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NOTE

From Suspended to Destitute: The Disproportionate Effect of Out-of-School Suspensions on Low-Income Families

Francesca Hoffmann*

INTRODUCTION

While America's dark history of institutionalized racism might seem like an ancient skeleton in a red, white, and blue painted closet, "extra-judicial killings by the police . . . now number more than . . . four times the number of people lynched or executed by capital punishment in the worst of years."¹ "No justice, no peace,"² reverberated throughout America in recent years as Trayvon Martin, Michael Brown, Eric Garner, Walter Scott, Freddie Gray, Samuel DuBose, Laquan McDonald, Alton Sterling, and Philando Castille were killed by the police, seemingly one after the next. But it's not just an issue with police. There's more to the story. The first thing Lesley McSpadden, Michael Brown's mother, said to the media as she stood next to where her deceased son's body laid for hours was, "You took my son away from me. Do you know how hard it was for me to get him to stay in school and graduate? You know how many black men graduate? Not many!"³ According to the Shriver Center, "The killing of racial minorities by police is but one violent example of racial injustice. But there are thousands of other examples of racial injustice that slowly and systemically deprive racial minorities of their rights, their opportunity, and of their belief in a free and just society."⁴ The systemic deprivation of minority opportunity and rights begins with America's school system.

Much of the nation was outraged when police arrested Texas ninth grader Ahmed Mohamed in September 2015 for bringing a homemade clock to school that

* Symposium Editor, *Indiana Journal of Law and Social Equality*, Volume 5; Indiana University Maurer School of Law, May 2017; University of Miami M.S.Ed. 2013; Purdue University B.A. 2011. I would like to thank Professor Deborah Widiss for her guidance, thoughtful comments, and, most importantly, for inspiring women at Maurer to use their voices for social change. This Note is dedicated to my former first grade students. You taught me so much, and it was a privilege to be your teacher.

1 Jerome Karabel, *Police Killings Surpass the Worst Years of Lynching, Capital Punishment, and a Movement Responds*, HUFFINGTON POST (Nov. 4, 2015, 8:07 AM), http://www.huffingtonpost.com/jerome-karabel/police-killings-lynchings-capital-punishment_b_8462778.html (last updated Nov. 4, 2016).

2 Steve Mazie, *What does "No Justice, No Peace" Really Mean?*, THINKBIG.COM, <http://bigthink.com/praxis/what-does-no-justice-no-peace-really-mean> (last visited Dec. 14, 2015).

3 *This American Life: The Problem We All Live With*, CHI. PUB. RADIO (July 31, 2015), <http://www.thisamericanlife.org/radio-archives/episode/562/transcript>.

4 John Bouman, *To End Poverty, We Must Address Racial Justice*, SHRIVER CTR. (Dec. 1, 2015), <https://medium.com/@shriverceneter/3681a2e8603d#.7sbra4qnz>.

was mistaken for a bomb.⁵ “#IStandWithAhmed” was mentioned on Twitter 209,000 times, and Barack Obama, Hillary Clinton, Mark Zuckerberg, and Shonda Rhimes were just a few of the high-status individuals who joined the Twitter crusade in expressing their support for the innovative teen.⁶ More recently, a White school resource officer, Ben Fields, was captured on video grabbing a Black student by the neck and throwing her across a classroom after she refused to leave class for having her cell phone out.⁷ The footage of the incident was viewed well over one million times.⁸ While headline spectacles such as Mohamed’s arrest and the South Carolina teen’s school confrontation raise questions of overt discrimination and often rally national attention, there is a more subtle form of racial discrimination in school discipline that is steadily building traction: the disproportionate discipline of minority students.

The disproportionate discipline of minority students, in particular black students, is a real problem that plays out for millions of kids and families each year. Tunette Powell’s four-year-old son, J.J., was suspended from preschool three times.⁹ While J.J. was suspended for acts such as “pushing a chair,”¹⁰ the White students at the school experienced less serious punishments for more serious offenses.¹¹ Stories like that of Tunette Powell are beginning to make their way into the headlines, and as a result, disproportionate discipline is amassing attention.

School districts, legislators, education scholars, and the Obama Administration are plunging headfirst into the fight against disproportionate discipline within K-12 schools, making disproportionate discipline a hot topic in the education and school law world today. Numerous school districts across the county are modifying their discipline policies to curtail the use of suspensions and

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- 5 Editorial, *Ahmed Mohamed and the Absurdities of Zero Tolerance*, BOS. GLOBE (Sept. 21, 2015), <https://www.bostonglobe.com/opinion/editorials/2015/09/21/ahmed-mohamed-and-absurdities-zero-tolerance/f5fKSCpxSYWTwKAKKUMOtL/story.html>.
- 6 Jessica Durando, *#IStandWithAhmed Takes Twitter by Storm*, USA TODAY, (Sept. 16, 2015, 3:08 PM), <http://www.usatoday.com/story/news/nation-now/2015/09/16/hillary-clinton-tweets-support-ahmed-mohamed/32497949/>.
- 7 Richard Fausset & Ashley Southall, *Video Shows Officer Flipping Student in South Carolina, Prompting Inquiry*, N.Y. TIMES (Oct. 26, 2015), <http://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html>.
- 8 See results for search of “South Carolina School Police Officer,” YOUTUBE, https://www.youtube.com/results?search_query=south+carolina+school+police+officerhttps://www.youtube.com/results?search_query=south+carolina+school+police+officer (last visited Nov. 3, 2015).
- 9 Tunette Powell, *My Son Has Been Suspended Five Times. He’s 3.*, WASH. POST (July 24, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/07/24/my-son-has-been-suspended-five-times-hes-3/>.
- 10 *This American Life: Is This Working?*, CHI. PUB. RADIO (Oct. 17, 2014), <http://www.thisamericanlife.org/radio-archives/episode/538/transcript>.
- 11 See *id.* (“And they said, they suspend kids? They were shocked. And I said, absolutely. I said, he’s been suspended, and I started telling them all the things that he had done. And then one parent’s like, I wonder why my kid hasn’t been suspended. And I’m like, hm? What? So then she says, well, my son, he hit this kid on purpose, and they had to rush that kid to the hospital, and all I got was a phone call. And I was like, hm. And one after another, they kept telling me different stuff—my kid did this, my kid did that, my kid bit somebody, my kid—all these things. And my kids, they’re all the same age, all the same class. And only JJ had been sent home. So I was like, what is going on? That’s when I thought to myself, something is not right.”).

expulsions in their arsenal of student discipline tools,¹² often in conjunction with new legislation.¹³ Some school administrations and an overwhelming number of advocacy groups are calling for suspension and expulsion freezes altogether, no matter how serious the infraction.¹⁴ The discussion on disproportionate discipline is not limited to the K-12 education community. Today, psychology and sociology scholars frequently write about the unintended sociological and psychological effects of disproportionate suspension and expulsion rates for minority students, as well as the ineffectiveness of suspensions as a deterrent in general.¹⁵ Legal scholars examine potential legal protections—or lack thereof—through disparate impact analysis.¹⁶ A Department of Education “Dear Colleague” letter pinpoints the legal ramifications for disproportionate discipline within schools.¹⁷ President Obama even directed the Department of Justice Office of Civil Rights to put greater resources into investigating “education-related civil rights issues,” which has resulted in the

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- 12 Schools are adopting updates to their codes of conduct to “reduce over-reliance on suspensions.” See Bethany Bump, *Capital Region Schools Evolve Thinking on Suspensions*, TIMES UNION (Oct. 25, 2015, 10:35 PM), <http://www.timesunion.com/tuplus-local/article/Capital-Region-schools-evolve-thinking-on-6589917.php>. The Department of Justice has even played a part in the re-vamping of school discipline codes; it worked with Baltimore schools to modify Baltimore Public Schools’ discipline code in 2008. Nadra Kareem Nittle, *U.S. Department of Education Investigating Record Number of Civil Rights Complaints*, AMERICA’S WIRE, <http://americaswire.org/drupal7/?q=content/us-department-education-investigating-record-number-civil-rights-complaints> (last visited Dec. 14, 2015). Additionally, over 18,000 k-12 schools are attempting to curtail suspension and expulsion rates by implementing positive behavior intervention supports (PBIS), and many are developing elaborate restorative justice programs. Jeffrey Sprague & C. Michael Nelson, *School-Wide Positive Behavior Interventions and Supports and Restorative Discipline in Schools*, U. OF OR. 3–4 (2012), [http://pages.uoregon.edu/ivdb/documents/RJ and PBIS Monograph for OSEP 10.11.12.pdf](http://pages.uoregon.edu/ivdb/documents/RJ%20and%20PBIS%20Monograph%20for%20OSEP%2010.11.12.pdf).
- 13 In 2015, Chicago passed SB 100—a state law that, among other things, prohibits schools in Illinois from using zero tolerance policies and only allows suspensions over three days in certain contexts. See Pub. Act. No. 099-0456 (2015) (codified as amended at 105 ILCS §§ 5/10-20.14, 5/10-22.6 (2015)); see also Bump, *supra* note 12. In 2015, New York assemblywoman Catherine Nolan proposed the Safe and Supportive School Bill in front the New York General Assembly. The Bill would “put an end to indiscriminate suspensions at public schools across the state” by prohibiting teachers from making a student leave the classroom for behaviors such as “tardiness, inappropriate language or dress code violations.” *Id.*
- 14 See John O’Connor, *Miami-Dade Schools Eliminating Out-of-School Suspensions*, STATEIMPACT (July 29, 2015), <https://stateimpact.npr.org/florida/2015/07/29/miami-dade-schools-eliminating-out-of-school-suspensions/> (noting that Miami-Dade County Public Schools included \$3.2 million in their 2015-2016 school budget to eliminate out of school suspensions entirely). See also Dylan Thomas, *Superintendent Aims to Eliminate Suspension Disparities by 2018*, SW. J. (Nov. 7, 2014), <http://www.southwestjournal.com/news/schools/superintendent-aims-to-eliminate-suspensions-disparities-by-2018> (noting that Minneapolis Public Schools implemented a “moratorium on all suspensions of the district’s youngest students, those in grades Pre-K–1.”).
- 15 See generally Brea L. Perry & Edward M. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067 (2014) (discussing the negative impact of suspensions on students’ reading and math improvement.).
- 16 See Zachary W. Best, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671, 1672–74 (2011). See generally Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071 (2009) (discussing potential legal avenues for disproportionate discipline claims).
- 17 See U.S. DEPT OF JUST. & U.S. DEPT OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 6–13 (2014).

investigation of a record number of disproportionate discipline claims in the past few years.¹⁸ The conversation surrounding disproportionate discipline is flourishing.

