

NO CHILD LEFT BEHIND BARS: SUSPENDING WILLFUL DEFIANCE TO DISASSEMBLE THE SCHOOL-TO-PRISON PIPELINE

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With the criminalization of school discipline and the subsequent increased involvement between students and the juvenile justice system, a path from school to prison became entrenched. Public schools across the nation continued to increase their reliance on punitive disciplinary measures to punish a range of behaviors. Through these measures, schools began to perceive pushed out students as problematic, despite the lack of evidence supporting the efficacy of such policies. Due to school disciplinarians' implicit bias when enforcing exclusionary policies, students of color and students with disabilities are most at risk. In the hopes of alleviating the devastating effects of the school-to-prison pipeline, California has taken a seemingly significant step towards reform in the form of California Assembly Bill 420. The bill aims to reduce the number of suspensions issued to students for willful defiance, however, it fails to sufficiently mitigate the impact of harsh disciplinary policies among those students who are most disproportionately impacted. In order to successfully enact meaningful education reform, the willful defiance standard in California Education Code section 48900(k) must either be eliminated as a behavior warranting disciplinary action or modified to clearly define the term, outline accountability measures, and allocate sufficient funding for training such that all students

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are afforded equal protection under the law. Absent substantial revisions to the California Education Code, the amended willful defiance standard not only fails to benefit all students, but may also violate California's anti-discrimination statute.

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I. INTRODUCTION

On September 18, 2007, at a school in Palmdale, what began as a festive birthday celebration ended with a sixteen-year-old high school student face down on a table being yelled at by a school security guard to “hold still.”¹ The guard broke her arm after she “left some crumbs on the floor” from cleaning up a piece of birthday cake that she had accidentally dropped.² She received five days of school suspension and was arrested for battery and littering.³ On June 10, 2010, police were called to a San Mateo school.⁴ There, a seven-year-old special education student was “blasted” with pepper spray for not coming down off of the bookshelf he had climbed up.⁵ And, in 2012, a Stockton student with Attention-Deficit Hyperactivity Disorder⁶ (“ADHD”) pushed an officer’s hand away from his hand and kicked the officer in his right knee.⁷ The student then had his hands and feet cuffed with zip ties, was cited for battery on a police officer, and was driven in the back of a squad car to a psychiatric hospital for evaluation.⁸ The student was five years old.⁹

These incidents, and many others occurring across the nation, illustrate the rapidly growing concern that has come to be known as the school-to-prison pipeline. The school-to-prison pipeline is a “collection of education and public safety policies and practices” that either directly or indirectly force students out of the classroom and into

1. Cody Dietz, *School Guards Break Child’s Arm and Arrest Her*, YOUTUBE (Sept. 28, 2007), https://www.youtube.com/watch?v=wk2b_twCCdw; Ann M. Simmons, *High School Scuffle Exposes a Racial Rift*, L.A. TIMES (Oct. 11, 2007), <http://articles.latimes.com/2007/oct/11/local/me-palmdale11>.

2. Dietz, *supra* note 1.

3. *Id.*

4. Henry K. Lee, *San Mateo Pays Family of Boy Pepper-Sprayed by Cop*, S.F. GATE, (Dec. 8, 2011, 4:00 AM), <http://www.sfgate.com/bayarea/article/San-Mateo-pays-family-of-boy-pepper-sprayed-by-cop-2384518.php>.

5. *Id.*

6. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 61 (5th ed. 2013) (defining ADHD as “a persistent pattern of inattention and/or hyperactivity” with impulsivity that is more frequently displayed and more severe than is typically observed in individuals at a comparable level of development).

7. Dave Manoucheri, *5-Year-Old Handcuffed, Charged with Battery on Officer*, KCRA (Feb. 9, 2012, 5:15 AM), <http://www.kcra.com/5-Year-Old-Handcuffed-Charged-With-Battery-On-Officer/12648852>.

8. *Id.*

9. *Id.*

the juvenile justice system.¹⁰ It is the trend of creating conditions, such as those resulting from suspension or expulsion, that increase the probability of student incarceration.¹¹ Although proponents of school-based discipline, including arresting or imprisoning youth for various school violations, believe it to be a deterrent to undesired behavior, embroiling youth in the criminal justice system does not typically yield the “desired reformative effect.”¹² Rather, the collateral consequences are life-long and austere.¹³ In the hopes of mitigating the severe effects of the rampant school-to-prison pipeline phenomenon, California has begun to take what would appear to be significant steps towards reform. With the signing of California Assembly Bill 420 (hereinafter “A.B. 420”) on September 27, 2014, California became the first state in the nation to eliminate school suspensions for students in kindergarten through third grade as well as expulsions for students in all grades under the “subjective and often-abused” willful defiance standard in the California Education Code.¹⁴

Willful defiance, a catch-all category for school discipline, is vaguely defined in California Education Code section 48900(k)(1) as, “disrupt[ing] school activities or otherwise willfully defy[ing] the valid authority [of school staff].”¹⁵ This broad definition has been interpreted to include a variety of minor school disruptions and misbehaviors, such as failing to satisfactorily clean up birthday cake crumbs or climbing up a bookshelf, as illustrated above, as well as “talking back, failing to have school materials[,] and dress code violations,” among numerous others.¹⁶ Thus, not only did willful defiance account for roughly forty-three percent of the 609,776 suspensions dispensed to California public school students in the

10. Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009–2010).

11. *Id.*

12. Jason P. Nance, *Students, Police, and the School-To-Prison Pipeline*, 93 WASH. U. L. REV. 919, 923 (2016).

13. *Id.* at 923–24.

14. ASSEM. B. 420, 2013–2014, Reg. Sess. (Cal. 2014); *California Takes Lead in Ending School-to-Prison Pipeline*, ANTI DEFAMATION LEAGUE: C. R. (Oct. 3, 2014), <http://blog.adl.org/civil-rights/california-takes-lead-in-ending-school-to-prison-pipeline>. A.B. 420, signed by Governor Jerry Brown, was chaptered to amend section 48900(k) of the California Education Code, and went into effect January 1, 2015. ASSEM. B. 420, 2013–2014, Reg. Sess. (Cal. 2014).

15. CAL. EDUC. CODE § 48900(k)(1) (West 2015).

16. *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, PUB. COUNS. (Sept. 27, 2014), http://www.publiccounsel.org/press_releases?id=0088.

2012–2013 academic year,¹⁷ it is also “the suspension offense category with the most significant racial disparities.”¹⁸ While enacted to combat California’s daunting school-to-prison pipeline by aiming to reduce the number of suspensions issued to students for willful defiance, A.B. 420 falls short of specifically establishing how it will be effectively implemented among all student groups, particularly students of color and students with special needs, to ensure that each and every student is afforded equal protection under the law. Therefore, absent further modifications to California Education Code section 48900(k), the amended willful defiance standard not only fails to benefit all students equally, but also potentially violates Government Code section 11135, California’s anti-discrimination statute.¹⁹ As various school districts in California have begun to eliminate willful defiance as a basis upon which suspensions may be issued, this Article urges the state of California to follow suit.²⁰

Part II of this Article provides a contextual background for the analysis of California’s school discipline reform, including the causes and effects of the school-to-prison pipeline as well as the preliminary steps that California has taken to combat this problem. This includes an examination of indirect methods of entry into the pipeline, specifically focusing on the history and impact of zero tolerance policies that have gradually grown to include offenses for willful defiance. Part II then discusses how school disciplinarians’ implicit bias when enforcing exclusionary policies serves to adversely affect certain student populations, particularly racial minorities and students with disabilities. Finally, California’s A.B. 420 will be presented along with the ways in which it was designed as a solution to California’s school-to-prison pipeline by targeting the controversial willful defiance standard. In Part III, this Article illustrates how the current facially neutral willful defiance standard may violate California Government Code section 11135 by having an adverse disproportionate impact on students of color and students with special needs despite the existence of less discriminatory alternatives. In so

17. Jeremy B. White, *California Bill Curbing ‘Willful Defiance’ Suspensions Opens School Discipline Debate*, THE SACRAMENTO BEE (Aug. 16, 2014, 12:00 AM), <http://www.sacbee.com/news/politics-government/article2606848.html>.

18. *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, *supra* note 16.

19. See CAL. GOV’T CODE § 11135 (West 2002).

20. *California Takes Lead in Ending School-to-Prison Pipeline*, *supra* note 14.

