

2023

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Recommended Citation

Maria Jardeleza (2023) "Access to Education: Protecting Students with Disabilities by Decriminalizing Behavior," *Human Rights Brief*. Vol. 27: Iss. 1, Article 5.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol27/iss1/5>

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ACCESS TO EDUCATION: PROTECTING STUDENTS WITH DISABILITIES BY DECRIMINALIZING BEHAVIOR

by *Maria Jardeleza**

I. Introduction

Contrary to international human rights standards, laws that criminalize disorderly and disruptive behavior in schools neglect the needs of students with disabilities. These laws lead to the exclusion of students with disabilities from educational settings and are applied unfairly against them. This Article will first look at state statutes and school policies that grant broad discretion in determining when and how to exclude students from learning opportunities through suspensions, expulsions, and referrals to law enforcement¹. Understanding the use of these statutes against students within the context of the data on school discipline rates for students with disabilities shows the disproportionate exclusion of students with disabilities. Cases addressing access to education in

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1 Off. for Civil Rts., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year*, U.S. DEP'T OF EDUC. (Jun. 2021) <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>. "A referral to law enforcement includes situations where a school official reports a student to a law enforcement agency or official, including a school police unit, for an incident that occurs on school grounds, during school related events, or while taking school transportation, regardless of whether official action is taken. Citations, tickets, court referrals, and school-related arrests are considered referrals to law enforcement." The CRDC reports that in the school year, 23.7% of referrals resulted in arrests. There were 229,470 referrals to law enforcement and 54,321 school-related arrests.

Spain, Germany, and Malawi reveal that the United States has the obligation to address this inequity by ensuring these statutes cannot criminalize nonviolent student behavior and develop policies that promote and protect student learning.

II. Background

Across the United States, there are statutes that broadly criminalize disorderly conduct and the disturbance of school. Generally, disorderly conduct statutes are vague and leave discretion for what behavior falls under the umbrella of "disorderly."² For example, disorderly conduct has included profanity, loud public behavior, rowdiness, disrespect, and generally being disruptive.³ Due to the vague and subjective nature of these statutes, disorderly conduct offenses are among the most common reasons students end up in juvenile court for nonviolent behavior in school.⁴ Similarly, school disturbance laws vaguely define what behavior they proscribe, resulting in discretionary enforcement.⁵ Though the language varies from state to state, school disturbance statutes criminalize nonviolent behavior that interferes with learning on school grounds.⁶ For example, a Florida statute makes it a misdemeanor for anyone to "willfully and maliciously" disturb or interrupt a school.⁷ Another statute makes it unlawful to disrupt or interfere with the "functions of any educational institution, school board, or activity on school board property."⁸ Similarly, Nevada makes it a misdemeanor to interfere with or disturb anyone inside a public-school building.⁹ In North Carolina, it is

2 Noelia Rivera-Calderón, *Arrested at the Schoolhouse Gate: Criminal School Disturbance Laws and Children's Rights in School*, NLG REV. (Oct. 2019), <https://www.nlg.org/nlg-review/article/arrested-at-the-schoolhouse-gate-criminal-school-disturbance-laws-and-childrens-rights-in-schools/>.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Fla. Stat. § 871.01 (2023) (stating "whoever willfully and maliciously interrupts or disturbs any school or any assembly of people met for the worship of God, any assembly of people met for the purpose of acknowledging the death of an individual, or for any other lawful purpose commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.").

8 Fla. Stat. § 877.13 (2023) (stating "It is unlawful for any person: (a) Knowingly to disrupt or interfere with the lawful administration or functions of any educational institution, school board, or activity on school board property in this state.").

9 Nev. Rev. Stat. Ann. § 392.910 (2022) (stating, "It is unlawful for any person maliciously in any manner to interfere with

a crime to disrupt, disturb or interrupt teaching.¹⁰ Most of these statutes do not contain language referencing students.¹¹ Most do not distinguish between regulating the conduct of trespassers disturbing a school and the conduct of students.¹² Because these statutes refer to behaviors that generally disrupt any aspect of school, they have successfully criminalized nonviolent student behavior like not following directions, making loud noises in the hallway, and yelling.¹³

