

# A CRISIS IN SPECIAL EDUCATION

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## New York City's Failure to Educate Students Classified with "Emotional Disability"

*A Proposal for Systemic Change*

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## Table of Contents

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Executive Summary .....	3
I. Introduction.....	6
II. Students with Disabilities are Entitled to a Free Appropriate Public Education in the Least Restrictive Environment that is Free from Discrimination .....	10
III. Emotional Disturbance / Emotional Disability is Poorly Defined and Often Misunderstood by Parents, Educators, and Mental Health Professionals .....	11
IV. Black and Latino Students are Overrepresented Among Students Classified with Emotional Disability in New York City .....	13
V. The DOE has Failed to Properly Locate, Identify, Evaluate, Assess Eligibility for, Classify, Educate, and Support Students Classified with Emotional Disability .....	16
VI. Students Classified with Emotional Disability are Frequently Segregated and Suffer from Societal Stigmatization, Disproportionate Rates of Academic Failure, Excessive Discipline, and Low Graduation Rates .....	23
VII. The DOE’s Failures to Appropriately Educate Students Classified with Emotional Disability Cause Harm Beyond Primary and Secondary School.....	30
VIII. Conclusion and Recommendations: The DOE and NYSED Must Undertake Remedial Measures to Appropriately Educate Students Classified with Emotional Disability.....	32
Acknowledgments .....	37
Endnotes.....	39

# **A CRISIS IN SPECIAL EDUCATION: NEW YORK CITY'S FAILURE TO EDUCATE STUDENTS CLASSIFIED WITH "EMOTIONAL DISABILITY"**

## **A Proposal for Systematic Change**

### *Executive Summary*

The New York City Department of Education ("DOE") has long failed to address appropriately the specific needs of school-age children with mental health disabilities, who are among the most neglected, underserved, and disadvantaged in New York City ("City" or "NYC"). Although the City has recently published "A Mental Health Plan for NYC" ("Mental Health Plan"), which proposes to combat the City's mental health crisis and alleviate emotional suffering for New Yorkers with urgent needs, including children,<sup>1</sup> there has been no similar response by the DOE. The mental health and educational needs of the approximately 7,000 NYC public school students with a disability classification formerly known as Emotional Disturbance, and more recently as Emotional Disability ("ED"),<sup>2</sup> have been all but ignored.

By a widely disproportionate margin, students classified with ED are students of color from economically disadvantaged backgrounds—nearly 50% are Black, approximately 40% are Latino,<sup>3</sup> and almost 90% are eligible for free or reduced-price school lunch.<sup>4</sup> Students classified with ED have a wide range of mental health issues affecting their educational performance, including an inability to build interpersonal relationships, a generally pervasive mood of unhappiness or depression, and/or a tendency to develop physical symptoms or fears associated with personal or school problems.<sup>5</sup>

Although students with ED have been eligible for special education protections under federal law for nearly 50 years, and under New York law for decades longer, students with an ED classification in NYC have been systematically deprived of equal and meaningful access to appropriate educational opportunities and supports for many years. The problem is now at a crisis level.



As this report demonstrates, year in and year out, the DOE has failed to adopt or implement procedures to appropriately locate, identify, evaluate, assess eligibility for, classify, educate, and deliver necessary services and supports (including mental health supports) to students with ED who are entitled to receive them. In addition, every school day, thousands of dedicated teachers, administrators, service providers, and clinicians across the five boroughs are not being provided the necessary tools and supports from the DOE to support these students. This work is complicated by the fact that the DOE, the New York State Education Department (“NYSED”), and the City have failed to sufficiently track and report critical data necessary to comprehend the full breadth of their failures to support students with ED and to formulate evidence-based improvements and remedies. These failures have caused many students with ED to be segregated in overly restrictive settings, deprived of a reasonable opportunity to make meaningful educational progress, inappropriately disciplined, isolated from their general education peers, and subjected to societal stigmatization.

This report has three objectives: (a) to illustrate the breadth and depth of the systemic failures of the DOE and the City (together with NYSED) to properly locate, identify, evaluate, assess eligibility for, classify, educate, and support students with ED; (b) to highlight the adverse impact of these failures on this particularly vulnerable population of students; and (c) to propose a general framework for remedial action aimed at realigning the DOE’s policies and practices to better meet the needs of students classified with ED and give teachers, service providers, and other school personnel the tools they need to appropriately support students with ED and other mental health challenges.

## Recommendations

As detailed in this report, we recommend the following remedial measures to bring about meaningful changes to a system that has long failed students classified with ED, especially economically disadvantaged students of color:

1. Reformulate the DOE's and NYSED's data-collection, record-keeping, and data-publishing practices with respect to students with ED classifications in order to afford transparency to the public and enable education policymakers to create effective evidence-based solutions that meaningfully support students with ED, their families, their teachers, and related service providers;
2. Provide higher quality support to teachers and staff and perform a comprehensive reassessment of the extent to which the DOE and school personnel who are tasked with supporting students classified with ED—e.g., Individualized Education Program (“IEP”) team members, teachers, service providers, and school administrators—possess the resources needed to create and implement effective educational programs for this population of students;
3. Develop practical, evidence-based procedures and protocols that better equip teachers, service providers, and other school personnel who support students with ED to properly and efficiently identify, evaluate, assess eligibility for, classify, educate, and otherwise support this vulnerable student population;
4. Reevaluate students presently classified with ED, utilizing improved evidence-based procedures and protocols, to determine the appropriateness of the students' IEPs, including their disability classifications, programs, placements, and supplementary supports, and to modify the IEPs as appropriate; and
5. Establish a multi-stakeholder advisory group, including DOE and NYSED officials, mental health and education policy experts, and other stakeholders (including parents,<sup>6</sup> students, and teachers), to develop and implement practical changes in how the DOE and the City educate and serve students classified with ED.



## I. Introduction

The DOE is the nation’s largest school system, serving approximately 900,000 students in more than 1,500 schools. That population includes, each year, over 7,000 students who have been assigned a disability classification traditionally known as “Emotional Disturbance,” and more recently referred to as “Emotional Disability.” Publicly available data spanning decades reveal that many students with an ED classification are placed in inappropriately restrictive settings and denied equal and meaningful access to educational opportunities and supports (including behavioral interventions and mental health services) to which they are entitled by law. Research also reveals that, despite publicly available evidence of the DOE’s systemic failure to properly locate, identify, classify, evaluate, assess eligibility for, classify, and support students assigned an ED classification, the DOE and NYC as a whole have failed to take the steps necessary to understand the extent of these failures, to explore potential solutions, and to modify their practices.

The profile of a typical student classified with ED is, in certain respects, amorphous. ED encompasses students with diverse mental health concerns who, over a prolonged period of time and to a degree affecting educational performance, exhibit one or more of the following: an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings; a generally pervasive mood of unhappiness or depression; and/or a tendency to develop physical symptoms or fears associated with personal or school problems.<sup>7</sup> Especially in light of the lack of sufficient objective evaluative criteria, as discussed in this report, these broad criteria can easily be, and often are, misapplied or inconsistently applied.

Demographically, by contrast, the population of students classified with ED conforms to a predictable profile. Black students account for approximately 50% of students classified with ED by the DOE, even though they make up only a quarter of the public school student population.<sup>8</sup> Similarly, 75% of all students classified with ED are male, despite only 51% of students citywide identifying as male.<sup>9</sup> And nearly 90% of students classified with ED are from underserved backgrounds, based on their eligibility for free or reduced-price school lunch.<sup>10</sup> By a wide margin, the largest group of NYC public school students who are classified with ED are Black males from poor backgrounds.<sup>11</sup> Students identified by NYSED and the DOE as “Latino” account for almost 40% of all students classified with ED in NYC.<sup>12</sup> Although this percentage generally tracks the percentage of Latino public school



students citywide, students who are categorized as Latino by the DOE and NYSED, and who come from high-poverty neighborhoods or low-income backgrounds, are also overrepresented among students classified with ED compared to their white classmates.<sup>13</sup>

Certain challenges faced by students classified with ED in NYC are shared by students with other disabilities. The DOE, for example, has long experienced a shortage of special education teachers and mental health professionals, resulting in fewer fully staffed special education classrooms and a system-wide inability to provide essential “related services”<sup>14</sup> to all students who need them.<sup>15</sup> In fact, the DOE has admitted that “approximately one in five students who could benefit from additional mental-health supports does not get them.”<sup>16</sup>

The COVID-19 pandemic exacerbated preexisting difficulties, especially for students with mental health concerns. As the NYS Comptroller reported in an August 2022 audit (“NYS Comptroller’s Report”) highlighting the DOE’s broad failure to provide necessary mental health supports to students between July 2018 through March 2022, students during the pandemic were “suddenly faced with disruption; long periods of isolation from friends; remote learning; income, food, or housing insecurity; and matters of life and death.”<sup>17</sup> These challenges disproportionately impacted those who were most “vulnerable to begin with,” including students with disabilities from economically depressed backgrounds.<sup>18</sup> The City has acknowledged that, “for youth of color,” the challenges are compounded by having to navigate “experiences of interpersonal and structural racism.”<sup>19</sup>

The findings of the NYS Comptroller's Report are grim, and even more so when the DOE's failures are viewed in the context of the most severely impacted students.<sup>20</sup> The NYS Comptroller's Report emphasized that "rates of childhood mental health concerns, including self-harm and suicide, have been increasing steadily since 2010, and the most current statistics are alarming."<sup>21</sup> Among New York State's approximately 808,150 high school students in 2017, 17.4% (140,618) seriously considered suicide and 10.1% (81,623) made non-fatal suicide attempts.<sup>22</sup> As NYC also recently reported, in 2021, 20% of children aged 3 to 13 had one or more mental, emotional, developmental, or behavioral problems, and 38% of NYC high schoolers reported feeling so sad or hopeless almost daily for at least two weeks during the prior year that they stopped doing their usual activities.<sup>23</sup> Black (41%) and Latino (42%) students were far more likely than white (20.9%) students to report feeling sad or hopeless, and 9.2% of public high school students in NYC reported attempting suicide over the past 12 months.<sup>24</sup>

While the DOE recognizes that "[m]ental health impacts all of us," and that "[e]nhanced school mental health programs improve schools' abilities to provide access and support during the school day," the NYS Comptroller's Report concluded that, over the prior four years, the DOE failed to provide the mental health supports students require (and to which they are entitled) in key ways:

- The DOE "does not proactively ensure schools' compliance with the [New York State] Education Law in providing mental health instruction";
- The DOE "does not require training for its school staff to identify and address mental health needs of its students";
- DOE schools "do not have the recommended number of mental health professionals to address their students' mental health-related needs"; and
- The DOE "does not have a dedicated centralized data system for collecting and analyzing mental health data, either for individual students or in the aggregate, which would enable it to assess program appropriateness and success and identify emerging issues."<sup>25</sup>

While the NYS Comptroller's Report does not focus on students with disabilities who receive additional supports through their IEPs, inadequacies in the DOE's basic mental-health-support infrastructure for all students undoubtedly compromises the City's ability to support students with the most acute mental health needs.



The City’s recently published Mental Health Plan acknowledges these problems and has highlighted the need for “critical infrastructure improvements.”<sup>26</sup> The Mental Health Plan admits that “services capacity” for child and youth mental health supports “is not keeping up with demand” and that the “system is fragmented and can be challenging for children, youth and families to navigate.”<sup>27</sup> The City has recognized that “[d]ecades of underinvestment in the systems serving children and youth, especially in communities of color, as well as the fact that the systems are segregated, isolated and not culturally responsive, have resulted in a mental health crisis impacting young people of all ages, backgrounds and abilities, and disproportionately affecting young people of color.”<sup>28</sup>



Through the authors’ decades of experience representing students with disabilities and working with coalitions of disability-rights advocates, the authors of this report have identified and documented a crisis in the way students classified with ED are treated, both by the DOE and at the state and national levels.

This report explores the scope of the DOE’s and the City’s (together with NYSED’s) systemic failures to educate and support students classified with ED, highlights the devastating impact of these failures on this vulnerable population, and proposes a framework for remedial action aimed at realigning the DOE’s policies, procedures, and practices to better meet the needs of students classified with ED and to better support teachers, service providers, and school personnel tasked with serving this vulnerable population. In addressing these issues, it is critical that elected officials, policymakers, educators, mental health professionals, and importantly, parents and students affected by mental health concerns, work together to develop and enforce meaningful changes to a failing and harmful system.

