
NOTES

USING CALIFORNIA STATE ANTI-DISCRIMINATION LAW TO COMBAT THE OVERUSE OF SCHOOL SUSPENSIONS

ALLISON FISHER*

INTRODUCTION

The use of harsh, punitive disciplinary measures has become pervasive in our elementary and secondary schools.¹ Many believe these “zero tolerance” educational policies, in which students are suspended or expelled from school for minor violations, are having disastrous effects on students across the country and are responsible for pushing many students out of school and into the hands of the juvenile justice system.² Minority students, especially African Americans, have been disproportionately

* Class of 2015, University of Southern California Gould School of Law; B.A. History, Vassar College. I am extremely grateful to Professor Clare Pastore for her help, guidance, and support throughout my research and writing of this Note and to the staff of the Southern California Law Review for their impeccable editing.

1. Sean Wilson, *School-Based Restorative Justice as an Alternative to Punitive Zero-Tolerance Policies*, HAMPTON INST. (Aug. 13, 2013), http://www.hamptoninstitution.org/restorativejustice.html#Uragq_aM-Og (“Many schools in America have been focused on controlling student behavior with punitive punishments . . .”).

2. See, e.g., Lizette Alvarez, *Seeing the Toll, Schools Revise Zero Tolerance*, N.Y. TIMES (Dec. 3, 2013), http://www.nytimes.com/2013/12/03/education/seeing-the-toll-schools-revisit-zero-tolerance.html?_r=0&hp=&adxnnl=1&adxnnlx=1387699492-5uP2HXBVsdXTDw6Tj9xwIg (“[G]et-tough policies in schools are leading to arrest records, low academic achievement and high dropout rates that especially affect minority students . . .”).

affected by these zero tolerance policies.³ With increasing success, advocates, parents, and students have been trying to change the way school officials discipline their students, though legislative and litigation efforts and grassroots community organizing. This Note discusses how advocates can use California's anti-discrimination statute, California Government Code section 11135, to combat the disproportionate effect zero tolerance policies have on African American students.

This Note begins in Part I with a discussion of the development and prevalence of zero tolerance educational policies and looks at zero tolerance policies as they exist in California as part of the Education Code. Part II will discuss how zero tolerance policies have, rather than making schools safer, negatively impacted both school environment and students individually. It will also look at the disproportionate effect of zero tolerance policies on minority students, particularly African American students. Part III will discuss various legislative efforts aimed at reforming zero tolerance policies. Part IV will look specifically at California's anti-discrimination statute, Government Code section 11135, and discuss how advocates might use it to bring a discrimination claim of disparate impact based on zero tolerance policies. Specifically, it uses the San Diego Unified School District as an example district, in which African American students make up 23.5% of the total students suspended despite accounting for only 9.7% of the district's enrollment, while white students make up only 12.3% of the students suspended although they account for 23.1% of total enrollment.⁴

I. ZERO TOLERANCE POLICIES

A. THE DEVELOPMENT OF ZERO TOLERANCE DISCIPLINARY POLICIES

"Zero tolerance" has become the general term to describe the now widespread approach to school discipline in the United States, referring to disciplinary policies that require automatic punishment for certain misconduct and also policies that allow disciplinarians to impose such punitive measures as suspension, expulsion, or arrest for common student misconduct.⁵ These zero tolerance disciplinary policies first began in the

3. *Id.*

4. See Appendix A (containing statistical data concerning enrollment and suspensions from the 2013–2014 school year, the most recent year for which data is available). The data was obtained from the California Department of Education using the Department's DataQuest online system, which allows users to create custom reports by selecting from a variety of specific input factors. The DataQuest system is available at <http://dq.cde.ca.gov/dataquest/dataquest.asp>.

5. See, e.g., AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *Are Zero Tolerance Policies*

1980s and coincided with the “tough on crime” movement that implemented increasingly punitive policies in the criminal justice system.⁶ By the late 1980s, school districts in California, New York, and Kentucky had adopted zero tolerance mandatory expulsion policies for drugs, fighting, and gang-related activity in school.⁷ By the early 1990s, similar zero tolerance policies had been passed by many state legislatures around the country, focusing on weapons, violence, and drugs.⁸

The federal government also forced zero tolerance policies into all federally funded schools with the Gun-Free Schools Act of 1994, requiring that any student found possessing a firearm in school be expelled for one calendar year and referred to police.⁹ The Gun-Free Schools Act has since been incorporated into the No Child Left Behind Act, the comprehensive federal education act.¹⁰

As the decade progressed, many schools that adopted zero tolerance policies began implementing “sweeping interpretations” of what constituted a “weapon” or “drugs,” resulting in some schools including paper clips, nail files, and scissors as weapons and Aspirin, Midol, and

Effective in the Schools?: An Evidentiary Review and Recommendations, 63 AM. PSYCHOLOGIST 852, 852 (2008) [hereinafter APA, *Review*] (defining “zero tolerance” as a “philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context”); ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 3 (Mar. 2010), <http://www.advancementproject.org/resources/entry/test-punish-and-push-out-how-zero-tolerance-and-high-stakes-testing-funnel> [hereinafter ADVANCEMENT PROJECT, PUSH OUT] (using “zero tolerance” to refer to “all punitive school discipline policies and practices”); Alvarez, *supra* note 2 (using the term “zero tolerance” to refer to rise of “suspensions, expulsions and arrests for minor nonviolent offenses” and “the number of police officers stationed at schools”).

6. ADVANCEMENT PROJECT, PUSH OUT, *supra* note 5, at 3–4.

7. RUSSELL J. SKIBA, IND. EDUC. POL’Y CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (Aug. 2000), <http://www.indiana.edu/~safeschl/ztze.pdf> [hereinafter SKIBA, ZERO TOLERANCE].

8. *Id.*; ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 1 (2000), <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf> [hereinafter ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED].

9. 20 U.S.C. § 8921 (2012). This was Congress’s second attempt to curtail the possession of firearms in schools, after the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. IV 1992), was struck down by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), as exceeding Congress’s Commerce Clause power.

10. No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.) (incorporating the Gun-Free Schools Act as 20 U.S.C. § 7151).

Certs Breath Mints as drugs.¹¹ In addition to expanding what constituted weapons and drugs, school districts “quickly expanded Zero Tolerance Policies to include many more types of behavior and, significantly, to cover infractions that pose little or no safety concerns,”¹² including smoking, threats, or swearing.¹³ They also grew to include offenses such as “disobeying rules,” “insubordination,” and “disruption,” which many states now call “willful defiance,” meaning students could be suspended or even expelled for such childish behavior as talking back to a teacher.¹⁴ As a result of such broad and seemingly ever-expanding zero tolerance policies, the rate of suspensions nationally has more than doubled from the early 1970s until now.¹⁵ In the 2009–2010 school year, elementary schools suspended 2.4% of students nationally, compared to only 0.9% in 1972–1973.¹⁶ During the same period, suspension rates for secondary schools increased from 8% in 1972–1973 to 11.3% in 2009–2010 nationally.¹⁷

B. ZERO TOLERANCE TODAY IN CALIFORNIA

The California Education Code sets out the offenses for which a student may be suspended.¹⁸ While these offenses serve as the only acceptable “grounds for suspension,” local schools and school districts have the discretion to choose which of these offenses they will discipline with suspension, and whether or not the punishment of such offenses will be automatic or consider the specific circumstances of the offense.¹⁹ These

11. ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 8, at 1.

12. *Id.*

13. SKIBA, ZERO TOLERANCE, *supra* note 7, at 2.

14. ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 8, at 1–2.

15. DANIEL J. LOSEN & TIA ELENA MARTINEZ, THE CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 8–9 (Apr. 8, 2013), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack_UCLA_4-8.pdf (comparing suspension rates from the 1970s, analyzed in the Children’s Defense Fund’s report, *School Suspension: Are They Helping Children?*, and data collected by the U.S. Department of Education, Civil Rights Division for the 2009–2010 school year).

16. *Id.* (defining elementary schools as Kindergarten through 8th grade).

17. *Id.* (defining secondary schools as 9th through 12th grades).

18. CAL. EDUC. CODE §§ 48900, 48900.2–.4, .7 (West 2006). See Appendix B for a full list of all offenses for which a student can be suspended. Expulsion is also an acceptable form of punishment for all of these offenses. *Id.* This paper, however, focuses on challenging suspension policies specifically because such policies have a more widespread effect on students throughout the state. For example, in the 2011–2012 school year, an average of 5.7% of all students in California (totaling 366,629 students) were suspended, while only 0.1% (totaling 9,553 students) were expelled. *State Schools Chief Tom Torlakson Releases First Detailed Data on Student Suspension and Expulsion Rates*, CAL. DEP’T OF EDUC. (Apr. 19, 2013), <http://www.cde.ca.gov/nr/ne/yr13/yr13rel48.asp>.

19. EDUC. § 48900 (“A pupil shall not be suspended from school or recommended for expulsion,

statutes provide schools with a list of “suspendable” offenses and, while many schools choose to punish such offenses using suspensions, the statutes do not require schools to do so. In this way, every school district in the state is free to create its own disciplinary policies, as long as the policies are consistent with state education law. As a result, different school districts, and even different schools within a district, will have different disciplinary policies.

Section 48900 lists nineteen categories of offenses for which suspension or expulsion is an acceptable punishment. In turn, each of these categories includes a variety of actions for which students can be suspended or expelled. For example, section 48900(a)(1) refers to any student who “caused, attempted to cause, or threatened to cause physical injury to another person,”²⁰ and section 48900(h) refers to any student who “possessed or used tobacco, or products containing tobacco or nicotine products.”²¹ The actions involved in these offenses can range in severity from willfully using violence upon another person,²² to possessing a dangerous object,²³ to “disrupting school activities.”²⁴ While regulations provide definitions of certain criminal acts, such as arson, battery, and graffiti,²⁵ neither the statute nor the regulations provide definitions for many of the noncriminal terms, such as “a dangerous object” or what behavior constitutes a “disruption.” Thus, school authorities are allowed to interpret these definitions as broadly or as narrowly as they see fit. Later sections of the Education Code go on to list four additional categories of offenses for which suspension could be used as punishment: sexual harassment,²⁶ hate violence,²⁷ harassment, threats or intimidation,²⁸ and terroristic threats.²⁹

unless . . . the pupil has committed an act” included in §§ 48900, 48900.2–4, or 48900.7). Section 48915 sets out those more serious offenses for which a student *must* be immediately suspended and recommended for expulsion, unless the principal determines expulsion is inappropriate due to the particular circumstance of the offense. *Id.* Offenses included in section 48915 include, among others, causing physical injury to another person, robbery or extortion, and selling or possession of a controlled substance. *Id.*

20. *Id.* § 48900(a)(1).

21. *Id.* § 48900(h).

22. *Id.* § 48900(a)(2).

23. *Id.* § 48900(b).

24. *Id.* § 48900(k).

25. CAL. CODE REGS. tit. 5, § 700 (2010).

26. CAL. EDUC. CODE § 48900.2.

27. *Id.* § 48900.3.

28. *Id.* § 48900.4.

29. *Id.* § 48900.7.

II: THE RESULTS OF ZERO TOLERANCE POLICIES AND RAMPANT SUSPENSIONS

The use of harsh, punitive zero tolerance policies has led to an explosion in suspensions, particularly out-of-school suspensions.³⁰ Before the nearly universal implementation of zero tolerance in 1974, about 1.7 million students were suspended nationally.³¹ That number nearly doubled between 1974 and 2006, with more than 3.3 million students suspended in 2006,³² and has remained approximately the same ever since.³³

Despite the nation's embrace of zero tolerance policies, these policies have been unsuccessful in making schools safer or improving student behavior.³⁴ Measuring the number of expulsions or suspensions is not indicative of school safety or student behavior.³⁵ Rather, these measurements become "meaningful measures of safety only if paired with direct measures of violence, disruptions, or student misbehavior."³⁶ Thus, while individual school districts that have implemented zero tolerance policies may tout the efficacy of such policies, there is little objective data to support their claims.³⁷ In a comprehensive review of the available literature regarding zero tolerance policies and practices, the American Psychological Association ("APA") Zero Tolerance Task Force found that

30. NATIONAL OPPORTUNITY TO LEARN CAMPAIGN ET AL., STOPPING OUT-OF-SCHOOL SUSPENSION: A GUIDE FOR STATE POLICY 1 (Dec. 2012), <http://stopsuspensions.org/sites/default/files/sns-state-policy-toolkit.pdf>.

31. TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR. & PUB. POL'Y RESEARCH INST., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 5 (July 2011), http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf [hereinafter FABELO, BREAKING SCHOOLS' RULES] (taking numbers and statistics from Hanno Petras et al., *Who Is Most at Risk for School Removal? A Multilevel Discrete-Time Survival Analysis of Individual-and-Context-Level Influences*, 103 J. EDUC. PSYCHOL. 223 (2011) and KIM BROOKS ET AL., SCHOOL HOUSE HYPE: TWO YEARS LATER (2000)).

32. FABELO ET AL., *supra* note 31.

33. *Id.*

34. SKIBA, ZERO TOLERANCE, *supra* note 7, at 15.

35. *Id.* at 13.