An incident reached national attention in 2015 when an officer forcibly dragged a student out of her desk after she refused to surrender her cellphone.¹⁴ Not only did this student face charges for disturbing the school, but another student who recorded the video and posted it on social media was also charged under the same statute.¹⁵ Neither student posed a threat to the safety of other students in the school, but both faced criminal charges.¹⁶ They are not the only ones. In fact, over half of school-based arrests in North Carolina from 2013-17 were based on charges under disturbance laws, and the Florida Justice department found disorderly conduct was one of the most common claims for school-based referrals to juvenile court.¹⁷ Unsurprisingly, these statutes disproportionately harm students of color, LGBTQ2+ students, and students with disabilities.¹⁸

Noting the misuse of the statutes to criminalize student behavior, some states have made efforts to amend them. For example, in South Carolina, S.C.

or disturb any persons peaceably assembled within a building of a public school for school district purposes. Any person who violates this subsection is guilty of a misdemeanor.”)

10 N.C. Gen. Stat. § 14-288.4 (2023) (stating, “(a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following: (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto. (6a) Engages in conduct which disturbs the peace, order, or discipline on any public school bus or public school activity bus).

11 Rivera-Calderón, *supra* note 2.

12 *Id.*

13 *See* *In re Nahif*, 717 A.2d 393 (Md. Ct. Spec. App. 1997); *see also* *In re Qoyasha D.*, 123 A.3d 1006 (Md. 2015).

14 Evie Blad, *She Recorded Her Classmate’s Arrest, Then Got Arrested, Too*, ED. WEEK, (Jan. 24, 2017), <https://www.edweek.org/leadership/she-recorded-her-classmates-arrest-then-got-arrested-too/2017/01>.

15 *Id.*

16 *Id.*

17 Rivera-Calderón, *supra* note 2.

18 *Id.*

Code Ann. § 16-17-420 had similar language to the statutes from Florida and Nevada until 2018. The legislature rewrote the statute to include explicit language that the statute does not apply to students and cannot be used to criminalize disruptive student behavior. Similarly, in Massachusetts, the legislature amended ALM GL ch. 272, § 40 to specifically prohibit the use of the statute to find elementary and secondary students delinquent.

Other laws grant broad discretion to school boards to create their own disciplinary actions to deal with student behavior.¹⁹ Because of this wide discretion, schools can choose to expel or suspend students for disruptive behavior, including behavior that directly or indirectly relates to a student’s disability.²⁰ Though the Individuals with Disabilities Education Act (IDEA) aims to protect access to education for students with disabilities, the protections fall short of prohibiting exclusion.²¹ IDEA protects the discretionary authority of school boards and schools to suspend, expel, and refer students to law enforcement, so inequitable treatment of students with disabilities persists.²²

In 2021, The United States Department of Education, Office for Civil Rights published a report on factors that impact equity and opportunity for students in public schools around the country, collected from the school year 2017-18.²³ The report, the Civil Rights Data Collection (the CRDC), had the stated purpose of monitoring schools’ compliance with the responsibility to provide equal educational opportunities to all students.²⁴ The report showed that students with disabilities²⁵ suffered significantly more removals from educational opportunities, in the form of suspensions, expulsions, and referrals to law enforcement than their

19 Nat’l Ctr. on Safe Supportive Learning Env’ts, *Compendium of School Discipline Laws and Regulations for the 50 States, District of Columbia and the U.S. Territories*, U.S. DEP’T OF EDUC. (Mar. 2023) <https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf>.

20 *Id.*

21 Amanda L. Sullivan, Ethan R. Van Norman, & David A. Klingbeil, *Exclusionary Discipline of Students with Disabilities: Student and School Characteristics Predicting Suspension*, 35 REMEDIAL AND SPECIAL EDUC. 119, 119 (2014).

22 *Id.*

23 Off. for Civil Rts., *supra* note 1.

24 *Id.*

25 *Id.* (noting “Students with Disabilities include students served under the Individuals with Disabilities Education Act and students served under Section 504 of the Rehabilitation Act of 1973”).

non-disabled peers.²⁶ Much of the behavior proscribed by disorderly conduct and school disturbance statutes often directly or indirectly relates to students' disabilities.²⁷ For example, behavioral and emotional disorders have associated behaviors that include temper tantrums, defiant conduct, verbal aggression, among others.²⁸ As a result, a staggering 20 percent of students with emotional and behavioral disorders have suffered an arrest for school conduct.²⁹

