



Guidance on Discrimination in School Discipline

August 2023

This enforcement guidance clarifies and explains how the New Jersey Division on Civil Rights (DCR) applies the New Jersey Law Against Discrimination (LAD) to discrimination in student discipline.

Executive Summary:

In August 2019, the Interagency Task Force to Combat Youth Bias (Task Force) was created by Executive Order to address the dramatic increase in reported bias incidents around our state, particularly in young adults and children. In October 2020, after holding five statewide public listening sessions and receiving written comments from the public, the Task Force, led by DCR, published the report: *An Anti-Bias Vision for the Next Generation: Report & Recommendations of the New Jersey Interagency Task Force to Combat Youth Bias* (hereinafter Youth Bias Task Force Report). The report provided twenty-seven recommendations calling for transformative change to fight hate and discrimination. Since publication of the Report, DCR and several state agencies have worked to implement the Task Force’s recommendations. Recommendation #3 addressed discrimination in the imposition of school discipline and in part recommended that DCR and the New Jersey Department of Education (DOE) “*issue guidance that assists school districts in meeting their legal obligations under the LAD and other state laws and regulations to administer student discipline without discriminating on the basis of race, national origin, gender, or disability.*”

This enforcement guidance explains how DCR applies the LAD to student discipline, with a particular focus on discrimination based on race, national origin, religion, gender, sexual orientation, and disability.¹ This guidance provides administrators, districts, students, parents, school boards, and stakeholders with the necessary information to ensure that all students can succeed in school without being subject to discriminatory disciplinary actions. It first outlines New Jersey’s substantial disparities in school discipline based on race, national origin, gender,² sexual orientation, and disability. It then discusses the relevant legal framework under the LAD for both disparate treatment and disparate impact discrimination. We recommend all school districts share this guidance widely, including by posting it on their websites, distributing it through list serves, and making it available to administrators, teachers, staff, students, and families.

With regard to disparate treatment, schools generally violate the LAD when they discipline students differently because of their race, national origin, gender, disability, or other protected characteristic, even if the differential treatment results from unconscious rather than conscious bias on the part of school personnel. With regard to disparate impact, schools also violate the LAD when they discipline students pursuant to neutral policies or practices that have an unequal impact on members of a protected class, unless the school can show that the practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest.

Finally, as to both disparate treatment and disparate impact, the guidance explains what school administrators should do to ensure that their discipline policies and practices comply with the LAD, including reviewing school disciplinary policies; collecting, monitoring and reviewing all disciplinary data to identify disparities based on race, national origin, gender, sexual orientation, and disability; fully investigating any allegations related to possible disparate discipline; soliciting feedback from students, parents, employees, and the community about discipline disparities and school climate; requiring all employees responsible for disciplining students to receive non-discrimination training; and researching any new discipline policies or practices before adopting them to determine whether research indicates they are likely to have a disparate impact.

Introduction

*“Students realize there are two systems: A system for them and a different system for their white counterparts. The system has to be for everyone. It cannot just be for some students.”*³ – Thomas Puryear, Education Chairperson for the New Jersey NAACP

Our schools bear a unique responsibility for ensuring that all students are able to thrive in their school environment. For years, however, the burdens imposed by school discipline have fallen much harder on some students than others. Based on the most recently available data, New Jersey’s Black students are being suspended at **more than 3.3 times** the rate of white students and Latinx/e⁴ and multi-racial students are being suspended at **1.5 times** the rate of white students.⁵ Studies have consistently shown that students of different races do not misbehave at different rates, but Black students are more likely to be disciplined for their misbehavior, and disciplined more severely for the same misconduct.⁶ Despite both federal and state laws intended to protect students with disabilities from discipline for disability-caused behavior, New Jersey’s students with disabilities are being suspended at **1.7 times** the rate of their non-disabled peers.⁷ And although DOE does not capture suspension data related to a student’s gender identity, gender expression, or sexual orientation, national data show that LGBTQ+ students are suspended nationwide at approximately **1.7 times** the rate of their non-LGBTQ+ peers, as well.⁸

These statistics provide powerful evidence that too many schools are not living up to their obligation to provide each and every student with an education without discriminating on the basis of race, national origin, disability, or other protected characteristics.⁹ That has made the classroom a more difficult space for Black students, Latinx/e students, other students of color, students with disabilities, LGBTQIA+ students, and students of other protected classes to navigate.

These disparities violate the LAD when they result from discriminatory policies, discriminatory enforcement, individual educators acting in a discriminatory manner, or the use of disciplinary tools that have a discriminatory impact based on race, disability, or other protected characteristics. Where school disciplinary policies or practices violate the LAD, DCR can and will exercise the full scope of its authority to address such violations. School and district officials have an obligation to ensure that their schools and their staff are in full compliance with the LAD. This guidance is meant to aid them in doing so. This guidance is also meant to outline for students, parents, caretakers, educators, and community members the ways in which the law protects students from discriminatory discipline and empower them to hold schools and districts accountable for consistently complying with the LAD. Violations of the LAD can be reported to New Jersey’s Division on Civil Rights by filing a complaint [here](https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/division-on-civil-rights-file-a-complaint/) (<https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/division-on-civil-rights-file-a-complaint/>) or calling DCR at 1-833-NJDCR4U (833-653-2748).

I. New Jersey’s Substantial Discipline Disparities

Racial disparities in student discipline in New Jersey are well documented and are consistent with disparities that exist nationwide.¹⁰ Although students of all races misbehave at similar rates, data from New Jersey DOE show that Black students in New Jersey are 3.3 times more likely to be suspended than white students, and Latinx/e and multi-racial students are 1.5 times more likely to

be suspended than white students. Data from DOE show that in the 2018-2019 school year, 8.9% of all Black students in New Jersey public schools were suspended, 4.1% of all Latinx/e and multi-racial students in New Jersey public schools were suspended, and 3.5% of all American Indian students in New Jersey public schools were suspended, compared to 2.7% of all white students.¹¹ These gaps begin with even New Jersey's youngest learners. DOE data show that in the 2018-2019 school year, Black students comprised 40.6% of all suspensions among students from pre-kindergarten through second grade, while DOE enrollment data indicate that they made up only 15.4% of pre-k through second grade students during that time.

These racial disparities are even more pronounced for Black girls when compared to their white counterparts. According to the U.S. Department of Education's Civil Rights Data Collection, Black girls in New Jersey comprised 48.4% of all out-of-school suspensions among female students in the 2017-2018 school year, while DOE enrollment data indicate that they made up only 6.7% of female students altogether during that same time period.¹² Black boys, meanwhile, comprised 38.9% of all out-of-school suspensions among male students, but made up only 7.9% of male students altogether.¹³

The racial disparities are also more pronounced for Black students with disabilities as compared to their white counterparts. Black students with disabilities account for a disproportionate share of all out-of-school suspensions among students with disabilities. The DOE's data for the 2017-2018 school year indicate that although only 17.8% of students with disabilities were Black, Black students accounted for 36% of suspensions among students with disabilities.¹⁴

Similarly, according to the U.S. Department of Education's Civil Rights 2017-2018 Data Collection, while Black students represent 15.1% of the total student population across the country, they account for 38.1% of all school expulsions where educational services were provided and 33.3% of all expulsions where educational services were not provided.¹⁵ And while Black students represent 19% of students with disabilities served by the Individuals with Disabilities Education Act (IDEA), they make up 36% of students with disabilities served by the IDEA who are restrained at school through the use of a mechanical device or equipment.¹⁶

Yet data have consistently shown that Black students do not, in fact, misbehave at higher rates than their white peers. Rather, data have shown that educators are more likely to observe and respond to Black students' misbehavior, thus leading to the over-representation in school disciplinary actions.¹⁷

These disparities extend to school-based criminal justice referrals. In New Jersey, according to an analysis of the Civil Rights Data Collection performed by the Education Week Research Center, in the 2017-2018 school year, although Black students made up 15.5% of enrolled students, they made up 29.8% of schools' law enforcement referrals and 28.9% of arrests in schools.¹⁸

