

# CENTER FOR LAW AND EDUCATION

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## Written Comments Submitted by the Center for Law and Education To the MA Graduation and Dropout Prevention and Recovery Commission April 29, 2009

The Center for Law and Education (CLE), a national advocacy organization with offices in Boston and Washington, D.C., strives to assist low-income students, parents, and advocates improve their public schools and work with their communities to fulfill every student's right to a high-quality education. CLE assists organizations and community groups seeking to challenge policies and systemic practices that impede low-income students, who are disproportionately students of color, English Language Learners, and students with disabilities, from attaining the same high academic standards set for all students. For over 30 years, CLE has played a major role in the shaping of education legislation and policies at the national and state level, including Title I of the Elementary and Secondary Education Act, reauthorized as the No Child Left Behind Act of 2001 (NCLB), and the Individuals with Disabilities Education Act (IDEA). In Massachusetts, CLE provides legal support and technical assistance to public interest and private *pro bono* counsel representing indigent students in education law related matters. In the fall of 2008, CLE entered into a collaborative partnership with the Boston law firm, Choate, Hall and Stewart, and the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School to establish a Pro Bono Education Project, under which law firm associates work directly with CLE to provide direct representation to low-income students who are subject to disciplinary suspensions/expulsions, inappropriate educational placements, and "push-outs" through inappropriate referrals to the juvenile court.

Based upon our expertise in critical education issues and our lengthy history providing legal support on behalf of low-income students, CLE offers the comments presented below in response to a number of issues included in the legislative charge of the Graduation and Dropout Prevention and Recovery Commission. These comments reflect CLE's core philosophy, underlying all our work, that the most effective way to address the dropout problem is to ensure that students receive the high-quality education to which they are entitled under law and that students not be deprived of an education as an administrative response to problematic behavior.<sup>1</sup>

### ***Charge #2: Further developing early indicator systems to identify students who are at risk of dropping out, or who are not likely to graduate on time from high school without receiving additional support, and school policies that exacerbate dropping out***

As an initial matter, we would like to raise a concern with respect to the use of early indicator systems to identify students "at risk" of dropping out. Such systems need to be implemented with caution because they have the potential to be misused and to label certain students as being on a path to dropping out on the basis of indicators such as truancy, disciplinary exclusion, retention, and poor test scores in reading fluency or math, that are disproportionately associated with such characteristics as race, limited English language proficiency, disability, low socio-economic background, and family mobility. Indicators such as these often

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<sup>1</sup> Portions of these comments are adapted from Joanne Karger, Jenny Chou, & Kathleen B. Boundy, Center for Law & Education, *Dropouts and Push-outs: How School Discipline Policies Are Failing Our Students* (forthcoming).

lead to students being identified as “at risk” based on low expectations for academic success and channeled into remedial programs where they may also be provided supportive services. Rarely, however, do we see evidence of systems of early indicators of academic risk or drop-outs being used as a critical lens for examining systemically the school’s own culture and environment, and whether the school’s policies and practices are, in fact, contributing to students failing to complete their schooling with a high school diploma.<sup>2</sup> Hence, we believe that any system of identifying early indicators of “risk” of dropping out must be implemented with extreme care so as not to harm the intended beneficiaries.

At the same time, we believe that it is extremely important for school communities to use this opportunity to identify school-based policies that exacerbate dropping out. In particular, we would like to highlight three types of such policies – namely, (a) failure to provide the elements of a high-quality education; (b) implementation of policies that have the inadvertent effect of “pushing” students out of school; and (c) utilization of overly-harsh discipline policies that exclude students from their educational programs in response to challenging student behavior.

