

# The SMART Center 2020 Speaker Series



Carol Davis, EdD



Rhonda Nese, PhD



Dan Losen, JD, MEd



Chris Reykdal



**March 18, 2020**

UW Husky Union Building  
Room 250

8:30 - 9:45am

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## Using Preventative Practices to Disrupt the School-to-Prison Pipeline

**Rhonda Nese, PhD** Assistant Professor in the Dept. of Special Education and Clinical Sciences at University of Oregon; Principal Investigator within Educational and Community Supports

**April 22, 2020**

UW Husky Union Building  
Room 250

8:30 - 9:45am

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## Efforts to Stop the School to Prison Pipeline: Seeking remedies to racial discipline disparities among students with disabilities

**Dan Losen, JD, MEd** Director of the Center for Civil Rights Remedies (CCRR) at UCLA's Civil Rights Project/Proyecto Derechos Civiles

**May 20, 2020**

UW Husky Union Building  
Room 332

8:30 - 9:45am



## 2020 Legislative Session Outcomes: Ensuring Students Learn in Safe and Healthy Environments

**Chris Reykdal** Washington State Superintendent of Public Instruction

Brought to you in part by  
**U.S. Department of  
Education's  
Institute of Education  
Sciences**

Grant number  
R305A170021 (PI: Bruns)





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### IN THE NEWS

Now accepting applications for our SMART Center Postdoctoral Research Training Program in School Mental Health. Click here for additional information.

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### PROJECT HIGHLIGHTS

Data analysis for the Organizational Assessment for Strategic Implementation in Schools (OASIS): A Measurement Suite to Support Educator Adoption of Evidence-Based Practices project is underway. Learn more about the status of this research project and others here.

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### RECENT PUBLICATIONS

Two new publications in Implementation Science and Prevention Science from our BASIS and SISTER project teams!

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In addition to regular training activities and special areas of focus, the Northwest Mental Health Technology Transfer Center (Northwest) has received funding to support increased training and technical assistance for school mental health in Alaska, Idaho, Oregon, and Washington. To operationalize this support Northwest has partnered with the University of Washington **School Mental Health Assessment, Research, and Training (SMART)** Center, a national leader in developing and supporting implementation of evidence-based practices (EBPs) in schools, including



<https://mhttcnetwork.org/centers/northwest-mhttc/school-mental-health>

**Dan Losen, JD, MEd**



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**Efforts to Stop the School to Prison Pipeline:** *Seeking remedies to racial discipline disparities among students with disabilities*

**Dan Losen, JD, MEd** Director of the Center for Civil Rights Remedies (CCRR)  
at UCLA's Civil Rights Project/Proyecto Derechos Civiles

# **Efforts to Stop the School to Prison Pipeline: Seeking Remedies to Racial Discipline Disparities Among Students with Disabilities**

**Daniel J. Losen, J.D. M.Ed.**



## **The Center for Civil Rights Remedies**

at The Civil Rights Project | *Proyecto Derechos Civiles*

# Outline

- Review of the descriptive data
  - Magnitude of the problem
  - Impact on education
  - Acknowledging that what educators do, matters
- Anti-discrimination law and the IDEA requirements (which are different)
- Identifying Problems and Pursuing Remedies:
  - Diving deeper into the data
  - Exploring root causes
  - Why remedies must go beyond compliance
  - The need for equity in a time of crisis
  - The need for race consciousness in remedies

# The Descriptive Data



The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

# Washington: Districts with highest “risk” for OSS at secondary level for Black students with disabilities in 2015-16:

“Risk” for at least one out of school suspension is a more conservative rate based on the unduplicated count of SWDs suspended out of school at least once divided by enrollment. Highest risk levels for districts with at least 50 Black secondary students with IEPs

- Puyallup 50%
- Vancouver 46%
- Clover Park 43%
- Evergreen 38%
- Renton 37%
- Spokane 34%
- Kent 31%

# Not Just the Student Risk for Being Suspended....

- Risk for out-of-school suspension, based on the unduplicated counts of students suspended **at least once**: Depresses the race and disability differences, because those with the highest risk for at least one suspension are also the most likely to be repeatedly suspended. Harsher systems tend to mete out multiple suspensions.
- Lacks information on number, and duration, which better demonstrates the disparate harm on educational opportunity.
- Rates of lost instruction captures the duration as well as the cumulative impact from many short suspensions.
- Still allows for comparisons because it incorporates enrollment size.

# Recommended Data Review for States and Districts: *Days of Lost Instruction Per 100*

- This is also called the rate of lost instruction.
- Can easily be reviewed by OSS, Expulsions, and ISS separately and/or together.
- **Can be accurately disaggregated by behavior category.**
- **In Vancouver: Used to determine exactly how much the policy suspending students for “failure to cooperate” contributed to the racially disparate impact from out of school suspension.**
- May resonate with educators who are conscious of days of instruction and the impact of missing school. Awareness may be heightened now that all students have experienced a sudden removal from classroom instruction.
- Buy-in of staff and community is critically important to the success of the remedy. This includes a willingness to review the racial disparities on a regular basis.

# The Need to Focus on The Impact of Punitive Discipline

- Exclusion is harmful to most students and the harm extends beyond the days of lost instruction.
- Especially important to avoid additional losses of instruction after the massive amounts of lost instruction in the wake of pandemic shutdowns.
- The best measure of the impact on educational opportunity from highly questionable and mostly punitive policies and practices.
- There are reasons to believe that students may exhibit more behavioral problems when they return to school due to:
  - Trauma
  - New mental health issues
  - Hunger
  - Frustration
  - Students with disabilities losing more than just instructional time.

# Example: National Data (2015-16)

- K-12-Level
  - 64 Days Lost – Black *Students*
  - 13 Days Lost – White Students
  - $64 - 13 = 51$  Days Black-White Gap  
*For every 100 students, Blacks lost 51 more days of instruction than their White peers lost.*
- Elementary-Level
  - 24 Days Lost – Black *Students*
  - 4 Days Lost – White Students
  - $24 - 4 = 20$  Days Black-White Gap
- Secondary-Level
  - 103 Days Lost – Black *Students*
  - 21 Days Lost – White Students
  - $103 - 21 = 82$  Days Black-White Gap

# Days of Lost Instruction: Washington 2015-16

(Among the highest)