36. *Id.*

37. *Id.* (finding that after a review of the available material, "there appears to be little evidence, direct or indirect, supporting the effectiveness of suspension or expulsion for improving student behavior or contributing to overall school safety"). Skiba goes on to argue that "indirect data suggest[s] that suspension may be ineffective for those students most often targeted for disciplinary consequences," noting that nearly 40% of school suspensions are due to repeat offenders based on studies done by C. Bowditch, *Getting Rid of Troublemakers: High School Disciplinary Procedures and the Production of Dropouts*, 40 SOC. PROBS. 493 (1993), V.K. Costenbader & S. Markson, *School Suspension: A Survey of Current Policies and Practices*, 78 NASSP BULL. 103 (1994), and MASS. ADVOC. CENT., *THE WAY OUT: STUDENT EXPULSION PRACTICES IN BOSTON MIDDLE SCHOOLS* (1986). *Id.*

in 2008, despite the increase in zero tolerance policies, the rates of school violence and disruption had remained stable since 1985.³⁸ Indeed, the use of serious disciplinary measures like out-of-school suspensions has been correlated with a higher number of criminal incidents, even when controlling for social and school demographics.³⁹

Evidence also suggests that zero tolerance policies have a negative impact on student behavior and school environment. The APA Zero Tolerance Task Force found that, contrary to the popular perception that the “removal of students who violate school rules will create a school climate more conducive to learning for those students who remain,” the data suggests that zero tolerance policies have “the opposite effect.”⁴⁰ Notably, despite the APA Zero Tolerance Task Force’s extensive review of twenty years of literature on zero tolerance policies, it found “surprisingly few data that could directly test the assumptions of a zero tolerance approach to school discipline, and the data that are available tend to contradict those assumptions.”⁴¹ Schools with higher rates of suspension have less satisfactory ratings of “school climate,” based on a variety of indicators,⁴² “school governance structures,”⁴³ and “spend a disproportionate amount of time on disciplinary matters.”⁴⁴ Rather than deterring future offenses, suspensions predict a higher future rate of misbehavior and suspension among those students who have been suspended.⁴⁵ Furthermore, research suggests that such policies have a

38. APA, *Review*, *supra* note 5, at 853.

39. Greg Chen, *Communities, Students, Schools, and School Crime: A Confirmatory Study of Crime in U.S. High Schools*, 43 URB. EDUC. 301, 314 (2008).

40. APA, *Review*, *supra*, note 5, at 854.

41. *Id.* at 852. *See also id.* at 853–54 (noting the five key assumptions about zero tolerance policies in handling school disciplinary matters as being: (1) “[s]chool violence is at a crisis level and increasing, thus necessitating forceful, no-nonsense strategies for violence prevention,” (2) “zero tolerance increases the consistency of school discipline and thereby the clarity of the disciplinary message to students,” (3) the “[r]emoval of students who violate school rules will create a school climate more conducive to learning for those students who remain,” (4) “[t]he swift and certain punishments of zero tolerance have a deterrent effect upon students, thus improving overall student behavior and discipline,” and (5) [p]arents overwhelmingly support the implementation of zero tolerance policies to ensure the safety of schools, and students feel safer knowing that transgressions will be dealt with in no uncertain terms”).

42. *Id.* at 854 (citing a study by Frank Bickel & Robert Qualls, *The Impact of School Climate on Suspension Rates in Jefferson County Public Schools*, 12 URB. REV. 79 (1980)).

43. *Id.* (citing a study by Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 URB. REV. 245 (1982)).

44. *Id.* (citing a study by Terrance M. Scott & Susan B. Barrett, *Using Staff and Student Time Engaged in Disciplinary Procedures to Evaluate the Impact of School-Wide PBS*, 6 J. POSITIVE BEHAV. INTERVENTIONS 21 (2004)).

45. *Id.* (citing studies by Bowditch, *supra* note 37; Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL., 59 (1998); L.M.

negative effect on “school-wide academic achievement,” even when controlling for demographics such as socioeconomic status.⁴⁶

While zero tolerance policies have not made schools safer, evidence indicates that they have undesired, negative effects on individual students. Suspensions can affect a student’s overall class grade, and suspended students can often fall behind in class after missing days of schoolwork, unable to catch up.⁴⁷ Suspended students are at an increased risk of being forced to repeat a grade.⁴⁸ Likewise, suspensions are a “moderate to strong predictor of a student dropping out of school”—more than 30% of high school sophomores who drop out of school had been suspended.⁴⁹ In addition to the educational setbacks a suspension can cause, out-of-school suspensions often leave students at home and unsupervised, allowing them to get into trouble when they would otherwise be under the supervision of their school.⁵⁰

There is also overwhelming data to indicate that suspensions and punitive disciplinary policies have a disproportionate effect on racial minorities, especially African American students.⁵¹ African American

Raffaele-Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in *NEW DIRECTIONS FOR YOUTH DEVELOPMENT: DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE* 17 (Johanna Wald & Daniel J. Losen eds., 2003); and T. Tobin, G. Sugai & G. Colvin, *Patterns in Middle School Discipline Records*, 42 *J. EMOTIONAL & BEHAV. DISORDERS* 82 (1996).

46. *Id.* (citing studies by James Earl Davis & Will J. Jordan, *The Effects of School Context, Structure, and Experiences on African American Males in Middle and High Schools*, 63 *J. NEGRO EDUC.* 570 (1994); Raffaele-Mendez, *supra* note 45; and R.J. Skiba & M.K. Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in *HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES* (C.M. Evertson & C.S. Weinstein eds., 2006)).

47. *ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED*, *supra* note 8, at 13.

48. *Id.*

49. *Id.* See also SKIBA, *ZERO TOLERANCE*, *supra* note 7, at 13 (citing a study by R.B. Ekstrom, M.E. Goertz, J.M. Pollack & D.A. Rock, *Who Drops out of High School and Why?: Findings from a National Study*, 87 *TCHRS. C. REC.* 357 (1986), which found that “31% of sophomores who dropped out of school had been suspended, as compared to a suspension rate of only 10% for their peers who had stayed in school”).

50. Ronald D. Stephens, *National Trends in School Violence: Statistics and Prevention Strategies*, in *SCHOOL VIOLENCE PREVENTION: A PRACTICAL HANDBOOK* 72, 75 (Jane Close Conoley & Arnold P. Goldstein eds., 1997) (showing statistics indicating that 85% of all daytime crimes were committed by truant youth).

51. See LOSEN & MARTINEZ, *supra* note 15, at 7 (estimating based on numbers collected by the U.S. Department of Education’s Office for Civil Rights, during the 2009–2010 school year for grades K–12, African American students were suspended nationally at a rate of 17%, American Indian students at a rate of 8%, Latino students at a rate of 7%, white students at a rate of 5%, and Asian students at a rate of 2%). These statistics are further broken down by elementary school grades (K–8) and secondary school grades (9–12). During the same school year, 6.6% of all African American elementary school students were suspended at least once, compared to 1.1% of all white elementary school students. *Id.* at 7–8. In secondary schools during the same year, 24.3% of all African American students nationally

students have been routinely suspended at higher rates than their white peers,⁵² and since the 1970s, suspension rates for all racial categories of students have increased.⁵³ However, the rate at which African American high school students are suspended today has more than doubled from 11.8% in 1972–1973 to 24.3% in 2009–2010, while the suspension rate of white students only increased from 6% to 7.1% during this same time.⁵⁴ The national suspension gap between black and white high school students stands today at over 17 percentage points compared to 5.8 percentage points in the early 1970s.⁵⁵ The suspension gap for elementary school students has increased from 1.5 percentage points to 5.5 percentage points during the same period.⁵⁶

There is a correlation between these disproportionate suspension rates and the implementation of zero tolerance policies. While some may try to attribute the disproportionate effect of zero tolerance policies to socioeconomic disadvantage, research on the subject has found that minority students are still suspended at a significantly higher rate than their white peers, even when controlling for socioeconomic status.⁵⁷ Neither are these disparate suspension rates the result of higher rates of rule-breaking or disruptive behavior by minority students.⁵⁸ Rather, higher rates of

were suspended at least once, compared to 7.1% of all white students nationally. *Id.* at 8. *See also* ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 8, at 7 (noting that African Americans are suspended at disproportionately higher rates than whites); APA, *Review*, *supra*, note 5, at 854 (noting nearly a dozen studies all finding that African American students were overrepresented in school suspensions and expulsions). Evidence also suggests that students with disabilities are overrepresented in school suspensions and expulsions. *See* LOSEN & MARTINEZ, *supra* note 15, at 8 (finding that students with disabilities were suspended at a rate of 4.1% for elementary school and 19.3% for secondary school, the second highest rates after African American students); ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 8, at 9 (noting that despite federal laws passed to ensure that a child is not punished for behavior that is characteristic of the child's disability, children with disabilities are often punished for such behavior).

52. LOSEN & MARTINEZ, *supra* note 15, at 9 (noting that in the 1972–1973 school year, white high school students had a 6% suspension rate, while African American high school students had a 11.8% suspension rate).

53. *See supra* note 51 and accompanying text (showing growth of suspension rates among races).

54. LOSEN & MARTINEZ, *supra* note 15, at 7.

55. *Id.*

56. *Id.*

57. SKIBA, ZERO TOLERANCE, *supra* note 7, at 12. *See also* APA, *Review*, *supra* note 5, at 854 (citing studies by Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317 (2002), and Wu et al., *supra* note 43, that debunk the notion that the racially disproportionate effects of zero tolerance are due to economic disadvantage)).

58. *See* APA, *Review*, *supra* note 5, at 854 (“[T]here [is not] any data supporting the assumption that African American students exhibit higher rates of disruption or violence that would warrant higher rates of discipline”); SKIBA, ZERO TOLERANCE, *supra* note 7, at 12 (citing studies by J. D. McCarthy & D. R. Hoge, *The Social Construction of School Punishment: Racial Disadvantage Out of Universalistic*

suspension for African American and other minority students appear to be the result of receiving harsher punishments than white students and for less serious violations.⁵⁹ These less serious violations tend to be based on more subjective offenses, such as willful defiance, where punishment is much more dependent on the opinion of the teacher or administrator.⁶⁰ For example, in one middle school, while white students were punished most often for offenses such as vandalism, smoking, obscene language, drugs, and alcohol, African American students were punished most often for loitering, disrespect, excessive noise, threats, and “conduct interference,” a catch-all offense similar to willful defiance.⁶¹

While this evidence is highly suggestive that zero tolerance policies disproportionately affect African American students, it does not necessarily mean that teachers and administrators are racist or have overt racial biases. Certain educational advocates increasingly believe that unconscious and implicit bias may be an underlying cause of the racially disproportionate effects of zero tolerance policies.⁶² Unconscious bias, also known as implicit bias or implicit social cognition, refers to the “attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”⁶³ The resulting mental processes that affect one’s

Process, 65 SOC. FORCES 1101 (1987) and Wu et al., *supra* note 43, to support the claim that “investigations of student behavior, race, and discipline have found no evidence that African Americans misbehave at a significantly higher rate” than whites).

59. SKIBA, ZERO TOLERANCE, *supra* note 7, at 12. See also APA, *Review*, *supra* note 5, at 854 (claiming evidence suggests that “African American students may be disciplined more severely for less serious or more subjective reasons,” citing studies done by Anne Gregory & S.R. Weinstein, *A Window on the Discipline Gap: Cooperation or Defiance in the High School Classroom*, 46 J. SCH. PSYCHOL. 455; McCarthy & Hoge, *supra* note 58; McFadden et al., *A Study of Race and Gender Bias in the Punishment of Handicapped School Children*, 24 URB. REV. 239 (1992); and Skiba et al., *supra* note 58).

60. SKIBA, ZERO TOLERANCE, *supra* note 7, at 12. See also Fabelo, *Breaking Schools’ Rules*, *supra* note 31, at 45–46 (revealing that the disproportionately high “rates of disciplinary involvement among African-American students [in Texas’s secondary schools] were driven chiefly by violations that are subject to the discretion of school employees”).

61. SKIBA, ZERO TOLERANCE, *supra* note 7, at 12.

62. Laura Isenee, *Fed Up with Zero Tolerance in Schools, Advocates Push for Change*, NPR (Feb. 26, 2014), <http://www.npr.org/2014/02/26/275978805/fed-up-with-zero-tolerance-advocates-push-for-change> [hereinafter Isenee, *Fed Up*] (quoting both the deputy director of the public interest law firm Texas Appleseed, Deborah Fowler, and a National Youth Law Center attorney, Michael Harris, who discussed how implicit, unconscious bias affects the implementation of zero tolerance policies in schools). Regarding a study by Texas Appleseed, in which African American students were four times more likely to get a ticket for minor misbehavior than other students, Fowler stated these “very big disparities . . . would be hard to explain outside of . . . implicit bias and discrimination.” *Id.*

63. Cheryl Staats & Charles Patton, *State of the Science: Implicit Bias Review 2013*, KIRWAN INST. 6, http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf [hereinafter Staats, *Implicit Bias Review*].

actions and decisions are “unconscious, automatically activated, and pervasive.”⁶⁴ Simply put, “[b]ecause we have adopted these stereotypes [associating white with good, and black with bad]—and it’s all of us, it doesn’t matter what race you are—our implicit bias comes into play without us even realizing that that’s going on.”⁶⁵ These implicit racial biases are arguably the reason why African American students are suspended at disproportionately higher rates than white students.

