shows that suspensions are often imposed arbitrarily<sup>10</sup>, and, as Petitioner’s Brief states, “the language of the no-suspension provision does not notify the court, the child, or counsel that the propriety of the suspension

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Disabilities 4 (July 2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> (citations omitted).

<sup>7</sup> Sarah E. Redfield & Jason P. Nance, *The American Bar Association Joint Task Force on Reversing the School-to-Prison Pipeline Preliminary Report*, American Bar Association Coalition on Racial and Ethnic Justice, Criminal Justice Section, and Council for Racial & Ethnic Diversity in the Educational Pipeline (2016), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1765&context=facultypub>.

<sup>8</sup> ACLU, *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students* 39, <https://www.aclu.org/report/cops-and-no-counselors> (citation omitted).

<sup>9</sup> *In Re S.F.*, CSA-REG-582-2019, 7-8 (op. issued Jan. 28, 2021; mandate issued March 2, 2021).

<sup>10</sup> *See generally* Beyond Suspensions, *supra* note 6.

must, should, or can be litigated before a violation of probation may be found.”<sup>11</sup> Thus, rather than an “opportunity” for the probation officer and trial court to intervene, the actual effect of “no-suspension” conditions of probation is that students are further involved with the juvenile justice system and pushed farther along the school to prison pipeline based on decisions that clearly include subjective determinations made by school district staff.

“No-suspension” conditions of probation are further problematic because they can violate the civil rights of students by punishing children for disability-related behavior at the school level. Behaviors related to disability are not always within the control of the student, and to criminalize them through the use of per se “no-suspension” conditions of probation is antithetical to the presumed rationale of probation, which is to hold youth accountable for their actions. For all these reasons, to condition probation on school suspension practices is neither rehabilitative nor in the best interest of youth or the community. The stakes of “no-suspension” conditions of probation are simply too high since a violation of probation can result in a youth’s loss of liberty and removal from family and community. As such, the Court should prohibit the use of “no-suspension” conditions of probation.

**A. Suspension Practices Are Demonstrably Biased and Disproportionately Applied to Students with Disabilities, and, Therefore, Must Not Be Used To Deprive Youth of Their Liberty.**

Both national and Maryland-specific data demonstrate long-standing discipline disparities for students with disabilities and make clear that these students are over-

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<sup>11</sup> Pet. Brief at p. 19.

represented among students who are suspended at school, even though research demonstrates that they do not misbehave more than their abled peers.<sup>12</sup> It is therefore imperative that the Court disallow the discretionary and discriminatory imposition of suspension to be used as a condition of probation that can result in a child's liberty, family, and community being removed in a delinquency matter. School discipline is blatantly inequitable. By incorporating school suspensions as a per se violation of probation, the court affirmatively adopts and perpetuates a discriminatory system, which will indisputably cause harm to youth the court has a duty to protect.

Nationally, data reveal that students with disabilities are approximately twice as likely to be suspended throughout each school level compared to students without disabilities.<sup>13</sup> For students at the intersection of race and disability, data demonstrate that students of color with disabilities face a significantly higher risk for suspensions compared to white students with disabilities. The United States Department of Education (USDOE)

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<sup>12</sup> See U.S. Comm'n on Civil Rights, *Beyond Suspensions*, *supra* note 6 (citing John Wallace Jr., Sara Goodkind, Cynthia Wallace & Jerald Bachman, *Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991-2005*, *Negro Educ. Rev.*, vol. 59, no. 1-2 (2008), 47-62 (explaining that "OCR has not investigated or identified any information or evidence suggesting, one way or another, that students of color with disabilities engage in excludable or disruptive behaviors more often and/or more severely...") and Jason Okonofua & Jennifer Eberhardt, *Two Strikes: Race and Disciplining of Young Students*, *Psychological Science*, vol. 26, no. 5 (2015)). See also *Id.* at 29.