This disparity begins in early childhood.³⁰ The CRDC reports that of the students who were expelled in preschool during this school year, 56.9 percent were students with disabilities.³¹ This is a staggering overrepresentation as students with disabilities only comprise one quarter of the total number of students.³² This trend continues through high school.³³ The CRDC shows that students with disabilities are overrepresented in expulsions, as well as both in- and out-of-school suspensions.³⁴ Due to out of school suspensions alone, students with disabilities missed a combined 3,145,559 days (about 8612 years) of school in the 2017-18 school year.³⁵ A study from 2014 demonstrated that the suspension rate for students with emotional and behavioral disturbances was as high as 47 percent, and nearly one third of these students had more than one suspension.³⁶

The inequity is even more apparent for students of color.³⁷ Black students with disabilities were disproportionately represented in suspensions and expulsions, accounting for 35.7 percent of out-of-school suspensions and 39 percent of expulsions; boys with disabilities representing nearly 80 percent of both out of school suspensions and expulsions.³⁸ Black students

with disabilities accounted for 9.1 percent of students arrested, though this category of students only comprised 2.3 percent of the total student population.³⁹

In January 2023, the United States Department of Education reported a 17.5 percent increase in the number of referrals to law enforcement, noting that students with disabilities represented larger percentages of students who suffered referrals and arrests than their overall enrollment.⁴⁰ The data shows that students with disabilities suffer more denials to education, either through suspensions, expulsions, or referrals to law enforcement, than their peers.⁴¹ The data also shows that the statutes and policies that grant broad discretion in handling behavior play a significant role in this inequitable access to education for students with disabilities.⁴²

The Universal Declaration of Human Rights (UDHR) establishes the right to free, compulsory primary education and guarantees its protection for all, regardless of race, color, sex, or other status.⁴³ Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees this right to education to persons with disabilities and compels State Parties⁴⁴ to ensure that persons with disabilities are included in the general education system and are not excluded on the basis of disability.⁴⁵ It further compels State Parties to provide reasonable accommodations and the support that persons with disabilities need to access effective education.⁴⁶ The United States has signed but not ratified this treaty.⁴⁷ Ratifying the treaty would bind

26 *Id.*

27 Rivera-Calderón, *supra* note 2.

28 Michael O. Ogundele, *Behavioral and Emotional Disorders in Childhood: A Brief Overview for Paediatricians*, 7 *WORLD J. CLIN. PEDIATR.* 9, 9 (2018).

29 Rivera-Calderón, *supra* note 2.

30 Off. for Civil Rts., *supra* note 1.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 Off. for Civil Rts., *Suspensions and Expulsions of Students with Disabilities in Public Schools*, U.S. DEP'T OF EDUC. (Aug. 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/discipline-of-students-with-disabilities-part-3.pdf>.

36 Sullivan, et al., *supra* note 21.

37 Off. for Civil Rts., *Suspensions and Expulsions of Students with Disabilities in Public Schools*, *supra* note 35.

38 *Id.*

39 *Id.*

40 Off. for Civil Rts., *Referrals to Law Enforcement and School-Related Arrests in U.S. Public Schools*, U.S. DEP'T OF EDUC. (Jan. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/referrals-and-arrests-part-5.pdf>.

41 *Id.*

42 Rivera-Calderón, *supra* note 2.

43 G.A. Res. 217 A, Universal Declaration of Human Rights (Dec. 10, 1948).

44 U.S. Dep't of Health and Hum. Serv., *International Agreements*, (February 2018). [https://www.phe.gov/s3/law/Pages/International.aspx#:~:text=An%20agreement%20between%20two%20countries,agreement%20between%20states%20\(countries\)](https://www.phe.gov/s3/law/Pages/International.aspx#:~:text=An%20agreement%20between%20two%20countries,agreement%20between%20states%20(countries).). (In international treaties like The CRPD, countries that agree to be bound by the terms of the agreement are called "State Parties".)

45 G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (January 24, 2007).

46 *Id.*

47 *Ratification of 18 International Human Rights Treaties*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://indicators.ohchr.org/> (last updated 2014).

the United States to ensure domestic law complies or else be in breach of international law.⁴⁸ Though the United States has not ratified, and therefore has not granted consent to be bound, the United States cannot ignore the treaty.⁴⁹ Signing created the obligation to not defeat the purpose of the CRPD.⁵⁰ To ensure students with disabilities enjoy the full extent of their educational rights, the laws of the United States must address the inequitable removal of students from educational opportunities.

