

# RESTORATIVE JUSTICE IN THE CLASSROOM: A PIPELINE TO NOWHERE FOR ALL

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## INTRODUCTION

Every day, countless news headlines are filled with stories describing tragic cases of violence in our nation's schools.<sup>1</sup> Stories describing shootings, stabbings, and other forms of egregious, life threatening violence are all too common occurrences in today's inner-city school districts.<sup>2</sup> Additionally, many more incidents of bullying, fights, and other dangerous behavior by students against their fellow classmates occur and often go unreported on a daily basis.<sup>3</sup> Despite efforts by multiple interested parties to address the issue, these violent trends show no signs of slowing down.<sup>4</sup> As violence and other behavioral problems continue to infect inner-city schools, and by some

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<sup>1</sup> See, e.g., Julie McMahon, *Student Who had Jaw Broken in Bloody Attack on Walk From School Joins Busing Campaign*, SYRACUSE.COM (Jan. 28, 2016, 7:30 AM), [http://www.syracuse.com/schools/index.ssf/2016/01/syracuse\\_student\\_whose\\_jaw\\_broke\\_in\\_bloody\\_attack\\_on\\_walk\\_from\\_school\\_joins\\_campaign.html](http://www.syracuse.com/schools/index.ssf/2016/01/syracuse_student_whose_jaw_broke_in_bloody_attack_on_walk_from_school_joins_campaign.html) (describing vicious injuries suffered by Syracuse City School District students in a series of student-on-student attacks and robberies); *Audit Finds NY Schools Significantly Underreported Violent Incidents*, CAMPUS SAFETY MAG. (Jan. 15, 2015), [http://www.campussafetymagazine.com/article/audit\\_finds\\_ny\\_schools\\_significantly\\_underreported\\_violent\\_incidents/Harassment](http://www.campussafetymagazine.com/article/audit_finds_ny_schools_significantly_underreported_violent_incidents/Harassment) (detailing violent incidents that systematically underreported in several New York State inner-city schools); Christina Salvo, *Violent Brawl at Sylmar High School Caught on Video*, EYEWITNESS NEWS ABC 7 (May 10, 2016), <http://abc7.com/news/violent-brawl-at-sylmar-high-school-caught-on-video/1331490/> (describing a violent brawl in a Los Angeles area high school cafeteria).

<sup>2</sup> See, e.g., Allie Bidwell, *Report: School Crime and Violence Rise*, U.S. NEWS & WORLD REP. (Jun. 10, 2014), <http://www.usnews.com/news/articles/2014/06/10/incidents-of-school-crime-and-violence-on-the-rise-for-students-and-teachers> (describing the increasing trend in student-on-student and student-on-teacher violence in many of the nation's inner-city schools).

<sup>3</sup> See, e.g., Sascha Brodsky, *Is Discipline Reform Really Helping Decrease School Violence?*, THE ATLANTIC (Jun 28, 2016), <http://www.theatlantic.com/education/archive/2016/06/school-violence-restorative-justice/488945/> (finding that nearly one-third of all violent incidents in 10 New York City public schools went unreported); CAMPUS SAFETY MAG., *supra* note 1 (detailing violent incidents that are systematically underreported in several New York State inner-city schools).

<sup>4</sup> ANLAN ZHANG ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2015 5-11 (2016).

accounts increase significantly, the quality of the education received by students in those schools is worsening as a result.<sup>5</sup>

The worsening quality of education resulting from such violence and other disruptions in inner-city school districts presents a serious legal and constitutional problem for these districts, and the state and local governments that fund and run them.<sup>6</sup> Many states, such as New York, expressly provide in their constitutions that all of the state's citizens have a constitutional right to a basic level of public school education.<sup>7</sup> And, when a state provides this educational right to its citizens, a public school district's inability or refusal to address school discipline and safety issues—issues so serious that they interfere with affected students' ability to receive an education—likely presents equal protection concerns.<sup>8</sup> These equal protection concerns arise under the Fourteenth Amendment to the United States Constitution, as the majority of students affected by such school violence and disruptive learning environment issues are racial minorities and students with disabilities.<sup>9</sup>

Unfortunately, classroom disruptions and even school violence are not a new phenomenon in the United States.<sup>10</sup> When school districts and local governments first began to seriously tackle these issues, many districts and municipalities decided to address the problem of school violence through the use of what could commonly be referred to as “traditional” methods of school discipline and security.<sup>11</sup> Schools employed zero tolerance policies, out of school suspensions, armed school resource officers with the power to arrest, and other means to directly address and punish violent and disruptive acts committed by students.<sup>12</sup> There is significant qualitative and quantitative

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<sup>5</sup> See, e.g., Elizabeth A. Harris, *New York Education Dept. Is Sued Over Violence in Schools*, THE N.Y. TIMES (Apr. 7, 2016), <http://www.nytimes.com/2016/04/08/nyregion/new-york-education-dept-is-sued-over-violence-in-schools.html>.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., N.Y. CONST. art. XI, § 1.

<sup>8</sup> Complaint at 4-8, 26, *Doe v. New York City Dep't of Educ.*, No. 1:16-cv-01684-NGG-RLM (E.D.N.Y. filed May 24, 2016) [hereinafter Complaint].

<sup>9</sup> *Id.*

<sup>10</sup> Susan Dominus, *An Effective but Exhausting Alternative to High-School Suspensions*, THE N.Y. TIMES MAG. (Sept. 7, 2016), [http://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html?\\_r=2](http://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html?_r=2;); N.Y.C.L.U., EDUCATION INTERRUPTED: THE GROWING USE OF SUSPENSIONS IN NEW YORK CITY'S PUBLIC SCHOOLS 5-7 (2011).

<sup>11</sup> N.Y.C.L.U., *supra* note 10, at 5-7.

<sup>12</sup> Dominus, *supra* note 10.

evidence that such traditional approaches to school discipline and safety have worked to reduce violent and disruptive behavior in schools.<sup>13</sup>

However, critics of these traditional methods of school discipline and safety have argued that, although such approaches may solve an immediate disruption or safety concern in the school by, for example, removing an offending student from the classroom, this approach over the long term has created a larger problem for society.<sup>14</sup>

Critics of this method claim that disciplining offending students by removing them from the educational environment through such tactics as suspensions, expulsions, and arrests creates a “school-to-prison pipeline.”<sup>15</sup> These critics contend that the continuous removal of offending students from the classroom, and in some cases the actual arrest of offending students, denies these students the opportunity to receive the basic education that they are constitutionally entitled to receive.<sup>16</sup> Because these students are denied such a basic education, some critics contend that these students grow up without the necessary aptitude and traditional skills to function in society.<sup>17</sup> Without such basic skills, these students are pushed to the margins of society and forced to resort to criminal, and often violent, means of supporting themselves.<sup>18</sup> This behavior keeps these individuals inescapably trapped in the criminal justice system that they were so often introduced to as juveniles when they were disciplined for school infractions.<sup>19</sup> As such, the “school-to-prison pipeline” is complete.<sup>20</sup>

Because of increasing concerns over this “school-to-prison pipeline,” several local and state governments have recently begun taking a different, and arguably overall less effective, approach in an attempt to reduce both violent and disruptive behavior *and* the number of students sent down this “pipeline to prison,” with the goal of ensuring a quality basic education for all students.<sup>21</sup> Over roughly the past dec-

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<sup>13</sup> See, e.g., ZHANG, ET AL., *supra* note 4, at 5-11; Paul Sperry, *How Liberal Discipline Policies are Making Schools Less Safe*, N.Y. POST (Mar. 14, 2015), <http://nypost.com/2015/03/14/politicians-are-making-schools-less-safe-and-ruining-education-for-everyone/>.

<sup>14</sup> N.Y.C.L.U., *supra* note 10 at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *id.* at 1-8.

<sup>18</sup> See *id.* at 3-4, 7.

<sup>19</sup> See *id.* at 4.

<sup>20</sup> See N.Y.C.L.U., *supra* note 10, at 4, 7.

<sup>21</sup> See, e.g., Brodsky, *supra* note 3.

ade, concern about escalating incidents of school violence and the “school-to-prison pipeline” in our inner-city schools has given rise to new methods of school discipline, as well as various other means of attempting to make certain inner-city schools appear safer.<sup>22</sup> Chief among these new methods of dealing with school safety and discipline is a model of school discipline commonly known as “restorative justice.”<sup>23</sup> The restorative justice model in schools aims to “create a better understanding” between the offending individual and those that he has wronged.<sup>24</sup> One of the primary goals of the restorative justice model is to keep the offending individuals in the classroom so as not to disrupt their education and, therefore, not subject them to the risk of becoming a part of the “school-to-prison pipeline.”<sup>25</sup> However, critics of the restorative justice model argue that this method is almost entirely non-punitive and has the effect of actually perpetuating classroom disruptions and violence once disruptive students realize that they will face no “real” consequences for their behavior.<sup>26</sup>

The restorative justice model began to catch on after levels of violence and other disruptions of the educational environment, and the resulting disciplinary measures, became so demonstrably high in large inner-city school districts such as those in New York City, Los Angeles, and Philadelphia, as well as in smaller cities such as Syracuse, New York, that various governmental entities began to take notice.<sup>27</sup> These agencies subsequently demanded that the school districts implement changes to reduce the incidents of violence and serious classroom disruptions and ensure these districts’ students,

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<sup>22</sup> *Id.*

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

<sup>24</sup> See N.Y.C.L.U., *supra* note 10, at 7.

<sup>25</sup> Mara Schiff, *Dignity, Disparity and Desistance: Effective Restorative Justice Strategies to Plug the School to Prison Pipeline*, prepared for the Center for Civil Rights Remedies and the Research-t-Practice Collaborative 2 (UCLA Civil Rights Project 2013), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/dignity-disparity-and-desistance-effective-restorative-justice-strategies-to-plug-the-201cschool-to-prison-pipeline/schiff-dignity-disparity-ccrr-conf-2013.pdf>.

<sup>26</sup> Sperry, *supra* note 13; Julie McMahon, *Syracuse Schools Staff Feel Helpless in Face of Threats, Violence, Union Survey Says*, SYRACUSE.COM (Dec. 10, 2015, 2:29 PM), [http://www.syracuse.com/schools/index.ssf/2015/12/syracuse\\_teachers\\_association\\_survey\\_safety\\_violence.html](http://www.syracuse.com/schools/index.ssf/2015/12/syracuse_teachers_association_survey_safety_violence.html).

<sup>27</sup> See, e.g., James T. Mulder, *Syracuse Has one of Highest Student Suspension Rates in Nation, State Attorney General Finds*, SYRACUSE.COM (Jun. 14, 2014, 1:50 AM), [http://www.syracuse.com/news/index.ssf/2014/06/y\\_general\\_syracuse\\_has\\_one\\_of\\_the\\_highest\\_student\\_suspension\\_rates\\_in.html](http://www.syracuse.com/news/index.ssf/2014/06/y_general_syracuse_has_one_of_the_highest_student_suspension_rates_in.html).

including those causing the disruptions, were receiving a higher quality education.<sup>28</sup> According to some journalists, students, and parents, such governmental notice has led to many educators and school administrators intentionally not addressing incidents of school violence and other serious classroom disruptions through the underreporting of such incidents and through the use of ineffective restorative justice practices.<sup>29</sup> This refusal to actually address these issues has led to the false appearance, some claim, that schools are safer and, thus, more conducive to an educational environment than they really are, thus, creating a “pipeline to nowhere” for all students, not just those who commit disciplinary infractions.<sup>30</sup> Although numerous articles have been published highlighting the merits of restorative justice practices in schools, none has yet examined the negative consequences that restorative justice practices often have on the educational environment that an offending student’s peers are frequently subjected to under restorative justice.<sup>31</sup>

Part I of this Comment will examine a public school student’s constitutional right to receive an education. Part II of this Comment will examine the more “traditional,” authoritative approach to school discipline in inner-city school districts, the reasons certain stakeholders have rejected these approaches as ineffective, and the consequences to students of such a decision.<sup>32</sup> Part III will examine the product of stakeholders’ concerns over the more traditional methods of school discipline: the restorative justice model.<sup>33</sup> Finally, Part IV of this Comment argues that, despite the negative effects that traditional models of school discipline may have on offending students, the restorative justice model often results, both directly and indirectly, in *all* students being subjected to an unconstitutionally poor quality

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<sup>28</sup> Mulder, *supra* note 27; Eliza Shapiro, *City Unveils Long-Awaited School Discipline Reforms*, POLITICO (Feb. 13, 2015), <http://www.politico.com/states/new-york/city-hall/story/2015/02/city-unveils-long-awaited-school-discipline-reforms-019733>.

<sup>29</sup> See, e.g., Brodsky, *supra* note 3.

<sup>30</sup> See, e.g., Brodsky, *supra* note 3; Sperry, *supra* note 13.

<sup>31</sup> See, e.g., Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016); S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271 (2014); Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281 (2012); Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education Clauses*, 5 N.Y.U. REV. L. & SOC. CHANGE 303 (2011).

<sup>32</sup> N.Y.C.L.U., *supra* note 10, at 3-4.

<sup>33</sup> See *id.*

learning environment, and as such, the traditional approach to discipline, although not perfect, is better on balance.

## I. BASIC EDUCATION AS A CIVIL RIGHT

Many state constitutions explicitly provide for a right to at least some basic level of education.<sup>34</sup> Further, where a state's constitution does provide for such a right, the Equal Protection Clause of the United States Constitution may be invoked under the Fourteenth Amendment if the opportunity to receive that education is denied through an act or omission by the state.<sup>35</sup> Because restorative justice practices have been implemented in numerous school districts throughout New York,<sup>36</sup> the education clause of the New York State Constitution, and the interpretation of that clause by New York State's highest court, is briefly examined below. This is followed by an examination of the equal protection concerns that may arise in any state where some form of education is constitutionally guaranteed under the state's constitution, and where the opportunity to receive that education is denied or prohibitively frustrated through acts or omissions by state officials, resulting in a disparate impact on minority students.

### A. *New York State Constitution*

The New York State Constitution specifies that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”<sup>37</sup> In interpreting this provision, the New York State Court of Appeals, the state's highest court, has held that school children are constitutionally entitled to a minimally adequate educational environment that will allow the children to receive a “sound, basic education.”<sup>38</sup> The purpose of providing a “sound, basic education” is to allow the children to learn the basic skills required to be self-suffi-

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<sup>34</sup> See, e.g., N.Y. CONST. art. XI, § 1; N.J. CONST. art. VIII, § IV, cl. 1; TEX. CONST. art. I, § 1, cl. 1.