<sup>13</sup> See U.S. Gov't Accountability Office, *GAO-18-258, K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* (2018), <https://www.gao.gov/assets/gao-18-258.pdf> (finding that students with disabilities represented approximately 12% of students but nearly 25% or more of students suspended from school).

notes that since the 1998-1999 school year, the first year it collected state-level data on exclusionary discipline, “there appears to be a consistent pattern where Black students with disabilities were suspended or expelled at greater rates than their percentage in the population of students with disabilities.”<sup>14</sup>

In 2019, the United States Commission on Civil Rights issued a briefing report titled *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities (Beyond Suspensions)* that analyzed 2015-16 data from the Civil Rights Data Collection and found that Black students represented 17% of enrolled students with disabilities yet comprised 39% of those students who received multiple out-of-school suspensions.<sup>15</sup> Recent research, which measures the disparate impact on educational opportunity in days of lost instruction due to out-of-school suspensions, confirms disparate school discipline for students with disabilities and Black students in schools throughout the United States.<sup>16</sup> In fact, two Maryland school districts, Baltimore City Public Schools and Montgomery County Public Schools, were flagged nationally for problematic disparities.<sup>17</sup>

Maryland’s school discipline data mirrors the national pattern of discipline disparities for students with disabilities. The Maryland Commission on the School-to-

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<sup>14</sup> *Beyond Suspensions*, *supra* note 6, at 150-51 (citing U.S. Dep’t of Education, Office of Special Educ. and Rehabilitative Servs. in response to Commission’s interrogatories, Feb. 9, 2018, at 6).

<sup>15</sup> *Id.* at 69.

<sup>16</sup> Daniel J. Losen & Paul Martinez, *supra* note 2, at 6.

<sup>17</sup> *Id.* at 15.



Prison Pipeline and Restorative Approaches (the MD Commission), in its Final Report dated December 2018, cites to a study completed by the Maryland Equity Project that averaged data from 2011, 2013, and 2015, and found that students with disabilities represented 13% of enrollment but 25% of students suspended out of school.<sup>18</sup> For the 2018-2019 school year, students with disabilities served under the Individuals with Disabilities Education Act (IDEA) represented 12.2% of the student population but comprised 25% of those suspended out-of-school.<sup>19</sup> Furthermore, Black students in Maryland face exclusionary discipline at 2.6 times the rate for white students; and for Black students with disabilities versus white students without disabilities, this becomes a factor of 5.2, twice as disproportionate.<sup>20</sup>

The Commission also found that approximately 14% of public schools in Maryland suspend out-of-school 25% or more of students in one or more of seven subgroups, including students with disabilities, and that “these high- suspending schools are located in 22 of the 24 school districts in Maryland and have high enrollments of Black students,

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<sup>18</sup> Maryland Comm’n on the School-to-Prison Pipeline and Restorative Practices, Final Report and Collaborative Action Plan: Report to the Maryland Governor and General Assembly pursuant to House Bill 1287, at 24 (hereinafter “MD Comm’n on Pipeline”), December 2018, <https://www.law.umaryland.edu/media/SOL/pdfs/Programs/ADR/STPP%20%20RP%20Commission%20Final%20Report.pdf>.

<sup>19</sup> Figures calculated by Disability Rights Maryland from Maryland State Department of Education 2018-19 enrollment data. See Maryland State Dep’t of Educ. Div. of Assessment, Accountability, and Info. Tech., 2018-2019 Student Publications available at <http://www.marylandpublicschools.org/about/Pages/DCAA/SSP/Student/20182019.aspx>.

<sup>20</sup> Figures calculated by Showing Up for Racial Justice: Annapolis and Anne Arundel County Chapter. See *Id.*

students with disabilities, and low-income students, pointing to both the magnitude and extent of discipline disproportionality in Maryland.”<sup>21</sup>

*Beyond Suspensions* addressed contributing factors to the discipline disparities and the school-to-prison pipeline. The report identified ineffective classroom behavior management practices and instructional skills of teachers as a factor linked to increased suspensions. In one study, researchers concluded that “staff often utilized ‘ineffective strategies’ to promote student compliance in the schools that were low achieving, high suspending, and had high dropout rates.”<sup>22</sup> In “low-risk” schools with lower rates of academic failure, suspension and dropout, schools utilized strategies recommended by the Office of Special Education Programs and adopted alternatives to out-of-school suspension with a focus on “positive, proactive disciplinary measures rather than reactive, punitive strategies.”<sup>23</sup>

*Beyond Suspensions* also pointed to improper identification of students of color with disabilities for special education services as a potential factor contributing to discipline disparities.<sup>24</sup> When students are not appropriately identified for special education services, they do not receive the academic and behavioral supports necessary to support and

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<sup>21</sup> MD Comm’n on Pipeline, *supra* note 18, at 25.

