

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

NYRON HARRISON,
THELMA WILLIAMS,
INDIVIDUALLY AND ON BEHALF OF
THEIR MINOR CHILD,
KA'MAURI HARRISON

Plaintiffs,

v.

JEFFERSON PARISH SCHOOL
BOARD, DR. JAMES GRAY, CECILY
WHITE, TERRI JOIA, AND PATRICIA
ADAMS

Defendants

CIVIL ACTION NO. 20-cv-2916

JUDGE: BROWN

MAGISTRATE: NORTH

**BRIEF OF AMICUS CURIAE ACLU FOUNDATION OF LOUISIANA IN
SUPPORT OF PLAINTIFFS' SECOND AMENDING/SUPPLEMENTAL COMPLAINT**

I. Introduction

Woodmere Elementary School officials suspended Ka'Mauri Harrison, a nine-year-old fourth-grader, and recommended that he be expelled from school for inadvertently making a BB gun visible as he took a virtual test on a computer in his bedroom. The Louisiana State Legislature promptly enacted legislation to curb such abuses in the future. *See* H.B. No. 83, 2020 2d Extraordinary Sess. (La. 2020) ("The Ka'Mauri Harrison Act"). Following the Harrison family's objections to the school's excessive punishment, and in spite of Louisiana's responsive legislation, the Jefferson Parish School Board ("School Board") affirmed its decision to remove Ka'Mauri from virtual school.

In addition to the injustice in this particular case, Ka’Mauri’s story demonstrates the need for a decisionmaking approach that recognizes the special plight of Black children in our schools and the challenge of fairly and sensibly applying existing rules to new situations, such as the COVID-19 pandemic. As the United States Supreme Court unanimously declared in *Brown v. Board of Education*, education is a cornerstone of our democracy and an essential means to economic advancement. 347 U.S. 483, 493 (1954). At the same time, decades of social science research shows that Black students disproportionately suffer suspension and expulsion from school in large part because of the discriminatory exercise of discretion, especially when combined with so-called “zero tolerance” policies. This potentially problematic discretion is amplified when a rule formulated for one situation—in this case, a brick and mortar school environment—is applied to a novel environment—virtual learning—for which the rule was not designed. Such expansive discretion is highly susceptible to abuse and the disproportionate educational disenfranchisement of Black students, particularly when wielded with the false certainty of zero tolerance.

That is exactly what happened here. School Board officials sought to enforce Louisiana’s disciplinary code—already open to interpretation—in the broadest possible manner by applying its most severe punishment to the remote learning environment and recommending the expulsion of Ka’Mauri Harrison. They should not have done so. Louisiana school officials’ statutory discretion cannot be stretched so far under even a traditional interpretive approach. But the School Board officials’ error is especially clear when taking into consideration the heightened potential for discriminatory treatment that these unprecedented circumstances present. Indeed, recognizing similar concerns, general rules of statutory interpretation require reading punitive rules narrowly to avoid injustice when culpability is not clear. School boards and courts should update this traditional approach by refraining from imposing suspension or expulsion in unprecedented

circumstances absent a clear disciplinary violation. Doing so will help ensure that Ka'Mauri, and thousands of other Black students, are not wrongly and discriminatorily excluded from school.

II. The Importance of Education and the Discrimination in Enforcement of School Discipline

A. The Importance of Education

As a threshold matter, depriving a student of educational opportunities through suspension or expulsion dramatically diminishes that student's life prospects. Not surprisingly, the first and most basic impact of exclusionary discipline is reducing how far a student is likely to progress academically. Students who suffer exclusionary discipline are much less likely to complete high school and go on to earn an advanced degree. *See* Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. Sch. Psych. 59, 72-73 (1998) ("Costenbader Article"); Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 Ariz. St. L.J. 313, 321-22 (2016) ("Nance Article").

Two studies recently affirmed the detrimental impact of exclusionary discipline on academic retention and achievement.¹ A Florida study found the odds of a student's dropping out of school doubled from 16% to 32% the first time a student is suspended. Robert Balfanz et al., *Sent Home and Put Off Track, in Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion* 22 (Daniel J. Losen ed., 2015). In Texas, subjecting a student to any type of exclusionary discipline translated into that student's being 23.5% less likely to finish high school,

¹ A substantial body of literature supports the results from these studies, suggesting that exclusionary discipline generally is associated with lower academic achievement at both the school level and the individual level. *See, e.g.*, James E. Davis & Will J. Jordan, *The Effects of School Context, Structure, and Experiences on African American Males in Middle and High School*, 63 J. Negro Educ. 570 (1994); Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?* 39 Educ. Researcher 59 (2010). Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Council of State Gov'ts Just. Ctr. & Pub. Pol'y Rsch. Inst. (2011); Kaitlin P. Anderson et al., *Understanding a Vicious Cycle: The Relationship Between Student Discipline and Student Academic Outcomes*, 48 Educ. Researcher 251 (2019).

even when controlling for a number of other pertinent variables. Miner P. Marchbanks III et al., *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout, in Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion* 59, 64 (Daniel J. Losen ed., 2015).