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doing, this analysis shall elucidate the need for either eliminating willful defiance as a behavior warranting disciplinary action, or in the alternative, modifying A.B. 420 such that effective implementation and enforcement policies will alleviate disproportionate impacts. Part IV thus recommends the adoption of a restorative justice approach, which focuses on rehabilitation as opposed to incarceration, to replace the harsh disciplinary philosophies underlying zero tolerance and willful defiance. In the event that willful defiance is to remain a suspension offense category, this Article proposes amending A.B. 420 to include explicit language defining the overly-broad term, outlining accountability measures, and allocating funding for training such that all students are consequentially afforded equal protection under the law.

II. CONTEXTUAL BACKGROUND: CAUSES AND EFFECTS OF THE SCHOOL TO PRISON PIPELINE

Since the late 1980s, our nation has witnessed an alarmingly sharp turn in the discipline of students.²¹ As the “tough on crime” approach of the 1980s infiltrated the public school system, state legislatures and local school districts began to adopt harsh disciplinary policies that propelled misbehaving students out of classrooms with extraordinary force.²² Moreover, recent high profile school shootings, such as those that took place at Virginia Tech,²³ Sandy Hook Elementary,²⁴ and Columbine,²⁵ coupled with “the media saturating a panicked public

21. American Psychologist Association, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852–56 (2008).

22. See Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 151 (2015).

23. See Christine Hauser & Anahad O’Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, (Apr. 16, 2007), <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?mcubz=0> (recounting details of the university shooting in which thirty-three people were killed during the course of two attacks on the campus in Blacksburg, Virginia).

24. See *Sandy Hook Shooting: What Happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/index.html> (describing what transpired at the Sandy Hook Elementary School in Newtown, Connecticut on December 14, 2012, where twenty students and six adults were shot and killed) (last visited Oct. 10, 2017).

25. See Helen Kennedy, *Columbine Shootings Leave 39 Dead or Injured In 1999*, N.Y. DAILY NEWS (Apr. 19, 2015, 12:00 PM), <http://www.nydailynews.com/news/national/high-school-bloodbath-gun-toting-teens-kill-25-article-1.822951> (reporting on the rampage perpetrated by two teenaged members of a “misfit clique dubbed the Trench Coat Mafia” at their high school near Denver which left as many as twenty-five students and teachers feared dead).

with hyperbolic stories about juvenile ‘super-predators,’²⁶ has produced an upsurge of referrals to the juvenile justice system for transgressions that were once dealt with by the school.²⁷ This criminalization of school discipline and the subsequent increased involvement between students and the juvenile justice system is part of the mounting concern referred to as the school-to-prison pipeline.²⁸

*A. Causes of the School-to-Prison Pipeline:
From Student to Juvenile Delinquent*

The school-to-prison pipeline is, in essence, a “pathway from school to prison.”²⁹ Students can enter the pathway either directly, through arrest or referral to the juvenile justice system for school misbehavior, or indirectly, through exclusionary school policies that shove students out of school and into the justice system.³⁰ Direct entry into the pathway is often caused by excessive law enforcement participation in the enforcement of school rules.³¹ For example, if a student throws, say, a baby carrot at a teacher, that student could be arrested by a School Resource Officer³² (hereinafter “SRO”) on charges of assault and battery.³³ Thus, the student comes into contact with the justice system through a school-based arrest as a direct repercussion of misconduct. Indirect entry, on the other hand, primarily results from “suspensions, expulsions . . . push-outs, and the

26. Barbara A. Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court’s “Age Matters” Jurisprudence*, 46 LOY. L.A. L. REV. 933, 952 (2013).

27. See American Psychologist Association, *supra* note 21, at 852–56 (describing how zero-tolerance policies impact the school-to-prison pipeline).

28. See *id.*

29. Elizabeth E. Hall, *Criminalizing Our Youth: The School-to-Prison Pipeline v. The Constitution*, 4 S. REGION BLACK L. STUDENTS ASS’N L.J. 75, 77 (2010).

30. See *id.*

31. Jonathon Arellano-Jackson, *But What Can We Do? How Juvenile Defenders Can Disrupt the School-to-Prison Pipeline*, 13 SEATTLE J. SOC. JUST. 751, 757 (2015).

32. A school resource officer is a “career law enforcement officer . . . assigned . . . to work in collaboration with schools and community-based organizations (A) to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school; (B) to develop or expand crime prevention efforts for students; (C) to educate likely school-age victims in crime prevention and safety; (D) to develop or expand community justice initiatives for students; (E) to train students in conflict resolution, restorative justice, and crime awareness; (F) to assist in the identification of physical changes in the environment that may reduce crime in or around the schools; and (G) to assist in developing school policy that addresses crime and to recommend procedural changes. 42 U.S.C. § 3796dd-8 (2012).

33. See Asawin Suebsaeng, *14-Year-Old Girl Faces Assault Charges For Throwing Baby Carrot At Teacher*, DAILY BEAST (Oct. 24, 2015, 5:08 PM), <http://www.thedailybeast.com/articles/2015/10/24/14-year-old-girl-faces-charges-for-throwing-baby-carrot-at-teacher.html>.

removal of students from mainstream educational environments . . . into disciplinary alternative schools.”³⁴ When students spend time out of the classroom either because they are suspended, expelled, in court, arrested, or incarcerated, they tend to fall behind in their studies.³⁵ As a consequence of falling behind, these students are frequently bored or frustrated in class, which causes them to be more likely to act out and misbehave.³⁶ Their misbehavior then results in additional suspensions, court dates, or jail time as punishment, or may lead them to drop out of school altogether, all of which create an increased likelihood of future criminal behavior and engagement with the criminal justice system.³⁷ While the school-to-prison pipeline cannot accurately be attributed to one cause alone, zero tolerance policies dwarf others in comparison.³⁸ Zero tolerance is one of the main exclusionary practices engaged in by California public schools that indirectly results in funneling schoolchildren through the school-to-prison pipeline.³⁹

1. A Brief Overview of Zero Tolerance Policies in the United States

Dominating the national discourse on school discipline since the early 1990s, the term “zero tolerance” refers to disciplinary policies that compel fixed punishments for specific offenses.⁴⁰ These policies serve to strip disciplinarians of the flexibility to determine appropriate consequences in favor of severe punitive measures, such as suspensions, expulsions, and direct referral to law enforcement, “intended to be applied regardless of the gravity of behavior,

34. Archer, *supra* note 10, at 869.

35. Rhonda Brownstein, *Pushed Out*, TEACHING TOLERANCE (2009), <https://www.tolerance.org/magazine/fall-2009/pushed-out> (last visited Mar. 27, 2019)

36. Archer, *supra* note 10, at 869.

37. Brownstein, *supra* note 35.

38. NANCY, A. HEITZEG, “EDUCATION OR INCARCERATION: ZERO TOLERANCE POLICIES AND THE SCHOOL TO PRISON PIPELINE 1 (Forum on Public Policy, 2009).

39. See *2011-2012 Suspension Count By Most Serious Offense Category*, CAL. DEPT. OF EDUC., <https://data1.cde.ca.gov/dataquest/dqCensus/DisSuspCount.aspx?year=2011-12&aggllevel=State&cds=00> (last visited Mar. 27, 2019).