However, there is a gaping hole in the literature and an invaluable perspective left out of an important narrative that renders the disproportionate discipline conversation incomplete. It is true that the disproportionate suspensions and expulsions of minority students can have the unintended consequences of depleting a student's sense of school belonging, causing underperformance in academics, and increasing likelihood of juvenile delinquency.¹⁹ Nevertheless, disproportionate discipline also has grave unintended consequences on the family,²⁰ which have not yet been fully explored.

When a student is suspended for fewer than ten days, constitutional due process merely entitles a student to informal notice and an opportunity to explain oneself prior to being suspended.²¹ The Supreme Court came to this conclusion in *Goss v. Lopez*²² by weighing the school's interest in efficiency against the child's loss of fewer than ten days of education.²³ As a result of the Court's 1975 ruling, a standard narrative generally unfolds when a student is issued a short-term suspension.²⁴ Typically, a child is first sent to the principal's office for disrupting the class, in some form or another. The principal next explains to the child what he or she is in trouble for (notice) and asks whether the child has anything to say about the matter (opportunity to explain oneself). Ultimately, the principal calls the child's parent to inform her that she must come pick the child up for the resulting suspension. Clearly, this practice has profound implications for not just the child, but also for the child's family.

Families headed by low-income minority single mothers, by the nature of disproportionate discipline, are the families who are most greatly affected by the unequal distribution of suspensions and expulsions of minority students. Because low-wage minority single mothers experience inflexibility in the work place, overwork due to the necessity to hold multiple jobs, lack of child-care options, limited resources, and single-motherhood, these women are arguably the least

18 Nadra Kareem Nittle, *U.S. Department of Education Investigating Record Number of Civil Rights Complaints*, AMERICA'S WIRE, <http://americaswire.org/drupal7/?q=content/us-department-education-investigating-record-number-civil-rights-complaints> (last visited Nov. 2, 2015).

19 See Anne Gregory, et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 60–61 (2010), <http://www.indiana.edu/~equity/docs/Gregory%20et%20al%202010.pdf>.

20 It is important to note that other scholars have acknowledged that disproportionate discipline has the unintended consequence of affecting families; however, scholars have not explored the full effects of disproportionate discipline, demographics of what families it most greatly affects, and possible solutions. See Skiba et al., *supra* note 16, at 1079 (citing Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 860 (2008)). Although Skiba's article pertains to zero-tolerance policies, the authors refer to zero-tolerance policies in the context of suspensions.

21 See *infra* Part I.B.

22 419 U.S. 565 (1975).

23 See *infra* Part I.B.

24 See *infra* Part I.B.

equipped to deal with their children being suspended on a whim;²⁵ however, the nature of disproportionate discipline tells us that low-wage minority single mothers are the parents who are most greatly affected. Existing protections that provide limited workplace flexibility, such as the Family Medical Leave Act (FMLA), are only applicable in medical-related emergencies.²⁶ Low-wage workers who leave their jobs last minute are at an extremely high risk of losing their jobs.²⁷ Due to higher suspension rates for minority students, minority students are not only losing out on education time, but their families might possibly be losing their livelihoods.²⁸

This Note argues that disproportionate discipline's effect on families, particularly low-income single minority mothers, is an additional consideration that deserves more weight in thinking about suspension policies within schools. This argument does not seek to minimize the importance of the effect of suspensions on students themselves. Rather, it proposes that considering the additional effect of disproportionate discipline on families might bolster support for legislative proposals that seek to constrain suspensions. Part I of this Note lays the factual background for disproportionate discipline and addresses current due process requirements for short-term suspensions. Part II explains how current notions of due process for short-term suspensions are inconsistent with current workplace norms and policies, especially for families headed by minority low-income single mothers. Part III addresses possible non-solutions and solutions. This Note ultimately proposes that considering the disproportionate effect of suspensions on low-income families could provide additional support for lobbyists and advocacy groups to push legislation that centers on the reduction of out of school suspensions as a discipline norm within the education realm.

I. LAYING THE LANDSCAPE FOR DISPROPORTIONATE DISCIPLINE

A. What is Disproportionate Discipline?

The disproportionate discipline of minority students is not a new phenomenon;²⁹ however, the disproportionate use of exclusionary practices such as *suspensions* for minority students is relatively recent. Historically, corporal punishment was the dominant form of discipline within schools until the late 1960s.³⁰ Today, the era of corporal punishment has nearly come to an end.³¹ As

25 See *infra* Part II.

26 See *infra* Part II.A.i.

27 See *infra* Part II.

28 *Id.*

29 SEE RUSSELL J. SKIBA, ROBERT S. MICHAEL, ABRA CARROLL NARDO & REECE PETERSON., POLICY RESEARCH REPORT #SRS1: THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 3–4 (2000) (highlighting early studies done on minority disproportionality in office referral, suspensions, and expulsions).

30 Skiba et. al., *supra* note 16, at 1073.

physical force as a means of a bad behavior deterrent amasses more and more negative stigma,³² out of school suspensions are the most prevalently used student discipline tool.³³ It is estimated that during the 2009–10 school year, over two million students were suspended in middle and high school alone; a majority of these suspensions were for minor infractions of school rules.³⁴

Today, the term “disproportionate discipline,” also referred to as the “discipline gap,”³⁵ generally refers to the overrepresentation of minority students receiving “differential administration of exclusionary and punitive discipline.”³⁶ The differential administration of punitive discipline can take place at either the classroom level or the administrative level. Research shows that, at the classroom level, educators make more frequent initial referrals for minority students for less serious disciplinary infractions, which commonly result in suspensions.³⁷ Once referred to the administrative level, Black students are three times more likely to be suspended than White students, as 16.4% of Black students are suspended compared to 4.6% of White students.³⁸ It is also noteworthy that over seventy percent of resulting school-related law enforcement referrals and arrests involved Black and Hispanic students.³⁹ Some geographic-specific figures are even more

31 See ELIZABETH T. GERSHOFF ET AL., CORPORAL PUNISHMENT IN U.S. PUBLIC SCHOOLS 10–11 (2015) (pointing out that the most recent OCR data shows .5% of students received corporal punishment in the 2009-2010 school year).

32 Public instances such as that of Vikings running back Adrian Peterson and surrounding debates clearly err on the side of eliminating or not utilizing existing corporal punishment statutes in the existing nineteen states that still legally allow corporal punishment. Valerie Strauss, *19 States Still Allow Corporal Punishment in School*, WASH. POST (Sept. 18, 2014), <https://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school/>; See also DeNeen L. Brown, *A Good Whuppin? Adrian Peterson Child Abuse Case Revives Debate*, WASH. POST (Sept. 13, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/13/a-good-whuppin-adrian-peterson-child-abuse-case-raises-old-debate/>. The arrest of a Floridian pastor for spanking a child for refusal to eat a strawberry further contributes to the revival of the age-old debate of whether or not spanking is an effective method for punishing a child or constitutes child abuse. Numerous groups, including the American Academy of Pediatrics, came out earlier this year to declare their stance against corporal punishment because of its proven link to mental illness. *Id.*

33 Skiba et al., *supra* note 16, at 1073.

34 DANIEL J. LOSEN & TIA ELENA MARTINEZ, THE CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 1 (2013), <http://files.eric.ed.gov/fulltext/ED541735.pdf>.

35 See Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59 (2010) (discussing how disproportionate discipline of minority student contributes to the academic achievement gap and thus becomes a “discipline gap”).

36 Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILD. 381, 381 (2000).

37 SKIBA ET AL., *supra* note 29, at 16.

38 U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION ISSUE BRIEF #1, at 3 (Mar. 2014), <http://blogs.edweek.org/edweek/rulesforengagement/CRDC%20School%20Discipline%20Snapshot.pdf>.

39 Tom Rudd, *Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated*, KIRWAN INST. ISSUE BRIEF, Feb. 2014, at 1 <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf>. It is important to note that schools’ over-referral of black students to law enforcement is a whole separate issue that deserves equal attention and is commonly referred to as the “school-to-prison pipeline.” MADELEINE COUSINEAU, INSTITUTIONAL RACISM AND THE SCHOOL-TO-

alarming. For example, Black students make up thirty-seven percent of the K-12 student body in Georgia but sixty-seven percent of all suspensions⁴⁰ and are five times more likely to be suspended than White students in the South.⁴¹ The overrepresentation of minority students in exclusionary discipline practices is not limited to the sphere of K-12 education. Even the nation's Black preschoolers—a group of children who are arguably not even developmentally capable of comprehending exclusionary discipline practices⁴²—experience discipline at a rate greater than their white-peer counterparts. Black children comprise eighteen percent of preschool enrollment yet make up nearly half of all preschoolers receiving more than one out of school suspension.⁴³ Given these statistics, it makes logical sense to wonder, *are black students disproportionately disciplined because their behavior actually is more suspension-worthy?* If this were the case, higher suspension rates for minority students would not reflect racial bias—whether overt or implicit. Instead, disproportionate suspension rates would be “a relatively appropriate response to disproportionate behavior.”⁴⁴ Studies show that actual misbehaviors of minority students do not account for racial disparities in school discipline.⁴⁵ To the contrary, most suspensions result from small instances of misbehavior, such as failure to wear a school uniform or refusal to take off a hat.⁴⁶

Regardless of the underlying causes of the disproportionate discipline of minority students—as there are numerous interconnected ideas that attempt to explain the “why” of disproportionate discipline—⁴⁷ the uneven distribution of suspension amongst racial groups in schools around the country has severe costs for minority students and society as a whole. In a study of one million students in

PRISON PIPELINE, (Paper Submitted for the 105th Annual Meeting of the American Sociological Ass'n) (2010), <http://www.suspensionstories.com/wp-content/uploads/2010/10/racism-and-stpp.pdf>. However, the focus of this paper is on preventing short-term suspensions, which is only one component of three needing reform in order to fully address the school to prison pipeline. *Id.* at 4.