Because education is such a formative experience, and further study requires completion of predicate material, knocking a student off the education track, especially early in life, tends to derail future schooling and instruction. The effects of loss of learning accumulate. This leads to demonstrably lower incomes and higher risk of incarceration. In short, without education, individuals are less able to provide for themselves, let alone a family, and more likely to be seen and treated as burdens to society.

i. Income

The compounding detrimental effects of exclusionary discipline do not remain behind schoolhouse gates. As a 2001 article in the *Journal of Economic Literature* explained, one reason education is determinative for income potential is that it performs “a credentialing function.” Samuel Bowless et al., *The Determinants of Earnings: A Behavioral Approach*, 39 J. Econ. Literature 1137, 1147 (2001). Education also improves an individual’s capacity to succeed in the workforce by imparting substantive skills and abilities. After controlling for prior ability and a large number of other possible influences on cognitive performance, those who “remain in school longer score higher on tests.” *Id.* at 1148. As a result, many economists “have supposed that the acquisition of cognitive skills is the mechanism whereby schooling increases earnings.” *Id.*

Indeed, educated people tend to make more money. In 2007, for instance, the *Journal of Public Economics* published the empirical results of a study finding that “[l]ifetime wealth

increases by about 15% with an extra year of compulsory schooling.”² Philip Oreopoulos, *Do Dropouts Drop Out Too Soon? Wealth, Health and Happiness from Compulsory Schooling*, 91 J. Pub. Econ. 2213, 2227 (2007). Those who stay in school, moreover, are less likely to be unemployed. *Id.* Likewise, a 2006 research project by Columbia University Teachers College found that “male high school graduates earn \$117,000-\$322,000 more than dropouts [in lifetime earnings]; those with some college earn significantly more; and the difference in lifetime earnings between a high school dropout and a college graduate is \$950,000-\$1,387,000.” Henry Levin et al., *The Costs and Benefits of an Excellent Education for All of America’s Children*, 7 (Jan. 2007).³ The rates for females were comparable. *Id.*

Although some debate remains about what mechanism best explains the relationship between education and income, this correlation is one of the most well-documented relationships in economics. Yet the struggle to see education provided on equal terms persists. Black children in the United States are disproportionately stripped of that “foundation of good citizenship” and economic advancement every day.

ii. Incarceration

Exclusionary discipline is also strongly linked with incarceration through its effect on educational attainment. Indeed, in 2006, the probability of being incarcerated was 63 times greater for a high school dropout than for a four-year college graduate. Nat’l Ctr. Juvenile Just., *Juvenile*

² A report commissioned by the World Bank in the early 2000s supports these findings on a global scale. After analyzing the effects of education on economic growth internationally, it concluded that these studies “have uniformly shown that more schooling is associated with higher individual earnings” and that the “rate of return to schooling across countries is centered at about 10 percent.” Eric A. Hanushek & Ludger Wößmann, *The Role of Education Quality in Economic Growth*, 5 (World Bank Pol’y Rsch. Working Paper 4122, Feb. 2007).

³ Three earlier U.S. studies provided direct and consistent estimates of the impact of test performance on earnings. They concluded that one standard deviation increase in mathematics performance at the end of high school translates into approximately 12 percent higher annual earnings. See Casey B. Mulligan *Galton Versus the Human Capital Approach to Inheritance*, 107 J. Pol. Econ. S184 (1975); Richard J. Murnane et al., *How Important are the Cognitive Skills of Teenagers in Predicting Subsequent Earnings?*, 19 J. Pol’y Analysis & Mgmt. 547 (2000); Edward P. Lazear, *Teacher Incentives*, 10 Swedish Econ. Pol’y Rev. 179 (2003).

Offenders and Victims: 2014 National Report 15 (Melissa Sickmund & Charles Puzzanchera eds., 2014). Scholars have observed a significant relationship between educational attainment and incarceration that has persisted for decades. Richard B. Freeman, *Why Do So Many Young American Men Commit Crimes and What Might We Do About It?*, 10 J. Econ. Persp. 25 (1996). An article published in the *American Economic Review* observed that incarceration rates between 1960 and 1980 for Black men with fewer than 12 years of schooling were around 3.6 percent, nearly double the rate for Black high school graduates. Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 Am. Econ. Rev. 155, 160 (2004). In 1994, more than two-thirds of all incarcerated men had not graduated from high school. By 2006, nearly one in ten male high school dropouts was incarcerated. See Nance Article, 48 Ariz. St. L.J. at 322-23.

Economic theory may in part explain why individuals with lower levels of education are more likely to be incarcerated, that is, because of their lower opportunity costs of crime. Wages lost through incarceration are likely to be less of a deterrent for less-educated individuals since they earn less than their educated counterparts. See Lance Lochner, *Education, Work, and Crime: A Human Capital Approach*, National Bureau of Economic Research, Working Paper 10478, 157 (May 2004).

However, the link between education, exclusionary discipline, and incarceration likely has deeper roots. A student who suffers suspension or expulsion may be less likely to comply with school rules if the setback makes schooling seem less valuable or attainable, especially if the student perceives the original disciplinary action as arbitrary or discriminatory. See Tara M. Brown, *Lost and Turned Out: Academic, Social and Emotional Experiences of Students Excluded from School*, 42 Urban Educ. 432, 439 (2007) (discussing excluded students' feelings of ostracism,

rejection, indignation, and disengagement). Even if students who have already been suspended or expelled deliberately defy authority after determining that their life prospects have been disadvantaged, this only confirms students' awareness that educational institutions are failing them. It is immaterial whether, at a young age, students can fully appreciate how a single, potentially harmless disciplinary violation can alter their life trajectory.

