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TESTIMONY OF
THE NEW YORK CIVIL LIBERTIES UNION
on
PROPOSED CHANGES TO THE 2012-2013 CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES
(THE DISCIPLINE CODE AND BILL OF STUDENTS' RIGHTS AND RESPONSIBILITIES, K-12)

June 19, 2012

Introduction

The New York Civil Liberties Union respectfully submits the following testimony regarding our recommendations for the 2012-2013 Citywide Standards of Discipline and Intervention Measures, hereinafter referred to as the Discipline Code.

With more than 48,000 members, the New York Civil Liberties Union is the foremost defender of civil liberties and civil rights in New York State. One of our primary advocacy campaigns for many years has been advocating for progressive, positive discipline in schools. We have documented the harms of overly-punitive, exclusionary, and criminal justice responses to student behavior, including the detrimental effects on student achievement and engagement, the discriminatory impact of zero tolerance on students of color and students with disabilities, and the correlation with high-dropout rates and involvement with the criminal justice system.

This year we are pleased to commend the Department of Education (DOE) for its efforts to engage the New York City advocacy community, parents and students in drafting a more effective and fair discipline code. The DOE has taken the very significant step of eliminating principal suspensions as a disciplinary option for Level 2 infractions and classroom removals for most Level 1 infractions. In addition, the draft Discipline Code is more clearly organized and accessible to parents, and contains a disciplinary ladder that references guidance interventions and restorative practices. Finally, we are pleased that the DOE has removed "horseplay" as a

punishable offense from infractions A24 and B24, and added language to infractions A22 and B21 that clarifies a student may be punished for insubordination only if their behavior "substantially interferes" with the "education environment."[1]

At the same time, there is work to be done. State law requires the DOE to update its code of conduct each year, with a focus on the *effectiveness* of its provisions and the *fairness* and *consistency* of its administration.[2] Yet the DOE's own data demonstrates that suspensions are neither effective nor fair: 30% of students who are suspended are suspended more than once, because suspensions do not help them learn from misbehavior.[3] And because suspensions are administered unfairly, black students and students with disabilities are heavily penalized by the system.

Black students make up 30 percent of the student population but serve 50 percent of all suspensions.[4] Further, black children are more likely to serve a long-term suspension (58 percent of long-term suspensions from 1999-2009); they are more likely to be suspended multiple times (of students who served 6 or more suspensions in a single year, 56 percent were black); and they are more likely to be subject to suspension for subjective misconduct than their white peers (57 percent of suspensions for insubordination, for example).[5] Students with disabilities—students who are at the greatest risk of not graduating high school—are 4 times more likely to be suspended than general education students.[6] Black students with disabilities represent 4 percent of total student enrollment but 13 percent of suspensions.[7] In 2010-2011, students served over 73,400 suspensions.[8] The average length of a long-term suspension is 25 days, or *5 weeks'* worth of instruction.[9] The DOE must correct these inequalities.

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[1] 2012 Draft of the "Citywide Standards of Intervention and Discipline Measures" (Discipline Code). Infractions A22 and A24 (pg. 19) and B21 and B24 (pg. 25).
[2] 8 NY ADC 100.2 (l)(2)(iii)(a); (N.Y. Comp. Codes R. & Regs. tit. 8, § 100.2)
[3] Deputy Chancellor Kathleen Grimm, Testimony at New York City Council Hearing on Department of Education's School Suspension Data. Hr'g Tr 20: 18-24. Nov. 30, 2011. Available at: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1011796&GUID=A7AB6DA7-4368-4C83-AF59-A70F0C089CCC&Options=&Search=. Last accessed June 15 2012.
[4] *See* New York Civil Liberties Union (NYCLU) "Soaring NYC Suspension Rate Disproportionately Impacts Black Students and Students with Special Needs," Nov.2011. Available at: http://www.nyclu.org/news/soaring-nyc-suspension-rate-disproportionately-impacts-black-students-and-students-with-special. Last accessed June 15, 2012. *See also*, NYCLU and Student Safety Coalition, "Education Interrupted: The Growing Use of Suspensions in New York City's Public Schools," Jan. 2011.
[5] "Education Interrupted," *Id*. at 19.
[6] *Id* at 3.
[7] *Id* at 20.
[8] *See* NYCLU "Soaring NYC Suspension Rate," *Id.*
[9] "Education Interrupted," *Id.* at 6.

We have seven recommendations for ways the DOE can continue to improve the Discipline Code so that school rules are more fair, consistent, and effective. We discuss each of them in turn.

1. Mandate positive discipline and train teachers, administrators and School Safety Officers in positive interventions.

The systematic implementation of positive discipline alternatives will make schools safer, calmer, and more effective places for young people to learn. The DOE has communicated its faith in positive discipline by piloting programs around the city and including positive discipline language in the Code and elsewhere. Yet, without a mandate and meaningful training, the use of these alternatives on the ground remains questionable. For many years, the DOE instructed principals to use zero tolerance discipline responses for many types of infractions in the Code, from bullying to possessing contraband. Without that same strong instruction from the DOE to move away from zero tolerance and implement positive alternatives, these changes will not happen in most schools.

Without adequate training, even tools like mediation and restorative practices can contribute to negative outcomes for students. Positive discipline should be required the same way punitive discipline has been, but at the same time the DOE must train educators to use these methods well.

Finally, we recommend the DOE measure and evaluate principals' use of alternatives to suspension. Collecting reliable data on the use of exclusionary and positive discipline from all schools is the only way to know if principals are using alternatives to keep students in class.

2. Eliminate zero tolerance infractions and restore discipline authority to educators.

Zero tolerance has been widely discredited for being discriminatory and ineffective.[10] Eliminating it means eliminating it from the text of the Code and from the practice in classrooms and hallways. It means giving strong instructions to principals that suspensions are not to be

[10]Russell Skiba, et. al, "Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations," *American Psychological Association Council of Representatives* (Aug. 9, 2006); Pedro A. Noguera, "School, Prisons and Social Implication of Punishment: Rethinking Disciplinary Practices," *Theory into Practice* (2003)*;* NAACP Legal Defense & Educational Fund, Inc., "Dismantling the School-to-Prison Pipeline (2005); Russell Skiba and M. Karega Rausch, "Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness," in Evertson and Weinstein (eds), *Handbook of Classroom Management: Research, Practice, and Contemporary Issues* (Lawrence Erlbaum Associates 2006); NYCLU and Student Safety Coalition, "Education Interrupted: The Growing Use of Suspensions in New York City's Public Schools," January 2011.

sought in the first instance of misbehavior. It means training School Safety Officers to contribute to positive discipline programs rather than undermine them.

The simplest step the DOE can take to reduce educators' reliance on zero tolerance practices is to reduce the number of infractions for which classroom removals, suspensions, and expulsion are available. Presenting a range of discipline options corresponding to each infraction, and a scheme of dividing behaviors into increasing levels of seriousness, is a meaningless exercise in a system where children can be removed from the learning environment for committing nearly any infraction.

3. Adjust the Levels in the Discipline Code to reflect a genuine commitment to progressive discipline.

We recommend that the levels in the Discipline Code be revisited in order to reflect a more sensible, progressive response to misbehavior. Classroom removals should not be an option for *any* Level 1 misbehavior. At the other end of the spectrum, expulsion should never be an option for Level 4 infractions.

Our study of New York City discipline data showed that the majority of suspensions are for Level 3 and Level 4 behaviors.[11] If, during the 2008-2009 school year, suspensions were not an optional punishment for Level 3, no fewer than 20,000 suspensions would have been avoided. Levels 4 and 5 should be accompanied by an instruction to educators that these levels of infractions represent the most serious misbehavior, and are only to be used when lower-level infractions do not apply and where non-punitive methods have failed to correct the behavior.