40 Edward J. Smith & Shaun R. Harper, *Table on Disproportionate Impact of K-12 School Suspension and Expulsion on Black Students in Southern States*, PENN GSE, http://www.gse.upenn.edu/equity/sites/gse.upenn.edu/equity/files/GSE_HarprSspnsnInfo_R5.pdf (last visited Nov. 12, 2014).

41 EDWARD J. SMITH & SHAUN R. HARPER, UNIVERSITY OF PENNSYLVANIA GRADUATE SCHOOL OF EDUCATION, *DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 1* (2015), http://www.gse.upenn.edu/equity/sites/gse.upenn.edu/equity/files/publications/Smith_Harper_Report.pdf.

42 See Donna St. George, *Suspended from School in Early Grades*, WASH. POST (Feb. 12, 2012), https://www.washingtonpost.com/local/education/suspended-from-school-in-early-grades/2012/02/02/gIQA3H0X9Q_story.html. (“[S]uspension is at odds with teaching the social and behavioral skills many young students lack. ‘We would never send a child home because that child was struggling at reading,’ he said. ‘We would never send a child home if that child was struggling with math. Why would we send a child home for struggling with social-emotional skills?’”).

43 U.S. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, *supra* note 38, at 1.

44 SKIBA, *supra* note 29, at 5.

45 *Id.* at 6.

46 Of the 710,000 suspensions in California schools during the 2011–12 school year, 48% of suspensions were for “willful defiance,” which included instances such as failing to wear a school uniform and refusal to take off a hat. Rudd, *supra* note 39, at 4.

47 See Townsend, *supra* note 36, at 383–84.

Texas, thirty-one percent of students who were suspended or expelled were held back a grade at least once, ten percent of students who were suspended between seventh and twelfth grade dropped out of school altogether, and half of the students who were disciplined over eleven times entered the juvenile justice system the following year.⁴⁸ Pedro Noguera, a leading scholar in the field of disproportionate discipline, sums up the concern of the affects of suspensions: “There’s this assumption that, if we get rid of the bad people, that the good people will be able to learn, the good people will be safe. What we continue to ignore is that we are producing the bad people. We’re producing in school the bad behavior.”⁴⁹

B. Current Due Process Requirements for Short-Term Suspensions

There is no denying the fact that the disparate disciplining of Black students occurs every day in schools around the country, but it is important to consider what series of actions lead up to the issuance of a suspension. Even in a short chain of events, there is an important stage in the suspension process that is often overlooked: the period between the initial discipline referral of a student and the resulting suspension. Under the Fourteenth Amendment Due Process Clause, an individual has a substantive right to certain constitutionally protected liberties that cannot be abridged without substantial justification.⁵⁰ In addition to substantive rights, an individual also has the procedural right to not be deprived “of life, liberty, or property, without due process of law.”⁵¹ It is well established under the theory of *in loco parentis* and related case law that schools generally have blanket authority to discipline students.⁵² This includes the authority to use suspension and expulsion as discipline tools.⁵³ Thus, a student’s substantive rights in the realm of school discipline are, at most, extremely minimal and, at minimum, nonexistent. Procedural due process rights, on the other hand, are guaranteed to all students prior to being subject to certain disciplinary measures in order to ensure fairness and impartial treatment for students.⁵⁴

48 TONY FABELO, MICHAEL D. THOMPSON, MARTHA PLOTKIN, DOTTIE CARMICHAEL, MINER P. MARCHBANKS III & ERIC A. BOOTH, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER & PUBLIC POLICY RESEARCH INSTITUTE, *BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* xi-xii (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf. This was a groundbreaking, statewide study done in Texas, whereby all Texas seventh grade students’ school records were tracked for six years and then compared to their matching juvenile records. *Id.* at 6.

49 *This American Life: Is This Working?*, CHI. PUB. RADIO (Oct. 17, 2014), <http://www.thisamericanlife.org/radio-archives/episode/538/transcript>.

50 Philip T.K. Daniel & Karen Bond Coriell, *Suspension and Expulsion in America’s Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?*, 13 *HAMLIN J.L. & PUB. POL’Y* 1, 5 (1992).

51 U.S. CONST. AMEND. XIV, § 1.

52 Skiba et al., *supra* note 16, at 1072–73. *See also* Daniel & Bond Coriell, *supra* note 50, at 6 (discussing the court’s general deference to school authority based on the school’s legitimate state interest in maintaining order and discipline).

53 Skiba et al., *supra* note 16, at 1072–73.

54 Daniel & Bond Coriell, *supra* note 50, at 7.

There are generally two different procedural due process standards; both were concurrently established by the Supreme Court in its landmark 1975 case, *Goss v. Lopez*.⁵⁵ This Note focuses on due process for “short-term” suspensions because an overwhelming majority of suspensions in schools today are less than ten days.⁵⁶ In the *Goss* analysis, which is still applicable today, the Court first asked whether a student’s liberty or property interest were at stake.⁵⁷ Because suspension implicated the student’s statutorily created property interest in an education⁵⁸ and liberty interest in sustaining “a person’s good name, reputation, honor, or integrity,”⁵⁹ the students were entitled to constitutional due process under the Fourteenth Amendment.⁶⁰ More importantly for the purpose of this Note’s analysis: once the *Goss* court decided that suspension did indeed trigger procedural due process protection, it set forth *how much* due process students are entitled to.⁶¹

Because “due process is flexible and calls for such procedural protections as the particular situation demands,”⁶² the amount of process afforded to each claimant can range from formal to informal procedural rights. Courts traditionally use the factors-based test established in *Mathews v. Eldridge*⁶³ to determine the exact “amount” of due process an individual is entitled to.⁶⁴ Under this test, all courts consider: (1) the private interests that will be affected by the government action, (2) the risk of erroneous deprivation of such interest and probable value of additional procedural safeguards, and (3) the government’s interest, including the administrative burden and the suitability of the case for trial-like procedures.⁶⁵ “Amount” of due process means more than meets the eye. The right to an evidentiary hearing, right to notice, right to have an attorney present, and right to cross-examine witnesses, among others, are what typically come to mind when thinking of procedural due process protections.

Importantly, however, courts also have discretion in regard to the timing of *when* a claimant can access procedural due process rights under the *Mathews* test.⁶⁶

55 419 U.S. 565, 581 (1975).

56 The *Goss* standard for suspensions has been codified by most states today. A majority of states consider any suspensions over ten days to be expulsions. See IND. CODE § 20-33-8-3(a)(1) (2015) (In Indiana, “expulsion” means a disciplinary or other action whereby a student: (1) is separated from school attendance for a period exceeding ten (10) school days.”).

57 See also Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972) (establishing that the first step in the legal analysis in determining whether due process is triggered after adverse state action is to determine whether an individual has a protected liberty or property interest, and further shifted away from the rights/privilege distinction previously used to trigger due process).

58 *Goss*, 419 U.S. at 573.

59 *Id.* at 574 (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

60 *Id.* at 576.

61 *Id.* at 577–79 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

62 *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481(1972)).

63 *Id.* at 334–35.

64 See Christopher J. Schmidt, *Ending the Mathews v. Eldridge Balancing Test: Time for a New Due Process Test*, 38 SW. L. REV. 287, 287 (2008).

65 *Mathews*, 424 U.S. at 335.

66 For example, in *Goldberg v. Kelly*, the Court determined that a welfare recipient’s interest in continued benefits entitled him to a pre-termination hearing before the benefits (a property right) could be taken away, because the recipient’s interest of uninterrupted financial assistance needed to survive

In the context of suspensions, the *Goss v. Lopez* Court weighed the nature of the competing interests involved and found that a school's interest in efficiency⁶⁷ and maintaining order⁶⁸ outweighed the child's interest in avoiding the "unfair or mistaken exclusion from the educational process" for less than ten days of school.⁶⁹ As a result, the Court found that suspensions for less than ten days merely required oral or written notice and "some kind of hearing" prior to a suspension.⁷⁰ This is still the due process standard for suspensions today. No time must pass between when "oral notice" is given and the time of the "hearing,"⁷¹ and the situation typically plays out in the following way: an administrator tells the student what he or she has done wrong, and the student is "given an opportunity to explain his version of the facts."⁷² The *Goss* Court acknowledged that "in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required;"⁷³ however, courts today rarely, if ever, allow for more formal due process procedures under this exception.⁷⁴ The Court also recognized that the due process requirements it imposed for suspensions are "less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."⁷⁵ Still, most school suspension policies are modeled after the minimal requirements laid forth in *Goss v. Lopez*. After the student is given oral notice and an opportunity to explain his or herself, the parent is called to come pick the child up from school before the end of the school day. Rarely, if ever, does a child's explanation change an administrator's decision to suspend.

outweighed the government burden of efficiency. 397 U.S. 254, 264–66 (1970). Conversely, the *Mathews v. Eldridge* Court held that an evidentiary hearing was not procedurally required before a person's disability benefits can be terminated. 424 U.S. at 349 (holding no pre-termination hearing was required because the significance of the financial burden of a trial outweighed the claimant's interest of continued benefits a pre-termination hearing). It is important to note that at the time of *Goss v. Lopez*, the Court was still relying on a similar, yet less formal, balancing test set forth in *Cafeteria Workers v. McElroy*. 367 U.S. 886, 895 (1961) ("[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").

67 *Goss*, 419 U.S. at 583 (emphasizing that the formalization of due process rights for suspensions "[M]ight well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.").

68 *Id.* at 580 ("Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device.").

69 *Id.* at 579.

70 *Id.*

71 *Id.* at 582.

72 *Id.*

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

74 *See Paredes v. Curtis*, 864 F.2d 426 (7th Cir. 1988) (holding that drug charges resulting in a ten-day suspension did not constitute an "unusual situation"); *see also Lamb v. Panhandle Cmty. Unit Sch. Dist.*, 826 F.2d 526 (6th Cir. 1987) (holding that a suspension at the end of the school year that prohibited the student from taking final exams and graduating was not an "unusual situation" that necessitated additional due process rights than laid out in *Goss v. Lopez*).

