

Defending Students Facing Suspension & Expulsion

Vinson & Elkins Training 9/23/2019

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This presentation is for informational purposes only. It is not legal advice, does not create an attorney-client relationship, and should not replace an individualized legal assessment of a particular case

Legal Services for Children

- Free legal and social work services for youth
- Initiate cases for youth up to the age 24 in the San Francisco Bay Area and ORR facilities in Northern California
- Holistic model
- Direct representation and Pro Bono Project

Practice Areas

- **Education** – Defending youth facing suspension or expulsion from school
- **Guardianship** – Representing youth who are unable to live with parent(s) and want another adult to be appointed as guardian
- **Immigration** – Defending youth in deportation proceedings and in seeking certain forms of humanitarian relief (SIJS, asylum, T and U visas) or DACA
- **Dependency** – Representing youth in the foster care system

Pro Bono Project

- **Training** – In person and web-based
- **Mentorship** — Mentor Attorney, Attorney of the Day, ILRC, and CGRS
- **Resources** – Online [Resource Library](#)
- **Client Support** — LSC social worker involvement
- **Time** — Accept a case when it fits your schedule. Full scope representation vs. discreet projects

How do these cases come to me?

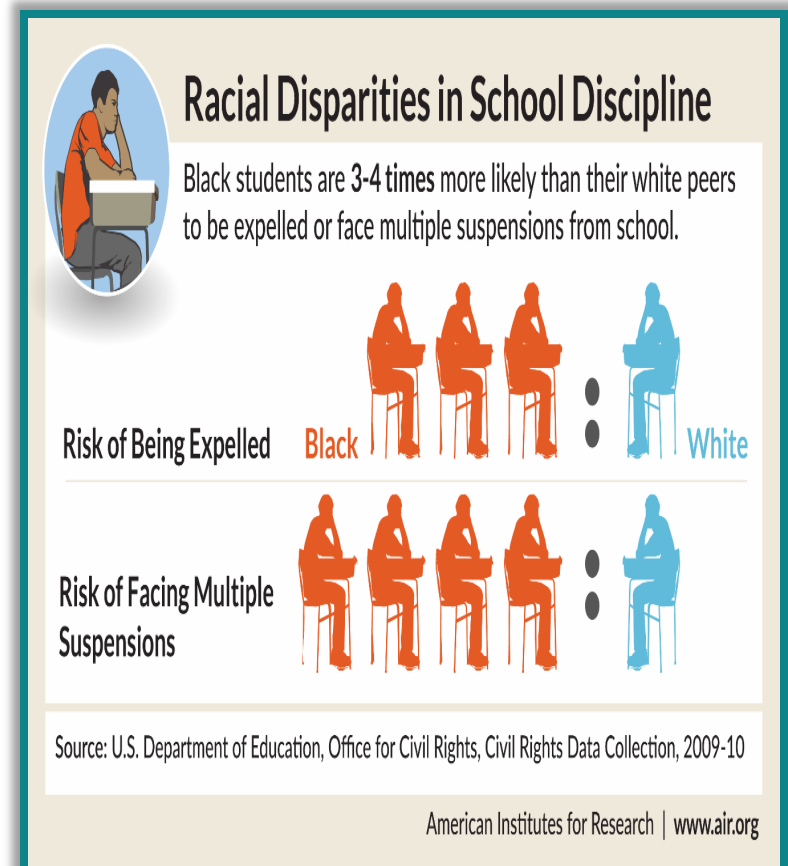
1. LSC Intake
2. LSC Referral to Pro Bono Attorney
3. Conflicts Check
4. Pro Bono Attorney Accepts Case
5. LSC Sends Referral Packet to Pro Bono Attorney
6. Call between LSC Social Worker, LSC Mentor Attorney, and Pro Bono Attorney
7. LSC Social Worker & Pro Bono Attorney Meet with Client
 - LSC Mentor Attorney Available to Consult for Advice/Strategy Support

Why Do These Cases Matter?