Moreover, the majority of these law enforcement referrals did not stem from serious criminal conduct. The New Jersey Juvenile Justice Commission conducted a study of school-based referrals to law enforcement during the 2015-2016 school year and found that 76% of all school-based referrals were for low-level offenses (4th degree/disorderly persons). And although New Jersey law requires mandatory law enforcement referrals for seven categories of misconduct,¹⁹ in the

2018-2019 school year, 53.5% of law enforcement referrals were non-mandatory, meaning they did not involve guns, dangerous weapons, possession or distribution of controlled dangerous substances, bias incidents, threats of violence, sexual assault or criminal sexual contact, assault on a teacher, or child abuse.²⁰

In 2019, New Jersey’s “Uniform State Memorandum of Agreement between Education and Law Enforcement Officials” (MOA) was amended to address some of the disciplinary disparities related to race and disability.²¹ But the paucity of available data in New Jersey makes it difficult to determine the reasons for these disparities. In New Jersey, data do not presently exist, for example, on which schools use School Resource Officers (SROs) or other law enforcement officers. This lack of data makes it harder for the public to assess how the use of law enforcement in New Jersey schools affects racial disparities in criminal justice referrals, or to assess the extent to which findings from studies regarding the use of SROs or law enforcement officers in other jurisdictions apply to New Jersey’s schools.²²

These disparities have profound and long-ranging consequences. For example, Black students, Latinx/e students, and students with disabilities lose instructional time to suspensions more frequently compared to their white and non-disabled peers, and studies clearly demonstrate that “[l]oss of classroom instruction time damages student performance.”²³ In other words, discipline disparities may well contribute to the racial achievement gap by disproportionately depriving Black and Latinx/e students of valuable instructional time.²⁴

Discipline disparities also impact students’ graduation rates and subsequent economic earning power and physical and mental health. Data show that “higher suspension rates are closely correlated with higher dropout and delinquency rates, and that they have tremendous economic costs for the suspended students.”²⁵ Students who do not graduate high school also more frequently report suffering from at least one chronic health condition—like asthma, diabetes, heart disease, high blood pressure, or stroke—than do high school graduates.²⁶ In light of this data, addressing New Jersey’s school discipline disparities may well have an important impact on well-documented racial disparities in income,²⁷ wealth,²⁸ and health.²⁹

II. New Jersey’s Law Against Discrimination Prohibits Discrimination in School Discipline

A. Legal Framework

The New Jersey Law Against Discrimination (LAD) prohibits discrimination and bias-based harassment based on actual or perceived race, religion, national origin, gender, sexual orientation, disability, and other protected characteristics in places of public accommodation, employment, and housing.³⁰ Places of public accommodation include all schools that are not operated by a religious or sectarian institution: The LAD states that it applies to “any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education or the Commissioner of Education of the State of New Jersey,”³¹ but not “any educational facility operated or maintained by a bona fide religious or sectarian institution.”³²

Applied to student discipline, the LAD's protections:

- Prohibit discrimination on the basis of actual or perceived race, religion, national origin, gender, sexual orientation, disability, and other protected characteristics in the implementation of school discipline policies;³³
- Protect students from discrimination at every stage of the disciplinary process, from behavior management in the classroom or hallways, to referrals to the principal or any other authority figure outside the classroom, up to and including the imposition of discipline in any form, including detention, suspension, expulsion, alternative school placement, or any other disciplinary measure;³⁴
- Apply to anyone who the school or district authorizes to discipline students, including teachers, administrators, school staff, security guards, school resource officers or other officers authorized by the school to engage in formal or informal discipline,³⁵ and other agents;³⁶ and
- Apply to discipline imposed by the school for conduct in any setting, including outside of school.

Under the LAD, there are at least two legal claims that may apply to discrimination or bias-based harassment in the administration of student discipline:

1. **Differential Treatment:** This claim applies where a student is disciplined differently because of their race or other protected characteristic, either because a policy explicitly treats students of different races differently or because authority figures apply a policy differently to students of different races or other protected characteristics.
2. **Disparate Impact:** This claim applies where a neutral practice or policy impacts students of one race or other protected characteristic more severely than it does students of another race or other protected characteristic, or students with disabilities more severely than students who do not have disabilities.

Each of these claims is discussed in further detail below, with examples of discipline that could violate the LAD. The key takeaway is this: The LAD holds those in charge of administering student discipline accountable not only for disciplinary decisions that are made with an explicitly discriminatory *intent*, but also if their disciplinary decisions have a discriminatory *impact*. Schools have a responsibility to monitor for and address bias-based disparities in student discipline (see pages 11-13 and 15 for ways schools can monitor for these disparities), and schools that fail to do so can be held accountable under New Jersey's Law Against Discrimination.

B. Differential Treatment

Schools violate the LAD when they discipline students differently because of their actual or perceived race, religion, national origin, gender, sexual orientation, disability, or other protected characteristics,³⁷ even if the differential treatment results from unconscious rather than conscious bias on the part of school personnel.³⁸ Differential treatment sometimes happens when a policy itself is discriminatory (*i.e.*, the policy itself treats students of one protected class differently, or was enacted with the intent to do so). Differential treatment also happens when school officials' enforcement of discipline policies is discriminatory (*i.e.*, when school officials discipline students

of one protected class differently than another, even if the policy appears neutral on its face). And differential treatment happens when school officials' process for disciplining students is discriminatory (*i.e.*, when school officials follow a different disciplinary process for students of one protected class than they do another, unless a difference in procedure is required by applicable statutes or regulations).³⁹ This section discusses all three in more detail.

Note that, for students with disabilities, it does not violate the LAD when the use of a different disciplinary process or practice is required by statute, regulation, or an individual student's valid individualized education plan (IEP) or 504 plan, or where use of that process or practice is a reasonable accommodation for the student's disability under either federal or state law.⁴⁰ Nothing in this guidance should be construed as overriding the obligation of schools to comply with the requirements imposed by federal law, state law, or a student's valid IEP or 504 plan, including their obligation to provide reasonable accommodations to students with disabilities under federal and state law. Nonetheless, where a school subjects a student with disabilities to adverse, differential disciplinary treatment on the basis of the student's protected characteristic and the differential treatment is not required by statute, regulation, or a student's valid IEP or 504 plan, the school's conduct violates the LAD.

Violations Rooted in Discriminatory Policies

A disciplinary policy or practice violates the LAD if the policy itself states that students of one race, national origin, gender, disability-status, or another protected characteristic should be disciplined differently from students of another. For example, a school policy that explicitly authorizes educators to use restraint or seclusion against students with disabilities, but not against their non-disabled peers, would violate the LAD by discriminating based on disability.

But a disciplinary policy also violates the LAD if it explicitly penalizes something that is "inextricably intertwined or closely associated with" race, national origin, gender, disability, or another protected characteristic.⁴¹ For example, a dress code that penalizes students for wearing their hair in twists, braids, cornrows, Afros, locs, Bantu knots, fades, or any other hairstyle that is closely associated with being Black would violate the LAD as explicitly amended by the "Create a Respectful and Open Workplace for Natural Hair Act" (CROWN Act) by discriminating on the basis of race.⁴²

A school that adopts a school policy with the intent to target students of a particular race, national origin, gender, disability, or other protected class would also violate the law.⁴³ For example, a school that revises its dress code to ban clothing with "political" or "inappropriate" phrases or symbols and specifies that "Black Lives Matter" or "Stop Asian Hate" attire is unacceptable, but does not prohibit students from wearing the confederate flag or other white supremacist phrases or symbols, would discriminate based on race. Such a policy would violate the LAD regardless of the race of the students against whom it ultimately was applied.