**(a) Failure to provide the elements of a high-quality education.** The Commission is in a unique leadership position to speak out about and to acknowledge the significance of the link between students dropping out of school and the denial of a high-quality education. Dropping out is not a single event but, rather, a process that unfolds over time.<sup>3</sup> Most students who eventually drop out have previously experienced academic problems, become disengaged from their classes, and fallen behind in the credits they need to graduate.<sup>4</sup> Under Title I/NCLB, students attending Title I schools, the schools serving predominantly children from low-income families and most often experiencing the highest dropout rates, are entitled to receive a high-quality education. Contrary to the general perception, NCLB is not simply a system for measuring whether students have made adequate progress toward proficiency and imposing consequences on schools when students do not. Rather, the law has a set of core program requirements, largely retained from the earlier version of Title I in effect prior to NCLB. These provisions are not discretionary but are, in fact, *legal requirements* that specify the key components of a quality education that are to be provided to students. For example, students attending schools that receive Title I funds are entitled to receive an accelerated and enriched (rather than watered down) curriculum that is aligned with the state curriculum frameworks; effective instruction provided by highly-qualified teachers who receive effective professional development; individualized assistance when they are struggling; and ongoing and regular high-quality assessments.<sup>5</sup> Title I schools are also required to assess how well they are providing their students with these elements according to a plan that is jointly developed with parents through a process described in the school’s jointly developed parent involvement policy. Despite their far reaching implications for helping to improve educational achievement for these vulnerable students, these legal requirements are not effectively implemented, monitored, or enforced. To begin to address the dropout problem, the MA Department of Elementary and Secondary Education (DESE) should monitor more closely local school district and school compliance with these Title I requirements that establish the core elements of a high quality education. Similarly, any dropout prevention and recovery grant program should promote enhanced implementation of the provisions underlying the right to a high-quality education.

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<sup>2</sup> One possibility is to examine more closely how school districts are utilizing funds for Coordinated Early Intervening Services (CEIS) under the Individuals with Disabilities Education Act. 20 U.S.C. § 1413(f); 34 C.F.R. § 300.226. Such services have the potential to benefit all students by addressing academic and behavioral problems prior to identification for special education.

<sup>3</sup> See Russell W. Rumberger, *Why Students Drop Out of School*, in DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 133 (Gary Orfield, ed. 2004); U.S. GENERAL ACCOUNTING OFFICE, SCHOOL DROPOUTS: EDUCATION COULD PLAY A STRONGER ROLE IN IDENTIFYING AND DISSEMINATING PROMISING PREVENTION STRATEGIES (GAO-02-240), 2002, at 16 <<http://www.gao.gov/new.items/d02240.pdf>> (last visited Apr. 28, 2009) [hereinafter GAO, SCHOOL DROPOUTS].

<sup>4</sup> See MELISSA RODERICK, CLOSING THE ASPIRATIONS-ACHIEVEMENT GAP IMPLICATIONS FOR HIGH SCHOOL REFORM: A COMMENTARY FROM CHICAGO 7 (2006) <[http://www.nslc.org/highschools/pdfs/MDRC\\_CPSstudy.pdf](http://www.nslc.org/highschools/pdfs/MDRC_CPSstudy.pdf)> (last visited Apr. 28, 2009).

<sup>5</sup> See Paul Weckstein, Center for Law & Education, *Closing the Circle on the Right to Quality Education* (forthcoming); Paul Weckstein & Stephen J. Wermiel, *The Need for Equal Opportunity and a Right to Quality Education* 35 HUMAN RIGHTS 21, 23 (2008).

**(b) Implementation of policies that have the inadvertent effect of “pushing” students out of school.**

The Commission should also consider targeting certain policies and practices that tend to “push” students out of school by increasing the likelihood that they will drop out. These policies include: (1) trying to elevate district and school level adequate yearly progress (AYP) determinations at the expense of certain struggling or failing students; (2) using the practice of grade retention; and (3) denying course credit to students who miss a certain number of days in the academic term.