<sup>22</sup> *Beyond Suspensions*, *supra* note 6, at 98, (citing Christine A. Christle, Kristine Jolivette & C. Michael Nelson, *Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency, Exceptionality*, vol. 13, no. 2, 69-88 (2005)).

<sup>23</sup> *Id.* at 98

<sup>24</sup> *Id.* at 101-102. *See also* Losen, et al., *Disturbing Inequities*, *supra* note 3, at 2-3 (finding that as the percentage of students identified as having an emotional disability or specific learning disability increased, so did their suspension rates).

accommodate them, and to assist them with replacing challenging behaviors with school-appropriate behaviors.<sup>25</sup> With unidentified, improperly identified, and unmet academic, behavioral and mental health needs, and without the specialized instruction and supports to which they are entitled, these students are disciplined and suspended for disability-related behavior.<sup>26</sup>

Lastly, *Beyond Suspensions* identified implicit bias as a contributing factor to discipline disparities. “Implicit biases can take many forms including acting on subtle, often subconscious, stereotypes that teachers hold about students of color, students with disabilities, or both.”<sup>27</sup> As a result of implicit biases, students of color and students with disabilities are disciplined more harshly and receive more serious consequences than white students for the same behaviors.

In its Final Report, the MD Commission concluded that “given the broad implementation discretion given to school personnel, *exclusionary discipline is applied inconsistently and inequitably across schools,*” and Black students and students with disabilities are disproportionately disciplined.<sup>28</sup> Because of the significant disproportionality in the way suspensions are meted out by local school systems, imposition of a “no-suspension” condition of probation puts students with disabilities and

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<sup>25</sup> See *Beyond Suspensions*, *supra* note 6, at 103; see also U.S. Dep’t of Education, Office for Civil Rights, Dear Colleague Letter: Preventing Racial Discrimination in Special Education (Dec. 12, 2016).

<sup>26</sup> *Beyond Suspensions*, *supra* note 6, at 103-04.

<sup>27</sup> *Id.* at 106.

<sup>28</sup> MD Comm’n on Pipeline, *supra* note 18, at 29.

students of color at a higher risk of having their probation violated, further reinforcing existing inequities rooted in our education and juvenile and criminal justice systems.

“No-suspension” conditions of probation are further problematic because disturbing inequities in exclusionary discipline compound existing inequities in the juvenile justice system, subjecting youth of color and youth with disabilities to layers of subjective over-exposure to the system and accompanying negative outcomes.<sup>29</sup>

Nationally, students with disabilities are overrepresented in the juvenile justice system by a percentage between 30% and 60%, with some estimates citing even higher percentages.<sup>30</sup> “Prevalence studies have found that 65-70 percent of youth in the justice system meet the criteria for a disability, a rate that is more than three times higher than that of the general population.”<sup>31</sup> Specific to probation, there is data that as of 2017,

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<sup>29</sup> Involvement in the juvenile justice system carries considerable detrimental collateral consequences, including increased risk of dropping out of school, increased mental health issues, lower college acceptance, diminished job prospects, and a higher likelihood of becoming involved in the adult criminal system. Jason Nance, *Students, Police and the School to Prison Pipeline*, 93 Wash. U. L. Rev. 919, 954-56 (2016), [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6209&context=law\\_lawreview](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6209&context=law_lawreview).

<sup>30</sup> Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, Council for Exceptional Children, Vol. 71, No. 3, 339-45, 340 (2005), <https://neglected-delinquent.ed.gov/sites/default/files/docs/mquinn0305.pdf> (last visited August 16, 2021); *see also* Daniel Losen et al., *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies* 24 (March 23, 2021), <https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies>.

