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U.S. Commission on Civil Rights  
1331 Pennsylvania Avenue, NW, Suite 1150  
Washington, DC 20425  
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To the Commissioners:

Attached to this letter, please find my written comments to supplement the December 8, 2017 briefing *The School-to-Prison Pipeline: Intersections of Students of Color with Disabilities*.

My expertise is derived from 15 years of professional experience in education and work with juvenile justice and education leaders in more than 20 states. In addition, in the past five years I have authored numerous articles related to this issue, have briefed the U.S. Departments of Justice and Education, served as an appointed member of state legislative workgroups, and have appeared before the California state legislature to testify.

The statements contained in this comment represent my professional point of view and not those of Bellwether Education Partners and may not be the views of others within the organization. Bellwether maintains an internal culture that cultivates and respects diverse points of view and does not take organizational positions on education issues.

Sincerely,



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## **The School-to-Prison Pipeline: Intersections of Students of Color with Disabilities**

Comment to Supplement the Briefing before the U.S. Commission on Civil Rights, December 8, 2017

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### About the Author:

Hailly T.N. Korman is a principal at Bellwether Education Partners on the Policy and Thought Leadership team. She joined the organization in January 2016 and focuses on correctional education, justice-involved youth, and school discipline. Hailly supports justice agencies and their education partners as they work to craft practices that significantly improve outcomes for justice-involved students, and she advocates for systemic reforms that mitigate the institutional obstacles to providing high-quality education services to youth in secure schools.

Informed by this work, Hailly also works with other public agencies to improve education transitions for all students whose academic pathways have been substantially disrupted in order to ensure that education opportunities offer stability and opportunity to young people who may be struggling to navigate complex bureaucracies.

Prior to joining Bellwether, Hailly was director of special projects at the Center for Educational Excellence in Alternative Settings, where she provided direct support to an emerging cohort of reform-minded education and youth justice system leaders across the country. Previously, she was an attorney at Morrison & Foerster LLP, where she served as pro bono counsel in *Reed v. State of California*, representing student plaintiffs at underperforming Los Angeles public schools challenging the constitutionality of strict reverse-seniority layoffs. In 2010, she received both Public Counsel's Impact Litigation Award and the ACLU's Social Justice Award for her work on that case. Before law school, Hailly spent nine years teaching primary grades; she has also taught an undergraduate seminar at UCLA on education policy and politics and a "know your rights" course at a local alternative high school.

Hailly is a graduate of Brandeis University with a major in politics and minors in legal studies and education. She also holds a J.D. from UCLA School of Law, where she was a member of the Public Interest and Critical Race Studies programs and the Collegium of University Teaching Fellows. She is also an alumna of Education Pioneers (LA '08) and Teach For America (LA '02).

## Placing the Debate in Context

The disparities in the imposition of punitive school discipline on students of color and students with disabilities are well documented and appear consistently across school, district, and state boundaries. There remains, however, a debate about the origin of these disparities. As illustrated by the in-person statements made in the briefing, that debate can be roughly grouped into two viewpoints: those who believe that disparities are the result of bias when discipline is *unequally applied* and those who suggest that differences in the behavior of individual students in defined identity categories result in differential rates of discipline that is *equally applied*.

I submit this comment to suggest that those debates be framed within the larger universe of available data: the robust body of research addressing the imposition of other types of punitive discipline, primarily in the juvenile and criminal justice context.

The relationships between school discipline and justice system contact are typically captured under the umbrella term “school-to-prison pipeline,” but that phrase only describes the possible trajectory of an individual student. In addition to that conceptual framework, there is another dimension of the relationship that ought to be explicitly considered: Rates of disparate school discipline for students of color and students with disabilities are nested within a larger social phenomenon, and, as a result, they parallel the disparate local and national rates of arrest, incarceration, and executions of people of color and people with disabilities. It is reasonable to infer that that the identified causes of those disparities are likely to be similar to — if not the same as — the differential rates of school-based discipline.

