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Just Another School: The Need to Strengthen Legal Protections for Students Facing Disciplinary Transfers

Miranda Johnson
Loyola University Chicago, Law School, mjohnson11@luc.edu

JUST ANOTHER SCHOOL?: THE NEED TO STRENGTHEN LEGAL PROTECTIONS FOR STUDENTS FACING DISCIPLINARY TRANSFERS

MIRANDA JOHNSON* & JAMES NAUGHTON**

Obviously, we advocate developing alternatives to educate children to deter, prevent or end disruption. But the danger of proliferating programs designed specifically for troubled children is the temptation to label and place ever-increasing numbers of children in them.

—Children's Defense Fund (1975)[1]

INTRODUCTION

Over the past decade, there has been increasing national, state, and local attention focused on the negative impacts of school expulsion and suspension. As a result of the well-documented and long-standing research showing the harm to students of exclusionary school discipline practices, states and school districts have begun reforming their policies and practices to limit the use of suspensions and expulsions. Many of these new reforms, however, have not included changes to provisions in state law and district policies allowing for students to be transferred from their neighborhood schools to alternative schools for disciplinary reasons. In this article, we argue that state and school district policies should expressly limit the use of alternative school transfers as part of overall strategies to reduce the use of exclusionary discipline practices.

Like suspension and expulsion, disciplinary placements in alternative schools can have devastating consequences for students. Alternative schools are often further from the student's home and are more likely to have high concentrations of peers with high risk factors and negative behaviors. Students who are removed from their neighborhood school to an alternative school for disciplinary reasons are separated from their friends and teachers and need to begin completely new classes in an entirely different school setting, often in the middle of the school year. Student mobility, including mobility as a result of alternative school placements, is associated with negative results that include reduced academic achievement, reduced likelihood of graduation on time,

* Miranda Johnson is a Clinical Professor of Law and Director of the Educational Law and Policy Institute at Loyola University Chicago School of Law. She holds a J.D. from New York University School of Law and a Master in Public Affairs from the Woodrow Wilson School of Public and International Affairs at Princeton University.

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1. CHILDREN'S DEFENSE FUND, SCHOOL SUSPENSIONS: ARE THEY HARMING CHILDREN? 121 (1975), https://files.eric.ed.gov/fulltext/ED113797.pdf.

fewer years of schooling, increased risk of depression, and increased likelihood of arrest as an adult.[2]

The paper will review social science research and data surrounding disciplinary transfers. It will also explore the legal protections governing alternative school placements for disciplinary purposes. As a case study, the paper will highlight lessons learned from implementation of a recent Illinois school discipline reform law, a large-scale overhaul to existing disciplinary provisions and one of the first of its kind across the country. Lastly, the paper will highlight recommendations to limit the use of alternative school transfers for disciplinary reasons.

I. THE DATA AND RESEARCH ON ALTERNATIVE SCHOOL PLACEMENTS RAISE CONCERNS ABOUT THE IMPACT OF ALTERNATIVE SCHOOL PLACEMENTS ON STUDENTS

Alternative schools began in the 1960s in order to provide a different model of education for young people at risk of school failure, and they have evolved over time.[3] The United States Department of Education ("USDOE") defines an alternative school as: "A public elementary/secondary school that (1) addresses needs of students that typically cannot be met in a regular school, (2) provides nontraditional education, (3) serves as an adjunct to a regular school, or (4) falls outside the categories of regular, special education, or vocational education."[4]

Alternative schools fall into three general categories: (1) Type I: schools that offer full or part-time educational options for students who need more individualization or accelerated credit recovery; (2) Type II: schools specifically designed for students who are disruptive or who exhibit challenging behaviors; and (3) Type III: therapeutic programs for students with social and emotional problems.[5] Type III placements are primarily for students with disabilities served under the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.*[6]

Alternative schools started primarily as Type I programs for students at risk of school failure. Type I, academic remediation-focused schools, are typically voluntary placements chosen by students in need of the flexibility of scheduling and credit recovery offered by alternative schools.[7] As will be described below, in the past few decades following the safe schools movement, more Type II, or behavior-focused, schools were opened. Participation in Type II schools is usually mandatory and for a designated period of time. Over time, the distinction between each of the three types of schools has become increasingly blurred.[8] Just as the types of alternative schools vary, so do the reasons for referral. These include: failing to succeed in traditional settings for reasons like poor attendance, failure to earn credits or drop out, suspension and expulsion and behav-

2. RUSSELL W. RUMBERGER, NAT'L EDUC. POL'Y CTR., STUDENT MOBILITY: CAUSES, CONSEQUENCES, AND SOLUTIONS 9 (2015), http://nepc.colorado.edu/files/pb_rumberger-student-mobility.pdf.

3. *See* CHERYL M. LANGE & SANDRA J. SLETTEN, U.S. DEPT. OF EDUC., NAT'L ASS'N OF STATE DIRECTORS OF SPECIAL EDUC., ALTERNATIVE EDUCATION: A BRIEF HISTORY AND RESEARCH SYNTHESIS 1 (2002).

4. INST. OF EDUC. SCIENCES, NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2010–11 (2012).

5. *See* Soleil Gregg, Appalachia Educ. Lab, Schools for Disruptive Students: A Questionable Alternative? 3–4 (1998).

6. While issues relating to placement of students with disabilities in alternative schools are timely and important, these concerns are outside of the scope of this article.

7. Aaron B. Perzigian et al., *Characteristics of Students in Traditional Versus Alternative High Schools: A Cross-Sectional Analysis of Enrollment in One Urban District*, 49 EDUC. & URBAN SOC. 676, 677–78 (2017).

8. *See id.* at 678.

ior problems, external stressors and social/emotional problems, and court referral or return from juvenile detention.[9]

A. *The Safe Schools Movement and the Rise of Alternative Schools*

The safe schools movement and the attendant zero-tolerance policies that it created arose from federal drug enforcement policies implemented in the 1980s.[10] Professor Derek Black describes the context in which harsh disciplinary policies arose as follows:

> During the 1980s, federal and state officials declared a war on drugs, enacted mandatory sentencing schemes for various crimes, and imposed longer jail sentences. The "broken windows" theory of policing also took hold in places like New York City that were determined to lower crime rates and improve the overall quality of life in the city. The thought was that by aggressively policing all problematic behavior, even the most minor, with a zero-tolerance approach, overall crime would decrease.[11]

As Congress turned its eyes to schools, it found that "crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem" and that "school systems find it almost impossible to handle gun-related crime by themselves."[12] In addition, Congress expressed concern that a perceived increase in violent crimes in school zones had resulted in a decline in quality of education in the United States.[13] These concerns led to the creation of two cornerstone pieces of legislation in the safe schools movement, the Gun-Free Schools Act of 1994 and the Safe and Drug-Free Schools and Communities Act of 1994.[14] In addition, it was also in the 1990s that the U.S. Department of Justice began to support the role of police officers in schools.[15] The confluence of these acts of Congress and the Department of Justice led to harsher punishments for students.[16]

The Gun-Free School Zones Act was first passed in 1990. The legislation made it a federal offense for any individual to knowingly possess a firearm in a place that the individual believes or has reasonable cause to believe is a school zone.[17] This provision of the Gun-Free School Zones Act was struck down in the Supreme Court's 1995 decision in *United States v. Lopez*, which found that this provision of the Gun-Free School Zones Act had exceeded Congress's Commerce Clause authority as the possession of a firearm in a school zone did not affect interstate commerce.[18] However, this did not stop Congress from legislating on perceived issues surrounding school safety.

Under the current Gun-Free Schools Act, every state that receives federal funds must have a state-level policy that requires local education agencies to expel a student for not less than a year if the student is determined to have

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9. *See* Camilla A. Lehr et al., *Alternative Schools: A Synthesis of State-Level Policy and Research*, 30 REMEDIAL & SPECIAL EDUC. 19, 27 (2009).

10. *See* Ellen M. Boylan, U.S. Dept. of Just., Advocating for Reform of Zero Tolerance Student Discipline Policies: Lessons from the Field 1 (2002).

11. DEREK W. BLACK, ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE 42 (2016).

12. 18 U.S.C. § 922(q)(1)(A)–(H) (2017).

13. *See* 18 U.S.C. § 922(q)(1)(F) (2017).

14. *See* MARIEKE BROCK & NORMA KRIGER, LIBRARY OF CONG., FED. RES. DIVISION, SCHOOL SAFETY POLICIES AND PROGRAMS ADMINISTERED BY THE U.S. FEDERAL GOVERNMENT: 1900-2016 7, 16, 20–21 (2017).

15. *See id.* at 9, 75–78.

16. *See* Boylan, *supra* note 10, at 21–22.

17. 18 U.S.C. § 922(q)(2)(A) (1988), *invalidated by* United States v. Lopez, 514 U.S. 549 (1995).

18. *See Lopez*, 514 U.S. at 568.

possessed a firearm at school.[19] While this law allows for the chief administering officer of the local educational agency to modify the expulsion requirement, a one-year expulsion represents the default minimum sanction for a student.[20] Further, the Act provides, but does not require, that a state may allow the local education agency to place an expelled student in an alternative education setting.[21] The rise of mandatory sanctions had an immediate effect on student discipline. As a report by the Education Law Center points out, "it appears that expulsion has increased under zero tolerance as well, in some states by more than double since 1990."[22] While the Gun-Free School Zones Act initially provided sanctions for students for firearms possessions, this Act and its zero-tolerance policies have been extended by the Safe and Drug-Free Schools and Communities Act in ways that may not have been anticipated.

As the safe schools movement gained momentum in the 1990s, the range of offenses covered by zero-tolerance policies also began to grow. According to a 1998 report by the National Center for Education Statistics, "most public schools reported having zero tolerance policies toward serious student offenses."[23] While zero-tolerance policies for serious student offenses are in line with the original intent of both the Gun-Free Schools Act and the Safe and Drug-Free Schools and Communities Act, the range of offenses covered by zero-tolerance policies greatly expanded during the mid to late 1990s. According to the National Center for Education Statistics report, by the 1996-1997 school year, of the 1,234 public schools in the survey, over seventy-eight percent had zero-tolerance policies for possession of items such as alcohol, drugs, and tobacco on their school campuses.[24] The increasing range of offenses covered by zero-tolerance may explain the dramatic rise in suspensions from 1994, when 1.7 million students were suspended, to 1997, when 3.1 million students were suspended from school.[25] As these policies have continued, there has been a threefold increase in alternative schools since 1997-1998, with 10,900 public alternative schools educating 612,900 students during the 2000-2001 school year.[26]

While zero-tolerance policies arose out of a concern related to school safety, the evidence suggests that harsh disciplinary policies do not make schools safer, and, indeed, may actually make schools less safe.[27] Incidents of serious violence in schools are relatively infrequent,[28] and school discipline policies tend to be applied to non-violent offenses that do not pose a serious risk to school safety.[29] In the 1980s and 1990s, the reach of state statutes expanded, allowing districts to expel students for offenses like disrespect, defiance, disor-

19. *See* 20 U.S.C. § 7961(b)(1) (2017).

20. *See id.*; BOYLAN, *supra* note 10, at 19.

21. 20 U.S.C. § 7961(b)(2) (2017).

22. BOYLAN, *supra* note 10, at 22.

23. SHEILA HEAVISIDE ET AL., U.S. DEP'T OF EDUC., VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-97 vi (1998).

24. *See id.* at 83.

25. BOYLAN, *supra* note 10, at 22.

26. BRIAN KLEINER ET AL., U.S. DEPT. OF EDUC., NAT'L CTR FOR EDUC. STAT., PUBLIC ALTERNATIVE SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE: 2000-01 33 (2004).

27. Am. Psychol. Asso'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 854 (2008) [hereinafter APA Zero Tolerance Task Force]; Matthew P. Steinberg et al., *What Conditions Support Safety in Urban Schools?: The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 128–29 (Daniel J. Losen ed., 2015).

28. *See* Matthew J. Mayer & Michael J. Furlong, *How Safe Are Our Schools?*, 39 EDUC. RES. 16 (2010); APA Zero Tolerance Task Force, *supra* note 27, at 853.

29. *See* Russell J. Skiba, Indiana Educ. Pol'y Ctr., Zero Tolerance, Zero Evidence: An Analysis of School. Disciplinary Practice 6, 10 (2000) [hereinafter SKIBA, ZERO TOLERANCE, ZERO EVIDENCE]; Rus-

derly conduct, and other unspecified offenses that are outlined in the school's code of conduct.[30] School discipline came to be commonly applied to these types of minor offenses, including disobedience, disrespect, attendance problems, and classroom disruption.[31]

The impact of school discipline is not benign. School suspensions and expulsions have been associated with a reduced likelihood of high school graduation, decreased chance of post-secondary enrollment,[32] and a higher risk for entry into the juvenile and criminal justice system.[33] Disciplinary policies disproportionately impact particular subgroups of students, particularly Black students and students with disabilities,[34] as well as Hispanic/Latino students in middle and high school, Native American students with disabilities, and lesbian, gay, bisexual, and transgender ("LGBT") students and students who are gender non-conforming.[35]

Of particular concern is the disproportionate impact of punitive disciplinary policies on Black male students. Two-thirds of Black boys were suspended at some point during elementary or secondary school, as compared to slightly over one-third of White boys.[36] Researchers have explored various potential explanations for this disproportionality, including poverty, statistical calculation methods, and differences in student behavior, and none of these factors explain the differential.[37] Researchers have concluded that "educator perspectives and practices have consistently emerged as significant predictors of rates of referral and disproportionality in suspension."[38] These factors include differences in teachers' classroom management, differential processing at the administrative level, and implicit bias of teachers.[39] As a result, Black students are more likely to be referred to the office for discipline and to receive more serious consequences than White students for the same and similar infractions.[40]

Many of the same concerns in the literature relating to suspension and expulsion also apply to disciplinary transfers to alternative schools, but the impact of these types of transfers has been less researched than have suspensions and expulsions.[41] The proliferation of alternative schools is an often-overlooked consequence of zero-tolerance policies, and the available data and

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sell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 96 (2011).

30. *See* Black, *supra* note 11, at 43–44.

31. *See* Skiba, Zero Tolerance, Zero Evidence, *supra* note 29, at 10.

32. Robert Balfanz et al., *Sent Home and Put Off Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the 9th Grade*, *in* CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 27, at 22–27.

33. Tracy L. Shollenberger, *Racial Disparities in School Suspension and Subsequent Outcomes: Evidence from the National Longitudinal Survey of Youth*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 41 (Daniel J. Losen ed., 2015).