<sup>31</sup> National Disability Rights Network, *Probation Referral: A Model for Diversion of Children and Youth with Disabilities from the Juvenile Justice System* 7 (October 2019), [https://www.ndrn.org/wp-content/uploads/2019/10/Probation\\_Referral\\_Report\\_FINAL\\_w\\_Appendices.pdf](https://www.ndrn.org/wp-content/uploads/2019/10/Probation_Referral_Report_FINAL_w_Appendices.pdf). Probation Referral (citing Skowrya & Coccozza, *Blueprint for Change: A Comprehensive*

youth of color comprised 46% of the U.S. population aged 10-17, but represented 55% of all probation dispositions and 67% of all children confined for rule violations of probation.<sup>32</sup> Black youth are more likely to have their probation revoked than white youth.<sup>33</sup>

As Petitioner’s brief stresses, the judicial system should not import the education system’s disparities through the use of “no-suspension” conditions of probation.<sup>34</sup> This is all the more critical because of the already existing disparities that exist at each point of contact in the juvenile justice system, including probation. It is contrary to the rehabilitative and therapeutic aims of juvenile justice for youth to be repeatedly subject to disparate and subjective exposure to the juvenile justice system. The “enduring disproportionate exposure to punitive measures has become normalized in juvenile justice and has paved the way for policies and practices that continue to be more reflective of

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Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System, National Center for Mental Health and Juvenile Justice (May 2015), [http://www.ncmhjj.com/wpcontent/uploads/2013/07/2007\\_Blueprint-for-Change-Full-Report.pdf](http://www.ncmhjj.com/wpcontent/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf).; Better Solutions for Youth with Mental Health Needs in the Juvenile Justice System, The Mental Health and Juvenile Justice Collaborative for Change, 1, 7 (2014), <http://cfc.ncmhjj.com/wp-content/uploads/2014/01/Whitepaper-MentalHealth-FINAL.pdf>.)

<sup>32</sup> ACLU, Revoked: How Probation and Parole Feed Mass Incarceration in the United States 43 (2020), [https://www.aclu.org/sites/default/files/field\\_document/embargoed\\_hrw\\_aclu\\_revoked\\_parole\\_and\\_probation\\_report\\_002.pdf](https://www.aclu.org/sites/default/files/field_document/embargoed_hrw_aclu_revoked_parole_and_probation_report_002.pdf).

<sup>33</sup> Chazz Arnett, Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts, 108 Journal of Criminal Law and Criminology 399, 445 (Summer 2018), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7631&context=jclc>.

<sup>34</sup> Pet. brief at 20-23.

adult correctional aims than genuine rehabilitative efforts.”<sup>35</sup> “No-suspension” conditions of probation should be prohibited so that the judicial system is not compounding the likelihood that youth will continue to be denied equal opportunities to succeed and advance, and so that courts are dismantling the school-to prison pipeline, rather than strengthening it.

**B. Student Codes of Conduct Are Too Subjective and Vague To Provide Youth Sufficient Notice of Behavior That Would Violate Their Probation.**

Student codes of conduct include a broad swath of behaviors and a broad range of responses, and do not provide clear notice of what actions will trigger a suspension. A “no-suspension” condition of probation is therefore fundamentally unfair and fails to achieve its intended purpose of guiding youth to conform to required behavioral expectations.

The MD Commission addressed concerns about the subjectivity of student codes of conduct in Maryland in its report.<sup>36</sup> It noted that the Maryland State Department of Education (MSDE) attempted to reduce the use of exclusionary discipline by adopting a regulation that required local school systems to develop codes of student conduct that reflect a rehabilitative approach to discipline.<sup>37</sup> However, not only did this approach fail to reduce the use of exclusionary discipline, but it resulted in student codes of conduct that were so broad that they *expanded* the subjectivity of disciplinary responses and the resulting, disproportionate effect on students.

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<sup>35</sup> Arnett, *supra* note 33, at 426.

<sup>36</sup> MD Comm’n on Pipeline, *supra* note 18, at 19.

<sup>37</sup> *Id.* at 16.

A study that compared the discipline codes of Maryland’s local school systems both in 2013-14, prior to the adoption of MSDE’s discipline regulation, and in 2015-16, a year after the regulation was adopted, found that “because the state guidelines [for codes of conduct] were so broad, many local codes recommended *nearly every response as appropriate for nearly every infraction.*”<sup>38</sup> The study also found that after the state regulation, local codes of conduct “averaged almost 15 response options per infraction.”<sup>39</sup> The researchers concluded that MSDE may not have been prescriptive enough in matching misbehavior with rehabilitative responses in the Guidelines for a State Code of Conduct, and that ultimately “choices made at the school and classroom level have a greater impact on disciplinary outcomes than broad statewide policy.”

