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THE COLLATERAL CONSEQUENCES OF SCHOOL DISCIPLINARY RECORDS

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ABSTRACT

Although a large body of scholarship has addressed the lifelong consequences of criminal records, researchers and advocates have paid less attention to the analogous set of permanent consequences that attach to school disciplinary records. Likewise, although many authors have addressed inequities in school discipline, the school-to-prison pipeline, and the negative impacts of missed school time due to discipline, scholarship has not yet comprehensively addressed the ways in which school records themselves can impede access to education, licensure, and employment for years to come. Yet in a way that parallels the set of inequitable barriers erected by criminal and juvenile records, school disciplinary records also lead to their own set of collateral consequences. These collateral consequences mean that the racial inequities pervasive in school disciplinary practices are reflected throughout adulthood in decisions about who gains access to critical opportunities to learn and to work.

This Article documents the ways that elementary and secondary school disciplinary records can continue to erect barriers for years after graduation. It finds that requirements to disclose K-12 disciplinary records in college admissions, graduate admissions, and applications for professional licensure are surprisingly common. FERPA exceptions and data breaches can also leave information from

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school records vulnerable. This Article provides the first thorough analysis of the limited ways that legislative and institutional changes have begun to address this issue to date. It concludes by proposing a more robust set of novel legislative solutions, analogous to expungement and ban the box laws in the criminal context, designed to ensure that records of school discipline remain truly confidential.

INTRODUCTION

When Charles[1] was fifteen, he was expelled from his charter school for three consecutive instances of disrespecting a teacher. In each case, Charles had questioned the accuracy of information provided by his teacher in class and had asked a series of questions that the teacher perceived as questioning her expertise. As a Black student with primarily white teachers, Charles was in a demographic that faces exclusionary discipline at drastically disproportionate rates, particularly for subjective offenses like disrespect.[2] Unsurprisingly, given his penchant for argument and questioning authority, Charles had expressed interest in someday becoming an attorney. More surprisingly, however, are the myriad ways in which Charles's record of school discipline will impact his pathway. Not only is information about school disciplinary records frequently collected and used in applications for college admission, but questions about K-12 disciplinary records are also regularly used in applications for law school admission and applications to practice law.[3] As Charles works to pursue his dream, his record of expulsion will continually resurface.

Although student records are purportedly confidential, information about a student's disciplinary history may nonetheless impede access to education and career opportunities for years to come.[4] Disciplinary history may be shared due to statutory carveouts, data breaches and misuse, and questions about school disciplinary history on applications for college admissions, graduate admissions, and professional licensure.[5] While the collateral consequences of criminal convictions[6] have been the subject of much analysis and have

1. Name changed to protect confidentiality.
2. *See infra* Subsection II.B.2.
3. *See infra* Subsection I.A.1.b.
4. *See infra* Subsection I.A.2.
5. *See infra* Subsection I.A.1.
6. *See, e.g.*, MARSHA WEISSMAN & EMILY NAPIER, EDUCATION SUSPENDED: THE USE OF HIGH SCHOOL DISCIPLINARY RECORDS IN COLLEGE ADMISSIONS 2 n.2 (2015), https://communityalternatives.org/wp-content/uploads/2019/11/education-suspended.pdf [https://perma.cc/G725-7U86] (using "collateral consequences" because it more clearly delineates the sorts of barriers that individuals may face due to records of school discipline from the additional lifelong consequences individuals may confront as a result of missed school time and the discipline itself. The term "collateral consequences" also serves to draw a parallel between the consequences of disciplinary records that are discussed in this Article, and the large body of literature on the collateral consequences of criminal records. Some individuals prefer the term "lifelong consequences" over "collateral consequences" because it helps avoid

spurred a wave of legislative reforms, the analogous consequences of elementary and secondary school disciplinary records have overwhelmingly gone unaddressed.[7]

The use of disciplinary records has a far-reaching and racially disparate impact. In the 2017–2018 school year, the most recent year publicly reported by the U.S. Department of Education's Office for Civil Rights, school districts expelled an estimated 101,652 children from school, and an additional 2,508,595 students received at least one out-of-school suspension.[8] The Office for Civil Rights also reports that an estimated 2,636,363 students received in-school suspensions during the same period.[9] Black students, indigenous students, and students with disabilities face exclusionary discipline at dramatically higher rates than their peers.[10] Students can face exclusionary school

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presenting a false dichotomy between consequences that are discussed in court and those that are not).

7. *See, e.g.*, Kate Weisburd, *Ban the Other Box*, MARSHALL PROJECT (June 15, 2016), https://www.themarshallproject.org/2016/06/15/ban-the-other-box [https://perma.cc/P7DB-MNSL] (noting that "[w]hile the barriers created by criminal records have begun to receive much-needed attention, the barriers created by school discipline records have been largely overlooked"); Malgorzata J. V. Olszewska, Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants' Disciplinary Background Information and Its Relation to Campus Crime (2007) (Ed.D. dissertation, East Carolina University) (ProQuest) ("There is a considerable lack of research about policies and practices surrounding the screening of college applicants' disciplinary background.").

8. *See Number and Percentage of Public School Students With and Without Disabilities Receiving Expulsions With and Without Educational Services by Race/Ethnicity, Disability Status, and English Proficiency, by State: School Year 2017–18*, U.S. DEP'T EDUC. (2021), https://civilrightsdata.ed.gov/assets/downloads/2017-2018/Discipline/Discipline/Expulsions-w-and-wo-ed-service/Expulsions-w-and-wo-ed-service_by-disability-and-no.xlsx [https://perma.cc/B5JT-D68E]; *Number and Percentage of Public School Students With and Without Disabilities Receiving One or More Out-of-School Suspensions by Race/Ethnicity, Disability Status, and English Proficiency, by State: School Year 2017–18*, U.S. DEP'T EDUC. (2021) [hereinafter *Number and Percentage of Public School Students*], https://civilrightsdata.ed.gov/assets/downloads/2017-2018/Discipline/Discipline/One-or-More-Oos-Suspensions/One-or-More-OoS-Suspensions_by-disability-and-no.xlsx [https://perma.cc/JG54-LCU4].

9. *See Number and Percentage of Public School Students With and Without Disabilities Receiving One or More In-School Suspensions by Race/Ethnicity, Disability Status, and English Proficiency, by State: School Year 2017–18*, U.S. DEP'T EDUC. (2021), https://civilrightsdata.ed.gov/assets/downloads/2017-2018/Discipline/Discipline/One-or-More-In-School-Suspensions/One-or-More-In-School-Suspensions_by-disability-and-no.xlsx [https://perma.cc/4URL-6B3H].

10. *See* NAT'L CTR. FOR LEARNING DISABILITIES, SIGNIFICANT DISPROPORTIONALITY IN SPECIAL EDUCATION: CURRENT TRENDS AND ACTIONS FOR IMPACT 5 (2020), https://ncld.org/wp-content/uploads/2023/07/2020-NCLD-

discipline starting at shockingly young ages: in the 2017–2018 school year alone, 2,822 preschoolers received out-of-school suspensions and 306 received expulsions.[11] Even at such a young age, the racial disparities in the application of exclusionary discipline are stark.[12]

This Article focuses principally on the areas in which the collateral consequences of K-12 school disciplinary records parallel the collateral consequences of criminal and juvenile records. Specifically, the Article investigates the direct barriers to education, employment, and other opportunities erected by disciplinary records and the ways in which laws and policies can more effectively combat these obstacles.[13]

Today, more than seventy-seven million Americans have records from criminal or juvenile justice systems.[14] Black Americans, and particularly Black men, disproportionately shoulder the burdens of criminal records.[15] These records can erect lasting barriers to employment, education, housing, voting, and numerous other economic advantages and civil rights.[16] Movements to address the collateral consequences of records from criminal and juvenile justice systems have seen tremendous successes in recent years.[17] Today,

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Disproportionality_Trends-and-Actions-for-Impact_FINAL-1.pdf [https://perma.cc/XCS6-PHYS].

11. *See* U.S. DEP'T EDUC., DISCIPLINE PRACTICES IN PRESCHOOL (2021), https://civilrightsdata.ed.gov/assets/downloads/crdc-DOE-Discipline-Practices-in-Preschool-part1.pdf [https://perma.cc/NSX5-6R82].

12. *See id.*

13. *See infra* Part II

14. *See* Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 11:30 PM), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 [https://perma.cc/8UVL-63JD].

15. *See* Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST., May 2018, at 1, 2, https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/43R9-88BX].

16. *See* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 594–98 (2006) (detailing barriers to housing, voting, and employment); Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 164 (2010) ("Something as simple as checking a box indicating a conviction bars a person from employment, housing, educational assistance, and government benefits. Collateral consequences take the form of employment disqualifications in the public and private sectors, prohibitions on federal educational subsidies, housing exclusions, public benefit ineligibility, and political punishment.").

17. *See infra* Section III.A.

more than 80% of individuals in the United States live in jurisdictions that have banned questions about criminal and juvenile history on job applications in at least some contexts.[18] A rapidly-growing number of states have restricted use of questions about criminal history in the college admissions process as well.[19] In recent years, states have passed hundreds of new laws annually designed to address the barriers erected by criminal and juvenile records.[20]

Comparable responses for school disciplinary records are few and far between and have not yet been systematically studied. Recently, however, the Common Application, the nonprofit application service used by more than a thousand colleges and universities,[21] opted to remove questions about school discipline from the required portion of its application and instead to leave whether to ask about school discipline to the discretion of individual member colleges.[22] This shift presents a critical opportunity for assessing the ways in which records of discipline currently erect barriers, for weighing the case for and against inquiry into disciplinary history, and for exploring potential policy responses.

This Article contributes to the literature in two main ways. First, it fills a gap by documenting the broad range of ways that supposedly confidential information from school disciplinary records can have lifelong effects.[23] And second, it offers novel legislative solutions—analogous to expungement and ban the box laws—designed to ensure

18. *See* BETH AVERY & HAN LU, NAT'L EMP. L. PROJECT, BAN THE BOX: U.S. COUNTIES, CITIES, AND STATES ADOPT FAIR–CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 3 (2021), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide [https://perma.cc/8CSF-SXDF]; *see also infra* Subsection III.C.2 (stating that some empirical evidence suggests that ban the box efforts can be counterproductive to increasing diversity in hiring).

19. *See* Eve Rips, *A Fresh Start: The Evolving Use of Juvenile Records in College Admissions,* 54 U. MICH. J. L. REFORM 217, 256–264 (2020).

20. *See infra* Section III.A.

21. *See About*, COMMON APP, https://www.commonapp.org/about [https://perma.cc/96QM-MZ5N] (last visited May 29, 2024), [hereinafter COMMON APPLICATION].

22. *See* Lindsay McKenzie, *Common App Ditches High School Discipline Question*, INSIDE HIGHER ED (Oct. 4, 2020), https://www.insidehighered.com/admissions/article/2020/10/05/common-app-stop-asking-students-about-their-high-school-disciplinary [https://perma.cc/WAL7-QEVS].

23. *See infra* Part II.

that records of school discipline do not continue to haunt individuals into adulthood.[24]

Several short disclaimers are in order. This is not an article about the full scope of the far-reaching consequences of school discipline, which have already been well documented.[25] This Article also does not focus on the far-reaching consequences of school discipline for the families of directly impacted students.[26] The collateral consequences

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24. *See infra* Part III.

25. Exclusionary school discipline leads to a host of elevated risks and adverse outcomes for students that have been extensively researched, particularly through scholarship focused on the "school-to-prison pipeline." Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 319–24 (2016). *See generally* Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1 (2016); Russell J. Skiba et al., *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE EDUC. 546 (2014); Russell J. Skiba et al., *In and of Itself a Risk Factor: Exclusionary Discipline and the School-to-Prison Pipeline*, *in* UNDERSTANDING, DISMANTLING, AND DISRUPTING THE PRISON-TO-SCHOOL PIPELINE 111 (Kenneth J. Fasching-Varner et al. eds., 2017); Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline*, *in* FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 11 (Anthony J. Nocella II et al. eds., 2014); Kerrin C. Wolf & Aaron Kupchik, *School Suspensions and Adverse Experiences in Adulthood*, 34 JUST. Q. 407 (2017). Exclusionary discipline leads to lower academic performance. *See* Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBS. 68, 81–83 (2016); Kaitlin P. Anderson et al., *Understanding a Vicious Cycle: The Relationship Between Student Discipline and Student Academic Outcomes*, 48 EDUC. RESEARCHER 251, 254–59 (2019). Students who face exclusionary discipline are at increased risk of dropping out. *See* Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, 5 J. APPLIED RSCH. ON CHILD. 1, 7–14 (2014). Students who experience suspensions and expulsions are also more likely subsequently to be arrested and to self-report engaging in criminal behaviors down the road. *See* Thomas Mowen & John Brent, *School Discipline as a Turning Point: The Cumulative Effect of Suspension on Arrest*, 53 J. RSCH. CRIME & DELINQ. 628, 642–44 (2016) (discussing arrest). *See generally* Thomas J. Mowen et al., *The Effect of School Discipline on Offending Across Time*, 37 JUST. Q. 739 (2020) (discussing self-reporting of future offending).

26. In a series of interviews with parents about the impact of harsh school discipline, researchers found that almost all parents included in the interview set expressed financial concerns related to exclusionary discipline, including inability to afford a caretaker to help assist with childcare when a child was home from school, inability to afford legal representation, and concerns about potential loss of employment due to missed work. Many parents also reported increased anxiety and stress tied to school discipline. Half of parents interviewed reported diminished expectations about a child's future prospects as a result of exclusionary discipline. *See* Thomas J. Mowen, *The Collateral Consequences of "Criminalized" School*

of school records are not more urgent to address than the myriad far-reaching consequences that result from the discipline itself instead of from the record, but rather are another facet of the long-term ramifications of school discipline. Just as efforts to reduce collateral consequences of criminal convictions and juvenile adjudications are not a replacement for working to change or abolish criminal justice systems as we know them, addressing the collateral consequences of school disciplinary records should not replace efforts to reduce use of harsh, exclusionary discipline. And finally, analogies in this Article between criminal records and school disciplinary records are not intended to equate the scale of the impact of criminal and school disciplinary records. Nonetheless, for individuals with records of school discipline, questions about disciplinary history may erect barriers to accessing key opportunities for years to come.[27]

This Article proceeds in three main parts. Part I examines the lifelong impact that records of school discipline can have for students and challenges the pervasive misconception that school disciplinary records are always kept confidential.[28] Part I also details three ways in which information from school disciplinary records may be distributed: exceptions to the privacy requirements in the Family Educational Rights and Privacy Act (FERPA), data breaches and misuse, and questions on applications for educational and professional opportunities that ask applicants to disclose their own disciplinary records.[29] Through a mix of literature review and original examination of application forms, the Article documents ways in which questions about school discipline are asked on applications for college enrollment, for enrollment in graduate education programs, and for professional licensure.[30] While questions about school disciplinary history are particularly common in applications for undergraduate admissions, questions about elementary and secondary school discipline are also regularly used in applications for admission to graduate programs and are used on applications for some forms of professional licensure.[31]

Punishment on Disadvantaged Parents and Families, 49 URB. REV. 832, 840–44 (2017). S*ee generally* Aaron Kupchik & Thomas J. Mowen, *Hurting Families*, *in* THE REAL SCHOOL SAFETY PROBLEM: THE LONG-TERM CONSEQUENCES OF HARSH SCHOOL PUNISHMENT 56 (2016).

27. *See infra* Part I.
28. *See infra* Part I.
29. *See infra* Section I.A.
30. *See infra* Subsection I.A.1.
31. *See infra* Subsection I.A.1.

Part II weighs the case for and against inquiring into student disciplinary records.[32] It first examines two leading reasons for using disciplinary records: concerns about safety and about liability.[33] It then lays out five significant reasons to be troubled by long-term use of school disciplinary records.[34] First, long-term use of school records functions as a form of permanent punishment, at odds with values of second chances or redemption.[35] Second, collateral consequences of school records have a disproportionate impact on Black students, indigenous students, and students with disabilities.[36] Third, long-term use of school disciplinary records penalizes children for behavior that happened at an age at which skills related to moral reasoning and to planning for the future are still developing.[37] Fourth, the vast majority of school discipline is for minor infractions.[38] And fifth, procedural protections for students facing exclusionary discipline are often extremely limited.[39] Part II ultimately concludes that the use of school disciplinary records creates an unnecessary harm.[40] Use of disciplinary information doesn't effectively serve its intended purpose, but it does further perpetuate inequities in school disciplinary practices.[41] It also

32. *See infra* Part II.

33. *See infra* Section II.B.

34. *See infra* Section II.B.

35. *Cf.* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in an Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (referring to lasting collateral consequences of criminal convictions as "civil death").

36. *See, e.g.*, *Data Snapshot: 2017-2018 National Data on School Discipline by Race and Gender*, GEO. CTR. ON POVERTY & INEQ. (2020), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/12/National-Data-on-School-Discipline-by-Race-and-Gender.pdf [https://perma.cc/QU4G-9XYS].

37. *Cf. Executive Function & Self-Regulation*, CTR. ON DEVELOPING CHILD, HARV. UNIV., https://developingchild.harvard.edu/science/key-concepts/executive-function/ [https://perma.cc/JS7H-CZMW].

38. *See, e.g.*, Russell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 AM. EDUC. RSCH. J. 640, 644 (2014) (finding that a "majority of offenses for which students are suspended appear to be nonviolent, less disruptive offenses").

39. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 581 (1975) (explaining that Due Process requires only "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story").

40. *See infra* Part II.