<sup>35</sup> See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979); *San Antonio Independ. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>36</sup> See, e.g., Sperry, *supra* note 13.

<sup>37</sup> N.Y. CONST. art. XI, § 1.

<sup>38</sup> *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 905-07 (2003).

cient, productive members of society.<sup>39</sup> As such, the New York State Court of Appeals has held that this is not a constitutional guarantee of equality among all of the state's schools.<sup>40</sup> Rather, it is a guarantee that all of the state's school children receive an education that meets the minimum standards necessary to give them a chance at being decent, productive members of society.<sup>41</sup>

According to the New York State Court of Appeals, not only does this mean that *all* of New York's school children must have access to minimally adequate facilities and instruments of learning such as desks, chairs, and reasonably current textbooks, but all school children are *also* entitled to minimally adequate teaching methods by qualified personnel *with the ability to effectively instruct their students*.<sup>42</sup>

## B. *The United States Constitution*

In its 1973 decision in *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court held that education was not a "fundamental right" guaranteed under the United States Constitution.<sup>43</sup> However, the Court also held that once a state decides to provide for such a right in its own constitution, which many states have done, the opportunity to receive an education *must* be made available on equal terms in line with the Fourteenth Amendment to the United States Constitution.<sup>44</sup>

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>45</sup> Within the context of education, the Supreme Court has held that this means that all students are entitled to a comparatively equal opportunity to receive a proper education.<sup>46</sup> In the Court's landmark decision in *Brown v. Board of Education*, the Supreme Court noted that "education is perhaps the most important function of state and local governments . . . it is the very foundation of good citizenship . . . it is

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<sup>39</sup> *Id.* at 906.

<sup>40</sup> *See id.* at 905-07.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>44</sup> *Id.* at 30.

<sup>45</sup> U.S. CONST. amend. XIV, § 1.

<sup>46</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>47</sup> Although the *Rodriguez* Court took care to note that this statement from *Brown* does not mean that the quality of the education received by all students must be precisely equal regardless of a school district’s size, socio-economic makeup, and so on, the Court held that when education is provided by a state, all of that state’s students do have the right to an equal opportunity to receive some basic level of education.<sup>48</sup>

The Court has further held that inequality along racial lines in the ability to receive an equal opportunity to such a basic level of education may be perpetuated by the policies or practices of governments and school districts.<sup>49</sup> Adherence to certain policies or practices, “with full knowledge of the predictable effects of such adherence upon [different races] in a school system,” should be taken into account when assessing whether a school’s policies or procedures produce a disparate impact among its students in violation of the Equal Protection Clause.<sup>50</sup>

As such, although the United States Supreme Court has held that there is no fundamental right to an education, the Supreme Court has essentially recognized that, similar to the goals of the education article of the New York State Constitution, under the Equal Protection Clause of the United States Constitution, the opportunity to receive a basic level of education that enables students to become productive members of society may not differ along racial or other protected grounds.<sup>51</sup> Although virtually all educators, school administrators, and government officials are likely to agree with such a statement, inner-city school districts around the country have undertaken markedly different approaches in an attempt to ensure that this opportunity exists for all students.

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

<sup>48</sup> *Rodriguez*, 411 U.S. at 28.

<sup>49</sup> *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979) (holding that a school district’s adherence to certain policies or practices that it knows produce a disparate impact along racial lines among its students is unconstitutional).

<sup>50</sup> *See id.*

<sup>51</sup> *See id.* at 460.



## II. ZERO TOLERANCE, SUSPENSIONS, AND POLICE OFFICERS IN SCHOOLS

Traditionally, many large, inner-city public school districts have followed a very strict model of discipline that calls for zero tolerance for many infractions and mandatory suspensions and expulsions for certain offenses.<sup>52</sup> Initially, zero tolerance policies were utilized primarily as a means of demonstrating how seriously school administrators dealt with cases of students possessing weapons on school grounds.<sup>53</sup> However, zero tolerance policies and the accompanying suspensions are now commonly utilized by educators and school administrators as an efficient means of addressing numerous other disciplinary infractions, both violent and non-violent in nature.<sup>54</sup> In New York City Public Schools, for example, the number of students suspended rose almost two-fold in the ten years after the implementation of zero tolerance policies. Additionally, during that period the New York City district broadened the range of misconduct for which it issued suspensions.<sup>55</sup> For instance, disciplinary issues that may have previously resulted in a “slap on the wrist,” such as minor aggressive physical contact with another student or using profane language towards a teacher, may, under the tougher zero tolerance model of school discipline, commonly result in the offending student being suspended.<sup>56</sup>

Some studies have suggested that this broad, strict mode of discipline in schools has failed many already vulnerable students by removing them from the educational environment and the supportive structure of the school community.<sup>57</sup> These studies suggest this removal perpetuates the student’s likelihood of engaging in disruptive or criminal behavior.<sup>58</sup> Recent studies also allege that the presence of school resource officers in schools, who are frequently armed and possess full police powers, increases the probability that a student will be arrested for an infraction for which, without the involvement of a

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<sup>52</sup> Dominus, *supra* note 10.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See N.Y.C.L.U., *supra* note 10, at 3-4.

<sup>58</sup> Dominus, *supra* note 10.

school resource officer, he would face a comparatively less severe punishment.<sup>59</sup>

Further, some advocates of changing this more traditional model of school discipline argue that these strict methods of discipline—most notably suspensions—disproportionally affect minority students over their white peers.<sup>60</sup> For example, a 2011 study by the New York Civil Liberties Union found that in New York City Public Schools, African-American students served fifty-three percent of the suspensions, while comprising only thirty-three percent of the student body.<sup>61</sup> This study also found that African-American students on average served longer suspensions, and were statistically more likely to be suspended for non-violent infractions, such as profanity or insubordination.<sup>62</sup>

Proponents of moving away from strict disciplinary methods argue that these methods are so devastating to affected students because the moment a student becomes involved in such a school disciplinary system that student's probability of being involved in the criminal justice system in the future increases exponentially.<sup>63</sup> For example, a 2000 report on school discipline and the effects of zero tolerance policies noted that, during a one-year period in Los Angeles, "eighty-five percent of all daytime crimes were committed by truant youths."<sup>64</sup> Further, the same report noted that approximately sixty-eight percent of the nation's prison population were high school dropouts.<sup>65</sup> Therefore, critics of the traditional system of discipline argue that rather than helping to prevent future involvement of students in further school disciplinary actions and the criminal justice system, these more traditional methods of discipline actually all but

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* ("Other studies show that suspensions are not just ineffective but inequitable, as students of color are more likely than white ones to be suspended for the same behaviors. In New York City, black students made up only 30 percent of all students from 1999 to 2009 but accounted for 50 percent of the suspensions, according to a N.Y.C.L.U. report."); N.Y.C.L.U., *supra* note 10, at 3, 18-19.

<sup>61</sup> N.Y.C.L.U., *supra* note 10, at 3, 18-19.

<sup>62</sup> *Id.*

<sup>63</sup> Bethany J. Peak, *Militarization of School Police: One Route on the School-to-Prison Pipeline*, 68 ARK. L. REV. 195, 220-21 (2015).

<sup>64</sup> OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES, ADVANCEMENT PROJECT, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY 13, 56, n.44 (2000).

