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Note

OBEY OR ABEY: AN EMPIRICAL EXAMINATION OF ABEYANCE AGREEMENTS IN PUBLIC SCHOOL DISCIPLINE

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ABSTRACT—"Exclusionary discipline" is widely understood to mean the typical responses to student misbehavior in public schools: suspension and expulsion. But sometimes their lesser-known counterpart, the abeyance agreement, swoops in before the suspension or expulsion is effectuated and gives the student a "second chance" to avoid such exclusionary discipline—provided the student complies with the terms of the agreement. It sounds simple, but the reality is far more complicated. Without a clearly defined, regulated, and tracked practice, abeyance agreements are an off-record discipline device used at the sole discretion of public school district administrators. Joining a landscape of urgent concerns over the disproportionate use of exclusionary discipline against Black students, male students, and students with disabilities, the use of abeyance agreements by public schools as an alternative to traditional exclusionary discipline raises concerns as to whether their use may similarly—and detrimentally—reflect these trends.

But *we simply don't know*. Presently, little to no quantitative research or qualitative discussion exists on the use of abeyance agreements in public school discipline. This Note is an exploration of that unknown: it introduces abeyance practices and the legal and policy concerns they raise, and identifies potential next steps in addressing their use. Most notably, this Note presents original datasets that illustrate the current landscape of abeyance practices in two large U.S. school districts and, in doing so, provides a baseline for comprehensive empirical research on the issue.

AUTHOR—J.D. Candidate, Northwestern Pritzker School of Law, 2023; B.A., Quinnipiac University, 2015. I owe endless gratitude to Jessica Gingold for igniting my interest in abeyance agreements and being a constant resource throughout this process. Thank you to Professor Monica Llorente, whose meticulous guidance helped me turn this idea into a piece, and thank you to Dr. David Perrodin, whose time, knowledge, and experience have made this piece possible. Thank you to Professor Ajay Mehrotra for his guidance through the empirical process. Many thanks to Peter Medlin and

Tara Garcia Mathewson for discussing their own explorations of this topic with me. I owe so much to my peers on the *Northwestern University Law Review* for their hard work on this piece, especially Alexandra Dakich, Bradford McGann, Deepa Chari, Elizabeth Charles, Kathryn Speckels, Megan Cahillane, Mick Borchert, Michael Palmer, and Amelia Dahl, with special thanks to Mike Bellis and Dylan DeWitt for their empirical support. Last, but never least, thanks to my mom, dad, brother, and friends for their unconditional support, and to my (now-grown!) Northwest Jackson Middle School students for inspiring my commitment to equity in education.

INTRODUCTION

A twelve-year-old boy is sitting next to his mother in his school's large, empty conference room across the table from the principal and the school district's legal counsel. This is not his first encounter with the principal, as he has a growing list of minor behavioral infractions, but it is the first time a school administrator has recommended him for expulsion. The principal slides a short contract—an abeyance agreement—and a pen in front of both mother and son, having hurriedly reviewed the contents of the document with

them, and instructs them to sign. The contract, typical of abeyance agreements, reads:

> The District shall hold the expulsion in abeyance as long as Student complies with the terms of this Agreement. If Student does not comply with one or more terms of this Agreement, the stay of expulsion may be lifted and Student will be expelled, effective immediately, for the remainder of the Expulsion Period.[1]

The student's mother, distraught by the situation and wanting her son to remain in school at all costs, signs the agreement without further question. She hands the pen to her child and directs him to sign on the dotted line in his sixth-grade penmanship.

Such an agreement may seem harmless—perhaps even a good thing. But, about halfway down the page of the school district's boilerplate abeyance agreement comes bold text, as if the darkened font could properly convey the magnitude of the agreement's implications. The abeyance contract further states:

> **Parent and Student acknowledge that they are aware of Student's right to a due process hearing prior to the effectuation of an expulsion. Parent and Student affirmatively state and agree that they voluntarily and knowingly are waiving the right to an expulsion hearing in order for Student to have the opportunity to continue his/her education at District without an expulsion on his/her record.**

A look beneath the surface reveals a more complicated truth: abeyance agreements appear to be more than the "second chance" school districts often frame them as. In fact, they are contractual mechanisms that evade federal and state disciplinary data-reporting requirements and circumvent due process battles. This Note proposes that abeyance agreements benefit school districts more than students and may further harm students already disproportionately impacted by exclusionary school discipline: Black students, male students, and students with disabilities.[2]

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[1] The language and format of abeyance agreements varies by school district. This language reflects that which may be found on a hypothetical abeyance agreement. I have included an example of an abeyance agreement and an abeyance letter from two different school districts in the Appendix.

[2] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES, at i (2018), https://www.gao.gov/assets/gao-18-258.pdf [https://perma.cc/6AGF-HCSE] ("Black students, boys, and students with disabilities were disproportionately disciplined (e.g., suspensions and expulsions) in K-12 public schools, according to GAO's analysis . . . ."). Traditional exclusionary discipline, as I mention throughout this Note, is generally understood to include discipline practices that remove students from the classroom: in-school suspensions, out-of-school suspensions, and expulsions. *See* COMM. FOR CHILD., RECENT TRENDS IN STATE LEGISLATIVE EXCLUSIONARY DISCIPLINE REFORM 2 (2018), https://www.cfchildren.org/wp-content/uploads/policy-advocacy/exclusionary-policy-brief.pdf [https://perma.cc/CNT6-UQW5].

The scholarly landscape in the realm of school discipline law is robust, yet there is a crucial gap in scholarship this Note seeks to fill. The use of abeyance agreements as a disciplinary device in public schools has yet to be discussed in legal and empirical scholarship.[3] Accordingly, at a quantitative level, this Note investigates how the use of abeyance agreements fits into the widely accepted understanding of disparate trends in exclusionary school discipline through two case studies. Building on these empirical results, this Note argues that abeyance agreements present grave legal and policy issues that warrant extensive examination of their use in public schools and some form of regulatory oversight. Specifically, abeyance agreements implicate issues of Fourteenth Amendment due process rights and contract

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Exclusionary discipline is known to be harmful to both individual students and, ultimately, society at large. Research has shown that students who experience exclusionary discipline are more likely than their peers to repeat a grade, drop out of school, and interact with the juvenile justice system. Studies also show that exclusionary discipline ultimately results in decreased earning potential and added societal costs, such as incarceration and lost tax revenue. *Id.*

[3] At the time of this writing, there is very little information on abeyance agreements and practices generally, but specifically in legal scholarship. To conclude that this is the first piece on abeyance, I searched extensively on Google, Westlaw, Lexis+, and SSRN, among other databases. Keywords such as "abeyance + school," "abeyance agreements + school discipline," "expulsion in abeyance + school," and similar variations turned up no relevant results in scholarship. Less common or vaguer terms such as "school discipline + contract," "pre-expulsion agreement," "last chance contract," and other variations also failed to return relevant results. A Westlaw search for "expulsion in abeyance" returns exactly two relevant secondary sources, both from the same bulletin. *Around the Nation*, SCH. L. BULL., (Westlaw/Quinlan, New York, N.Y.), Dec. 15, 2009, at 1 (referring to a situation in which a number of high school students depicted racist symbols on school property but were offered abeyance agreements allowing them to continue school); *Quick Case*, STUDENT DISCIPLINE L. BULL., (Westlaw/Quinlan, New York, N.Y.), at 2 (describing a student who challenged his expulsion, despite its being held in abeyance, for reputational harm); *see* Burton v. Cleveland Heights-Univ. Heights Sch. Dist., 2016-Ohio-2841, ¶ 14, 52 N.E.3d 1252, 1257.

On Google, search results were limited to various school districts' policies, a podcast by Dr. David Perrodin on the topic of abeyance agreements, two brief articles written by Peter Medlin—which were published about a year into writing this piece—and a smattering of results mentioning abeyance but outside of the context of education. *See Insider Truth About Student Discipline Abeyance Agreements*, THE SAFETY DOC PODCAST (Nov. 14, 2019), https://thesafetydoc.podbean.com/e/insider-truth-about-student-discipline-abeyance-agreements/ [https://perma.cc/D653-ZWLK]; Peter Medlin, *Expelled Students Are Often Sent to 'Adaptive Learning Sites.' What Are They?*, N. PUB. RADIO (June 15, 2022, 6:12 AM), https://www.northernpublicradio.org/wnij-news/2022-06-15/expelled-students-are-often-sent-to-adaptive-learning-sites-what-is-an-adaptive-learning-site [https://perma.cc/F35E-4HAT]; Peter Medlin, *'It Really Doesn't Do Anything to Repair the Harm': How Rockford Schools Wield a Lesser-Known Form of Exclusionary Discipline*, N. PUB. RADIO (June 9, 2022, 10:46 AM), https://www.northernpublicradio.org/wnij-news/2022-06-09/it-really-doesnt-do-anything-to-repair-the-harm-how-rockford-schools-wield-a-lesser-known-form-of-exclusionary-discipline [https://perma.cc/Q254-APSQ].

Lastly, while preparing this piece for publication, Dr. Perrodin published a short article on abeyance agreements, which has bolstered the source material for this Note. David P. Perrodin, *Abeyance Agreements: Evading Accountability for Disciplinary Actions?*, 104 PHI DELTA KAPPAN 24 (2022). Given these results, I am confident that this piece can serve as the launching pad for a wealth of research and scholarship on abeyance agreements to come.

unconscionability in the legal context. Policy concerns include the lack of regulation of these agreements, their role in impeding student agency in the discipline process, and the part they play in perpetuating the school-to-prison pipeline.

Part I of this Note defines and explains the practice of holding discipline in abeyance. Part II gives empirical context to this underresearched, underdiscussed practice by exploring how abeyance agreements operate in comparison to known trends in exclusionary discipline. Specifically, Part II compares two original case studies of two public school districts—one in the Midwest and one in the Northwest—with a control set of government-collected discipline data reflecting national trends. Against this quantitative backdrop, Part III briefly reviews the current landscape of students' procedural due process rights in public school discipline before positing two major legal problems with the use of abeyance agreements in public school discipline and their various public policy implications. Finally, Part IV suggests steps that legislators, community stakeholders, and school leadership should take to address the various law and policy issues that the use of abeyance agreements in school discipline raise.

Most importantly, because it is one of the earliest scholarly discussions of abeyance agreements in public schools, this Note establishes a baseline for further examination of the issues presented below and lays the groundwork for future efforts to shift the status quo in school discipline.

I. ABEYANCE AGREEMENTS EXPLAINED

As the conversation around abeyance agreements is still emerging in the education and legal spheres, there is little public information about their use. Thus, before exploring empirical data and the legal and policy implications surrounding their use, it is critical to understand the origins, nature, and purpose of abeyance agreements in school discipline. Section I.A defines abeyance agreements and contextualizes their use. Section I.B outlines the practice in the context of school discipline. Section I.C then explores several reasons school districts may use abeyance agreements.

A. Definition and Origins of Abeyance Agreements

A quick Google search of "abeyance agreements" will produce few meaningful education-related results.[4] This is because, as of this writing, there are no rules as to how abeyance agreements operate in the public school context, no regulation of the practice, and no publicly available research or scholarship related to the use of abeyance agreements in public school

[4] *See supra* note 3.

discipline. In fact, there is not even a single, agreed-upon name for the practice; a flurry of descriptors have been used to identify the same concept, such as pre-expulsion agreements, suspended expulsion, "last chance" contracts, and others.[5] Resorting to plain text to derive meaning, Merriam-Webster defines "abeyance" as "a state of temporary inactivity; suspension."[6] Thus, following its dictionary definition, an abeyance contract is an agreement to hold off on something.

Abeyance agreements find their origins in contexts outside of the education realm.[7] In trust and estate planning, "abeyance" refers to a situation in which a property or trust's rightful owner has yet to be determined or has not fulfilled the obligations requisite to taking ownership.[8] As there is no true owner, the legal right to the property or trust is held in a state of expectancy until such circumstances change.[9] Abeyance agreements also appear in employment contexts. Employees of the federal government can be subject to "last-chance agreements," wherein the employee agrees to maintain satisfactory attendance and proper conduct at work in lieu of disciplinary action by the employer. In doing so, the employee waives the right to appeal the ensuing termination should they violate the terms of the agreement.[10] Like the last-chance agreement, the U.S. Department of Energy defines "abeyance agreement" on its website as a "written and signed agreement in which a Deciding Official agrees to withhold implementation

[5] For ease and clarity, this Note uses "abeyance agreement" because the term is both consistent with the plain meaning of the practice and most commonly used in school-district policies. "Suspended expulsion" is also used by school districts, particularly in California, but this term is particularly confusing because of the use of the word "suspended," which has a different context in school discipline. *See Suspended Expulsion*, LAW INSIDER, https://www.lawinsider.com/dictionary/suspended-expulsion [https://perma.cc/2EY5-9GUA] ("Suspended expulsion means setting aside an expulsion contingent upon the student fulfilling certain conditions. Upon recommendation of the Hearing Authority, a student whose expulsion is suspended may be assigned to an alternative school."); *see also* THE SAFETY DOC PODCAST, *supra* note 3 ("[Abeyance agreements] are also referred to as pre-expulsion agreements or a first offenders program.").

[6] *Abeyance*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abeyance [https://perma.cc/5WM8-N826].

[7] THE SAFETY DOC PODCAST, *supra* note 3 ("[T]he term abeyance agreement is adopted and adapted from the legal system, not from education policy in public schools.").

[8] Julia Kagan, *Abeyance*, INVESTOPEDIA, (Nov. 17, 2020), https://www.investopedia.com/terms/a/abeyance.asp [https://perma.cc/DBC2-6V42].