34. *Id.* at 34; Daniel J. Losen, *Introduction*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 2–4, 7–8 (Daniel J. Losen ed., 2015).

35. *See* Russell J. Skiba et al., *What Do We Know About Discipline Disparities? New and Emerging Research*, *in* INEQUALITY IN SCHOOL DISCIPLINE: RESEARCH AND PRACTICE TO REDUCE DISPARITIES 22–24 (Russell J. Skiba et al. ed. 2016).

36. *See* Shollenberger, *supra* note 33, at 34.

37. *See* Skiba et al., *supra* note 35, at 24–26.

38. *See id.* at 25.

39. *See id.* at 25–26.

40. *See id.* at 25.

41. For an important addition to the literature on alternative schools see Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871 (2018). Professor Fedders links the disproportionate impact of school exclusion on Black students and the segregation of Black students in alternative schools with school districts' resistance to desegregation required by the Supreme Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See id.* at 893–94.

research on the impact of student placement in alternative schools is explored in more detail below.

B. *National Data on Alternative School Placements*

National data on alternative school placements is difficult to find and measurement instruments vary. The USDOE reported that 646,500 students attended alternative schools and programs during the 2007-2008 school year.[42] Sixty-four percent of districts reported having at least one alternative school or program.[43] Not only is this USDOE data over ten years old at this point, but it also lumps together alternative schools with alternative programs housed within regular schools. Of students attending alternative schools, most are in grades nine through twelve, and there are growing numbers of younger students.[44] An estimated twelve percent of students with disabilities nationally attended alternative schools, which is comparable to the national average of students with disabilities enrolled in schools nationwide.[45] The percentage of students with disabilities placed in alternative schools varies widely by district and state and includes a higher number of students with emotional disabilities.[46]

The 2017 *Building a Grad Nation* report provides more recent data on alternative high school placements. According to this report, nearly 300,000 students attended alternative high schools in 2015, accounting for two percent of the high school population.[47] Eighty-five percent of alternative high schools were overseen by school districts, and fifteen percent were run by charter schools.[48] A number of those being overseen by school districts were also contracted to outside entities like charter schools.[49] Students at alternative school placements are disproportionately low-income when compared to the general student population. While low-income students account for forty-six percent of the school population attending traditional high schools, seventy-one percent of the students attending alternative high schools are low-income.[50]

Moreover, alternative school placements serve higher rates of Black and Hispanic students than non-alternative schools (fifty-nine percent versus fifty-two percent).[51] These statistics are consistent with the findings of an in-depth study in Philadelphia, which found that students placed in disciplinary alternative schools are disproportionately Black and male when compared to students served by traditional schools.[52] A survey of Kentucky's Jefferson County School District, which services approximately 100,000 students, provides an example of the impact of these racial disparities in alternative school placement. Jefferson County's public schools sent 13.1% of their Black third grade students to alter-

42. *See* Priscilla Rouse Carver & Laurie Lewis, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., Alternative Schools and Programs for Public School Students at Risk of Educational Failure: 2007-08 3 (2010).

43. *See id.*

44. *See* Lehr et al., *supra* note 9, at 24.

45. *See id.* at 20.

46. *See id.*

47. *See* Jennifer L. DePaoli et al., EVERYONE GRADUATES CTR., SCH. OF EDUC. AT JOHN HOPKINS UNIV., BUILDING A GRAD NATION: PROGRESS AND CHALLENGE IN RAISING HIGH SCHOOL GRADUATION RATES 30–31 (2017).

48. *See id.* at 31.

49. *See id.*

50. *See id.* at 6.

51. *See id.*

52. HANLEY CHIANG & BRIAN GILL, MATHEMATICA POL'Y RES., STUDENT CHARACTERISTICS AND OUTCOMES IN ALTERNATIVE AND NEIGHBORHOOD HIGH SCHOOLS IN PHILADELPHIA 63 (2010).

native placements, while only sending 3.8% of their White students.[53] The study also revealed that Black students are more likely to be subsequently detained by law enforcement after placement in an alternative school at every level, with the highest disparity being in middle school where a full fifty percent of Black students were detained compared to thirty-two percent of White students.[54] The most striking conclusion of the Jefferson County study is its finding that the overrepresentation of Black males in alternative schools and subsequent juvenile detainment reflects "nothing less than a state of crisis."[55]

C. *Research on Alternative School Placement*

Due to challenges to collecting and analyzing data regarding the impact of alternative school placement,[56] there is a lack of good data on the outcomes of alternative school placement on students. The existing data suggest reasons to be concerned. The 2017 *Building a Grad Nation* report focuses specifically on low-graduation-rate high schools, including alternative schools, as one of the five identified drivers that prevent the United States from achieving the target of a ninety percent graduation rate. According to the report, "[t]hough alternative schools make up roughly six percent of all high schools enrolling 100 or more students, they account for 30 percent of all low-graduation-rate high schools. Sixty percent of alternative schools and programs graduate fewer than 67 percent of their students in four years."[57] That alternative schools have a lower four-year graduation rate than traditional high schools is not surprising, given that many students are placed at alternative schools precisely because they are failing to accumulate sufficient credits to remain on track to graduate. However, even when using adjusted graduation rates, many alternative schools are failing to graduate their students. For example, in a 2003-2004 survey of students in Philadelphia, researchers found that the six-year graduation rate for alternative school students was only twenty-six percent, less than half of the sixty percent graduation rates of students attending their neighborhood school.[58]

Part of the explanation may be that students enrolled in alternative schools often earn less credit: one study found that in a large urban school district, students in alternative schools earned an average of 1.59 credits in one semester of high school compared to the average of 2.5 for students in traditional public schools.[59] Many students at alternative schools also have lower levels of academic proficiency than their peers in neighborhood schools. For example, of the students surveyed in another Philadelphia study, only twenty-five percent in alternative schools achieved eleventh grade math and reading proficiency over six years, whereas a full fifty percent of neighborhood school students achieved

53. Judi Vanderhaar et al., *Reconsidering the Alternatives: The Relationship Between Suspension, Disciplinary Alternative School Placement, Subsequent Juvenile Detention, and the Salience of Race*, 5 J. APPLIED RES. ON CHILD. 1, 10 (2014).

54. *See id.* at 18.

55. *Id.* at 21.

56. Researchers note the difficulty in collecting and fully analyzing data on the outcomes of alternative school placements. This information is often scattered across topic areas such as dropout prevention, special education and at-risk youth and is therefore challenging to pull together for a coherent picture. *See* LANGE & SLETTEN, *supra* note 3, at 6.

57. *See* DePaoli et al., *supra* note 47, at 31.

58. *See* Chiang & Gill, *supra* note 52, at 64. Researchers use the six-year graduation rate to account for the fact that many students are placed at alternative schools because they are behind on school credits and are therefore unable to graduate within the typical four-year timeframe for high school graduation.

59. *See* Kimber Wilkerson et al., *Behavior-Focused Alternative Schools: Impact on Student Outcomes*, 2 BEHAVIORAL DISORDER 81, 91 (2016).

proficiency within six years.[60] As a result, students are often given less challenging or stimulating coursework.[61] Perhaps relatedly, placement in alternative schools is also associated with significantly lower school attendance, which in turn impacts a student's academic performance and ability to graduate on time.[62]

A number of reasons may contribute to students' lower academic performance at alternative schools, including lower quality of instruction[63] and lower levels of oversight and accountability than traditional public schools.[64] Only six states provide accountability structures for alternative schools that evaluate alternative schools based on statewide academic standards as well as providing them with flexibility given the needs of the populations they serve.[65] Nine additional states hold alternative schools to the same standards as other schools, while the remaining states have limited and insufficient accountability frameworks.[66] Statutes in twenty-two states do not contain any provisions related to the accountability of alternative schools to meet state standards.[67] In addition, in only about half of states are there statutes that govern staffing in alternative schools and only four states have explicit policies relating to professional development of teachers at alternative schools.[68] At times, districts may assign to alternative schools teachers who have been let go at traditional schools in the district.[69] The *Jobs for the Future* study of the state policy environment for alternative schools concludes that "much of the nation's alternative education system remains stuck in an era of different and lower standards" and that no states "have instituted the comprehensive, innovative approach required for alternative education students to succeed."[70]

Funding is also an issue, because alternative schools are often funded like traditional schools, based on enrollment at the beginning of the school year. However, because enrollment at alternative schools tends to increase throughout the school year, funding is often inadequate to meet the high needs of their student populations.[71] Moreover, when districts contract with private providers to run alternative schools, the schools may only receive a percentage of the district's per pupil allocation.[72] In a 2017 study of alternative schools, researchers found that nationwide "nearly a third of the alternative-school population attends a school that spends at least $500 less per pupil than regular schools do in the same district."[73]

These concerns are consistent with the findings of a University of Minnesota study of state directors of special education or their designees, which identified funding, staffing, and accountability as the most common issues for

60. *See* Chiang & Gill, *supra* note 52, at 63.

61. *See* Emily Morgan et al., Council of State Governments Just. Ctr., The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System 167 (2014).

62. *See* Wilkerson et al., *supra* note 59, at 90–91.

63. *See* Morgan et al., *supra* note 61, at 171.

64. *See id.* at 175.

65. *See* Cheryl Almeida et al., Jobs for the Future, Reinventing Alternative Education: An Assessment of Current State Policy and How to Improve It 11 (2010).

66. *See id.* at 12.

67. *See id.*

68. *See id.* at 15–16.

69. *See id.* at 19.

70. *Id.* at 20.

71. *See id.* at 19.

72. *See id.*

73. Heather Vogell & Hannah Fresques, *'Alternative' Education: Using Charter Schools to Hide Dropouts and Game the System*, PROPUBLICA (Feb. 21, 2017), https://www.propublica.org/article/alternative-education-using-charter-schools-hide-dropouts-and-game-system.

alternative schools or programs.[74] The directors surveyed suggested that "the money allotted for alternative schools was not sufficient to provide quality facilities or instructional resources" for the students.[75] The directors also noted that when there were budget cuts, alternative schools were likely to be the first to see cuts.[76] Additionally, these directors stated that obtaining qualified teachers for alternative schools was a major area of concern.[77] These schools often need teachers with dual certifications, one in their subject area and another in special education, and specialized training to work with students with significant behavioral and academic needs.[78] Finding teachers with these qualifications is particularly challenging in light of general shortages of qualified general education and special education teachers.[79]

Although alternative schools face challenges related to staffing and funding, they serve students with significantly higher risk factors than the general student population. Students attending alternative schools have a higher rate of health-related issues and depression,[80] higher rates of violent crime victimization,[81] and face other nonacademic learning barriers that their teachers are unequipped to address.[82] A study of students in California's "continuation schools," another term for alternative schools, found that students attending these schools often have diverse educational backgrounds and needs such as behavioral difficulties or being a pregnant or parenting teen.[83] Students in alternative schools also face a plethora of other out-of-school stressors and traumas. In California, continuation school students in eleventh grade are three times more likely to be in foster care or living with a relative other than a parent.[84] These students were also at least two times more likely to engage in heavy alcohol and drug use, five times more likely to use marijuana on a daily basis, and twice as likely to have substance use related problems.[85] The study notes that these risk factors are tied into the great deal of turbulence that these students face in their personal lives.[86] In addition, nearly 21.3% of students in California's continuation schools, were English Language Learners, or "ELL" students, and were mainly Spanish-speaking ELL students.[87] As alternative schools experience inadequate funding and staffing, these high-need student populations are left under-served and under-resourced. In essence, students with the highest needs are often being funneled into the lowest-resourced schools.

As a result of their high-risk student populations, alternative schools require more—rather than less—resources in order to create a climate of success. As one nationwide study found, "the prevalence of most risk behaviors is significantly higher among students attending alternative high schools com-

74. *See* C.A. Lehr. & C.M. Lange, Univ. of Minn., Inst. on Cmty. Integration, Alternative Schools and the Students They Serve: Perceptions of State Directors of Special Education 5–6 (2003).

75. *See id.* at 5.

76. *See id.*

77. *See id.* at 5–6.

78. *See id.* at 6.

79. *See id.*

80. *See* RUMBURGER, *supra* note 2, at 8.

81. *See* JORGE RUIZ DE VELASCO ET AL., ALTERNATIVE EDUCATION OPTIONS: A DESCRIPTIVE STUDY OF CALIFORNIA CONTINUATION HIGH SCHOOLS 4 (2008) (asserting continuation students are twice as likely as other eleventh graders to be threatened or injured with a weapon more than once).

82. *See id.* at 2.

83. *See id.* at 2, 8.

84. *See id.* at 3.

85. *See id.* at 3–4.

86. *See id.* at 4.

87. *See id.* at 3.

pared with students at regular high schools."[88] However, these tendencies can be counteracted by programs that provide "a) a comprehensive, multidisciplinary focus on risk factors rather than categorical behaviors; b) training in social skills; c) individual attention; d) integrated services provided by school-community teams; and e) community-wide, multi-agency collaborative approaches."[89] The study notes that little research is available to indicate the extent to which these types of supports are available at alternative schools.[90] A study by Duke University also notes that "[s]uccessful alternative schools are those with a full day of school, small student bodies, small classes, a student-centered atmosphere, alignment of curriculum and assessment, availability of special education services, training and support for teachers, and connections with multiple external agencies."[91] While the study provides examples of several alternative schools that have implemented these ideas, it also points to the potentially prohibitive cost of running a school that provides such intensive services. For example, the study discusses the Success Academy in Baltimore, which requires students to "take a behavior-management course as well as academic subjects ranging from remedial instruction to International Baccalaureate" and provides "a full day of instruction, counseling, wraparound services, and a safe and structured environment."[92] However, the study also points out that the cost for the Success Academy is "around $1.2 million for a program that serves about 100 students a year," an amount that is unaffordable for most cash-strapped districts.[93]

To be sure, some research has found positive outcomes for students attending alternative schools.[94] Researchers have noted abundant anecdotal reports of students who had previous negative school experiences or dropped out, and who then later succeeded at alternative schools.[95] However, these researchers focused mainly on those students attending an alternative school of their choice, as opposed to disciplinary transfers. Students who are disciplinarily transferred to alternative schools are impacted not only by the lower quality of education in alternative school environments but also by the impact of shifting school placements, particularly in the middle of a school year.