41. *See infra* Subsection II.B.2.

serves to tie students to records that don't accurately represent their character.[42]

Finally, Part III suggests concrete ways that laws and policies can more effectively address the barriers erected by records of school discipline.[43] In considering these possibilities, the Part provides a survey of how states currently handle destruction of information from school disciplinary records.[44] The Part describes the only state law to ban questions about school disciplinary records in applications for college admission.[45] It also provides more context on the Common Application's decision to move away from mandating questions about discipline in admissions.[46] Drawing in part from these initial changes, the Part proposes novel ways that state and federal laws that restrict use of criminal and juvenile records on applications for licensure and education can be expanded to incorporate school disciplinary records as well.[47] It also proposes original model language to allow for meaningful expungement of information from school records.[48] Collectively, these proposals aim to combat the long shadow that disciplinary proceedings at a young age can cast over access to critical opportunities for years to come.[49]

I. THE LIFELONG IMPACT OF SCHOOL RECORDS

School disciplinary records, like criminal records, can erect ongoing barriers for students. This Part first explores the ways in which school disciplinary records, despite their purported confidentiality, can end up getting disclosed widely. These include self-disclosure requirements on applications for educational opportunities and professional licensure, statutory exceptions, and data breaches or misuse.[50] This Part then lays out the concrete ways in which sharing information from school records can hinder access to opportunity. Outside of college applications, little data exists on how information about school discipline is used in making decisions. However, information about use of disciplinary information in the

42. *See infra* Subsection II.B.3.
43. *See infra* Part III.
44. *See infra* Section III.B.
45. *See infra* Subsection III.B.2.
46. *See infra* Subsection III.B.2.
47. *See infra* Section III.C.
48. *See infra* Section III.C.
49. *See infra* Section III.C.
50. *See infra* Section I.A.

college admissions process suggests both that disciplinary records can directly impact decision-making and that questions about disciplinary history can cause pronounced chilling effects for applicants.[51]

A. How School Records Get Distributed

Although school records are often thought of as confidential, school disciplinary information can be shared or made public in a number of different ways.[52] Current and former students may be asked to disclose information about school disciplinary records for years after graduation as part of applications for college, graduate programs, and professional licensure.[53] FERPA, which prohibits release of education records without consent,[54] includes exceptions and carveouts that enumerate situations in which educational information may be shared without permission.[55] Even when record information is fully protected by FERPA, data misuse and security breaches increasingly leave information vulnerable.[56]

1. *Self-Disclosure Requirements*

School records are often shared by the record holders themselves in response to self-disclosure requirements.[57] Just as many undergraduate programs, graduate programs, licensure boards, and prospective employers ask about criminal and juvenile records on application forms,[58] many of these institutions also inquire into school disciplinary records. Although these inquiries are particularly common in undergraduate and graduate-level admissions, questions about disciplinary history can continue to impact individuals outside of educational contexts through professional licensure requirements as well.[59]

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51. *See* WEISSMAN & NAPIER, *supra* note 6, at 9–10.
52. *See infra* Subsections I.A.1–I.A.3.
53. *See* WEISSMANN & NAPIER, *supra* note 6, at i.
54. *See* 20 U.S.C. § 1232g(b)(1).
55. *See id.*
56. *See* Elana Zeide, *Student Privacy Principles of the Age of Big Data: Moving Beyond FERPA and FIPPS*, 8 DREXEL L. REV. 339, 372–74 (2016).
57. *See* WEISSMANN & NAPIER, *supra* note 6, at 5.
58. *See* Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 368 (2018).
59. *See* Megan Denver & Alex Ewald, *Credentialing Decisions and Criminal Records: A Narrative Approach*, 56 CRIMINOLOGY 715, 717 (2018).

a. College Admissions

Many colleges and universities ask for information about school disciplinary history, including both academic and behavioral misconduct.[60] In 2015, the Center for Community Alternatives found that almost three-quarters of all colleges and universities ask for information about a student's disciplinary history in the admissions process.[61] Until 2021, all postsecondary institutions using the Common Application were required to ask applicants whether they had ever been found responsible for a disciplinary violation while enrolled in a secondary education program.[62] The Common Application is a nonprofit organization that assists in streamlining college applications by creating a shared form that applicants can fill out for all colleges and universities to which they plan to apply.[63] In addition to filling out the shared, or "common" portion of the application, each individual college or university is able to include its own individual, "supplemental" questions on the application.[64] Until 2021, the shared portion of the Common Application asked:

> Have you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from the institution.[65]

Hundreds of colleges and universities that use the Common Application relied on this wording.[66]

In 2021, the Common Application removed the question about school discipline from the shared portion of its application and instead left whether and how to inquire into school discipline to the discretion

60. *See* WEISSMANN & NAPIER, *supra* note 6, at 1.
61. *See id.* at iii.
62. *See* McKenzie, *supra* note 22.
63. *See* COMMON APPLICATION, *supra* note 21.
64. *See* Scott Jaschik, *Common App Drops Criminal History Question*, INSIDE HIGHER ED (Aug. 12, 2018), https://www.insidehighered.com/admissions/article/2018/08/13/common-application-drops-criminal-history-question-although-colleges [https://perma.cc/PH4F-GYEJ].
65. *See* McKenzie, *supra* note 22.
66. *See id.*

of individual colleges and universities.[67] To examine the decisions individual institutions are making, this Section includes a review of the 1,002 schools that had applications for first-year, non-transfer undergraduate admission available through the Common Application's website in Fall of 2023. This data is then cross-referenced with demographic data from the U.S. Department of Education's Integrated Postsecondary Education Data System (IPEDS) to obtain information about selectivity, racial diversity, and Pell eligibility rates at individual colleges and universities.

In response to the discretion granted by the Common Application, 56% of colleges opted not to include a question on school discipline while 44% continue to ask about disciplinary records.[68] Of schools that continue to ask about disciplinary history, 88% ask broadly about all offenses that lead to certain types of discipline, while 12% restrict the question only to certain types of incidents, usually more serious behavioral infractions, academic honesty infractions, or both.[69] Postsecondary institutions also vary in how they approach older school records, with 72% of colleges limiting the inquiry just to high school and college-level discipline, 26% asking about discipline at any point in an applicant's educational history, and 2% taking another approach.[70] Some schools now ask broadly about any sort of disciplinary action without providing examples of discipline,[71] while others ask more narrowly about disciplinary action that requires removal from school.[72] Question wording is frequently ambiguous as to exactly which information should be disclosed.[73] For example, the

67. *See* Scott Anderson, *New Resource for College-Specific School Discipline Questions*, COMMON APP (Aug. 30, 2021), https://www.commonapp.org/blog/new-resource-college-specific-school-discipline-questions [https://perma.cc/7MNN-KVMZ].

68. *See* Data Analysis by Eve Rips on First Year, Non-Transfer Admissions using Data From commonapp.org (on file with author).

69. *See id.*

70. *See id.*

71. *See, e.g.*, BROWN UNIV., APPLICATION FOR ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade [or the international equivalent] forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action?").

72. *See, e.g.*, UNIV. ALA., APPLICATION FOR ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been suspended, dismissed, removed (by trespass warning or otherwise) or expelled from a secondary or high school for one or more days, or is any such action pending or expected to be brought against you?").

73. *See* McKenzie, *supra* note 22.

original wording required by the Common Application, which is still used at many colleges and universities, is ambiguous as to whether relatively minor forms of discipline, like detentions, should be disclosed.[74] Other schools are ambiguous as to the types of offenses that must be disclosed[75] or ambiguous as to whether only discipline from high school on should be disclosed.[76]

If applicants check the box indicating that they do have disciplinary history, institutions typically require a follow-up question that asks for additional information.[77] Some schools have opted to add clarifying language specifying how the information will be used and letting applicants know that disclosure of disciplinary history is not an automatic bar to admission.[78]

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74. *See id.*

75. *See, e.g.*, LAWRENCE TECH. UNIV., APPLICATION FOR ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been expelled, suspended, or placed on probation by any secondary school or college you have attended, for reasons of academic dishonesty or because of an offense that harmed or had the potential to harm others?").

76. *See, e.g.*, WALSH UNIV., APPLICATION FOR ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been investigated or found responsible for a disciplinary violation at a previous institution (high school, college, university, etc.) related to behavioral misconduct that resulted in disciplinary action, including probation, suspension, removal, dismissal, or expulsion?").

77. *See, e.g.*, DUKE UNIV., APPLICATION FOR ADMISSION (2023) (screenshot on file with the author) (asking "[i]f you answered 'yes' to this question, in the space below please give the date of each incident, and describe the incident and circumstances in detail"); MISS. ST. UNIV., APPLICATION FOR ADMISSION (2023) (asking "[p]lease provide details"); IND. UNIV. BLOOMINGTON, APPLICATION FOR ADMISSION (2023) (screenshot on file with the author) (asking applicants who indicate that they have either a disciplinary or a criminal record "[p]lease provide a document that contains a complete explanation (in English) of: - the disciplinary action, charges, conviction, or other behavior that caused injury to person(s) or property which resulted in some form of discipline or intervention; - the dates and court disposition (court ruling or result); - the location (city, state, and country); - the impact the incident(s) had on you; and - a statement granting your permission to officials at all institutions and agencies to release information needed by IU to substantiate statements made in your application or letter").

78. *See, e.g.*, HARVARD UNIV., APPLICATION FOR ADMISSION (2023) (screenshot on file with the author) (specifying that "[a]s with all information provided in the application, we will consider your response in the context of our whole person review. We are primarily interested in learning the details of the incident from your perspective"); IND. UNIV. BLOOMINGTON, *supra* note 77 (specifying that "[a] previous disciplinary action, charge, conviction, or conduct of the sort identified here does not automatically disqualify applicants from admission to IU, but they do require review by the campus admissions committee. Furthermore, the review of any behavior disclosure information provided will be conducted independently of the evaluation of your academic eligibility for admissions and will only be shared with the admissions

Demographic differences between schools that ask about discipline and those that do not are all comparatively minor.[79] Of Common Application schools, institutions that ask about discipline have an average of a 68.8% admissions rate, while those that do not have a less selective admissions rate of 74.1%.[80] Pell eligibility rates, which are frequently used to measure the percentage of low-income students served at postsecondary institutions, vary slightly: Schools that ask about disciplinary history have an average Pell-eligibility rate of 28.2% while schools that do not have an average rate of 32.5%.[81]

While it is too early to tell whether adding disciplinary questions back in will impact the racial diversity of colleges and universities, data from IPEDS provides context as to whether schools that opted to add disciplinary questions back in were more diverse to begin with. Schools that decided to add a disciplinary record question back in had higher African American enrollment (12.6% African American enrollment) than schools that did not add criminal history questions in (10.5% African American enrollment).[82] The reverse was true for Hispanic enrollment: Schools that added disciplinary record questions back in had slightly lower Hispanic enrollment (10.4%) than schools that did not (11.9%).[83]

b. Graduate Admissions

Even though applicants for graduate degrees are typically at least several years out of high school, applications for graduate admissions may also contain similar questions.[84] The prevalence of these

committee and/or with other officials at IU who have a need to know as part of the behavior review process"); UNIV. ALA., *supra* note 72 (specifying that "[t]he University has a vital interest in the safety of its campus and character of its students. Prior behavior is reviewed as part of admissions decisions, but a criminal or disciplinary history is not an absolute or automatic bar. Each disclosure is individually reviewed and any admission decision relating to such a disclosure is made on a case-by-case basis. Such decisions may be appealed").

79. *See* F. Chris Curran, *Ban the Discipline Box? How University Applications That Assess Prior School Discipline Experiences Relate to Admissions of Students Suspended in High School*, 63 RSCH. HIGHER EDUC. 1120, 1134, 1145, 1151 (2022).

80. *See* Data Analysis by Eve Rips on First Year, Non-Transfer Admissions using Data From commonapp.org (on file with author).

81. *See id.*

82. *See id.*

83. *See id.*

84. *See 8 Important Differences Between Undergraduate and Graduate School*, SACRED HEART UNIV. (July 21, 2023), https://info.sacredheart.edu/the-

questions in the graduate admissions process varies significantly by field.[85] This Section examines graduate admissions for health, legal, and business-related degrees.

Questions about elementary and secondary discipline are common in health-related fields.[86] While applications for MD programs ask only about discipline at the postsecondary level,[87] applications for many other health-related graduate programs are run through shared application services created by an organization called Liaison and ask the same two questions about discipline of all applicants: "Have you ever been disciplined for academic performance (e.g., academic probation, dismissal, suspension, disqualification, etc.) by any college or school?" and "Have you ever been disciplined for student conduct violations (e.g., academic probation, dismissal, suspension, disqualification, etc.) by any college or school?"[88] These questions are used in admission for degrees including Doctor of Osteopathic Medicine (D.O.), various dentistry degrees, physical therapy programs, veterinary medicine programs, and podiatry degrees.[89]

Law schools take a wide range of approaches in asking about K-12 disciplinary history.[90] While the majority of law schools ask only about discipline in postsecondary settings, almost a third of law schools—30.6 percent—ask discipline questions that would require disclosure of at least some forms of elementary or secondary

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pioneer-pursuit/8-important-differences-between-undergraduate-and-graduate-school [https://perma.cc/BX6M-CQ8N].

85. *See id.*

86. *See How to Talk About Academic Discipline on Your Application*, MED. SCH. HEADQUARTERS (Dec. 2020), https://medicalschoolhq.net/opm-260-how-to-talk-about-academic-discipline-on-your-application [https://perma.cc/Z5PM-N63F].

87. *See* AM. MED. COLL. APPLICATION SERV., APPLICATION (2023) (screenshot on file with the author) (asking about disciplinary action taken by colleges or medical schools, but not about K-12 programs).

88. *See* AM. ASS'N COLL. OSTEOPATHIC MED., APPLICATION (2023) (screenshot on file with the author); AM. DENTAL EDUC. ASS'N - ASSOCIATED AM. DENTAL SCHS. APPLICATION SERV., APPLICATION (2023) (screenshot on file with the author); AM. PHYSICAL THERAPY ASS'N – PHYSICAL THERAPY CENTRAL APPLICATION SERV., APPLICATION (2023) (screenshot on file with the author); ASS'N. AM. VETERINARY MED. COLLS., APPLICATION (2023) (screenshot on file with the author); AM. ASS'N. COLLS. PODIATRIC MED. APPLICATION SERV., APPLICATION (2023) (screenshot on file with the author).

89. *See id.*

90. *See* Gabriel Kuris, *Law School Applicants and Disciplinary Issues*, U.S. NEWS (July 13, 2020), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/how-law-school-applicants-can-address-criminal-disciplinary-incidents [https://perma.cc/S2GN-PV7K].

disciplinary information.[91] Some disciplinary questions narrow this inquiry to high school and postsecondary discipline only,[92] while others ask broadly about discipline at any point in the applicant's educational experience.[93] In addition to schools that ask directly about K-12 discipline, a number of law schools ask questions that might indirectly require disclosure of information about discipline in elementary or secondary education.[94] For example, many schools include questions about disruption in education for any reason, which might require an applicant to disclose a suspension or expulsion that caused a significant disruption in her schooling.[95] Some schools also ask questions about whether the applicant has ever been subject to an administrative proceeding.[96] Finally, some law schools ask primarily about discipline in postsecondary settings only but require students to

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91. *See* Data Analysis by Eve Rips of 196 Law School Application Forms for Fall 2023 First-Year, Non-Transfer JD Admissions Using Data Available Through the Law School Admissions Council's Website, www.lsac.org, Conducted in February 2023 (on file with author). Applications that asked about discipline at "any school" or "any academic institution" were treated as requiring the applicant to disclose high school disciplinary information unless the application explicitly clarified otherwise. Applications that asked about whether any disciplinary proceedings are still pending were treated as not requiring disclosure of elementary or secondary disciplinary information, given the unlikelihood of disciplinary proceedings continuing several years after high school.

92. *See, e.g.*, UNIV. DAYTON SCH. L., APPLICATION FOR JD ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been dropped, suspended, warned, disciplined, placed on scholastic or disciplinary probation, expelled or requested to resign, or allowed to resign in lieu of discipline from any high school, college or university, or requested or advised by any such institution to discontinue your studies therein?").

93. *See., e.g.*, UNIV. IOWA COLL. L., APPLICATION FOR JD ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been disciplined in any way by any educational institution for any reason, whether academic or non-academic? This includes, but is not limited to, letters of reprimand, warning notices or findings of misconduct").

94. *See, e.g.*, UNIV. NOTRE DAME L. SCH., APPLICATION FOR JD ADMISSION (2024) (asking "[h]ave you ever been disciplined (i.e., suspended, dismissed, expelled, asked to withdraw, or placed on probation) or found responsible for any academic, scholastic, disciplinary, or other misconduct by any school, college, or university?").

95. *See* Data Analysis by Eve Rips of 196 Law Schools Application Forms, *supra* note 91.

96. *See, e.g.*, UNIV. KY. J. DAVID ROSENBERG COLL. L., APPLICATION FOR JD ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been a party in any civil, administrative, or other proceeding?"). Because expulsion proceedings are administrative hearings, an applicant would technically be required to share some forms of high school disciplinary information by this question. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975).

share information about academic honesty violations from any point in their educational careers.[97]

Business, engineering, and many other graduate programs also frequently use shared applications through Liaison but do not include disciplinary questions on the shared portions of the application.[98] Instead, as with the Common Application, individual schools that use the shared application service may add questions about discipline to their own applications.[99] Many MBA programs opt to ask questions that include elementary or secondary discipline as part of their supplemental applications.[100] Of the forty-six schools offering applications for MBA programs through Liaison's shared application service, 37% include questions about elementary or secondary school discipline.[101] As with law school applications, some business schools narrow this inquiry only to high school and postsecondary discipline,[102] while others ask about discipline at any point in the

97. *See, e.g.*, UNIV. BUFFALO SCH. L., APPLICATION FOR JD ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been found to have engaged in academic dishonesty (cheating or plagiarism) at any time?").

98. *See Centralized Application Service*, LIAISON, https://www.liaisonedu.com/centralized-application-service-liaison/ [https://perma.cc/BR59-7S46] (last visited May 29, 2024).

99. *See Liaison FAQ*, IND. UNIV. LUDDY SCH. INFORMATICS, COMPUTING, & ENG'G, DEP'T INFORMATICS, https://informatics.indiana.edu/apply/faq.html [https://perma.cc/F2AQ-4MYM] (last visited May 29, 2024).

100. *See, e.g.*, LIPSCOMB UNIV., APPLICATION FOR PROFESSIONAL MBA (2024) (asking "[h]ave you ever been dismissed/placed on probation/suspended for academic or disciplinary reasons?").

101. *See* Data Analysis by Eve Rips of Forty-Six Business School Application Forms for MBA Admissions Based on Data Available Through BusinessCAS, https://businesscas.org/apply/, Conducted in June 2023 (on file with author). Applications that asked about discipline at "any school" or "any educational institution" or "any academic program" were treated as requiring the applicant to disclose high school disciplinary information, unless the application explicitly clarified otherwise, as were applications that asked about suspensions, expulsions, or discipline generally without providing additional context. Applications that asked about whether any disciplinary proceedings are still pending were treated as not requiring disclosure of elementary or secondary disciplinary information, given the unlikelihood of disciplinary proceedings continuing several years after high school.

102. *See, e.g.*, UNIV. PITT., APPLICATION FOR SIGNATURE MBA ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been suspended or dismissed from any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct?").

applicant's educational history.[103] Some schools ask broadly about all discipline, while others ask about just suspensions and expulsions.[104]

c. Professional Licensure

In addition to impacting access to higher education, questions about school disciplinary history sometimes also play a role in applications for licensure.[105] While some states have passed laws restricting inquiry into criminal and juvenile records in applications for professional licensure, these laws have not been extended to records of school disciplinary infractions.[106] Today, questions about school disciplinary history are sometimes used in applications for licensure in fields including, although not limited to, law, medical, and mental health-related professions.[107]

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103. *See, e.g.*, ANDERSON UNIV., APPLICATION FOR DAYTIME MBA (2023) (screenshot on file with the author) (asking "[h]ave you ever been on probation, suspended, or dismissed for academic or disciplinary reasons?"); UNIV. MIAMI, APPLICATION FOR FULL-TIME MBA ADMISSION (2023) (screenshot on file with the author) (asking "[h]ave you ever been disciplined by a student or faculty judicial board for misconduct, or have you ever been convicted of a crime (other than for a traffic offense)?").

104. *Compare* PEPPERDINE UNIV. GRAZIADIO SCH. BUS., APPLICATION FOR EXECUTIVE MBA ADMISSION (2023) (asking "[h]ave you ever been found responsible for a disciplinary violation at an educational institution you have attended, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action? These actions could include but are not limited to probation, suspension, removal, dismissal, or expulsion from the institution"), *with* UNIV. OF PITT., *supra* note 102.

105. *See* R.I. SUP. CT. COMM. ON CHARACTER & FITNESS, REVISED APPLICATION FOR ADMISSION TO THE RHODE ISLAND BAR 9 (2007) (asking "[h]ave you ever been involved in, reprimanded for, or disciplined by an employer or educational institution for misconduct including . . . misconduct involving student activities; excessive absences; failure to complete assignments in a timely manner[?]").