40. Arellano-Jackson, *supra* note 31, at 757. For example, among a list of eleven rules, one elementary school’s zero tolerance policy states: “[p]ossession of any weapon or dangerous object will automatically result in the recommendation for expulsion” and “any violation of dress code requirements, which the school official suspects is symbolic of gang affiliation . . . will be reported to the police” and “tagging or graffiti . . . will result in suspension, expulsion, arrest and loss of driving privilege.” *Zero Tolerance Policy*, GLEN VIEW ELEMENTARY SCH., <https://glenview.gilroyunified.org/our-school/zero-tolerance-policy> (last visited Mar. 27, 2019) (emphasis omitted).

mitigating circumstances, or situational context.”⁴¹ The concept ultimately functions on the assumption that removing disruptive students deters others from engaging in disruptive behavior, thereby producing an enhanced learning climate for all those who remain.⁴²

Zero tolerance stems from the 1980s “tough on crime” movement to implement far more punitive policies in the criminal justice system.⁴³ The practice was enshrined by the Gun-Free Schools Act of 1994,⁴⁴ a federal law requiring “states to mandate a minimum one-year expulsion of any student caught with a firearm on school property” as a condition for receiving federal funds.⁴⁵ It was originally conceived as an approach to maintaining uniform discipline and, primarily, as a method for improving campus security in the wake of devastating school shootings.⁴⁶

However, the Gun-Free Schools Act not only validated the zero tolerance concept, allowing for its implementation as a standard part of public school discipline, it also served as a catalyst for the inclusion of additional student behaviors and offenses, mainly those surrounding violence, weapons, and drugs.⁴⁷ Moreover, public schools broadly interpreted the definition of “violence,” “weapons,” and “drugs” such that, in some cases, the standard paper clip or pair of scissors was considered a weapon and over-the-counter medications like Aspirin or Midol constituted drugs.⁴⁸ Most significantly, however, was the incorporation of transgressions of willful defiance that “pose little or no safety concerns” and that “have absolutely no connection to violence and drugs.”⁴⁹ These zero tolerance policies only continued to grow, embracing more and more offenses of willful defiance, such

41. American Psychologist Association, *supra* note 21, at 852.

42. *Id.*

43. Allison Fisher, *Using California State Anti-Discrimination Law to Combat the Overuse of School Suspensions*, 88 U.S.C. L. REV. 1197, 1198–99 (2015).

44. 20 U.S.C. § 7961 (2015).

45. Michael Rubinkam, *Kids’ Suspensions Renew Debate Over Zero Tolerance*, ASSOCIATED PRESS, *reprinted in* U.S. NEWS (Feb. 18, 2013), <http://www.usnews.com/news/us/articles/2013/02/18/kids-suspensions-renew-debate-over-zero-tolerance>.

46. *Id.*

47. *Id.*

48. THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (June 15, 2000), <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>.

49. *Id.*

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as disobeying school rules, insubordination, and disruption.⁵⁰ For example, before voting to ban suspension of students on the basis of willful defiance in 2013, the Los Angeles Unified School District had a zero tolerance policy “for students who failed to comply, in any way, with any policy or direction given by teachers or school administrators.”⁵¹

Zero tolerance today has become much more than fixed disciplinary policies. It has developed into an educational philosophy that is flooding public schools, one that “employs a brutally strict disciplinary model” embracing severe consequences over valued education.⁵² This mentality amplifies the growing need for modern education reform, which in California, may begin by more aggressively tackling the willful defiance suspension offense category. Supporters of zero tolerance policies advocate that they are necessary tools and useful for removing troublemaking students from the classroom.⁵³ Despite disagreement, the repercussions of zero tolerance policies are often attributed to misapplication or justified as “necessary sacrifices” if they are to be “applied fairly and are to be effective” as a deterrent.⁵⁴ However, there is growing evidence that “zero tolerance” not only does not necessarily make schools safer, but also that zero tolerance policies tend to directly increase the rate at which students drop out of school and become involved with the justice system.⁵⁵

2. How Zero Tolerance Policies Cause Students to Become Embroiled with the Criminal Justice System

Though school districts may promote the efficacy of zero tolerance policies in promoting school safety, objective data supporting those assertions are lacking.⁵⁶ According to the Zero Tolerance Task Force commissioned by the American Psychological Association (“APA”), school violence and disruption rates have been

50. Fisher, *supra* note 43, at 1200.

51. Nathan Rott, *LA Schools Throw Out Suspensions for ‘Willful Defiance’*, NPR (May 15, 2013, 5:31 PM), <http://www.npr.org/2013/05/15/184195877/1-a-schools-throw-out-suspensions-for-willful-defiance>.

52. THE CIVIL RIGHTS PROJECT, *supra* note 48.

53. Rubinkam, *supra* note 45.

54. American Psychologist Association, *supra* note 21, at 852.

55. Rubinkam, *supra* note 45.

56. Fisher, *supra* note 43, at 1202–03.

steady, notwithstanding increased implementation of zero tolerance policies.⁵⁷ Instead, positive correlations have been found between these policies and the number of juvenile criminal episodes.⁵⁸

As a result of wide-ranging and constantly growing zero tolerance policies, national suspension rates have more than doubled since the early 1970s.⁵⁹ Where less than one percent of elementary school students and eight percent of high school students were suspended in the 1972–1973 school year, almost three percent of elementary school students and roughly eleven percent of high school students were suspended in the 2009–2010 school year.⁶⁰ In other terms, national suspensions increased from about 1.7 million annually before the passage of the Gun-Free Schools Act to more than 3.3 million suspensions in 2006, after an almost universal adoption and enactment of zero tolerance policies.⁶¹ California Supreme Court Chief Justice Tani Cantil-Sakauye explained that as a consequence of being suspended, “a young person’s likelihood of contact with the juvenile justice system” triples within the year.⁶²

In addition to heightened suspension rates, truancy rates have become a serious concern in recent years.⁶³ In the 2012–2013 school year, the California Department of Education (“CDE”) reported a truancy rate of 29.28 percent, “with 1.9 million students considered truants” in California.⁶⁴ The CDE reported that “chronic absence in

57. American Psychologist Association, *supra* note 21, at 853.

58. Fisher, *supra* note 43, at 1203.

59. *Id.* at 1200.

60. *Id.*

61. *Id.* at 1202.

62. Diane Lefer, *Disrupting the School-To-Prison Pipeline*, LA PROGRESSIVE (Jan. 24, 2017), <https://www.laprogressive.com/school-prison-pipeline>.

63. *See New Data Show Chronic Absenteeism is Widespread and Prevalent Among All Student Groups*, ED.GOV (June 10, 2016), <https://www.ed.gov/news/press-releases/new-data-show-chronic-absenteeism-widespread-and-prevalent-among-all-student-groups> (“A new analysis from the U.S. Department of Education shows that chronic absenteeism impacts students in all parts of the country . . .”).

64. Kimberly Beltran, *Bill Lays Out New Anti-Truancy Program*, CABINET REP. (Mar. 28, 2016), <https://www.cabinetreport.com/politics-education/bill-lays-out-new-anti-truancy-program>. Under California’s compulsory education law, students between six and eighteen years of age are required to attend school full-time. CAL. EDUC. CODE §§ 48200–48208 (West 1987). A truant is a student who, “without a valid excuse, is absent from school for three full days in one school year, or is tardy or absent for more than 30 minutes during the school day on three occasions in one school year.” *Id.* A student is considered a “habitual truant” after the student’s “third truancy in a school year and following a district’s effort to hold a conference with the parent or legal guardian and the pupil . . . and may be referred to a school attendance review board (SARB) or to the local probation officer.” *Id.*

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the sixth grade is the most predictive indicator that a student will not graduate from high school,” thus making contact with the justice system more likely as well.⁶⁵ Ultimately, harsh and exclusionary discipline policies tend to have the indirect effect of facilitating an introduction between students and the criminal justice system rather than improving school-wide security for which these policies were originally implemented.

B. Effects of the School-to-Prison Pipeline

Generally, juvenile delinquents experience academic disappointment, substance abuse and mental health issues, disengagement from society, and various other impediments as collateral consequences of their contact with the juvenile justice system.⁶⁶ Almost half of all youth who spend time in residential juvenile justice facilities possess an academic achievement level that falls “below the grade equivalent for their age.”⁶⁷ Moreover, many of these students have already experienced “school failure” and are either marginally literate or illiterate.⁶⁸ In addition to academic repercussions, about sixty five to seventy percent of juveniles who encounter the justice system tend to have diagnosable mental health disorders, such as anxiety and depression, with roughly forty-six and eighteen percent affected, respectively.⁶⁹

Felony convictions carry the most damaging consequences for youth.⁷⁰ Long after custody time is served, barriers to employment, housing, and reintegration into society exist.⁷¹ Branded with a scarlet “F,” juvenile convicted felons are also often faced with a harder time obtaining a driver’s license or a loan, renting an apartment, and pursuing higher education.⁷² While California Welfare and Institutions

65. Beltran, *supra* note 64.

66. *Youth Involved with the Juvenile Justice System*, YOUTH.GOV, <http://youth.gov/youth-topics/juvenile-justice/youth-involved-juvenile-justice-system> (last visited Mar. 28, 2019).

67. *Id.*

68. *Id.*

69. *Id.*

70. Julianne Hing, *Florida’s School-to-Prison Pipeline Is Largest in The Nation*, COLORLINES (Feb. 12, 2013, 10:07 AM), <http://www.colorlines.com/articles/floridas-school-prison-pipeline-largest-nation>.