Social science research on the subject, while still in its infancy, also supports the theory that implicit bias may cause teachers and administrators to punish students of color more harshly and for less serious offenses. In the first annual *State of Science: Implicit Bias Review*, the Kirwan Institute for the Study of Race and Ethnicity argued that implicit bias can affect teachers’ perception of minority student behavior, specifically by interpreting black students to be more threatening and aggressive than their white peers.⁶⁶ Amplified by implicit racial bias, a “cultural mismatch” between white teachers and students of color can further lead to teachers misinterpreting student behavior and result in “unnecessary and unequal disciplinary intervention for students of color.”⁶⁷

64. *Id.* at 3. When playing a video game designed to simulate a police officer’s experience, research subjects were instructed to shoot when an armed individual appeared, but not to shoot when an unarmed individual appeared. *Id.* In making these nearly instantaneous decisions, the research subjects shot armed targets more quickly when they were black, refrained from shooting white armed targets more often than black ones, and more frequently shot black unarmed targets than white targets. *Id.*

65. Isenee, *Fed Up*, *supra* note 62 (quoting National Youth Law Center attorney Michael Harris, who studies implicit racial bias).

66. Staats, *Implicit Bias Review*, *supra* note 63, at 32. One study revealed that “students who displayed a Black walking style (i.e., ‘deliberately swaggered or bent posture, with the head slightly tilted to the side, one foot dragging, and an exaggerated knee bend’) were perceived by teachers as . . . highly aggressive.” *Id.* (citing a study by La Vonne Neal et al., *The Effects of African American Movement Styles on Teachers’ Perceptions and Reactions*, 37, J. SPECIAL EDUC. 49 (2003)). Another study revealed that when “subjects were shown a series of faces (one series of black and one series of white) that progressed from a scowl to a smile and asked what face in the series indicated an offset/onset of anger,” those who had high implicit bias had a greater readiness to perceive anger in black faces, but not with the white faces. *Id.* (citing study by Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640 (2003)). Studies such as these suggest that “White teachers may incorrectly perceive Black students as angry or aggressive, which could deter them from reaching out to assist these students or cause them to mislabel Black students as deviant.” *Id.* at 32–33.

67. *Id.* at 33 (citing studies by Ann Arnett Ferguson, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* (2000) and C.S. Weinstein, S. Tomlinson-Clark, & M. Curran, *Toward a Conception of Culturally Responsive Classroom Management*, 55 J. TCHR. EDUC. 25 (2004)).

III. CURRENT LITIGATION STRATEGIES AND LEGISLATIVE ADVOCACY

A. LITIGATION STRATEGIES

Legal advocates and scholars are quick to point out due process problems inherent in zero tolerance disciplinary policies,⁶⁸ as well as the disparate impact such policies have on minority and disabled students.⁶⁹ Yet legal challenges based on due process and claims of discrimination often do not succeed in combating zero tolerance punishments, and they rarely have the ability to invalidate entire zero tolerance policies.

Nearly two decades before zero tolerance policies began to manifest in our schools, the Supreme Court held in *Washington v. Davis* that a law “is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”⁷⁰ Rather, to prove a law discriminates under the Equal Protection Clause, a plaintiff must prove the discriminatory law stemmed from an intentional discriminatory purpose, and not merely that it has a discriminatory impact.⁷¹ In the school disciplinary context, plaintiffs must show more than mere disproportionate suspension rates to establish that a school’s disciplinary practices are intended to discriminate against minority students.⁷² Absent direct evidence

68. See, e.g., Robert C. Cloud, *Due Process and Zero Tolerance: An Uneasy Alliance*, 178 ED. LAW REP. 1, 4 (2003) (analyzing the relationship of zero tolerance and due process through a review of case law and finding that zero tolerance policies, which treat all students the same, regardless of age, why they misbehave, or whether they even intended break the rules, can jeopardize the protections of substantive due process because such policies do not protect students against “arbitrary, capricious, unreasonable, or irrational actions” of school authorities); Kathleen M. Cerrone, Comment, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 133 (1999) (arguing that states imposing zero tolerance laws “must provide formal due process procedures when expelling a student,” but noting that to date “many states impose expulsion without any procedural due process”).

69. See generally Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL’Y 327 (2005) (detailing the results of zero tolerance policies for students of color, as well as potential state and federal legal remedies).

70. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

71. *Id.* at 239–40. There has been ample criticism of this requirement. See, e.g., David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 937 (1989) (arguing that by choosing discriminatory intent as the necessary standard to prove a violation of the Equal Protection Clause, the Court chose the most conservative interpretation of discrimination, truncating the possible legal definitions of discrimination left open by *Brown v. Board of Education*); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (arguing that the dichotomy of intentional discrimination and unintentional discrimination, or discriminatory impact, is an inappropriate way to analyze the constitutionality of discrimination because unconscious, racially discriminatory beliefs and ideas are beyond such a definition).

72. See, e.g., *Tasby v. Estes*, 643 F.2d 1103, 1107 (5th Cir. 1981) (finding that statistically

of an intent to discriminate based on race, such as that found in *Sherpell v. Humnoke School District No. 5 of Lonoke County, Arkansas*,⁷³ courts can consider “circumstantial evidence to determine whether officials intended to discriminate on the basis of race when punishing students.”⁷⁴ Such circumstantial evidence is based on whether minority students are punished more harshly than white students who are “similarly situated,” or those who commit the same or similar offenses.⁷⁵ Courts, however, have generally required “virtually identical factual circumstances” to establish that different students were “similarly situated,” making it an exceedingly difficult standard to meet.⁷⁶ For example, in *Fuller v. Decatur Public School Board of Education School District 61*, in which African American students who were expelled after a physical confrontation brought claims of racial discrimination, the court held that “none of the Caucasian students who were expelled for physical confrontation or fighting can be considered ‘similarly situated’ to the students involved in this case” because “it was the only fight of this magnitude [the principal] has seen in 27 years in education.” Therefore, the plaintiffs failed to establish a claim of racial discrimination.⁷⁷

disproportionate punishment of black students did not demonstrate that school officials were motivated by a discriminatory purpose); *Fuller v. Decatur Pub. Sch. Bd. of Educ.*, 78 F. Supp. 2d 812, 815 (C.D. Ill. 2000) (finding statistical evidence that black students made up less than half the student body, but accounted for 82% of students expelled, did not demonstrate school officials’ intent to discriminate). If plaintiffs are able to show more than mere statistical data, however, they are much more likely to succeed in an equal protection claim. *See, e.g., Sherpell v. Humnoke Sch. Dist. No. 5 of Lonoke Cnty., Ark.*, 619 F. Supp. 670, 674–75 (E.D. Ark. 1985) (finding a school district’s disciplinary system was intentionally racially discriminatory, where faculty members used racial slurs and corporal punishment for only a black child and the punishment resulted in broken skin and blood).

73. *Sherpell*, 619 F. Supp. at 674–75.

74. CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 36 (2010) [hereinafter KIM, *LEGAL REFORM*].

75. *Id.* *See also id.* at 160 n.20 (“A showing of race discrimination . . . requires that the other incidents’ circumstances be reasonably comparable to those surrounding [plaintiff’s] [] suspensions, and that the nature of the infraction and knowledge of the evidence” by schools be “sufficiently similar to support a finding of facial inconsistency. The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.” (alterations in original) (quoting *Dartmouth Review v. Dartmouth Coll.*, 889 F. 2d 13, 19 (1st Cir. 1989)) (internal quotation marks omitted)).

76. KIM, *LEGAL REFORM*, *supra* note 74, at 37 (citing *Parker v. Trinity High Sch.*, 823 F. Supp. 511, 519–20 (N.D. Ill. 1993) (finding no white students were involved in “similarly situated” fights, where suspended African American students’ fights involved injury to a teacher despite intervention by teachers); *Heller v. Hodgin*, 928 F. Supp. 789, 792, 796 (S.D. Ind. 1996) (stating that because different faculty members had each imposed a five-day suspension to an African American student and plaintiff white student for using the term “white ass fucking bitch,” the punishment would not have been discriminatory even if the plaintiff had been suspended for more than five days).

77. *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812, 825 (C.D. Ill. 2000). However, while the “similarly situated” standard is hard to meet, it is not impossible. *See Payne*

Title VI of the Civil Rights Act of 1964⁷⁸ could have enabled advocates to bring federal discrimination claims based on disparate impact alone. Title VI prohibits “discrimination under any program or activity receiving” federal funding,⁷⁹ and its corresponding regulations define prohibited discrimination as not only intentional discrimination, but also that which results from the use of “criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race.”⁸⁰ In 2001, however, the Supreme Court held in *Alexander v. Sandoval* that while a private right of action existed to bring a claim of intentional discrimination under Title VI, there was no corresponding private right of action to bring a claim of disparate-impact discrimination under the regulations.⁸¹ As a result, *Sandoval* prohibits advocates, parents, and students from bringing federal claims under Title VI to challenge the disparate impact of zero tolerance and school suspension policies.⁸²

v. Worthington Sch., No. C2-99-830, 2001 WL 506509 (S.D. Ohio Apr. 25, 2001) (holding that failure to discipline students for repeated use of racial slurs when school policy was to punish for such racial harassment and giving a more lenient punishment to a white student, who pinned down an African American student and made racial slurs, while giving a harsher punishment to another African American student, who came to the aid of the student pinned down, resulting in a physical exchange, was evidence of disparate discipline and a violation of the Equal Protection Clause).

78. 42 U.S.C. § 2000d (2012).

79. *Id.*

80. 28 C.F.R. § 42.104(b)(2) (2015) (emphasis added).

81. *Alexander v. Sandoval*, 532 U.S. 275, 285–86 (2001). This decision generated extensive criticism by legal scholars and civil rights advocates. See, e.g., Adele P. Kimmel et al., *The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, 76 FLA. B.J., 24, 24 (Jan. 2002) (criticizing the Court’s decision in *Sandoval* for reversing three decades of unanimous precedent from nine federal appeals courts that read a private right of action into Title VI for disparate impact discrimination and noting the effect the decision would have on a wide range of civil rights issues litigated throughout the country); Derek Black, *Picking Up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 358 (2002) (criticizing the Court’s decision in *Sandoval* and describing how private individuals might still enforce Title VI under 42 U.S.C. § 1983, through a theory of deliberate indifference, or reframe deliberate indifference claims as intentional discrimination claims); Kevin G. Welner, *Alexander v. Sandoval: A Setback for Civil Rights*, EDUC. POL’Y ANALYSIS ARCHIVES, June 24, 2001, at 1, 3–4 (2001) (characterizing the Court’s decision in *Sandoval* as a substantial setback for civil rights advocates and noting civil rights cases that could be dismissed for lack of standing).

82. In response to the ruling in *Sandoval*, certain states created their own disparate impact regulations that do allow for a private right of action, moving disparate impact cases from federal to state courts. Section 1135 of the California Government Code is such a disparate impact statute. See Kim, *Legal Reform*, *supra* note 74, at 40–44 (noting that both California and Illinois have state-based disparate impact claims with a private rights of action). Under section 1135 of the California Government Code and its regulations, California prohibited the use of “criteria or methods of administration that have the purpose or effect of” discriminating on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability. See CAL. GOV’T CODE § 11135(a) (West Supp. 2015); CAL. CODE REGS. tit. 22, § 98101(i) (2010). For a more in-depth discussion of the creation of section 11135 of the California Government

Federal courts have also limited plaintiffs' use of substantive due process as a means of combating zero tolerance policies by holding that education is not a fundamental right.⁸³ Substantive due process "asks whether the government has an adequate reason for taking away a person's life, liberty, or property."⁸⁴ Courts weigh the impact of the law in question against the importance of the right (to life, liberty, or property) potentially being infringed.⁸⁵ Laws that affect rights deemed to be fundamental because they are implicitly or explicitly protected by the Constitution receive the highest level of scrutiny.⁸⁶ Because education was not deemed a fundamental right under the Constitution, laws that burden a student's access to education do not necessarily receive strict scrutiny. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that education was not a fundamental right under the United States Constitution, and thus any Equal Protection challenges to laws concerning education would be afforded only the "usual standard for reviewing a State's social and economic legislation," rational basis review.⁸⁷ As a result of *Rodriguez*, laws governing education, including those concerning student discipline, must only be shown to be rationally related to a legitimate educational purpose.⁸⁸ This low standard of review presents a substantial obstacle for advocates trying to bring federal substantive due process claims regarding zero tolerance policies because "[i]n the context of school discipline, a substantive due process claim will succeed only in the 'rare case' when there is 'no rational relationship between the

Code and how it has been used for advocacy in education and other areas, see *infra* Part IV. Illinois created a "Sandoval-fix" as part of its Civil Rights Act of 2003 ("ICRA"), which prohibits any "unit of State, county, or local government" from utilizing "criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender." 740 ILL. COMP. STAT. 23/5 (2004). Educational advocates have had mixed success under the statute. Compare *Swan v. Bd. of Educ. of City of Chi.*, No. 13-C-3623, 2013 U.S. Dist. LEXIS 115294, at *60-87 (N.D. Ill. Aug. 15, 2013) (ruling evidence that school closures were based on underutilization and resulted in closure of a disproportionate number of schools with African American students did not establish a likelihood of success of an ICRA claim), with *McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 984 F. Supp. 2d 882, 890-94, 902-03 (N.D. Ill. 2013) (finding that the school district's dual gifted educational tracks, one for predominantly white students and the other for Hispanic students, violated the ICRA and ordering a new system be put in its place).

83. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

84. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 558 (4th ed. 2011).

85. *Id.*

86. *Id.*

87. *Rodriguez*, 411 U.S. at 35.

88. *Id.* at 44 (considering only whether the state school-financing laws in question held a "rational relationship to a legitimate state purpose").

punishment and the offense.”⁸⁹ When facing a challenge to a suspension or expulsion resulting from zero tolerance policies, courts will generally find a rational relationship between the punishment and the offense, except in instances where students were unaware they were in possession of contraband.⁹⁰ In the majority of cases, however, courts defer to the disciplinary discretion of the school because “[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion,” so long as such decisions do not result in “violations of specific constitutional guarantees.”⁹¹

Unlike the U.S. Constitution, however, every state constitution has an education clause and many have been interpreted as creating a fundamental right to education.⁹² For those states that identify a fundamental state right to education, substantive due process claims regarding education are generally analyzed using strict scrutiny,⁹³ meaning those defending policies concerning education must bear the much heavier burden of proving that the law in question is narrowly tailored to address a compelling state interest.⁹⁴

The Supreme Court has also limited the efficacy of procedural due process claims combating zero tolerance and short-term suspension policies. In *Goss v. Lopez*, the Court found that where a state creates a right

89. *Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir. 2000) (quoting *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989)).

90. *See id.* at 576–77 (expelling a student who was unaware of a knife put in his car by a friend was not rationally related to any legitimate state interest); *Langley v. Monroe Cnty. Sch. Dist.*, No. 1:05CV40, 2006 U.S. Dist. LEXIS 72166, at *11–12 (N.D. Miss. Oct. 2, 2006) (finding sufficient as a question for a jury whether suspending a student who was unaware of an open beer can left in her car by a friend was rationally related to the school’s interest).

91. *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

92. Ken Gormley, *Education as a Fundamental Right: Building a New Paradigm*, 2 FORUM ON PUB. POL’Y 207, 219 n.63 (2006) (noting that the highest courts of Alabama, Arizona, California, Connecticut, Kentucky, Minnesota, New Hampshire, North Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming have found education to be a fundamental right under their state constitutions). While nearly all state constitutions have created a right to education, not all have explicitly made it a fundamental right. *See e.g.*, *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (holding that under the state constitution’s education clause, students had a right “to the same educational opportunity that money buys for others,” but declining to address whether the clause created a fundamental right to education); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394–95 (Tex. 1989) (holding that under the state constitution’s education clause, students had a right to equal opportunity access to educational funds, but declining to address whether the clause created a fundamental right to education).

93. KIM, LEGAL REFORM, *supra* note 74, at 86.

94. CHEMERINSKY, *supra* note 84, at 554.

to education, this property right could not be denied without due process.⁹⁵ However, the Court limited the requisite process for a ten-day suspension to “notice of the charges against [the student] and, if [the student] denies them, an explanation of the evidence the authorities have and an opportunity to present his [or her] version.”⁹⁶ The Court considered that in most cases, this “hearing” and “opportunity to be heard” would consist of the authorities “informally discuss[ing] the alleged misconduct with the student minutes after it has occurred.”⁹⁷ Also, it recognized that the additional procedures of “the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident” were not required for suspensions of ten days or less.⁹⁸ With such minimal processes required for short-term suspensions, federal procedural due process challenges are not an effective avenue for combating short-term suspensions.⁹⁹ States have been left to decide what are the minimum procedural standards for suspensions over ten days and expulsions, which the Court acknowledged “may require more formal procedures.”¹⁰⁰ The Supreme Court, however, has never returned to the issue of long-term suspensions to clarify what these more formal procedures must be. Because of this, advocates have been more successful in reversing expulsions based on zero tolerance policies by challenging the meaningfulness of the hearing and the lack of the “more formal procedures” referenced by the Court.¹⁰¹ These challenges, however, only address individual instances of expulsion and do not address the underlying zero tolerance policies and overuse of punitive disciplinary measures in

95. *Goss v. Lopez*, 419 U.S. 565, 573 (1975).

96. *Id.* at 581.

97. *Id.* at 582.

98. *Id.* at 583.

99. See KIM, LEGAL REFORM, *supra* note 74, at 82 (noting that as a result of *Goss v. Lopez*, “advocates have little room to challenge the procedures available to students subject to short-term suspensions” because “[t]he opportunity to be heard for a short-term suspension need not be fully adversarial,” given that “there is no right to counsel, to confront and cross-examine witnesses, or to call defense witnesses,” and that in certain circumstances, schools may wait to afford such procedural protections until after the suspension).

100. *Goss*, 419 U.S. at 584.

101. KIM, LEGAL REFORM, *supra* note 74, at 84–85 (citing *Sieck v. Oak Park-River Forest High Sch. Dist.*, 807 F. Supp. 73, 76 (N.D. Ill. 1992) (finding a policy of mandatory suspension for theft brought into question the “meaningfulness” of a student’s hearing); *Lee v. Macon Cnty. Bd. of Educ.*, 490 F. 2d 458, 460 (5th Cir. 1974) (reversing a school board’s decision to expel students because it merely ratified the principal’s recommendation, rather than creating an independent decision); *Colvin v. Lowndes Cnty.*, 114 F. Supp. 2d 504, 512 (N.D. Miss. 1999) (reversing a student’s zero tolerance expulsion for inadvertently bringing a knife to school because there was no independent consideration of the facts and circumstances of the case); *Lyons v. Penn Hills Sch. Dist.*, 723 A.2d 1073, 1076 (Pa. Commw. Ct. 1999) (finding that a school board exceeded its authority by adopting a zero tolerance policy that prevented an exercise of discretion by school officials).

general.

B. LEGISLATIVE AND COMMUNITY ADVOCACY

Increasingly in the past ten years, those opposed to zero tolerance policies have begun to succeed in making changes through community organizing on a district level and legislative advocacy on a state level. In 2005, after joint efforts of the community group *Padres y Jovenes Unidos*¹⁰² and the Advancement Project,¹⁰³ the Denver Public School District worked with advocates to create “new discipline policies that eliminated the unnecessary suspension, expulsion, and ticketing of students.”¹⁰⁴ As part of the new disciplinary policies, schools were to handle minor misconduct within the school setting, implementing restorative justice programs rather than relying on suspensions for common offenses.¹⁰⁵ After three years, the Denver Public School District saw more than a 40% reduction in the use of out-of-school suspensions.¹⁰⁶ Similar advocacy campaigns have produced new disciplinary policies and regulations in other school districts, including the Milwaukee Public School District and the Baltimore Public School District.¹⁰⁷ In 2013, through the effort of a coalition of community and legal organizations, including the Dignity in Schools Campaign and Public Counsel Law Center, the Los Angeles Unified School District became the first school district in California to ban willful defiance as a basis for suspension.¹⁰⁸

102. *Padres y Jovenes Unidos*, or Parents and Youth United, is a community group based out of Denver, Colorado, led by people of color that focuses on achieving educational excellence, racial justice for youth, immigrant rights, and quality healthcare for all. For more information, visit <http://www.padresunidos.org>.

103. The Advancement Project is a national civil rights group that utilizes law and policy to combat issues surrounding democracy, voting rights, and access to justice. The Advancement Project also has campaigns based in California that focus on educational equity, equity in public funds, health, and urban peace. For more information, visit *PADRES & JÓVENES UNIDOS*, <http://www.advancementprojectca.org> (last visited Sept. 7, 2015).

104. *ADVANCEMENT PROJECT, PUSH OUT*, *supra* note 5, at 35. Although the Advancement Project material indicates that such revised policies were implemented in the 2008–2009 school year, the Denver Public School Report on the Restorative Justice Program indicates that the program was initially implemented at select sites beginning in 2005. Myriam L. Baker, *Year End Report 2008–2009*, *DPS RESTORATIVE JUSTICE PROJECT* 3 (2009), http://www.rjcolorado.org/_literature_55812/Denver_Public_Schools_Restorative_Justice_Program_Final_Report_2008-2009 (submitting report to Denver Public Schools for the 2009 school year).

105. Baker, *supra* 104 at 2–3. For an in-depth discussion of restorative justice practices, see *infra* Part III.B.iii.

106. *Id.* at 15.

107. *Id.* at 36.

108. Teresa Watanabe, *L.A. Unified Bans Suspension for ‘Willful Defiance,’* *L.A. TIMES* (May 14, 2013), <http://articles.latimes.com/2013/may/14/local/la-me-lausd-suspension-20130515>. Under section 48900(k) of the California Government Code, a pupil who disrupts “school activities or otherwise

This “subjective catch-all” infraction accounted for 48% of the 710,000 suspensions in California in 2011–2012 and includes such minor rule violations as “refusing to take off a hat [or] turn off a cellphone,” “failing to wear a school uniform” or “failing to bring material to class.”¹⁰⁹ Many critics of the willful defiance violation also highlight its disproportionate effect on minority students.¹¹⁰ A campaign spearheaded by Coleman Advocates for Children & Youth led the San Francisco Unified School District to become the second school district in California to implement similar restrictions on the use of willful defiance as a basis for school suspension, less than a year after Los Angeles.¹¹¹

Success in implementing similar over-arching disciplinary changes on the state level has been slow, but is gaining in momentum. In 2008, Connecticut made all suspensions in-school suspensions, rather than out-of-school, except in the most extreme of cases, minimizing the amount of classroom time students will miss and remain outside the supervision of the

willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties” can be suspended. CAL. EDUC. CODE § 48900(k) (West 2006). Students in the Los Angeles Unified School District (“LAUSD”), however, can only be expelled for disrupting “school-wide activities” and such suspensions can only be issued by an administrator. L.A. UNIFIED SCH. DIST., PARENT-STUDENT HANDBOOK 2013–2014 at 26, http://home.lausd.net/pdf/Families_Forms/2013-2014_Parent_Student_Handbook.pdf.

109. Watanabe, *supra* note 108. While Watanabe cites 710,000 suspensions in California in the 2011–2012 school year, *id.*, the California Department of Education cites 860,018 as the total number of offenses involved in suspensions. Appendix A.

110. See *id.* (noting that LAUSD’s ban of willful defiance as a basis for suspensions “comes amid mounting national concern that removing students from school is imperiling their academic achievement and disproportionately harming minority students, particularly African Americans”). See also Kathryn Baron, *Three Up, One Down for Student Discipline Reforms*, EDSOURCE (Sept. 24, 2012), http://edsources.org/today/2012/three-up-one-down-for-student-discipline-reforms/20428#_Urhio2MOg (noting concerns of advocates that “students of color were more likely to be expelled or suspended than white students for behavior described as ‘willful defiance’”).

111. See *Parents and Students Rally as SFUSD Board Votes on Landmark Resolution to Eliminate Suspension Gap for Students of Color*, PUB. COUNSEL (Feb. 26, 2014), http://www.publiccounsel.org/press_releases?id=0078 (“Parents and students rallied as the San Francisco Unified School District voted Tuesday, February 25, on a plan to reduce suspensions for students of color and create a comprehensive system of positive interventions, restorative practices, and supports.”); *Resolution No. 1312-10A4: Establishment of a Safe and Supportive Schools Policy in the San Francisco Unified School District*, S.F. UNIFIED SCH. DIST. (Feb. 25, 2014), <http://fixschooldiscipline.org/wp-content/uploads/2014/12/SFUSD-Safe-and-Supportive-Schools-Resolution-2.14.pdf> (changing district policy to “provide that no student shall receive a suspension or recommendation for expulsion/be expelled solely on the basis of ‘disruption/willful defiance’ ([CAL. EDUC. CODE] Section 48900(k)),” implementing restorative justice practices and School-Wide Positive Behavior Interventions and Support as alternative to suspensions and expulsions, and developing specific approaches to address the racially disproportionate effect of punitive discipline on African American students).

school.¹¹² In 2009, Indiana’s Education Code incorporated “an evidence based plan for improving student behavior and discipline,”¹¹³ forcing school districts “to develop disciplinary policies and practices that utilize positive behavioral supports” and other “alternatives to punitive disciplinary measures,” such as suspension and expulsion.¹¹⁴ In January 2014, Maryland’s Board of Education adopted a new set of regulations aimed at reforming racially disparate punishment, focusing on reducing out-of-school suspension by taking such action only when a student “poses an imminent threat of serious harm . . . or when a student is engaged in chronic or extreme disruptive behavior.”¹¹⁵

In 2012, California Governor Edmund “Jerry” Brown Jr. signed two bills meant to encourage the use of alternative means of discipline besides suspension and expulsion.¹¹⁶ A.B. 1729 amended section 48900 of the Education Code to encourage school authorities to discipline students with alternatives to suspension and expulsion “that are age appropriate and designed to address and correct the pupil’s specific misbehavior.”¹¹⁷ It also amended section 48900.5 to include a nonexhaustive list of alternative “means of correction,” which range from a meeting of the school, a parent, and the pupil, to participation in a restorative justice program.¹¹⁸ A.B. 2537 amended section 48915 to allow school authorities to use “alternative means of correction” for certain more serious offenses rather than requiring a principal to recommend to the school board that the student be expelled.¹¹⁹

112. CONN. GEN. STAT § 10-233c(g). For more information, see *Guidelines for In-School and Out-of-School Suspension*, CONN. STATE DEPT. OF EDUC. 7–9 (2010), http://www.sde.ct.gov/sde/lib/sde/pdf/pressroom/In_School_Suspension_Guidance.pdf.