Research on student mobility suggests that non-promotional school transfer negatively impacts students' academic outcomes. A National Research Council workshop in 2009 summarized the findings of sixteen studies and found that even one non-promotional school move reduced elementary school achievement in reading and math and increased high school dropout rates.[96] The National Education Policy Center's report, *Student Mobility: Causes, Consequences, and Solutions,* also points to a 2012 study done in Nashville, Tennessee that found that students in grades three to eight who experience a change in school placement experience a reduction in "achievement growth in reading and mathematics by 6%, representing 10 days of instruction."[97] In a more

88. Jo Anne Grunbaum et al., *Youth Risk Behavior Surveillance National Alternative High School Youth Risk Behavior Survey, United States, 1998,* 70 J. SCH. HEALTH 5, 15 (2000).

89. *Id.* at 16.

90. *See id.*

91. JENNI OWEN ET AL., INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE 36 (2015).

92. *Id.* at 36–37.

93. *See id.* at 36.

94. *See* Lehr et al., *supra* note 9, at 21.

95. *See id.*

96. *See* Rumberger, *supra* note 2, at 8 (citing NAT'L RES. COUNCIL & INST. OF MED., STUDENT MOBILITY: EXPLORING THE IMPACT OF FREQUENT MOVES ON ACHIEVEMENT: SUMMARY OF A WORKSHOP 11 (2010)).

97. *Id.* (citing Jeffrey Grigg, *School Enrollment Changes and Student Achievement Growth: A Case Study in Educational Disruption and Continuity,* 85 SOC. OF EDUC. 388, 388–404 (2012)).

recent 2013 study of students in Chicago Public Schools, researchers found that each move to a new school was associated with a twelve to nineteen percent reduction in on-time high school graduation.[98]

While student mobility is due to a variety of reasons, the National Education Policy Center's report distinguishes between voluntary and involuntarily transfers. The primary distinction between voluntary and involuntary transfers is the level of planning and attendant disruption that occurs to a student's education. The study observes that voluntary transfers may be done for strategic reasons, that parents and students moving schools voluntarily may have the opportunity to consider school options, and the moves are generally less reactive than involuntarily school transfers.[99] By contrast, when students are removed from their classroom in the mid-year and placed in an alternative school, they are confronted with new teachers, classes, and peers without advance planning for needed academic and social supports.[100] The academic and emotional impact of this type of mid-year transfer to not only a new school, but also to an entirely different type of student population, has yet to be fully captured and understood by most courts confronted with challenges to alternative school placements.

D. *Educational Experience at Alternative Schools*

When students transfer to an alternative school, they often find themselves confronted with a curriculum that may vary greatly from the neighborhood school they previously attended. This discrepancy in school funding described in the previous section has a real impact on the educational experience of students who attend alternative schools. For example, when the study compared two schools in Orlando, Florida, it found that the neighborhood school offered "more than two dozen Advanced Placement courses, even more after-school clubs, and an array of sports from bowling to water polo," while the privately-run, district-utilized alternative school "offers no sports teams and few extracurricular activities."[101] Instead, the students at the alternative school spent their day in front of computers, up to four hours a day, with little to no live teaching.[102] When students require extra academic support at the Florida alternative school, one student stated that "over here, there's nothing, nothing, nothing at all," in way of after-school support.[103] With little to no individualized attention from instructors either through live teaching or after-school supports, students often find themselves adrift in their new environment. This conclusion is not surprising as students at the alternative school only attend school for four-hour sessions, with a single teacher monitoring up to twenty-five students compared to a national average of one teacher for 16.1 students in 2014,[104] and no homework is assigned to students.[105]

Unfortunately, the experience of students in this case study is not an outlier. In a 2009 report on alternative schools in the state of Mississippi, the American Civil Liberties Union found that some students at alternative schools were never given textbooks to take home, students received fewer minutes of

98. *See* Janette E. Herbers et al., *School Mobility and Developmental Outcomes in Young Adulthood*, 25 DEV. & PSYCHOPATHOLOGY 501, 508 (2013).

99. *See* Rumberger, *supra* note 2, at 11.

100. *See id.*

101. Vogell, *supra* note 73.

102. *See id.*

103. *See id.*

104. *See Teacher Trends*, NAT'L CTR. FOR EDUC. STAT., U.S. DEPT. OF EDUC., https://nces.ed.gov/fastfacts/display.asp?id=28 (last visited Aug. 27, 2018).

105. *See* Vogell, *supra* note 73.

instruction than classmates at neighborhood schools, homework was rarely given to students, and there were few, if any, extracurricular activities.[106] In Texas, students placed in an alternative school for disciplinary reasons are prohibited from participating in extracurricular activities.[107] The effect on the educational experience of students is significant: one author found that the students more immensely feel the impact of losing access to "all extracurricular activities, all advanced courses, and all contact with students at the regular school than when a student is barred from one class or one extracurricular activity."[108] These impacts are particularly compelling when one looks at the type of environment of alternative schools. Without an outlet for students or even the typical school experience such as "lockers, yearbooks, sports teams and school dances," these schools can be a stigmatizing and isolating place for students.[109]

Indeed, providing a rich and wide-ranging educational experience for students is not generally contemplated as a goal of an alternative school program. For instance, Chicago Public School's Alternative Safe Schools program states that their Safe Schools provide: "Educational services, [b]ehavioral intervention to improve academic performance, [s]ocial behavior intervention, [v]ocational and career training opportunities, and [l]ife-skills training."[110] Notably absent from the Alternative Safe Schools program's overview is any engagement in the facets of school-life that mainstream students are able to experience. In fact, it is pointed out that safe schools in Chicago have few, if any, extracurricular activities and sometimes these schools may even have waiting lists which leave students without educational opportunities in the interim.[111] As students find themselves placed in these schools, with little opportunity for engagement, there is yet another phenomenon that may remove them further from the school community—the rise of online schooling.

The exponential growth of online learning programs can be seen in places such as Chicago, Georgia, and Florida. Companies such as Ombudsman, a for-profit, online learning provider, runs more than one hundred programs in fourteen states, while Catapult Academy runs twenty alternative high school programs in Georgia and Florida.[112] In Chicago, providers such as Ombudsman, Magic Johnson Bridgescape, and Pathways provide instruction almost exclusively through online instruction.[113] While each of these online-learning providers touts high graduation rates, as Professor Michael Klonsky points out "the risk for these students is that rather than experiencing school as a social institution, they 'end up living in their own heads.'"[114] This loss of community has played out in a myriad of ways as Klonsky points out: "the loneli-

106. *See* Jamie Dycus et al., ACLU, Missing the Mark: Alternative Schools in the State of Mississippi 37–38 (2009).

107. *See* TEX. EDUC. CODE ANN. § 37.006(g) (West 2011) ("The terms of placement under this section must prohibit the student from attending or participating in a school-sponsored or school related activity.").

108. Audrey Knight, *Redefining Punishment for Students:* Nevares v. San Marcos I.S.D., 20 REV. LITIG. 777, 794–95 (2001).

109. *See* Fedders, *supra* note 41, at 899.

110. *Alternative Safe Schools*, CHI. PUB. SCH., https://cps.edu/Programs/Pathways_to_success/Alternative_education_and_transition/Pages/AlternativeSafeSchools.aspx (last visited Aug. 26, 2018).

111. *See Alternative Schools for Expelled Students*, ILL. LEGAL AID ONLINE, https://www.illinoislegalaid.org/legal-information/alternative-schools-expelled-students (last visited Aug. 26, 2018).

112. *See* Francesca Berardi, *Take These Students, Please*, SLATE (May 24, 2017), http://www.slate.com/articles/news_and_politics/schooled/2017/05/chicago_now_has_schools_where_online_learning_is_all_the_kids_do.html.

113. *See id.*

114. *Id.*

ness of computer-based instruction can foster isolation and rage."[115] Ray Salazar, a high school teacher in Chicago Public Schools ("CPS"), expressed concern that students steered into online alternative schools need more in-person guidance and instruction, not less.[116]

While social isolation represents one aspect of the difficulty of online instruction, the efficacy of these programs has also been called into question by a recent University of Chicago study. In 2016, the University of Chicago conducted a study of seventeen CPS high schools that offered online and face-to-face Algebra I credit recovery courses in the summers of 2011 and 2012.[117] According to the study, a total of 1,224 ninth graders participated in the credit recovery courses and were randomly assigned to either an online or face-to-face course.[118] At the conclusion of the credit recovery programs, students were surveyed about their experience and attitude toward the course recovery program. Of the students surveyed, the online students reported that they perceived their courses to be significantly more difficult and that grading expectations were less clear as well as a significantly lower liking of math and less confidence in their math ability than students in face-to-face courses.[119] In addition, only thirty-one percent of students in the online course received grades of A, B, or C while fifty-three percent of students in the face-to-face course received those grades.[120] The study ultimately concludes that for online courses to be viable, there needs to be continued improvement of the course material and, importantly, more instructional support for students.[121] While the debate around the efficacy of online instruction continues, it is crucial to remember that the students placed in these alternative programs, whether online or in a traditional brick and mortar school, often have higher needs than their peers. Students placed in alternative schools for disciplinary purposes have a particular need for "personal and social support" in order to be successful.[122] The concentration of students who have experienced trauma and one or more risk factors for school failure, coupled with the stigmatizing effects of social isolation and lack of extracurricular peer engagement, raise the question of the legal standard that should be applied prior to transferring a student to an alternative school program.

II. CURRENT LEGAL PROVISIONS PROVIDE LIMITED PROTECTIONS FOR STUDENTS FACING DISCIPLINARY TRANSFERS TO ALTERNATIVE SCHOOL SETTINGS

Students typically are involuntarily placed in alternative schools in response to a disciplinary incident through one of three means: (1) following a decision to suspend or expel a student; (2) as an alternative to suspension or expulsion; or (3) as a 45-day transfer to an Interim Alternative Educational Setting (IAES) pursuant to the Individuals with Disabilities Education Act.[123] At the end of 2013, statutes in forty-two states allowed expelled or suspended stu-

115. *Id.*

116. *See id.*

117. *See* JESSICA HEPPEN ET AL., U. CHI. CONSORTIUM ON SCH. RES., GETTING BACK ON TRACK: COMPARING THE EFFECTS OF ONLINE AND FACE-TO-FACE CREDIT RECOVERY IN ALGEBRA I 3 (2016).

118. *See id.*

119. *See id.* at 5.

120. *See id.* at 7.

121. *See id.* at 10.

122. *See* J.S. Herndon & Héfer Bembenutty, *In-School and Social Factors Influencing Learning Among Students Enrolled in a Disciplinary Alternative School*, 35 LEARNING & INDIV. DIFFERENCES 49, 53 (2014).

123. For the purposes of this article, we will address legal challenges relating to the first two means and not the 45-day placement requirements specific to students with disabilities. For an excellent discussion of the legal standard related to 45-day placements in Interim Alternative Educational Settings see L. Kate Mitchell, *We Can't Tolerate That Behavior in This School!": The Consequences of Exclud-*

dents to enroll in alternative educational programs.[124] Statutes in fourteen states required alternative program enrollment and statutes in twenty-eight states encouraged it.[125] In some states, alternative placement is required if students are suspended or expelled due to an assault, a felony, or bringing a weapon to school.[126] In some states, alternative schools or programs are required for students returning from suspension or expulsion.[127]

In most states, alternative educational programs targeting discipline and behavior issues are segregated from other types of alternative educational programs. In over half the states, students can be placed at alternative schools for disruptive verbal behavior, physical fights, and chronic truancy.[128] In nineteen states, alternative education programs are provided only for behavioral or disciplinary purposes.[129] In thirty-one other states, alternative education is available for a range of purposes, and ten of these states provide for separate alternative schools for students who meet disciplinary criteria.[130] According to language in this type of legislation, "alternative schools are settings intended to segregate potentially dangerous students and/or are for students who interfere with others' learning."[131] In a state survey report by *Jobs for the Future*, the authors write, "[t]he drawback to such narrow eligibility is that it establishes alternative education as a punitive environment, rather than a meaningful method for earning a diploma."[132]

In terms of the amount of due process provided to students prior to disciplinary transfer, state statutes vary significantly in the amount of procedure and protection afforded to students facing disciplinary transfers in lieu of suspension or expulsion. Students' placement at alternative schools usually results from a recommendation by a district-level administrator, school staff, or a school committee, and about half of districts report providing due process when parents wish to challenge the placement decision.[133] As an illustration of the variation in the due process required, we provide below a brief description of four state statutory schemes governing transfers to alternative schools. Our focus is on statutory provisions relating specifically to involuntary transfer to alternative schools that occurs as an alternative to suspension and expulsion, because these students typically are not provided the due process afforded to students in suspension or expulsion proceedings.

New York is an example of a state providing considerable due process to students prior to involuntarily transferring them. New York state law allows for involuntary transfer as an alternative to suspension, and there is a two-tier process for review and an opportunity for a formal hearing. Yet, the due process required is lower than that mandated for suspensions; while hearings are requested for suspensions of more than five school days, a hearing relating to the alternative school transfer is provided only if the parent requests it.[134] The grounds for involuntary transfer are also broad and vague: a principal may initi-

ing Children with Behavioral Health Conditions and the Limits of the Law, 41 N.Y.U. REV. OF L. & SOC. CHANGE 407 (2017); *see also* Fedders, *supra* note 41, at 905–07.

124. *See* Morgan et al., *supra* note 61, at 166.

125. *See id.*

126. *See* Lehr et al., *supra* note 9, at 26.

127. *See id.*

128. *See* Carver et al., *supra* note 42, at 4.

129. *See* Almeida et al., *supra* note 65, at 7.

130. *See id.*

131. Lehr et al., *supra* note 9, at 26.

132. ALMEIDA ET AL., *supra* note 65, at 7.

133. *See* Carver et al., *supra* note 42, at 12–13.

