

# Legal Aid of North Carolina, Inc.

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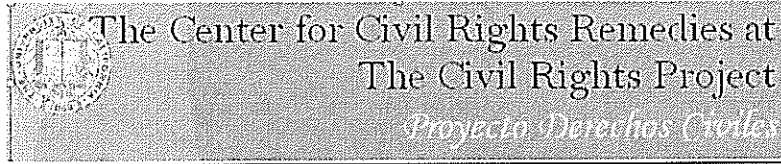
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April 16, 2013

### **Re: Complaint against the Durham Public School District under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973**

This Complaint, filed by Advocates for Children's Services of Legal Aid of North Carolina ("ACS"), on behalf of individual clients, and the Center for Civil Rights Remedies at the Civil Rights Project of UCLA ("CRP"), on behalf of all other similarly situated students, alleges that the frequent use of out-of-school suspension in the public schools of Durham, North Carolina, violates the U.S. Department of Education's regulations interpreting Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973.<sup>1</sup>

Applying a "disparate impact" theory, the Complaint seeks to vindicate the rights of all Durham Public School students - including Black students, students with disabilities, and especially Black students with disabilities - who are disproportionately harmed by suspension policies and practices in the Durham Public School District. The Complaint asks the U.S. Department of Education's Office for Civil Rights ("OCR") to investigate the Durham Public School District and encourage the district to adopt new non-discriminatory policies and practices that use out-of-school suspension only as a last resort.

#### **I. Introduction and Summary**

The Durham Public School District ("DPS" or "Durham") suspends thousands of students

<sup>1</sup>42 U.S.C.A. §§ 2000d-2000d-7 (1964); Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794 (2002).

"The test of the morality of a society is what it does for its children." -Dietrich Bonhoeffer



out of school each year and disproportionately suspends Black students, and especially Black students with disabilities. The two individual students described in this Complaint, both of whom are Black students with disabilities, provide a snapshot of the systemic problems that exist in DPS. These individual complainants serve as examples of the harm caused by the disparate impact of DPS disciplinary policies and practices, but they are not alone.

Data recently published by OCR confirms that, for the 2009-10 school year, DPS suspended 2,425 Black students at least one time. This constitutes 14.1% of all Black students enrolled in DPS. In contrast, only 3.3% of all White students enrolled in DPS received a suspension in 2009-10. In other words, the risk for Black students to be suspended is more than four times the risk for White students to be suspended. DPS also suspended 17% of all students with disabilities, compared with 8.4% of all students without disabilities.

There are profound racial disparities in the suspension of students with disabilities as well. 23.3% of all Black students with disabilities enrolled in Kindergarten through 12th grade were suspended at least once in 2009-10. Yet for white students with disabilities, the suspension rate was 6.3% of their enrollment. The Black/White gap was much larger among students with disabilities. Specifically it was 9.5 points between students without disabilities, but 17 points between students with disabilities.

The district-wide data disparities described above, and most of the detailed analysis provided in this Complaint, were based on data collected and certified by the Durham Public Schools in response to the Civil Rights Data Collection, a survey conducted by the U.S. Department of Education's Office for Civil Rights (OCR) on the 2009-10 academic year and reported publicly by OCR itself in March of 2012. In that data, there were clear disparities based on race and disability.

However, it is important to note that each student is only counted once in the OCR data on out-of-school suspensions. In reality, individual students are often suspended multiple times in a given year, which is reflected in the incident rate. Most of data presented herein do not include the actual number of times an individual student is suspended from school. Thus, while these data give an accurate picture of how much school discipline practices effect a given population, they are a conservative estimate of the disparate use of suspensions, as they do not calculate incident rates. As this Complaint will demonstrate, when using state data on the number of suspensions meted out to each racial group in Durham, the racial disparities are even larger when incident rates are compared.

These high and disparate rates of suspension are not due to written policies that intentionally discriminate against students of color or students with disabilities. In fact, this Complaint does not allege intentional discrimination by anyone employed by DPS. Instead, we concede that DPS policies are facially neutral and were likely written with the intention of ensuring a safe and orderly learning environment.

However, as interpreted by Department of Education regulations, Title VI and Section 504 of the Rehabilitation Act of 1973 prohibit government practices that have the *effect*—even if not the *intent*—of discriminating by race or disability.<sup>2</sup> Under this “disparate impact” view, if a public school district’s disciplinary policies or practices disparately harm students of color or students with disabilities, they are unlawful unless they are justified by educational necessity *and* there are no less discriminatory means of achieving the same educational goals.

Durham's suspension practices cannot survive this disparate impact analysis, especially when looking at Durham's middle and high schools. As this Complaint will describe, and as the individual complainants stories will further illustrate, the district-wide disparities are small compared with the disparities found in Durham’s middle and high schools. For example, disturbingly, in DPS middle schools 37.2% of all enrolled Black males with disabilities were suspended *at least once* in 2009-10. That is nearly three times the rate of White middle school males with disabilities (12.5%), 7 times the rate for White middle school males without disabilities (4.9%), and represents a gap of over 32 percentage points. The Black/White gap at the high school level between Black females with disabilities (25%) and White females without disabilities (0%) is nearly as large at 25 percentage points.

In addition to the recent experiences of the two individual complainants, there is ample evidence that these disparities persist throughout DPS. Recent data from the North Carolina Department of Public Instruction (“DPI”) show that Durham's overall incident rate for grades 9-12 rose from 25.19 per 100 students in 2010-11 to 33.40 per 100 students in 2011-12.<sup>3</sup>

Meanwhile, from at least the 2009-10 school year until now, DPS has disciplinary codes that authorize out-of-school suspension for minor, non-violent behaviors. For example, Durham students can receive out-of-school suspension for unexcused absences, dress code violations such as wearing “sunglasses” or even mere inappropriate language or “cursing.” For example, in 2012, one of the individual complainants was suspended out of school for five days for talking during a test and playing with his calculator. DPS imposed this suspension even though the school was aware the student had been diagnosed with Attention deficit-hyperactivity disorder (ADHD) and had a learning disability.

The Durham Public School District's suspension policies and practices are unnecessarily harsh and are not justified by educational necessity for purposes of either Title VI or Section 504. In fact, a recent article in a local newspaper acknowledged the need for DPS to address the racial disparities in suspension rates within the district. One DPS board member decried the problem of racially disparate suspensions in DPS, stating: “Black children are going to feel like they are made to be unwelcome. Perhaps we aren’t using the right strategies.... We have got to

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<sup>2</sup>See 34 C.F.R. § 100.3(b)(2) (2000); 28 C.F.R. § 41.51(b)(3) (1973).

<sup>3</sup> This suspension data is based on a comparison between consolidated reports for academic years 2011-2012 and 2010-2011, showing an increase. North Carolina State Board of Education Department of Public Instruction. *Report to the Joint Legislative Education Oversight Committee, Consolidated Data Report, 2011-2012 and Consolidated Data Report, 2010-2011*. These reports are available at: <http://www.ncpublicschools.org/research/dropout/reports/>.

stop suspending children of color.”<sup>4</sup>

Beyond local acknowledgement of the problem, national research on best educational practice does not support Durham's approach to school discipline. To the contrary, research indicates that relying on out-of-school suspensions will undermine rather than enhance the goal of providing a safe and productive learning environment. Research from the Council of State Governments<sup>5</sup>, the American Pediatrics Association<sup>6</sup>, the American Psychological Association<sup>7</sup>, and several other sources has demonstrated that frequently suspending students out of school is associated with higher levels of grade retention, academic failure, dropping out, and involvement in the juvenile justice system. Despite the good intentions of teachers and administrators, frequent out-of-school suspensions simply do not create safer or more productive learning environments. Based on this research, states such as Connecticut are taking steps to limit the use of out-of-school suspensions to only the most serious offenses, as described later in this Complaint.

Because Durham's suspension practices have a disparate impact and are not supported by educational necessity, they fail the disparate impact analysis under both Title VI and Section 504. But even if it were necessary to consider the existence of less discriminatory alternatives, Durham's suspension practices would fail that inquiry, too.

Alternative disciplinary policies would likely lower DPS's high rates of out-of-school suspension for all students—including students of color and students with disabilities—while at the same time ensuring a more constructive impact from school discipline. Many alternatives are available. One especially promising option is the practice known as Positive Behavioral Interventions and Supports (“PBIS”). Schools in Florida that have implemented this alternative *with high fidelity* have reduced out-of-school suspensions from an average of 43 days per 100 students to 25 days per 100 students.<sup>8</sup> Alternatives like PBIS improve circumstances for all students, including students of color and students with disabilities, because they improve discipline while using out-of-school suspensions only as measures of last resort.

