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## The Golem in the Machine: FERPA, Dirty Data, and Digital Distortion in the Education Record

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# The Golem<sup>1</sup> in the Machine: FERPA, Dirty Data, and Digital Distortion in the Education Record

Najarian R. Peters\*

## *Abstract*

*Like its counterpart in the criminal justice system, dirty data—data that is inaccurate, incomplete, or misleading—in K-12 education records creates and catalyzes catastrophic life events. The presence of this data in any record suggests a lack of data integrity. The systemic problem of dirty data in education records means the data stewards of those records have failed to meet the data integrity requirements embedded in the Family Educational Rights and Privacy Act (FERPA). FERPA was designed to protect students and their education records from the negative impact of erroneous information rendered from the “private scribblings” of educators. The legislative history of FERPA indicates that legislators were concerned about the harm*

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1. See Dan Bilefsky, *Hard Times Give New Life to Prague’s Golem*, N.Y. TIMES (May 10, 2009), <https://perma.cc/JJU7-PYG7> (describing the Golem as a “crisis monster”).

*to students' education and the structure of opportunities based on misinformation in secret files created and kept in schools. Dirty data created, collected, and processed as accurate and reliable, notwithstanding the disproportionate impact of school discipline, on marginalized students in general, and Black children specifically, is exactly the kind of harm that FERPA was intended to prevent. This Article demonstrates (1) how educational inequities linked to dirty data implicate student privacy interests understood at the time FERPA was created; and (2) how FERPA should be enhanced to prevent dirty data harms at the point of collection and creation. Additionally, this Article outlines the concept of dirty data and data integrity requirements embedded in FERPA and proceeds to examine the phenomenon of dirty data and student harm in historically marginalized students' education records, starting at the point of creation and collection. While several Articles have examined the failure of FERPA, none of the prior scholarship has analyzed FERPA's connection to dirty data in the education record related to racial discrimination. This Article introduces a two-step process that would require input validation in the educational record context through (1) substantive content and input validation; and (2) a reasonable inference review. Finally, this Article introduces a requirement of accounting of disclosures to law enforcement.*

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## INTRODUCTION

The U.S. Department of Justice Civil Rights Division and the U.S. Department of Education Office of Civil Rights issued a significant guidance document known as the “Dear Colleague Letter: Nondiscriminatory Administration of School Discipline” in 2014.<sup>2</sup> The purpose of that document and research was to provide guidance to schools on how to avoid discriminatory practices in school discipline based on personal characteristics.<sup>3</sup> The guidance was created by the Office of Civil Rights, Civil Rights Data Collection (CRDC). The CRDC’s research revealed that African-American students were more than three times as likely as their white counterparts to be expelled or suspended.<sup>4</sup> Furthermore, the investigations found that over half of the students who were included in school-related arrests or referred to the police were either African American or Latinx.<sup>5</sup> These findings indicated discrimination when compared to the overall percentages of African American and Latinx representation in the data collected by the CRDC. White students, the largest category of students, were underrepresented in disciplinary actions while African-American and Latinx students were

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2. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (2014) [hereinafter U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER], <https://perma.cc/QT7M-PYFV>.

3. *See id.* (focusing on preventing discrimination based on “race, color, or national origin”).

4. The study revealed that African American students represented 15 percent of those in the CRDC, but they made up 35 percent of those suspended once, 44 percent of those suspended two or more times, and 36 percent of those students who were expelled. *Id.*

5. These students made up approximately 50 percent of those arrested or referred to law enforcement. *See id.*

overrepresented.<sup>6</sup> The guidance letter reminded educational institutions that they have an obligation to avoid discriminatory patterns and practices in the administration of student discipline and provided recommendations and assistance in addressing school disciplinary practices and policies.<sup>7</sup> The guidance was rescinded by the Trump administration.<sup>8</sup> However, in 2018, the U.S. Government Accountability Office released its *Discipline Disparities for Black Students, Boys, and Students with Disabilities*.<sup>9</sup> Its findings mirrored the findings of the 2014 report.<sup>10</sup> Prior to the release of both reports, decades of research indicated similar trends: that school discipline lacked equity in administration and disproportionately and negatively impacted non-white children—and specifically harmed the educational structure of opportunities of Black children.<sup>11</sup> The research substantiating these discriminatory patterns and practices rarely, if ever, focuses on the data creation and collection practices that are at the foundation of discriminatory

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6. See *id.* (“[I]n our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students.”).

7. See *id.* (providing concrete examples of school actions that could constitute disparate treatment or disparate impact in violation of Title IV or Title VI).

8. See Vanita Gupta, *DeVos and DOJ Repeal Discipline Guidance that Clarifies Children’s Civil Rights*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Dec. 21, 2018), <https://perma.cc/C3PT-JAND> (“Rescinding this important school discipline guidance signals that the federal government does not care that too many schools have policies and practices that push children of color out of school. Federal nondiscrimination laws have not changed.”).

9. See generally U.S. GOV’T ACCOUNTABILITY OFF., K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (2018) [hereinafter K-12 EDUCATION: DISCIPLINE DISPARITIES], <https://perma.cc/79ZU-FZ2T> (PDF).

10. Compare U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER, *supra* note 2 (highlighting substantial racial disparities in regards to discipline that “are not explained by more frequent or more serious misbehavior by students of color”), with K-12 EDUCATION: DISCIPLINE DISPARITIES, *supra* note 9, at 12 (relying on CRDC data and continuing to find disproportionate levels of discipline across “type of disciplinary action, level of school poverty, or type of public school”).

11. See, e.g., Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y. L. SCH. L. REV. 1071, 1086 (2009) (relying on prior studies that “demonstrated that a disproportionate number of students who are expelled from school are from low-income families or are students of color”).

discipline. The compilation of the education record, where teachers, administrators, and other school actors have broad discretion to input their subjective opinions, is the foundation of discriminatory patterns and practices.<sup>12</sup> Recording and digitizing subjective impressions about marginalized children means that certain impressions go unchallenged before they are codified and calcified in the education record.<sup>13</sup> The discriminatory patterns revealed in 2014 and 2018, along with other studies, indicate that there are data inaccuracies connected to, if not catalyzing, discriminatory practices in school disciplinary actions.<sup>14</sup>

Like its counterpart in the criminal justice system, dirty data—data that is inaccurate, incomplete, or misleading—in K-12 education records creates and catalyzes catastrophic life events. The presence of dirty data in any record suggests inaccuracy and a lack of data integrity.<sup>15</sup> The systemic problem of dirty data in education records means the data stewards of those records have failed to meet the data integrity requirements embedded in the Family Educational Rights and Privacy Act (FERPA).<sup>16</sup> FERPA was designed to protect students and their education records from the negative impact of erroneous information rendered from the “private scribblings”

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12. See Najarian R. Peters, *The Right to Be and Become: Black Home-Educators as Child Privacy Protectors*, 25 MICH. J. RACE & L. 21, 36 (2019) (“Education record data are collected, created, digitized, processed, and transferred with varying and inconsistent oversight and broad discretion.”).

13. See *id.* (noting digitization with lack of “audit[] for data integrity” as a contributor to “disparate impact and other forms of racial discrimination”).

14. See K-12 EDUCATION: DISCIPLINE DISPARITIES, *supra* note 9, at 37–39 (detailing programs in place to encourage positive alternatives to discipline and noting data collection efforts put in place to identify known data disparities); U.S. DEP’T EDUC., DEAR COLLEAGUE LETTER, *supra* note 2 (including a section on the importance of accurate record keeping and providing data-based remedies when a school is found to be out of compliance with Title VI).

15. See, e.g., P. VIMALACHANDRAN ET AL., ENSURING DATA INTEGRITY IN ELECTRONIC HEALTH RECORDS: A QUALITY HEALTH CARE IMPLICATION 1 (2018), <https://perma.cc/XL7V-LQR4> (PDF) (noting the direct link between dirty data and the corresponding drop in data integrity in the medical records setting when data lacks “accuracy, internal quality, and reliability”).

16. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(a)(2).

of educators.<sup>17</sup> The legislative history of FERPA indicates that legislators were concerned about the harm to students' education and the structure of opportunities based on misinformation in secret files created and kept in schools.<sup>18</sup> The dirty data created, collected, and processed as accurate and reliable, notwithstanding the disproportionate impact of school discipline that it validates and aids in reproducing in K-12 schools (and higher education, which is beyond the scope of this Article), is exactly the kind of harm that FERPA was intended to prevent.<sup>19</sup> The ability (limited though it may be) to both access and amend an education record reflects the concern of students being mischaracterized and distorted as individuals.

Distortion without recourse means that individual characteristics are disposed of and replaced by the will and intention of another for whatever purpose the other intends. The result of subjective interpretations can be a piece of documentation that results in harms to a student's reputation, self-presentation, and identity. This is where the harm of Golemization begins. While the popular explanation of the Golem brings to mind the folklore of a scary humanoid or monster that provided protection to persecuted Jews, the Talmud describes the Golem as a "dumb klutz because he was literal-minded, could not speak and had no . . . intellect."<sup>20</sup> The Golem, a fictional being from Jewish folklore, is created out of clay and comes to life only after certain words are written on the creature's forehead. The projection and determination of what the Golem will become is achieved through the language and intention of another. Similarly, the distorted image and

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17. *See id.*

18. *See* DEP'T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS (2002) [hereinafter FERPA LEGISLATIVE HISTORY], <https://perma.cc/6NLW-VGJP> (PDF) ("Parents originally had the right to a hearing to challenge the content of records to insure they are not 'inaccurate, misleading, or otherwise in violation of the privacy or other rights of students' . . .").

19. The racially discriminatory impact of erroneous and misleading data does not explicitly appear to be a motivating factor in the legislative history.

20. Bilefsky, *supra* note 1. Please note: the example of the Golem here is an analogy intended to give the reader a visual impression of a Frankenstein-like creature, created and controlled by another. This analogy represents what it means to create a calcified distortion of human behavior procured through the act and intention of another in the education record.

mischaracterization of a marginalized student is created in the education record by the subjective, and often biased, observations and interpretations of teachers and administrators—frequently without recourse at the point of data creation and collection.<sup>21</sup> Dirty data documentation is the rendered imagination, intention, and projection in language-form that lives in the real world as digital artifacts and data, referenced as if they were clean, accurate, and reliable.