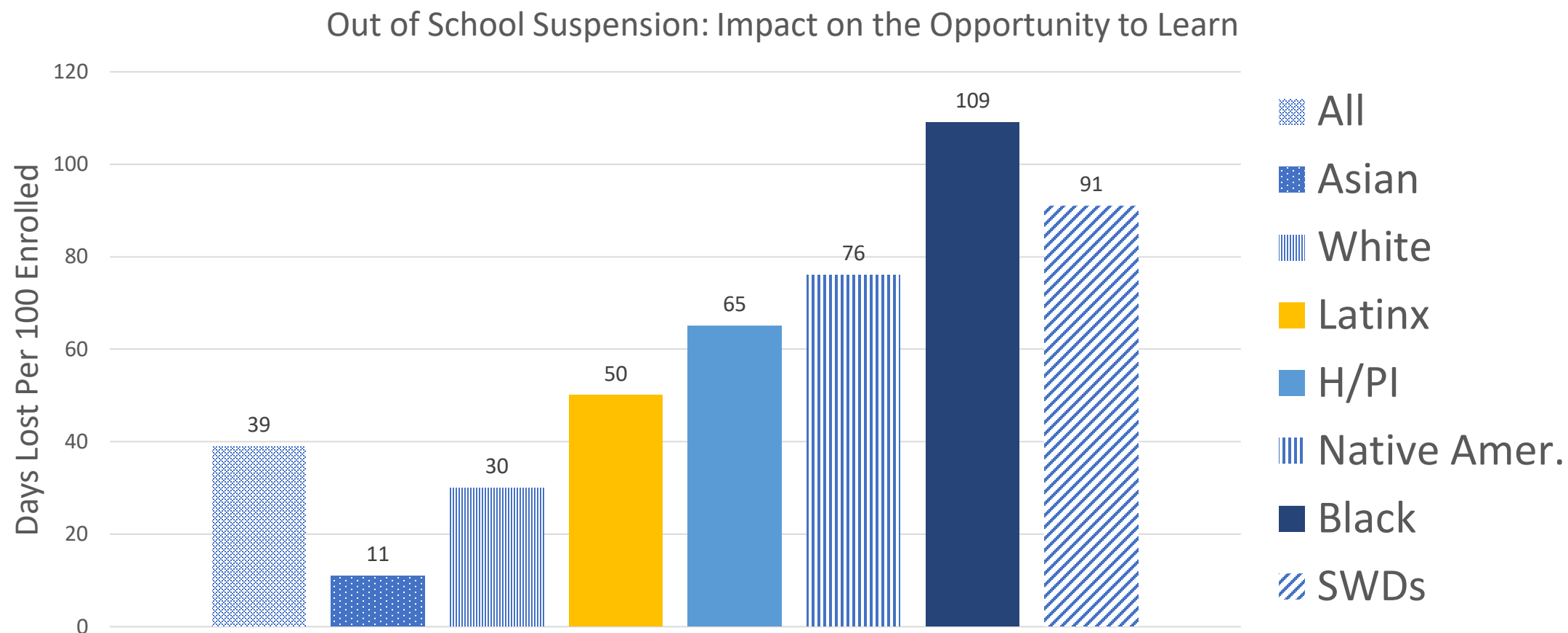
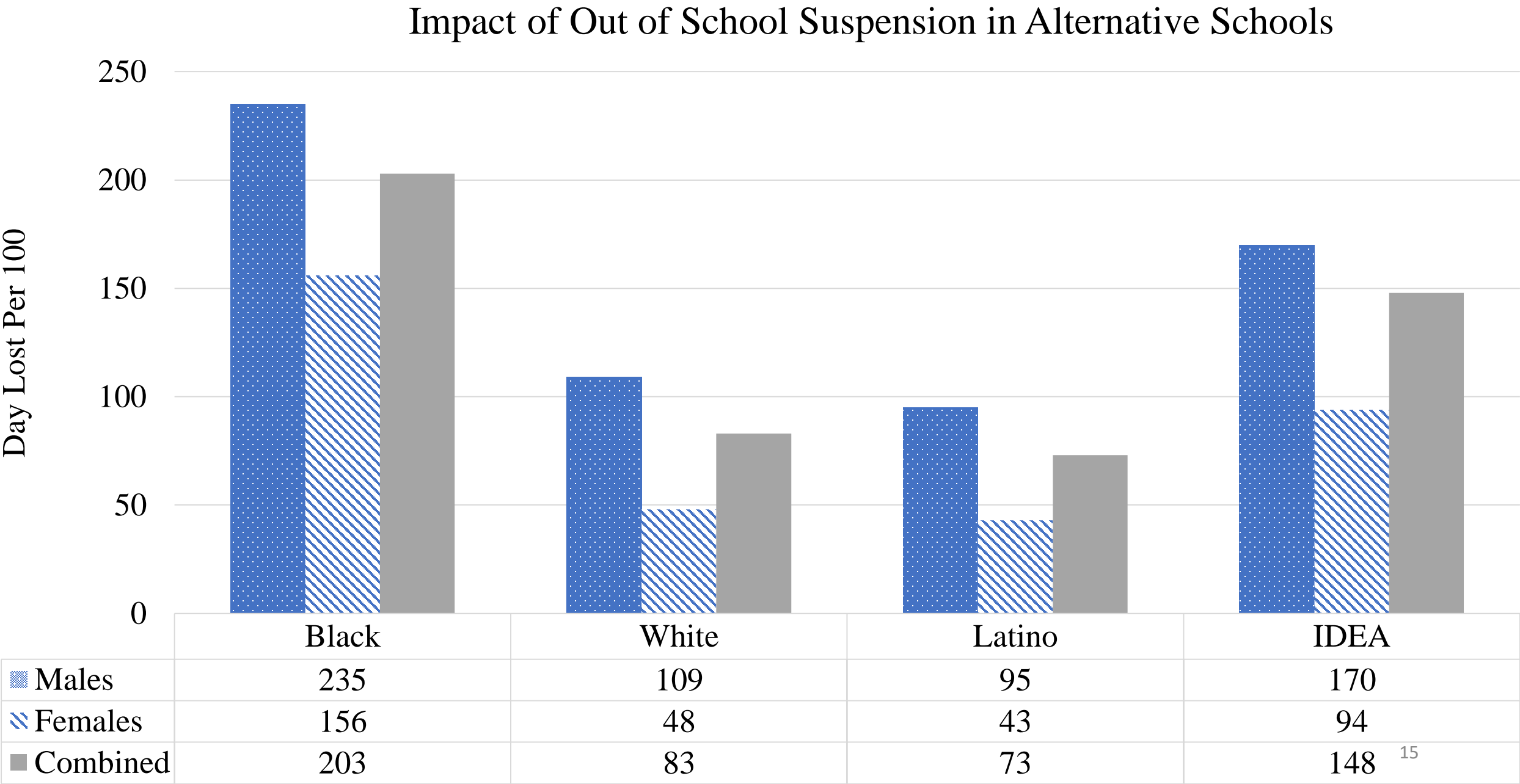
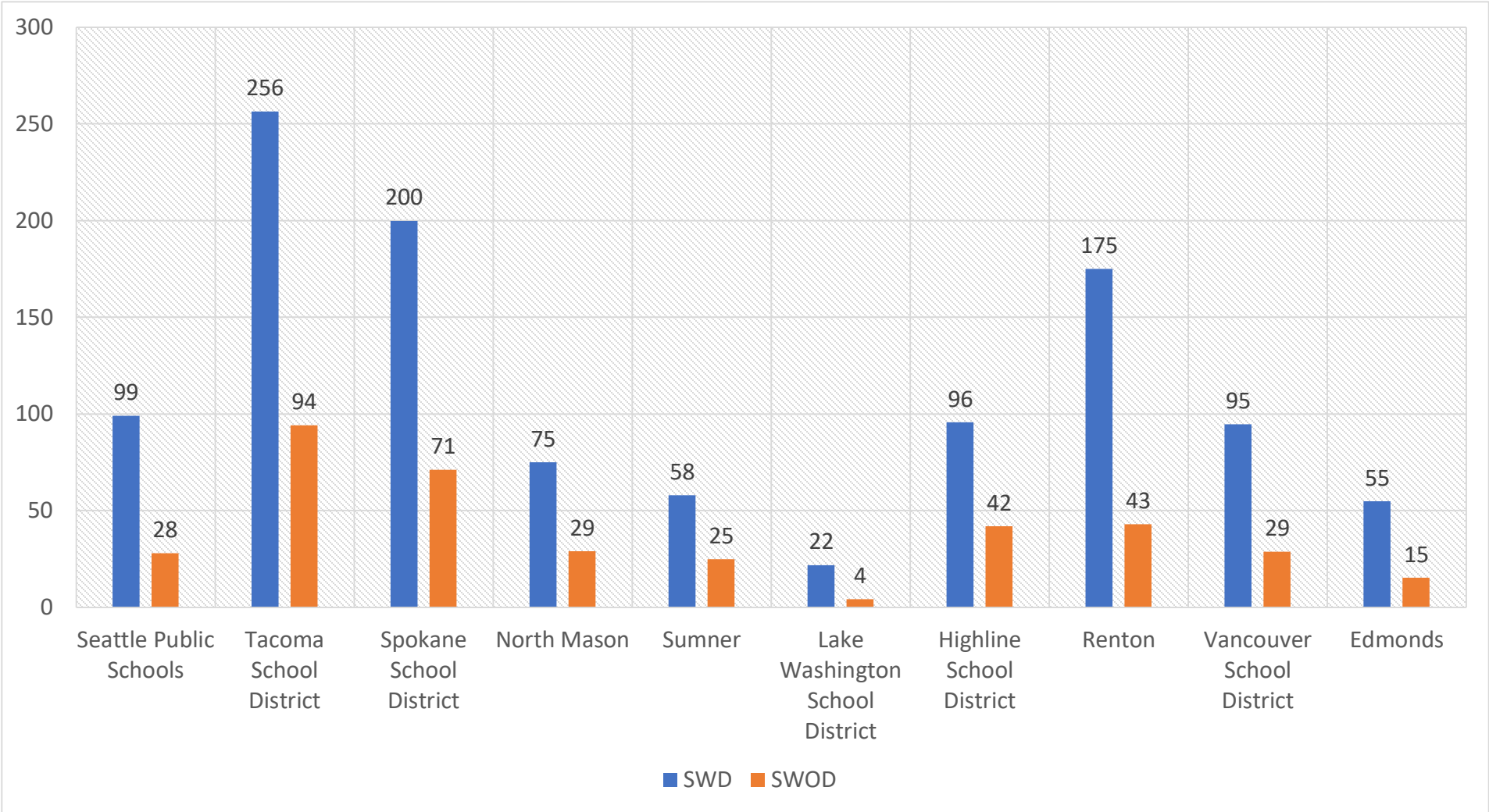