Efforts to claim that questions about school discipline are new and mysterious ignore a wealth of available data and expertise. None of these questions are novel and using the mask of caution to urge restrained civil rights enforcement — including rescission of the U.S. Departments of Justice and Education’s 2014 guidance letter on this issue — is disingenuous.

## Significant Research on the Disproportionate Administration of Punitive Strategies Exists

Both the juvenile and adult justice systems have long histories of disproportionate contact with people of color and people with disabilities; research into this issue dates back until at least the early 1950s.

Within the research, it is undisputed that the juvenile and adult justice systems come into more frequent contact with people of color and people with disabilities than their white and non-disabled counterparts. It is also undisputed that the consequences at each point of the interaction are more severe for people of color and people with disabilities.

While not intended to provide a comprehensive survey of the available data, these recent data points illustrate this reality:

- Black and white adults use marijuana at equivalent rates, but Black people are 3.7 times more likely to be arrested for marijuana possession.<sup>1</sup>
- When convicted for felony crimes in the same jurisdiction, Black adults are incarcerated 51 percent of the time while white adults in the same jurisdiction are incarcerated only 38 percent of the time.<sup>2</sup>
- Black youth in their state's juvenile justice systems are more than four times as likely to be committed to secure facilities than their white counterparts. In six states, that disparity is more than ten-to-one.<sup>3</sup>
- Native youth are twice as likely to be admitted to adult prisons than their white counterparts.<sup>4</sup>
- All people with disabilities are 13 times more likely to be arrested than people without disabilities. And more than 55 percent of Black people with disabilities are arrested before the age of 28.<sup>5</sup>

The United States Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) terms this category of experiences "disproportionate minority contact" or DMC. This is "the disproportionate number of minority youth who come into contact with the juvenile justice system."<sup>6</sup> There is no similarly defined single conceptual category within the adult justice context, but the phenomenon is well documented. In both sectors, this concept has widespread recognition as a problem to be solved. Attempts to frame the very same phenomenon when it appears in schools as the ordinary outcome of neutral policies and practices ignore decades of relevant research.

### **This Research Indicates that Bias Meaningfully Fuels Disproportionality and that Further Inquiry is Warranted**

Bias is notoriously difficult to document, particularly where researchers are not recording data themselves but are instead relying on the records kept by those whose behavior is under scrutiny. But at the risk of oversimplification, a review of the existing research can be summarized: There are detectable and statistically significant differences in the ways in which our law enforcement and judicial systems treat young people of color and young people with disabilities who are otherwise identical to their white and non-disabled peers. And although the detectable bias in each interaction may be minimal, the effects compound as an individual moves through the justice system, culminating in the largest disparities at the most serious end of the process.

Statistical disparities shown in data are not, standing alone, sufficient evidence of bias and do not conclusively establish that any bias is present. No researcher has advanced that claim. But it is important to note that where researchers have had access to meaningful investigations, they have, in fact, been able to establish that bias is both present and influential.

For example, a study in Cook County, Illinois found that when controlling for all other variables, judges demonstrated racial bias:

We find evidence of **significant interjudge disparity** in the racial gap in incarceration rates, which provides support for the model in which **at least some judges treat defendants differently on the basis of their race**. The magnitude of this effect is substantial.<sup>7</sup>

To that end, those who study the issue consistently conclude that the undisputed statistical disparities point to a need for deeper investigation of specific systems, more complete data collection, and additional targeted research. It is, in fact, impossible to find a credible study that concludes that the difficulty of ascertaining the degree to which bias influences disparities means that no further investigation would be appropriate.

### **Schools Are Part of Our Civic Fabric**

The established pattern of the disproportionate imposition of punitive strategies in our justice context tracks the available data from schools about differential rates of suspensions and expulsions in schools. These are not just two parallel sets of data; they are, in fact, two manifestations of the same phenomenon.

Schools are integral to, not separate from, our civic experience. Every person — child and adult — who shows up in a school building also exists outside of that building and within our larger civic context, a context that includes our law enforcement and justice systems. Discussions about when and how statistical evidence of disproportionality should trigger an investigation cannot be had in a vacuum; they should, instead, be grounded in the substantial body of research and evidence outside the schoolhouse walls.