This Article illustrates the following: (1) how educational inequities linked to dirty data implicate student privacy interests as understood at the time FERPA was enacted; and (2) how FERPA should be enhanced to prevent dirty data harms at the point of collection and creation. This Article outlines the concept of dirty data and data integrity requirements embedded in FERPA and proceeds to examine the phenomenon of dirty data and student harm in historically marginalized students' education records, starting at the point of creation and collection. While several articles have examined the failure of FERPA, none of the prior scholarship has analyzed FERPA's connection to dirty data in the education record and related it to racial discrimination. This Article introduces a two-step process that would eliminate golemization and negative distortion in the education record via (1) substantive content and input validation and (2) a reasonable inference review. Additionally, this Article introduces a requirement of accounting of disclosures to law enforcement.

#### I. DATA INTEGRITY AND ACCURACY REQUIREMENTS EMBEDDED IN THE FAMILY RIGHTS AND PRIVACY ACT

Twelve days after Richard Milhous Nixon resigned from the Office of the President of the United States, President Gerald Ford signed the Family Rights and Privacy Act (FERPA) on August 21, 1974.<sup>22</sup> Also known as the Buckley Amendment,

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21. See, e.g., Dennis Reynolds, *Restraining Golem and Harnessing Pygmalion in the Classroom: A Laboratory Study of Managerial Expectations and Task Design*, 6 ACAD. MGMT. LEARNING & EDUC. 475, 479–81 (2017) (detailing a study that highlighted the impact teachers' expectations, both positive and negative, can have on students' future class performance).

22. FERPA LEGISLATIVE HISTORY, *supra* note 18.



FERPA was effective on November 19, 1974 in the aftermath of Watergate; its purpose was to provide protections for education records.<sup>23</sup> Ironically, the Act was deeply influenced by Nixon's concerns about individual privacy rights most expressly mentioned in a February 1974 radio address.<sup>24</sup> Nixon expressed deep concern about potential and actual harms to individual privacy with the increased computerization of government records.<sup>25</sup> He described information about citizens, created and collected without their knowledge, and the lack of subsequent recourse to either review or correct the data stored and decisions made based on that data.<sup>26</sup> In that radio address, although he did not explicitly call it dirty data, President Nixon described

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23. *See id.* (noting that Senator James Buckley sponsored the new section of the General Education Provisions Act).

24. *See* Richard Nixon, *Radio Address About the American Right of Privacy*, AM. PRESIDENCY PROJECT (Feb. 23, 1974), <https://perma.cc/58D4-7Q5Z> (highlighting individual rights as one of the “roots of American greatness”).

25. *See id.* (discussing the “vast store of personal data [that] has been built up over the years” as a direct threat toward the individual rights Nixon viewed as most crucial).

26. *See id.*

To use James Madison's terms, in pursuing the overall public good, we must make sure that we also protect the individual's private rights. There is ample evidence that at the present time this is not being adequately done. In too many cases, unrestricted or improper use of personal information is being made. In some instances, the information itself is inaccurate and has resulted in the withholding of credit or jobs from deserving individuals. In other cases, obsolete information has been used, such as arrest records which have not been updated to show that the charges made against an individual were subsequently dropped or the person found innocent. In many cases, the citizen is not even aware of what information is held on record, and if he wants to find out, he either has nowhere to turn or else he does not know where to turn. Whether such information is provided and used by the government or the private sector, the injury to the individual is the same. His right to privacy has been seriously damaged. So we find that this happens sometimes beyond the point of repair. Frequently, the side effect is financial damage, but it sometimes goes further. Careers have been ruined, marriages have been wrecked, reputations built up over a lifetime have been destroyed by the misuse or abuse of data technology in both private and public hands. It is clear, as one Government study has concluded, that “it is becoming much easier for record-keeping systems to affect people than for people to affect record-keeping systems.”

what scientists call dirty data or data that is incomplete, inaccurate, unreliable, or misleading.<sup>27</sup>

In his radio address, President Nixon announced the creation of the Domestic Council Committee on the Right to Privacy, which he intended would monitor the “collection, storage, and use of personal data.”<sup>28</sup> This Committee, according to Nixon, would examine:

How the Federal Government collects information on people and how that information is protected;

Procedures which would permit citizens to inspect and correct information held by public or private organizations;

Regulations of the use and dissemination of mailing lists;

And most importantly, ways that we can safeguard personal information against improper alteration or disclosure.<sup>29</sup>

Further, Nixon stated that he was directing the committee to

begin providing a series of direct, enforceable measures—including regulations, executive actions, policy changes, legislation where necessary, and voluntary restraints—all of which we can immediately begin to put into effect. Advanced technology has created new opportunities for America as a nation, but it has also created the possibility for new abuses of the individual American citizen. Adequate safeguards must always stand watch so that man remains the master—and never becomes the victim—of the computer.<sup>30</sup>

Following President Nixon’s pronouncement, the Watergate investigation, and President Nixon’s resignation, Senator James L. Buckley brought his amendment to the General Education Provision Act to the Senate floor.<sup>31</sup> Senator

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27. See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2280 n.220 (2019) (discussing the proposition that datasets be required to have something to alert to potential inaccuracies); Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 15 (2019) (defining dirty data as data that is “skewed, or systemically biased”).

28. Nixon, *supra* note 24.

29. *Id.*

30. *Id.*

31. See 120 CONG. REC. app. at 14,580 (1974) (statement of Sen. Buckley).

Buckley echoed President Nixon's concerns for individual privacy rights by highlighting the connection of those concerns to the Watergate investigation.<sup>32</sup> Senator Buckley connected those concerns to his education bill which would "protect the rights of students and their parents . . . to prevent the abuse of personal files and data in the area of federally assisted educational activities."<sup>33</sup> Senator Buckley echoed President Nixon's concerns related to accuracy, data collection, and privacy when he stated,

When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.<sup>34</sup>

Ultimately, Senator Buckley's Amendment focused on what he termed education records or "records, files, documents, and other materials directly related to a student which are maintained by a school or by one of its agents."<sup>35</sup> Over the years, various amendments to FERPA and legal actions have modified the definition of the educational record.<sup>36</sup> Still the connection between individual privacy, data collection, data integrity, and accuracy remain core elements of FERPA, which includes provisions to protect students' and parents' rights to inspect, review, and amend education records.<sup>37</sup> Additionally, in *Owasso*

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32. *See id.* ("[T]he revelations coming out of Watergate investigations have underscored the dangers of Government data gathering and the abuse of personal files, and have generated increased public demand for control and elimination of such activities and abuses.").

33. *Id.*

34. *Id.*

35. 120 CONG. REC. app. at 39,862 (1974) (statement of Sen. Buckley).

36. *See Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1201, 1202 (10th Cir. 2000) (Kelly, J., dissenting) (noting that the majority opinion's definition of educational records as including certain peer-grading methods "is a vast expansion of the actual words of the statute, and unsupported by the legislative history").

37. *See* 20 U.S.C. § 1232g(a)(1)(A) (restricting funding to schools that deny inspection rights); 34 C.F.R. § 99.10(a) (2020) ("[A] parent or eligible student must be given the opportunity to inspect and review the student's education records.").

*Independent School District v. Falvo*,<sup>38</sup> the Court reasoned that the sparse legislative history supported a finding that FERPA was not created to prevent the disclosure of student grades on individual homework assignments, but rather to focus on records “of a permanent nature that could be relied upon by third parties or other schools to erroneously categorize a student.”<sup>39</sup>

Notwithstanding the legal history at the foundation of FERPA that centers data integrity and accuracy, the Act’s amendment procedure includes a gaping loophole. While parents, students eighteen years or older, or students who are attending an institution of higher education may request an amendment to challenge inaccuracies in the education record, the amendment procedure “may not be used to challenge a grade, an opinion, or a substantive decision made by a school about an eligible student.”<sup>40</sup> As currently configured, FERPA allows students and parents to amend education records that contain inaccuracies. But the right to amend seemingly cannot neutralize or remove the vast majority of subjective determinations that have cast marginalized school-age children in general, and Black children specifically, as more aggressive, more disruptive, more insubordinate, and less innocent than white and other non-Black school-age children.<sup>41</sup> These typecasts have been found to be based on subjective perceptions that teachers often make with a broad range of discretion.<sup>42</sup> The vast majority of all teachers in K-12 education environments are

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38. 534 U.S. 426 (2002).

39. Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 75, 91 (2011).

40. DEP’T OF EDUC., THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: GUIDANCE FOR ELIGIBLE STUDENTS 2 (2011) [hereinafter U.S. DEP’T OF EDUC., GUIDANCE FOR ELIGIBLE STUDENTS], <https://perma.cc/X7QJ-T52G> (PDF); see DEP’T OF EDUC., THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: GUIDANCE FOR PARENTS 2 (2011) [hereinafter U.S. DEP’T OF EDUC., GUIDANCE FOR PARENTS], <https://perma.cc/5FCP-LPFW> (PDF).

41. See U.S. DEP’T OF EDUC., GUIDANCE FOR PARENTS, *supra* note 40, at 2; U.S. DEP’T OF EDUC., GUIDANCE FOR ELIGIBLE STUDENTS, *supra* note 40, at 2.

42. See Jayanti Owens & Sara S. McLanahan, *Unpacking the Drivers of Racial Disparities in School Suspension and Expulsion*, 98 SOC. FORCES 1548, 1553, 1572 (2020) (leaning on social psychology to note that the amount of racial bias is positively proportional to the amount of discretion given).

white women.<sup>43</sup> Studies have examined the relational interactions and behavior of white teachers with Black and Latinx students.<sup>44</sup> Those interactions indicate that disciplinary decisions and decisions related to achievement made by white teachers are more disadvantageous to Black and Latinx students when compared to decisions related to white students.<sup>45</sup>

## II. DIRTY DATA CREATION, COLLECTION, AND HARM TO MARGINALIZED STUDENTS

In *The Right to Be and Become: Black Home-Educators as Child Privacy Protectors*,<sup>46</sup> I argued that the well-documented phenomenon of maltreatment of Black students in formal school settings is the most important motivating factor for Black parents to home-educate their children.<sup>47</sup> Here, I briefly recount that analysis, which illustrates the kind of treatment Black children encounter in formal school settings and how dirty data negatively impacts marginalized students' structure of opportunities in and beyond educational environments.<sup>48</sup> Two areas that highlight the harm of dirty data calcified in the education record are decisions related to advanced placement and gifted and talented programs, and disciplinary decisions.