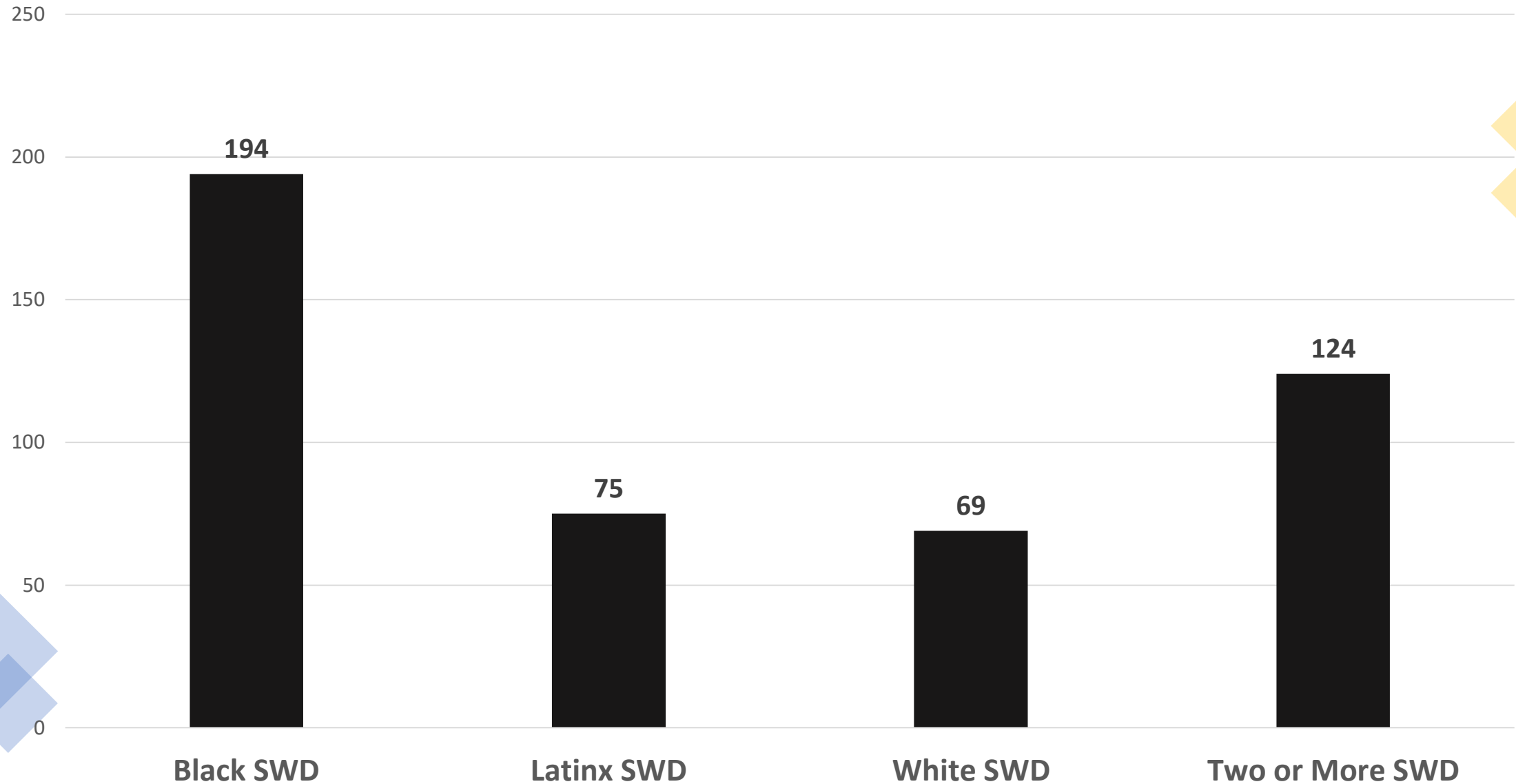
Figure 4. National Review of Days of Lost Instruction (per 100) for students enrolled in alternative schools (2015-16).