71. Eliza Hersch, *California’s Proposition 47 and Collateral Consequences*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Dec. 1, 2014), <http://ccresourcecenter.org/2014/12/01/california-s-proposition-47-collateral-consequences-part-ii-reentry-restoration-rights>.

72. *Sealing Juvenile Records*, CAL. CTS., <http://www.courts.ca.gov/28120.htm> (last visited Mar. 28, 2019).

Code section 781 allows youth to seal or expunge⁷³ their criminal record, the process is not always automatic and not all crimes are expugnable.⁷⁴

Even when an arrest does not lead to any further disciplinary action, psychologically, school-based arrests “can precipitate the breakdown in trust between young people and the adults in their lives,” turning what should be a nurturing atmosphere into one that is intimidating and hostile.⁷⁵ Accordingly, the consequences of harsh disciplinary policies, which increasingly result in student arrests or incarcerations, carry life-long and destructive repercussions for impressionable members of society who have not yet entered adulthood.⁷⁶

C. The School-to-Prison Pipeline’s Disproportionate Impact on Minority Students and Students with Special Needs

Not only do exclusionary, zero tolerance policies have the deleterious result of increasing the probability of an introduction between students and the juvenile justice system, but such policies are also not evenly distributed among all student groups.⁷⁷ Students of color have historically been “suspended at higher rates than their white peers, and since the 1970s, suspension rates for all racial categories of students have increased.”⁷⁸ While students of color face loftier suspension rates in general, black males in particular suffer from more frequent and more severe discipline than any other minority group.⁷⁹ Although there are those of the opinion that disproportionate suspension rates are due to socioeconomic disadvantage, “research on the subject has found that minority students are still suspended at a significantly higher rate than their white peers, even when controlling

73. CAL. WELF. & INST. CODE § 781; *Expungements*, CAL. CTS., <https://www.courts.ca.gov/partners/172.htm> (last visited Mar. 28, 2019) (defining a conviction that is expunged as “set aside or dismissed”).

74. *Youth in the Justice System: An Overview*, JUV. L. CTR., <http://jlc.org/news-room/media-resources/youth-justice-system-overview> (last visited Mar. 28, 2019).

75. Hing, *supra* note 70.

76. *Id.*

77. *State Schools Chief Tom Torlakson Announces Decline In Suspensions and Expulsions For Fifth Year In a Row*, CAL. DEP’T. EDUC. (Nov. 1, 2017), <https://www.cde.ca.gov/nr/ne/yr17/yr17rel80.asp>.

78. Fisher, *supra* note 43, at 1205.

79. THE CIVIL RIGHTS PROJECT, *supra* note 48.

for socioeconomic status.”⁸⁰ Thus, the discrepancy is more likely attributed to the result of minority students receiving harsher punishments for less serious offenses than their white counterparts receive for more serious ones.⁸¹ For example, the aforementioned incident at Knight High School in Palmdale, which resulted in three students being booked on suspicion of battery and being suspended, “provoked simmering racial tensions” in part because the scuffle that broke out occurred between three black students and a white security guard.⁸²

Zero tolerance policies also have an overwhelming impact on special education students.⁸³ The Individuals with Disabilities Education Act (“IDEA”) was amended in 1997 to afford extensive procedural safeguards for special needs students by ensuring “that a child would not be punished for behavior that was a characteristic of the child’s disability.”⁸⁴ Despite this federal protection, however, children with disabilities are often still unfairly disciplined, as they are twice as likely to be suspended (thirteen percent) than those without disabilities (six percent).⁸⁵ Moreover, their parents or guardians are often ill-equipped or unable to enforce their rights.⁸⁶ Because of the fact that federal law idealistically provides great protection for students with special needs, “the existence of much higher levels of discipline for these students suggests, at a minimum, that serious inquiry is needed into whether and how implementation of this facially strong system of laws is failing.”⁸⁷

D. The Problem with Willful Defiance and California’s Seemingly Groundbreaking A.B. 420 Education Reform Bill

As a result of the aforementioned repercussions of the school-to-prison pipeline, a series of influential local and state developments have been made over the past several years to reform harsh

80. Fisher, *supra* note 43, at 1205.

81. *Id.* at 1205–06.

82. See Simmons, *supra* note 1.

83. THE CIVIL RIGHTS PROJECT, *supra* note 48.

84. *Id.*

85. *Id.*; NAT’L COUNCIL ON DISABILITY, BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES (June 18, 2015), http://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf.

86. THE CIVIL RIGHTS PROJECT, *supra* note 48.

87. *Id.*

disciplinary practices in California's public school system.⁸⁸ For example, Los Angeles, Oakland, Pasadena, and San Francisco Unified School Districts have all implemented agreements between SROs and school districts to "limit the filing of criminal charges and citations against students for minor infractions and instead refer them to . . . other support services."⁸⁹ Most notably, however, was the passage of California's A.B. 420, which took effect on January 1, 2015.⁹⁰

Prior to the passage of A.B. 420, California law allowed a student to be suspended or recommended for expulsion if the principal of the school determined that the student had committed certain acts of willful defiance.⁹¹ California Education Code section 48900 provides directives for California public school employees, particularly outlining how suspensions and expulsions are to be applied.⁹² This code section also includes roughly twenty different behaviors⁹³ which could qualify as grounds for suspension.⁹⁴ Willful defiance, the behavior listed in section 48900(k), is so vaguely defined that it lacks

88. *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, *supra* note 16.

89. *AB 420 Signing Caps Landmark Year for School Discipline Reform in the State*, AM. C.L. UNION OF S. CAL. (Sept. 27, 2014), <https://www.aclusocal.org/en/press-releases/ca-enacts-first-nation-law-eliminate-student-suspensions-minor-misbehavior>.

90. CSBA & Pub. Couns., *Recent Legislation on Discipline: AB 420*, CSBA.ORG (Mar. 2015), [https://www.csba.org/GovernanceAndPolicyResources/~media/CSBA/Files/GovernanceResources/GovernanceBriefs/201503_AB420DisciplineFactSheet.ashx](https://www.csba.org/GovernanceAndPolicyResources/~/media/CSBA/Files/GovernanceResources/GovernanceBriefs/201503_AB420DisciplineFactSheet.ashx).

91. *Gov. Brown Signs Bill Eliminating Suspension (K-3) or Recommended Expulsion of Students (K-12) for Willful Defiance of School Authorities*, LBREPORT.COM (Sept. 28, 2014), <http://www.lbreport.com/news/sep14/skulxepel.htm>.

92. See CAL. EDUC. CODE § 48900 (West 2017).

93. These behaviors are: causing, attempting to cause, or threatening to cause physical injury to another person; willfully using violence upon another, except in self-defense; possessing, selling, or otherwise furnishing a dangerous object, unless the student had written permission to possess the item; unlawfully possessing, using, selling, or otherwise furnishing, or being under the influence of, a controlled substance, an alcoholic beverage, or an intoxicant of any kind; unlawfully offering, arranging, or negotiating to sell a controlled substance, an alcoholic beverage, or an intoxicant of any kind; committing or attempting to commit robbery or extortion; causing or attempting to cause damage to school or private property; stealing or attempting to steal school or private property; possessing or using tobacco, or products containing tobacco or nicotine products; committing an obscene act or engaging in habitual profanity or vulgarity; unlawfully possessing or unlawfully offering, arranging, or negotiating the sale of drug paraphernalia; disrupting school activities or otherwise willfully defying the valid authority of school employees in the performance of their duties; knowingly receiving stolen school or private property; possessing an imitation firearm; committing or attempting to commit a sexual assault; harassing, threatening, or intimidating a pupil who is a complaining witness or a witness in a school disciplinary proceeding for purposes of either preventing that pupil from being a witness or retaliating against that pupil for being a witness, or both; unlawfully offering, arranging to sell, negotiating to sell, or selling the prescription drug Soma; engaging in or attempting to engage in hazing; and engaging in an act of bullying. *Id.*

94. CAL. EDUC. CODE § 48900 (West 2018).

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guidance, grants school disciplinarians far too much discretion, and, thus, has recently come under attack as breeding discrimination due to implicit biases.⁹⁵ According to data from the CDE for the 2012–2013 school year, over half of all suspensions issued to California public school students were for willful defiance.⁹⁶ Willful defiance itself became a major problem after CDE data exposed that “students in certain ethnic groups experienced a disproportionate ratio of expulsions and suspensions.”⁹⁷ Today, there is a wide-spread consensus that the willful defiance suspension offense category is both “overused and applied disproportionately.”⁹⁸

From January 2015 to July 2018, A.B. 420 serves to eliminate the authority to suspend and to recommend for expulsion a pupil enrolled in grades K-3 and to recommend for expulsion a pupil enrolled in grades K-12 for disrupting school activities or willfully defying the authority of school employees.⁹⁹ However, suspensions on the basis of willful defiance are still permitted for students between grades four and twelve.¹⁰⁰ The amended section 48900, with the changes made by A.B. 420 emphasized in bold and underlined below, now states that:

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

. . .