Indeed, attaching such severe consequences to a minor's misbehavior is antithetical to the foundational role of public education in "preparing" students and "helping [them] adjust normally to [their] environment." *Brown*, 347 U.S. at 493. Regardless of whether students are aware of the ramifications of exclusionary discipline, excluding a student from classroom instruction as a punishment begins a negative feedback cycle that manifests in a disturbingly high probability of incarceration. The disproportionate rate at which Black students are caught in the school-to-prison pipeline is stark evidence of the impact of systemic racism. *See generally* Marsha Weissman, *Prelude to Prison: Student Perspectives on School Suspension* (2015); *see also* Sean Nicholson-Crotty et al., *Exploring the Impact of School Discipline on Racial Disproportion in the Juvenile Justice System*, 90 Soc. Sci. Q. 1003, 1007 (2009).

B. The Injustice—Disproportionality in Exclusionary Discipline

Scholars estimate that public school children lost nearly 18 million days of instruction during the 2011-2012 school year because of exclusionary discipline policies. Daniel J. Losen et al., *Are We Closing the School Discipline Gap?*, 4 (2015) ("Losen Article"). A disconcerting, disproportionate number of those days were lost by Black children. In fact, social science literature has documented race—more than any other individual characteristic—as the determining factor in disproportionate exclusionary discipline. This is true whether using national, state, or local data and at all school levels across all settings. *See* Jacob Kang-Brown et al., *A Generation Later: What We've Learned about Zero Tolerance in Schools*, Vera Institute of Justice: Center on Youth

Justice, Issue Brief (Dec. 2013) (“Vera Study”); Daniel J. Losen, *Discipline Policies, Successful Schools, and Racial Justice*, Nat’l Educ. Pol’y Ctr. (Oct. 2011) (“Losen Study”); Child.’s Def. Fund, Wash. Rsch. Project., *School Suspensions: Are They Helping Children?* (1975) (“CDF Study”).

i. Nationally

Schools across the country today suspend and expel many more students than they have historically, as harsh exclusionary discipline policies have grown dramatically more prevalent over the past 50 years. According to the Vera Institute of Justice, “[n]ationally, the number of secondary school students suspended or expelled over the course of a school year increased roughly 40 percent from one in [thirteen] in 1972-73 to one in nine in 2009-10.” *See* Vera Study at 2. According to another study conducted through the University of Colorado’s National Education Policy Center, suspension rates have doubled nationwide since the 1970s. *See* Losen Study at 5.

Social scientists have been documenting the racial disparity in school discipline for decades. In 1975, for example, the Children’s Defense Fund published one of the earliest reports documenting the overrepresentation of Black students in school suspensions. *See* CDF Study. Another study found that although Black students made up “only 22.0% of the student population” studied, they received “43.9% of the school suspensions[.]” Anna A. McFadden et al., *A Study of Race and Gender Bias in the Punishment of School Children*, 15 *Edu. & Treatment Child.* 140, 144 (1992). Even more alarming, that study also found that, “even though [B]lack [students] accounted for only 36.7% of the disciplinary referrals, they received 54.1% of the corporal punishment[.]”⁴ *Id.*

⁴ Costenbader Article, 36 *J. Sch. Psych.* at 72 (finding that disproportionate representation of black students among those suspended was consistent with the 1992 McFadden study and others); Linda M. Mendez & Howard M. Knoff, *Who Gets Suspended from School and Why: A Demographic Analysis of Schools and Disciplinary Infractions in a*

These disciplinary inequalities remain prevalent throughout the United States today.⁵ In 2014, the U.S. Department of Education released national data demonstrating that racial disproportionality in school discipline was still extensive. In its report, the Office of Civil rights observed that “Black students are suspended and expelled at a rate three times greater than white students.” U.S. Dep’t of Educ., *Civil Rights Data Collection, Data Snapshot: School Discipline 1* (Mar. 2014). Whereas 4.6% of white students are suspended, the average suspension rate for Black students was 16.4%. *Id.* at 3. In total, “twenty percent (20%) of [B]lack boys and more than 12% of [B]lack girls receive an out-of-school suspension.” *Id.* This disparity is especially alarming in light of the fact that as many as 1.2 million Black students are suspended from K-12 public schools in a single year in the United States. Edward J. Smith & Shaun R. Harper, *Disproportionate Impact of K-12 School Suspension and Expulsion on Black Students in Southern States*, Ctr. for the Study of Race & Equal. in Educ. (2015) (“UPenn Study”).

ii. In the South

The prevalence of disproportionate exclusionary discipline is particularly pronounced in the South. A University of Pennsylvania Graduate School of Education study found that during a single school year in the South, “427,768 Black boys were suspended and 14,643 were expelled, the highest numbers among both sexes and all racial/ethnic groups.” *Id.* More generally, during

Large School District, 26 Educ. & Treatment Child. 30 (2003) (finding that on a national level, African American students compose 17% of the elementary and secondary population and 32% of the suspended population).