**Lost Instruction Per 100 Enrolled  
For Districts in WA with Largest Numbers of SWDs at Secondary Level (2015-16)**



# Vancouver Districtwide Secondary: Per 100 enrolled, Black Students with Disabilities Lost 125 More Days than their White Peers (Due to Out of School Suspension in 2018-19)



# Excessive Responses?

## Are These Data Accurate?

- Referrals to Law Enforcement
- School-based arrests
- What about off-the-books suspensions?
- In-school suspensions? Arguments for and against have special implications for students with disabilities. Do students really have adequate access to the curriculum while serving an in-school suspension?

# Do We Need to Add More Police to Patrol School Hallways?

- School removal can have implications for children of undocumented parents.
- Are undocumented parents placed at risk if they exercise the due process rights of their children and challenge unjustifiable disciplinary removal?
- A major concern where local police have agreed to work with ICE (and even where the agreements are not formal)
- School early warning systems, threat assessments, and codes of conduct often include “notifying police.”
- But doesn’t adding police make our children safer?
- In times of scarce resources and high need to provide students with adequate supports and services, including mental and physical health, what is the opportunity cost when education dollars are spent on police?

## State of Maine: Districts With High Referral to Law Enforcement Rates Overall & For Students With Disabilities

District Name	All Students Referral to Law Enforcement Per 1000	IDEA All Students Referral to Law Enforcement Per 1000
RSU 25	192.3	225.8
RSU 71	118.3	121.2
RSU 60/MSAD 60	60.1	95.9
Harpswell Coastal Academy	57.1	0.0
RSU 03/MSAD 03	51.1	66.7
RSU 05	49.7	96.8
Kittery Public Schools	38.5	0.0
RSU 50	34.5	125.0
Augusta Public Schools	30.5	107.1
RSU 15/MSAD 15	26.1	62.5

# Relevant Laws, Regulations and Guidance



The Center for Civil Rights Remedies

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at The Civil Rights Project | *Proyecto Derechos Civiles*

# Many Different Types of Race and Disability Discrimination

- Blatantly hostile environments.
- Different treatment of similarly situated children.
- Subtler forms of different treatment: implicit racial bias.
- Resource inequities and other forms of structural racism.
- Disparate impact.
- FAPE Denial.
- Denial of access and/or opportunity.

# Federal and State Policies and The School to Prison Pipeline

- Joint DOJ/OCR Discipline Guidance: Rescinded on questionable grounds. 15 State AGs speak out in favor of guidance (including Washington's AG). The Trump administration's decision was not reviewable in court.
- State Law and OSPI's Guidelines, *Preventing and Addressing Discrimination in Student Discipline* (October, 2019). With guidance on conducting a root-cause analysis that is consistent with the rescinded guidance and the IDEA regulations.
- Federal Regulations on Racial Disparities in Special Education: The Trump administration's attempt to rescind these regulations on similar grounds as used to justify the rescision of the joint guidance were reviewed, and the attempt was denied as "arbitrary and capricious" by a federal judge.
  - Pursuant to the new regulations OSPI identifies Seattle (using risk ratio of 3.0 for 3 consecutive years) for significant racial disproportionality in discipline and the reservation of 15% of the IDEA Part B funds to address the issue.
- OSERS guidance letter August 1, 2016 (not rescinded) speaks to school discipline issues for SWDs and is very important to consider.

# State of Washington: Laws and Guidance

- **WAC 392-400-020**
- **Application.**
- (1) This chapter establishes the minimum procedural and substantive due process rights of students when they may be subject to discipline in Washington school districts. A school district may establish additional due process protections for students consistent with federal statutes and regulations, state statutes, common law, and rules prescribed by the office of superintendent of public instruction.
- (2) This chapter must be construed in a manner consistent with the following laws and rules:
  - (a) RCW [28A.600.010](#) through [28A.600.022](#) and [28A.320.211](#), regarding the administration of student discipline;
  - (b) RCW [28A.300.042](#), regarding the collection, reporting, and disaggregation of student-level discipline data;
  - (c) Chapter [392-190](#) WAC, prohibiting unlawful discrimination in Washington public schools, including the requirement under WAC [392-190-048](#) that school districts annually review disaggregated discipline data to identify and address disproportionality in the administration of discipline on the basis of sex, race, limited-English proficiency (i.e., English learners), and disability, including students protected under Section 504 of the Rehabilitation Act of 1973 and Part B of the Individuals with Disabilities Education Act;
  - (d) WAC [392-172A-05140](#) through [392-172A-05175](#), and 34 C.F.R. Part 300.530 through 300.536, regarding the discipline of students with disabilities under the Individuals with Disabilities Education Act;
  - (e) RCW [28A.165.035](#), regarding the state menu of best practices and strategies for behavior; and
  - (f) RCW [28A.415.410](#) and [28A.415.420](#), regarding training to support school personnel in implementing discipline policies and procedures and gaining knowledge and skills in cultural competence.

# Data Reviews to Match Legal Theories

- **Different treatment:** Evidence of intent (can be indirect)
  - **Implementation of less-punitive responses:** Compare, for example, rate of warnings per 100 enrolled. Do the disparities show Blacks get more warnings per 100 enrolled than whites? Or are they reversed?
  - **Knowledge of unjustified disparities:** Do district leaders know that certain discipline policies contribute to the disparity in harmful consequences? Do they also know that there are less discriminatory alternatives? Their level of knowledge matters.
  - **Building level:** Is there inconsistent enforcement or different rules by school? (Lodi Unified example)
  - **Staff:** Do certain educators contribute more to the disparities than others?
  - **Compare 1<sup>st</sup> offenders:** Do first time offenders for minor misconduct get suspended at the same rate regardless of race/ethnicity?
  - **Poverty?** Use cross tabulated data to show that disparities are also found among low-income students, so the differences are not explained away.
  - **Calls for leniency?** Review and/or monitor comments attached to, or part of disciplinary referral slips.
  - **Don't ignore the objective categories:** Racial differences for objective categories could indicate racial profiling and security disparities. Who gets searched most often and thoroughly?
  - **Evidence of blatant discrimination:** Statements of educators, whether there were complaints of racial harassment that were ignored, whether the harshest responses are only meted out to a given racial/ethnic group in response to misconduct of similar severity.