134. *Compare* N.Y. EDUC. LAW § 3214(3)(c) (McKinney 2017), *with* N.Y. EDUC. LAW § 3214(5)(d) (McKinney 2017).

ate a transfer of a general education student "where it is believed that such a pupil would benefit from the transfer, or when the pupil would receive an adequate and appropriate education in another school program or facility."[135]

Before a principal can initiate a transfer, the parent or guardian and the student must be given an opportunity to attend an informal conference and may bring an attorney or advocate to the meeting.[136] The transfer can move forward if the principal determines after the conference that a transfer is still warranted.[137] The principal then sends to the superintendent the recommendation for transfer and must provide, "a description of behavior and/or academic problems indicative of the need for transfer; a description of alternatives explored and prior action taken to resolve the problem."[138] The superintendent then must independently review such a request,[139] and the district must provide the parent or guardian in New York with notice of the right to a fair hearing, as well as a list of community and legal assistance organizations that may aid the parent in the hearing.[140] A transfer is not allowed to move forward without parental consent until the ten-day window to request a hearing has elapsed, or after issuance of a decision following a hearing where the formal decision to transfer is approved.[141]

California provides somewhat less due process to students than does New York prior to allowing involuntary transfers of students to its "continuation schools." California's education code requires that the student first be found to have either (1) committed an offense that would be eligible for suspension or expulsion, or (2) been "habitually truant or irregular in attendance from instruction."[142] After a student has been found to have committed the offense, the school district must keep in mind that an involuntary transfer "shall be imposed only when other means fail to bring about pupil improvement."[143] The law carves out an exception to this requirement and allows involuntary transfers if a principal determines that the pupil's presence would pose a danger to person or property or threaten to disrupt the instructional process.[144] Prior to transferring a student voluntarily, the district must notify the student and the student's parent or guardian of their right to request a meeting with a designee of the district superintendent.[145] If the student or the student's parent or guardian requests a meeting, they have certain procedural rights, including the right to inspect all documents relied upon to make the decision, to question any evidence or witnesses relied upon, and to present evidence on the student's behalf.[146] They may also designate representatives or other witnesses to be present with them at the meeting.[147]

After a meeting, if requested, the district then issues a final decision, with the caveat that no person involved in the final decision to transfer can be a member of the staff of the school that the pupil was enrolled in at the time the decision was made.[148] If those requirements are met, the district sends a writ-

135. N.Y. EDUC. LAW § 3214(5)(b).
136. *See id.*
137. *See* N.Y. EDUC. LAW § 3214(5)(c).
138. *Id.*
139. *See* N.Y. EDUC. LAW § 3214(5)(d).
140. *See id.*
141. *See id.*
142. CAL. EDUC. CODE § 48432.5 (West 2018).
143. *Id.*
144. *See id.*
145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*

ten decision explaining the transfer to the parent or guardian, stating the facts and reasons for the transfer and indicating whether or not there will be periodic review of the decision.[149] Involuntary placements in California are limited to the end of the semester after the semester in which the actions giving rise to the transfer occurred, unless the student's parent or guardian agrees to an annual review of this decision.[150]

Georgia provides considerable discretion to teachers to remove a student from their classroom and thereby trigger a process that might result in suspension or placement in an alternative school. In Georgia's statutory scheme, teachers can remove a student from their class, and then they have the option to either grant or withhold consent for the student's return.[151] The grounds for removal are quite broad. Teachers may remove a student who:

> [R]epeatedly or substantially interferes with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn, where the student's behavior is in violation of the student code of conduct, provided that the teacher has previously filed a report [of student misbehavior with the principal or a designee] or determines that such behavior of the student poses an immediate threat to the safety of the student's classmates or the teacher.[152]

If a teacher does not allow a student to return to the classroom, the student is referred to a placement review committee that is comprised of three members, two teachers, and one member of the professional staff of a school, who have authority to either return the student to the teacher's class or refer the student for other disciplinary actions.[153] These "other disciplinary actions," which can be done on a principal's own initiative or through the recommendation of the placement committee, include placement in an alternative education program, out-of-school suspensions, or another disciplinary action as long as it is consistent with board policy.[154] This section of Georgia's statute does not specify the duration, method of review, or appeal rights when a student receives a transfer to an alternative education program.

As compared to the other three states, Wisconsin's school code is the least extensive in way of statutory language around transfers to alternative schools. Section 118.164 of Wisconsin's code allows a teacher to remove a student who endangers the property, health, or safety of others or is dangerous, unruly, or disruptive.[155] The teacher must inform the principal or their designee in writing of the reasons for the student's removal within twenty-four hours.[156] The principal or their designee is then authorized to place a student in a number of settings, including an alternative education program, another class within the school, or back in the removing teacher's classroom if it is the best or only alternative.[157] This section does not include the same protections as those provided for students facing suspension or expulsion, and it does not refer to an opportunity to appeal the principal's decision.[158]

Wisconsin's statewide statutory scheme does not provide much in the way of guidance or protection, and this is translated into school district practice.

149. *See id.*
150. *See id.*
151. *See* Ga. Code Ann. § 20-2-738(b)–(c) (2018).
152. *Id.* § 20-2-738(b).
153. *See id.* § 20-2-738(d)(1)–(2).
154. *Id.* § 20-2-738(e)(1)(A)–(B).
155. *See* Wis. Stat. § 118.164(2) (2018).
156. *See id.*
157. *See* Wis. Stat. § 118.164(3)(a)(1)–(4).
158. For protections afforded for suspension and expulsion see Wis. Stat. Ann. § 120.13(1).

For example, the code of conduct of Milwaukee Public Schools allows for disciplinary transfers of general education students "at any time if there is sufficient reason to do so."[159] These are administrative transfers of students with discipline problems or who are expelled. The policy makes clear that, "[a]s a rule, students are not returned to a school from which they have been transferred by the administration or expelled."[160] Thus, the code of conduct effectively allows for students to be transferred indefinitely to alternative schools with minimal, if any, due process. It also makes clear that expelled students are placed in alternative schools when their term of expulsion is over, rather than being given the opportunity to return to their neighborhood schools.

As this section demonstrates, there is a wide variation in the protections afforded to a student when faced with transfer to an alternative school, ranging from New York's more extensive set of protections to Wisconsin's relative lack of guidance on when a student can be transferred. In most instances, the protections afforded are less than those given to students who are suspended and expelled. This relative lack of due process has sparked legal challenges to alternative school placements, but these have been largely unsuccessful.

III. LEGAL CHALLENGES TO ALTERNATIVE SCHOOL PLACEMENTS HAVE GENERALLY BEEN UNSUCCESSFUL

Typically, federal court challenges to alternative school placements rely on procedural due process and equal protection claims under the Fourteenth Amendment to the U.S. Constitution. In order to try to stop an alternative school placement from taking place, the plaintiff—the student[161]—may seek a preliminary injunction to prevent the school district from placing the student in an alternative school placement while the case is pending. The success of both procedural due process and equal protection arguments, as well as a motion for a preliminary injunction, depends on the court's findings regarding the significance of placement in an alternative school. As will be discussed below, courts typically do not find enough of a harm resulting to the student from an alternative school placement in order to rule in the plaintiff's favor.

A. *Procedural Due Process*

The leading case for due process protections in the school discipline context is the Supreme Court's decision in *Goss v. Lopez*.[162] *Goss* was initiated by a group of nine students, each of whom alleged that he or she had been suspended from their public school for up to ten days without a hearing. The suspended students sought a declaration that an Ohio statute was unconstitutional, as it allowed the school to suspend students without a hearing of any kind and thereby violated their due process rights under the Fourteenth Amendment. Although there is no federal constitutional right to an education, the Court found that Ohio state law created a right to an education that could not be taken away without procedural due process.[163] The Court held in *Goss* that, with respect to a suspension of ten days or less, students must be provided notice and an opportunity to be heard.[164] The Court found that short-term

159. MILWAUKEE PUB. SCHS., PARENT/STUDENT HANDBOOK ON RIGHTS, RESPONSIBILITIES, AND DISCIPLINE 2018-19 28 (2018).

160. *Id.*

161. When students are minors, their parent or parents typically bring the case on their behalf as their "next friend."

162. *See* 419 U.S. 565, 568 (1975).

163. *See id.* at 572–74.

164. *See id.* at 579.

suspensions implicated students' property and liberty interests in their education because, "[i]f sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[165] The Court's decision also raised the possibility that longer suspensions or expulsion might require more formal procedures.[166]

Post-*Goss*, lower courts have grappled with whether procedural due process protections apply to disciplinary transfers and if so, the amount of procedural due process required prior to transferring a student to an alternative school. In determining how to apply *Goss* to transfers to alternative schools, the critical question is the degree to which alternative school transfers impinge on students' liberty and property interests in their education. Thus, suits have revolved around the issue of whether an alternative school placement is significantly inferior to the student's neighborhood school or whether it is "just another school."

A number of circuits have found that procedural due process does not apply to alternative school transfers. The Tenth Circuit rejected a challenge to the student's disciplinary transfer to an alternative school on the ground of standing, finding that the student's one-year placement amounted to a sanction that was "far less severe than expulsion" and requiring the plaintiffs to show that the alternative school assignment was "substantially prejudicial."[167] This holding was subsequently cited with approval by the Eleventh Circuit.[168] The Fifth Circuit likewise agreed with this standard, dismissing for lack of standing based on the court's determination that a student transferred to another school for disciplinary reasons "is not being denied access to public education, not even temporarily. He was only to be transferred from one school program to another program with stricter discipline."[169] Similarly, the United States District Court for the Middle District of Alabama held that "unless there is a showing that the alternative school is so inferior as to amount to an expulsion, the plaintiffs lack standing to challenge the discipline."[170]

Several courts have acknowledged that procedural due process rights may apply to alternative school placements, but they have required only minimal levels of due process. For example, in *Buchanan v. City of Bolivar,* a student was placed in custody by Bolivar city police after the assistant principal of his school identified him as a student who was throwing rocks and damaging property on school grounds.[171] When the student returned to school, the assistant principal gave the parent and her son the option between a ten-day out-of-school suspension or a ten-day placement in an alternative school.[172] The parent opted for placement in the alternative school and signed consent for her son to attend the school.[173] The parent later appealed the school's decision arguing that her procedural due process rights were violated when the school did not give her and her son notice and an opportunity to be heard.[174] The court proceeded to examine *Goss* and found that the standard of an "informal give-and-take between student and disciplinarian," which applies to ten-day or less

165. *Id.* at 575.
166. *See id.* at 584.
167. Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981).
168. *See* C.B. *ex rel.* Breeding v. Driscoll, 82 F.3d 383, 389 n.5 (11th Cir. 1996).
169. Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26 (5th Cir. 1997).
170. Marner *ex rel.* Marner v. Eufaula City Sch. Bd., 204 F. Supp. 2d 1318, 1323 (M.D. Ala. 2002) (citing *Breeding*, 82 F.3d at 389 n.5).
171. *See* 99 F.3d 1352, 1354 (6th Cir. 1996).
172. *Id.* at 1355.
173. *See id.*
174. *See id.* at 1358–59.

suspensions, may apply to placements in alternative schools.[175] However, the court went even further noting that there may be no "procedural due process rights to notice and an opportunity to be heard when the sanction imposed is attendance at an alternative school absent some showing that the education received at the alternative school is significantly different from or inferior to that received at his regular public school."[176]

In *Betts v. Board of Education of the City of Chicago,* the Seventh Circuit reviewed a student's challenge to the district transferring her from her neighborhood school to an alternative school, which she attended for one day a week. The court observed that the transfer was "a penalty which is tantamount to expulsion."[177] Yet the court found that the student's procedural due process rights were satisfied by a meeting that took place the day following the incident, which was attended by the parent, her daughter, the school principal's administrative assistant, and the high school counselor. At that meeting, the principal's administrative assistant informed her that he was recommending an alternative school placement, and the student was immediately transferred. Because the student admitted to the charge of pulling the fire alarm, the Seventh Circuit found that minimal due process was owed to her. The court ruled that procedural due process under the Fourteenth Amendment was satisfied because "[the student] and her mother received adequate notice of the charges, had sufficient opportunity to prepare for the meeting, were accorded an orderly hearing and were given a fair and impartial decision."[178]

At least two federal district courts have found that additional due process protections are required prior to an alternative school transfer. In *Riggan v. Midland Independent School District,* the Western District of Texas found that "[w]hen assignment to an alternative education program effectively acts as an exclusion from the educational process, due process rights may be implicated."[179] In *Riggan,* the plaintiff was an eighteen-year old high school senior who allegedly took compromising photographs of his principal's car parked in front of a teacher's private residence. The principal became aware of the plaintiff's possession of the photographs, investigated the allegations, and found that the plaintiff did take the photographs. The principal charged the plaintiff with retaliation, a high-level offense in the school's code of conduct. The principal suspended and later transferred the plaintiff to an alternative education placement for five days for the alleged misconduct. The plaintiff appealed this decision through multiple school and district-level hearings and eventually his appeal was heard by the board of trustees ("the board") of the district. The board upheld the discipline and the plaintiff appealed the decision to federal court. The court, in denying the defendant-school's motion for summary judgment on the plaintiff's due process claims, stated that "the case law reinforces the basic idea that protected property rights are affected and due process protections are required when the discipline imposed amounts to a deprivation of access to education."[180] The court found that the plaintiff had raised a genuine issue that a transfer would deny his access to education, as the transfer occurred during a final exam review period and he would be prohibited from participating in and benefiting from the comments of teachers and peers during his reviews. Additionally, the court noted that the plaintiff's situation may be one

175. *Id.* at 1359 (quoting Goss v. Lopez, 419 U.S. 565, 584 (1975)).
176. *Id.*
177. Betts v. Board of Educ., 466 F.2d 629, 633 (7th Cir. 1972).
178. *Id.*
179. Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 655 (W.D. Tex. 2000) (citing Cole v. Newton Spec. Mun. Separate Sch. Dist., 676 F.Supp. 749, 752 (S.D. Miss. 1987)).
180. *Id.*

in which "a give and take exchange with the principal may not be sufficient to satisfy the student's due process rights."[181]

The most sweeping federal decision regarding alternative school placements is *Everett v. Marcase,* a consolidated class action against Philadelphia's public school system of "lateral transfers," a euphemism for disciplinary transfers.[182] The plaintiffs raised issue with the informal and ad hoc basis through which students were given lateral transfers to schools and sought relief in the form of, *inter alia,* more detailed and precise guidelines for lateral transfers.[183] The court held there must be a hearing before a "fair and impartial person or group of persons" prior to a student being transferred to a disciplinary alternative school.[184] The court found that "transfers involve protected property interests of the pupils and are of sufficient significance as to warrant the shelter of due process protection."[185] The court rejected the school district's claim that disciplinary transfers do not deprive students of a property right, finding that "[a]ny disruption in a primary or secondary education, whether by suspension or involuntary transfer, is a loss of educational benefits and opportunities."[186]

The *Everett* court is notable due to its strongly worded opinion regarding the nature of an alternative school placement. The court held evidentiary hearings on the alternative school placements in Philadelphia and found, based on the evidence presented at the hearings, that "a transfer during the school year has, at least to many pupils, a serious adverse impact upon their educational progress."[187] The court also noted the stigma of an alternative school placement, finding that,

> Even though such transfers may in certain specific instances be for the good of the pupil as well as the transferring school, it nonetheless bears the stigma of punishment. The analogy between a transfer for the good of the pupil and a jail sentence for a convicted felon for 'rehabilitation' is not entirely remote.[188]

The court also demonstrated thoughtful consideration of the impact of an alternative school placement from the student's perspective, noting, "[t]o transfer a pupil during a school year from a familiar school to a strange and possibly more distant school would be a terrifying experience for many children of normal sensibilities."[189]

Generally, since the *Everett* decision in 1977, few plaintiffs have been successful in developing a sufficient record regarding the impact of an alternative school placement to convince courts to rule in their favor on the due process arguments. On the whole, the number of federal cases involving disciplinary transfers to alternative schools is quite limited. One of the reasons for this is the time lag to obtaining a decision in a federal case.[190] By the time a court reaches a decision, the timeframe for the alternative school placement may have ended, the student may have already graduated, or the student may be reluctant to disrupt his or her education again by transferring back to a neighborhood school. In order to prevent the alternative school transfer from going

181. *Id.* at 656.
182. *See* 426 F. Supp. 397, 399 (E.D. Pa. 1977).
183. *See id.* at 399.
184. *See id.* at 403.
185. *Id.* at 400.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. While some federal cases may resolve in three months, cases may extend much longer. In one study, over one-third of federal cases took more than a year to resolve, some took two to three years to complete, and some took even longer. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 4 (2009).

into effect while the challenge to a placement is pending, the student or parent must obtain a preliminary injunction at the onset of the case and, again, due to the nature of the perceived harm of alternative school placement, attempts to obtain a preliminary injunction have largely been unsuccessful.