## **II. Students with Disabilities are Entitled to a Free Appropriate Public Education in the Least Restrictive Environment that is Free from Discrimination**

All public school students in NYC, whether or not they have disabilities, enjoy the right to a free public education and equal educational opportunity. The New York State Constitution guarantees every child a “sound basic education,” including the skills necessary for productive civic engagement.<sup>29</sup> While there is not a currently recognized federal constitutional right to equal education,<sup>30</sup> the Fourteenth Amendment to the U.S. Constitution guarantees all students the right to equal protection and fundamentally fair procedures with respect to the delivery of public education.<sup>31</sup>

Students with disabilities enjoy additional protections under both federal and state laws. The Individuals with Disabilities Education Act<sup>32</sup> (“the IDEA”) — the main federal law governing and funding special education nationally — mandates that eligible students with disabilities across the United States receive Free Appropriate Public Education (“FAPE”) and related special education services designed to meet their unique needs and prepare them for further education, employment, and independent living.<sup>33</sup> The IDEA entitles each student with a disability to a tailored educational plan, known as an IEP, and imposes on states and local school districts the obligation to ensure that students with disabilities within their jurisdictions receive a FAPE in the Least Restrictive Environment (“LRE”).<sup>34</sup>

In enacting and reauthorizing the IDEA, Congress highlighted that:

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.<sup>35</sup>

Students with disabilities also enjoy a range of additional rights—and New York State, NYC, and the DOE are subject to a range of additional obligations to those students—under the Americans with Disabilities Act (“the ADA”),<sup>36</sup> Section 504 of the Rehabilitation Act (“Section 504”),<sup>37</sup> New York State’s Human Rights Law,<sup>38</sup> and New York City’s Human Rights Law.<sup>39</sup>

### **III. Emotional Disturbance / Emotional Disability is Poorly Defined and Often Misunderstood by Parents, Educators, and Mental Health Professionals**

While recognized as a distinct classification under federal, state, and municipal law, Emotional Disturbance/Disability has been defined amorphously for nearly fifty years. Initially, mental health concerns were not even treated as a qualifying disability giving rise to special education rights under either the Elementary and Secondary Education Act of 1965 or the Education of the Handicapped Act of 1970, the first federal laws affording special education rights to students with disabilities. Students classified with ED were not deemed eligible for special education protections until the enactment of the Education for All Handicapped Children Act in 1975.

Between 1975 and the present, there has been little change in, let alone clarification of, the definition of ED, and there has been insufficient improvement in the means and methods for identifying and educating students classified with ED. Evidence of the failure to adequately define the ED classification can be found in the DOE's current description of ED, which refers to broadly defined symptoms derived from the then-current version of the Diagnostic and Statistical Manual of Mental Disorders ("DSM"). Notably, although the DSM has been revised many times since 1975, the federal and state special education definitions have not been updated. Moreover, the DSM has been subject to significant criticism and is primarily used for billing and to promote uniformity in research.<sup>40</sup> Additionally, the DSM largely does not correlate to particular mental health diagnoses. Accordingly, a wide range of general behaviors and characteristics—including, among many others, hyperactivity, aggression, impulsivity, and general immaturity—may give rise to an ED classification in NYC.<sup>41</sup>

Currently, New York State special education law, consistent with the IDEA, defines ED as a condition exhibiting one or more of the following characteristics: (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors, (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, (c) inappropriate types of behavior or feelings under normal circumstances, (d) a generally pervasive mood of unhappiness or depression, or (e) a tendency to develop physical symptoms or fears associated with personal or school problems.<sup>42</sup> To qualify as having ED, these characteristics must persist "over a long period of time and to a marked degree that adversely affects the child's educational



performance.”<sup>43</sup> To make this determination, IEP teams—multi-disciplinary teams of professionals, known in NYC as Committee on Special Education (“CSE”) teams—are not given clear guidance or protocols. Instead, they are directed to review “a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations.”<sup>44</sup>

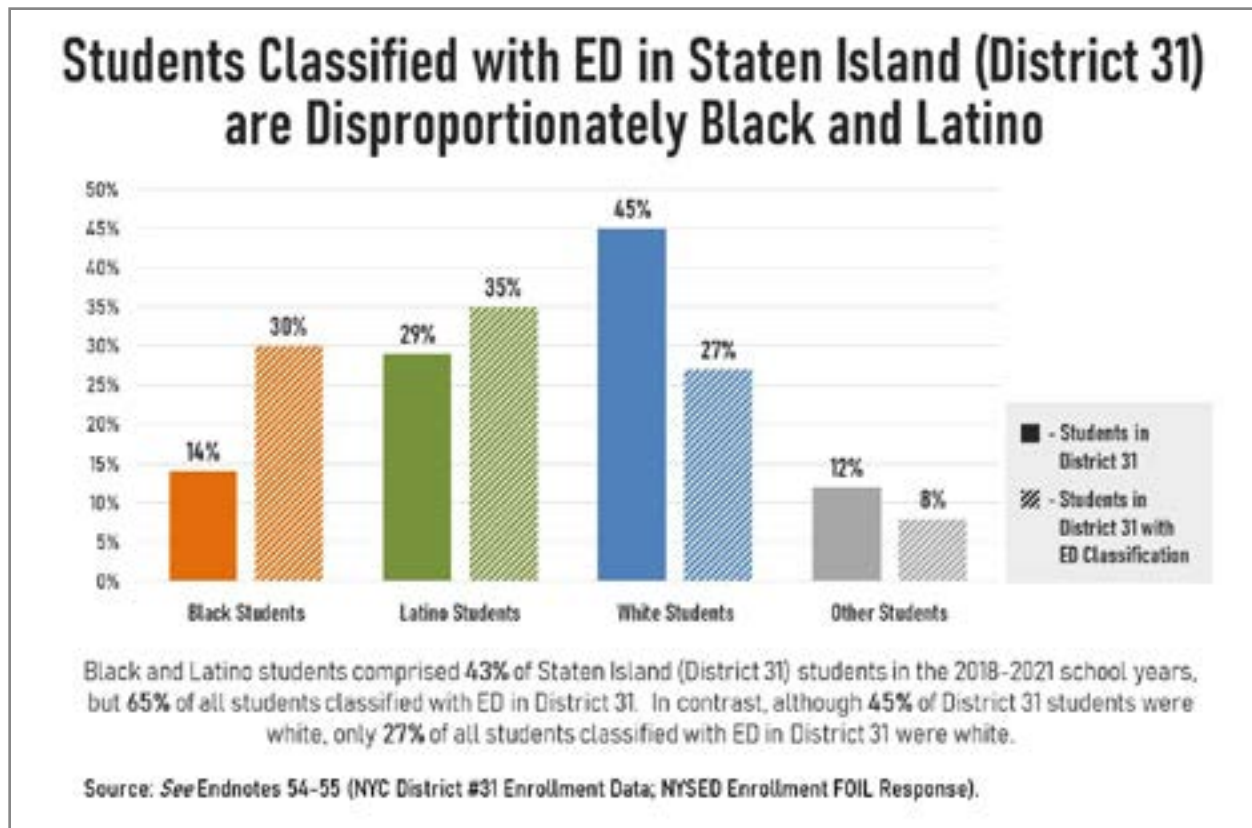
The report authors served Freedom of Information Law (“FOIL”) requests on NYSED for (i) evaluation metrics, criteria, and protocols for determining whether a student in New York State should be classified as having “Emotional Disturbance” on their IEP; and (ii) all materials distributed, presented, or prepared for presentation to any school district in New York State or to personnel of any school district in New York State, including, members of IEP teams, for the purpose of training such personnel to determine whether a student should be given a disability classification of “Emotional Disturbance” on their IEP. In response, NYSED produced only one document from the 2019 Committee on Special Education Chairpersons Training.<sup>45</sup> This document, entitled, “Committee on Preschool Special Education and Committee on Special Education (CPSE/CSE) Eligibility Determination Process & Procedures Section 200.4(c)” contained a single slide that listed the term “emotional disturbance” once.<sup>46</sup> Given the range of behaviors and characteristics that fall within the definition of ED, and the DOE’s failure to create clear guidance or standardized protocols concerning these critical determinations,<sup>47</sup> it is virtually impossible to arrive at a practically applicable or consistent meaning of ED.

#### **IV. Black and Latino Students are Overrepresented Among Students Classified with Emotional Disability in New York City**

Each school year in NYC, a disproportionate percentage of students who receive an ED classification from the DOE are Black and Latino students, predominantly those who identify as male and come from economically disadvantaged backgrounds. According to the DOE's published data, during the 2018-2022 school years, nearly 73% of all public school children received free or reduced-priced school lunch, while 90% (6,434) of students classified with ED were eligible for the free/reduced price lunch program.<sup>48</sup> In addition, approximately 75% (5,339) of all NYC public school students classified with ED identified as male, although only 51% of the total NYC public school population identified as male. Black students, despite making up only 25% of NYC public school students, accounted for almost 50% (3,386) of students classified with ED.<sup>49</sup> Similarly, Latino students accounted for nearly 40% (2,818) of students classified with ED.<sup>50</sup> Conversely, white students, despite making up 15% of NYC public school students, accounted for less than 9% (620) of students classified with ED.<sup>51</sup> More specifically, of the 7,211 students classified with ED in NYC's public schools during the 2021-2022 school year, over 4.5 times the number of Latino students and more than five times the number of Black students had ED classifications compared with white students.<sup>52</sup>

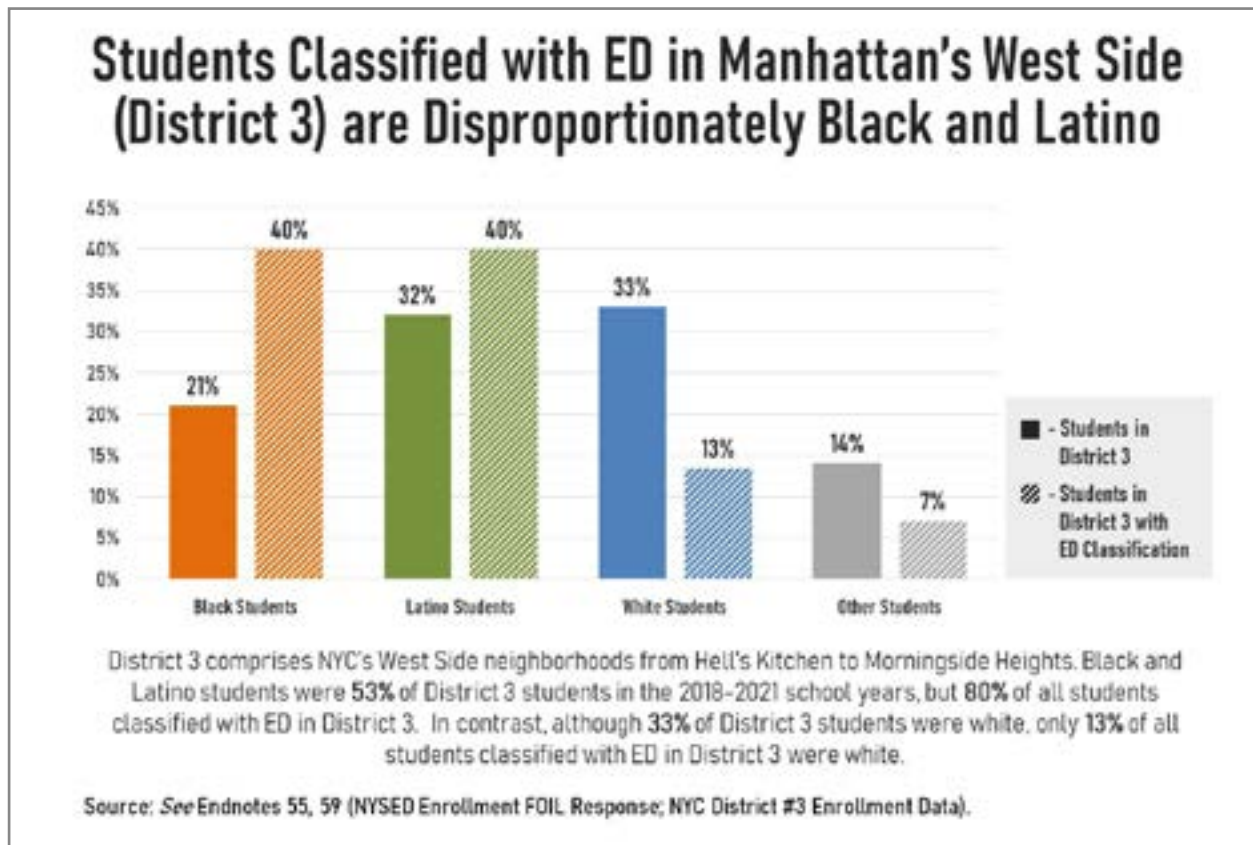
To place the comparative racial makeup of students classified with ED in further context, we have analyzed data from selected districts in which a larger percentage of the student population is white: Staten Island (District 31) and Manhattan (District 3).<sup>53</sup> Staten Island (District 31), where nearly 60% of students were reported to be economically disadvantaged,<sup>54</sup> is illustrative, as shown below. During the 2018-2021 school years, Staten Island had the highest rates of students classified with ED in NYC.<sup>55</sup> While white students accounted for nearly 45% of Staten Island's students, fewer than 27% of students with ED classifications were white.<sup>56</sup> By contrast, while Latino students accounted for only approximately 29% of Staten Island's students, over 35% of Staten Island students with ED classifications were Latino.<sup>57</sup> Moreover, while Black students accounted for fewer than 14% of Staten Island's students, over 30% of the district's students with ED classifications were Black. Moreover, students who identified as male accounted for approximately 73% of the district's students classified with ED, despite comprising only 51% of the district's students.<sup>58</sup>