### **Efforts to Require Examination of the Causes of Disproportionality and to Remedy its Effects Are Common**

In 2002, the federal Juvenile Justice and Delinquency Prevention Act broadened the scope of DMC from the early definition of disproportionate minority *confinement* to cover the larger problem of disproportionate minority *contact*. The law required “an examination of potential disproportionate representation from secure detention and confinement to all decision points within the juvenile justice continuum and implementation of data-based prevention and system improvement strategies to reduce identified disproportionality.”<sup>8</sup> Under this statutory authority, the U.S. Department of Justice regularly funds efforts to reduce disproportionality in state juvenile justice systems. In fact, OJJDP has mandated data collection in every state since 2005.

Analogous efforts on the part of the U.S. Department of Education to investigate and remedy disproportionate imposition of school-based discipline are fully consistent with this approach. In fact, these efforts fill a glaring gap in the work of its companion federal

agency, the Department of Justice: expelling and suspending students from school feeds them directly into state juvenile justice systems.<sup>9</sup> The 2014 school discipline guidance issued by the Departments of Justice and Education is just one part of a larger federal strategy to reduce the disproportionality of punitive strategies in all sectors of public life.

### **Determining the Influence of Bias on Disproportionality in School Discipline is an Essential Role for Civil Rights Leaders**

Evidence of disproportionality in the administration of punitive discipline strategies — both at school and in the justice system — is not sufficient to identify bias. It is, however, a leading indicator of where bias may be found if one were to investigate. Additionally, all of the existing research shows that a targeted inquiry is the only way to determine whether bias is, or is not, the underlying cause of the disparity. Where bias does lead to differential treatment, our constitutional and statutory protections against discrimination are implicated.

Those charged with enforcing those federal civil rights protections, including the right to be free of discriminatory treatment based on race or disability, must continue to conduct these investigations where the available evidence indicates that racial bias may be operating.

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- <sup>1</sup> The War on Marijuana in Black and White. ACLU Foundation, 2013. Available at: <https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=report/war-marijuana-black-and-white>
- <sup>2</sup> Abrams, David and Bertrand, Marianne and Mullainathan, Sendhil, Do Judges Vary in Their Treatment of Race? (May 28, 2013). Journal of Legal Studies, Vol. 41, No. 2 (June 2012), pp. 347-383; U of Penn, Inst for Law & Econ Research Paper No. 11-07. Available at SSRN: <https://ssrn.com/abstract=1800840>
- <sup>3</sup> Rovner, Joshua, Racial Disparities in Youth Commitments and Arrests, The Sentencing Project, 2016. Available at: <http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>
- <sup>4</sup> Hartney, Christopher and Linh Vuong, Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System. National Council on Crime and Delinquency, 2009. Available at: [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf)
- <sup>5</sup> Erin J. McCauley, “The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender”, *American Journal of Public Health* 107, no. 12 (December 1, 2017): pp. 1977-1981. Available at: <http://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304095>
- <sup>6</sup> United States Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention Program Summary: Disproportionate Minority Contact. Available At: <https://www.ojjdp.gov/programs/ProgSummary.asp?pi=18>
- <sup>7</sup> Abrams, David and Bertrand, Marianne and Mullainathan, Sendhil, Do Judges Vary in Their Treatment of Race? (May 28, 2013). Journal of Legal Studies, Vol. 41, No. 2 (June 2012), pp. 347-383; U of Penn, Inst for Law & Econ Research Paper No. 11-07. Available at SSRN: <https://ssrn.com/abstract=1800840>, *emphasis added*
- <sup>8</sup> United States Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention Program Summary: Disproportionate Minority Contact. Available At: <https://www.ojjdp.gov/programs/ProgSummary.asp?pi=18>
- <sup>9</sup> Fableo, Tony, et al., Breaking School Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice System Involvement, Council of State Governments, 2011. Available at: [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf)