

**NEW YORK STATE BAR ASSOCIATION  
TASK FORCE  
ON THE SCHOOL TO PRISON PIPELINE<sup>1</sup>  
FINAL REPORT**

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

**Task Force on the School to Prison Pipeline**

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## I. Executive Summary

### A. Task Force Mission

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

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

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

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

#### 1. Principal Suspension:

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

#### 2. Superintendent's Hearing:

If the principal deems that the code of conduct violation warrants a suspension of longer than five days, he/she can refer the violation to the Superintendent of Schools for a Superintendent's hearing. The Superintendent or his/her designee will convene a due process hearing. During said hearing, the parent(s)/guardian(s) have the ability to cross-examine District witness(es) and call witnesses on their behalf.

### 3. Disciplinary Punishments for Students with Disabilities

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

The "School to Prison Pipeline" has developed due in measure to the nature of these suspensions. The current system punishes misconduct by exclusion. Students with code of conduct violations are removed from the school setting and often placed into situations in which supervision, and more importantly instruction and the positive socialization effects of a school setting are not present during the day. This provides the unfortunate opportunity for students to become caught up in unacceptable and possible criminal activity. Further, whether knowingly or not, certain school districts suspend students of color and students with a disability at a greater frequency than students who are Caucasian or do not have an IEP or 504 plan. This disparate treatment of minority students and students with disabilities is shown in greater detail *infra*, in Section IV(A) entitled "Populations Subject to Disparate Treatment," through case studies and other statistical data from the United States Department of Education's Office of Civil Rights. Due to the fact that suspension is the statutorily endorsed discipline that may be issued in accordance with Education Law Section 3214, this trend will only continue to worsen unless ameliorative statutory change is effectuated.

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

#### **C. Recommendations**

This Report includes the following recommendations that should be made to Education Law Section 3214. This Task Force believes that the inclusion of language in Education Law Section 3214 to permit and endorse the use of restorative justice practices in lieu of suspension of students will help rectify this growing problem of the "School to Prison

Pipeline.” By statutorily endorsing school district use of alternative disciplinary procedures to suspension, this Task Force believes that many more school districts will utilize this model to treat with student misconduct. The Task Force trusts that this will interrupt the disturbing trend of increase in the flow of the “School to Prison Pipeline.” The Task Force appreciates that there are several of the over seven hundred New York school districts that have exercised local discretion and have instituted restorative justice techniques. Our recommendation should not be taken to suggest that school districts were without independent authority to adopt restorative justice procedures.

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

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

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

Finally, we urge the State Legislature and Governor to provide ample financial support to school districts’ introduction of restorative justice as an alternative to exclusionary discipline.

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

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

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

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

While the Task Force has been preparing this paper on the School to Prison Pipeline, the Commissioner of Education has adopted an emergency regulation to include out of school suspensions data in determining which schools should be posted on “needs improvement” lists by the State Education Department.<sup>380</sup> These regulations, which are set to be approved in final form in February 2019 by the Board of Regents, underscores that the New York State Education Department understands that the suspension of students is an issue that needs to be resolved.<sup>381</sup>

Bills have been introduced in the New York State Legislature seeking to modify Education Law Sections 2801 and 3214 to include restorative justice practices. However,

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<sup>380</sup> See 8 NYCRR §§ 100.2, 100.21

<sup>381</sup> *Id.*

in both the Assembly and the Senate these efforts have been unsuccessful.<sup>382</sup> The proposed Assembly bills which provide for the use of restorative justice practices, prevention programs, and interventions require the same to be used prior to and in conjunction with suspensions arising from classroom discipline infractions. Furthermore, the proposed bills include a standard for discipline in certain situations in which classroom removal or suspension is basically prohibited including but not limited to tardiness, unexcused absences from class or school, leaving school without permission, violation of school dress code, and lack of identification upon request of school personnel.

While the Task Force understands and endorses the need for wider use of restorative justice practices, it is also aware of the good faith efforts of school administrators in the administration of school discipline. The Assembly and Senate bills would impose significant restrictions on school district administrators' discretion in treating with student misconduct. These include limiting suspensions to a maximum of twenty days, unless mandated by law (e.g., bringing a firearm to school), and the exclusion of certain grades from suspension. Even though it would be beneficial for the State Education Department to review alternative approaches to suspending students in grades Kindergarten through third grade, this proposal, along with the suspension cap, is not a change recommended by the Task Force at this time. Rather, the Task Force has taken a more tempered approach to introduce statutory restorative justice as an option for school districts to embrace.