106. *See 50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/ [https://perma.cc/3P5G-XBAK] (last visited May 29, 2024).

107. *See, e.g.*, MASS. GEN. LAWS ch. 112, § 74A (2024) (requiring all applicants seeking a nursing license to demonstrate "good moral character," which requires full disclosure that applicant's history of disciplinary sanctions); ALA. ADMIN. CODE r. 536-X-2.02(2) (2024) (requiring all applicants seeking a license to become a "Marriage and Family Therapist" to demonstrate "good moral character," which requires full disclosure of that applicant's history of disciplinary sanctions).

On character and fitness forms for candidates applying to practice law, twenty states[108] currently ask questions about school discipline that require candidates to disclose at least some records from K-12 education systems.[109] The vast majority of those states ask about discipline at "any school" without restricting the inquiry only to more recent incidents.[110] Twelve states[111] of those twenty ask broadly about disciplinary records for any type of offense.[112] Eight states[113] ask more narrowly about only specific infractions, most frequently those tied either to alcohol or to drug use.[114] In addition to the twenty states

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108. *See, e.g.*, ARIZ. ST. BAR ADMISSION OFF., CHARACTER & FITNESS APPLICATION 6 (2024); COLO. SUP. CT. OFF. ATT'Y REGUL. COUNS., BAR APPLICATION 2 (2024); VIRG. BD. BAR EXAM'RS, CHARACTER & FITNESS QUESTIONAIRRE 5 (2024) (showing that Arizona, Colorado, and Virginia, as well as Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, New York, Pennsylvania, Rhode Island, and South Carolina, ask questions about school discipline on character and fitness applications). This listing of states does not include states that ask about censure in an administrative forum, about incidents limited to the last five years, or questions that ask only about "withdrawing" from an educational institution.

109. *See generally* JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., BAR ADMISSIONS QUESTIONS PERTAINING TO MENTAL HEALTH, SCHOOL/CRIMINAL HISTORY, AND FINANCIAL ISSUES (2019), http://www.bazelon.org/wp-content/uploads/2019/05/Bar-Application-Character-and-Fitness-Questions.pdf [https://perma.cc/N9YR-TJ8A] (author's analysis of Bazelon Center data, which encompasses character and fitness questions that appear on every state and territorial bar application).

110. *See id.* at 59, 92.

111. *See generally id.* Arizona, Arkansas, Illinois, Iowa, Kansas, Maine, Maryland, Mississippi, New Hampshire, New York, Rhode Island, and South Carolina are states that ask broadly about discipline records. *Id.* at 6, 9–10, 29, 34, 36, 44, 46, 59, 69, 78, 88, 92.

112. *See generally id.* For example, Arizona asks both "[h]ave you ever at any time been dropped, suspended, expelled or disciplined by any school or college for any cause whatsoever, including scholastic deficiency?" and "[h]ave you ever at any time been questioned or accused with respect to cheating, plagiarism or honor code violation in the course of your schooling or elsewhere?"; and New York asks, "[h]ave you ever been placed on probation, dropped, suspended, expelled or otherwise been subjected to discipline by any institution of learning above elementary school level for conduct which might reflect upon your character?" *Id.* at 6, 78.

113. *See generally id.* Colorado, Florida, Georgia, Indiana, Minnesota, Missouri, Pennsylvania, and Virginia ask these questions. *Id.* at 13–14, 21–22, 24–26, 32–33, 55–56, 61–63, 85, 104–105.

114. *See generally id.* For example, Colorado asks "[r]egardless of whether the record has been expunged, canceled, or annulled, or whether no record was made, have you ever been accused of cheating, plagiarism, or other academic dishonesty at any school you attended?"; and Minnesota asks "[h]ave you EVER been warned, placed on probation, suspended, requested to discontinue your studies, allowed to discontinue your studies in lieu of discipline, expelled, or otherwise disciplined, by

that ask directly about some forms of K-12 school discipline, many others ask applicants a catchall question about any other incidents that might speak to the applicant's moral character, thereby leaving applicants in the puzzling position of needing to decide whether disciplinary infractions from elementary or secondary school might be perceived as impacting fitness to practice law.[115]

Questions that would require some disclosure of elementary or secondary school disciplinary history are also periodically used in physical and behavioral health-related fields.[116] Some of these applications ask broadly about all disciplinary proceedings, without any qualifying language limiting the scope of the inquiry.[117] Other inquiries that would include elementary and secondary disciplinary information are limited just to questions about academic dishonesty.[118] A number of application forms in health fields ask questions that are ambiguous as to which types of disciplinary information should be disclosed.[119]

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any educational institution for conduct in any way related to alcohol or other drugs?" *Id.* at 14, 56.

115. *See generally id.* For example, Oregon asks "[i]s there any additional information with respect to possible misconduct or lack of moral qualification or general fitness on your part that is not otherwise disclosed by your answers to questions in this application?" *Id.* at 85.

116. *See* MD. ST. BD. CHIROPRACTIC EXAM'RS, APPLICATION FOR INITIAL CHIROPRACTIC LICENSURE 2 (2023) (on file with the author).

117. *See, e.g.*, *id.* (asking "[h]ave you ever been expelled, suspended or formally disciplined during your educational training?"); *see also* TEX. DEP'T LICENSING & PROF'L REGUL., MIDWIFE APPLICATION (2023) (screenshot on file with the author) (asking "[h]ave disciplinary proceedings been initiated against you in Texas or any other jurisdiction?"); TENN. BD. DENTISTRY, APPLICATION INSTRUCTIONS FOR LICENSURE AS A DENTIST BY CRITERIA 5 (2023) (screenshot on file with the author) (asking "[h]ave you ever been dropped, suspended, expelled, or disciplined by any school or college for any cause?").

118. *See, e.g.*, NEV. ST. BD. PSYCHOLOGICAL EXAM'RS, APPLICATION FOR LICENSURE AS A PSYCHOLOGIST 4 (2023) (on file with the author) (asking "[h]ave you ever been dismissed from or asked to resign from any education, training, or employment due to negligence, professional misconduct or academic dishonest?"); *see also* MINN. BD. BEHAVIORAL HEALTH & THERAPY, LICENSED PROFESSIONAL CLINICAL COUNSELOR APPLICATION 5 (2023) (on file with the author) (asking "[h]ave you ever violated or been formally charged with a violation of the honor code of any educational facility?").

119. *See* N.Y. ST. EDUC. DEP'T, OFFICE PROFESSIONS – PHYSICIAN APPLICATION (2023) (screenshot on file with the author) (pointing out that, for example, New York applications for professional licensure in a range of fields ask "[h]as any licensing or disciplinary authority refused to issue you a license or ever revoked, annulled, cancelled, accepted surrender of, suspended, placed on probation, refused to renew a professional license or certificate held by you now or previously,

2. *FERPA Exceptions*

FERPA governs disclosure of, and access to, student education records.[120] FERPA defines "education records" to mean "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[121] Schools are generally prohibited from disclosing information in education records without parental consent.[122] School districts that defy the requirements of FERPA run the risk of losing federal funding.[123] Despite these protections, statutory exceptions create room for student disciplinary records to be shared with a range of different organizations.[124]

Records of student discipline are generally treated as education records under FERPA.[125] The U.S. Department of Education has consistently interpreted FERPA's definition of "education records" as including records of school discipline.[126] Although lower courts have

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or ever fined, censured, reprimanded or otherwise disciplined you?"); *see also* WASH. MED. COMM'N., PHYSICIAN MEDICAL LICENSE (MD) APPLICATION (2023) (on file with the author) (pointing out that, while the focus of this question seems primarily to have been on disciplinary action with respect to licensure, school districts could arguably count as a disciplinary authority). The Washington state application for licensure as a physician asks "[h]ave you ever been found in any civil, administrative, or criminal proceeding to have violated any laws relating to drugs or the practice of health care?" *Id.* Because school disciplinary hearings are administrative proceedings, school discipline related to drug use might also be implicated here. *See id.*

120. *See* 20 U.S.C. § 1232g.

121. 20 U.S.C. § 1232g(a)(4).

122. *See* 20 U.S.C. § 1232g(b)(1).

123. *See id.*; *see also* Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361, 363 (2005).

124. *See* 20 U.S.C. §§ 1232g(b)(1), (h) (outlining exceptions for the release of education records and permitting the disclosure of disciplinary records under certain circumstances).

125. See Family Educational Rights and Privacy, 60 Fed. Reg. 3464 (Jan. 17, 1995) (explaining that "[i]n contrast to law enforcement unit records, the Department has been legally constrained to treat the records of a disciplinary action or proceeding as 'education records' under FERPA").

126. *See id.*; *What is an Education Record?*, U.S. DEP'T EDUC., https://studentprivacy.ed.gov/faq/what-education-record [https://perma.cc/KSK2-N2Y2] (last visited May 29, 2024) (stating that education records "include but are not limited to grades, transcripts, class lists, student course schedules, health records (at the K-12 level), student financial information (at the postsecondary level), and student discipline files"); *see also* Brief for Appellee at 24, U.S. v. Miami Univ., 294 F.3d 797 (6th Cir. 2002) (No. 00-3518) (arguing that "[t]he language and structure of the FERPA leave no doubt that student disciplinary records are 'education records' within

occasionally found that records of discipline do not fall under FERPA's definition of "education[al] records,"[127] these cases predate amendments to FERPA that indirectly imply protected status for most disciplinary records.[128] In the leading case on the issue, *United States v. Miami University*, the Sixth Circuit found that "[u]nder a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university."[129] The Sixth Circuit also noted that the legislative history for FERPA and its amendments indicate that Congress intended to include disciplinary records as part of protected education record information.[130] Legal scholars have generally agreed with the Sixth Circuit's reasoning.[131] While FERPA does include an exception for records created by law enforcement for law enforcement

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the meaning of the statute and do not fall within the statutory exception for 'law enforcement' records").

127. *See, e.g.*, State *ex rel.* Miami Student v. Miami Univ., 680 N.E.2d 956, 959 (Ohio 1997) (finding that records of university disciplinary proceedings are not "education[al] records" under FERPA because the proceedings are nonacademic and "do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance"); Red & Black Publ'g Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (finding that college disciplinary records do not fall within the meaning of "education[al] records" under FERPA).

128. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 951, 112 Stat. 1581, 1835 (codified as amended at 20 U.S.C. § 1232g(b)(6)(A) (allowing disclosure of limited information about postsecondary students who have violent offenses or sex offenses); *see also* Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records,* 51 AM. U. L. REV. 1, 18–19 (2001) (finding that "[t]hese decisions predated the 1998 FERPA amendments regarding disciplinary records and seemed willing to ignore FERPA in favor of state law").

129. *Miami Univ.*, 294 F.3d at 812; *see also* Doe v. MIT, 46 F.4th 61, 74 (1st Cir. 2022) (finding that "[u]nder FERPA, a university receiving federal funds generally may not disclose a student's 'education records'" and that "[s]tudent disciplinary records typically fall under this protective carapace").

130. *See Miami Univ.*, 294 F.3d at 812.

131. *See, e.g.*, Daggett & Huefner, *supra* note 128, at 29 (finding that "it is clear that a student's discipline records are records under FERPA and thus subject to its confidentiality requirements"); Thomas R. Baker, *State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under F.E.R.P.A.*, 149 EDUC. L. REP. 283, 286 (2001) (finding that "[n]on–academic student disciplinary records clearly fell within the intended scope of FERPA protection").

purposes,[132] FERPA regulations make clear that ordinary records of student discipline do not fall under this exception.[133]

However, despite the protections from disclosure laid out in FERPA, the law contains more than a dozen exceptions that allow for information from education records to be shared with specified individuals or agencies without the consent of the parent, guardian, or child.[134] These exceptions include disclosure to school officials who have "legitimate educational interests" in the information;[135] disclosure to other schools to which the student has applied, including postsecondary institutions;[136] disclosure in health and safety emergencies;[137] disclosure in response to subpoenas;[138] disclosure to state and local officials in conjunction with juvenile justice proceedings, provided the records are used prior to an adjudication of delinquency for reasons related to the system's ability to effectively serve the student;[139] and disclosure to representatives of child welfare agencies, provided they have the right to access the child's case plan.[140] At the postsecondary level, FERPA also includes exceptions for disclosing the final results of disciplinary proceedings when crimes of violence or nonforcible sex offenses are involved, but these exceptions do not apply to records from K-12 education systems.[141]

Students with disciplinary records are particularly impacted by the exception permitting disclosure to postsecondary institutions.[142]

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132. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii).

133. *See* 34 C.F.R. § 99.8(b)(2)(ii) (2023) (specifying that records of law enforcement do not include "[r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution"); *see also Miami Univ.*, 294 F.3d at 815 (holding that "[e]ven though some of the disciplinary proceedings may have addressed criminal offenses that also constitute violations of the Universities' rules or policies, the records from those proceedings are still protected 'education records' within the meaning of the FERPA"); Daggett & Huefner, *supra* note 128, at 15.

134. *See* 20 U.S.C. § 1232g(b)(1).

135. *See* 20 U.S.C. § 1232g(b)(1)(A); *see also* 20 U.S.C. § 1232g(h) (specifying that "[n]othing in this section shall prohibit an educational agency or institution from . . . disclosing [disciplinary records] to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student").

136. *See* 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. § 99.31(a)(2) (2023).

137. *See* 20 U.S.C. § 1232g(b)(1)(I).

138. *See* 20 U.S.C. § 1232g(b)(1)(J).

139. *See* 20 U.S.C. § 1232g(b)(1)(E).

140. *See* 20 U.S.C. § 1232g(b)(1)(L).

141. *See* 20 U.S.C. § 1232g(b)(6)(A); 20 U.S.C. § 1232g(b)(6)(B).

142. *See generally* 20 U.S.C. § 1232g(b)(6)(B).

FERPA regulations specify that student records may be shared with colleges and universities provided that "[t]he disclosure is . . . to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer."[143] FERPA also permits disclosure of records "in connection with a student's application for, or receipt of, financial aid."[144]

While FERPA permits schools to disclose disciplinary information to postsecondary institutions to which a student has applied, high schools vary significantly in the extent to which they are willing to share this information.[145] On top of asking students to disclose their own school disciplinary history, many colleges and universities ask high schools to share disciplinary records on the forms they are required to submit along with a student's application.[146] High schools are sharply divided on whether they disclose student disciplinary infractions in response.[147] In a 2015 survey of high school guidance counselors, half of schools reported that they do not disclose disciplinary history from student records to colleges and universities, 26% reported that they consistently disclose student disciplinary information, and 24% reported that it depends on the circumstances.[148] Almost two-thirds of high schools maintain no formal, written policies regarding disclosure of disciplinary information to postsecondary institutions.[149] At the high schools where disciplinary history is sometimes or always disclosed, 41% report that the only individual to review the information before sending it to a college is the guidance counselor.[150] Students are therefore left in the difficult position of not knowing the extent to which their disciplinary record will be shared with colleges and universities.[151] Schools that refuse to share disciplinary information with colleges are more likely to be private schools that serve wealthier, whiter communities.[152]

143. 34 C.F.R. § 99.31(a)(2) (2023).
144. *See* 20 U.S.C. § 1232g(b)(1)(D).
145. *See* WEISSMAN & NAPIER, *supra* note 6, at 13–15.
146. *See id.* at 1.
147. *See id.* at 13–15.
148. *See id.* at 13.
149. *See id.* at 15.
150. *See id.* at 14.
151. *See id.*
152. McKenzie, *supra* note 22.

Because FERPA permits disclosure of information from school records to other child-serving systems in some circumstances, disciplinary history can also become part of a student's juvenile record or part of a student's case file with a child welfare agency.[153] Inclusion in additional systems of record keeping may place students at further risk of having information from school records made accessible. While the federal Child Abuse Prevention and Treatment Act requires states to develop procedures to keep child welfare records confidential,[154] it also allows records to be accessed in a number of situations, including by courts and grand juries,[155] and by any other individuals or organizations authorized by a state, so long as the records are accessed "pursuant to a legitimate State purpose."[156] States have authorized a wide range of different entities to have access to at least some forms of child welfare records, including juvenile justice system employees, parties that have a court order permitting access to the files, and any other person the head of the state's child welfare agency determines is necessary to serve the best interests of the child.[157]

Similarly, despite the popular perception that juvenile records are purely confidential, juvenile records can be disclosed in a number of situations.[158] Although FERPA specifies that recipients of school records for juvenile justice purposes must "certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student,"[159] mistakes in handling of criminal and juvenile records are common.[160] Juvenile records exist not only in courthouses but with "police departments, social services agencies, schools, housing authorities, and mental health facilities that even under the most stringent sealing

153. 20 U.S.C. § 1232g(b)(1)(E) (discussing use for juvenile justice proceedings); 20 U.S.C. § 1232g(b)(1)(L) (discussing use in child welfare contexts).

154. 42 U.S.C. § 5106a(b)(2)(B)(viii).

155. 42 U.S.C. § 5106a(b)(2)(B)(viii)(V).

156. 42 U.S.C. § 5106a(b)(2)(B)(viii)(VI).

157. *See* Courtney Barclay, *When the Need to Know Outweighs Privacy: Granting Access to Child Welfare Records in the Fifty States*, 34 CHLDS. LEGAL RTS. J. 175, 186–96 (2014).

158. *See* Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 383 (2018).

159. 20 U.S.C. § 1232g(b)(1)(E)(ii)(II).

160. *See* Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 330–32 (2019).

and expungement laws do not go away."[161] In some states, juvenile records are available on public websites or may be purchased.[162] Background checks conducted by employers may produce information from juvenile records.[163] When the barriers between school disciplinary records and juvenile records are blurred, students are at heightened risk of having disciplinary information more widely distributed.

3. *Data Breaches and Misuse*

In addition to authorized disclosure of school disciplinary information through FERPA exceptions, student record information may also become public through unauthorized data hacking, theft, or misuse.[164] In the context of criminal records, concerns about online proliferation of criminal record information make addressing collateral consequences of criminal records increasingly urgent and complicated.[165] With respect to school records, a rapidly growing number of data breaches means that confidential student information could end up posted online and accessible to potential universities or employers.[166]

Technical innovation and an increasing emphasis on data-driven education have led to the creation of extensive digital databases of information about students.[167] Increased reliance on cloud computing has also increased the potential likelihood of both unsanctioned access to data and of accidental disclosure of confidential information.[168] As data is collected for an increasing number of purposes, schools often share student data broadly with third-party services, which may

161. Radice, *supra* note 158, at 384.

162. *See id.* at 385.

163. *See id.* at 387–88.

164. *See* U.S. DEP'T HOMELAND SEC., PROTECTING OUR FUTURE: PARTNERING TO SAFEGUARD K-12 ORGANIZATIONS FROM CYBERSECURITY THREATS 6 (2023), https://www.cisa.gov/sites/default/files/2023-01/K-12report_FINAL_V2_508c_0.pdf [https://perma.cc/QJ9H-G4R5].

165. *See, e.g.*, Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 341–43 (2015); Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361, 376–78 (2016).

166. *See* Christine L. Borgman, *Open Data, Grey Data, and Stewardship*, 33 BERKELEY TECH. L.J. 365, 405 (2018).

167. *See* Zeide, *supra* note 56, at 345.