What this means practically is that students do not know whether certain behaviors will result in counseling, a letter to their parent, a detention, or a suspension. For example, the Code of Conduct for Frederick County Public Schools lists twenty-eight behaviors that *could* trigger a school discipline response and states that “disciplinary measures may include, but need not be limited to, the following: warning, counseling, detention, special assignments, in-school detention, in-school assistance, removal from class, suspension from extra-curricular activities, school probation, suspension, long-term suspension, and

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<sup>38</sup> F. Chris Curran & Maida A. Finch, *Maryland Schools’ Codes of Conduct: Comparing Discipline Policy across Districts 40* (July 15, 2018), <https://edpolicylab.umbc.edu/files/2018/04/Maryland-Schools-Codes-of-Conduct-Comparing-Discipline-Policy-Across-Districts.pdf>.

<sup>39</sup> *Id.* at 7.

exclusion from school.”<sup>40</sup> Further, as Petitioner notes, schools can impose discipline for a “wide range of unspecified conduct.”<sup>41</sup> Students are suspended for offenses as vague as “disrespect” or “disruption.”<sup>42</sup> As a result of the broad, discretionary nature of codes of student conduct, typical adolescent behavior (cursing, a disrespectful comment, a schoolyard push) or disability-related behavior may or may not result in a suspension. As Petitioner noted, because student codes of conduct leave school staff with broad, unregulated discretion and students with a lack of procedural protections, “a suspension tells us virtually nothing about the child’s conduct.”<sup>43</sup>

The subjectivity of codes of student conduct is especially concerning because of the disproportionate impact of these vague policies. Federal guidance from the USDOE acknowledges that:

Children with disabilities are at a greater risk of disciplinary removals that significantly interrupt their learning, often unnecessarily. These risks are increased for children of color with disabilities. In many cases, we have reason to believe these removals are due to minor instances of misbehavior that are unrelated to issues of child or school safety, and can and should be addressed through supports and guidance.<sup>44</sup>

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<sup>40</sup> Frederick County Student Code of Conduct, [https://policy.frederick.k12.va.us/students/402\\_r-a-code\\_of\\_student\\_conduct](https://policy.frederick.k12.va.us/students/402_r-a-code_of_student_conduct).

<sup>41</sup> Pet. for Writ of Cert. at 5.

<sup>42</sup> *Id.* at 6-8; *see also* Frederick County Student Code of Conduct, *supra* note 40, (allowing discipline for “[a]ny other conduct which, in the judgment of the principal, interferes with the orderly operation of the school.”).

<sup>43</sup> Pet. Brief at 12

<sup>44</sup> U.S. Dep’t of Education, Office of Spec. Educ. and Rehab. Servs., Dear Colleague Letter on Supporting Behavior of Students with Disabilities 14 (Aug. 1, 2016), <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>.



Catherine Lhamon, then assistant secretary of education for civil rights, said in an interview, “A red flag for us, consistently, is catchall terms, like ‘disorderly conduct,’ that leave too much discretion that is unfettered.” She noted that poorly defined terms leave open the possibility of discrimination against certain students.<sup>45</sup>

Moreover, while other probation conditions, such as observing a curfew or engaging in community service, focus on matters within a student’s control, a “no-suspension” requirement makes the student’s probation conditional on the decisions of others. This provides further reason to reject the imposition of a “no suspension” condition of probation. Assuming the condition is intended as a deterrent for particular negative behaviors, it is too broad and imprecise, especially as the probationer does not control the suspension sanction. The “no suspension” rule does not provide a direct connection for the probationer of clearly targeted behaviors for which their probation may be justifiably violated. Because suspension is all too often the result of arbitrary, unfair or unwarranted disciplinary action by school staff, it should not result in a probation violation with accompanying risks of loss of liberty and removal from family and community.

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<sup>45</sup> Susan Ferriss, Update: How Kicking a Trash Can Became Criminal for a 6th Grader, Center for Public Integrity (April 10, 2015, updated September 3, 2015), <https://www.pri.org/stories/2015-04-10/how-kicking-trash-can-became-criminal-6th-grader>.