B. *Preliminary Injunctions*

As students, parents or guardians, and advocates have attempted to challenge transfers to alternative schools, there have been many unsuccessful attempts at using preliminary injunctions. In order to obtain a preliminary injunction, plaintiffs must show that there is a likelihood that they will succeed on the merits of the case, that they will suffer irreparable harm unless the injunction is granted, the balance of equities is in their favor, and that an injunction is in the public interest.[191] If successful, a preliminary injunction preserves the student's status quo until the final judgment of the court and would keep the student in the current placement in the disciplinary transfer context. The importance of preliminary injunctions as a remedy to disciplinary action by a school district should not be understated as they serve as an immediate freeze on a student's current placement and are a forward facing, prospective way to prevent the harm of transfer. Other remedies and forms of redress for an improper disciplinary transfer may take months or even a year and are only available after the harm of the transfer has occurred. While courts have granted preliminary injunctions halting student expulsions and school action that prohibits student attendance at graduation ceremonies,[192] courts have not been amenable to arguments of the irreparable harm that disciplinary transfer does to a student.

Aside from weighing the harm of transferring a student against that of expelling them, a number of cases have analyzed the harm of transferring a student to the student's interest in extracurricular activities, their reputation, and their high school careers. For instance, in *O.Z. v. Board of Trustees of Long Beach Unified School District*, a middle school student was suspended and given an "intervention transfer" to another school.[193] The student, a seventh-grader, created a video slide show on the website *YouTube* depicting a dramatized murder of her English teacher.[194] The teacher found the video when conducting a Google search of her own name and reported the video to the school principal.[195] The student's parents sought a preliminary injunction arguing that the intervention transfer to another middle school would cause the student irreparable harm.[196] The court denied the motion and held that, while there may be difficulties transferring to an unknown school, the student had not shown she would suffer irreparable harm.[197] The court noted that "the Court's opinion

191. *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

192. *See* Johnson v. Collins, 233 F. Supp. 2d 241, 251–52 (D.N.H. 2002) (holding that expelled high school student faced irreparable harm if "[student] continues to be deprived of an education during the pendency of this lawsuit"); *see also* Certain Named and Unnamed Non-Citizen Children and their Parents v. Texas, 448 U.S. 1327 (1980) (affirming a district court injunction preventing public officials from denying a plaintiff class of children a public education and noting the "harm caused these children by lack of education"); Crump v. Gilmer Indep. Sch. Dist. 797 F. Supp. 552, 554 (E.D. Tex. 1992) (holding that students will "suffer irreparable harm if they are denied the opportunity to participate in their graduation ceremony").

193. *See* No. 08-5671 ODW (AJWx), 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008).

194. *See id.*

195. *See id.*

196. *See id.* at *2, *4.

197. *See id.* at *5.

would likely be different if Plaintiff were a ninth grade student and the transfer would affect her entire high school career."[198]

While the court in *Long Beach* opined that its analysis may have differed had the student been transitioning to high school the next year, other courts have not found a student's grade level a compelling reason to grant a preliminary injunction. In *S.B. ex rel. Brown v. Ballard County Board of Education*, the plaintiff was a junior in high school when she was placed in an alternative school for up to ninety days.[199] The school, after an investigation, alleged that the plaintiff had purchased pills from another student. The assistant principal informed plaintiff and her mother that plaintiff was to report to an alternative school the next day and would be placed there for up to ninety days depending on her behavior.[200] The plaintiff argued that transfer would cause irreparable harm by excluding her from "(1) tutoring in chemistry, physics, and geometry, (2) softball, and (3) other school functions like 'basketball games, dances, or other extracurricular activities.' . . . She also state[d] that her placement in Alternative School will harm her reputation."[201] The court began by noting that a transfer is not equivalent to suspension or expulsion, calling the discipline "markedly different."[202] The court then held that the plaintiff failed to show irreparable harm and found that, while the inability to participate in extracurricular activities was "unfortunate," it did not implicate a constitutional deprivation.[203] Additionally, the court stated that, while the plaintiff spoke of the negative stigma she felt attending alternative school, this testimony fell "far short of establishing a factual basis whereby this Court could conclude that Plaintiff will be saddled with long-term reputational harm as a result of her punishment."[204]

Ultimately, the court in *Ballard County* did not find an argument about the impact of transferring a student on participation in extracurriculars compelling. Indeed, a number of courts have held that students do not have a constitutional right to participate in extracurricular activities.[205] These extracurricular activities are one source of student self-worth, but these arguments have not been a convincing point for the courts. In *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*, the Eighth Circuit overturned a district court's grant of a preliminary injunction for students facing a school transfer.[206] The Eighth Circuit found that the effect of a student's transfer on activities like band, honors classes, or their future was too speculative to support a preliminary injunction.[207] The case itself involved a group of students who created a blog website and posted a number of offensive, racist, and sexually explicit comments about their classmates.[208] After the school discovered the website and held a hearing, the students were suspended for 180 days and transferred to an alternative school for the period of their suspensions.[209] The students argued that the transfer would harm their academic work and music careers, as the

198. *Id.*
199. *See* 780 F. Supp. 2d 560, 562 (W.D. Ky. 2011).
200. *See id.* at 563–64.
201. *Id.* at 569 (internal citations omitted).
202. *Id.* at 567.
203. *See id.* at 569.
204. *Id.*
205. *See* Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) (holding that a student does not have a "general constitutional right to participate in extracurricular activities"); *see also* Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382, 387 (6th Cir. 1992) (holding that the "main purpose of high school is to learn science, the liberal arts and vocational studies, not to play [sports]").
206. *See* 696 F.3d 771, 780 (8th Cir. 2012).
207. *See id.* at 779.
208. *See id.* at 773.
209. *See id.* at 774.

alternative school did not offer honors classes or band.[210] The court rejected both arguments and held that it was not convinced that "certain and great" harm would occur to the students' academics and that the alleged injury to the students' band careers was speculative harm, which did not support a preliminary injunction.[211]

While preliminary injunctions have been difficult for parents and students to obtain, they have not proven to be an insurmountable task. In a case from the Northern District of Illinois, *Huebner v. Board of Education*, the court found that a student would suffer irreparable harm if he was not permitted to attend regular classes at his home school and forced to transfer to an alternative school.[212] The student in *Huebner* was a sophomore student with no prior disciplinary history who became involved in a senior year-end prank.[213] The prank, setting of a canister "smoke bomb," caused approximately two-thousand dollars' worth of damage to the school and ultimately led to the student's parents withdrawing him for the school year in lieu of an expulsion hearing.[214] The student and his parents then reconsidered and asked for a due process hearing, but the district indicated that, if the hearing went forward, the district would recommend that the state's attorney consider additional criminal charges against the student.[215] The student and his parents decided not to proceed with the hearing, and the student was placed at an alternative education school, where he received online instruction for three hours a day without classroom discussion, physical education, lab work, or opportunity to participate in the school hockey team.[216]

The student and his parents brought suit seeking, *inter alia*, a preliminary injunction that would allow the student to finish out the rest of his school year. The court found that the student met all of the requirements for a preliminary injunction and emphasized that the student would suffer "a denial of the quality education that [the student] is capable of receiving. The State's goal is to educate its citizens to the fullest extent of their capacity, and [the student's] enrollment in the [alternative school] does not promote this goal."[217] The court also balanced the harm to the school and to the student, finding that the student would face "deprivation of credits for regular classes, stigma from fellow students, and a lack of a quality education."[218] While this case was decided a number of years ago, subsequent research on alternative schools appear to support the court's findings relating to the quality of education, stigmatization of students in alternative schools, and difficulties with academic advancement encountered by alternative school students.[219]

C. *Equal Protection*

While federal and state courts have met procedural due process claims and requests for preliminary injunctions with skepticism, the vast majority of courts have outright dismissed claims under the Equal Protection Clause. Part of the explanation for this phenomenon may come from the Supreme Court's decision in a 1973 case, *San Antonio Independent School District v. Rodriguez*, which

210. *See id.* at 779.
211. *Id.* (citation omitted).
212. *See* No. 96 C 8390, 1997 U.S. Dist. LEXIS 3568, at *26–27 (N.D. Ill. Mar. 19, 1997).
213. *See id.* at *3–4.
214. *Id.* at *4, *7.
215. *See id.* at *7–8.
216. *See id.* at *9.
217. *Id.* at *25.
218. *Id.* at *26.
219. *See supra* Sections I.C, I.D.

held that education was not a fundamental right and that the lowest standard of scrutiny—rational basis—applied to school funding decisions.[220] Since the decision in *San Antonio*, a number of federal courts have extended rational basis review to challenges to school discipline decisions arising under the Equal Protection Clause, placing the burden on parents and students to prove that the school does not have a legitimate interest in disciplining the student. The decision in *San Antonio* coupled with the Supreme Court's 1976 decision in *Washington v. Davis*, which required not only a showing of discriminatory impact but also added a requirement that a plaintiff show discriminatory intent when bringing an equal protection claim,[221] essentially foreclosed students from successfully bringing federal equal protection claims. Taken together, *San Antonio* and *Washington*, required students to not only prove that a school acted without a legitimate purpose in disciplining them, but also that the school's actions had a discriminatory impact on similarly situated students and that the impact was intentional. For these reasons, the equal protection challenges brought in federal court under the Equal Protection Clause have largely failed.

In one of the most recent cases, an Oklahoma district court granted a school district's motion to dismiss a federal equal protection claim when a student was suspended and placed in an alternative education setting for the remainder of a semester.[222] The student in *Storie v. Independent School District No. 13* had taken an unauthorized medication on school property in violation of school policy.[223] In support of her equal protection claim, the student alleged that the school district's actions were arbitrary and capricious, as another student had not been suspended after taking prescription medication.[224] The court reviewed the general standard for an equal protection claim, which requires that a plaintiff plead that the defendant intentionally treated them differently from similarly situated individuals and that the difference was irrational and abusive.[225] In addition, the court discussed the "class of one" claim, where the plaintiff alleges that she had been intentionally treated differently from others without a rational basis for different treatment.[226] The court, without discussion of the merits of the claim, dismissed the complaint under both standards, holding that the student failed to prove that her unequal treatment was based on any animosity or ill-will toward the student.[227] As *Storie* demonstrates, to survive a motion to dismiss, students and parents will not only need to plead a well-defined, "similarly-situated" class but also to pay close attention to satisfying the *Washington* requirement that the school's actions be done with a discriminatory purpose. As the case below demonstrates, even when a plaintiff shows that there was an intent to segregate students into different school environments, this showing will not be enough to withstand summary judgment.

In *Turley v. Sauquoit Valley School District*, a former student brought suit against her school district alleging, *inter alia*, that the district violated her right to an education under the Equal Protection Clause after it transferred her to an alternative school in the district.[228] The student, who had graduated at the time the suit was brought, was transferred to the alternative school during her

220. *See* 411 U.S. 1, 37, 55 (1973).
221. *See* 426 U.S. 229, 238–39 (1976).
222. *See* Storie v. Independent. Sch. Dist. No. 13, 834 F. Supp. 2d 1305, 1307 (E.D. Okla. 2011).
223. *See id.*
224. *See id.* at 1309.
225. *See id.*
226. *See id.*
227. *See id.* at 1310.
228. *See* 307 F. Supp. 2d 403, 407 (N.D.N.Y. 2003).

freshman year after experiencing academic and behavioral problems. She and her mother agreed to the district's recommendation that she transfer to the alternative school. She claimed that the education at the alternative school was "substandard" and testified that her classmates "were placed in the alternative school because they were uncontrollable. There were fights, there was disrespect, there was often pandemonium. In addition to the fighting and hurting each other, students would kick walls, punch doors, tip over desks, and destroy property."[229]

The court, in its analysis, started from the premise established in *San Antonio* that education is not explicitly or implicitly guaranteed in the Constitution and therefore, is not a fundamental right.[230] Following from this premise, the court analyzed the student's claim under rational basis and discussed whether the decision to segregate certain types of students in an alternative school program was rationally related to any legitimate state interest.[231] The court recognized that while the student may have qualms with the quality of education and/or environment at the alternative school, the student is only "entitled to an education, not the best education possible."[232] In addition, the court noted the district had a legitimate interest in its students graduating that justified transferring students in jeopardy of not graduating to alternative placements that provide a "less intensive and more flexible program."[233] While the court considered the possibility that alternative schools may provide "an inferior education, in a physically inadequate facility, with unqualified and/or ineffective teachers in a chaotic and/or unsafe environment as opposed to the high school," it found these facts do not infringe on a federal constitutional right.[234] Implicit in the court's ruling, then, is a recognition that, even if there is a discriminatory impact on students that results in a different or "substandard" education, the plaintiffs must prove discriminatory intent by the school district in order to succeed on a federal equal protection claim. However, the court did offer a glimmer of hope for Equal Protection Clause cases, as it concluded that the more appropriate forum of the student's case would be a state court, where the state's constitution may be able to provide relief to the student.