Finally, expulsion should under no circumstances be a disciplinary option for Level 4 infractions. We needn't explain the harm that expulsion can do to a child's future. Allowing for the application of the most serious punishment to anything but the most serious behaviors is counter to the logic of dividing infractions into Levels. Even state and federal law allow exceptions to minimum suspension periods under certain circumstances.[12]

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[11] "Education Interrupted," *Id* at 11.

[12] *See,* Federal Gun-Free Schools Act, 20 U.S.C.A. § 7151 (b), *stating*, "Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school…**,** *except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing."* (emphasis added). *See also,* Safe Schools Against Violence in Education (SAVE) Act, New York Educ. Law §2801 (2)(l) et seq., requiring, "a minimum suspension period, for students who repeatedly are substantially disruptive of the

4. Clarify the role of School Safety Officers with Regard to Discipline.

This March, a sixteen year old student at Sheepshead Bay High School was handcuffed for over one hour after being attacked by two other students in the school. The cuffs were so tight that her fingers and wrists became swollen and red. The student was not arrested but received a summons for disorderly conduct.

The NYCLU does not believe that her experience was unique. This school year, we have received over a dozen intakes from families whose children have been unnecessarily restrained by police officers in their schools or charged with crimes for breaking school rules. More than 15 students are arrested at or ticketed in New York City schools each day.[13] Ninety-six percent of these are black and Latino youth.[14] The NYCLU urges the DOE to take a more proactive stance on limiting police involvement in student discipline and explicitly prohibit the arrest of young people for common, minor misbehavior. Other districts have established similar limits with the result that fewer young people are fed into the criminal justice system.[15]

In addition, School Safety Officers must be trained to work with students with special needs, and schools must be given proper supports for meeting these students' needs. It has been well-documented that schools and police refer students to EMS when they become unruly, particularly special education students.[16] In March of this year, the Daily News reported that a

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educational process or substantially interfere with the teacher's authority over the classroom, *provided that the suspending authority may reduce such period on a case by case basis."*(emphasis added).

[13] *See* New York Civil Liberties Union (NYCLU) "Soaring NYC Suspension Rate Disproportionately Impacts Black Students and Students with Special Needs," Nov.2011. Available at: http://www.nyclu.org/news/soaring-nyc-suspension-rate-disproportionately-impacts-black-students-and-students-with-special. Last accessed June 15, 2012.

[14] *Id.*

[15] The Advancement Project has been working with various school districts to eliminate the "schoolhouse to jailhouse track" in four different cities including, Baltimore, Chicago, Denver, and St. Petersberg, Florida. *See,* "Schoolhouse to Jailhouse: On the Ground," available at: http://www.advancementproject.org/our-work/schoolhouse-to-jailhouse/on-the-ground. Last accessed June 15 2012. *See also,* Judge Steven Teske and Judge Brian Huff, "When Did Making Adults Mad Become a Crime? The Court's Role in Dismantling the School to Prison Pipeline," Juvenile and Family Justice Today, Winter 2011. Available at http://www.child-dev.com/assets/files/Dismantling%20pipeline.pdf. Last accessed June 13, 2012.

[16] *See,* Councilmember Robert Jackson Testimony at New York City Council Hearing on School Based Mental Health Services, *stating,* "These are not isolated incidents – they are all-too-common. In February, I met with representatives from all 5 borough offices of Legal Services NYC, who told me that they had seen a rise in the number of students sent by schools to ERs for behavior problems." Hr'g Tr: 13: 18-25; 14:2-4. May 1, 2012. Available at: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1108301&GUID=28898978-357B-42F3-AD8D-C88BE8C88482&Options=&Search=. Last accessed June 15 2012; *See also,* Rachel Monahan, "Kindergarten Cops Blamed in Tantrum Scuffle." New York Daily News, April 17, 2012. Available at http://www.nydailynews.com/new-york/brooklyn/kindergarten-cops-5-year-old-autistic-boy-tantrum-school-3-generations-scrap-nypd-article-1.1062717 . Last accessed June 13 2012; Michael Winerip, "Keeping Students' Mental Health Care out of the E.R." The New York Times, April 8, 2012. Available at:

five year-old, autistic student in Coney Island was restrained and handcuffed by the police for throwing a tantrum in class. The child's great grandmother, who attempted to calm him down, was shoved so hard by the arresting officer that she broke a rib. The child was taken by EMS to the Coney Island Hospital, where the psychiatrist gave him a clean bill of health and told him he could return to school the next day.[17]