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<sup>4</sup> Wes Platt, *Durham School Leaders Grapple with Troubling Statistics*. THE HERALD SUN (March 5, 2013, 9:30 PM), <http://www.heraldsun.com/news/localnews/x1942451403/Durham-school-leaders-grapple-with-troubling-statistics>

<sup>5</sup> Tony Fabelo, Michael D. Thompson, Martha Plotkin, Dottie Carmichael, Miner P. Marchbanks & Eric A. Booth *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, The Council of State Governments Justice Center, The Public Policy Research Institute, (July 19, 2011), [http://justicecenter.csg.org/files/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](http://justicecenter.csg.org/files/Breaking_Schools_Rules_Report_Final.pdf)

<sup>6</sup> *Out-of-School Suspension and Expulsion*, American Academy of Pediatrics, Council on School Health, (February 25, 2013), <http://pediatrics.aappublications.org/content/early/2013/02/20/peds.2012-3932.full.pdf+html>.

<sup>7</sup> *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, American Psychological Association Zero Tolerance Task Force, (December 2008) AMERICAN PSYCHOLOGIST, Vol. 63, No. 9 pp. 852–x62, <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

<sup>8</sup> See Rtl for Behavior Project, Annual Report 2008-2009: Outcome and Evaluation Data, Florida's Positive Behavior Support, ((date) 2009), at [www.pbis.org/common/pbisresources/publications/FLPBS\\_RtIB\\_Project\\_Annual\\_Report20082009.pdf](http://www.pbis.org/common/pbisresources/publications/FLPBS_RtIB_Project_Annual_Report20082009.pdf) (OSS Rates by Implementation Level Across School Years, p. 23).

Select school districts across the country are adopting more effective discipline policies that improve the learning environment without depriving children of valuable instructional time. Recently, for example, the Oakland Unified School District in California entered voluntarily into an agreement with OCR. In May 2012, OCR initiated a Compliance Review, investigating several issues including whether Black students were disciplined more harshly or more frequently than White students.<sup>9</sup> Just a few months later in September 2012, the Oakland District voluntarily entered a Resolution Agreement with OCR. This voluntary agreement seeks to minimize the time students are suspended from school due to misbehavior and provide supports to students who are struggling, among other provisions.<sup>10</sup>

Similarly, the Meridian Public School District in Mississippi and the U.S. Department of Justice entered a voluntary agreement to reduce both the high frequency and racial disparities in suspension and other forms of school removal. This consent decree would amend Meridian's federal school desegregation order that prohibits racial discrimination against students. The comprehensive agreement includes limiting school removals including suspensions, implementing positive and age-appropriate discipline systems, and monitoring discipline data to address racial disparities.<sup>11</sup>

This Complaint's goal is to turn these types of alternatives into reality in Durham. We hope to reach a Resolution Agreement with the Durham Public Schools that will call for new policies and practices that are less severe and more effective. Consistent with our hope for a mutually agreeable outcome, this Complaint does not allege that DPS intentionally discriminated against anyone. Instead, it asserts that the administration of Durham's discipline policy has an unlawful disparate impact on Black students, students with disabilities, and most profoundly on Black students with disabilities.

We believe that OCR is uniquely situated to investigate our Complaint and facilitate a Resolution Agreement. OCR is the only administrative body that can find an unlawful disparate impact or enforce a remedy pursuant to such a finding. Therefore, we hope that OCR's investigation will lead to new discipline practices and procedures in the Durham Public Schools that do not have unjust and harmful outcomes.

## II. Jurisdiction

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<sup>9</sup> Press Release, OCR, *U.S. Department of Education Announces Voluntary Resolution of Oakland Unified School District Civil Rights Investigation* (September 28, 2012) (available online at <http://www.ed.gov/news/press-releases/us-department-education-announces-voluntary-resolution-oakland-unified-school-di>).

<sup>10</sup> *Agreement to Resolve*. OCR Case Number 09125001, Oakland Unified School District and OCR. (September 17, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09125001-b.pdf>.

<sup>11</sup> Press Release, Department of Justice, *Justice Department Files Consent Decree to Prevent and Address Racial Discrimination in Student Discipline in Meridian, Miss.* (March 22, 2013), <http://www.justice.gov/opa/pr/2013/March/13-crt-338.html>.

DPS is a recipient of federal financial assistance and is therefore subject to the anti-discrimination prohibitions of Title VI and Section 504. Complainants have not filed a lawsuit raising these discrimination claims in state or federal court. This Complaint has not been investigated by another federal, state, or local civil rights agency or through the DPS internal grievance procedures, including due process proceedings. This Complaint is timely because the disparate impact of DPS' school removal practices is likely ongoing. Both individual complainants experienced out-of-school suspensions in the 2012-13 school year and within the past 180 days.

### **III. Complainants**

This Complaint is filed on behalf of DPS students - including Black students, students with disabilities, and especially Black students with disabilities - who are disproportionately harmed by DPS' suspension policies and practices. ACS represents two DPS students, N.B. and T.H., and, with consent from their parents, submits this Complaint on their behalf. The signed consent forms for use of personal information are attached at the end of this Complaint. CRP joins the individual complainants in this Complaint and, in its sole capacity, files on behalf of all other similarly-situated DPS students affected by Durham's discriminatory suspension policies and practices.

### **IV. Factual Background**

Students in Durham are suspended out of school frequently, are at greater risk of suspension if they are Black, have a disability, or both, and are subject to policies that authorize out-of-school suspension for minor misbehaviors. Students of color who also have disabilities are at the greatest risk for out-of-school suspension. This Complaint addresses disparities by race and disability, which are evident from three sources of information.

First, the recent experiences of the individual complainants, coupled with statistical and anecdotal evidence, suggest that DPS continues to impose suspensions frequently and for minor infractions. Second, OCR has recently published data, sortable by race and disability, on out-of-school suspensions in DPS during the 2009-10 academic year.<sup>12</sup> Third, DPS has published to the Internet some of their disciplinary codes, which show that the district has consistently authorized out-of-school suspension for minor infractions.<sup>13</sup>

We have diligently sought to obtain more recent data from DPS to further bolster this Complaint. When we learned that OCR was collecting data for the 2011-12 school year, we filed a public records request with DPS, but have yet to receive the data that DPS reported to OCR. We filed a similar request with the state and recently received additional data on incidents

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<sup>12</sup> Durham Public Schools: LEA Summary of Selected Facts for 2009, Department of Education, Civil Rights Data Collection, <http://ocrdata.ed.gov/Page?t=d&eid=29113&syk=5&pid=119> (last visited April 13, 2013).

<sup>13</sup> 4301- Code of Student Conduct, Durham Public Schools, <http://www.dpsnc.net/about-dps/district-policies/524/4301-code-of-student-conduct> (last visited April 13, 2013).

broken down by race for DPS for the 2011-12 school year. Those data are being analyzed, but in the interest of filing a timely complaint only some of those data are referenced in this complaint.

Even with the limits on the data we were able to review, there is more than enough evidence to show disparate impact by race and disability. Furthermore, we plan to supplement this Complaint as requested data becomes available.

## **A. Individual Complainants**

### ***i. N.B.***

N.B. is a 17-year-old, eleventh-grade Black student with a disability in DPS. N.B. has a history of behaviors that have affected her ability to make progress at school. She has experienced chronic fatigue, depression, hearing voices, and hallucinations. She has also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Since the beginning of middle school, N.B. has served at least 165 days of out-of-school suspension (OSS) and 66 days of in-school suspension (ISS). Most of these suspensions were punishments for behavior that was clearly connected to N.B.'s underlying mental health issues.

N.B.'s difficulties began as an elementary school student in DPS. In first grade, and then again in fourth grade, N.B. was referred to the Student Assistance Program (SAP). The first referral noted that N.B. "frequently blurts out in class," "talks excessively," is "impulsive," is "disruptive in class," and "often does not do what she is told by the teacher." A few years later, the fourth grade referral noted some of the same concerns. N.B.'s mental health records indicate that she was being administered Adderall at school during this time, yet DPS did not conduct any evaluations to see if N.B. was potentially eligible for special education and related services.

N.B. began middle school as a sixth grade student at a traditional middle school in DPS. However, during her time at that school, which includes the 2007-2008, 2008-2009, and 2009-2010 school years, N.B. received at least 28 days of OSS and at least 33 days of ISS. During the 2009-2010 school year, while N.B. was an eighth grade student, DPS transferred her to Lakeview, the district's alternative school, where she spent the majority and remainder of the school year. However, the suspensions did not end. While at Lakeview, N.B. received a ten-day OSS. During her eighth grade year, N.B. had 41 absences and failed her end-of-grade (EOG) exams.