## **C. The Juvenile Justice System Must Account for Students’ Adolescent Development and Disability-Related Behavior.**

### **1. The Juvenile Justice System Must Account for Adolescent Development.**

Counter to the therapeutic and rehabilitative aims of the juvenile court, “no-suspension” conditions of probation can criminalize typical adolescent behavior and minor, subjective school-based misconduct. Advancing medical technology in neuroimaging methodologies has demonstrated that the period of adolescence is a highly transitional developmental stage with distinct attributes and that the adolescent brain continues to develop until a person reaches their mid-twenties.<sup>46</sup> “[b]efore the prefrontal cortex of the brain, the part that controls impulse and reasoning, fully matures, youth are likely to engage in risky behaviors, be easily influenced by peer pressure, be apt to forego contemplation of long-term consequences for short term rationales, and be prone to poor decision-making.”<sup>47</sup> According to research synthesized by the 2013 National Research Council, adolescents are less able to regulate their behavior in emotionally charged contexts, more sensitive to external influences such as the presence of peers and immediacy of rewards, and less able to make informed decisions that require consideration of long-term consequences.<sup>48</sup> In recent years, courts have relied upon the growing body of research on adolescent development to find that adolescents are affected

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<sup>46</sup> Arnett, *supra* note 33, at 437.

<sup>47</sup> *Id.* at 408-09.

<sup>48</sup> National Research Council. *Reforming Juvenile Justice: A Developmental Approach* (The National Academies Press 2013), <https://doi.org/10.17226/14685>.

by immaturity in their high order executive functions, in particular, impulse control, planning ahead, and risk avoidance.<sup>49</sup>

The juvenile justice system must consider adolescent development in its practices and policies in order to achieve its aims of accountability, prevention of re-offending, and fairness and equitable treatment.<sup>50</sup> Given the cognitive and behavioral developmental delays of adolescents, punitive responses to typical adolescent misbehavior and poor decision-making are less effective and fair.<sup>51</sup> It is concerning that the education system responds to such behavior with arbitrary and inequitable exclusionary discipline, but it is unacceptably punitive for the courts to take this one step further by allowing subjective suspensions for minor misconduct to trigger a violation of probation. It is in the nature of youth to make mistakes and to be immature, especially in the context of peer group settings. Such conduct must not automatically threaten their liberty and their life with family and community. The social costs are too great as demonstrated by our mass incarceration of persons with disabilities and of color.

## 2. The Juvenile Justice System Must Account for Disability-Related Behavior.

In addition to typical adolescent behavior, all too often students with disabilities are disciplined because of behaviors that stem from their disabilities. Given the

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<sup>49</sup> See e.g. *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>50</sup> John A. Tuell, et al., Translating the Science of Adolescent Development to Sustainable Best Practice. Children's Action Corps 1, [https://rfknrcjj.org/wp-content/uploads/2017/09/Developmental\\_Reform\\_in\\_Juvenile\\_Justice\\_RFKNRCJJ.pdf](https://rfknrcjj.org/wp-content/uploads/2017/09/Developmental_Reform_in_Juvenile_Justice_RFKNRCJJ.pdf)

<sup>51</sup> Arnett, *supra* note 33, at 438.

disproportionate impact discipline has on students with disabilities, *Amici* are concerned that “schools may be singling out students with disabilities for exclusionary discipline due to disability-related behaviors.”<sup>52</sup> A “no-suspension” condition of probation thus can criminalize not only typical adolescent behavior but disability-related behavior that the student’s school should have been appropriately supporting through special education services but was not. Many children with disabilities experience both academic and functional challenges as a result of their disabilities, and there is a strong correlation between academic struggles and behavior.<sup>53</sup> A student who is struggling academically and not receiving appropriate interventions may act out in order to avoid academic demands or may feel frustrated and exhibit noncompliance or work avoidance. In some cases, the student may lack the cognitive skills to make good choices, to understand expectations, or to express frustration appropriately in trying to meet those expectations.<sup>54</sup> Challenging behaviors can also occur when otherwise capable students are not provided effective and appropriate instruction, including literacy instruction and academic intervention, or when they are not provided appropriate behavioral supports.