168. *See id.* at 345–46.

provide support with educational technology, assessment, and organizational operations.[169]

Parents of K-12 students report serious concerns about widespread access to school record information.[170] In 2015, a survey conducted by the Future of Privacy Forum found that the majority of parents had security or privacy concerns related to their child's school records.[171] In particular, 68% of parents reported concerns about electronic records being used in the future by colleges or employers, and 87% of parents reported concerns about data hacking or theft.[172]

These concerns are increasingly justified. In a 2023 report, the United States Department of Homeland Security found that reported cybersecurity incidents in K-12 systems more than tripled in the time period between 2018 and 2021.[173] A Government Accountability Office (GAO) analysis of student record data breaches from 2016 to 2020 found that at least ninety-nine distinct data breaches impacted K-12 students during that period alone, reaching students in 287 different school districts.[174] The GAO analysis found that fifty-eight of the ninety-nine breaches involved academic record information, such as disciplinary records, grades, assessment information, reasons for absences, and information about special education services.[175] The GAO's report also cautioned that the ninety-nine documented incidents likely failed to account for a meaningful number of data breaches, including at least fifteen identified incidents in which data might have been compromised, but the information was not definitive.[176] When data from third-party vendors is breached, the number of students whose information becomes public may be particularly high, as third-party vendors often work with multiple school districts.[177]

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169. *See id.* at 346.

170. *See generally* FUTURE PRIV. F., BEYOND THE FEAR FACTOR: PARENTAL SUPPORT FOR TECHNOLOGY AND DATA USE IN SCHOOLS (2015), https://fpf.org/wp-content/uploads/2015/11/Beyond-the-Fear-Factor_Sept2015.pdf [https://perma.cc/JY74-DWBR].

171. *See id.* at 12.

172. *See id.*

173. *See* U.S. DEP'T HOMELAND SEC., *supra* note 164, at 6.

174. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-644, RECENT K-12 DATA BREACHES SHOW THAT STUDENTS ARE VULNERABLE TO HARM 9 (2020), https://www.gao.gov/assets/710/709463.pdf [https://perma.cc/P8YG-CWNU].

175. *See id.* at 12.

176. *See id.* at 10.

177. *See id.* at 17.

Sometimes these incidents have stemmed from errors on the part of a school or district itself.[178] The GAO report classified twenty-five of the ninety-nine breaches as accidental breaches of information and found that school staff were responsible for the vast majority of these incidents.[179] For example, in 2022, representatives from a public school district in Columbus, Ohio, disclosed unredacted records related to school discipline for 4,200 students in response to a request from an attorney who was interested in researching the frequency of disciplinary action in the district.[180] The attorney who received the information reported that "[i]t was literally every single discipline record for every single student for the last 4 years."[181]

In other cases, student data breaches have resulted from hacking activity or other intentional attacks. These attacks from cybercriminals were often deliberate attempts to steal personally identifiable information.[182] The GAO report found that at least fifty-two of the ninety-nine documented breaches were the result of intentional action.[183] While students were responsible for the majority of these intentional breaches, cybercriminal attacks accounted for at least six incidents.[184] For example, in 2019, the San Diego Unified School District reported a data breach that left records of more than half a million students, parents, and staff members vulnerable, including records of disciplinary history.[185] A 2022 data breach in the Los Angeles Unified School District carried out by a ransomware tool resulted in roughly 2,000 student records, including records of

178. *See id.*

179. *See id.* at 14.

180. *See* A. Kevin Corvo, *Hilliard City Schools Evaluating Protocols After Releasing 4,200 Names of Students in Public-Information Request*, COLUMBUS DISPATCH (Mar. 3, 2022, 2:26 PM), https://www.dispatch.com/story/news/local/communities/hilliard/2022/03/02/hilliard-schools-re-examining-public-information-protocols/9334290002/ [https://perma.cc/7AAK-XNK7].

181. *See* Kevin Landers, *Hilliard City Schools Acknowledges Data Breach of Student Information*, 10TV (Mar. 7, 2022, 6:21 PM), https://www.10tv.com/article/news/local/hilliard-city-schools-acknowledges-data-breach-student-information/530-426c7b07-88ff-4987-a1ff-a8d87fe7962b [https://perma.cc/U4XH-PK8J].

182. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 174, at 15.

183. *See id.* at 14.

184. *See id.*

185. *See Personal Info of 500K Students, Parents and Employees Exposed in Data Breach at San Diego Unified School District*, KTLA (Dec. 21, 2018, 4:22 PM), https://ktla.com/news/local-news/data-breach-at-san-diego-unified-school-district-affects-staff-and-up-to-500000-students/ [https://perma.cc/TNG8-TG2Z].

discipline, being posted online.[186] Once records are shared online, school districts have little recourse to protect the information that has been distributed.[187]

B. Consequences

Distribution of disciplinary records only impedes access to opportunity if it actually impacts decision-making. There are two main mechanisms by which information from disciplinary records can restrict access to critical opportunities: direct use of the information to reject an applicant, and chilling effects that discourage individuals from submitting applications when questions about disciplinary history are present.[188] Research on the extent to which disciplinary history is used in decision-making processes is limited, but the research that exists, mostly in the context of college admissions, points toward both direct use of disciplinary information in admissions decisions and a chilling effect for prospective applicants.[189] While more research is ultimately needed to determine the full impact that records of disciplinary history might have on access to education and professional licensure, existing data provides reason for grave concern.[190]

In the Center for Community Alternatives's 2015 study of use of disciplinary information in college admissions, researchers found that 89% of colleges that collected high school disciplinary information in the admissions process used that information to inform decisions about whom to admit.[191] Over a quarter of postsecondary institutions reported that there are some types of disciplinary information that result in an automatic denial of admission.[192] The study also found that

186. *See* Mark Keierleber, *Trove of L.A. Students' Mental Health Records Posted to Dark Web After Cyber Hack*, THE 74 (Feb. 22, 2023), https://www.the74million.org/article/trove-of-l-a-students-mental-health-records-posted-to-dark-web-after-cyber-hack/ [https://perma.cc/DHY7-WMPX].

187. *Cf.* Clay Clavert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPECTUS 123, 135–38 (2010) (discussing the difficulties of protecting information from an expunged criminal record once it has been made available online).

188. *See* WEISSMAN & NAPIER, supra note 6, at i.

189. *See id.*

190. *See id.* at 10.

191. *See id.*

192. *See id.* at 10–11 (finding further that the schools that automatically disqualify students disqualify them for admission based certain types of disciplinary history: 80% disqualify students automatically for some types of weapons offenses,

even when students with disciplinary history are accepted to a college, roughly a third of colleges require additional special supervision of some students with disciplinary history, and 45% restrict available housing options for students with some types of school disciplinary records.[193] More than a third of colleges bar at least some students with disciplinary records from all campus housing.[194]

An analysis of data from the National Center for Education Statistics' Education Longitudinal Study found evidence that students who indicated they had been in trouble at school in tenth grade were less likely to be admitted at postsecondary institutions that asked about disciplinary history than at those that opted not to ask about discipline, when controlling for other factors.[195] Although there has not yet been a quantitative causal analysis of the impact of the Common Application's decision to remove its disciplinary history question on admissions, an analysis of the Common Application's decision to remove its required criminal history question found a statistically significant increase in Black enrollment at schools that opted not to add criminal history questions to their school supplements.[196] There was no corresponding statistically significant increase in Black enrollment at schools that added a criminal history question back in.[197]

The Center for Community Alternatives has also investigated chilling effects caused by questions about criminal history.[198] Researchers studied applications to the State University of New York (SUNY) system and examined the number of individuals who started, but did not ultimately submit, an application.[199] They found that of the 2,924 individuals who started an application to SUNY and checked the box indicating a prior felony conviction, 63% (1,828 individuals

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61% for illegal drug distribution, 57% for assault resulting in injury, 21% for school-based arrest, and 16% for bullying).

193. *See id.* at 13.

194. *See id.*

195. *See* Curran, *supra* note 79, at 1144. The analysis found no corresponding link between more narrowly indicating having been suspended in tenth grade and reduced rates of admission, perhaps due to limitations in the data sample. *See id.* at 1151–52.

196. *See* Hannah K. Chimowitz, The Collateral Consequences of Criminal Stigma in Higher Education: Investigating Barriers to Institutional Access and Social Inclusion (2023) (Ph.D. dissertation, University of Massachusetts Amherst).

197. *See id.*

198. *See* ALAN ROSENTHAL ET AL., CTR. FOR CMTY. ALTS., BOXED OUT: CRIMINAL HISTORY SCREENING & COLLEGE APPLICATION ATTRITION ii (2015), https://communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf [https://perma.cc/X532-MMUX].

199. *See id.* at v.

total) did not ultimately submit an application.[200] This rate of attrition was three times higher than the rate for the general body of applicants.[201] The researchers attributed this difference in part to the "stigmatizing and daunting impact of the supplemental procedures imposed on applicants who disclose a felony conviction."[202] Researchers also found that this attrition process disproportionately impacted Black individuals, who were more likely to check the box indicating a felony conviction than the general population.[203]

Data reported by representatives from the Common Application shows similar patterns of applicant attrition in response to questions about disciplinary history.[204] In 2019, out of individuals who started an application and indicated that they had disciplinary history, 22% did not ultimately submit their final application to any colleges.[205] This rate is almost twice as high as the rate of attrition for applicants with no disciplinary history, amongst whom 12% started but did not ultimately submit an application.[206] The Common Application reported that in 2019 alone, over 7,000 applicants with disciplinary history started, but did not finish, college applications.[207] Black and Latinx populations are significantly overrepresented amongst those individuals: Black and Latinx students together represented more than half of the individuals who started but did not finish applications, despite representing just over a quarter of the overall pool of applicants.[208]

II. WEIGHING THE COLLATERAL CONSEQUENCES OF DISCIPLINARY RECORDS

Because school records are used so frequently to make important decisions, the justifications for reliance on these records, as well as the potential problems with their use, merit consideration.[209] This Part first looks at why institutions use information about school disciplinary records in their decision-making processes.[210] It then examines the

200. *See id.*
201. *See id.*
202. *See id.* at ii.
203. *See id.* at 14.
204. *See* McKenzie, *supra* note 22.
205. *See id.*
206. *See id.*
207. *See id.*
208. *See id.*
209. *See* Rips, *supra* note 19, at 230.
210. *See infra* Section II.A.

potential harms associated with inquiry into exclusionary discipline.[211] In the balance, inquiry into school disciplinary records creates an unnecessary harm. Reliance on school disciplinary records in making determinations about access to education and licensure does not serve the principal intended purposes of promoting safety and reducing liability risks, but it does further amplify the inequities pervasive in school disciplinary practices and make it harder for current and former students to move on from records that don't serve as accurate representations of their character.

A. Reasons for Use of School Disciplinary Records

Research on why schools and licensure boards ask about school disciplinary records is limited.[212] However, research into why colleges use criminal records in admissions provides a helpful framework, particularly given that the Common Application added its former questions about disciplinary records and about criminal history at the same time.[213] In a 2014 study on why colleges and universities ask about criminal records, institutions cited a cluster of concerns about safety, and particularly about reducing violence on campus, as the leading reasons for asking questions about criminal history.[214] Concerns about liability were also particularly important to colleges, with 55.4% reporting that protecting against liability was a very important consideration to them in deciding to inquire into criminal history.[215] Anecdotal evidence suggests that colleges also primarily justify inquiries into school discipline on safety and liability grounds.[216] Although reasons for inquiry into records on licensure

211. *See infra* Section II.B.

212. *See* Rips, *supra* note 19, at 231.

213. *See* Larry Gordon, *Does a Pot Bust Trump a 4.0 GPA?*, L.A. TIMES (Dec. 5, 2007, 12:00 AM), https://www.latimes.com/local/la-me-admit5dec05-story.html [https://perma.cc/C44T-MZ4W].

214. *See* Matthew W. Pierce et al., *The Use of Criminal History Information in College Admission Decisions*, 13 J. SCH. VIOLENCE 359, 365 (2014).

215. *See id.*

216. *See* McKenzie, *supra* note 22 (quoting the CEO of the American Association of Collegiate Registrars and Admissions Officers for the idea that "safety was often the reason given" to justify inquiry into disciplinary history); Gordon, *supra* note 213 (noting that "[m]any colleges say that the Virginia Tech tragedy forced them to look more closely at liability and responsibility issues during admissions," despite the fact that the man responsible for that incident had no criminal or disciplinary record); Carolyn Thompson, *Should High School Punishments Go on College Applications?*, ASSOCIATED PRESS (Feb. 18, 2016, 9:15 AM), https://apnews.com/article/c5115fe3e4cd4484909233efc83d46aa

applications are understudied,[217] safety concerns are also a central justification for inquiry into records on applications for professional licensure.[218] This Subsection looks first at issues related to safety and then considers concerns about reducing risk of liability. Some postsecondary institutions report additional reasons for inquiring into misconduct, including reducing risks of academic misconduct, ensuring students can be licensed, and various forms of external pressure (public relations concerns, mirroring peer institutions, and responding to demands from parents and alumni), but less than a third of colleges listed each of these reasons as very important to their decision making.[219]

1. *Safety Concerns*

Safety is front of mind for postsecondary institutions and licensure boards when inquiring into disciplinary and criminal records.[220] In the 2014 study on motivations for use of criminal history questions in college admissions, when colleges were asked to report which motivations were "very important" to their decision to inquire into criminal history, 64.9% listed reducing violence, 50.0% listed reducing illegal drug use, 45.6% listed reducing nonviolent crime, 41.1% listed reducing suicide, and 33.3% listed reducing alcohol

[https://perma.cc/5EP4-AETB] (quoting the Dean of Admission at Marist College, who also serves as a board member of the National Association for College Admissions Counseling, for the idea that "[a]fter the Virginia Tech shooting, colleges really started to look closely at the responsibility the admissions office had in seeing whether there's some warning signs that are going to come along with it").

217. *See* Megan Denver & Alec Ewald, *Credentialing Decisions and Criminal Records: A Narrative Approach*, 56 CRIMINOLOGY 715, 737 (2018) (noting that "[t]here is 'not a lot of solid evidence' about why employers might be hesitant to hire individuals with criminal records" and that "in more structured legal contexts, such as occupational licensure, there is a notable research gap").

218. *See, e.g.*, *id.* at 716 (discussing decision makers as "balancing public safety against the need to provide social and economic opportunities to individuals with criminal records" when making licensing decisions); N.Y. CORRECT. LAW § 752 (McKinney 2023) (permitting licenses to be denied when "the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public").

219. *See* Pierce et al., *supra* note 214, at 365.

220. *See, e.g.*, *id.*

use.[221] Colleges and universities are particularly likely to stress concerns related to firearms and to sexual misconduct.[222]

However, research in the field provides reason to be skeptical that K-12 school disciplinary records hold much predictive power or that the decision to inquire about disciplinary records keeps communities safer.[223] A 2007 study investigated whether there was a causal relationship between inquiry into school disciplinary records, criminal records, and military discharge records in college admissions and the prevalence of campus crime, using data reported pursuant to the Cleary Act.[224] The study found that "there is no statistically significant difference in . . . rate of campus crime, between colleges and universities that inquire into undergraduate applicants' disciplinary background and those that do not, regardless of demographic characteristics of the institution."[225]

While research focused specifically on school disciplinary history is limited, studies that look just at criminal records, but that do not also consider K-12 discipline, show consistent findings.[226] A 2013 study compared misconduct before college, as measured by responses on criminal history questions on college admissions forms, and misconduct during college, as measured by misconduct files maintained by the dean's office.[227] The researchers found that only 3.3% of college seniors who engaged in misconduct during college had disclosed misconduct from before college on their applications.[228] They concluded that "the current screening questions on the college application are not adequate to detect which students will engage in misconduct during college."[229] A related 2023 study found that when the Common Application removed the question about criminal records

221. *See id.*

222. *See, e.g.*, *id.* at 367 (noting that 80% of colleges that collect criminal record information reported they would probably or definitely not admit a student convicted of rape or sexual assault); Rips, *supra* note 19, at 256–61 (noting that colleges were particularly likely to raise objections about sexual assault when opposing legislation that would ban inquiry into criminal records in college admissions); Thompson, *supra* note 216 (discussing the role of the Virginia Tech shooting in colleges' decisions to inquire into criminal records).

223. *See, e.g.*, Olszewska, *supra* note 7, at 117 (concluding there is no significant difference in the rate of campus crimes by such inquires).

224. *See id.* at 69–77.

225. *See id.* at 117–18.

226. *See* Carol W. Runyan et al., *Can Student-Perpetrated College Crime Be Predicted Based on Precollege Misconduct?*, 19 INJ. PREVENTION 405, 405 (2013).

227. *See id.*

228. *See id.* at 408–09.

229. *See id.*

from the shared portion of the application, there was no statistically-significant difference between campus crime rates at colleges that removed the criminal history question and those that kept the question on their school supplemental applications when controlling for other institutional characteristics.[230] Cumulatively, in evaluating the research in the field, the U.S. Department of Education reports that "no evidence has established a direct causal link between students with criminal records and an increase in campus crime rates."[231]

2. *Liability Concerns*

Although concerns related to safety are overwhelmingly the most pressing for postsecondary institutions, liability is also a significant concern. In the 2014 survey of reasons for inquiring into criminal history, 55.4% of colleges reported that concerns about liability are "very important," and 21.4% reported that concerns about liability are "somewhat important" when deciding whether to ask about criminal records.[232]

In her article on use of background checks in college admissions, Darby Dickerson notes that lawsuits for negligence in admissions have thus far been unsuccessful and finds that only one published case has considered whether universities may be liable for not conducting background checks.[233] In that case, *Eiseman v. New York*, the parents of a student who was killed by a classmate sued state actors, including the State University of New York at Buffalo, alleging that the university was negligent in admitting the perpetrator.[234] The perpetrator had been accepted as part of a statutorily-created program called SEEK, designed to improve college access for marginalized populations.[235] The New York Court of Appeals ultimately found that the university was not liable for negligence.[236] The court reasoned that "colleges today in general have no legal duty to shield their students

230. *See* Chimowitz, *supra* note 196, at 62.

231. *See* U.S. DEPT. EDUC., BEYOND THE BOX 21 (2023), https://lincs.ed.gov/sites/default/files/2023-04/beyond-the-box.pdf [https://perma.cc/5SBW-H8TK].

232. *See* Pierce et al., *supra* note 214, at 365.

233. *See* Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J. COLL. & UNIV. L. 419, 466 (2008).

234. *See* Eiseman v. State, 511 N.E.2d 1128, 1132 (N.Y. 1987).

235. *See id.* at 1131.

236. *See id.* at 1137.

from the dangerous activity of other students."[237] The court also found that "heightened duty of inquiry should not have been imposed on the College. Such a duty would run counter to the legislative policy embodied by the SEEK program as well as the laws and policies promoting the reintegration of former convicts into society."[238]

Ironically, choosing to inquire into school disciplinary records might actually create a duty to review the information disclosed that could increase liability risk. Indeed, in the context of criminal records, while some schools inquire into criminal history because of concerns about liability, other postsecondary institutions report opting not to inquire into criminal records in part because doing so might mean assuming an unnecessary duty.[239]

Legislation can also play an important role in reducing liability risks. While lawsuits alleging negligence in college admissions are rare, lawsuits against an employer alleging negligence in hiring are far more common.[240] Employers have sometimes been placed in the position of needing to balance complying with ban the box legislation against the potential to face a negligent hiring lawsuit if the employer should have known that an employee would create a foreseeable risk to others.[241] Amanda Agan argues that because of this tension, policy proposals designed to improve access to employment for individuals with records "need to be combined with explicit limits on negligent hiring liability."[242] Some states have taken precisely that approach and have passed legislation limiting the ability to use criminal convictions as evidence of employer negligence in hiring.[243] Similarly, in the

237. *See id.* at 1136.