Violations Rooted in Discriminatory Enforcement

A school that applies neutral school discipline policies differently based on students' race, national origin, gender, disability, or another protected category violates the LAD.⁴⁴ A school also violates the LAD if its employees or other agents—like classroom teachers, security guards, school-based police officers, or other employees or agents—apply school discipline policies differently based on a student's membership in a protected class.⁴⁵

The LAD protects students from differential treatment at every stage of the disciplinary process, from behavior management in the classroom or hallways, to referrals to the principal or any other authority figure outside the classroom, up to and including the imposition of discipline.⁴⁶ This means that a school may violate the LAD not only if it punishes students differently based on race, national origin, gender, disability,⁴⁷ or another protected characteristic, but also if teachers, security staff, or others monitor students in the hallways differently based on any of those characteristics, reprimand students in the classroom differently based on any of those characteristics, or refer students to the principal or other authority figures outside the classroom differently based on any of those characteristics. Common examples of differential treatment discrimination in the application of school discipline policies are discussed further below.

One common type of differential treatment discrimination occurs when schools treat students differently based on race, national origin, gender, disability, or another protected characteristic for engaging in the same misconduct. For example, if a Black student and an Asian student got into a fight, and the school suspended the Black student for 5 days but only suspended the Asian student for 2 days, even though it was unclear who started the fight and the students' conduct leading up to and during the fight were similar, that may constitute discrimination based on race. Similarly, if a classroom teacher does not refer white students to the principal's office for "disruptive," "disrespectful," "insubordinate," or other subjective behaviors, but tends to refer Black or Latinx/e students to the principal's office for the same types of conduct, that would constitute discrimination based on race, national origin, or other protected characteristics.

A school also discriminates if it imposes different requirements on students following a suspension, expulsion, or other disciplinary removal based on race, national origin, gender, disability, or another protected characteristic. For example, if a school requires students with disabilities to undergo a psychological evaluation before returning to school after a suspension or expulsion, but does not require students who do not have disabilities to undergo such an evaluation before returning to school after a suspension or expulsion for similar behavior, that would likely constitute differential treatment and violate the LAD based on disability.

Another common type of differential treatment discrimination occurs when schools choose to overlook policy violations by students from one protected class, while strictly enforcing the same policy against students from another protected class. For example, if a school's staff enforces a prohibition on "tight clothing" against girls wearing tight pants, but not against boys wearing tight pants, or enforces a prohibition on exposing undergarments against a girl whose bra strap is showing but not against a boy whose boxer shorts are visible, that may constitute discrimination based on gender. And if a school's staff consistently disciplines Black and Latinx/e girls for violating the school's dress code, but overlooks white girls wearing similar attire, that may

constitute discrimination based on race, national origin, or other protected characteristics. Similarly, if a school's security guards or hall monitors consistently ask Black students for their hall passes or student IDs, while allowing white students to walk through the halls unquestioned, that may constitute discrimination based on race.

Differential treatment discrimination also occurs when schools' discipline of an individual student is influenced by that student's race, national origin, gender, disability, or other protected characteristic.⁴⁸ It is a violation of the LAD for any authority figure involved in the disciplinary process to use a racial or other bias-based slur towards a student at any point from the moment of the student's alleged misbehavior through to the imposition of discipline. Not only would such conduct be strong evidence of differential treatment discrimination, but an authority figure's use of a bias-based slur during the disciplinary process would also likely be sufficient to state a separate claim under the LAD for hostile environment harassment.⁴⁹

School officials' passive tolerance of bias-based slurs or other bias-based offensive language among students or other members of the school community that the officials knew or should have known about may also provide evidence of differential treatment discrimination.⁵⁰ For example, if a teacher who has failed to address students' use of racial slurs towards their classmates of color during class then imposes discipline on a student of color, that could provide evidence that their discipline of the student may have been influenced by race. Similarly, if a school does not conduct HIB⁵¹ investigations into allegations of race or ethnicity-based bullying or harassment, but then disciplines a student of color for alleged HIB incidents, that could raise an inference that their discipline of the student may have been influenced by race.

In determining whether a school's discipline of an individual student is influenced by that student's race, national origin, gender, disability, sexual orientation, or other protected characteristic, DCR may consider any evidence suggesting bias on the part of school officials (whether intentional, implicit, or unconscious), including statistical evidence showing race, national origin, gender, disability, sexual orientation, or other relevant disparities in school discipline; statements made during the discipline process; parallel situations involving other students of the same protected class being treated differently than students who are not members of that protected class; and other evidence regarding similar incidents.⁵² When analyzing a school's disciplinary data, DCR views the data holistically and considers multiple metrics, and encourages schools to do the same. DCR considers multiple metrics, including, but not limited to, the raw number of suspensions among students by protected class, the rate of suspension per 100 students by protected class, and the percentage of students suspended by protected class. DCR also uses multiple methods of comparison, including, but not limited to, the risk gap (calculated as the difference between rates of suspension between comparable protected classes), the risk ratio (calculated by dividing the rate of suspension in one protected class by the rate of suspension in a comparable protected class), and the composition index (calculated by comparing a protected class's percentage of enrollment to the same protected class's percentage of suspensions).

Violations Rooted in Discriminatory Process

Schools also violate the LAD if they follow a different process when disciplining students of a specific race, national origin, gender, disability, or other protected characteristic. This can occur when school officials fail to follow federal or state procedural requirements when disciplining students of a certain race, national origin, gender, disability, or other protected characteristic, but follow those requirements when disciplining students of another race, national origin, gender, disability, or other protected characteristic.

For example, under relevant state regulations, when a student with a disability is suspended for less than 10 days, the principal is required to send “written notification and a description of the reasons” for the suspension to both the student’s case manager and the student’s parents.⁵³ When a student with a disability is subjected to a change of placement as the result of a long-term suspension, expulsion, or other disciplinary measure, under federal and state law the student is entitled to what is known as a “manifestation determination,” in which the student’s parent and members of the student’s IEP Team review all relevant information about the incident to determine whether the conduct in question was either “caused by, or had a direct and substantial relationship to, the child’s disability” or “the direct result of the [school]’s failure to implement the IEP.”⁵⁴ If school officials typically provide the required written notice and/or manifestation determinations to white students with disabilities, but neglect to provide written notice and/or manifestation determinations to Black students with disabilities, that may constitute discrimination based on race. Note that adverse differential treatment of students with disabilities is always prohibited by federal and state law, including where a school fails to provide required statutory procedural safeguards for a student with disabilities. The LAD, however, does not prohibit schools from treating students with disabilities differently when they are required to do so by federal law, state law, or a student’s valid IEP or 504 plan. Indeed, the LAD itself may sometimes require a student with disabilities to be treated differently as a reasonable accommodation for that student.

Similarly, under New Jersey law, when any student is going to be suspended for less than 10 days, the school must provide the student with “oral or written notice of the charges,” and, if those charges are denied, “an explanation of the evidence forming the basis of the charges.”⁵⁵ The school must also hold “an informal hearing during which the student is given the opportunity to present the student’s version of events.”⁵⁶ Unless the student’s presence poses a “continuing danger” or an “ongoing threat of disrupting the educational process,” that informal hearing must occur “[p]rior to any suspension.”⁵⁷ If a school typically provides non-Black students with an opportunity to present their version of events prior to deciding whether to impose a suspension, but does not provide such an opportunity to Black students, that may constitute discrimination based on race. Moreover, a student’s protected characteristic cannot factor into the decision as to whether the student poses a “continuing danger” or an “ongoing threat of disrupting the educational process.” For example, if a Black student or a student with a disability is denied an informal hearing prior to a suspension on the basis that their presence posed a “continuing danger” or an “ongoing threat of disrupt[ion],” but the objective circumstances do not provide a basis for such a finding, the school’s conduct may constitute discrimination based on race or disability.

New Jersey law also prohibits the suspension or expulsion of most students prior to third grade. Pursuant to state law, students enrolled in preschool through second grade cannot be suspended or

expelled,⁵⁸ except that an out-of-school suspension may be imposed if the incident involves “conduct that is of a violent or sexual nature that endangers others”⁵⁹ and an expulsion may be imposed if conduct violates the Zero Tolerance for Guns Act.⁶⁰ If a school nonetheless suspends or expels a preschooler, kindergartener, or first or second grader in violation of the law based on race, national origin, gender, disability or any other protected characteristic, that would violate the LAD.