Under state constitutions, it has been easier for students and parents to find relief from school discipline. In *Phillip Leon M. v. Greenbrier County Board of Education*,[235] the school board expelled the student without educational services for one year.[236] The school board defended its decision on two grounds: first, that the school did not have a duty to provide an education to an expelled student, and second, that under the West Virginia Constitution there is no requirement to provide an alternative education to an expelled student.[237] The West Virginia Supreme Court rejected both arguments, finding that under existing West Virginia case law, "education is a fundamental, constitutional right in this State"[238] and that the denial of an education is subject to the highest standard of review—strict scrutiny.[239] By failing to provide an alternative education to a student or any education, the court held that the school had "failed to tailor narrowly the measures needed to provide a safe and secure

229. *Id.* at 406 (internal quotation marks omitted).
230. *See id.* at 407.
231. *See id.*
232. *Id.* at 408.
233. *Id.* at 407.
234. *Id.* at 408.
235. *See* 484 S.E.2d 909 (W. Va. 1996).
236. *See id.* at 911–12.
237. *See id.*
238. *Id.* at 914 (quoting Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979)).
239. *See id.*

school environment."[240] While the holding in *Phillip Leon M.* was modified and limited by a ruling the subsequent year,[241] the case still illustrates the impact and potential of recognizing education as a fundamental right under state constitutions. The court ultimately concluded in *Phillip Leon M.* that the student did not completely forfeit his right to an education and that the board of education's complete denial of an education violated West Virginia's constitutional guarantee of an education.[242]

While *Phillip Leon M.* was decided in the late-1990s, the recognition of the right to an education in state constitutions has expanded. Before 1960, only two states had declared education to be a fundamental right: Wyoming and North Carolina.[243] In the 1990s, twelve more states recognized education as a fundamental right, and, in the most recent survey conducted in 2014, a total of twenty-two states recognize education as a fundamental right.[244] It is in these states that recognize education as a fundamental right that due process and equal protection challenges to alternative school placements would be more likely to succeed as the burden shifts to the school to prove that they have a compelling interest in moving the student to an alternative placement.[245] As more states recognize education as a fundamental right in their constitutions, parents and students may find a home for their Equal Protection Clause claims. The more promising route to creating change in local practices related to alternative school transfers, however, is state policy reform, like the school discipline reform legislation passed in Illinois.

IV. CASE STUDY: THE ILLINOIS SCHOOL DISCIPLINE REFORM LAW IS A PROMISING EXAMPLE OF EXPANDING LEGAL PROTECTIONS PRIOR TO ALTERNATIVE SCHOOL TRANSFER

Following the issuance of federal guidance related to school discipline in January 2014[246] and in response to youth and community pressure to reduce the high rate of school discipline and its disproportionality in Illinois,[247] Illinois passed a sweeping school discipline reform law in August 2015. Public Act 99-456 (the "Illinois School Discipline Reform Law" or "Illinois SDR Law"),[248] which went into effect on September 15, 2016, significantly limits the scope of school administrators' discretion to impose exclusionary discipline on students. While the law primarily focuses on school suspension and expulsion, in several significant sections, the law also imposes new limitations on alternative school transfers. This section explores the law in Illinois relating to alternative school

240. *Id.*

241. *See* Cathe A. v. Doddridge Cty. Bd. of Educ., 490 S.E.2d 340, 351 (W. Va. 1997) ("There may 'be a point when a student's actions are so egregious, that in order to protect teachers and other school personnel [and, we add, other students], the State may determine that there is a compelling state interest not to provide an alternative to that particular expelled student.'") (quoting Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 919 (W. Va. 1996) (McHugh, J., concurring, in part, dissenting, in part)).

242. *Phillip Leon M.*, 484 S.E.2d at 909.

243. Trish Brennan-Gac, *Educational Rights in the States*, 40 HUM. RTS. 12, 12 (2014).

244. *See id.* at 12, 14.

245. *See* David J. D'Agata, *Alternative Education Programs: A Return to "Separate but Equal,"* 29 NOVA L. REV. 635, 653–54 (2005).

246. *See* U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NON-DISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (2014). This guidance was subsequently rescinded by the U.S. Department of Justice and U.S. Department of Education on December 21, 2018.

247. *See The Campaign for Common Sense Discipline*, VOICES OF YOUTH IN CHI. EDUC., http://voyceproject.org/campaigns/campaign-common-sense-discipline/ (last visited Aug. 27, 2018).

248. This law is commonly known in the state by its Senate bill number, SB 100.

transfers, both before and after disciplinary reform, and the related lessons learned in the years following implementation of this statute.

A. *Law Governing Alternative School Transfers Prior to the Illinois School Discipline Reform Law*

In Illinois, the procedures for transferring a student to an alternative school are codified in two sequenced sections of the Illinois School Code[249] and the procedures governing suspension and expulsion are in an entirely different section.[250] The Alternative Learning Opportunities Law, codified in Section 13B of the Illinois School Code,[251] allows school districts to create alternative learning opportunities programs or contract with outside entities that operate such programs.[252] These are voluntary programs for students "at risk of academic failure," or Type I alternative schools.[253] Districts are allowed to enroll students in these programs only at the request of the student or the student's parent or guardian and after a parent conference has taken place to enable informed decision-making regarding enrollment.[254] These programs generally provide a smaller learning environment with a "flexible standards-based learning environment" and additional support services,[255] such as an evening high school, a high school completion program for students who dropped out, or in-school tutoring and mentoring programs.[256] The purpose of these schools is to provide education to students in a manner that supports "individual learning styles, career development, and social needs to enable students to successfully complete their education."[257]

Until Illinois law was amended in 2012, these types of alternative school programs were completely distinct from alternative schools serving students following an incident that sparked disciplinary action. In 2012, the law was amended to allow a student to voluntarily enroll in an alternative learning opportunities program if the student has been expelled.[258] The corresponding sections of the provisions in Illinois law relating to expulsions were also amended to allow transfer of expelled students to alternative learning opportunities programs and to prohibit schools established under Article 13A from denying transfer to an expelled pupil unless the student was deemed a threat to the safety of students or staff in the program.[259]

The preceding section of the Illinois School Code, Section 13A of the Illinois School Code, or the Safe Schools Law, relates to involuntary transfers. Under this provision, a school district can administratively transfer students if they are subject to suspension or expulsion under the requirements of the disciplinary provision of the Illinois School Code.[260] These transfers are, in essence,

249. *See* 105 ILL. COMP. STAT. ANN. 5/13A, 5/13B (West 2018).
250. *See id.* 5/10-22.6.
251. *See id.* 5/13B.
252. *See id.* 5/13B-20.10.
253. For a definition of Type I alternative schools see *supra* Part I.
254. *See* 105 Ill. Comp. Stat. Ann. 5/13B-60.5, 13B-60.10.
255. *Id.* 5/13B-20.
256. *Id.* 5/13B-20.5.
257. *Id.* 5/13B-10.
258. *See id.* 5/13B-20.25. The text of this law also allows voluntary enrollment by students suspended for more than twenty days, but, because suspensions in Illinois are limited to ten consecutive days and the state educational agency did not interpret this statute to apply to twenty cumulative days of suspension, this provision effectively only applies to expelled students. *See* ILL. STATE BD. OF EDUC., NON-REG. GUIDANCE 12-03, PUBLIC ACT 97-0495: TRANSFER OF STUDENTS TO REGIONAL SAFE SCHOOL AND ALTERNATIVE LEARNING OPPORTUNITY PROGRAMS para. E-1 (2012) [hereinafter ILL. NON-REG. GUIDANCE], https://www.isbe.net/Documents/guidance-alop-rssp-pa97-0495.pdf.
259. *See* 105 Ill. Comp. Stat. Ann. 5/10-22.6(a), 5/34-19.
260. *See id.* 5/13A-4.

an involuntary transfer to an alternative school. The legislative findings in this statute, enacted in 1995, note:

> Disruptive students typically derive little benefit from traditional school programs and may benefit substantially by being transferred from their current school into an alternative public school program, where their particular needs may be more appropriately and individually addressed and where they may benefit from the opportunity for a fresh start in a new educational environment.[261]

The statute also justifies the creation of the alternative school's program on grounds that, "[a]dministrative transfers may prove more productive for dealing with disruptive students than out-of-school suspensions or expulsions, which have been the subject of much criticism."[262] Thus, alternative school programs for disruptive students were designed as an alternative to suspension and expulsion.

The schools specifically designated for disruptive students under this statute are termed "regional safe schools."[263] After a student is transferred to a regional safe school and at the earliest time following the transfer, the sending district and receiving alternative program must meet and develop an alternative education plan for the student.[264] The parent or guardian is to be invited to this meeting and the student may also be invited, and the meeting is required to spell out the duration of the transfer, the specific academic and behavioral components of the plan, and a method and timeframe for reviewing the student's progress.[265] A student's Individualized Education Program ("IEP") will also transfer to the regional safe school.[266]

One concern relating to execution of this statute is the availability of alternative school options. The statute requires that at least one regional safe school be established for each educational service region.[267] In Illinois' urban centers, there tend to be multiple alternative school options for students in grades six through twelve. However, for the state's rural regions, such as the Region Three that covers rural Bond, Christian, Effingham, Fayette, and Montgomery counties, there may be only one or two regional safe schools serving students in grades six to eight.[268] One of the closest regional safe schools for high school students in Region Three would be the Woodruff Career and Technical Center in Peoria, Illinois, a full hour away from some of their homes.[269] For many students and parents, this distance may prove an insurmountable obstacle. It is for this reason that the Illinois School Code was amended as discussed above to allow expelled students to attend alternative learning opportunity programs in addition to regional safe schools—this created more options for students subject to discipline, although it still did not guarantee the availability of school placements.

Another concern with this statute relates to the time period of the transfer. While suspensions in Illinois law are limited to ten school days[270] and expulsions are limited to two school years,[271] there are no statutory requirements limiting the time period of alternative school transfers. The required meeting

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261. *Id.* 5/13A-1(e).
262. *Id.* 5/13A-1(i).
263. *Id.* 5/13A-3.
264. *See id.* 5/13A-4.
265. *Id.* 5/13A-4(1)–(3).
266. *Id.* 5/13A-4.
267. *Id.* 5/13A-3(a).
268. *See* JULIE WOLLERMAN, ILL. REG'L. SAFE SCH. PROGRAMS, FY 13 ILLINOIS REGIONAL SAFE SCHOOLS DIRECTORY 4 (2013), http://www.iceary.org/downloads/FY13.Directory.RSSP.pdf.
269. *Id.* at 38.
270. 105 ILL. COMP. STAT. ANN 5/10-22.6(b).
271. *See id.* 5/10-22.6(d).

to be held between the sending district and receiving district must address the duration of the transfer,[272] but there are no specified criteria guiding this decision-making. Indeed, while the statute provides a means for a parent or student to challenge a decision by the alternative school to return the student to his or her regular school, it does not contemplate that the parent or student may wish to challenge the student's continued placement in the alternative schools setting.[273]

A final, and more fundamental, concern relates to the due process owed to the student prior to the transfer. The Safe Schools Law requires that the student be "eligible for suspension or expulsion through the discipline process established by a school district,"[274] but the statutory text does not make explicit whether a full expulsion hearing or school board action is required prior to the student's transfer. The Safe Schools Law cross-references the Illinois School Code provisions on suspension and expulsion.[275] These provisions require that, prior to expulsion of a student, there must be a hearing held before the district's board of education or a hearing officer appointed by the board, with the final expulsion determination to be made by the board of education.[276] Once a student is expelled by the district, he or she may—but is not required to be—immediately transferred to an alternative school.[277] Districts are able to expel a student for up to two school years and are not required to provide a student with alternative education during that time period, so long as they provide due process.[278] With respect to a suspension, which is limited by Illinois law to ten school days, the board is allowed to authorize district or school personnel to suspend students without board approval.[279] If parents wish to challenge this decision, they may request a suspension review meeting to be conducted before the board of education or a hearing officer appointed by the board, with the final determination on the suspension to be made by the board.[280] Thus, Illinois statutory law provides clear due process requirements for suspension and expulsion, while the due process applicable to alternative school is not specified.

Indeed, the Illinois State Board of Education's guidance on alternative school placements suggests that there is a separate process for alternative school transfers that is different from the requirements imposed on districts prior to suspensions or expulsions. In a document responding to questions posed following amendments to the provisions relating to alternative school placements in 2012, the agency stated that the amendments did not change the provisions related to "disruptive students," noting, "[s]tudents may continue to be administratively transferred to [Regional Safe School] programs in lieu of expulsion or suspension as detailed in 105 ILCS 5/13A [Alternative Public Schools Law]."[281] Because the Safe Schools Law did not, in fact, detail the transfer process, the due process owed to students being transferred in lieu of suspension or expulsion continued to remain unclear.

Only recently, following an Illinois court case in the employment law context in 2015, has it become clearer that a disciplinary hearing is required. In

272. *See id.* 5/13A-4(1).
273. *See id.*
274. *Id.* 5/13A-2.5.
275. *See* 105 ILL. COMP. STAT. ANN 5/10-22.6.
276. *See id.* 5/10-22.6(a).
277. *See id.*
278. *See id.* 5/10-22.6(a), 5/10-22.6(d).
279. *See id.* 5/10-22.6(b).
280. *See id.*
281. ILL. NON-REG. GUIDANCE, *supra* note 258, at para. D-1.

Leak v. Board of Education of Rich Township High School District 227, the court affirmed the dismissal of a former superintendent's complaint alleging, *inter alia*, that the school board breached her employment contract when it terminated her for disciplinarily transferring forty-eight students to alternative schools without school board action.[282] The superintendent asserted that she was authorized by the Illinois School Code to administratively transfer students to alternative schools without board hearings.[283] The court found that, while the School Code authorizes a superintendent to transfer a student for ten days or less, it does not allow a student to be indefinitely transferred without action by the school board.[284] The court determined that students' procedural due process rights would be violated if they could be indefinitely transferred without a hearing before the school board or a hearing officer, not the superintendent.[285] The court reasoned that,

> We do not believe our legislature intended to violate the due process rights of our State's students by allowing them to be indefinitely transferred to alternative schools without any action by their school district's board. . . . A student's interest in remaining at his high school and not being forced to attend an alternative school for an extended period of time is of great significance, and thus, transferring a student without a board hearing jeopardizes this interest.[286]

Interpreting this decision, one of the prominent law firms that advise school districts in Illinois has been informing school personnel that, "[p]lacement in an alternative school is tantamount to an expulsion, which requires notice to parents, a hearing, and Board action."[287] This understanding, however, has yet to be codified in statutory law and it was not included as part of the Illinois School Discipline Reform Law, which creates the potential for confusion and differential interpretation of the requirements relating to alternative school transfer in districts throughout the state.