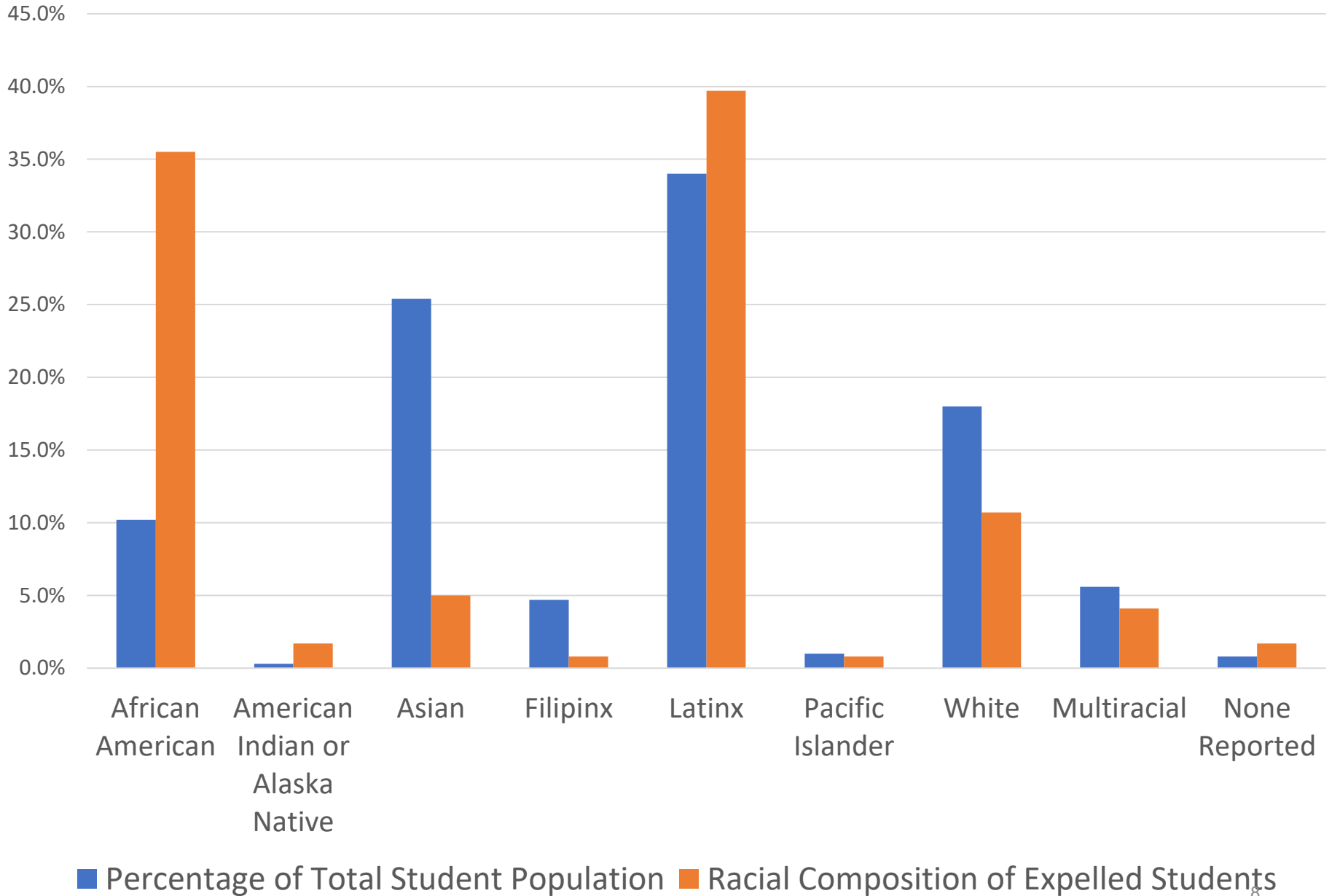


Racial Disproportionality

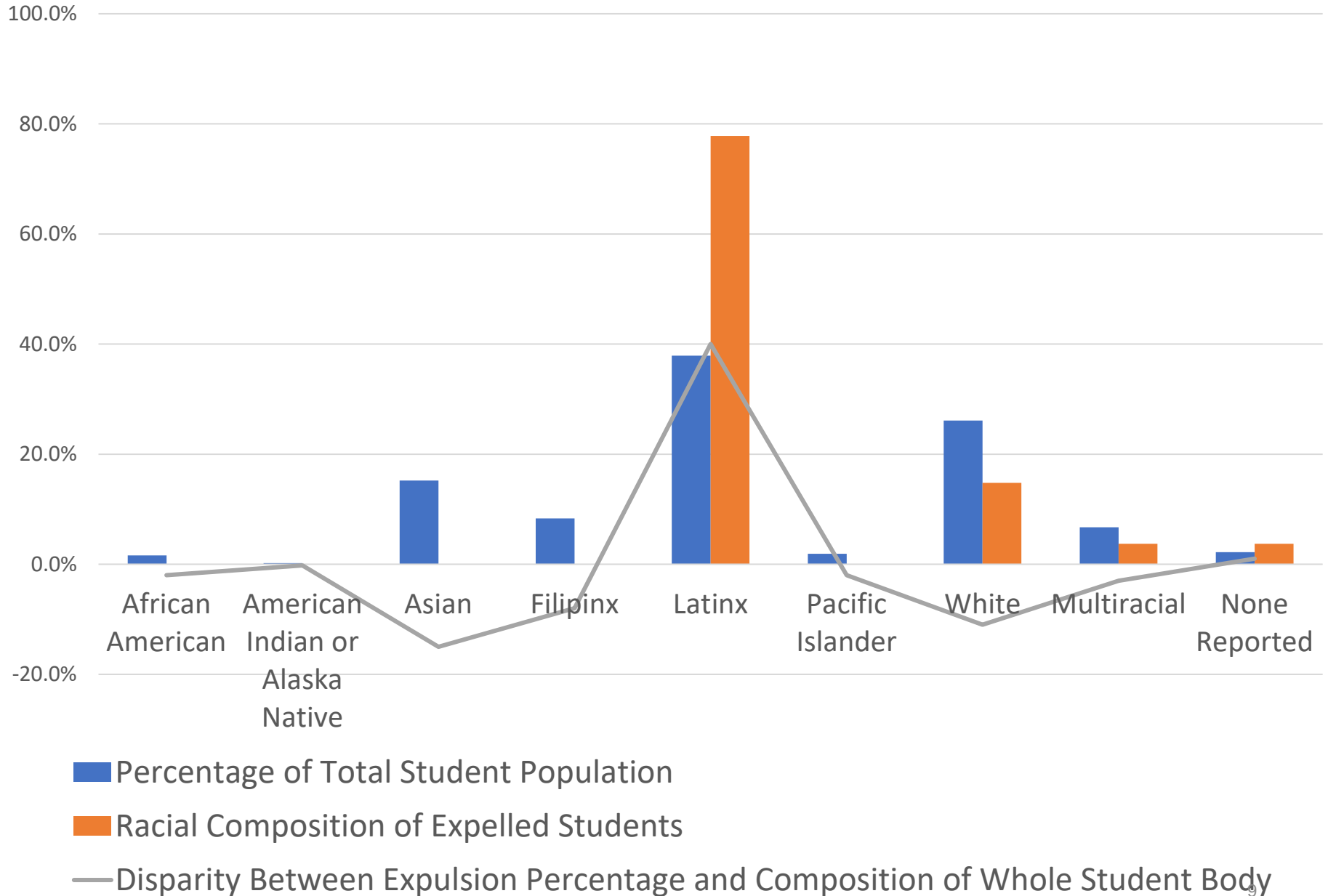
- It is *not* that Black students are misbehaving more;
- Studies show that when poverty factors are taken out of the equation, higher percentages of white students were disciplined on more serious grounds, such as possessing drugs or carrying a weapon;
- Black students are receiving harsher punishments when it comes to misbehavior that requires a more subjective evaluation. (Implicit Bias)