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43. Madeline Will, *Still Mostly White and Female: New Federal Data on the Teaching Profession*, EDUCATIONWEEK (Apr. 14, 2020), <https://perma.cc/EXN8-NZGQ>.

44. See Dan Battey et al., *Racial (Mis)Match in Middle School Mathematics Classrooms: Relational Interactions as a Racialized Mechanism*, 88 HARV. EDUC. REV. 455, 455 (2018) (examining “the quality of relational interactions when teachers and students are racially matched and mismatched”).

45. See *id.* at 467–68 (applying a Cochran-Armitage trends test that showed white teachers' more negative reactions to Black students than to their white peers); Constance A. Lindsay & Cassandra M.D. Hart, *Teacher Race and School Discipline*, EDUC. NEXT, <https://perma.cc/S9CP-FSRC> (last updated Nov. 1, 2016); Owens & McLanahan, *supra* note 42, at 1553.

46. Peters, *supra* note 12.

47. See *id.* at 43 (“[P]arental protection to prevent exposure to racism in childhood is not only supported by legal precepts but is also rational, and essential to healthy childhood development.”).

48. See *id.* at 36 (noting that technology used to collect records data in schools disproportionately negatively impacts Black children).

A. *Under-Inclusion in Gifted and Talented Programs*

As I have previously written, the racialized presumptions that burden Black children's structure of opportunities and access to diverse class offerings negatively impact their educational trajectory and their sense of what is possible.<sup>49</sup> These practices and de facto policies place a disproportionate percentage of school-age Black children on a trajectory away from self-development toward not only modulation but self-destruction.<sup>50</sup>

The resilience and sustainability of the idea of Black cognitive inferiority is due, in part, to its constitutive makeup as both master-narrative and metanarrative about Black people that has resonated throughout American history and jurisprudence.<sup>51</sup> Legal challenges like *Brown v. Board of Education*<sup>52</sup> have not eliminated the layered, persistent, and "pervasive work-product generated by the stigmatization of perceived Black inferiority."<sup>53</sup> In prior eras, phrenologists and segregationists spread the gospel of Black cognitive inferiority, but today the data attained from seemingly race-neutral and "individualized analysis of underachievement are tools that maintain the status quo."<sup>54</sup> It is not a coincidence that these data incantations and patterns track the same rhetoric used in prior eras spanning from pre-Emancipation to Jim Crow. The thoughts, the language, the data flows, and the resulting harms are historically bound to one another. Research indicating decreased impact of low expectations and belief gaps in ability, categorization, sorting, and datafication of Black children based on either implicit or explicit biases of teachers and administrators about their innate abilities does not exist. Black

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49. *See id.* at 31 ("Black children remain overwhelmingly disinherited in the promise of educational opportunity because they are exposed to harms of overwhelming messages of inferiority, unequal educational opportunities, and disproportionate discipline in the educational system.").

50. *See id.* at 32–33 (detailing how these messages inflict "grave social psychological harm" and lead Black students to engage in behavior that is "self-defeating").

51. *See id.* at 32.

52. 347 U.S. 483 (1954).

53. Peters, *supra* note 12, at 33.

54. Rita Kohli et al., *The "New Racism" of K–12 Schools: Centering Critical Research on Racism*, 41 REV. RSCH. EDUC. 182, 186 (2017).

children are still disproportionately subjected to mischaracterizations, scrutiny, and suspicion.<sup>55</sup> These mischaracterizations are based on the false belief of inherent inferiority in traditional school environments, seemingly substantiated by standardized testing, assessments, and evaluations that consistently reflect Black student failure.<sup>56</sup> Black children and their families encounter and must navigate presumptions that they are incapable of academic achievement, are lazy, and do not work hard enough in school to achieve academic success.<sup>57</sup> Behavioral scientists determine that Black children watch too much television, characterize them as not caring about educational opportunity or success, and view them as disengaged from school and require being compelled or forced to learn.<sup>58</sup>

Prior to the sorting and categorization memorialized in the student records, observations and conversations about Black children occur that precipitate interactions and result in a common language and narrative about Black children. The output, composed of largely subjective interpretation, consistently mirrors and therefore substantiates master- and metanarratives discussed above about the myth of Black inferiority. Knowing the unique risks and perils associated with traditional school environments, many Black parents and Black children employ multiple strategies of vigilance and avoidance, ranging from assimilation, accommodation, and compromise to direct action and confrontation, depending on the circumstances.<sup>59</sup> These parents are confronted with the burden of not only correcting the perception about the cognitive abilities of their children, but also correcting the overdetermination and

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55. See Peters, *supra* note 12, at 33–37 (providing examples of disproportionality).

56. See *id.* at 33 (listing attempts to remove causes of stigmatizations in traditional school environments).

57. See *id.* at 32–35 (describing negative stereotypes about Black students and how those affect academic success).

58. See *id.* at 58 (“The prevailing perception . . . [is] constructed and reproduced through ahistorical social frames and discredited behavioral science studies . . .”).

59. See *id.* at 44 (describing methods used to protect Black childhood from the consequences of living with racial stigma).

mischaracterization of their children's behavior.<sup>60</sup> Parents and children who engage in this kind of ongoing school remediation do so every time they are presented with a new teacher, a new school, or a new administrator.<sup>61</sup> Legal scholars and law- and policy makers do not take account of this high level of vigilance and guarding, but they should. Instead, they prefer to center the narrative of irresponsibility, disengagement, and deficiency, which is the same historically settled approach of thought, language, data, and harm.

Likewise, Black children do not have equitable access to gifted and talented educational programs, even when accounting for socioeconomic status.<sup>62</sup> Despite the passage of almost one-hundred years since studies about gifted Black children were first published,<sup>63</sup> access to gifted educational services continues to be underinclusive of Black children.<sup>64</sup> Even when students of color "satisfy criteria for gifted services," they "are less likely than White students to be identified . . . ."<sup>65</sup> Research studies indicate that teacher perceptions and

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60. See *id.* at 54 (noting the damaging effects of "mischaracterizations and treatment documented in traditional school settings" against Black students).

61. See Linwood H. Cousins & Roslyn A. Mickelson, *Making Success in Education: What Black Parents Believe About Participation in Their Children's Education*, 14 CURRENT ISSUES EDUC. 1, 11 (2011) (studying the impact of Black parental involvement in school remediation).

62. See Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, 2 AM. EDUC. RSCH. ASS'N OPEN 1, 1 (2016) (explaining that students of color are underrepresented in gifted programs).

63. For an example of one of the oldest reports focused on gifted Black students, see Horace Mann Bond, *Some Exceptional Negro Children*, 34 CRISIS 257, 257-59, 278, 280 (1927). See also Martin David Jenkins, *A Socio-Psychological Study of Negro Children of Superior Intelligence*, 5 J. NEGRO EDUC. 175, 175-90 (1936) (detailing a study with four questions of incidence, age and grade, conformity with patterns of other races and racial compositions, for gifted Black children); Katheryn Kearney & Jené LeBlanc, *Forgotten Pioneers in the Study of Gifted African-Americans*, 15 ROEPER REV. 192, 192-99 (1992) (summarizing the lives and works of five scholars who conducted studies on gifted Black children in the early twentieth century).

64. See Grissom & Redding, *supra* note 62, at 1 (explaining Black students' underrepresentation in gifted programs).

65. *Id.*



discretion result in referrals for gifted services.<sup>66</sup> Studies also indicate that Black students are more likely to be identified, referred to, and encouraged to pursue gifted and talented programs by Black teachers.<sup>67</sup> These studies rely on the theory of bureaucratic representation; meaning that Black and Latinx teachers may recommend Black and Latinx students to gifted and talented programs at higher rates and advocate for universal screening in their schools to help remove barriers to these services that rely on subjective assessments by white teachers.<sup>68</sup> The documentation in the education record about student ability and potential creates barriers to student development when it aligns with age-old anti-Black perceptions of inferiority.<sup>69</sup> Those flawed perceptions codified in the education record mean that inaccuracies in the record may abound.<sup>70</sup> Those inaccuracies should be recognized as dirty data based on the cognitive deficiency and challenges exhibited, not by the student being observed, but by the teacher engaged in the observation.<sup>71</sup> The research that suggests Black children are viewed as deficient and are not referred to gifted services, even when assessments show they should be, also suggests that those who act as gatekeepers to those opportunities may be ill-suited to manage access to those assessments in an equitable

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66. See ALEXANDER PAYNE, GEO. WASH. UNIV. CTR. FOR EQUITY & EXCELLENCE IN EDUC., *EQUITABLE ACCESS FOR UNDERREPRESENTED STUDENTS IN GIFTED EDUCATION* 9 (2011), <https://perma.cc/U87L-N5C2> (PDF) (“Since some teachers may have stereotypical beliefs about a student’s innate abilities or because culturally and/or linguistically diverse students may not conform to a teacher’s preconceptions of what signifies giftedness, such a teacher may be more inclined to overlook a diverse student who is gifted.”); Jason A. Grissom et al., *The “Representative Bureaucracy” in Education: Educator Workforce Diversity, Policy Outputs, and Outcomes for Disadvantaged Students*, 44 EDUC. RESEARCHER 185, 188 (2015) (explaining that teachers have “substantial discretion” in referral processes for gifted programs).

67. See Grissom & Redding, *supra* note 62, at 10.

68. White teachers make up almost 83 percent of all teachers in public schools. *Id.*

69. See Peters, *supra* note 12, at 51 (detailing the effects of such barriers).

70. See *id.* at 36 (“Notwithstanding oft touted student data privacy rights, the data created and used reflects compounded feedback loops based on data that is far too often not audited for data integrity and accuracy.”).