Despite stories like these, the DOE continues to disclaim responsibility for the training, activities, conduct and *misconduct* of School Safety Officers. While the DOE invited the NYPD to place officers in schools, and contributes a large portion of the operating budget of the School Safety Division, it has subsequently denied all responsibility for their policies and practices, their authority in schools, and their relationships with students and teachers. One way the DOE maintains this hands-off school safety policy is by abstaining from any language in the Discipline Code that refers to arrests of students, issuing of criminal summonses for school-based infractions, the use of handcuffs on students, or police interventions in student discipline. Reading this document, a student or parent would have no sense of the fact that breaking one of these rules could result in physical restraint by police, a referral to EMS and criminal charges against the student.

At the very least the Discipline Code must inform teachers and students of restrictions on the types of discipline situations that may result in police involvement and EMS referrals. For instance, if it is the DOE's policy, as has been suggested in the media, that children who throw tantrums will be handcuffed and placed in an ambulance,[18] this fact must be reflected in the Discipline Code. Ultimately, we urge the DOE to embrace a policy that *prohibits* School Safety Officers from arresting or ticketing students for breaking a school rule. As long as a criminal justice response is on the table, positive discipline can never take root in schools.

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http://www.nytimes.com/2012/04/09/nyregion/trying-to-keep-students-mental-health-care-out-of-the-er.html?pagewanted=2&_r=1. Last accessed June 13, 2012.

[17] Monahan, *Id*.

[18] A police spokeswoman for the Coney Island incident noted, "Officers were called to the school because the boy was out of control." *Id*. In addition, the New York Times reported that in February one Bronx Hospital received "58 E.M.S. calls from schools during a 10-day period." Winerip, *Id*.

5. Clearly state the due process protections students are entitled to for each type of discipline response listed in the code.

The DOE should add a third column on page 13 explaining the Due Process protections that attach to each type of exclusionary discipline. Classroom Removals should include the right to parental notification of the removal within 24 hours.[19] Principal suspensions should, at minimum, include the right to written notice within 24 hours, the right to request a conference with the principal, and the right to alternate instruction.[20] Superintendent suspensions should, at minimum, include the right to written notice, the right to a hearing with representation within five days of the suspension and appropriate notice of special education protections.[21]

In addition, the Code should state that students have a right to access video surveillance footage to defend themselves in suspension hearings and suspension appeals.[22] Limiting students' access to footage that will be used to make the school's case, but not exculpatory footage is fundamentally unfair.[23]

6. Ensure that students' rights to free speech and religious expression are honored throughout the Discipline Code and in practice.

This recommendation, which we have made for several years, is with specific reference to infractions A09/B09, A33/B36, and A37/B40.

> **A09/ B09: "Wearing clothing, headgear (e.g. caps or hats), or other items that are unsafe or disruptive to the educational process."**

Infractions A09 and B09 are currently accompanied by the following text: "If there is a question regarding whether or not clothing or headgear is representative of religious expression, the school should contact the Youth Development Liaison in the CFN." This instruction is based

[19] Chancellor's Regulation A-443 §III.A.8
[20] *Id.* at III.B.2
[21] *Id*. at III.B.3(n)
[22] *See,* Matter of Rome City School District v. Grifasi*,* 806 N.Y.S.2d 381 (Sup. Ct., Oneida County, 2005) holding that student's due process right to access video evidence outweighed fellow students' rights to privacy under FERPA.
[23] The notice of suspension letter for superintendent suspensions is the only place in which the DOE has articulated this policy. The sample appended to Chancellor's Regulation A-443 is outdated and does not include the language currently used in superintendent suspension notices. The current notice of suspension letter includes this statement: "The right to view and obtain in person at the school a copy of any video recording of the incident if the school shows you or your child a video recording of the incident prior to the suspension and/or the school intends to introduce the video recording at the hearing."

on the flawed premise that a person who adopts a particular expression of his religious practice is observing a stricture that will be recognized by the Youth Development Liaison.