Most of the behaviors for which N.B. was suspended were clearly linked to her mental health issues. DPS was not ignorant of this link. DPS staff were aware that N.B. was receiving mental health services in the community and N.B.'s father had signed a release authorizing DPS to share information with N.B.'s mental health providers. N.B.'s middle school counselor attempted to refer her for further mental health evaluation and services through another community-based provider due to N.B.'s difficulties at school. Despite all of this, N.B. was never

evaluated to determine if she was eligible for special education services and she was never given an Individualized Education Program (IEP).

N.B. began her high school career as a ninth grade student at Lakeview in the fall of 2010. During that school year, N.B. amassed 82 absences, 57 of which were due to out-of-school suspensions. N.B. was also suspended in school for at least 22 school days. The next year, N.B. was kept at Lakeview and she did not do much better. During her tenth grade year at Lakeview, N.B. missed 60 percent of the total school days (105 absences total) and she was suspended out-of-school for at least 34 school days.

N.B. began the 2012-13 school year at a traditional high school in DPS. While at the school, she received six discipline reports. In September 2012, N.B. was given three days of ISS for being late to class, loud, and disrespectful. In the week following this write-up, N.H. received several more behavior referrals on separate days. On September 17, 2012, N.B. was taken to the office where she continued to scream and attempted to run away. Eventually, N.B. was handcuffed and shackled by a school resource officer (SRO) and taken to a hospital where she had to be sedated. For this episode, N.B. received a ten-day OSS.

On October 1, 2012, N.B. returned to school and met with an "Intervention Team." However, on October 3, 2012, N.B. got into a verbal altercation with another student and the principal recommended that N.B. be administratively transferred to Lakeview pursuant to DPS Policy 4134 ("Immediate Transfer When Criminal Charges are Pending").<sup>14</sup>

After transferring N.B. to Lakeview, DPS finally began the process of evaluating N.B.'s eligibility for special education services. She was found eligible under the category of Serious Emotional Disability (SED) and an IEP and Behavior Intervention Plan was implemented in January 2013. Although N.B. began to make progress, within three months of being found eligible for special education and related services, N.B. has already been out-of-school suspended without educational services for a total of 20 days for three substantially similar incidents related to her disability. N.B. and her mother are very concerned that if the suspensions continue, N.B. will not be able to get credit for her current courses, be promoted to 12th grade, and move back to a traditional school so that she can graduate.

*ii. T.H.*

T.H. is a 15-year-old, eighth-grade Black student with a disability who was enrolled in DPS until April 2013. As an elementary school student in DPS, T.H. struggled in reading, consistently scoring Level I's on the state's End-of-Grade Reading tests. He also experienced behavioral problems at home and school. In August 2009, T.H. was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), depressive disorder and a learning disability.

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<sup>14</sup> <http://www.dpsnc.net/about-dps/district-policies/524/4134-immediate-transfer-when-criminal-charges-are>



In 2009, due to T.H.'s growing academic and behavioral needs, T.H.'s elementary school conducted an evaluation to see if T.H. was eligible for special education services. In addition to academic concerns, several behavioral concerns were noted. The IEP Team that made the referral was also aware that T.H. had several mental health diagnoses including ADHD and ODD, was starting medication for his ADHD, and was getting community support for his disabilities, which included individual and family therapy. During the evaluation period, in November 2009, T.H. received his first two-day out-of-school suspension for fighting.

In early 2010, T.H. was found eligible for special education services by DPS under the category of Specific Learning Disability (SLD). The IEP Team developed an IEP for T.H.. However, the IEP addressed only T.H.'s reading and writing goals and there is no indication that T.H.'s behavioral issues were discussed or considered in the IEP Team's decision. The Team was aware that T.H. had mental health diagnoses that affected his behavior and for which he took medication, that T.H. had received treatment and community support for these issues, and that T.H. had already been suspended that school year for behaviors that could be connected to his diagnoses. Despite this, the IEP Team focused solely on T.H.'s academic needs and stated that T.H. did not have behaviors that impeded his learning.

After DPS failed to adequately identify and address the functional issues associated with T.H.'s disability, T.H.'s behaviors escalated. During the 2010-2011 school year, T.H. received five discipline referrals including a two-day out-of-school suspension (OSS) and a five-day OSS.<sup>15</sup> The same school year, T.H. failed a class and a teacher noted on his report card that his behavior was interfering with his academic progress and distracting others from their work.

Although there was mounting evidence that T.H.'s discipline issues were connected with his disability, when T.H.'s next IEP meeting was held in early 2012, the Team again stated that T.H. did not have any behaviors that impeded his learning or that of others. However, in fact, prior to the meeting, T.H. already had several disciplinary referrals that school year.

In that same meeting, T.H.'s IEP Team noted that T.H. was having difficulty meeting IEP goals adequately due to his lack of attendance. Yet, the Team did not connect the attendance issues to T.H.'s suspensions, which constituted fifty percent of his absences, nor did the Team take any steps to address the behavioral issues so that further out-of-school suspensions could be prevented.

In the remaining months of the 2011-2012 school year, as T.H.'s academic performance continued to decline, T.H. was suspended out-of-school four additional times for a total of 15 more days. Many of these suspensions were for underlying behaviors that are commonly linked with ADHD and ODD, such as lack of focus, noncompliance or disruptive behavior. For example, in June 2012, T.H. was suspended out of school for five days for talking during a test and playing with his calculator. Instead of addressing these behaviors as potential manifestations

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<sup>15</sup> The referral for the two-day OSS erroneously stated that T.H. was not identified as a student with a disability.

of T.H.'s disability and taking steps to create a Behavior Intervention Plan to prevent future suspensions, the school responded punitively with out-of-school suspensions.

During the entire 2011-2012 school year, T.H. was suspended out-of-school a total of 24 days. At no point did DPS discuss or consider substantive ways to address his problem behaviors without resorting to the punitive measure of out-of-school suspension. The school also failed to provide T.H. with any education services while he was suspended, resulting in his falling even farther behind.

By the end of the 2011-2012 school year, T.H. was failing four classes. Over the summer of 2012, T.H. continued to exhibit behaviors that ultimately led him to be detained for two months in the Durham County Youth Home (DCYH), a secure 24-hour juvenile detention facility. During his detention, T.H. continued to be served academically by DPS through Lakeview, the district's alternative school. Upon his release from detention, T.H. was enrolled at his base school as an eighth-grade student. As a condition of T.H.'s release, the juvenile court judge stated that T.H. must go to school and not violate any school rules. The juvenile court judge threatened that any violation of T.H.'s probation could result in his immediate return to detention.

Although T.H. seemed to be doing well at first, his new school failed to implement his IEP and did not convene his IEP Team to discuss the affect that T.H.'s behaviors and ensuing out-of-school suspensions were having on his educational performance. Just a few weeks after being released from detention, on October 25, 2012, DPS suspended T.H. out-of-school for three days for non-compliance and disruptive behavior. Fearing that he would be sent back to detention for the suspension, T.H. fled his home. For almost two months, T.H.'s mother did not know where he was.

In December 2012, T.H. was finally located and sent to detention. From January to April, T.H. was detained in the DCYH and served by DPS. With the help of an advocate, T.H.'s mother requested that the IEP Team convene to discuss T.H.'s behavioral issues. She also requested that DPS compensate T.H. for the previous special education violations. DPS did provide T.H. with compensatory services and attempted to evaluate and address his behavioral needs while he was in detention. However, the impact of the past suspensions proved to be a significant barrier. Although T.H. began making some progress once he was being provided with consistent educational services in detention without disruption by repeated out-of-school suspensions, evaluations revealed that T.H. was extremely far behind, scoring in the bottom 2 percent on reading and writing evaluations given to him by DPS. On April 4, 2013, T.H. was placed out-of-district by a juvenile court judge and is no longer served by DPS.

## **B. Evidence of Disparate Impact**

### *i. Race*

In the 2009-10 academic year, Durham students experienced clear racial disparities in out-of-school suspensions. Durham's educators suspended 3.3% of all White students enrolled in

Kindergarten through 12th Grade, but suspended 14.1% of Black students. This is a difference of 10.8 percentage points.<sup>16</sup>

<b>Percent of enrolled students suspended out-of-school (OSS) at least once</b>					
	All	Black	Hispanic	White	Black/White Gap
Elementary Schools	3.4	5.3	0.7	0.4	+4.9
Secondary Schools (combined middle and high schools) <sup>17</sup>	14.1	19.2	10.5	4.1	+ 15.1

*ii. Disability*

In addition to highlighting racial disparities, the OCR data also reflect disparities based on disability. It is unclear why students with disabilities would be suspended more than students without disabilities. After all, the law mandates that students with disabilities be given extra support and special education services, and the law prohibits schools from suspending these students for more than 10 days if the behavior is a manifestation of the student's disability. Despite this, the risk for suspension for students without disabilities in DPS was 8.4% while the risk for suspension for students with disabilities in DPS was 17%. Overall, in Durham, students with disabilities were suspended far more often than their non-disabled peers.