B. *The Illinois School Discipline Reform Law and Alternative School Transfers*

The 2015 Illinois School Discipline Reform Law eliminates zero-tolerance policies and limits school districts' abilities to impose exclusionary school discipline. The law primarily focuses on school suspension and expulsion, observing that, "[a]mong the many possible disciplinary interventions and consequences available to school officials, school exclusions, such as out-of-school suspensions and expulsions, are the most serious."[288] The law goes on to require school officials to "limit the number and duration of expulsions and suspensions to the greatest extent practicable."[289]

Notably, in several significant sections, the law also imposes new limitations on alternative school transfers. The law creates a new set of legal requirements applicable to suspensions of students for more than three days, expulsions, and disciplinary transfers to alternative schools.[290] In these circumstances, schools must: (a) exhaust other "appropriate and available behavioral and disciplinary interventions" and (b) determine that a student's continuing presence would

282. *See* 41 N.E.3d 501, 503, 507 (Ill. App. Ct. 2015).
283. *See id.* at 504.
284. *See id.* at 505.
285. *See id.*
286. *Id.* (internal citations omitted).
287. Jacqueline Wernz, Attorney, Franzcek Radelet PC, Presentation at Chicago Bar Association/Young Lawyers Section Education Law Committee Seminar: "School Discipline From A-Z," Sl. 31 (Mar. 2, 2016) (on file with the author).
288. 105 ILL. COMP. STAT. ANN. 5/10-22.6(b-5) (West 2018).
289. *Id.*
290. *See id.* 5/10-22.6(b-20).

either pose a threat to the safety of other students or staff or would substantially disrupt school operations.[291] While school officials are given the authority to determine whether these requirements have been met, they are charged with making "all reasonable efforts to resolve such threats, address such disruptions, and minimize the length of student exclusions to the greatest extent practicable."[292] In addition, for students returning from an out-of-school suspension, expulsion or transfer to an alternative school, the school district is required to create a policy to facilitate the re-engagement of the student.[293] The inclusion of explicit safeguards relating to both placement and return from alternative school placements in this recent discipline reform law demonstrates a recognition by the Illinois state legislature of the potential harm involved in such a transfer.

Given that the focus of the Illinois School Discipline Reform Law was on reducing the use of suspension and expulsion, the law has demonstrated significant success in accomplishing that goal. However, one of the unintended consequences of the new law has been a rise in the use of disciplinary transfers to alternative schools. According to data reported by the Illinois State Board of Education, the total number of expulsions, in-school suspensions, and out-of-school suspensions reported by school districts decreased in the school following the implementation of school discipline reform, while the total number of transfers to alternative schools in lieu of other disciplinary actions increased.[294] Transfers to alternative schools rose from 1,558 in the 2014-2015 school year prior to passage of the Illinois Discipline Reform Law to 1,788 in the 2016-2017 school year, the year after the law went into effect.[295] At the same time, expulsions with educational services dropped from 498 students in the 2014-2015 school year to 380 students in the 2016-2017 school year, and expulsions without educational services dropped from 637 students in the 2014-2015 school year to 155 students in the 2016-2017 school year.[296] This suggests that some of these expulsions may have been replaced by disciplinary transfers to alternative schools.

More troubling is the racial composition of alternative school transfers in Illinois, particularly the high percentage of Black students who were transferred to alternative school placements. This racial disparity, already substantial prior to school discipline reform, increased following school discipline reform. Table 1 below shows the last three years of school discipline reported by the Illinois State Board of Education: the 2014-2015 school year is the school year prior to passage of the Illinois Discipline Reform Law, the 2015-2016 school year is the year after the law passed but before it went into effect, and the 2016-2017 school year is the full year that the law went into effect. Of the 1,558 transfers to alternative schools in lieu of another disciplinary action during the 2014-2015 school year, sixty-four percent were Black students, although they accounted for only eighteen percent of student enrollment state-wide that

291. *Id.*

292. *Id.*

293. *See id.* 5/10-22.6(b-25).

294. *Compare* ILL. STATE BD. OF EDUC., 2015 END OF YEAR STUDENT DISCIPLINE REPORT (2015) [hereinafter ILL. 2015 DISCIPLINE REPORT], https://www.isbe.net/Documents/2015-eoy-student-discipline.pdf, *and* ILL. STATE BD. OF EDUC., 2016 END OF YEAR STUDENT DISCIPLINE REPORT (2016) [hereinafter ILL. 2016 DISCIPLINE REPORT], https://www.isbe.net/Documents/2016-eoy-student-discipline.pdf, *with* ILL. STATE BD. OF EDUC., 2017 END OF YEAR STUDENT DISCIPLINE REPORT (2017) [hereinafter ILL. 2017 DISCIPLINE REPORT], https://www.isbe.net/Documents/2017-eoy-student-discipline.pdf.

295. *See* ILL. 2015 DISCIPLINE REPORT, *supra* note 294, at 230; ILL. 2017 DISCIPLINE REPORT, *supra* note 294, at 209.

296. *See* ILL. 2015 DISCIPLINE REPORT, *supra* note 294, at 230; ILL. 2017 DISCIPLINE REPORT, *supra* note 294, at 209.

year.[297] In the 2016-2017 school year, after the discipline reform law had gone into effect, Black students accounted for seventy percent of disciplinary transfers.

TABLE 1: DISCIPLINARY TRANSFERS BY RACE/ETHNICITY: BEFORE AND AFTER SCHOOL DISCIPLINE REFORM IN ILLINOIS[298]

Transfers to alternative schools in lieu of another disciplinary action (% of student population)	*2014-15 (before discipline reform)*	*2015-16 (after passage of the law)*	*2016-17 (first year in effect)*
Hispanic or Latino (25–26%)	192 (12%)	176 (14%)	208 (12%)
Black or African-American (17–18%)	994 (64%)	778 (63%)	1258 (70%)
White (48–49%)	295 (19%)	203 (16%)	225 (13%)
Two or More Races (3%)	71 (5%)	61 (5%)	75 (4%)
Asian (5%)	6 (0%)	13 (1%)	10 (1%)
Native Hawaiian or Pacific Islander (0%)	0	2 (0%)	1 (0%)
American Indian or Alaskan Native (0%)	0	1 (0%)	11 (1%)
Total	*1,558*	*1,234*	*1,788*

The reasons for this racial disproportionality are not fully clear, but available data from the state educational agency suggest that, consistent with national trends, alternative school transfer is typically used for students who engage in subjective offenses. The most commonly cited reason in Illinois State Board of Education's data for disciplinary transfers is the vague "other reasons" category.[299] This catch-all category accounted for fifty-five percent of disciplinary transfers in the 2014-2015 school year,[300] fifty-seven percent in the 2015-2016 school year,[301] and fifty-eight percent in the 2016-2017 school year.[302] In general, the "other reasons" category describes behaviors that are less severe and more subjective than behaviors like violence, weapons or drug use, which account for the remainder of the offenses generating alternative school transfers. National research indicates that Black students are more likely to be disciplined for subjective behaviors, such as disrespect, excessive noise, or threats,[303] which are likely to be the behaviors captured in the "other reasons" category of offenses. Other incidents such as violence or drug offenses make up a smaller portion of other behaviors leading to transfers in Illinois.[304] In national data sets, White students were significantly more likely to be referred to the office for these more objective offenses.[305]

297. *See* ILL. 2015 DISCIPLINE REPORT, *supra* note 294, at 230; ILL. STATE BD. OF EDUC., 2014-2015 FALL ENROLLMENT COUNTS, DISTRICT SUMMARY (2014), https://www.isbe.net/Pages/Fall-Enrollment-Counts.aspx.

298. ILL. 2015 DISCIPLINE REPORT, *supra* note 294; ILL. 2016 DISCIPLINE REPORT, *supra* note 294; ILL. 2017 DISCIPLINE REPORT, *supra* note 294; ILL. STATE BD. OF EDUC., FALL ENROLLMENT COUNTS (2014-2015, 2015-2016, 2016-2017), https://www.isbe.net/Pages/Fall-Enrollment-Counts.aspx.

299. *See* Ill. 2015 Discipline Report, *supra* note 294; ILL. 2016 DISCIPLINE REPORT, *supra* note 294; ILL. 2017 DISCIPLINE REPORT, *supra* note 294.

300. *See* Ill. 2015 Discipline Report, *supra* note 294.

301. *See* Ill. 2016 Discipline Report, *supra* note 294.

302. *See* Ill. 2017 Discipline Report, *supra* note 294.

303. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 332 (2002).

304. *See* Ill. 2015 Discipline Report, *supra* note 294; ILL. 2016 DISCIPLINE REPORT, *supra* note 294; ILL. 2017 DISCIPLINE REPORT, *supra* note 294.

305. Skiba et al., *supra* note 303, at 332.

Overall, what the data from the first years of implementation of school discipline reform suggest is that significant gains have been made but that more work needs to be done in order to ensure that alternative school transfers are not used as a replacement for suspension and expulsion and that transfers are administered equitably. Accomplishing that goal requires equipping school administrators, teachers, and staff with new skill-sets grounded in evidence-based approaches to reduce the use of exclusionary school discipline. The Illinois School Discipline Reform Law does include a professional development component, requiring that:

> School districts shall make reasonable efforts to provide ongoing professional development to teachers, administrators, school board members, school resource officers, and staff on the adverse consequences of school exclusion and justice-system involvement, effective classroom management strategies, culturally responsive discipline, and developmentally appropriate disciplinary methods that promote positive and healthy school climates.[306]

However, one of the major concerns expressed by teachers in a recent survey, related to implementation of school discipline reform, is the unsatisfactory nature of the professional development that they have obtained.[307] A quarter or less of the teachers expressed satisfaction with the professional development they received on adverse consequences of school exclusion and justice-system involvement (sixteen percent satisfied), effective classroom management strategies (twenty-six percent), culturally responsive discipline (twenty percent), and developmentally appropriate discipline methods that promote positive and healthy school climate (twenty-three percent).[308] In a survey of Chicago teachers, forty percent of teachers identified "[a]lternatives to punitive discipline" as one of their top three professional development priorities, which was the preference with the highest rating.[309] These survey findings—together with the data from the initial implementation of the Illinois School Discipline Reform Law—strongly suggest that professional development needs to be a top priority going forward in implementation of the new law.

Another challenge is that, while the law provides new standards relating to the use of alternative school placements, it does not make clear that a hearing is required in order to determine whether these standards have been satisfied. The law is quite explicit with respect to the findings that must be made to uphold a student's suspension after the parent seeks a review and to issue an expulsion decision.[310] However, the law contains no mention of how findings related to alternative school transfer are to be determined or recorded. The Illinois School Discipline Reform Law also did not substantially revise the provisions of the Safe Schools Law relating to alternative school transfer, so that law remains intact. The consequence of this has been that some school districts have not made changes to their requirements relating to alternative school transfer following passage of the Illinois School Discipline Reform Law. For example, the Code of Conduct of Chicago Public Schools allows for emergency reassignment of students to an alternative safe school without a hearing while their expulsion hearing is pending.[311] This provision does not include any mention of the new state law requirement that, prior to an alternative school

306. 105 ILL. COMP. STAT. ANN. 5/10-22.6(c-5) (West 2018).

307. *See* Ashley McCall et al., Teach Plus, From Zero to SB100: Teachers' Views on Implementation of School Discipline Reform 5 (2018).

308. *See id.*

309. EDUCATORS FOR EXCELLENCE, VOICES FROM THE CLASSROOM: A SURVEY OF AMERICA'S EDUCATORS 29 (2018).

310. *See* 105 ILL. COMP. STAT. ANN. 5/10-22.6(a), 10-22.6(b), 10-22.6(b-20).

311. CHI. PUB. SCHS., STUDENT CODE OF CONDUCT 48 (2018).

transfer, schools must exhaust other "appropriate and available behavioral and disciplinary interventions."[312] A code of conduct for a suburban district provides detailed due process requirements for students who are suspended or expelled,[313] but none for transfers to the district's alternative school program for students exhibiting behavioral challenges.[314] These inconsistencies demonstrate a need to harmonize and clarify the legal standards relating to alternative school placement.

V. What Does the Way Forward Look Like?

The existing data and research on alternative school transfers suggests reason to be concerned about the impact of these transfers on students. Over half a million students are receiving their education in schools that offer them a lower chance of graduation than their neighborhood schools.[315] At the same time, alternative schools offer students less of the type of options, like extracurricular involvement, that may serve to maintain their interest and engagement in remaining in school and graduating.[316] By concentrating a significant number of students with behavior challenges together, alternative schools may risk escalating students' behaviors.[317] Alternative schools are also increasingly segregating students of color and students with disabilities, both groups that previously were targets of *de jure* segregation.[318] At the same time, there is no evidence that the use of exclusionary discipline to remove students from the school is promoting school safety, and, indeed, the result may be the opposite of what was intended due to the corresponding negative impact on school climate.[319] The confluence of these concerns suggests that we must fundamentally rethink the use of alternative schools. Because courts have not been receptive to legal challenges, the best opportunities for creating change are in state statutes and in school-based practices.

Making change in this area will require a mindset shift in our approach to students exhibiting challenging behaviors. In an article by James McPartland and his colleagues from the Johns Hopkins University Center for Research on the Education of Students Placed at Risk (CRESPAR), the authors noted:

> [S]ome students are so hostile to authority that they need an alternative setting for their education. But at some point, a nonselective school must stop rejecting difficult cases and start finding ways to adapt school to the diverse needs of its students. A school must help to socialize young learners to work hard and adapt to academic and behavioral goals.[320]

As this article suggests, the purpose of education is to prepare students to succeed in school and beyond, and, rather than removing students who are struggling from a school, educational systems may need to adapt their environments to meet their needs. Below we recommend several reforms to guide the way forward.

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312. *See* 105 Ill. Comp. Stat. Ann. 5/10-22.6(b-20).

313. J. Sterling Morton High Sch., 2017-18 Student Handbook 76–77 (2017), https://il01904869.schoolwires.net/cms/lib/IL01904869/Centricity/Domain/84/2017%202018%20Student%20Handbook%20FINAL.pdf.

314. *See id.* at 49.

315. *See supra* Sections I.C., I.D.

316. *See supra* Section I.D.

317. Thomas J. Dishion & Kenneth A. Dodge, *Peer Contagion in Interventions for Children and Adolescents: Moving Towards an Understanding of the Ecology and Dynamics of Change*, 33 J. Abnormal. Child Psychol. 395, 396–97 (2005).

318. Fedders, *supra* note 41, at 871.

319. *See supra* Section I.A.