Thus, if a school suspends a Black preschooler for conduct that neither endangered others nor violated the Zero Tolerance for Guns Act, that may constitute discrimination based on race. Similarly, in implementing this law, a student’s protected characteristic cannot factor into the school’s decision as to whether the student’s conduct was “of a violent or sexual nature that endangers others.” So, a school’s suspension of a Black kindergartener or a first grader with a disability may constitute discrimination based on race or disability if the objective circumstances do not provide a basis for a finding that the student’s conduct endangered others or violated the Zero Tolerance for Guns Act.

In summary, under a differential treatment theory, DCR may find that a school violates the LAD any time it disciplines students of one race, national origin, gender, sexual orientation, disability status, or other protected characteristic differently than it does students of another and that differential treatment is not compelled by federal law, state law, or a student’s valid IEP or 504 plan. Schools **cannot** impose discriminatory disciplinary policies. This means they cannot use discipline policies that explicitly require students to be disciplined differently based on their membership in a protected class, and they cannot use discipline policies that penalize students for something that is “inextricably intertwined or closely associated with” a protected characteristic. They also cannot adopt a neutral policy with the intent to target a protected class. Schools also **cannot** apply neutral disciplinary policies in a discriminatory way. This means they cannot treat students differently based on race, national origin, gender, disability, or another protected characteristic for engaging in the same misconduct; overlook policy violations by students from one protected class, while strictly enforcing the same policy against students from another protected class; or allow their discipline of an individual student to be influenced by that student’s race, national origin, gender, disability, or other protected characteristic. Schools also **cannot** bypass requirements intended to protect students in the disciplinary process in a discriminatory way. This means schools must follow consistent disciplinary processes and cannot fail to enforce procedural safeguards when disciplining students of one protected class and not another.

To ensure that their discipline policies and practices comply with the LAD, school administrators should:

- Review their schools’ disciplinary policies to ensure no policy treats students differently based on actual or perceived race, religion, national origin, gender, sexual orientation, disability, and other protected characteristics unless that differential treatment is itself required by federal law, state law, or a student’s valid IEP or 504 plan;
- Review their schools’ disciplinary policies to ensure that no policy penalizes students for something “inextricably intertwined or closely associated with” race, national origin, gender, disability, or another protected characteristic;

- Supervise the drafting and revision of school disciplinary policies to ensure that no policy is drafted or revised with the intent to target students based on race, national origin, gender, disability, or another protected characteristic;
- Monitor and review disciplinary decisions to ensure students receive the same or similar discipline for engaging in the same misconduct, unless the difference in discipline is the result of school officials' compliance with federal or state statutory or regulatory requirements when disciplining students with disabilities or a student's valid IEP or 504 plan;⁶¹
- Collect, monitor and review disciplinary data, using best practices and appropriate metrics to identify potential disparities based on race, national origin, gender, disability, or any other protected characteristic, and consider whether any disparities identified are the result of inconsistent enforcement or inconsistent implementation of procedural safeguards;
- Collect, monitor, and review classroom referral data for each instructor to identify disparities based on race, national origin, gender, disability, or any other protected characteristic, consider whether any disparities identified are the result of inconsistent referrals, and take immediate and appropriate action if inconsistent referrals are found;
- Thoroughly investigate all allegations that employees or other individuals empowered by the school to discipline students have used bias-based slurs or other offensive language, or have allowed students or others in the school community to use bias-based slurs or other offensive language without consequence; take appropriate action based on the results of the investigation; and provide oversight and review of future disciplinary actions taken by employees or agents against whom such allegations have been raised;
- Equally communicate the policies and procedures to all students and caretakers regardless of their protected characteristics, including by providing the policies and procedures in a student or caretaker's native language;
- Regularly solicit feedback from students, parents, employees, and other school community members regarding observed discipline disparities and school culture and climate, and allow such feedback to be given anonymously;
- Require employees, including supervisors, to report to school administration any observed disparities, any use of bias-based slurs or offensive language by employees, and any observed failure by employees to address students' use of bias-based slurs;
- Require supervisors conducting staff assessments and evaluations to identify whether staff members have engaged in differential treatment or conduct that results in disparate impact, and consider these actions, omissions, and patterns in the overall assessment of the staff member;
- Ensure that all employees responsible for disciplining students, all supervisors of those employees, all HIB coordinators, and all employees who participate in drafting or revising disciplinary policies receive regular training on the non-discriminatory enforcement of school disciplinary policies, processes, and practices, including a discussion of the possible role of implicit or unconscious bias;
- Ensure that supervising administrators receive regular training on how to identify and address discriminatory enforcement of school disciplinary policies and differential treatment in school settings, including how to appropriately collect, analyze, and use data to identify disparities; and

- Provide professional development opportunities for employees to further develop the skills to appropriately manage the use of bias-based slurs or other offensive language by students.

B. Disparate Impact

Schools may also violate the LAD when they discipline students pursuant to neutral policies or practices that have an unequal impact on members of a protected class, even if the unequal impact of the policies or practices is unintentional. This is known as “disparate impact” discrimination. Under the LAD, schools cannot use a discipline policy that has a disparate impact on Black students, other students of color, students with disabilities, LGBTQ+ students, or students from any other protected class unless the school can show that the practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a school’s discipline policy may still be prohibited under the LAD if the complainant shows that there is a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. Because disparate impact discrimination may not be as easily recognizable as disparate treatment discrimination, it is crucial for schools to think carefully about policies that may cause a disparate impact.

A policy or practice has a “disparate impact” if it actually or predictably results in disproportionately negative effects on members of a protected class. In other words, a neutral policy or practice has a disparate impact if it impacts students with a protected characteristic more severely than it does other students. For example, if Black students make up 20% of a high school’s student population, but 30% of the students suspended or expelled for “insubordination,” the school’s policy of suspending or expelling students for insubordination has a disparate impact on Black students.⁶² Similarly, as applied to disability discrimination, a neutral policy or practice has a disparate impact if it impacts students with disabilities more severely than it does students without disabilities. For example, if students with disabilities make up 10% of a school’s student population, but 20% of non-mandatory law enforcement referrals, the school’s neutral policy of making non-mandatory law enforcement referrals is likely to create a prima facie case of a disparate impact on students with disabilities. Exercising discretion in non-mandatory law enforcement referrals in a manner that results in a disparate impact violates the LAD where a school cannot show it is necessary to achieve a substantial, legitimate, nondiscriminatory interest or where a less discriminatory, equally effective alternative exists.

This is true whether a school has already implemented the policy and its own discipline data reveal disparities, or the school adopts a new policy despite evidence that shows that the policy or practice impacts students of one protected class more severely than another. This means that a school can violate the LAD by adopting a neutral and new discipline policy or practice that is known to have a disparate impact when adopting that policy is not necessary to achieve a substantial and legitimate nondiscriminatory interest, even before it has been in place long enough to adversely impact students in that particular school. For example, a significant body of evidence demonstrates that “zero tolerance” school discipline policies⁶³ consistently lead to unequal rates of suspension and expulsions for Black students and other students of color as compared to their white peers. In light of that evidence, a school’s decision to adopt a zero-tolerance policy could itself have a disparate impact.

The following is a non-exhaustive list of policies or practices that evidence currently demonstrates may have a disparate impact on Black students, other students of color, students with disabilities, LGBTQIA+ students, or students from any other protected classes:

- Zero-tolerance policies that are not mandated by state or federal law;⁶⁴
- Discipline policies that permit suspension or expulsion for minor or subjective infractions, such as “insubordination,” “disrespect,” or “misbehavior”;⁶⁵
- A school’s use of school resource officers or other law enforcement personnel to impose or enforce discipline, particularly for non-violent and non-drug related student misconduct;⁶⁶
- A school’s use of restraint and seclusion,⁶⁷ sometimes referred to as the use of “isolation rooms”;⁶⁸ and
- A school’s practice of making court or law enforcement referrals for students deemed truant under N.J.S.A. 18A:38-25 without first following the procedures outlined in N.J.A.C. 6A:16-7.6(a), including making an individualized, case-by-case determination regarding the need for a court referral, pursuant to N.J.A.C. 6A:16-7.6(a)(4)(iii).⁶⁹

Under the LAD, schools cannot use a discipline policy that has a disparate impact on Black students, other students of color, students with disabilities, LGBTQIA+ students, or students from any other protected class unless the school can show that the practice or policy “is necessary to achieve a substantial, legitimate, nondiscriminatory interest.” Even then, a school’s discipline policy may still be prohibited under the LAD if the complainant can show there is a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

A school’s interest is substantial when it is a core interest that has a direct relationship to the function of the school. A school’s interest is legitimate when it is genuine and not false or pretextual. And a school’s interest is nondiscriminatory when the justification does not itself discriminate based on a protected characteristic. For example, schools have a substantial, legitimate, non-discriminatory interest in creating a safe learning environment for all students and teachers.