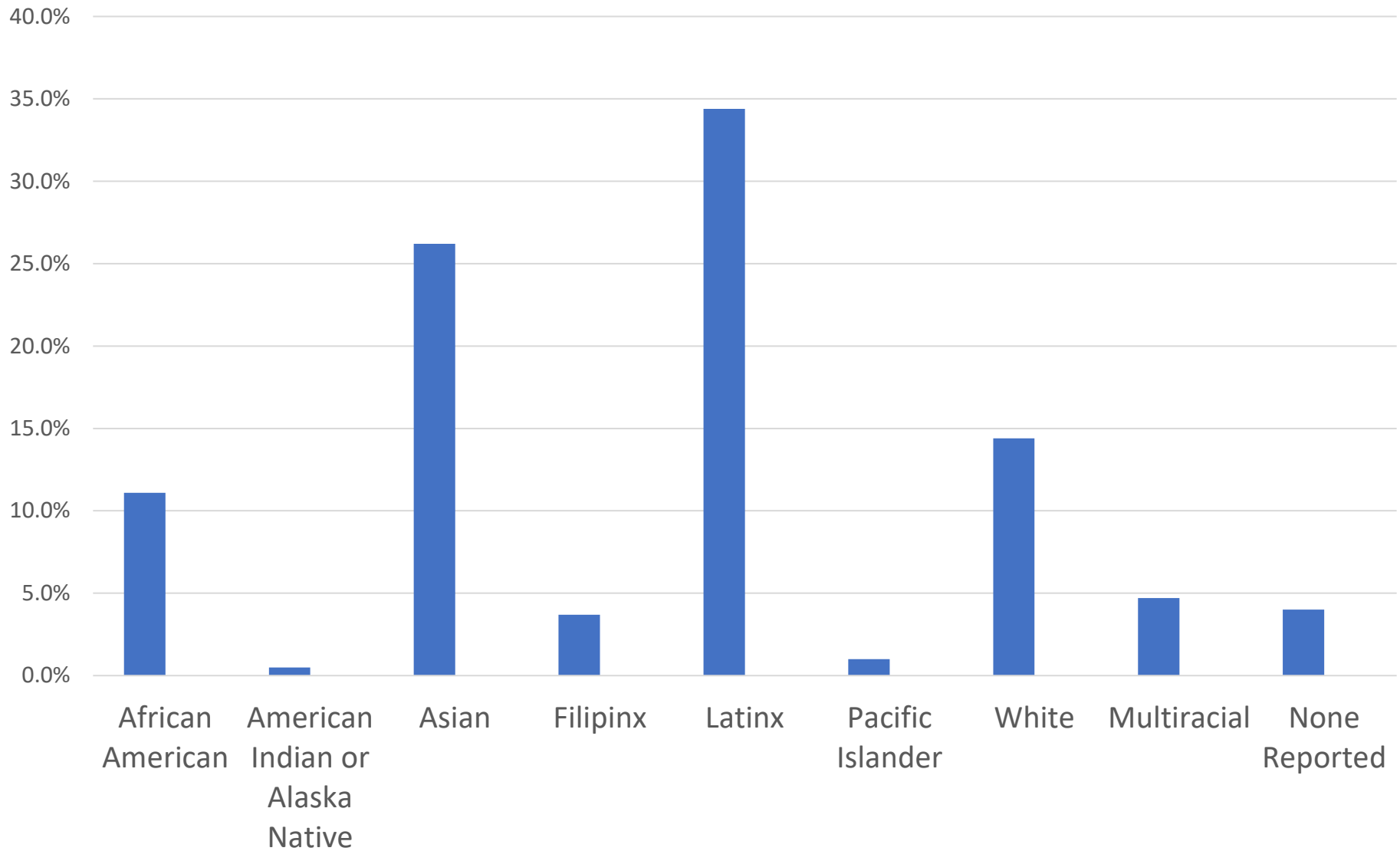
Alameda County Expulsion Rates 2017-2018



San Mateo County Expulsion Rates 2017-2018



San Francisco County Expulsion Rates 2017-2018



■ Percentage of Total Student Population ■ Racial Composition of Expelled Students*

Three Basic Principles About California School Discipline

- Students have a fundamental right to public education, even if they misbehave in school.
California Constitution Article IX, section 1; Serrano v. Priest, 5 Cal. 3d 584, 608-10 (1971).
- Students have the right to challenge punishment and tell their side of the story before removal. *Goss v. Lopez, 419 U.S. 565 (1975)*
- Students have procedural rights to fair notice, a “prompt” hearing before an impartial arbiter, etc.
Charles S. v. San Francisco Unified School District, 20 Cal. App. 3d 83 (1971).