(k)(1) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers,

95. *Id.*; See Cheryl Staats, *Implicit Racial Bias and School Discipline Disparities*, KIRWAN INST. 1, 2 (May 2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/05/ki-ib-argument-piece03.pdf> (discussing how implicit bias, “the unconscious biases that people are unaware they hold but influence their perceptions, behaviors, and decision-making,” contributes to racialized discipline disparities in K-12 public education); see also NAT’L COUNCIL ON DISABILITY, *BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES* (June 18, 2015), http://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf (explaining how implicit bias can influence an educator’s perception of student behavior).

96. *State Schools Chief Tom Torlakson Announces Decline in Suspensions and Expulsions for Third Year in a Row*, CAL. DEP’T OF EDUC. (Jan. 13, 2016), <http://www.cde.ca.gov/nr/ne/yr16/yr16rel5.asp>.

97. *Id.*

98. White, *supra* note 17.

99. CAL. EDUC. CODE § 48900(k)(1)–(2) (West 2015).

100. See *id.* § 48900(k)(2).

administrators, school officials, or other school personnel engaged in the performance of their duties.

(2) Except as provided in Section 48910, a pupil enrolled in kindergarten or any of grades 1 to 3, inclusive, shall not be suspended for any of the acts enumerated in this subdivision, and this subdivision shall not constitute grounds for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion. This paragraph shall become inoperative on July 1, 2018, unless a later enacted statute that becomes operative before July 1, 2018, deletes or extends that date.¹⁰¹

Governor Brown previously vetoed a bill similar to A.B. 420 that proposed a complete elimination of willful defiance as the basis for both suspensions and expulsions.¹⁰² Brown stated that he could not “support limiting the authority of local school leaders” and was of the belief that teachers must “retain broad discretion to manage and set the tone in the classroom.”¹⁰³ However, while educational advocates cite A.B. 420 as a step forward in reforming California’s disciplinary educational policy, the Marin County Civil Grand Jury, located in the San Francisco Bay Area of California, found that the amended Education Code “received little formal countywide notice and no specific board emphasis.”¹⁰⁴ Consequentially, “schools were left to create their own programs” and there was “no evidence that administrators or trustees conducted thorough analyses of suspension statistics as a first step in identifying the pluses and minuses of disciplinary programs.”¹⁰⁵ Therefore, A.B. 420’s language is arguably not yet concrete and precise enough to effectively curtail the disproportionate impacts caused by willful defiance.

101. *Id.* § 48900(k)(1)–(2) (emphasis added).

102. See Assemb. B. 2242, 2011–2012 Reg. Sess. (Cal. 2012); Kathryn Baron, *Three up, One Down for Student Discipline Reforms*, EDSOURCE (Sept. 24, 2012), <https://edsourc.org/2012/three-up-one-down-for-student-discipline-reforms/20428>.

103. White, *supra* note 17.

104. *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, ACLU (Sept. 27, 2014), <https://www.aclunc.org/news/california-enacts-first-nation-law-eliminate-student-suspensions-minor-misbehavior>; MARIN CTY. CIV. GRAND JURY, SCHOOL SUSPENSION: LESS IS MORE (Mar. 2014), http://www.marincounty.org/~media/files/departments/gj/reports-responses/2013/eda_less_is_morefinal1.

105. *Id.*

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III. LEGAL PROTECTIONS: CALIFORNIA'S ANTI-DISCRIMINATION LAW

After the passage of A.B. 420, the total number of suspensions in California fell from 709,580 in the 2011–2012 school year to 503,101 in the 2013–2014 school year.¹⁰⁶ On January 13, 2016, State Superintendent Tom Torlakson announced a 12.8 percent decline in the number of students suspended in California compared to the year before (making it the third year in a row of significant decline), the highest category of which came under willful defiance.¹⁰⁷ More significantly, however, “decisions by a growing number of school boards to go beyond [A.B. 420] and ban the use of the catch-all category of ‘willful defiance’ as a cause for suspensions and expulsions and instead rely on the other [twenty-four] more specific rationales for suspension spelled out in the California Education Code” have developed into policies that have been adopted by the San Francisco, Los Angeles, Oakland, and Azusa Unified School Districts.¹⁰⁸

Although A.B. 420, supported by the CDE, propelled California into an era of positive discipline philosophy aimed toward keeping children in school rather than on the streets or in the criminal justice system, disparity persists among students today. As California suspension rates began to decline following the passage of A.B. 420, observers in Los Angeles “questioned the integrity of the suspension data and certain principals’ efforts to address disciplinary problems, citing allegations that some administrators have sent children home without officially suspending them”¹⁰⁹ These allegations certainly raise concerns about the “actual effectiveness” of the Los Angeles Unified School District’s attitude towards reform, perhaps reflecting larger compliance, implementation, and enforcement issues state-wide.¹¹⁰ Because federal law offers limited avenues through which disparate impacts of exclusionary disciplinary policies could be

106. Jane Meredith Adams, *California Student Suspension Rate Drops As ‘Willful Defiance’ Punishments Decline*, EDSOURCE (Nov. 23, 2015), <https://edsources.org/2015/california-student-suspension-rate-drops-as-willful-defiance-punishments-decline/90989>.

107. *State Schools Chief Tom Torlakson Announces Decline in Suspensions and Expulsions for Third Year in a Row*, *supra* note 96.

108. *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, *supra* note 16.

109. Melinda D. Anderson, *Will School-Discipline Reform Actually Change Anything*, ATLANTIC (Sept. 14, 2015), <https://www.theatlantic.com/education/archive/2015/09/will-school-discipline-reform-actually-change-anything/405157>.

110. *Id.*

challenged,¹¹¹ a litigant's most promising course of action would be through the California state constitution.¹¹²

In 1977, the California legislature enacted California Government Code section 11135, an anti-discrimination state statute analogous to the federal Title VI¹¹³ of the 1964 Civil Rights Act.¹¹⁴ California Government Code section 11135 states in pertinent part:

No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or received any financial assistance from the state.¹¹⁵

Section 11135's extensive legislative history¹¹⁶ reveals that the statute was intended to be interpreted expansively.¹¹⁷ Throughout the two decades after section 11135 was enacted, the legislature continuously amended section 11135 "to ensure a broad construction of the statute and to correct state court interpretations . . . that the

111. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

112. Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL'Y. 327, 352, 364 (2005).

113. Title VI states that, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2012).

114. See *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011) (noting that Government Code § 11135 is akin to Title VI of the Civil Rights Act of 1964).

115. CAL. GOV'T CODE § 11135(A) (West 2017).

116. In response to *Arriaga v. Loma Linda Univ.*, the legislature passed Assembly Bill 1670 which inserted an explicit private right of action. 10 Cal. App. 4th 1556 (1992) (finding no private right of action under section 11135). In 2001, the legislature again amended the statute to clarify that plaintiffs may file suit under section 11135 without exhausting other administrative remedies. Assemb. B. 677, 2001–2002 Reg. Sess. (Cal. 2001). As a reaction to the state court's first explicit disparate impact case, *Garcia v. Bd. of Trs. of Cal. State Univ.*, the legislature passed Assembly Bill 1742 to explicitly include California State Universities. 131 Cal. App. 4th 1282 (Ct. App. 2005), *depublished by Garcia v. Bd. of Tr. of Cal. State Univ.*, 2005 Cal. LEXIS 12600 (2005); Assemb. B. 1742, 2005–2006 Reg. Sess. (Cal. 2005).