71. See *id.*

manner.<sup>72</sup> The resulting harm structure means degraded opportunities of college preparedness and job prospects, along with other factors that negatively impact the life chances and future reputations of students.<sup>73</sup> FERPA was intended to protect against those kinds of inaccuracies related to student achievement and ability.<sup>74</sup>

Historically, the claim of inherent Black cognitive inferiority was connected to the claim of inherent Black physical prowess, brute strength, and criminality.<sup>75</sup> Prior to Emancipation and Reconstruction, the master- and metanarratives of Black inferiority cast Black people as childlike, docile, lazy, harmless, and in need of protection by the paternalistic attributes of those who enslaved them.<sup>76</sup> Since Reconstruction, no language has been spared to describe or psychologically conjure the indelible effect of the Black criminal in America.<sup>77</sup> Current data describing the disciplinary actions concerning Black children support findings consistent with the same elements of past historical racialized perceptions.<sup>78</sup>

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72. See Grissom & Redding, *supra* note 62, at 10 (finding that Black students with Black teachers were “significantly more likely” to be assigned to gifted programs than Black students without Black teachers).

73. See *id.* at 10, 14 (showing how these inaccurate assessments harmed Black students’ futures).

74. See Penrose, *supra* note 39, at 77 (“FERPA’s purpose was to give parents access to their children’s educational records to ensure that data being relied upon to classify their children was correct or correctable.”).

75. See W. Carson Byrd & Victor E. Ray, *Ultimate Attribution in the Genetic Era: White Support for Genetic Explanations of Racial Difference and Policies*, 661 ANNALS AM. ACAD. POL. SCI. 212, 218 (2015).

76. See Peters, *supra* note 12, at 58 n.125 (mentioning the educational disenfranchisement of Black children pre-Emancipation).

77. See Kohli, *supra* note 54, at 189 (reviewing research on school punishment reflecting “teachers’ criminalizing and deficit perceptions of Black male students”).

78. See Owens & McLanahan, *supra* note 42, at 1549 (“As compared to White students, Black students are 3.2 times more likely to be suspended or expelled . . .”); Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 331 (2016) (“National, state, and local data across all settings and at all school levels clearly demonstrate that school administrators and teachers discipline minority students, particularly African-American students, more harshly and more frequently than similarly-situated white students.”).

B. *Over-Inclusion and Representation in School Disciplinary Actions*

I have previously argued that “Black children are not more likely to behave badly or even worse than” non-Black children.<sup>79</sup> Still, Black children are in fact “viewed as less innocent<sup>80</sup> and

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79. See Peters, *supra* note 12, at 37 n.68 (citing RUSSELL J. SKIBA & NATASHA T. WILLIAMS, EQUITY PROJECT AT IND. U., ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR 1 (2014), <https://perma.cc/8333-VZZK> (PDF) (observing that a variety of statistical approaches have failed to find evidence that students of color act out at higher rates that could justify differential punishment); Douglas B. Downey & Shana Pribesh, *When Race Matters: Teachers' Evaluations of Students' Classroom Behavior*, 77 SOC. EDUC. 267, 267–82 (2004) (finding that Black students placed with Black teachers are rated to behave similarly well, or better, than white students rated by white teachers, but the Black students are rated worse if placed with white teachers)).

80. See *id.* at 37 n.69 (citing Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 539 (2014) (finding that Black children were afforded innocence less than children of other races); Michael J. Dumas & Joseph Derrick Nelson, *(Re)Imagining Black Boyhood: Toward a Critical Framework for Educational Research*, 86 HARV. EDUC. REV. 27, 33 (2016) (“Black children were rarely perceived as being worthy of playtime and were severely punished for exhibiting normal childlike behaviors.”); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 493, 496 (2004) (describing the effects of conscious prejudice on perceived innocence); Edward W. Morris, *“Ladies” or “Loudies”?* *Perceptions & Experiences of Black Girls in Classrooms*, 38 YOUTH & SOC’Y 490, 511 (2007) (describing the effect of “tainted perceptions” on perceived femininity); Jamilia J. Blake et al., *Unmasking the Inequitable Discipline Experiences of Urban Black Girls: Implications for Urban Educational Stakeholders*, 43 URB. REV. 90, 99 (2011) (concluding that Black girls are similarly overrepresented in disciplinary infractions to Black boys); Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1521 (2012) (“[N]umerous studies over the past decade have examined and documented that at every stage of the juvenile justice system youth of color ‘are more likely [than White youth] to be arrested, charged, detained, sentenced severely, and tried as adults’ . . . .”); Jamilia J. Blake et al., *The Role of Colorism in Explaining African-American Females’ Suspension Risk*, 32 SCH. PSYCH. Q. 118 (2017); REBECCA EPSTEIN ET AL., GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 14 (2017) (describing the “adultification” of Black girls)).

In the 1990’s, Black children were described as sub-human mutants, crack babies and super-predators by liberal and conservatives alike. The crack-cocaine epidemic brought forth what is now recognized as pseudo-social science but at the time, the bases for law and social policy that enhanced the mass incarceration epidemic disparately impacting Black and Brown communities

older<sup>81</sup> than white children, and are subjected to harsher and more prevalent discipline” in educational environments.<sup>82</sup> Studies have shown that Black children are often disciplined for subjective infractions while their white peers are disciplined for more objective infractions.<sup>83</sup> Reports and recordings have captured school officials, including school resource officers (SROs—who are often police officers), and teachers, “using excessive force against Black children including tasers, punching, slapping, choking, dragging down stairs, slamming and dragging Black children’s bodies across classroom floors.”<sup>84</sup>

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throughout the United States. The terms and theories developed describing crack babies and super predators have been proven to be false narratives.

*Id.* (citing Susan Okie, *Crack Babies: The Epidemic that Wasn't*, N.Y. TIMES (Jan. 26, 2009), <https://perma.cc/7LPM-HE63> (describing the myth of the crack baby); Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <https://perma.cc/2FQA-XDJJ> (dispelling the myth of “superpredators”).

81. *See id.* at 38 n.70 (citing A. R. Todd et al., *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCH. SCI. 384, 384–93 (2016); Michel Martin, *Consequences When African-American Boys Are Seen as Older*, NPR: TELL ME MORE (Mar. 19, 2014, 12:04 PM), <https://perma.cc/PKR4-BFVG> (discussing research showing that Black boys are seen as older than they are); Christopher Ingraham, *Why White People See Black Boys like Tamir Rice as Older, Bigger and Guiltier than They Really Are*, WASH. POST (Dec. 28, 2015, 2:24 PM), <https://perma.cc/29DJ-C3QB> (arguing that Black boys are viewed as older)).

82. *Id.* at 37–38.

83. *See id.* at 38 n.71 (citing EDWARD J. SMITH & SHAUN R. HARPER, UNIV. OF PA., *DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES* 87 (2015), <https://perma.cc/3A9U-Y6FB> (PDF) (concluding that the educational system continually disadvantages Black communities); Erik J. Girvan et al., *The Relative Contribution of Subjective Office Referrals to Racial Disproportionality in School Discipline*, 32 SCH. PSYCH. Q. 392, 400–04 (2017) (concluding that implicit biases affect teacher’s decisions more than racial differences in student behaviors); Russel J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 317–42 (2002) (describing that amongst other disparities, Black students face exclusionary discipline for subjective reasons such as “disrespect, excessive noise, threat, and loitering”).

84. *See id.* at 38 n.72 (citing *What If the South Carolina Student Thrown Across a Classroom Had Been White?*, WASH. POST (Oct. 28, 2015), <https://perma.cc/9222-5LRZ>; Rebecca Klein, *More Cops in Schools Means More Black Kids in the Criminal Justice System*, HUFF. POST (Feb. 22, 2018, 12:19 PM), <https://perma.cc/V2C3-VHP2>; Rebecca Klein, *Protecting or Policing?: School-Based Police Officers Are Paid to Protect Our Kids. But Sometimes They*

As early as preschool, Black children begin to experience social stigma expressed through over-watching, surveillance, and general suspicion (as I argued in *Black Home-Educators as Child Privacy Protectors*).<sup>85</sup>

Additionally, FERPA allows SROs to access student record data under the school official exception.<sup>86</sup> The application of the school official exception to the SRO requires a determination about whether the SRO has a “legitimate educational interest in that information.”<sup>87</sup> If the SRO has a legitimate interest in accessing the record, they may access the record.<sup>88</sup> The SRO may also access the information through the health and safety exception.<sup>89</sup> It is important to note that records created by SROs, who are often members of law enforcement/police officers, are not automatically considered part of the education record.<sup>90</sup>

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*Do More Harm than Good*, HUFF. POST (Dec. 13, 2016, 7:07 AM), <https://perma.cc/ED54-CZLX>; Rebecca Klein, *Set to Stun: Children Are Being Tasered by School-Based Police Officers. No One Knows How Often It's Happening or What Impact It's Having on Students*, HUFF. POST (Aug. 11, 2016, 9:01 AM), <https://perma.cc/Z23F-BFTS>; Mark Osborne, *Surveillance Video Shows Chicago Police Dragging Female Student Down Stairs, Using Stun Gun*, ABC NEWS (Apr. 12, 2019, 2:50 PM), <https://perma.cc/V9WA-Z2CU>; Kyle Spencer & Adam Hooper, *Bullied by the Badge: Thousands of Police Officers Are Now Stationed Inside Public Schools. What Does This Mean for Students?*, HUFF. POST (Aug. 10, 2016, 12:00 PM), <https://perma.cc/4HTH-6QFR> (listing examples of excessive force used against Black children).

85. See *id.* at 39 n.73 (citing WALTER S. GILLIAM ET AL., YALE CHILD STUDY CTR., *DO EARLY EDUCATORS' IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS?* 2 (2016) (“Findings revealed that when expecting challenging behaviors teachers gazed longer at Black children, especially Black boys.”); Tasha K. Henneman, *Preschool Expulsions: Parental Experiences of Black Boys Who Were Pushed Out or Left Behind* (2014) (Ph.D. dissertation, Mills College); Melinda D. Anderson, *Even Black Preschool Teachers Are Biased*, ATLANTIC (Sept. 28, 2016), <https://perma.cc/4MNS-U5M5> (describing the disproportionality of preschool suspensions against Black children)).