⁵ For example, a statewide study in Indiana found that, between the years of 2009 and 2013, “22% of Black students experienced a suspension or expulsion, as opposed to 8% of White students.” Maithreyi Gopalan & Ashlyn A. Nelson, *Understanding the Racial Discipline Gap in Schools*, 5 AERA Open 1, 4 (2019). The disparity was much higher for high school students. Indeed, the same study found “[a]cross the 2008-2009 through 2013-2014 academic years, 8% to 13% of White high school students received an expulsion or suspension versus 25% to 34% of Black high school students[.]” *Id.* Another recent report found that 90% of all girls expelled from New York City public schools in 2011-2012 were Black. Kimberlé W. Crenshaw et al., *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, African Am. Pol’y F. (2015). In the Pacific Northwest as well, Black students have been dramatically overrepresented in exclusionary discipline and lose more days of school than their white counterparts. Claudia G. Vincent, *Exclusionary Discipline Practices Across Students’ Racial/Ethnic Backgrounds and Disability Status: Findings from the Pacific Northwest*, 35 Educ. & Treatment Child. 585, 595 (2012).

that year, “Blacks were nearly half of all students suspended and expelled from public schools in the South.” *Id.*

District level figures from across the South are equally if not more concerning. For example, “[i]n 132 Southern school districts, Blacks were disproportionately suspended at rates five times or higher than their representation in the student population”; “[i]n 77 districts, Blacks were disproportionately expelled at rates five times or higher than their representation in the school population”; and “[i]n 181 districts, Blacks were 100% of the students expelled.” *Id.* at 1.

iii. Louisiana

Louisiana itself ranks towards the bottom of the Southern states in the disproportionate expulsion of Black students. According to the UPenn Study, in Louisiana, though only 45% of students statewide were Black, they accounted for “72% of expulsions...the highest proportion among the states.” *Id.* Other states with comparable rates were Mississippi and Tennessee. *Id.* at 32, 44.

Even when they are not expelled, Black students in Louisiana are suspended at a dramatically higher rate than their white counterparts. During the 2011-2012 academic year, for example, “41,689 Black students were suspended from Louisiana K-12 public schools[.]” *Id.* at 28. And even though “Blacks were 45% of students in school districts across the state, they comprised 67% of suspensions.” *Id.* Jefferson Parish, where Ka’Mauri Harrison attends school, applied exclusionary discipline at a higher rate than other districts, accounting for 5 percent of students in Louisiana, but 14 percent of the total number of suspensions statewide during the 2011-2012 school year. Troublingly, Black students accounted for nearly 67 percent of those suspensions in Jefferson Parish, even though only 46 percent of students enrolled in the District that year were Black. *Id.* at 29.

Disproportionalities in exclusionary discipline extend to the critical grade-school years as well. Another study conducted by a widely recognized authority in the field of school discipline analyzed statewide data from the same school year as the UPenn Study. It found that, whereas 2.2 percent of all white students were suspended from primary school in 2011-2012, 6.9 percent of all Black elementary school students were suspended at least once, and Black students were suspended at a rate of approximately 3-to-1 relative to all other students. Losen Article, Table 2 at 16.

III. The Roots of the Injustice

A. Implicit Bias and Subjective Offenses

Scholarship over the past few decades has examined the potential causes of this troublingly lopsided disciplinary record. Empirical data show that (1) racial disciplinary disparities are pervasive and (2) there is no evidence that Black students misbehave more than their peers. It is difficult to fathom, then, how or why nearly 7 percent of all Black students Ka'Mauri's age and younger were suspended at least once during a given year in Louisiana. *Id.* Ka'Mauri is in the fourth grade. What, then, explains the apparent discrimination?

The first piece of the puzzle turns out to be the role of discretion in deciding whether a student has violated school rules. For example, one landmark study concluded that the exercise of discretion appeared to explain the differential treatment of Black students compared with their white counterparts. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 Urb. Rev. 317 (2002). That study found that “racial disparities in school suspension appear to find their origin primarily in the disproportionate rate of office referrals” and “patterns of referrals suggest that [B]lack students are more likely to be referred to the office for more subjective reasons.” *Id.* at 335. Thus, it appears that discretion permits school officials to disproportionately discipline Black students.

Discretion, however, does not explain why discipline is so often exercised to the detriment of Black students. The same study that found Black students were referred for more subjective reasons went on to emphasize that no study “has found any evidence that the higher rates of discipline received by African-American students are due to more serious or more disruptive behavior.” *Id.* These results point to bias as an explanation for the racial disparity in discretionary discipline. Nevertheless, the differential treatment of Black students has not declined, even as rates of explicit bias among teachers and society have decreased significantly. Erik J. Girvan et al., *The Relative Contribution of Subjective Office Referrals to Racial Disproportionality in School Discipline*, 32 Sch. Psych. Q. 392 (2017). This stubborn, harmful differential has thus led social scientists to postulate that subconscious discrimination might be influencing teachers’ disciplinary decisions.

Social psychologists often refer to such stereotyped, subjective perceptions among educators as “implicit bias.” In contrast to overt discrimination or explicit bias, “implicit bias is thought to reflect the automatic cognitive associations or affective predispositions individuals have with different social groups.” Jordan G. Starck et al., *Teachers Are People Too: Examining the Racial Bias of Teachers Compared to Other American Adults*, 49 Educ. Researcher 273, 274 (2020). Especially in the education context, implicit biases are problematic because “[i]ndividuals have limited awareness of and control over [them].” *Id.* Some types of student behavior, which may or may not warrant discipline in the first instance, are more likely to provoke decisionmaking clouded by a teacher’s implicit bias. Implicit bias tends to affect one’s judgment particularly when attention is overloaded or when self-regulation of one’s behavior is more difficult. Molly Carnes et al., *The Effects of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial*, 90 Acad. Med. 221 (2015).