*(1) Trying to elevate district and school level AYP determinations at the expense of certain students.* Because schools are not required, in determinations of adequate yearly progress (AYP), to include the performance of students who have dropped out (or transferred, for example, to an alternative school within the same school year), the proficiency rates of schools are artificially inflated. Failure to include dropouts and transfers creates an inaccurate determination of proficiency and also reduces the likelihood that schools will give sufficient effort to help struggling students catch up and remain in school with their peers. A student who is having academic difficulty is viewed as a “liability” for the school if s/he remains in school and fails to demonstrate proficiency on the MCAS. As a result, it becomes all too easy for a school to ignore the needs of struggling students and allow them, instead, to drop out. Similarly, schools may hold back from following up and investigating fully when a student demonstrates early signs of dropping out. In the worst case scenario, school personnel may quietly counsel older students, in particular those who are English language learners beyond the compulsory education age, to drop out.

A related problem associated with AYP calculations pertains to schools’ under-identifying students in need of special education services and Individualized Education Programs (IEPs) under the Individuals with Disabilities Education Act (IDEA) and, instead, placing these students on Section 504 plans in order not to have to count their performance in the disaggregated disability subgroup, which includes only students with IEPs. Keeping students off IEPs can enable schools to lower the size of their disability subgroup so that it is below the minimum threshold required for reporting purposes (40 in Massachusetts). Moreover, when lower-achieving students are placed on Section 504 plans, their scores are diluted as a result of being included only in the total cohort determination and not in the subgroup numbers. This practice, in addition to violating federal and state legal requirements pertaining to the education of students with disabilities, results in students not receiving the necessary services and supports that they need and may contribute to their eventually dropping out. We recommend that the Commission collect data concerning the manner in which schools are utilizing the various practices described above with respect to AYP determinations that have the effect of exacerbating the numbers of dropouts.

*(2) Using the practice of grade retention.* Many schools continue to use grade retention despite the fact that research has shown that this practice does not result in improved student achievement and, in fact, is a strong predictor of dropping out.<sup>6</sup> Retained students are more likely to leave school because retention does not address the reasons that the instruction the student had received was ineffective and because retained students, who are older than their classmates, are more likely to feel further disconnected from their peers. One study found that being retained a grade increases the risk of dropping out by 40 to 50 percent and that being retained for more than one grade, increases the risk of dropping out by 90 percent.<sup>7</sup> It is also disturbing that research has documented the disproportionate use of retention for male students, students from low-

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<sup>6</sup> See Linda Darling Hammond, *Standards, Accountability, and School Reform*, 106 TCHRS C. REC. 1047-1085 (2004); C. Thomas Holmes, *Grade Level Retention Effects: A Meta-Analysis of Research Studies*, in FLUNKING GRADES: RESEARCH AND POLICIES ON RETENTION 16, 27 (Lorrie A. Shepherd & Mary Lee Smith, eds., 1989); Melissa Roderick, *Grade Retention and School Dropout: Investigating the Association*, 31 AM. EDUC. RESEARCH J. 729, 747 (1994).

<sup>7</sup> See Franklin P. Schargel, *Who Drops Out and Why*, in HELPING STUDENTS GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 33 (internal citations omitted) (Jay Smink & Franklin P. Schargel, eds., 2004).

income backgrounds, and students from ethnic minorities.<sup>8</sup> Instead of grade retention, schools should focus on providing each student with a high-quality education, including the provision of effective instruction and individualized assistance.

(3) *Denying course credit for students who miss a certain number of days in the academic term.* In many school districts, students are denied course credit and receive a mandatory class failure after a certain number of unexcused absences in a marking period. Such an approach is counterproductive because it essentially removes any incentive for the student to return to class and hand in assignments.<sup>9</sup> Moreover, this practice, which results in students not being promoted to the next grade, has the potential to lead students to drop out. In place of the denial of academic credit for unexcused absences, preventative and intervention strategies should be used to address problems early on before they escalate.<sup>10</sup>

**(c) Utilization of overly-harsh discipline policies that exclude students from their educational programs as an administrative response to challenging behavior.** The over-zealous use by schools of harsh discipline policies, which result in the removal of students from their learning environment, has serious negative implications for students, including increasing the likelihood that they will drop out of school. CLE discusses this issue in detail in our comments for Charge #5.