117. Brief for Impact Fund et al. as Amici Curiae Supporting Appellants, *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011) (No. 09-15878) [hereinafter Brief for Impact Fund] (emphasizing that "a broad interpretation of Section 11135 is also consistent with California cases which have repeatedly called for a liberal construction of anti-discrimination statutes").

legislature deemed too narrow.”¹¹⁸ The scope of section 11135 was primarily broadened to incorporate discrimination against a wide range of protected classes.¹¹⁹ For example, in 1992, the statute expanded the definition of “disabled persons” in order to include broader coverage for members of this group.¹²⁰ Ten years later, the statute was amended to prohibit discrimination based on race and national origin.¹²¹ Finally, in 2006, the legislature amended section 11135 to include “sexual orientation” as a protected class.¹²² Thus, while federal equal protection guaranteed under Title VI requires a showing of intent to discriminate,¹²³ the broadly interpreted section 11135 provides more protection, as it guards against intentional and unintentional discrimination alike.¹²⁴ In other words, section 11135 prevents public schools from establishing practices, such as zero tolerance policies, that are seemingly neutral but have an unjustified adverse impact on a protected class.¹²⁵ Moreover, unlike its federal counterpart,¹²⁶ section 11135 can be used by all individuals against any state agencies or organizations that receive state funding.¹²⁷

While California Government Code section 11135 could potentially serve as a legal protection against the disparate impact that A.B. 420 was initially enacted to combat, little precedential authority addressing the scope and applicability of section 11135 exists,

118. Danfeng Soto-Vigil Koon, *Cal. Gov’t Code § 11135: A Challenge to Contemporary State-Funded Discrimination*, 7 STAN. J.C.R. & C.L. 239, 252 (2011) (demonstrating how the legislature expanded § 11135’s coverage and relief, beginning with *Arriaga* and ending with *Garcia*, California’s first explicit disparate impact case).

119. Brief for Impact Fund, *supra* note 117.

120. See 1992 Cal. Stat. ch. 913, sec. 18.

121. See 2002 Cal. Stat. ch. 1102.

122. S.B. 1441, 2005–2006 Leg. Reg. Sess. (Cal. 2006) (codified at CAL. GOV’T CODE § 11135).

123. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that a law “is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”).

124. The Comm. Concerning Cmty. Improvement v. City of Modesto, No. CV-F-04-6121, 2007 WL 2408495, at *8 (E.D. Cal. Aug. 21, 2007), *vacated in part*, 583 F.3d. 690 (9th Cir. 2009) (stating that “intentional discrimination is not required for proof of a § 11135 claim, which may be proved by disparate impact . . .”).

125. Victor Leung & Roxanne H. Alejandre, *Unequal Access: How Some California Charter Schools Illegally Restrict Enrollment*, AM. C.L. UNION., <http://www.publicadvocates.org/wp-content/uploads/Report-Unequal-Access-080116.pdf> (last visited Mar. 29, 2019).

126. See *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001).

127. ASSEMB. B. 1670 § 3, 1999–2000 Leg. Reg. Sess. (Cal. 1999) (codified as CAL. GOV’T CODE § 11139).

especially in the education context.¹²⁸ Despite obstacles, section 11135 may still serve as a powerful tool if only to elucidate the unconstitutionality of the willful defiance suspension offense category as it exists today.

California courts use a three-part burden-shifting test when analyzing section 11135 disparate impact claims.¹²⁹ The first step requires the plaintiff to establish a prima facie case of disparate impact by establishing that defendant's "facially neutral practice caused a disproportionate adverse impact on a protected class."¹³⁰ If the plaintiff establishes a prima facie case, the burden then shifts to the defendant who is required to "justify the challenged practice."¹³¹ If the defendant meets this burden, then "the plaintiff may still prevail by establishing a less discriminatory alternative."¹³² This test is applied to the willful defiance standard in the California Education Code below to show not only that the standard potentially violates equal protection, but also that A.B. 420 must be amended to eradicate the willful defiance standard or, in the alternative, to include an effective implementation plan such that willful defiance would no longer breed such significant disparate impact.

A. A Facially Neutral Practice Caused a Disproportionate Adverse Impact on a Protected Class

For a plaintiff to make out a prima facie case of disparate impact under section 11135, she must establish that the challenged practice, though facially neutral, produced an unequal impact on a protected class.¹³³ To prove this prima facie case of disparate impact, an "appropriate measure" for assessing disparate impact" must first be applied.¹³⁴ In adjudicating a disparate impact claim under section 11135, the Ninth Circuit found that "[a] district court may not find the existence of disparate impact 'on the sole basis of [a statistic] unless it reasonably [finds] that [the statistic] would be a reliable indicator of a

128. See Susan Frey, *New Law Limits Student Discipline Measure*, EDSOURCE (Sept. 28, 2014), <https://edsource.org/2014/new-law-limits-student-discipline-measure/67836>.

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

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (citing *N.Y. City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000)).

disparate impact.”¹³⁵ Furthermore, courts are not obligated “to assume that plaintiff’s statistical evidence is reliable.”¹³⁶

Here, there is nothing in particular about the willful defiance standard listed in the education code, including amendments made to part (k) after the passage of A.B. 420, that explicitly writes race or disabilities into the law. Thus, willful defiance is arguably facially neutral. However, the vagueness of the willful defiance standard indeed generates and propagates a disproportionate adverse impact on protected classes, namely students of color and special needs students.

In *Moua v. City of Chico*,¹³⁷ the court held that plaintiffs did not satisfy the requirements for a prima facie case of disparate impact.¹³⁸ There, the City of Chico’s failure to provide Hmong-speaking interpreters to Hmong-speaking crime victims while providing these services for other non-English speaking crime victims was challenged as having a disparate impact on the plaintiffs, a group of Hmong-speaking individuals.¹³⁹ However, plaintiffs failed to present sufficient evidence “to show that the municipal defendants’ actions had a disparate impact on them,” as they provided no evidence, statistical or otherwise, “to show that the effectiveness of police-civilian communications varies across ethnic or language groups in Chico.”¹⁴⁰ While plaintiffs presented an expert report from Dr. John R. Logan, a social demographer and urban sociologist, as statistical evidence in support of a disparate impact theory, the statistics did “nothing to indicate that the municipal defendants’ practices regarding interpreters and relations with non-English speaking crime victim” have had an adverse impact on Hmong crime victims.¹⁴¹ Thus, the court granted summary judgment to the defendants, finding that the first prong of the burden-shifting test was not met.¹⁴²

Unlike in *Moua*, where the plaintiffs failed to substantiate their claims with distinct evidence of disparate impact, educational complainants here can point to statistical studies that corroborate the

135. *Id.* (quoting N.Y. Urban League v. State of New York, 71 F.3d 1031, 1038 (2d Cir.1995)).

136. *Darensburg*, 636 F.3d at 519 (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 996 (1988)).

137. 324 F. Supp. 2d 1132 (E.D. Cal. 2004).

138. *Id.* at 1143.

139. *Id.* at 1136.

140. *Id.* at 1142–43.

141. *Id.* at 1143.

142. *Id.*

existence of a disparate impact due to the use of the subjective willful defiance language in the California Education Code.¹⁴³ Whereas the plaintiffs in *Moua* did not use an appropriate measure to demonstrate a correlation between the use of language interpreters and police effectiveness, citing only to statistics indicating that two percent of the population in Chico speak Hmong and that Hmong is the most commonly spoken language in Chico after English and Spanish,¹⁴⁴ here, data exists beyond the number of minority or disabled students within each school. Complainants can cite to the aforementioned statistics directly correlating educators' use of willful defiance as grounds for suspension with the adverse impacts that those suspensions have had on students of color and students with special needs.¹⁴⁵ This type of substantiated and causal evidence is of the utmost importance to California courts when making this initial finding.

Similarly, in *Darensburg v. Metropolitan Transportation Commission*,¹⁴⁶ the Ninth Circuit held that the plaintiffs failed to establish a prima facie case of disparate impact.¹⁴⁷ There, plaintiffs brought a class action against the state-funded Metropolitan Transportation Commission ("MTC") alleging that its funding decisions for the Regional Transit Expansion Plan ("RTEP") violated section 11135 by disproportionately affecting the district's predominately minority ridership.¹⁴⁸ The court reasoned that the percentage of minorities among the bus and rail ridership was not a proper measure for assessing the impact of the facially neutral policy on minorities.¹⁴⁹ Rather, the court articulated that the "basis for a successful disparate impact claim involves a comparison between . . . those affected and those unaffected" by the contested conduct, which would require taking into account the population base and its racial

143. For example, § 48900(k)(1) authorizes suspension or expulsion if a student has "disrupted school activities or otherwise *willfully defied* the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties." CAL. EDUC. CODE § 48900(k)(1) (West 2015) (emphasis added).