<sup>65</sup> *Id.* at 56, n.45.

guarantee such involvement.<sup>66</sup> This, critics argue, is the foundation of the “school-to-prison pipeline.”<sup>67</sup>

In *Goss v. Lopez*, the United States Supreme Court held that, under the Fourteenth Amendment, when a state constitutionally guarantees students the right to a certain level of public education, “[it] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred,” and that the “length and . . . severity” of the punishment should be taken into account when determining whether a student’s constitutional rights have been violated.<sup>68</sup> Critics of strict disciplinary methods point to the supposed “school-to-prison-pipeline” and argue that the severity of zero tolerance policies and high suspension rates serve to effectively deprive an offending student of this constitutional right in a manner that is fundamentally unfair and neither within the letter nor the spirit of the Supreme Court’s decision in *Goss*.<sup>69</sup>

State and local governments are increasingly taking notice of claims that such high numbers of suspensions have profoundly negative effects on the overall education that suspended students end up receiving.<sup>70</sup> In one case, the New York State Attorney General’s Office recently released a report on the high number of suspensions handed down in certain schools within the Syracuse City School District in recent years.<sup>71</sup> The Attorney General’s report criticized the school district for having one of the highest suspension rates in the state, and for suspending African-American students at a rate of almost twice that of white students.<sup>72</sup> The Attorney General’s office noted that on average, more than thirty percent of the Syracuse district’s students are suspended at least once in a given year.<sup>73</sup> As a result of the Attorney General’s investigation, the Syracuse City School District entered into an agreement with the Attorney General’s Office that required the District to revise its student code of

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<sup>66</sup> Peak, *supra* note 63, at 195.

<sup>67</sup> See, e.g., Dominus, *supra* note 10.

<sup>68</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>69</sup> See *id.*

<sup>70</sup> See, e.g., Eliza Shapiro, *Suspensions Down Nearly 32 Percent at City Schools*, POLITICO (Mar. 31, 2016, 1:21 PM), <http://www.politico.com/states/new-york/city-hall/story/2016/03/suspensions-down-nearly-32-percent-at-city-schools-032982>.

<sup>71</sup> Mulder, *supra* note 27.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

conduct.<sup>74</sup> The agreement called for the revised student code of conduct to create and implement disciplinary practices that would significantly reduce the use of suspensions and the involvement of school resource officers to only the most severe and disruptive behaviors.<sup>75</sup>

Similarly, New York City's public schools have recently seen an increased level of attention paid to the noticeably high number of suspensions and their disparate impact according to a student's race.<sup>76</sup> Even the federal government, under the Obama administration, has published guidelines and resources for dealing with this perceived issue, and other inner-city school districts around the country, including those in Los Angeles and Chicago, have recently taken notice of the high number of suspensions received for disciplinary infractions by minority students.<sup>77</sup> When discussing alternatives to suspensions and other strict disciplinary measures, these districts have pointed to the effects that such suspensions are purported to have on the probability that those minority students will end up in the criminal justice system as adults.<sup>78</sup> This concern has led to a new system of discipline with a goal that minor infractions, such as shoving another student or refusing to comply with a teacher's request to do something, are now no longer to be met with traditional punitive disciplinary measures such as zero tolerance and the accompanying suspensions.<sup>79</sup>

### III. RESTORATIVE JUSTICE AND ITS IMPACT ON THE OVERALL EDUCATIONAL ENVIRONMENT

In response to the above criticisms that some inner-city, minority students are being disproportionality affected by the traditional "zero tolerance policy" approach to school discipline, many inner-city school districts across the country have implemented the "restorative justice" model of school discipline in its place.<sup>80</sup> The restorative jus-

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Shapiro, *supra* note 28.

<sup>77</sup> *C.f.* Heather MacDonald, *Violence in the Halls, Disorder in the Malls*, CITY-JOURNAL (Dec. 29, 2016), <http://www.city-journal.org/html/violence-halls-disorder-malls-14920.html>; Teresa Watanabe et al., *Why some LAUSD teachers are balking at a new approach to discipline problems*, THE L.A. TIMES (Nov. 7, 2015), <http://www.latimes.com/local/education/la-me-school-discipline-20151108-story.html>; Sperry, *supra* note 13.

<sup>78</sup> *Id.*

<sup>79</sup> Sperry, *supra* note 13.

<sup>80</sup> *See, e.g.*, Brodsky, *supra* note 3.

tice model is best characterized as a social justice take on school discipline that aims to keep the offending student in the classroom so as not to disrupt his education.<sup>81</sup> Instead, restorative justice calls for bringing together the offenders and their victims, and forging a common understanding through meetings and discussions between the parties.<sup>82</sup> Under restorative justice, punitive disciplinary measures, and in particular suspensions and the involvement of school resource officers, are to be used only as an absolute last resort for serious disciplinary infractions.<sup>83</sup>

Many schools that implemented the restorative justice approach to discipline have reported a significant decrease in the number of suspensions handed out to students.<sup>84</sup> However, a large number of parents and teachers in these schools claim that this new approach has actually caused the overall classroom environment to worsen.<sup>85</sup> These parents and teachers report that the need to make schools appear safer because of outside monitoring, and the resulting restorative justice disciplinary model, is creating a classroom environment that makes it prohibitively difficult for teachers to manage disruptive students, and, therefore, for the disruptive students' peers to learn effectively.<sup>86</sup>

In inner-city school districts that have implemented the restorative justice model, it has repeatedly been alleged that students caught using illegal substances, stealing, and even physically attacking someone have not been removed from the classroom, suspended, or otherwise faced any form of punitive disciplinary action.<sup>87</sup> Instead, under restorative justice, these disruptive and often violent students are typically "sent to a talking circle . . . where they can discuss their feelings."<sup>88</sup>

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<sup>81</sup> See N.Y.C.L.U., *supra* note 10, at 3-4.

<sup>82</sup> See, e.g., Brodsky, *supra* note 3.

<sup>83</sup> Paul Riede, *Syracuse Schools Chief Sharon Contreras on Discipline: 'Changing the Culture is Difficult'*, SYRACUSE.COM (Jan. 30, 2014, 7:20 AM), [http://www.syracuse.com/news/index.ssf/2014/01/syracuse\\_schools\\_chief\\_sharon\\_contreras\\_on\\_discipline\\_changing\\_the\\_culture\\_is\\_di.html](http://www.syracuse.com/news/index.ssf/2014/01/syracuse_schools_chief_sharon_contreras_on_discipline_changing_the_culture_is_di.html).

<sup>84</sup> See, e.g., Julie McMahon, *From No Tolerance to Restorative Justice: LA Teachers Grapple with New Discipline Policy*, SYRACUSE.COM (Nov. 13, 2015, 4:27 PM), [http://www.syracuse.com/schools/index.ssf/2015/11/from\\_no\\_tolerance\\_to\\_restorative\\_justice\\_la\\_teachers\\_grapple\\_with\\_new\\_discipline.html](http://www.syracuse.com/schools/index.ssf/2015/11/from_no_tolerance_to_restorative_justice_la_teachers_grapple_with_new_discipline.html).