<b>Percent of enrolled students suspended OSS at least once</b>			
	Student With Disabilities	Students Without Disabilities	Disability Gap in percentage points
District Average	17	8.4	+8.6
Elementary Schools	6.7	2.8	+3.9
Secondary Schools	24.3	12.8	+11.5

*iii. Race, Disability and Gender*

<sup>16</sup> Where this complaint references suspensions numbers and percentages for K-12, the raw data were publicly reported by the U.S. Department of Education’s Office for Civil Rights and then analyzed and published in a spreadsheet on August 7, 2012 as companion to the report, “Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School”, by Daniel J. Losen and Jonathan Gillespie.

<sup>17</sup> These numbers and percentages for elementary, middle and high schools come from the companion spreadsheet published on April 8, 2013, with the report, “Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools,” by Daniel J. Losen and Tia Martinez, by the Center for Civil Rights Remedies of the Civil Rights Project at UCLA. The methods and controls for errors in the report of district wide data are described in appendix B of the report available at [www.civilrightsproject.ucla.edu](http://www.civilrightsproject.ucla.edu). The report’s spreadsheet provides the data for Durham, NC by each school level, Elementary, Middle and High, (referenced in this complaint) as well as by Secondary level, which analyzes the middle and high school data as one combined “secondary schools” analysis.

DPS' disparate suspension of Black students and students with disabilities combined to produce particularly high suspension rates for Black students who also had disabilities. As the table shows, the race and disability gaps remain large even when controlling for gender and is most pronounced when Black males with disabilities in secondary schools are compared with others.

<b>Percent of enrolled suspended OSS at least once</b>					
	All	AA	H	W	Black/White Gap
Elementary With disabilities	6.7	8.3	1.1	0	+8.3
Secondary with disabilities	24.3	30.4	6.5	8.2	<b>+22.2</b>
Elementary without disabilities	2.8	4.7	0.6	0.5	+4.2
Secondary without disabilities	12.8	17.3	10.9	<b>3.7</b>	+13.6
Elementary males with disabilities	9.0	11.2	1.6	0	+11.2
Secondary males with disabilities	28.6	<b>33.7</b>	10.0	12.5	<b>+21.2</b>
Secondary males without disabilities	16.1	<b>21.8</b>	14.9	5.9	+15.9
Elementary females with disabilities	1.4	<b>1.3</b>	0	0	+1.3
Secondary females with disabilities	16.3	<b>23.5</b>	0	0	<b>+23.5</b>
Secondary females without disabilities	9.7	<b>13.5</b>	7.3	1.6	+ 11.9

This chart, based on OCR data collected from DPS for the 2009-10 school year, compares the risk for suspension at the elementary, secondary school levels. The chart only counts students once. Based on this data, the greatest risk for suspension is experienced by secondary school Black males with disabilities. Their suspension risk is 21 points higher than similarly situated White secondary school males with disabilities.<sup>18</sup>

This racial/disability gap controls for gender but there also happens to be a 26-point difference between Black and White secondary school females with disabilities. However, it is also important to note that the racial disparity between Hispanics and Whites increases significantly in secondary schools as well.

**C. Additional Evidence of Disparate Impact**

The suspension rates cited above, though troubling, actually understate both Durham's reliance on suspensions and the disparities arising from those suspensions. They understate Durham's reliance on suspensions because they do not account for DPS students, like the individual complainants, who were suspended out of school multiple times. In other words, students that were suspended multiple times are only counted once in the analysis above. As

<sup>18</sup> The even larger disparities cited in the introduction to this complaint were between middle school males and high school females. The numbers in the charts in this section grouped middle and high schools together to give a clearer sense of the systemic nature of the problem.

such, in all likelihood, these suspension rates and the disparities by race and disability would be even higher if the data reflected the rate of suspensions per 100 students for each racial group.

Although the suspension rates discussed above do not reveal the length or precise number of suspensions in Durham, we can make some inference about students who were suspended more than once because the U.S. Department of Education reported separate data sets for students who were suspended only once and students who were suspended more than once. In comparing these two sets of data, even more troubling DPS disparities are revealed. For example, across the K-12 grade span, less than one third of the suspended White students without disabilities were suspended two or more times in 2009-10 (0.9% out of 2.9%). However, more than half of the suspended Black students with disabilities were suspended two or more times (11.8% out of 23.4%).<sup>19</sup> Put another way, in 2009-10, Blacks with disabilities (K-12) were 13 times more likely to have been suspended two or more times, compared to White students without disabilities.

The increase in racial disparities when focusing on multiple suspensions is additionally evidenced by the state's report of the racial breakdown of incidents resulting in OSS for DPS students. Using the enrollment data DPS reported to OCR for 09-10 as a baseline, we took the state's report of incident data on out-of-school suspensions (for all grades) published by the North Carolina Department of Public Instruction ("DPI") to calculate the incident rate for the same year. The data show that in 2009-10, DPS issued suspensions at a rate of 31.4 per 100 Black students, but just 4.8 per 100 White students. In other words, the incident rate for Blacks for out-of-school suspension was nearly 7 times greater than the incident rate for Whites.<sup>20</sup>

#### **D. District's Disciplinary Policy and Practice**

Information from DPS establishes that the vast majority of DPS students who were suspended out of school in 2011-2012 were suspended for conduct that was noncriminal, unrelated to drugs or tobacco and nonviolent. North Carolina law requires schools to report certain serious criminal acts to the State Board of Education.<sup>21</sup> In 2011-12 there were 5,993 incidents resulting in out-of-school suspension in DPS. Yet, DPS reported only 333 serious acts.

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<sup>19</sup> This analysis can be found in the companion spreadsheet to the report published by the Center for Civil Rights Remedies called, "Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School" The spreadsheet is called "one more than one" and is available at [www.civilrightsproject.ucla.edu](http://www.civilrightsproject.ucla.edu).

<sup>20</sup> This suspension data source is the number of short-term and long-term suspensions for Durham County reported in Table S2. 2009-10 Suspensions and Expulsions by LEA, Gender and Race by the North Carolina State Board of Education Department of Public Instruction, titled *Report to the Joint Legislative Education Oversight Committee for academic year 2009-2010*. The enrollment data for Durham County are available at <http://ocrdata.ed.gov>. The DPI reports are available at: <http://www.ncpublicschools.org/research/dropout/reports/>.

<sup>21</sup> See N.C. GEN. STAT. § 115C-12(21). There are 16 criminal acts that must be reported. In 2011-12, the most frequently reported acts in Durham are possession of an alcoholic beverage (25), possession of a controlled substance (136), and possession of a weapon (142), <http://www.dpsnc.net/schools/calendars/board-of-education/board-agendas/support-services-committee-meeting-3.5.1>.

Although, Durham should be commended for infrequent use of expulsions and referrals to law enforcement, it appears that discipline policies authorize school administrators, and particularly school principals, to impose harsh and punitive punishments against students in response to minor misbehaviors. The DPS discipline policy asserts the following objective: "the code of student conduct sets out system wide expectations for student behavior designed to *provide the best possible school climate*."<sup>22</sup> Despite this precept, the same policy authorizes DPS officials to subject students to out-of-school suspensions for minor behaviors such as unexcused absences, inappropriate language or the overly broad category of "disruptive behavior."<sup>23</sup>

The Durham Student Code of Conduct ("DSCC") distinguishes between short and long-term suspensions, both of which are out-of-school suspensions. Short-term suspensions are for a period of ten days or less, whereas long-term suspensions are greater than ten days and may even extend over the summer into the new school year.<sup>24</sup> Further, the DSCC allows administrators to subject students to a "365-day suspension," which is not counted as an expulsion.<sup>25</sup>

The DSSC divides student conduct into five separate levels depending on the severity of the behavior, denoted as Levels I-V. Level I is reserved for the most minor student conduct and Level V for more serious conduct, with each level corresponding with enumerated student behaviors within the policy. Despite the distinction among behaviors, the DSSC authorizes suspensions even for those minor behaviors that fall under the Level I category, such as repeated violations of the same rule or failure to participate in the prescribed interventions. For instance, a student may be subjected to an out-of-school suspension for something as minor as failing to comply with directions on more than one occasion, "disruptive behavior," or even dress code violations.

