



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #15

REQUESTED ACTION: None, as the report is informational at this meeting.

Attached is a report from the Task Force on School to Prison Pipeline. The Task Force was appointed in 2017 to compile information about current practices with respect to school discipline, examine the current law relating to discipline, outline appropriate sanctions and restorative justice alternatives, and create “best practices” for school districts as to discipline and restorative justice.

The report provides an overview of New York Education Law §3214, which sets forth the procedures to be used by school districts in disciplining students with respect to out-of-school suspensions. The Task Force reviews studies documenting that students who are excluded from school face adverse consequences, including lower academic achievement, higher truancy, higher dropout rates, and higher contact with the juvenile justice system. These adverse impacts are experienced at higher rates by students of color, students with disabilities, and LGBTQ students.

The report reviews the use of restorative justice alternatives rather than the use of suspensions for bad behavior. While these alternatives take many forms, the aim of each is to bring individuals together in constructive dialogue to address the root of conflict. The report notes research indicates that the use of these models can result in a decrease in the use of suspensions and decrease the disparity in adverse impacts.

The Task Force makes the following recommendations:

- Education Law §3214 should be amended to permit the use of restorative justice practices in lieu of suspensions.
- School districts should review their codes of conduct to include restorative justice practices for specific code violations.
- The State Education Department should consider (1) the development of a standardized methodology for measuring disparities in discipline and report data annually to the public and (2) develop model materials and processes that districts can use to analyze the root causes of disparities.

The report references three appendices: The proposed amendment to Education Law §3214, the December 2018 report of the New York Equity Coalition, and examples of codes of conduct. For the sake of reproduction, the appendices are not included in the printed materials, but may be accessed online at www.nysba.org/pipelinerreport.

The report was posted in the Reports Community on January 2. It is being presented to you on an informational basis at this meeting, and will be scheduled for debate and vote at the April 13 meeting.

Sheila A. Gaddis and John H. Gross, co-chairs of the Task Force, will present the report at the January 18 meeting.

**NEW YORK STATE BAR ASSOCIATION
TASK FORCE
ON THE SCHOOL TO PRISON PIPELINE¹
INFORMATIONAL REPORT**

¹ Opinions expressed are those of the Task Force preparing this Report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

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Table of Contents

I. Executive Summary	1
A. Task Force Mission.....	1
B. Brief Synopsis of N.Y. Education Law § 3214 and the School-to-Prison Pipeline	1
C. Recommendations.....	3
II. Introduction/Overview of the School to Prison Pipeline	4
III. Overview of the Current Law	6
A. Education Law § 3214: Student Discipline Proceedings.....	9
B. Dignity for All Students Act (DASA)	31
IV. Sub-Committee Reports and Observations	45
A. Populations Subject to Disparate Treatment.....	45
1. Does New York have a Disparities Problem?	47
2. The Role of Implicit Bias, Coupled with Vague Definitions of Misconduct, in Creating Disparities	51
B. Restorative Justice & Current Productive Practices.....	53
1. Current Productive Practices and School Wide Prevention Models.....	58
2. Restorative Justice Practices as Intervention.....	60
V. Detailed Recommendation: Amending Education Law Section 3214 to Include Restorative Justice	63
VI. Conclusion	66
Appendices	67
Appendix A - Amendment to N.Y. Education Law § 3214.....	67
Appendix B - Report By The New York Equity Coalition, December 2018.....	70
Appendix C - Example Codes of Conduct	90

I. Executive Summary

A. Task Force Mission

Sharon Gerstman, Esq., during her term as President of the New York State Bar Foundation, established the Task Force on the School to Prison Pipeline. The Task Force was charged with the following mission:

The mission of this Task Force was to compile information concerning current practices in schools regarding discipline, examine current law regarding school discipline, appropriate disciplinary sanctions, and institution of restorative justice alternatives including youth courts, and create a “best practices” for school districts regarding discipline and restorative justice.

B. Brief Synopsis of N.Y. Education Law § 3214 and the School to Prison Pipeline

New York Education Law Section 3214 sets forth the procedures that school districts may use when disciplining students for various code of conduct violations. Education Law Section 3214 also provides procedures for disciplining special education students, including but not limited to those students with an individualized education plan (“IEP”), or plan in accordance with Section 504 of the Rehabilitation Act (“504 Plan”). Currently, the only form of discipline that may be issued against a student is out of school suspension. As explained in greater detail *infra*, the following disciplinary punishments may be issued:

1. Principal Suspension:

The principal of a school district may issue an out of school suspension of up to five days to a student for a code of conduct violation. Prior to issuing the suspension, the principal must advise the parent(s)/guardian(s) of the student of their rights for an informal conference in which the parent(s)/guardian(s) can question the complaining witness.

2. Superintendent’s Hearing:

If the principal deems that the code of conduct violation warrants a suspension of longer than five days, he/she can refer the violation to the Superintendent of Schools for a Superintendent’s hearing. The Superintendent or his/her designee will convene a due process hearing. During said hearing, the

parent(s)/guardian(s) have the ability to cross-examine District witness(es) and call witnesses on their behalf.

3. *Disciplinary Punishments for Students with Disabilities*

If a student has an IEP or a 504 plan and has violated the school district's code of conduct, a manifestation hearing is held to determine whether the charged conduct was a manifestation of the IEP or 504 plan. If the charged conduct is determined to be a manifestation, then a student can be transferred to an alternative placement for no more than 45 cumulative days during a given school year. If there is no manifestation, then the student may be issued discipline like a general education student.

The "School to Prison Pipeline" has developed due to the nature of these suspensions. The current system punishes misconduct by exclusion. Students with code of conduct violations are being removed from the school setting and into situations in which supervision, and more importantly instruction and the positive socialization effects of a school setting are not present during the day, providing the unfortunate opportunity for students to become caught up in unacceptable and possible criminal activity. Further, whether knowingly or not, certain school districts are suspending students of color and students with a disability at a greater propensity and frequency than students who are Caucasian or do not have an IEP or 504 plan. This disparate treatment of minority students and students with disabilities is shown in greater detail *infra*, in Section IV(A) entitled "Populations Subject to Disparate Treatment," through case studies and other statistical data from the United States Department of Education's Office of Civil Rights. Due to the fact that suspension is the statutorily endorsed discipline that may be issued in accordance with Education Law Section 3214, this trend will only continue to worsen without any ameliorative statutory change.

School districts have not only suspended students for misconduct on school grounds, but have referred misconduct to law enforcement. As described more fully in Section IV(A)(1) *infra*, Law Enforcement referrals have increased significantly in 2018 and there is data that demonstrates implicit biases have led to higher referrals for students of color and/or students with a disability. Students who have been suspended or referred to law enforcement are more likely to enter the juvenile system causing the School to Prison Pipeline to grow.

C. Recommendations

This Report includes the following recommendations that should be made to Education Law Section 3214. This Task Force believes that the inclusion of language in Education Law Section 3214 to permit the use of restorative justice practices in lieu of suspension of students would help rectify this growing problem of the School to Prison Pipeline. By statutorily endorsing school district use of alternative disciplinary procedures to suspension, this Task Force believes that many more school districts will utilize this model to treat with student misconduct. The Task Force hopes that this will interrupt the disturbing trend of the School to Prison Pipeline. The Task Force appreciates that there are several of the over seven hundred New York school districts that have exercised local discretion and have instituted restorative justice techniques. Our recommendation should not be taken to suggest that school districts are without authority to adopt restorative justice procedures.

This Task Force also recommends that school districts review their code of conducts to include the use of restorative justice practices for specific code of conduct violations. While this Task Force does not suggest a change in the law mandating the use of restorative justice practices for code of conduct violations, the New York State Education Department (“NYSED”) and the Board of Regents should undertake review of this issue.

Finally, the Task Force urges that the New York State Education Department study and consider the following:

1. The development of a standardized methodology for measuring disparities in discipline at both district and school levels across the protected classes of race, gender, disability and, if possible, by LGBTQ status. NYSED would report the data annually to districts and the public.
2. The study and development of model materials and processes that districts and schools can use to analyze the root causes of the disparities demonstrated in their data. The Task Force suggests that this include information on strategies including training, services, courses, materials, consultants and best practices that have been shown to successfully reduce disparities in discipline to assist schools and/or districts in recognizing and addressing such disparities.

II. Overview of the School to Prison Pipeline

The School to Prison Pipeline Task Force (“Task Force”) of the New York State Bar Association is cognizant that student suspension from school is often the first step in a chain of events leading to undesirable consequences. In an attempt to address this important issue extant in many New York State school districts, the Task Force studied workable alternatives to student suspensions and thus urges the New York State Bar Association to affirmatively recommend that the Student Suspension statute, Education Law §3214 be amended to ensure that school districts consider employing restorative practices in their codes of conduct.

Research sets forth that students who are excluded from school face dire consequences including lower academic achievement; higher truancy; higher dropout rates and a higher contact with the juvenile justice system. All of this leads to lower local and state economic growth.² In addition, the Office of Civil Rights (“OCR”) has documented that students of certain racial groups tend to be disciplined more than their peers. For example, African-American students without disabilities are more than three (3) times as likely as white peers without disabilities to be suspended or expelled.³

Statistics further demonstrate that students who are suspended are three times more likely to have risk of contact with the judicial system and two times more likely to drop out of school than are students who are not suspended from school. Furthermore, students with a first arrest and court appearance are four times more likely to drop out of school and students even who are treated as a juvenile in a court proceeding are seven times more likely to secure a future of adult criminal records.⁴

According to the Center for Urban Education Success, Restorative Justice Practice is an increasingly acknowledged and employed approach to school discipline, behavior, and relationships. Rather than focusing upon punitive measures, which lead to anger, shame and ostracism, Restorative Justice Practice is focused on repair and reconciliation. Its principles are rooted in indigenous communities and religious

² See generally, Russel J. Skiba, Mariella I. Arredondo, & M. Karega Rausch, *New and Developing Research on Disparities in Discipline*, DISCIPLINE DISPARITIES: A RESEARCH TO PRACTICE COLLABORATIVE AT INDIANA UNIVERSITY, March 2014.

³ U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

⁴ Fred Cheesman, *Facts about the School-to-Prison Pipeline*, NAT’L CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE CTS., (2016), available at <http://www.national-consortium.org/~media/Microsites/Files/National%20Consortium/Conferences/2016/Materials/School-to-Prison-fact-sheet.ashx>; see also Steven C. Teske, & J. Brian Huff, *The Court’s Role in Dismantling the School-to-Prison Pipeline*, JUV. AND FAM. JUST. TODAY, Winter 2011, at 14-17.

traditions⁵ where the concept of justice relies on an assumption that everyone in a community is relationally connected to one another and to their community and that when a wrong has occurred, “it represents a wound in the community, a tear in the web of relationships”⁶ which requires repair. Restorative Justice Practice holds accountable everyone involved in a relationship – offenders, victims, and community members. Unlike exclusionary discipline, which separates victims and offenders, Restorative Justice Practice techniques are designed to bring these stakeholders together where they can take turns speaking in a safe listening space. Using both proactive and interventional strategies, students, teachers, and everyone else in the school community (social workers, staff, administrators, parents, school safety officers, etc.) meet in various formats, such as restorative circles, community building circles, restorative conversations and peer mediation⁷ which steers the conversations away from retribution and toward reintegrating wrongdoers back into the community. These Restorative Justice strategies are particularly beneficial in school settings where members of the community will be seeing each other repeatedly and often following a conflict.⁸ Similar to punitive discipline, Restorative Justice philosophy and practices can lead to community transformation⁹ over time, but deepened relationships and community rather than crime and isolation characterize the transformed culture.

The Late Chief Judge Judith Kaye had tirelessly worked to secure legislation which would move school districts away from imposing only punitive disciplining measures on students and towards the employment of restorative practices. The New York State Bar Association should move in a direction to make Judge Kaye’s vision a reality and to work toward the goal of dismantling the School to Prison Pipeline, which presently exists.

One note of caution – the Task Force does not recommend the dismantling of student discipline under Section 3214 of the Education Law. There is little doubt that across

⁵ Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 455-475 (2008).

⁶ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 29 (2015).

⁷ Tom Cavanaugh, Patricia Vigil & Estrellita Garcia, *A Story Legitimizing the Voices of Latino/Hispanic Students and Their Parents: Creating a Restorative Justice Response to Wrongdoing and Conflict in Schools*, 47 EQUITY & EXCELLENCE IN EDUC. 565, 565-79 (2014); Anne Gregory, Russi Soffer, Easton Gaines, Aria Hurley & Neela Karikhalli, *Implementing Restorative Justice in Schools: Lessons Learned From Restorative Justice Practitioners in Four Brooklyn Schools*, BROOKLYN COMMUNITY FOUNDATION, Nov. 2016, http://www.brooklyncommunityfoundation.org/sites/default/files/lessons_learned_about_early_implementation_of_restorative_justice_in_schools_for_distribution.pdf; Allison Ann Payne & Kelly Welch, *The Effect of School Conditions on the Use of Restorative Justice in Schools*, 16 YOUTH VIOLENCE AND JUV. JUST. 224, 224-40 (2017).

⁸ Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 281-335 (2012).

⁹ Jeanne B. Stinchcomb, Gordon Bazemore & Nancy Riestenberg, *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, 4 YOUTH VIOLENCE AND JUV. JUST. 123, 123-47 (2006).

New York State many school districts use the tools of this statute appropriately, effectively in accord with student due process protection.

III. Overview of the Current Law

Every board of education, board of trustees, board of cooperative educational services and county vocational extension board must adopt and amend a code of conduct to maintain order on school property¹⁰ or at a school function.¹¹ The code of conduct governs the conduct of students, teachers, school personnel, and visitors. At a minimum the code of conduct must include:

- **Conduct Guidelines:** appropriate conduct, language and dress on school property and acceptable treatment of teachers, school administrators, other school personnel, students and visitors on school property;¹²
- **Disciplinary Measures:** appropriate range of disciplinary measures that may be imposed for violation of the code;¹³
- **Roles:** roles of teachers, administrators, other school personnel, the board or other governing body, and parents;¹⁴
- **Provisions Against Bullying and Harassment:** provisions “prohibiting harassment, bullying, and/or discrimination against any student, by employees or students that creates a hostile school environment by conduct or by threats, intimidation or abuse, including cyberbullying” as defined in N.Y. Education Law § 11(8);¹⁵
- **Security Procedures:** standards and procedures to assure the security and safety of students and school personnel;¹⁶
- **Removal Procedures:** provisions for removing students and other persons who violate the code from the classroom or school property;¹⁷

¹⁰ School property means “[1)] in or within any building, structure, athletic playing field, playground, parking lot or land contained within the real property boundary line of a public elementary or secondary school; or [(2)] in or on a school bus, as defined by section [142] of the vehicle and traffic law.” N.Y. EDUC. LAW § 11(1) (McKinney 2018).

¹¹ 8 NYCRR § 100.2(l)(2); School function is defined as “a school-sponsored extracurricular event or activity.” N.Y. EDUC. LAW § 11(2) (McKinney 2018).

¹² 8 NYCRR § 100.2(l)(2)(ii)(a).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* § 100.2(l)(2)(ii)(b).

¹⁶ *Id.* § 100.2(l)(2)(ii)(c).

- **Disruptive Pupils:** provisions “prescribing the period for which a disruptive pupil may be removed from the classroom for each incident, provided that no such pupil shall return to the classroom until the principal makes a final determination pursuant to Education Law § 3214(3-a)(c), or the period of removal expires, whichever is less;”¹⁸
- **Specific Disciplinary Measures:** disciplinary measures to be taken against those who possess or use weapons or illegal substances, use physical force, commit acts of vandalism, violate another student’s civil rights, threaten violence, or harass, bully, and/or discriminate against other students;¹⁹
- **Responding to Bullying, Harassment, and/or Discrimination:** provisions “for responding to acts of harassment, bullying, and/or discrimination against students by employees or students ..., which with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student’s behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student’s behaviors had on the individual(s) who was physically injured and/or emotionally harmed;”²⁰
- **Disciplinary Procedures and Alternative Education:** provisions for the detention, suspension and removal from the classroom of students, consistent with applicable laws, including policies and procedures to ensure the continued educational programming and activities for students who are placed in detention, suspended from school or removed from the classroom;²¹
- **Reporting and Enforcement:** procedures to report and determine violations and procedures to impose and carry out disciplinary measures;²²
- **Compliance with Other Laws:** procedures to ensure that the code and its enforcement comply with state and federal laws;²³

¹⁷ *Id.* § 100.2(l)(2)(ii)(d).

¹⁸ *Id.* § 100.2(l)(2)(ii)(e).

¹⁹ *Id.* § 100.2(l)(2)(ii)(f)-(g).

²⁰ *Id.* § 100.2(l)(2)(ii)(h).

²¹ *Id.* § 100.2(l)(2)(ii)(i).

²² *Id.* § 100.2(l)(2)(ii)(j).

- **Criminal Acts:** provisions for notifying local law enforcement agencies about which code violations constitute a crime;²⁴
- **Parental Notification:** circumstances under and procedures by which persons in parental relation to the student will be notified of code violations;²⁵
- **Court Complaints:** circumstances under and procedures by which a complaint in criminal court, a juvenile delinquency petition, or person in need of supervision petition will be filed;²⁶
- **Referrals to Human Service Agencies:** circumstances under and procedures by which referrals to appropriate human service agencies are made;²⁷
- **Minimum Suspension Periods:** a minimum suspension period for students who repeatedly are substantially disruptive of the educational process or substantially interfere with the teacher's authority over the classroom (suspending authority may reduce this period on a case-by-case basis to be consistent with any other state or federal law);²⁸
- **Violent Students:** a minimum suspension period for acts that would qualify the student as a violent pupil as defined by section 3214 of the Education Law (suspending authority may reduce this period on a case-by-case basis to be consistent with any other state or federal law);²⁹
- **Student Bill of Rights:** a bill of rights and responsibilities of students that focuses on positive student behavior and that will be annually publicized and explained to all students;³⁰
- **In-Service Programs:** guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of the school policy on student conduct and discipline;³¹ and

²³ *Id.* § 100.2(l)(2)(ii)(k).

²⁴ *Id.* § 100.2(l)(2)(ii)(l).

²⁵ *Id.* § 100.2(l)(2)(ii)(m).

²⁶ *Id.* § 100.2(l)(2)(ii)(n).

²⁷ *Id.* § 100.2(l)(2)(ii)(o).

²⁸ *Id.* § 100.2(l)(2)(ii)(p).

²⁹ *Id.* § 100.2(l)(2)(ii)(q).

³⁰ *Id.* § 100.2(l)(2)(ii)(r).

³¹ *Id.* § 100.2(l)(2)(ii)(s).

- **Retaliation:** a provision “prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.”³²

The code of conduct must be developed in collaboration with students, teachers, administrators, parent organizations, and school personnel.³³ Each school district must file a copy of its code of conduct and any amendments to the code of conduct with the Commissioner no later than thirty days after their adoption.³⁴ As set forth above, a school district’s code of conduct lays the foundation for student disciplinary procedures.

A. Education Law § 3214: Student Discipline Proceedings

The Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law”³⁵ In 1975, the United States Supreme Court, in *Goss v. Lopez*, held that the Fourteenth Amendment “protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.”³⁶ More importantly, in such case, the Court held for the first time that a student’s entitlement to a public education is a property interest protected by the Fourteenth Amendment’s Due Process Clause “which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”³⁷

Furthermore, in *Goss v. Lopez*, the Court noted that “young people” who attend the public school system “do not ‘shed their constitutional rights’ at the schoolhouse door.”³⁸ More specifically, the Court observed that a “10-day suspension from school is not *de minimis* ... and may not be imposed in complete disregard of the Due Process Clause.” Although a short suspension is far less serious than an expulsion, the Court found that “[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.”³⁹

³² *Id.* § 100.2(l)(2)(ii)(t).

³³ *Id.* § 100.2(l)(1)(i).

³⁴ *Id.* § 100.2(l)(2)(iii)(a).

³⁵ U.S. CONST. amend. XIV, § 1.

³⁶ *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

³⁷ *Id.*

³⁸ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

³⁹ *Id.* at 576.

The Court's holding in *Goss v. Lopez* set the ground rules for state disciplinary procedures. While attempting to balance the interests of students and schools, the Court held that:

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.⁴⁰

The ruling established in *Goss v. Lopez* affords students the right to due process prior to being suspended or expelled but it does not afford them the utmost protections under the law. For example, student discipline proceedings need not take the form of a judicial or quasi-judicial trial and students do not have the right to legal counsel or the right to confront and cross-examine witnesses for a suspension of 10 days or less.⁴¹

Even though the *Goss v. Lopez* decision focused primarily on suspensions of ten days or less, the Court nonetheless recognized that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”⁴² Therefore, the Court left it up to the states to determine exactly what “more formal procedures” are required for long-term suspensions or expulsions.

Overall, the Court in *Goss* established the principle that fundamental fairness is inherent to the student discipline process. Therefore, *Goss v. Lopez* remains the cornerstone for student discipline proceedings in most, if not all states, especially New York.

The New York State Legislature created Education Law Section 3214 in 1947 as a procedure to discipline students, which includes suspension.⁴³ A school district's board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal of a school may suspend the pupils from required attendance upon instruction for the following conduct:

- Insubordination
- Being Disorderly
- Being Violent
- Being Disruptive

⁴⁰ *Id.* at 581.

⁴¹ *Id.* at 583.

⁴² *Id.* at 584.

⁴³ N.Y. EDUC. LAW § 3214 (McKinney 2018).

- or Conduct otherwise endangers the safety, morals, health or welfare of others.⁴⁴

A violent pupil is defined as an elementary student or secondary student under twenty-one years of age who:⁴⁵

- Commits an act of violence upon a teacher, administrator, or other school employee;⁴⁶
- Commits, while on school district property, an act of violence upon another student or any other person lawfully upon said property;⁴⁷
- Possesses, while on school district property, a gun, knife, explosive, or incendiary bomb, or other dangerous instrument capable of causing physical injury or death;⁴⁸
- Displays while on school district property, what appears to be a gun, knife, explosive or incendiary bomb or other dangerous instrument capable of causing death or physical injury;⁴⁹
- Threatens, while on school district property, to use any instrument that appears to be capable of causing physical injury or death;⁵⁰
- Knowingly and intentionally damages or destroys the personal property of a teacher, administrator, other school district employee or any person lawfully upon school district property;⁵¹ or,
- Knowingly or intentionally damages or destroys school district property.⁵²

A disruptive pupil is an elementary or secondary student under twenty-one years of age who is substantially disruptive of the educational process or substantially interferes with the teacher's authority over the classroom.⁵³

1. Corporal Punishment or Aversive Interventions

Section 3214 of the Education Law provides disciplinary procedures for disciplining students but it does not provide for the use of corporal punishment. No teacher, administrator, officer, employee or agent of a school district in New York State or Board of Cooperative Educational Services (BOCES), a charter school, state-operated or state

⁴⁴ *Id.* § 3214(3)(a).

⁴⁵ *Id.* § 3214(2-a).

⁴⁶ *Id.* § 3214(2-a)(1).

⁴⁷ *Id.* § 3214(2-a)(2).

⁴⁸ *Id.* § 3214(2-a)(3).

⁴⁹ *Id.* § 3214(2-a)(4).

⁵⁰ *Id.* § 3214(2-a)(5).

⁵¹ *Id.* § 3214(2-a)(6).

⁵² *Id.* § 3214(2-a)(7).

⁵³ *Id.* § 3214(2-a)(b).

supported school, may use corporal punishment against a pupil.⁵⁴ Corporal punishment is defined as any act of physical force upon a pupil for the purpose of punishing that pupil.⁵⁵

However, there are certain, and very limited instances, in which reasonable physical force can be used, including:⁵⁶

- i. To protect oneself from physical injury;⁵⁷
- ii. To protect another pupil or teacher or any person from physical injury;⁵⁸
- iii. To protect the property of the school, school district or others;⁵⁹ or
- iv. To restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school or school district functions, powers and duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.⁶⁰

Further aversive interventions cannot be used against pupils as a tool to reduce or eliminate maladaptive behaviors.⁶¹ An aversive intervention is defined as an intervention that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors, including:⁶²

- i. Contingent application of noxious, painful, intrusive stimuli or activities; strangling, shoving, deep muscle squeezes or other similar stimuli;⁶³
- ii. Any form of noxious, painful or intrusive spray, inhalant or tastes;⁶⁴
- iii. Contingent food programs that include the denial or delay of the provision of meals or intentionally altering staple food or drink in order to make it distasteful;⁶⁵
- iv. Movement limitation used as punishment, including but not limited to helmets and mechanical restraint devices;⁶⁶ or
- v. Other stimuli or actions similar to the interventions described above.⁶⁷

⁵⁴ 8 NYCRR § 19.5(a)(1).

⁵⁵ *Id.* § 19.5(a)(2); 8 NYCRR § 100.2(l)(3)(i).

⁵⁶ 8 NYCRR § 19.5(3); 8 NYCRR § 100.2(l)(3)(i).

⁵⁷ 8 NYCRR § 19.5(3)(i); 8 NYCRR § 100.2(l)(3)(i)(a).

⁵⁸ 8 NYCRR § 19.5(3)(ii); 8 NYCRR § 100.2(l)(3)(i)(b).

⁵⁹ 8 NYCRR § 19.5(3)(iii); 8 NYCRR § 100.2(l)(3)(i)(c).

⁶⁰ 8 NYCRR § 19.5(3)(iv); 8 NYCRR § 100.2(l)(3)(i)(d).

⁶¹ 8 NYCRR § 19.5(b)(1).

⁶² *Id.* § 19.5(b)(2).

⁶³ *Id.* § 19.5(b)(2)(i).

⁶⁴ *Id.* § 19.5(b)(2)(ii).

⁶⁵ *Id.* § 19.5(b)(2)(iii).

⁶⁶ *Id.* § 19.5(b)(2)(iv).

⁶⁷ *Id.* § 19.5(b)(2)(v).

However, an aversive intervention does not include voice control, limited to loud, firm commands; time-limited ignoring of a specific behavior; token fines as part of a token economy system brief physical prompts to interrupt or prevent a specific behavioral interventions medically necessary for the treatment or protection of the student; or other similar interventions.⁶⁸

2. Off Campus Conduct and Social Media

Pupils may be disciplined for off-campus misconduct when it is “reasonably foreseeable” that the misconduct will “create a risk of a material and substantial disruption” in the school setting.⁶⁹ The board may take disciplinary action against a student who committed a school-related criminal act or school-related act that indicates the student’s presence in school poses a danger to the health, safety, morals, or welfare of other students.⁷⁰ However, a school district may not punish a student’s criminal conduct if it does not affect the school setting.⁷¹

The New York State Education Department (“NYSED”) and New York’s Attorney General have released guidance documents which define cyberbullying as the repeated use of information technology, including email, instant messaging, blogs, chat rooms, cell phones and gaming systems to deliberately harass, threaten, antagonize or intimidate others.⁷² Students have routinely been disciplined for conduct that occurred on social media, for example, posts relating to violence at school,⁷³ and cyberbullying, to both teachers and students.⁷⁴

With regard to searching students’ personal devices, students have a legitimate expectation of privacy in school, and school officials must balance that expectation of privacy against the school’s interest in maintaining order and discipline.⁷⁵ When determining whether a school appropriately searched a student’s device for the purpose

⁶⁸ *Id.* § 19.5(b).

⁶⁹ *Doninger v. Niehoff*, 527 F.3d 41 (2d. Cir 2008); *Appeal of S. W.*, 44 Ed. Dept. Rep. 446 (2005); *Appeal of K.S.*, 43 Ed. Dept. Rep. 492 (2004); *Appeal of R.C.*, 41 Ed. Dept. Rep. 446 (2002); *Appeal of Mangaroo*, 33 Ed. Dept. Rep. 286 (1993).

⁷⁰ *Appeal of Pollnow*, 21 Ed. Dept. Rep. 291 (1981).

⁷¹ *Id.*

⁷² *The New York State Dignity for All Students Act: A Resource and Promising Practices for School Administrators & Faculty*, NEW YORK STATE EDUCATION DEPARTMENT, (December 2017), <http://www.p12.nysed.gov/dignityact/documents/FINALDignityForAllStudentsActGuidanceDec2017.pdf>; *Cyberbullying*, ATTORNEY GENERAL: BARBARA D. UNDERWOOD, <https://ag.ny.gov/internet/cyberbullying> (last visited December 21, 2018). The term cyberbullying is also defined in the Dignity for All Students Act as harassment or bullying which occurs through any form of electronic communication. N.Y. EDUC. LAW. § 11(8) (McKinney 2018).

⁷³ *Wisniewski v. Bd. of Educ. of the Weedsport C.S.D.*, 494 F.3d 34 (2d Cir. 2007).

⁷⁴ *Appeal of E.S.*, 50 Ed. Dept. Rep. ____, Decision No. 16,105 (2010); *Appeal of J.F. and J.F.*, 46 Ed. Dept. Rep. 205 (2006); *Appeal of Ravlik*, 40 Ed. Dept. Rep. 262 (2000); *Appeal of Leahy*, 39 Ed. Dept. Rep. 375 (1999).

⁷⁵ *New Jersey v. T.L.O.*, 469 U.S. 341 (1985).

of discipline, a school must determine: 1) whether the search was justified in its inception, and 2) was the search reasonably related in scope to the circumstances which justified the interference in the first place.⁷⁶

3. Procedure for Suspension or Removal of Pupils

i. Teacher Removal of Disruptive Students.

Teachers have the power and authority to remove a disruptive pupil from his/her classroom consistent with discipline measures contained in the district's code of conduct.⁷⁷ School authorities must establish policies and procedures to ensure that the educational programming and activities for students removed from the classroom continues.⁷⁸ Students may not be removed in violation of any state or federal law or regulation.⁷⁹ The teacher must inform the student and school principal of the reasons for the removal.⁸⁰

If the teacher finds that the pupil's continued presence in the classroom does not pose a continuing danger to persons or property and does not present an ongoing threat of disruption to the academic process, the teacher has to explain the basis for the removal to the student, allowing the student to informally present his/her version of the incident, prior to removing the student from the classroom.⁸¹

In all other cases, the teacher must explain the basis for the removal to the student and provide an informal opportunity to be heard within twenty-four hours of the student's removal.⁸² If the twenty-four hour period does not end on a school day, it will be extended to the corresponding time on the next school day.⁸³

The principal must inform the student's parent or person in parental relation to the student of the removal and the basis for it within twenty-four hours. If the twenty-four hour period does not end on a school day, it will be extended to the corresponding time on the next school day.⁸⁴ The student and his/her parent will, upon request, be given an opportunity for an informal conference with the principal to discuss the reasons for the removal.⁸⁵

⁷⁶ *Id.*

⁷⁷ N.Y. EDUC. LAW § 3214(3-a) (McKinney 2018).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

If the student denies the charges, the principal will explain the basis for the removal and allow the student and his/her parent an opportunity to present the student's version of the incidents.⁸⁶ The informal hearing must be held within forty-eight hours of the student's removal.⁸⁷ If the forty-eight hour period does not end on a school day, it will be extended to the corresponding time on the second school day next following the student's removal.⁸⁸

The principal will not set aside the discipline imposed by the teacher unless he/she finds that the charges against the student are not supported by substantial evidence, that the student's removal violates the law, or that the conduct warrants suspension from school (suspension will then be imposed).⁸⁹ The principal's determination must be made by the close of business on the day succeeding the forty-eight hour period for an informal hearing.⁹⁰

Students may not return to the classroom until the principal makes a final determination, or the period of removal expires, whichever is less.⁹¹ The principal may, in his/her discretion, designate a school district administrator to carry out these functions.⁹²

ii. Suspensions of Five Days or Less

A student's legitimate entitlement to a public education may not be taken away for misconduct without due process.⁹³ As previously mentioned, only a school district's board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools or principal of the school where the pupil attends will have the power to suspend a pupil for a period not to exceed five school days.⁹⁴ When a pupil is to be suspended, the board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal must provide the pupil with notice of the charged misconduct prior to the suspension.⁹⁵ The school district must also immediately notify the parent(s) or person in parental relation

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See Goss*, 419 U.S. 565.

⁹⁴ N.Y. EDUC. LAW § 3214(3)(b)(1) (McKinney 2018). The principal's authority to suspend may not be delegated. *See Appeal of A.L., Jr.*, 42 Ed. Dept. Rep. 368 (2003) (finding that a suspension imposed by the assistant principal was improper); *see Appeal of T.B.*, 52 Ed. Dept. Rep. _____, Decision No. 16,385 (2012).

⁹⁵ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

in writing that the student may be suspended from school.⁹⁶ Such written notice must be provided by personal delivery, express mail delivery or an equivalent means reasonably calculated to assure that the parent receives the notice within 24 hours of the suspension decision.⁹⁷ Notification sent by regular mail does not satisfy the delivery requirement.⁹⁸ The notice must describe the incident for which the suspension is proposed and inform the parent of his/her right to request an immediate informal conference with the principal.⁹⁹ The notice must also state that the student and parent have a right to an informal conference and that they have the right to question the complaining witness.¹⁰⁰ Failure to notify of these rights will result in expunging the suspension from the student's record.¹⁰¹

Furthermore, the board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal, must provide an explanation for the suspension if the pupil denies the misconduct.¹⁰² The pupil and the person in parental relation to the pupil must be afforded an opportunity for an informal conference with the principal, person, or body authorized to impose discipline¹⁰³ at which the pupil and/or person in parental relation will be authorized to present the pupil's version of the event(s) and to ask questions of the complaining witness.¹⁰⁴ Such informal conference must take place prior to the suspension.¹⁰⁵ However, should the pupil's presence in the school pose a continuing danger to persons or property, or an ongoing threat of disruption to the academic process, the pupil's notice and opportunity for an informal conference will take place as soon after the suspension as is reasonably practicable.¹⁰⁶ Notwithstanding, a teacher should immediately report and refer a violent pupil to the principal or superintendent for a

⁹⁶ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999) (holding that telephone notification does not satisfy the writing requirement); *see also Appeal of V.G.*, 44 Ed. Dept. Rep. 271 (2005); *Appeal of T.B.*, 52 Ed. Dept. Rep. _____, Decision No. 16,385 (2012). Further, such written notice must be provided in the parent's primary language or mode of communication. *Appeal of S.C.*, 44 Ed. Dept. Rep. 164 (2004).

⁹⁷ *Appeal of a Student with a Disability*, 44 Ed. Dept. Rep. 136 (2004).

⁹⁸ *Id.*

⁹⁹ *Appeal of a Student Suspected of Having a Disability*, 38 Ed. Dept. Rep. 52 (1998).

¹⁰⁰ *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of P.R. and C.R.*, 41 Ed. Dept. Rep. 48 (2001).

¹⁰¹ *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of P.R. and C.R.*, 41 Ed. Dept. Rep. 48 (2001).

¹⁰² N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

¹⁰³ *Appeal of Somers*, 32 Ed. Dept. Rep. 431 (1993).

¹⁰⁴ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565. It is insufficient to merely provide the student and his/her parent an opportunity to speak with the principal without the complaining witnesses present or an opportunity to speak to the complaining witnesses without the principal present. *Appeal of A.L., Jr.*, 42 Ed. Dept. Rep. 368 (2003); *Appeal of Allert*, 32 Ed. Dept. Rep. 342 (1992).

¹⁰⁵ *Appeal of a Student with a Disability*, 44 Ed. Dept. Rep. 136 (2004).

¹⁰⁶ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

violation of the code of conduct pursuant to N.Y. Education Law §2801 and a minimum suspension.¹⁰⁷

As for in-school suspensions, a full §3214 disciplinary hearing is not required. Due process requires that a student be given an opportunity to appear informally before the person or body authorized to impose discipline to discuss the conduct.¹⁰⁸ Also, similar to suspensions for five days or less, school districts are not required to maintain a record of the informal meeting for an in-school suspension.¹⁰⁹

A student or person in parental relation to the student may appeal a suspension of five days or less directly to the Commissioner of Education, unless the board of education has a board policy which sets forth the proper appeal procedures for such suspension.¹¹⁰ Failure to strictly adhere to the due process requirements outlined above, will result in the Commissioner of Education issuing a directive to expunge the suspension from the student's record.¹¹¹ However, school districts may correct alleged procedural due process violations by holding a curative hearing and by allowing the student to return to school from the time the due process violation occurred to the date of the curative hearing.¹¹²

iii. Suspensions Exceeding Five Days

Education Law §3214 also develops procedures for suspensions exceeding five days, which also require notice and an opportunity for a fair hearing. The timing, contents of the notice, and nature of the hearing depend on the circumstances of the case.¹¹³

¹⁰⁷ N.Y. EDUC. LAW § 3214(3)(b)(2) (McKinney 2018).

¹⁰⁸ *Appeal of Watts*, 23 Ed. Dept. Rep. 459 (1984).

¹⁰⁹ *Id.*

¹¹⁰ *Appeal of S.C.*, 44 Ed. Dept. Rep. 164 (2004); *see also Appeal of A.B.*, 57 Ed. Dept. Rep. ____, Decision No. 17,172 (2017). Commissioner of Education will only overturn a suspension if it was determined to be arbitrary, capricious, lacked rational basis or was affected by error of law. *Bd. of Educ. of Monticello Cent. Sch. Dist. v. Comm'r of Educ.*, 91 N.Y.2d 133 (1997).

¹¹¹ *See Appeal of P.B.*, 53 Ed. Dept. Rep. ____, Decision No. 16,533 (2013) (ordering the student's suspension be expunged for the following reasons: (1) the parent's right to an informal conference was not provided in the notice prior to the student's suspension; (2) the district failed to personally deliver the notice or use a method reasonably calculated to ensure receipt within 24 hours; and (3) the district failed to provide the parent(s)/guardian(s) with a meaningful opportunity to attend the informal conference and speak to witnesses prior to the imposition of the suspension); *see also Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998); New York State School Boards Association, New York State Association of School Attorneys, "Student discipline, never easy, gets a little harder," (January 27, 2014) *available at* <http://www.nyssba.org/news/2014/01/24/on-board-online-january-27-2014/student-discipline-never-easy-gets-a-little-harder/>.

¹¹² *Appeal of C.Q. and J.Q.*, 41 Ed. Dept. Rep. 294 (2002).

¹¹³ N.Y. EDUC. LAW § 3214(3)(c)(1) (McKinney 2018); *see also Goss*, 419 U.S. 565.

However, if the pupil is a student with a disability, or presumed with a disability, a manifestation proceeding must occur pursuant to N.Y. Education Law 3214(3)(g).¹¹⁴

In contrast to suspensions for five days or less, only the superintendent and the board have authority to suspend a student for more than five days. The pupil must have had the opportunity for a fair hearing, upon reasonable notice,¹¹⁵ at which such pupil will have the right of representation by counsel,¹¹⁶ who has the right to question witnesses¹¹⁷ against such pupil and to present witnesses and other evidence¹¹⁸ on his or her behalf.¹¹⁹ This type of hearing is called a Superintendent's Hearing, as the superintendent of schools, district superintendent of schools, or community superintendent, or his/her designee will personally hear and determine the proceeding or will designate a hearing officer to conduct the hearing.¹²⁰ The hearing does not need to be held within five days of the suspension, but the student must be allowed to return to school after five days if no hearing has been held.¹²¹ A pupil who has previously been suspended for an action by a principal, can be disciplined through a Superintendent's hearing for the same misconduct.¹²² During a hearing, the hearing officer may administer oaths and issue subpoenas in connection with the proceeding.¹²³ Unlike suspensions of five days or less, a record of the hearing must be maintained but no stenographic transcript is

¹¹⁴ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹¹⁵ Reasonable notice varies under the circumstances of each case but one day's notice is insufficient. *Appeal of Eisenhauser*, 33 Ed. Dept. Rep. 604 (1994); see also *Carey v. Savino*, 91 Misc. 2d 50 (holding that less than one day's notice is insufficient to comport with due process because it does not allow the student enough time to secure counsel). Such notice "must provide the student with enough information to prepare an effective defense, but need not particularize every single charge against a student." *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 428 (1999); *Monticello*, 91 N.Y.2d 133 (finding that notice must allow the student and his/her counsel, if any, to prepare and present an adequate defense). Furthermore, the charges must be "sufficiently specific to advise the student and his counsel of the activities or incidents which have given rise to the proceeding and which will form the basis for the hearing." *Appeal of M.P.*, 44 Ed. Dept. Rep. 132 (2004).

¹¹⁶ There is no requirement that a student must be represented by counsel. *Appeal of Albicocco*, 21 Ed. Dept. Rep. 166 (1981).

¹¹⁷ Written statements of witnesses in lieu of testimony cannot be introduced by the school district during a hearing because such introduction violates the student's right to question witnesses. *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of D.C.*, 41 Ed. Dept. Rep. 277 (2002).

¹¹⁸ *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 428 (1999) ("As long as students are given a fair opportunity to tell their side of the story and rebut the evidence against them, due process is served.").

¹¹⁹ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹²⁰ A due process violation does not occur where the superintendent imposes the suspension and acts as the hearing officer. *Appeal of Labriola*, 20 Ed. Dept. Rep. 74 (1980); *Appeal of Payne*, 18 Ed. Dept. Rep. 280 (1978) (finding that the performance of multiple functions by the same person is not a *per se* due process violation).

¹²¹ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

¹²² A short suspension imposed in conjunction with a further penalty for the same action does not constitute double jeopardy. *Appeal of Swingle*, 32 Ed. Dept. Rep. 245 (1992).

¹²³ N.Y. EDUC. LAW § 3214(3)(c)(1).

required, and a tape recording is satisfactory.¹²⁴ At the conclusion of the hearing, the hearing officer will make findings of fact and recommendations to the superintendent as to the appropriate measure of discipline.¹²⁵ Unless completed by the superintendent, the hearing officer's report will be advisory only, and the superintendent can accept all or any part thereof.¹²⁶ However, the decision to suspend a student must be based on "competent and substantial evidence that the student participated in the objectionable conduct."¹²⁷ A student's admission of misconduct is sufficient proof of guilt¹²⁸ and hearsay evidence may also constitute competent and substantial evidence.¹²⁹

A Superintendent's Hearing determination can be appealed to the school district's board of education who will make its decisions solely upon the record of the hearing.¹³⁰ The board of education may adopt, in whole or in part, the decision of the superintendent of schools.¹³¹ However, if the basis for the suspension is the possession of any firearm, rifle, shotgun, dagger, dangerous knife, dirk, razor, stiletto, or any of the weapons, instruments, or appliances specified in N.Y. Penal Law §265.01¹³² on school

¹²⁴ *Id.* No *per se* due process violation occurs when there are inaudible portions of the tape recording. *Appeal of A.G.*, 41 Ed. Dept. Rep. 262 (2002) (holding that the petitioner must show how the inaudible portions of the hearing record may have mitigated against the finding of guilt or penalty imposed before a due process violation will be found to have occurred); *Appeal of Labriola*, 20 Ed. Dept. Rep. 74 (1980) (finding that the inaudible portions of the hearing record did not violate the student's due process rights where the school district gave the student the opportunity to correct any errors). School districts are not required to make a record for suspensions of five days or less. *Appeal of Lee, D.*, 38 Ed. Dept. Rep. 262 (1998).

¹²⁵ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹²⁶ *Id.*; see *Appeal of Cellini*, 30 Ed. Dept. Rep. 473 (1991).

¹²⁷ *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 427 (1999); see also *Appeal of Gorzka*, 35 Ed. Dept. Rep. 20 (1995); *Appeal of Swingle*, 32 Ed. Dept. Rep. 245 (1992); *Appeal of Albicocco*, 21 Ed. Dept. Rep. 166 (1981).

¹²⁸ *Appeal of Esther E.*, 39 Ed. Dept. Rep. 357 (1999); *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997); see also *Monticello*, 91 N.Y.2d 133 (holding that unimpeached testimony that the student admitted the misconduct supports a finding of guilty).

¹²⁹ *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 127 (1999); *Monticello*, 91 N.Y.2d 133.

¹³⁰ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹³¹ *Id.*

¹³² A person is guilty of criminal possession of a weapon in the fourth degree when:
(1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chukka stick, sand bag, sand club, wrist-brace type slingshot or slingshot, shank or "Kung Fu star"; or
(2) He or she possesses any dagger, dangerous knife, dirk, machete, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or
(3) [repealed]
(4) He possesses a rifle, shotgun, antique firearm, black powder rifle, black powder shotgun, or any muzzle-loading firearm, and has been convicted of a felony or serious offense; or

grounds or school property by the student, the hearing officer or superintendent will not be barred from considering the admissibility of such weapon, instrument, or appliance as evidence, notwithstanding a determination by a court in a criminal or juvenile delinquency proceeding that the recovery of such weapon, instrument or appliance was the result of an unlawful search or seizure.¹³³ Furthermore, student disciplinary hearings may still occur even if there are pending criminal charges against the student involving the same behavior because it is illogical to bar students who have committed lesser offenses from attendance at school for five days while allowing those who committed serious crimes to return pending disposition of the criminal charges.¹³⁴

Should a student be suspended for more than five days by the board of education, the Board may hear and determine the proceeding or appoint a hearing officer who will have the same powers and duties as the Board with respect to a Superintendent's Hearing.¹³⁵

The penalty imposed by either the superintendent or the board must be proportionate to the offense.¹³⁶ A penalty imposed by a school district will be overturned if it is so excessive to warrant substitution of the Commissioner's judgment for that of the superintendent or the board.¹³⁷ Furthermore, school districts may only impose penalties that are legally permissible under §3214 of the Education Law.¹³⁸ The only legally permissible penalty under §3214 is suspension from attendance.¹³⁹ School

(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States; or

(6) He is a person who has been certified not suitable to possess a rifle or shotgun, as defined in subdivision sixteen of section 265.00, and refuses to yield possession of such rifle or shotgun upon the demand of a police officer. Whenever a person is certified not suitable to possess a rifle or shotgun, a member of the police department to which such certification is made, or of the state police, will forthwith seize any rifle or shotgun possessed by such person. A rifle or shotgun seized as herein provided will not be destroyed, but will be delivered to the headquarters of such police department, or state police, and there retained until the aforesaid certificate has been rescinded by the director or physician in charge, or other disposition of such rifle or shotgun has been ordered or authorized by a court of competent jurisdiction.

(7) He knowingly possesses a bullet containing an explosive substance designed to detonate upon impact.

(8) He possesses any armor piercing ammunition with intent to use the same unlawfully against another.

N.Y. PENAL LAW § 265.01 (McKinney 2018).

¹³³ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹³⁴ *Pollnow v. Glennon*, 594 F.Supp. 220 (S.D.N.Y. 1984).

¹³⁵ N.Y. EDUC. LAW § 3214(3)(c)(2); see *Appeal of Cellini*, 30 Ed. Dept. Rep. 473 (1991).

¹³⁶ *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997).

¹³⁷ *Id.*

¹³⁸ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999).

¹³⁹ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

districts may not impose alcohol/drug assessments, counseling services, psychiatric evaluations or community service as a penalty.¹⁴⁰ A permanent suspension is an extreme penalty that may only be applied in extraordinary circumstances where the student shows “an alarming disregard for the safety of others”¹⁴¹ and where it is necessary to safeguard other students, which is discussed more fully below.

iv. Suspension of Pupils who Possess a Weapon on School Property

If a pupil brings a weapon¹⁴² on school property, the pupil will be immediately suspended for a period of not less than one calendar year.¹⁴³ Further, any nonpublic school pupil participating in a program operated by a public school district using funds,¹⁴⁴ who is determined to have brought a firearm to or possessed a firearm at a public school, or other premises used by the school district to provide such programs, will be suspended for a period of not less than one calendar year from participation in such program.¹⁴⁵ School districts may also impose permanent suspension on students who bring guns to school.¹⁴⁶ A superintendent of schools, district superintendent of schools, or community superintendent will have the authority to modify the suspension requirement on a case by case basis.¹⁴⁷ The determination of a superintendent will be subject to review by the board of education which is similar to any suspension of a student for longer than five days, and by the Commissioner of Education pursuant to Education Law §310.¹⁴⁸

Notwithstanding the foregoing, Education Law §3214 does not permit a superintendent to suspend a student with a disability in violation of the Individuals with Disabilities Education Act (“IDEA”) or Article 89 of the Education Law.¹⁴⁹ If the pupil is under the age of sixteen, the Superintendent will refer the pupil to a presentment agency for a juvenile delinquency proceeding consistent with Article Three of the Family Court Act, unless the student is fourteen or fifteen years of age in which they would qualify for

¹⁴⁰ See e.g., *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 427 (1999); *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999); *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998); *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997).

¹⁴¹ *Appeal of A.S. and S.K.*, 44 Ed. Dept. Rep. 129 (1994).

¹⁴² 18 U.S.C. § 930(2)(g).

¹⁴³ N.Y. EDUC. LAW § 3214(3)(d)(1) (McKinney 2018); see also Federal Gun-Free Schools Act, 20 U.S.C. § 4141 *et. seq.*

¹⁴⁴ Pursuant to the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301, *et. seq.*

¹⁴⁵ N.Y. EDUC. LAW § 3214(3)(d)(1); see also 20 U.S.C. § 4141 *et. seq.*; 20 U.S.C. § 6301, *et. seq.*

¹⁴⁶ *Appeal of Henry*, 34 Ed. Dept. Rep. 470 (1995).

¹⁴⁷ N.Y. EDUC. LAW § 3214(3)(d)(1).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

juvenile offender status.¹⁵⁰ Further, should the pupil have written authorization¹⁵¹ of such educational institution possession of such weapon would not warrant discipline.¹⁵²

v. Disciplining Pupils in Possession of Drugs, Alcohol, and Tobacco

School districts have the authority to discipline pupils for possessing, selling, using, or being under the influence of drugs, alcohol, or tobacco while on school property.¹⁵³ School districts may suspend students for such activities because those activities endanger the safety, morals, health, and welfare of others, and are likely a violation of the school district's code of conduct.¹⁵⁴ The Commissioner of Education has held that it is not irrational or an abuse of discretion to impose a greater penalty for drugs than for alcohol or tobacco.¹⁵⁵

For a school to discipline a pupil for being under the influence of alcohol they need to first determine whether the pupil is under the influence of alcohol by acquiring competent and substantial evidence. One way to acquire such evidence is through the use of breathalyzers for such determination.¹⁵⁶ School districts must properly administer such devices since the use of a breathalyzer constitutes a search under the Fourth Amendment.¹⁵⁷ A search must be: (1) justified at its inception; and (2) reasonably related in scope to the circumstances that justified the inception of the search.¹⁵⁸ In addition to the use of a breathalyzer, a school district may acquire competent and substantial evidence that a pupil has consumed alcohol by smelling alcohol on a pupil's breath or observing out of character behavior.¹⁵⁹

Certain activities involving drugs, alcohol, and tobacco constitute crimes under the New York Penal Law. Therefore pupils who engage in these activities will be disciplined and may also be referred to local law enforcement agencies.¹⁶⁰

vi. Waiver of the Right to a Student Disciplinary Hearing

¹⁵⁰ *Id.*; N.Y. CRIM. PROC. LAW § 1.20(42) (McKinney 2018).

¹⁵¹ Written authorization must be in a manner authorized by N.Y. PENAL LAW § 265 for activities approved and authorities by the trustees or board of education or other governing body of the public school and such governing body adopts appropriate safeguards to ensure student safety. N.Y. EDUC. LAW § 3214(3)(d)(2).

¹⁵² N.Y. EDUC. LAW § 3214(3)(d)(2).

¹⁵³ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003); *Appeal of Cynthia and Robert W.*, 37 Ed. Dept. Rep. 437 (1998).

¹⁵⁴ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003); *Appeal of Cynthia and Robert W.*, 37 Ed. Dept. Rep. 437 (1998).

¹⁵⁵ *Appeal of J.P.*, 44 Ed. Dept. Rep. 204 (2004); *Appeal of C.C.*, 44 Ed. Dept. Rep. 207 (2004).

¹⁵⁶ *Appeal of James*, 39 Ed. Dept. Rep. 482 (2000).

¹⁵⁷ *Id.*; *O'Connor v. Ortega*, 480 U.S. 709 (1987).

¹⁵⁸ *O'Connor*, 480 U.S. 709.

¹⁵⁹ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003).

¹⁶⁰ 8 NYCRR § 100.2.

A student's due process right to an opportunity for a student disciplinary hearing may be waived if the waiver is intelligent, knowing and voluntary.¹⁶¹ For a waiver to be valid, the student and his/her parent must be informed of their rights and the consequences of waiving those rights.¹⁶² The school district must provide the student and his/her parent with a written document that explains their rights and the consequences of waiving those rights.¹⁶³ A lawful waiver may only allow penalties that are legally permissible under §3214 of the Education Law.¹⁶⁴ In other words, a school district's waiver system must only allow the imposition of penalties that are legally permissible.¹⁶⁵

vii. Procedure for After a Pupil Has Been Suspended

If a suspended pupil is of compulsory attendance age,¹⁶⁶ immediate steps must be taken for his/her attendance upon instruction elsewhere or for supervision or detention of said pupil pursuant to Article Seven of the Family Court Act.¹⁶⁷ In other words, any student of compulsory age who is suspended from attendance at school must receive an alternative education.¹⁶⁸ Such alternative instruction must be substantially equivalent to the student's regular classroom program.¹⁶⁹ If a pupil has been suspended for cause, the suspension may be revoked by the board of education whenever it is in the best interest of the school and the pupil to do so.¹⁷⁰ The board of education may also condition a student's early return to school and suspension revocation on the pupil's voluntary participation in counseling or specialized classes, including anger management or dispute resolution.¹⁷¹

viii. Involuntary Transfer¹⁷² of Students

The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may transfer a pupil who has not been determined to be a student with a disability or a student presumed to have a disability for discipline

¹⁶¹ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999).

¹⁶² *Id.*

¹⁶³ *Appeal of V.L.*, 44 Ed. Dept. Rep. 160 (2004).

¹⁶⁴ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

¹⁶⁵ *Id.*

¹⁶⁶ N.Y. EDUC. LAW § 3205 (McKinney 2018) ("In each school district of the state, each minor from six to sixteen years of age will attend upon full time instruction.").

¹⁶⁷ *Id.* § 3214(3)(e). School districts must promptly, not instantaneously, provide alternative instruction. *Appeal of Deborah F.*, 42 Ed. Dept. Rep. 178 (2002).

¹⁶⁸ *Appeal of Pickney*, 37 Ed. Dept. Rep. 284 (1998).

¹⁶⁹ *Appeal of A.L., Jr.*, 41 Ed. Dept. Rep. 368 (2003).

¹⁷⁰ N.Y. EDUC. LAW § 3214(3)(e).