[9] *Id.*

[10] *See, e.g.*, Worrell v. Dep't of Navy, 168 F. App'x 425, 427 (Fed. Cir. 2006) (dismissing an appeal by a former U.S. Navy employee who was terminated upon violating a last-chance agreement); Gibson v. Dep't of Veterans Affs., 160 F.3d 722, 727 (Fed. Cir. 1998) (dismissing an appeal by a former Department of Veterans Affairs employee who was terminated upon violating a last-chance agreement).

of a decision on a disciplinary action in abeyance for a specific period of time, in exchange for terms agreed to by the parties."[11]

More relevant to the disciplinary context, abeyance agreements have also been used in criminal justice administration. A "plea in abeyance" is similar to a plea bargain, but a successful plea in abeyance results in the dismissal of charges; no conviction is entered.[12] While similar arrangements may exist in other states under various names, at least one state uses the term "plea in abeyance" in its penal code.[13] In Utah, a plea in abeyance is a court order "accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against the defendant nor imposing sentence upon the defendant on condition that the defendant comply with specific conditions as set forth in a plea in abeyance agreement."[14] The subsequent definition in Utah's code provides that a plea in abeyance agreement enumerates the terms and conditions a defendant must accept for the defendant's plea to be held in abeyance.[15] Simply put, a plea in abeyance agreement is a contract between the defendant and the state. The terms of the contract require the defendant's waiver of virtually all the rights they hold as a criminal defendant, including the right to counsel, the right to a presumption of innocence, and the right to an appeal.[16] This practice as employed in the criminal justice system is akin to its underresearched counterpart in the education context.[17]

B. Abeyance Agreements in School Discipline

Until recently, no synthesized definition of abeyance agreements as used in the public school context existed. But in November 2022, Dr. David

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[11] *Abeyance Agreement*, U.S. DEPT. OF ENERGY, https://www.directives.doe.gov/terms_definitions/abeyance-agreement [https://perma.cc/PR5P-T3CH].

[12] *See* UTAH CODE ANN. § 77-2a-1(2) (West 2021). Some might suggest that if abeyance agreements operate parallel to plea bargaining, then they must be useful. *But see* Gretchen Gavett, *The Problem with Pleas*, PBS (Oct. 31, 2011), https://www.pbs.org/wgbh/frontline/article/the-problem-with-pleas/ [https://perma.cc/TAB7-AFU6] (describing how plea bargains are "used to save money and time," not to provide options or promote fairness for defendants).

[13] UTAH CODE ANN. § 77-2a-1(2).

[14] *Id.*

[15] *Id.* § 77-2a-1(3).

[16] *Pleas in Abeyance*, UTAH CTS., https://www.utcourts.gov/howto/criminallaw/plea_in_abeyance.html [https://perma.cc/R4W5-MCV7].

[17] The similarity between these practices is concerning in its own right. That the American education system borrows practices and policies from the criminal justice system is an embodiment of the school-to-prison pipeline. *See infra* Section III.B.3.

Perrodin[18] defined abeyance agreements as "behavior contracts laid out before a suspension or expulsion in which the school agrees to halt the disciplinary action as long as the student does not engage in any further misconduct during a specified period."[19] While abeyance agreements widely vary in their terms and conditions, there are five features that typically surface in abeyance agreements: acknowledgement of the student's violation, the agreement's duration, an attendance policy, a reference to the school's code of conduct, and a waiver of due process for the initial violation and all future violations for the duration of the agreement.[20]

Another important term that often varies between school districts is the student's school placement during the abeyance agreement. In some cases, students who sign abeyance agreements continue to attend their regular neighborhood schools. In many instances, however, school districts will temporarily transfer students to alternative schools as a condition of the abeyance agreement.[21] Alternative schools are "public schools with a disciplinary or academic focus that serve students who have been expelled or suspended from school, or are at risk of educational failure."[22] Compared to abeyance agreements that keep students in their original placements, transfers to alternative schools for abeyance purposes remove children from their original school environments and are exclusionary discipline by nature.[23]

While not much is publicly known about how school districts use abeyance practices, some districts include explicit provisions covering abeyance agreements in their online district policy manuals.[24] One public

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[18] Dr. David P. Perrodin is a former school administrator and current Professor of Education at Viterbo University. Dr. Perrodin earned his Ph.D. from the University of Wisconsin-Madison in Educational Leadership and Policy Analysis. He has since written multiple books on school discipline and safety. Graciously, Dr. Perrodin lent me his time for an interview in October 2021, which I cite throughout this piece. *See, e.g.*, *infra* note 37. Additionally, Dr. Perrodin's recently published article in *Phi Delta Kappan* has served as an exceptional source on abeyance agreements for this Note. *See* Perrodin, *supra* note 3.

[19] Perrodin, *supra* note 3.

[20] *Id.* at 25–26.

[21] *Id.* at 25, 27.

[22] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-373, K-12 EDUCATION: CERTAIN GROUPS OF STUDENTS ATTEND ALTERNATIVE SCHOOLS IN GREATER PROPORTIONS THAN THEY DO OTHER SCHOOLS, at i (2019), https://www.gao.gov/products/gao-19-373 [https://perma.cc/AQ3G-678F].

[23] These transfers have particular implications for students, which will be discussed throughout this Note. *See infra* notes 92–95, 112–114.

[24] *See* TUCSON UNIFIED SCH. DIST., STUDENT DISCIPLINE – SUSPENSION ABEYANCE CONTRACT 1 (2010), https://govboard.tusd1.org/Portals/TUSD1/GovBoard/docs/sectJ/JK-R4.pdf [https://perma.cc/6S5P-YCH2]; PULASKI CMTY. SCH. DIST. BD. OF EDUC., ABEYANCE AGREEMENT (2019),

school district defines its version of the abeyance agreement as "set[ting] forth the conditions under which the school agrees to not impose a suspension. If the student violates the agreement, the suspension will automatically be reinstated at that time without further process."[25] To be eligible for an abeyance, the student must "acknowledge he/she violated the *Guidelines for Student Rights and Responsibilities* and parent/legal guardian and, if applicable, student must agree to waive the student's right to a long-term suspension hearing and any subsequent appeals."[26] Thus, the student must admit guilt, waive their procedural rights, and agree to the terms of the contract in order to continue to attend school without the blemish on their record.[27] Should the student violate the abeyance agreement, the exclusionary discipline—suspension or expulsion—will be immediately reinstated, and the student will have no recourse to challenge it.

C. Purpose of Abeyance Agreements

While there are many reasons why school districts might use abeyance agreements as disciplinary devices, a few logical advantages stand out. First, abeyance agreements decrease the number of disciplinary actions a district must report to state and federal governments. Districts are required to submit data on the number of suspensions and expulsions effectuated in a given school year.[28] But abeyance agreements are not currently accounted for in these reporting requirements. This, in turn, means that the reported data may not present an accurate picture of exclusionary discipline in districts regularly deploying abeyance practices. At a time in which school districts across the country face pressure to reduce exclusionary discipline,[29] the

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https://campussuite-storage.s3.amazonaws.com/prod/837026/2d9b34b8-ed41-11e6-884f-22000bd8490f/1910740/53caf1d2-5708-11e9-91cb-12fc0edcc734/file/JGF%20Abeyance%20Agreement%20PCSD.pdf [https://perma.cc/EK69-8LEE]. These definitions are consistent with one another and with the general understanding of abeyance practices.

[25] TUCSON UNIFIED SCH. DIST., *supra* note 24, at 1.

[26] *Id.*

[27] Perrodin, *supra* note 3 ("In fact, the [abeyance agreement] is a magic wand that makes discipline records disappear.").

[28] *See* Off. for C.R., *Civil Rights Data Collection (CRDC)*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crdc.html [https://perma.cc/JB4X-GKRH] ("The CRDC collects data from nearly all public local educational agencies (LEA) and schools, including juvenile justice facilities, charter schools, alternative schools, and schools serving only students with disabilities."). In addition to reporting data for all students, school districts must report data separately by race/ethnicity, gender, English-learner status, and disability. *Id.*

[29] *Joint "Dear Colleague" Letter*, U.S. DEP'T OF EDUC. (Jan. 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html [https://perma.cc/UQZ3-RSVY]. Much of this pressure stems from the *Dear Colleague Letter* and accompanying school discipline guidelines released by the Obama administration in 2014, which "urged schools to use suspension, expulsion, and

ability to present more favorable data may be an incentive for districts to use abeyance agreements.

Along the same line, districts—and parents—may see the abeyance agreement as a way to keep students in school when disciplinary issues arise. Exclusionary discipline removes students from the educational setting, interrupting their learning. This interruption can lead to grade retention, poor academic performance, and even dropout.[30] For offenses that are not among the most severe but still call for *some* disciplinary action, abeyance agreements pose a seemingly favorable alternative to true exclusion as they allow students to continue attending school.[31] And allowing students to remain at their own schools during the abeyance period is indeed a positive thing. For those who face disciplinary transfers as a condition of abeyance, however, negative outcomes may await.[32] Like suspensions and expulsions,

reporting students to the police as a last resort in an effort to reduce the discipline gap across the country," and the subsequent Every Student Succeeds Act (ESSA) in 2015. *See School Discipline Explained: Why It Harms Students of Color and How We Can Fix It*, ED POST (Mar. 15, 2021), https://www.edpost.com/stories/school-discipline-explained-why-it-harms-students-of-color-and-how-we-can-fix-it [https://perma.cc/V49Y-3NU6]. ESSA required states to create plans to support school districts in reducing exclusionary discipline, creating a chain of accountability. *See* Colleen Brooks & Benjamin Erwin, *School Discipline*, NAT'L CONF. OF STATE LEGISLATURES (June 24, 2019), https://www.ncsl.org/research/education/school-discipline.aspx [https://perma.cc/X466-WHK3]; *see also* Athanase Gahungu, *Adopting Non-Exclusionary Discipline Practices: The First Steps Are the Most Confusing*, 3 INT'L J. ON SOC. & EDU. SCIS. 379–93 (2021) ("In [principals'] views, the lower the expulsions and suspensions, the better their schools are. By contrast, the teachers feel pressured by their principals and districts to practice non-exclusionary practices . . . ."); TRACEY LLOYD, URB. INST., REDUCING EXCLUSIONARY DISCIPLINE AND ENSURING SCHOOL SAFETY: AN EXPLORATORY, MIXED-METHODS ANALYSIS OF SCHOOL DISCIPLINE REFORM IN MASSACHUSETTS (2020), https://www.ojp.gov/pdffiles1/nij/grants/305084.pdf [https://perma.cc/Z8XD-KD43] ("[M]ore US public school districts and personnel are being pressured and legally mandated to reduce OSS rates and eliminate disparities in discipline . . . .").

[30] Julie Gerlinger, Samantha Viano, Joseph H. Gardella, Benjamin W. Fisher, F. Chris Curran & Ethan M. Higgins, *Exclusionary School Discipline and Delinquent Outcomes: A Meta-Analysis*, 50 J. YOUTH & ADOLESCENCE 1493, 1494 (2021).

[31] Many of the schools whose district policies specifically reference the use of abeyance agreements exclude their use for certain severe offenses, such as the use or possession of a firearm. *See, e.g.*, TUCSON UNIFIED SCH. DIST., *supra* note 24, at 2 ("An abeyance contract is NOT available for possession of a firearm or destructive device as defined in the *Student Rights and Responsibilities*."); HIGHLINE PUB. SCHS., PROCEDURE 3240 – STUDENT CONDUCT 16 (2019), https://www.highlineschools.org/about/board-policies/policy-details/~board/board-policies/post/procedure-3240-student-conduct [https://perma.cc/CG53-ZUZ4] ("The school or district may enter into behavior agreements with students and parents/guardians in response to behavior violations, including agreements to reduce the length of suspensions conditioned on the participation in treatment services, agreements in lieu of suspension or expulsion, or agreements holding a suspension or expulsion (except an expulsion for a firearm) in abeyance.").

[32] Miranda Johnson & James Naughton, *Just Another School?: The Need to Strengthen Legal Protections for Students Facing Disciplinary Transfers*, 33 NOTRE DAME J.L., ETHICS & PUB. POL'Y 69, 69 (arguing that disciplinary transfers to alternative schools, which often have negative effects on

transfers to alternative schools exclude students from their regular learning environments and still disrupt their everyday learning.[33] Whether the outcomes for students transferred to alternative schools are better than those for students who are excluded from school altogether warrants further study.

Additionally, districts may find using abeyance agreements to be more efficient than exclusionary discipline. Abeyance agreements present a quick way to conclude disciplinary investigations and redirect school resources to other priorities.[34] Once the agreement is signed, there is no need to elicit further student statements, prepare for a disciplinary hearing, or conduct additional investigation into the alleged offense or its root causes. But although abeyance agreements might initially save districts time, they are nothing more than Band-Aids slapped onto the real problem.[35] Looking into and ultimately identifying the root cause of the student's behavior are critical prerequisites to preventing further behavioral issues and ensuring the student's well-being.[36]

Whatever the motivation behind a school district's choice to use abeyance agreements, this unregulated practice inherently affords districts plenary authority to decide if and how to use them.[37] This results in vast

students, should be limited in addition to suspensions and expulsions). *But see* Camilla A. Lehr, Chee Soon Tan & Jim Ysseldyke, *Alternative Schools: A Synthesis of State-Level Policy and Research*, 30 REMEDIAL & SPECIAL EDUC. 19, 21 (2009) (describing research showing that students attending alternative schools—importantly, by choice—may have increased self-esteem, better peer relationships, and increased academic achievement).