# Disparate Impact: Race and/or Disability

- **Unnecessary causes:** Do some code violations contribute more than others to the overall racial disparity? What about all minor offenses, as a group? Are suspensions justifiable for any of them?
- **Suspension and choice:** Use data to demonstrate how a code contributes to the disparity in question. Having the code doesn't mean districts *must suspend* for violations.
- **Context:** It shouldn't matter if it's part of the state code, and it may not cause a disparity in every district. Disparate impact can be a highly contextual analysis, and can vary by district and by code of conduct. Does a particular policy cause race or disability-based disparity in the particular district.
- **Vague codes:** can invite subjectivity in applying/interpreting the code. Who is referred?, Who winds up suspended? Lack of clarity is hard to justify as a matter of policy. Disparities caused by vaguely worded codes also raise racial bias/different treatment concerns.
- **Length is policy/practice:** Are the suspension lengths justified? Are escalating punishments necessary? Is the policy of assigning longer suspensions based on research? Are there limits on length? Do schools within the district use different suspension lengths for similar types of misconduct?
- **Less discriminatory alternatives: Are there equally or more effective alternatives?**
- **The policy of autonomy:** permitting some schools within the district's oversight to have a harsher code of conduct could cause a disparity.
- **Overlapping issues:** A policy of inconsistency (Lodi) and subjectivity that invites racial bias can have a disparate impact.

# Disparate Impact's Core Question: Justified?

**Broad:** Is the the system of incrementally harsher punishments justifiable?

Are last year's behaviors influencing this year's punishments?

**Code of Conduct:** Assuming no discriminatory intent and punishments responded to misbehavior: (Attendance violations, minor misdeeds) did the policy contribute to the disparity?

**Are there less discriminatory alternatives that meet the same goal as the policy in question?**

**Resource decisions:** Is an uneven distribution of SROs a form of racial profiling? Is placement of least experienced teachers with students struggling the most having a disparate impact?

**Inconsistent and autonomous policy:** Are the harsher policies found in schools within the same district, serving more students of color?

**Systemic non-compliance:** Does systemic FAPE denial under disability law have a race-based disparate impact? If so, the racially disparate impact of a systemic practice that violates the IDEA requirements could also be a Title VI violation.

# Analyze Data by Code of Conduct

- How much does disparate suspension for disruption and/or "failure to cooperate" contribute to the racial or disability disparity.
- Is suspension for the category justified?
- What about fighting? Could be subjective.
- What about limiting the disparate impact by limiting the duration of suspensions, including for fights without injury.
- Ask, is adding to the length of suspensions educationally justified?

# Range rates of Days Lost Per100 for individual schools by Level Elementary or Secondary in 2017-18

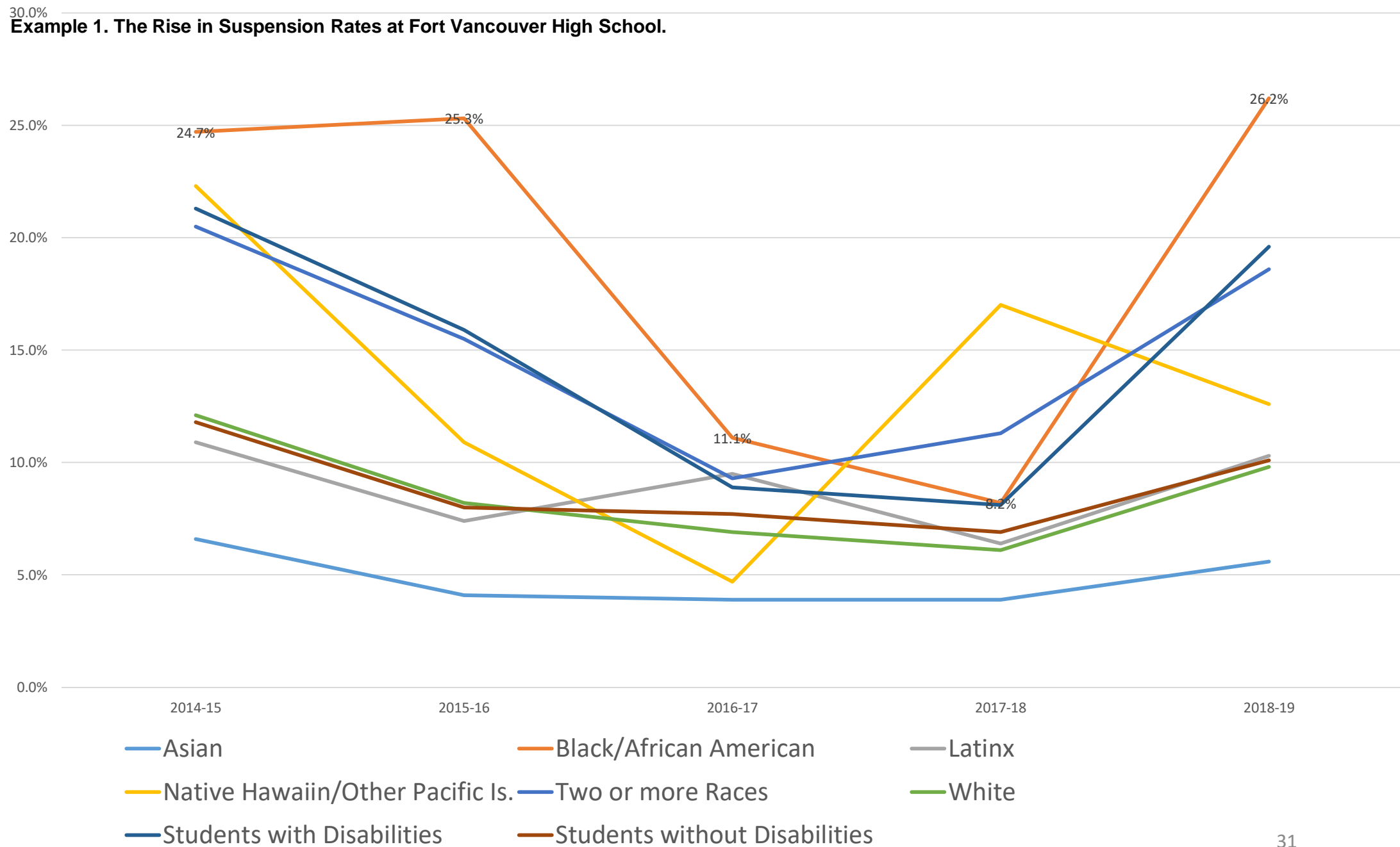
(must have at least 10 enrolled of each group)

	Black	White	Latinx	H/PI	SWD
Elementary	0 to 108	4 to 42	6 to 21	17 to 33	4 to 95
Secondary	8 to 172	8 to 65	0 to 104	19 to 675	13 to 204

# Using Trend Data at the District Level to Detect Problems and Remedies

- Identify what is working and what might not be, especially when implementation timelines are known.
- Shows the persistence of the racial gaps.
- Dispel chaos theory myths.
- Looking at trends can help overcome small “n” sizes, but also can reveal where small N sizes are volatile.
- Can help flag unusual problems that are easily overlooked in a given year. Trend lines of rates by offense category can flag “whack-a-mole” issues which might show up clearly in trend graphs.
- Growing concerns in CA as accountability and new legislation is enforced.
- Need to look at disciplinary transfers for both different treatment and disparate impact.