238. *See id.* at 1137.

239. *See* Derek Langhauser, *Use of Criminal Convictions in College Admissions*, 154 EDUC. L. REP. 733, 738 (2001); *see also* Bradley D. Custer, *College Admission Policies for Ex-Offender Students: A Literature Review*, 67 J. CORR. EDUC. 35, 39 (2016).

240. *Compare* Dickerson, *supra* note 233, at 466 (noting that negligent admissions lawsuits have been unsuccessful to date), *with* Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1007, 1032–33 (2011) (reviewing federal and state court decisions in negligent hiring cases).

241. *See* Amanda Agan, *Increasing Employment of People with Records: Policy Challenges in the Era of Ban the Box*, 16 CRIMINOLOGY & PUB. POL'Y 177, 181 (2017); Adriel Garcia, Comment, *The* Kobayashi Maru *of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current Ban the Box Legislation*, 85 TEMP. L. REV. 921, 922 (2013) (characterizing competing pressures for ban the box legislation and negligent hiring).

242. *See* Agan, *supra* note 241, at 182.

243. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 142.002(a) (2023) (specifying that "[a] cause of action may not be brought against an employer, general

context of college admissions, Dickerson notes that "Congress or state legislatures may determine that the best approach is to develop a set of standards . . . that would provide a presumption that a college or university was not negligent if the prescribed steps were followed."[244]

B. Problems with Collateral Consequences of School Discipline

There are many reasons to worry about collateral consequences of school discipline.[245] Many of these problems directly mirror the reasons for concern about lifelong consequences of criminal convictions discussed in Part I. This Section highlights five particularly pressing problems with collateral consequences that merit additional discussion in the specific context of disciplinary records. First, that lifelong use of disciplinary records in effect serves as a form of permanent punishment, at odds with values of redemption and second chances.[246] Second, that inequities in school discipline are drastic, and lifelong consequences of records further perpetuate those inequities.[247] Third, that children's minds are still developing, and mistakes made during childhood and adolescence are unlikely to predict long-term misbehavior.[248] Fourth, that children can face harsh discipline for relatively minor incidents, including for highly subjective infractions.[249] And finally, that students receive only very limited procedural protections in disciplinary contexts and, as a result, often face disciplinary hearings without representation or the appointment of an unbiased hearing officer.[250]

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contractor, premises owner, or other third party solely for negligently hiring or failing to adequately supervise an employee, based on evidence that the employee has been convicted of an offense"); COLO. REV. STAT. § 8-2-201(2)(a)(I) (2023) (prohibiting use of criminal record information as evidence in negligent hiring suits when the criminal record "does not bear a direct relationship to the facts underlying the cause of action," involved an arrest that did not lead to a conviction, was sealed or pardoned, or involved a deferred judgment).

244. *See* Dickerson, *supra* note 233, at 475.

245. *See, e.g.*, AARON KUPCHICK, THE REAL SCHOOL SAFETY PROBLEM 24–25 (commenting that children disciplined by suspensions may not graduate, be denied mentoring, and incur limits to employment).

246. *See infra* Subsection II.B.1.

247. *See infra* Subsection II.B.2.

248. *See infra* Subsection II.B.3.

249. *See infra* Subsection II.B.4.

250. *See infra* Subsection II.B.5.

1. *Disciplinary Records and Second Chances*

Concerns about permanent punishment are at the heart of much of the scholarship about the problems with collateral consequences of criminal convictions.[251] Although courts have generally found that collateral consequences of convictions are civil, "non-punitive" responses, and therefore do not violate protections against double jeopardy, ex post facto punishment, or cruel and unusual punishment,[252] many theorists have advanced normative arguments that collateral consequences are unjustified punishment.[253] For example, Devah Pager argues that when a criminal record "results in the exclusion of ex-offenders from valuable social and economic opportunities, individuals face what is akin to double jeopardy: being punished more than once for the same crime."[254] Gabriel Chin argues that collateral consequences of criminal convictions constitute a new form of "civil death," a punishment used until the middle of the twentieth century, under which the civil rights of a person convicted of a crime were extinguished for life.[255]

Literature on collateral consequences of criminal convictions is often divided into camps recommending forgiveness-based responses

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251. *See, e.g.*, Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1206–07 (2016) (listing examples of collateral consequences of criminal convictions as including restrictions on jury service and voting); U.S. COMM'N C.R., COLLATERAL CONSEQUENCES 9 (2019), https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf [https://perma.cc/7MC3-QSY5] (noting that collateral consequences of criminal convictions may limit housing opportunities, employment opportunities, and social welfare benefits).

252. *See, e.g.*, Turner v. Glickman, 207 F.3d 419, 427–31 (7th Cir. 2000) (finding that a prohibition on access to welfare benefits was not a punishment for double jeopardy purposes); *see also* Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences*," 59 HOW. L. J. 341, 343 (2016) (finding that "the [Supreme] Court has ruled that being 'non-punitive' makes collateral consequences exempt from the protections against bills of attainder, double jeopardy, cruel and unusual punishment, and excessive fines"); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 640 (2006) (finding that most lawsuits alleging that collateral consequences violate the prohibition on double jeopardy have been denied).

253. *See, e.g.*, Jain, *supra* note 251, at 1226 (discussing how prosecutors counterbalance criminal punishment with collateral consequences).

254. *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 58 (2007).

255. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in an Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

and camps recommending approaches based on forgetting records.[256] Forgiveness-based approaches include certificates of rehabilitation and official pardons, while expungement is the paradigmatic example of an approach grounded in forgetting.[257] Forgiving and forgetting are not mutually exclusive, and some theorists have argued that both may be necessary to address fully the range of barriers faced by individuals with records.[258]

Regardless of whether one embraces an approach focused on forgiving records, forgetting records, or a combination, similar principles apply in the context of records of school discipline.[259] The underlying reasons for valuing both approaches based in forgiveness and approaches based in forgetting—belief in redemption and second chances, belief that people change, belief that the justice system frequently makes mistakes, belief in the racist underpinnings of the justice system—all apply in full measure to school disciplinary systems as well.[260] The schools responsible for disciplining students are also responsible for preparing students for higher education and the workforce.[261] When students are tied to their disciplinary records in the long-term, it directly serves to hinder these objectives.[262]

256. *See, e.g.*, Doe v. U.S., 168 F. Supp. 3d 427, 442 (E.D.N.Y. 2016) (asserting that "[t]here are two general approaches to limiting the collateral consequences of convictions: (1) the 'forgetting' model, in which a criminal record is deleted or expunged so that society may forget that the conviction ever happened; and (2) the 'forgiveness' model, which acknowledges the conviction but uses a certificate of rehabilitation or a pardon to symbolize society's forgiveness of the underlying offense conduct").

257. *See id.*

258. *See, e.g.*, Roberts, *supra* note 165, at 335–41.

259. *See generally* Bryan R. Warnock & Campbell F. Scribner, *Discipline, Punishment, and the Moral Community of Schools*, 18 THEORY & RSCH. EDUC. 98, 109 (2020) (comparing punitive and restorative justice policies in schools).

260. *See infra* Subsection II.B.2 (discussing inequities in school discipline); Subsection II.B.3 (discussing child development and recidivism); Subsection II.B.5 (discussing procedural limitations).

261. *See generally* U.S. DEP'T EDUC., GUIDING PRINCIPLES FOR CREATING SAFE, INCLUSIVE, SUPPORTIVE, AND FAIR SCHOOL CLIMATES 3 (2023), https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf [https://perma.cc/X4ND-6EUH] (describing how schools can aid in creating the foundation to success for students).

262. *See id.* at 5

2. *Inequities in School Discipline*

School disciplinary records disproportionately impact Black and Native American students.[263] In the most recent year of data published by the Department of Education's Office for Civil Rights, Black students represented an estimated 38.2% of students receiving out-of-school suspensions and 37.5% of expulsions, despite representing only 15.1% of students overall.[264] Rates of disparity are even more drastic when looking at racial gaps in suspensions and expulsions of girls, with Black girls facing suspensions at a rate 4.19 times higher than white girls.[265] Indigenous populations are also disproportionately burdened by school discipline, with American Indian and Alaska Native students representing 1.4% of students receiving one or more out-of-school suspensions and 1.2% of

263. Research is inconsistent as to whether Latinx populations are overrepresented in exclusionary discipline. *Compare* Carolyn A. Brown & Caterina Di Tillio, *Discipline Disproportionality Among Hispanic and American Indian Students: Expanding the Discourse in U.S. Research*, 2 J. EDUC. & LEARNING 47, 51 (2013) (finding no disproportionality), *and* Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 653 (2011) (finding no disproportionality), *with* Jeremy D. Finn & Timothy J. Servoss, *Security Measures and Discipline in American High Schools*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 44, 51 (Daniel J. Losen ed., 2015) (finding overrepresentation of Latinx populations), *and* RUSSELL J. SKIBA ET AL., NEW AND DEVELOPING RESEARCH ON DISPARITIES IN DISCIPLINE 5 (2014), https://juvenilecouncil.ojp.gov/sites/g/files/xyckuh301/files/media/document/disparity_newresearch_full_040414.pdf [https://perma.cc/Q58X-BJZW] (arguing that studies tend to indicate overrepresentation of Latinx populations). Although Asian American and Pacific Islander (AAPI) students as a whole are not overrepresented in suspension or expulsion rates compared to white peers, certain demographics within broader AAPI populations are overrepresented: for example, a study of data from the state of Washington found that Pacific Islanders were disproportionately disciplined when compared with white students. *See* Bach Mai Dolly Nguyen et al., *Ethnic Discipline Gap: Unseen Dimensions of Racial Disproportionality in School Discipline*, 56 AM. EDUC. RSCH. J. 1973, 1991 (2019).

264. *See Number and Percentage of Public School Students*, *supra* note 8 (noting that data on expulsions is for expulsions either with or without educational services provided).

265. *See Data Snapshot: 2017–2018 National Data on School Discipline by Race and Gender*, GEO. CTR. POVERTY & INEQ. (2020), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/12/National-Data-on-School-Discipline-by-Race-and-Gender.pdf [https://perma.cc/BPG2-HR4V].

expulsions, even though they comprise just 1.0% of students overall.[266] Research consistently shows that these disparities are not the product of more severe misbehavior among nonwhite students.[267] Startlingly, these rates of racial disproportionality in use of exclusionary discipline are even higher than rates of racial disproportionality in arrests nationally.[268]

Despite the fact that the Individuals with Disabilities Education Act (IDEA) restricts use of longer suspensions and expulsions for students whose conduct is a manifestation of a disability,[269] students who receive special education services face suspensions and expulsions in particularly large numbers. In the most recent year of data from the U.S. Department of Education Office for Civil Rights, students with disabilities under IDEA comprised 13.2% of the overall student population but received an estimated 24.5% of out-of-school suspensions and 21.5% of expulsions.[270] Students with disabilities who receive services solely under § 504 of the Rehabilitation Act of 1973 received an estimated 3.6% of out-of-school suspensions and 3.5% of expulsions but comprised just 2.7% of the overall student population.[271] Students who have been identified as having disabilities pursuant to IDEA lost an average of forty-one days per hundred students enrolled due to exclusionary discipline, compared with nineteen days per hundred students not identified as having a disability under IDEA.[272]

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266. *See Number and Percentage of Public School Students*, *supra* note 8.

267. *See Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline,* U.S. DEP'T JUST. (Jan. 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html [https://perma.cc/J3LG-48JY] (citing to six studies that back the claim that "the substantial racial disparities of the kind reflected in the CRDC data are not explained by more frequent or more serious misbehavior by students of color").

268. *Compare Number and Percentage of Public School Students*, *supra* note 8 (finding that an estimated 38.2 percent of students receiving out-of-school suspensions and 37.5 percent of students receiving expulsions were Black), *with Table 43: Arrests by Race and Ethnicity, 2019*, FED. BUREAU INVESTIGATIONS (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-43/#overview [https://perma.cc/7DAQ-5KP8] (finding that in 2019, 26.6 percent of all arrests and 33.9 percent of juvenile arrests were of Black individuals).

269. *See* 20 U.S.C. § 1415(k).

270. *See Number and Percentage of Public School Students*, *supra* note 8.

271. *See id.*

272. *See* DANIEL J. LOSEN ET AL., DISABLING INEQUITY: THE URGENT NEED FOR RACE-CONSCIOUS RESOURCE REMEDIES 5 (2021), https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf [https://perma.cc/XP9S-7L6N].

Students who face both racism and ableism are particularly likely to face complex stereotyping and unique vulnerabilities.[273] For Black students with disabilities, disparities in use of exclusionary discipline are particularly high: 27% of Black male students who receive services under IDEA and 19% of IDEA-eligible Black female students facing out-of-school suspensions, compared to 12% of their white male and 6% of their white female IDEA-eligible peers.[274]

The disparate impact of school discipline also extends to LGBTQ students.[275] Using data from their National School Climate Survey, the Gay, Lesbian & Straight Education Network (GLSEN) found that 39.8% of LGBTQ-identified students reported that they had faced discipline in school.[276] GLSEN estimates that 24.9% of LGBTQ students have experienced a school suspension, compared with 14.5% of non-LGBTQ peers.[277] These disparities are heightened when further disaggregated by race, with 46.7% of Black LGBTQ students and 44.1% of Latinx LGBTQ students facing some form of discipline at school, compared with 36.3% of their white LGBTQ peers.[278]

Both implicit and explicit bias play a role in the inequitable application of school discipline.[279] In *The Rage of Innocence: How*

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273. *See, e.g.*, Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 663, 729 (2023) (asserting "[t]hat race and disability were not only each socially constructed, but also co-constructed has important implications for scholars and advocates deploying legal strategies for challenging racial and disability discrimination. Recognizing these connections offers opportunities for effective and comprehensive advocacy aimed at holding state and private actors accountable for unlawful acts of racial and disability discrimination").

274. *See* NAT'L CTR. FOR LEARNING DISABILITIES, *supra* note 10, at 5.

275. *See, e.g.*, NEAL A. PALMER ET AL., EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT, AND THE SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH 11 (2016), https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf [https://perma.cc/8VJJ-DWJN].

276. *See id.*; *see also* Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, PEDIATRICS, Jan. 2011, at 49, 49 (using data from the National Longitudinal Study of Adolescent Health to find that non-heterosexual students were more likely to face a range of punitive consequences, including expulsion from school, than their straight peers).

277. *See* PALMER ET AL., *supra* note 275, at 11.

278. *See id.* at 25–26.

279. *See* Kent McIntosh et al., *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RSCH. ON CHILD. 1, 7 (2014) (finding that "evidence that disproportionality is greater for discipline decisions related to more ambiguous or subjective student problem behaviors, which require teachers to make an inference or judgment call

America Criminalizes Black Youth, Kristin Henning tells the stories of two smart, scientifically-minded boys who both experimented in imprecise ways with making Molotov cocktails out of curiosity and who both brought their creations to school.[280] One child, a Black thirteen-year-old with no prior disciplinary history, was arrested, suspended from school, banned from all school activities, prosecuted in juvenile court, and shamed in school in various ways.[281] The other child, who was white, had his classes rearranged so that he could take chemistry.[282] As Henning notes, "we are not just afraid of school shootings. And we are not just afraid of children with guns. We are afraid of Black children."[283]

Rates of disparity in school discipline between Black and white students are the highest when exclusionary discipline is discretionary rather than mandatory.[284] The disparity in rates of discipline is also higher when the underlying offense is more subjective in nature.[285] In one prominent study of discipline of middle school students at a large public school district for example, researchers found that white students were more likely to be referred for discipline for offenses that could be objectively documented, such as smoking and vandalism, while Black students were more likely to be referred for more

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rather than rely on objective criterion, suggests that implicit bias also affects school discipline decisions").

280. *See* KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH vii–xiii (2021).

281. *See id.* at vii–viii, ix, xi, xiii.

282. *See id.* at ix.

283. *See id.*

284. *See* TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 45–46 (2011), https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking_Schools_Rules_Report_Final.pdf [https://perma.cc/H6J7-NC7Y].

285. *See* Laura R. McNeal, *Managing our Blindspot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 293 (2016) (finding that "[a]lthough there are several broad categories of school disciplinary offenses, one in particular—willful defiance—permits a high level of subjectivity, which greatly contributes to the disproportionate treatment of children from traditionally marginalized groups . . . . The willful defiance disciplinary category is where explicit and implicit biases are most prevalent and harmful to students of color"); David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 552 (2014) (asserting that that student are particularly likely to experience disparate treatment for "vague offense categories like disrespect and defiance, which heighten the negative stereotypes of African Americans as being more threatening and dangerous").

subjective infractions, such as disrespect and loitering.[286] Research also shows that schools serving primarily students of color are more likely to implement heightened security measures such as use of metal detectors and increased presence of law enforcement on campus, and implicit bias likely plays a significant role in these differences.[287]

Najarian Peters has argued that because Black students are overrepresented in school disciplinary actions, records of school discipline can constitute a form of "dirty data": data that is "inaccurate, incomplete, or misleading."[288] She asserts that this directly cuts against one of the core legislative purposes of FERPA, which was aimed from the start at avoiding inclusion of erroneous information in school records.[289] Cumulatively, she finds that "the distorted image and mischaracterization of a marginalized student is created in the education record by the subjective, and often biased, observations and interpretations of teachers and administrators—frequently without recourse at the point of data creation and collection."[290] Fanna Gamal has highlighted how little power students and parents have in shaping the data contained in student records.[291] This power inequity leaves students from marginalized backgrounds, including transgender students, students with disabilities, and non-white students, particularly vulnerable.[292]

Ambiguity in how disciplinary history questions are worded may also further compound the racial inequities pervasive in use of exclusionary discipline.[293] White students and students from economically privileged backgrounds have, on average, higher access to school counselors than non-white students and students from lower-income backgrounds.[294] This may contribute to inequities in

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286. *See* Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 334 (2002).

287. *See* Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 802–04 (2017).

288. *See* Najarian R. Peters, *The Golem in the Machine: FERPA, Dirty Data, and Digital Distortion in the Education Record*, 78 WASH. & LEE L. REV. 1991, 1991, 2008–09 (2022).

289. *See id.* at 2000.

290. *See id.* at 1996–97.

291. *See* Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315, 1332–33 (2023).

292. *See id.* at 1318.

293. *See* McNeal, *supra* note 285, at 293.