The Supreme Court has consistently held that the sincerity of an individual's religious belief cannot be doubted merely because it departs from other commonly-held tenets, nor can a particular religious practice be questioned just because it is singular or unprecedented.[24] In order for a school to clarify a "question regarding whether or not clothing or headgear is representative of religious expression," the school needs to look no further than the student in question. We recommend that the DOE amend this instruction to schools to adhere to constitutional requirements.

A37/ B40: "Engaging in intimidating and bullying behavior, including cyber-bullying."

The NYCLU commends the DOE for its dedication to protecting students from bias-based harassment and bullying. In implementing the Dignity for All Students Act,[25] New York State's anti-harassment statute, we hope the DOE will take note of its legislative sponsors' intent to avoid a zero tolerance response to bullying.[26]

That said, we continue to be troubled by the DOE's inclusion of "cyber-bullying" in these infractions without acknowledging any constitutional limits on schools' power to punish students for First Amendment-protected speech. The Second Circuit held in *Doninger v. Niehoff* that off-campus student speech can be regulated by the school only when it materially and substantially disrupts the work or discipline of the school, or it was reasonably foreseeable to school administrators that it might create such a disruption.[27] Importantly, the discipline at issue in *Doninger* was not a suspension (the student was prohibited from running for senior class secretary).[28]

In order to legally enforce a code provision against "cyber-bullying," the DOE must, at minimum, include language reflecting the requirements of *Doninger*. In light of the non-

[24] *See* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 833 (U.S. Supreme Court, 1989).
[25] NY Educ. Law §§10-18, 801-a, 2801 (2010).
[26] See Assemblymember Daniel O'Donnell, Letter to Governor Paterson Re: A.3661-C/S.1987-B, 7 Sept. 2010, *stating* "The legislature is aware, however, that in recent years, suspension rates have increased in New York City Public Schools. There is wide agreement among researchers that a school's over-reliance on exclusionary methods of discipline, such as suspension, damages that school's educational mission …Therefore, it is not intended that this legislation should be implemented in a manner that leads to an over-reliance on student suspensions."
[27] Doninger v. Niehoff, 527 F.3d 41 (U.S. Court of Appeals for the Second Circuit, 2010).
[28] *Id*.

exclusionary punishment at issue in *Doninger*, however, we strongly suggest the DOE take a stance that is more protective of students' rights, and errs on the side of problem-solving over censorship. As recently stated in guidelines issued by the First Amendment Center (endorsed by the National School Boards Association, National Association of State Boards of Education, and American Association of School Administrators), "the skill of listening to speech with which one profoundly disagrees nevertheless remains an essential element of preparation for democratic citizenship."[29]

Therefore, we recommend that the DOE consider adding the following elements to any infraction that seeks to punish students for protected speech.

a. The speech was directed at a student or group of students.
b. The speaker intended or could have reasonably predicted the speech would come to the attention of the targeted student or group, and it did in fact come to the attention of that student or group.
c. The speech materially and substantially disrupted the work and discipline of the school, or the speech was sufficiently severe, pervasive and persistent so as to create a hostile environment in school that substantially and materially interfered with the educational opportunity of the targeted student or students.
d. Punishment is a last resort in a progressive discipline system where other responses have been employed and have failed.