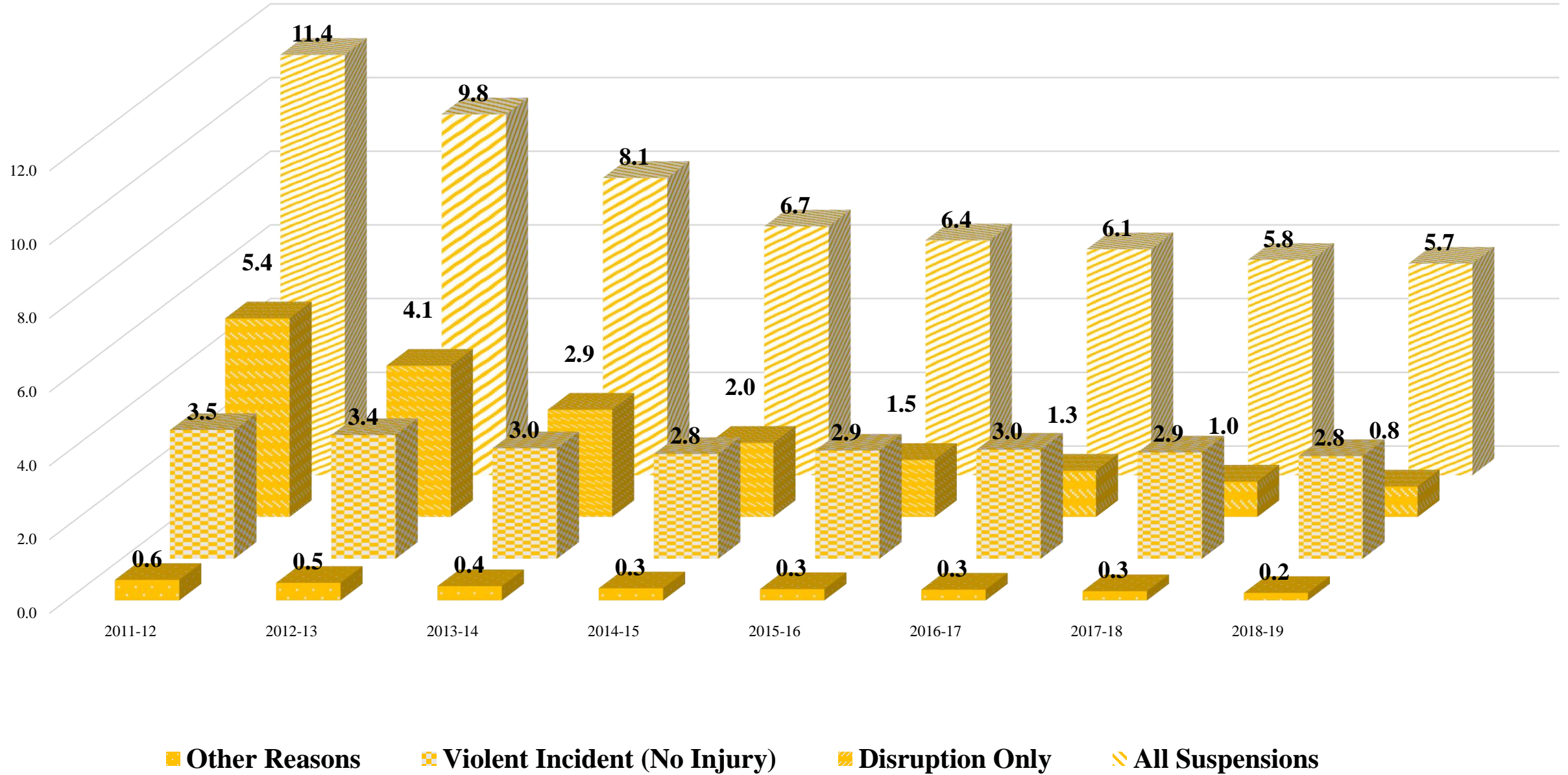
**Example 1. The Rise in Suspension Rates at Fort Vancouver High School.**



# Revisit and Revise the Current Code of Conduct

- Enlist stake-holder group to revise code.
- Review and compare to recommended codes of conduct developed by non-profits. (ABA; Dignity in Schools, Consistently align code with principles of restorative justice, PBIS and Social Emotional Learning).
- Submit revised code to independent experts for feedback.

# Suspensions Per 100 for Less Serious Offenses Seven Year Trend



# FAPE Denial

- More than violation of MDH due process.
- Procedural violations can lead to substantive denial of FAPE
- SWDs with multiple suspensions raise many questions, like whether there was an Functional Behavioral Assessment, and subsequent Behavioral Improvement Plan in the IEP.
- You can see whether students were suspended frequently prior to a SPED evaluation, and perhaps pending the results.

# Are Suspensions From School Experienced Equally?

- SWDs receive more when attending school.
- They may struggle more to catch up.
- If the suspension is unjust, as in for disability-caused behavior, the punishment may be even more damaging.
- What about youth exposed to domestic violence or abuse outside of school? If a problem at home is the suspected cause of the behavior problem, is sending the student home the best remedy?

# IDEA Rules To Address Racial Disproportionality

- Do NOT require proof of any type of discrimination in order to be flagged.
- The consequences are not punitive, but they do require redirection of resources.
- Congress never intended students with disabilities to be excluded from the remedy.
- The required root cause analysis does not have to determine whether racial discrimination is the cause, but that is one possibility.

# Findings regarding discipline disparities and race with disability: FAPE Denial?

- Are there signs of different treatment?
- Is due process provided at MDHs?
- Do outcomes of the MDHs suggest that they are likely suspending at least some SWD for disability caused behaviors?
- Are some students not getting MDHs?
- If the outcome was that **it was a manifestation**, what did the district do about it?
- Does the frequency of the MDHs raise any concerns?
- Have the suspended students with disabilities had a functional behavioral assessment and a behavioral improvement plan?
- What if there is nothing about the MDH in the students file?