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<sup>52</sup> See *Beyond Suspensions*, *supra* note 6, at 115.

<sup>53</sup> Peter Leone et al., *School Failure, Race and Disability: Promoting Positive Outcomes, Decreasing Vulnerability for Involvement with the Juvenile Delinquency System*, The National Center on Education, Disability & Juvenile Justice 21 (2003), [http://www.edjj.org/Publications/Pub10\\_03Paper.pdf](http://www.edjj.org/Publications/Pub10_03Paper.pdf).

<sup>54</sup> Alisha R. Pollastri et al., *The Collaborative Problem Solving Approach: Outcomes Across Settings*, 21 *Harv. Rev. Psychiatry* 188, 189-90 (July/Aug. 2013), <http://thinkkids.org/wp-content/uploads/2013/01/CPS-Outcomes-7-2013.pdf>.

Students with disabilities are entitled to appropriate Individualized Education Program (IEP) services under federal law. The USDOE acknowledged that:

[T]he use of exclusionary disciplinary measures may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address his or her behavioral needs. To ensure that each child receives a meaningful educational benefit, IEP Teams must consider the need for positive behavioral interventions and supports for children with disabilities whose behavior impedes their learning or that of others, and, when determined necessary to ensure FAPE [Free Appropriate Public Education], include or revise needed behavioral supports in the child's IEP.<sup>55</sup>

A “no-suspension” condition of probation has the potential to criminalize disability-related behavior that the student's school failed to appropriately address through special education services and behavior supports. Even more alarming, this could happen repeatedly since many students with disabilities receive multiple suspensions for the same type of conduct, with Black students with disabilities particularly at risk. The 2015-16 Civil Rights Data Collection found that Black students represented 17% of enrolled students with disabilities yet comprised 39% of those students who received *multiple* out-of-school suspensions.<sup>56</sup>

For students with disabilities, their disability-related behaviors can far too easily be linked to subjective violations of student codes of conduct, particularly in the vague categories of “disruption” and “disrespect.” Not only is the power in the hands of

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<sup>55</sup> OSERS Dear Colleague Letter, *supra* note 44, at 14.

<sup>56</sup> U.S. Dep't of Education Office for Civil Rights, 2015-16 Civil Rights Data Collection: School Climate and Safety (April 2018, revised May 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

administrators to determine what constitutes a violation of the student code of conduct, but in some cases, these administrators also have the power to punish the student for the school's failure to provide the appropriate education that would address the student's behavioral needs. The juvenile justice system cannot afford to bring this discriminatory treatment into the courts. To do so would, as Petitioner notes, "place[] upon such discrimination the imprimatur of the Judiciary."<sup>57</sup>

In addition to the disparate impact and subjective, arbitrary nature of suspension practices, this court should also consider the impact of punitively responding to suspensions for typical adolescent behavior and disability-related behavior with a violation of probation. The criminalization of such behavior feeds the school-to-prison pipeline and is contrary to the rehabilitative and therapeutic aims of juvenile court.

3. The Juvenile Justice System Must Account For a Lack of Procedural Safeguards Designed To Protect Students With Disabilities From Being Criminalized for Disability-Related Behavior and Having Their Civil Rights Violated.

The court below looked to the student code of conduct for procedures that might allow courts to have confidence in the validity or reliability of decisions to impose suspensions.<sup>58</sup> The court did not consider whether there were any procedures that would protect students from having their probation violated for disability-related behavior.

The IDEA allows students with disabilities to be suspended for up to ten days for violations of a code of student conduct before legal protections for disability-related

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<sup>57</sup> Pet. Brief at 22

<sup>58</sup> Slip Op. at 8.

behavior are triggered. It is only after ten days of suspension that the IDEA requires that the IEP team convene to determine whether the behavior that resulted in the suspension was disability-related behavior and whether discipline protections should kick in. *Amici* are concerned that although the IDEA recognizes that students with disabilities may exhibit behavior that both violates the code of student conduct and is caused by or substantially related to their disability, the IDEA allows these students with disabilities to be suspended for “not more than 10 school days (to the extent such alternatives are applied to children without disabilities)” before a school must consider the impact their disability had on their behavior.<sup>59</sup> In practice, this means a student could have up to five, two-day suspensions before protections are triggered and the school must consider the impact of disability on the student’s behavior. If a student’s probation is violated for such short-term suspensions, there is no procedural safeguard or protection in place at the school or court level to determine whether the behavior is disability-related. As a matter of school discipline, this may be acceptable, but for a probation proceeding where the student’s liberty is at stake, this is highly concerning. It allows for the criminalization of disability-related behavior where students are punished for their disability, when the law requires accommodation.