All Level II conduct is eligible for both short and long-term suspensions. The DSSC allows school administrators to subject students to long-term suspensions if "aggravating factors" are alleged. While the DSCC policy encourages school officials to take into account both aggravating and mitigating factors in making discipline decisions, by authorizing suspensions for minor misbehaviors it allows administrators to punish students for minor behaviors and overlook mitigating factors per their discretion. Examples of such factors include a student's: age, intent, academic history, discipline history (including number of infractions and prior discipline for the same violation), and the threat level or injury resulting from the incident.<sup>26</sup>

Level II behaviors include a broad range of behaviors. Following is a list of behaviors classified as Level II: inappropriate language, any disturbance on a school bus, sending mass email messages, shoving or blocking the passage of another, taking "any action...which might reasonably be expected to result in a fight," playing "ridiculous" tricks on or swearing at another student or remaining after school too long. This is a mere sample of the types of behaviors that

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<sup>22</sup> Code of Student Conduct, Durham Public Schools, *supra* note 13 (emphasis added).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

are classified as Level II misconduct, any of which could subject a student to either short or long-term out-of-school suspension based on the recommendation of the school principal or the claim of "aggravating factors."<sup>27</sup>

Under the DSCC, "suspensions of greater than ten days are reserved for serious misconduct which either *threatens the safety of others within the school or threatens to substantially disrupt the educational environment.*"<sup>28</sup> Yet, the DSCC fails to adequately limit the types of minor misbehaviors for which a student may be subjected to long-term out-of-school suspension. As such, based on the principal's suggestion, a student could be subjected to a long-term out-of-school suspension for minor behavior such as using inappropriate language or cursing.

Durham policy provides: "The principal shall have authority to exercise discipline over the pupils of the school. The principal may suspend a student for 10 days or less or recommend long-term suspension or expulsion of a student . . . [F]inal responsibility for making or recommending those decisions shall rest with the principal."<sup>29</sup> However, by failing to place a ceiling on the types of behaviors eligible for suspension, the DSCC authorizes harsh and punitive punishments such as out-of-school suspension for even minor behaviors. Meanwhile, school principals are further empowered to ignore mitigating factors regarding student behavior and impose severe punishments, again, merely based on their discretion.

Of note, the DSCC explicitly recognizes that most "disciplinary consequences can occur *with the student remaining in an educational environment.*"<sup>30</sup> Further, per the DSCC, the following array of in-school consequences should be considered by school principals in lieu of out-of-school suspensions: "behavior contracts, peer mediation, in-school suspension, conflict resolution, detention, restitution, loss of privileges, and school or community service."<sup>31</sup> Long-term suspensions are reserved for "more serious violations of the Code of Conduct" as determined by the school principal.<sup>32</sup> Yet, students can and often are subjected to long-term suspensions for minor misbehaviors due to the policies that fail to properly limit the types of behaviors eligible for suspension.

### **E. Ongoing Suspension Practices in District**

While we are still awaiting the data DPS was required to submit to OCR for the 2011-12 school year, there is no reason to believe that Durham students have seen reductions in disparities by race and disability in out-of-school suspensions. Even without the most recent OCR data, there is ample evidence that frequent use of suspension persists. Recent data from

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 4300- Student Discipline, Durham Public Schools, <http://www.dpsnc.net/about-dps/district-policies/524/4300-student-discipline> (last visited April 13, 2013).

<sup>30</sup> 4301- Code of Student Conduct, Durham Public Schools, *supra* note 13.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

DPI show that Durham's overall incident rate for grades 9-12 rose from 25.19 per 100 in 2010-11 to 33.40 per 100 students in 2011-12.<sup>33</sup> Further, there is no evidence to suggest the DPS significantly revised their suspension policies to become more reasonable and less punitive.

## V. Reasons for Investigating this Complaint

The Durham Public Schools' suspension practices raise serious questions about their compliance with Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Title VI prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin.<sup>34</sup> Section 504 likewise prohibits recipients of federal financial assistance from discriminating based on disability.<sup>35</sup>

U.S. Department of Education regulations implementing these statutes prohibit practices that have a *disparate impact* by race or disability, even if there is no *discriminatory intent* behind those practices. The regulations prohibit school district conduct that has "the effect of subjecting [people] to discrimination" due to race or disability, as well as conduct that has "the effect of defeating or substantially impairing accomplishment of the objectives of the [school's] program" with respect to students of a particular race or students with disabilities.<sup>36</sup>

In the education context, a disparate-impact analysis proceeds in three steps. The first step is to ascertain whether a school district's facially neutral practice has a disproportionate and adverse impact on children of a particular race or children with disabilities. If so, then there is a *prima facie* case of disparate-impact discrimination. Next, if there is a *prima facie* case of disparate impact, the practice is unlawful unless the district demonstrates that it serves an educational necessity. Finally, even if the practice does serve an educational necessity, it is unlawful if equally effective and less discriminatory alternative practices are available.

In Durham, each step of this analysis demonstrates that the school district's suspension practices have the unlawful effect of discriminating by race and disability.

### A. District's Suspension Practices Disparately Impact Students of Color and Students with Disabilities

Durham's frequent use of out-of-school suspensions disparately impact students of color and students with disabilities. Even assuming that the disparate impacts are inadvertent - and

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<sup>33</sup> This suspension data is based on a comparison between consolidated reports for academic years 2011-2012 and 2010-2011, in which you see an increase. It was collected and released in a report by the North Carolina State Board of Education Department of Public Instruction, titled *Report to the Joint Legislative Education Oversight Committee, Consolidated Data Report, 2011-2012 and Consolidated Data Report, 2010-2011*. These reports are available at: <http://www.ncpublicschools.org/research/dropout/reports/>.

<sup>34</sup> 42 U.S.C. §§ 2000d-2000d-7 (1964).

<sup>35</sup> Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (2002).

<sup>36</sup> 28 C.F.R. § 41.51 (b)(3) (1973); 34 C.F.R. § 100.3 (b)(2) (2000).



thus do not reflect intentional discrimination - they still establish a *prima facie* case of disparate impact discrimination under Title VI and Section 504.

The evidence of disparate impact will not be repeated at length here because it is simply overwhelming. We have already demonstrated stark disparities when the data are analyzed by race, by disability status, and by the two combined. But certain disparities from the 2009-10 academic year warrant emphasis:

- The most pronounced disparities were revealed when the risks for suspensions by race with disability are compared. For both Black males and females with disabilities, at the secondary level, their risk for suspension was 24 percentage points higher than their White peers with disabilities.
- Independent of disability status, the data reflect large disparities by race with nearly one out of every 5 Black secondary school students suspended out of school (19.2%). This is nearly 5 times the rate of suspension for White secondary school students (4.1%).
- Independent of race, the data reflect large disparities by disability status with nearly one out of every 4 secondary school students with disabilities suspended out of school (24.3%). This is nearly double the rate for students without disabilities at that level (12.8%).

Under a disparate-impact theory, this *prima facie* evidence of discriminatory impact cannot be undermined by a showing that students of color or students with disabilities actually engage in a disproportionate share of behaviors punishable by suspension. The Department's disparate-impact regulations prohibit unjustified practices that have the "effect" of discriminating even when they are applied neutrally. The core questions are whether out-of-school suspension is a justifiable response, and even if it is, whether there is an equally or more effective response that is less harmful.