294. *See* DOUGLAS J. GAGNON & MARYBETH J. MATTINGLY, MOST U.S. SCHOOL DISTRICTS HAVE LOW ACCESS TO SCHOOL COUNSELORS: POOR, DIVERSE, AND CITY SCHOOL DISTRICTS EXHIBIT PARTICULARLY HIGH STUDENT-TO-COUNSELOR RATIOS 3–4 (2016),

which students get support in navigating how to respond when colleges use unclear wording in questions about disciplinary records.[295]

When postsecondary institutions, licensure boards, and other actors rely on school disciplinary records, the inequities rampant in K-12 discipline are further amplified.[296]

3. *Children Think Differently*

Students obtain school disciplinary records at a time in their lives when their ability to understand the impact of their actions is continuing to develop.[297] The regions of the brain that govern so-called "executive functions" develop gradually throughout childhood and early adulthood.[298] Executive functions are a group of skills that include thinking ahead, making future plans, and tackling multiple tasks simultaneously.[299] Limbic systems, which are important for socioemotional development, play a particularly prominent role in adolescence.[300] Because of these developments, both younger children and adolescents can face limitations in their abilities to understand legal processes, to plan for the future, and to comprehend the impact of their actions on others.[301] Adolescents are more likely to pursue

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https://scholars.unh.edu/cgi/viewcontent.cgi?article=1285&context=carsey [https://perma.cc/FEA9-5H7Q].

295. *See Do Colleges Look at Disciplinary Records?*, SIGNATURE COLL. COUNSELING, https://www.signaturecollegecounseling.com/do-colleges-look-at-disciplinary-records/ [https://perma.cc/P3BE-2T3W] (last visited May 29, 2024).

296. *See id.*

297. *See* NAT'L INST. MENTAL HEALTH, THE TEEN BRAIN: 7 THINGS TO KNOW (2023), https://www.nimh.nih.gov/sites/default/files/documents/health/publications/the-teen-brain-7-things-to-know/teen-brain-7-things-to-know.pdf [https://perma.cc/BUU4-PEH4].

298. *See* Beatriz Luna et al., *What Has fMRI Told Us About the Development of Cognitive Control Through Adolescence?*, 72 BRAIN & COGNITION 101, 101 (2010).

299. *See Executive Function & Self-Regulation*, *supra* note 37.

300. *See* Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCH. SCI. 55, 56 (2007).

301. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 356–57 (2003) (discussing limitations on competency to stand trial); Luna, *supra* note 298, at 102, 105 (discussing response inhibition and working memory); Patricia Soto-Icaza et al., *Development of Social Skills in Children: Neural and Behavioral Evidence for the Elaboration of Cognitive Models*, 9 FRONTIERS NEUROSCIENCE 1, 8 (2015) (discussing understanding of behavior of others).

risk-taking behaviors than children or older adults and are more likely to respond to peer pressure.[302] As brains develop, individuals with records from juvenile systems become less likely to recidivate.[303] When school disciplinary records are used in decision-making long after the underlying incident in question, they tie individuals to behavior they are likely to have aged out of.[304]

These concerns about child development are foundational to many of the differences between juvenile justice systems and criminal justice systems.[305] It is in part because of these concerns that juvenile records are generally afforded a significantly greater degree of protection than records from adult criminal systems.[306] Juvenile records are frequently, although not always, confidential.[307] Juvenile records in many states are sealed, meaning that they are made harder to obtain and are only accessible to certain individuals.[308] Statutes authorizing expungement of juvenile records are more common and typically farther-reaching than their adult criminal analogues.[309]

Children can generally face exclusionary school discipline at any age.[310] Today, most countries in the world and approximately half of

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302. *See* Steinberg, *supra* note 300, at 56 (discussing risk-taking behaviors); Laurence Steinberg, *Risk Taking in Adolescence: What Changes, and Why?*, 1021 ANNALS N.Y. ACAD. SCIS. 51, 54 (2004) (discussing risk-taking behaviors); B. Bradford Brown, *Adolescents' Relationships with Peers*, *in* HANDBOOK OF ADOLESCENT PSYCH. 363, 375–76 (Richard M. Lerner & Laurence Steinberg eds., 2004) (discussing susceptibility to peer pressure).

303. *See* Alex R. Piquero, *Taking Stock of Developmental Trajectories of Criminal Activity over the Life Course*, *in* THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RSCH. 23, 37 (Akiva M. Liberman ed., 2008); Robert J. Sampson & John H. Laub*, Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 569 (2003); Michael Gottfredson & Travis Hirschi, *The True Value of Lambda Would Appear to be Zero: An Essay on Career Criminals, Criminal Careers, Selective Incapacitation, Cohort Studies, and Related Topics*, 24 CRIMINOLOGY 213, 218 (1986).

304. *See* Radice, *supra* note 58, at 375.

305. *See id.* at 378–79.

306. *See id.* at 407–08 (discussing sealing and expungement); RIYA S. SHAH & LAUREN FINE, JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 23 (2014), https://jlc.org/sites/default/files/publication_pdfs/national-review.pdf [https://perma.cc/YAA8-HLKZ] (discussing confidentiality, sealing, and expungement).

307. *See* SHAH & FINE, *supra* note 306, at 13.

308. *See* Radice, *supra* note 58, at 407–09.

309. *See 50-State Comparison: Expungement, Sealing & Other Record Relief*, *supra* note 106.

310. *See* Katherine M. Zinsser et al., *A Systematic Review of Early Childhood Exclusionary Discipline*, 92 REV. EDUC. RSCH. 743, 746–47 (2022).

states have set minimum ages of juvenile court jurisdiction, under which children are considered too young to be held accountable in criminal or juvenile justice systems.[311] The United Nations Committee on the Rights of the Child has recommended fourteen as the absolute minimum age that countries should set for holding children accountable in criminal or juvenile systems and commends nations that set minimum ages at fifteen or sixteen.[312] State minimum ages vary: Ten is the most commonly set minimum, but California, Massachusetts, and Utah have all recently set a minimum age of twelve.[313] Although a handful of states have passed laws addressing use of exclusionary discipline in preschool, states overwhelmingly continue to be able to suspend or expel children at any age.[314] As a result, in some states, children have records of school discipline even at ages at which they have been deemed to be too young to have criminal or juvenile records.[315]

4. *Most Records Are for Minor Infractions*

Students frequently receive harsh school discipline in response to behavior that does not pose a danger to the health or safety of other students.[316] In his announcement of a Department of Education "dear colleague" letter on the use of exclusionary discipline, then-Secretary of Education Arne Duncan reported that "as many as 95 percent of

311. *See* EVE RIPS ET AL., INCAPABLE OF CRIMINAL INTENT: THE CASE FOR SETTING A MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN ILLINOIS 16, 19 (2021), https://www.luc.edu/media/lucedu/law/centers/childlaw/pdfs/incapable_of_criminal_intent.pdf [https://perma.cc/57YH-DUBE].

312. *See* U.N. COMM. ON RTS. CHILD, GENERAL COMMENT NO. 24 (2019) ON CHILDREN'S RIGHTS IN THE CHILD JUSTICE SYSTEM 9 (2019), https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf [https://perma.cc/HF6T-K4GK].

313. *See* RIPS ET AL., *supra* note 311, at 16.

314. *See* TIFFANY FERRETTE ET AL., CTR. FOR L. & SOC. POL'Y, CENTERING BLACK FAMILIES: EQUITABLE DISCIPLINE THROUGH IMPROVED DATA POLICIES IN CHILD CARE 24–25 (2023), https://www.clasp.org/wp-content/uploads/2023/02/2.28.2023_Centering-Black-Families-Equitable-Discipline-through-Improved-Data-Policies-in-Child-Care.pdf [https://perma.cc/PV2U-LT86].

315. *See* Kate Zinsser, *250 Preschool Kids Get Suspended or Expelled Each Day: Five Questions Answered*, PHYS.ORG (Aug. 16, 2021), https://phys.org/news/2021-08-preschool-kids-expelled-day.html#:~ [https://perma.cc/U2VC-W4EZ].

316. *See* Blair Wriston & Nancy Duchesneau, *How School Discipline Impacts Students' Social, Emotional and, Academic Development (SEAD)*, EDUC. TR. (Apr. 6, 2023), https://edtrust.org/resource/how-school-discipline-impacts-students-social-emotional-and-academic-development-sead/ [https://perma.cc/83FQ-U79C].

out-of-school suspensions are for nonviolent misbehavior—like being disruptive, acting disrespectfully, tardiness, profanity, and dress code violations."[317] Research consistently backs up this point and demonstrates that the majority of exclusionary discipline is used in response to relatively minor nonviolent infractions.[318]

Students are frequently suspended or expelled due to infractions for disrespect, disobedience, and defiance.[319] For example, one study found that almost half of the 710,000 suspensions in California during the 2011–2012 school year were for "willful defiance."[320] Determinations of what constitutes disrespect or defiance are highly subjective.[321] Racial disproportionality in discipline for these infractions is particularly high as the subjective nature leaves room for implicit bias to play a larger role in decision-making.[322]

Despite the underlying irony of requiring students to miss school as a punishment for missed school time, students are also frequently

317. *See* Daniel T. Satterberg et al., *Re-engaging Youth With the Protective Power of Education*, 13 SEATTLE J. FOR SOC. JUST. 857, 861 (2015) (citing a U.S. Department of Education press release).

318. *See, e.g.*, Russell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 AM. EDUC. RSCH. J. 640, 644 (2014) (finding that "majority of offenses for which students are suspended appear to be nonviolent, less disruptive offenses"); Linda M. Raffaele Mendez & Howard M. Knoff, *Who Gets Suspended from School and Why: A Demographic Analysis of Schools and Disciplinary Infractions in a Large School District*, 26 EDUC. & TREATMENT CHILD. 30, 50 (2003) (finding that at all school levels in a Florida district "most suspensions were for relatively minor infractions"); JANE SUNDIUS & MOLLY FARNETH, OPEN SOC'Y INST.—BALT., PUTTING KIDS OUT OF SCHOOL: WHAT'S CAUSING HIGH SUSPENSION RATES AND WHY THEY ARE DETRIMENTAL TO STUDENTS, SCHOOLS, AND COMMUNITIES 2 (2008), https://www.opensocietyfoundations.org/publications/putting-kids-out-school-whats-causing-high-suspension-rates-and-why-they-are-detrimental [https://perma.cc/4MFG-8QGS] (finding that in Maryland, weapons-related charges made up under two percent of all out-of-school suspensions and firearms-related charges made up just 0.02%).

319. *See* Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCH. 455, 460–61 (2008); Skiba, *supra* note 318, at 644.

320. *See* Teresa Watanabe, *L.A. Unified Bans Suspension for 'Willful Defiance,'* L.A. TIMES (May 14, 2013, 12:00 AM), http://articles.latimes.com/2013/may/14/local/la-me-lausd-suspension-20130515 [https://perma.cc/9ERB-JUXQ].

321. *See* Skiba, *supra* note 286, at 334.

322. *See* McNeal, *supra* note 285, at 293; *see also* Simson, *supra* note 285, at 524.

suspended due to tardiness or truancy.[323] For example, in a study of suspensions and expulsions in Arizona, researchers found that 10% of all suspensions were due to missed class time.[324] In some districts, truancy accounted for half of all suspensions.[325] Truancy is frequently due to situations that are beyond the control of the individual student.[326] Common underlying causes of student truancy include trauma, lack of access to transportation, housing instability, and family caregiving responsibilities.[327]

Students also regularly face exclusionary discipline for behavior that would be constitutionally protected in other contexts, such as violations of dress code policies, use of profanity, and many of the aforementioned disrespect and defiance infractions.[328] Although courts repeatedly cite the maxim from *Tinker v. Des Moines* that students do not abandon their rights "at the schoolhouse gate," constitutional protections for students frequently are limited in the name of ensuring safe and effective learning environments for students.[329] These limitations have often been justified in part because schools act *in loco parentis*, based on authority given to them by parents.[330] Schools frequently use this authority to discipline students

323. *See* Maria Polletta, *Arizona Could Become Latest State to Ban Attendance-related Suspensions*, ARIZ. CTR. INVESTIGATIVE REPORTING (Feb. 13, 2024), https://azcir.org/news/2024/02/13/proposed-arizona-law-bans-attendance-related-suspensions/ [https://perma.cc/9AMM-AQMD].

324. *See* Tara García Mathewson & Maria Polleta, *When the Punishment is the Same as the Crime: Suspended for Missing Class*, HECHINGER REP. (Dec. 6, 2022), https://hechingerreport.org/when-the-punishment-is-the-same-as-the-crime-suspended-for-missing-class/ [https://perma.cc/HH5U-5685].

325. *See id.*

326. *See Root Causes,* ATTENDANCE WORKS, https://www.attendanceworks.org/chronic-absence/addressing-chronic-absence/3-tiers-of-intervention/root-causes/#:~ [https://perma.cc/3KVP-E6Z5] (last visited May 29, 2024).

327. *See id.*

328. *See* Catherine J. Ross, *"Bitch," Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*, 88 TEMP. L. REV. 717, 717 (2016) (finding that "violations of school rules that restrict constitutionally protected expression are a leading cause of the initial discipline that sets children on the path from school to a delinquency label and confinement").

329. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

330. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995); *see also* Morse v. Frederick, 551 U.S. 393, 413–22 (2007) (Thomas, J., concurring); Susan Stuart, In Loco Parentis *in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 969–70 (2010).

for behavior related to speech alone.[331] In New York City, for example, more than eight in ten suspensions were for "lower level discretionary infractions of the Discipline Code, such as using profane language or lying to school personnel."[332] Ultimately then, when application forms ask applicants to disclose all disciplinary history, the majority of responses will include only these smaller infractions.

5. *Procedural Limitations*

The collateral consequences of school disciplinary records are also troubling because of the limited nature of procedural protections in school disciplinary contexts.[333] School disciplinary proceedings are subject only to limited due process requirements, with suspensions of up to ten days requiring solely "informal give-and-take between a student and disciplinarian."[334] The Supreme Court established in *Goss v. Lopez* that school suspensions of ten days or less "may not be imposed in complete disregard of the Due Process Clause."[335] However, the Court imposed only the relatively minimal requirements of "oral or written notice of the charges against [the student] and, if he denies them, an explanation of the evidence the authorities have and the opportunity to present his side of the story."[336] The *Goss* court left open the possibility that suspensions over ten days and expulsions might require a more formal process.[337] Students with disabilities receive some additional statutory protections when facing suspension or expulsion.[338]

Students must receive some notice pursuant to *Goss* if facing exclusionary discipline, but notice can generally be limited in nature.[339] Although "timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the

331. *See* Ross, *supra* note 328, at 717.

332. *See* N.Y.C. SCH.-JUST. P'SHIP TASK FORCE, KEEPING KIDS IN SCHOOL AND OUT OF COURT: REPORT AND RECOMMENDATIONS 4 (2013), https://www.nycourts.gov/ip/justiceforchildren/pdf/nyc-school-justicetaskforcereportandrecommendations.pdf [https://perma.cc/ZTK4-7TTD].

333. *See* Diana Newmark, *The Illusion of Due Process in School Discipline*, 32 WM. & MARY BILL RTS. J. (forthcoming 2023) (stating a detailed explanation of limitations on due process in school disciplinary proceedings).

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

335. *Id.* at 576.

336. *Id.* at 581.

337. *See id.* at 584.

338. *See, e.g.*, 20 U.S.C. § 1415(k).

339. *See Goss*, 419 U.S. at 581.

competing interests involved,"[340] notice of a school disciplinary proceeding does not necessarily need to include a detailed description of every charge that a student is facing.[341]

Protections at hearings for longer suspensions and expulsions are also pared back.[342] For example, hearing officers are generally not required to be neutral third-party actors, provided the hearing officer is able to act in an unbiased manner.[343] Evidence presented at school disciplinary hearings is typically not required to comply with the full set of evidentiary rules required at a criminal or juvenile trial.[344] Courts have generally found that hearsay is admissible.[345] Lower court decisions vary on whether students have the right to examine or cross-examine witnesses when facing exclusionary discipline and on the extent of that right.[346] Students generally have no right to an

340. *See id.* at 579.

341. *See, e.g.*, Arrington v. Eberhart, 920 F. Supp. 1208, 1219 (M.D. Ala. 1996); Alex v. Allen, 409 F. Supp. 379, 386–87 (W.D. Pa. 1976); *see also* Dolores J. Cooper & John L. Strope, *Long Term Suspensions and Expulsions After Goss,* 57 WEST ED. L. REP. 29, 30 (1990) ("Though adequate notice must include the infraction and the time and place for a hearing, school officials apparently need not list or detail each charge against a student.").

342. *See New Research from Professor Diana Newmark Highlights Issues with Due Process in School Discipline*, U. ARIZ. L. (Apr. 10, 2023), https://law.arizona.edu/news/2023/04/new-research-professor-diana-newmark-highlights-issues-due-process-school-discipline [https://perma.cc/3S7G-KWC4].

343. *See, e.g.*, Jennings v. Wentzville R-IV Sch. Dist., 397 F.3d 1118, 1125 (8th Cir. 2005).

344. *See, e.g.*, Colquitt v. Rich Twp. High Sch. Dist. No. 277, 298 Ill. App. 3d 856, 865 (1998) ("[A]n expulsion hearing is not a judicial or quasi-judicial proceeding and, therefore, common law rules of evidence need not be transplanted wholesale.").

345. *See* Lynn M. Engel, *The Admissibility of Hearsay in Public Secondary School Disciplinary Hearings*, 1991 U. CHI. LEGAL F. 375, 377 (finding that with respect to public school disciplinary hearings "most courts have held that hearsay is admissible").

346. *Compare* Newsome v. Batavia Loc. Sch. Dist., 842 F.2d 920, 924–25 (6th Cir. 1988) (finding no right to cross-examine, despite the asserting that "[t]he value of cross-examination to the discovery of truth cannot be overemphasized"), *and* Gorman v. Univ. R.I., 837 F.2d 7, 26 (1st Cir. 1988) (finding that "the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases"), *with* Dillon v. Pulaski Cty. Special Sch. Dist., 594 F.2d 699, 700 (8th Cir. 1979) (finding that a student must be allowed the right to cross-examine in an expulsion proceeding), *and Colquitt*, 699 N.E.2d at 1115–16 (finding that when a student was faced with a three-semester expulsion and the outcome of the hearing turned on the credibility of key witnesses, "the opportunity for cross-examination is imperative").

appointed counsel at disciplinary hearings, even when expulsion is a possibility.[347]

The evidentiary burden placed on schools wishing to suspend or expel students is not as strict as the beyond a reasonable doubt standard used in criminal and juvenile proceedings.[348] Courts have generally found that decisions at school disciplinary hearings, when supported by substantial evidence, are afforded great weight.[349] Cumulatively, these procedural limitations create serious concerns about the opportunity students receive to ensure their school records serve as an accurate reflection of their conduct.

III. LEGISLATION AND POLICY PROTECTIONS

In light of the serious concerns with lifelong use of school disciplinary records, and the lack of evidence to justify concerns about promoting safety and reducing liability risk, this Part considers legislation and policy solutions designed to help ensure that individuals are not held back by K-12 disciplinary records for years after graduation. Many of the legislative and policy strategies used to help address the collateral consequences of criminal convictions have the potential to be adapted to combat parallel consequences of school disciplinary records. This Part examines two of the leading approaches used to address collateral consequences of criminal records—expungement laws and statutes banning inquiry into records—and makes recommendations for how each approach might be adapted, albeit with key differences, to address school records as well. In doing so, it first provides background on recent legislative successes in addressing lifelong barriers caused by criminal records. It then looks at the ways that limited existing statutory protections fall short and

347. *See* Eric Weinhold, Gideon *Goes to School: An Argument for a Right to Appointed Counsel in School Disciplinary Proceedings*, 81 ALB. L. REV. 1395, 1402–03 (2018).