Building on this understanding, Girvan et al. developed an approach—known as the vulnerable decision point (“VDP”) model—to explain when and why implicit bias occurs. The VDP model predicted “that a substantial component of disproportionality is due to the influence of implicit bias in particular VDPs, such as when teachers are tired, hungry, or frustrated and are faced with the need to make a quick judgement call as to how best to respond to an unexpected student behavior.” Girvan et al., 32 Sch. Psych. Q. at 394. To test that hypothesis, Girvan sought to “examine the relative contribution of racial disparities in discipline decisions regarding subjectively versus objectively defined behaviors to overall rates of disproportionality.” *Id.* If implicit bias contributes to disciplinary disproportionalities, the theory posited, then greater disproportionality should be observed in more “subjective” disciplinary decisions that involve a greater exercise of discretion.

The results confirmed what the VDP model predicted: “substantially more of the variance in student-level disproportionality is attributable to racial disparities in subjective [referrals] than to racial disparities in objective [referrals].” Girvan et al. at 400. Furthermore, the distinction between those types of referrals suggests that “disproportionality is attributable, in some way, to biases in how teachers perceive, interpret, and make decisions about student behaviors that are not clearly and objectively defined (e.g., defiance, disrespect, disruption) as opposed to more objectively defined behaviors (e.g., fighting, skipping class).” *Id.* at 401.

The implications of the Girvan study may also apply to other aspects of school discipline, such as the severity of punishment. The imposition of out-of-school suspension presumably should correspond to the severity of student behavior. Recent research has found, however, that the probability of exclusionary discipline increases with the *perceived* seriousness of the offense, rather than its seriousness from an objective standpoint. Russell J. Skiba et al., *Parsing*

Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion, 20 Am. Educ. Rsch. J. 1, 4 (2014). And school administrators appear to view the same infraction as more serious if committed by a Black student since being “categorized as Black also remains a significant predictor of receiving an out-of-school suspension *after* having been referred and after controlling for the severity of the behavior itself.” Claire E. Kunesh & Amity Noltemeyer, *Understanding Disciplinary Disproportionality: Stereotypes Shape Pre-Service Teachers’ Beliefs About Black Boys’ Behavior*, 54 Urb. Educ. 471, 475 (2019). In other words, not only do biased perceptions of Black students make them more likely to be written up for more subjective offenses, but such perceptions also render their conduct more severe in the eyes of administrators, making them more likely to be suspended or expelled.

These studies, taken together, suggest that implicit bias distorts disciplinary decisionmaking among educators and school administrators when they have discretion to escalate punishments ordered against Black students. Accordingly, excessive discretion coupled with limited awareness of—and training to counteract—implicit bias is likely a root cause of the prevalent disproportionality in exclusionary discipline.

B. School Composition and Attitudes of Administrators

While bias towards students on an individual level appears to increase discriminatory school discipline, other variables correlated with race further compound this problem. In fact, Skiba and colleagues have suggested that systemic variables “may be *more* important in determining the overrepresentation of Black students in discipline than are any behavioral or student characteristics.” Skiba et al. (2014) at 23. For example, a school’s percentage of Black enrollment is the “most striking” and well documented school-level “predictor of school suspension.” *See id.* at 22, *citing in support* Rene R. Rocha & Daniel Hawes, *Racial Diversity, Representative bureaucracy, and Equity in Multicultural Districts*, 90 Soc. Sci. Q. 326 (2009) and

Kelly Welch & Allison A. Payne, *Racial Threat and Punitive School Discipline*, 57 Soc. Probs. 25 (2010). Indeed, being enrolled at a school with a larger Black student-body “increases one’s risk of out-of-school suspension nearly as much as engaging in a fight or battery.” Skiba et al. (2014) at 22. Even more notably, a greater likelihood of suspension for attending a school with more Black students is observed “*even after* controlling for student demographics or behavior.” *Id.* This means that “in rich and poor schools alike, regardless of one’s gender, one’s school achievement level, or the severity of one’s behavior, simply attending a school with more Black students substantially increases one’s risk for receiving an out-of-school suspension.” *Id.*

These findings suggest that implicit bias is not the only cause of disciplinary disproportionality; systemic factors also are at play. Otherwise, attending a school with more Black students would not increase a student’s likelihood of being suspended or expelled even if she is white. Yet it does. These systemic factors further disadvantage Black students since, of course, they are statistically more likely to attend a school with a larger Black student population.

C. Zero Tolerance Policies

Zero tolerance policies are likely yet another factor compounding discriminatory treatment of Black students. The idea of “zero tolerance” was originally developed as an approach to drug enforcement, and zero tolerance policies got a boost at the federal level with the Gun-Free Schools Act of 1994 (“GFSA”), which conditions receipt of federal education dollars on a state’s law “requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to school.” 20 U.S.C. § 7961(b)(1). Since the 1990s, zero tolerance policies have proliferated across the United States and are now commonly applied to disciplinary conduct other than that involving drugs and guns.

The American Psychological Association commissioned the Zero Tolerance Task Force to study the efficacy of zero tolerance policies in public schools after many problems began to

surface. The Task Force concluded that all of the policy's underlying assumptions were unwarranted, including the premise that "zero tolerance increases the consistency of school discipline." Russell Skibia et al., Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* 43 (Aug. 2006) ("APA Report"). To the contrary, application of zero tolerance varied widely across schools and, in fact, "African American students may be disciplined more severely for less serious or more subjective reasons" even in zero tolerance regimes.⁶ *Id.* at 6.