¹⁷¹ *Id.*

¹⁷² Involuntary Transfer does not include a transfer made by a school district as part of a plan to reduce racial imbalance within the schools or as a change in school attendance zones or geographical boundaries. *Id.* § 3214(5)(a).

purposes from regular classroom instruction to an appropriate educational setting in another school upon the written recommendation of the school principal and following independent review.¹⁷³

A school principal may initiate a non-requested transfer where it is believed that such a pupil would benefit from the transfer, or when the pupil would receive an adequate and appropriate education in another school program or facility.¹⁷⁴ No recommendation for pupil transfer will be initiated by the principal until such pupil and a person in a parental relation has been sent written notification of the consideration of transfer recommendation.¹⁷⁵ The notice sent to the parents, sets a time and place of an informal conference with the principal and will inform such person in parental relation and such pupil of their right to be accompanied by counsel or an individual of their choice.¹⁷⁶

After the informal conference, should the principal conclude that the pupil would benefit from a transfer or that the pupil would receive an adequate and appropriate education in another school program or facility, the principal may issue a recommendation of transfer to the superintendent.¹⁷⁷ The recommendation will include a description of behavior and/or academic problems indicative of the need for transfer and a description of alternatives explored and prior action taken to resolve the problem.¹⁷⁸ A copy of the letter must be sent to the person in parental relation and to the pupil.¹⁷⁹

Upon receipt of the principal's recommendation for transfer and a determination to consider that recommendation, the superintendent must notify the person in parental relation and the pupil of the proposed transfer and of their right to a fair hearing,¹⁸⁰ and must list community agencies and free legal assistance which may be of assistance.¹⁸¹ The written notice must include a statement that the pupil or person in parental relation has ten (10) days to request a hearing and that the proposed transfer will not take effect, except upon written parental consent, until the ten (10) day period has elapsed or if a fair hearing is requested, until after a formal decision following the hearing is rendered, whichever is later.¹⁸²

¹⁷³ *Id.*

¹⁷⁴ *Id.* § 3214(5)(b).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 3214(5)(c).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* § 3214(3)(c).

¹⁸¹ *Id.* § 3214(5)(d).

¹⁸² *Id.*

ix. Manifestation Proceeding: For Students with Disabilities

a. Discipline Procedures for Students with Disabilities under N.Y. Education Law § 3214

As previously discussed, Education Law §3214 sets forth a specific procedure for disciplining students with disabilities,¹⁸³ or students presumed to have a disability.¹⁸⁴ This is referred to as a manifestation proceeding. A student with, or presumed to have a disability¹⁸⁵ may be suspended or removed from his or her current educational placement for violation of school rules only in accordance with the procedures established for a manifestation¹⁸⁶ proceeding.¹⁸⁷

The trustees or board of education of any school district, a district superintendent of schools, or building principal has the authority to order the placement of a student with

¹⁸³ *Id.* § 4401(1).

A “student with a disability” means a person under the age of twenty-one who is entitled to attend public schools pursuant to section thirty-two hundred two of this chapter and who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education. Such term does not include a child whose educational needs are due primarily to unfamiliarity with the English language, environmental, cultural or economic factors. Lack of appropriate instruction in reading, including in the essential components of reading instruction as defined in subsection three of section twelve hundred eight of the elementary and secondary education act of nineteen hundred sixty-five, or lack of appropriate instruction in mathematics or limited English proficiency will not be the determinant factor in identifying a student as a student with a disability. “Special education” means specially designed instruction which includes special services or programs as delineated in subdivision two of this section, and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability. A “child with a handicapping condition” means a child with a disability.

Id.

¹⁸⁴ Student presumed to have a disability is defined as a student who the school district is deemed to have knowledge was a student with a disability before the behavior that precipitated disciplinary action. N.Y. EDUC. LAW § 3214(3)(g)(2); *see also* 20 U.S.C. § 1415(k).

¹⁸⁵ A school district is deemed to have knowledge that the student had a disability if prior to the time the behavior occurred: (1) the student’s parent has expressed concern to school district personnel in writing that the student is in need of special education (may be oral if parent does not know how to write or has a disability that prevents a written statement); (2) the student’s behavior or performance demonstrates the need for special education; (3) the student’s parent has requested that an individual evaluation of the student be conducted; or (4) the student’s teacher, or other school district personnel, has expressed concern about the student’s behavior or performance to the director of special education or to other school district personnel in accordance with the district’s established child find or special education referral system. 8 NYCRR § 201.5(b); *see also Appeal of a Student Suspected of Having a Disability*, 41 Ed. Dept. Rep. 341 (2002).

¹⁸⁶ N.Y. EDUC. LAW § 3214(3)(g)(2)(ii) (A manifestation team is a representative of the school district, the parent or person in parental relation, and relevant members of the committee on special education, as determined by the parent or person in parental relation).

¹⁸⁷ *Id.* § 3214(3)(g)(1).

a disability into an appropriate interim alternative educational setting (“IAES”), or another setting.¹⁸⁸ They also have the authority to suspend a pupil for a period not to exceed five consecutive school days where such student is suspended as long as the suspension does not result in a change in placement,¹⁸⁹ or if determined upon a recommendation of a hearing officer.¹⁹⁰

The superintendent of schools of a school district, either directly or upon recommendation of a hearing officer, may do the following: 1) order the placement of a student with a disability into an IAES, or another setting; 2) suspension for up to ten (10) consecutive school days, inclusive of any period in which the student is placed in an appropriate interim alternative educational placement, another setting or suspension, where the superintendent determines that the student has engaged in behavior that warrants a suspension and does not result in change of placement;¹⁹¹ and 3) order the change in placement of a student with a disability to an IAES for up to forty-five (45) days, but not to exceed the period of suspension ordered by a superintendent.¹⁹²

However, should a Committee on Special Education (“CSE”) determine that the behavior of a student with a disability was not a manifestation of the student’s disability, then the student can be disciplined similar to a student that does not have a disability, except that such student must continue to receive services, albeit in an interim alternative setting.¹⁹³

b. Discipline Procedures for Students with (or presumed to have) a Disability under the Commissioner’s Regulations

The Commissioner of Education has adopted regulations for suspensions and removals of students with disabilities. A manifestation of a review of the relationship between the student’s disability and the behavior subject to disciplinary action must be made immediately, if possible, but in no case later than ten (10) school days after:

- 1) A decision is made by a superintendent of schools to change the placement of a student to an IAES; or

¹⁸⁸ *Id.* §§ 3214(3)(g)(3)(ii), (iv).

¹⁸⁹ The United States Supreme Court has held that removing a student from school for more than ten days constitutes a change in educational placement. *Honig v. Doe*, 484 U.S. 305 (1988).

¹⁹⁰ N.Y. EDUC. LAW §§ 3214(3)(g)(3)(ii), (iv).

¹⁹¹ *Id.* § 3214(3)(g)(3)(iii). Such short-term suspensions may be used to temporarily remove a disabled student who violated the school district’s code of conduct or who poses an immediate threat to the safety of others, even if the behavior related to the disability. *Appeal of a Student with a Disability*, 34 Ed. Dept. Rep. 634 (1995).

¹⁹² N.Y. EDUC. LAW § 3214(3)(g)(3)(iv).

¹⁹³ *Id.* § 3214(3)(g)(3)(vi).

- 2) A decision is made by an impartial hearing officer to place a student in an IAES;
or
- 3) A decision is made by a board of education, district superintendent of schools, building principal or superintendent to impose a suspension that constitutes a disciplinary change in placement.¹⁹⁴

A manifestation review is conducted by a manifestation team following the determination by a hearing officer that the student is found guilty of the misconduct.¹⁹⁵ The manifestation team includes a representative of the school district knowledgeable about the student and the interpretation of information about child behavior.¹⁹⁶ The parent and other relevant members of the CSE are also included in the manifestation review.¹⁹⁷ The manifestation team reviews all relevant information in the student's file, including the student's individualized education plan ("IEP"), any teacher observations, and any relevant information provided by the parents to determine if:

- 1) The conduct in question was caused by or had a direct and substantial relationship to the student's disability; or
- 2) The conduct in question was the direct result of the school district's failure to implement the IEP.¹⁹⁸

If either of these conditions are met, then it is determined that the conduct was a manifestation of the student's disability.¹⁹⁹ If a nexus is found between the misconduct and the student's disability, a suspension beyond ten school days may not be imposed, unless the student's presence constitutes a dangerous situation.²⁰⁰ Also, if the manifestation team ultimately determines that the conduct was a manifestation of the student's disability, a referral must be made to the CSE to determine whether a program modification is required.²⁰¹ In order to make such determination, the CSE must conduct a functional behavioral assessment ("FBA") and return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan ("BIP").²⁰² If no nexus is found between the student's misconduct and his/her

¹⁹⁴ 8 NYCRR § 201.4(a).

¹⁹⁵ *Id.* § 201.4(b). Students with disabilities are "entitled to an assessment by a multidisciplinary team to recommend accommodations and modifications necessary to meet the educational needs of the student." *Appeal of a Student with a Disability*, 34 Ed. Dept. Rep. 634 (1995).

¹⁹⁶ 8 NYCRR § 201.4(b).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* § 201.4(c).

¹⁹⁹ *Id.* § 201.4(d)(1).

²⁰⁰ *Appeal of a Student with a Disability*, 35 Ed. Dept. Rep. 22 (1995).

²⁰¹ *Id.*

²⁰² 8 NYCRR § 201.4(d)(2).

disability, the school district may impose a penalty.²⁰³ However, the student's placement may not be changed without compliance with due process requirements.²⁰⁴

No later than the date on which a decision is made to change the placement of a student with a disability to an interim alternate educational setting ("IAES"),²⁰⁵ or a decision to impose a suspension or removal,²⁰⁶ that constitutes a disciplinary change in placement,²⁰⁷ the parent must be notified of such decision and will be provided with the procedural safeguards notice.²⁰⁸

²⁰³ *Appeal of a Student with a Disability*, 36 Ed. Dept. Rep. 273 (1996). If no nexus is found, a student's anecdotal record may be considered but only under these circumstances. *Id.*

²⁰⁴ *Appeal of a Student with a Disability*, 35 Ed. Dept. Rep. 22 (1995).

²⁰⁵ 8 NYCRR § 201.2(k).

An interim alternative educational setting or IAES is a temporary educational placement, other than the student's current placement at the time the behavior precipitating the IAES placement occurred. A student who is placed in an IAES will:

- 1) Continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and
- 2) Receive as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

Id.

²⁰⁶ 8 NYCRR § 201.2(l) (Removal is defined as: "1) a removal of a student with a disability for disciplinary reasons from that student's current educational placement and 2) the change in placement of a student with a disability to an IAES by an impartial hearing officer.").

²⁰⁷ *Id.* § 201.2(e).

A disciplinary change in placement means a suspension or removal from a student's current educational placement that is either:

- 1) For more than 10 consecutive school days or
- 2) For a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year; because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and because such additional factors as the length of each suspension or removal, the total amount of time the student has been removed and the proximity of the suspensions or removals to one another. The school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

Id.

²⁰⁸ 8 NYCRR § 201.4(3).

Prior written notice must include:

- (i) a description of the action proposed or refused by the district;
- (ii) an explanation of why the district proposes or refuses to take the action;
- (iii) a description of other options that the CSE considered and the reasons why those options were rejected;
- (iv) a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action;
- (v) a description of other factors that are relevant to the CSE's proposal or refusal;

The trustees or board of education of any school district, a district superintendent of schools, or a building principal with the authority to suspend students pursuant to Education Law §3214 will have the authority to order the placement of a student with a disability into an appropriate IAES, another setting or suspension for a period not to exceed five (5) consecutive school days, and not to exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior.²⁰⁹

A superintendent of schools, either directly or upon recommendation of a hearing officer designated to conduct a superintendent's hearing, may order the placement of a student with a disability into an IAES, another setting, or suspension for up to ten (10) consecutive school days, inclusive of any period in which the student has been suspended or removed²¹⁰ for the same behavior.²¹¹ Should the superintendent determine that the student has engaged in behavior that warrants a suspension, the duration of any such suspension or removal will not exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior.²¹² Except for when a student with a disability has a pattern of suspensions or removals, a superintendent of schools may only order additional suspensions of not more than ten (10) consecutive school days in the same school year for separate incidents of misconduct.²¹³

However, a student with a disability may not be removed other than imposition of the five (5) or ten (10) school day suspension if the removal would result in a disciplinary change in placement based on pattern of suspensions or removal as determined by school personnel.²¹⁴ If the manifestation team has determined that the behavior was not a manifestation of such student's disability or the student is placed in an IAES, the student may be removed.²¹⁵

Should a student with a disability be charged with behavior involving serious bodily injury, weapons, illegal drugs or controlled substances, a superintendent of schools,

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- (vi) a statement that the parents of a student with a disability have protection under the procedural safeguards of this Part, and, if this notice is not an initial referral for an evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
 - (vii) sources for parents to contact to obtain assistance in understanding the provisions of this Part.

Id. § 201.7.

²⁰⁹ 8 NYCRR § 201.7(b).

²¹⁰ Irrespective of any suspension of five days or less for the same behavior issued by the Principal under 8 NYCRR § 201.7(b).

²¹¹ 8 NYCRR § 201.7(c).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* § 201.7(d).

²¹⁵ *Id.* § 201.7(d).

either directly or upon recommendation of a hearing officer, may order the change in placement of a student with a disability to an appropriate IAES, to be determined by the CSE for up to forty-five (45) school days, but not to exceed the period of suspension ordered by the Hearing Officer,²¹⁶ where the student:²¹⁷

- 1) Has inflicted serious bodily injury,²¹⁸ upon another person while at school, on school premises or at a school function under the jurisdiction of the educational agency;²¹⁹
- 2) Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of the educational agency;²²⁰ or
- 3) Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of the educational agency.²²¹

Notwithstanding the foregoing, the period of suspension or removal ordered by the superintendent may not exceed the amount of time that a nondisabled student would be suspended for the same behavior.²²² School personnel may also consider any unique circumstances on a case-by-case basis when determining whether a change in placement consistent with the other requirements of Part 201 of the Commissioner's Regulations is appropriate for a student with a disability who violates a school district's Student Code of Conduct.²²³

During any period of suspension, a student with a disability will be provided services to the extent required.²²⁴ During a suspension or removal for periods of up to ten (10) school days in a school year that do not constitute a disciplinary change in placement, students of compulsory attendance age with a disability will be provided with alternative instruction on the same basis as nondisabled students.²²⁵

²¹⁶ N.Y. EDUC. LAW § 3214(3).

²¹⁷ 8 NYCRR § 201.7(e)(1).

²¹⁸ *Id.* § 201.2(m) ("Serious bodily injury means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.").

²¹⁹ *Id.* § 201.7(e)(1)(i).

²²⁰ *Id.* § 201.7(e)(1)(ii).

²²¹ *Id.* § 201.7(e)(1)(iii).

²²² *Id.* § 201.7(e)(2).

²²³ *Id.* § 201.7(f).

²²⁴ *Id.* § 201.10(a).

²²⁵ *Id.* § 201.4(b).

B. Dignity for All Students Act (DASA)

The Dignity for All Students Act (“DASA”) was signed into law on September 13, 2010, and took effect on July 1, 2012 (with supplemental provisions on cyberbullying taking effect in July of 2013), to afford all students in public schools a safe and supportive school environment free of harassment, bullying and discrimination.²²⁶ The legislation amended the Education Law by creating Article 2, “Dignity for All Students.” The Act also expanded Section 801-a of the Education Law by requiring that the mandated course of instruction in grades kindergarten through twelve, in civility, citizenship and character education include a component raising awareness and sensitivity to discrimination or harassment and civility.²²⁷ Additionally, DASA amended Education Law, Section 2801 by requiring the inclusion of language, compliant with DASA, into school districts’ Codes of Conduct.²²⁸

1. Requirements for School Districts

i. Article 2 of the Education Law

DASA provides that no student will be subjected to harassment or bullying, nor will any student be subjected to discrimination based on the student’s “actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender²²⁹ or sex.”²³⁰ The law’s broad definition of harassment makes it clear that the law protects students from threats, intimidation and abuse based on, but not limited to, the above categories.²³¹ DASA applies to harassment, bullying or

²²⁶ N.Y. EDUC. LAW § 12 (McKinney 2018); *see also The Dignity Act for All Students*, N.Y. ST. EDUC. DEP’T (NYSED), <http://www.p12.nysed.gov/dignityact/> (last updated July 9, 2018).

²²⁷ N.Y. EDUC. LAW § 801-a (McKinney 2018).

²²⁸ *Id.* § 2801(n).

²²⁹ DASA states that “gender” means “actual or perceived sex and will include a person’s gender identity or expression.” *Id.* § 11(6).

²³⁰ *Id.* § 12(1).

²³¹ DASA defines harassment and bullying as:

the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that (a) has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being; or (b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

Id. § 11(7). The conduct, verbal threats, intimidation or abuse includes but is not limited to such acts “based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.” *Id.* The statute also includes the

discrimination of students by employees or students on school property or at a school function.²³² However, DASA does not prohibit denial of admission into, or exclusion from, a course of instruction based on a person's gender otherwise permissible under law, or to prohibit, as discrimination based on disability, actions that would otherwise be permissible under law.²³³

Under DASA, a school district's Board of Education is required to create policies and guidelines implementing its provisions. School districts must establish policies intended to create a school environment that is free from harassment, bullying, and discrimination; guidelines to be used in school training programs to discourage the development of harassment, bullying, and discrimination, and to make school employees aware of the effects of harassment, bullying, cyberbullying, and discrimination on students; guidelines that are designed to raise employees' awareness and sensitivity to potential harassment, bullying and discrimination, and to enable employees to prevent and respond to incidents of harassment, bullying and discrimination; as well as guidelines relating to the development of nondiscriminatory instructional and counseling methods.²³⁴

Additionally, a Dignity Act Coordinator must be appointed at every school. The Dignity Act Coordinator is an individual "thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex."²³⁵

Provisions in the policies and procedures must include, but not be limited to, provisions which:

1. Identify the principal, superintendent, or either individual's designee as the school employee charged with receiving reports of harassment, bullying and discrimination;²³⁶

2. Enable students and parents to make an oral or written report of harassment, bullying or discrimination to teachers, administrators and other school personnel that the school district deems appropriate;²³⁷

3. Require school employees who witness harassment, bullying or discrimination, or who receive an oral or written report of such incidents, to promptly

definition of "cyberbullying," which is defined as harassment or bullying occurring through any form of electronic communication. *Id.* § 11(8).