348. *In re* Bd. Educ. v. Mills, 293 A.D.2d 37, 39 (N.Y. App. Div. 2002) (stating that "the competent and substantial evidence standard of proof is appropriate in student suspension proceedings").

349. *See, e.g.*, *id.* (finding that "appellate courts in this state have uniformly held that the competent and substantial evidence standard of proof is appropriate in student suspension proceedings"); Carey *ex rel.* Carey v. Me. Sch. Admin. Dist. 17, 754 F. Supp. 906, 919 (D. Me. 1990) (finding that a "student must not be punished except on the basis of substantial evidence"); A.V. v. Plano Indep. Sch. Dist., 585 F. Supp. 3d 881, 903 (E.D. Tex. 2022) (finding that determinations of schools on disciplinary matters are given significant weight when supported by substantial evidence).

then proposes two concrete legislative approaches, analogous to expungement and ban the box laws in the criminal context, that will help in ensuring students are given a fair opportunity to move forward.

A. Legislative Responses to Criminal Records

In the context of criminal records, advocates have seen tremendous success in recent years in achieving significant legislative reforms.[350] These changes include record relief provisions that make records harder to access or that destroy records altogether; restrictions on use of information about criminal history in economic settings, such as on applications for employment, housing, and education; and programs designed to restore civil rights, such as measures that expand access to voting for individuals with records.[351] According to one estimate, in 2021 alone, forty states and the District of Columbia collectively passed 151 new laws that provide protections for individuals with records.[352] Between 2019 and 2021, states passed more than 400 new laws addressing collateral consequences of criminal and juvenile records.[353]

The most common forms of record relief provision laws are expunging, sealing, and setting aside records.[354] Sealing statutes are most frequently applicable to records from juvenile justice systems and make records harder to access without completely destroying the information contained in them.[355] Information from sealed records continues to be accessible to specified government actors, such as law enforcement officials or judges.[356] Expungement statutes vary significantly state-by-state: In some states, expungement leads to the destruction of a record, while in others, expungement functions more

350. *See* MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., FROM REENTRY TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2021 1 (2022), https://ccresourcecenter.org/wp-content/uploads/2022/01/2022_CCRC_Annual-Report.pdf [https://perma.cc/V8TN-SLJT].

351. *See id.* at 2–3.

352. *See id.* at 2.

353. *See id.*

354. *See id*.

355. *See Seal*, BLACK'S LAW DICTIONARY (11th ed. 2019); SHAH & FINE, *supra* note 306, at 23.

356. *See* Radice, *supra* note 58, at 408; *see also* SHAH & FINE, *supra* note 306, at 23.

like record sealing.[357] Many expungement statutes afford individuals whose records have been expunged the right to deny the existence of the record in question.[358] Expungement laws can impact both juvenile records and adult criminal records, although expungement laws related to adult criminal records are generally more limited in nature and frequently apply only to non-conviction records.[359]

Laws designed to restrict use of criminal history in economic settings often take the form of ban the box laws, which limit use of questions about criminal and juvenile records on application forms, such as those for employment, professional licensure, education, or housing.[360] The term "ban the box" was initially coined by the All of Us or None movement, which is a project of Legal Services for Prisoners with Children.[361] All of Us or None defines "ban the box" as "a movement to end the discrimination faced by millions of people in the United States, returning to their communities from prison or jail and trying to put their lives back together."[362] Today, thirty-seven states and more than 150 cities have restricted use of criminal and juvenile records in at least some contexts, and four out of five Americans live in a jurisdiction that has banned the box on some employment forms.[363] The movement to ban the box on college applications has picked up steam, with several states enacting recent legislation that restricts the ability of colleges and universities to ask about criminal and juvenile records in the college admissions process.[364] States have also passed legislation restricting use of criminal history in a range of other contexts including housing, occupational licensing, access to driver's licenses, and access to public benefits.[365]

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357. *See* Eve Rips, *Off the Record: Preserving Statistical Information After Juvenile Expungement*, 72 AM. U. L. REV. 587, 615–18 (2023).

358. *See* Mitchell M. Simon, *Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case for Not Creating Unnecessary Problems*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 79 app. C (2014).

359. *See 50-State Comparison: Expungement, Sealing & Other Record Relief*, *supra* note 106.

360. *See* LINDA EVANS, LEGAL SERVS. FOR PRISONERS WITH CHILD., BAN THE BOX IN EMPLOYMENT: A GRASSROOTS HISTORY 8 (2016), http://www.prisonerswithchildren.org/wp-content/uploads/2016/10/BTB-Employment-History-Report-2016.pdf [https://perma.cc/8XDG-QFAW].

361. *See id.* at 10.

362. *Id.* at 8.

363. *See* AVERY & LU, *supra* note 18, at 2.

364. *See* Rips, *supra* note 19, at 256–63.

365. *See* LOVE & SCHLUSSEL, *supra* note 350, at 5–11.

In addition to policy solutions that make records harder to access and that restrict inquiry into criminal history, states have taken a number of other approaches to address collateral consequences in recent years.[366] These approaches include laws protecting the ability of individuals with records to vote and to serve on juries.[367] States have also passed laws making it easier to access key documents when leaving prison or jail, reforming sex offender registries, and requiring studies or data collection related to collateral consequences.[368]

B. Inadequate Current Protections

Current statutory protections for school records fall short of providing adequate safeguards for students.[369] This Section first looks at how states handle destruction of information from school disciplinary records. It then looks at the limited initial steps taken to move away from inquiries into disciplinary history, considering both the first state to ban asking about school disciplinary history on applications for admission to college and the Common Application's decision to move away from requiring questions about disciplinary history.

1. *Limited Expungement Analogues*

In part due to the proliferation of criminal and juvenile records, expungement laws are growing in popularity, with states passing eighty-two laws related to sealing and expungement in 2021 alone.[370] Despite the popularity of these approaches with respect to criminal and juvenile records,[371] analogous statutes for student disciplinary records are extremely limited. Even in cases where information from disciplinary records may be destroyed, this destruction does not confer the explicit protections that many criminal record expungement statutes do.[372]

At a national level, under FERPA, parents and older students are entitled to a hearing to request corrections of information from a

366. *See id.* at 24–27.
367. *See id.* at 24–26.
368. *See id.* at 27.
369. *See* U.S. DEP'T HOMELAND SEC., *supra* note 164, at 4 (discussing various cyberintrusions that have occurred).
370. *See* LOVE & SCHLUSSEL, *supra* note 350, at 12.
371. *See infra* Subsection III.C.2.
372. *See infra* Subsection III.B.1.

student's record if they believe it to be "inaccurate, misleading, or in violation of the privacy rights of the student."[373] If the educational agency conducting the hearing finds the information to be inaccurate, misleading, or in violation of the student's privacy rights, the student's record must be amended.[374] If not, the parent may still include a statement in the record about his or her reason for contesting the information.[375] These FERPA procedures do not give students the legal right to deny that the record ever existed, nor do they provide opportunities for removing accurate information for purely redemptive purposes.[376]

States take a broad range of statutory approaches to maintenance, privacy, and disclosure of school records.[377] A few states have enacted statutory requirements that at least some sort of education records must be destroyed after a fixed period.[378] For example, in Louisiana, schools are required to destroy all student records after five years, unless otherwise prohibited from doing so by federal law.[379] In Nebraska, schools must destroy all disciplinary information after a student has been continuously absent from school for at least three years.[380] In Wisconsin, behavioral records may not be maintained for more than one year after a student is no longer enrolled in a school, unless the student in question grants written permission for the records to be maintained for a longer period.[381] As with FERPA, these statutes do not confer on students the right to deny the existence of the record.[382]

The School Records Act in Illinois takes a different approach by treating records of suspensions and expulsions as part of a student's

373. *See* 20 U.S.C. § 1232g(a)(2).

374. *See* 34 C.F.R. § 99.21(b)(1) (2023).

375. *See* 34 C.F.R. § 99.21(b)(2) (2023).

376. *See Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T EDUC. (Aug. 25, 2021), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html [https://perma.cc/L3N8-PFQT] (discussing the rights that students have under FERPA procedures).

377. *See infra* Subsection III.B.1.

378. *See, e.g.*, LA. STAT. ANN. § 17:3914(K)(4) (2023) (providing an example of a state statute that does not expunge student disciplinary records but rather states that student records are to be destroyed after five years); NEB. REV. STAT. § 79-2,104 (2023) (providing an example of a state statute that mandates the destruction of student records after a student has been contentiously absent for three years).

379. *See* LA. STAT. ANN. § 17:3914(K)(4) (2023).

380. *See* NEB. REV. STAT. § 79-2,104 (2023).

381. *See* WIS. STAT. § 118.125(3) (2023).

382. *See Family Educational Rights and Privacy Act (FERPA)*, *supra* note 376.

temporary record.[383] Temporary records may not be destroyed until at least five years have passed since the student has left the school.[384] However, the statute mandates that temporary records, including records of student discipline, "shall not be disclosed," except in limited circumstances that are much narrower than those in FERPA.[385]

A small number of states mention "expungement" of school records in some limited contexts. For example, North Carolina's school record statute explicitly creates a right for parents or students to request expungement of a student's disciplinary record, regardless of whether the record is inaccurate or misleading.[386] Under North Carolina's statute, the student's parent or guardian, or a student age sixteen or older, may request the expungement of disciplinary information either if the student has graduated or if at least two years have passed since the date of the suspension or expulsion in question, with no further suspensions or expulsions in the intervening period.[387] For the expungement to move forward, the superintendent must make a determination that the record "is no longer needed to maintain safe and orderly schools"[388] or to serve the child in an adequate way.[389] Superintendents or their designees may also proactively opt to expunge a student's record, without the student, parent, or guardian making an initial request.[390]

Connecticut requires expungement of expulsion records when a student has graduated from high school, unless the record is related to firearms possession.[391] Connecticut also permits expungement of expulsion records, at the school board's discretion, if the student has demonstrated behavior following an expulsion that justifies the expungement or if the student's expulsion period has been shortened or waived.[392] Connecticut's statute does not detail specific effects of the expungement, beyond removal from a student's record.[393]

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383. *See* 105 ILL. COMP. STAT. 10/2(f) (2023).
384. *See* 105 ILL. COMP. STAT. 10/4(f) (2023).
385. *See id.*
386. *See* N.C. GEN. STAT. § 115C-402(b) (2023). Utah also references "expungement" of records, but only provides the right to parents or students to the extent already mandated by FERPA. *See* UTAH CODE ANN. 1953 § 53E-9-306 (West 2023); UTAH ADMIN. CODE r. 277-487-4 (LexisNexis 2023).
387. *See* N.C. GEN. STAT. § 115C-402(b))(1–2) (2023).
388. *See* N.C. GEN. STAT. § 115C-402(b)(3) (2023).
389. *See* N.C. GEN. STAT. § 115C-402(b)(4) (2023).
390. *See* N.C. GEN. STAT. § 115C-402(c) (2023).
391. *See* CONN. GEN. STAT. § 10-233d(f) (2023).
392. *See id.*
393. *See id.*

California expands upon the approach required by FERPA by authorizing parents and guardians of current or former students to challenge the content of a student record not just when it is inaccurate, misleading, or a violation of a student's privacy rights, but also when it is based on unsubstantiated conclusions, is outside of an observer's area of competence, or is "[n]ot based on the personal observation of a named person with the time and place of the observation noted."[394] As with other challenges under FERPA, parents may appeal these decisions and may include a written note in the student's record explaining their perspective if they lose the appeal.[395] California law also explicitly gives school boards the discretion to expunge records in cases where an order of expulsion has been put on pause, and the pupil is permitted to return to school on probationary status.[396]

Across the board, the few statutes that allow for the deletion of information from a student record, including in North Carolina, Connecticut, and California, do not clearly reference what the consequences of removing disciplinary information from a record are for the student or former student in question.[397] While criminal and juvenile expungement statutes often contain provisions clearly specifying the effects of expungement, such as being able to deny that the record in question ever existed, parallel provisions have not been written into school record statutes.[398] As a result, even if a student or parent is able to have disciplinary information from a student record destroyed, this does not translate to an unambiguous legal right for the student or former student to deny the existence of the record or for the student to check "no" when asked about disciplinary records on applications for education or licensure.[399]

2. *First Steps Toward Banning the Discipline Box*

As the movement to restrict use of criminal and juvenile records in college admissions has grown, a small number of initial steps have been taken to address disciplinary history as well.[400] This Section first

394. *See* CAL. EDUC. CODE § 49070(a) (West 2023).

395. *See* CAL. EDUC. CODE § 49070(b)(3), (d) (West 2023).

396. *See* CAL. EDUC. CODE § 48917(e) (West 2023).

397. *See, e.g.*, N.C. GEN. STAT. §115C-402 (2023); CONN. GEN. STAT. §10-233d (2023); CAL. EDUC CODE §48917 (West 2023).

398. *See* SHAH & FINE, *supra* note 306, at 23 (discussing effects of juvenile expungement statutes).

399. *See id.*

400. *See* Anderson, *supra* note 67.

looks at the choice made by the Common Application to remove questions about disciplinary history from the shared portion of its application form and then looks at the only state law that bans some types of questions about disciplinary history from college applications.

a. The Common Application

Some institutions have voluntarily shifted away from use of disciplinary records.[401] Today, almost a thousand colleges and universities in the United States, including both public and private institutions, use the Common Application in their admissions processes.[402] In 2018, following pressure from advocacy organizations, the Common Application made the decision to remove a question requiring applicants to disclose criminal and juvenile record information from the common portion of the application, but to leave the required question about school disciplinary history in place.[403] While colleges and universities continued to be able to opt into asking about criminal and juvenile records on their school supplemental applications, this shift from the Common Application allowed individual schools the autonomy to decide if and how to ask about criminal and juvenile record information.[404] Colleges and universities responded in a variety of ways, with some opting to remove criminal record questions altogether, some opting to add the originally required question to their school supplements, and still others adding their own new questions, which were worded in a wide variety of different ways.[405]

In 2020, the Common Application opted to treat school disciplinary records in a manner similar to criminal and juvenile records by removing the mandatory disciplinary history question while continuing to permit individual colleges and universities to ask about disciplinary records in their school supplements.[406] In explaining

401. *See* COMMON APPLICATION, *supra* note 21.

402. *See id.*

403. *See* Jen Davis, *Change to Criminal History Question for 2019-20 Application Year*, COMMON APP (Aug. 19, 2018), https://www.commonapp.org/blog/common-app-removes-school-discipline-question-college-application [https://perma.cc/G58F-9ANR].

404. *See id.*

405. *See* Rips, *supra* note 19, at 267–73.

406. *See* Emma Steele, *Common App Removes School Discipline Question on the Application*, COMMON APP (Sept. 30, 2020),

the decision to remove the disciplinary history question, Jenny Rickard, President and CEO of the Common Application, stated that "[r]equiring students to disclose disciplinary actions has a clear and profound adverse impact. Removing this question is the first step in a longer process to make college admissions more equitable. This is about taking a stand against practices that suppress college-going aspiration and overshadow potential."[407] In its press statement, the Common Application cited its own research finding that Black college applicants reported disciplinary records at a rate two times higher than white students and that students who disclose disciplinary records are less likely to submit their applications than those who don't.[408] The Common Application's statement also stressed that students who have high school disciplinary records are less likely to attend college than those who do not.[409]

To help allay student and guidance counselor confusion, the Common Application created a resource to help students determine which schools ask about discipline and where on the application those schools ask about disciplinary records.[410] As discussed in Part II, colleges and universities that use the Common Application have taken a variety of approaches to their newfound discretion, with roughly 60% choosing to leave questions about school discipline off of their application forms, but approximately 40% continuing to ask about at least some forms of disciplinary records.[411]

b. Colorado's Ban the Box Law

In 2019, Colorado became the first state to prohibit public colleges and universities from asking students about school disciplinary records in the college admissions process.[412] The law went into effect in 2020 and restricts the ability of state institutions of higher education to inquire into both criminal and disciplinary history at any point prior to admission.[413] However, the statute includes several exceptions. In the context of school discipline, it includes exceptions

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https://www.commonapp.org/blog/common-app-removes-school-discipline-question-college-application [https://perma.cc/E7DC-GYCC].

407. *Id.*
408. *See id.*
409. *See id.*
410. *See* Anderson, *supra* note 67.
411. *See generally id.*
412. *See* Rips, *supra* note 19, at 260.
413. *See* COLO. REV. STAT. § 23-5-106.5 (2023).

for inquiries into school discipline relating to stalking, sexual assault, and domestic violence,[414] and for records "related to academic performance."[415] In the criminal context, it includes exceptions for inquiry into several specified serious offenses and also permits inquiry about all pending charges, regardless of the underlying offense.[416] While some of the exceptions for specified criminal convictions apply only to incidents that occurred within the past five years, the exceptions permitting inquiry into certain types of school disciplinary history allow for questions about discipline from any point in the past.[417]

Colorado's law faced initial opposition from some colleges and universities, which expressed concerns about public safety and placed particular emphasis on apprehensions about sexual misconduct on college campuses.[418] Although the bill, as introduced, initially did not include some of the exceptions for more serious convictions, proponents of the legislation felt that the compromise was necessary to advance the bill.[419] As of 2023, of the fourteen colleges and universities in Colorado that use the Common Application, 71% (ten schools total) continue to ask questions about some forms of school disciplinary history.[420] The remaining 29% (four schools total) have removed discipline questions altogether.[421] Of the ten schools that ask about disciplinary history, four ask only about discipline related to stalking, sexual assault, and domestic violence.[422] Another four ask about academic misconduct violations in addition to stalking, sexual assault, and domestic violence.[423] Two schools, despite the statutory prohibition, continue to include broad questions that ask applicants to

414. *See* COLO. REV. STAT. § 23-5-106.5(3)(c) (2023).

415. COLO. REV. STAT. § 23-5-106.5(3)(e) (2023).

416. *See* COLO. REV. STAT. § 23-5-106.5(3)(a)–(d) (2023).

417. *See* COLO. REV. STAT. § 23-5-106.5(3)(b)–(e) (2023).

418. *See Hearing on S.B. 19-170 Before the H. Comm. On Educ.*, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019) (statement of Julie McKenna, Brandeberry McKenna Public Affairs on behalf of Colorado Mesa University).

419. *See* Rips, *supra* note 19, at 261.

420. *See* Review by Eve Rips of Applications for First-year Admission in May 2023 for Colorado College, Colorado Mesa University, Colorado School of Mines, Colorado State University, Fort Lewis College, Metropolitan State University of Denver, Naropa University, Regis University, University of Colorado Boulder, University of Colorado Springs, University of Colorado Denver, University of Denver, University of Northern Colorado, and Western Colorado University.

421. *See id.*

422. *See id.*

423. *See id.*

disclose all disciplinary history, regardless of the underlying offense.[424]

C. Legislation and Policy Recommendations

Given the harms associated with lifelong consequences of school disciplinary records, policymakers should work to advance solutions, similar to those used in the criminal justice context, designed to ensure that records of K-12 discipline do not erect excessive barriers. This Section recommends a two-pronged approach. First, it recommends that states create opportunities for individuals with school disciplinary records to have those records expunged and that states do so in a way that gives students the opportunity to deny having a school disciplinary record altogether. And second, it recommends that states should also pass laws banning inquiry into school disciplinary records, so that individuals will not face questions about school records to begin with. The emphasis on expungement and ban the box laws is not meant to preclude additional responses such as increased training for both high schools and colleges on sharing disciplinary information, improved practices in data collection about how postsecondary institutions use disciplinary records, and use of certificates of rehabilitation, which may all also have an important role to play in addressing collateral consequences.