A policy or practice is only necessary to achieve a school’s interest in creating a safe learning environment for all students and teachers if it *effectively* carries out the goal of achieving a safe learning environment for all students and teachers. Moreover, a school’s justification for a practice or policy that has a disparate impact must be supported by empirical evidence (i.e., evidence that is not hypothetical or speculative). For example, if a school asserted that its policy or practice of taking a “zero tolerance” approach to student insubordination was necessary to create a safe learning environment, it would have to point to empirical evidence that a zero tolerance policy effectively creates a safe learning environment for students and teachers.

In summary, under a disparate impact theory, a school may be found to violate the LAD if it uses a discipline policy or practice that impacts students of one protected class more severely than it does students of another protected class unless it can show that the policy or practice is necessary

to achieve a substantial, legitimate, nondiscriminatory interest. A school's justification must be backed by empirical evidence and may not be hypothetical or speculative. And even if empirical evidence supports the school's assertion that the challenged policy is necessary to achieve such an interest, a school still cannot use a policy or practice that impacts students of one race more severely than students of another race if the student or complainant can show that a less discriminatory, equally effective alternative means of achieving the school's interest exists.

To ensure that their discipline policies and practices comply with the LAD's prohibition against disparate impact discrimination, school administrators should:

- Ensure that all employees responsible for disciplining students receive regular, interactive training on the non-discriminatory enforcement of school disciplinary policies, processes, and practices, including a discussion of the possible role of implicit or unconscious bias;
- Research new discipline policies or practices before adopting them to determine whether research indicates they are likely to impact Black students, other students of color, students with disabilities, LGBTQ+ students, or students from any other protected class more severely than other students;
- Regularly monitor their school's disciplinary data for disparities based on race, ethnicity, gender, disability, or any other protected category, and disaggregate the data to identify intersectional disparities, such as disparities impacting Black girls or Black students with disabilities;
- Identify any formal or informal policies or practices in use by the school that may be contributing to those disparities, and discontinue use of those practices unless empirical evidence demonstrates that they are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory, equally effective alternative that would achieve the same interest; and
- Proactively explore adoption of evidence-based alternatives to discipline policies that may be contributing to disparities, including trauma-informed and restorative justice practices and equity-centered implementation of positive behavioral interventions and supports (PBIS).

The Division on Civil Rights and Department of Education expect all covered New Jersey Boards of Education and their counsel to be aware of and familiar with this document, and with the requirements the LAD imposes with respect to school discipline. All covered entities are expected to ensure that their disciplinary policies and practices are in compliance with the Law Against Discrimination. The Division on Civil Rights may initiate enforcement proceedings in the event a school district, school board, or other entity fails to comply with the Law Against Discrimination.

The Division on Civil Rights is committed to preventing and eliminating discrimination and harassment on the basis of race, religion, gender, sexual orientation, national origin, disability, and other protected characteristics in schools and in all places of public accommodation, employment, and housing. If you believe you have been subject to discrimination, harassment, or retaliation in

violation of the LAD, you may either (1) file a complaint with DCR (within 180 days of the violation) online at <https://bias.njcivilrights.gov/en-US/> or by calling 1-833-NJDCR4U (833-653-2748) or (2) file a lawsuit in court (within two years of the violation).

To learn more about DCR's enforcement of the LAD, the Fair Chance in Housing Act, and the New Jersey Family Leave Act and the agency's work to prevent, eliminate, and remedy discrimination and bias-based harassment in employment, housing, and places of public accommodation, go to www.njcivilrights.gov.

¹ The purpose of this enforcement guidance is to clarify and explain DCR’s understanding of existing legal requirements in order to facilitate compliance with the LAD. This guidance does not impose any new or additional requirements that are not included in the LAD, does not establish any rights or obligations for any person, and will not be enforced by DCR as a substitute for enforcement of the LAD.

² In this guidance, DCR uses the term “gender” to refer, collectively, to the protected characteristics of sex, gender identity, and gender expression.

³ Adam Clark, *N.J. Saw ‘Alarming Increase’ In School Discipline. 9% of State’s Black Student’s Suspended*, NJ.com (Nov. 18, 2020) (quoting Tom Puryear, Education Chairperson for the New Jersey NAACP).

⁴ In this guidance, DCR uses the phrase “Latinx/e” to refer to individuals who identify as Latino, Latina, Latinx, or Latine. In some prior DCR publications, the phrase “Latinx” has been used to include all people residing in the United States who identify as of Latin American descent. However, “[s]ome people have challenged ‘Latinx,’ saying it’s an anglicization, as well as a word that is impossible to pronounce in Spanish. In response to that criticism, advocates for the term have begun to move in the direction of a new term: Latine.” Paloma Celis Carbajal, Curator for Latin American, Iberian & Latino Studies, General Research Division, “From Hispanic to Latine: Hispanic Heritage Month and the Terms That Bind Us,” N.Y. Public Library (Sept. 29, 2020), <https://www.nypl.org/blog/2020/09/29/hispanicheritage-month-terms-bind-us>. DCR uses the term “Latinx/e” throughout this report.

⁵ N.J. Dep’t of Ed., *Commissioner’s Annual Report to the Education Committees of the Senate and General Assembly on Student Safety and Discipline in New Jersey Public Schools* (Jul. 1, 2018 – Jun. 30, 2019), <https://www.state.nj.us/education/schools/vandv/1819/vandv.pdf>. This guidance uses DOE data from the 2018-2019 school year because it is the most recent school year for which data is available in which the number of suspensions and associated data was not affected by school closures due to the COVID-19 pandemic. Although DOE has released its reports for the 2019-2020 and 2020-2021 school years, the overall number of suspensions in both years reflects a reduction in overall suspensions likely attributable to the pandemic. Nonetheless, those most recent reports reflect extremely similar disparities. See N.J. Dep’t of Ed., *Commissioner’s Annual Report to the Education Committees of the Senate and General Assembly on Student Safety and Discipline in New Jersey Public Schools* (Jul. 1, 2019 – Jun. 30, 2020), https://www.nj.gov/education/vandv/annualreport/1920/SSDS_report_2019-20.pdf (showing Black students suspended 3.4 times more than white peers and Latinx/e and multiracial students suspended 1.4 times more than white peers); N.J. Dep’t of Ed., *Commissioner’s Annual Report to the Education Committees of the Senate and General Assembly on Student Safety and Discipline in New Jersey Public Schools* (Jul. 1, 2020 – Jun. 30, 2021), https://www.nj.gov/education/vandv/annualreport/2021/SSDSReport2020_2021.pdf (showing Black students suspended 3.1 times more than white peers and Latinx/e and multiracial students suspended 1.4 times more than white peers).

⁶ New Jersey Interagency Task Force to Combat Youth Bias, *An Anti-Bias Vision for the Next Generation: Report & Recommendations of the New Jersey Interagency Task Force to Combat Youth Bias at 21-23* (2020), <https://www.nj.gov/oag/dcr/downloads/2020-ybtf-report.pdf> [hereinafter “Youth Bias Task Force Report”].

⁷ Data collected by the New Jersey Department of Education, 2018-2019 school year.

⁸ GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth* (2016), https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf.

⁹ N.J.S.A. 10:5-12(f).