86. U.S. DEP'T OF EDUC., *GUIDANCE FOR ELIGIBLE STUDENTS*, *supra* note 40, at 3.

87. *Id.*

88. *Id.*

89. *Id.* at 4.

90. *Id.* at 6 (“‘Law enforcement unit records’ (i.e., records created by the law enforcement unit, created for a law enforcement purpose, and maintained by the law enforcement unit) are not ‘education records’ subject to the privacy protections of FERPA.”).

Police officers who work in schools as SROs can create police reports that are not accessible or amendable by students or parents under FERPA.<sup>91</sup> Those records created by police officers are not considered education records.<sup>92</sup> FERPA only covers education records.<sup>93</sup> Therefore, requests to disclose or amend education records do not apply to the records that law enforcement actors acting within the educational environment create, collect, and otherwise process for their own records external to the school environment.<sup>94</sup> While school officials are supposed to notify students or parents before disclosing records “unless a court has ruled otherwise,” “law enforcement or government officials may ask a school for confidentiality or serve process that requires the school to keep the request confidential.”<sup>95</sup> Under this scenario, schools are supposed to “remind law enforcement officials of FERPA’s notification requirements, and determine whether the confidentiality request is supported by proper legal process.”<sup>96</sup> There are a variety of problems related to the burdens schools have under FERPA at the intersection of requests from law enforcement and confidentiality of such disclosures. FERPA does not require schools to keep an accounting of actual law enforcement disclosures or requests for disclosure.<sup>97</sup> This means FERPA allows education records to be accessed by law enforcement and likely used to create police documentation without notice or consent of the student or the parents.<sup>98</sup> Beyond the education record, SROs create criminal records on children in school and those records disproportionately and negatively impact Black

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Amelia Vance & Sarah Williamson, *Law Enforcement Access to Student Records*, STUDENT PRIVACY COMPASS (Sept. 25, 2017), <https://perma.cc/8KCU-7MMH>.

96. *Id.*

97. *Frequently Asked Questions*, DEP’T OF EDUC., <https://perma.cc/REV8-82ZR>.

98. *See id.* (supporting the conclusion that law enforcement can access student records if they have legitimate educational interests, but then do not need to disclose their actual purpose or use).

and Latinx children, who are subsequently overrepresented in the carceral continuum.<sup>99</sup>

In *Black Home-Educators as Child Privacy Protectors*, I presented additional research verifying discriminatory disciplinary practices in K-12 educational environments. I have included some of that analysis and research here as a part of the series anticipated by the initial article.

In 2014, the United States Education Office of Civil Rights found that “Black children represent 18% of preschool enrollment, but 48% of preschool children receiving more than one out-of-school suspension; in comparison, white students represent 43% of preschool enrollment but 26% of preschool children receiving more than one out of school suspension.”<sup>100</sup>

That study also found that school disciplinary decision-making practices allow Black students to be overrepresented in both suspensions and expulsions.<sup>101</sup> Similar studies have found that Black students are disproportionately referred to law enforcement.<sup>102</sup> The 2014 study did not reveal anything new because researchers have known about the racial disciplinary gap in educational environments, even when accounting for socioeconomic status, since the 1970s.<sup>103</sup> New

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99. See Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 280 (2009) (“Moreover, several criminologists and legal scholars have expressed concerns that some strategies designed to make schools safer—particularly the growing number of school resource officers (SROs)—might actually criminalize student behavior and lead to a substantial increase in the number of school-based arrests.”).

100. Peters, *supra* note 12, at 39 n.74 (citing DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE ISSUE BRIEF NO. 1 (2014)).

101. *Id.*

102. See Nance, *supra* note 78, at 331 (“[A]lthough African-American students comprised only 16% of the student population during the 2011-2012 school year, they represented . . . 27% of the students who were referred to law enforcement.”); Graham & Lowery, *supra* note 80, at 483–84 (“African American youth age 10–17 comprise about 15% of their age group in the population, yet they represent about 25% of all juvenile arrests, 30% of referrals to juvenile court, 40% of all incarcerated juveniles, and close to 60% of waivers to adult criminal court.”).

103. See Peters, *supra* note 12, at 39 n.75 (“Since the 1970s, the racial discipline gap has been documented and consistent across socioeconomic

studies revealed that Black girls are the most vulnerable to the disciplinary gap.<sup>104</sup> Black girls are more likely to be suspended than white girls.<sup>105</sup> Black girls are targeted by their teachers and school administrators for behavior traits that are viewed negatively and align with stereotypes about Black women.<sup>106</sup> The thought, language, data, and harm structure alignment flows in one direction. Subsequently, Black girls are disciplined at disproportionate rates when compared to their white counterparts. Often, Black girls are targeted for “violating” school dress codes.<sup>107</sup> Black hair styles, whether worn by Black girls or Black boys, are also considered appropriate areas of school disciplinary focus.<sup>108</sup> When white girls wear their hair in

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status.” (citing Anne Gregory et al., *The Relationship of School Structure and Support to Suspension Rates for Black and White High School Students*, 48 AM. EDUC. RES. J. 904 (2011)).

104. *Id.* at 39.

105. *Id.* at 39 n.76 (citing KIMBERLÉ WILLIAMS CRENSHAW, AFR. AM. POL’Y F., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED 16 (2015), <https://perma.cc/F5E6-6EXX> (PDF) (“Data released by the Department of Education for the 2011–2012 school year reveal that while Black males were suspended more than three times as often as their white counterparts, Black girls were suspended six times as often.”)).

106. *Id.* at 40 n.80 (citing MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2018)).

107. *Id.*

108. *Id.* at 40 n.81 (citing Julia Jacobs & Dan Levin, *Black Girl Sent Home from School over Hair Extensions*, N.Y. TIMES (Aug. 21, 2018), <https://perma.cc/E3FW-8576>; Kay Lazar, *Black Malden Charter Students Punished for Braided Hair Extensions*, BOSTON GLOBE (May 12, 2017, 1:54 AM), <https://perma.cc/32CG-HU5J>; Andre Perry, “Stay Out of My Hair!” Black Students Need the Federal Government to Tell Schools to Leave Their Hair Alone, HECHINGER REP. (Mar. 5, 2019), <https://perma.cc/6QXX-Z7T8>; Mark Tribble, *Grappling with the N-Word*, COURIER POST (Oct. 4, 2016, 2:00 PM), <https://perma.cc/B9L8-CSDP> (last updated Dec. 21, 2018, 2:05 PM); Roman Stubbs, *A Wrestler Was Forced to Cut His Dreadlocks Before a Match. His Town Is Still Looking for Answers*, WASH. POST (Apr. 17, 2019), <https://perma.cc/56VE-DKC2>; Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365; D. Wendy Greene, *Black Women Can’t Have Blonde Hair . . . In the Workplace*, 14 J. GENDER RACE & JUST. 405, 430 (2011); D. Wendy Greene, *A Multidimensional Analysis of what Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 368 (2013); D. Wendy Greene, *Title VII: What’s Hair (And Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355 (2008); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIA. L. REV. 987 (2017)).



French braids, they are not subjected to school disciplinary measures because schoolteachers and administrators do not view the French braid as broaching a standard cognizable by school policy. However, individual braided hair styles worn by Black children trigger the imaginations of school actors who summon and deploy policy violation speech acts that result in disparate disciplinary actions. When teachers and administrators surveil Black children toward the end of exclusionary discipline, it means that when they see Black children they are already looking at them with suspicion—as if they know something is amiss, they have to imagine it, look hard enough, and then name it.<sup>109</sup> The question becomes, why are Black children watched differently and, therefore, seen differently than their white peers? What makes a French braid acceptable and individual braids or cornrows unacceptable? The answer appears to be: because white people tend to wear French braids if they wear their hair braided to school—French braids are acceptable and not imagined as a violation of school policy. This is only one example of how the cultural preferences of those who create and enforce school policies influence how others create and enforce those policies, even when those decisions rely on arbitrary distinctions.<sup>110</sup>

These policy and enforcement decisions by schoolteachers and administrators are not objective. They allow Black children to be discriminated against in schools based on the ingrained preferences, idiosyncrasies, and whims of the dominant culture.<sup>111</sup> Those preferences, idiosyncrasies, and whims create an observation loop that results in Black children's bodies and behavior being overwatched and made hyper-visible for the purpose of negative distortion.<sup>112</sup> Technologies deployed in educational contexts follow these patterns of negative distortion. The preferences of the dominant culture mischaracterize Blackness as something that warrants suspicion, regulation, and control in multiple contexts, including in the educational environment.<sup>113</sup> This argument is supported

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109. *Id.* at 40.

110. *Id.*

111. *Id.* at 41.

112. *Id.*

113. See generally Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863 (2020).

by comparing the patterns of decision-making regarding which schools employ surveillance technology, such as metal detectors and cameras, with which schools have historically been vulnerable to school shooting violence.<sup>114</sup> The vast majority of school shootings, including those that occurred at the K-12 level and in higher education, are committed by white male shooters in predominantly white institutions.<sup>115</sup> However, while gun control measures that would affect all schools are rejected,<sup>116</sup> schools with large populations of non-white children continue to bear the brunt of various forms of surveillance and policing that involve the equivalent of stop and frisk searches, overwatching, and interference, leaving students who attend these schools subject to unique privacy harms.<sup>117</sup>

When Black, Latinx, and other racially marginalized children know that they are treated differently than their white peers, the impact should be understood to include emotional harm as well as the violations of physical and bodily security that these children experience at school.<sup>118</sup> Recognizing that the

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114. Peters, *supra* note 12, at 41; see Richard Luscombe, *Generation Columbine: How Mass Shootings Changed America's Schools*, GUARDIAN (Apr. 19, 2019, 1:00 AM), <https://perma.cc/4C9C-H7RC>; Kristen Harper & Deborah Temkin, *Compared to Majority White Schools, Majority Black Schools Are More Likely to Have Security Staff*, CHILD TRENDS (Apr. 26, 2018), <https://perma.cc/8B84-NDXH>.