[33] Disciplinary alternative schools are also associated with significantly lower school attendance, increased interaction between peers with high risk factors and negative behaviors, lower quality of instruction, decreased academic achievement, "reduced likelihood of graduation on time, fewer years of schooling, increased risk of depression, and increased likelihood of arrest as an adult." Johnson & Naughton, *supra* note 32, at 69–70, 76; *see* Kimber Wilkerson, Kemal Afacan, Aaron Perzigian, Whitney Justin & Jenna Lequia, *Behavior-Focused Alternative Schools: Impact on Student Outcomes*, 41 BEHAV. DISORDERS 81, 81–91 (2016). And for students with disabilities, alternative schools present further challenges: educators in alternative schools tend to lack the requisite dual certifications in their subject area and in special education. Camilla A. Lehr & Cheryl M. Lange, *Alternative Schools and the Students They Serve: Perceptions of State Directors of Special Education*, POL'Y RSCH. BRIEF, Jan. 2003, at 1, 6.

[34] Perrodin, *supra* note 3, at 27.

[35] *Id.* The reasons for student misbehavior in the classroom vary widely, but there is always a root cause. Common causes include the student's basic needs not being met outside the classroom, medical challenges, lack of student–teacher relationships, the need for attention, lack of confidence, and feeling either unchallenged or too challenged academically. Andrea Banks, *Why Do Children Misbehave? Finding the Root Causes of Classroom Misbehavior*, INSIGHTS TO BEHAV. (Apr. 22, 2020), https://insightstobehavior.com/blog/children-misbehave-finding-root-classroom-misbehavior/ [https://perma.cc/5YA2-TFPX].

[36] Banks, *supra* note 35.

[37] Interview with David Perrodin, Professor, Viterbo Univ. (Oct. 12, 2021) (recording on file with *Northwestern University Law Review*) ("We don't have any federal guidance on it, but it is strange . . . it's in so many district policies. It's codified under policy. And that's a part which is just mind-blowing to me, is people can say, 'Well, this is our policy.'").

variations between districts: some create and maintain records of students' abeyance agreements, while others leave no paper trail at all.[38] Some allow students to continue attending their neighborhood schools during the abeyance period; others provide for a temporary change in placement to an alternative school.[39] This decentralized approach of vesting unbridled discretion in administrators creates substantial challenges in understanding abeyance agreements and in tracking and examining their effects on students.

II. ABEYANCE AGREEMENTS IN PRACTICE

Decades of research affirms that students of color—particularly Black students—male students, and students with disabilities are disproportionately subjected to exclusionary discipline in public schools.[40] But how does the use of abeyance agreements fit into and potentially impact this well-established narrative? The scarcity of information and research on abeyance agreements and their use in the public school context makes it difficult to understand and contextualize their role in the larger scheme of public school discipline.

Recognizing this gap, I set out to acquire empirical insights to begin to situate the use of abeyance agreements in this narrative. Because what we know about traditional exclusionary discipline has been repeatedly confirmed in literature,[41] I grounded my inquiry in the hypothesis that the use

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[38] *Id.*

[39] Perrodin, *supra* note 3, at 27; *see* Johnson & Naughton, *supra* note 32, at 69–70. There are various types of alternative schools; this Note refers to alternative schools designed to educate "students who are disruptive or who exhibit challenging behaviors" for a predetermined period of time, usually as a result of disciplinary action. *Id.* at 70.

[40] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 2 ("Black students, boys, and students with disabilities were disproportionately disciplined (e.g., suspensions and expulsions) in K-12 public schools, according to GAO's analysis . . . ."); *see also* NAT'L CTR. FOR LEARNING DISABILITIES, SIGNIFICANT DISPROPORTIONALITY IN SPECIAL EDUCATION: TRENDS AMONG BLACK STUDENTS 1 (2020), https://www.ncld.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Black-Students_FINAL.pdf [https://perma.cc/JN5P-S23M] ("Years of research point to inequities in education for students of color, students from low-income backgrounds, and students with disabilities. These inequities are particularly apparent when it comes to rates of discipline . . . .").

[41] *See, e.g.*, Nicholas Gage & Antonis Katsiyannis, *Disciplinary Exclusions*, *in* DISPROPORTIONALITY AND SOCIAL JUSTICE IN EDUCATION 99, 112–13 (Nicholas Gage et al. eds., 2019) (finding that despite decades of discussion, "Black students remain at the highest risk for disciplinary exclusions when considering student race" and that male students and students with disabilities also receive disproportionate disciplinary exclusions); DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 12–15 (2012), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf [https://perma.cc/9QCA-67KQ] (finding Black students and students with disabilities were suspended disproportionately during the 2009–2010 school year); Melanie Leung-Gagné, Jennifer

of abeyance agreements in public school discipline would follow these findings. Specifically, I hypothesized that abeyance agreements—like suspensions and expulsions—are effectuated at higher rates against Black students, male students, and students with disabilities than against white students, female students, and students without disabilities.

To begin, I compiled an original dataset on the use of exclusionary discipline and abeyance agreements by submitting Freedom of Information Act (FOIA) requests.[42] In response to these inquiries, I received data from two large public school districts located in the midwestern and northwestern United States with differing racial or ethnic compositions.[43] The process through which this data was obtained is discussed in Section II.A, while the known limitations of the data are discussed in Section II.B. The data from each district—Districts "A" and "B"—is presented as two illustrative case studies against a control set of nationwide data on exclusionary discipline in Sections II.C.1–II.C.3.

A. Research Design and Process

To acquire initial insights on how the use of abeyance agreements impacts students in relation to the findings of traditional exclusionary discipline, I submitted FOIA requests to a variety of school districts seeking information about their use of abeyance agreements. Many districts responded exactly as expected: they either did not have such records—as many districts who use abeyance agreements do not keep record of them—or they did not understand to what practice I was referring. Because this practice is not yet clearly defined, widely discussed, or regularly utilized in many spheres of the education world, such unfamiliarity was not surprising.

Specifically, I sought data from school districts whose websites or district manuals explicitly refer to their use of abeyance practices. I asked for data in three categories:

(1) Data regarding the number of actual student expulsions[44] for each school year ending between 2016 and 2021;

McCombs, Caitlin Scott & Daniel J. Losen, *Pushed Out: Trends and Disparities in Out-of-School Suspension*, LEARNING POL'Y INST., (Sept. 30, 2022) ("Decades of data have shown that certain groups of students are disproportionately suspended, including students of color . . . students receiving special education services . . . and males.").

[42] Freedom of Information Act (FOIA), 5 U.S.C. § 552.

[43] I have kept the school districts in this case study anonymous out of respect for their maintaining and providing records of abeyance agreements. As the first study in this area, I want to avoid any potential chilling effects on the maintenance and disclosure of this data moving forward.

[44] "Actual student expulsions" refers to the number of students who were recommended for expulsion and ultimately expelled by the school district.

(2) Data regarding the number of expulsion referrals[45] for each school year ending between 2016 and 2021; and
(3) Data regarding the number of student "expulsions in abeyance" (or any other term used to describe student expulsions which have been temporarily suspended contingent on student compliance with a behavior contract, pre-expulsion alternative program, etc.)[46] for each school year ending between 2016 and 2021.

For each data category, I requested that the data include a raw total for each category and be disaggregated by race (white, Black or African American, Hispanic or Latino, Asian, Native Hawaiian/other Pacific Islander, American Indian/Alaska Native, two or more races), by gender (male, female, other), by disability status (IEP,[47] non-IEP,[48] with a disability,[49] without a disability[50]), and by grade in school (prekindergarten through grade twelve). In doing so, I hoped to identify specific trends in the use of abeyance agreements by comparing the data to a known control group of traditional exclusionary discipline data.

In response, I received two complete sets of data, fully disaggregated as requested, such that I could compare them to the control group as case studies. This data is presented in Section II.C.2 as belonging to "District A" and "District B."

B. Limitations

This study is limited in several ways. First, given my limited capacity as an individual student researcher, I sought data from a comparatively small

[45] "Expulsion referrals" refers to the number of students who were recommended for expulsion by the school district, and is inclusive of both those who were not ultimately expelled and those who were ultimately expelled.

[46] "Expulsions in abeyance" refers to the number of students who were to be recommended for expulsion but instead signed an offered abeyance agreement to withhold the exclusionary discipline as initially recommended. Because of the lack of a standardized term for abeyance agreements, I included a parenthetical description of the abeyance phenomenon for clarification in my FOIA requests.

[47] An "IEP" is an Individualized Education Program. Students who have one or more qualifying disabilities under the Individuals with Disabilities in Education Act (IDEA) are legally entitled to an IEP. *See infra* note 98 and accompanying text. The existence of an IEP is one way of categorizing students with disabilities for the purpose of research.

[48] "Non-IEP" refers to those students who do not qualify for protection under the IDEA. This is inclusive of both students without disabilities and students who have one or more qualifying disabilities under the broader provisions of Section 504 of the Rehabilitation Act of 1973.

[49] "With a disability" refers to all students who qualify under either the IDEA or Section 504, or both, for special educational services.

[50] "Without a disability" refers to all students who do not have one or more qualifying disabilities under the IDEA or Section 504.

sample of the approximately 17,300 school districts in the United States.[51] This limitation shaped the design of this study as a preliminary empirical examination of the use of abeyance agreements. Thus, while these two case studies represent consistency in trends between the use of traditional exclusionary discipline and abeyance agreements, more research is needed across a much larger sample of districts to be indicative of any larger trends.

Second, because of these time and capacity constraints, I necessarily sought data from school districts whose websites reference abeyance agreements. It is unclear how many districts in the United States employ abeyance agreements, and this study does not seek to canvass the extent of their use; rather, these case studies are meant to compare the use of abeyance agreements against known trends in exclusionary discipline. Thus, knowing which schools *do* use abeyance agreements provided useful and timely leads to find workable data. Using publicly available leads may skew the data; for example, it is possible that districts that advertise their use of abeyance agreements are more likely to both maintain careful records and be prudent in their use to avoid public scrutiny. This may bias the research design, as this sample of districts might be using abeyance agreements less overall or less disproportionately compared to a random sample.

Third, the data below only accounts for trends during the 2017–2018 school year. I opted to provide data from 2017–2018 for several reasons. As of this writing, the most recent publicly available nationwide school discipline data from the U.S. Department of Education's Civil Rights Data Collection (CRDC) is from 2017–2018, and it is most useful to compare my dataset to nationwide data from the same school year. Additionally, because of the COVID-19 pandemic and the vast switch in instructional mode—from in-person to at-home and hybrid learning—in the 2019–2020 and 2020–2021 school years, exclusionary discipline was used far less during the 2019–2020 and 2020–2021 school years.[52] In 2021–2022, exclusionary discipline seemed to increase again but was accompanied by new behavioral challenges and student instability given the stress and uncertainty of the pandemic.[53] Thus, the data on exclusionary discipline and the use of abeyance measures

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[51] *2017–18 State and National Estimations*, C.R. DATA COLLECTION, https://ocrdata.ed.gov/estimations/2017-2018 **[**https://perma.cc/8A2P-LDRN**]** ("The 2017–18 estimations are based on data collected from all of the nation's school districts and schools—approximately 17,300 school districts and 96,300 schools."). For this study, I submitted FOIA requests to only thirty-eight school districts.

[52] Richard O. Welsh, *School Discipline in the Age of COVID-19: Exploring Patterns, Policy, and Practice Considerations*, 97 PEABODY J. EDUC. 291, 295–96 (2022). Research has shown that during this period of at-home learning, unreported exclusions—"such as muting students, turning off cameras, isolating students in breakout rooms, removing students from a zoom session, or deactivating email accounts"—may have impacted the reliability of discipline data. *Id.* at 299.

[53] *Id.* at 295.

from these school years is likely not fully reflective of current trends in exclusionary discipline or the use of abeyance agreements during "normal" school years.[54]

Fourth, because of student anonymity in publicly available school records, this study cannot account for the intersections of student identities. For example, a student who is Black, is male, and has a disability would be counted in each identity category. We cannot glean how the intersections of various identities may manifest in the data.[55] Similarly, the data in each case study is district-wide. This means that we do not know exactly how the data breaks down at a school-by-school level, which may not precisely reflect the trends at a district level.

Fifth, we also cannot conclude how many of the students who signed abeyance agreements *actually* committed the offenses of which they were accused. An innocent student facing expulsion may be incentivized to sign the abeyance agreement, much like an innocent defendant might take a plea bargain to guarantee a lesser sentence.

Finally, although this data is technically available to the public given its accessibility via FOIA, the purpose of this Note is to shed light on the potential issues abeyance agreements pose, not to expose or indict specific school districts for their use of these underresearched disciplinary mechanisms. Consequently, and with due respect to these districts for maintaining and providing these helpful records, I refer to the districts as "District A" and "District B" and have only provided data percentages, rather than raw numbers, to preserve their anonymity.

C. Results

It is widely accepted in scholarship that the use of exclusionary discipline in public schools most disproportionately impacts minority groups of students.[56] Specifically, Black students, male students, and students with disabilities are statistically overrepresented in exclusionary discipline nationwide.[57] In 2018, the Government Accountability Office (GAO) conducted a review of the CRDC findings from the 2013–2014 school year,

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[54] *See id.* at 303–04.

[55] These trends are evinced by the source of the control group data displayed in Section II.C.1, but I did not include this level of disaggregation in this Note for consistency with my own datasets. For that information, see *2017–18 State and National Estimations*, *supra* note 51.

[56] *See, e.g.*, *Race, Discipline, and Safety at U.S. Public Schools*, ACLU, https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/race-discipline-and-safety-us-public-schools [https://perma.cc/4FFM-M655] ("We've known for years that students of color have long experienced excessive and unequal rates of suspension.").