75 *Goss*, 419 U.S. at 583.

Because some school districts are sanctioned for issuing over a certain number of suspensions, schools, in practice, also issue “undocumented suspensions.”⁷⁶ Undocumented suspensions informally require parents to come pick their children up from school early without classifying the incident as a “suspension.” In those instances, no procedural due process rights attach.⁷⁷ Whether short-term or undocumented, all forms of suspension have profound implications for families because of the non-existent notice required under current due process standards.

II. THE INTERSECTION OF PROCEDURAL DUE PROCESS REQUIREMENTS FOR SUSPENSIONS AND THE CURRENT JOB-PLACE REALITY

A. *The Families Most Affected by Disproportionate Discipline*

Although there are other family populations whom disproportionate discipline also affects, the focus of this Note is the effect of suspensions as a discipline tool on low-income, single, Black mothers. Based on the nature of disproportionate discipline and the student population it affects, the large percentage of single, Black mothers in the United States and statistics that show more mothers are working today than ever before, this Note makes the assumption that single Black mothers are most greatly affected by disproportionate discipline.

Non-Black minority students, and as a result, their families, are not as greatly affected by disproportionate discipline as Black students. Black students represent sixteen percent of the school-age population but thirty-three percent of out of school suspensions.⁷⁸ They also represent forty-two percent of students receiving more than one out of school suspension.⁷⁹ Conversely, Hispanic/Latino students make up twenty-four percent of school-age population but only twenty-three percent of out of school suspensions;⁸⁰ they also represent only twenty-one percent of students receiving more than one out of school suspension.⁸¹ Similarly, Asian students make up five percent of the school-age population but represent only two percent of all out of school suspensions.⁸²

76 *Discipline*, MICHIGAN ALLIANCE FOR FAMILIES, <http://www.michiganallianceforfamilies.org/education/discipline/> (last visited Nov. 20, 2015).

77 *See Parents and Students Applaud San Francisco School Plan to Eliminate Suspension Gap for Students of Color*, Press Release, PUBLIC COUNSEL, (Dec. 11, 2013), http://www.publiccounsel.org/press_releases?id=0076. It is noteworthy that some school districts, such as San Francisco, are taking active steps to eliminate “undocumented suspensions” by acknowledging their unlawfulness and requiring data collection and reporting for all “permits to leave.” S.F. UNIFIED SCH. DIST. BD. OF ED., RESOL. NO. 1312-10A4, ESTABLISHMENT OF A SAFE AND SUPPORTIVE SCHOOLS POLICY IN THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, 6 (Feb. 25, 2014).

78 U.S. DEPARTMENT OF EDUCATION OFFICE OF CIVIL RIGHTS, *supra* note 38, at 2.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

It is clear that Black students, and therefore Black families, more frequently experience suspensions, but a closer look at the average composition of the Black family today reveals why higher suspension rates are so devastating. Statistics show that an overwhelming majority of children born to black mothers are born out of wedlock.⁸³ In 2010, seventy-three percent of all non-Hispanic Black births were to unmarried women.⁸⁴ In comparison, the out of wedlock birth rate is fifty-three percent for Hispanic and twenty-nine percent for non-Hispanic White births.⁸⁵ It is important to acknowledge that fifty-eight percent of the non-Hispanic Black women who gave birth outside marriage were in cohabitating relationships;⁸⁶ however, one study showed that these relationships typically do not last until the child reaches school-age.⁸⁷ Even though 63.27% of unwed Black mothers believed “there [was] a pretty good or almost certain chance” that they would eventually marry their cohabitating partner,⁸⁸ only 16% of women in cohabitating relationships were married to the father of their child five years after the baby’s birth; only 26% of couples were still cohabitating.⁸⁹ Given that most school-aged children begin kindergarten around the age of five, seventy-four percent of the Black mothers giving birth out of wedlock are truly “single mothers” when their children enter the education system.⁹⁰ Even those women that are married might be raising their children alone. In 2007, U.S. prisons held 744,200 fathers of 1,559,200 children, nearly half of whom were Black children.⁹¹

The idea that Black, low-income single mothers are more greatly affected by suspensions only stands true if these mothers are active participants in the workforce. While some scholars are quick to point out that twenty-seven percent of poor single mothers do not work,⁹² seventy-three percent of poor, single mothers are in the labor force. Women are also the “sole or primary breadwinners in forty percent of households with children.”⁹³ Images of the stereotypical “welfare queen,” regardless of whether this typecast was ever accurate, is certainly inaccurate today. The 1996 welfare reform requires most women to work to receive Temporary Aid to

83 See JOYCE A. MARTIN ET AL., *Births: Final Data for 2010*, in 61 NATIONAL VITAL STATISTICS REPORTS 1, 8 (2012), http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf.

84 *Id.*

85 *Id.*

86 *Id.*

87 CENTER FOR RESEARCH ON CHILD WELLBEING, FRAGILE FAMILIES RESEARCH BRIEF: PARENTS’ RELATIONSHIP STATUS FIVE YEARS AFTER A NON-MARITAL BIRTH 1 (Princeton Univ. 2007), <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief39.pdf>.

88 SOMA ROY ET AL., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY DATASET 3510 (Accessed Nov. 10, 2015), <https://www.amstat.org/sections/srms/proceedings/y2005/Files/JSM2005-000701.pdf>.

89 CENTER FOR RESEARCH ON CHILD WELLBEING, *supra* note 87.

90 *See id.*

91 U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008).

92 JOAN C. WILLIAMS & HEATHER BOUSHEY, THE THREE FACES OF WORK-FAMILY CONFLICT 6 (Ctr. for Am. Progress 2010).

93 Claire Caine Miller, *The Motherhood Penalty vs. the Fatherhood Bonus: A Child Helps Your Career, if You’re a Man*, N.Y. TIMES, (Sept. 6, 2014), http://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html?_r=0.

Needy Families (TANF) benefits,⁹⁴ as well as limits the number of years an individual can receive TANF benefits to five years.⁹⁵ The full-time employment of mothers with children under age eighteen increased from nineteen percent to fifty-seven percent between 1965 and 2000,⁹⁶ arguably, in part, as a result of the need for low-income women to work to receive TANF benefits and support their families at the end of the five-year period.

B. The danger of suspensions for low-income workers

Given that 1.2 million Black students were suspended in 2014,⁹⁷ there is a constant possibility that a school administrator could call a working mother and inform her that her child was suspended and in need of being picked up from school. A majority of Black mothers of school-aged children are raising their children without a partner, immersed in the workforce, and still low-income;⁹⁸ this trifecta makes current suspension practices particularly dangerous to low-income single Black mothers. Current procedural due process requirements for short-term suspensions are misaligned with the job-place reality for low-income parents generally, but particularly for single, Black mothers.⁹⁹ Job inflexibility, high costs of childcare, gender expectations, and extremely limited workplace policy protections make leaving a job in the middle of the day to pick up a suspended child a risk to the wellbeing of the entire family. To illustrate: Rajuawn Thompkins' four-year-old son was suspended from Imagine Hope Community Charter School in Washington D.C. for "kicking off his shoes and crying in frustration."¹⁰⁰ As a result of her son's frequent formal suspensions, coupled with additional "undocumented suspensions," Thompkins lost her job.¹⁰¹

There are a multitude of workplace-related factors that make the way current suspension practices operate highly problematic for mothers such as Thompkins.

94 TANF (Temporary Assistance for Needy Families) benefits are also known more generally as welfare and were part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA); PRWORA "ended entitlement to welfare benefits" under the Aid to Families with Dependent Children Act. Hope Corman et al., *Effects of welfare reform on women's crime*, 40 Int'l Rev. L. & Econ. 1, 1 (2014).

95 Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 Berkeley J. of Emp. & Lab. L. 1, 54 (2007).

96 Suzanne M. Bianchi, *Family Change and Time Allocation in American Families*, in CONTEMPORARY FAMILY LAW 207 (Thomas Reuters 3rd ed. 2012) (2006).

97 SMITH & HARPER, *supra* note 41. This figure does not even take into account the number of preschoolers suspended. *See id.*

98 *See discussion supra*, Part II.A.

99 *See also* STEPHANIE BORNSTEIN, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS 17 (U.C. Hastings Center for WorkLife Law, 2011) ("[T]he daily responsibilities of caring for young children, aging parents, or ill spouses continue to conflict with the way in which low-wage jobs in the United States are currently structured.").

100 St. George, *supra* note 42.

101 *Id.*

i. Job Inflexibility

Low-wage workers experience a “lack of even minimal [job] flexibility”¹⁰² and have extremely limited workplace protections. Low-wage workers are less likely to have employer-provided benefits, more likely to be subject to mandatory overtime, and rarely have access to paid time off.¹⁰³ Only thirty-nine percent of low-wage workers report that their employers allow for some type of paid time off (“PTO”) for personal illness; in comparison, over seventy-nine percent of mid and high-wage employees report access to sick-leave related PTO.¹⁰⁴ As a result, over fifty-nine million workers in the U.S. have no sick leave coverage, and over eighty-six million workers do not have paid sick leave to care for sick children.¹⁰⁵ Even if a worker did have access to sick leave, it might not be usable. Most employers require employees give advanced notice to take time off, and existing laws that require employers to provide sick leave only apply to limited groups of employees.¹⁰⁶ Additionally, many low-wage jobs require workers to abide by strictly enforced attendance policies and unyielding schedules that “penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be ‘unreliable.’”¹⁰⁷ Low-wage workers are also punished for not fulfilling mandatory overtime requirements, even if such assignments are given without notice.¹⁰⁸ Under no-fault attendance policies, women who are late or miss work, regardless of the reason, are subject to a strike system. Strikes for late arrival often collectively add up and result in termination. The U.C. Hastings Center for Worklife Progress recounts the story of Tameeka, a single low-income mother who was demoted from her training supervisor job in spite of twelve out of thirteen positive evaluations during her six-month probationary period.¹⁰⁹ Tameeka was working the midnight shift when her babysitter suddenly quit. Initially, she requested to change shifts but was denied. Thereafter, Tameeka left work early three days per week to meet the needs of her children. Altogether, she only accrued one day and one hour of unpaid, authorized sick leave.¹¹⁰ While Tameeka’s demotion did not result from missing work for repeated suspensions, her

102 BORNSTEIN, *supra* note 99, at 18.

103 Betsy Gwin, *Lessons for Anti-Poverty Advocates from the Workplace Flexibility Movement: Improving Flexibility in Low-Wage Work and Access to Work Supports*, 18 GEO. J. ON POVERTY L. & POL’Y 265, 271–72 (2011).