#### ***Charge #4: Developing a reimbursement mechanism for districts sending students to alternative education programs***

Charge #4 promotes the creation of a reimbursement mechanism for districts sending their students to alternative education programs. We feel that this provision needs to be implemented with caution, though we applaud the proposed legislation's focus on programs, presumably within existing schools accountable for meeting state and federal standards, not separate facilities codified by MA DESE as public schools that are held to different and lower standards. While we support the creation of a range of age-appropriate, high-quality alternative education pathways and options, DESE must take strong measures to ensure that such programs are under the jurisdiction of existing public schools, which must be accountable for guaranteeing the same core elements of program quality described above, including, among other things, an accelerated and enriched curriculum, effective instruction by highly-qualified teachers, and individualized attention to differences.<sup>11</sup> Because there are currently only a small number of alternative education programs that receive grants from MA DESE conditioned upon their meeting state standards, it is critical that any reimbursement program for alternative education programs be connected to an assurance that these programs are not separate, stigmatizing placements but provide their students with instructional services and supports, consistent with the core elements of a high-quality education.

Moreover, CLE advocates changing current state law to reflect the fundamental principle that, in response to problematic student behavior, a student should not be deprived of his/her right to a free public education aligned with the state's high standards and denied the opportunity for his/her behavior to be addressed as an education matter. Rather, any such student should receive appropriate instruction, effective behavioral intervention, counseling, mental health supports, and other services necessary to learn and participate effectively in the classroom. Any change in state discipline law must reflect this basic principle. Currently,

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<sup>8</sup> See Samuel J. Meisels & Fong-Ruey Liaw, *Failure in Grade: Do Retained Students Catch Up?* 87 J. EDUC. RES. 69, 71 (1993).

<sup>9</sup> See JAY SMINK & JOANNA ZORN HEILBRUNN, NATIONAL DROPOUT PREVENTION CENTER/NETWORK, LEGAL AND ECONOMIC IMPLICATIONS OF TRUANCY 20-21 (2005) <[http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/29/dd/ec.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/dd/ec.pdf)> (last visited Apr. 28, 2009).

<sup>10</sup> See, e.g., Lynn S. Fuchs & Douglas Fuchs, *A Framework for Building Capacity for Responsiveness to Intervention*, 35 SCH. PSYCH. REV. 621, 621 (2006).

<sup>11</sup> See MA DESE, *Alternative Education: Frequently Asked Questions and Promising Practices* <<http://www.doe.mass.edu/alted/faq.html>> (last visited Apr. 28, 2009).



there is no obligation under state law for school districts to provide continuing educational services to students who have been removed from their public education for disciplinary reasons.<sup>12</sup> The one exception is students with disabilities who are removed for more than 10 school days. Consequently, excluded students without disabilities who are channeled into separate alternative education schools are often not receiving a public education that meets the standards set by the state for all students. Although students with disabilities are entitled to receive an appropriate education during periods of removal for more than 10 school days, because these students are disproportionately represented in alternative education schools, they are not accessing the general education curriculum aligned to high state standards, being educated in the least restrictive environment, and being taught by highly qualified teachers as required under federal and state law. Without an effort to ensure that all alternative education programs, including those designed to educate students who have been subject to school discipline and those who are above the compulsory education age, provide their students with the opportunity to meet the academic content and achievement standards established for all students, Charge #4 has the potential to legitimize a “dual track system” within the Commonwealth’s public schools that will segregate further low-income, racial and ethnic minority and disabled students living largely in high poverty school districts by channeling them into alternative education.