Critics have argued that zero tolerance philosophy does more than magnify the penalties for certain violations. Kennedy-Lewis, for example, has claimed the assumptions inspired by zero tolerance have effectively discouraged educators from exercising requisite discretion because, under zero tolerance regimes, educators' judgements of students' behavior are often portrayed as "infallible," and students' behavior is seen as context-independent. Brianna L. Kennedy-Lewis, *Using Critical Policy Analysis to Examine Competing Discourses in Zero Tolerance Legislation: Do We Really Want to Leave No Child Behind?*, 29 J. Educ. Pol'y 165, 175 (2014). Similarly, the Task Force's proposed definition of zero tolerance maintained the philosophy is "intended to deter future transgressions by *sending a message* that no form of a given unacceptable behavior will be tolerated under any circumstances." APA Report at 26 (emphasis added).

Zero tolerance policies thus run counter to the near universal consensus among social scientists and education scholars that discipline policies should have "carefully drawn definitions

⁶ The Task Force report emphasized the "[l]iterally thousands of media reports" involving "individual zero tolerance school disciplinary incidents" brought to the public attention since the philosophy rose to dominance. *Id.* at 27. For example, a bread knife found in the truck of a high school junior in Hurst, Texas, led him to be expelled to a county-run juvenile alternative education program. *Id.* at 27-28. An 11-year-old girl was suspended for two weeks from Garrett Middle School in Atlanta, Georgia, for possession of a 10-inch novelty chain attaching her Tweety Bird wallet to her key ring since the district policy has classified a chain as a weapon in the same category as swords. *Id.* at 28. A seventh-grade boy in Dublin, Ohio was suspended for bringing a toy cowboy gun to school for a skit in French class with the permission of the teacher. *Id.* These stories are disturbingly similarly to Ka'Mauri Harrison's plight.

of all behaviors subject to school discipline” and that the severity of a punishment should not exceed the severity of a conduct violation. *Id.* at 99. Zero tolerance philosophy supports making an example of a student—even if application of a particular policy is overinclusive and even if the severity of the penalty far exceeds the threat posed by the offense. As a result, in addition to encouraging a brashness among administrators predisposed to employing harsh punishments, zero tolerance philosophy may itself engender aggressive attitudes towards suspension and expulsion among administrators and explain, in part, the overapplication of exclusionary discipline that disproportionately affects Black students. *See, e.g.,* Skiba et al. (2014) at 8-10, 18 (examining the relationship between principals’ attitudes towards exclusion and rates of exclusionary discipline).

IV. Abuse of Discretion in the Remote Learning Environment

With this understanding of racial discrimination, exclusionary discipline, and their life-altering detrimental impact on Black students in mind, school officials (and courts) should step back and reconsider how they approach school disciplinary actions. The current pandemic makes this reevaluation all the more imperative. But other emergencies and changed expectations will no doubt challenge decisionmakers in the future as well. For the reasons explained below, this brief proposes a simple rule of interpretation: When school officials are deciding to order exclusionary punishment in unprecedented circumstances, they should do so with a presumption against suspension and expulsion absent a clear disciplinary violation.

A. The Discriminatory Impacts of Discretion Coupled with Zero Tolerance Are Amplified in a New Circumstance Such as COVID-19

The social science literature discussed above catalogs the discrimination against Black students that can result from too much discretion (vague standards) or too little (zero tolerance) with regard to exclusionary discipline policies. On the one hand, vague disciplinary standards

allow implicit bias to interfere with teachers' reasoned judgement; on the other, zero tolerance policies frequently result in harsh punitive consequences for relatively minor infractions. Accordingly, social scientists recommend "carefully drawn definitions of all behaviors" that are punishable by exclusionary discipline, with discretion on the back end to ensure the severity of a penalty does not outweigh the infraction.

When rules designed for one context are applied to another, more judgment calls are inherently required. The application of rules written for in-person learning in a school building to the context of remote learning from home is precisely such a scenario. The need to apply old rules to new circumstances inevitably increases the scope of interpretation and, hence, discretion. The COVID-19 pandemic in particular has required school officials across the United States to make novel decisions about how to apply disciplinary codes designed for in-person instruction to the remote learning environment. For example, a student may work in a common room in which parents have a stocked liquor bar, or tobacco products, or a gun rack visible on a video call. A student's parent or older sibling may leave prescription drugs not prescribed for the student exposed. Or, as here, a BB gun (belonging to a sibling no less) might be caught on camera. In the virtual "classroom," conduct that is legal, appropriate at home, and/or beyond a student's control threatens the possibility of disciplinary action if school rules are applied too broadly to this new environment. And because applying old rules to new environments necessarily amplifies discretion in both interpretation and enforcement, these new situations increase the potential role of implicit bias and, ultimately, discriminatory exclusionary discipline.

Applying zero tolerance to the remote learning environment amplifies this problem. The assumptions used to justify zero tolerance policies, which are primarily designed to promote the safety of students in a physical school building, are not relevant in the virtual environment. A

student does not put his virtual classmates in imminent danger by displaying a parent's liquor bar, tobacco products, or gun rack, let alone a sibling's BB gun. Zero tolerance is categorically excessive when applied to the remote learning environment, particularly in light of the severe minimum punishments these policies typically mandate.