104 *Id.* at 272.

105 VICKY LOVELL, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON’T HAVE PAID SICK LEAVE 1, 3 (Inst. Women’s Policy Research, 2004), (explaining this is even more problematic for low-wage workers because “[w]orkers in lower-income families miss more days than those in higher-income families; this is consistent with well-established disparities in health that are correlated with income.”).

106 For example, the New York Paid Sick Leave Act requires employees to have worked for an employer for at least 120 days in order for an employee to be entitled to the paid sick leave mandated by the act. Furthermore, the law does not apply to federal, state, or municipal workers, or independent contractors. N.Y.C., N.Y., Local Law 46 (Jun. 26, 2013).

107 BORNSTEIN, *supra* note 99, at 19.

108 *See also* Gwin, *supra* note 103, at 272.

109 BORNSTEIN, *supra* note 99, at 20.

110 *Id.*

story still portrays the imminent risk that low-wage working mothers face when faced with a childcare emergency outside of their control.

The problem of low-wage worker turnover from inflexible attendance policies can “wreak havoc” for employers, as well.¹¹¹ High turnover rates within the low-wage labor force are detrimental to businesses: costs to train a new employee making under \$30,000 per year averages 16.1% of the employee’s yearly salary.¹¹² It is without a doubt that the issue of sick children and consequential looming risk of parental job loss escalated to the national spotlight in recent years;¹¹³ however, the right to time off for student discipline remains under-considered. If “being female doubles the odds of experiencing job termination related to family illness,”¹¹⁴ suspensions certainly have a similarly detrimental effect on women and low-wage workers.

ii. Limited Job-Protected Leave

There are limited workplace policies in place for protecting low-wage, working parents in general; even state and federal policies specifically created to address the tightrope walk of balancing parent and work responsibility fall woefully short. A lack of job-protected leave exacerbates the problem of suspensions not only for low-income, single, black mothers but also for parents working at inflexible jobs, in general. Congress passed the Family Medical Leave Act of 1993¹¹⁵ (FMLA), in part,¹¹⁶ “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”¹¹⁷ The implementing regulations further recognize the purpose of the FMLA: they state that “workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.”¹¹⁸ Under

111 *Id.* at 18.

112 See HEATHER BOUSHEY & SARAH JANE GLYNN, THERE ARE SIGNIFICANT BUSINESS COSTS TO REPLACING EMPLOYEES (Center for American Progress, 2012), <https://www.americanprogress.org/issues/labor/report/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/>.

113 See generally Susan Perry, *A Third of Working Parents Risk Pay or Job Loss When Child Gets Sick, Survey Finds*, MINNPOST (Oct. 24, 2012), <https://www.minnpost.com/second-opinion/2012/10/third-working-parents-risk-pay-or-job-loss-when-child-gets-sick-survey-finds> (discussing a survey done by C.S. Mott Children’s Hospital that revealed 33% of parents reported taking time off of work to care for their sick children put their job at risk or resulted in loss of pay); Danielle Shapiro, *For Working Moms, One Sick Kid Can Spell Disaster*, THE DAILY BEAST (Jan. 26, 2014), <http://www.thedailybeast.com/articles/2014/01/26/for-working-moms-one-sick-kid-can-spell-disaster.html> (telling the story of various low-income women who are “one sick child away from being fired”).

114 LOVELL, *supra* note 105, at 5.

115 29 U.S.C.A. §§ 2601–54 (2014).

116 See O’Leary, *supra* note 95, at 38 (noting that the FMLA was also passed out of “recognition of the limits of Title VII and the Pregnancy Discrimination Act”).

117 29 U.S.C.A. § 2601(b)(1) (West 2014).

118 29 C.F.R. § 825.101(b) (2011).

the FMLA, an employee is entitled to up to twelve weeks of leave from work¹¹⁹ to tend to one of five circumstances surrounding birth, adoption, and family illness-related needs¹²⁰ without fear of losing her job; however, the FMLA has extreme limitations. Implementing regulations define “vital needs” and “family obligations” extremely narrowly. “Vital home needs,” for the purpose of this Note,¹²¹ only encompasses “serious health condition[s],”¹²² and “family” is limited to “a spouse, son, daughter, or parent.”¹²³ In its current state, the FMLA does nothing to protect low-wage parents—or any parents for that matter—who are forced to leave work for a suspension. Even if the FMLA is amended to allow for absences from work for a wider range of circumstances, such as school suspensions, the FMLA does not protect all private employees and does not allow for any paid time off¹²⁴—a luxury that many low-wage workers cannot afford.¹²⁵

Rightfully acknowledging the vital importance of parental involvement in a child’s education,¹²⁶ some states have attempted to address the challenge of balancing a parent’s responsibility to support her child academically and financially.¹²⁷ Because of the proven effects of parental involvement in a child’s academic success,¹²⁸ a majority of states have some form of family engagement provisions within state education laws. Additionally, under the No Child Left Behind Act (NCLB),¹²⁹ schools receiving Title I assistance were required to create

119 29 U.S.C.A. § 2612(a)(1) (“Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . .”).

120 See 29 U.S.C.A. § 2612(a)(1)(A)-(E) (An individual is entitled to twelve workweeks of leave for (1) the birth of a son or daughter of the employee to care for the son or daughter; (2) if an employee adopts or fosters a child; (3) to care for an ill spouse, son, daughter, or parent who has a serious health condition; (4) because of an employee’s own serious health condition; or (4) because of “qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty in the Armed forces.”).

121 The FMLA also allows up to twelve weeks of leave for “the birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care,” for the employee’s own serious health condition that impairs his or her ability to work, and for “any qualifying exigency arising out of the fact that [a family member] is a military member on covered active duty or call to covered active duty status.” U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT (2012), <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>.

122 *Id.*

123 *Id.*

124 The FMLA only protects private employees who work for private employers that have 50 or more employees and have been employed full-time (1,250 hours) by the employer for the past 12 months. *Id.*

125 This is not to suggest that the legislature should amend the FMLA to require paid leave to pick up a suspended child. It is merely to illustrate the multi-dimensional challenges that low-income parents face when it comes to taking time off from work.

126 The Harvard Family Research Project found that family engagement can help close the education gap and “is one of the strongest predictors of children’s school success.” SHAKTI BELWAY, MISHAELA DURÁN, LELA SPIELBERG, STATE LAWS ON FAMILY ENGAGEMENT IN EDUCATION REFERENCE GUIDE 5 (National Parent Teacher Association), https://s3.amazonaws.com/rdcms-pta/files/production/public/State_Laws_Report.pdf.

127 See generally *id.* (detailing the current national landscape for family engagement and labor laws by state).

128 See *id.* at 3.

129 The NCLB was repealed in December, 2015, and replaced with the Every Student

family and parent engagement policies in an effort to bolster academic achievement.¹³⁰ Generally, these laws attempted to “create policies, strategies, and practices that build on the strengths and wisdom of families to support their child’s learning and improve student achievement.”¹³¹ Forty states have education laws requiring school districts to implement family engagement policies, and five states mandate pilot family engagement projects.¹³² A select number of states also have labor laws that aim to “facilitate family engagement by protecting employees with school-age children from being terminated or otherwise penalized for attending parent-teacher conferences or other important school meetings.”¹³³ These laws recognize that taking time off of work for a school-related activity can endanger the family’s livelihood.

Family engagement and labor laws are a step in the right direction, but most labor and family engagement laws fail to fully rectify the inconsistency of harsh workplace policies and the unpredictable nature of parenthood. There are only sixteen states with labor laws that allow employees with school-aged children to take leave from work for school-related purposes;¹³⁴ two of those states’ labor laws only apply to public sector employees,¹³⁵ four states only “encourage” workplaces to grant employees with children time off for school conferences only,¹³⁶ and some states allow time off for school-related activities but require advanced notice—a requirement far from helpful for parents dealing with unpredictable suspensions.¹³⁷ Even those states that do offer general protections for school-related activities other than conferences only allow for minimal time off.¹³⁸ Alarming, California and

Succeeds Act. See Lyndsey Layton, *Obama Signs New K-12 Education Law that Ends No Child Left Behind*, THE WASHINGTON POST (Dec. 2010), https://www.washingtonpost.com/local/education/obama-signs-new-k-12-education-law-that-ends-no-child-left-behind/2015/12/10/c9e58d7c-9f51-11e5-a3c5-c77f2cc5a43c_story.html.

130 See Every Student Succeeds Act Title I Part A § 1010 (2002), <https://www.gpo.gov/fdsys/pkg/BILLS-114s1177enr/pdf/BILLS-114s1177enr.pdf>. The family engagement provisions of NCLB are also in the new Every Student Succeeds Act. Similarly, every Title I school is required to reserve at least one percent of Title I funding to implement and sustain parent and family engagement policies. See The Leadership Conference Education Fund, *Parent and Family Engagement Provisions in the Every Student Succeeds Act 1* (2016), <http://civilrightsdocs.info/pdf/education/ESSA-Parent-Family-Engagement.pdf>.

131 See BELWAY ET AL., *supra* note 126, at 15.

132 *Id.*

133 *Id.* at 147.

134 BELWAY ET AL., *supra* note 126, at 147.

135 Hawaii and Texas both have a labor law that allows limited leave for school functions, but the laws only protect public-sector employees. Both states also only allow a maximum of two hours of paid leave, two times per year for each child. *Id.*

136 Alabama, Louisiana, Oklahoma, and Utah encourage, rather than mandate, time off for employees with children to attend limited school functions. *Id.*

137 *Id.* at 148 (“Illinois law sets forth highly specific guidelines regarding the circumstances under which employees may exercise their right to leave time. The specifics include the amount of time an employee may use both during the school year and on any given day. The law further stipulates the amount of notice required from employees, which must be done in writing seven days in advance, among other requirements.”).