115. See Tiffany Xie, *Mass Shooters Have a Gender and a Race: A Closer Look at White Male Privilege*, POL. RSCH. ASSOCS. (June 19, 2014), <https://perma.cc/JVH7-5L66> (“Recent studies reveal that most school shooters are White males, with 97 percent being male and 79 percent White.”).

116. See Tom LoBianco et al., *Senate Rejects Series of Gun Measures*, CNN, <https://perma.cc/V7TZ-T7MV> (last updated June 20, 2016, 8:47 PM) (“But tough election year politics, paired with disputes over the effectiveness of each party’s ideas, proved too powerful to break the longstanding partisan gridlock that’s surrounded gun issues for years.”).

117. See Peters, *supra* note 12, at 41.

118. See *id.* at 42 n.45 (citing MONIQUE W. MORRIS, RACE, GENDER, AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS, AFR. AM. POL’Y. F. 2 (2012), <https://perma.cc/2PZV-RTFR> (PDF); Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. PUB. POL’Y 1 (2009), <https://perma.cc/59Q7-J95R> (PDF); David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181, 182–83 (2015); Artika R. Tyner, *The Emergence of the School-to-Prison Pipeline*, ABA (June 1, 2014), <https://perma.cc/9DBX-6778>). For additional discussion on the history of the use of the term “school-to-prison pipeline,” see Kayla Crawley & Paul Hirschfield, *Examining the School-to-Prison Pipeline Metaphor*, OXFORD RSCH. ENCYCLOPEDIAS:

harm to racially marginalized children concerns how they are targeted by policies and technology that are deployed in ways that compound children's vulnerability and marginality in educational environments is essential to understanding how to remedy this harm. Here, the vulnerability and marginality begin with how Black children are problematized when seen and by whom. The decision to problematize Black children upon seeing Black children is then combined with formal interventions. SROs often influence or are involved in this process because they are both the first people students see when entering the educational environment, and they are called on to intervene with students that teachers and administrators have labeled as problematic.<sup>119</sup> The connection between disciplinary decision-making in schools and the carceral continuum or school-to-prison pipeline starts with schools allowing police officers to watch, surveil, and subsequently discipline students.<sup>120</sup> It continues when teachers and school administrators depend on police officers to intervene and manage student behavior for even minor infractions.<sup>121</sup> Carla Shedd has described how schools that are predominantly Black reflect prison-like environments, complete with metal detectors, body scans, patrolling police officers, and constant interference with regular activity.<sup>122</sup> Even when simply walking down the hallway, a student might be stopped and frisked by a police officer in school.<sup>123</sup> It comes as no surprise that environments

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CRIMINOLOGY & CRIM. JUST. (June 25, 2018), <https://perma.cc/T2L2-2DCF> ("The notion of a 'school-to-prison pipeline' directs attention to particular social processes and aspects of the interrelationship between schools and the criminal justice system.").

119. Peters, *supra* note 12, at 42.

120. *Id.*

121. See MORRIS, *supra* note 118, at 2 (describing the school-to-prison pipeline as a "collection of policies, practices, conditions, and prevailing consciousness that facilitate both the criminalization within educational environments and the processes by which this criminalization results in the incarceration of youth and young adults"); Heitzeg, *supra* note 118, at 1 (assessing the effects of disciplinary policies in schools); Ramey, *supra* note 118, at 182–83 (examining the process of criminalizing school discipline); Tyner, *supra* note 118 ("For far too many students, entering the gateway to incarceration begins with a referral from the classroom to the courtroom.").

122. CARLA SHEDD, UNEQUAL CITY: RACE, SCHOOLS, AND PERCEPTIONS OF INJUSTICE 17 (2015).

123. See Peters, *supra* note 12, at 42.

that mirror prisons criminalize Black children by design, and that this design is not one that allows for a reasonable expectation of privacy in a school setting.<sup>124</sup>

Dirty data created about Black children begin with age-old deficit discourses about Black people<sup>125</sup> and creates real-world consequences that resound beyond their lifetimes.<sup>126</sup> The following discussion contains excerpts from my Article, *The Right to Be and Become: Black Home-Educators as Child Privacy Protectors*:

[T]echnology and data management uses may also pose a challenge for child privacy protection and equitable learning opportunities. Technolog[ies] used in schools [are] often imbued with bias that disproportionately impacts Black children. Education[al] record data are collected, created, digitized, processed, and transferred with varying and inconsistent oversight and broad discretion. Notwithstanding oft touted student data privacy rights, the data created and used [by schools] reflects compounded feedback loops [which are] based [in turn] on data that is far too often not audited for data integrity and accuracy. Data integrity and accuracy is of great concern especially as it pertains to understanding the origins of disparate impact and other forms of racial discrimination [in educational environments]. Studies [consistently] indicate that Black children occupy the bottom rung of most advantageous metrics in traditional school settings, and [are overrepresented] in the disadvantageous metrics. Dirty data has been found to permeate a wide variety of contexts, where race was found to be the most salient factor in analyses.<sup>127</sup>

Society does not allow one who is negatively distorted or stigmatized as criminal or inferior to be “let alone.” Since privacy preserves the right to be and become or to engage in

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124. See *id.* at 36.

125. See generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016).

126. See Dominique Harrison, *Civil Rights Violations in the Face of Technological Change*, ASPEN INST. (Oct. 22, 2020), <https://perma.cc/68UP-NRFN> (“Historical data based on unlawful practices, such as false police reports, unconstitutional searches, target stops, and arrests have led to biased algorithms that disproportionately rank Black and Brown individuals and their communities as being high risk for crimes.”).

127. Peters, *supra* note 12, at 36.

self-actualization[, even] in stigmatized childhood, we might conceive the opposite of [privacy] as a form of negative distortion. Inherently defined as problems, stigmatized human persons are presumed to be in need of correction or out of place. Negative distortion makes use of stereotyping, but is not the thing itself. Negative distortion depends on projections by actors who are capable of shaping power relationships by reducing human persons to specific and/or general problems.<sup>128</sup>

Even when constructed as generalized problems, Black children are vulnerable to being disproportionately defined by the preferences or biases ingrained in school policies and the way in which those policies are enforced in educational environments.

Whether implicitly or intentionally, the impact and [privacy] harm can be the same. A Black child is watched and monitored in a way that other [non-Black] children are not. A Black child's expression of a range of childlike emotions including irritability, anxiety, and discomfort resulting in any number of infractions are not viewed as child-like nor [as] behavior external to who the Black child is as an individual. The child-like behavior of Black children is viewed as character evidence. Value-laden perceptions about Black children determine that they should be and therefore are watched more, and impact how [Black children] are watched qualitatively.<sup>129</sup>

What one might perceive from watching a Black child may be different from what one might perceive from watching a non-Black child depending on the watcher's individual biases.

This type of watching can occur regardless of the race or socio-economic background of the person watching. That is why the data shows that Black children who engage in the same or similar behavior are penalized more frequently and more harshly than other children. The privacy harm is not

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128. *Id.* at 55.

129. *Id.* at 55–56; see, e.g., Yolanda Young, *Teachers' Implicit Bias Against Black Students Starts in Preschool, Study Finds*, GUARDIAN (Oct. 4, 2016, 11:38 AM), <https://perma.cc/Y75Z-XDMR> (reporting on a study finding that teachers direct more attention to Black students when expecting problematic behavior).

simply the violations of unjust searches, monitoring, and bodily integrity[, such as] when a Black child is strip searched, body scanned, dragged down flights of stairs, or thrown across a classroom by school police officers [or other school actors].<sup>130</sup>

The harm is also a “necessary condition of negative distortion of what it means to be a Black child who is watched in a qualitatively different way” and then penalized based on a triggered perception or illusion in the watcher’s mind that works to mischaracterize the child’s behavior.<sup>131</sup> This results in a distorted understanding and presentation of the child. Therefore, a child who might simply be tired or hungry becomes an aggressive and violent student who is a danger to his teacher and others around him given certain mindsets and imaginations.

This kind of negative distortion of Black school-age children, now largely digital, is a kind of *Golemization*, the transformation achieved through one of the traditions (language and rhetoric) of what Dr. Khalil Gibran Muhammad calls “the condemnation of Blackness” in his book by the same title.<sup>132</sup>

### III. PANDEMIC PRIVACY, SAFETY, AND THRIVING

Reports of white parents upset about school closings or remote teaching that required their children to stay home have been prevalent in the media.<sup>133</sup> In contrast, a variety of reports and stories about how Black parents viewed having their children out of school during the pandemic highlight the dissimilarity in some educational experiences.<sup>134</sup> Reports of

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130. *Id.* at 56.

131. *Id.*

132. See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010).

133. See, e.g., Lauren Camera, *Angry White Parents vs. the Public School System*, U.S. NEWS (May 12, 2021), <https://perma.cc/8FKH-UVSX>.

134. See Donna St. George, *Some Families of Color Remain Wary of Returning to Classrooms as New School Year Begins*, WASH. POST (Sept. 1, 2021, 8:00 AM), <https://perma.cc/B6YV-VA5B>; Eveline Chao, *As Schools Reopen, Will Black and Asian Families Return?*, PBS NEWS HOUR (July 5, 2021, 3:01 PM), <https://perma.cc/VX4C-RA7B>; Anna Saavedra et al., *Why Some Parents Are Sticking with Remote Learning—Even As Schools Reopen*, BROOKINGS (June 8, 2021), <https://perma.cc/9YAC-DWKT>; Bracey Harris, *Why*

Black children thriving in remote schooling or online schooling present a stark contrast to the data related to in-person schooling.<sup>135</sup> When schools began to open Black children were less likely to be enrolled in “in-person learning” compared to white students.<sup>136</sup> Remote learning provided Black and Brown parents more opportunities to intervene contemporaneously with the treatment their children were experiencing, which the children were left to navigate alone when in-person at school.<sup>137</sup> These real-time interventions provide a sense of safety from racism to Black children and a sense of relief to Black parents—feelings that were missing in the in-person schooling experience. In comparison, white parents were the least happy with online learning for their children when compared to Hispanic, Black, and Asian parents.<sup>138</sup>

The distinction is rooted in the norms and mores of in-person education that require conformity to the preferences that encourage the negative distortion and disproportionate

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*Black Families Are Choosing to Keep Their Kids Remote When Schools Reopen*, HECHINGER REP. (Aug. 7, 2020), <https://perma.cc/SN8T-RCHR>; Eliza Shapiro et al., *Missing in School Reopening Plans: Black Families' Trust*, N.Y. TIMES (Feb. 1, 2021), <https://perma.cc/4UNW-BTY8>; Melinda D. Anderson, *Why Black Parents Aren't Joining the Push to Reopen Schools*, MOTHER JONES (Mar. 18, 2021), <https://perma.cc/X7ZA-FGTF>.