Event	Timeline
Initial suspension	Maximum length of suspension is five days. EC § 48911(a).
Extension-of-suspension meeting	Must occur before suspension can be extended to sixth day. EC § 48911(g). Note: If student is detained in Hall, school frequently does not hold this meeting until student is released.
Manifestation determination review	Must occur within ten schooldays. 20 U.S.C. § 1415(k)(1)(E).
Notice of expulsion hearing	Must be sent ten calendar days before date of hearing. EC § 48918(b).
Expulsion hearing	Student entitled to hearing within thirty schooldays from principal's determination that student violated Education Code. Student entitled to one postponement "for a period of not more than 30 calendar days." EC § 48918(a)(1).
School board hearing	Variable per rules in EC § 48918(a)(2). Usually occurs within a month of expulsion hearing.
Filing of appeal	Student must file appeal within 30 days of school board's expulsion order.

Initial Suspension

- Limit of 5 consecutive school days
- Limit of 20 days total per school year
- Only when “alternative means of correction” have failed to bring about proper conduct, which are listed in *Cal. Educ. Code §48900.5*
- Immediate notice to parent/guardian. *Cal. Educ. Code §48911*
- Opportunity to be heard before suspension, unless “emergency situation.” *Cal. Educ. Code §48911*
- No right to education during suspension! ☹️

Extension of Suspension

- “New suspension” requiring its own meeting.
 - *Montoya v. Sanger Unified School District*, 502 F. Supp. 209 (C.D. Cal. 1980)
- Only permitted if:
 - District is recommending expulsion, **and**
 - *“Presence of the pupil would cause a danger to persons or property or a threat of disrupting the instructional process.”*

This is the process at the school district level.

The student has the right to appeal to the county board of education and may also challenge the expulsion decision through a writ.

Act & initial suspension

Extension of suspension meeting

- Informal meeting must happen within five schooldays.
- Parent must attend. Attorney can attend

Manifestation Determination Review

- Meeting to determine whether disability protections apply
- Parents must attend. Attorney can attend
- Within 10 days of expulsion recommendation
- For students with disabilities or suspected disabilities only.

Hearing

- Must happen with 30 schooldays of principal determination
- Student entitled to continuance
- Notice requirements
- Basic discovery
- Adversarial hearing with witnesses

School board meeting

- Reviews hearing panel determination
- No opportunity to introduce evidence
- Frequently pro forma



Protections for Students with Special Needs

- IDEA (Individuals with Disabilities Education Act)
 - Comparatively narrow federal statute governing special education
 - Offers more protections than 504
 - Enumerates thirteen categories of disabilities. If student is identified as having one of those disabilities, student may be eligible for special education and related services memorialized in an Individualized Education Plan (IEP).
- Section 504 of the Rehabilitation Act
 - Comparatively broad federal statute governing disability generally
 - Offers less protection than IDEA
 - Applies to all disabilities. Services provided to a student frequently memorialized in a Section 504 Plan.
- Even if disability not yet identified, protections may attach if school had sufficient reason to investigate whether child is disabled and failed to do so.

Students with disabilities

- Any student protected under IDEA or Section 504 is entitled to a Manifestation Determination Review (MDR) prior to being disciplined. 34 C.F.R. § 300.530(e) (IDEA); 34 C.F.R. § 104.35 (Section 504).
- IDEA MDRs consider:
 - Whether the conduct was caused by or had a direct and substantial relationship to the disability, or
 - Whether the conduct was the direct result of the school's failure to implement the IEP.
- A district's MDR findings can be challenged in a due process proceeding.
- Students protected by IDEA may have the right to remain in their school of origin while the expulsion process unfolds.