[57] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 12.

the most recent available at the time.[58] Through its analysis, the GAO found that for every disciplinary action surveyed—in-school suspensions, out-of-school suspensions, referrals to law enforcement, expulsions, corporal punishment, and school-related arrests—Black students, male students, and students with disabilities faced disproportionate rates of discipline when compared to their representation in the overall student population.[59] These findings are consistent with the trends in more recent data, which are used as the control group in Section II.C.1.[60]

1. Control Group: Civil Rights Data Collection

TABLE 1: TRENDS IN 2017–2018 BY RACE/ETHNICITY, NATIONWIDE

	Percent of Total Enrollment*	Percent of One or More Out-of-School Suspensions	Percent of Expulsions With and Without Educational Services
American Indian/Alaska Native	1.0%	1.4%	1.2%
Asian	5.2%	1.1%	0.8%
Hispanic/Latino	27.2%	21.7%	21.4%
Black/African American	15.1%	38.2%	37.6%
White	47.3%	32.9%	34.8%
Native Hawaiian, Other Pacific Islander	0.4%	0.4%	0.2%
Two or More Races	3.8%	4.3%	3.8%

* n = 50,922,024

The data in Table 1 demonstrates that Black students were substantially overrepresented in exclusionary discipline in 2017–2018 nationwide, while white students were underrepresented. Despite making up only 15.1% of the

[58] *Id.* at 2.

[59] *Id.* at 2, 12.

[60] *2017–18 State and National Estimations*, *supra* note 51.

nation's total public school enrollment, Black students accounted for 38.2% of all out-of-school suspensions and 37.6% of all expulsions—more than twice their share of the total student enrollment. However, 47.3% of the nationwide enrollment were white students, yet white students accounted for only 32.9% of out-of-school suspensions and 34.8% of expulsions.

TABLE 2: TRENDS IN 2017–2018 BY GENDER, NATIONWIDE[61]

	Percent of Total Enrollment*	Percent of One or More Out-of-School Suspensions	Percent of Expulsions With and Without Educational Services
Male	51.4%	70.5%	72.7%
Female	48.6%	29.5%	27.3%

* n = 50,922,024

Table 2 illuminates a significant disparity in the use of exclusionary discipline against male and female students. While male and female students comprised nearly equal parts of the total nationwide public school enrollment at 51.4% and 48.6%, respectively, male students accounted for 70.5% of all out-of-school suspensions and 72.7% of all expulsions in 2017–2018. Contrarily, female students made up 29.5% of out-of-school suspensions and 27.3% of all expulsions. Thus, male students faced significant overrepresentation in exclusionary discipline in 2017–2018, while female students were significantly underrepresented across the nation.

TABLE 3: TRENDS IN 2017–2018 BY DISABILITY STATUS, NATIONWIDE[62]

	Percent of Total Enrollment*	Percent of One or More Out-of-School Suspensions	Percent of Expulsions With and Without Educational Services
Without Services Under IDEA	86.8%	82.7%	78.5%
With Services Under IDEA	13.2%	17.3%	21.5%

* n = 50,922,024

[61] *Id.*

[62] *Id.* The category "with services under IDEA" accounts for students who are provided special education services under the Individuals with Disabilities Education Act (IDEA), and not for students who are provided special education services only under Section 504 of the Rehabilitation Act of 1973. A number of students who receive special education services may be included in the "without services under IDEA" category, meaning that the overrepresentation of students with disabilities in exclusionary discipline may be even higher than what is already shown in Table 3.

Table 3 illustrates the overrepresentation of students receiving special education services under the Individuals with Disabilities Education Act (IDEA) in exclusionary discipline during the 2017–2018 school year. Students who did not receive services under the IDEA in 2017–2018—86.8% of all students—accounted for 82.7% of those facing out-of-school suspensions and 78.5% of expulsions. However, despite only making up 13.2% of the national public school enrollment during that year, students with disabilities as accounted for under the IDEA comprised 17.3% of all students facing out-of-school suspensions and 21.5% of expulsions. This overrepresentation is particularly significant because of the additional protections against exclusionary discipline for students with disabilities that exist under the IDEA, which are discussed in Part III.

With these trends in mind—the overrepresentation of Black students, male students, and students with disabilities in exclusionary discipline—we turn to the question of how the use of abeyance agreements compares. Research shows that students who experience exclusionary discipline are more likely to face negative outcomes in their education and beyond than students who do not.[63] In particular, there are correlations between disciplinary exclusions from school and negative academic and behavioral outcomes, involvement in the juvenile justice system, and the probability of dropout.[64] Some might suggest that this is backwards—that children of color and other minority groups are more inclined to misbehave than other children—but several empirical studies have invalidated this theory.[65] Thus, if using abeyance agreements in lieu of exclusionary discipline implicates these negative outcomes for students, abeyance practices may be contributing to the perpetuation of disparate outcomes for students from overrepresented groups.

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[63] Russell J. Skiba & Daniel J. Losen, *From Reaction to Prevention: Turning the Page on School Discipline*, 39 AM. EDUCATOR 4, 6 (2016).

[64] Russell J. Skiba, Mariella I. Arredondo & Natasha T. Williams, *More than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE EDUC. 546, 547 (2014).

[65] *See, e.g.*, Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 335 (2002) (finding Black students were no more likely to disrupt the classroom than white students yet were more likely to receive disciplinary office referrals for "more subjective judgement" offenses); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?*, 116 AM. J. EDUC. 557, 572 (2010) (finding Black students were more likely to be referred to the office for punishment than other students, even after controlling for student behavior); Russell J. Skiba, Robert H. Horner, Choong-Geun Chung, M. Karega Rausch, Seth L. May & Tary Tobin, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85, 101–02 (2011) (finding Black middle and elementary school students were more likely to receive office referrals for poor behavior than white students and more likely to be suspended or expelled than white students for similar behavior).

As noted, the two districts in this case study—"District A" and "District B"—maintained detailed records of their schools' use of abeyance agreements during the 2017–2018 school year and provided them to me upon request.[66] Tables 4 through 6 demonstrate District A's use of expulsion and expulsions held in abeyance during the 2017–2018 school year, and Tables 7 through 9 demonstrate the same for District B.[67]

2. Case Study: District A

District A, located in an urban area in the midwestern United States, is a large public school district.

Compared to nationwide trends in exclusionary discipline from the pre-pandemic school years,[68] the actual expulsion data from District A aligns with the findings of overrepresentation of Black students, male students, and students with disabilities. More strikingly, District A's data on its practice of holding expulsions in abeyance also tracks these trends.

[66] The availability of such records appears to be an anomaly. *See* Interview with David Perrodin, *supra* note 37 ("Most districts won't enter this into their student record system . . . and there isn't a requirement to report to the state or the feds or to your local board of education. So, the fact that they kept those was completely a district decision.").

[67] "Expulsions held in abeyance" refers to the students who were recommended for expulsion during the 2017–2018 school year but accepted District A's offer to hold their expulsions in abeyance. "Actual expulsions" is inclusive of the students who were recommended for expulsion and then actually expelled from District A. It is unclear how many—if any—students in the latter category were offered an abeyance agreement but chose to decline. District A declined to provide me with this information upon a second FOIA request.

[68] This refers to school years ending before 2020.

TABLE 4: TRENDS IN 2017–2018 BY RACE/ETHNICITY, DISTRICT A[69]

	Percent of Total District Enrollment*	Percent of Total Expulsions Held in Abeyance**	Percent of Total Actual Expulsions***
American Indian/Alaska Native	0.2%	n/a	n/a
Asian	3.9%	n/a	n/a
Hispanic/Latino	27.4%	12.9%	n/a
Black/African American	31.1%	59.2%	56.1%
White	30.2%	18.5%	26.8%
Native Hawaiian, Other Pacific Islander	0.1%	n/a	n/a
Two or More Races	7.0%	8.8%	n/a

* n = 28,144; ** n = 319; *** n = 82

While white students made up 30.2% of District A's total enrollment in 2017–2018, they accounted for only 26.8% of all actual expulsions. Furthermore, white students comprised only 18.5% of all expulsions held in abeyance that year. Meanwhile, District A's total enrollment included 31.1% Black students—yet Black students accounted for 56.1% of all actual expulsions and 59.2% of all expulsions held in abeyance. Thus, white students were underrepresented in both actual expulsions and expulsions held in abeyance, while Black students were significantly overrepresented in both.

[69] District A, Discipline Data Provided in Response to FOIA Request (2021) (on file with author). Note that where "n/a" is shown, the data showed < 10 students in that category. To protect student information per the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, districts do not report exact numbers when there are fewer than 10 students represented in a particular category.

TABLE 5: TRENDS IN 2017–2018 BY GENDER, DISTRICT A[70]

	Percent of Total Enrollment*	Percent of Total Expulsions Held in Abeyance**	Percent of Total Actual Expulsions***
Male	51.6%	61.8%	63.4%
Female	48.4%	38.2%	36.6%

* $n = 28{,}144$; ** $n = 319$; *** $n = 82$

Table 5 demonstrates that, much like the national breakdown in 2017–2018, District A's total enrollment that year was almost evenly split between male and female students. However, despite making up 51.6% of District A's enrollment, male students accounted for 61.8% of all expulsions held in abeyance and 63.4% of all actual expulsions. Female students represented 48.4% of District A's 2017–2018 enrollment but only 38.2% of expulsions held in abeyance and 36.6% of all actual expulsions. While not as stark as the contrast in the nationwide data for that year, shown in Table 2, male students were still significantly overrepresented in exclusionary discipline. Importantly, Table 5 shows that the percentages of males and females whose expulsions were held in abeyance closely track the actual expulsion data.

TABLE 6: TRENDS IN 2017–2018 BY DISABILITY STATUS, DISTRICT A[71]

	Percent of Total Enrollment*	Percent of Total Expulsions Held in Abeyance**	Percent of Total Actual Expulsions***
Without Services Under IDEA	85.0%	65.8%	61.0%
With Services Under IDEA	15.0%	34.2%	39.0%

* $n = 28{,}144$; ** $n = 319$; *** $n = 82$

Table 6 shows that students with disabilities under the IDEA in District A were subjected to exclusionary discipline at higher rates than the national average in 2017–2018, as seen in Table 3. While students without special education services under the IDEA made up 85.0% of the total enrollment in District A—closely tracking the 86.8% of the national enrollment—this group of students accounted for only 65.8% of expulsions held in abeyance

[70] District A, *supra* note 69.
[71] *Id.*

and 61.0% of all actual expulsions in 2017–2018. However, students who received special education services under the IDEA were overrepresented in exclusionary discipline that year, making up 34.2% of all expulsions held in abeyance and 39.0% of all actual expulsions. Again, understanding that students receiving services under the IDEA are supposed to be afforded additional protections against exclusionary discipline and disciplinary transfers, this overrepresentation is a serious concern.[72]

The insights from District A's data demonstrate not only that the use of traditional exclusionary discipline was in line with the nationwide trends of the 2017–2018 school year—Black students, male students, and students with disabilities were overrepresented—but also that the use of abeyance agreements closely tracks those trends, too.

3. Case Study: District B

District B is an urban school district located in the northwestern United States. Its racial and ethnic makeup was much less diverse than the national composition, as well as District A's, in 2017–2018. Nonetheless, District B's data largely follows similar patterns in the use of exclusionary discipline and abeyance agreements.

[72] *See infra* Section III.A.2.

TABLE 7: TRENDS IN 2017–2018 BY RACE/ETHNICITY, DISTRICT B[73]

	Percent of Total Enrollment*	Percent of Total Expulsions Held in Abeyance**	Percent of Total Actual Expulsions***
American Indian/Alaska Native	1.4%	1.5%	1.5%
Asian	2.7%	1.0%	0.7%
Hispanic/Latino	10.8%	13.9%	13.8%
Black/African American	3.2%	6.3%	5.5%
White	66.7%	56.2%	56.4%
Native Hawaiian, Other Pacific Islander	1.6%	0.8%	1.4%
Two or More Races	13.7%	20.4%	20.6%

* n = 36,819; ** n = 397; *** n = 1,881

In 2017–2018, 66.7% of District B's total enrollment was white. That year, however, 56.2% of expulsions held in abeyance and 56.4% of all expulsions were white students. Meanwhile, Black students made up only 3.2% of the district enrollment yet accounted for 6.3% and 5.5% of total expulsions held in abeyance and actual expulsions, respectively. Notably, multiracial students comprised 13.7% of the total student enrollment but 20.4% of expulsions held in abeyance and 20.6% of total actual expulsions.

[73] District B, Discipline Data Provided in Response to FOIA Request (2022) (on file with author).

TABLE 8: TRENDS IN 2017–2018 BY GENDER, DISTRICT B[74]

	Percent of Total Enrollment*	Percent of Total Expulsions Held in Abeyance**	Percent of Total Actual Expulsions***
Male	52.2%	81.1%	75.1%
Female	47.5%	18.9%	24.9%

* n = 36,819; ** n = 397; *** n = 1,881

Table 8 demonstrates a pattern of discipline in District B like that of District A in 2017–2018. Again, while there was a close-to-even split between male and female students in District B, male students accounted for 81.1% of all expulsions held in abeyance and 75.1% of all actual expulsions. To the contrary, female students—while comprising 47.5% of the total district enrollment—faced only 18.9% of all expulsions held in abeyance and 24.9% of all actual expulsions. This contrast is vastly greater than that of the nationwide data in Table 2.