113. IND. CODE ANN. § 20-26-5-32 (2009).

114. ADVANCEMENT PROJECT, PUSH OUT, *supra* note 5, at 36.

115. 40 MD. REG. 2091–93 (Dec. 13, 2013), <http://www.marylandpublicschools.org/press/2013Press/StudentDisciplineRegulations.pdf>. See also MD. STATE DEP’T OF EDUC., *Press Release: State Board Adopts New Student Discipline Regulations* (Jan. 28, 2014), http://www.marylandpublicschools.org/press/01_28_2014_a.html (noting that the new regulations “require local school systems to adopt policies that reduce long-term out-of-school suspensions and expulsions, and use such actions only when a student poses an imminent threat of serious harm to other students or staff, or when a student is engaged in chronic or extreme disruptive behavior”).

116. Assemb. B. 1729, 2011–2012 Leg., Reg. Sess. (Cal. 2012) (codified as CAL. EDUC. CODE §§ 48900, 48900.5); Assemb. B. 2537, 2011–2012 Leg., Reg. Sess. (Cal. 2012) (codified as CAL. EDUC. CODE § 48915).

117. Assemb. B. 1729 § 2(v), 2012–2013 Leg., Reg. Sess. (Cal. 2012) (codified as CAL. EDUC. CODE § 48900(v)).

118. *Id.* § 3 (codified as CAL. EDUC. CODE § 48900.5(b)).

119. Assemb. B. 2537 § 3, 2012–2013 Leg., Reg. Sess. (Cal. 2012) (codified as CAL. EDUC. CODE § 48915(a)(1)).

Most recently, in 2014, California became the first state in the country to ban the use of willful defiance as a basis for the suspension and expulsion of certain students.¹²⁰ The bill, which will sunset in three years, prohibits schools from suspending students enrolled in kindergarten through third grade on the basis of a willful defiance violation, as well as prohibits schools from recommending for expulsion students enrolled in kindergarten through twelfth grade on the basis of willful defiance.¹²¹ Only two years before, Governor Brown vetoed a similar bill that would have eliminated willful defiance as grounds for suspension and expulsion,¹²² claiming that he could not “support limiting the authority of local school leaders” and felt that teachers must “retain broad discretion to manage and set the tone in the classroom.”¹²³ Educational advocates cite the new 2014 bill as a major turning point in reforming California’s disciplinary educational policy.¹²⁴

IV. SECTION 11135 AS A MEANS OF COMBATING EXCESSIVE SUSPENSIONS

A. HISTORY AND DEVELOPMENT OF SECTION 11135 ANTI-DISCRIMINATION LAW

California law provides a potential avenue to combat discrimination through the anti-discrimination statute, California Government Code section 11135. The statute, in part, reads,

[n]o person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and

120. See NAT’L OPPORTUNITY TO LEARN, *CA Is First State to Ban Suspensions for Willful Defiance* (Oct. 2, 2014), <http://www.otlcampaign.org/blog/2014/10/02/ca-first-state-ban-suspensions-willful-defiance> (noting that California is the first state to “ban suspension for willful defiance”); Julianne Hing, *California Becomes First in the Nation to Limit Suspensions for Willful Defiance*, COLOR LINES (Sept. 29, 2014), http://colorlines.com/archives/2014/09/california_becomes_first_in_the_nation_to_limit_suspensions_for_willful_defiance.html (same).

121. Assemb. B. 420, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (codified as CAL. EDUC. CODE § 48900(k)(2)).

122. Assemb. B. 2242, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

123. Veto Letter from Edmund G. Brown Jr., Governor of California, to the Members of California State Assembly (Sept. 21, 2012), http://edsources.org/today/wp-content/uploads/AB_2242_Veto_Message.pdf.

124. See *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, AM. CIVIL LIBERTIES UNION N. CAL. (Sept. 27, 2014), <https://www.aclunc.org/news/california-enacts-first-nation-law-eliminate-student-suspensions-minor-misbehavior> (“AB 420 is the latest in a series of influential local and state reforms and milestones to reform harsh, disciplinary practices in California in 2014”).

equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.¹²⁵

Like its federal counterpart, Title VI of the Civil Rights Act,¹²⁶ section 11135 has corresponding regulations that include within the definition of discrimination any practices that “utilize criteria or methods of administration that . . . have the *purpose or effect* of subjecting a person to discrimination.”¹²⁷ Thus, unlike challenges based on federal equal protection, which require showing intent to discriminate under *Washington*,¹²⁸ section 11135 protects against both intentional and unintentional discrimination. Furthermore, in the wake of *Sandoval* striking down a private right of action to bring federal disparate impact claims,¹²⁹ the California Legislature amended state anti-discrimination law to establish an explicit private right of action to enforce section 11135, in order to guarantee that section 11135 could be used by the public to bring disparate impact claims.¹³⁰ Thus, unlike its federal counterpart, California’s anti-discrimination statute allows for individuals to bring discrimination claims for disparate impact against any state agency or organization receiving funding from the State.

Since enacting section 11135 in 1977, the California Legislature has continued to broaden the scope of the statute in an effort to ensure Californians the ability to bring disparate impact claims to court.¹³¹ After first amending the law to include a private right of action,¹³² the Legislature clarified that the right of “action for equitable relief” was “independent of any other rights and remedies,”¹³³ meaning a victim of discrimination was

125. CAL. GOV’T CODE § 11135(a) (West Supp. 2015). Sections 11135 through 11139.8 are part of Article 9.5, Discrimination.

126. 42 U.S.C. § 2000d (2012).

127. CAL. CODE REGS. tit. 22, § 98101(i) (2014) (emphasis added).

128. *Washington v. Davis*, 426 U.S. 229, 242 (1976). *See supra* note 70 and accompanying text.

129. *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001). *See supra* note 81 and accompanying text.

130. Assemb. B. 1670 § 3, 1999–2000 Leg., Reg. Sess. (Cal. 1999) (codified as CAL. GOV’T CODE § 11139 (“This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief.”)).

131. Danfeng Soto-Vigil Koon, *Cal. Gov’t Code § 11135: A Challenge to Contemporary State-Funded Discrimination*, 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 239, 251–55 (2011) (arguing that the Legislature’s expansion of section 11135’s relief and coverage on at least eight occasions is evidence of its intent that the statute should be broadly construed by courts).

132. *See supra* notes 129–30 and accompanying text.

133. Assemb. B. 677 § 2, 2001–2002 Leg., Reg. Sess. (Cal. 2001) (codified as CAL. GOV’T CODE § 11139).

not required to exhaust administrative remedies before, or instead of, bringing an action in court.¹³⁴ At the same time, the Legislature expanded the law to include any program or activity that is “conducted, operated, or administered by the state or by any state agency,” in addition to those funded directly by, or receiving financial assistance from the state.¹³⁵ Thus, it required all state agencies to adhere to the nondiscriminatory policies enforceable against nongovernment agencies receiving state funds.¹³⁶ In 2005, after a California Court of Appeal dismissed a claim alleging disparate impact in state university admission procedures, finding that the university did not conduct a “program or activity” within the meaning of section 11135,¹³⁷ the Legislature amended section 11135 to specifically state “this section applies to the California State University.”¹³⁸ And since the early 2000s, the Legislature has continued to expand the list of protected traits to which section 11135 applies, including race,¹³⁹ national origin,¹⁴⁰ sexual orientation,¹⁴¹ and genetic information.¹⁴²

B. LITIGATING SECTION 11135 ANTI-DISCRIMINATION CLAIMS

In analyzing a section 11135 disparate impact claim, courts use a three-step, burden-shifting framework.¹⁴³ First, the plaintiff must establish a prima facie case of disparate impact by proving that the defendant’s “facially neutral practice causes a disproportionate adverse impact on a protected class.”¹⁴⁴ Second, if the plaintiff can establish a prima facie case, the burden shifts to the defendant to rebut the disparate impact claim and the defendant “must justify the challenged practice.”¹⁴⁵ Finally, if the defendant “meets its rebuttal burden, the plaintiff may still prevail by

134. Koon, *supra* note 131, at 252.

135. Assemb. B. 677 § 1(a) (codified as CAL. GOV’T CODE § 11135(a)).

136. Koon, *supra* note 131, at 252.

137. Garcia v. Bd. of Trs. of Cal. State Univ., 32 Cal. Rptr. 3d 724, 726 (Ct. App. 2005). The case was depublished on November 16, 2005, in an order from the California Supreme Court, which also denied review of the case.

138. Assemb. B. 1742 § 20(a), 2005–2006 Leg., Reg. Sess. (Cal. 2005) (codified as CAL. GOV’T CODE § 11135(a)).

139. S.B. 105 § 2.5, 2001–2002 Leg., Reg. Sess. (Cal. 2002) (codified as CAL. GOV’T CODE § 11135(a)).

140. *Id.*

141. S.B. 1441 § 1, 2005–2006 Leg., Reg. Sess. (Cal. 2006) (codified as CAL. GOV’T CODE § 11135(a)).

142. S.B. 559 § 6, 2011–2012 Leg., Reg. Sess. (Cal. 2011) (codified as CAL. GOV’T CODE § 11135(a)).

143. Darenburg v. Metro. Transp. Comm’n, 636 F.3d 511, 519 (9th Cir. 2011).

144. *Id.*

145. *Id.*

establishing a less discriminatory alternative.”¹⁴⁶

Despite the potential for challenging discriminatory practices by bringing disparate impact claims, there are few cases that have litigated section 11135 claims as the law exists today.¹⁴⁷ This is a result of both the numerous legislative changes to the law, as well as the fact that the majority of cases raising section 11135 claims have been resolved on other grounds. There are only sixty-four published cases that cite to section 11135 at all, and many of these cases merely refer to section 11135 in passing, or are decided on other grounds.¹⁴⁸

There are only four section 11135 disparate impact cases, all litigated in the past ten years, that have discussed whether a plaintiff has satisfied the prima facie burden of proving that a defendant’s facially neutral practice caused a disproportionate adverse impact on a protected class.¹⁴⁹ Three of these cases were brought in federal court.¹⁵⁰ In three of these cases, the court found that plaintiffs had failed to establish a prima facie case of disparate impact.¹⁵¹

In the first case, *Moua v. City of Chino*, a group of Hmong-speaking individuals challenged the City of Chino’s failure to provide language interpreters to Hmong-speaking crime victims.¹⁵² The court granted summary judgment to the defendants, finding the plaintiffs had failed to

146. *Id.*

147. Koon, *supra* note 131, at 255.

148. At least thirty-four cases that cite to section 11135 involve disability claims. Because subsection 11135(b) states that any discrimination that amounts to a violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (2012), is also a violation of section 11135, all disparate impact claims involving disability are brought in conjunction with ADA claims and have been analyzed under the ADA framework. *See, e.g.*, Cal. Council of the Blind v. Cnty. of Alameda, 985 F. Supp. 2d 1229, 1254 (N.D. Cal. 2013) (noting ADA claims encompass section 11135 claims and analyzing plaintiffs’ disability discrimination claim under ADA framework); Doe v. Samuel Merritt Univ., 921 F. Supp. 2d 958, 962, 964–72 (N.D. Cal. 2013) (analyzing a section 11135 claim under the ADA framework).

149. *See generally* *Moua v. City of Chico*, 324 F. Supp. 2d 1132 (E.D. Cal. 2004) (discussing a prima facie showing of disparate impact under the California Fair Employment and Housing Act (FEHA), which applies the same standards as a section 11135 claim); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 726–28 (9th Cir. 2009) (discussing the prima facie burden in an actual section 11135 claim); *Darensburg v. Metro. Transp. Comm’n*, 611 F. Supp. 2d 994, 1041–42 (N.D. Cal. 2009), *aff’d*, 636 F.3d 511 (9th Cir. 2011) (same); *Comunidad En Accion v. L.A. City Council*, 162 Cal. Rptr. 3d 423, 426–27 (Ct. App. 2013) (same).

150. *Moua*, 324 F. Supp. 2d 1132; *Comm. Concerning Cmty. Improvement*, 583 F.3d 690; *Darensburg*, 611 F. Supp. 2d 994.