Further, it would be nearly impossible for the use of restorative justice practices in the proposed bills to be successful without sufficient additional funding for school district staff to be trained to use restorative justice effectively.

While the Task Force commends the proponents of the Assembly and Senate bills for understanding and appreciating the grave results of the School to Prison Pipeline, mandating school districts to use restorative justice practices ignores those situations when a suspension or a removal of a student may be appropriate and necessary. Rather, the Task Force recommends modifying Section 3214 to expressly endorse greater school district use of restorative justice practices as an alternative to the suspension of students by expressly providing in the law the option for school districts to implement restorative justice practices when appropriate and suitable for the student. This permits tailored introduction of restorative justice based on local needs. It avoids the "stigma" of a mandate.

The Task Force appreciates the fact that school districts do not need legislative authority to implement restorative justice practices. However, school districts are creatures of statute – i.e., municipal corporations guided by the express provisions of New York's

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<sup>382</sup> N.Y. Assem. 3873, 240th Leg. Session, Reg. Session (N.Y. 2017). It is important to note that such bills have been reintroduced during the 2019-2020 legislative session. See N.Y. Assem. 1981, 242nd Leg. Session, Reg. Session (N.Y. 2019).



Education Law. The Task Force believes that the absence of a statutory endorsement of restorative justice has led to less than robust use of restorative justice by New York school districts. The Task Force believes that inclusion of restorative justice in Section 3214 of the Education Law will lead to the salutary result of expansive use of restorative justice by school districts electing its use. Further, our proposed legislation does require parental involvement in the use of restorative justice.

As noted previously, several school districts have already begun to introduce the use of restorative justice practices. This Task Force has attached, in Appendix C<sup>383</sup> of this Report, two example codes of conduct from certain school districts which currently include the use of restorative justice practices. These school districts should be commended for their forward thinking in an attempt to help reverse the School to Prison Pipeline.

For example, suspensions have reduced significantly in the Rochester City School District (“Rochester”) since the implementation of its new Code of Conduct, which includes restorative justice practices as an alternative to suspensions. Since the implementation of Rochester’s Code of Conduct, student suspensions have decreased by approximately 28%.<sup>384</sup>

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

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<sup>383</sup> Appendix C is included for the sole purpose of providing illustrative examples of restorative justice practices in school district Codes of Conduct. The use of the attached Codes of Conduct in this Report should not be viewed as an endorsement of the entire Code of Conduct.

<sup>384</sup> THE CHILDREN’S AGENDA, *supra* note 372, at 10.

By providing school districts with statutorily endorsed alternative measures such as restorative justice practices, the loss of students to the lifelong negative vagaries of the School to Prison Pipeline will be alleviated.

Ideally, the implementation of restorative justice practices will eventually take the place of suspensions and expulsions for most disciplinary cases. The imposition of restorative justice as a substitute for existing disciplinary procedures would be met with significant opposition among the over seven hundred school districts in the State of New York because it will be viewed as another State mandate on our already taxed school district resources. Restorative justice should not be the object of grudging acceptance by school districts. Even though not mandatory, we are hopeful that the recommendation of this report will be viewed in a solitary manner by our K-12 educational system.

The source of reluctance of the implementation of restorative justice is the significant financial limitations imposed by the state through the existing tax cap legislation. This limitation on school district resources severely hinders our already highly taxed school districts and imposes a reluctance to innovate. The State of New York must allocate sufficient funding to those school districts that embrace restorative justice techniques. When compared to the expenditure of limited tax dollars arising from prosecution and incarceration of unfortunate youth who find themselves on the "other" end of the School Prison Pipeline the investment reaps incalculable benefits.

The New York State Education Department should give consideration to the creation of State funded training programs, teaching personnel how to guide, support, and help navigate the accused student through the restorative justice process.

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

In addition to the foregoing, the Task Force was initially tasked with recommending policy regarding the use of School Resource Officers ("SROs").

Some school districts, in conjunction with the local police department, employ an SRO through the local police department. An SRO is used in some school districts to assign an on-duty police officer from the local police department in a school building. The police officer is typically not employed by the school district and officers are required to adhere to traditional standards for searches and seizures when investigating criminal activity. An SRO acts as a liaison between the police department and the school district, and the

scope of its duties is determined mutually by the parties. Hence, in instances where an SRO is utilized, an agreement between the school district and the local law enforcement department is put in place.

The use of SROs in school districts is an important issue that this Task Force considered in the drafting of this Report; however, it was unable to reach a conclusion for a recommendation. Nevertheless, it is a subject that requires further review and consideration by another committee or study group, possibly in conjunction with the Criminal Justice section of the New York State Bar Association.

## VI. Conclusion

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