Expulsion



Expulsion is the removal of a child from **ALL** comprehensive schools in the district, which can last up to one calendar year.

Students are placed in community day schools run by the county.

- Principal or school administrator can only **recommend** expulsion
- Student Services department in school district **coordinates** expulsion hearing process
- School Board makes the ultimate **decision to expel**

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Procedural & Time Requirements

1. Right to a Timely Hearing – *within 30 school days*
(*Garcia v. Los Angeles County Board of Ed.*)
2. Right to a Postponement by student/parent
3. Right to Timely Notice of the Hearing – *10 days before*
4. Right to Request Translated Docs & Interpretation at Hearing
5. Right to an Impartial Decision-Maker
6. Right to Bring Representation for the Hearing
7. Right to Inspect and Present Evidence

“Levels” of Expulsion Recommendations

- **Mandatory, “Zero Tolerance” Offenses**
 - Possessing, selling or furnishing a firearm
 - Brandishing a knife at another person
 - Selling a controlled substance
 - Committing or attempting sexual assault or battery
 - Possession of an explosive
- **Medium-Discretion Offenses**
 - Serious physical injury
 - Possession of a knife or other dangerous object Unlawful possession of any controlled substance (except first marijuana offense under once ounce)
 - Robbery or extortion
 - Assault or battery on any school employee
- **Discretionary Offenses**
 - Any other violation of the Education Code

	Mandatory Recommendation	Rebuttable Presumption in favor of Expulsion Recommendation	Discretionary Recommendation
Authority	Section 48915(c), (d).	Section 48915(a), (b).	Sections 48900, 48900.2, 48900.3, 48900.4, 48915(e).
Jurisdictional element	<p>At school</p> <p>At off-campus school activity</p>		<ul style="list-style-type: none"> • At school • At off-campus school activity • During lunch period • While going to/coming from school or an off-campus school activity
Primary finding	<ul style="list-style-type: none"> • Firearm offense (excludes imitation firearms) • Brandishing a knife • Selling a controlled substance • Sexual assault • Possession of an explosive 	<ul style="list-style-type: none"> • Causing serious injury to another person, except in self defense • Possession of any knife or other dangerous object • Possession of a controlled substance (exceptions for small amount of marijuana or valid prescriptions) • Robbery or extortion • Assault or battery upon a school employee 	<ul style="list-style-type: none"> • Any mandatory or presumptive offense. • Use of force/causing physical injury (including attempt and threats) • Possession of firearm (including imitation), knife, explosive, or dangerous objects • Possession, use, sale, or furnishing controlled substances, including under some circumstances alcohol, tobacco, prescription medications, or drug paraphernalia. • Theft/receipt of stolen property • Obscene act • Habitual profanity or vulgarity • Sexual assault (including attempt) or sexual battery • Hazing • Bullying • Sexual harassment • Hate violence • Harassment/threat/intimidation

What must the school prove?

For MANDATORY expulsion offenses, the school must prove:

1. All procedural and time requirements have been met;
2. That the student actually committed the alleged offense, by SUBSTANTIAL EVIDENCE; and
3. That the act was sufficiently related to school attendance or activity.

(NO SECONDARY FINDINGS)

For all other offenses, what must the school prove?

In **Discretionary** and **Medium Discretion** offenses, the **SCHOOL HAS THE BURDEN** to prove:

1. All procedural and time requirements have been met;
2. That the student actually committed the alleged offense, by **SUBSTANTIAL EVIDENCE**;
3. That the act was sufficiently related to school attendance or activity; and
4. **SECONDARY FINDINGS**, that either:
 1. Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others, OR
 2. Other means of correction were not feasible or have failed in the past to correct the student's behavior.

Alternative Means of Correction

- Referrals to school counselor or social worker for case management and counseling.
- School team (including student and parent) that develops an individualized plan to address the behavior.
- Participation in an anger management or similar program.
- Participation in a restorative justice program.
- After-school programs that address specific behavioral issues or expose pupils to positive activities and behaviors.
- Referral for a comprehensive psychosocial or psychoeducational assessment for IEP or 504 Plan.
- A schedule change or transfer

Cal. Educ. Code Section 48900.5

Jurisdiction: It's not just conduct at school . . .