¹⁰ The data in this section do not reflect all disciplinary removals. They reflect only those removals that schools have classified as “suspensions.” However, whether schools classify disciplinary actions as a formal suspension is irrelevant to whether the discipline violates the LAD. If a school removes a child from class for disciplinary reasons, DCR will analyze whether that removal violated the LAD regardless of how a school labels the removal. Both formal and informal suspensions and other uses of formal or informal discipline can violate the LAD if they produce differential treatment or a disparate impact.

¹¹ N.J. Dep’t of Ed., *Commissioner’s Annual Report to the Education Committees of the Senate and General Assembly on Student Safety and Discipline in New Jersey Public Schools* (Jul. 1, 2018 – Jun. 30, 2019), <https://www.nj.gov/education/vandv/annualreport/1819/vandv.pdf>.

¹² U.S. Department of Education Office for Civil Rights, *Civil Rights Data Collection, 2017-2018 State and National Estimates, Student Enrollment, Discipline*, <https://ocrdata.ed.gov/estimations/2017-2018>.

¹³ *Id.* at 8.

¹⁴ Youth Bias Task Force Report, *supra* note 6 at 22.

¹⁵ U.S. Department of Education Office for Civil Rights, *Civil Rights Data Collection, An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year* at 3, 12 (June 2021), <https://ocrdata.ed.gov/assets/downloads/crdc-exclusionary-school-discipline.pdf>.

¹⁶ *Id.* at 10.

¹⁷ Youth Bias Task Force Report at 21, *supra* note 6, at 41-46; *see also* U.S. Dep’t of Educ., Office of Civil Rights & U.S. Dep’t of Justice, Civil Rights Div., Dear Colleague Letter on Nondiscriminatory Administration of School Discipline, (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>; John M. Wallace, et al., Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005, 59 *Negro Educ. Rev.* 47 (2008), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2678799/>, at 7, 9-11.

¹⁸ U.S. Department of Education Office for Civil Rights, *Civil Rights Data Collection, 2017-2018 State and National Estimates, School Climate, Arrests*, <https://ocrdata.ed.gov/estimations/2017-2018>.

¹⁹ Memorandum of Understanding at 12.

²⁰ N.J. Dep’t of Ed., *Commissioner’s Annual Report to the Education Committees of the Senate and General Assembly on Student Safety and Discipline in New Jersey Public Schools* (Jul. 1, 2018 – Jun. 30, 2019), <https://www.state.nj.us/education/schools/vandv/1819/vandv.pdf>.

²¹ Youth Bias Task Force Report, *supra* note 6, at 41-46.

²² U.S. Comm’n on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities* 45 (Jul. 2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> (discussing data demonstrating that: (1) “[s]chools where at least half of the student population is nonwhite, as well as high-poverty schools (i.e., where at least 75 percent of students are eligible for free or reduced-price lunches), have the highest percentages of law enforcement officers on campus”; (2) “even after controlling for socioeconomic status and poverty levels, schools with more school resource officers had higher arrest rates for subjective offenses”; and (3) “students who attended schools with at least one SRO were almost five times as likely to face a criminal charge for ‘disorderly conduct’” as students who did not).

²³ Daniel Losen et al., Center for Civil Rights Remedies, “Are we Closing the School Discipline Gap?” , <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap> at 4 (Feb. 2015).

²⁴ *Id.*

²⁵ *Id.*; *see also* Daniel Losen, et al., The Center for Civil Rights Remedies, “Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies,” (Mar. 22, 2021), <https://civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>

²⁶ Office of Disease Prevention and Health Promotion, High School Graduation, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/high-school-graduation#25> ; Vaughn MG, Salas-Wright CP, Maynard BR. “Dropping out of school and chronic disease in the United States,” *J Public Health.* 2014;22(3):265–70.

²⁷ Laura Sullivan et. al, New Jersey Institute for Social Justice, “Making the Two New Jerseys One: Closing the \$300,000 Racial Wealth Gap in the Garden State” 7 (Feb. 2022), https://assets.nationbuilder.com/njisj/pages/689/attachments/original/1645217098/Making_the_Two_New_Jerseys_One_2.15.22-compressed.pdf?1645217098 .

²⁸ *Id.* at 8.

²⁹ *Compare* Office of Disease Prevention and Health Promotion, High School Graduation, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/high-school-graduation#25>; Vaughn MG, Salas-Wright CP, Maynard BR. “Dropping out of school and chronic disease in the United States,” *J Public Health.* 2014;22(3):265–70, *with* New Jersey State Health Assessment Data, “Health Indicator Report of Asthma Prevalence in Adults – Asthma Prevalence Among Adults Aged 18 and Over, by Race/Ethnicity, New Jersey, 2011-2018,” <https://www-doh.state.nj.us/doh-shad/indicator/view/AsthmaPrevalence.Race.html> (documenting persistent racial disparities in asthma prevalence from 2011-2018, with 2018 data indicating a 14.1% prevalence for Black New Jerseyans, compared to 7.5% for white New Jerseyans); New Jersey State Health Assessment Data, “Health Indicator Report of Cardiovascular Disease – High Blood Pressure – Prevalence of Diagnosed High Blood Pressure among Adults by Race/Ethnicity, New Jersey 2011-2017 (Odd Years),” <https://www-doh.state.nj.us/doh-shad/indicator/view/CardiovascularDiseaseHBP.Race.html> (documenting persistent racial disparities in diagnosed high blood pressure prevalence from 2011-2017, with 2017 data indicating a 41% prevalence for Black New Jerseyans, compared to a 28.4% prevalence for white New Jerseyans); New Jersey State Health Assessment Data, “Health

Indicator Report of Diabetes (Diagnosed) Prevalence – Diagnosed Diabetes Prevalence in Adults Ages 18 and Over, by Race/Ethnicity, New Jersey, 2011-2018,” <https://www-doh.state.nj.us/doh-shad/indicator/view/DiabetesPrevalence.Race.html> (documenting persistent racial disparities in diagnosed diabetes prevalence from 2011-2018, with 2018 data indicating a 16.4% prevalence for Black New Jerseyans and a 10.1% prevalence for Hispanic New Jerseyans, compared to a 7.2% prevalence for white New Jerseyans).

³⁰ See e.g., N.J.S.A. §§ 10:5-4, N.J.S.A. § 10:5-5(l), 10:5-9.1, 10:5-12, 10:5-12.2. . See also *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 405 (2007) (holding that the protections under the LAD extend to schools “regardless of their source of funding”).

³¹ N.J.S.A. § 10:5-5(l).

³² *Id.*

³³ N.J.S.A. 10:5-12(f) (prohibiting discrimination in places of public accommodation based on “race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person”); see *Turner v. Wong*, 363 N.J. Super. 186, 212 (N.J. Sup. Ct. App. Div. 2003) (“The LAD is not limited to outright denial of access or service. . . . [I]t also renders unlawful any acts discriminating against any person in the furnishing of the public accommodation.”); see also *Clark v. Bd. of Educ. of Franklin Twp. Pub. Sch.*, No. CIV.A. 06-2736 (FLW), 2009 WL 1586940, at *11 (D.N.J. June 4, 2009) (denying motion to dismiss claim that school vice principal disciplined African American preschool student differently because of his race).

³⁴ N.J.S.A. 10:5-12(f) (prohibiting places of public accommodation, including schools, from “directly or indirectly . . . refus[ing], withhold[ing] from or deny[ing] to any person any of the accommodations advantages, facilities or privileges thereof, or . . . discriminat[ing] against any person in the furnishing thereof”); see also *Williams v. Lenape Bd. of Educ.*, No. CV 17-7482 (RBK/JS), 2020 WL 2111221, at *13 (D.N.J. May 4, 2020) (“[T]he New Jersey Supreme Court has made clear that the NJLAD applies in school settings.”).

³⁵ A school can be held responsible if a school resource officer or other type of law enforcement officer who is working in the school or as an agent, makes non-mandatory law enforcement referrals that disproportionately impacts students on the basis of race, national origin, religion, gender, disability, and other protected characteristics. (N.J.S.A. 10:5-12(e)).