# You get 10 “free days” ....

- True
- False
- It Depends

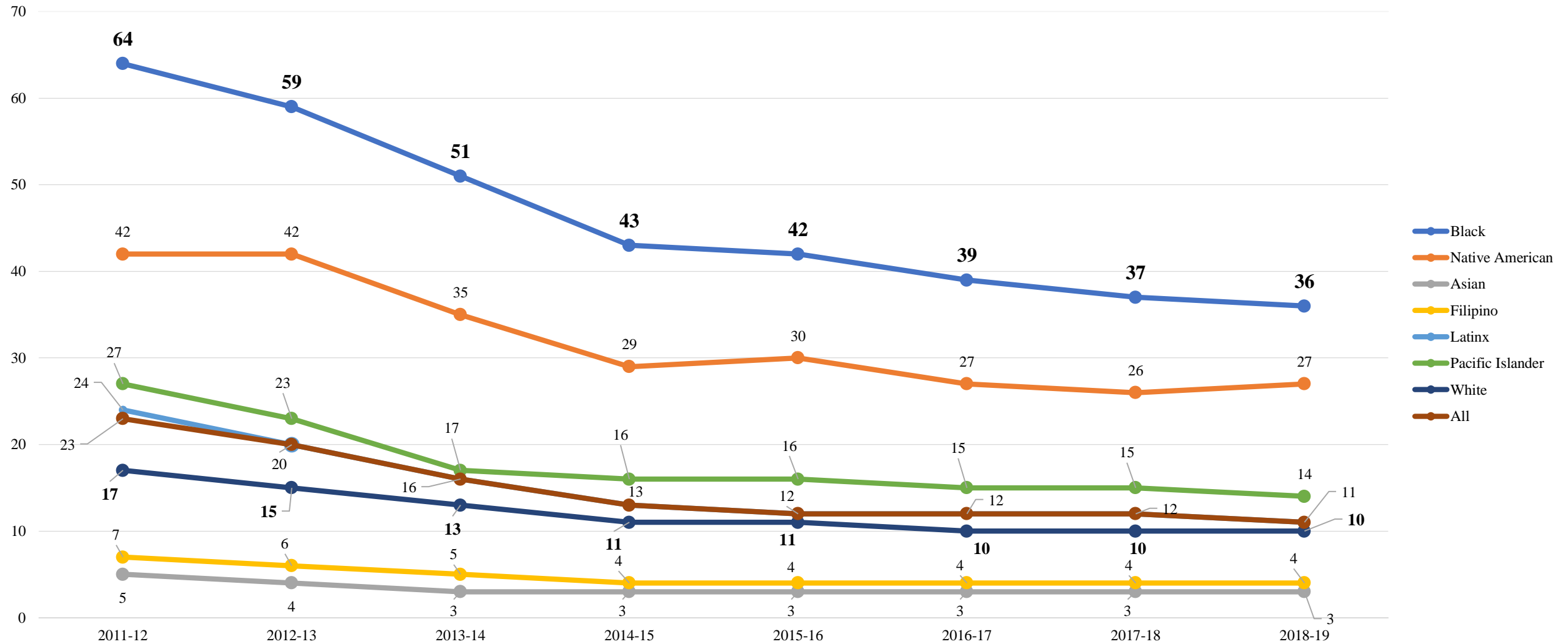
# False: “Nothing is Free”

- Even if the student doesn't have a disability, when students miss school, there is a cost to our society as well as to the student.
- **Once the school knows that the behavior is disability caused there is no legitimate reason to punish a student with disabilities for behavior they cannot control. Doing so is equal to punishing a student for having the disability (barring dangerousness).**
- There's a difference between the likelihood that the district would get away with it and understanding the legal and moral obligation behind the procedural safeguard.
- The manifestation determination assumes the school doesn't already know, which is why they hold the meeting. But what if they already know?
- Note, at the MDH the team must explore whether the school failed to provide FAPE and that directly caused, *or* is substantially related to the reason for the misbehavior. Failure to provide FAPE doesn't come with a 10-day grace period.

# Be wary of empirical research that concludes “no evidence of discrimination,” especially at the national, regional or state levels.

- Cognitive dissonance: Those who aren’t directly being discriminated against will usually prefer an explanation of disparities that is easier to accept.
- There is race and disability discrimination in our society so beware of findings that suggest the status quo is non-discriminatory.
- Methods matter, and each type of discrimination requires different methods. (One cannot control for school-level policies if you are attempting to measure the disparate impact of a policy or practice)
- Empirical data alone are rarely sufficient evidence to draw firm conclusions about discrimination.
- Context matters.
  - National data sets and sampled data can’t be generalized to district and school level presumptions of non-discrimination.
  - Comparisons require detailed file reviews.
  - Districts vary widely in disparities and in likely causes of the disparities. There are typically several contributing causes, not just one.

# 7-Year California Narrowing of the Racial Gap in Days of Lost Instruction Per 100 Students (2011-12 to 2018-19)



# Districts Often Have the Capacity to Look Closely at Disparities:

- Cross tabulated, Race/disability/gender disparities in days lost by code of conduct.
- Large differences in rates among similar schools in the same district helps establish that there are already less discriminatory alternatives within the district.
- Within a district, some school leaders may be far more effective at creating safe and productive learning environments without harsh punishments.
- It's important to look at teachers and staff making the referrals.
- Consider several years of data and trend lines at the school level.