III. Analysis

The Committee on the Rights of Persons with Disabilities (the Committee) monitors the implementation of the CRPD by the State Parties.⁵¹ Since 2020, the Committee has investigated and issued observations on a number of cases that discuss access to education for students with disabilities by the State Parties.⁵² Three cases illuminate how public-school systems in the United States can ensure students with disabilities can enjoy the full extent of their educational rights.

In 2020, the Committee looked at education in Spain.⁵³ Addressing a communication by a student with Down syndrome and his family, the Committee considered the issue of whether compulsory enrollment in a special education center because of a student's disability constituted a violation of Article 24 by the State Party.⁵⁴ In the publication of the views, the Committee noted several concerns: lack of support for this student in the State Party's public education system, pressure put on the student to attend a school separate and distinct from schools of general education, cruel, inhumane, or degrading treatment or punishment on the basis of disability.⁵⁵

The student attended a public elementary

school in Spain until fifth grade.⁵⁶ The student had Down syndrome and received educational support from a special education assistant.⁵⁷ In fourth grade, the student's teacher had grabbed him by the neck and made threats to throw him out the window and hit him with a chair.⁵⁸ The teacher told the parents that the student should be in a special education center to learn excluded from the general education setting because his behavior was anti-social and dangerous.⁵⁹ The record does not show what behavior this teacher referenced.⁶⁰ Another teacher slapped this student several times.⁶¹ Despite the parents of the student reporting these incidents, the Provincial Director of Education did not investigate.⁶² In fifth grade, another teacher refused to allow the special education assistant to support the student.⁶³ This teacher also urged that the student be transferred to a special education center.⁶⁴ The student suffered further neglect and abuse.⁶⁵ Though the parents made additional reports, the Provincial Director of Education did not investigate.⁶⁶ A social worker reported that the student's behavior suggested difficulty adapting to this school environment because of the relationship with the teacher.⁶⁷ The report did not suggest that the student needed to be excluded from the general education environment or to learn in a special education center.⁶⁸ The school issued a report that drew clinical conclusions beyond the qualifications of the psychoeducational school team.⁶⁹ The committee concluded that the State Party failed to meet the obligations of CRPD article 24.⁷⁰

Addressing the concerns that the public school excluded this student from the general education setting, failed to accommodate the student's educational needs, and treated this student in a manner cruel, inhumane, or degrading on the basis of his disability, the Committee made several recommendations.⁷¹

48 *Id.*

49 Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S., at 331.

50 *Id.*

51 Committee on the Rights of Persons with Disabilities, *Introduction to the Committee*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/crpd/introduction-committee> (last visited Nov. 18, 2023).

52 *Id.*

53 Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 41/2017*, U.N. CRPD, UN Doc. /C/23/D/41/2017 (2020) [hereinafter CRPD Views].

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 CRPD Views, *supra* note 53.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 CRPD Views, *supra* note 53.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 CRPD Views, *supra* note 53.

The Committee obligated the State Party to expedite legislative reform to define inclusion for students with disabilities in education and to ensure that inclusive education is considered as a right for mainstream education to guarantee.⁷² The Committee recommended creating an inclusive education policy that included rights-based assessments, support for teachers, and respect for diversity.⁷³

In October 2023, the Committee issued concluding observations on Germany's compliance with the CRPD.⁷⁴ Looking at how the State Party had complied with the CRPD in the context of education, the Committee noted several concerns.⁷⁵ The Committee identified that Germany had yet to fully implement inclusive education throughout the education system, as special schools and classes that exclude students with disabilities from the general education classroom remained prevalent.⁷⁶ Further, students with disabilities faced barriers when enrolling in and accessing learning in general education settings.⁷⁷ At a municipal level, Germany lacked a clear mechanism to promote inclusive education, maintaining misconceptions and negative perceptions about it.⁷⁸ Furthermore, public schools failed to make education environments accessible to all learners and failed to accommodate effectively to meet the needs of students with disabilities.⁷⁹ Public schools also failed to sufficiently prepare teachers and staff.⁸⁰ The Committee was concerned with the lack of training on the right to inclusive education and on the best practices of teaching students with disabilities.⁸¹

Noting these areas where the State Party had not fulfilled the obligation set by the CRPD article 24, the Committee recommended that the State Party enhance accessibility and accommodation for all disabilities and provide ongoing training for teachers and staff on the right to inclusive education and the skills, methods, and best practice required for its

72 *Id.*

73 *Id.*

74 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Germany*, UN Doc. /C/DEU/CO/2-3 (2023) [hereinafter CRPD Concluding Observations].