This disparity is likewise apparent in Manhattan (District 3), where during the 2018-2019 through 2020-2021 school years, nearly 50% of its students were economically disadvantaged.<sup>59</sup> During the 2018-2019 school year, white students comprised 33% of the district's population and Latino students 32%.<sup>60</sup> White students, however, accounted for only 13.4% of the district's ED classifications, while Latino students accounted for over 40%.<sup>61</sup>

Moreover, Black students, despite making up only 21% of the district's population during this time, accounted for over 40% of the district's ED classifications.<sup>62</sup> During the 2019-2020 school year, the percentage of Black students in District 3 dropped to 19%, the percentage of Latino students remained the same, and the percentage of white students increased to 33%.<sup>63</sup> Yet, although Black and Latino students with ED classifications again accounted for 40% and 39%, respectively, of the district's ED population, the percentage of the district's ED population that was white dropped to 11%.<sup>64</sup> This percentage dropped again during the 2020-2021 school year to 6.5%, while the percentage of Black and Latino students with ED classifications rose to approximately 45%.<sup>65</sup> During the 2020-2021 school year, despite comprising fewer than half the number of white students in the district, Black students accounted for nearly seven times the number of students with ED classifications compared with white students.<sup>66</sup>



Nevertheless, in the State Performance Plan (“SPP”) for the 2018-2019 through the 2020-2021 school years, the NYSED Chancellor’s Office denied that there is “disproportionate representation in specific disability categories” and specifically represented that “no school districts will have disproportionality that is the result of inappropriate policies, practices and procedures.”<sup>67</sup>

Not surprisingly, the ED classification trends of Black students reported in NYC mirror the ED classification trends reported statewide and nationally. According to enrollment data published by NYSED, while white students accounted for over 40% of all New York State public school students in the 2018-2019, 2019-2020 and 2020-2021 school years, only approximately 25% of all students with an ED classification in New York State were white.<sup>68</sup> Yet, while Black students comprised only over 16% of all New York State public school students over this time, Black students with ED accounted for nearly 40% of all students with an ED classification in New York State.<sup>69</sup> Nationwide studies have likewise found that Black students disproportionately receive an ED classification.<sup>70</sup>

## **V. The DOE has Failed to Properly Locate, Identify, Evaluate, Assess Eligibility for, Classify, Educate, and Support Students Classified with Emotional Disability**

### **A. The DOE Lacks Sufficient Evidence-Based Procedures, Policies, and Resources for Locating, Identifying, Assessing Eligibility for, and Classifying Students with Emotional Disability**

The DOE does not have sufficient procedures, protocols, policies, or resources for the appropriate identification and classification of students with ED. To the extent policies and procedures exist, they fail to set forth reasonably clear and explicit evidence-based standards that provide students with ED classifications, their parents, and DOE personnel (including teachers, members of IEP teams, and other school employees) with fair notice as to how they will be applied.

The DOE's responses to the authors' FOIL demands reveal that the DOE relies on general statements in the DOE's Special Education Standard Operating Procedures Manual (the "SOPM") for the standards (to the extent they exist) to classify, place, and deliver special education and related services to students classified with ED. The SOPM's definition of ED parrots the definition under the IDEA, and fails to provide teachers and other school personnel with an administrable objective standard and protocol by which to locate, identify, determine eligibility for, and classify students with ED.

IEP teams in NYC are given little further guidance with respect to the identification and classification of students with ED. School personnel are directed to "complete and sign the Emotional Disturbance Justification Form."<sup>71</sup> But that form, a short and generalized questionnaire, does not provide sufficient non-arbitrary criteria for the classification of students with ED, offering IEP teams little direction—let alone specific and actionable protocols—for accurately locating and identifying students classified with ED. Unsurprisingly, based on the authors' experience and observation, the Emotional Disability Justification Form is inconsistently utilized by IEP teams and is often not disclosed to the parents of students who receive an ED classification.

The consequence of not having sufficient, administrable, evidence-based procedures for locating, identifying, assessing eligibility for, and classifying students with ED is not only an increased risk of misidentification and misclassification, but also parents being left in the dark as to how and why their children received an ED classification, what it means for the education of their children, and what supports their children are eligible to receive.



The DOE similarly lacks a sufficient protocol for evaluating and developing IEPs for students who are classified with ED in a way that is likely to produce consistent objective results. And there is insufficient guidance for IEP teams relating to the range of educational placements, educational programs, and educational resources specific to students classified with ED to ensure that these students are placed in settings that are inclusive and capable of meeting their educational and behavioral needs. The only written resource the DOE provides to IEP teams and school personnel for student evaluations, development of IEPs, and decisions on placements for those students appears to be the SOPM. But while the SOPM generally notes that students with “severe” emotional disabilities may be served through highly restrictive “State-Supported Schools,” “State-Operated Schools,” “Day Treatment Programs,” and “home instruction,”<sup>72</sup> it does not specify criteria by which students classified with ED—severe or otherwise—are to be evaluated, assigned goals, special education programs, or related services, or placed in appropriate schools and programs.

Accordingly, evaluators across the City (to the extent they are available) who perform the evaluations and assessments of students on which IEP teams are supposed to rely in making ED classification determinations produce such evaluations and assessments based on their experience and judgment, but without a uniform set of objective, evidence-based protocols. In the authors’ experience, this has resulted in inconsistency in how evaluations are performed, how IEPs are developed, and how placements are determined for these students.



The absence of evidence-based policies for DOE personnel is paired with significant staffing deficiencies. The NYS Comptroller recently reported on the DOE’s “professional staffing shortages” and highlighted that “most of the schools” in NYC “fall below the recommended [mental health] professional staff-to-student ratio.”<sup>73</sup> The DOE itself, in its most recent report to the New York City Council, acknowledged its “shortage of special education teachers,” “continued staffing issues,” and the “special education teacher gap across the system.”<sup>74</sup>



The parents of the students classified with ED are, in many cases, left unequipped to help remedy the DOE’s failures, as the DOE also does not publish (or otherwise provide in accessible format) critical information, and then frequently fails to keep parents apprised of how their children’s IEPs are to be implemented. To illustrate, Ms. N.<sup>75</sup>, the mother of several children with disabilities who attended District 75 schools<sup>76</sup> in NYC (including one child classified with ED), reported that: “We parents were not made aware how our children were being educated. We had to rely on our children to tell us what was happening.” This is a parental complaint that special education advocates, especially those who support children classified with ED, hear routinely from families.

#### B. The DOE and NYSED have Failed to Gather and Publish Relevant Data

The limited data that the DOE and NYSED have tracked and published regarding students classified with ED confirm that serious problems exist, including disproportionately low graduation rates (approximately 25% of such students graduate and only 10-15% receive local diplomas), disproportionately high rates of severe discipline at school, disproportionately high rates of school absenteeism, disproportionately high dropout rates, and disproportionately high rates of involvement in the juvenile justice system.<sup>77</sup> Studies also confirm that the prevalence of ED as a primary disability is eight times higher among students in detention and correctional facilities than it is for the general school-age population.<sup>78</sup> But these data only scratch the surface of the data required to understand the extent of, and build evidence-based remedies for, the deficiencies observed in the education of students classified with ED.





It is axiomatic that “what gets measured, gets managed.”<sup>79</sup> The U.S. Surgeon General has highlighted the value of data collection to identify and respond to the needs of youth, including their mental health needs.<sup>80</sup> The extent of the DOE’s successes and failures in the education of students classified with ED—or any other qualifying disability—simply cannot be measured sufficiently using currently tracked data, and problems cannot be fully identified or rectified without accurate and comprehensive data. As the NYS Comptroller’s Report recently emphasized, proper data collection by the DOE regarding the mental health of students in NYC “would enable the DOE to manage, monitor, and evaluate services or programs and identify emerging trends, which could result in more effective, data-driven decision making.”<sup>81</sup>

However, the DOE and NYSED’s failure to collect and make accessible data on vital issues relating to students classified with ED and other mental health concerns is well established. These data and recordkeeping failures are tripartite: a failure to track certain essential data; a failure to disaggregate and publish certain essential data; and a failure to publish data in a form that is practicably usable for parents, schools, service providers, policymakers, and other advocates. According to the NYS Comptroller’s Report, the DOE “does not have a dedicated system for collecting and analyzing mental health data either for the individual student or in the aggregate.”<sup>82</sup>

The City has acknowledged that “collecting better, more equitable data” would enable it to identify gaps in existing and developing supports and identify current challenges facing youth and families.<sup>83</sup> Yet neither the DOE, nor NYSED have taken sufficient steps to improve their data collection.<sup>84</sup> For example, in 2021, in response to the authors’ FOIL request for data on students with ED classifications who have been subjected to formal disciplinary action and the percentage of such students compared to the percentage of all



students who have been subject to formal disciplinary action, disaggregated by school and by students’ age, gender, race, and LEP status, NYSED explained that it only collects such disciplinary data by disability type and not by age, gender, or race, and that “[t]he Emotional Disturbance [disciplinary data] can be compared with other special education classifications, but it can’t be compared with all students.”<sup>85</sup> NYSED further certified that its Information and Reporting Services neither maintain nor possess “[d]ata indicating how many students with an IEP classification of ‘Emotional Disturbance’ have been subject to ‘formal disciplinary action’ broken down by New York City geographical district” or “at the student level.”<sup>86</sup> These failures to disaggregate special education data mask the disproportionate impact of the City’s and State’s policies affecting the City’s most vulnerable populations, and make it difficult, if not impossible, to develop evidence-based remedies for the full constellation of deficiencies in the education and support of students with ED classifications in NYC districts (and statewide).

The DOE and NYSED’s failures to collect and make available data on vital issues relating to students classified with ED is also a dereliction of the State’s duty to track and report disproportionate discipline data, including data regarding disciplinary removals, under the IDEA and Section 296(4) of New York’s Executive Law. In order to receive funding under the IDEA, states must prepare an SPP every six years and an APR every year.<sup>87</sup> On August 29, 2019, the NYS Office of the Attorney General (“OAG”), NYSED,



and the NYS Board of Regents (“Board of Regents”) wrote a joint letter to the DOE to “clarify the obligations of every school district in New York in administering their school discipline policies.”<sup>88</sup> The letter explained that the IDEA “separately requires New York State to proactively identify school districts that disproportionately discipline students of color with disabilities,” citing 20 U.S.C. § 1418 and 34 C.F.R. § 300.646. The data collected by the DOE, especially relating to classification, placement, discipline, and outcomes, are partly scattered over various sites, and are not disaggregated by age, race, disability classification, or socioeconomic data (e.g., free and reduced-price school lunch eligibility). To the extent tracked and published, the DOE data obscure the information necessary for a parent, policymaker, advocate, or other member of the public to see and sufficiently understand what is happening to students classified with ED within the NYC school system.

In addition, the failure to track services provided to students classified with ED, such as counseling, behavioral analysis, and behavioral intervention plans, makes it difficult, if not impossible, to determine whether, or the extent to which, the stigma imposed by the ED classification (discussed *infra* Section VI) is mitigated by the provision of specialized services that enable such students to be reintegrated into general education settings. For example, according to the NYS Comptroller’s Report, the DOE’s website highlights six mental health programs.<sup>89</sup> But only 37% of schools have even one of these programs.<sup>90</sup> The DOE claimed that other “supports/programs” were available to the remaining schools, but was unable to readily provide a listing of any other supports/programs.<sup>91</sup>



These failings in data collection and transparency are confirmed by the DOE's responses to FOIL requests revealing that the DOE does not even possess, let alone publish, a range of other data reflecting, among other things, (i) the number or percentage of students classified with ED who receive behavioral intervention plans and certain other services, or (ii) the programs, including special education or alternative DOE programs,<sup>92</sup> that offer services or resources specially tailored to students with an ED classification.<sup>93</sup> The DOE's responses to the FOIL requests further confirm that even the minimal data which the DOE collects are not easily accessible by the public.

The consequences of the DOE's failure to track and publish relevant and current data regarding emotional disability are clear. Such data is essential to identify whether school districts are meeting their obligations, where there are systemic failures, when students are falling off-track, which students may be receiving unequal treatment, and which education strategies and interventions work and do not work. They are equally key to rectifying the issues identified.<sup>94</sup> It is obvious that "[t]horough data collection is an essential way of showing whether a student is or is not making progress . . . ."<sup>95</sup>

Put simply, parents and other advocates should not be required to make FOIL demands<sup>96</sup> or pursue litigation to obtain important data about how the DOE educates and supports students classified with ED and other disabilities. That data should be comprehensive, accurate, and published by the DOE transparently and in a form that enables parents, other advocates, teachers, and the rest of the public to ensure that the DOE is meeting its obligations and that the students the DOE serves are receiving the education to which they are entitled.



## **VI. Students Classified with Emotional Disability are Frequently Segregated and Suffer from Societal Stigmatization, Disproportionate Rates of Academic Failure, Excessive Discipline, and Low Graduation Rates**

Another pernicious aspect of NYC public schools' lack of administrable protocols for educating students classified with ED is segregation. Students classified with ED—overwhelmingly Black and Latino males—are often segregated in restrictive classroom settings or restrictive schools, with students who are lower functioning intellectually and academically.<sup>97</sup> Students classified with ED, especially Black students and students from low-income neighborhoods, are “predominantly recommended for self-contained classrooms,”<sup>98</sup> and have “disproportionately high rates of suspensions and chronic absenteeism.”<sup>99</sup>

The practice of segregating students classified with ED in highly restrictive settings is a nationwide phenomenon. For example, in the 2016-2017 school year, fewer than half of students classified with ED nationwide spent most of the day in a general education classroom. And, while approximately 3% of students with disabilities generally were educated in separate schools, approximately 13% of students classified with ED were educated in separate schools.<sup>100</sup>

In NYC, the DOE's practice of segregating students classified with ED is even more prevalent. Indeed, each school year, nearly half of all students classified with ED in NYC are placed in 12:1:<sup>101</sup> or 8:1:<sup>102</sup> segregated, “self-contained” classrooms. Further, nearly half of all students classified with ED are placed in segregated, non-neighborhood schools, including District 75 schools, District 79 schools,<sup>103</sup> out-of-district schools, and residential facilities. In fact, approximately 37% of all NYC public school students classified with ED are placed in highly restrictive District 75 schools, which exclusively serve students with disabilities (and do not have any general education students).<sup>104</sup> Students classified with ED are more likely to be served in District 75, compared with those classified with other types of disabilities.<sup>105</sup>

Based on the authors' observations and experience, once siloed in these restrictive placements—especially since student reevaluations in NYC generally must be completed only every three years—students classified with ED are often kept in segregated and restrictive settings for years.<sup>106</sup>





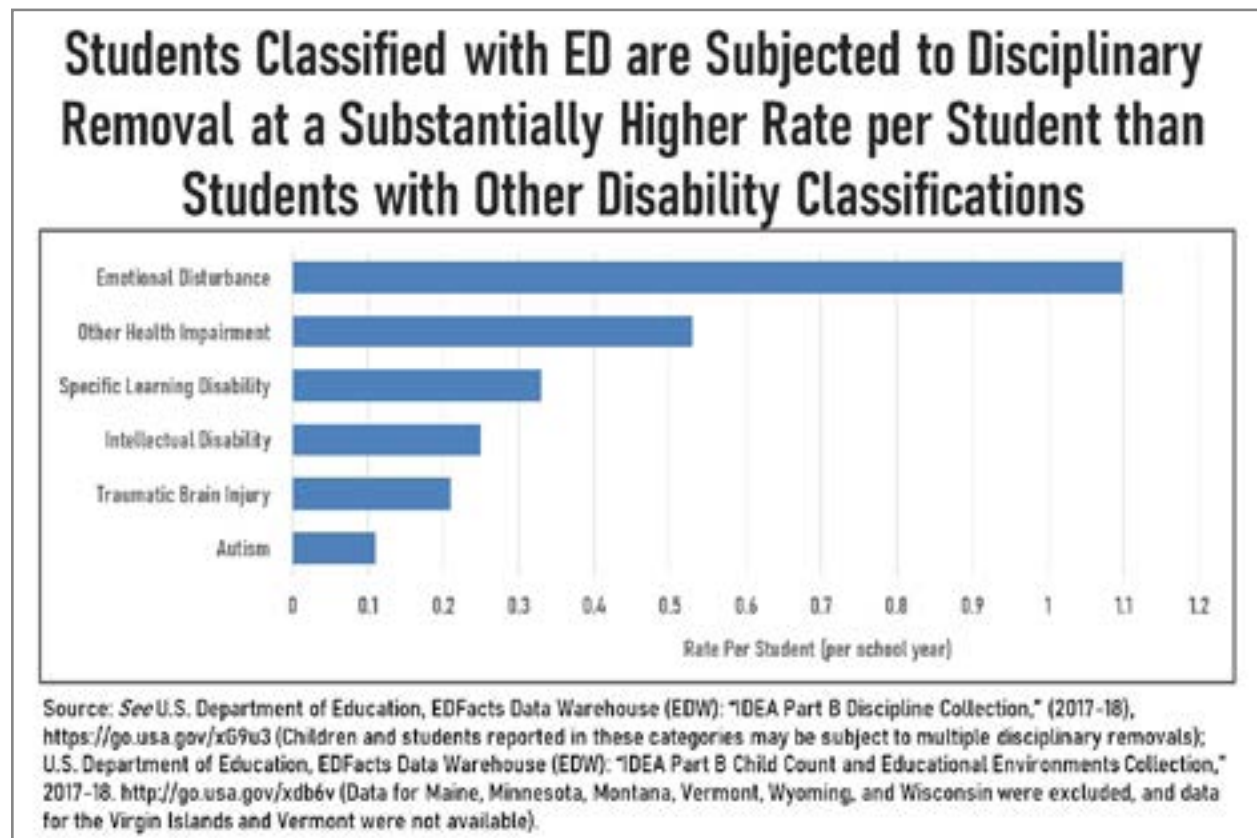
The ubiquitous societal stigma associated with an ED classification is also well established.<sup>107</sup> NYSED has acknowledged the stigma that surrounds mental health.<sup>108</sup> However, students classified with ED are, to a disproportionate extent, (a) misperceived across society as being prone to violent and disruptive behaviors and as having compromised cognitive function; (b) excluded from access to educational resources (including inclusion opportunities) as a consequence of such perceptions; (c) subjected to draconian and inappropriate disciplinary measures (including law enforcement intervention); and (d) deemed ineligible for enrollment in charter schools and non-public schools.<sup>109</sup>

By virtue of the societal stigma associated with their ED classifications, students classified with ED experience significant social challenges, including bullying, rejection, isolation, and self-harm.<sup>110</sup> These students internalize the stigma they experience in education and social settings, and are often inundated by feelings of shame, inadequacy, and deficiency.<sup>111</sup> For example, students with an ED classification are more likely than peers with other disabilities to report feeling feared, avoided, unwelcome, and disliked in school, an environment in which all students should feel safe, welcome, and nurtured.<sup>112</sup> The damaging effects of an ED classification have led some special education experts to conclude that the ED label is “perceived far too negatively” to be “an effective category of services for children with serious mental health issues.”<sup>113</sup> In fact, in March 2020, NYSED announced it was exploring “alternative approaches” to an ED classification due to the “negative connotation and stigma” associated with that label,<sup>114</sup> recognizing that the term “disturbance” is “particularly problematic,” because, while “it can be very disabling to have [an emotional disorder] . . . it’s not disturbing.”<sup>115</sup> NYSED thereafter took steps to change the label “emotional disturbance” to

“emotional disability.”<sup>116</sup> But while such a change is welcome, there are no data suggesting that such re-branding will meaningfully alleviate the stigma associated with the ED classification, or otherwise improve the DOE’s education of students classified with ED.

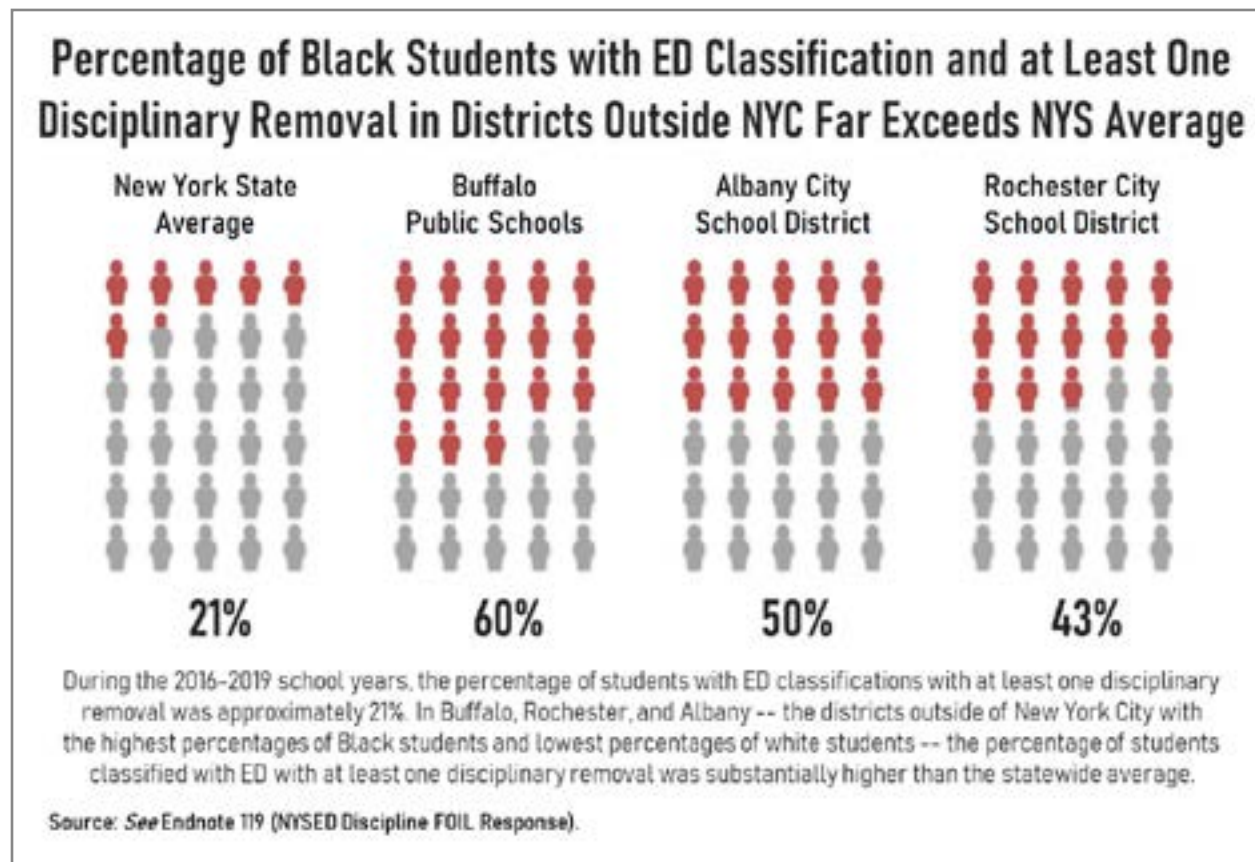
The above-discussed amorphous definition of ED under federal, state, and local law—which encompasses a wide range of broadly defined characteristics—further contributes to the misunderstanding and fear of classified students.<sup>117</sup>

Students classified with ED also face disproportionately high disciplinary rates and inappropriate types of discipline.<sup>118</sup> During the 2016-2019 school years, for example, approximately 7% of all students with disabilities had at least one disciplinary removal per school year,<sup>119</sup> while more than three times as many (22%) students with ED classifications had at least one disciplinary removal.<sup>120</sup> As another example, in the 2015-2016 school year, “12 percent of [DOE] students classified with emotional disturbance were suspended at least once during the year, compared with 5 percent of students with learning disabilities and other health impairments, and less than 2 percent of students with other disability classifications.”<sup>121</sup> These disparities are consistent with disciplinary rates for students classified with emotional disability nationally:<sup>122</sup>



Moreover, the DOE often fails to adhere to the procedural requirements governing the discipline of students classified with ED: (i) correction of student behavior through interventions and supports,<sup>123</sup> (ii) adherence to procedural due process requirements for teacher removals, principal suspensions, and superintendent suspensions,<sup>124</sup> (iii) properly conducted Manifestation Determination Reviews (“MDRs”),<sup>125</sup> (iv) adherence to procedural due process requirements following an MDR,<sup>126</sup> and (v) appropriate development of Suspension Plans.<sup>127</sup>

At the state level, 21% of students with ED classifications had at least one disciplinary removal for the school year during the 2016-2019 school years.<sup>128</sup> Buffalo, Rochester, and Albany—the districts outside of NYC with the highest percentages of Black students and the lowest percentages of white students—had the highest rates of students with ED classifications with at least one disciplinary removal.<sup>129</sup> Over this 2016-2019 period, nearly 60% of students with ED classifications in Buffalo, 50% of students with ED classifications in Albany, and 43% of students with ED classifications in Rochester had at least one disciplinary removal for the school year—more than double and, in Buffalo’s case, nearly triple the statewide rate.<sup>130</sup>





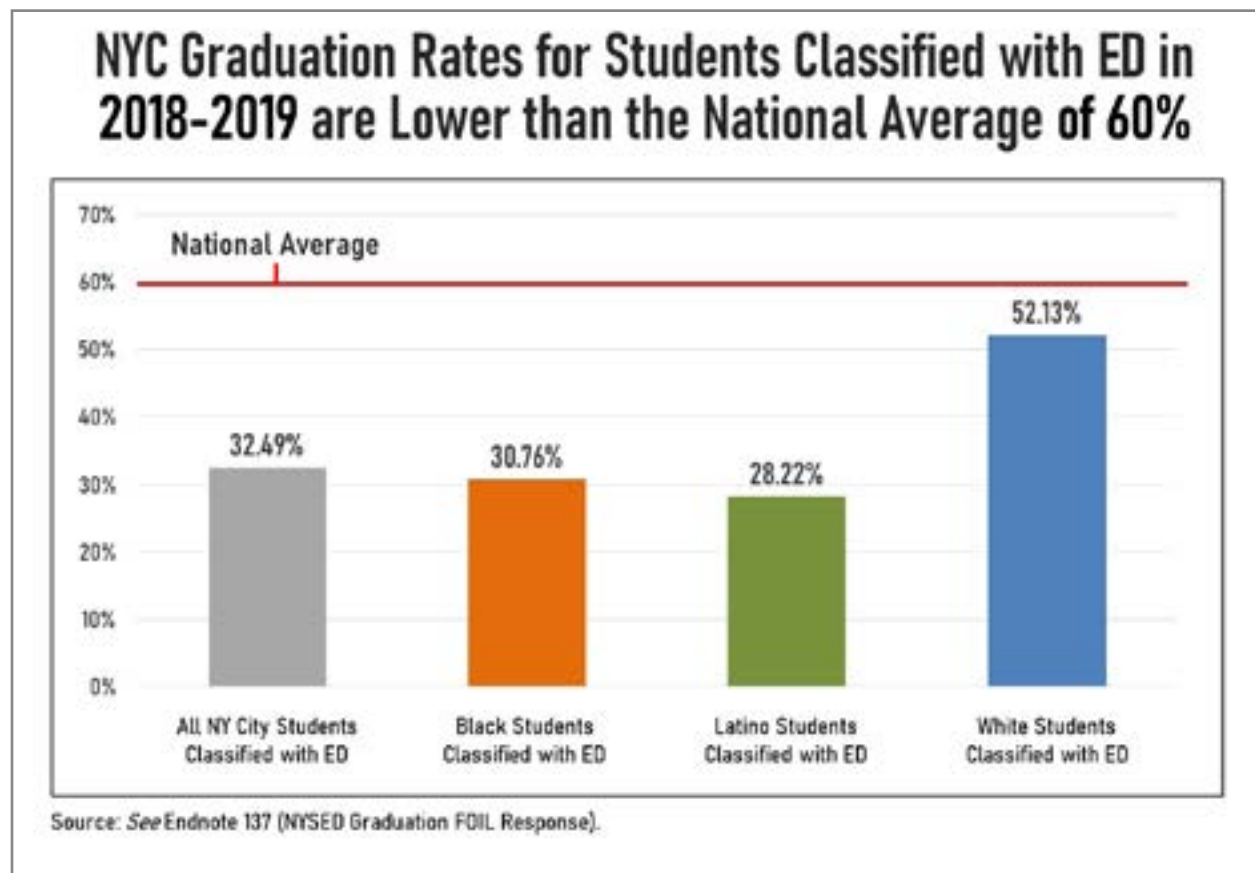
Incidents of excessive and inappropriate discipline of students classified with ED are frequently reported and well known to special education advocates. Special education advocates who support students classified with ED often confront situations in which school safety officers use physical force inappropriately on students classified with ED, school administrators contact the police to address situations involving students classified with ED, and principals and superintendents impose disproportionately harsh disciplinary measures on students classified with ED, without the proper use of MDRs, without sufficient communication with parents, and in a manner that isolates students from the educational and other supports they require.

District 75 schools are better resourced than nearly all other NYC schools to provide supports to students with ED. Yet the statistics demonstrate that at least 9.1% of all children experiencing a mental health crisis during the 2018-19 and 2019-20 school years occurred in District 75 schools, even though District 75 enrolled only 2.3% of NYC students.<sup>131</sup> More than one out of every five (21.3%) students handcuffed while experiencing a mental health crisis was a student with a disability in District 75.<sup>132</sup> And, citywide, the three schools reporting the highest total number of NYPD responses to a student experiencing a mental health crisis between 2016 and 2020 were District 75 schools.<sup>133</sup>



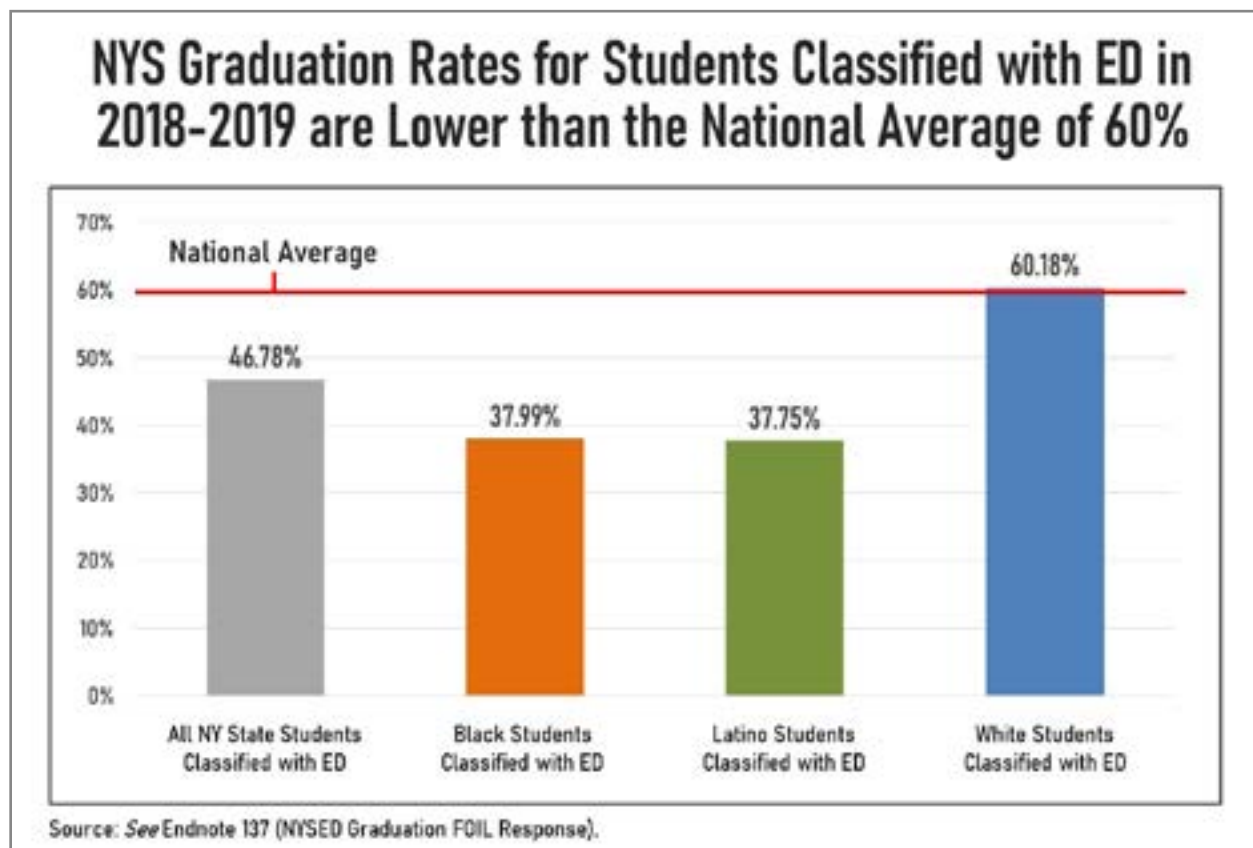
Harsher discipline and unwarranted segregation of students classified with ED have, in turn, contributed to dismal graduation rates. The U.S. Department of Education determined, in 2018, that students with an ED classification were far more likely to drop out and far less likely to graduate high school than other students with disabilities.<sup>134</sup> Only 60% of students classified with ED graduated with a traditional high school diploma, compared to 73% of all students with disabilities.<sup>135</sup> Thirty-two percent of students classified with ED dropped out prior to graduation, double the 16% rate of students with other disabilities and over six times the 5.1% national dropout rate for all students.<sup>136</sup>

In NYC, graduation rates for students classified with ED were even lower than the dismal national average, as illustrated below.<sup>137</sup> In 2018, for example, only 32.49% of students classified with ED graduated from NYC public schools.<sup>138</sup> The graduation rate is even lower for Black and Latino students classified with ED. In 2018, the NYC graduation rate for Black students classified with ED was 30.76%, while the rate for Latino students was only 28.22%.<sup>139</sup>





While graduation rates for students with ED classifications were slightly better statewide, the rates for Black and Latino students with ED classifications were much lower than the national graduation rate for students with ED classifications. During the 2018-2019 school year, for example, 46.78% of students with ED classifications graduated from New York State public schools, but the graduation rate for Black students with ED classifications was 37.99% and, for Latino students, 37.75%.<sup>140</sup> In contrast, graduation rates for White students with ED classifications in New York State public schools were slightly higher than the national average: 60.18%.<sup>141</sup>



## VII. The DOE's Failures to Appropriately Educate Students Classified with Emotional Disability Cause Harm Beyond Primary and Secondary School

Of the students with ED classifications who do graduate high school, many are unable to participate in post-secondary educational programs or find security in employment.<sup>142</sup> One of the reasons for this is the type of diploma or certificate many of them receive.<sup>143</sup> ED students who are placed in restrictive classrooms, or are given programs that deny them access to a New York Regents curriculum,<sup>144</sup> often (i) graduate (if they graduate at all) with a local diploma, which is not equivalent to New York's Regents diploma, or (ii) receive a skills and achievement certificate (the old IEP certificate) or a Career Development and Occupational Studies certificate ("CDOS certificate"), neither of which is equivalent to a local or Regents diploma.<sup>145</sup>

Skills and achievement certificates were created to ensure that students with disabilities are recognized for their efforts in completing education programs commensurate with their abilities.<sup>146</sup> CDOS certificates recognize the importance of vocational training and document student achievement in that area.<sup>147</sup> Students who earn either a CDOS certificate or a Skills and Achievement certificate are ineligible for admission to many, if not most, colleges. In addition, given that students who receive local diplomas have, by definition, not achieved passing scores on the Regents exams that measure academic proficiency, they may be unprepared (or perceived as unprepared) to pursue higher education or even further vocational training.<sup>148</sup>



Students classified with ED are also at a higher risk of being subjected to the school-to-prison pipeline.<sup>149</sup> In part, this is because students classified with ED are more than twice as likely to face a disciplinary removal from school than students with other disabilities,<sup>150</sup> and are twice as likely to be suspended or expelled from school than students overall.<sup>151</sup> Removal from school is a recognized "entry point" to the criminal legal system.<sup>152</sup> Unsurprisingly, "[a]cross the country, students with emotional disabilities are three times more likely to be arrested before leaving high school than the general population."<sup>153</sup>



The suspension rate, and the risk of future incarceration, are even higher for Black and Latino students.<sup>154</sup> In response to these dismal trends, the Obama administration issued administrative guidance in 2014 warning school districts that disproportionate rates of discipline for students of color may amount to a violation of federal civil rights laws.<sup>155</sup> Yet, according to the DOE's 2020-2021 Suspension Report, during the 2020-2021 school year, more than twice the number of Black and Latino students were suspended compared to white students.<sup>156</sup>

## VIII. Conclusion and Recommendations: The DOE and NYSED Must Undertake Remedial Measures to Appropriately Educate Students Classified with Emotional Disability

The NYS Comptroller's Report on the DOE's failure to provide mental health supports to students is a useful starting point for remedying the DOE's deficiencies in the education and support of students with ED classifications. The recommendations in that report target the same fundamental deficiencies in infrastructure and organization that have caused the ED student population to be left behind: poor data collection and management, inadequate support for teachers and providers, the absence of evidence-based decision-making, and insufficient staffing.

Based in part on the NYS Comptroller's recommendations, we strongly recommend that the DOE and NYSED—with input from other stakeholders (including parent groups and teachers)—undertake the following remedial measures:

1. *The DOE and NYSED Must Improve Data Collection Categories and Transparency.* The DOE must re-examine and reformulate its data-collection and data-publishing practices with respect to students with ED classifications, with the objectives of: (i) enabling education policymakers to create evidence-based, administrable protocols for the identification, location, evaluation, determination of eligibility, classification, education, and support of students with ED classifications, and to identify and address persistent racial and gender disproportionality with respect to this disability classification; (ii) equipping educators, parents, and other advocates with the information and resources they need to identify problems and to work together to address those problems; and (iii) evaluating, on an ongoing basis, the efficacy of programs and interventions for this population.

The data system must also track all educational services provided to students with ED classifications, especially interventions such as behavior intervention plans and counseling, at both the individual and the systemic level. The DOE must, at a minimum, be able to answer on a system-wide basis how many students with ED classifications have been given functional behavioral assessments, have behavior intervention plans, or receive counseling.



NYSED must likewise reevaluate its data-collection and data-publishing practices with respect to students with ED classifications. As one student-rights advocate recently recommended, NYSED must specifically commence: (i) “collecting and making publicly available special education classification data of students with disabilities at the [district] and state level,” disaggregated by race, gender, disability and student group (economically disadvantaged, English language learner, foster care, homeless, migrant, and parent in armed forces), and cross-tabulated at the student-group level by race and gender; (ii) “publicly reporting information on the types of school settings where students with IEPs are served,” disaggregated by disability classification and least restrictive environment, and cross-tabulated by race, gender, and English Language Learner status; and (iii) adding this data to New York’s existing special education report, in order to “increase transparency and accountability for students served across the state.”<sup>157</sup>

2. *The DOE Must Provide Better Supports to Teachers, Other School Staff, and Service Providers.* As the NYS Comptroller’s Report has noted, the DOE and school staff “are immersed in students’ lives daily” and are thus “uniquely positioned to notice any changes in behavior . . . or other signs that could indicate a student is struggling with mental health issues.”<sup>158</sup> DOE and school staff are invaluable to the identification of students who need an ED classification, to the formulation of appropriate IEPs for such students, and to the effective implementation of those IEPs.<sup>159</sup> The DOE must perform a comprehensive reassessment of the extent to which the DOE and school personnel who are tasked with supporting students classified with ED—e.g., IEP team members, teachers, related service providers, and school administrators—possess or lack the resources they need to create and implement IEPs for this population of students.

With input from mental health experts, teachers, and others, the DOE must develop additional resources that enable those personnel who currently lack them to better support students classified with ED. Those resources must be (i) tailored to the teachers’ or providers’ roles (e.g., a district representative on an IEP team, a special education classroom teacher, and a school counselor must each receive customized resources to support them in their particular roles), (ii) formulated to encourage consistent, even-handed, evidence-based decision-making, and (iii) adaptable to new and changing information and data concerning students classified with ED.

**3. The DOE and NYSED Must Develop Practical, Evidenced-Based Procedures for Locating, Identifying, Evaluating, Assessing Eligibility for, Classifying, Educating, and Supporting Students with ED.** IEP team members, teachers, school administrators, and related service providers still lack specific, evidence-based procedures from the DOE and NYSED that would enable them to serve students classified with ED in a consistent, predictable, and effective manner. All that the DOE and NYSED currently offer its school personnel is a short, generic description of ED in the middle of its SOPM and a so-called Emotional Disturbance Justification Form that, as discussed above, fails to provide non-arbitrary criteria for classifying students with ED, and offers IEP teams and parents virtually no guidance. In light of the amorphous definition of ED under federal and state law, the inherent challenges in identifying and educating this student population, and the established (and disproportionality) in how the DOE classifies and treats students classified with ED, the DOE and NYSED must adopt procedures that enable school personnel to support these students in a consistent, predictable, and effective manner. Specifically, the DOE, with support from NYSED, must:

- give schools evidence-based guidance to aid them in identifying students who may qualify for an ED classification;
- give IEP teams evidence-based guidance to aid them in assigning the ED classification and formulating IEPs for qualifying students;
- give teachers, related services providers, and school administrators evidence-based guidance for teaching, supporting, and disciplining students classified with ED; and
- monitor for disproportionality of the ED classification and audit those schools with the highest rates of ED classification.

4. *The DOE Must Re-evaluate Students Presently Classified as ED and Review and Amend their IEPs as Warranted.* Available data indicate that, in NYC, the ED classification has not been assigned even-handedly through the use of evidence-based procedures, and that, in many cases, the programs, placements, and related services provided to students classified with ED have also been inappropriate or insufficient. Accordingly, the DOE must re-evaluate those students presently classified as ED to determine the appropriateness of the classification, review each student's IEP, and modify the IEP as necessary.
5. *The DOE and NYSED Must Establish a Multi-Stakeholder Advisory Group to Formulate Remedial Measures for Students Classified with ED.* While the burden to rectify the problems identified in this report lies primarily with the DOE, multi-disciplinary collaboration is required. The DOE and NYSED must therefore convene an advisory panel, composed of DOE and NYSED officials, mental health and education policy experts, and other stakeholders (including parent groups, students, teachers and other advocates) to study the root causes of the challenges in supporting students classified with ED and to develop and implement practical, administrable, effective changes in how the DOE and the City educate and serve those students.

In addition to the remedial measures recommended in this report to be undertaken by the DOE and NYSED, the breadth and depth of the deficiencies highlighted in this report require review and potential action by other governmental agencies. The New York City Council's Standing Committees on Education, Mental Health, Disabilities, and Addiction, Civil and Human Rights, and Youth Services must investigate, conduct hearings, and consider legislative action to address the issues raised in this report. In addition, the New York City Mayor's Office for People with Disabilities, the New York State Department of Education, the New York State Office of the Chief Disability Officer, the New York State Justice Center for the Protection of People with Special Needs, the Civil Rights Bureau of the New York State Attorney General's Office and the Office for Civil Rights of the U.S. Department of Education must explore ways in which to address the systemic failure to educate and support students with ED in NYC and statewide.

We are optimistic that the Mayor and the DOE Chancellor, in furtherance of the objectives announced in the Mental Health Plan, and consistent with recently published U.S. Department of Education guidance, will lead the way in rectifying the City's and the DOE's past failures in this area. We call on the DOE and the City immediately to adopt these recommendations to develop meaningful change to a system that has long failed students with ED and other mental health challenges, especially economically disadvantaged students of color.





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## Endnotes

1 See NYC, Care, Community, Action: A Mental Health Plan for New York City (Mar. 2023) at 6-7, <https://www.nyc.gov/assets/doh/downloads/pdf/mh/care-community-action-mental-health-plan.pdf> (“NYC Care, Community, Action”).

2 In July 2022, the NYS Board of Regents approved the term “emotional disability” to replace the previous classification of “emotional disturbance.” NYS EDUC. DEP’T., OFFICE OF SPECIAL EDUCATION, Permanent Adoption of the Amendments to Section 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification “Emotional Disturbance,” (July 21, 2022) <https://www.nysed.gov/memo/special-education/permanent-adoption-amendments-sections-2001-and-2004-regulations-commissioner> (“Adoption of Amendments”).

3 Throughout this report, the term “Latino” encompasses all students whom the DOE and the New York State Education Department classify as “Hispanic or Latino,” which includes persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race. See NYC DEP’T OF EDUC., Federal Parent/Guardian Student Ethnic and Race Identification (PSE Form), <https://www.schools.nyc.gov/docs/default-source/default-document-library/pseform-english>; NYSED Glossary of Terms – Enrollment Data, <https://data.nysed.gov/glossary.php?report=enrollment>.

4 NYC DEP’T OF EDUC., OFFICE OF THE CHIEF ACADEMIC OFFICER, School-Age Special Education Data Report (Nov. 1, 2022), at 28, <https://infohub.nyced.org/docs/default-source/default-document-library/annual-special-education-data-report-sy22.pdf> (“NYC DEP’T OF EDUC. Annual Special Education Data Report”).

5 34 CFR § 300.8(c)(4)(i); 8 NYCRR § 200.1(zz).

6 All references to “parents” include “guardians.”

7 NYS Comptroller, Mental Health Education, Services, and Supports: New York City Department of Education, Report 2020-N-7 (Aug. 2022), at 7, <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2022-20n7.pdf> (“NYS Comptroller Report”). The NYS Comptroller’s Report focused only on general education students. *Id.*

8 NYC DEP’T OF EDUC. Annual Special Education Data Report, *supra* note 4; NYS EDUC. DEP’T., NYC Public Schools Enrollment (2021-22), <https://data.nysed.gov/enrollment.php?year=2022&instid=7889678368>.

- 9 *Id.*
- 10 NYC DEP'T OF EDUC. Annual Special Education Data Report, *supra* note 4.
- 11 *Id.*
- 12 *Id.*; The NYC DEP'T OF EDUC. and NYSED define Hispanic or Latino students as persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race. See *supra* note 3.
- 13 *Id.*; Cheri Fancsali, *Special Education in New York City: Understanding the Landscape*, NYU RESEARCH ALLIANCE FOR NEW YORK CITY SCHOOLS (Aug. 2019), <https://steinhardt.nyu.edu/research-alliance/research/publications/special-education-new-york-city> (“Research Alliance Report”).
- 14 “Related services” means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 CFR § 300.34.
- 15 Institute of Education Sciences, *Teacher Shortages in New York State: New Teachers’ Certification Pathways, Certification Areas, District of Employment, and Retention in the Same District* (Nov. 2021), [https://ies.ed.gov/ncee/edlabs/regions/northeast/pdf/REL\\_2022109\\_brief.pdf](https://ies.ed.gov/ncee/edlabs/regions/northeast/pdf/REL_2022109_brief.pdf).
- 16 NYS Comptroller Report, *supra* note 7, at 3.
- 17 *Id.* at 7.
- 18 *Id.*
- 19 NYC Care, Community, Action, *supra* note 1, at 11, 17.
- 20 NYS Comptroller Report, *supra* note 7, at 7.
- 21 *Id.*
- 22 *Id.*



23 NYC Care, Community, Action, *supra* note 1, at 11.

24 *Id.* at 11, 17.

25 NYS Comptroller Report, *supra* note 7, at 3.

26 NYC Care, Community, Action, *supra* note 1, at 12.

27 *Id.* at 12.

28 *Id.*

29 NY CONST. art. 11 § 1; *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995).

30 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

31 The Fourteenth Amendment’s Equal Protection Clause mandates that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. art. XIV § 1. The U.S. Supreme Court has declared that “separate educational facilities are inherently unequal” and that students subject to arbitrary segregation are “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Additionally, under the Fourteenth Amendment’s Due Process Clause, public schools must adhere to “fundamentally fair procedures.” See *Goss v. Lopez*, 419 U.S. 565 (1975).

32 20 U.S.C. § 1400, *et seq.*

33 20 U.S.C. § 1400(c)(5).

34 20 U.S.C. § 300.17.

35 20 U.S.C. § 1400(c)(1).

36 42 U.S.C. § 12101, *et seq.* The ADA was enacted based on Congress’s express declarations that (1) “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem”; (2) “individuals with disabilities continually encounter various forms of discrimination, including . . . relegation to lesser services, programs, activities, benefits, jobs, or other opportunities”; and (3) “discrimination against individuals with disabilities persists in such critical areas as . . . education.” 42 U.S.C. §§ 12101(b)(1), (2); 42 U.S.C. §§ 12101(a)(2), (3). Accordingly, Title II of the ADA mandates that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or

activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132; see *also* 28 C.F.R. § 35.130.

37 Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794; see *also* 34 C.F.R. § 104.

38 “The opportunity to obtain education ... without discrimination because of ... disability ... is hereby recognized as and declared to be a civil right.” N.Y. EXEC. LAW § 291.

39 The New York City Human Rights Law prohibits public accommodations, which include “governmental bodies or agencies” such as schools, NYC Admin. Code § 8-102, from refusing, withholding, or denying the advantages or privileges of such accommodations to persons because of their disability status. NYC Admin. Code §§ 8-107(4)(a); 8-102(9).