### **B. Frequent Out-of-School Suspensions are Not Educationally Necessary**

Durham's frequent out-of-school suspensions are not educationally necessary because the relevant research supports imposing out-of-school suspension only as a last resort. In contrast, research does not suggest that there is an educational purpose for suspending students - and thus denying them access to school - for anything less than the most serious offenses. In fact, the American Psychological Association has determined that out-of-school suspension is not only ineffective but, for some students, it can actually reinforce misbehavior.<sup>37</sup>

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<sup>37</sup> American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, Vol. 63 No. 9 *American Psychologist* 852, 854 (2008) <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

The Center for Civil Rights Remedies of the Civil Rights Project at UCLA has found no research linking frequent out-of-school suspensions with improvement in school safety or student behavior. Our review of the literature confirms a previous review by the American Psychological Association, which found no evidence that zero-tolerance disciplinary policies, as applied to mundane and non-violent misbehavior, improve school safety or student behavior.<sup>38</sup> Vague rules - such as Durham's that permits out-of-school suspension at the discretion of the principal, even if the behavior is minor, non-criminal and not endangering the students or staff - demonstrate the need for policy reform within the district. Research suggests that when school administrators are afforded such discretion, they tend to punish Black students more harshly than White students who engage in identical conduct.<sup>39</sup>

In fact, there is evidence that frequent out-of-school suspensions exacerbate the problems they are supposed to cure. A study by the Council of State Governments, which tracked over one million middle school students for six years, linked suspensions to dropping out and high-risk involvement with the juvenile justice system. Likewise, a study showed that Indiana schools with low suspension rates achieved higher test scores, even when controlling for race and poverty.<sup>40</sup> That is why professional organizations like the American Academy of Pediatrics, and the American Psychological Association have concluded that the out-of-school suspensions do not work.<sup>41</sup> Specifically, in March of 2013 the Academy stated, "out-of-school suspension and expulsion are counterproductive to the intended goals, rarely if ever are necessary, and should not be considered as appropriate discipline in any but the most extreme and dangerous circumstances, as determined on an individual basis rather than as a blanket policy."<sup>42</sup>

Of course, the evidence discrediting harsh suspension policies has not stopped school districts from implementing them. In general, defenders of these policies argue that suspensions (1) improve the educational environment for well-behaving students; (2) improve outcomes for students who have been suspended; and (3) deter future misconduct. Each of these arguments lacks merit.

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<sup>38</sup> *Id.* at 583-584

<sup>39</sup> Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Council of State Governments Justice Center (2011), [http://knowledgecenter.csg.org/drupal/system/files/Breaking\\_School\\_Rules.pdf](http://knowledgecenter.csg.org/drupal/system/files/Breaking_School_Rules.pdf) [http://knowledgecenter.csg.org/drupal/system/files/Breaking\\_School\\_Rules.pdf](http://knowledgecenter.csg.org/drupal/system/files/Breaking_School_Rules.pdf)

<sup>40</sup> M. Karega Rausch & Russell Skiba, *Discipline, Disability, and Race: Disproportionality in Indiana Schools*, Center for Evaluation & Education Policy (2006), [http://www.indiana.edu/~equity/docs/discipline\\_disability\\_race\\_indiana.pdf](http://www.indiana.edu/~equity/docs/discipline_disability_race_indiana.pdf).

<sup>41</sup> American Academy of Pediatrics Committee on School Health, *Out-of-School Suspension and Expulsion*, Vol. 112 No. 5 *Pediatrics*, 1206 (2003), <http://pediatrics.aappublications.org/content/112/5/1206.full.pdf+html?sid=b76baf23-07bf-4cdf-8fa0-10587add04f3>; American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, Vol. 63 No. 9 *American Psychologist* 852 (2008), <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

<sup>42</sup> Out of School Suspension and Expulsion, *Pediatrics* 131, no. 3 (March 1, 2013), pp. e1000-e1007 (at 1005) (DOI: 10.1542/peds.2012-3932). Available at <http://pediatrics.aappublications.org/content/131/3/e1000.full.pdf+html>. OUT

First, although school officials who order suspension often believe they are shielding the students who remain in school from the misbehaving students, research does not show that chaotic classroom settings can be properly blamed on a few "bad apples." Instead, disruptive classroom behavior depends largely on the district and on the school and classroom environments. Researchers have shown, for example, that the same student can behave very differently in different classrooms.<sup>43</sup> Disruptions can tend to increase or decrease with the skill of the teacher in providing engaging instruction and in managing the classroom. As engagement goes up, misbehavior and suspensions go down.<sup>44</sup> The American Psychological Association has therefore explained: "When applied correctly, effective classroom management principles can work across all subject areas and all developmental levels . . . . They can be expected to promote students' self-regulation, reduce the incidence of misbehavior, and increase student productivity."<sup>45</sup>

Certainly a "bad apples" theory cannot explain the data for the Durham Public Schools, which suspended one out of every 5 Black secondary school students at least once.

Second, far from improving outcomes, suspension hurts the students who are suspended. Quite simply, as Connecticut Governor Rell has noted, students do not receive adequate academic or behavioral instruction when they are not in school.

Out-of-school suspension also tends to harm the suspended students by exacerbating personal challenges that may have contributed to the misbehavior in the first place. For example, students at risk of suspension can include children with single and impoverished parents who cannot afford to miss work when their children are suspended. For these students, as the American Academy of Pediatrics' Committee on Social Health has observed, "academic suspension in turn provides yet another life stress that...may predispose them to even higher risks of behavioral problems."<sup>46</sup> The lack of professional assistance at the time of exclusion from school, in turn, increases the risk of permanent school drop-out.<sup>47</sup> Many in law enforcement have echoed the Academy of Pediatrics' concerns about the consequences of having high numbers of unsupervised suspended students.<sup>48</sup>

Viewed in this light, Durham's disproportionate suspension of students with disabilities is particularly troubling. Those students and their parents already face substantial educational

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<sup>43</sup> See BETH HARRY & JANETTE KLINGNER, *WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? UNDERSTANDING RACE & DISABILITY IN SCHOOLS* (Teachers College Press 2006).

<sup>44</sup> David Osher, George Bear, Jeffrey Sprague, & Walter Doyle, *How can we improve school Discipline?* *Educational Researcher*, Vol. 39 No. 1, 48-58 (2010).

<sup>45</sup> Tom Kratochwill, *Classroom Management: Teachers Modules*, American Psychological Association, 5, <http://www.apa.org/education/k12/classroom-mgmt.aspx>.

<sup>46</sup> American Academy of Pediatrics Committee on School Health, *Out-of-School Suspension and Expulsion*, Vol. 112 No. 5 *Pediatrics* 1206, 1207 (2003), <http://pediatrics.aappublications.org/content/112/5/1206.full.pdf+html?sid=b76baf23-07bf-4cdf-8fa0-10587add04f3>.

<sup>47</sup> *Id.*

<sup>48</sup> See *Fight Crime: Invest in Kids*, (2009). *Comments pursuant to notice of proposed information collection request*. New York. [on file with author]. See generally <http://www.fightcrime.org/>.

challenges. If out-of-school suspensions were nevertheless helpful to them, then the suspensions would lead to marked improvements in behavior and academic outcomes. However, that is not what the data suggest. Instead, the data show a high frequency of students suspended repeatedly in Durham, demonstrating the ineffectiveness of suspensions.

Third, there is no evidence that out-of-school suspension, as applied to nonviolent misbehavior, deters student misbehavior or improves school safety. In fact, there is ample evidence for the opposite proposition. Longitudinal studies have consistently shown that students suspended in sixth grade are *more* likely to receive office referrals or suspensions in subsequent grades. For example, Raffaele Mendez, who studied longitudinal data on students from 150 schools in Florida's Pinellas County, found a strong relationship (after controlling for other at-risk factors) between the number of sixth-grade suspensions and the number of seventh and eighth grade suspensions.<sup>49</sup>

Thus, although teachers and administrators surely face substantial challenges in educating and disciplining students, there is no evidence that frequently suspending students helps to meet those challenges. For that reason, Durham's disparate suspension of students of color and students with disabilities is not educational necessary and violates Title VI and Section 504.

### **C. Less Discriminatory Discipline Practices are Available and Provide Greater Benefits**

Even if Durham Public School's suspension policies conferred some benefit on Durham students - though they do not - they would still violate Title VI and Section 504. That is because DPS could substantially improve educational outcomes and enact school discipline policies that do not disproportionately harm students of color and students with disabilities.

As a threshold matter, replacing even some of Durham's out-of-school suspensions with less severe punishments would be less discriminatory even if the less severe punishments were imposed at the same disparate rates that now prevail in Durham. The less *severe* punishment is necessarily less *discriminatory* because it avoids the most damaging feature of out-of-school suspension: excluding students from the learning environment. However, replacing all of Durham's out-of-school suspensions with in-school suspensions, while less discriminatory, would still not be sufficient since there are even better and even less discriminatory alternatives that do not rely on exclusion from the classroom as the primary method to address misbehavior.