²³² N.Y. EDUC. LAW § 12(1).

²³³ *Id.*

²³⁴ *Id.* § 13(1)-(3).

²³⁵ *Id.* § 13(3).

²³⁶ *Id.* § 13(1)(A).

²³⁷ *Id.* § 13(1)(B).

orally notify the principal, superintendent or either individual's designee not later than one school day after such school employee witnesses or receives a report of harassment, bullying or discrimination, and to file a written report with the principal, superintendent or either individual's designee not later than two school days after making such oral report;²³⁸

4. Require the principal, superintendent or either individual's designee to lead or supervise the thorough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports;²³⁹

5. Require that when an investigation reveals any such verified harassment, bullying or discrimination, the school take prompt actions reasonably calculated to end the harassment, bullying or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such harassment, bullying or discrimination was directed. The actions must be consistent with the guidelines to be created by the school district related to the development of measured, balanced and age-appropriate responses to such incidents;²⁴⁰

6. Prohibit retaliation against any individual who, in good faith, reports, or assists in the investigation of harassment, bullying or discrimination;²⁴¹

7. Include a school strategy to prevent harassment, bullying and discrimination;²⁴²

8. Require the principal to make a regular report to the superintendent on data and trends related to harassment, bullying and discrimination;²⁴³

9. Require the principal, superintendent or either individual's designee to promptly notify the appropriate local law enforcement agency when such individual believes that any harassment, bullying or discrimination constitutes criminal conduct;²⁴⁴

10. Include appropriate references to the provisions of the school district's code of conduct that are relevant to harassment, bullying and discrimination;²⁴⁵

²³⁸ *Id.* § 13(1)(C).

²³⁹ *Id.* § 13(1)(D).

²⁴⁰ *Id.* § 13(1)(E).

²⁴¹ *Id.* § 13(1)(F).

²⁴² *Id.* § 13(1)(G).

²⁴³ *Id.* § 13(1)(H).

²⁴⁴ *Id.* § 13(1)(I).

²⁴⁵ *Id.* § 13(1)(J).

11. Require that at least once during each school year, each school provide all school employees, students and parents with a written or electronic copy of the school district's policies on bullying, harassment and discrimination created in accordance with DASA, or a plain-language summary thereof, which includes a notification of the process by which students, parents and school employees may report harassment, bullying and discrimination. However, it is not necessary for school districts to further distribute such policies and guidelines to school employees, students and parents if they otherwise do so;²⁴⁶ and

12. Require the school district to maintain current versions of the school district's policies created pursuant to the requirements of DASA, on the school district's internet website, if one exists.²⁴⁷

School Training Programs under DASA

Back in May of 2012, the Board of Regents adopted Regulations with respect to training requirements.²⁴⁸ The Regulations require school districts to establish guidelines to implement school employee training programs, which promote a positive school environment free from harassment, bullying, and discrimination, and to discourage and respond to such incidents. In addition, these Regulations were amended in 2013 to require school districts to create guidelines that also address bullying, and that make school employees aware of the effects of harassment, bullying, cyberbullying, and discrimination.²⁴⁹ The guidelines will include, but not be limited to, the following:

- training to raise awareness and sensitivity to potential acts of discrimination and/or harassment directed at students, committed by employees or students, on school property or at school functions, including but not limited to, discrimination and/or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. Such training must address the "social patterns of harassment, bullying and discrimination, the identification and mitigation of such acts, and strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings;"²⁵⁰
- training to enable employees to prevent and respond to incidents of discrimination, bullying and/or harassment;²⁵¹

²⁴⁶ *Id.* § 13(1)(K).

²⁴⁷ *Id.* § 13(1)(L).

²⁴⁸ See 8 NYCRR § 100.2.

²⁴⁹ N.Y. EDUC. LAW § 13(2).

²⁵⁰ 8 NYCRR § 100.2(jj)(3)(i); N.Y. EDUC. LAW § 13(5).

²⁵¹ 8 NYCRR § 100.2(jj)(3)(ii).

- training to make employees aware of the effects of harassment, bullying, cyberbullying, and/or discrimination on students;²⁵²
- training to ensure the effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging harassment, bullying and/or discrimination against students by students and/or school employees;²⁵³ and
- training to include safe and supportive school climate concepts in curriculum and classroom management.²⁵⁴

The Regulations do not specify the extent of the training required; however, the Regulations provide it may be incorporated into an existing professional development plan required under the Commissioner’s Regulations and/or conducted in conjunction with any other training for school employees.²⁵⁵ DASA and its accompanying regulations also require a school district’s board of education to create guidelines relating to the development of measured, balanced and age-appropriate responses to instances of harassment, bullying or discrimination by students. Such guidelines must include: (a) remedies and procedures that follow a progressive model that make appropriate use of intervention, discipline and education, which vary in method according to the nature of the behavior, the developmental age of the student and the student’s history of problem behaviors, and (b) are consistent with the school district’s code of conduct.²⁵⁶

Dignity Act Coordinator Training & Dissemination of Dignity Act Coordinator Information

Under DASA, Dignity Act Coordinators are required to receive training that coincides with the requirements of school training programs under Education Law §13. Therefore, Dignity Act Coordinators are required to be provided with training:

1. which addresses the social patterns of harassment, bullying and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;²⁵⁷

²⁵² *Id.* § 100.2(jj)(3)(iii).

²⁵³ *Id.* § 100.2(jj)(3)(iv).

²⁵⁴ *Id.* § 100.2(jj)(3)(v).

²⁵⁵ *See id.* § 100.2(jj)(3)(vi).

²⁵⁶ N.Y. EDUC. LAW § 13(4).

²⁵⁷ 8 NYCRR § 100.2(jj)(4)(iii).

2. in the identification and mitigation of harassment, bullying and discrimination;²⁵⁸ and

3. in strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings.²⁵⁹

Furthermore, Dignity Act Coordinators and school employees should be informed during the training program that the Regulations should not be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender, or to prohibit discrimination based on disability, that would be permissible under law.²⁶⁰

Additionally, the Commissioner's Regulations include requirements for appointment of, and dissemination of information regarding, the Dignity Act Coordinator(s). The Dignity Act Coordinator(s) must be approved by the board of education, trustees or board of trustees and "be employed by such school district, BOCES or charter school, as applicable, and be licensed and/or certified by the Commissioner as a classroom teacher, school counselor, school psychologist, school nurse, school social worker, school administrator or supervisor, or superintendent of schools."²⁶¹ Also, their name(s) and contact information must be shared with all personnel, students and parents.

The Regulations require that contact information be disseminated in the following manner:

1. listing the information in the Code of Conduct and updates thereto posted on the school district's website;²⁶²
2. including the information in the plain language summary of the Code of Conduct provided to all parents at the beginning of the year;²⁶³
3. including the information to parents and persons in parental relation at least once per school year in a manner determined by the school, including, but not limited to, through electronic communication and/or sending the information home with students;²⁶⁴
4. posting the information in highly-visible areas of school buildings;²⁶⁵ and

²⁵⁸ *Id.* § 100.2(jj)(4)(iv).

²⁵⁹ *Id.* § 100.2(jj)(4)(v).

²⁶⁰ *Id.* § 100.2(jj)(5).

²⁶¹ *Id.* § 100.2(jj)(4)(vi).

²⁶² *Id.* § 100.2(jj)(4)(vii)(a).

²⁶³ *Id.* § 100.2(jj)(4)(vii)(d).

²⁶⁴ *Id.* § 100.2(jj)(4)(vii)(e).

²⁶⁵ *Id.* § 100.2(jj)(4)(vii)(b).

5. making the information available at the school district and at school-level administrative offices.²⁶⁶

In the event the Dignity Act Coordinator vacates his/her position, another school employee will immediately be designated for an interim appointment as Coordinator, pending approval of a successor Coordinator within thirty (30) days.²⁶⁷

ii. Education Law, Section 801-a

Under Education Law, Section 801-a, school districts are required to provide instruction in civility, citizenship and character education which includes a component instructing students on the principles of honesty, tolerance, personal responsibility, respect for others, observance of laws and rules, courtesy, dignity and other traits that will enhance the quality of students' experiences in, and contributions to, the community.²⁶⁸ The course must also include an additional component which emphasizes discouraging acts of harassment, bullying and discrimination. This component must include instruction of safe, responsible use of the Internet and electronic communications. DASA expands the concepts of "tolerance," "respect for others" and "dignity" by requiring school districts, when providing the required civility, citizenship, and character education, to include in such instruction, raising "awareness and sensitivity to discrimination, bullying or harassment and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes."²⁶⁹

Commissioner's Regulations

In line with Section 801-a of the Education Law, Section 100.2(c) of the Commissioner's Regulations outlines the required subjects of instruction in elementary and secondary schools.²⁷⁰ The regulation includes a requirement that all public school students, other than students in charter schools, receive instruction in civility, citizenship and character education as required by Section 801-a of the Education Law.

Additionally, the Board of Regents adopted a Regulation that became effective on July 1, 2012, which includes a provision requiring charter schools to provide instruction that supports the development of a school environment free of harassment, bullying, and discrimination as required by DASA.²⁷¹ Charter schools were previously exempt from the requirement. The instruction must contain the same components as the instruction

²⁶⁶ *Id.* § 100.2(jj)(4)(vii)(c).

²⁶⁷ *Id.* § 100.2(jj)(4)(viii).

²⁶⁸ N.Y. EDUC. LAW § 801-a.

²⁶⁹ *Id.*

²⁷⁰ *See* 8 NYCRR § 100.2(c).

²⁷¹ *See id.* § 119.6.

provided by other public schools. However, because it is not necessary for charter schools to provide a curriculum component on civility, citizenship and charter education, the instruction must be incorporated into another portion of a charter school's curriculum.²⁷²

iii. Education Law Section 2801 and Codes of Conduct

DASA amended Section 2801 of the Education Law, by requiring school districts to include in their Codes of Conduct provisions in compliance with Article 2 of the Education Law, or DASA. Specifically, Article 2 of the Education Law requires inclusion into a school district's Code of Conduct, a version of the policy prohibiting harassment and bullying of students by employees or students, and/or discrimination by same, based upon a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.²⁷³ The policy must be age appropriate and written in plain language.²⁷⁴ Currently, Education Law § 2801(5) requires school districts to annually review their Codes of Conduct and update them if necessary.²⁷⁵

Commissioner's Regulations

Section 100.2(l)(2) of the Commissioner's Regulations, which sets forth the provisions required to be included in a Code of Conduct, were amended in accordance with DASA. Specifically, the Regulations require that school districts modify their Codes of Conduct to include:

- “provisions prohibiting harassment, bullying and/or discrimination against any student, by employees or students, [on school property and/or at a school function or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property,] that creates a hostile environment by conduct, [with or without physical contact and/or by verbal] threats, intimidation or abuse, including cyberbullying [of such a severe nature] that either: (1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (2) reasonably causes or would reasonably be expected to cause physical injury to a student to fear for his or her physical safety. ... Such conduct will include, but is

²⁷² See *id.* § 100.2(c)(2); see also *id.* § 119.6.

²⁷³ N.Y. EDUC. LAW § 12; see also N.Y. EDUC. LAW ART. 2.

²⁷⁴ N.Y. EDUC. LAW § 12(2).

²⁷⁵ *Id.* § 2801(5).

not limited to, acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, or sex."²⁷⁶

- "disciplinary measures to be taken for incidents on school property or at school functions involving harassment, bullying and/or discrimination."²⁷⁷
- "provisions for responding to acts of bullying, harassment and/or discrimination against students by employees or students ... which, with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses will be reasonably calculated to end the harassment, bullying and/or discrimination, prevent recurrence, and eliminate the hostile environment. The progressive model of student discipline will be consistent with the other provisions of the code of conduct."²⁷⁸
- "provisions setting forth the procedures by which local law enforcement agencies will be notified promptly of code violations, including but not limited to incidents of harassment, bullying, and/or discrimination, which may constitute a crime."²⁷⁹
- "a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which will be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis."²⁸⁰
- "guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, harassment, bullying and discrimination against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management."²⁸¹

²⁷⁶ 8 NYCRR § 100.2(l)(2)(ii)(b).

²⁷⁷ *Id.* § 100.2(l)(2)(ii)(g).

²⁷⁸ *Id.* § 100.2(l)(2)(ii)(h).

²⁷⁹ *Id.* § 100.2(l)(2)(ii)(l).

²⁸⁰ *Id.* § 100.2(l)(2)(ii)(r).

²⁸¹ *Id.* § 100.2(l)(2)(ii)(s).

- “provisions prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.”²⁸²

Furthermore, Section 100.2(1)(2) of the Commissioner’s Regulations also requires Boards of Education and Boards of Cooperative Educational Services to ensure community awareness of their Codes of Conduct by posting the complete Code of Conduct, including any annual updates or amendments thereto, on their website, if they maintain one, and by providing copies of a summary of the Code of Conduct to all students, in an age-appropriate, plain-language version, either at a school assembly held at the beginning of each school year or by mailing it to all persons in parental relation before the beginning of each school year.²⁸³ Additionally, school districts are to provide a complete copy of the Code of Conduct to all existing and new teachers and to make a complete copy available for review by students, parents, other school staff and other community members.²⁸⁴

iv. School Safety Plans

In addition to codes of conduct, school districts must also adopt and amend a comprehensive district-wide school safety plan and building level emergency response plans regarding crisis intervention, emergency response, and management.²⁸⁵ These plans must be developed by a district-wide school safety team and a building level emergency response team.²⁸⁶

Such comprehensive district wide safety plans must include the following:

- 1) Policies and procedures for responding to implied or direct threats of violence by students, teachers, or other school personnel as well as visitors to the school, including threats by students against themselves, including suicide.²⁸⁷
- 2) Policies and procedures for responding to acts of violence by students, teachers, other school personnel, as well as school visitors, including consideration of zero-tolerance policies for school violence.²⁸⁸
- 3) Appropriate prevention and intervention strategies, including:²⁸⁹

²⁸² *Id.* § 100.2(1)(2)(ii)(t).

²⁸³ *Id.* § 100.2(1)(2)(iii)(b).

²⁸⁴ *Id.*

²⁸⁵ N.Y. EDUC. LAW § 2801-a(1) (McKinney 2018).

²⁸⁶ *Id.*

²⁸⁷ *Id.* § 2801-a(2)(a).

²⁸⁸ *Id.* § 2801-a(2)(b).

- a) Collaborative arrangements with state and local law enforcement officials, designed to ensure that school safety officers and other security personnel are adequately trained, including being trained to de-escalate potentially violent situations;²⁹⁰
 - b) Non-violent conflict resolution training programs;²⁹¹
 - c) Peer mediation programs and youth courts;²⁹² and
 - d) Extended day and other school safety programs.²⁹³
- 4) Policies and procedures for contacting appropriate law enforcement officials in the event of a violent incident.²⁹⁴
 - 5) Policies and procedures for contacting parents, guardians or persons in parental relation to the students of the district in the event of a violent incident and policies and procedures for contacting parents, guardians, or persons in parental relation to an individual student of the district in the event of an implied or direct threat of violence by such student against themselves, including suicide.²⁹⁵
 - 6) Policies and procedures relating to school building security, including where appropriate the use of school safety officers and/or security devices or procedures.²⁹⁶
 - 7) Policies and procedures for the dissemination of informative materials regarding the early detection of potentially violent behaviors.²⁹⁷
 - 8) Policies and procedures for annual school safety training for staff and students.²⁹⁸
 - 9) Protocols for responding to bomb threats, hostage taking, intrusions, and kidnappings.²⁹⁹

²⁸⁹ *Id.* § 2801-a(2)(c).

²⁹⁰ *Id.* § 2801-a(2)(c)(i).

²⁹¹ *Id.* § 2801-a(2)(c)(ii).

²⁹² *Id.* § 2801-a(2)(c)(iii).

²⁹³ *Id.* § 2801-a(2)(c)(iv).

²⁹⁴ *Id.* § 2801-a(2)(d).

²⁹⁵ *Id.* § 2801-a(2)(e).

²⁹⁶ *Id.* § 2801-a(2)(f).

²⁹⁷ *Id.* § 2801-a(2)(g).

²⁹⁸ *Id.* § 2801-a(2)(h).

²⁹⁹ *Id.* § 2801-a(2)(i).

- 10) Strategies for improving communication among students and between students and staff and reporting of potentially violent incidents, such as the establishment of youth-run programs, peer mediation, conflict resolution, creating a forum or designating a mentor for students concerned with bullying or violence and establishing anonymous reporting mechanism for school violence.³⁰⁰
- 11) A description of the duties of hall monitors and any other school safety personnel.³⁰¹

A building level emergency response plan must include the following elements:

- 1) Policies and procedures for response to emergency situations, such as those requiring evacuation, sheltering, and lock-down.³⁰²
- 2) Designation of an emergency response team comprised of school personnel, law enforcement officials, fire officials, and representatives from local regional and/or state emergency response agencies.³⁰³
- 3) Floor plans, blueprints, schematics, or other maps of the school interior, school grounds and road maps.³⁰⁴
- 4) Establishment of internal and external communication systems in emergencies.³⁰⁵
- 5) Definition of the chain of command in a manner consistent with the national interagency incident management system/incident command system.³⁰⁶
- 6) Coordination of the emergency response plan with the state-wide plan for disaster mental health services to assure that the school has access to federal, state, and local mental health resources.³⁰⁷
- 7) Procedures for review and the conduct of drills and other exercises to test components of the emergency response plan.³⁰⁸

³⁰⁰ *Id.* § 2801-a(2)(j).

³⁰¹ *Id.* § 2801-a(2)(k).

³⁰² *Id.* § 2801-a(3)(a).

³⁰³ *Id.* § 2801-a(3)(b).

³⁰⁴ *Id.* § 2801-a(3)(c).

³⁰⁵ *Id.* § 2801-a(3)(d).

³⁰⁶ *Id.* § 2801-a(3)(e).

³⁰⁷ *Id.* § 2801-a(3)(f).

³⁰⁸ *Id.* § 2801-a(3)(g).