TABLE 9: TRENDS IN 2017–2018 BY DISABILITY STATUS, DISTRICT B[75]

	Percent of Total Enrollment*	Percent of Total Expulsions Held in Abeyance**	Percent of Total Actual Expulsions***
Without Services Under IDEA	88.6%	72.0%	73.6%
With Services Under IDEA	11.4%	28.0%	26.4%

* n = 36,819; ** n = 397; *** n = 1,881

Finally, Table 9 exemplifies the same trends for students with disabilities receiving services under the IDEA. This group of students comprised only 11.4% of the total district enrollment in 2017–2018 yet accounted for 28.0% of all expulsions held in abeyance and 26.4% of all actual expulsions in 2017–2018. Students who did not receive special

[74] *Id.* Students who declined to specify gender are not accounted for in these numbers.
[75] *Id.*

education services under the IDEA that year—88.6% of the total district enrollment—accounted for 72.0% of all expulsions held in abeyance and 73.6% of all actual expulsions.

Again, the data from District B indicates that the same three groups of students are overrepresented in traditional exclusionary discipline and even *further* overrepresented in the use of abeyance agreements. Note that in Table 7, Black students accounted for 6.3% of expulsions held in abeyance, versus 5.5% of actual expulsions; in Table 8, male students faced 81.1% of all expulsions held in abeyance, versus 75.1% of actual expulsions; and in Table 9, students receiving services under the IDEA accounted for 28.0% of all expulsions held in abeyance, versus 26.4% of all actual expulsions. This trend in District B's data is inconsistent with District A's data, which demonstrated a tendency to expel students from overrepresented groups at higher rates than it effectuated abeyance agreements, with the exception of Black students.

While this data represents only two school districts using abeyance practices—and is accordingly too small a sample to draw larger conclusions about nationwide trends—it nevertheless illustrates that in some school districts, abeyance agreements are disproportionately used against Black students, male students, and students with disabilities. Furthermore, the data supports the proposition that students more frequently subjected to traditional exclusionary discipline practices are also more likely to have to choose between abeyance and actual exclusion. As this Note will discuss in Part IV, these findings demonstrate why districts using abeyance agreements should be required to maintain better records so accurate data can be collected and analyzed.

III. LAW AND POLICY CONCERNS AROUND ABEYANCE AGREEMENTS

The use of abeyance agreements in public school discipline has not been thoroughly explored in research, scholarship, or otherwise. With so little information on their use, it is difficult to understand the legal and public policy issues that abeyance agreements present. Part III identifies and discusses some of the potential legal problems that abeyance agreements inherently pose, as well as some consequences of their use that are concerning as matters of public policy.

A. Legal Issues

Abeyance agreements, when used in the discipline of public school students, raise two primary legal problems. First, as explained in Section III.A.1, they deprive students of their property and liberty interests in education by circumventing the due process protections to which students

are entitled. For students with disabilities, who are afforded specific protections on the basis of their disability under the IDEA, abeyance agreements invoke particular legal complications. While an in-depth exploration of the intersections of the IDEA and abeyance agreements exceeds the scope of this Note, Section III.A.2 necessarily provides a brief discussion of this context to demonstrate the full reach of abeyance contracts.

Second, abeyance agreements may violate the well-established contract law doctrine of unconscionability. Section III.A.3 discusses the implications of procedural and substantive unconscionability in the formation and terms of abeyance agreements.

1. Fourteenth Amendment Due Process Concerns

The Supreme Court has consistently recognized the importance of all children's access to public education since the landmark ruling in *Brown v. Board of Education*.[76] Nevertheless, the Court has yet, and appears unlikely, to establish education as a fundamental right under the Fourteenth Amendment.[77] Nevertheless, in the seminal public school discipline case *Goss v. Lopez*, the Supreme Court found that every public school student has protected property and liberty interests in education under the Due Process Clause of the Fourteenth Amendment.[78] Because all states establish and maintain public school systems, the Court reasoned, they afford all students within their purview a protected property interest in their education.[79] Furthermore, the Court stated that students facing exclusionary discipline have a protected liberty interest against reputational threats.[80]

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[76] *See* Goss v. Lopez, 419 U.S. 565, 576 (1975) (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)) (asserting that excluding children from school is a "serious event in the life of the" child); Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (reaffirming the importance of education noted in *Brown* twenty-eight years prior and holding that denying undocumented children basic education amounted to discrimination).

[77] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

[78] 419 U.S. at 574.

[79] *Id.* ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . . .").

[80] *Id.* at 574–75 ("The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied. . . . If sustained and recorded, [the suspension] could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.").

In effect, a school cannot deprive a child of their property or liberty interests in an education without due process of law.[81] Per *Goss*, the minimum requirements for due process where a student will be excluded from school for fewer than ten days are notice of the allegations and evidence against them and an opportunity to express their own side of the story.[82] For students who face disciplinary exclusion in excess of ten days, the student is entitled to receive notice and "some kind of hearing."[83]

Post-*Goss*, the Court has not elaborated further on these due process requirements in exclusionary school discipline. However, the *Mathews v. Eldridge* three-factor approach to discerning "what process is due" beyond the minimum entitlement to notice and a hearing is applicable in the school discipline context.[84] The balancing test created by the Court aims to minimize "the risk of an erroneous deprivation" by weighing the interests of the individual against the state actor's interests when an individual's liberty or property interests are implicated.[85] Specifically, courts consider three factors: the gravity of the deprivation of such interests, the types of procedures most appropriate to addressing the issues at hand, and the burden on the state actor.[86]

Applied in the context of school discipline, a district must craft steps to balance students' due process interests with administrative concerns in implementing such procedures.[87] According to guidance provided by the U.S. Department of Education, "[d]ue process protections generally include notification requirements, the right to fair disciplinary hearings prior to suspensions and expulsions, appeal processes, and other safeguards prior to

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[81] *Id.* at 574 ("Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent[] fundamentally fair procedures to determine whether the misconduct has occurred."). Additionally, the Sixth Circuit has discerned that students are entitled to substantive due process in the context of school discipline. Seal v. Morgan, 229 F.3d 567, 575–79 (6th Cir. 2000) ("As a matter of federal constitutional law . . . [a] Board may not expel students from school arbitrarily or irrationally.").

[82] *Goss*, 419 U.S. at 581.

[83] *Id.* at 576, 579, 584.

[84] 424 U.S. 319, 333, 335 (1976); *see* Brent M. Pattison, *Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings*, 18 TEMP. POL. & C.R. L. REV. 49, 51–53 (2008). Other rights that have been discussed in various state and federal cases include "the right to a hearing prior to imposition of the suspension; the right to counsel; the right to notice of the allegations against them; the right to an impartial hearing officer; the right to a recorded hearing; and the right to present witnesses and evidence." *Id.* at 52.

[85] *Mathews*, 424 U.S. at 335.

[86] *Id.*

[87] *See id.*

the application of disciplinary sanctions."[88] By employing such precautions, "schools can help to imbue the disciplinary process with a sense of fairness and legitimacy."[89]

The use of abeyance agreements implicates due process concerns at several stages of the agreement's lifecycle. First, in cases of longer-term exclusion, where the abeyance agreement is initially presented to the parent and student upon accusation of a code of conduct violation, there has generally been no impartial hearing.[90] While some might consider the meeting at which the district presents the agreement to be "some kind of hearing" per the Court's instruction in *Goss*, it is not an impartial one: the student has no formal opportunity to share their side of the story, view the evidence against them, or question witnesses.[91] Already, the lack of a fair hearing at this point in the abeyance process raises due process issues.

Additionally, in many cases, signing the abeyance agreement will result in a disciplinary transfer from the neighborhood school to an alternative school—a placement change which peers and others will certainly be aware of when the student stops coming to school for an extended period of time.[92] On at least three occasions, federal district courts have held that alternative school transfers trigger due process protections for public school students.[93] However, some courts have decided that a transfer to an adequate alternative school does *not* necessarily violate a student's property interest in a public education.[94] Yet, even if the transfer does not implicate the student's property

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[88] U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 14 (Jan. 2014), https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf [https://perma.cc/X2LG-YCGP].

[89] *Id.*

[90] *See* Perrodin, *supra* note 3.

[91] Interview with David Perrodin, *supra* note 37 ("An administrative or abeyance agreement meeting is brief, maybe fifteen minutes.").

[92] *See* Johnson & Naughton, *supra* note 32, at 81 ("Students typically are involuntarily placed in alternative schools in response to a disciplinary incident through one of three means: (1) following a decision to suspend or expel a student; (2) as an alternative to suspension or expulsion; or (3) as a 45-day transfer to an Interim Alternative Educational Setting (IAES) pursuant to the Individuals with Disabilities Education Act.").

[93] *See id.* at 88; Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 655–56 (W.D. Tex. 2000) ("When assignment to an alternate education program effectively acts as an exclusion from the educational process, due process rights may be implicated."); Everett v. Marcase, 426 F. Supp. 397, 403–04 (E.D. Pa. 1977) ("A transfer prior to final hearing . . . would appear to violate the due process prescribed in *Goss* type suspensions.").

[94] *See, e.g.*, Chyma v. Tama Cnty. Sch. Bd., No. C07-0056, 2008 WL 4552942, at *4 (N.D. Iowa Oct. 8, 2008) ("The consensus view seems to be that a student does not have a property interest in attending a particular school, thereby triggering a right to procedural due process, unless the education provided at the alternative school is significantly inferior to that provided in the student's original school.").

interests, it certainly implicates the student's liberty interest in preserving his reputation and warrants the opportunity to fairly contest the charges.[95]

The more urgent due process concerns, however, arise one step further in the abeyance process. Should a parent and student sign off on the abeyance of discipline, the student has thereby agreed to faithfully adhere to the district's code of conduct.[96] Any further violations will result in the automatic reinstatement of the discipline for the initial offense, plus whatever discipline the district imposes for the new charges.[97] In other words, the student will be excluded from school and denied any further process—no hearing, no appeal.[98]

This is particularly troubling as further violations of the code of conduct could occur discretionarily; a teacher could choose to refer a student for discipline for allegedly talking back, but they also could choose to handle it in the classroom without an office referral. An administrator could choose to discipline a student for being tardy one too many times—an offense that alone would not typically warrant a student's exclusion from school. As a result, the student walks on eggshells through the duration of the abeyance agreement, with no possible recourse to defend their reputation or protect their educational interests should they say the wrong thing or walk into school a little late due to circumstances beyond their control. Such a deprivation seems to be exactly what the Court in *Goss* sought to prevent when establishing the minimum due process requirements for students facing exclusionary discipline.[99]

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[95] *See Everett*, 426 F. Supp. at 400 ("Even though [disciplinary] transfers may in certain specific instances be for the good of the pupil as well as the transferring school, [they] nonetheless bear[] the stigma of punishment. . . . Any disruption in a primary or secondary education, whether by suspension or involuntary transfer, is a loss of educational benefits and opportunities."); *Goss*, 419 U.S. at 576 ("[T]he total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.").

[96] *See, e.g.*, TUCSON UNIFIED SCH. DIST., ABEYANCE CONTRACT FOR A SHORT-TERM SUSPENSION 1–2 (2012), https://govboard.tusd1.org/Portals/TUSD1/GovBoard/docs/sectJ/JK-R4-E1.pdf [https://perma.cc/GT6V-H3ZB] ("3. The student agrees to obey all school rules and to attend every class, every day unless excused by a parent/legal guardian. 4. If the student has any further violation of the Guidelines For Student Rights & Responsibilities, any remaining suspension days will automatically be imposed in addition to any consequences for the current violation.").

[97] *Id.*

[98] TUCSON UNIFIED SCH. DIST., *supra* note 24, at 1 ("If the student violates the agreement, the suspension will automatically be reinstated at that time without further process.").

[99] *See Goss*, 419 U.S. at 576 ("Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.").

2. Due Process Concerns for Students with Disabilities

The use of abeyance agreements in discipline involving students with disabilities presents additional legal implications. Under the IDEA, students with disabilities are entitled to additional procedural and substantive rights safeguarding their access to a free appropriate public education (FAPE).[100] To ensure that students with disabilities receive a FAPE, schools must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[101] To meet this requirement, a school-based team—composed of a child's educators, parents or guardians, and, where appropriate, the child himself—crafts and tailors an Individualized Education Program (IEP) to the child's unique needs.[102] Furthermore, a qualifying student's education must be administered in the least restrictive environment, meaning that they should be educated as much as possible alongside their nondisabled peers in light of their individual needs.[103] In addition to these substantive measures, the IDEA requires procedural safeguards that protect both students with disabilities and their parents in the educational process.[104]

One critical procedural protection for students with disabilities facing discipline is the manifestation determination review (MDR).[105] The MDR exists to protect students with disabilities from unnecessary placement changes.[106] This protection is critical because when a child with a disability is removed from their agreed-upon learning environment, it can prevent the child from receiving the services required by their IEP. The IDEA requires an MDR to be held when an IDEA-eligible student faces exclusionary discipline exceeding ten days for a code of conduct violation, which would

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[100] 34 C.F.R. § 300.101(a).

[101] Bd. of Educ. v. Rowley, 458 U.S. 176, 203 (1982).

[102] 20 U.S.C. § 1414(d)(3).

[103] 34 C.F.R. § 300.114.

[104] *See, e.g.*, AW *ex rel.* Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 678 (4th Cir. 2004) ("The IDEA confers upon disabled students substantive and procedural rights that ensure the child's right to 'public education in participating States.' . . . Procedurally, the IDEA 'guarantee[s] parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.'" (quoting Honig v. Doe, 484 U.S. 305, 310–12 (1988))).

[105] 34 C.F.R. § 300.530(e).