Recent research from The Council of State Governments suggests that school districts can reduce out-of-school suspension if the adults change their approach to managing student

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<sup>49</sup>See Raffaele Mendez, Predictors of suspension and negative school outcomes: A longitudinal investigation, in DECONSTRUCTING THE SCHOOL TO PRISON PIPELINE: NEW DIRECTIONS FOR YOUTH DEVELOPMENT, No. 99, 17-33 (J. Wald & D.L. Losen eds., 2003). See also Raffaele Mendez & Howard Knoff, *Who gets suspended from school and why: A demographic analysis of schools and disciplinary infractions in a large school district*. EDUCATION AND TREATMENT OF CHILDREN, Feb. 2003; 26, 1, ProQuest Education Journals, 30-51.

behavior. Researchers analyzed disciplinary variations in Texas's largest school districts, controlling for both individual traits - including disability type, test scores, and prior disciplinary history - and school traits such as teacher experience and percentage of socio-economic disadvantage.<sup>50</sup> They found that the actions of school administrators "can make a difference in whether students are successful in avoiding disciplinary actions independent of their risk factors."<sup>51</sup>

When disciplinary actions are unavoidable, school administrators can choose actions that work better than out-of-school suspension. For example, in 2010 Connecticut passed a law requiring that out-of-school suspensions be imposed only rarely. Under the law, out-of-school suspensions can be imposed only on students who pose a danger to themselves or others, or instead as a last resort for students who engage in persistent and egregious misbehavior. Even disobedient students that need to be removed from their classrooms are supposed to remain in school.<sup>52</sup>

The alternatives to out-of-school suspension are many, so we address only a few specific examples here.

*i. Student-Specific Alternatives*

Perhaps the most obvious alternative to out-of-school suspension is in-school suspension. That tactic provides students with supervision and gives them an opportunity to stay productive and avoid falling behind in class.

But even in-school suspensions are usually more severe than other effective means of discipline. Mediation, counseling and parent conferences, to name a few examples, are more constructive interventions that provide an opportunity to better understand and address the root cause of student misbehavior. Even in instances in which there is concern about potential student violence, mechanisms exist for assessing the student's risk level and intervening effectively without having to exclude a child from school.<sup>53</sup>

*ii. Training in Classroom Behavior Management*

There are also systemic means of improving school discipline that do not hinge on direct intervention with misbehaving students. One approach is to provide training and support for

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<sup>50</sup>Fabelo, *supra* n. 5, at 80. See also Balfanz, R., Spiridakis, K., Neild, R.C., & Legters, N. High-poverty secondary schools and the juvenile justice system: How neither helps the other and how that could change, *in* DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE: NEW DIRECTIONS FOR YOUTH, No. 99,71-89 (J. Wald & D. Losen eds., 2003).

<sup>51</sup>Fabelo, *supra* n. 5 at 83.

<sup>52</sup>See CONN. GEN. STAT. ANN. § 10-233c (West 2012).

<sup>53</sup>Cornell, D., Allen, K., & Fan, X. *A randomized controlled study of the Virginia student threat assessment guidelines in grades K-12*. School Psychology Review, 41, 100-115 (2003), <http://www.nasponline.org/publications/spr/abstract.aspx?ID=3358>.

teachers in classroom and behavior management.<sup>54</sup> Researchers from two national centers - the National Comprehensive Center for Teacher Quality and the National Evaluation and Technical Assistance Center for the Education of Children and youth who are Neglected, Delinquent or At-Risk - have described four ways teachers and school administrators can improve the classroom environment: (1) through their relationships with students, (2) through their attitudes and social-emotional competence, (3) by contributing to the conditions for learning and (4) through their responses to student behavior.<sup>55</sup>

Consistent with those recommendations, the Durham Public Schools could seek out training on the best ways to manage classrooms and interact with students. The district should therefore expand its programs for training teachers in educating students with disabilities, and it should provide ongoing support and professional development in this area.

### *iii. School-Wide Positive Behavioral Interventions and Supports*

The implementation of School-Wide Positive Behavioral Interventions and Supports (SWPBIS) is another less discriminatory alternative to out-of-school suspension. SWPBIS seeks to change underlying attitudes and policies concerning how behavior is addressed,<sup>56</sup> and it comprises three levels of intervention. The first level is school-wide. Its goal is to ensure a safe and effective learning environment by monitoring office referrals for discipline and setting school-wide goals for reducing these referrals. The system of interventions and supports is designed to shift the focus from the individual student to the collective behaviors, structures, and routines in the school as a whole.

Numerous studies have found positive results with this approach.<sup>57</sup> As noted in the

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<sup>54</sup> ANNE GREGORY ET AL., THE CIVIL RIGHTS PROJECT AT UCLA, *The Promise of a Teacher Professional development program in reducing the racial disparity in classroom exclusionary discipline*. Insert Page Number (2013)

<sup>55</sup> JANE COGGSHALL ET AL, AMERICAN INSTITUTES FOR RESEARCH, *Enhancing Educators' Capacity to Stop the School-to-Prison Pipeline*, 169-186 (2012), <http://www.psesd.org/conferences/alt2suspension/docs/EnhancingEducatorsCapacity.pdf>.

<sup>56</sup> George Sugai & Robert Horner, *The Evolution of Discipline Practices: School-wide Positive Behavior Supports*, 24 CHILD AND FAMILY BEHAVIOR THERAPY NO. 1-2, 2002, at 23-50.

<sup>57</sup> Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 JOURNAL OF EDUCATIONAL PSYCHOLOGY NO. 2, 508-520 (2010); Robert H. Horner et al., *A Randomized Wait-list Controlled Effectiveness Trial Assessing School-wide Positive Behavior Support in Elementary Schools*, 11 JOURNAL OF POSITIVE BEHAVIOR INTERVENTIONS 133 (2009); Stephen R. Lassen et al., *The Relationship of School-wide Positive Behavior Support to Academic Achievement in an Urban Middle School*, 43 Psychology in the Schools 701-712 (2006) <http://fpbs.fmhi.usf.edu/revision07/research/research%20articles%20supporting%20pbs/middleschoolimplementation.pdf>; Carol W. Metzler et al., *Evaluation of a Comprehensive Behavior Management Program to Improve School-wide Positive Behavior Support*, 24 EDUCATION AND TREATMENT OF CHILDREN 448-479 (2001); Howard S. Muscott et al., *Positive Behavioral Interventions and Supports in New Hampshire: Effects of Large-Scale Implementation of Schoolwide Positive Behavior Support on Student Discipline and Academic Achievement*, Vol. 10 JOURNAL OF POSITIVE BEHAVIOR INTERVENTIONS, NO. 3, 2008, at 190-205.

introduction to the Complaint, Florida schools that implemented SWPBIS with high fidelity saw out-of-school suspensions decrease from an average of 43 days per 100 students to 25 days per 100 students.<sup>58</sup>

The second and third levels of SWPBIS provide additional supports and services for smaller numbers of students who exhibit challenging behavior. These include interventions conducted on individual classrooms and focus more on specialized instruction of school expectations, skills training for students, or other strategies tailored to specific behaviors.

*iv. Ecological Approaches*

Ecological approaches to classroom management manage school discipline by impacting the quality of activities in the classroom.<sup>59</sup> Some of the defining features of the ecological approach are well-planned lessons, varied methods of instruction, clear and developmentally appropriate behavioral expectations, and careful monitoring of student engagement.

*v. Social and Emotional Learning*

Social and emotional learning is perhaps best described as "the process through which we learn to recognize and manage emotions, care about others, make good decisions, behave ethically and responsibly, develop positive relationships, and avoid negative behaviors."<sup>60</sup> Social and emotional strategies aim to develop student assets that foster self-discipline. Systemic approaches that focus on improving student conduct and teaching students appropriate behavior have been successful at lowering suspension rates by more than half in one school district, thereby improving student learning and outcomes.<sup>61</sup> The Director of the Safe and Supportive Schools Technical Assistance Center, David Osher, suggests, "if classroom activities lack holding power, it is unlikely that schoolwide discipline approaches [schoolwide positive behavioral supports and social emotional learning] will make up for this deficiency."<sup>62</sup> Therefore, SWPBIS is likely most effective if implemented in combination with social and emotional learning and ecological management approaches.<sup>63</sup>

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<sup>58</sup>See Florida's Positive Behavior Support: Rtl for Behavior Project, Annual Report 2008-2009: Outcome and Evaluation Data (2009), at [www.pbis.org/common/pbisresources/publications/FLPBS\\_RtIB\\_Project\\_Annual\\_Report20082009.pdf](http://www.pbis.org/common/pbisresources/publications/FLPBS_RtIB_Project_Annual_Report20082009.pdf) (OSS Rates by Implementation Level Across School Years, p. 23). In addition, in a public comment on a brief before the U.S. Commission on Civil Rights on School Discipline and Disparate Impact, the Leadership Conference on Civil Rights articulates several places where PBIS helped reduce racial disparities in school discipline. See [www.usccr.gov/pubs/School\\_Disciplineand\\_Disparate\\_Impact.pdf](http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf). at 129-133.

<sup>59</sup> Osher, Bear, Sprague, & Doyle, *supra* n. 41 at 49.