These are back-end recommendations aimed at addressing the consequences of school records for individuals who have already faced harsh discipline. While important, they are in no way designed to be a replacement for policies aimed at reducing harsh and inequitable school disciplinary policies from the start. Reforms designed to address excessive and inequitable use of harsh school discipline in the first place, such as shifts toward Positive Behavioral Interventions and Supports (PBIS), restorative justice programs, improved data collection and monitoring of disparities in the impact of discipline, implicit bias trainings, and legislative restrictions on use

424. *See, e.g.*, REGIS UNIV., APPLICATION FOR ADMISSION (2023) (screenshot on file with author) (asking "[h]ave you received school disciplinary action since 9th grade?"); COLO. COLLEGE, APPLICATION FOR ADMISSION (2023) (screenshot on file with author) (asking "[h]ave you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from the institution").

of exclusionary discipline are critical to addressing the problem at its roots.[425] But fully addressing harsh and inequitable school discipline requires not only multiple front-end solutions designed to create more equitable and developmentally appropriate responses to school misconduct, but also support for individuals who may continue to face barriers due to existing school disciplinary records.

1. *Expungement Laws for School Discipline Records*

While some states delete school records after a fixed period, or allow information to be deleted under certain circumstances, and while parents have the right to request corrections of inaccurate or misleading records under FERPA, these provisions do not serve an analogous function to laws authorizing expungement of criminal records.[426] A more robust approach to school record expungement would permit individuals whose school records have been expunged to act as if the records never existed and would allow for destruction of records even in situations in which the accuracy of the record is not in dispute.

Laws that allow criminal or juvenile records to be expunged vary widely in the types of records that may be expunged, who is eligible to have records expunged, the process for expunging records, and the effects of having a record destroyed.[427] Expungement statutes frequently allow an individual with an expunged record to act as if the record never existed.[428] Most expungement laws are opt-in and require

425. *See, e.g.*, Redfield & Nance, *supra* note 25, at 107 (discussing implicit bias training, use of checklists, lawyer intervention, and restorative justice programs); Jason P. Nance, *supra* note 26, at 315–19 (discussing restrictions on use of harsh disciplinary measures, expanded training for school officials, school climate improvements, expanded disciplinary data reporting, and reducing ambiguities in school disciplinary codes); Daniel J. Losen, *Discipline Policies, Successful Schools, Racial Justice, and the Law*, 51 FAM. CT. REV. 388, 395–96 (2013) (discussing PBIS systems and improved training for teachers and other school officials); Catherine P. Bradshaw et al., *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes*, 12 J. POSITIVE BEHAV. INTERVENTIONS 133, 134–135 (2013) (discussing PBIS systems); Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583, 614–20 (2018) (discussing restorative justice interventions).

426. *See Family Educational Rights and Privacy Act (FERPA)*, *supra* note 376.

427. *See* Rips, *supra* note 357, at 611–15.

428. *See* Simon, *supra* note 358, at 92.

a petition to be filed in order for a record to be cleared.[429] An increasing, although still comparatively small, number of expungement statutes clear records automatically, often after a fixed period has elapsed.[430] For example, in Illinois, the state's juvenile expungement statute automatically expunges most misdemeanor arrests after a year and expunges some types of adjudications of delinquency two years after a case has been closed.[431] These automatic expungement laws, also known as clean slate laws, serve an important function because uptake rates for expungement laws that require petitions to be filed are generally low.[432]

Given the low uptake rates for opt-in expungement laws, school record expungement statutes should ideally automatically expunge records, rather than requiring individual students or parents to request to have records removed.[433] Ideally, students should have records automatically expunged before graduation, when the school is still in close contact with the students and when the expungement would be most likely to impact college admissions. Individuals whose disciplinary records have been automatically expunged should receive a notification about the expungement and their legal rights following the expungement. Families of students whose records have not yet been automatically expunged should also be given the opportunity to petition for expungement at any point if a fixed period has passed since the underlying incident and if the student has not subsequently been suspended or expelled.

School record expungement statutes should explicitly state that individuals whose school disciplinary records have been expunged can act as if the record never existed and may say that no record exists on any inquiries into disciplinary history. This would be a significant point of difference between the expungement statutes proposed here and existing statutes that authorize destruction of school records. In passing school record expungement statutes, states should mirror language from criminal and juvenile record expungement laws about the ability to deny the record. For example, Illinois's juvenile record

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429. *See* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study,* 133 HARV. L. REV. 2460, 2465 (2020).

430. *See id.* at 2464–65.

431. *See* 705 ILL. COMP. STAT. 405/5-915.1 (2023); 705 ILL. COMP. STAT. 405/5-915.3 (2023).

432. *See, e.g.*, Prescott & Starr, *supra* note 429, at 2486–93 (finding that of individuals who are legally eligible for expungement in Michigan, only 6.5% will actually receive an expungement within five years of becoming eligible).

433. *See id.*

expungement statute specifies that when an individual's record is expunged, "he or she may not be required to disclose that he or she had a juvenile law enforcement or juvenile court record,"[434] and Kentucky's juvenile record expungement statute states that a person whose record has been expunged may "properly reply that no record exists" when asked about the record in any context.[435] School disciplinary expungement statutes should take a parallel approach and should specify that an individual whose record has been expunged may say no when asked if he or she has a school disciplinary record.

States should also ensure that information about school record expungement is made available to the individuals who stand to benefit from it. FERPA currently requires that parents and students over the age of eighteen be notified of their rights under the statute.[436] Parents and students should similarly be notified of their rights to have school disciplinary records expunged. For families of current students, this notification could be combined with other required annual notifications and should also be provided every time a family is notified that a student is facing suspension or expulsion. Because many of the individuals who stand to benefit from having records of school discipline expunged are alumni, rather than current students, school record expungement statutes should also require a one-time effort to inform individuals who are eligible for expungement and have already graduated about expungement policies. This notification should be sent to the former student's last known physical address and to any email addresses on file for the student.

Although expungement statutes in the criminal context generally exclude certain more serious offenses, an ideal school record expungement statute should permit all student records to be expunged.[437] While most school discipline is for minor infractions, in the rare cases of very serious incidents, such as use of a firearm in school or sexual assault, students are likely to end up with an arrest record for the same incident.[438] Thus, even without a school record,

434. 705 ILL. COMP. STAT. 405/5-915(2.6) (2023).

435. KY. REV. STAT. ANN. § 431.078(6) (West 2023).

436. *See* 20 U.S.C. § 1232g(e); *see also* 34 C.F.R. § 99.7(a)(1) (2023).

437. *See, e.g.*, *Expungement Assistance*, MICH. DEP'T ATT'Y GEN., https://www.michigan.gov/ag/initiatives/expungement-assistance [https://perma.cc/5KYE-NZXQ] (last visited May 29, 2024) (noting offenses excluded from expungement in Michigan).

438. *See* Catherine Yim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 877–88 (2012) (discussing the prevalence of police in schools, requirements to notify police following certain incidents, and high rates of school-based referrals to law enforcement).

information about more serious incidents will still need to be disclosed as part of inquiries into criminal records. If carveouts for more serious offenses end up being politically necessary to pass legislation, these carveouts should be used sparingly. States could, for example, mirror the approach taken in Connecticut and create a narrow exception only for incidents related to bringing firearms to school.[439] Finally, states should require that when information from school records is removed through expungement, a de-identified or pseudonymized version of the information is preserved for research purposes and statutory reporting requirements and is kept in a location that is separate from the student's individual file. Data on school discipline can play a critical role in understanding the impact of discipline and in reforming existing practices.[440] When criminal and juvenile expungement statutes do not require preservation of information for research purposes, information that is critically important to research is lost.[441] Analogous statutes in the context of school disciplinary records should ensure that information is preserved for research purposes by requiring that after removing information from a student's record, pseudonymized information about the disciplinary incident is maintained in a location that is separate from the student's record. Determining what it means to de-identify or pseudonymize information meaningfully can be an extremely complicated and divisive question.[442] At a minimum, states should ensure that all directory information about the student, as defined by FERPA, is removed from the record of discipline when preserving information for research.[443] States should also take additional security measures to

439. *See* CONN. GEN. STAT. § 10-233d(f) (2023).

440. *See* Redfield & Nance, *supra* note 25, at 159 (arguing that "reporting data about each aspect of the school-to-prison pipeline is a basic necessity for reform" and that data must be "sufficiently disaggregated as to reflect specific state or area conditions as well as national trends").

441. *See* Rips, *supra* note 357, at 621–27.

442. *Compare* Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1704 (2010) (stressing that "[r]eidentification science disrupts the privacy policy landscape by undermining the faith we have placed in anonymization"), *with* Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J.L. & TECH. 1, 5 (2011) (arguing that "concerns over anonymized data have all the characteristics of a moral panic and are out of proportion to the actual threat posed by data dissemination").

443. 20 U.S.C. § 1232g(a)(5)(A) (defining "directory information" as "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student").

protect expunged disciplinary records when preserving pseudonymized information, including limiting the number of individuals who can access pseudonymized records, detailing how information from pseudonymized records may be used for research purposes, and imposing penalties for improper handling of information.

2. *Banning the Discipline Box*

States can also protect students from facing long-term barriers on applications by passing laws that restrict the ability of postsecondary institutions, licensure boards, and employers from asking about school disciplinary records. These laws would serve as analogs to laws banning questions about criminal and juvenile records in applications for employment, education, and other critical opportunities.

Currently, laws banning the box that asks about criminal records vary significantly in approach. These variations include differences in the types of applications in question; when, if ever, an organization may eventually inquire into criminal history; and whether the statutes include exceptions for serious offenses.[444] The majority of ban the box laws focus on applications for employment, but ban the box laws increasingly also impact applications for college admissions, licensure, and housing.[445] In most contexts, ban the box laws only prohibit inquiries into criminal history during an initial application process.[446] For example, in the employment context, ban the box laws generally still permit background checks or inquiries into criminal history after a specific point in a hiring process, such as once a conditional offer of employment has been made.[447] In the college admissions context, ban the box laws generally permit consideration of criminal history in making determinations about access to campus housing.[448] Some ban the box laws include carveouts for more serious

444. *See 50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, *supra* note 106.

445. *See id.* (discussing employment, licensure, and housing); Rips, *supra* note 19, at 235–37 (discussing college admissions).

446. *See 50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, *supra* note 106.

447. *See id.*

448. *See* Rips, *supra* note 19, at 263.

offenses, while others prohibit questions about criminal records altogether.[449]

Bans on inquiry into school disciplinary records are particularly urgent in the context of applications for higher education and professional licensure, where questions about disciplinary history are regularly used. Laws banning inquiry into criminal records in higher education admissions and on applications for professional licensure have both increased in popularity in recent years.[450] The current situation leaves applicants in some states in the odd position of not needing to disclose criminal or juvenile records on initial applications but still needing to disclose information about disciplinary history, despite the limitations on procedural protections in the disciplinary context, minor nature of most disciplinary infractions, and the young ages at which students can face exclusionary school discipline. Although some laws banning the criminal history box in college admissions don't include admissions to graduate programs, prohibitions on inquiry into elementary and secondary school discipline should include graduate admissions as well, given the prevalence of disciplinary questions in graduate admissions and the significant amount of time that has passed since the underlying incidents.[451]

Some research suggests that in the employment context, ban the box laws may actually harm chances of advancing as a candidate for Black applicants, and particularly for Black men, perhaps because employers are more likely to rely on stereotypes when Black applicants are not given the opportunity to prove that they have no

449. *See 50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, *supra* note 106.

450. *See* Rips, *supra* note 19, at 256 (noting that "[t]he state movement to ban the box on college admissions has grown quickly, with the first five states passing bills to restrict use of criminal history in admissions between 2017 and 2020"); LOVE & SCHLUSSEL, *supra* note 350, at 8 (noting that "[o]f all the criminal record reforms enacted during this modern reintegration reform era, no other approaches the regulation of occupational licensing agencies in terms of breadth, consistency, and likely efficacy").

451. *See, e.g.*, MD. CODE ANN., EDUC. § 26-501(b) (West 2023) (defining "admissions application" to mean an application "to enroll as an undergraduate student"); COLO. REV. STAT. § 23-5-106.5(2)(a) (2023) (prohibiting inquiry into most forms of criminal and disciplinary history on "any form of application, including electronic applications, for admission to the state institution of higher education"). *But see, e.g.*, WASH. REV. CODE § 28B.160.010(1) (2023) (defining "admissions application" to mean an application "to enroll as an undergraduate or graduate student").

criminal history.[452] However, initial research suggests that a similar effect is not seen with respect to use of criminal record information in college admissions.[453] In a 2019 study, researchers found that there was no statistically significant evidence that Black applicants without records had reduced odds of admission at postsecondary institutions that removed criminal history questions.[454] Because collateral consequences of disciplinary records have received so much less attention than consequences of criminal records, studies have not looked directly at the impact of restrictions on disciplinary history questions. It seems likely that use of disciplinary information in postsecondary admissions would follow a similar pattern to use of criminal records in admissions. Nonetheless, if states pass laws banning inquiry into disciplinary records, they should carefully monitor implementation to ensure that legislation doesn't have the unintended consequence of reduced acceptance rates for Black applicants with no disciplinary records.

Ideally, states should avoid including carveouts for more serious offenses, like the ones used in Colorado to permit inquiry into stalking, domestic violence, and sexual misconduct on applications for college admission.[455] In the higher education context, these carveouts are not typically included in laws banning inquiry into criminal history. Of the seven states that have banned inquiry into criminal records in college admissions, only two include exceptions for more serious incidents.[456] Carveouts for more serious offenses would fail to address

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452. *See, e.g.*, Agan & Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q. J. ECON. 191, 191 (2018) (finding that ban the box laws can actually increase race-based gaps in which job applicants receive interview requests and reasoning that "the best interpretation of these results is that employers are relying on exaggerated impressions of real-world racial differences in felony conviction rates"); Mike Vuolo et al., *Criminal Record Questions in the Era of "Ban the Box,"* 16 CRIMINOLOGY & PUB. POLICY 139, 154 (2017) (finding that "as African American men were able to demonstrate on job applications that they did not have a criminal record of any type, they were called back at higher rates"); Allison Dwyer Emory, *Protective State Policies and the Employment of Fathers with Criminal Records*, SOC. PROBS, Nov. 2021, at 1, 17 (finding that "black men living in protective states reported this employment penalty even if they did not have criminal records themselves").

453. *See* Robert Stewart & Christopher Uggen, *Criminal Records and College Admissions: A Modified Experimental Audit*, 58 CRIMINOLOGY 156, 177 (2020).

454. *See* id.

455. *See* COLO. REV. STAT. § 23-5-106.5(3)(c) (2023).

456. *See* Rips, *supra* note 19, at 262 (discussing Colorado, Louisiana, Maryland, and Washington); CAL. EDUC. CODE § 66024.5 (West 2023); OR. REV. STAT. § 350.200 (2023); VA. CODE ANN. § 23.1-407.1 (2023).

concerns about perpetuating racial disparities and about imposing disproportionate consequences on individuals who have already faced harsh punishment. Carveouts also aren't justified in light of the lack of a causal link between questions about disciplinary history and safety. In the context of applications for licensure, laws restricting use of criminal records take a wide range of approaches to carveouts, with states often prohibiting use of criminal record information unless the underlying charge is closely linked with the responsibilities of the profession.[457] Many states also prohibit consideration of older criminal records.[458] Because elementary and secondary school disciplinary records are likely to be older records by the point that an individual is applying for professional licensure, states should ideally categorically ban consideration of all elementary and secondary school disciplinary records in applications for licensure.[459] Given concerns from colleges and universities about potential liability for failure to ask about previous misconduct, legislation banning inquiry into disciplinary records could include statutory language, similar to language used in hiring contexts in Texas and Colorado, making clear that colleges and universities are presumptively not negligent for failure to inquire into a student's disciplinary history. Because disciplinary records have such a high potential to be misleading and because they have not been shown to be an effective tool in predicting future misconduct, states should consider specifying that a student's elementary or secondary school disciplinary record may not be used as evidence in a lawsuit alleging negligence in admissions.

Finally, in any situation in which states continue to permit inquiry into disciplinary records, they should, at a minimum, prohibit asking about disciplinary information that was expunged or overturned. Currently, some application forms explicitly ask students to disclose disciplinary records even if that information has been expunged, canceled, or annulled.[460] Questions phrased in this manner

457. *See 50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, *supra* note 106.

458. *See id.*

459. *See id.*

460. *See* JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L, *supra* note 109. For example, Colorado asks "[r]egardless of whether the record has been expunged, canceled, or annulled, or whether no record was made, have you ever been accused of cheating, plagiarism, or other academic dishonesty at any school you attended?", and Georgia asks "[r]egardless of whether the record has been expunged, cancelled or annulled, or whether no record was made, have you ever been subject to proceedings before a school honor court or council (or any similar body)?" *Id.* at 14, 25.

put applicants in the fraught position of having to decide whether to disclose information that they may have a legal right to keep confidential and to deny or to directly defy application instructions. Placing applicants in this position cuts against the underlying purpose of expunging records.[461] In the criminal context, four states have prohibited inquiries into expunged or annulled records.[462] For example, New Hampshire requires that on applications for employment, licensure, and other opportunities, "a person may be questioned about a previous criminal record only in terms such as '[h]ave you ever been arrested for or convicted of a crime that has not been annulled by a court?'"[463] States should ensure that similar protections exist for individuals with disciplinary records by requiring that in any contexts in which inquiries into disciplinary records have not been banned outright, inquiries into records that have been annulled, overturned, or expunged are clearly prohibited. In doing so, states will at a minimum ensure that applicants for important opportunities are not pressured to disclose legally protected information.

CONCLUSION

Mistakes made at a young age, regardless of whether they lead to an arrest, to school discipline, or to both, should not erect permanent barriers to critical opportunities. School disciplinary history can create obstacles in moments where students are trying to set themselves on positive pathways forward, through applications for education and professional licensure. These hurdles can come years after graduation, after students have already navigated the often-harsh official consequences imposed by their school districts.

Developing policy solutions to expunge student records and to prohibit inquiry into school disciplinary history is a critical step to ensuring that students receive a fair chance to move forward. This two-tiered response will serve to reduce how frequently students are asked

461. *See* James A. R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens,* 36 U. MICH. J.L. REFORM 915, 917 (2003) (finding that "[t]he goal of expungement legislation has been to facilitate a convicted person's reentry into society. Specifically, statutes have had one or more of the following purposes: to eliminate discrimination against convicts who have fulfilled their sentence terms and have been deemed rehabilitated, to reduce the potential for continuing public sanction, and to reward rehabilitated convicts").

462. *See* Simon, *supra* note 358, at 121–23.

463. N.H. REV. STAT. ANN. § 651:5(X)(f) (2023).

to disclose school disciplinary records and to create opportunities for students to have their records wiped clean. These solutions are one critical part of a comprehensive set of responses needed to address the austere and discriminatory impact of exclusionary school discipline.

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