***Charge #5: Exploring the connection between school discipline policies and students' level of engagement or alienation from school, with emphasis on school referrals for discipline purposes and court-involved youth***

CLE philosophically rejects the underlying premise of current state law that uses denial of public education as the primary means of punishing inappropriate student behavior. Removing a student from his/her learning environment when the student’s behavior is not substantially likely to cause injury to self or others runs counter to the goal of schools to ensure that students receive a high-quality education aligned with challenging state standards. Because in today’s labor market high school graduation is key to youths’ accessing post secondary education and higher paying jobs requiring critical think skills, any policy that causes students to lose instruction and fall behind, drop out or otherwise leave school without a diploma is of significant import. Consequently, we advocate a paradigm shift with respect to school discipline policies, according to which no child is deprived of an education in response to problematic behavior and school disciplinary measures are fair, equitable and individualized and not utilized to criminalize student behavior.

There is no dispute that schools have a responsibility to promote a safe learning environment for their students. Yet, research has shown that removing students from their educational program as a means of punishment is ineffective in helping students change problematic behavior or in creating a safer school environment.<sup>13</sup> One study found that the strongest predictor of the number of suspensions a student received in middle school was the number of suspensions s/he received in late elementary school.<sup>14</sup> Disciplinary exclusions may also lead students to engage in delinquent behavior by providing them with extra time to be without adult supervision, during which they can become targets for gang recruitment and other

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<sup>12</sup> See *Board of Education v. School Committee of Quincy*, 415 Mass. 240 (1993). It is noteworthy that in the *Quincy* case, the State Board of Education argued that because the state compulsory education law requires students to attend school up through the age of 16, school districts must provide students through the age of 16 with educational services when they are excluded from school for disciplinary reasons. The Supreme Judicial Court ultimately held that the compulsory education law does not require school districts to provide such educational services and that it is up to the Legislature to decide whether and how educational programs are to be provided to students who have been expelled. See MA DESE, *Advisory Opinion on School Discipline* (Jan. 27, 1994) <<http://www.doe.mass.edu/lawsregs/advisory/discipline/AOSD1.html>> (last visited Apr. 28, 2009).

<sup>13</sup> Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in *HAND BOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES* (Carolyn M. Evertson & Carol S. Weinstein, eds., 2006).

<sup>14</sup> Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE* 26 (Johanna Wald & Daniel J. Losen, eds. 2003).

problems.<sup>15</sup> Exclusion is also associated with poor academic achievement and grade retention.<sup>16</sup> Moreover, once students are suspended, they may develop low self-esteem, feel alienated from their peers, and have negative attitudes about school.<sup>17</sup> For disengaged students, exclusion rewards the desire not to attend school, and the practice results in students missing important classroom instruction, falling even further behind in their work, and ultimately dropping out of school.<sup>18</sup> Youths who drop out have fewer prospects of obtaining a job, earn lower salaries,<sup>19</sup> tend more often to be unemployed,<sup>20</sup> have greater health problems,<sup>21</sup> are more likely to be dependent on welfare,<sup>22</sup> and have higher rates of incarceration.<sup>23</sup>

The harmful effects of school exclusion are particularly disturbing in light of the fact that research has long highlighted the disproportionate impact of school discipline policies on students of color, in particular African American males.<sup>24</sup> The Schott Foundation has cited data from the Office for Civil Rights of the U.S. Department of Education, showing that African American males in Massachusetts receive out-of-school suspensions at twice the rate of white, non-Hispanic male students.<sup>25</sup> Similarly, a 2008 report by the Gaston Institute found that Latino students in Massachusetts had an out-of-school suspension rate that was nearly twice as high as that for all students in the Commonwealth.<sup>26</sup> Research has also shown that students of color tend to be disproportionately charged with minor offenses such as disobedience and disrespect, which are subjective in nature and allow for the introduction of racial bias.<sup>27</sup> It is not surprising that schools that rely heavily on suspension and expulsion tend to have the highest rates of minority overrepresentation in suspensions and expulsions.<sup>28</sup>

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<sup>15</sup> Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 Phi Delta Kappan 372, 376 (1999).