[106] Despite the name, a "placement change" does not always mean changing the physical location of the child's education. "Placement" refers to the type of setting in which the child's IEP is executed, which is determined by how much time a child is educated alongside their nondisabled peers (which must be the least restrictive environment). *Id.* § 300.116. If a child's removal from their IEP placement is for a period of ten or more school days—not consecutive, but total—it is considered a "change in placement" for purposes of the IDEA and an MDR must first be conducted. *Id.* § 300.536.

constitute a change in placement.[107] During this review, the pertinent parties consider "all relevant information in the student's file," such as their IEP and observations from their parents and teachers, to determine whether the behavior that led to the disciplinary incident is a "manifestation" of the student's disability or a direct result of the school's failure to implement the IEP.[108] If either is true, the student cannot legally be excluded from school without educational services.[109] This hearing must be held within ten days of the alleged violation.[110]

When school districts offer abeyance agreements to students with disabilities, many substantive and procedural components of the IDEA are implicated. When an IDEA-eligible student faces exclusionary discipline for a behavior that violates school policy, the school district can hypothetically circumvent the MDR requirement by quickly proposing an abeyance agreement to the parent and student, often within a day or two of the incident, thereby preempting the MDR from ever occurring. In this case, a parent may sign the abeyance agreement, waiving their child's disciplinary due process rights—such as the MDR—and potentially agreeing to an alternative school transfer, even though the behavioral infraction may have been a manifestation of the student's disability and thereby exempt from exclusionary discipline.[111] Transferring a student to an alternative school is considered a change in placement under the IDEA and thus must legally be preceded by an MDR. When students with disabilities are transferred to an alternative school for the pendency of the abeyance agreement, their IEP follows; thus, the alternative school is responsible for fulfilling the child's IEP services.[112] Given the general lack of resources at alternative schools for students with disabilities, this raises additional questions about whether the child will be able to make progress towards their IEP goals in such settings.[113]

Because convening an IEP team is often time-consuming, challenging to coordinate, and adversarial, school districts may be incentivized to opt for abeyance agreements instead of holding the MDR.[114] Additionally, the

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[107] For purposes of the IDEA, a change of placement occurs when a child with a disability is removed from his current educational placement for more than ten consecutive school days. *Id.* § 300.536(a)(1). A child with a disability who violates a code of student conduct cannot be suspended or otherwise excluded from his current placement for more than ten consecutive school days. *Id.* § 300.530(b)(1).

[108] *Id.* § 300.530(e).

[109] *Id.*

[110] *Id.*

[111] Interview with David Perrodin, *supra* note 37.

[112] 34 C.F.R. § 300.323(e)–(f).

[113] *See supra* note 33 and accompanying text.

[114] This incentive may explain, in part, why students with disabilities were overrepresented in the abeyance data in both Districts A and B. *See supra* Sections II.C.2–II.C.3.

technical complexity of the IDEA[115]—on top of the existing power imbalance between districts and families—might present greater challenges for parents of students with disabilities in discerning whether to agree to abeyance. Nonetheless, circumventing the MDR requirement could give rise to a special education complaint and a subsequent cause of action under the IDEA, warranting an even closer look at the use of abeyance agreements for students with disabilities.

3. Unconscionable Contract

In the realm of school discipline, abeyance agreements are form contracts typically signed by the student and a parent or guardian, as well as school administrators. Because of courts' strong preference for the freedom of contract, absent an invalidating cause such as unconscionability, signing parties are bound by the terms.[116] However, balancing the interest against oppressive agreements, courts have held that contracts that are unconscionable at formation should not be enforced.[117]

Proving unconscionability generally requires a showing of both procedural deficiencies in the contract-making process and substantive unconscionability, or contract terms which unreasonably favor the other party.[118] While the determination of whether a contract is unconscionable must be made in light of the factual circumstances in which the contracting occurred, "[i]n many cases the meaningfulness of choice is negated by a gross inequality of bargaining power."[119] Scholars posit that courts have trended away from finding unconscionability in contracts and that the doctrine is therefore dead.[120] But as others have identified numerous recent state court decisions invalidating contracts on unconscionability grounds, the

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[115] Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 J. GENDER, SOC. POL'Y & L. 107, 111 (2011).

[116] *See id.* at 119.

[117] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

[118] Procedural unconscionability requires demonstrating an absence of meaningful choice on the part of one of the parties; substantive unconscionability requires showing contract terms which unreasonably favor the other party. *See, e.g.*, Summers v. Crestview Apartments, 236 P.3d 586, 590 (Mont. 2010) ("Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.").

[119] *Williams*, 350 F.2d at 449.

[120] *See, e.g.*, Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 51–52 (2012) (describing how academic rejection of unconscionability and the "association between unconscionability and unrestrained judicial activism" has discouraged judges from considering unconscionability claims, thus leading consumers to stop pleading unconscionability); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 90 (2006) ("Academic criticisms of unconscionability in the modern tide of contract formalism have pushed courts to rigidly restrain the application of unconscionability.").

issue of unconscionability as applied to abeyance agreements is worthy of exploration.[121]

From existing information about abeyance agreements in public school discipline, it is worth exploring whether these contracts could be found unconscionable. Consider Dr. Perrodin's experience:

> [The student and their parent] are brought into a room. Often the school's attorney is there. . . . It wasn't really a meeting, right? It was just presenting parents with a one-page document. There's extreme positionality in it: "We are the school. If you don't take this, we can simply . . . pursue expulsion. . . . [A]nd we can start to create records that will stay with your student." That was very noticeable for me as a tactic.[122]

In this situation, the school district holds all the cards: either the parent chooses to sign the agreement, or the child is removed from school and the expulsion is recorded—a permanent mark to forever tarnish the student's reputation. With unclear downsides, the district's favorable positioning of abeyance, and the lack of power and time needed to successfully negotiate the terms of the boilerplate contract, the parent is compelled to sign.[123] Procedurally, most would find that this is hardly a "meaningful choice."

The substance of the abeyance agreement, crafted exclusively by the school district, is no more favorable to the student. If the parent "chooses" to enter into the agreement, the district stands to gain everything: they do not have to deal with the administrative burdens of recommending the child for expulsion; they face little to no paperwork, no meetings, no hearings, no appeals. And if the child is sent to an alternative education setting for the duration of their abeyance agreement, the district may not even have to deal with the child. Most significantly, the district has no reporting obligations to

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[121] *See* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 1020–26 (2019) (listing recent cases in which courts have invalidated contracts for unconscionability); Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 779 (2014) (finding that courts have identified unconscionability in 20% of nonarbitration cases surveyed).

[122] Interview with David Perrodin, *supra* note 37.

[123] Tucson Unified School District's policy reads: "The abeyance contract template . . . may not be modified except to insert one or more of the optional conditions. . . . If the school administration would like to include a requirement not listed as one of the optional conditions, the administrator must obtain approval from the Legal Department for that modification." TUCSON UNIFIED SCH. DIST., *supra* note 24, at 1. The optional conditions provided include no terms which would have any ostensible benefit to the student—for example, several of the conditions relate to proof of compliance, such as with court-ordered probation or counseling. Others provide for restitution to the school and community service requirements. *See* TUCSON UNIFIED SCH. DIST., POLICY # JK-R4-E3: SUSPENSION ABEYANCE OPTIONAL CONDITIONS (2015), https://govboard.tusd1.org/Portals/TUSD1/GovBoard/docs/sectJ/JK-R4-E3.pdf [https://perma.cc/B3CL-LMN2].

oversight agencies because abeyance agreements are not recognized as exclusionary discipline and are therefore not subject to reporting requirements.[124]

Meanwhile, the student has much to lose by entering into the abeyance agreement. In addition to acknowledging guilt (true or not) and waiving all rights to a hearing and appeals process for the initial alleged offense, the student further waives all due process rights for subsequent offenses if the school contends he has violated the abeyance agreement.[125] Additionally, discipline for the initial offense will automatically be reimposed.[126] Such a proposition could be considered an "unfavorable" term that subverts fundamental principles of fairness in contracting.

B. Policy Concerns

In addition to legal concerns, abeyance agreements also raise numerous public policy concerns—namely, the lack of government regulation, the exclusion of the student in the decision-making process, and the perpetuation of the school-to-prison pipeline. This Section briefly discusses these concerns and encourages their exploration in future scholarship.

1. Nonregulation

Abeyance agreements are currently not governed by any regulatory scheme.[127] As a result, school districts have full discretion to craft both abeyance agreement policies and contracts.[128] While some might argue that

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[124] THE SAFETY DOC PODCAST, *supra* note 3 ("[A]n [abeyance] agreement expires . . . and once it's done, it's done, it's not on the books anywhere. It doesn't become a student record. It's not reported to the state or feds."). The U.S. Department of Education's Office for Civil Rights (OCR) administers the CRDC program biennially. CRDC collects required data from public local educational agencies, schools, and other institutions serving students to ensure compliance with civil rights laws such as Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973. OCR is authorized to do so by the Department of Education Organization Act, 20 U.S.C. § 3413(c)(1), and its implementing regulations. *See* 34 C.F.R. §§ 100.6(b), 104.61, 106.71. To view the types of data collected by CRDC, see OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2020–21 CIVIL RIGHTS DATA COLLECTION: LIST OF CRDC DATA ELEMENTS FOR SCHOOL YEAR 2020–21 (2021), https://www2.ed.gov/about/offices/list/ocr/docs/2020-21-crdc-data-elements.pdf [https://perma.cc/TXA9-S8C4].

[125] *See, e.g.*, TUCSON UNIFIED SCH. DIST., *supra* note 96, at 1–2 ("3. The student agrees to obey all school rules and to attend every class, every day unless excused by a parent/legal guardian. 4. If the student has any further violation of the Guidelines For Student Rights & Responsibilities, any remaining suspension days will automatically be imposed in addition to any consequences for the current violation.").

[126] *Id.*

[127] Perrodin, *supra* note 3, at 27 ("No guidelines exist for implementing [abeyance agreement] policies. Because the practice is entirely unregulated, there are no set definitions, and school boards can simply write the practice into their policies.").

[128] *Id.*

this is an exercise of a school district's autonomy and localized needs, such discretion may lead to a host of issues in data tracking, recordkeeping, and consistency between districts.[129]

This decentralization matches that of the broader U.S. public education system. That is, states and local authorities retain decision-making power and control over education.[130] Given funding and policy priorities, districts generally have discretion to determine, for example, how their school administration will be organized, how many students will be assigned per teacher, and what extracurricular activities to offer.[131] And some might point to notoriously counterproductive federal education laws as evidence against high-level regulation in education.[132]

However, this plenary discretion over abeyance practices at the district level is distinct from other public school discipline practices.[133] State

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[129] Again, this inconsistency is evidenced by the difficulties I had in tracking down clear, organized data on the use of abeyance agreements in my research. *See supra* Sections II.A–II.B.

[130] *Organization of U.S. Education*, U.S. DEP'T OF EDUC. (Feb. 20, 2008), https://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-org-us.html [https://perma.cc/B3A4-6XVA]. However, federal laws apply in certain school discipline contexts. For example, the IDEA, a federal statute, applies to the discipline of students with disabilities. Schools are also required to comply with other federal laws when administering school discipline, such as Title IV of the Civil Rights Act of 1964 and the Family Educational Rights and Privacy Act.

[131] *School Districts*, CTR. FOR THE STUDY OF FEDERALISM (2006), https://encyclopedia.federalism.org/index.php/School_Districts [https://perma.cc/CR9Q-2FUA].

[132] Consider federal laws such as the No Child Left Behind Act and the Gun-Free Schools Act of 1994. No Child Left Behind has been repeatedly blamed for creating plateaus in student learning, overemphasizing testing, failing to narrow the opportunity gap between students of varying socioeconomic backgrounds, driving teachers out of public schools, and hurting students with disabilities and English-language learners through inappropriate assessments. Linda Darling-Hammond, *Evaluating 'No Child Left Behind,'* NATION (May 21, 2007), https://www.thenation.com/article/archive/evaluating-no-child-left-behind/ [https://perma.cc/V2U3-BPZG]; Lily Eskelsen García & Otha Thornton, *'No Child Left Behind' Has Failed*, WASH. POST (Feb. 13, 2015), https://www.washingtonpost.com/opinions/no-child-has-failed/2015/02/13/8d619026-b2f8-11e4-827f-93f454140e2b_story.html [https://perma.cc/Z9NE-STH8]. Specifically relating to discipline, the Gun-Free Schools Act of 1994 is attributed with establishing "zero-tolerance" policies which require specific mandatory punishments for certain student offenses, most commonly for drug or weapon possession or use. The goal of zero tolerance is to reduce student violence and drug use. But these policies have only further perpetuated the school-to-prison pipeline by pushing kids out of schools and increasing student contact with law enforcement. Russell J. Skiba, *The Failure of Zero Tolerance*, 22 RECLAIMING CHILD. & YOUTH 27, 27 (2014), https://reclaimingjournal.com/sites/default/files/journal-article-pdfs/22_4_Skiba.pdf [https://perma.cc/7DAF-45FP]; Catherine Winter, *Spare the Rod: Amid Evidence Zero Tolerance Doesn't Work, Schools Reverse Themselves*, APM REPS. (Aug. 25, 2016), https://www.apmreports.org/episode/2016/08/25/reforming-school-discipline [https://perma.cc/5VHJ-82JX].

[133] Every state and the District of Columbia has law on the books regulating school suspension and expulsion policies, according to the Policy Surveillance Program. *School Discipline Laws*, THE POL'Y SURVEILLANCE PROGRAM (Dec. 1, 2018), https://lawatlas.org/datasets/school-discipline-policies [https://perma.cc/73N3-HUYW]. There can be variations in the minutiae of those policies. For

regulations enumerate specific requirements for exclusionary discipline that school districts must follow, such as compliance with minimum due process under *Goss*.[134] But using abeyance agreements, which operate outside regulated exclusionary discipline, creates substantial variations from district to district and state to state. From the minutiae of the contract terms to the name used to describe the practice itself, abeyance agreements have remained masked from the public while evading due process requirements altogether.