<sup>85</sup> Sperry, *supra* note 13.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

In Chicago, restorative justice practices have led to students barely suffering any consequences “for infractions as serious as groping a teacher [or] bringing hollow-point bullets to class.”<sup>89</sup> A recent survey conducted by the Syracuse City School District’s teachers union suggested that under restorative justice, teachers now feel as though they cannot control their classrooms.<sup>90</sup> Teachers surveyed overwhelmingly stated that they faced high numbers of threats and violent behaviors, and that they felt helpless in dealing with them.<sup>91</sup> Specifically, over fifty percent of teachers in Syracuse reported that they had been harassed or threatened by students, and thirty-six percent of teachers reported that a student had physically assaulted them at least once.<sup>92</sup> Some of the physical assaults were so serious that teachers even reported broken bones and hospitalizations.<sup>93</sup>

This trend of significant increases in violent and disruptive behavior is almost identical in inner-city schools nationwide that have decided to utilize a restorative justice approach to discipline.<sup>94</sup> In St. Paul, Minnesota, assaults on teachers increased by thirty-six percent in the one-year period following St. Paul Public Schools’ implementation of a restorative justice style approach; in 2015, teachers in St. Paul even threatened to strike if the school district continued to ignore the dramatic rise in violence.<sup>95</sup> In the Los Angeles Unified School District, teachers complain that they are being bullied and threatened by students, and that these students admittedly fear no reprisals because of the lack of serious consequences under the school district’s new restorative justice disciplinary approach.<sup>96</sup> One Los Angeles teacher noted that “[w]e now have a ‘restorative justice’ counselor, but we still have the same problems . . . [k]ids aren’t even suspended for fights or drugs.”<sup>97</sup> Sixty-five percent of teachers in the neighboring urban, heavily minority Santa Ana school district have stated that the new, more lenient approach is not working and has actually made the class-

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<sup>89</sup> *Id.*

<sup>90</sup> McMahon, *supra* note 26.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See Sperry, *supra* note 13.

<sup>95</sup> See Katherine Kersten, *Federal Racial Discipline Quotas Create Chaos in St. Paul Schools*, THE FEDERALIST (Jul. 29, 2016), <http://thefederalist.com/2016/07/29/federal-racial-discipline-quotas-create-chaos-in-st-paul-schools/>.

<sup>96</sup> See Sperry, *supra* note 13.

<sup>97</sup> *Id.*

room environment prohibitively hostile.<sup>98</sup> As such, in school districts across the country, restorative justice has resulted in the inverse of one of the main problems it was intended to address: instead of suspensions and other more punitive, traditional methods of discipline being used for almost all offenses including minor infractions, the almost entirely non-punitive restorative justice model is now used for all offenses, including seriously disruptive and violent infractions.<sup>99</sup>

Additionally, although some inner-city school districts that have implemented restorative justice or similar approaches have experienced a noticeable decrease in suspensions, many teachers, parents, and students see this as being essentially a false positive.<sup>100</sup> Many school administrators have been accused of blatantly ignoring disciplinary infractions, allegedly in an attempt to make their schools appear to be safer than they actually are so as to comply with government monitoring requirements or standards.<sup>101</sup> Often, the infractions that are ignored involve serious acts of bullying and violence.<sup>102</sup>

These new ultra-lenient disciplinary goals and practices have frequently left teachers feeling that they cannot control disruptive and violent students, and have left many inner-city school students simply too afraid to go to school.<sup>103</sup> This non-punitive model of discipline, instead of maintaining a structured, orderly learning environment, effectively serves to empower a minority of disruptive, even violent students at the expense of fellow students who want to learn.<sup>104</sup>

According to the President of the Syracuse Teachers Association, the restorative justice model and its inherent lack of traditional structured, punitive discipline has created a “systemic inability to administer and enforce consistent consequences for violent and highly disruptive student behaviors [that] put[s] students and staff at risk and makes quality [educational] instruction impossible.”<sup>105</sup> Teachers’ unions in Indiana, California, and Iowa have all lodged similar complaints that their districts’ new restorative justice policies are making

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<sup>98</sup> *Id.*

<sup>99</sup> *See, e.g., id.*

<sup>100</sup> *See, e.g., id.*

<sup>101</sup> Complaint, *supra* note 8, at 4-6, 26; *See, e.g.,* Brodsky, *supra* note 3.

<sup>102</sup> Sperry, *supra* note 13.

<sup>103</sup> Complaint *supra* note 8, at 4, 26; McMahan, *supra* note 26.

<sup>104</sup> Sperry, *supra* note 13.

<sup>105</sup> *Id.*

it prohibitively difficult to instruct their students.<sup>106</sup> According to one educator in Philadelphia's public schools, disruptive students now control the classrooms, and act out with impunity.<sup>107</sup> "The less [teachers] are willing or able to respond, the more [the disruptive students] will control the classroom, the hallways and the school," this Philadelphia educator stated in testimony before the US Commission on Civil Rights.<sup>108</sup> This educator even reported being told by one student "I'm going to torture you . . . I'm doing this because I can't be removed."<sup>109</sup> Countless similar incidents of threats, violence, and other disruptions that lead to teachers' inability to properly instruct their students have been reported by inner-city school teachers across the United States after their school districts have done away with traditional, structured discipline in favor of a restorative justice model.<sup>110</sup>

The above studies, statistics, and first-hand reports from educators show that restorative justice, although commendable in its overall goals, has in many cases resulted in a detrimental impact on the overall learning environment for all students in an affected classroom.

#### IV. PIPELINE TO PRISON FOR SOME VS. PIPELINE TO NOWHERE FOR ALL

In at least one city, the disruptive, lawless environment created by the lack of proper discipline under a restorative justice model has caused parents and students to take legal action.<sup>111</sup> A group of New York City public school parents and students recently filed a lawsuit against the New York City Department of Education, alleging that the school district's purposeful lack of meaningful and effective disciplinary measures, and the resulting continued presence of disruptive students in the classroom, has created a prohibitively difficult learning environment.<sup>112</sup> These students and parents argue that by refusing to remedy such an environment, the school district is depriving the

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<sup>106</sup> See, e.g., Emmanuel Felton, *More Teachers' Union Leaders Come Out Against New Student-Discipline Policies*, EDUCATION WEEK (Dec. 16, 2016), [http://blogs.edweek.org/edweek/teacherbeat/2016/12/more\\_teachers\\_union\\_leaders\\_co.html?cmp=eml-enl-tu-news3](http://blogs.edweek.org/edweek/teacherbeat/2016/12/more_teachers_union_leaders_co.html?cmp=eml-enl-tu-news3).

<sup>107</sup> Sperry, *supra* note 13.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Complaint, *supra* note 8.

<sup>112</sup> *Id.*



affected students of the right to a basic education that they are guaranteed under the New York State Constitution.<sup>113</sup>

These parents and students allege in their complaint that the New York City school district's lack of strict disciplinary enforcement "perpetuate[s] an educational system that is characterized by chronic and deliberate indifference to the pervasive violence, intimidation and harassment experienced by their students."<sup>114</sup> That is, by attempting to avoid sending a handful of students down the "pipeline to prison" through restorative justice practices and the underreporting of and refusal to address disciplinary infractions, the New York City school system has basically created a "pipeline to nowhere" for all students in the affected classrooms.<sup>115</sup>

This suit brought in New York City is critically important because it is in many respects, the first of its kind to allege that a school district has fostered a disruptive, violent classroom environment that has risen to a level where students' constitutional rights are being trampled.<sup>116</sup> Regardless of how the court eventually decides this case, the result of this suit should have a widespread impact on education and students' legal rights in inner-city school districts.<sup>117</sup> An analysis of several court decisions concerning education and equal protection, however, suggests that this current action should be resolved in favor of the plaintiff students and parents, and further that in this and similar situations in other cities described above, restorative justice practices in favor of some may often produce unconstitutional results for all.