151. *Moua*, 324 F. Supp. 2d 1132; *Darensburg*, 636 F.3d 511 (finding on appeal that plaintiffs failed to establish prima facie case, despite lower court finding otherwise); *Comunidad En Accion*, 162 Cal. Rptr. 3d 423 (Ct. App. 2013).

152. *Moua*, 324 F. Supp. 2d at 1142–43.

provide sufficient evidence of any disparate impact.¹⁵³

The second case, *Committee Concerning Community Improvement v. City of Modesto*, involved a challenge by residents of various unincorporated Latino neighborhoods to the city and county's "Master Tax Sharing Agreement" ("MTSA"), which governed how the city and county would apportion the taxes of unincorporated neighborhoods between the two entities if such neighborhoods became incorporated by Modesto.¹⁵⁴ The MTSA excluded certain majority-Latino neighborhoods, which resulted in the city's refusal to annex the neighborhoods, as well as underdeveloped infrastructure.¹⁵⁵ The Ninth Circuit held that the district court erred in concluding that the plaintiffs failed to state a prima facie case under section 11135 by failing to establish a disparate impact on plaintiffs and remanded the case back to the district court.¹⁵⁶ Nearly two years later, in 2011, the parties entered into a settlement agreement that required the city and county to develop and improve waste management and clean water facilities in the unincorporated areas and provide avenues for the neighborhoods to be annexed by the city.¹⁵⁷

The third case, *Darensburg v. Metropolitan Transportation Commission*, the most comprehensive case, involved a challenge by East Bay municipal bus riders to the funding decisions of the Metropolitan Transportation Commission ("MTC"), which funded Bay Area light rail projects more than East Bay buses.¹⁵⁸ After a bench trial, the district court ruled in favor of the defendant, finding that while the plaintiffs had established a prima facie case for disparate impact, the defendant justified the challenged funding practice, and the plaintiffs failed to establish a "less discriminatory alternative."¹⁵⁹ On appeal, the Ninth Circuit affirmed the lower court's ruling; however, it affirmed on different grounds.¹⁶⁰ The Ninth Circuit held that the plaintiffs had failed to establish a prima facie case of disparate impact and, as such, did not discuss the merits of the

153. *Id.* at 1143.

154. *Comm. Concerning Cmty. Improvement*, 583 F.3d at 678–79.

155. *Id.*

156. *Id.* at 700.

157. Order After Settlement Conference, *Comm. Concerning Cmty. Improvement*, No. 1:04-cv-06121LJO DLB, <https://cases.justia.com/federal/district-courts/california/caedce/1:2004cv06121/19087/554/0.pdf?ts=1376988267>; Ken Carlson, *Modesto, Stanislaus Neighborhoods End Lawsuit*, MODESTO BEE (July 2, 2011), <http://www.tmcnet.com/usubmit/2011/07/02/5613390.htm>.

158. *Darensburg v. Metro. Transp. Comm'n.*, 636 F.3d 511, 514 (9th Cir. 2011).

159. *Id.*

160. *Id.*

plaintiffs' "less discriminatory alternative."¹⁶¹ With the exception of the *Darensburg* district court opinion that was affirmed on other grounds on appeal, there are no cases discussing how a plaintiff can establish a "less discriminatory alternative" to succeed on a section 11135 claim.

The fourth and final case to discuss a plaintiff's prima facie case of disparate impact is *Comunidad En Accion v. Los Angeles City Council*, in which residents of predominantly Latino neighborhoods challenged the city council's decision to locate three new waste management centers in their neighborhoods.¹⁶² The court of appeals affirmed a summary judgment in favor of the defendant, finding that the plaintiffs failed to show "discrimination in a state funded 'program or activity' as the phrase is used in section 11135."¹⁶³ While the plaintiffs challenged the decisions of the city's planning department regarding the placement of waste management facilities in plaintiffs' neighborhoods, the entity receiving state funds was the city's local enforcement agency ("LEA"), responsible for enforcing local, state, and federal laws regarding waste management.¹⁶⁴ The court rejected plaintiffs' argument that city's planning department and the LEA were part of a "comprehensive waste management program" such that the decisions of the city's planning department could be considered part of a "program or activity" funded by the state under section 11135.¹⁶⁵

In assessing whether a plaintiff has established a prima facie section 11135 case, courts look for statistical evidence of disproportional discrimination.¹⁶⁶ In *Moua*, the district court found that the plaintiffs did not establish that the City of Chino's failure to provide Hmong-speaking crime victims with Hmong-speaking interpreters had a disparate impact on the plaintiffs specifically, or Hmong-speaking crime victims in general.¹⁶⁷

161. *Id.* at 514–15

162. *Comunidad En Accion v. L.A. City Council*, 162 Cal. Rptr. 3d. 423, 467 (Ct. App. 2013).

163. *Id.* at 431. Because there can be no reasonable argument that school districts within California are not "state funded program[s] or activit[ies]," this case will not be discussed in depth. *Id.* at 428.

164. *Id.* at 427.

165. *Id.* at 428.

166. *Moua v. City of Chico*, 324 F. Supp. 2d 1132, 1143 (E.D. Cal. 2004) (noting lack of statistical evidence in finding no prima facie 11135 claim); *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994, 1012, 1043–47 (N.D. Cal. 2009) (relying primarily on statistical evidence to find that the plaintiff had established a prima facie case for a 11135 claim); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 726–28 (9th Cir. 2009) (same); *Comunidad En Accion*, 162 Cal. Rptr. 3d. at 429–30 (relying on statistical and anecdotal evidence to find that the plaintiff had established a discriminatory effect).

167. *See Moua*, 324 F. Supp. 2d at 1142–43 (having already found that the plaintiffs failed to establish a prima facie case of disparate impact under FEHA, the court declined to extend jurisdiction to the plaintiffs' state section 11135 claim). A prima facie showing of disparate impact under section

Plaintiffs brought disparate impact claims under both the federal FEHA and California section 11135, alleging that the municipal defendant's failure to provide Hmong-speaking interpreters to Hmong-speaking crime victims, while providing interpreter services for other non-English-speaking crime victims, had a disparate impact on plaintiffs.¹⁶⁸ Granting summary judgment to the defendant, the court found that the plaintiffs failed to establish a prima facie disparate impact case because they "presented no evidence (statistical or otherwise) to show that the effectiveness of police-civilian communications varies across ethnic or language groups in Chico." Moreover, the statistical data that plaintiffs proffered did "nothing to indicate that the municipal defendants' practices regarding interpreters and relations with non-English-speaking crime victims have had a disproportionately harmful effect on Hmong crime victims."¹⁶⁹

The district court in *Committee Concerning Community Improvement* found that plaintiffs, residents of predominantly Latino neighborhoods considered unincorporated territory of the City of Modesto, had presented sufficient evidence that the City's MTSA, which excluded plaintiffs and arguably prevented them from being annexed by the City, had a discriminatory impact on the plaintiffs.¹⁷⁰ The court relied heavily on statistical data that showed that the city declined to extend the MTSA to plaintiffs unincorporated neighborhoods that were 71% Latino, but did extend the MTSA to other unincorporated neighborhoods that were only 48% Latino.¹⁷¹

Given the limited case analysis addressing how to establish a prima facie section 11135 disparate impact claim, the 2011 Ninth Circuit ruling in *Darensburg* is instructive for advocates.¹⁷² The plaintiffs in *Darensburg*,

11135 and FEHA are the same. See *Darensburg*, 636 F.3d at 519 (stating that "a plaintiff establishes a prima facie case [of section 11135 disparate impact] if the defendant's facially neutral practice causes a disproportionate adverse impact on a protected class"); *Moua*, 324 F. Supp. 2d at 1142 (stating that a prima facie case under the FEHA "disparate impact theory . . . consists of [showing] '(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices.'" (quoting *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir.1997))).

168. *Moua*, 324 F. Supp. 2d at 1136.

169. *Id.* at 1143.

170. *Comm. Concerning Cmty. Improvement*, 583 F.3d at 705 (reversing the lower court's ruling that plaintiffs had failed to establish the necessary intent to discriminate for equal protection and Title VI claims and remanding the case so the district court could rule on federal claims). Because the district court originally dismissed the federal claims, it declined to extend jurisdiction over the plaintiffs' section 11135 state claim, but did note "that plaintiffs **had** presented some evidence of disparate impact." *Id.*

171. *Id.* at 703.

172. *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511 (9th Cir. 2011) (bringing state disparate

composed of minority individuals and minority rights groups in Alameda and Contra Costa Counties, argued that the preference of MTC to fund rail expansion projects over bus expansion projects underfunded the counties' intra-city bus systems ("AC Transit") and heavy funding of inter-city rail systems ("BART" and "CalTrain"), had a disparate impact on the minority plaintiffs.¹⁷³ After a trial, the district court found that the plaintiff had established a prima facie case of disparate impact under section 11135 based primarily on the statistical evidence that minority riders made up "75% of AC Transit riders," "53% of BART riders [and] 50% of Caltrain riders,"¹⁷⁴ and therefore the heavy funding of rail expansion projects "comes at the expense of improving the bus service used by the more heavily minority bus riders of AC Transit."¹⁷⁵ The district court further found that the defendant was able to meet its burden of showing "a substantial legitimate justification for its conduct,"¹⁷⁶ because it relied on the "advice of the Partnership Board, which consists of representatives of all the regional transit operators,"¹⁷⁷ and because the "rail projects complement bus service by providing connectivity, and help further the goal of harmonizing transportation and planned development."¹⁷⁸ The district court, however, rejected plaintiffs' 11135 claim because the plaintiffs "presented no evidence as to whether [their alternative selection criteria for funding expansion projects] would be equally effective in using . . . funds while lessening any racial disparity."¹⁷⁹ On appeal, the Ninth Circuit concluded that the plaintiff had failed to establish a prima facie case of disparate impact, finding that while AC Transit has a greater percentage of minority ridership than BART and Caltrain, "it does not

impact claims under section 11135 and federal claims under the Equal Protection Clause and Title VI).

173. *Id.* at 513–16.

174. *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994, 1007 (N.D. Cal. 2009).

175. *Id.* at 1042 (rejecting plaintiffs' federal claims and additional disparate impact claims based on the MTC's funding policies regarding "committed" and "uncommitted" funds).

176. *Id.* at 1052. The burden by which the defendant must justify its conduct was unsettled. The plaintiff argued that the defendant "must demonstrate a strict transportation necessity through empirical validation studies," while the defendant argued "it need only show a substantial legitimate justification for its actions." *Id.* at 1051, 1052. This was a main point of contention upon appeal. *See* Appellants' Opening Brief at 56–72, *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511 (9th Cir. 2011) (No. 09-15878), 2009 U.S. 9th Cir. Briefs LEXIS 1135, at *56–72 (arguing that the district court applied the wrong standard to the defendant's burden of justification). The Court of Appeals, however, did not reach this issue and resolved the case on other grounds. *Darensburg*, 636 F.3d at 515. *See also* Kate Baldrige, *If You Give a Mouse a Cookie: California's Section 11135 Fails to Provide Plaintiffs Relief in Darensburg v. Metropolitan Transportation Commission*, 43 GOLDEN GATE U. L. REV. 7, 13 (2013) (discussing why the district court applied the wrong burden of proof to the defendant's justification).

177. *Darensburg*, 611 F. Supp. 2d at 1054–55.

178. *Id.* at 1057.

179. *Id.* at 1060.

necessarily follow that an expansion plan that emphasizes rail projects over bus projects will harm minorities.”¹⁸⁰ The statistics presented by the plaintiffs “say nothing about the particular ridership of the planned expansion[],” and thus, there would be no way to know if the rail expansion would adversely affect Bay Area minorities.¹⁸¹

B. SECTION 11135 AND EDUCATION

While at least two publications concerning zero tolerance reform suggest that section 11135 could afford protection against the unlawful discriminatory impact of state-funded punitive educational policies,¹⁸² no cases to date have raised such claims. In the educational setting, section 11135 claims have generally been framed as individual claims of discrimination by students with disabilities, often in conjunction with federal ADA claims.¹⁸³ When such claims have been raised together, section 11135 claims have not been addressed directly by the courts.¹⁸⁴ Outside of ADA claims, however, one recent case addressing the scope of section 11135 reiterated that the section was part of “a scheme of interrelated statutes which attempt to protect public school students from discrimination and harassment engendered by race, gender, sexual orientation or disability,”¹⁸⁵ lending support for the use of section 11135 as

180. *Darensburg*, 636 F.3d at 514–15. The court of appeals found the “district court erred by relying on a faulty syllogism: (1) a greater percentage of bus riders than rail riders are minorities; (2) fewer bus expansion projects than rail expansion projects were included . . . and bus projects received a lesser percentage of requested funding than did rail projects; (3) therefore, minorities were adversely affected.” *Id.* at 520.

181. *Id.* at 520. The court also took note of the fact that BART alone serves 101.578 million riders annually, while AC Transit only serves 65.383 million, meaning even though AC Transit serves 78% minority ridership, it does not necessarily serve more minority individuals than BART. *Id.* at 516, 520–21.