135. See Elizabeth Miller, *For Some Black Students, Remote Learning Has Offered a Chance to Thrive*, NPR (Mar. 1, 2021, 5:00 AM), <https://perma.cc/2TWW-R86Q>; Laura Newberry & Howard Blume, *Some Black Parents See Less Bullying, Racism with Online Learning and Are Keeping Kids Home*, L.A. TIMES (June 8, 2021, 5:00 AM), <https://perma.cc/KK48-AJ6B>; Kelly Powers, *Black Families Are Finding Empowerment in Homeschooling. And It's Not Just Amid COVID-19*, COURIER POST (Sept. 8, 2021), <https://perma.cc/3LVL-EHUS> (last updated Sept. 9, 2021).

136. See ‘We Feel Safer’: Black Parents Say Remote Learning Gives Kids Reprieve from Racism, TODAY (May 6, 2021, 2:44 PM), <https://perma.cc/N54U-QCZH>; Christine Fernando, *Some Black Parents Say Remote Learning During Pandemic Has Kept Students Safe from Racism in Classroom*, CHI. TRIB. (May 4, 2021), <https://perma.cc/PWS9-T2JA>; Melinda D. Anderson, *You're Going Out of Your Mind If You Think I'm Ever Going Back to School*, N.Y. TIMES (Oct. 28, 2020), <https://perma.cc/Z85Y-7R99>; *More Black Missouri Families Have Switched to Homeschooling, and Not Just Because of COVID-19*, KCUR (Sept. 30, 2021, 10:33 AM), <https://perma.cc/XSA5-9TJ8>.

137. See *supra* notes 134–136 and accompanying text.

138. See *More Non-White than White Parents Prefer Remote Learning for Their Children*, ECONOMIST (Mar. 14, 2021), <https://perma.cc/CCN2-RTCK>.

problematization of racially marginalized children.<sup>139</sup> Various reports have found that racially marginalized children benefit from remote learning opportunities that the pandemic created, and now that schools are opening, fewer parents have chosen to enroll them in in-person learning.<sup>140</sup> Moreover, Black families have chosen to leave formal educational environments altogether and instead have opted to home-educate their children in increased numbers.<sup>141</sup> According to the United States Census Bureau, Black families' home-schooling numbers increased five-fold, from 3.3 percent to 16.1 percent in 2020.<sup>142</sup> While some families have chosen to leave formal educational environments, the vast majority of children will still be educated in-person after the pandemic. Thus, enhancing the student privacy protection and data collection features of FERPA would help to decrease racial discrimination. This would decrease introduction to the carceral continuum, which often begins with subjective observations that lead to the negative distortion or "Golemization" of racially marginalized children documented in the education record.<sup>143</sup>

#### IV. THE URGENT NEED FOR INPUT VALIDATION AND A REQUIREMENT FOR A REASONABLE INFERENCE IN EDUCATION RECORDS

The educational systems in place are more likely to push Black children into the school-to-prison pipeline than white children, and record-keeping practices help form the bases for those decisions. Critically, the core issue—Black children's vulnerability to racial discrimination in school settings—dates to the founding of our country.<sup>144</sup> This Article focuses on how

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139. See Peters, *supra* note 12, at 31.

140. See *supra* notes 134–136 and accompanying text.

141. See *supra* notes 134–136 and accompanying text.

142. Casey Eggleston & Jason Fields, *Census Bureau's Household Pulse Survey Shows Significant Increase in Homeschooling Rates in Fall 2020*, U.S. CENSUS BUREAU (Mar. 22, 2021), <https://perma.cc/JH8W-DGJP>.

143. See Peters, *supra* note 12, at 37–43.

144. By 1790, racial discrimination, including assaults and insults, was the leading cause of children leaving the first public schools in a Massachusetts county. Prince Hall, a leader in the Massachusetts community of Free Black people, petitioned the Massachusetts Legislature for an "African" schoolhouse. See Derrick A. Bell, Jr., *The Legacy of W.E.B. Du Bois*:



data creation and collection in schools characterizes children and makes them more vulnerable.

The gap in FERPA that bars substantive erasure of inaccuracies and persistent input of dirty data means that a curative that is not only reactive, but preventative, is required.<sup>145</sup> This is evident because an SRO can include notes in the education records and create police reports that are neither accessible nor amendable under FERPA.<sup>146</sup> FERPA must be changed to require input validation based on reasonable inferences at the point of data creation and collection before this data is permitted to be included in the education record.<sup>147</sup> Additionally, FERPA should require educational environments to maintain an account of disclosures to law enforcement that may be shared with students or parents.<sup>148</sup>

#### A. *Substantive Content and Input Validation Requirement*

Currently, teachers, school officials, administrators, and other school actors may include their subjective observations and opinions about student behavior in the education record.<sup>149</sup> Thereafter, a student may try to challenge the documentation through the amendment procedure, but FERPA does not guarantee a substantive change or erasure.<sup>150</sup> If FERPA will not provide a mechanism to remove subjective opinions that are often rife with inaccuracies and dirty data, FERPA must create resistance against including those protected opinions.<sup>151</sup> School

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*A Rational Model for Achieving Public School Equity for America's Black Children*, 11 CREIGHTON L. REV. 409, 410 (1977).

145. See U.S. DEP'T OF EDUC., GUIDANCE FOR ELIGIBLE STUDENTS, *supra* note 40 (noting the restrictions on amending education records).

146. See *id.* (explaining that "law enforcement unit records" are not controlled by FERPA).

147. See Brandon Wong, *FERPA: The Joke with No Punchline*, AEIDEAS (Feb. 23, 2015), <https://perma.cc/KCU4-V7RK> (discussing the flaws of FERPA and suggesting broad principles for its reform).

148. See *id.* (suggesting that more than a quick fix is needed to mend FERPA).

149. See *id.* (noting that such information is included in educational records but not covered by FERPA).

150. See *id.* (outlining the educational record amendment procedure and likely outcomes).

151. See Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public*

actors with the power to create data in the education record must also validate their observations and conclusions.<sup>152</sup> For example, a bias-incident survey or check by a qualified reviewer, such as a school district appointed discipline equity officer, might assist school actors with avoiding the creation of dirty data in education records.<sup>153</sup> This validation process might be accomplished by conversing with a qualified reviewer who could then discuss the motivation and facts (that form the bases for the decision-making and resulting documentation) with the school actor.<sup>154</sup> This additional step could create the needed resistance to decreasing the negative impact of disciplinary decisions that disproportionately harm racially marginalized children.<sup>155</sup> While this type of measure may create an administrative burden on schools, this burden is significantly less than the harms children endure because of discriminatory disciplinary practices in American schools.<sup>156</sup> Reputational, identity, and self-presentation harms are the exact kind of harms that privacy and privacy law including FERPA were intended to protect.<sup>157</sup>

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*Interest*, 44 J. LEGIS. 22, 45–46 (2017) (“Failing to enforce a logical and narrow reading of FERPA at the departmental level undermines the congressional goal of avoiding multiple interpretations of the statute.”).

152. See Nance, *supra* note 78, at 371 (arguing that “schools should report detailed data describing the number and reasons for adverse disciplinary actions such as suspension, expulsion, or referrals to law enforcement by student subgroups”).

153. See *id.* (advocating for a system in which “school administrators and teachers . . . collect and regularly review (i.e., weekly or monthly) . . . disaggregated data to identify emerging patterns and discuss how to address racial gaps as they appear”).

154. See *id.* at 367 (“Like everyone else, school officials and teachers also have implicit racial biases, which affect their decision-making towards students, especially relating to discipline.”)

155. See *id.* (“Providing debiasing training can be beneficial to those who are equity-minded and help school officials and teachers make better discipline decisions.”).

156. See Lindsay & Hart, *supra* note 45 (“Across the United States, black and Latino students are far more likely than their white classmates to be removed from school as punishment.”).

157. See Penrose, *supra* note 39, at 76–77 (“FERPA’s focus was ensuring that parents were able to receive, review and, where necessary, correct all educationally related documents that could affect their child’s educational progress.”).

The process of input validation should be based on reasoning that follows fact and a reasonable interpretation of fact.<sup>158</sup> Therefore, the input validation requirement should be based on a reasonable inference about the student behavior. The school actor should be responsible for documenting why their determination for school discipline is warranted before their statements are accepted into the record.<sup>159</sup> Such assessments might also entail a series of benchmarking questions to help the school actor determine whether their assessment of the behavior in the specific instance is like other instances of discipline. Reviewing previous patterns wherein the school actor sought to formally discipline a student and not document it and, more importantly, not discipline other students, might prompt a comparison regarding why discipline and documentation were appropriate in one instance but not the other. Perhaps in similar instances, the teacher decided to give a warning, instead of a reprimand and disciplinary action. These differences are highlighted when Black parents try to advocate for their children when their children are discriminated against for the same behavior that their non-Black peers are not disciplined for or, if disciplined, receive more lenient penalties for.