- 8) Policies and procedures for securing and restricting access to the crime scene in order to preserve evidence in cases of violent crimes on school property.³⁰⁹

2. Requirements for the Commissioner of Education

DASA requires the Commissioner of Education to provide direction, which may include model policies, to school districts to prevent harassment, bullying, and discrimination.³¹⁰ The Commissioner must also provide grants to school districts to facilitate the implementation of the guidelines.³¹¹ In addition, DASA requires the Commissioner to promulgate regulations to assist school districts in implementing this law, as well as provide guidance related to the application of the regulations. Such regulations will include, “but not [be] limited to, regulations to assist school districts in developing measured, balanced and age appropriate responses to violations of this policy, with remedies and procedures following a progressive model that makes appropriate use of intervention, discipline and education.”³¹²

Additionally, DASA requires the Commissioner to create a procedure so that school districts report to the State Education Department, at least annually, material incidents of discrimination, bullying and harassment on school grounds or at a school function.³¹³ The reports must delineate the specific nature of the incidents of harassment, bullying or discrimination and may comply with the reporting requirements through the use of the existing uniform violent incident reporting system.³¹⁴

Furthermore, the Commissioner must provide school districts with guidance and educational materials relating to best practices in addressing cyberbullying and which help families and communities work cooperatively with schools in addressing cyberbullying, whether it occurs on or off school property, or at or away from a school function.³¹⁵

The Commissioner will also prescribe regulations that require, in addition to all other certification and licensing requirements, that school professionals applying for a certificate or a license, on or after July 1, 2013, have completed training on the social patterns of harassment, bullying and discrimination and the identification and mitigation of same, as well as strategies for effectively addressing problems of exclusion, bias and aggression in educational settings. This includes, but is not limited to, certificates or licenses for service as a classroom teacher, school counselor, school

³⁰⁹ *Id.* § 2801-a(3)(h).

³¹⁰ *Id.* § 14(1).

³¹¹ *Id.* § 14(2).

³¹² *Id.* § 14(3).

³¹³ *Id.* § 15.

³¹⁴ *Id.*

³¹⁵ *Id.* § 14(4).

psychologist, school social worker, school administrator or supervisor, or superintendent of schools.³¹⁶

Reporting Regulations

The Commissioner has created Regulations amending Section 100.2 of the Commissioner's Regulations to add a Dignity Act reporting requirement. The Regulations require each school district to submit to the Commissioner an annual report of material incidents of discrimination, bullying and harassment that occurred in such school year, in accordance with Education Law Section 15 and the Commissioner's Regulations. The reports will be submitted in a manner prescribed by the Commissioner, on or before the basic educational data system (BEDS) reporting deadline or at such other date as determined by the Commissioner.³¹⁷ The reports will include material incidents of harassment, bullying, and/or discrimination resulting from an investigation of a written or oral complaint made to the superintendent, school principal or their designee, or any other school employee; or are otherwise directly observed by such individuals regardless of whether a complaint is made.³¹⁸

In accordance with the Regulations, a "material incident of harassment, bullying, and/or discrimination" is:

"a single verified incident or a series of related verified incidents where a student is subjected to harassment, bullying, and/or discrimination by a student and/or employee on school property or at a school function. In addition, such terms will include a verified incident or series of related incidents of harassment or bullying that occur off school property, [where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property], and is the subject of a written or oral complaint to the superintendent, principal, or their designee, or other school employee. Such conduct will include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender or sex."³¹⁹ Denials of admission into, or exclusion from a course of instruction, based on gender or disability that would be permissible under law are excluded from this definition.

The report will include: the types of bias involved and where multiple types of bias are involved, all should be reported; whether the incident resulted from student and/or employee conduct; whether the incident involved physical contact and/or verbal

³¹⁶ *Id.* § 14(5).

³¹⁷ 8 NYCRR § 100.2(kk)(3)(i).

³¹⁸ *Id.* § 100.2(kk)(3)(ii).

³¹⁹ *Id.* § 100.2(kk)(1)(ix).

threats, intimidation or abuse, including cyberbullying; and the location where the incident occurred.³²⁰

3. Immunity from Liability for Reporting Incidents

DASA provides for immunity for good faith reporting. Specifically, any person having reasonable cause to suspect that a student has been subjected to discrimination, bullying or harassment who, acting reasonably and in good faith, reports such incident to school officials, the Commissioner, or police, or otherwise initiates, testifies, participates or assists in a proceeding, will have immunity from any civil liability that arises from taking of such action. No school district or employee will retaliate against such person.³²¹

Reporting Regulation

The aforementioned Regulation regarding reporting requirements includes a provision protecting good faith reporters and prohibiting retaliation that is directly in line with Article 2 of the Education Law.

4. Application to Charter Schools

Under Regulation 8 NYCRR § 119.6, each charter school must include in its Code of Conduct provisions prohibiting harassment, bullying and discrimination, in accordance with the requirements for public schools.

IV. Sub-Committee Reports and Observations

The readily available research discussed below demonstrates that despite efforts to comply with the mandates of the Education Law, other alternatives are necessary to treat with those unfortunate situations when a chain of events starting with a student suspension lead to the undesirable consequences of the School to Prison Pipeline.

A. Populations Subject to Disparate Treatment

The suspensions or other disciplinary measures currently taken against students pursuant to Education Law Section 3214 is of an extreme disparate nature. In the School to Prison Pipeline Report issued by the American Bar Association (hereinafter referred to as “ABA Report”), it concludes that students of color, students with disabilities, and LGBTQ students all experience the adverse impacts caused by suspensions and other disciplinary actions at far higher rates than would be expected

³²⁰ *Id.* § 100.2(kk)(3)(iii).

³²¹ N.Y. EDUC. LAW § 16 (McKinney 2018).

based on their numbers in the student population.³²² Such disparate treatment of these classes of students is also evident in New York due to the application of Education Law Section 3214.

While the School to Prison Pipeline has been a genuine problem for quite some time, recent data from the U.S. Department of Education's Civil Rights Data Collection shows that there is significant disparity among certain classes of students. "This disproportionality manifests itself all along the educational pipeline from preschool to juvenile justice and even to adult prison for students of color, for students with disabilities, for LGBTQ students, and for other groups in particular settings. These students are poorly served at every juncture."³²³

The ABA Report specifically states that "[s]tudents of color are disproportionately:

- lower achievers and unable to read at basic or above [average];
- damaged by lower expectations and lack of engagement[;]
- retained in grade or excluded because of high stakes testing[;]
- subject to more frequent and harsher punishment[;]
- placed in alternative disciplinary schools or settings[;]
- referred to law enforcement or subject to school-related arrest[;]
- pushed or dropping out of school[;]
- failing to graduate from high school[; and]
- feel threatened at school and suffer consequences as victims."³²⁴

The disproportionality mentioned above also manifests itself in similar ways for students with disabilities, and other factors such as race and ethnicity, gender, and disability compound the disproportionality. Specifically, "[s]tudents with disabilities (or those who are labeled as disabled by the school) are disproportionately:

- students of color, especially in discretionary categories under the Individuals with Disabilities Education Act (IDEA);
- less likely to be academically proficient;
- disciplined, and more harshly so;
- retained in grade, but still dropping out or failing to graduate;
- more likely to be placed in alternative disciplinary schools or settings;
- or otherwise more likely to spend time out of the regular classroom, to be secluded or restrained; and

³²² Sarah E. Redfield & Jason P. Nance, *American Bar Association Joint Task Force on Reversing the School-to-Prison-Pipeline*, AMERICAN BAR ASSOCIATION 10-11 (2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf [hereinafter ABA Report].

³²³ *Id.* at 10.

³²⁴ *Id.*

- referred to law enforcement or subject to school-related arrest and incarceration.”³²⁵

Further, the ABA Report found that the disparities in treatment for student suspensions are also present in the juvenile justice system where youth of color, youth with disabilities, and LGBTQ youth are typically disproportionately arrested, referred, detained (longer), charged, found delinquent (or transferred to adult court).³²⁶ The juveniles in the system statistically have been disproportionately imprisoned rather than sentenced to a diversion program or probation in order to help rehabilitate the person.³²⁷ As a byproduct, those caught in the School-to-Prison Pipeline are less likely to have access to meaningful education to enable them to graduate from high school and prepare them for higher education and work opportunities.³²⁸

The ABA Report ultimately concludes that the disproportionality of suspensions among social and racial classes cannot be explained by the notion that “certain groups are more likely to be engaged in bad or delinquent behavior.”³²⁹ Rather, the authors of the ABA report cite major causes of the disparities such as the wide discretion contained in most student discipline codes.³³⁰ Since there is a strong correlation between attendance and academic success, multiple suspensions lead to academic failure and a far higher risk of criminal justice system involvement.³³¹ Most importantly, it is evident from the data that that disciplinary actions, including suspensions, do not lead to better outcomes for students, nor does it help provide for a safer school setting.³³²

The ABA Report detailed the disparate nature of the School to Prison Pipeline on a national level. The national data portrays the use of student suspensions as a tool to support the biases that are held in everyday life. As stated above, this Task Force was tasked with the mission to determine whether such biases and disparate treatments extend to New York State School Districts based on the language of Education Law §3214.

1. Does New York Have a Disparities Problem?

As discussed *infra*, Education Law Section 3214 permits school districts to suspend students as a means of disciplinary action. Such suspensions can be levied by a School Principal of five or less days, or by the Superintendent of Schools, if the suspension is to

³²⁵ *Id.* at 11.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 20.

³³⁰ *Id.* at 18-20.

³³¹ *Id.* at 20-22.

³³² *Id.* at 22-24.

be longer than five days.³³³ In each type of suspension, the student is entitled to due process in the form of an informal conference, if the suspension is issued by the Principal, or in the form of a Superintendent's Hearing, if the suspension is issued by the Superintendent. It is apparent from the data regarding out of school suspensions within New York State that the disparities problem explained below is predominant among large urban school districts.

During the 2016-2017 school year, there were 35,234 total suspensions in New York City Schools.³³⁴ 25,696 (72.9%) of these suspensions were a short-term principal's suspension while 9,538 (27.1%) of these suspensions were long-term suspensions.³³⁵ Of those suspensions, 46.9% of the suspensions were of black students, even though black students encompassed only 26.5% of the entire student population.³³⁶ 38.9% of the suspensions were students that had an individualized education plan ("IEP"), despite only 19.4% of the entire student population having an IEP.³³⁷ In 2015-2016, nearly 50% of the 37,647 suspensions were Black students, whereas 38.6% of the suspensions were students with an IEP.³³⁸ The student population was only 27.1% Black and 18.7% of students had an IEP.³³⁹ It is evident from this data, that there is clearly a disparity of suspensions for Black students and students with IEPs.

Furthermore, during the 2016-2017 school year, black students in school districts outside of New York City were suspended at a rate of four times more than the suspension of white students.³⁴⁰ Additionally, while the total suspension rate of students was the highest in high schools across New York State, black students in

³³³ N.Y. EDUC. LAW § 3214.

³³⁴ *Student Safety Act Reporting on Suspensions: 2016-2017 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_factsheet_2016-2017.pdf (last visited Dec. 19, 2018). The total number of suspensions reported by New York City for the 2017-2018 academic year has increased to 36,668 which amounts to a 4.1% from 2016-2017. *Student Safety Act Reporting on Suspensions: 2017-2018 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_fact_sheet_2017-2018.pdf (last visited Dec. 19, 2018).

³³⁵ *Student Safety Act Reporting on Suspensions: 2016-2017 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_factsheet_2016-2017.pdf (last visited Dec. 19, 2018).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Student Safety Act Reporting on Suspensions: 2015-2016 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/SSA_Suspension_FactSheet_2015-2016.pdf (last visited Dec. 19, 2018).

³³⁹ *Id.*

³⁴⁰ *Stolen Time: New York State's Suspension Crisis*, THE NEW YORK EQUITY COALITION 4-7 (Dec. 2018), available at <https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/sites/5/2018/12/09090556/Stolen-Time.pdf>.

primary and middle schools were suspended nearly five times more than white students.³⁴¹

Research also shows that students of color are more likely to be referred to law enforcement for disciplinary infractions than Caucasian students.³⁴² In the second quarter of 2018, 58% of the law enforcement arrests in New York City schools were black students while only 6.3% of arrests were white students.³⁴³ As these students are referred to law enforcement, the likelihood of future referrals outside of student code of conduct referrals increases. In a study completed in Texas, students who were suspended or received referrals were three times as likely as a non-suspended student to enter the juvenile system within one year of the disciplinary infraction.³⁴⁴

This nationwide issue also extends to school districts in New York. As stated previously, the data collected by the United States Department of Education, Office of Civil Rights, indicates that school districts suspend students of color and students with disabilities at significantly higher rates than white students and those without disabilities.³⁴⁵ A comprehensive report was completed by a Task Force chaired by former Chief Judge Judith Kaye, which found that in the New York City School District:

- Most suspensions are for minor and common school misbehavior;
- Students of Color and students receiving special education services are suspended in disproportionate numbers;
- There was no evidence that the higher rate of suspensions for students of color was linked to higher rates of misbehavior;
- The disproportionality of suspensions for students of color had increased as the number of suspensions overall had decreased; and
- The majority of suspensions were concentrated among a small number of schools.³⁴⁶

³⁴¹ *Id.*

³⁴² American Civil Liberties Union, *School-to-Prison Pipeline [Infographic]*, ACLU <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/school-prison-pipeline-infographic> (last visited Dec. 28, 2018).

³⁴³ New York Civil Liberties Union, *Student Safety Act Reporting*, NYCLU https://www.nyclu.org/sites/default/files/ssa_2018_q2_nyclu.pdf (last visited Dec. 28, 2018).

³⁴⁴ Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, COUNCIL OF ST. GOV'TS JUST. CENTER, xii (July 2011), available at https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.

³⁴⁵ U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., *supra* note 3.

³⁴⁶ *Keeping Kids In School and Out of Court: New York City School Justice Partnership Task Force Report and Recommendations*, N.Y. ST. PERMANENT JUD. COMMISSION ON JUST. FOR CHILD., 4-6 (2013), <https://www.nycourts.gov/IP/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>.

As stated above, across New York State, there is evidence of disparate treatment of suspensions toward minority students and those students with IEPs. The issue of disproportional treatment towards student suspensions in school districts is not limited to New York City. In 2014 the New York State Attorney General's Office entered into consent decrees with the cities of Syracuse³⁴⁷ and Albany³⁴⁸ School Districts in an effort to correct disparate discipline.

In Syracuse, the New York State Attorney General's Office determined that:

[R]acial disparities exist throughout the disciplinary process, as black students are disciplined at higher rates than white students. Overall, during the 2011-2012 school year, almost 44% of black students received at least one teacher referral, while the figure for white students was nearly 26%. For in-school suspensions, nearly 27% of black students received at least one in-school suspension, while 15% of white students received such a suspension. Finally, 25% of black students received at least one suspension out of school, while 12% of white students received at least one such suspension. For black students in middle school grades, 62% received at least one teacher referral, 44% received at least one in-school suspension, and 42% received at least one out-of-school suspension, compared to figures of 41%, 26% and 28% for white students, respectively. Black students were recommended for Superintendent's Hearings—a necessary precursor to Long-Term Suspensions—at twice the rate as white students. During the 2012-2013 school year, one in every ten black students in secondary school (grades 6-12) was recommended for Superintendent's Hearings, whereas one in every twenty white students in secondary school received such a recommendation.³⁴⁹

Additionally, in Albany, the New York State Attorney General's Office determined that there was "significant racial disparities in rates of referral."³⁵⁰

For each school year between August 2009 and May 2014, over 40% of all black students received at least one office referral, compared to 20% of all white students. These disparities result from policies that vest wide

³⁴⁷ Investigation of Eric T. Schneiderman, Att'y Gen. of the State of N.Y. of Syracuse City Sch. Dist., AOD No. 14-159, (Off. of the Att'y Gen. of the State of N.Y., Civ. Rts. Bureau July 10, 2014), *available at* https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/Syracuse_City_School_District_AOD-Executed.pdf [hereinafter Syracuse City Sch. Dist. Consent Decree].

³⁴⁸ Investigation of Eric T. Schneiderman, Att'y Gen. of the State of N.Y. of the City Sch. Dist. of Albany, AOD No. 15-243, (Off. of the Att'y Gen. of the State of N.Y., Civil Rights Bureau Dec. 4, 2015), *available at* https://www.albanyschools.org/district/Programs/AG_report/2015-16/AG_agreement_12-15.pdf [hereinafter City Sch. Dist. of Albany Consent Decree].

³⁴⁹ Syracuse City Sch. Dist. Consent Decree, *supra* note 347, at 6.

³⁵⁰ City Sch. Dist. of Albany Consent Decree, *supra* note 348, at 8.

discretion in staff to remove students from the classroom without adequate guidance or limitation on exercising that discretion. Since 2012, the District has made concerted efforts to increase training opportunities for staff in classroom management, cultural competency, and positive behavior interventions and supports.³⁵¹

Further, the school district also engaged in disparate treatment towards other minority students, as well as students with disabilities. Such disparate treatment was also seen in gender based cases as well as amongst age groups.

While there are school districts with significant disproportionality among certain student groups when issuing suspensions and are inappropriately influenced by gender, race, disability, there are many school districts that do not administer discipline in a disproportionate manner. This suggests that some school districts within New York State may be models for reform within a district.

2. *The Role of Implicit Bias, Coupled with Vague Definitions of Misconduct, in Creating Disparities*

The ABA Report,³⁵² and recent reports from the NAACP Legal Defense Fund (“NAACPLDF”)³⁵³ and the U.S Government Accountability Office³⁵⁴ identify the combination of implicit bias and the discretion offered by vaguely defined offenses, like disobedience, defiance and disruption, as factors that permit unintended disparities to be created.

The NAACPLDF Report succinctly explains the interrelationship between implicit bias and vague disciplinary standards:

“The inclusion of discretionary offenses for which students may be suspended has disproportionately harmed Black students even though Black students are not more likely to act out in school. Research has consistently established that Black students do not have higher rates of misconduct than other students. Rather, Black students are disproportionately disciplined for more subjective offenses, such as disrespecting a teacher or being perceived as a threat, than their White

³⁵¹ *Id.* at 8-9.

³⁵² See ABA Report, *supra* note 322, at 18-20, 54-56.

³⁵³ AJMEL QUERESHI & JASON OKONOFUA, LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE 4 (Jin Hin Lee et al. eds., 2017), https://www.naacpldf.org/wp-content/uploads/LDF_Bias_Report_WEB-2.pdf [hereinafter NAACPLDF Report].