This brew of excessive discretion and zero tolerance is especially toxic to Black students. The social science literature discussed above demonstrates the discriminatory impact in exclusionary discipline Black students suffer *even before* accounting for the aggravating factors of increased discretion and excessive zero tolerance flowing from the pandemic. And we know this discrimination is exacerbated when a school is majority Black, as in the case of Woodmere Elementary, where Ka'Mauri Harrison goes to school and where Black students make up nearly 90 percent of the student body.

On top of all this, a defining element of the novel virtual learning environment—the need to be at home—further threatens the fair treatment of Black school children. Students in schools like Woodmere are disproportionately likely to live in smaller homes and with parents who lack time and resources to monitor them, making such accidental appearances of banned objects in the background of their virtual classes more likely. Nick Albares, *Poverty Gap Widens Between Louisiana and U.S.*, Louisiana Budget Project (Sept. 15, 2016) (noting that one in four Louisiana kids are growing up in poverty and “[o]ne in three [B]lack Louisianans lived below the federal poverty line in 2015”).

This is exactly what happened to Ka'Mauri Harrison in Jefferson Parish: the principal of Woodmere Elementary justified her expulsion recommendation of Ka'Mauri through an overly broad misapplication of a harsh zero tolerance policy to the area inside the bedroom Ka'Mauri shares with his brothers. But this misapplication—permitted by the inevitable need to interpret

rules, amplified by discretion in their application to a new environment, and (mis)guided by implicit and institutional bias—was wrong.

B. Numerous Principles of Interpretation Counsel Against an Overbroad Reading of Punitive Measures in General—and Here in Particular

In fact, the school official’s decision was so expansive that it failed even to grapple with the text of the applicable state statute that grants school officials discretion to order exclusionary punishments,⁷ La. R.S. 17:416, which states in relevant part:

Any case involving a student in kindergarten through grade five found guilty of being in possession of a *firearm* on school property, on a school bus, or in actual possession *at a school sponsored event*, pursuant to a hearing as provided for by Paragraph (1) of this Subsection, shall be expelled from school...

La. R.S. 17:416(C)(2)(c)(i) (emphasis added). Two key provisions of this law in particular cannot be contorted so far as to cover Ka’Mauri’s situation, even under traditional interpretive rules.

Firearm. The first issue is whether a “firearm” includes a BB gun. The relevant Louisiana statute does not contain a definition of the term, but Louisiana elsewhere defines “firearm” as “any pistol, revolver, rifle, shotgun, machine gun, submachine gun, black powder weapon, or assault rifle which is designed to fire or is capable of firing fixed cartridge ammunition or from which a shot or projectile is discharged by an explosive.” La. R.S. 14:95.1(D).

A BB gun does not satisfy this definition. BB guns do not fire “fixed cartridge ammunition,” nor do they discharge projectiles “by an explosive.” BB guns shoot “BBs,” which are discrete projectiles and not “ammunition in which the cartridge case is permanently attached to the projectile.” *See* OXFORD ESSENTIAL DICTIONARY OF THE U.S. MILITARY (1st ed. July 2001) (definition of “fixed ammunition”). Any argument that a BB gun’s spring action or use of pressurized air *could* be considered “an explosive,” moreover, would be inconsistent with

⁷ *See, e.g.*, La. R.S. 17:416(B)(b)(i) (directing that the punishment of a student “found carrying or possessing a firearm” shall be enforced “in accordance with” other provisions of the disciplinary code including La. R.S. 17:416(C)(2)(c)(i)).

Louisiana’s statutory Regulation of Explosives. *See* La. R.S. 40:1472.2. “Explosives,” under these regulations, “means any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion” and includes various examples like “dynamite” and “black powder in quantities in excess of five pounds,” among others. *Id.* Here, no chemical “compound” or “mixture” is involved, and a BB gun does not contain any device that functions “by explosion.” Thus, it is unreasonable for BB gun to mean firearm under Louisiana law.

Even using the federal definition of “firearm,” as school officials apparently did, does not make a BB gun a firearm. Federal law similarly defines a firearm to mean a weapon which will “expel a projectile by the action of an explosive[.]” *See* 18 U.S.C. § 921(a)(3). And the federal sentencing guidelines make clear that BB guns are not “firearms” under federal law. *See U.S. Sent’g Guidelines Manual*, § 1B1.1, cmt. n.1(e) (U.S. Sent’g Comm’n 2018) (“A weapon, commonly known as a ‘BB’ or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is ... not a firearm.”).

Indeed, this view would lead to absurd results. If the terms “firearm” included a BB gun under La. R.S. 17:416(C)(2)(c)(i) because compressed air could be considered an “explosive,” then all sorts of other toys, including airsoft guns or even “Nerf” guns, would be cause for expulsion and other firearm regulation based on their similar use of compressed air to discharge projectiles.

At a school sponsored event. The second issue is whether the phrase “at a school sponsored event” can be understood to encompass the remote learning environment. It cannot. The school officials’ expansive application of this disciplinary provision is especially unreasonable in light of numerous general legal principles, some of which, informed by considerations similar to the

lessons from social science research discussed above, counsel against interpreting punitive provisions so broadly.

To begin, the interpretive canon of *noscitur a sociis* counsels against such an expansive interpretation because the phrase “at a school sponsored event” is informed by its companions: “on school property” and “on a school bus.” These neighboring terms both unequivocally refer to specific, tangible physical places. Thus, “at a school sponsored event” should be interpreted to also involve physical presence at the kind of place one could have an “event.” The provision is plainly meant to capture official school functions that might not occur “on school property,” but at another physical *place* the school owns or temporarily controls, such as a prom or sporting event.