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 CRPD Concluding Observations, *supra* note 74.

81 *Id.*

implementation.⁸² The Committee also recommended that the State Party develop a monitoring system that focused on eliminating all direct and indirect forms of discrimination against students with disabilities and their families.⁸³

In September 2023, the Committee issued concluding observations on Malawi's compliance with the CRPD.⁸⁴ The Committee noted several areas of concern regarding the State Party's obligations under Art. 24, as well as a special concern for inequitable treatment of people with disabilities based not only on their disability but also on their gender and skin tone.⁸⁵ Identifying that students with disabilities have lower school attendance rates than their nondisabled peers, the Committee found *de facto* discrimination.⁸⁶ Finding this *de facto* inequality and discrimination in education, the Committee was concerned with the lack of explicit reference to women and girls in the legislation regarding the rights of persons with disabilities.⁸⁷ The Committee further noted a concern about teacher and staff resistance to accessibility and inclusion and discriminatory attitudes toward children with disabilities.⁸⁸ Because these, along with exclusion from the general education setting, prevented access to inclusive education, the Committee made several recommendations.⁸⁹

The Committee recommended that Malawi bring legislation into compliance with article 24, as well as provide training for inclusive education in all teacher preparation programs.⁹⁰ The Committee further recommended methods of accountability, including regular needs assessments to determine whether students with disabilities receive appropriate accommodations.⁹¹ The Committee also noted a need for accommodated assessments to provide for the specific needs of students with disabilities.⁹²

Because the laws and policies of discipline in the United States subject students with disabilities to similar exclusion from general education environments and fail to accommodate the educational and

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 CRPD Concluding Observations, *supra* note 74.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

behavioral needs of students with disabilities, the United States should have the obligation to meet the standards set for Spain, Germany, and Malawi.

As the public school system in Spain excluded the student with Down syndrome from the general education setting by placing him in a special education center, policies and laws that suspend, expel, or refer students to police demonstrate the same exclusionary practices. This removal from learning environments excludes students with disabilities from accessing the learning opportunities that their nondisabled peers enjoy. This fails to meet the obligations of CRPD Article 24. Like the public school system in Spain failed to accommodate the student by withholding access to the special education assistant and failing to train teachers on how to support students with disabilities, the policies and laws in the United States that deem disruptive behavior as grounds for removing a student from learning fail to accommodate students with disabilities. Holding students with disabilities to the same standard of behavior as students without disabilities fails to accommodate the unique educational and behavior needs of students with disabilities. Instead of providing reasonable accommodations to meet such needs, these policies and laws prevent students with disabilities from accessing learning. Similar to the Committee's findings with Spain, the United States fails to meet their obligations under CRPD Art. 24.

Furthermore, like the Committee's concerns in Germany, the United States also fails to accommodate students with disabilities by establishing disciplinary consequence that punish with exclusion instead of accommodating unique behavioral and educational needs. Like the Committee's concern in Germany for lack of accessibility, students in the United States cannot access general education settings when the education system suspends, expels, and refers to law enforcement students with disabilities for disruptive behavior. Like the Committee's concern for persons with disabilities in Malawi, the United States also fails to address inequality and discrimination on the basis of gender and skin tone. Like the data in Malawi, the data in the United States is clear: students with disabilities suffer de facto discrimination, Black students with disabilities and boys with disabilities even more. Like the Committee's recommendations for Malawi, the United States needs to respond to this de facto discrimination to promote equity and inclusion for all students, in compliance with article 24.

IV. Conclusion

Though not all disruptive behavior may be related to a student's disability, broad language in school disruption and disorderly conduct statutes leads to clear inequity in education. The data demonstrates that students with disabilities are removed from learning environments through suspensions, expulsions, and referrals to law enforcement significantly more than their nondisabled peers. The discrepancy is even larger for Black students and boys. Art. 24 obligates the United States not to undermine the effort to establishing the right to inclusive education for students with disabilities. Like the Committee recommended for Spain, Germany, and Malawi, the United States must take affirmative steps to guarantee this right. Understanding that these statutes disadvantage students with disabilities, legislators should be careful to draft school disruption laws in a manner that cannot be used against students. Understanding the complexity of student behavior, especially that of students with disabilities, schools and school boards should be careful to establish discipline policies that prioritize learning and keeping students in school.