³⁵⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-258, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 4 (2018).

counterparts. These disparities result from and perpetuate stereotypes about Black students, specifically the stereotype that they are aggressive and dangerous.

Only recently have we fully understood that not only do such disparities perpetuate stereotypes regarding students of color, but are themselves the product of stereotypes subconsciously present in almost all of us. Every day, each of us is exposed to a variety of media that communicate negative stereotypes about persons of color. These stereotypes, unknowingly, affect behaviors of all people, including teachers. Teachers develop implicit biases that cause them to interpret otherwise innocent behavior as part of a pattern of negative behavior inherent in the student. Paired with disciplinary codes that define misconduct in vague terms, stereotypes significantly shape teacher decisions as to which students they punish. These discriminatory behaviors affect not only teachers, but the students who are their victims. Reacting to years of discriminatory treatment, students may adjust their behavior, reacting coldly to teachers with whom they are not familiar, fearing that the teacher, like others, will unfairly target them for discipline.”³⁵⁵

In order reduce the disparities in discipline that contribute to the School to Prison Pipeline school districts need timely and accurate information on the location and populations within their district where disparities are shown to be occurring, and access to research based tools to remedy them. The Trump Administration’s Federal Commission on School Safety stated in a report issued on December 18, 2018, that the 2014 guidance issued jointly by the U.S. Department of Education and the Department of Justice, which requires schools to monitor and remediate disparities in discipline by race, disabilities and other factors, should be abandoned.³⁵⁶ The New York State Education Department (“NYSED”) already collects information on discipline that can be used to identify disparities by race, gender, and disability (and by combinations of them) at both the district and school level. Since the 2014 Federal guidance forms the basis of NYSED’s requirements,³⁵⁷ the Task Force recommends that NYSED adopt its own disparities regulations that do not depend on the Federal guidance. Since the research discussed above shows that simply reducing the total number of suspensions

³⁵⁵ NAACPLDF Report, *supra* note 349, at 4 (citations omitted) (internal quotation marks omitted).

³⁵⁶ Federal Commission on School Safety, *Final Report of the Federal Commission on School Safety*, 67-72 (Dec. 18, 2018), available at <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

³⁵⁷ The “2014 School Discipline Guidance Package” issued by the U.S. Department of Education and the U.S. Department of Justice can be found on the U.S. Department of Education’s website. *School Climate and Discipline: Federal Efforts*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html> (last modified Dec. 8, 2015). The guidance package contains four documents: (1) Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline; (2) Guiding Principles; (3) Directory of Federal School Climate and Discipline Resources; and (4) Compendium of School Discipline Laws and Regulations.

alone will not cure the disparities problem and may indeed make it worse, an approach that is explicitly targeted at reducing disparities will be needed to actually reduce disparities in discipline across protected groups and to reduce the School-to-Prison Pipeline. One such approach is the use of restorative justice practices which is described below in more detail.

In an effort to achieve an informed approach to the adoption of disparities regulations, the Task Force suggests the New York State Education Department/Board of Regents consider the following regarding the collection of data. While existing data does suggest implicit bias and the resulting disparate treatment of students of color or who have disabilities in the state's large urban areas, there are hundreds of suburban and rural school districts in the State.

1. The adoption of a standardized methodology for measuring disparities in discipline at both district and school levels across the protected classes of race, gender, disability and, if possible, by LGBTQ status. Annually this information should be reported to Districts and the public. Districts that have district-wide or school disparities above a threshold point set by the State Education Department would be required to develop remedial plans with targets and goals to reduce the disparities below the threshold within a reasonable period of time.
2. Using the current research on strategies that are effective in the reduction of disparities, the State Education Department should consider the development of model materials and processes that districts can use to analyze the root causes of the disparities shown in their data and information on strategies including training, services, courses, materials, consultants, and best practices that have been shown to successfully reduce disparities in discipline.

B. Restorative Justice & Current Productive Practices

Efforts have been made throughout the country regarding utilization of restorative justice as an integral part of the student disciplinary process. New York has been among one of the states to begin exploring the use of restorative justice alternatives rather than only using the traditional punitive model of suspending students for bad behavior. As explained in further detail below, restorative justice alternatives allow for a more instructive and effective model of discipline by permitting students to learn and grow from their mistakes while continuing their educational path.

Restorative justice is an increasingly acknowledged and employed approach to school discipline, behavior, and relationships. Restorative justice operates with an underlying thesis that "human beings are happier, more cooperative and productive, and more

likely to make positive changes in their behavior when those in positions of authority do things *with* them, rather than *to* or *for* them.”³⁵⁸ Restorative justice lies at the intersection of criminal justice, school culture, and professional development. As an increasing amount of evidence demonstrates the long-standing system of punitive discipline to be not only ineffective in reducing behavioral incidents but to be detrimental to young people, particularly those of color, school districts are increasingly turning to the research-supported practices of restorative justice.³⁵⁹ In New York State, numerous cities have introduced initiatives to bring restorative justice into their schools. For example, in 2015, New York City’s Department of Education instituted a policy toward behavior that incorporated restorative justice, which was precipitated by a two-decade long rise in student suspensions and an overrepresentation of black students being suspended.³⁶⁰ Similarly, the Rochester City School District has recently reworked its code of conduct with a de-emphasis on suspensions through the use of restorative justice.³⁶¹

The effectiveness of restorative justice is most often measured by quantitative studies that document its repeated success in reducing the severity and frequency of school violations.³⁶² To that end, restorative justice has been found to be an effective means of narrowing the discipline gap that disproportionately punishes students of color,³⁶³

³⁵⁸ Allison Ann Payne & Kelly Welch, *supra* note 7, at 226.

³⁵⁹ VALERIE L. MARSH, BECOMING RESTORATIVE: THREE SCHOOLS TRANSITIONING TO A RESTORATIVE PRACTICES CULTURE (2017), available at http://urcues.org/wp-content/uploads/2017/10/Restorative-Practices-Brief-2_final-25_EDITED.pdf; VALERIE L. MARSH, RESTORATIVE PRACTICES: HISTORY, SUCCESSES, CHALLENGES & RECOMMENDATIONS (2017), available at http://urcues.org/wp-content/uploads/2017/06/Restorative-Practices-Brief-1_final.pdf.

³⁶⁰ SAMANTHA POWNALL, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE, (Johanna Miller et al. eds., 2013), available at https://www.nyclu.org/sites/default/files/publications/nyclu_STPP_1021_FINAL.pdf.

³⁶¹ Justin Murphy, *RCS D Board Approves New Code of Conduct*, DEMOCRAT & CHRONICLE (June 16, 2016), <http://www.democratandchronicle.com/story/news/2016/06/16/rcsd-code-of-conduct-suspensions-restorative/85978032/>.

³⁶² GORDON BAZEMORE & MARA SCHIFF, “NO TIME TO TALK:” A CAUTIOUSLY OPTIMISTIC TALE OF RESTORATIVE JUSTICE AND RELATED APPROACHES TO SCHOOL DISCIPLINE 77 (2010); Thalia González, *supra* note 8; Sarah Guckenberger et al., *Restorative Justice in U.S. Schools: Summary Findings from Interviews with Experts*, WESTED (Oct. 2015), <https://jprc.wested.org/wp-content/uploads/2015/11/1447101213resourcerestorativejusticeinusschoolsummaryfindingsfrominterviewswithexperts.pdf>; David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 35 YOUTH & SOC’Y 249, 249-72 (2001); Brenda E. Morrison, *Regulating Safe School Communities: Being Responsive and Restorative*, 41 J. OF EDUC. ADMIN. 690, 690-704 (2003); Mara Schiff, *Dignity, Disparity, and Desistance: Effective Restorative Justice Strategies to Plug the “School-to-Prison Pipeline,”* UCLA: THE CIV. RTS. PROJECT (Jan. 2013), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/dignity-disparity-and-desistance-effective-restorative-justice-strategies-to-plug-the-201cschool-to-prison-pipeline/schiff-dignity-disparity-ccrr-conf-2013.pdf>; Jeanne B. Stinchcomb, et al., *supra* note 9; Ted Wachtel, *Defining Restorative*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES (2013), <https://www.iirp.edu/pdf/Defining-Restorative.pdf>.

³⁶³ Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and*

resulting in disruption of the School-to-Prison Pipeline. However, restorative justice is more than a discipline reform. It is also an approach to transforming school culture.³⁶⁴ Studies that include qualitative methods are particularly helpful in learning about how restorative justice affects relationships, especially among students and teachers. These studies show that students prefer restorative justice to traditional punitive measures³⁶⁵ and that restorative justice has a large positive impact on the entire school culture. With restorative justice practices in place, students gain a voice in their communities and teachers experience less stress.³⁶⁶

The evidence is clear – restorative justice works as a viable alternative to punitive discipline in schools. In contrast to restorative justice, there is a vast amount of evidence that finds the punitive approach to be ineffective in improving discipline and associated with a constellation of additional problems, such as social justice offenses, fueling the School-to-Prison Pipeline, decreased achievement, increased misbehavior, and increased likelihood that communities both inside and outside the school will suffer. Restorative justice offers more than the traditional punitive discipline, such as community, relationship, repair, decreased incidences of misbehavior, improved school culture, decreased racial discipline gap, and student agency. The road to reform is never easy, nor is it ever quick to achieve effective reform; however, restorative justice provides incentives supported by evidence that school communities can improve the experiences of all members/participants – including staff, parents, teachers, administrators, and especially students.

As mentioned previously, New York has explored the use of restorative justice practices by forming its own School-Justice Partnership which examined the disciplinary challenges in New York referred to above and issued recommendations for addressing disparities in discipline. The Task Force, led by the late Chief Judge Judith S. Kaye and supported by the New York State Permanent Judicial Commission on Justice for Children, issued a comprehensive array of recommendations to combat discipline disparities in New York schools. Among them was a recommendation to use

Achieve Equity in School Discipline, 26 J. EDUC. AND PSYCHOL. CONSULTATION 325, 325-53 (2016); Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 59-68 (2010); Mara Schiff, *supra* note 362.

³⁶⁴ Anne Gregory et al., *supra* note 363; Tom Cavanaugh, Patricia Vigil & Estrellita Garcia, *supra* note 7; Allison Ann Payne & Kelly Welch, *supra* note 7.

³⁶⁵ Wendy J. Drewery, *Conferencing in Schools: Punishment, Restorative Justice, and the Productive Importance of the Process of Conversation*, 14 J. COMMUNITY AND APPLIED SOC. PSYCHOL. 332, 332-44 (2004); Barry A. Fields, *Restitution and Restorative Justice in Juvenile Justice and School Discipline*, 22 YOUTH STUD. AUSTL. 44, 44-51 (2003); Anne Gregory et al., *supra* note 363; Jane O’Dea & Craig Loewen, *Life in the hallway: Students’ Perceptions of Violent and Disruptive Behaviour in Their Schools*, in BUILDING FOUNDATIONS FOR SAFE AND CARING SCHOOLS: RESEARCH ON DISRUPTIVE BEHAVIOR AND VIOLENCE, 47-82 (Grace Malicky et al. eds., 1999).

³⁶⁶ Guckenberger et al., *supra* note 362.

“Restorative Approaches”³⁶⁷ to build the capacity for schools to implement and institutionalize the commitment to use positive interventions with their students. Restorative justice is by no means a new concept, but this was one of the early appearances of the practice in this context in the state of New York.

In New York State as well as many other parts of the country, there has been an increased recognition that punitive disciplinary measures such as school suspensions often cause more problems than they solve and aggravate existing problems. As a result of such recognition, a consensus is growing that the use of more proactive, solution-oriented alternatives are worthwhile. While these alternatives take many forms and the effectiveness of some of them is not yet entirely clear, one common aspect of all of them is that they aim to achieve restorative justice. The various forms of restorative justice seek to bring individuals involved in a conflict together to engage in a constructive dialogue to resolve the conflict at its root, in the belief that by doing so, we will likely reduce future conflict. In other words, each modality of restorative justice shifts the focus of a disciplinary hearing or inquiry toward repairing the harm caused in a conflict and away from punishment as a stand-alone resolution. Inherent in all restorative justice’s iterations is a belief that when we do the difficult work of resolving conflict at its root, we reduce future conflict and come away from the process with more empathy and a decreased likelihood of repeating the same mistakes that led to the original conflict.

The use of restorative justice practices has spread across New York schools at an impressive pace. In April 2017, the New York State School Boards Association released a report entitled “Rethinking School Discipline.”³⁶⁸ The report advocates for a dramatic shift away from punitive disciplinary practices and toward restorative justice.³⁶⁹ This is but one example of the broad consensus that is building around the effectiveness and importance of using restorative justice practices rather than relying on suspension and expulsion of students to change behavior.

Across the country, restorative justice models adopted by large districts have resulted in dramatic decreases in the numbers of suspensions. In Chicago, for example, upon adoption of a restorative justice approach, school suspensions were reduced from 23 percent of the student body to 16 percent over the course of five academic years.³⁷⁰

³⁶⁷ *Keeping Kids In School and Out of Court: New York City School Justice Partnership Task Force Report and Recommendations*, *supra* note 346, at 31.

³⁶⁸ GAYLE SIMIDIAN, *RETHINKING SCHOOL DISCIPLINE* (David Albert ed., 2017), available at https://www.nyssba.org/clientuploads/nyssba_pdf/rethinking-school-discipline-04272017.pdf.

³⁶⁹ *Id.*

³⁷⁰ W. David Stevens et al., *Discipline Practices in Chicago Schools: Trends in the Use of Suspensions and Arrests*, UNIV. OF CHICAGO CONSORTIUM ON CHICAGO SCH. RES. (March 2015), <https://consortium.uchicago.edu/sites/default/files/publications/Discipline%20Report.pdf>

Though restorative justice alone does not fully account for the reduction, the shift in focus and goals that it represents appeared to play a significant role.

Various models have been adopted across New York State as well, with varying degrees of success. The Buffalo City School District has included restorative justice in its updated code of conduct and has begun to move some schools within the District towards a restorative model. In New York City, there have been sustained efforts across several boroughs to bring restorative justice into both schools and the juvenile justice system. Some thought leaders have included Common Justice, Brooklyn Restorative Justice Project, and the Red Hook Community Justice Center.

In Syracuse, suspension rates were among the highest in the nation at 35 percent of the District's student population being suspended. Not only was the suspension rate at Syracuse high but the racial disparity among students receiving suspensions was also very high. It was so high that the Attorney General's office took notice and launched an investigation in 2013.³⁷¹ Eventually, the District entered into an "Assurance of Discontinuance" with the Attorney General's office to implement restorative justice practices along with a host of other adjustments to the District's disciplinary practices. Despite the School District decreasing the total suspensions in half over a period of three years, the District has been unable to resolve its disproportionality of suspensions, as Black male students are being suspended at a rate that is disproportionate to their peers, rendering them twice as likely to be suspended.

Across the state, smaller school districts have also sought to implement restorative justice practices in their schools. In the Rochester area, Partners in Restorative Initiatives (PIRI) has trained both schools inside the Rochester City School District and schools outside of Rochester and has produced great results. In East High School, located in Rochester, suspensions dropped from 2,541 during the 2015-2016 academic year, to only 909 the following academic year. Again, while this dramatic drop which is the largest in the District cannot be attributed to restorative justice practices alone, it does seem to suggest their utility. Outside of Rochester, PIRI also works in the Avon Central School District in Avon, New York to implement a comprehensive list of restorative options for various challenges in schools. While no empirical data exists as to the efficacy of this program, the school continues to successfully use Community-Building Circles, Talking Circles, Celebration or Honoring Circles, Academic Circles, Circles of Understanding, Healing Circles and Conflict Circles. The District also has a restorative committee and they meet with each building to discuss the progress and success of restorative justice

³⁷¹ Julie McMahon, *Black Students Twice as Likely to be Suspended in Syracuse Despite Discipline Overhaul*, SYRACUSE.COM: THE POST STANDARD (Jan. 12, 2017) https://www.syracuse.com/schools/index.ssf/2017/01/black_students_twice_as_likely_to_be_suspended_in_syracuse_despite_discipline_ov.html.

practices. The District has spent time looking at their disciplinary referrals and have found that increasing the number of community building activities such as circles and community-wide assemblies and activities reduces the monthly number of referrals.

The empirical evidence supporting use of restorative justice exists in studies of students in countries outside the United States, but there is still room for a significant amount of analysis of the effectiveness of these programs within the United States. The Federal Office of Juvenile Justice and Delinquency Prevention did complete a study in July of 2017 demonstrating a moderate reduction of recidivism rates in students who participated in restorative justice in comparison to students who were brought through the traditional juvenile justice court system. Additionally, the study confirmed a higher level of victim satisfaction among those victims who participated in restorative justice rather than the traditional criminal justice system. Significantly more research is needed into the various models and their efficacy across the diverse student populations that make up New York State. Thus, as discussed below, the Task Force recommends that any implemented models also contain a data collection component to allow for evidence-based analysis going forward.

1. Current Productive Practices and School Wide Prevention Models

There are several models and programs that schools may implement as an alternative to traditional punitive models of school discipline. Suspensions are currently the primary means of discipline for student misconduct as set forth in New York State Education Law Section 3214.

Recognizing that suspensions are an exclusionary means of discipline, as explained in more detail below, we recommend that School Districts be provided by statute with the opportunity to use restorative practices in addition to or instead of suspensions. Students who are disconnected from their schools through the use of suspensions are more likely to fall behind academically, become further involved in criminal behavior, and ultimately become more likely to enter the School to Prison Pipeline.

Furthermore, the use of suspensions rarely offers a resolution to behavioral problems. The use of restorative justice practices offers the benefits of keeping students in school, providing a resolution to the initial misconduct, and promoting positive, prosocial bonds between students and faculty.

The following school response models are options that schools may choose to use in their districts. The following models address the school climate in its entirety, including students, teachers, and administrators, with a focus on building a positive community within the school itself and addressing root causes of disciplinary issues. These models are designed to help address discipline issues prior to an incident occurring and/or

prior to escalation. Schools should have the option to choose a model that best fits the needs of their specific community.