320. J. McPartland et al., *Finding Safety in Small Numbers*, 55 Educ. Leadership 14, 17 (1997).

A. *Support State Statutory Reform to Limit the Use of Exclusionary School Discipline, Including Alternative School Placement*

Despite the challenges arising from implementation of school discipline in Illinois, the experience in Illinois demonstrates the importance of integrating limitations on alternative school transfers as part of comprehensive school discipline reform. Drawing on the Illinois experience, state statutory reforms should:

- Limit the use of exclusionary discipline "to the greatest extent practicable" or impose even more stringent limits;
- Provide clear substantive limitations on the use of suspensions, expulsions and disciplinary transfers so as to limit the scope of administrator discretion;
- Require exhaustion of available and appropriate interventions before students can receive longer suspensions, expulsions or disciplinary transfers;
- Require reentry planning prior to return of students from suspension, expulsion and alternative schools; and
- Prohibit administrators and school staff from counseling students to drop out or transfer to an alternative school for academic or behavioral reasons.[321]

Statutory reforms should also impose time limitations on alternative school placement, like the provision in California that limits the duration of an alternative school placement to the semester following the incident unless the parent or student agree to an annual review of the placement.[322]

B. *Require a Hearing Prior to Transfer*

Given their implications for a student's educational trajectory, students facing an involuntary transfer should be provided with the same due process afforded to students facing expulsion. If hearings are required for both, then this will prevent alternative school transfers from being used to circumvent the hearing requirements. Because it is also good practice to require alternative school placement for any student being suspended long-term or expelled, the imposition of a hearing requirement may essentially eliminate the concept of alternative school transfer in lieu of suspension or expulsion. This is the category of alternative school transfers that seems most likely to pose procedural due process concerns. As in New York, the transfer to an alternative school should be stayed pending the outcome of the hearing,[323] so as to avoid any unnecessary impacts to the student of a mid-semester transfer.

C. *Operationalize Limiting School Discipline "to the Greatest Extent Practicable"*

Because school discipline practices are implemented at the local level, school district practice must adapt in order to effectuate long-term change. The first part of this process requires consideration of the purpose of school discipline. It is from a common understanding of that purpose that all other actions should be grounded. For example, drawing from a model policy produced by the Illinois Association of School Boards, a suburban district in Chicago identified the purpose of its disciplinary policy as follows:

> The goals and objectives of this policy are to provide effective discipline practices that: (1) ensure the safety and dignity of students and staff, (2) maintain a

321. The Illinois statute states: "School officials shall not advise or encourage students to drop out voluntarily due to behavioral or academic difficulties." 105 ILL. COMP. STAT. ANN. 5/10-22.6(h) (West 2018). It is not clear whether this provision applies to the practice of counseling students to withdraw from their neighborhood school voluntarily and enroll in an alternative school.

322. *See* Cal. Educ. Code § 48432.5 (West 2018).

323. *See* N.Y. Educ. Law § 3214(5)(d) (McKinney 2018).

> positive, weapons-free, and drug-free learning environment; (3) keep school property and the property of others secure; (4) address the causes of a student's misbehavior and provide opportunities for all individuals involved in an incident to participate in its resolution; and (5) teach students positive behavioral skills to become independent, self-disciplined citizens in the school community and society.[324]

This is an example of a school discipline policy that promotes an instructional and restorative response to school discipline. Such a policy is consistent with the recommendation by the Council of State Governments that "Consequences for misbehavior in which there has been physical or psychological harm caused to another person should reflect a restorative approach that (1) focuses on repairing that harm caused by the misconduct, (2) encourages students to take responsibility for their actions, and (3) helps students learn to avoid such behavior in the future.[325]

Such an approach should be built on a Multi-Tiered Systems of Support framework aimed at proactively supporting student's academic and behavioral needs.[326] Within such a framework, districts should implement evidence-based and promising alternatives to exclusionary discipline, such as Schoolwide Positive Behavior Support ("SWPBS"),[327] restorative justice practices,[328] and social and emotional learning.[329] A study of students at a disciplinary alternative school demonstrated a particular need for students to be taught social-emotional skills at their traditional schools, including helping students to enhance their self-efficacy, to develop their educational aspirations, and teaching them how to delay gratification.[330] In addition, several interventions that have shown positive results in reducing the use of exclusionary school discipline practices may also be helpful in reducing the need by districts to resort to alternative school transfers, including Building Bridges[331] and Teacher-Student Mediation.[332]

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324. OAK PARK & RIVER FOREST HIGH SCH., 2018-2019 STUDENT PLANNER & HANDBOOK 45 (2018).

325. *See* Morgan et al., *supra* note 61, at 56.

326. *See Multi-Tiered Systems of Support (MTSS) and PBIS*, U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUCATION PROGRAMS, POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, https://www.pbis.org/school/mtss (last visited Aug. 28, 2018); *see also* U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 6–7 (2014) [hereinafter DOE GUIDING PRINCIPLES], https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf.

327. DOE GUIDING PRINCIPLES, *supra* note 326, at 6–7.

328. *See* Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 26 J. EDUC. & PSYCH. CONSULTATION 325 (2016); Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 151–65 (Daniel J. Losen ed., 2015).

329. *See What is SEL?*, COLLABORATIVE FOR ACAD., SOC., & EMOTIONAL LEARNING (CASEL), https://casel.org/what-is-sel/ (last visited Aug. 28, 2018).

330. J. Stephan Herndon & Héfer Bembenutty, *Self-regulation of Learning and Performance Among Students Enrolled in a Disciplinary Alternative School*, 104 PERSONALITY & INDIVIDUAL DIFFERENCES 266, 270 (2017) ("More importantly, these findings call for educators in traditional school settings to enhance their students' self-efficacy beliefs, intrinsic interest, educational aspirations, and willingness to delay gratification in an effort to prevent their students from descending down the disciplinary alternative track due to deviant behavior, anger, violent, problem with the law.").

331. *See generally* MICHELLE RAPPAPORT, BUILDING BRIDGES: AN ALTERNATIVE TO SUSPENSION (2014); Claudia Hernandez-Melis, Pamela Fenning & Elizabeth Lawrence, *Effects of an Alternative to Suspension Intervention in a Therapeutic High School*, 60 PREVENTING SCH. FAILURE 252 (2016).

332. *See* Ondine Gross, Restore the Respect: How to Mediate School Conflicts and Keep Students Learning (2016).

D. *Utilize a Consistent and Equitable Problem-Solving Framework*

Given the concerns about racial disproportionality in school discipline and alternative school placement, it is important for districts to have a clear, consistent, and equitable framework in place to guide administrator decision-making when making disciplinary decisions. The research suggests that the discretion involved in making determinations related to the use of school discipline invites bias to play a role in decision-making, particularly with respect to subjective offenses like disruption and disrespect.[333] An example of an evidence-based model for creating structured determinations of threat assessment is the Virginia Model for Student Threat Assessment.[334] Another example has been developed by the Illinois-based Transforming School Discipline Collaborative in its Model Student Code of Conduct, a sample code of conduct designed to support school districts to revise their codes of conduct and student handbooks in line with the Illinois School Discipline Reform Law as well as emerging research and guidance related to school discipline.[335] The Model Student Code of Conduct contains a discipline checklist designed to serve as an example of the type of procedure a district could put in place to guide administrator decision-making toward a more objective measure of whether the student's actions constituted a threat or disruption; if so, what interventions and supports are warranted; and whether exclusionary school discipline is the only available last resort option.[336] As explained by the Model Student Code of Conduct, "Scholars on implicit bias in other settings suggest that developing and using checklists at key decision points can help reduce bias in the decision-making process."[337]

E. *Data Collection*

State and local discipline reform processes should also mandate the collection and public reporting of data on disciplinary transfers to alternative schools together with data on in-school suspensions, out-of-school suspensions, in-school and expulsions. This data should be disaggregated by race/ethnicity, disability, limited English proficiency, grade level, gender and infraction type. An example is the Illinois discipline data reporting law, which was passed the year prior to the Illinois School Discipline Reform Law.[338] This law requires the Illinois State Board of Education to produce annual disaggregated data reports on school discipline in each district throughout the state, including

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333. *See* Skiba et al., *supra* note 303, at 332.

334. *See* DEWEY G. CORNELL, THE VIRGINIA MODEL FOR STUDENT THREAT ASSESSMENT (2010), https://curry.virginia.edu/uploads/resourceLibrary/Virginia_Model_for_Student_Threat_Assessment_overview_paper_7-16-10.pdf.

335. TRANSFORMING SCH. DISCIPLINE COLLABORATIVE, TSDC'S MODEL STUDENT CODE OF CONDUCT: AN INTERDISCIPLINARY APPROACH TO TRANSFORMING SCHOOL DISCIPLINE (2016), https://www.isbe.net/documents/tsdc-model-code-conduct.pdf. Miranda Johnson, one of the authors of this article, was one of the lead authors of the Model Student Code of Conduct.

336. *See id.* at 13–17.

337. *Id.* at 13 (citing Shawn Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY, Summer 2009, at 19).

338. *See* 105 ILL. COMP. STAT. ANN. 5/2-3.162 (West 2018). This law did not require discipline data to be disaggregated based on disability but contained the other suggested bases for disaggregation described above. The law also did not require the state agency to report data on the use of in-school suspensions, but the agency's End of Year Discipline Reports have included that data. *See, e.g.*, ILL. 2015 DISCIPLINE REPORT, *supra* note 294; ILL. 2016 DISCIPLINE REPORT, *supra* note 294; ILL. 2017 DISCIPLINE REPORT, *supra* note 294.

data from charter schools.[339] These data reports served as the basis for much of the Illinois data relied on in this article.[340]

Making discipline data reports publicly available allows monitoring of the impact of school discipline reform and examination of any potential unintended consequences, such as a trade-off between decreased use of expulsions and increased use of out-of-school transfers. As part of this data collection, it is important that the data collected from school districts include the numbers of disciplinary transfers to alternative schools that occurred in lieu of expulsion and with the agreement of the family. This is because, when schools and districts face pressure to reduce the use of expulsions, there is a possibility that they will increasingly ask families to agree to alternative school placement in exchange for the district's agreement not to seek expulsion. While such a resolution may be preferable to a student being expelled, monitoring the number of such placements provides a more complete picture of the impact of school discipline reform.

F. *Professional Development*

In order to ensure that school discipline reform results in meaningful change, state and district policy reform processes should ensure that all school staff involved in the school discipline process are equipped with comprehensive training related to alternatives to exclusionary school discipline. Of critical importance is training specifically targeted at teachers, who are on the front-lines of working with students and determining whether their behavior warrants an office referral. The professional development provisions in the Illinois School Discipline Reform Law provide a starting point, both in terms of the identified topics for training as well as the scope of the actors encompassed by the statute.[341] However, the effectiveness of this statute has been limited by its lack of specificity regarding the timeframe of the "ongoing" training required, and the requirement only that the district make "reasonable efforts" to provide such training.[342] Further, the statute leaves it to local school districts to finance the training and to identify sources able to offer it.

A bill passed by the City Council in the District of Columbia, which built upon the experiences from Illinois, demonstrates a more promising alternative. The bill requires the state superintendent's office to provide regular training to local school districts as well as recommendations for additional instruction on topics including:

A. Trauma and chronic stress, their effects on students and learning, and effective responses;
B. Classroom management, positive behavioral interventions, and fostering a positive school climate;
C. Disciplinary approaches that utilize instruction and correction;
D. Restorative practices and other evidence-based or promising interventions; and
E. Implicit bias and culturally responsive techniques.[343]

To further ensure the availability of professional development resources for districts, the bill tasks the state superintendent's office with working with other government agencies, local school districts, as well as colleges and universities to create a certificate program that encompasses training in the identified

339. *See* 2014 Ill. Legis. Serv. 98-1102 (West).
340. *See supra* Section V.B.
341. *See* 2014 Ill. Legis. Serv. 98-1102 (West).
342. *See* 105 ILL. COMP. STAT. ANN. 5/10-22.6(c-5).
343. D.C. CODE § 38-236.06(a)(2) (2018).

topics.[344] The bill's lead author is also seeking funding from the city council to ensure the effective implementation of the bill's requirements.[345]

In addition to state law changes, school districts should also prioritize training teachers using evidence-supportive professional development practices. An example is My Teaching Partner, a teacher consultative and coaching model that has been extensively researched by Dr. Anne Gregory.[346] Dr. Gregory and her colleagues found that, after two years of implementation of this program, teachers involved in the program did not have any statistically significant racial disparity in their discipline referrals.[347] The study attributes the resulting low rates and equitable use of school discipline to the likelihood that the training is "exposing students to rigorous, engaging curricula and to high expectations for engagement and achievement."[348] A more modest intervention that has also shown results in reducing racial disproportionality in school discipline is seventy minutes of online empathy training for teachers.[349] The findings of this study were stunning, because this brief, low-cost intervention reduced discipline rates of middle school students by half, showing that disproportionality can be impacted by changing teachers' mindsets even without increasing their skills.[350]

What this research demonstrates is that there is a flaw in the underlying assumption motivating alternative school transfer for disciplinary purposes, which is that these students' behavior is somehow deviant and that, accordingly, they must be removed from the regular school environment. Rather, children's misbehavior in the form of disruption, defiance, and minor rule-breaking should be reasonably anticipated given that their brains have not yet fully matured.[351] Accordingly, it is school-based practices that must change in order to accommodate students' needs, keep them in their neighborhood schools, and enable them to successfully graduate.

344. *See id.*

345. Press Release, David Grosso, D.C. Council At-Large, Council Unanimously Passes Grosso's Bill to Transform Discipline in D.C. Schools (May 1, 2018), http://www.davidgrosso.org/grosso-analysis/2018/5/01/council-passes-grossos-bill-to-transform-discipline-in-dc-schools.

346. *See* Anne Gregory et al., *Closing the Racial Discipline Gap in Classrooms by Changing Teacher Practice*, 45 SCH. PSYCH REV. 171, 187–88 (2016).

347. *See id.* at 172.

348. *Id.* at 188.

349. *See* Jason A. Okonofua et al., *Brief Intervention to Encourage Empathic Discipline Cuts Suspension Rates in Half Among Adolescents*, 113 PROC. NAT'L ACAD. OF SCI. 5221, 5223 (2016).

350. *See id.* at 5224.

351. *See* Jennifer Lynn-Whaley & Arianna Gard, *The Neuroscience Behind Misbehavior: Reimagining How Schools Discipline Youth*, *in* KEEPING KIDS IN SCHOOL AND OUT OF COURT 26, 28 (2012), https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/51818 ("Given the brain's structure at this developmental stage, risky behaviors can be understood as a normal part of adolescence. Structures in the cognitive control system responsible for impulse control and self-regulation do not develop fully until late adolescence.").