<sup>16</sup> See Raffaele Mendez, *supra* note 14, at 26 (internal citations omitted). See also Lawrence M. DeRidder, *How Suspension and Expulsion Contribute to Dropping Out*, 56 Educ. Digest 44-47 (Feb. 1991).

<sup>17</sup> See Commission for Change in the Oakland Public Schools, *Children in School: Sounding the Alarm of Suspensions* 11 (Aug. 1992), available in ERIC, ED No. 350680.

<sup>18</sup> See AMERICAN PSYCHOLOGICAL ASSOCIATION, ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 5, 49-50 (2006) <<http://www.apa.org/releases/ZTTFReportBODRevisions5-15.pdf>> (last visited Apr. 28, 2009); DeRidder, *supra* note 16, at 45; Ruth B. Ekstrom, et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356, 563 (1986); Raffaele Mendez, *supra* note 14, at 30.

<sup>19</sup> Christine A. Christle, Kristine Jolivet, & C. Michael Nelson, *School Characteristics Related to High School Dropout Rates*, 28 REMEDIAL & SPECIAL EDUC. 325, 325 (2007).

<sup>20</sup> CENTER FOR LABOR MARKET STUDIES, NORTHEASTERN UNIVERSITY, AN ASSESSMENT OF THE LABOR MARKET, INCOME, HEALTH, SOCIAL, AND FISCAL CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL: FINDINGS FOR ILLINOIS ADULTS IN THE 21<sup>ST</sup> CENTURY 8 (Oct. 2007) <[http://www.clms.neu.edu/publication/documents/An\\_Assessment\\_of\\_the\\_Consequences\\_of\\_Dropping\\_Out\\_of\\_High\\_School\\_in\\_Illinois.pdf](http://www.clms.neu.edu/publication/documents/An_Assessment_of_the_Consequences_of_Dropping_Out_of_High_School_in_Illinois.pdf)> (last visited Apr. 28, 2009).

<sup>21</sup> U.S. DEPT. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2006, at 1-2 (2008) <[http://www.dropoutprevention.org/stats/docs/Dropout\\_Rates-2006.pdf](http://www.dropoutprevention.org/stats/docs/Dropout_Rates-2006.pdf)> (last visited Apr. 28, 2009).

<sup>22</sup> GAO, SCHOOL DROPOUTS, *supra* note 3, at 4.

<sup>23</sup> CAROLINE WOLF HARLOW, EDUCATION AND CORRECTIONAL POPULATIONS: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 3, at 2 (Jan. 2003) <[http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1b/20/5a.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/20/5a.pdf)> (last visited Apr. 28, 2009).

<sup>24</sup> Skiba & Peterson, *supra* note 15, at 374.

<sup>25</sup> Schott Foundation for Public Education, *Given Half a Chance: The Schott 50 State Report on Public Education and Black Males: Individual State Reports: Massachusetts* (2008) <<http://blackboysreport.org/node/78>> (last visited Apr. 28, 2009).

<sup>26</sup> NICOLE LAVAN & MIREN URIATE, THE MAURICIO GASTON INSTITUTE FOR COMMUNITY LATINO DEVELOPMENT AND PUBLIC POLICY, A STATUS OF LATINO EDUCATION IN MASSACHUSETTS: A REPORT 8 (Mar. 2008) <[http://www.gaston.umb.edu/articles/lavan\\_uriarte\\_08\\_edu\\_status\\_report.pdf](http://www.gaston.umb.edu/articles/lavan_uriarte_08_edu_status_report.pdf)> (last visited Apr. 28, 2009).

<sup>27</sup> CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 7 (2000).

<sup>28</sup> Skiba & Peterson, *supra* note 15, at 374.