In fact, a Louisiana court reached a similar conclusion while interpreting a related provision and relying on a similar interpretive doctrine—the requirement to give meaning to all the words in a statute. In that case, a Louisiana state court refused to extend an earlier version of the same statute to an incident involving marijuana that occurred outside of school. *Labrosse v. St. Bernard Parish School Bd.*, 483 So. 2d 1253 (La. Ct. App. 1986). The *Labrosse* court held that it was unlawful for a school board to expel a student for possession of marijuana when the allegation was that the student smoked a marijuana cigarette while off campus during lunch. The *Labrosse* court reasoned that the statute placed “specific limitations” on officials’ discretion “to hold students accountable for their behavior *at specific places* and *during specific times*.” *Id.* at 1258.

The same logic applies here. La. R.S. 17:416(A)(1)(a) empowers teachers with discretion to punish students for disorderly conduct that occurs “in school or on the playgrounds of the school, on the street or road while going to or returning from school, on any school bus, during intermission or recess, or at *any school-sponsored activity or function*.” (emphasis added). Interpreting the phrase “at a school sponsored event” to extend inside a private residence while a

student takes a test on his personal computer would “obliterate” the relatively broader meaning of “any school-sponsored *activity or function*.” See *Labrosse*, 483 So. 2d at 1258 (emphasis added). Thus, this statute does not apply inside the Harrison family home.⁸

A number of other interpretive canons also counsel against interpreting “at a school sponsored event” so broadly. For example, an overly broad interpretation would implicate the Harrison family’s constitutional rights, including their right to privacy, which is explicitly protected in the Louisiana State Constitution. Article I, Section 5 of the Louisiana Constitution states, “Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, *or invasions of privacy*.” La. Const. art. I, § 5 (emphasis added). This recognition “accords greater protection of privacy rights” than privacy protections under the U.S. Constitution. See *State v. Brown*, 35 So. 3d 1069, 1072 (La. 2010). Thus, the rule to avoid constitutional questions where possible further counsels for more careful and narrow interpretation of the relevant provision. See *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961).

So too for the Rule of Lenity and void-for-vagueness doctrine. The Rule of Lenity provides that when a court encounters vagueness or ambiguity in a “penal” statute, and when the resulting indeterminacy cannot be resolved by applying various other interpretive tools, the court should adopt the least harsh of the permissible interpretations. In the same vein, penal statutes may be deemed outright unconstitutional for being too vague, since vagueness may afford too much discretion and result in arbitrary enforcement. See generally John C. Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985).

⁸ Note also that the relative breadth of the “school-sponsored” phrase in subsection A is not similarly constrained by its companions to school-owned property, since subsection A explicitly applies to places outside the school, as when “going to or returning from” school.

Importantly, a law does not have to be criminal or involve incarceration to be penal. It is consistent with Louisiana law for exclusionary discipline statutes, such as the one at issue here, to be considered penal. *See Labrosse*, 483 So. 2d at 1258 (characterizing suspension proceedings as having a “quasi—criminal nature”). Violating the Gun Free Schools law not only results in expulsion from the student’s school, but also prevents that student from being “admitted to any public school in any other parish or city school system in the state except upon the review and approval of the school board of the school system to which he seeks admittance.” La. R.S. 17:416(B)(3)(a)(i).

C. Especially in Light of These Factors, the School Officials’ Decisionmaking Cannot Stand

The School Board and its officials plainly abused their discretion here. Even standard interpretive techniques, some informed by the law’s long-held belief in avoiding punishment in uncertain situations, show that Ka’Mauri Harrison neither possessed a “firearm” nor did so “at a school-sponsored event.” To the contrary, Ka’Mauri and his family lawfully possessed a BB gun at home.

But even if there were any doubt, Ka’Mauri should not have been recommended for expulsion unless he clearly violated the state Gun Free Schools law. The Supreme Court has recognized that education is of paramount importance to an individual’s chances to provide for oneself and one’s family, avoid incarceration, and contribute to society rather than burdening it. Social science has documented how exclusionary discipline disparately impacts Black students—for a variety of unjustified reasons and in a host of harmful ways. And this brief has explained why new situations, such as the current pandemic, exacerbate this already immense problem. Taking all these lessons into account, this Court and other decisionmakers should resolve any doubts in favor of students in novel and challenging situations. And, in contrast to how they deploy

traditional canons, which long ago internalized their policy rationales, they should do so knowingly, with full recognition of the role discretion and zero tolerance policies play in the discriminatory treatment of Black students.

The Louisiana State Legislature’s immediate reaction in passing legislation to combat this type of injustice is further evidence that School Board officials’ decisionmaking was flawed. Indeed, the Ka’Mauri Harrison Act added a definition of “virtual instruction” to La. R.S. 17:416 and mandates that a school board’s discipline policy “shall clearly define the rules of conduct and expectations of students engaged in virtual instruction, shall provide for notice of such rules and expectations ... shall include clearly defined consequences of conduct ... shall be narrowly tailored ... and shall take into consideration the students’ and their families’ rights to privacy and other constitutional rights while at home or in a location that is not school property.” H.B. No. 83 § 1. This Court should reinforce the Louisiana Legislature’s message by overturning the order of exclusionary discipline against Ka’Mauri and, more generally, making clear that school officials must refrain from ordering exclusionary punishment in unprecedented circumstances absent a clear disciplinary violation.

Respectfully submitted,

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