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TESTIMONY OF THE NEW YORK CIVIL LIBERTIES UNION

before

THE NEW YORK CITY DEPARTMENT OF EDUCATION

on

**PROPOSED CHANGES TO THE 2010-2011 CITYWIDE STANDARDS OF
INTERVENTION AND DISCIPLINE MEASURES
(THE DISCIPLINE CODE AND BILL OF STUDENTS' RIGHTS AND
RESPONSIBILITIES, K-12)**

June 23, 2010

The New York Civil Liberties Union respectfully submits the following testimony regarding our recommendations for the 2010-2011 Citywide Standards of Discipline and Intervention Measures, hereinafter referred to as the Discipline Code.

With more than 48,000 members, the New York Civil Liberties Union is the foremost defender of civil liberties and civil rights in New York State. For several years, we have been advocating for an end to the School to Prison Pipeline—education and public safety policies and practices, including classroom removals, suspensions, expulsions, arrests and other police tactics, that push students out of school and into the criminal and juvenile justice systems. Through our ongoing work on this issue, we have seen the powerful effects that exclusionary discipline and the criminalization of school infractions have on New York City students. The Pipeline is a significant contributor to

low graduation rates, particularly among students of color, and is an impediment to New York's constitutional right to an education for all people under the age of 21.

We recognize and commend the Department of Education's (DOE's) efforts to engage the New York City advocacy community in building a more positive discipline regime. Positive interventions include an array of tactics for engaging students who misbehave rather than punishing them. Some examples of proven interventions are restorative justice models, peer juries, mediation, and increased access to counseling.

Many of the proposed changes to the 2010-2011 Code are simple edits that will promote positive interventions and hopefully will have a profound impact on the way punishments are used in New York City. For instance, presenting intervention strategies to the left of discipline tactics for listed infractions is a subtle but powerful reinforcement to educators that inclusive and positive methods should be used *before* resorting to exclusionary discipline.

We hope these changes are not merely cosmetic, but signify a commitment on the part of the DOE to shift the culture of New York City schools towards more supportive learning environments. To that end, we ask the DOE to commit to training all members of the school community—pedagogical and administrative, DOE employees and non-DOE employees—on positive interventions and students' rights, and requiring them to adhere to the protocol of using interventions *before* punishments. Without “buy-in” and consistent reinforcement, many schools, and individuals within those schools, will revert to the most expedient and most severe punishments.

This testimony will highlight areas of the Code that should be additionally revised to address the operation of the School to Prison Pipeline in New York City. In addition,

we will make recommendations regarding amending specific infractions for their potential civil liberties violations.

Police Practices

Despite mounting evidence of the failure of this policy, the DOE continues to disclaim responsibility for the training, activities, and misconduct of school safety officers (SSOs). While the DOE invited the NYPD to place officers in schools, it has subsequently denied responsibility for their conduct, their authority in schools, and their relationships with students and teachers. One way the DOE maintains this hands-off school safety policy is by abstaining from any language in the Discipline Code that refers to arrests of students, issuing of criminal summonses for school-based infractions, the use of handcuffs on students in non-emergency situations, or police interventions in student discipline.

It has become apparent that in too many schools, SSOs are involved in every facet of school discipline. NYPD personnel continue to handcuff and arrest children for incidents that arise from the breaking of minor school rules, such as writing on a desk, throwing a temper tantrum in Kindergarten class, trying to enter school too early, violating the dress code, skipping class, being tardy or talking back. As NYPD employees, they act independently of school personnel, often overreacting to student misbehavior, intervening in situations best handled by pedagogical staff (sometimes *despite* the actions of pedagogical staff), and even enforcing rules that are not part of the Discipline Code. The NYCLU in January filed a federal class action lawsuit challenging the NYPD's practice of wrongfully arresting and using excessive force against children in New York City Schools.

The NYCLU urges the DOE to acknowledge and address these issues in the Discipline Code. As the policy document that students and parents are most likely to read and internalize, the Discipline Code should explain the DOE’s policy on the role of SSOs. The NYCLU recommends that this include a clear statement that SSOs are not to enforce school rules. Their participation in positive interventions can and should be encouraged, but their involvement in disciplining young people must be officially discouraged by the DOE—beginning with a clear explanation of their limited roles to students, parents, and school staff via the Code.

Classroom Removals and Suspensions

Exclusionary discipline policies such as suspensions and classroom removals are tremendously disruptive to a student’s academic and social progress. They have been shown to contribute to, rather than reduce, student recidivism (as compared to positive interventions);¹ they interfere with students’ ability to maintain their academic standing; and they increase the likelihood that a student will drop out of school and become involved with the criminal justice system.² Further, the American Psychological Association has found that exclusionary tactics are disproportionately imposed on male students, students of color and students with special needs.³

The DOE can begin to reduce reliance on exclusionary discipline by reducing the number of offenses for which classroom removals, suspensions, and expulsion are available discipline options. In just a few years, the number of infractions for which a

¹ Russell Skiba and M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness* in Evertson and Weinstein, *Handbook of Classroom Management* (Lawrence Erlbaum Associates, 2006) 1063-1077; American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* (2006).

² *Id.*

³ American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* (2006).

child can be suspended has grown to nearly half of all offenses in the Code. The range of discipline options corresponding to each infraction, and the scheme of dividing behaviors into increasing levels, is meaningless in a system where children can be removed from their learning environment for committing the lowest-level infractions. We recommend that the levels in the Discipline Code be revisited in order to reflect a more sensible, gradient response to increasingly serious infractions.