A33/ B36: Distributing Violent, Lewd, or Obscene Materials

The NYCLU is also concerned about the constitutionality of infractions A33 and B36, which prohibit "posting, distributing, displaying, or sharing literature or material containing a threat of violence, injury or harm, or depicting violent actions against or obscene, vulgar or lewd pictures of students or staff including posting such material on the Internet."

While the Supreme Court has recognized schools' interest in curtailing in-school speech that is "vulgar," [30] this power has not been extended to students' out-of-school communications. As the Third Circuit Court of Appeals stated "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control

[29] American Jewish Committee and Religious Freedom Education Project/First Amendment Center, "Harassment, Bullying and Free Expression: Guidelines for Free and Safe Public Schools," May 2012. Available at http://www.firstamendmentcenter.org/madison/wp-content/uploads/2012/05/FAC-Harassment-Free-Expression-BROCHURE.pdf. Last accessed June 13, 2012.
[30] Bethel School District No. 403 v. Fraser, 478 US 675 (United States Supreme Court, 1986).

his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[31]

In order for a school to punish a student for electronic speech, the communication must meet, at a minimum, the standard set out in *Doninger*: the speech materially and substantially disrupts the work or discipline of the school, or it was reasonably foreseeable to school administrators that it might create such a disruption.[32] The code must be amended to reflect adherence to this First Amendment standard.

Finally, the NYCLU disputes the characterization of any student expression as a "dangerous or violent behavior" that can result in a student's suspension for up to one year, or even expulsion. We strongly recommend that this behavior be re-categorized as a Level 2, "disorderly disruptive" behavior. This will also help students and teachers adhere to the First Amendment standard, reinforcing the concept that punishable speech must be *disruptive*.

7. Properly distinguish between physical and verbal sexual harassment and consensual physical contact in infractions A38 and B35.

Infractions A38 and B35 rightly prohibit the sexual harassment of students. The NYCLU is concerned, however, that the DOE has conflated "making sexually suggestive comments, innuendoes, propositions or similar remarks," with "engaging in … physical conduct of a sexual nature." Two students kissing in the school yard, a student passing a flirtatious note to a classmate, and a student sexually assaulting another are vastly different situations. Yet, based on this overbroad infraction, all three can be punished by a one-year suspension. Most outrageously, students who are 17 and engage in this behavior could be expelled from school.

The NYCLU recommends that DOE amend this infraction to differentiate expressive conduct that is neither "dangerous" nor "violent" from behavior that is. First, the DOE should separate this infraction into two separate sections. One should prohibit *verbal harassment* of a sexual nature and ensure that this behavior triggers counseling and interventions for offenders. This infraction could also prohibit sexual harassment via electronic messages or images that enter into the school environment, materially and substantially interfere with the school's educational mission, and meet the foreseeability requirement set out by the Second Circuit.[33]

[31] Layshock v. Hermitage School District, 630 F.3d. 205 (U.S. Court of Appeals for the Third Circuit, 2011).
[32] *See Doninger*, 527 F.3d 41.
[33] *Id*.

Such an infraction should be no higher than a Level 2 behavior, properly designated as "disorderly" or "disruptive."

A separate infraction should address *physical harassment* of a sexual nature, redefining the prohibited conduct so as not to criminalize consensual, age-appropriate displays of affection (particularly considering that public school students in New York can be as old as 21 years of age) and ensuring that the corresponding interventions and disciplinary responses are appropriate. The NYCLU has called for this change for four years.

Conclusion

We look forward to continuing our collaboration with the DOE on discipline and due process issues. We urge you to consider seriously our recommendations today, and to publish responses to the public's commentary during the Discipline Code revision process. Responding to comments will help interested members of the public to understand the DOE's motivations, its interpretations of applicable law, and its long-term strategies for student discipline.

Students have a right to a public education—a right that is seriously compromised when young people spend weeks or months serving suspensions, or when they are pulled from their classrooms by police. They also have rights to free expression and religion—rights that should be respected in school as they are outside. We recognize the DOE's efforts to create a more positive discipline policy, and we urge you to continue improving in this area. Thank you for considering our recommendations.