138 North Carolina grants four hours of leave per year to “attend or otherwise be involved in the child’s school.” *Id.* at 157 (citing N.C. GEN. STAT. ANN. § 95-28.3(a) (West 2016)).

Nevada¹³⁹ are the only states that explicitly prohibit employers from firing employees who choose to make use of policies granting parental leave for school activities.¹⁴⁰ Even though thirty-five of the states that lack labor laws have laws that support family engagement, most family engagement statutes mandate schools provide opportunities for things such as more parent teacher conferences, contracts between parents and schools, and parent education classes.¹⁴¹ Engagement policies could even potentially exacerbate the difficulty for a working parent by requiring her to attend more school-related functions without having analogous labor protections for education-related activities.

Although not exemplar, California and Nevada are two states worth turning to as strong models for labor laws that better protect single working mothers. Both states have labor laws that explicitly forbid employers from taking any sort of adverse action against employees who take time off to participate in school activities.¹⁴² California allows employees to take off up to forty hours every year for school-related activities,¹⁴³ and Nevada forbids an employer from “terminat[ing], demot[ing], suspend[ing] or otherwise discriminate[ing] against the employment of a person who . . . is notified during his work by a school employee of an emergency regarding the child.”¹⁴⁴

It is worth pointing out that even states such as California and Nevada that have the most liberal labor law protections lack adequate enough laws to account for the disproportionate suspension of black students. California, one of the states that allows for the most leave time (forty hours per year), allows an employee a maximum of eight hours off per month to “participate in their children’s education.”¹⁴⁵ The eight hours would be sufficient for a single mother to leave from work to pick up the child if suspended, but what then? The child could possibly be suspended for up to ten days, which would well surpass the eight-hour allotted monthly limit. Even in California a single mother is forced to choose between staying home and possibly losing her job or paying for childcare. That said, California and Nevada are still the states with the most comprehensive labor laws, which is better than the alternative prevalent in most states—no labor protections at all.

iii. Other Factors

139 *Id.* at 148 (“Nevada’s law renders it unlawful for employers to either terminate or threaten to terminate parents for attending meetings requested by school administrators.”).

140 *See id.*

141 For example, the family engagement statute in Illinois permits school districts to conduct “parental institutes” to generally increase parental engagement levels. *Id.* at 17.

142 *See* CAL. LAB. CODE § 230.8(2)(d) (West 1989).

143 BELWAY ET AL., *supra* note 126, at 151.

144 NEV. REV. STAT. § 392.920 (1989).

145 BELWAY ET AL., *supra* note 126, at 148–49. A further point of inquiry would be examining whether or not staying home with a suspended child qualifies as “participating in children’s education.”

A low-income woman's financial insecurity further makes her more at-risk if her child is suspended. Once a low-income single mother loses her job, it is much more difficult for her to find a new one. This challenge makes the risk of losing her job all the more dangerous for her family. All mothers, regardless of socioeconomic status, are less likely to be hired for jobs, to be perceived as competent at work, or to be paid as much as their male colleagues with the same qualifications.¹⁴⁶ Low-income mothers with children under six, however, "[pay] a wage penalty five times as great as that of higher-paid women with young children" and lose six percent in wages per child.¹⁴⁷ Not only do these women lack job protections, they also do not have financial protections to fall back on. Prior to the 1996 welfare reforms, welfare "served as a form of paid leave between jobs . . . [and] many women were working while on welfare."¹⁴⁸ Now, when a woman loses her job, she has very limited assistance to support her family. Additionally, her family's situation is likely to be exacerbated by a lack of child support payments.¹⁴⁹ Twenty-six percent of noncustodial fathers earn an average of \$5,627 per year, and eighty-eight percent of those fathers do not pay court-ordered child support.¹⁵⁰ This means that low-income single mothers, in addition to making the lowest wages, likely do not have access to child support payments to support their children in case of job-loss. If a single mother doesn't have access to affordable childcare, as many low-income individuals do not,¹⁵¹ a suspension could also cause a parent to either go into financial debt or stay home with her child. Not only could a suspension cause a child to lose out on educational learning opportunities, it could also cost the child's entire family its livelihood.

III. POSSIBLE SOLUTIONS

There is no one single fix that addresses the numerous competing interests that school suspensions evoke: the school district has an interest in efficient administration;¹⁵² the students have an interest in remaining in the classroom;¹⁵³

146 Caine Miller, *supra* note 93.

147 *Id.*

148 O'Leary, *supra* note 95, at 53.

149 See Tonya Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012). One study found that "sixty percent of poor fathers who do not pay child support are racial and ethnic minorities, and twenty-nine percent were institutionalized (mostly in prison) at the time of interview. Only forty-three percent of men not in prison were working, and those employed in 1996 worked an average of just twenty-nine weeks and earned \$5,627 that year. Their barriers to employment were also considerable: forty-three percent were high-school dropouts, thirty-nine percent had health problems, and thirty-two percent had not worked in three years." *Id.* at 647.

150 *Id.*

151 See Sarah Jane Glynn et al., *The Importance of Preschool and Childcare for Working Mothers*, Center for American Progress (2013), <https://www.americanprogress.org/issues/education/report/2013/05/08/62519/the-importance-of-preschool-and-child-care-for-working-mothers/>. A low-income family, on average, pays 39.5% of its income towards childcare costs. *Id.*

152 See *supra* discussion Part II.A.

teachers have an interest in maintaining effective learning environments for all students without disruptions;¹⁵⁴ other students have an interest in an uninterrupted education;¹⁵⁵ and parents have an interest in not being forced to leave work for small student infractions.¹⁵⁶ Therefore, coming up with a “solution” to the problem school suspensions raise involves striking a delicate balance with various conflicting interests. “Solving” the problem also involves considering a variety of possible avenues, including legal avenues, legislative avenues, and policy implementation at the school level.

A. Non-Solutions: Available Remedies That Do Not “Solve” the Problem

i. Legal Remedies

Ensuring evenly distributed suspensions and expulsions of all students using the law as a tool for leveling the playing field would not eliminate the problem suspensions pose for *all* low-income families, but it could help.¹⁵⁷ Under current legal standards, students or parents disproportionately affected by suspension policies are unlikely to avail themselves using legal remedies. Although legal remedies might be technically available, gathering evidence to make a showing of disparate treatment under Title IV; Title VI; or the Equal Protection Clause, or disparate impact under Title VI and Title IV can be extremely cumbersome.

A parent could potentially bring two legal claims to seek redress for school discipline that is perceived as discriminatory: disparate treatment or disparate impact. First, a parent could argue that the school’s suspension of a minority student was motivated by racial animus, which is a form of disparate treatment. Under a disparate treatment claim, a parent would have to be able to show that teachers or administrators administered a facially neutral discipline policy in a discriminatory way.¹⁵⁸ A parent could bring a disparate treatment claim under the Fourteenth Amendment Equal Protection Clause,¹⁵⁹ Title VI of the Civil Rights Act

153 *See supra* Part I.B.

154 *See infra* Part III.A.ii.2.

155 *See* Adrienne Green, *When Schools are Forced to Practice Race-Based Discipline*, THE ATLANTIC (Aug. 26, 2015), <http://www.theatlantic.com/education/archive/2015/08/teachers-say-no-disparate-impact-discipline/402144/>. (Some argue that “guidelines [eliminating exclusionary discipline] “will encourage schools to tolerate disruptive and dangerous behavior lest they have too many students of one race being punished,” wrote the education-law expert Joshua Dunn in a Fordham Institute blog post last year. “The effect will be to punish students who behave and want to learn since their education will be sabotaged by troublemakers. And the disruptive will certainly learn, and learn quickly, that their schools are now tolerating even more disruptive behavior.”). *Id.*

156 *See supra* Part II.

157 The problem of suspension for low-income families would not be alleviated if suspension rates for white students increased and suspension rates for minority students stayed the same; however, it would be more probable to assume that suspension rates for minority students would go down if laws ensured evenly distributed suspensions among races.

158 *See* U.S. DEP’T JUSTICE & U.S. DEP’T OF EDUC., *supra* note 17, at 7.

159 U.S. CONST. amend. XIV § 1.

of 1964 (Title VI),¹⁶⁰ or Title IV.¹⁶¹ Courts typically allow schools the authority to discipline a student under the Fourteenth Amendment Equal Protection Clause if the school's actions are reasonably related to a legitimate educational interest; however, a court will apply strict scrutiny if the school was motivated to discipline a student out of racial animus.¹⁶² Because most teachers and administrators do not disproportionately refer or suspend students based on overt racial animus, but rather might do so because of implicit bias,¹⁶³ Fourteenth Amendment Equal Protection Clause and Title VI and IV disparate treatment claims are near impossible to prove absent a showing of intentional discrimination.¹⁶⁴

There are instances where circumstantial evidence can be used to show discriminatory intent necessary to bring a successful disparate treatment claim (either under Title VI or the Equal Protection Clause).¹⁶⁵ A court might infer discriminatory intent if a parent is able to show: (1) a Black student was more harshly punished than a white student for the same offense; or (2) the parent could use circumstantial evidence that “allows the Departments to infer discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances;”¹⁶⁶ however, student privacy laws limit the amount of information a parent has access to, including the consequences different students received for similar punishments.¹⁶⁷ New discipline reporting mechanisms under ESSA report

160 Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000(d) (2006). Title VI prohibits discrimination based on “race, color, or national origin” in any institutions or activities that receive federal financial assistance. *Id.*

161 42 U.S.C. § 2000(c) (2006). Title IV prohibits discrimination in public elementary and secondary schools based on race, color, or national origin.