A student may only be suspended or expelled for acts that are related to a school activity or school attendance and which occur:

- a. ON SCHOOL GROUNDS
- b. WHILE GOING TO OR COMING FROM SCHOOL
- c. DURING LUNCH PERIOD (ON OR OFF CAMPUS)
- d. DURING, OR WHILE GOING TO OR COMING FROM, A SCHOOL-SPONSORED ACTIVITY

An expulsion recommendation based on conduct alleged to have occurred during the commute is ALWAYS discretionary!



THE EXPULSION PROCESS

First Steps

- Call between LSC Mentor Attorney, LSC Social Worker, and Pro Bono Attorney
 - Discuss roles, mandated reporting requirements, differences in confidentiality
- Arrange initial meeting with the client and guardian
 - Discuss roles with the family, review records, etc.
- Social worker conducts psychosocial assessment to identify any additional non-legal needs

Tips for Interviewing Clients

- Meet clients where they're at
 - Interview setting (office vs. home visit)
 - Be aware of nonverbal cues
- Build rapport
 - Take time to get to know the client
- Be mindful of the language needs of the family
 - Use interpreters for in-person meetings
 - Written communication should be in their preferred language

Determine Case Goals

- Attorney and Social Worker should determine case goals (with client's input)
 - Education and vocation
 - Health and Access
 - Living Environment

The Expulsion Packet

How will I know what the school says about the incident?

Request the “Expulsion Packet” as soon as possible, (if not already included in pro-bono materials).

- Witness statements (“This is what happened!”)
- Notices (letters, forms, etc.)
- Discipline history
- Attendance and grade history
- Pictures!
- Any other relevant (or irrelevant) information

Pre-hearing steps

- **Communicate with district**
 - Inform district that client is represented. Demand all correspondence.
 - Submit records request and privacy waiver.
 - Request subpoenas and postponement if needed
- **Prepare for the hearing**
 - Obtain records from school district, parallel delinquency proceedings, etc.
 - Conduct fact investigation. Identify and prep witnesses.
 - Collect equities. Identify one or two character witnesses. Gather support letters and create mitigation packet.
 - Draft post-hearing brief
- **Continue settlement negotiations**
 - E.g., transfer, suspended expulsion, termination of proceeding.
- **Assist family in stabilizing client's education**
 - Enroll in community day school
 - Look for charter or private school options
 - Assess viability of attending school in another district
- **Communicate with other attorneys**
 - LSC mentor attorney
 - Delinquency or dependency attorney, especially about admissions
 - Other delinquency or dependency personnel. E.g., Probation or CASA

Settlement Options

- 1) Voluntary transfer to another comprehensive school.
- 2) Alternatives to discipline (e.g., Restorative Justice, Behavior Support Plan, etc.).
- 3) Alternative district counseling process.
- 4) Probationary period.
- 5) Special Education Assessment.
- 6) Expungement of school record

Trauma & School Discipline

- Success in school requires “attention, organization, comprehension, memory, engagement in learning, and trust.”
- Complex trauma’s effect on children’s brains (fight or flight response, dissociation) impairs these areas of functioning.
- Complex trauma also induces aggression, reactivity, impulsivity, distractibility, or withdrawal and avoidance.

Children with ≥ 3 ACE's are:

- Two-and-half times more likely to repeat a grade;
- Five times more likely to have severe attendance issues;
- Six times more likely to experience behavioral problems; and
- More than twice as likely to be suspended from school.



HEARING PREP

Expulsion Hearings: Who Are the Players?

- School Board or Administrative Panel: three certificated administrative employees (usually principals, vice-principals, deans) who are NOT from the school that the student attends or where the incident took place
- Hearing Administrator: some districts have an administrator who oversees expulsion hearings and will “lead” the hearing
- Representative from School: usually a dean, principal or VP who will present the case for the school
- Witnesses: for the school and for the student
- Student & Parent or Other Support Persons

Expulsion Hearing Format

General Introductions & Instructions:

- Explanation of hearing, charges presented, names for the record, etc.