One school response model is the Multi-tiered System of Support. The New York State Board of Regents considered a report in May 2018 on Social Emotional Learning (SEL).³⁷² In accordance with the recommendations of the Safe Schools Task Force, Department staff and the Task Force’s School Climate and Student Engagement Workgroup have developed new SEL guidance materials and are prepared to present benchmarks for voluntary implementation by the field and a framework for SEL implementation in New York State beginning in June 2018. The report focused on a “whole child/whole school approach to supporting and educating young people that are healthy, safe, engaged, and challenged, [which] is the foundation upon which SEL implementation must take place. Such an approach works with the whole school community to integrate SEL principles into the fabric of school life.”³⁷³

Facilitating SEL schoolwide involves multiple components of school life including, but not limited to the following: (i) Alignment of district and school support, personnel policies, and existing and new practices in a multi-tiered system of support (MTSS); and (ii) Addressing discipline as an opportunity for social emotional growth that seeks concurrent accountability and behavioral change through SEL-based restorative justice practices.

The system **used for facilitation social emotional learning** is built on a Multi-Tiered System of Support (MTSS) incorporating tiers of intervention and support for both academic instruction and behavioral instruction. The tiers are as follows:

Tier 1: Universal intentions that are school wide in each classroom serving all students. (80% of the total population)

Tier 2: Specialized interventions serving at risk students. (5 - 15% of the total population)

Tier 3: Tertiary Interventions - serves high risk students (1 - 5% of the total population)

MTSS is predicated on five (5) pillars: (i) Social Emotional Learning; (ii) Mental Health Support; (iii) Behavioral Supports and Interventions; (iv) Restorative Practices; and (v) Academic Supports and Interventions/RTI, as seen below on the following chart.

³⁷² N.Y. STATE EDUC. DEP’T, *Introducing New Guidance and Resources for Social Emotional Learning*, (May 2, 2018), available at <http://www.regents.nysed.gov/common/regents/files/518brd1.pdf>.

³⁷³ N.Y. STATE EDUC. DEP’T, *Social Emotional Learning Essential for Learning, Essential for Life: Attachment 2* May 2018 Regents Item, 22 (May 2, 2018), available at <http://www.regents.nysed.gov/common/regents/files/518brd1.pdf>.

	SEL	Mental Health Support	Behavioral Supports & Interventions	Restorative Practices	Academic Supports & Interventions/RTI
Tier 3	<ul style="list-style-type: none"> Individual instruction in SEL competencies strategies and skills Practice and coaching 	<ul style="list-style-type: none"> Crisis intervention Individual counseling/support plan Family Collaborations Referral to services 	<ul style="list-style-type: none"> Wraparound services Functional Behavioral Assessments (FBAs), Behavioral Intervention Plans (BIPs) Faculty/staff mentor Academic and/or behavioral coach 	<ul style="list-style-type: none"> Family Conferences/ Collaborations Formal Restorative Conference(s) 	<ul style="list-style-type: none"> Intensive instruction (1-2 students) After school tutoring Computer-assisted programs Specially-designed instruction (SDI)
Tier 2	<ul style="list-style-type: none"> Targeted explicit instruction in SEL competencies, strategies, and skills Practice and coaching with feedback Peer-to-peer SEL workshops SEL focused community building circles 	<ul style="list-style-type: none"> Individual/small group counseling Support groups (e.g. anger management, etc.) Family Engagement Substance abuse prevention counseling Referral to services 	<ul style="list-style-type: none"> Faculty/staff mentor Daily Check In/Check Out Daily Progress Reports (DPR) Social and Academic Instructional Groups (Small Group) Individual Behavior Contract Academic and/or behavioral coach Targeted afterschool support program(s) 	<ul style="list-style-type: none"> Peer Mediation Restorative Problem-Solving Circles Formal Restorative Conference Community service 	<ul style="list-style-type: none"> Peer Tutoring and Paired Reading Small group supplemental instruction Guided instruction Visual/auditory aids/cues and manipulatives
Tier 1	<ul style="list-style-type: none"> Explicit instruction in SEL Competencies Integration of SEL within the content areas General teaching practices that model and support SEL School climate surveys (student, staff, families) SEL Plan based on survey and other student data Family engagement 	<ul style="list-style-type: none"> Mental health education Mental health screening Prevention/ Intervention supports (e.g. stress management, wellness, drug/substance abuse/ suicide prevention, etc.) Trauma-Informed/ trauma-sensitive approach Peer education 	<ul style="list-style-type: none"> Schoolwide Behavioral Expectations Evidence-based classroom management Guidance conference(s) Training of peer educators Student leadership opportunities Bullying prevention (i.e., DASA) Culturally responsive practices Student government, extracurriculars Afterschool and summer programs Community schools Community service opportunities 	<ul style="list-style-type: none"> Community Building Circles Negotiation Skills Training Peer Mediation Restorative Circles Community service Student circle keeper training Family Engagement Responsive discipline policies 	<ul style="list-style-type: none"> Standards-aligned, differentiated, data informed, cross-curricular, culturally responsive instruction Goal-setting for learning Student self/peer assessments Project based learning/ assessments Family engagement Universal Design for Learning Health Education Coordination

Adapted from Illinois SS/HS State Group and Erie 2 BOCES

A second model is known as the **School Responder Model**, which is a multi-systemic approach to prevention and early intervention for youth at risk of justice involvement. Key components include: Identifying at-risk youth, the implementation of community-based services, and developing a behavioral health team to appropriately respond to students in need of behavioral interventions. This proactive approach recognizes that students with behavior issues may have other underlying issues, such as adverse childhood experiences, learning disabilities, etc., that if appropriately addressed, may help resolve classroom misbehavior.³⁷⁴

2. Restorative Justice Practices as Intervention

In addition to the school wide prevention models discussed above, school districts may also implement restorative justice practices at the intervention point in lieu of suspending students. These restorative justice practices could when appropriate replace the use of suspensions as a means of addressing disciplinary matters. Many of the intervention models outlined below include positive, constructive forms of discipline as the ultimate outcome, such as writing apology letters, performing community service, and staying after school for extra help. These models allow for creative consequences as well. For example, if a student has had issues with cell phone use, perhaps one of the “disciplinary” outcomes for him/her is to turn in their cell phone at the main office each day for the duration of the school day. Another example would be if a student breaks the dress code by wearing a hat, perhaps the student would be remanded to

³⁷⁴ Jacquelyn Greene & Olivia Allen, *Disrupting School-Justice Pathways for Youth with Behavioral Health Needs*, NAT’L CTR. FOR MENTAL HEALTH AND JUV. JUST. (2017), https://www.ncmhjj.com/wp-content/uploads/2017/10/NCJFCJ_SJP_ResponderModel_Final.pdf.

write an essay or report on the safety risks of wearing hats in schools rather than being sent to in-school suspension for the day.

One intervention model that may be used by school districts is Student Court, also known as Teen Court or Peer Court. Student courts are school based intervention programs that utilize trained students to conduct peer led sentencing hearings in place of traditional school-based interventions. This model allows the student who has been charged with behavioral misconduct the opportunity to tell their side of the story. The accuser can also provide their perspective on what happened. After listening to aggravating and mitigating circumstances, student volunteers deliberate on a fair and appropriate consequence for the action. Sentences are meant to be constructive and ultimately reconnect students with their school and student body. This model uses the power of positive peer pressure. It has been long understood that students respond to their peers in a more positive way than they do to adults in authority.³⁷⁵

Another intervention model often used by school districts is Youth Court. Like Student Courts, Youth Courts are peer-led diversion programs. They are an alternative to traditional court-based intervention for incidents that rise to the level of a chargeable offense, and typically include law enforcement and judicial involvement. The Youth Court model can be adapted to be used within the school setting. This restorative justice practice may be used to address issues that go beyond student code of conduct issues, such as possession of drugs, alcohol or weapons on school property. Key tenants to Youth Courts are accountability (acknowledging wrongdoing), restorative justice (incorporating victims and restoring balance after a crime has been committed), and giving young people second chances (everyone makes mistakes – one bad decision should not define a youth forever). When given the opportunity to acknowledge wrongdoing and explain him/herself to their peers, young people learn more from their mistakes and are less likely to repeat those behaviors in the future. According to a 2016 study conducted in Los Angeles County Teen Court, youth who participated in Teen Court were less likely to repeat offend than those who went through formal probation.³⁷⁶ Furthermore, Youth Courts give young people a sense of ownership and control. Involvement fosters a sense of community since teens relate to each other more than they do to adults. Taking that a step further, it builds positive connections between the offender and the community through the completion of community service and other pro-social activities. Student volunteers benefit from civic education and involvement, often garnering lifelong skills, such as public speaking, critical thinking, and communication. Because Youth Courts rely on student volunteers, they are an

³⁷⁵ Michael Lynch & Dante Cicchetti, *Children's Relationships with Adults and Peers: An Examination of Elementary and Junior High School Students*, 35 J. SCH. PSYCHOL. 81, 81-99 (1997); see also Sarah D. Sparks, *Teenagers are Wired for Peer Approval*, 32 EDUC. WEEK 8, 8 (2013) (citing Dustin Albert et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114, 114-20 (2013)).

³⁷⁶ Lauren N. Gase et al., *The Impact of Two Los Angeles County Teen Courts on Youth Recidivism: Comparing Two Informal Probation Programs*, 12 J. EXPERIMENTAL CRIMINOLOGY 105, 105-26 (2016).

economically viable option for many communities. Another benefit to the implementation of Youth Courts as an alternative to traditional courts is the flexibility and adaptation of each court to fit its community's specific needs. There are a variety of styles of Youth Courts that can be used: peer jury, youth judge, tribunal, and adult judge. This menu of options allows programs to evaluate what will work best in their unique circumstances and setting. When young people are engaged, listened to, and held accountable, especially by their peers, they are much more likely to learn a positive lesson from their mistakes when compared to those who are disciplined/sanctioned in more traditional ways. The benefits of Youth Court intervention/diversion programs are immeasurable due to the far-reaching effects they have on the young offenders, the volunteers, mentors, and the community at large.

Individual youth courts are typically the creation of local communities, which develop and operate youth court programs.³⁷⁷ For example, in 1984 the "Tarrytown Youth Court Program" was established in that village as an alternative to formal family court adjudication of certain offenses committed by minors.³⁷⁸ The program was administered by the village police department. If a youth court does not already exist within the community of a particular school district, a school district may be able to contract with a youth court nearby. Alternatively, multiple school districts may be able to pull together resources to establish a youth court for use by multiple districts.

A third intervention model school districts may consider using is Restorative Conferencing. Restorative conferencing emphasizes the harm done by an offense and works to rebuild or restore the relationship through positive actions. Conference programs are similar to victim-offender reconciliation/mediation programs in that they involve the victim and offender in an extended conversation about the offense and its consequences. However, conferencing may also include the participation of families, community support groups, police, social welfare officials and attorneys. Conference programs demonstrate to the offender that many people care for him/her. All parties arrive at and agree to a plan for reparation, which increases commitment to it as a just resolution. Conferencing is used only when the offender admits guilt. It is not used to determine guilt or innocence.

A fourth intervention model to be considered by school districts is Circles. Circles involve conflict resolution based on Native American principles that emphasize restoring harm and balance through a circular conversation. Participants include the person who committed the harm, the person who was harmed, and members of the community, which can include the student body. Circles hold young people responsible

³⁷⁷ Margaret Fisher, *Youth Courts: Young People Delivering Justice*, AMERICAN BAR ASSOCIATION, (March 2002) at 8, available at <https://www.ncjrs.gov/pdffiles1/ojdp/196944.pdf>.

³⁷⁸ 1984 N.Y. Op. Att'y Gen. (Inf.) 87, Op. No. 84-12 (Feb. 22, 1984).

for their actions while working to rebuild positive connections using mutually helpful actions.

Lastly, another intervention model school districts may use instead of student suspension is a model known as **Accountability Boards**. Accountability Boards include a panel of adults who preside over a hearing during which the offender can explain their side of the story. The panel may ask questions of the offender and explore root causes or problems that may have contributed to the behavior. The panel then comes up with a set of recommendations based on restorative principles that will hold the offender accountable but also ultimately help address the underlying problem. For example, if a young person having problems with drug use appears before an Accountability Board, the board may impose a drug and alcohol screening and/or treatment as part of their recommendation.

V. Detailed Recommendation: Amend N.Y. Education Law § 3214 to Include Restorative Justice

Based upon the foregoing research, this Task Force makes the following recommendations to help reduce the disproportionality among students and school suspensions, and to help improve the School to Prison Pipeline.

This Task Force recommends that restorative justice be added to N.Y. Education Law Section 3214 as an available alternative approach to school discipline. Gradually, this approach may eventually replace exclusionary discipline policies (e.g., suspensions and expulsions) with diversion programs (e.g., student court, circles, mediation) that keep students in school. This plan will only be effective if it is well received by school administrators, which means that funding, training, follow through resources, and data collection and reporting must be put in place. Education Law Section 3214 should be modified to allow for restorative justice alternatives to be implemented in New York schools. We recognize that the complete elimination of suspensions and expulsions of students is not feasible. However, we would recommend that those disciplinary options be reserved under limited circumstances.

While the Task Force has been preparing this paper on the School to Prison Pipeline, the Commissioner of Education has adopted an emergency regulation to include out of school suspensions data in determining which schools should be posted on “needs improvement” lists by the State Education Department.³⁷⁹ These regulations, which are set to be approved in final form in February 2019 by the Board of Regents, underscores that the New York State Education Department understands that the suspension of students is an issue that needs to be resolved.³⁸⁰

³⁷⁹ See 8 NYCRR §§ 100.2, 100.21

³⁸⁰ *Id.*

The New York Assembly has attempted to modify the provisions of Education Law 2801 and 3214 to include restorative justice practices. However, both the Assembly and the Senate have been unsuccessful in their efforts to date.³⁸¹ Upon review of the proposed bills of the Assembly, it refers to the premise that restorative justice practices MUST be used prior to suspensions, essentially eliminating any out of classroom discipline. Furthermore, such proposed bills include a standard for discipline in certain situations in which classroom removal or suspension is basically prohibited including but not limited to tardiness, unexcused absences from class or school, leaving school without permission, violation of school dress code, and lack of identification upon request of school personnel. The proposed law also sets forth a maximum of a twenty-day suspension, except as specified under law (e.g. bringing a firearm to school).

While the Task Force understands the need for wider use of restorative justice practices, it is also aware of the good faith efforts of most all school administrators in the administration of school discipline. It is the opinion of the Task Force that the above noted Assembly and Senate proposed bills would impose untenable burdens on school district administrators when issuing disciplinary penalties. While the Task Force commends the Assembly for understanding and appreciating the grave concerns of the School to Prison Pipeline, it cannot mandate school districts to use restorative justice practices in situations where a suspension or a removal of a student may be appropriate and necessary. Rather, the Task Force recommends modifying Section 3214 to endorse greater school district use of restorative justice practices as an alternative to the suspension of students.

As noted previously, several school districts have already begun to introduce the use of restorative justice practices. This Task Force has attached, in Appendix C of this Report, two example codes of conduct from certain school districts which currently include the use of restorative justice practices. These school districts should be commended for their forward thinking in an attempt to help reverse the School to Prison Pipeline.

Despite the fact that school districts do not need legislative authority to implement restorative justice practices, it is well known that school districts are creatures of statute – i.e., municipal corporations. Furthermore, the fact that the use of restorative justice practices are not expressly defined in Education Law Section 3214 gives school districts concern that restorative justice practices are not an option in lieu of discipline for code of conduct violations.

This Task Force is of the opinion that the endorsement by the State Legislature of the statutory amendment to Section 3214 of the Education Law to include the use restorative justice practices in lieu of suspending students will highlight and underscore

³⁸¹ N.Y. Assem. 3873, 240th Leg. Session, Reg. Session (N.Y. 2017).

the success of these school based strategies. It will further support restorative justice efforts that will lead to these students who have been charged with code of conduct violations to remain in the classroom where they belong and where they have the best chance to avoid the “School to Prison Pipeline.” This Task Force’s grave concern regarding long term suspensions is that students who are already susceptible to bad influences, whether drugs, alcohol, violence or other behaviors, will be more susceptible to these influences without being able to attend class while serving a suspension. This is how the School to Prison Pipeline begins, and is the premise for this Task Force’s recommendation to include the use of restorative justice practices in Education Law Section 3214 for student discipline proceedings. This Task Force believes that the School to Prison Pipeline can be alleviated, if not reversed, by our proposed modification to Education Law Section 3214, which provides additional protections to students during the disciplinary phase by incorporating the permissive use of restorative justice practices if such use is justified. This Task Force’s suggested modification to Education Law Section 3214 is attached hereto as Appendix A.

By providing principals and superintendents with statutorily endorsed alternative measures such as restorative justice practices, it will help alleviate the loss of our students to the lifelong negative vagaries of the School to Prison Pipeline.

Ideally, the implementation of restorative justice practices would eventually take the place of suspensions and expulsions for most disciplinary cases.

We are mindful that the recommendations of this report may be viewed as the imposition of yet another State mandate on our already taxed school district resources. The current State of New York Tax Cap Legislation severely hinders the ability of financially hard pressed school districts to innovate. Hence, the State of New York must allocate sufficient funding to those school districts that embrace restorative justice techniques. When compared to the expenditure of limited tax dollars arising from prosecution and incarceration of unfortunate youth who find themselves on the “other” end of the School Prison Pipeline the investment reaps incalculable benefits.

In the meantime, consideration should be given to the creation of State funded training programs, teaching personnel how to guide, support, and help navigate the accused student through the disciplinary process.

The Task Force is cognizant that its recommendation focusing on a modification of the New York statute is simply a start to reform student disciplinary proceedings. However, such statutory enactments will underscore the State’s recognition of the severe societal concerns with the existing structure of student discipline in our public schools. It will bring expanded interest and public comment on the use of restorative justice and hopefully it will spur increased allocation of already scarce dollars to support this effort to keep students in an educational setting and to reverse the School

to Prison Pipeline. With these proposed modest modifications recommended by the New York State Bar Association, existing efforts to ameliorate a difficult result from the “pipeline” will be endorsed and expanded across our State.

VI. Conclusion

The School to Prison Pipeline has been and will continue to be a serious problem in New York due to the rigidity of Education Law §3214. School Districts across New York State have been issuing suspensions in accordance with Education Law §3214 in a disparate manner towards minorities and students with disabilities. As a result, these populations have been forced out of the educational setting and in an environment where they are succumbing to negative societal influences. This pipeline will continue to grow if everyone sits idly by. By amending Education Law §3214 to allow and endorse existing efforts by school districts to include restorative justice practices in the administration of discipline for student code of conduct violations, this Task Force believes an important first step will have been taken to cure this problem.