No regulation means no administrative requirements, such as reporting the number of abeyance agreements executed in a given school year in exclusionary discipline totals when preparing mandatory reports for oversight.[135] For school districts, amidst the increasing pressure to reduce the use of exclusionary discipline, the ability to avoid data reporting requirements—and the costs associated with them[136]—is a clear incentive to

example, the District of Columbia and North Carolina are the only jurisdictions that explicitly prohibit schools from expelling students for dress code violations. But because of the Court's decision in *Goss v. Lopez*, minimum due process is required when state actors exclude students from school. *See supra* Section III.A.1.

[134] *See School Discipline Laws & Regulations by State*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, https://safesupportivelearning.ed.gov/school-discipline-laws-regulations-state [https://perma.cc/845A-M2UW]; NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, U.S. DEP'T OF EDUC., COMPENDIUM OF SCHOOL DISCIPLINE LAWS AND REGULATIONS FOR THE 50 STATES, DISTRICT OF COLUMBIA AND THE U.S. TERRITORIES 29 (June 2022), https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf [https://perma.cc/MFG6-A5BM].

[135] *See* Peter Medlin, *Expelled Students Are Often Sent to 'Adaptive Learning Sites.' What Are They?*, N. PUB. RADIO (June 15, 2022, 6:12 AM), https://www.northernpublicradio.org/wnij-news/2022-06-15/expelled-students-are-often-sent-to-adaptive-learning-sites-what-is-an-adaptive-learning-site [https://perma.cc/H5BW-KYB6] ("State data on EIAs isn't readily available . . . ."). As a current resident of Illinois, I reached out to the Illinois State Board of Education (ISBE) via email to inquire whether Illinois requires that school districts and local education authorities report the use of abeyance agreements, or whether districts count the use of abeyance agreements in another discipline category that must be reported. A media representative from ISBE responded: "We do not collect data on Expulsion in Abeyance (EIA) agreements as this is not a state defined term . . . *We are unable to provide any additional guidance on which Student Discipline data element encompasses EIAs*." E-mail from Liam Chan Hodges, Media Coordinator, Ill. State Bd. of Educ., to Author (July 27, 2022, 01:43 EDT) (emphasis added) (on file with *Northwestern University Law Review*).

[136] *See, e.g.*, AM. ASS'N OF SCH. ADM'RS, USING DATA TO IMPROVE SCHOOLS: WHAT'S WORKING 24, https://aasa.org/uploadedFiles/Policy_and_Advocacy/files/UsingDataToImproveSchools.pdf [https://perma.cc/CAF7-A8ML] ("An issue of concern always is 'What will it cost to collect the data?'").

opt for abeyance agreements.[137] This paints an auspicious but skewed picture—one in which it appears that student behavior is under control.[138]

For example, when viewed in isolation, the number of actual expulsions in District A, identified in Section II.C, is misleading.[139] In reality, when considering those students whose expulsions were held in abeyance, the total number of students who *faced* expulsion during the 2017–2018 school year is over four times higher than the number of *actual* expulsions. However, this much larger, more accurate number is not reported for oversight.[140] Thus, to the state and federal departments of education and the public—to whom the district is accountable—District A *appears* to have only recommended for expulsion one-fourth of the students it actually recommended for expulsion in 2017–2018.

Left to their own devices, schools may also have substandard procedures for internal recordkeeping of abeyance agreements, which can have serious negative impacts on individual students. While a school has the discretion to keep a record of abeyance agreements in student files, it is more often the case that these agreements vanish upon their completion and leave no evidence behind.[141] Dr. Perrodin has emphasized that failing to maintain full, adequate records of behavioral incidents can conceal "a skill deficit, pattern of behavior, or even a systemic practice of institutional bias."[142]

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[137] States have recently placed great pressure on districts to reduce their rates of exclusionary discipline. *See, e.g.*, SARAH DRINKWATER, OFF. OF LEARNING, EXECUTIVE NUMBERED MEMO 002-2014-15 - HOUSE BILL 2192-SCHOOL DISCIPLINE; S.B. 100, 99th Gen. Assemb. (Ill. 2015); *see also* Interview with David Perrodin, *supra* note 37 ("But the reality is the school doesn't want to report a suspension. That's negative for the school. When schools are worried about open enrollment and parents can go online and identify how many suspensions are at a school, they don't want that. . . . So there's a lot of incentive for a school to try to go down that ab[eyance] agreement.").

[138] Peter Medlin, *'It Really Doesn't Do Anything to Repair the Harm': How Rockford Schools Wield a Lesser-Known Form of Exclusionary Discipline*, N. PUB. RADIO (June 9, 2022, 10:46 AM), https://www.northernpublicradio.org/wnij-news/2022-06-09/it-really-doesnt-do-anything-to-repair-the-harm-how-rockford-schools-wield-a-lesser-known-form-of-exclusionary-discipline [https://perma.cc/4HRZ-EGBE] ("'The state doesn't count them. So, when you look at state data for in-school and out-of-school suspensions and expulsions, [expulsions in abeyance] don't fall in that category,' she said. 'For example, we've had 83 expulsions in one year, 62 in another—and we're looking at many more [expulsions in abeyance] than that.'").

[139] *See supra* Table 4.

[140] THE SAFETY DOC PODCAST, *supra* note 3.

[141] Perrodin, *supra* note 3, at 27 ("With no reporting requirement, oversight, accountability, or efficacy research, most AAs are expunged from school databases after they expire, unlike school suspensions and expulsions, which must be reported to the state and federal government.").

[142] *Id.*; *see* Interview with David Perrodin, *supra* note 37 ("You don't have complete behavioral records, so you have a less complete picture of the student and you can't identify [if] these are repetitive behaviors [or] if they've changed over time, if they become more severe over time because you don't have those records. So you are then incapable of identifying the supports that would match to what would

Additionally, from a student and school safety standpoint,[143] where a student's behavioral incidents involved substance abuse, self-harm, or harm to others, having these records can play a critical role in averting further incidents and keeping both the child and others around them safe.[144]

Having access to a record of these incidents is also imperative when seeking to hold a school district accountable. For example, if a student who has a history of self-harm or substance abuse commits suicide, abeyance agreements can pose an insurmountable barrier for parents aiming to impose liability on the district.[145] If the abeyance agreements and the disciplinary infractions are not recorded such that they "never existed," a school district can claim that it was unaware and had no reason to know of the student's condition. With no paperwork to prove otherwise, the parents are out of luck.[146]

2. Student Agency

Agency refers to the human ability to make choices, act, and influence what goes on in daily life. When children act as agents in their own lives, they tend to have more positive outcomes in their health, well-being, grades, and other areas than children who do not.[147] Given this understanding of agency, the use of abeyance agreements in public school discipline may be a barrier to a child's exercise and development of self-advocacy skills.

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be represented in a complete set of records. So that hurts the student."). However, it can also be argued that having a "clean slate" at a new school allows students to start fresh with teachers and administrators who may not have preconceived notions of their behavior or their potential.

[143] Particularly as the rate of school shootings reaches an all-time high, maintaining records of students' behavior patterns is critical for preventing such incidents. Andrew Williams & Noreen O'Donnell, *US School and Mass Shootings Reaching All-Time Highs in 2022: Data and Maps*, NBC CONN. (May 25, 2022), https://www.nbcconnecticut.com/news/national-international/us-school-and-mass-shootings-reaching-all-time-highs-in-2022-data-and-maps/2793567/ [https://perma.cc/AEF2-GJJW] ("Data from the Center for Homeland Defense and Security shows that school shooting incidents reached the highest level ever in 2021 . . . .").

[144] Interview with David Perrodin, *supra* note 37 ("[T]he appeal right is, 'if you sign this right now, we'll create something that if the student complies with it, it'll vanish. It will no longer be a record.' But it also is no longer a behavioral record. So, what if it is a student who is doing this because of whatever behavior, because of something [like] depression or anxiety? And suddenly, we've lost that essential record. That behavioral record is gone because it's never been created.").

[145] *Id.* ("[And what if] the student has some sentinel event happen, [like] harm to self [or] suicide, down the road? You look and it's like, 'well, we don't have any records [of] this' . . . .").

[146] *Id.* ("I've also worked as an expert witness in legal cases. And I've seen this, too, where people will, parents would, report that these types of meetings occurred. But then, of course, the legal counsel would try to seek evidence of those meetings. And again, parents aren't walking out of there with a paper copy of that abeyance agreement.").

[147] Sevtap Gurdal & Emma Sorbring, *Children's Agency in Parent–Child, Teacher–Pupil and Peer Relationship Contexts*, 13 INT'L J. QUALITATIVE STUD. ON HEALTH & WELL-BEING 1, 2 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6366412/pdf/zqhw-13-1565239.pdf [https://perma.cc/6DX6-RESB].

Consider a typical expulsion hearing: the student has the right to present evidence of their side of the story, confront and cross-examine opposing witnesses, and make a statement.[148] Even if a parent or attorney speaks on their behalf, their participation in preparing their own defense is a critical exercise of agency.

Some might suggest that abeyance agreements, by their nature, present students with a choice and therefore encourage their agency too. But it is ultimately the role of the parent or guardian to decide whether to opt their minor child into any kind of contract, such as a plea or abeyance agreement. The child is required to sign and agree to contractual terms about which they had no opportunity to provide meaningful input.[149] And even though parents are given control in deciding whether to sign, it is not much of a choice when they are unable to negotiate the terms of the contract and coerced by those in positions of power to sign the abeyance agreement.[150]

Because abeyance agreements are typically form contracts that are created by the school district, which are then presented for signature in a quick meeting, the student is precluded from having a voice in a serious matter that centers entirely around them. Additionally, in circumventing the requirements of due process, abeyance agreements deny students facing exclusionary discipline a fair opportunity to exercise agency in sharing their side of the story and contesting the charges against them. Instead, they are conditioned through the abeyance agreement process to believe that they have no meaningful choice in what happens to them.[151] This is especially true

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[148] *See supra* note 88 and accompanying text.

[149] Criminal justice studies have shown that in the context of juvenile plea bargaining, children are most likely to acquiesce to their parents' decisions. Erika Fountain, Adolescent Plea Bargains: Developmental and Contextual Influences of Plea Bargain Decision Making 84 (May 2, 2017) (Ph.D. dissertation, Georgetown University), https://repository.library.georgetown.edu/bitstream/handle/10822/1043881/Fountain_georgetown_0076D_13752.pdf [https://perma.cc/R9NK-X2GZ].

[150] *See supra* Section III.A.3. This narrative presumes that the hypothetical parent has an average level of involvement in their child's education and is from a middle-class background. Of course, the power dynamics may shift when the parent is, for example, influential in the community or affluent. Such parents may be more likely to have established relationships with administrators, have experience with contracts, and have the means to retain counsel. Thus, students with these types of parents could theoretically be less likely to sign abeyance agreements. Dr. Perrodin, alternatively, suggests that "[p]arents with high status or who've threatened to unleash negative publicity against the school may even believe that the [abeyance agreement] offer means they've browbeat[en] the school into making a deal." Perrodin, *supra* note 3. Conversely, for parents who may not have the ability to be as involved at school or who lack the professional relationships or savvy to navigate this situation, the power imbalance may be at its greatest. Conducting empirical and descriptive research considering the intersections between socioeconomic status and abeyance agreements from the parental angle would be a worthwhile endeavor to explore these potential phenomena.

[151] Interview with David Perrodin, *supra* note 37 ("[W]e want students to participate in their IEP process [and] to sometimes lead their IEPs if they're age 14 and older. And now we have this parallel

for students who are transferred to alternative schools during the pendency of their abeyance periods—a disruptive event in their childhood.[152]

3. School-to-Prison Pipeline

In addition to raising concerns about nonregulation and the subversion of student agency, the correlations established in this Note serve as an impetus for further investigation of how abeyance agreements may be contributing to the perpetuation of the school-to-prison pipeline. "School-to-prison pipeline" refers to the widely accepted phenomenon in which children are "funneled out of public schools and into the juvenile and criminal justice systems."[153] Research shows that this substantially occurs through the use of exclusionary disciplinary practices and the fostering of punitive school environments.[154] Moreover, the school-to-prison pipeline is most prominently an issue in "economically depressed neighborhoods and failing schools," which disproportionately serve students of color.[155] Empirical data demonstrating the disproportionate use of exclusionary discipline against Black students and students of other minority groups, such as those enumerated in Part II, aligns with the finding that the school-to-prison pipeline largely implicates these groups of students.[156]

Practices in public schools that mirror those used in carceral settings—silent lunches, single file lines on the right side of the hallway, metal detectors, locking kids in schools, and the presence of police officers—are

process [with abeyance agreement meetings] which clearly conveys, 'You don't have a locus of control over what is happening to you. . . . This isn't your turn to plea[d] your side. So instead of having a student inform the services that they will receive, it puts them on the sideline and they become a recipient of whatever people decide is best for them, which is completely counterintuitive.").

[152] Medlin, *supra* note 135 ("Transitioning to an alternative school can be a challenge. That's on top of starting to work through social-emotional and behavioral issues that landed them there in the first place.").

[153] *School-to-Prison Pipeline*, ACLU, https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline [https://perma.cc/5833-H8ZX].

[154] Abigail Novak & Abigail Fagan, *Expanding Research on the School-to-Prison Pipeline: Examining the Relationships Between Suspension, Expulsion, and Recidivism Among Justice-Involved Youth*, 68 CRIME & DELINQ. 3, 3–7 (2022).

[155] Jay Blitzman, *Where You Live Matters: Zip Codes Are Key Factor in Assessing Risk*, COMMONWEALTH MAG. (May 23, 2020), https://commonwealthmagazine.org/opinion/where-you-live-matters/ [https://perma.cc/5DLT-QMKZ].