In the matter of *Campaign for Fiscal Equity, Inc. v. State*, an organization representing the interests of New York City school district parents and students brought suit against the district in a New York State court.<sup>118</sup> The suit alleged that overcrowded classrooms, unqualified teachers, and decrepit school facilities and materials violated the students' right to a sound, basic education guaranteed under the New York State Constitution.<sup>119</sup> This, according to an earlier iter-

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 8.

<sup>115</sup> Complaint, *supra* note 8, at 6-7; Sperry, *supra* note 13.

<sup>116</sup> See Michelle Parthum, *Using Litigation to Address Violence in Urban Public Schools*, 88 WASH. U. L. REV. 1021, 1037-40 (2011).

<sup>117</sup> Jeremiah Kittredge, *Suing to Make NYC Schools Safe – Because it's the Only Way Left to Make the City Listen*, N.Y. POST (Apr. 19, 2016), <http://nypost.com/2016/04/19/suing-to-make-nyc-schools-safe-because-its-the-only-way-left-to-make-the-city-listen/>.

<sup>118</sup> *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003).

<sup>119</sup> *Id.* at 909-19.

ation of the same suit, also resulted in a disparate impact in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.<sup>120</sup>

In *Campaign for Fiscal Equity*, the New York State Court of Appeals held that the language of the New York State Constitution entitles schoolchildren in New York to a sound, basic education.<sup>121</sup> In its holding, the court noted that an integral part of such a basic education is “minimally adequate” teaching methods and educational facilities.<sup>122</sup> Inadequacy may be shown by establishing a causal link between the school district’s alleged action or inaction and the demonstrably poor education received by students.<sup>123</sup>

Intentionally not removing disruptive and even violent students from a classroom has been demonstrated to negatively impact the education received by that student’s peers.<sup>124</sup> As discussed above, educators in numerous inner-city school districts claim that when they are unable to discipline disruptive students, they are unable to manage their classroom and effectively instruct that disruptive student’s peers.<sup>125</sup> It has been repeatedly alleged across these various inner-city school districts that the failure, or rather inability, of teachers to control their classroom is a direct result of the new restorative justice approach to discipline being implemented in these schools, and the desire of school administrators to make their schools appear safer in the face of government scrutiny.<sup>126</sup>

The court’s rationale in *Campaign for Fiscal Equity* suggested that teaching methods were subject to a type of “adequacy test,” to determine whether they met the basic level of education that is guaranteed to all students by the constitution of New York State.<sup>127</sup> If teaching methods, including the overall educational environment provided by the school district’s administration, were such that students were prevented from receiving this basic level of education, then, the court held, they were in violation of the education article in the New York State Constitution.<sup>128</sup>

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<sup>120</sup> *Campaign for Fiscal Equity, Inc. v. State*, 616 N.Y.S.2d 851, 853 (1994).

<sup>121</sup> *Campaign for Fiscal Equity, Inc.*, 100 N.Y.2d at 902, 905.

<sup>122</sup> *Id.* at 907.

<sup>123</sup> *Id.* at 919.

<sup>124</sup> *See* Complaint, *supra* note 8, at 6-7, 83-85.

<sup>125</sup> *See, e.g.,* McMahon, *supra* note 26.

<sup>126</sup> *See, e.g.,* Sperry, *supra* note 13; Complaint, *supra* note 8, at 2-7.

<sup>127</sup> *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 905 (2003).

<sup>128</sup> *Id.* at 905-07.

Both quantitative and qualitative evidence suggests that newly implemented restorative justice methods of school discipline are leading to increased levels of school violence and other serious disruptions.<sup>129</sup> These incidents of violence and disruptions are having a deleterious effect on the overall educational environment such that students are being denied the opportunity to receive the basic level of education to which they are constitutionally entitled.<sup>130</sup> Statistically, violence is on the rise in districts that have implemented a restorative justice model.<sup>131</sup> In the Los Angeles Unified School District, while the number of expulsions and suspensions has gone down, fights and other incidents of violence have actually increased over twenty percent between the 2013-2014 and 2014-2015 school years.<sup>132</sup> In New York City, recent statistics show school violence is at a record high, despite the school district's full court press with restorative justice.<sup>133</sup> The School Violence Index, which the state of New York uses to track the number and seriousness of violent incidents in all of the state's public schools, rose by twenty-two percent to a record high between the 2013-2014 and 2014-2015 school years.<sup>134</sup> The New York State Department of Education reports that 2015 was the most violent year on record in the history of New York City public schools.<sup>135</sup> A breakdown of the current levels of violence in New York City Schools is frighteningly illustrative, as the current levels of violent incidents in the city's schools mean that an act of violence occurs in the schools once every 4.5 minutes, and a weapon is recovered once every 28.4 minutes.<sup>136</sup>

Further, in line with the restorative justice model's radical departure from traditional methods of discipline, New York City School District officials, at the direction of the city's mayor, have recently begun taking steps to reduce the involvement of school resource officers and other law enforcement personnel when serious crimes are

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<sup>129</sup> See, e.g., Complaint, *supra* note 8, at 2-8, 12-14, 83-85.

<sup>130</sup> *Id.*

<sup>131</sup> Mike Szymanski, *How is the Largest School Police Force in the Nation Keeping LA's Children Safe?* LA SCHOOL REPORT (Oct. 24, 2016), <http://laschoolreport.com/how-is-the-largest-school-police-force-in-the-nation-keeping-las-children-safe/>.

<sup>132</sup> *Id.*

<sup>133</sup> FAMILIES FOR EXCELLENT SCHOOLS, SAFETY LAST: NEW YORK CITY'S PUBLIC SCHOOLS ARE MORE DANGEROUS THAN EVER 2 (2016).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

committed by students on school grounds.<sup>137</sup> However, some allege that these steps are simply an attempt to make the city's schools appear safer than they really are.<sup>138</sup> The head of the local law enforcement officers' union alleges that the school district has relaxed its drug enforcement policies to an unacceptably lenient level.<sup>139</sup> For example, a New York City high school student was recently caught on school grounds with a distribution-sized quantity of marijuana and other drug paraphernalia.<sup>140</sup> Instead of being arrested on felony drug charges, this student was merely issued a "summons"—the equivalent of a traffic ticket.<sup>141</sup>

Additional evidence suggests that restorative justice policies are not producing any better results in other inner-city school districts that have recently implemented the disciplinary model.<sup>142</sup> As discussed above, since the Syracuse City School District switched to a restorative justice model of discipline, many of its teachers have alleged that they are not able to effectively instruct their students.<sup>143</sup> Further, fifty percent of Syracuse's teachers do not feel that the city school district has made violence prevention a priority, and thirty percent feel that the district has actually tried to downplay or deter reporting of incidents of violence and other serious disruptions.<sup>144</sup> Although no statistics are available, teachers in the Los Angeles Unified School District have recently expressed similar concerns regarding a lack of support from their school district's administrators.<sup>145</sup> Many parents, students, and educators now allege that this violent and disruptive behavior, and the lack of proper attention paid to such

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<sup>137</sup> See, e.g., Carl Campanile, *Student Busted with Bags of Pot at High School Gets Wrist Slap*, N.Y. POST (Oct. 5 2016), <http://nypost.com/2016/10/05/student-busted-with-bags-of-pot-at-high-school-gets-wristslap/> [hereinafter Campanile, *Student Busted with Bags of Pot*]; Carl Campanile, *De Blasio Does Not Want Anyone to See Pictures of Guns, Drugs Seized in Schools*, N.Y. POST (Oct. 8, 2016), <http://nypost.com/2016/10/08/de-blasio-doesnt-want-anyone-to-see-pics-of-guns-drugs-seized-in-schools/> [hereinafter Campanile, *De Blasio Does Not Want Anyone to See*].