<sup>60</sup> Joseph E. Zins et al., *The Scientific Base Linking Social and Emotional Learning to School Success*, BUILDING ACADEMIC SUCCESS ON SOCIAL AND EMOTIONAL LEARNING: WHAT DOES THE RESEARCH SAY? 4 (Zins et. al eds., 2004), also available at <http://digilib.bc.edu/reserves/py633/mont/py63340.pdf>.

<sup>61</sup> DAVID OSHER, AMERICAN INSTITUTES FOR RESEARCH, AVOID SIMPLE SOLUTIONS AND QUICK FIXES: LESSONS LEARNED FROM A COMPREHENSIVE DISTRICTWIDE APPROACH TO IMPROVING SCHOOL SAFETY, *page number*. .

<sup>62</sup>Osher, Bear, Sprague, & Doyle, *supra* n. 41 at 49-50.

<sup>63</sup>*Id.* at 49, 53.

*vi. Restorative Justice*

Restorative justice "provides high levels of both control and support to encourage appropriate behavior, and places responsibility on students themselves, using a collaborative response to wrongdoing."<sup>64</sup> Teachers implementing this approach use core strategies like conferencing circles to resolve conflict and engage students in managing the environment.<sup>65</sup> At a March 2012 conference sponsored by the New York State Permanent Judicial Commission on Justice for Children, several experts presented very promising examples of how restorative justice improved school climate and reduced out-of-school suspensions.<sup>66</sup> While the researchers who study restorative justice are only beginning to develop empirical proof of its effectiveness, increasing reports of success suggest that this may be a viable and less discriminatory alternative worth exploring in the Durham Public Schools.

## **VI. Relief Requested**

We request that OCR thoroughly investigate out-of-school suspension practices in the Durham Public Schools and explore any evidence that those practices violate either Title VI or Section 504.

Our purpose is to improve rather than vilify the Durham Public Schools. We believe that the administrators and teachers in Durham have the capacity to make substantial changes that will dramatically reduce the use of out-of-schools suspensions while maintaining safe and orderly learning environments and improving achievement. We request that OCR encourage DPS to enter into a formal and public Resolution Agreement with both Advocates for Children's Services, on behalf of its individual clients, and the Center for Civil Rights Remedies at the Civil Rights Project of UCLA. We would be interested in seeing many of the terms that other school districts have voluntarily agreed upon in Oakland, California, Meridian, Mississippi, and Palm Beach County, Florida.<sup>67</sup> We anticipate that we would not press OCR for a formal finding of a Title VI or Section 504 violation, provided that the Resolution Agreement includes the following

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<sup>64</sup> Abby J. Porter, *Restorative Practices in Schools: Research Reveals Power of Restorative Approach, Part II*, International Institute for Restorative Practices page number 2007) [http://www.iirp.edu/iirpWebsites/web/uploads/article\\_pdfs/schoolresearch2.pdf](http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/schoolresearch2.pdf).

<sup>65</sup> Nancy Fishman & Dory Hack, *School-based Youth Courts: Creating a Restorative Justice Alternative to Traditional School Disciplinary Responses*, LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS, NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN (2012), [http://www.school-justicesummit.org/papers/paper\\_11.cfm](http://www.school-justicesummit.org/papers/paper_11.cfm).

<sup>66</sup> Summit materials are available at [http://www.school-justicesummit.org/presentations/presentation\\_details.cfm?topicID=5](http://www.school-justicesummit.org/presentations/presentation_details.cfm?topicID=5).

<sup>67</sup> Oakland Unified School District Resolution Agreement, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09125001-b.pdf>. Meridian Public School District proposed Consent Decree available at <http://www.justice.gov/iso/opa/resources/850201332211248646502.pdf>. Palm Beach County School District settlement agreement available at <http://www.justice.gov/iso/opa/resources/442201322616361724384.pdf>



kinds of prescriptions:

- A. DPS will collaborate and partner with the Complainants and their representatives, mutually agreed upon experts, and members of local community groups serving the interests of parents and children from the subgroups represented in the Complaint, to create and monitor a Resolution Agreement designed to eliminate or significantly reduce the adverse and disparate impact of all DPS' discipline policies and practices, with an emphasis on reducing the use of out-of-school suspensions.
- B. The Resolution Agreement shall contain strategies, objectives, and timelines to ensure that DPS school discipline policies and practices resort to out-of-school suspension only as a measure of last resort, and that the use of out-of-school suspension and all other disciplinary interventions are monitored for their impact on a quarterly basis.
- C. The Resolution Agreement shall place clear limits on the use of out-of-school suspensions and expulsions. In-school suspensions and other less severe disciplinary sanctions shall be required except for serious offenses to be specified in the Resolution Agreement. These serious offenses might include violence or physical threats, weapons possession, or illegal drug possession. As a matter of policy, DPS should explicitly limit the use of suspension for only those serious behaviors in order to ensure the district policy against using suspensions for minor misbehaviors is implemented at the school level.
- D. The Resolution Agreement will create and authorize a review team, including parties to the Complaint or their assignees, to further analyze and revise the DPS Student Code of Conduct.
- E. DPS will contract with an independent consultant, who must be selected by the team and approved by the complainants with expertise in classroom management, to identify means of reducing out-of-school suspensions and improving school climate and safety without relying on frequent disciplinary exclusions.
- F. The review team and the independent consultant shall consider and implement at least three of the following interventions:
  1. DPS will implement with fidelity School Wide Positive Interventions and Supports in its schools. The Superintendent should establish and train a district-wide Leadership Team in SWPBIS as well as other evidence-based alternatives to Zero Tolerance policies such as “ecological approaches to classroom management” and “social emotional learning.” The PBIS would be combined with training on multi-cultural competency.
  2. DPS will implement a restorative justice approach into their schools where the students who cause the conflict are instrumental in resolving them. This may

- include methods such as conflict management, mediation, restorative conferencing and circles.
3. DPS will implement training for teachers and administrators in classroom management and discipline as well as social and emotional learning. This training may be provided through professional development or by working with a consultant for the district such as that provided by Research for Better Teaching. However, the mere expansion of extant training programs in Durham, if they are not associated with fewer out-of-school suspensions, would not be sufficient.
  4. DPS will provide training for parents who need support around behavioral issues.
- G. The Resolution Agreement will require DPS to implement new directives related to students with disabilities. These directives might include the development and implementation of behavioral assessments, behavior intervention plans, and a process for conducting appropriate manifestation determination reviews for students with disabilities whose behavior impedes the child's learning or that of others.
- H. The Resolution Agreement will require data analysis, periodic review, and reporting. DPS will agree to collect all discipline data on a quarterly basis on disciplinary responses disaggregated by race and/or ethnicity, gender disability status, and type of offense. We also request that the data be publicly reported to the Durham community on an annual basis. Further, this regular analysis of discipline data will determine whether rates are decreasing or increasing, in which categories the changes are occurring, and identify which school officials are issuing disciplinary referrals. Once identified, those over-relying on suspensions will be trained on more appropriate student behavior management techniques.
- I. The Resolution Agreement will ensure that if school security, school safety or law enforcement officers are involved in student discipline, they will be trained in child and age-appropriate techniques and incorporated within the school structure as supportive adults, with incentives to help ensure students remain in school. To the extent DPS utilizes such officials, they should be trained to become allies to educators, students and families and act as liaisons and advocates for maintaining a safe and orderly school environment, without criminalizing students unnecessarily.
- J. The Resolution Agreement will set a 5-year goal of reducing the frequency of out-of-school suspensions to less than 5 percent for all groups, which shall also result in reducing all disciplinary disparities in the use of out-of-school suspensions to less than 5 percentage points.
- K. The Resolution Agreement will include other measures, goals and actions to respond

to additional issues discovered in the course of OCR's investigation.

If the Durham Public Schools do not enter into a mutually agreed upon Resolution Agreement along these lines, or if they fail to implement the terms of such an Agreement, we urge OCR to complete their investigation and find DPS employs policies and engages in practices that disparately impact each of the aforementioned subgroups in violation of Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act.

**VII. Conclusion**

The Advocates for Children's Services, Legal Aid of North Carolina, on behalf of ACS' individual clients, and the Center for Civil Rights Remedies of the Civil Rights Project at UCLA, on behalf of all Durham Public School students, respectfully ask that OCR investigate this Complaint.

Respectfully submitted on April 16, 2013 by:

ADVOCATES FOR CHILDREN'S SERVICES  
OF THE LEGAL AID OF NORTH CAROLINA

CENTER FOR CIVIL RIGHTS REMEDIES  
AT THE CIVIL RIGHTS PROJECT OF UCLA

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