Students with disabilities also tend to be disproportionately affected by suspensions and expulsions,<sup>29</sup> often for behavior that is related to their disability in violation of their rights under federal and state special education law. A major longitudinal study found that one-third (33%) of students with disabilities had been suspended or expelled at some point during their school careers.<sup>30</sup> In addition, students identified as having an emotional disturbance (ED) were found to be significantly more likely than students in all other disability categories to be suspended or expelled.<sup>31</sup> In fact, 63% of students with ED had experienced disciplinary action in one school year, with the average being seven discipline incidents per student.<sup>32</sup>

Moreover, schools too often criminalize the behavior of students with disabilities by making inappropriate referrals to law enforcement authorities rather than addressing the behavior as an educational issue. Although the 1997 reauthorization of IDEA added a provision stating that “[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities...,”<sup>33</sup> such referrals cannot be made in an effort to circumvent the legal obligations of the school district.<sup>34</sup> Under IDEA and state special education law, the school is required to address the behavior of students with disabilities by providing these students with the appropriate special education and related services that meet the individualized needs of the student.<sup>35</sup> When schools refer a student with a disability to law enforcement authorities rather than addressing the behavior as an educational matter within the school environment, the student’s rights under Section 504 of the Rehabilitation Act of 1973 may also be implicated.<sup>36</sup>

Students with disabilities, who are suspended or expelled from school for more than 10 school days, are still entitled to receive a free appropriate public education (FAPE). Yet many school districts provide only minimal tutoring to these students (sometimes only two-three hours per day or per week), leading them to fall further behind their peers. For regular education students, the situation is even worse because, as noted earlier, under current state law, school districts are not required to provide educational services to regular education students during the period of exclusion.<sup>37</sup> Given the importance of MA students achieving to high standards and passing the high-stakes MCAS examination as a condition of receipt of a high school diploma, it defies logic to deprive students, who are disproportionately low-income, racial minorities, English language learners, and students with disabilities, of important learning time. These students, whom research has shown are more likely to be suspended or expelled from school, are the ones who need *more* educational support, not less. For this reason, CLE advocates a change in current state law to reflect the basic principle that students should not be excluded from their learning environment for problematic behavior. While schools must deal with serious infractions swiftly and decisively, student behavior should not be criminalized and students’ education should be disrupted as little as possible for their benefit and for that of society as a whole.

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<sup>29</sup> Dalun Zhang, Antonis Katsiyannis, & Maria Herbst, *Disciplinary Exclusions in Special Education: A 4-Year Analysis* 29 BEHAVIORAL DISORDERS 337, 337 (2004).

<sup>30</sup> SRI INTERNATIONAL, NATIONAL LONGITUDINAL TRANSITION STUDY 2, FACTS FROM NLTS2: SCHOOL BEHAVIOR AND DISCIPLINARY EXPERIENCES OF YOUTH WITH DISABILITIES 3 (Mar. 2006) <[http://www.nlts2.org/fact\\_sheets/nlts2\\_fact\\_sheet\\_2006\\_03.pdf](http://www.nlts2.org/fact_sheets/nlts2_fact_sheet_2006_03.pdf)> (last visited Apr. 28, 2009).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* The disability category of other health impairments, which includes students with attention-deficit/hyperactivity disorder (ADHD) also experienced a high rate of disciplinary action in one school year (36 %).

<sup>33</sup> 20 U.S.C. § 1415(k)(9)(A)(1997) (current version at 20 U.S.C. § 1415(k)(6)(A)(2008)).

<sup>34</sup> 143 CONG. REC. S4403 (May 14, 1997) (statement of Sen. Harkin).

<sup>35</sup> See *Morgan v. Chris L.*, 1997 U.S. App. LEXIS 1041, \*16 (6th Cir. 1997) (finding that because the school had failed to address the student’s behavioral needs, the school’s filing of a juvenile court petition constituted a change in placement, thereby violating the student’s right to a free appropriate public education under the statute).

<sup>36</sup> 29 U.S.C. § 794.

<sup>37</sup> See *supra* CLE comments for Charge #4 (citing *Board of Education v. School Committee of Quincy*, 415 Mass. 240 (1993) and MA DESE, *Advisory Opinion on School Discipline* (Jan. 27, 1994)).