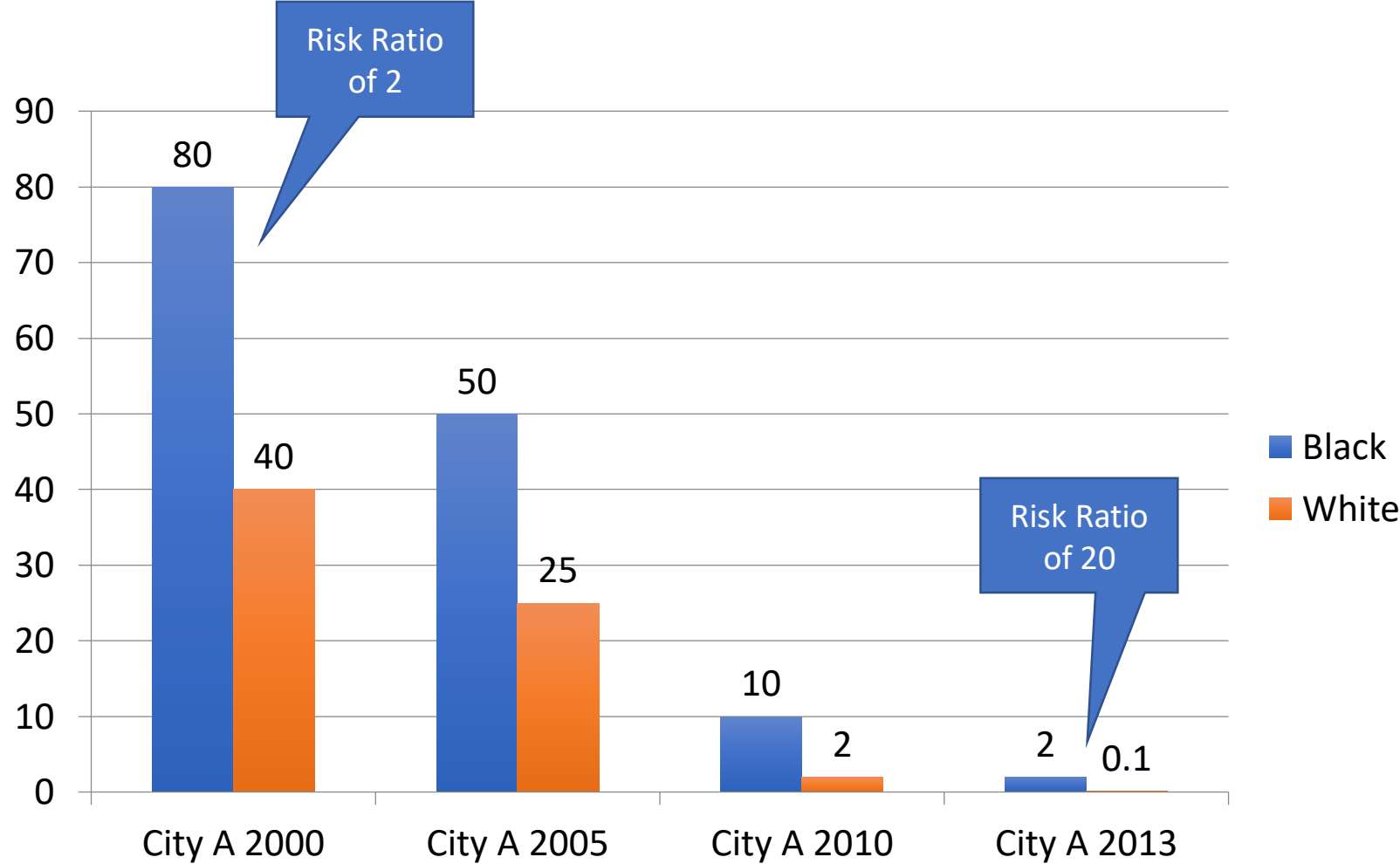
# Do the Disability Disparities Suggest Disability-Based Discrimination?

- One oft cited study failed to consider that some students might have been unfairly suspended for disability-caused behavior.
- Or whether the district had failed to provide the required support as described in the IEP.
- Put roughly equal numbers of students with disabilities in the “non-disabled” comparison group.
- Efforts to empirically evaluate the possible unjust **different treatment** of students by educators calls for a very granular review of student records and usually some comparisons of similarly situated students.
- **Different treatment is just one of many forms of unlawful discrimination.**

**Measuring  
Progress?  
Attend to Both  
Harm Reduction  
and Racial  
Differences**

- should flag high-suspending (excessive) districts and schools.
- should help track the experience of each subgroup compared to a stable benchmark or threshold. (CA uses 6%)
- Should reflect the magnitude of the disparity in absolute terms.
- Will flag a dual system whereby only certain subgroups receive the harshest penalties.
- Will reflect real progress in reducing harm and narrowing the racial differences.

Despite Dramatic Reduction in Suspension Use and Near Elimination of the Racial Gap: Risk Ratios may not indicate progress.



Analysis for the State of Maryland:  
Which District Is Highest Suspending?  
Which Had the Largest Racial Gap?

County	Black Risk %	White Risk %	Black-White Racial Gap (Percentage points)	Black to White <u>Relative</u> Risk Ratio
Prince Georges	9	3	6	3.0
Baltimore City	8	2	6	4.0
Wimcomico	19	5	14	3.8
Dorchester	<b>17</b>	<b>6</b>	<b>11</b>	<b>2.4</b>
Montgomery	<b>5</b>	<b>1</b>	<b>4</b>	<b>5.0</b>
State Average	9	3	6	3.0

# Why don't they work?

- Ratio of decline must exceed starting ratio
- You can't divide by zero so for low incident or segregated schools there is no comparison point (but you can still subtract).
- Too sensitive to what happens to White students (and if it's a good thing Whites are likely to reap the benefit).
- In the highest-suspending schools where Whites are also suspended at high rates, the ratios are lower.
- the closer Whites get to 50% the less likely it is that the ratio rises above 2.0.

## If relative risk ratios are used: Use Inverse Ratios, or A Stable Comparison Point, and Show Underlying Values

- State requirements pursuant to the IDEA is to use risk ratios (including for progress over time).
- Risk for not getting suspended should be just as permissible.
  - Ratios will be much smaller
  - No tendency to get large artificially
- Control the volatility of relative ratios:
  - Compare to rates for all students at the state level.

# Specific Policy Changes

- Eliminate OSS for one or more minor offenses, start with lower elementary grades and expand by one grade per year. Add additional behaviors to the no-suspension list.
- Offer drug counseling instead of suspension for possession offenses.
- Limit suspension to one day for certain minor codes of conduct, with exceptions upon review of the central office. (Los Angeles)
- Centralize review of discipline of more than 5 days (Baltimore, NYC)
- Provide representation at all expulsion hearings (MA)
- Require documentation of use of non-exclusionary alternatives to disciplinary removal for most conduct violations.
- Conduct FBA and BIP for every SWD suspended

# General Research-Based Recommendations

- Restorative Practices
- Social and Emotional Learning
- Multi-tiered Systems of Support
- PBIS best if multiculturally sensitive component is added, starting with looking at disaggregated office referral data.
- Teacher training
- Investing in support staff (not security)
- Paying attention to race

# Resource Recommendations

- Hire restorative justice coaches
- Hire parental outreach coordinators
- Provide classroom management training for teachers
- More rigorous data review, including data quality safeguards
- All staff should be trained in effective responses to misbehavior
- Consider reducing the SRO by using a hiring freeze and use 100% of the funds to replace each SRO that retires or quits with a behavioral specialist, RJ counselor, or dedicate funds to increasing Teacher and Leader training.
- Locate a family and youth health clinic in at least one high school.
- Earmark teacher recruiting dollars to ensure that the teacher and administrator applicant pool is diverse.

# Data Practice Recommendations

- Provide baseline data for schools or classrooms most active in discipline reform.
- Invest time and resources in good data systems and training for those that use them.
- Avoid measuring progress in discipline reform efforts using relative measures.
- Data reports to the public should be transparent and highlight the racial disparities.
- Don't take the pledge....

# The End

Daniel J. Losen

Director, Center for Civil Rights Remedies of the Civil  
Rights Project at UCLA

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