182. See CMTY. ASSETS DEV. RE-DEFINING EDUC. ET AL., REDEFINING DIGNITY IN OUR SCHOOLS: A SHADOW REPORT ON SCHOOL-WIDE POSITIVE BEHAVIOR SUPPORT IMPLEMENTATION IN SOUTH LOS ANGELES, 2007–2010 9 (2010) http://www.cadre-la.org/core/wp-content/uploads/2011/03/4488_RedefDignityFullLengthReport_FINAL.pdf (mentioning section 11135 in a list of “legal limits to punitive discipline”). See also KIM, LEGAL REFORM, *supra* note 74, at 41 (noting section 11135 of the California Government Code has the potential to provide relief for state disparate impact claims in the context of school discipline).

183. 42 U.S.C. § 1201 (2012). See *Doe v. Samuel Merritt Univ.*, 921 F. Supp. 2d 958, 962 (N.D. Cal. 2013) (analyzing a claim where a disabled student brought a section 11135 discrimination claim and others, after failing to be provided with three statutorily mandated attempts to pass a medical licensing exam); *Y.G. v. Riverside Unified Sch. Dist.*, 774 F. Supp. 2d 1055, 1065–66 (C.D. Cal. 2011) (where a special needs student’s mother brought a section 11135 discrimination claim, among others, after a school forced a student into an individual education program without proper procedure).

184. See, e.g., *Doe*, 921 F. Supp. 2d at 962 (mentioning section 11135 discrimination claims only when listing claims brought by a plaintiff); *Y.G.*, 774 F. Supp. 2d at 1057, 1065 (same).

185. *Hector F. v. El Centro Elementary Sch. Dist.*, 173 Cal. Rptr. 3d 413, 417 (Ct. App. 2014)

a basis to combat the racially disproportionate impact of school suspension policies.

C. SECTION 11135 AND SDUSD SUSPENSION POLICIES

In California, there were 610,807 suspensions in the 2013–2014 school year, affecting a total of 279,383 students.¹⁸⁶ San Diego has the second largest school district in California and its school district is considered one of the top districts in the state; however, the district continues to suspend African American students at a rate more than twice their enrollment.¹⁸⁷ African American students make up 23.5% of the total students suspended, despite accounting for only 9.7% of the district's enrollment, while their white peers make up only 12.3% of the total students suspended, despite accounting for 23.1% of total enrollment.¹⁸⁸ Unlike the Los Angeles Unified School District, the largest school district in the state, which has made massive reforms of its disciplinary procedures and reduced the number of suspensions significantly, the San Diego Unified School District (SDUSD) has yet to implement such wide-reaching reform and persists in suspending African American students at a disproportionate rate. For this reason, SDUSD serves as a pertinent example district in which a section 11135 claim could be used to combat racial discrimination in suspension policies and force the district to implement less punitive disciplinary practices. SDUSD also serves as an apt example district because the District's suspension policy embraces nearly all the offenses included in California Education Code section 48900, including the debated willful defiance offense.¹⁸⁹

(finding that parents of matriculated elementary school student had standing to ensure “public schools are free from discrimination, harassment and bullying as articulated in Government Code section 11135” under the “public right enforcement” standing requirement exception).

186. See generally Appendix A. While the information provided by the California Education Department on DataQuest states that a total of 279,383 students were suspended in the 2013–2014 school year, under different search terms, the site also provides data that there were 503,101 “students who were involved in one or more incidents . . . who were subsequently suspended.” *Id.* It is unclear what leads to the discrepancy between this number and the “total number of students suspended” provided. *Id.*

187. SAN DIEGO UNIFIED SCH. DIST., *About San Diego Unified School District* (last visited July 3, 2015), <http://www.sandi.net/page/21>. See also Appendix A (showing African American students are suspended at a rate of 23.5%, while white students are suspended at a rate of 12.3%).

188. See Appendix A.

189. CAL. GOV'T CODE § 48900 (West 2006). For a list of offenses that are grounds for suspension in the Education Code, see Appendix B.

1. Facially Neutral Practice

As noted above,¹⁹⁰ the first step in a section 11135 disparate impact claim requires the plaintiff to identify a facially neutral practice and prove it causes a disproportionate adverse impact on a protected class.¹⁹¹ As might be expected, nothing in SDUSD's disciplinary scheme explicitly or implicitly incorporates race (or gender, or sexual orientation) into the District's suspension policies. SDUSD sets out its district-wide policies through Administrative Procedures, which are updated as necessary.¹⁹² Administrative Procedure No. 6290 ("AP 6290") sets out the suspension practices and procedures for SDUSD, which was last updated in 2014.¹⁹³ SDUSD adopted all the offenses set out in the California Education Code sections 48900 and 48900.2 through 48900.4 as offenses for which suspension is an acceptable form of punishment.¹⁹⁴ The majority of offenses are not punished on a strict zero tolerance basis, meaning that suspension does not have to be the disciplinary measure taken.¹⁹⁵ However, SDUSD does have a zero tolerance policy for certain offenses, including weapons, repeated incidents of fighting, sexual harassment, alcohol, tobacco and drugs.¹⁹⁶

AP 6290 states that suspension "is a serious and, by its very nature, controversial act to be applied with prudence and restraint after careful investigation and *in the absence of reasonable alternatives*."¹⁹⁷ However, AP 6290 does not describe what such "reasonable alternatives" might be and other Administrative Procedures do not describe any such alternatives, such as restorative justice practices. Thus, while the SDUSD leaves open alternative disciplinary methods, the availability and use of such methods is highly questionable.

Rather than having non-punitive, restorative practices articulated as the presumptive response to school violations, SDUSD seems to have no

190. See *supra* notes 144–145 and accompanying text.

191. *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011).

192. SAN DIEGO UNIFIED SCH. DIST., *Administrative Procedures*, <http://www.sandi.net/page/243> (last visited July 3, 2015). There is no district-wide student or parent handbook, rather each individual school within the district creates and distributes a handbook based on the District's Administrative Procedures.

193. SAN DIEGO UNIFIED SCH. DIST., *Administrative Procedure No. 6290* (Sept. 15, 2014), <http://www.sandi.net/cms/lib/CA01001235/Centricity/Domain/34/procedures/pp6290.pdf> [hereinafter SDUSD, *AP No. 6290*].

194. *Id.* at 2–4. For a list of the Education Code's offenses, see Appendix B.

195. *Id.* at 4 (noting that "a student may be suspended for those acts listed above").

196. SAN DIEGO UNIFIED SCH. DIST., *Zero Tolerance Policy* (Aug. 11, 2010), http://www.sandi.net/cms/lib/CA01001235/Centricity/Shared/forms_pdfs/zerotolerance.pdf.

197. SDUSD, *AP No. 6290*, *supra* note 193, at 2.

articulated disciplinary policy besides suspension and expulsion.¹⁹⁸

2. Disproportionate Adverse Impact on a Protected Class

The second step a plaintiff must satisfy in a section 11135 claim is to establish that the facially neutral practice has a disproportionate adverse impact on a protected class.¹⁹⁹ The plaintiff must not only prove that there is an actual adverse impact,²⁰⁰ but also that the impact disproportionately affects the plaintiff compared to others.²⁰¹ Here, the SDUSD suspension policies have an adverse, disproportionate impact on African American students.²⁰²

In the 2013–2014 school year, SDUSD had a total enrollment of 130,303 students, with the largest student populations being Hispanic or Latino (60,865 students and 46.7% of the student enrollment) and white (30,136 student and 23.1% of the student enrollment).²⁰³ There were more than twice as many white students as African American students, with only 12,593 African American students enrolled, a rate of 9.7% of the total enrollment.²⁰⁴

One might predict that white and African American students were suspended at rates fairly consistent with their rates of district enrollment. Nothing, however, could be further from the truth. During the 2013–2014 school year, 9,686 total students were suspended, about 7.4% of the total student enrollment.²⁰⁵ The number of actual suspensions imposed is even greater than this, since some students would have been suspended more

198. *Id.* See also SAN DIEGO UNIFIED SCH. DIST., *Administrative Procedure No. 6295* (Sept. 15, 2014), <http://www.sandi.net/cms/lib/CA01001235/Centricity/Domain/34/procedures/pp6295.pdf> (providing the procedures for expulsion).

199. *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011).

200. See *id.* (finding that the plaintiffs had not proven adverse disparate impact by establishing that the less-funded bus systems had a larger percent of minority riders than the more-funded rail system because the plaintiffs did not consider how many more riders use the rail system or how many minority riders would benefit by rail system expansion).

201. *Moua v. City of Chico*, 324 F. Supp. 2d 1132, 1143 (E.D. Cal. 2004) (finding that Hmong-speaking crime victims were not disproportionately affected by the police's translation services when compared to other minorities).

202. See Appendix A (showing the disproportionate effect on African American students). Hispanic and Latino students are also disproportionately, adversely affected by suspensions. While "Hispanic or Latinos of any race" make up 46.7% of the total enrollment, they make up 53.6% of total suspensions. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* This is the amount of the individual students suspended, not the total number of suspensions.

than once.²⁰⁶ Of the 9,686 suspended students, 2,281 were African American.²⁰⁷ African American students constituted 24.3% of all the students suspended, despite only representing 9.7% of the total student body.²⁰⁸ White students, however, who made up 23.1% of the total body, only accounted for 12.3% of the total number of students suspended.²⁰⁹ Thus, while nearly 7 out of every 100 African American students were suspended, only about 1 out of every 100 white students were suspended. Looking at both the percentages and total number of students suspended, it seems undeniable that SDUSD's suspension policy disproportionately affects African American students.

The effects of suspension are also adverse for students.²¹⁰ Suspensions, especially out-of-school suspensions, prevent students from being in the classroom, can cause them to fall behind their peers academically, and are a "moderately strong predictor of a student dropping out of school."²¹¹

3. Defendant Justifies the Challenged Practice

To defend against a claim that the District's suspension policies have a disparate impact on African American students in violation of section 11135, SDUSD would claim that its punitive disciplinary policies are justified as measures designed to ensure school safety and protect the learning environment of students.²¹² SDUSD would likely point out that all of the offenses that serve as grounds for suspensions are known to students by way of AP 6290 and thus, students must act accordingly. To allow students who threaten the safety of the students at school, or who disrupt the learning environment, to remain in school is unfair to the rest of the student population and undermines the goal of providing those students with an education.

SDUSD would also argue that any disparate impact on African

206. *See id.* (noting that the numbers provided by DataQuest reflect the number of students "involved in one or more incidents during the academic year" and that "students who were suspended or expelled multiple times are counted only once.").

207. *Id.*

208. *Id.*

209. *Id.*

210. *See supra* notes 47–49 and accompanying text (showing the adverse effects of suspension on students).

211. *Id.*

212. In *Darensburg*, the Ninth Circuit left open the question as to what burden of justification the defendant may need to meet, a strict necessity burden or merely a legitimate justification. *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 515 (9th Cir. 2011).

American students in suspension rates is not the result of the suspension policies, but rather evidence that African American students misbehave more often than their white peers, as the number of suspensions theoretically correlates to the number of offenses and rules violations that take place at school. To successfully combat this argument, advocates would require first hand accounts of students, parents, teachers, and school administrators, who could describe and analyze individual incidents, addressing the way in which the SDUSD suspension policies are administered and overall student behavior in the District. General research on the routinely disproportional impact of zero tolerance on minority students would support the advocates' argument because it has found that higher rates of suspensions for minority students are not based on minority students committing offenses at a higher rate.²¹³

As discussed in Part III, minority students are often punished more severely for subjective offenses involving disrespect or threats. SDUSD has a number of these subjective offenses, such as menacing, bullying, extortion, slurs, theft, threats or abuse toward students, and defiance of authority, in which the offenses cover a wide range of behavior, from childish antics to serious criminal wrongdoing, all punishable by suspension.²¹⁴ Defiance of authority, also referred to as willful defiance, has gained statewide attention for its disparate impact on minority students.²¹⁵ It would require personal, first-hand accounts by students and teachers to assess to what extent African American students in SDUSD are suspended, or not, for subjective offenses and how often their white peers are suspended, or not, for the same or similar behavior. Statistics from the State Department of Education, however, corroborate that African American students at SDUSD are indeed suspended at higher rates than white students for defiance offenses than for other types of offenses.²¹⁶ Not only are African American students suspended at a higher rate for defiance offenses than for other suspendable offenses, at a rate of 24.3% compared to 23.1% respectively, but also, white students are suspended at a lower rate for defiance offenses than for other offenses, at 11.4% compared to 12.2% respectively.²¹⁷ This means that 855 African American students (out

213. See *supra*, notes 51–61 and accompanying text.

214. SDUSD, *AP No. 6290*, *supra* note 193, at 2–4.

215. Baron, *supra* note 110. See also *supra* notes 108–11 and accompanying text (discussing willful defiance).

216. See Appendix A (showing African American students are suspended at a rate of 23.1% for non-defiance suspensions, but at a rate of 24.3% for defiance suspensions, while white students are suspended at a rate of 12.7% for non-defiance suspensions, but only 11.4% for defiance suspensions).