40 See Gary Greenberg, *The Book of Woe: The DSM and the Unmaking of Psychiatry* (Blue Rider Press 2013); Allen Frances, *Saving normal: An insider’s revolt against out-of-control psychiatric diagnosis, DSM-5, Big Pharma, and the medicalization of ordinary life* (Mariner Books 2013).

41 Lisa Lightner, A Day In Our Shoes, *Understanding the Emotional Disturbance IEP Category: IEP Goals, Accommodations, Examples*, <https://aday-inourshoes.com/emotional-disturbance-category-iep-criteria-accommodations/#h-what-is-emotional-disturbance>.

42 34 CFR § 300.8(c)(4)(i); 8 NYCRR § 200.1(zz).

43 34 CFR § 300.8(c)(4)(i).

44 NYSED, Committee on Preschool Special Education and Committee on Special Education (CPSE/CSE) Eligibility Determination Process & Procedure: Section 200.4(c), CSE Chairpersons Training (2019), <https://www.nylpi.org/wp-content/uploads/2023/11/4-Eligibility-Eligibility-Determination-Process-Procedure-Section-200.4c.pdf>. This document is one of the documents received from NYSED on March 31, 2022. See NYSED March 2022 FOIL Response, *infra* note 45..

45 FOIL request made by Kasowitz Benson Torres LLP dated May 21, 2021 (“May 2021 FOIL Request,” <https://www.nylpi.org/wp-content/uploads/2023/11/2021-05-21-FL-EM-21-661-Abrams-FOIL-Request-May-2021-FOIL-Request.pdf>), with FOIL response -- nearly a full year later -- from Betty

Rosa, New York State Commissioner of Education, dated March 31, 2022 (“NYSED March 2022 FOIL Response,” <https://www.nylpi.org/wp-content/uploads/2023/11/2022-03-31-FL-EM-21-661-Abrams-Office-of-Special-Education-Response-NYSED-March-2022-FOIL-Response.pdf>, <https://www.nylpi.org/wp-content/uploads/2023/11/2019-Committee-on-Special-Education-CSE-Chairpersons-Training-NYSED-March-2022-FOIL-Response.pdf>, <https://www.nylpi.org/wp-content/uploads/2023/11/4-Eligibility-Eligibility-Determination-Process-Procedure-Section-200.4c.pdf>, <https://www.nylpi.org/wp-content/uploads/2023/11/12-definitions-NYSED-March-2022-FOIL-Response.pdf>).

46 *Id.*

47 *Id.*

48 Kids’ Well-being Indicators (“KWIC”), Children Receiving Free or Reduced-price School Lunch – Public Schools, [https://www.nyskwic.org/get\\_data/indicator\\_profile.cfm?subIndicatorID=52](https://www.nyskwic.org/get_data/indicator_profile.cfm?subIndicatorID=52); NYC DEP’T OF EDUC. Annual Special Education Data Report, *supra* note 4, at 28.

49 NYC DEP’T OF EDUC. Annual Special Education Data Report, *supra* note 4, at 28.

50 *Id.*

51 *Id.*

52 3,386 of the students classified with ED were Black; 2,818 were Latino; and 620 were white. *Id.*

53 District 3 comprises NYC’s west side neighborhoods from Hell’s Kitchen to Morningside Heights. See NYC District 3 Schools, <https://www.doed3.org/schools>.

54 “NYC GEOG DIST #31–Staten Island Enrollment (2018-19),” NYSED, <https://data.nysed.gov/enrollment.php?year=2019&instid=800000042056> (“NYC District #31 Data (2018-19)”; “NYC GEOG DIST #31–Staten Island Enrollment (2019-20),” NYSED, <https://data.nysed.gov/enrollment.php?year=2020&instid=800000042056> (“NYC District #31 Data (2019-20)”; “NYC GEOG DIST #31–Staten Island Enrollment (2020-21),” NYSED, <https://data.nysed.gov/enrollment.php?year=2021&instid=800000042056> (“NYC District #31 Data (2020-21),” together with NYC District #31 Data (2018-19) and NYC District #31 Data (2019-20), “NYC District #31 Enrollment Data”).

55 These statistics exclude Staten Island students in District 75. See “Enrollment by disability items 9 and 10 for David Abrams,” FOIL Response from

Betty Rosa, New York State Commissioner of Education, dated May 17, 2022 (“NYSED Enrollment FOIL Response”). <https://www.nylpi.org/wp-content/uploads/2023/11/Enrollment-by-disability-items-9-and-10-for-David-Abrams-NYSED-Enrollment-FOIL-Response.xlsx>.

56 NYC District #31 Enrollment Data, *supra* note 54.

57 *Id.*

58 *Id.*; NYSED Enrollment FOIL Response, *supra* note 55.

59 NYC GEOG DIST #3-Manhattan Enrollment (2018-19), NYSED, <https://data.nysed.gov/enrollment.php?year=2019&instid=800000047476> (“NYC District #3 Data (2018-19)”; “NYC GEOG DIST #3-Manhattan Enrollment (2019-20),” NYSED, <https://data.nysed.gov/enrollment.php?year=2020&instid=800000047476> (“NYC District #3 Data (2019-20)”; “NYC GEOG DIST #3-Manhattan Enrollment (2020-21),” NYSED, <https://data.nysed.gov/enrollment.php?year=2021&instid=800000047476> (“NYC District #3 Data (2020-21),” together with NYC District #3 Data (2018-19) and NYC District #3 Data (2019-20), “NYC District #3 Enrollment Data”).

60 NYC District #3 Data (2018-19), *supra* note 59.

61 NYSED Enrollment FOIL Response, *supra* note 55.

62 NYC District #3 Data (2018-19), *supra* note 59; NYSED Enrollment FOIL Response, *supra* note 55.

63 NYC District #3 Data (2019-20), *supra* note 59.

64 3,386 of the students classified with ED were Black; 2,818 were Latino; and 620 were white. *Id.*; NYSED Enrollment FOIL Response, *supra* note 55.

65 NYSED Enrollment FOIL Response, *supra* note 55.

66 *Id.*; NYC District #3 Data (2020-21), *supra* note 59.

67 NYC Public Schools Special Education School District Data Profile 2018-19, NYSED, <https://data.nysed.gov/specialed/?year=2019&instid=800000048663> (“NYC Special Education Data Profile (2018-19)”; NYC Public Schools Special Education School District Data Profile 2019-20, NYSED, <https://data.nysed.gov/specialed/?year=2020&instid=800000048663> (“NYC Special Education Data Profile (2019-20)”; NYC Public Schools Special Education School District Data Profile 2020-21, NYSED, <https://data.nysed.gov/specialed/?year=2021&instid=800000048663> (“NYC Special Education Data Profile (2020-21)”) together with NYC Special Education Data Profile (2018-19) and NYC Special



Education Data Profile (2019-20), (collectively “NYC Special Education Data Profiles”). These Special Education School District Data Profiles are “prepared in accordance with the requirements of the [the IDEA]. Each State must have a State Performance Plan (“SPP”) to evaluate the State’s efforts to meet the requirements and purposes of the implementation of the IDEA. The SPP is a six-year plan which describes New York State’s performance on 17 indicators. States must report annually to the public on the performance of the State in an Annual Performance Report (“APR”), and each school district against the State’s targets. New York State’s SPP and the APR that describe these indicators in detail are available at <http://www.p12.nysed.gov/specialized/spp/>.” See NYC Special Education Data Profiles.

68 NY State Public School Enrollment (2018-19), NYSED, <https://data.nysed.gov/enrollment.php?year=2019&state=yes> (“NYS Enrollment (2018-19)”); NY State Public School Enrollment (2019-20), NYSED, <https://data.nysed.gov/enrollment.php?year=2020&state=yes> (NYS Enrollment (2019-20)); NYSED, <https://data.nysed.gov/enrollment.php?year=2021&state=yes> (“NYS Enrollment (2020-21),” together with NYS Enrollment (2018-19) and NYS Enrollment (2019-20), “NYS Enrollment Data”); NYSED Enrollment FOIL Response, *supra* note 55.

69 NYS Enrollment Data, *supra* note 68; NYSED Enrollment FOIL Response, *supra* note 55.

70 Janice Rutledge Janz & Mary M. Banbury, *Challenges in Classifying Students with Emotional Disturbance: Perspectives of Appraisal Professionals*, 2 UC SANTA BARBARA SPACES FOR DIFFERENCE: AN INTERDISCIPLINARY J. 16 (2009) (noting that Black students were two times more likely to be classified as ED than their white counterparts), <https://escholarship.org/uc/item/5734n13w>.

71 NYC DEP’T OF EDUC., Special Education Standard Operating Procedures Manual (Nov. 16, 2021), at 53, [https://infohub.nyced.org/docs/default-source/default-document-library/specialeducationstandardoperating-proceduresmanualmarch.pdf?sfvrsn=4cdb05a0\\_2](https://infohub.nyced.org/docs/default-source/default-document-library/specialeducationstandardoperating-proceduresmanualmarch.pdf?sfvrsn=4cdb05a0_2) (“SOPM”).

72 *Id.* at 99-100.

73 NYS Comptroller Report, *supra* note 7, at 9.

74 Chancellor David C. Banks, “February 2022 NYC Council Report,” <https://infohub.nyced.org/docs/default-source/default-document-library/february-2022-ccr-narrative.pdf>.

75 To protect the privacy of Ms. N. and her minor children, this report

does not disclose her or her children’s identities.

76 District 75 Schools provide special instruction and services to students across NYC with the most severe disabilities. “District 75,” NYC DEP’T OF EDUC., <https://www.schools.nyc.gov/learning/special-education/school-settings/district-75>.

77 Janz, *supra* note 70, at 16-17.

78 Quinn, et al. *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 SAGE J. 339 (2005) <https://journals.sagepub.com/doi/abs/10.1177/001440290507100308>.

79 Peter F. Drucker, *The Practice of Management* (Harper & Row 1954).

80 NYS Comptroller Report, *supra* note 7, at 9.

81 *Id.*

82 *Id.*

83 NYC Care, Community, Action, *supra* note 1, at 25.

84 *Id.*

85 FOIL response from Betty Rosa, New York State Commissioner of Education, dated June 14, 2021 (“NYSED June 2021 FOIL Response”). <https://www.nylpi.org/wp-content/uploads/2023/11/2021-06-14-NYSED-Response-Letter-NYSED-June-2021-FOIL-Response.pdf>.

86 FOIL response from Rose M. LeRoy, NYSED Director of Educational Data and Research, dated October 21, 2021 (“October 2021 Certification of Records”). <https://www.nylpi.org/wp-content/uploads/2023/11/2021-10-21-NYSED-Certification-of-Records-Not-Possessed-FL-EM-21-661-October-2021-Certification-of-Records.pdf>.

87 NYSED, Special Education State Performance Plan (SPP)/Annual Performance Report (APR), <https://www.nysed.gov/special-education/spp-apr>.

88 NYSED, STATE OF NEW YORK OFFICE OF THE ATTORNEY GENERAL, Guidance Letter (August 29, 2019), <https://www.p12.nysed.gov/>.

89 *Id.*

90 *Id.*

91 *Id.*

92 NYS Comptroller Report, *supra* note 7, at 12.

93 FOIL Response to Kerry Cooperman from Lily Wesley, General Litigation Division of the NYC Law Department dated July 28, 2020. <https://www.nylpi.org/wp-content/uploads/2023/11/2020-07-28-FOIL-Response-to-Kerry-Cooperman-from-Lily-Wesley.pdf>.

NYSCEF Notification

% of students with ED classification by grade and gender, and placement recommendation

NYCDOE concerning 12/21/2018 FOIL request to NYCDOE

94 See Nicole Gorman, *Why Collecting Student Data is Important to Student Achievement*, EDUCATION WORLD (Sept. 2, 2015), <https://www.educationworld.com>.

95 Jerry Webster, *Data Collection for Special Education*, THOUGHTCO. (Aug. 27, 2020), <https://www.thoughtco.com/data-collection-for-special-education-3110861>.

96 Notably, one FOIL request can take approximately one year and can cost \$1,000 or more, which places an impossible burden on most parents and advocates.

97 Research Alliance Report, *supra* note 13.

98 *Id.*

99 *Id.*

100 Christina A. Samuels, *Students with Emotional Disabilities: Facts About This Vulnerable Population*, EDUCATIONWEEK, Mar. 27, 2018, <https://www.edweek.org/leadership/students-with-emotional-disabilities-facts-about-this-vulnerable-population/2018/03>; see also James Patrick Jones, *Implicit and Explicit Attitudes of Educators Toward the Emotional Disturbance Label* (Ph.D. dissertation Ball State U.) (Nov. 2009), at 97, [https://cardinalscholar.bsu.edu/bitstream/handle/123456789/193429/Jjones\\_2009-1\\_BODY.pdf?sequence=1&isAllowed=y](https://cardinalscholar.bsu.edu/bitstream/handle/123456789/193429/Jjones_2009-1_BODY.pdf?sequence=1&isAllowed=y).