<sup>138</sup> See Campanile, *De Blasio Does Not Want Anyone to See*, *supra* note 137.

<sup>139</sup> See Campanile, *Student Busted with Bags of Pot*, *supra* note 137.

<sup>140</sup> *Id.*

<sup>141</sup> *See id.*

<sup>142</sup> See, e.g., McMahon, *supra* note 26.

<sup>143</sup> *Id.*

<sup>144</sup> *See id.*

<sup>145</sup> See Watanabe et al., *supra* note 77.

behavior under the restorative justice model, have made it impossible for teachers to appropriately instruct students in the classroom.<sup>146</sup>

If a student's educational environment is subject to some type of adequacy test, as the court in *Campaign for Fiscal Equity* suggests, then it should follow that an intentional act or omission by educators or school administrators that has the direct effect of negatively impacting a student's education to the point where that student cannot learn is inherently inadequate. As such, one could conclude that in states that provide for the right to a basic education in their state constitution, such practices by school administrators and teachers must be unconstitutional. These practices must be unconstitutional because the evidence strongly suggests that these practices are resulting in a classroom environment that is prohibitively disruptive and often violent, resulting in teachers' inability to instruct their students.

As noted above, in *Columbus Board of Education v. Penick*, the United States Supreme Court stated that a school district's adherence to certain policies or practices, "with full knowledge of the predictable effects of such adherence upon [different races] in a school system" should be considered in assessing whether that district's policies produce a disparate impact among its students in violation of the Equal Protection Clause.<sup>147</sup> As the recent complaint filed by parents and students against the New York City public school system demonstrates, the facts strongly suggest that this district's new restorative justice model of school discipline is resulting in increasingly violent and disruptive effects on the classroom environment, and that those effects are disproportionately felt in schools with large populations of minority students.<sup>148</sup> Additionally, in other districts that have implemented the restorative justice model, school administrators' knowledge of, and disregard for, these increasingly violent and disruptive classroom environments may be inferred by their comments and actions.<sup>149</sup> In the Syracuse City School District, despite reports of "violent incidents in schools almost on a daily basis," the President of

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<sup>146</sup> See Complaint, *supra* note 8, at 2-8; Sperry, *supra* note 13; McMahon, *supra* note 26.

<sup>147</sup> See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979) (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 255 (S.D. Ohio 1977)).

<sup>148</sup> See Complaint, *supra* note 8, at 2-8; Sperry, *supra* note 13; McMahon, *supra* note 26.

<sup>149</sup> See, e.g., Felton, *supra* note 106; Julie McMahon, *It's Normal to Want to Kill Each Other Now, School Discipline Expert Tells Syracuse*, SYRACUSE.COM (Dec. 24, 2015, 7:53 AM), [http://www.syracuse.com/schools/index.ssf/2015/12/discipline\\_expert\\_tells\\_syracuse\\_community\\_to\\_step\\_up.html](http://www.syracuse.com/schools/index.ssf/2015/12/discipline_expert_tells_syracuse_community_to_step_up.html); Campanile, *De Blasio Does Not Want Anyone to See*, *supra* note 137.

the Syracuse Teachers Union recently claimed that “the [Syracuse City Schools district office] is discouraging [the district’s teachers] from administering tough consequences for disruptive behavior.”<sup>150</sup> Further, when confronted with statistics and incidents that strongly suggested the district’s new restorative justice model had actually increased violence and disruptions in its classrooms, a top school administrator in Syracuse remarked that “it is normal [for teachers and students] to want to kill each other [under the restorative justice approach]” and that such a feeling could last for many years.<sup>151</sup> The top administrator added that during that time period the effects of the policy would be felt disproportionately by the district’s “[minority] and disabled children,” while the restorative justice model is implemented.<sup>152</sup> In New York City’s public school system, recent developments paint the same picture of indifference and inaction in several New York City Schools heavily populated by minority students.<sup>153</sup> The head of the union representing New York City’s school safety agents recently criticized New York City Mayor Bill de Blasio’s office for allegedly directing school officials to take a more lenient approach to serious crimes and disruptions committed on school grounds.<sup>154</sup>

An analysis of these statements and actions by government officials and school administrators under the standard outlined by the United States Supreme Court in *Penick*, above, strongly suggests that the continuation of restorative justice methods of discipline in these and similarly affected districts may be unconstitutional under the Fourteenth Amendment.<sup>155</sup> In each instance described above, school officials are intentionally continuing to pursue a course of action—the restorative justice model of discipline—that they know, or should know, will be felt disproportionately in schools populated largely by minority students.<sup>156</sup> As such, although these officials may have implemented restorative justice practices in a good faith effort to address the disproportionately large number of minority students fac-

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<sup>150</sup> See Riede, *supra* note 83.

<sup>151</sup> See McMahon, *supra* note 149.

<sup>152</sup> *Id.*

<sup>153</sup> Campanile, *De Blasio Does Not Want Anyone to See*, *supra* note 137.

<sup>154</sup> *Id.*

<sup>155</sup> See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979).

<sup>156</sup> See *id.*; see also, e.g., McMahon, *supra* note 149; Campanile, *De Blasio Does Not Want Anyone to See*, *supra* note 137.

ing suspensions and other serious disciplinary measures,<sup>157</sup> the implementation of the restorative justice model has, in effect, expanded the disparate impact problem.<sup>158</sup> The restorative justice model expands the disparate impact on minority students by affecting not just the offending student, but also, as a result of restorative justice practices keeping the offending student in the classroom, the offending student's classmates, whose learning process continues to be disrupted, and who are, on average, also of minority races.<sup>159</sup> Therefore, because these school officials are intentionally pursuing a restorative justice disciplinary policy that disproportionately impacts minority students, the Supreme Court's reasoning in *Penick* strongly suggests that such actions by these officials are unconstitutional.

At first glance an analysis of this issue under the United States Supreme Court's decision in *Goss v. Lopez* may appear to weigh on the side of a restorative justice approach as an effort to reduce high numbers of suspensions among minority students.<sup>160</sup> However, further analysis under *Goss* suggests that, as discussed above, when such an approach results in effectively denying an offending student's fellow classmates any reasonable ability to obtain a basic level of education by creating a prohibitively violent or disruptive classroom environment, that approach cannot be the answer.<sup>161</sup> The Supreme Court held in *Goss* that the "Due Process Clause . . . forbids arbitrary deprivations of liberty" and that although the "authority possessed by the [s]tate to prescribe and enforce standards of conduct in its schools [is] concededly very broad . . . [it] must be exercised consistently with constitutional safeguards."<sup>162</sup> The *Goss* Court also held that, when a state's constitution provides for a right to an education, "the [s]tate is constrained to recognize a student's legitimate entitlement to a public

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<sup>157</sup> See Julie McMahon, *Syracuse Teachers Challenged to 'Study Their Students' During Tense Shift in Discipline*, SYRACUSE.COM (Mar. 10, 2016, 12:33 PM), [http://www.syracuse.com/schools/index.ssf/2016/03/syracuse\\_teachers\\_challenged\\_to\\_study\\_their\\_students\\_during\\_tense\\_shift\\_in\\_disci.html](http://www.syracuse.com/schools/index.ssf/2016/03/syracuse_teachers_challenged_to_study_their_students_during_tense_shift_in_disci.html).