³⁶ N.J.S.A. 10:5-12(f) (prohibiting “any owner, lessee, proprietor, manager, superintendent, **agent**, or **employee** of any place of public accommodation” from, among other things, “discriminat[ing] against any person” based on a protected characteristic); see also *Clark v. Bd. of Educ. of Franklin Twp. Pub. Sch.*, No. CIV.A. 06-2736 (FLW), 2009 WL 1586940, at *11 (D.N.J. June 4, 2009) (finding a Vice Principal may be held liable under the LAD in their official capacity if they engage in discriminatory discipline).

³⁷ N.J.S.A. 10:5-12(f).

³⁸ *Id.*; *Lehman v. Toys ‘R’ Us, Inc.*, 132 N.J. 587, 604-605 (N.J. 1993) (“The LAD is not a fault- or intent-based statute. . . . The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional. Although unintentional discrimination is perhaps less morally blameworthy than intentional discrimination, it is not necessarily less harmful in its effects, and it is at the *effects* of discrimination that the LAD is aimed.”); *Dickerson v. Wallkill Valley Regional High School Bd. of Educ.*, Civ. No. 19-CV-08450(KSH)(CLW), 2020 WL 2847757, at *11 (D.N.J. June 1, 2020) (“The elements required . . . to bring a public accommodation claim under N.J.S.A. 10:5-12(f) are that ‘(1) defendant operates a place of public accommodation; (2) the plaintiff is a member of a protected class’ and (3) he or she was denied equal treatment on the basis of his or her membership in a protected class.”); C.f. *State v Andujar*, 247 NJ 275, 303 (2021) (“[I]mplicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination.”).

³⁹ For example, as discussed further on page 10, schools are required by both statute and DOE regulations to follow certain procedures when disciplining students with disabilities that they are not required to follow when disciplining students without disabilities. Following those procedures for students with disabilities does not violate the LAD. However, a school does violate the LAD if it follows DOE regulations when disciplining students with disabilities of one race, national origin, gender, or other protected characteristic, but fails to follow the required procedures when disciplining students with disabilities of another race, national origin, gender, or other protected characteristic.

⁴⁰ See Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (2004); Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (1990); N.J.S.A. 10:5-1 *et seq.*

⁴¹ N.J.S.A. 10:5-12; N.J.S.A. 10:5-5(vv); see also New Jersey Division on Civil Rights, Guidance on Race Discrimination Based on Hairstyle 6 (2019), https://www.nj.gov/oag/dcr/downloads/dcr-guide_Hair-Discrimination.pdf (“The LAD not only prohibits discrimination that is explicitly based on a protected characteristic, but also discrimination that is ostensibly based on something that is inextricably intertwined or closely associated with

a protected characteristic.”); *see, e.g., Zalewski v. Overlook Hospital*, 300 N.J. Super. 202, 210-212 (discrimination against a man who others believed “did not behave as they perceived a male should behave” was actionable under the LAD); *Tisby v. Camden Cty. Correctional Facility*, 448 N.J. Super. 241, 245-46, 249 (N.J. App. Div. 2017) (Muslim woman stated a prima facie claim under the LAD for discrimination based on religion where she alleged that she was terminated because she wore a hijab); *E.E.O.C. v. United Galaxy, Inc.*, Civ. No. 10–4987 (ES), 2013 WL 3223626, at *6-*7 (D.N.J. June 25, 2013) (Sikh man stated a claim under the LAD for failure to hire based on religion where he alleged that he was not hired as a sales associate because he wore a turban and maintained an unshaven beard).

⁴² N.J.S.A. 10:5-12; N.J.S.A. 10:5-5(vv). The CROWN Act codified DCR’s interpretation of the LAD, found in the Guidance on Race Discrimination Based on Hairstyle, *supra*, into the statutory text.

⁴³ *See* N.J.S.A. 10:5-12(f).

⁴⁴ *See* N.J.S.A. 10:5-12(f).

⁴⁵ *See* N.J.S.A. 10:5-12(f); *see also Dickerson v. Walkill Valley Regional High School Bd. of Educ.*, Civ. No. 19-CV-08450(KSH)(CLW), 2020 WL 2847757, at *11 (D.N.J. June 1, 2020) (“The elements required . . . to bring a public accommodation claim under N.J.S.A. 10:5-12(f) are that ‘(1) defendant operates a place of public accommodation; (2) the plaintiff is a member of a protected class’ and (3) he or she was denied equal treatment on the basis of his or her membership in a protected class.”).

⁴⁶ N.J.S.A. 10:5-12(f) (prohibiting places of public accommodation, including schools, from “directly or indirectly . . . refus[ing], withhold[ing] from or deny[ing] to any person any of the accommodations advantages, facilities or privileges thereof, or . . . discriminat[ing] against any person in the furnishing thereof”); *see also Williams v. Lenape Bd. of Educ.*, No. CV 17-7482 (RBK/JS), 2020 WL 2111221, at *13 (D.N.J. May 4, 2020) (“[T]he New Jersey Supreme Court has made clear that the NJLAD applies in school settings.”).

⁴⁷ Use of different behavioral management techniques for students with disabilities does not violate the LAD when use of those behavioral management techniques is required by statute, regulation, or an individual student’s IEP or 504 plan, *see supra* p. 7 & n. 39, or where use of those techniques has been requested as a reasonable accommodation for the student’s disability under either the ADA or the LAD.

⁴⁸ N.J.S.A. 10:5-12(f); *see also Sandy v. Township of Orange*, Docket No. A-0034-19, 2021 WL 3197029, *12 (N.J. Sup. Ct. July 29, 2021) (holding that a police officer’s statement that she took certain actions, including stopping and arresting plaintiff, “because [he was] a . . . foreigner” constituted direct evidence that the police officer’s “furnishing of public accommodations – the performance of her services as a police officer” were conducted “in a discriminatory manner based on plaintiff’s national origin” and “circumstantial evidence [that] the other officers acted in a discriminatory manner as well”); *Clark v. Bd. Of Educ. Of Franklin Township Public Schools*, Civil Action No. 06-2736 (FLW), 2009 WL 1586940, * (D.N.J. June 4, 2009) (denying summary judgment on differential treatment discrimination claim against vice principal who uttered racial epithet in connection with suspension of Black, disabled preschool student).

⁴⁹ *See, e.g., Sandy v. Township of Orange*, Docket No. A-0034-19, 2021 WL 3197029, *12 (N.J. Sup. Ct. July 29, 2021) (holding that plaintiff alleged both a hostile environment claim and a disparate treatment discrimination claim where police officer referred to plaintiff as a “foreigner” during police encounter because “[h]e does not only contend defendants created a hostile environment based on national origin; he contends [the police officer] actually exercised her authority as a police officer to stop, arrest, detain, and charge him with offenses . . . because of his national origin”); *Holmes v. Jersey City Police Dep’t*, 449 N.J. Super. 600, 605 (N.J. Sup. Ct. 2017) (distinguishing the legal standard that applies to peer-on-peer harassment from that which applies to harassment “by teachers or other authority figures” and holding that plaintiff stated a claim for hostile environment harassment where threatening and anti-transgender statements “were made by police officers, in a position of authority over plaintiff” during plaintiff’s arrest and detention); *Clark v. Bd. Of Educ. Of Franklin Township Public Schools*, Civil Action No. 06-2736 (FLW), 2009 WL 1586940, *8-11 (D.N.J. June 4, 2009) (denying summary judgment on differential treatment discrimination claim against vice principal who uttered racial epithet in connection with suspension of Black, disabled preschool student); *Williams v. Lenape Bd. Of Educ.*, Civ. No. 17-7482 (RBK/JS), 2020 WL 2111221, *16 (May 4, 2020) (“[T]he use of the n-word is so plainly egregious that a single utterance can be enough to establish a hostile environment.”).