The weakness of this proposed intervention is its reliance on a teacher's willingness to openly disclose past behavior, at least in some instances. While this is a fair critique, it does not account for the impact of having and enforcing the requirement. If school actors know they must explain their decisions to a reviewer, they will likely assess their own actions before they formally engage in the discipline and documentation process. In fact, this likely already happens when non-racially marginalized students are given the benefit of the doubt in similar situations, which explains why disciplinary actions disproportionately impact racially marginalized students.<sup>160</sup> If a teacher knows

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158. See Greenberg & Goldstein, *supra* note 151, at 38 (“The ED’s failure to adequately distinguish between the records and the information they contain makes applying FERPA a greater difficulty than it already is.”).

159. See Nance, *supra* note 78, at 369 (proposing that “school officials and teachers should ask themselves a brief set of questions” to “remind them of the concept of implicit bias” before disciplining a student); Heitzeg, *supra* note 118, at 3–4 (recommending a menu of more reasoned and objective responses to school zero-tolerance policies).

160. See Young, *supra* note 129 (discussing the disparity of disciplinary treatment given to Black students as opposed to nonmarginalized students).

that FERPA requires their assessments to be thorough to avoid resistance, the system may provide an enhanced formality in the social structure to support Black children which the system already provides to white parents and their children.

Baseline bias assessments on school actors may also be helpful.<sup>161</sup> For example, if we accept the research as true, namely, that marginalized and minoritized students are disciplined disproportionately,<sup>162</sup> then we must ask, why are teachers, administrators, resource officers, and other school actors not required to be assessed based on racial literacy and bias as a matter of requisite professional competency (not compassion or empathy)? We require teachers, administrators, and other school actors to have certain educational credentials,<sup>163</sup> but we do not require them to have adequate training that might counteract the cognitive deficits and vulnerabilities that catalyze disproportionate discriminatory treatment of marginalized children across every level of formal education.<sup>164</sup> Moreover, in light of the most recent findings about extremist views that have infiltrated law enforcement, such assessments should be required at schools prior to the hiring of resource officers or members of law enforcement—assuming they should continue to be hired at all.<sup>165</sup> Currently, law

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161. See Nance, *supra* note 78, at 367 (“Like everyone else, school officials and teachers also have implicit racial biases. . .”).

162. See *id.* at 331 (“National, state, and local data across all settings and at all school levels clearly demonstrate that school administrators and teachers discipline minority students, particularly African-American students, more harshly and more frequently than similarly-situated white students.”).

163. See *How to Earn Your Teacher Certification*, ALL EDUC. SCHS., <https://perma.cc/UT53-YEFJ> (outlining the practices of teacher certification and linking to requirements for each state).

164. See Nance, *supra* note 78, at 367 (“Nevertheless, despite the fact that implicit racial biases are deeply embedded in our subconscious minds, researchers agree that implicit racial biases are malleable and can be addressed, even if field-tested strategies and interventions are still in their very early stages.”).

165. While pervasive and persistent white supremacy in the ranks of state actors, including law enforcement and the military, date to the Antebellum era, high-profile examples of the current infiltration have become known more recently. See Kim Bellware, *Police Departments Across the U.S. Open Probes into Whether Their Own Members Took Part in the Capitol Riot*, WASH. POST (Jan. 9, 2021, 10:00 PM), <https://perma.cc/G4BL-KL47> (considering that police officers from across the country attended the riot); Neil MacFarquhar, *Police*

enforcement organizations lack the requisite competencies to consistently and adequately vet and eliminate white supremacist threats within its ranks.<sup>166</sup> Therefore, at the worst end of the SRO spectrum, schools that hire law enforcement officers run the risk of hiring a police officer who has not been vetted for racist and extreme beliefs.<sup>167</sup>

### B. Reasonable and Equity-Based Inference Requirement

As applied, consider the research that shows Black school age children are disciplined more harshly for the same kinds of infractions and for more subjective reasons.<sup>168</sup> If a school actor

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*Officers Who Traveled to Washington Are Being Investigated for Connection to the Capitol Melee*, N.Y. TIMES (Jan. 9, 2021), <https://perma.cc/UBF4-Y6T6> (assessing police departments responses to their officers participating in the riot); Maria Caspani, *Off-Duty Police, Firefighters Under Investigation in Connection with U.S. Capitol Riot*, REUTERS (Jan. 10, 2021), <https://perma.cc/7K4J-WRK7> (same); Cynthia Miller-Idriss, *When the Far Right Penetrates Law Enforcement*, FOREIGN AFFS. (Dec. 15, 2020), <https://perma.cc/AE4F-C6UF> (comparing the American and German responses to white supremacists in police organizations); Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://perma.cc/MD2Q-TK6E> (discussing that the emphasis on addressing implicit bias has left explicit bias unattended); Alice Speri, *The FBI Has Quietly Investigated White Supremacist Infiltration of Law Enforcement*, INTERCEPT (Jan. 31, 2017, 7:10 AM), <https://perma.cc/7R75-KYR8> (“Although these right-wing extremists have posed a growing threat for years, federal investigators have been reluctant to publicly address that threat or to point out the movement’s longstanding strategy of infiltrating the law enforcement community.”); FBI COUNTERTERRORISM DIV., WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 3–7 (Oct. 17, 2006), <https://perma.cc/G9QJ-D4HL> (PDF) (examining the prevalence and issues connected to white supremacist infiltration of police departments).

166. See FBI COUNTERTERRORISM DIV., *supra* note 165, at 4 (noting the difficulties of detecting and reporting such infiltration).

167. See *id.* at 3 (“[R]eporting on attempts reflects self-initiated efforts by individuals, particularly among those already within law enforcement ranks, to volunteer their professional resources to white supremacist causes with which they sympathize.”).

168. See Peters, *supra* note 12, at 37–41 (overviewing the disproportionate disciplining of Black students); Nance, *supra* note 78, at 331–32

[T]he most recent national data from the CRD Collection reveals that although African-American students comprised only 16% of the student population during the 2011–2012 school year, they represented 32% of students who received an in-school suspension; 33% of students who received one out-of-school suspension; 42% of

is required to substantiate the reasoning behind the discretionary assessment of behavior before that assessment becomes calcified in the education record, they must explain the inferences they made about the student's behavior. This requirement would send a strong message to school actors that a reasonable inference must be based on a reasonable interpretation of alleged facts. This is particularly important given the level of discretion within subjective decision making about school discipline.<sup>169</sup> The elements of accuracy and proportionality are important to the conceptualization and enforcement of the right to a reasonable inference.<sup>170</sup> Therefore, the right to a reasonable and equity-based inference, where decisions may result in damage to self-identity or reputation, means that a school actor would have to account for at least (1) why their interpretation and observations reflect the factual situation and (2) why the level of disciplinary action and documentation they decide to propose is proportionate to their interpretations and observations of those facts.

### C. *Accounting of Disclosures to Law Enforcement*

As previously discussed, FERPA allows SROs who are also police officers to access the education record, but there is no requirement to record their access.<sup>171</sup> While SROs are considered school officials under FERPA, their presence and impact on disciplinary decision-making is connected to the alarming rate of marginalized students populating the school-to-prison pipeline.<sup>172</sup> SROs may access records without student and parent knowledge because there is no requirement

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students who received more than one out-of-school suspension; and 34% of students who were expelled. Further, during that same time frame, African-American students represented 27% of the students who were referred to law enforcement, and 31% of students who were subject to a school-based arrest.

169. See Peters, *supra* note 12, at 40 (discussing the bias and subjectivity that allows schools to punish braids worn by Black students but not corresponding styles such as French braids worn by other students).

170. See Nixon, *supra* note 24 (warning of the effects of unreliable data).

171. See U.S. DEP'T OF EDUC., GUIDANCE FOR ELIGIBLE STUDENTS, *supra* note 40, at 3 (discussing disclosure policies and exceptions under FERPA).

172. See Nance, *supra* note 78, at 338–41 (2016) (addressing the issues presented by school resource officer programs).

that schools track and disclose to students or parents when they access school records.<sup>173</sup> FERPA should require schools to develop and maintain a system that catalogs any disclosures to law enforcement.<sup>174</sup> This requirement could be designed similar to the Health Insurance Portability and Accountability Act's<sup>175</sup> system, but without any exceptions to tracking.<sup>176</sup> Every time a student's education record is accessed by law enforcement, a student or parent should be notified. Parents and students must be apprised of when law enforcement has access to the student's education records given the high stakes created by pervasive discriminatory practices that disproportionately negatively impact racially marginalized people.<sup>177</sup> There is a direct connection between that access and marginalized students' exposure to the carceral continuum. Even when more reasonable and proportionate responses are available—as evidenced by what happens to nonmarginalized students who engage in similar, same, or even more egregious behavior—racially marginalized students and their families still end up bearing the burden of navigating discriminatory decision-making in formal education.

#### CONCLUSION: GOLEM IN, GOLEM OUT

From its beginning, FERPA was meant to protect the privacy interests of students.<sup>178</sup> The intended protection included guarding against distortions and inaccuracies that officials at the highest levels of our federal government recognized to be detrimental to student reputation and

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173. See DOJ OFF. CMTY. ORIENTED POLICING SERVS., ASSIGNING POLICE OFFICERS TO SCHOOLS 32 (2010), <https://perma.cc/HEU9-ZCDX> (PDF) (noting that whether FERPA is applicable to resource officers depends on their designation as school officials in individual districts).

174. See, e.g., 45 C.F.R. § 164.528 (2020) (explaining the process of accounting for any disclosures under the Health Insurance Portability and Accountability Act).

175. Pub. L. No. 104-191, 110 Stat. 1939 (1996).

176. See *id.* (“An individual has a right to receive an accounting of disclosures of protected health information. . .”).

177. *Id.*

178. See 20 U.S.C. § 1232g (requiring that schools must obtain permission from parents or eligible students before disclosing sensitive information on the student).

identity.<sup>179</sup> The rights to access and request to amend align with the intention to protect reputation and identity. Added protections must exist to ensure that education records are free of discriminatory dirty data and digital distortions that circumscribe the structure of opportunities to thrive while catalyzing and sustaining the school-to-prison pipeline. Accurate data that is based on reasonable inferences will prevent the education records' creation of a distorted student identity and reputation and, therefore, help eliminate the "Golem in, Golem out" phenomena.

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179. See Nixon, *supra* note 24 (expressing concerns about the effects of computerized data holdings and analysis).