Infraction B35: “Making sexually suggestive comments...or engaging in...physical conduct of a sexual nature...”

Infraction B35 rightly prohibits student-on-student sexual harassment. The NYCLU is concerned, however, that the DOE has inappropriately conflated “making sexually suggestive comments, innuendoes, propositions or similar remarks,” (which includes constitutionally-protected speech) with “engaging in ... physical conduct of a sexual nature.” The draft Code makes no distinction in terms of potential punishment between using sexually-charged language, engaging in age-appropriate displays of affection, and engaging in aggressive physical contact of a sexual nature. Two students kissing in the school yard, a student passing a flirtatious note to a classmate, and a student sexually assaulting another are wildly different situations. Yet, based on this overbroad infraction, all three can be punished by a one-year suspension. In fact, if any of these students were over 17, they could be expelled.

Further, the DOE’s attempt to extend the prohibition to include electronic communications of a sexual nature is violative of students’ First Amendment rights. The constitutional standard for limiting student speech is that the speech must substantially interfere with the school’s mission. The restriction must be tailored narrowly so as not to

unduly infringe on protected (non-disruptive) speech, including students' off-campus speech. When it has no nexus to the school environment, student speech, like that of non-students, enjoys full constitutional protection. In New York City, where cell phones are prohibited from being used or even brought into schools, this prohibition is even more likely to reach students' out-of-school communications.

The NYCLU recommends that DOE correct this infraction to address its failure to differentiate protected expressive conduct from sexual assault and to reflect a commitment to protecting students' free speech rights. First, the DOE should separate this infraction into two separate offenses. One should prohibit *verbal harassment* of a sexual nature and ensure that this behavior triggers counseling and interventions for offenders. This infraction could also reasonably prohibit sexual harassment via electronic messages or images that enter into the school environment and substantially interfere with the school's mission.

The other should address *physical harassment* of a sexual nature, redefining the prohibited conduct so as not to criminalize consensual, age-appropriate displays of affection (particularly considering that students in New York can be up to 21 years of age).

Infractions A37 & B40: “Engaging in cyber-bullying”

If adopted and enforced, the DOE's attempt to police so-called “cyber-bullying” as it is currently drafted will lead to serious infringements of students' First Amendment rights. Cyber-bullying, like all bullying and bias-based harassment, is something schools should address in order to protect students from discrimination. The NYCLU has long been a supporter of the recently-passed Dignity for All Students Act—state legislation

that emphasizes training and positive interventions to address the root causes of bullying. Additionally, we have called upon the DOE to fully implement the substantially similar Dignity in All Schools Act, which was enacted by the New York City Council in 2004 (Local Law 42). Both bills promote training, education, and transparency to reduce instances of bullying. We believe that utilizing exclusionary discipline to punish bullies, and to punish bullying targets for their reactions, is counterproductive and can contribute to anger, frustration, and aggression among students. We hope that the DOE will promote positive interventions, training, and counseling to address this behavior in all its forms.

That said, we are troubled by the DOE's half-hearted inclusion of "cyber-bullying" as an infraction in the 2010-2011 draft Code. Chiefly, we are concerned that DOE's meager attempt at defining this new infraction demonstrates no consideration for the First Amendment. Again, the constitutional standard for limiting student speech is that the speech must substantially interfere with the school's mission. If the communication neither originates nor enters the school environment, and does not substantially interfere with other students' education, the speech enjoys full constitutional protection.

As was stated earlier, in New York City cell phones are prohibited from being used or even brought into most schools. As a result, the DOE is effectively opening the door for teachers and principals to pry into students' private lives and punish them for expressive conduct that has not met this long-recognized constitutional standard. The DOE's goals for prohibiting cyber-bullying would be better served through proactive training and explaining to students why publishing harmful communications on the internet is problematic.

Infractions A33 & B36: Distributing Violent, Lewd, or Obscene Materials

The NYCLU is concerned about the constitutionality of infractions A33 and B36, which prohibit “posting or distributing literature or material containing a threat of violence, injury or harm, or depicting violent actions against or obscene, vulgar or lewd pictures of students or staff including posting such material on the Internet.”

For one thing, this prohibition is too broad to pass constitutional muster. Once again, non-disruptive student speech is protected by the First Amendment. We recommend that the Code be amended to reflect adherence to this First Amendment standard—one that focuses on the potential of the expression to disrupt the learning environment, rather than on the content of the expression.

Nowhere in the Discipline Code are there usable definitions of the terms “violence” or “obscene, vulgar or lewd,” implying that teachers and administrators will impose their understanding of those terms onto student speech. This will inevitably lead to situations where students in some schools receive harsh punishment for expressive acts, while students in others do not—or even where particular “problem” students are punished for expression that would be acceptable if created by a classmate.

Further, the NYCLU disputes the characterization of any non-disruptive student expression—including distasteful or disagreeable expression—as a “dangerous or violent behavior” that should result in a student’s suspension for up to one year, or even expulsion. Therefore, we recommend that this behavior be re-categorized under Level 2, “disorderly disruptive behaviors.” This will also help students and teachers adhere to the appropriate First Amendment standard of *disruptiveness*.

Finally, the inclusion of language banning students from posting certain items on the Internet is deeply troubling from a First Amendment perspective. While the DOE may reasonably choose to prohibit disruptive expression *in school*, it is a severe infringement of students' civil rights to attempt to control the form and content of their expression outside of school. If the DOE is concerned about the effect of Internet postings on the learning environment, those concerns would perhaps be better addressed by educating students on the social and individual harms that flow from posting derogatory or threatening materials online.