Once a student has been suspended for ten days (cumulatively or consecutively), the IDEA requires an IEP team to hold a “manifestation determination review” to determine whether the behavior that resulted in the suspension was “caused by, or had a direct and substantial relationship to the child’s disability” or might be “the direct result of the local

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<sup>59</sup> 20 U.S.C. § 1415 (k)(1)(C).

educational agency’s failure to implement the IEP.”<sup>60</sup> If the answer to either of these questions is yes, the student must be immediately returned to school and the *suspension is terminated*. However, the student receives no such protection from the juvenile court; under a “no-suspension” term, once the suspension occurs, it provides cause for the violation of probation which, unlike the school suspension, is not terminated automatically when an IEP team determines that the behavior resulted from the child’s disability. Students with disabilities may be deemed to have violated their probation for suspensions that resulted from disability- related behavior. Such action would violate the civil rights of youth with disabilities and is antithetical to the purpose of probation conditions, which is to establish clear guidance for youth behavior and hold youth accountable for those behaviors for which they are responsible. Punishing youth for their disability-related behavior is not rehabilitative or in their interest.

## CONCLUSION

Re-involvement with the juvenile justice system due to suspensions risks harm to students and reinforces the school-to-prison pipeline. Extensive research establishes the negative effects of student referrals to law enforcement for minor offenses that could be handled by the school discipline system.<sup>61</sup> Judge Steven Teske, the presiding juvenile court

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<sup>60</sup> 20 U.S.C. § 1415 (k)(E)(i).

<sup>61</sup> ACLU, *Bullies in Blue: The Origins and Consequences of School Policing* (April 2017), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_bullies\\_in\\_blue\\_4\\_11\\_17\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf) (citing Nance, *supra* note 29); Justice Policy Institute, *Education under Arrest: The Case Against Police in Schools 13-16* (November 2011),



judge in Clayton County, Georgia, explained the connection at a U.S. Senate subcommittee hearing on school discipline in 2012: “[I]t should come to no one’s surprise that the more students we arrested, suspended, and expelled from our school system, the juvenile crime rate in the community significantly increased. These kids lost one of the greatest protective buffers against delinquency—school connectedness.”<sup>62</sup> It is bad enough that students might be suspended from school as a disciplinary measure, but it is far more damaging still that they could be subjected to further involvement with the juvenile courts to consider violation of their probation for suspensions which districts dole out with unfettered discretion.

For the reasons stated above, amici respectfully request that this Court reverse the order of the Court of Special Appeals.

September 3, 2021.

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[http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest\\_fullreport.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf)).

<sup>62</sup> The Hon. Steven Teske, Testimony before the Senate Subcommittee on the Constitution, Civil Rights, and Human Rights, Subcommittee Hearing on “Ending the School to Prison Pipeline” 2 (Dec. 12, 2012),

<https://www.judiciary.senate.gov/imo/media/doc/12-12-12TeskeTestimony.pdf>.

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**CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112**

I hereby certify that this amicus brief contains 6,407 words (excluding the certifications and appendix), is written in Times New Roman 13 point font, and complies with the font, spacing, and type size requirements stated in Rule 8-112.

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### **CERTIFICATE OF SERVICE**

In accordance with Maryland Rule 20-201 (g), I HEREBY CERTIFY that on this 3RD day of September, 2021, a copy of the foregoing Brief in Support of Petition for Writ of Certiorari was filed electronically using the MDEC System which sent electronic notification of filing to all persons entitled to service, and electronic mail to: Brian M. Saccenti, Assistant Public Defender, Counsel for Petitioner; Carrie J. Williams, Assistant Attorney General, Counsel for Respondent; and Daniel Jawor, Assistant Attorney General, Counsel for Respondent.

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