101 Students with academic and/or behavioral management needs that interfere with the instructional process and require additional adult support and specialized instruction are placed in classrooms that contain 12 students, 1 special education teacher and 1 paraprofessional. NYC DEP'T OF EDUC., District 75, NYC Public Schools, <https://www.schools.nyc.gov/learning/special-education/school-settings/district-75>.

102 Students whose needs are severe and chronic and require constant, intensive supervision, a significant degree of individualized attention, intervention and behavior management are placed in classrooms that contain 8 students, 1 special education teacher and 1 paraprofessional. *Id.*

103 District 79 is the City’s Alternative Schools District comprised of Alternate Learning Centers for middle and high school students on Superintendent’s Suspension. NYC DEP’T OF EDUC. District 79, NYC Public Schools Info-Hub, <https://infohub.nyced.org/in-our-schools/programs/district-79>.

104 Pooja Salhotra, *More than 10,000 NYC students are classified as ‘emotionally disturbed.’ Some are out to change the label*, CHALKBEAT (Aug. 30, 2021), <https://ny.chalkbeat.org/2021/8/30/22639411/ny-special-education-emotionally-disturbed>.

105 *Id.*

106 NYC DEP’T OF EDUC., The IEP (2023), [schools.nyc.gov/learning/special-education/the-iep-process/the-iep](https://schools.nyc.gov/learning/special-education/the-iep-process/the-iep).

107 Janz, *supra* note 70, at 93.

108 NYSED, Mental Health Education Literacy in Schools: Linking to a Continuum of Well-Being, (Jul. 1, 2018) at 4, <http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/educationliteracyinschools-final.11.2018.pdf>.

109 Lisa Isaacs, *Mental Health Issues and Obligations of School Districts Under Child Find*, NYS BAR ASS’N, Nov. 13, 2013, at 2 (concluding that “[c]hildren with mental health issues are perceived to be . . . dangerous . . . incompetent . . . disruptive.”), <https://nysba.org>.

110 Samuels, *supra* note 100; NAT’L CTR. FOR LEARNING DISABILITIES, *Social, Emotional and Behavioral Challenges* (Jan. 27, 2017), <https://www.ncld.org/research/state-of-learning-disabilities/social-emotional-and-behavioral-challenges/>.

111 *Id.*

112 See Janz, *supra* note 70, at 19 (noting that “educators and lay people alike often view the actual classification of Emotional Disturbance as negative” and that “[s]ome general and special education teachers treat students with these labels differently”).

113 Jones, *supra* note 100, at 90 (finding that educators have “significantly higher implicit negativity toward the ED label relative to [the classification of Learning Disability]”).

114 Cathy Woodruff, *SED may stop classifying students as having ‘emotional disturbance’*, NYS SCH. BDS. ASS’N (Mar. 16, 2020), <https://www.nyssba.org/news/2020/03/12/on-board-online-march-16-2020/sed-may-stop-classifying-students-as-having-emotional-disturbance/>.

115 *Id.*; see generally NY DIGITAL PRESS, *To reduce stigma, New York moves to change ‘emotional disturbance’ label to ‘emotional disability’* (March 15, 2022), <https://www.newyorkdigitalpress.com/to-reduce-stigma-new-york-moves-to-change-emotional-disturbance-label-to-emotional-disability/>.

116 Adoption of Amendments, *supra* note 2.

117 See Jones, *supra* note 100, at 1, 5 (discussing the “definitional inconsistencies” in the meaning of “emotional disturbance,” noting that “[d]efinitional imprecision has plagued the ED label since its introduction,” and explaining that “[b]oundaries between ED and other categories . . . have been thought to be obscured by comorbid features and a lack of distinctive criteria (Hallahan & Kauffman, 1977)”).

118 *Id.*

119 See “Discipline data emotional disturbance and all SWD items 7 and 8 for David Abrams,” FOIL Response from Betty Rosa, New York State Commissioner of Education, dated May 17, 2022 (“NYSED Discipline FOIL Response”), <https://www.nylpi.org/wp-content/uploads/2023/11/Discipline-data-emotional-disturbance-and-all-SWD-items-7-and-8-for-David-Abrams-NYSED-Discipline-FOIL-Response.xlsx>. A disciplinary removal is any instance in which a child is removed from their educational placement for disciplinary purposes, including in-school suspension, out-of-school suspension, expulsion, removal by school personnel to an Interim Alternative Educational Setting (“IAES”) for drug or weapon offenses or serious bodily injury, and removal by hearing officer for likely injury to self or others. NYSED, PD8 – Report of Students with Disabilities Subject to Disciplinary Removal, July 1, 2017 – June 30, 2018, <https://www.p12.nysed.gov/sedcar/forms/instructions/instructions1718.html#pd8>. See also US DEP’T OF EDUC., OFFICE OF SPECIAL EDUC. PROGRAMS, OSEP Fast Facts: Children Identified with Emotional Disturbance (May 6, 2020), [https://sites.ed.gov/idea/osep-fast-facts-children-IDed-Emotional-Disturbance-20#:~:text=The%20States%20with%20the%20largest,NC%20\(1%2D3%25\)](https://sites.ed.gov/idea/osep-fast-facts-children-IDed-Emotional-Disturbance-20#:~:text=The%20States%20with%20the%20largest,NC%20(1%2D3%25)) (“OSEP Fast Facts”).

120 NYSED Discipline FOIL Response, *supra* note 119. The discipline data for the 2019-2020 and 2020-2021 school years do not reflect this problem



because, for the most part, NYC students were learning remotely due to the COVID-19 pandemic. See NYS Comptroller Report, *supra* note 7, at 18.

121 We understand that this suspension data, as set forth in the Research Alliance Report, *supra* note 13, was supplied to the drafters of the Research Alliance Report by the DOE. However, we are unaware of any report or materials made public by the DOE containing or acknowledging this data.

122 OSEP Fast Facts, *supra* note 119.

123 *Id.*

124 *Id.*

125 When a student who receives special education services faces a “disciplinary change in placement,” the NYC Chancellor’s Regulations mandate an MDR to a) ensure that the student is not disciplined for behavior that has a direct and substantial relationship to the student’s disability and/or that is a direct result of a school’s failure to implement the student’s IEP and b) assist in determining the relationship between the student’s disabling condition and the student’s behavior. NYC CHILDREN’S SERS., *Welcome to Education Resources: Discipline/Suspensions*, <https://www.nyc.gov/html/acs/education/discipline.html>; SOPM, *supra* note 71, at 108.

126 *Id.*

127 *Id.*

128 NYSED Discipline FOIL Response, *supra* note 119.

129 *Id.*

130 *Id.*

131 ADVOCATES FOR CHILDREN OF NY, Police Response to Students in Emotional Crisis (Jun. 2021), at 7 [https://www.advocatesforchildren.org/sites/default/files/library/police\\_response\\_students\\_in\\_crisis.pdf?pt=1](https://www.advocatesforchildren.org/sites/default/files/library/police_response_students_in_crisis.pdf?pt=1).

132 *Id.* at 2.

133 *Id.*

134 OSEP Fast Facts, *supra* note 119.

135 *Id.*

136 *Id.*

137 See Annual grad rate emotional disturbance items 1 and 2 for David Abrams, FOIL Response from Betty Rosa, New York State Commissioner of

Education dated May 17, 2022 (“NYSED Graduation FOIL Response”). <https://www.nylpi.org/wp-content/uploads/2023/11/Annual-grad-rate-emotional-disturbance-items-1-and-2-for-David-Abrams-NYSED-Graduation-FOIL-Response.xlsx>.

138 *Id.*

139 *Id.* The graduation rate increased to 51% in 2020 and 53.55% in 2021. *Id.* Following the overall trend, NYC’s graduation rates of Black and Latino students classified with ED increased from 2018 to 2021, but these rates still fell below NYC’s average graduation rate for white students classified with ED. For example, in 2021, the average graduation rate in NYC public schools for Black students classified with ED was only 51.52%, and for Latino students, only 49.59%, while the graduation rate for white students with ED was 67.44%. We chose not to focus on these statistics in our analysis because Regents requirements for graduation were suspended at this time, likely causing a skewing of the graduation data. See Jillian Jorgensen, *For Second Straight Year, Students Will Be Exempt from Regents Requirements*, SPECTRUM NEWS NY1 (Mar. 30, 2021), <https://ny1.com/nyc/all-boroughs/education/2021/03/30/for-second-straight-year--students-will-be-exempt-from-regents-requirements#:~:text=For%20Second%20Straight%20Year%2C%20Students%20Will%20Be%20Exempt%20From%20Regents%20Requirements&text=This%20June%2C%20New%20York%20high,long%20set%20the%20state%20apart>.

140 NYSED Graduation FOIL Response, *supra* note 137.

141 *Id.*

142 Samuels, *supra* note 100.

143 Rebecca Klein, *These students are finishing high school, but their degrees don’t help them go to college*, HECHINGER REP, (Dec. 2, 2017), <https://hechingerreport.org/students-finishing-high-school-degrees-dont-help-go-college/>.

144 The NYS Board of Regents is responsible for the general supervision of all educational activities within the State. The NYS Regents Exams are a set of required tests administered to students in NYS which allow them to receive a high school diploma after passing. NYC DEP’T OF EDUC., *NY State High School Regents Exams*, <https://www.schools.nyc.gov/learning/testing/ny-state-high-school-regents-exams>.

145 NYC DEP’T OF EDUC., *Graduation Requirements*, <https://www.schools.nyc.gov/learning/testing/ny-state-high-school-regents-exams>.

[nyc.gov/learning/student-journey/graduation-requirements](https://www.nyc.gov/learning/student-journey/graduation-requirements); see Klein, *supra* note 143; see also Memorandum from James P. DeLorenzo, *Individualized Education Program (IEP) Diploma*, NYSED (Jan. 28, 2014), <https://www.p12.nysed.gov/>.

146 Memorandum from James P. DeLorenzo, *Skills and Achievement Commencement Credential for Students with Severe Disabilities*, NYSED (Apr. 2012), <https://www.p12.nysed.gov/specialed/publications/SACCMemo.pdf>; NYSED, *General Education and Diploma Requirements*, <https://www.nysed.gov/curriculum-instruction/general-education-and-diploma-requirements>.

147 *Id.*

148 See Klein, *supra* note 143.

149 Jill Barshay, *The debate over students with disabilities, suspensions and race*, HECHINGER REP. (Dec. 10, 2018), <https://hechingerreport.org/the-debate-over-students-with-learning-disabilities-suspensions-and-race/>. The school-to-prison pipeline refers to education policies that push students into the criminal legal system. NYCLU, *School-to-Prison Pipeline*, <https://www.nyclu.org/en/issues/racial-justice/school-prison-pipeline>. Schools send students into the pipeline through zero-tolerance disciplinary policies, which involve the police in minor misbehavior and often lead to arrests and juvenile detention referrals which can result in criminal charges and incarceration. Schools also indirectly push students into the pipeline through suspension, expulsion, and discouragement. *Id.*

150 OSEP Fast Facts, *supra* note 119.

151 Samuels, *supra* note 100.

152 Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special education too often leads to jail for thousands of American children*, HECHINGER REP. (Oct. 26, 2014), <https://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/>.

153 *Id.*

154 Barshay, *supra* note 149.

155 Evie Blad, *Here's What the End of Obama-Era Discipline Guidance Means for Schools*, EDUCATIONWEEK (Dec. 18, 2018), <https://www.edweek.org/leadership/heres-what-the-end-of-obama-era-discipline-guidance-means-for-schools/2018/12>. This guidance was rescinded under the Trump administration, with the stated rationale that “teachers are best positioned to identify and address disorderly conduct.” *Id.*

156 NYC DEP’T OF EDUC., 2020-2021 *Suspension Report*, <https://infohub.nyced.org/docs/default-source/default-document-library/sy2122-ll93-city-council-annual-summary.pdf>.

157 Chantal Hinds, *Public Comment: New York State to Replace the Special Education Classification Term “Emotional Disturbance,” with “Emotional Disability,”* NEXT 100 (June 2, 2022), <https://thenext100.org/public-comment-new-york-state-to-replace-the-special-education-classification-term-emotional-disturbance-with-emotional-disability/>.

158 NYS Comptroller Report, *supra* note 7, at 9-10.

159 *Id.* at 9. As the NYS Comptroller recently highlighted, “[p]roperly trained” school staff are “an important conduit to early intervention for struggling students, guiding them to needed in-school supports and services, such as social workers, counselors, and other school professionals or administrators.” *Id.* at 10.

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