162 Skiba et al., *supra* note 16, at 1090.

163 See JOHANNA WALD, SUPPLEMENTARY PAPER II: CAN “DE-BIASING” STRATEGIES HELP TO REDUCE RACIAL DISPARITIES IN SCHOOL DISCIPLINE? 1-2 (Harvard Law School Institute for Race & Justice, 2014) (“As our knowledge about how implicit racial bias is triggered, and how its impact on our decisions and actions has grown, a strong hypothetical case can be made for its contribution to the stark racial disparities that figure so prominently in school discipline data. We underline the term hypothetical because there is not yet, to our knowledge, any direct evidence that the implicit racial bias held by decision-makers in the disciplinary chain contributes to the disproportionate numbers of children of color who are severely punished in schools. That said, there is clear evidence that children of color are punished more severely than White children for relatively minor, subjective offenses in schools”).

164 See generally Skiba et al., *supra* note 16, at 1099.

165 See U.S. DEPT OF JUST. & U.S. DEPT OF EDUC., *supra* note 17.

166 *Id.* (list of questions the Department of Education typically asks after an allegation of intentional discrimination in school discipline to figure out whether the discipline was intentionally discriminatory. It is important to note that the Harvard Civil Rights Project points out that “Title VI has been “ineffective and [is] rarely enforced” in discipline cases.” Skiba et al., *supra* note 16, at 1091 (citing the Civil Rights Project); However, the Department of Justice and Department of Education Joint “Dear Colleague” letter explicitly allows for more circumstantial evidence to be used to show discriminatory intent. More research is needed to decipher whether recent DOE guidance, in actuality, allows for more successful Title VI disparate treatment claims.)

167 The Family Educational Rights and Privacy Act prohibits schools from disclosing “student records” without written parental consent. “Student records” include student discipline records. Although there are limited exceptions where parental consent is not required to release student discipline information, the exceptions only allow for disclosure of final outcomes of a disciplinary proceeding for violent crimes or non-forcible sex offenses. 34 C.F.R. §§ 99.31(a)(13)–(14); see also, U.S. DEPT OF EDUC., BALANCING

card requirements may allow parents to use broad, district-wide statistics to more easily make these comparisons.¹⁶⁸

Second, a claimant could bring a disparate impact claim if he or she believes a neutral discipline policy's administration was not motivated by racial animus, yet still had a discriminatory effect.¹⁶⁹ Because the Supreme Court held in *Washington v. Davis* that disparate impact alone is not enough to show racial animus under the Fourteenth Amendment Equal Protection Clause,¹⁷⁰ a parent must bring a disparate impact claim under Title VI or Title IV.¹⁷¹ Even though Title VI's accompany regulations allow for a parent to bring a disparate impact claim absent evidence of intentional discrimination, *Alexander v. Sandoval* ended private rights of action under Title VI in 2001.¹⁷² As a result, enforcement of Title VI claims is left to the federal government.¹⁷³

Additionally, low-income parents still face the structural barrier that they are not entitled to a civil attorney absent a showing of effect on physical liberty.¹⁷⁴ Some might contend that parents can still file complaints through the Department of Education Office of Civil Rights; however, the complaint form contains procedural complexities, numerous time-sensitive deadlines, and encourages parents to file internal grievances prior to filing a complaint.¹⁷⁵ Most disproportionate discipline claims today are brought by large advocacy groups,¹⁷⁶ many of which do not take on individual clients.¹⁷⁷

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- STUDENT PRIVACY AND SCHOOL SAFETY (2007), <http://www2.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf>.
- 168 PROFESSIONAL LEARNING EXCHANGE, THE EVERY STUDENT SUCCEEDS ACT: STATE AND LOCAL EDUCATION AGENCY REPORT CARD REQUIREMENTS 3 (2016), https://www.psea.org/uploadedFiles/Publications/Professional_Publications/Advisories/Advisory-ESSA-StateAndLocalReportcardRequirements.pdf.
- 169 Amy Howe, *Disparate Impact-Claims Survive Challenge: In Plain English*, SCOTUSBLOG, (Jun. 25, 2015), <http://www.scotusblog.com/2015/06/disparate-impact-claims-survive-challenge-in-plain-english/>.
- 170 426 U.S. 229 (holding that a police admissions exam did not violate the 14th Amendment Equal Protection Clause in spite of a showing that it had a disparate impact on the admission of black police officers.).
- 171 Title VI, *supra* note 160.
- 172 Skiba et al., *supra* note 16, at 1091 (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)).
- 173 *Id.* at 1099.
- 174 COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE & NORTHEASTERN UNIVERSITY SCHOOL OF LAW PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY (COLUMBIA LAW SCHOOL), EQUAL ACCESS TO JUSTICE 1 (2007).
- 175 See U.S. Department of Education, *OCR Complaint Forms* (last updated Nov. 5, 2015), <http://www2.ed.gov/about/offices/list/ocr/complaintintro.html> (detailing the procedures necessary to file a discrimination complaint through the Office of Civil Rights).
- 176 See generally American Civil Liberties Union of New Jersey, *South Orange-Maplewood School District Office of Civil Rights Complaint*, ACLU (Oct. 9, 2014), <https://www.aclu.org/legal-document/south-orange-maplewood-school-district-office-civil-rights-complaint> (example of an OCR complaint filed by the New Jersey ACLU, demonstrating the complexity of filing a claim as compared to a parent filling out the form).
- 177 See also COLUMBIA LAW SCHOOL, *supra* note 174, at 3. Because “the majority [of a survey of trial judges from 37 states] reported that pro se litigants were ineffective in their self-advocacy because they failed to present necessary evidence [and] committed procedural errors . . . “ it seems likely that the same pitfalls in pro se court would manifest in the filing of a disproportionate discipline complaint with the DOE Office Of Civil Rights, as well, although more research is needed to back this contention.

ii. Elimination of Exclusionary Discipline Altogether

Some school districts and policy makers are moving towards precluding suspensions entirely,¹⁷⁸ but this is not a realistic solution. One might well say, “*What? Eliminating exclusionary discipline altogether is a non-solution? Isn’t that contrary to the entire premise of this Note?*” Yes and no. It might be true that school exclusionary discipline practices have little or no value as a discipline tool *to the student*, but teachers still need a way to remove a student from the classroom if the student’s behavior is disrupting the classroom culture and learning environment of other students. There is space for better teaching strategies to minimize the need for suspensions, but a student’s interest in a disruption-free classroom, the school’s interest in “promot[ing] safe and orderly school environments,”¹⁷⁹ and the teacher’s interest in maintaining class order dictate that exclusionary practices should not entirely disappear.¹⁸⁰ Even with preventative measures such as Positive Behavior Supports¹⁸¹ in place, there will still be, on occasion, a student who needs to be physically taken out of the general education classroom.¹⁸²

Elimination of all exclusionary practices might sound great in theory, but it simply is not a practical solution for teachers, especially when the teaching profession is suffering in numbers as greatly as it is.¹⁸³ Discipline-related problems

178 See *supra* note 12 discussion.

179 U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., *supra* note 17.

180 See *supra* discussion Part III.A.i..

181 See *infra* note 191.

182 My own teaching experience confirms this. In my third year of teaching at one of the highest performing charter schools in Washington, D.C., my school did attempt to keep one student in particular in the classroom at all costs. Among other problematic patterns of behavior, his everyday mission in life seemed to be to unplug my projector while I was teaching a whole-class guided reading lesson, which might seem comical now, but it wasted nearly twenty to thirty minutes of class time every day. This amount of time might seem trivial, but thirty minutes of instruction for students already behind their higher-socioeconomic peers across the city can add up to a large amount of time over the course of the school year. After countless behavior intervention plans (at a school that already had a character education program and PBIS) extensive parental involvement, attempts at strengthening my personal relationships with him, and numerous personal aides (whereas this would not even be possible in most traditional public schools without a special education diagnosis under IDEA), this student continuously disrupted an entire classroom of twenty-eight first graders. It was definitely not to this student’s benefit to be excluded from class, but keeping him in class at all costs was also not fair to the other twenty-something students in class who were losing precious learning time.

183 See Eric Westervelt, *Where Have All the Teachers Gone?*, NPR (Mar. 3, 2015, 2:03 PM), <http://www.npr.org/sections/ed/2015/03/03/389282733/where-have-all-the-teachers-gone> (Enrollment is drastically declining at some of the leading teacher training programs. Enrollment is down fifty-three percent over the past five years in California and twenty percent over the last three years in North Carolina due to the “erosion of teaching’s image as a stable career.”); see also Dan Carden, *Interest in Indiana Teaching Careers Declines Sharply*, NWITIMES.COM (Sept. 24, 2015), http://www.nwitimes.com/news/local/govt-and-politics/interest-in-indiana-teaching-careers-declines-sharply/article_dc856843-53d4-5248-9b72-76a829136925.html (The issuance Indiana teaching licenses dropped thirty-three percent in the 2014–15 school year, and between 2009–13 the number of college students in Indiana taking teacher education courses dropped fifty percent).

are the “prime stress-producing factor in teaching.”¹⁸⁴ It is no surprise that over three quarters of teachers disagree with policies that prevent minorities from being expelled at greater rates (likely also in part because of teachers’ preference for classroom autonomy).¹⁸⁵ Prospective educators do not need another reason not to go into the teaching profession.

a. Possible (Though Admittedly Far-Fetched) Solution: Change Procedural Due Process Requirements for Suspensions

There are certainly a multitude of details to be worked through, but changing the way courts conceptualize the amount of due process a student is entitled to for suspensions under *Goss v. Lopez*¹⁸⁶ may affect positive change for families and students. Under the *Mathews v. Eldridge* test,¹⁸⁷ courts currently weigh (1) the child’s interest in ten or fewer days of education against (2) the school’s interest in efficiency.¹⁸⁸ If courts instead weighed: (1) the amount of educational harm resulting from losing less than ten days of school *plus* the interest of a parent in keeping her job for the benefit of the family against (2) the school’s interest in efficiency, the scales would likely tip in favor of necessitating more formal due process procedures. By recognizing these additional harms, schools might be less likely to use out of school suspensions for non-suspension worthy behaviors because courts could necessitate more procedural requirements. For example, a court could shift the burden onto the school to prove that the behaviors resulting in suspension actually occurred *and* were truly suspension-worthy.¹⁸⁹ Requiring the school to affirmatively justify how the suspension was fair and consistent would make school administrators less likely to engage in unnecessary suspensions as a behavior control mechanism, as well as make it more difficult to disprove. Additionally, the court could also require more formal notice and opportunity to present the student’s side prior to calling the parent for a midday pick-up. Perhaps having this additional safeguard would also prevent teachers and administrators from using out-of-school suspensions, as they would have to devote more time and resources to utilize suspension as a discipline tool. Although this is not the traditional way of thinking about due process analysis—nor would it likely be adopted given the immense

184 Barbara F. Zimmerman, *The Nature and Consequences of Classroom Disruption* (1995) (unpublished PhD dissertation, State University of New York), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.139.4113&rep=rep1&type=pdf>.