144. *Moua*, 324 F. Supp. 2d at 1143.

145. See *supra* notes 75–85.

146. 636 F.3d 511 (9th Cir. 2011).

147. *Id.* at 523.

148. *Id.* at 514, 518.

149. *Id.* at 519.

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composition.¹⁵⁰ Because the plaintiffs failed to do so, the court affirmed the district court's decision in favor of MTC, but on the grounds that the first prong was not met rather than the last.¹⁵¹

Unlike *Darensburg*, where plaintiffs attempted to analyze the impact of RTEP on minority transit users or minority bus riders independently, here, statistical evidence exists, which would allow the court to analyze the effects of willful defiance on the entire population of black students compared to the entire population of white students, rather than solely those students affected.¹⁵² For example, in the 2011-2012 school year, African Americans accounted for eighteen percent of willful defiance suspensions in California, despite the fact that they made up only seven percent of total enrollment.¹⁵³ On the other hand, white students made up twenty six percent of the public school population in the same year, but only twenty percent of willful defiance suspensions.¹⁵⁴ Even after the enactment of A.B. 420, in the 2014-2015 school year, African-American students made up six percent of total statewide enrollment in California's public school system, but accounted for 16.4 percent of students suspended, a rate identical to that of the previous year.¹⁵⁵ Comparatively, white students made up 24.6% of total enrollment, but only 20.9% of suspensions.¹⁵⁶ Thus, even though A.B. 420 aimed to reduce the rate of suspensions that were issued based on the willful defiance standard, not all students benefitted from the amendment equally.

The evidence available to educational complainants here indicates a clearly disproportionate impact on students of color due to the existence and usage of the willful defiance suspension offense category. Because this statistical evidence is reliable and concrete, unlike the absence of causal evidence in *Moau* and unlike the

150. *Id.* at 519–20 (quoting *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003)).

151. *Id.* at 514–15 (explaining that the district court held that, while patrons established a prima facie case of disparate impact, MTC established a substantial legitimate justification and patrons failed to present a less discriminatory alternative in response).

152. *Id.* at 519–20 (quoting *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003)).

153. Susan Frey, *Largest School Districts Vary Widely in Use of 'Willful Defiance' to Suspend Students*, EDSOURCE (Dec. 31, 2013), <https://edsources.org/2013/largest-school-districts-vary-widely-in-use-of-willful-defiance-to-suspend-students/54381>.

154. *Id.*

155. *State Schools Chief Tom Torlakson Announces Decline in Suspensions and Expulsions for Third Year in a Row*, *supra* note 96.

156. *Id.*

“inappropriate statistical measure and . . . logical fallacy” in *Darensburg*, it would likely be appropriate and sufficient to establish at least a prima facie case of disparate impact.¹⁵⁷

B. The Challenged Practice of Suspending for Willful Defiance Is Justified

Once the disproportionate adverse impact created by the practice of suspending or expelling students for willful defiance is demonstrated, school districts would have to demonstrate a “substantial legitimate justification”¹⁵⁸ for the challenged policy.¹⁵⁹ To prove such a justification, the district would need to establish that the challenged practice was “necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.”¹⁶⁰ In the context of public schools, the school district must show that the practice is “educationally necess[ary],”¹⁶¹ which “involves something beyond [a] mere articulation of a rational basis for the challenged practice.”¹⁶²

Here, California school districts may defend willful defiance as necessary to meeting the legitimate goal of reducing student contact with the justice system by asserting that, though disparity persists, state-wide suspension rates have declined,¹⁶³ thus contributing to the solution of the larger issue of California’s school-to-prison pipeline.

157. *Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 522 (9th Cir. 2011); *See Moua v. City of Chico*, 324 F. Supp. 2d 1132, 1142 (E.D. Cal. 2004).

158. *See* Brief for Impact Fund et al. as Amici Curiae Supporting Appellants at 23, *Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 519 (9th Cir. 2011) (No. 09-15878) (arguing that the district court’s adoption of a lesser substantial legitimate justification standard rather than the robust business necessity defense “erodes the strong anti-discrimination protections intended by the Legislature in Section 11135 and could lead to a patchwork of differing standards based on perceptions of complexity”).

159. *Darensburg*, 636 F.3d at 518 (noting the district court addressed the standard of proof to be used for this second prong when defending against section 11135 adverse impact claims and adopted the more lenient substantial legitimate justification standard rather than the business necessity standard).

160. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1278 (M.D. Ala. 1998), *aff’d*, 197 F.3d 484 (11th Cir. 1999), *rev’d on other grounds sub. nom.* *Alexander v. Sandoval*, 532 U.S. 275 (2000) (quoting *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993)).

161. *See, e.g., Elston*, 997 F.2d at 1413.

162. *Cureton v. NCAA*, 37 F. Supp. 2d 687, 697, 709 (E.D. Pa. 1999), *rev’d on other grounds*, 198 F.3d 107 (3d Cir. 1999) (explaining that defendant must show that the “practice causing the disproportionate effect is nonetheless justified by an ‘educational necessity,’ which is analogous to the ‘business necessity’ justification applied under Title VI”).

163. *See State Schools Chief Tom Torlakson Announces Decline in Suspensions and Expulsions for Third Year in a Row*, *supra* note 96.

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Moreover, many teachers and educators justify the use of willful defiance as a ground for suspension because the alternative would ban them from using a method to “kick out” insubordinate students, thus minimizing their control of the classroom which is arguably an educational necessity.¹⁶⁴ Ultimately, satisfying this prong would be difficult, if not impossible, considering the fact that these justifications appear to simply be a rational basis rather than an urgent necessity. Even in the unlikely event that the defendants would be able to successfully meet this burden, plaintiffs would still be able to prevail by showing that a less discriminatory alternatives exists.¹⁶⁵

C. A Less Discriminatory Alternative Exists

For the final prong of the burden-shifting test, besides the district court opinion in *Darensburg v. Metropolitan Transportation Commission*,¹⁶⁶ which on appeal was affirmed on different grounds,¹⁶⁷ no cases to date explicitly discuss how to establish that a less discriminatory alternative to a facially neutral practice exists. However, an alternative to the controversial use of willful defiance as a suspension offense category currently employed by several school districts in California, including two of the state’s largest districts, with students who come from violent and impoverished communities, would likely provide examples of viable alternatives sufficient to meet the final prong of the section 11135 burden-shifting test.¹⁶⁸

Since the passage of A.B. 420, the Los Angeles Unified School District and the San Francisco Unified School District have both “already completely banned suspensions and expulsions for willful defiance” in favor of restorative justice techniques, “taking a significant step towards dismantling the school-to-prison pipeline.”¹⁶⁹

Restorative justice is a practice that “emphasizes accountability, making amends, and . . . [facilitating] meetings between” transgressing students, their peers, and their teachers such that the offending student may compensate by taking responsibility for their actions.¹⁷⁰ Both

164. Anderson, *supra* note 1099.

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

166. 611 F. Supp. 2d 994 (N.D. Cal. 2009).

167. *See* 611 F. Supp. 2d 994 (N.D. Cal. 2009), *aff’d*, 636 F.3d 511 (9th Cir. 2011).

168. Frey, *supra* note 153.

169. *California Takes Lead in Ending School-to-Prison Pipeline*, *supra* note 14.

170. *What Is Restorative Justice?*, CTR. OF J. & RECONCILIATION, <http://restorativejustice.org> (last visited Apr. 2, 2019).

school districts allow teachers to remove a disruptive, willfully defiant student from the classroom.¹⁷¹ However, rather than sending the student home as punishment, the student is sent to the principal's office, a counselor, or a restorative justice facilitator.¹⁷² Because the student is only missing one class instead of an entire day of school, this removal from the classroom is not considered a suspension¹⁷³ and also likely does not have the same repercussions as a traditional at-home suspension, as the student is still under supervision, receiving attention, and being assisted rather than shoved off school grounds. Thus, this solution addresses concerns that a disciplinary tool would be taken from teachers because teachers could still remove disruptive students from their classrooms. Due to the strong success of restorative justice as an alternative to the use of willful defiance as a basis under which to suspend a student, it is very likely that potential justifications for willful defiance made by school districts would be successfully rebutted.