<sup>158</sup> See McMahon, *supra* note 26; Paul Sperry, *You're Now a Racist if You Say Schools Need to be Safer*, N.Y. POST (Apr. 10, 2016), <http://nypost.com/2016/04/10/youre-now-a-racist-if-you-say-schools-need-to-be-safer/>.

<sup>159</sup> See, e.g., Sperry, *supra* note 158.

<sup>160</sup> *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975) (holding that lengthy suspensions *may* rise to the level of unconstitutionality when a state provides a student with the right to an education).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 574.

education as a [constitutionally protected] property interest.”<sup>163</sup> As such, a plain reading of these statements by the *Goss* Court indicates that a state is constitutionally bound to protect the educational rights of *all* of its students, not just those facing disciplinary measures.<sup>164</sup> And, if the evidence strongly suggests that new, more lenient disciplinary standards prescribed and enforced by a school district are causing a prohibitively disruptive and often violent classroom environment, making it impossible for an offending student’s classmates to receive even a basic level of education, then that school district cannot be protecting the education rights of *all* of its students.<sup>165</sup> Therefore, under the language of the Court’s holding in *Goss*, that school district’s actions are likely unconstitutional.<sup>166</sup>

Considering the forgoing, although the traditional model of school discipline, particularly the heavy reliance on suspensions, is not perfect by any stretch of the imagination, on balance this traditional approach is likely more constitutionally sound than the alternative restorative justice model, due to the negative impact that the restorative justice often has on the overall classroom learning environment. For example, as discussed above, the traditional method of suspending a student for wrongful conduct will, in all likelihood, affect only that particular student, future possible negative effects on society of a poorly educated citizen notwithstanding. However, when that offending student is allowed to remain in the classroom under the guise of restorative justice, and where that student continues to cause serious disruptions, it is not the offending student but often all of the offending student’s classmates who are affected, in that they are unable to receive the basic level of education to which they are entitled. Therefore, the “footprint” of possible unconstitutionality is far smaller when only the offending student is affected by a school’s disciplinary policy. As such, when considering the impact of disciplinary measures such as suspension on an offending student, we must view that student’s right to an education under his state’s constitution, as well as his right of equal access to that education under the Equal Protection Clause of the Fourteenth Amendment, as qualified rights, similar to how many

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<sup>163</sup> *Id.* at 573-74.

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).



other basic rights are viewed.<sup>167</sup> For the sake of the offending student's classmates, this right should be viewed as forfeitable if the offending student's behavior creates an environment where the education of that student's peers becomes prohibitively difficult. If the situation is viewed from this angle, depriving an offending student of their educational rights through the use of traditional methods of school discipline should still pass constitutional muster under the reasoning employed by the United States Supreme Court in *Rodriguez* and *Goss*—two of the Court's key decisions on students' educational rights.<sup>168</sup>

According to the tests employed in *Rodriguez* and *Goss*, school disciplinary measures may be considered constitutional if such measures reasonably further the legitimate state interest in providing a basic level of education to *all* students, and contain adequate safeguards so that discipline is not handled in an arbitrary manner.<sup>169</sup> In using traditional methods of school discipline under the above circumstances, the first element of this test, the state's interest in providing a basic level of education to all students, is easily satisfied.<sup>170</sup> The second element, adequate safeguards, is not as self-evident, however, can still be met when a school district employs traditional methods of discipline under the above circumstances.<sup>171</sup> One of the Court's main holdings in *Goss* was that an offending student should be provided with an explanation of the reasons for the disciplinary action against him and afforded an opportunity to challenge his punishment or explain his actions.<sup>172</sup> Thus, so long as a school district provides this, its disciplinary methods should pass this test.

Further, even the United States Supreme Court has acknowledged that in the educational environment, there is often no other possible alternative to suspensions as a disciplinary tool.<sup>173</sup> Therefore, although restorative justice may be a viable approach for a small num-

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<sup>167</sup> For example, one may forfeit his right to life or liberty when he commits a serious crime. Similarly, a student should forfeit his right to an education in his state when he commits serious violations of school rules.

<sup>168</sup> See *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

<sup>169</sup> See *Goss*, 419 U.S. 565 at 573-74; *Rodriguez*, 411 U.S. 1 at 44.

<sup>170</sup> See *Rodriguez*, 411 U.S. 1 at 44.

<sup>171</sup> See *Goss*, 419 U.S. 565 at 573-74.

<sup>172</sup> *Id.* at 579.

<sup>173</sup> *Id.* at 580 ("Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device.").

ber of insignificant, non-violent offenses,<sup>174</sup> the facts strongly suggest that handling serious disruptions and violence in schools through the use of suspensions and other traditional methods of school discipline is, although not an easy or perfect solution, overall, the most effective approach “to a problem for which there is no perfect solution.”<sup>175</sup>

## CONCLUSION

Not sending disruptive and even violent students down the “school-to-prison pipeline” is a laudable goal, and society would certainly benefit from having fewer children growing up to become professional criminals. As such, in theory the restorative justice model of discipline may have some merit in the school environment. However, these disruptive students cannot be saved at the expense of the education of an even larger number of their classmates, which is what is happening in many of our nation’s inner-city schools that have adopted the restorative justice model. In such situations, and where the students’ state has provided for the right to an education in its constitution, a school district’s restorative justice practices constitute an unconstitutional deprivation of the disruptive students’ classmates right to an education. Further, when such a deprivation by a school district’s restorative justice practices results in a disproportionate effect on minority students, as is often the case in inner-city schools, these practices are likely also unconstitutional under the Equal Protection Clause of the United States Constitution.

Therefore, while restorative justice may serve as a useful supplement to suspensions and other traditional methods of school discipline, from both a common sense and a constitutional standpoint, it cannot be used as a school district’s only method of discipline. Because there is no perfect substitute for traditional methods of discipline such as removing a violent or disruptive student from the classroom, schools must continue to practice and enforce these traditional methods as a means of ensuring that the greatest possible number of students are receiving the basic education to which they are entitled. If our Nation’s school districts, particularly those in our inner-cities,

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<sup>174</sup> See M. Eve Hanan, *A Critique of Restorative Justice and a Proposal for Diversionary Mediation*, 46 N.M.L. REV. 123, 125 (2016) (“As it is currently formulated, restorative justice is a sentencing theory, and one that may be beneficial to our system of criminal justice, but one that does not offer an alternative to that system.”).

<sup>175</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

continue solely down the restorative justice path despite its overwhelmingly negative consequences, violence and disorder in these schools will continue to grow, and the societal goal of ensuring that our students grow up to be productive members of society will suffer greatly as a result.