[156] *See supra* Section II.C.1; *see, e.g.*, Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/ [https://perma.cc/SG9A-H7PQ] ("[M]any minorities and economically disadvantaged students are located in property-poor urban districts which fare the worst in educational expenditures (or) in rural districts which suffer from fiscal inequality.").

tangible proof of the school-to-prison pipeline.[157] Of course, the proper use of abeyance agreements arguably might keep students who would otherwise be expelled in school, pushing back on this phenomenon. But the overlap between abeyance agreements as used in the school discipline and criminal justice contexts more likely demonstrates yet another way in which public schools are implicitly preparing children for future interaction with the criminal justice system.[158] Moreover, the interplay between abeyance agreements and disciplinary alternative schools may be further preserving the school-to-prison pipeline. Students who attend disciplinary alternative schools are more likely to have contact with the juvenile justice system than are students at traditional public schools.[159] It is worth exploring these links in future research on abeyance agreements.

IV. PROPOSED RESPONSE

The current shortage of information and data regarding the use of abeyance agreements leaves stakeholders who share the aforementioned legal and policy concerns—such as parents and community members—ill-equipped to act on them. This Part serves as an urgent call to action to close the information gap and begin taking affirmative steps to address these concerns. These steps involve stakeholders of all kinds—researchers, legislators, communities, parents and families, students, and, of course, school leaders—as ensuring the best for students truly "takes a village."

A. Future State and Nationwide Studies

As research about the use and impact of abeyance agreements is scarce, uniform practice proposals for educators and school administrators are premature. Researchers are still evaluating the efficacy of widely known proposed exclusionary discipline reforms.[160] While the case studies presented in this Note are a start, researchers should prioritize gathering information from a more representative sample of districts about the frequency and nature of the use of abeyance agreements. This data collection would enable researchers to taxonomize district-level variance—a prerequisite step to discerning how these contracts ultimately impact students. Obtaining both

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[157] Lynda Stone, *Silent Lunches: How Do We Get to Educational Reform in the US?*, OPENDEMOCRACY (Feb. 28, 2017), https://www.opendemocracy.net/en/silent-lunches-how-do-we-get-to-educational-reform-in-us/ [https://perma.cc/JH9Y-QG82].

[158] *See supra* Part I.

[159] Paul J. Hirschfield, *The Role of Schools in Sustaining Juvenile Justice System Inequality*, 28 FUTURE CHILD. 11, 11–35 (2018).

[160] Nora Gordon, *Disproportionality in Student Discipline: Connecting Policy to Research*, BROOKINGS (Jan. 18, 2018), https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research/ [https://perma.cc/XN85-MQQ2].

empirical data and narrative information from students, families, and school administrators will be essential to creating a comprehensive understanding of the use of abeyance agreements in public schools at the local and national level.[161]

B. Implementation of State Oversight

Once there is more conclusive data to inform education stakeholders about the use of abeyance agreements, state boards of education should alter their data-collection policies to require school districts to report the total number of abeyance agreements executed in a year. They should also disaggregate the data by the suspensions and expulsions that were held in abeyance to accurately depict the school's disciplinary landscape. Accounting for abeyance agreements in school discipline data reporting will provide for proper oversight and accountability.[162]

Armed with information, state policymakers would be able to analyze trends in the use of abeyance agreements in districts across their states, such as their potential disparate impact on Black students, male students, and students with disabilities. Then, policymakers could consider if and how their state's policies address schools' use of abeyance agreements.[163] For example, if abeyance agreements are found to lead to disparate and negative outcomes, states could opt to implement exhaustion clauses into their existing school discipline laws, requiring that schools attempt all available behavioral interventions before resorting to abeyance agreements for certain offenses.[164] They could also prohibit the waiver of due process rights.[165] Even further, policymakers could require the abatement of abeyance agreements

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[161] Additionally, there may be a school district currently using abeyance agreements in a manner optimizing student needs and rights; that too could have value as a case study to guide broader and equitable implementation of these agreements.

[162] Interview with David Perrodin, *supra* note 37.

[163] *See* Kimberly Charis & Geanette Foster, NAT'L ASS'N OF STATE BDS. OF EDUC., *State Policy's Role in Reversing Trend Toward Punitive Discipline*, POL'Y UPDATE, Mar. 2016, at 1, 1, https://nasbe.nyc3.digitaloceanspaces.com/2016/03/State-Policys-Role-in-Reversing-Trend-toward-Punitive-Discipline.pdf [https://perma.cc/9WQ4-6K52].

[164] Illinois has an exhaustion clause in its school code:

> [O]ut-of-school suspensions of longer than 3 days, expulsions, and disciplinary removals to alternative schools may be used only if other appropriate and available behavioral and disciplinary interventions have been exhausted and the student's continuing presence in school would either (i) pose a threat to the safety of other students, staff, or members of the school community or (ii) substantially disrupt, impede, or interfere with the operation of the school.

105 ILL. COMP. STAT. 5/10-22.6(b-20). Provisions like this one should be adapted by states to explicitly include the use of abeyance agreements.

[165] Perrodin, *supra* note 3, at 25.

altogether, as Dr. Perrodin advocates.[166] No matter the avenue, states should center students' rights and needs in the disciplinary process.

C. Awareness for Parents, Families, and Communities

Parents and families who understand the legal landscape of education are better positioned to effectively advocate for their children.[167] Insights from research must be shared in a parent-friendly manner with families and communities to bring attention to the use of abeyance agreements in their local public schools. Once these findings are shared, civil rights and education-related nonprofit organizations should craft resources using accessible language that explain the due process rights to which students are entitled when facing discipline. These resources should also provide guidance for parents on what to expect and how to proceed when a district offers to hold their child's discipline in abeyance. For parents of students with disabilities, federally mandated state protection and advocacy agencies should include particular guidance on the interactions between the IDEA and abeyance practices.[168] Parents who are more informed of their children's rights and options when it comes to discipline will be less intimidated and less susceptible to a school district's persuasion when attending abeyance meetings.

D. Alternatives to Abeyance Agreements and Exclusionary Discipline

School districts should identify and implement alternatives to exclusionary discipline into their curriculum and discipline procedures. While the results of many of these alternatives are still being analyzed, and it is unclear how abeyance agreements fit into the spectrum of options, those alternatives which decrease the use of exclusionary discipline would likely decrease the need for abeyance agreements. Evidence- and research-based practices, such as Positive Behavior Intervention and Supports, restorative justice practices, and social and emotional learning instruction, have all been shown to reduce suspensions and expulsions in public schools.[169] When

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[166] *Id.* at 28 ("I believe the most ethical course of action is to pass federal legislation to abolish the [abeyance agreement] as a disciplinary option for educators.").

[167] Deborah Lynam, *From Awareness to Action: The Parent's Journey*, UNESCO, https://mgiep.unesco.org/article/from-awareness-to-action-the-parent-s-journey [https://perma.cc/SEE9-ML6T].

[168] Every state has its own protection and advocacy agency for people with disabilities. *See NDRN Member Agencies*, NAT'L DISABILITY RTS. NETWORK, https://www.ndrn.org/about/ndrn-member-agencies/ [https://perma.cc/N8ZY-VVZL].

[169] RACHEL FLYNN, ROSA HIRJI, ERNEST SAADIQ MORRIS, ALLISON BROWN & SYLVIA LUNA, ACCOUNTABILITY PROJECT OF THE CHILD.'S RTS. LITIG. COMM., DISPARATE IMPACT UNDER TITLE VI

coupled with ongoing professional development for educators, teaching students lifelong skills through such programs—rather than expecting them to simply learn their lesson by signing a behavior contract—will likely be far more productive in the long run for all involved.

Additionally, the U.S. Department of Education's Office for Civil Rights and Office of Special Education and Rehabilitative Services released new guidance in July 2022 to support schools in meeting the needs of students with disabilities and, concurrently, avoid the discriminatory use of exclusionary discipline.[170] Specifically, the guidance acknowledges the harmful effects and disparities in the use of exclusionary discipline and explicitly urges states and schools to "significantly reduce their use."[171] These resources are "the most comprehensive" yet and should be considered by school districts in shaping discipline policies and alternative behavior supports for students with disabilities.[172] Better understanding of and compliance with the specific legal protections for students with disabilities will likely improve outcomes and decrease the need for exclusionary discipline and abeyance agreements.

CONCLUSION

The national conversation around school discipline continues to develop as current events and new research shape what is viewed as acceptable for students. This progress is not insignificant, but there is still so much more to unearth, to learn, and to understand about the ways in which abeyance agreements fit into the broader scheme of school discipline. As stakeholders contemplate reforms to school discipline at every level, it is crucial to understand and consider the current landscape on exclusionary discipline in full—a landscape that includes the use of abeyance agreements.

Though the scope of abeyance practices in public school discipline must be further investigated, this Note provides a step toward understanding how abeyance agreements impact students' academic progress, outcomes, and well-being. Bringing this topic out from the shadows and into the nationwide

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AND THE SCHOOL-TO-PRISON PIPELINE 11–12, https://www.njjn.org/uploads/digital-library/disparate-impact-memo-2015.authcheckdam.pdf [https://perma.cc/XL4K-22A7].

[170] *New Guidance Helps Schools Support Students with Disabilities and Avoid Discriminatory Use of Discipline*, U.S. DEP'T OF EDUC. (July 19, 2022), https://www.ed.gov/news/press-releases/new-guidance-helps-schools-support-students-disabilities-and-avoid-discriminatory-use-discipline [https://perma.cc/UPX4-FQMB].

[171] OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., POSITIVE, PROACTIVE APPROACHES TO SUPPORTING CHILDREN WITH DISABILITIES: A GUIDE FOR STAKEHOLDERS 3 (July 19, 2022), https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf [https://perma.cc/9MCZ-NZQZ].

[172] *Id.*

discourse about school discipline puts us one step closer to an education system in which *all* students are protected and can thrive—one in which children are seen as more than the discipline they receive and the contracts they sign.

APPENDIX

FIGURE A1: EXAMPLE OF AN ABEYANCE CONTRACT FOR A LONG-TERM SUSPENSION, PAGE ONE

TUSD

Tucson Unified School District
School Name
School Address
School Phone Number

ABEYANCE CONTRACT FOR A LONG-TERM SUSPENSION

Parent/Legal Guardian Name
Address
Tucson, Arizona 857 *Last 2 #'s*

Re: *Student Name* **Matric#:** *|| |* **Grade:** *|| |* **Ethnic Code:** *|| |*

Gender: *M/F* **Ex Ed**: *Y/N* **504:** *Y/N* **Date of Incident:** *Date*

Manifestation Date

Recitals:

1. *Student Name* acknowledges violating the Guidelines For Student Rights & Responsibilities as follows: *Violation Name(s)*. The student *Brief Description of Student Behavior from Comment Section*.

2. The consequence of this violation may include a long-term suspension (a suspension that is longer than ten (10) days).

3. The school administration intends to recommend that the student be suspended for *# Days* days, beginning on *Suspension Start Date* and ending on *Abeyance End Date*.

4. Optional: [Delete this section if there are no optional recitations].
   [Parents/Legal Guardians] intend to obtain counseling for [student].
   [Parents/Legal Guardians] intend to complete regular drug testing.]

Terms and Conditions:

1. **The student and parent/legal guardian agree to waive (1) the student's right to a hearing on the long-term suspension if that has not yet been held and (2) any subsequent appeal.**

2. The student will serve *# Days Suspension* days of suspension and may return to school on *Return Date from Suspension*. The school agrees to hold *# Days* days of suspension in abeyance.

3. The student agrees to obey all school rules and to attend every class, every day unless excused by a parent/legal guardian.

JK-R4-E2 – Abeyance Contract LT Suspension 3-24-09

FIGURE A1: EXAMPLE OF AN ABEYANCE CONTRACT FOR A LONG-TERM SUSPENSION, PAGE TWO

TUSD

4. If the student has any further violation of the Guidelines For Student Rights & Responsibilities, any remaining suspension days will automatically be imposed in addition to any consequences for the current violation.

5. Optional requirements from Optional Conditions Sheet may be copied and pasted here. If no optional conditions are imposed, delete this statement.

☐ I accept and agree to the terms and conditions stated above including the waiver of (1) the right to a long-term suspension hearing (if one has not already been held) and (2) any subsequent appeals.

☐ I reject this offer and request a long-term hearing be held instead.

Signatures

_____
Student Name

_____
Parent/Legal Guardian Name

_____
Administrator Name, District Administrator

_____
Date Signed

Copies to: Student Equity
Student Cumulative File
Other (Type in Site Offices Requiring Copies)

FIGURE A2: EXAMPLE OF A LETTER OF ABEYANCE (REDACTED)

December 20, 2016

Superintendent
Jennifer Gill

Board Members
Charles Flamini
Lisa Funderburg
Blake Handley
Judith Ann Johnson
Adam Lopez
Donna Moore
J. Michael Zimmers

Board Secretary
Julie Hammers

[redacted]
[redacted]
[redacted]
Springfield, IL [redacted]

Dear [redacted]

During its December 19, 2016 meeting, the Board of Education took no action in the matter concerning [redacted]. At this time, any action considered will be held in abeyance so long as [redacted] refrains from action that constitutes misconduct. [redacted] will be administratively placed at the [redacted]. A review of this placement will be made at the end of the third quarter of the current school year.

Should you have any questions, please do not hesitate to contact me at 217/525-4406.

Sincerely,

Julie Hammers
Board Secretary

CERTIFIED MAIL
Enclosure
c via email:
Mrs. Gill
Mr. Cross
Mr. Sanders
Ms. Baker
Ms. Lee
Mr. Hurd
Ms. Borders
Ms. Doss
Mr. Barham

Working Together to Achieve Outstanding Results

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