185 Green, *supra* note 155.

186 419 U.S. 565 (1975).

187 See *supra* discussion Part III.A.i.

188 419 U.S. 565.

189 See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (using the *Mathews v. Eldridge* test to find that a U.S. citizen-detainee had a due process right to notice of the factual basis for his classification as an enemy-combatant, but the circumstances demanded that the burden could be shifted to a rebuttable presumption in favor of the government’s evidence). Although the circumstances in *Hamdi* were more extreme (post-September 11th detention of an alleged enemy combatant), this case still shows that the amount of due process given under the Mathews Test can include a court’s ability to burden-shift based on the weight of the three factors. *Id.*

complexity in reconfiguring current due process notions¹⁹⁰—it is worth thinking through for important policy reasons.

b. Feasible Solutions

With so many competing interests at stake, there is no easy or single “fix” for exclusionary discipline practices that would eliminate all costs for all parties involved. Rather, a patchwork of strategies can reduce the current costs of suspension. No one cost can entirely be eliminated, but competing interests can be more adequately balanced so no one party—such as the families of suspended students—bear the brunt of school discipline policies. Teachers and students share a common interest (albeit for different reasons): the interest in having a positive classroom culture void of significant learning disruptions. There are numerous preventative strategies that schools can implement in order to alleviate student discipline problems before they begin. Having a strong classroom culture that rewards students’ positive behavior, rather than punishes students for disruptive behavior, is one way to go about this.

Positive Behavior Supports (PBS) and the Safe and Responsive Schools Project aim to help schools develop preventative strategies for addressing student behaviors.¹⁹¹ Not only is it proven that these preventative programs can improve student behavior, they also increase teacher perceptions of student misbehaviors.¹⁹² Teachers felt more aware of strategies to change student behaviors and “increased options for keeping students in school.”¹⁹³ It is important to note that the implementation of preventative programs should be a school-wide, not a top-down, effort in order to create community buy-in.¹⁹⁴ Standing alone, PBS is not enough.¹⁹⁵

It would also benefit low-income students if schools recognized trauma as a factor that impacts student behavior.¹⁹⁶ Given that one out of four children have

190 Re-configuring due process still raises numerous valid questions: would schools instead use in school suspensions to avoid lengthy due process requirements? Would working parents be the only parents to get these additional due process safeguards? If so, is that fair?

191 See Russell J. Skiba, Shana Ritter, Adam Simmons, Reece Peterson & Courtney Miller, *The Safe and Responsive Schools Project, Safe and Responsive Schools 631* (2005), http://www.indiana.edu/~equity/docs/A_School_Reform_Model.pdf.

192 See *id.* at 645.

193 *Id.*

194 *Id.* at 646.

195 PBS is already implemented in sixteen thousand schools around the country, yet disproportionate discipline is still a pervasive problem. See Jane Ellen Stevens, *Masachusetts, Washington State Lead U.S. Trauma-Sensitive School Movement*, ACES TO HIGH (2012), <http://acestohigh.com/2012/05/31/massachusetts-washington-state-lead-u-s-trauma-sensitive-school-movement/>.

196 A growing body of research suggests that children’s brains respond to trauma (defined as “multiple traumas including physical or sexual abuse, abandonment, and domestic and neighborhood violence”) in ways that dramatically affect their behaviors. See Jane Meredith Adams, *Schools Promoting Trauma-Informed Teaching to Reach Troubled Students*, EDSOURCE (Dec. 2, 2013) (“In the brains of traumatized youth, neural pathways associated with fear and survival responses are strongly developed, leaving some children in a state of hyperarousal that causes them to overreact to incidents

witnessed a violent act, programs such as the ARC Framework can significantly prevent student misbehaviors and alleviate the need for suspensions.¹⁹⁷ The limited number of schools that have already implemented trauma-informed improvement plans have shown up to forty percent reduction in suspension since their implementation.¹⁹⁸ Newly emerging strategies such as meditation within schools has also had profound effects on students. For example, a “Quiet Time” meditation program in San Francisco schools reduced the suspension rate by as much as forty-five percent in one school during the program’s first year, and a similar study in Connecticut showed significantly lower stress-hormone levels in high school students.¹⁹⁹ Lastly, the implementation of restorative justice models to teach students improved conflict-resolution skills can also contribute to alleviating discipline problems within the classroom. These preventative measures are all necessary, long-term solutions to preventing behavior issues from arising in the first place. Preventative approaches aimed at improving classroom management and student behaviors address students’ interests in maintaining disruption-free classrooms, the disciplined student’s need to remain in the classroom, and the teacher’s need to maintain order.

Prevention of misbehavior will not always be enough for two reasons: (1) if a teacher can’t recognize behavior that is truly “disruptive,” preventative efforts are useless, and (2) misbehaviors are inherently bound to occur sometime. Because White teachers can perceive different cultural behaviors as “misbehaviors,”²⁰⁰ teachers can mislabel minority student behavior as discipline-worthy; this practice undermines any preventative efforts the school might have in place. In order to prevent this phenomenon, culturally responsive teaching, implicit bias trainings, and law in education courses need to be taught in teacher training programs and reinforced through professional development sessions throughout a teacher’s career. Additionally, schools should turn to suspension policies such as California’s and Illinois’ which eliminated suspensions for minor misbehaviors²⁰¹ and require exhaustion of preventative strategies before schools may issue suspensions.²⁰²

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- other children would find nonthreatening, the research shows. Consumed by fear, they find it difficult to achieve a state of calmness that would allow them to process verbal instructions and learn”).
- 197 Trauma Center, *Attachment, Regulation, and Competency*, JUSTICE RESOURCE INSTITUTE, <http://www.traumacenter.org/research/ascot.php> (accessed Dec. 15, 2015).
- 198 Stevens, *supra* note 195.
- 199 Amanda Mochado, *Should Schools Teach Kids to Meditate?* THE ATLANTIC (Jan. 27, 2014), <http://www.theatlantic.com/education/archive/2014/01/should-schools-teach-kids-to-meditate/283229/>.
- 200 See TOWNSEND, *supra* note 36, at 383 (“Cultural conflicts may exist between African American students’ culture and schools’ mainstream culture. For example, many African American students are accustomed to engaging in multiple activities simultaneously in their homes and communities. They can be involved in multiple conversations while eating, studying, watching television, or participating in other recreational activities. Thus, those students may prefer activities that allow them to socialize with others while completing tasks. At school, teachers usually expect and reward students’ individual engagement in one activity at a time, as opposed to managing multiple tasks and working with others”).
- 201 Press Release: *California Enacts First-in-the-Nation Law to Eliminate Suspensions for Minor Misbehaviors*, ACLU of Northern California (2014), <https://www.aclunc.org/news/california-enacts-first->

Even after refining what constitutes a suspension-worthy “misbehavior” through policy reform and implementing preventative strategies at the school-level, misbehaviors are still bound to occur. Therefore, suspensions should not be altogether eliminated. In order to address parents’ interest in continued employment and the teacher’s need to maintain a disruption-free environment, schools should turn to in-school-suspensions (ISS) (termed something different so as to eliminate the negative stigma) as an alternative to out-of-school suspensions; however, “schools need more than a room and a teacher for in-school suspension to change behavior.”²⁰³ According to the Education Pipeline Project at Boston College, ISS can offer a “teachable moment” to connect with students and show them that they belong in school. Certain characteristics of ISS programs, such as term limits, problem-solving/mediation focus, professional staffing, and structured programs can lead to reductions in school discipline rates, overall.²⁰⁴

Schools should continue to implement preventative strategies and still allowing for in-school suspensions while these measures take effect. Parents would not have to risk losing their jobs, students *could* still get some sort of educational benefit—an issue that is beyond the scope of this Note—and teachers would still have the necessary relief for a student who really did need to be removed from the classroom.

CONCLUSION

With 1.2 million black children suspended annually, a majority of whom are children of low-income single mother households, the use of suspensions as a discipline tool is clearly misaligned with the needs of vulnerable families. When a low-income single mother is called to pick up her child from school—or any parent with inflexible job schedule for that matter—inflexible schedules and lack of policy protections for education-related emergencies create a strong likelihood that she will suffer some sort of penalty. If she does not lose her job the first time, given a black child’s statistical likelihood of frequent suspensions, it is likely that she will eventually. Clearly, suspensions have far more grave implications than currently given credit for. Taking into account the supplementary consideration of the

nation-law-eliminate-student-suspensions-minor-misbehavior. (After the enactment of AB420, “California bec[ame] the first state in the nation to eliminate suspensions for its youngest children, and all expulsions for all students for minor misbehavior such as talking back, failing to have school materials and dress code violations).

202 See Evie Blad, *Illinois Governor Signs Sweeping School Discipline Bill Championed by Students*, EDUCATION WEEK (Aug. 25, 2015, 4:14 PM), http://blogs.edweek.org/edweek/rulesforengagement/2015/08/illinois_governor_signs_school_discipline_bill_championed_by_students.html.

203 *In School Suspension: A Learning Tool*, EDUCATION WORLD, http://www.educationworld.com/a_admin/admin/admin329.shtml (last visited Dec. 17, 2015).

204 See *id.* (“At Falcon Middle School in Peyton, Colorado, safety and discipline incidents dropped dramatically after the school introduced an in-school suspension program in 2001-2002. ‘We had 437 safety and disciplinary incidents in 2000-2001 [before in-school suspension],’ principal Bill Noxon told Education World. ‘In 2001-2002, we had 74.’”).

disproportionate affect of suspensions on low-income families could provide additional support for lobbyists and advocacy groups to push legislation that centers on the reduction of out of school suspensions as a discipline norm within the education realm.