217. *Id.*

of 12,593 total African American students) were suspended for defiance offenses, compared to only 402 white students (out of 30,136 total white students).²¹⁸ These statistics provide additional evidence suggesting that African American students are punished more harshly, and more often, than their white student counterparts.

4. Plaintiffs May Still Prevail by Establishing a Less Discriminatory Alternative

In the last decade, there has been a great deal of exploration into alternatives to punitive disciplinary measures. One approach, advocated by the American Psychological Association, involves a multi-tiered system aimed at the prevention of disruptive and negative student behavior and utilizes restorative justice to address such incidents when they occur.²¹⁹ The first level is preventative and involves implementing school-wide measures that “improve school climate and improve the sense of school community and belongingness.”²²⁰ Such preventative measures can focus on “bullying prevention, conflict resolution/peer mediation, [and] improved classroom behavior management.”²²¹ The second level involves preventative measures reaching out to individual students who may be at risk of misbehaving, and implementing services, such as anger management or mentoring, attempting to re-engage the students with school.²²² After implementing such comprehensive preventative measures, the third level is aimed at dealing with those students who have already committed offenses through the use of restorative justice programs instead of suspension or expulsion.²²³

While the preventative measures involved in the first and second levels of this three-tiered approach go a long way in reducing suspension

218. *Id.*

219. APA, *Review*, *supra* note 5, at 857–58. Others have proposed similar approaches to school discipline. *See, e.g.*, Joseph C. Gagnon & Peter E. Leone, *Alternative Strategies for School Violence Prevention*, 92 NEW DIRECTIONS FOR YOUTH DEV. 101 (2001) (proposing a three-tiered approach similar to the APA).

220. APA, *Review*, *supra*, note 5, at 858.

221. Skiba, *Zero Tolerance*, *supra* note 7, at 16. There are many examples of primary preventative measures, such as the Resolving Conflict Creatively Program (RCCP), which has had successful results in schools in New York City, Anchorage, Atlanta, and Oregon. *See* Jennifer Selfridge, *The Resolving Conflict Creatively Program: How We Know It Works*, 43 THEORY INTO PRAC. 59, 60–62, 64 (2004) (reporting on the successful implementation of RCCP policies in schools across the country); Joshua L. Brown et al., *The Resolving Conflict Creatively Program: A School-Based Social and Emotional Learning Program*, in BUILDING ACADEMIC SUCCESS ON SOCIAL AND EMOTIONAL LEARNING: WHAT DOES THE RESEARCH SAY? 151–67, 151 (Joseph E. Zines et al. eds., 2004) (reporting on the successful implementation of RCCP policies in public schools across New York City).

222. APA, *Review*, *supra* note 5, at 858–59.

223. *Id.*

and punitive discipline by curbing disruptive and violent behavior before it starts, the implementation of comprehensive restorative justice practices is the specific “reasonable alternative” to suspensions that SDUSD should implement.²²⁴ Not only have restorative justice programs been successful in significantly decreasing the number of overall suspensions in a variety of schools, but also evidence indicates that these practices decrease the disparity in the rates at which African American students are suspended.²²⁵

The goals of restorative justice practices are to “restore victims, offenders, as well as broader affected communities to a more positive place” after a negative or traumatic event.²²⁶ The implementation of such practices can range from informal discussions in which students sit down as a class and discuss issues or events that bothered them,²²⁷ to more formal, orchestrated events in which students are assigned the role of arbitrator and tasked with creating a resolution to a specific instance of misconduct. Regardless of the setting, the objective of restorative justice practice is to not only “identify more specifically what harm has occurred [to the participants personally], and then to develop—through dialogue as opposed to top-down punishment—a mutually agreeable solution, of how to repair the harm,” but also to reintegrate the offender back into the community.²²⁸ Gaining popularity in the criminal and juvenile justice systems as an alternative to incarceration,²²⁹ restorative justice practices can be particularly beneficial in school disciplinary settings because they enable students to better understand the harm caused by their actions, making students less likely to repeat the behavior.²³⁰ Restorative sessions can act as learning and community building experiences for the student offender and

224. An argument can be, and likely should be, made that SDUSD should implement all three levels of this non-punitive disciplinary approach.

225. David Simson, *Restorative Justice and Its Effects on (Racially Disparate) Punitive School Discipline*, 7TH ANNUAL CONFERENCE ON EMPIRICAL LEGAL STUDIES 35 (May 12, 2012), <http://ssrn.com/abstract=2107240> (finding that the sample of schools implementing restorative justice practices “reduced their black suspension percentage disparity by about 4.5 percentage points,” while schools that did not implement such practices “actually increased their disparity by slightly less than 1 percent.”).

226. *Id.* at 8.

227. MICHAEL D. SUMNER ET AL., THELTON E. HENDERSON CTR. FOR SOC. JUSTICE, SCHOOL BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND 31–32 (2010), https://www.law.berkeley.edu/files/thesj/10-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf.

228. Simson, *supra* note 225, at 9.

229. Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1 W. CRIMINOLOGY REV. 1, 7–9 (1998).

230. Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 548, 559 (2009).

victim, the teacher or administrator involved, and the school community as a whole, further helping to decrease future incidents.²³¹

There have been numerous studies conducted that track the successful implementation of restorative justice practices in schools throughout the country. A 2012 meta-analysis of the suspension rates of school that had implemented restorative justice practices revealed that schools with restorative justice programs generally reported a reduced rate of suspension.²³² The International Institute for Restorative Practices, looking at six schools in Pennsylvania, found that after implementing restorative justice programs, suspension rates were reduced, as well as the frequency of suspensions for offenses involving “behavioral incidents.”²³³ The Denver Public School District, which implemented district-wide, comprehensive restorative justice practices in 2006, has since seen a 10% reduction across the entire district in suspensions, with overall suspension rates dropping from 30% to 22.5% over three years—translating into about one thousand fewer suspensions a year.²³⁴ In addition to the change in suspensions, there were also various additional positive behavioral changes in the student body, such as an increase in attendance and timeliness,²³⁵ as well as an increase in students’ social skills, as rated by teachers.²³⁶ A middle school in Oakland, California, implemented restorative justice practices and saw its suspension rates drop from 50% of the student body to only 6% in just two years.²³⁷ Many of these studies also offer insight into how these schools created and implemented restorative practices that would be invaluable for SDUSD in creating and implementing its own comprehensive, district-wide restorative approach.²³⁸

CONCLUSION

Many agree that the zero tolerance policies that permeate our schools have had deleterious effects on students that are more than just academic.

231. *Id.* at 562.

232. Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline* 41 J.L. & EDUC. 281, 303–05 (2012).

233. INT’L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 6–19 (2009), http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/92115_IIRP-Improving-School-Climate.pdf.

234. *See* Baker, *supra* note 104, at 15–16.

235. *Id.* at 9–10.

236. *Id.* at 13–14.

237. SUMNER ET AL., *supra* note 227, at 31–32 (2010). Unfortunately, the middle school closed only two years after implementing the restorative practices because of declining enrollment. *See* Simson, *supra* note 225, at 10.

238. Baker, *supra* note 104, at 3–4.

Section 11135 provides educational advocates with an as-yet untested avenue to combat illegal discrimination in California. Using a combination of statistical data, as well as firsthand accounts of the way in which a school or a school district implements a zero tolerance policy to have a discriminatory effect on minorities, advocates may be able to use section 11135 to overhaul an entire zero tolerance disciplinary regime, a benefit to students of all races.

Appendix A

Table of School District Enrollment and Suspensions

Totals & Broken Down By Race

Appendix A contains statistical data concerning enrollment and suspensions from the 2013–2014 school year, the most recent year for which data is available. The raw data was obtained from the California Department of Education using the Department’s DataQuest online system, which allows users to create custom reports by selecting from a variety of specific input factors. The DataQuest system is available at <http://dq.cde.ca.gov/dataquest/dataquest.asp>. The rates were calculated by the author using the numbers provided by the California Department of Education.

The racial categories in the table are those used by the California Department of Education. The numbers reflect the number of students involved in one or more incidents during the academic year who were subsequently suspended or expelled from school. Those students who were suspended or expelled multiple times are counted only once.

In the table, “Suspensions” includes both in-school and out-of-school suspensions, and includes suspensions for all offenses. “Defiance Suspensions” includes both in-school and out-of-school suspensions, and includes only those suspensions under section 48900(k) of the California Education Code (in which a student “[d]isrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties”).

TABLE 1. California District Enrollment and Suspensions

	<i>Enrollment (K–12)</i>	<i>Total students Suspended</i>	<i>Total Number of Offenses Involved in Suspensions</i>	<i>Suspension Rate</i>
Cal. Statewide totals	6,236,672	279,383	610,807	4.4
White	1,559,113 (25.0%)
African American	384,291 (6.2%)
Hispanic/Latino	3,321,274 (53.3%)

TABLE 2. Defiant-Behavior Suspensions and Total Suspensions as a Percentage of Enrollment

<i>SDUSD</i>	<i>Enroll- ment</i>	<i>In- school Def.</i>	<i>Out-of- school Def.</i>	<i>Def. total</i>	<i>All other in- school</i>	<i>All other out-of- school</i>	<i>All other total</i>	<i>Total</i>
Total	130,303	1,009	2,511	3,520	1,097	5,069	6,166	9,686 7.4%
White	30,136 23.1%	132 13.0%	270 10.8%	402 11.4%	165 (15.0%)	620 12.2%	785 12.7%	1,187 12.3%
African American	12,593 9.7%	231 22.9%	624 24.9%	855 24.3%	271 24.7%	1,155 22.8%	1,426 23.1%	2,281 23.5%
Hispanic/ Latino	60,865 46.7%	555 55.0%	1,421 56.6%	1,976 56.1%	534 48.7%	2,685 53.0%	3,219 52.2%	5,195 53.6%
Asian	11,014 8.5%	22 2.2%	49 2.0%	71 2.0%	32 2.9%	156 3.0%	188 3.0%	259 2.7%
American Indian/ Alaska Native	352 0.3%	4 0.4%	10 0.4%	14 0.4%	1 0.1%	16 0.3%	17 0.3	31 0.3%
Pacific Islander	784 6.0%	3 0.3%	16 0.6%	19 0.5%	5 0.5%	37 0.7%	42 0.7%	61 0.6%
Filipino	6,670 5.1%	12 1.2%	21 0.8%	33 0.9%	19 1.7%	128 2.5%	147 2.4%	180 1.5%
Two or More Races	7,253 5.6%	47 4.7%	93 3.7%	140 4.0%	64 5.8%	245 4.8%	309 5.0%	449 4.6%
No Race Reported	636 0.5%	3 0.3%	7 0.3%	10 0.3%	6 0.5%	27 0.5%	33 0.5%	43 0.4%

Appendix B: Grounds For Suspension in California

CAL. EDUC. CODE §§ 48900, 48900.2-48900.4, and 48900.7

As it read during the 2013–2014 school year.

CAL. EDUC. CODE § 48900. Grounds for suspension or expulsion.

A pupil shall not be suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined pursuant to any of subdivisions (a) to (r),

inclusive:

(a) (1) Caused, attempted to cause, or threatened to cause physical injury to another person.

(2) Willfully used force or violence upon the person of another, except in self-defense.

(b) Possessed, sold, or otherwise furnished a firearm, knife, explosive, or other dangerous object, unless, in the case of possession of an object of this type, the pupil had obtained written permission to possess the item from a certificated school employee, which is concurred in by the principal or the designee of the principal.

(c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, a controlled substance . . . , an alcoholic beverage, or an intoxicant of any kind.

(d) Unlawfully offered, arranged, or negotiated to sell a controlled substance . . . , an alcoholic beverage, or an intoxicant of any kind, and either sold, delivered, or otherwise furnished to a person another liquid, substance, or material and represented the liquid, substance, or material as a controlled substance, alcoholic beverage, or intoxicant.

(e) Committed or attempted to commit robbery or extortion.

(f) Caused or attempted to cause damage to school property or private property.

(g) Stole or attempted to steal school property or private property.

(h) Possessed or used tobacco, or products containing tobacco or nicotine products

(i) Committed an obscene act or engaged in habitual profanity or vulgarity.

(j) Unlawfully possessed or unlawfully offered, arranged, or negotiated to sell drug paraphernalia

(k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties.

(l) Knowingly received stolen school property or private property.

(m) Possessed an imitation firearm

(n) Committed or attempted to commit a sexual assault . . . or committed a sexual battery

(o) Harassed, threatened, or intimidated a pupil who is a complaining witness or a witness in a school disciplinary proceeding for purposes of either preventing that pupil from being a witness or retaliating against that pupil for being a witness, or both.

(p) Unlawfully offered, arranged to sell, negotiated to sell, or sold the prescription drug Soma.

(q) Engaged in, or attempted to engage in, hazing

(r) Engaged in an act of bullying

[. . .]

Additional Grounds for Suspension

CAL EDUC. CODE § 48900.2 (sexual harassment).

CAL EDUC. CODE § 48900.3 (hate violence).

CAL EDUC. CODE § 48900.4 (harassment, threats, or intimidation).