Opening Statements:

- School first, then student (note: school may not have a formal opening statement – it may just blend into the presentation of the case)

School Presents Case:

- Summary of alleged event
- Witnesses Called (and may be sworn in) and then Direct Examination
- Cross Examination of School's Witnesses by Student
- Questions of Witnesses by Panel

Student Presents Case:

- Witnesses Called (again, may be sworn) and then Direct Examination
- Cross Examination of Student's Witnesses by School
- Questions of Witnesses by Panel

Closing Statements

Presentation of Evidence

What evidence can the student present?

- Written or other physical evidence
- Witnesses

What rules apply?

- Technical Rules of Evidence (CA and federal) DO NOT apply
- Relevant evidence will be admitted if it's the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs
- Hearsay IS ADMISSABLE, **BUT a decision to expel cannot be made on hearsay alone**
- Subpoenas may be issued to require the attendance of a witness

Witness Testimony Not Always Required

An expulsion order can be based on hearsay evidence if:

1. The hearing panel makes a good cause determination that disclosing a witness's identity or testimony would subject that witness to an **unreasonable risk of psychological or physical harm AND**
2. The witness's testimony is presented at the hearing as a sworn declaration.
 - The preliminary finding must include significant & specific risks of harm before a panel can let sworn declarations take the place of testimony.
 - To use this exception, districts must allow the accused student access to a copy of the sworn declaration, although the name and identity of the witness may be redacted. Cal. Educ. Code § 48918(f).

Should Client Testify?

- If the student has **NOT** made a statement about the incident thus far, and the school has only hearsay evidence to present, the student **SHOULD NOT** make any statements in the hearing (his or her statement alone would be direct evidence, which means the district would then have enough non-hearsay evidence to expel).
- If the student was arrested for the offense at school and has a pending delinquency case, the District Attorney can subpoena the tape of the expulsion proceeding and use it as evidence against the student at the delinquency proceeding. The student **SHOULD NOT** make any statements at the hearing!

Potential Hearing Outcomes

NOT Expelled

Pupil is eligible to return to school of origin (or other comprehensive school if the student wishes) immediately.

Expelled

Pupil must be given a program of instruction during the period of the expulsion (usually a county alternative program).

Pupil will be given a rehabilitation plan and a date for readmission.

Right to appeal!

Suspended Expulsion

Probationary status in which a student is technically expelled, but is allowed to return to his or her comprehensive school placement (or other appropriate placement).

If the student violates ANY provision of §48900 (even willful defiance), any district or school rule during the term of the suspended expulsion, the original order can be enforced **WITHOUT A HEARING.**

Procedural Protections Post-Hearing

1. Right to a Timely Resolution - § 48918(a) & § 48918(e).
2. Right to Notice of an Expulsion Order - § 48918(j).
3. Right to a Record - § 48918(g)
4. Right to Appeal - § 48919.
5. Writ of Administrative Mandamus

After the Hearing

- Pro bono attorney will close cases after the expulsion hearing / resolution of legal case
- Social worker will keep the case open for the term of expulsion / probationary period
 - Ensure successful re-entry / transition to new school placement
 - Provide additional support and referrals to meet non-educational case plan goals

Helpful Links

- **Legal Services for Children Expulsion Defense Manual:**
http://www.lsc-sf.org/lsc-resource-library/?_sft_subject=1_lsc-pro-bono-program
- **Public Counsel Community Toolkit:**
<http://www.fixschooldiscipline.org/community-toolkit/>
- **American Civil Liberties Union of Nor Cal**
<https://www.aclunc.org/our-work/know-your-rights/school-discipline>
- **California Department of Education DataQuest:**
<http://data1.cde.ca.gov/dataquest/>



Next Steps

To join our Pro Bono Panel:

Submit an application at

<https://www.lsc-sf.org/es/pro-bono-panel/>

More questions?

Contact Pro Bono Director Ashley Melwani at
(415) 780-6346 or ashley@lsc-sf.org