⁵⁰ *Williams v. Lenape Bd. of Educ.*, No. CV 17-7482 (RBK/JS), 2020 WL 2111221, at *13 (D.N.J. May 4, 2020) (finding plaintiff’s claim against school district for race-based differential treatment in school football program supported by evidence that the football coaching staff “did not take any meaningful steps to address the racial slurs that white players were using in the locker room”).

⁵¹ “HIB” is an acronym for “harassment, intimidation, and bullying” as defined by the Anti-Bullying Bill of Rights Act (ABR), N.J.S.A. 18A:37-13 et seq., which prescribes a comprehensive scheme for reporting, investigating, and responding to HIB incidents. Under the ABR, a “harassment, intimidation or bullying” (HIB) incident has three key

components. First, a HIB incident includes any gesture, written, verbal or physical act, or electronic communication “that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.” Second, the incident must take place on school property, at any school-sponsored function, on a school bus, or off school grounds where it substantially disrupts or interferes with the orderly operation of the school or the rights of other students. Third, at least one of the following conditions must be satisfied: (a) “a reasonable person should know, under the circumstances, [that the conduct] will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property; (b) [the conduct] has the effect of insulting or demeaning any student or group of students; or (c) [the conduct] creates a hostile educational environment for the student by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.” N.J.S.A. 18A:37-14.

⁵² See, e.g., *Williams v. Lenape Bd. of Educ.*, No. CV 17-7482 (RBK/JS), 2020 WL 2111221, at *13 (D.N.J. May 4, 2020).

⁵³ N.J.A.C. 6A:14-2.8(a).

⁵⁴ N.J.A.C. 6A:14-2.8 & App. A; see also 20 U.S.C. § 1415(k)(1)(E). An IEP is an Individualized Education Program under Part B of the Individuals with Disabilities Education Act (IDEA). An IEP team includes teachers, parents, school administrators, related services personnel, and students (when appropriate).

⁵⁵ N.J.A.C. 6A:16-7.2(a)(1).

⁵⁶ N.J.A.C. 6A:16-7.2(a)(2).

⁵⁷ N.J.A.C. 6A:16-7.2(a)(2)(ii).

⁵⁸ N.J.A.C. 18A:37-2a.

⁵⁹ *Id.*

⁶⁰ *Id.*; See N.J.S.A. 18A:37-7 et seq.

⁶¹ For example, as discussed further on page 10, schools are required by both statute and DOE regulations to follow certain procedures when disciplining students with disabilities that they are not required to follow when disciplining students without disabilities. If following those procedures, or following a student’s valid IEP or 504 plan, results in students with disabilities being disciplined less severely than their peers without disabilities for engaging in the same or similar misconduct, that difference would not violate the LAD.

⁶² Riddle, Travis et al. “Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias”, (Apr. 2 2019), <https://www.pnas.org/doi/10.1073/pnas.1808307116> (demonstrating that where data showed that as Black students moved into counties with higher levels of bias, the gap between the likelihood of a Black student being disciplined and expelled and the likelihood of a white student being disciplined including expulsion grew significantly).

⁶³ “Zero tolerance policy,” as used herein, refers to a student code of conduct or other school or district policy that results in mandatory suspension, expulsion, or law enforcement referral for certain types of student misconduct.

⁶⁴ HEITZEG, NANCY A. “CHAPTER ONE: Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline.” *Counterpoints*, vol. 453, Peter Lang AG, 2014, pp. 11–36, <http://www.jstor.org/stable/42982328> (“Zero tolerance policies are additionally associated with an increased police and security presence at school, metal detectors, security cameras, locker and personal searches, and all the accoutrements of formal legal control. Violators – disproportionately [B]lack and Latin[e] – are suspended, expelled, and increasingly arrested and charged in juvenile court as a result.”; Advancement Project. (2012, December 12). Testimony of Judith A. Browne Dianis Co-Director; Advancement Project Hearing on Ending the School-to-Prison Pipeline Before the Subcommittee on the Constitution, Civil Rights, and Human Rights, Senate Committee on the Judiciary. Washington, DC.

⁶⁵ Daniel Losen, et al., The Center for Civil Rights Remedies, “Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies,” (Mar. 22, 2021), <https://civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>; Daniel Losen et al., Center for Civil Rights Remedies, “Are we Closing the School Discipline Gap?,” (Feb. 2015) (documenting both that there are “gross disparities in the use of out-of-school suspension experienced by students with disabilities and those from historically disadvantaged racial, ethnic, and gender subgroups” and that “[t]he consensus is that frequently suspending children from school for minor offenses is not educationally sound”); Tom Rudd, , *Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated* | Kirwan Institute for the Study of Race and Ethnicity (osu.edu) (Feb. 2014) (“Research suggests that Black students as young as age five are routinely suspended and expelled from schools for minor infractions like talking back to teachers or writing on their desks. . . . Contrary to the prevailing assumption that African American boys are just getting ‘what they deserve’

when they are disciplined, research shows that these boys do not ‘act out’ in the classroom any more than their [w]hite peers.”); Skiba, R. (2000), “Zero tolerance, Zero Evidence: An Analysis of School Disciplinary Practice. Bloomington: Indiana Education Policy Center, Indiana University, [ED469537.pdf](#) (“There is, of course, the possibility that the higher rates of school exclusion and punishment for African-American students are due to correspondingly high rates of disruptive behavior. . . . Yet investigations of student behavior, race, and discipline have found no evidence that African Americans misbehave at a significantly higher rate. If anything, available research suggests that [B]lack students tend to receive harsher punishments than white students, and that those harsher consequences may be administered for less severe offenses.”).

⁶⁶ The Center for Civil Rights Remedies, “Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies,” (Mar. 22, 2021), <https://civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>; see also Logan J. Gowdey, *Disabling Discipline: Locating a Right to Representation of Students with Disabilities in the ADA*, 115 Columbia L. Rev. 2265, 2272 (Dec. 2015).

⁶⁷ The United States Department of Education’s Office for Civil Rights defines “physical restraint” as “a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely” and “mechanical restraint” as “the use of any device or equipment to restrict a student’s freedom of movement.” They define “seclusion” as “the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.” U.S. Dep’t of Ed. Office for Civil Rights, *Annual Report to the Secretary, the President, and the Congress*, n.35 (Jan. 2021), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf>. Seclusion is also sometimes referred to as “isolation.”

⁶⁸ U.S. Dep’t of Ed. Office for Civil Rights, *Annual Report to the Secretary, the President, and the Congress*, 42 (Jan. 2021), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf>; see also The Center for Civil Rights Remedies, “Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies,” (Mar. 22, 2021), <https://civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>.

⁶⁹ Zhang, Dalun, et al. “Truancy Offenders in the Juvenile Justice System: A Multicohort Study.” *Behavioral Disorders*, vol. 35, no. 3, Council for Exceptional Children, 2010, pp. 229–42, <http://www.jstor.org/stable/43153821>; Allen, Quaylan, and Henry Santos Metcalf. “‘Up to No Good’: The Intersection of Race, Gender, and Fear of Black Men in US Society.” *Historicizing Fear: Ignorance, Vilification, and Othering*, edited by Travis D. Boyce and Winsome M. Chunnu, University Press of Colorado, 2019, pp. 19–34, <http://www.jstor.org/stable/j.ctvwh8d12.4>; ROCQUE, MICHAEL, and RAYMOND PATERNOSTER. “UNDERSTANDING THE ANTECEDENTS OF THE ‘SCHOOL-TO-JAIL’ LINK: THE RELATIONSHIP BETWEEN RACE AND SCHOOL DISCIPLINE.” *The Journal of Criminal Law and Criminology (1973-)*, vol. 101, no. 2, Northwestern University School of Law, 2011, pp. 633–65, <http://www.jstor.org/stable/23074048>; VERMA, Saunjuhi, et al. “The School to Deportation Pipeline: The Perspectives of Immigrant Students and Their Teachers on Profiling and Surveillance within the School System.” *The Annals of the American Academy of Political and Social Science*, vol. 673, [Sage Publications, Inc., American Academy of Political and Social Science], 2017, pp. 209–29, <https://www.jstor.org/stable/26582249>.