Ultimately, this analysis serves to elucidate the incredible ramifications of the current willful defiance standard. Even if litigants do not actually bring forth section 11135 claims, this analysis demonstrates the need for amending A.B. 420 to either completely eliminate the willful defiance suspension offense category, or to establish effective implementation directives.

IV. RECOMMENDATIONS

As examined above, while A.B. 420 encourages students to remain in class rather than on the streets or in the criminal justice system, it fails to address the inadvertent disparate impacts caused by allowing willful defiance to remain a valid suspension offense category. Thus, school districts' continued reliance on willful defiance likely violates California's anti-discrimination statute. Moreover, A.B. 420 falls short of providing an effective implementation plan for the new policy as well as adequate administrative training such that all

171. David Washburn, *Countdown to Expand Ban on "Willful Defiance" Suspension in California Schools*, EDSOURCE (Feb. 15, 2018), <https://edsource.org/2018/youth-advocates-pushing-to-expand-californias-ban-on-willful-defiance-suspensions/593754>.

172. David Washburn & Daniel J. Willis, *The Rise of Restorative Justice in California Schools Brings Promise, Controversy*, EDSOURCE (last updated May 14, 2018), <https://edsource.org/2018/the-rise-of-restorative-justice-in-california-schools-brings-promise-controversy/597393>.

173. *Id.*

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students are equally afforded both protection and due process. Because A.B. 420 includes a three and a half years sunset provision, “statewide coalition partners will be returning with legislative proposals to expand the protections for students and increase investments in effective alternatives” before the 2018 summer.¹⁷⁴ The following are recommendations this Article makes in light of the bill’s sunset provision nearing its expiration date.¹⁷⁵

A. Amending A.B. 420 to Include Language that Eliminates Willful Defiance as a Suspension Offense Category and Replaces it with Restorative Justice

This Article recommends the state-wide adoption of restorative justice as an alternative to suspension for willful defiance for students of all ages, rather than just students in grades K-3. The Poway school district in California had the lowest rate of suspensions for willful defiance in the 2011–2012 school year with only eleven percent of suspensions being for willful defiance.¹⁷⁶ This incredibly low rate can be attributed to the restorative justice approach that Poway has been using for years.¹⁷⁷ For example, instead of being suspended or expelled for disrupting a class, a student may “write an apology to the teacher and perhaps stay after school to help the teacher prepare for the next day.”¹⁷⁸ This educational philosophy serves to combat the root of the school-to-prison pipeline by keeping students in the classroom rather than ejecting them onto the streets and into the criminal justice system.

B. Amending A.B. 420 to Include an Enforcement and Implementation Plan Financed by S.B. 527

This Article recommends strengthening the text of A.B. 420 to include more comprehensive compliance, enforcement, and implementation policies. This would be accomplished first through specifically defining the term willful defiance in the California

174. *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, PUB. COUNS. (Sept. 27, 2014), http://www.publiccounsel.org/press_releases?id=0088.

175. The restrictions imposed by AB 420 become inoperative on July 1, 2018 unless a subsequent statute removes or extends that date. *Id.*

176. Frey, *supra* note 153.

177. Frey, *supra* note 153.

178. Frey, *supra* note 153.

Education Code. It would also consist of a stronger and more concrete accountability system whereby schools would be required to keep track of all suspensions issued, to whom they were issued, and the reasons for which they were issued. Finally, it would require the training of administrators, teachers, SROs, and other educational staff members who interact with students. This Article recommends that the grant program created by Senate Bill 527 (hereinafter “S.B. 527”) be used to fund the successful implementation and enforcement of A.B. 420.¹⁷⁹

S.B. 527, Safe Neighborhoods and Schools Fund: Learning Communities for School Success Program, is an education finance bill which establishes a grant program administered by the CDE to further the purpose of Proposition 47 in reducing truancy and supporting students who are at risk of dropping out of school.¹⁸⁰ School districts are eligible to apply for three years of grant funding for “planning, implementation, and evaluation of activities in support of evidence-based, non-punitive programs and practices to keep students in school,” consistent with the Local Education Agency’s goals for meeting pupil engagement and school climate state priorities under the Local Control and Accountability Plan.¹⁸¹ Thus, the explicit guidelines for implementing and enforcing A.B. 420 as articulated below ought to be funded by this grant program.

Most importantly, should the willful defiance standard remain part of the California Education Code, it must first be defined to the maximum extent, and its appropriate use must be specifically delineated.¹⁸² The memorandum distributed to Seattle Unified School District personnel can be instructive with regards to defining willful defiance in California.¹⁸³ The memorandum states that willful defiance can occur when

[a] student’s “disruption” or “defiance” has an impact on the effective or safe functioning of the school, such as continuing to remain at the scene of a fight or to instigate a disturbance after being told to stop the behavior; or [r]epeated

179. S.B. 527, 2015–16 Leg. Sess. (Cal. 2016).

180. CAL. GOV’T CODE § 7599.2 (2014).

181. S.B. 527, 2015–16 Leg. Sess. (Cal. 2016).

182. Diana Tate Vermeire, *Discipline in California Schools: Legal Requirements and Positive School Environments*, AM. C.L. UNION 1, 15 (Mar. 2010), https://edsources.org/wp-content/uploads/old/discipline_in_california5.pdf.

183. *Id.* at 15.

disobedience to school personnel when other interventions have not been successful in modifying the misbehavior.¹⁸⁴

This definition serves to curb and abate the continuously expanding zero tolerance policies that have grown from targeting the most serious and safety-threatening offenses all the way to punishing for trivial willful defiance transgressions. Additionally, the memorandum goes a step further to demarcate what does not constitute willful defiance in order to reduce the level of subjectivity with even more clarity.¹⁸⁵ It states that willful defiance does not occur when a student “fails to obey the valid authority of school personnel,” “refuses to give her name” or “walks away from school personnel” when these transpire in a “non-safety-related incident” or when “a student was not reasonably aware of a direction given by school personnel (i.e. in a noisy room, hearing problems or other disabilities, language limitations, etc.).”¹⁸⁶ These concrete examples serve to lay out specific trivial offenses that would not amount to willful defiance, thereby reducing a school disciplinarian’s ability to subjectively suspend for such misdemeanors.

With regards to accountability, student discipline records should be kept with specificity to ensure both that the student’s behavioral issues may be addressed effectively and that the school may monitor what offenses students are being suspended for. Currently, California public schools are mandated to “collect and report various discipline-related data to the state.”¹⁸⁷ However, California public schools are not required to collect “the comprehensive data necessary to effectively assess the effectiveness and fairness of school discipline policies.”¹⁸⁸ It has been suggested that data collection should include, at a minimum, the student’s demographic information “necessary to address inconsistencies in discipline policies and their implementation,” the offense, the referring school employee as well as that employee’s race or ethnicity, and the administrator approving the imposition of the discipline.¹⁸⁹ Such detailed habitual data collection would thus serve to assist schools in assessing their policies,

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 22.

188. *Id.* at 22.

189. *Id.* at 23.

determining appropriate solutions, and monitoring compliance with an amended A.B. 420.

Finally, all those involved in the education of students should be trained regarding appropriate disciplinary practices. The San Francisco school district, for example, plans to train teachers in “de-escalation techniques” as they move toward positive disciplinary practices.¹⁹⁰

V. CONCLUSION

With the criminalization of school punishment, a path to prison became entrenched for students, impacting students of color and students with special needs most significantly. Public schools in California and across the nation progressively increased their reliance on harsh disciplinary measures to punish a diverse range of student behaviors. Through these measures, the schools began weeding out students who they perceived as problems, despite little evidence that these policies produce safe learning environments. A.B. 420 is a significant step in line with a broader statewide shift away from punitive measures issued to students in the public school systems. Although California has taken admirable steps in obstructing and impeding the school-to-prison pipeline, A.B. 420 fails to sufficiently mitigate the impact of harsh disciplinary policies for the students who are most impacted. In order to successfully enact meaningful education reform that affords all students equal protection under the law, the willful defiance standard in the California Education Code must either be eliminated or significantly amended such that the term is well defined, accountability measures are implemented, and educators are adequately trained regarding the new procedures.

190. Frey, *supra* note 128.

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