

# COMMENT

## SCHOOL-TO-PRISON PIPELINE: AN EVALUATION OF ZERO TOLERANCE POLICIES AND THEIR ALTERNATIVES\*

### ABSTRACT

Although our country's education system historically focused on rehabilitative measures, concerns about school violence led to an increased use of punitive measures during the 1990s. Reliance on harsh penalties has grown over time, leading to the strengthening of the school-to-prison pipeline: a nationwide phenomenon that criminalizes student misbehaviors and then uses punitive consequences that tend to push children into the prison systems. Zero tolerance policies—regulations that require specific punishments for outlined student misbehaviors, many times without accounting for the unique circumstances of an incident—are one of the school-to-prison pipeline's main contributors. This Comment reviews the development of zero tolerance policies and evaluates their effectiveness. After concluding that due process requirements will not adequately safeguard children from these regulations, this Comment examines a range of alternatives, including joint efforts between key stakeholders, legislative reforms, and restorative justice practices. The conclusion of this Comment proposes alternative measures that can be used in lieu of zero tolerance policies, which are more effective in securing safe school environments and deterring students from future misconduct.

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I. INTRODUCTION

During her last year teaching, Ms. Parker was thrilled to learn that in the spring semester she would be teaching a coveted advanced placement class, treasured by teachers at her school due to students’ superior behavior and outstanding academic performance. Her group of children was no exception.

But after a few months of reveling in this joy, the unthinkable happened.

As her class busily reviewed radius and circumference in preparation for the state assessment, both of the school's police officers and a school administrator entered her classroom. The officers walked straight toward the back of her classroom, asked one of her students to stand up, had him sprawl against the side wall, and proceeded to pat him down. The invasion was so unprecedented that Ms. Parker did not know how to react; the only thing she could think of was to try to maintain that student's dignity by distracting the rest of her students. As she taught, she began talking even louder than her usual high tone and instructed all the children to look at her. Each child followed her instructions perfectly.

But in spite of these attempts to divert, she could distinctly hear one officer's voice over her own and did not doubt the other twenty-eight children in that classroom did too. The officer barked instructions and declared his intention to arrest the student. The affair ended classically: the sixth grade, twelve-year-old child was handcuffed and escorted away by the police officers with the administrator—who had spent that time looking around Ms. Parker's classroom, examining her handouts for the day—trailing behind.

Ms. Parker sat at her desk and proceeded to teach from her document camera, tears silently rolling down her face, until her voice broke and her students discovered her calm façade was false. She gave the children time to talk while she composed herself, but her energetic, friend-loving children were dead silent. No one even attempted to take advantage of this unusual recess. She finally sat back down and apologized to her students for their having to witness that disgrace, while internally she battled with how she could have handled the situation better and what she could have done differently. Ms. Parker was livid, both for the humiliated child and for the other innocent children whose academic experience had now been irreversibly tainted.

But that fury got her thinking. She knew there were police officers stationed at her school. She knew they helped with school discipline. She knew the students were frequently suspended either within or outside the school, and that the school also had a high number of children at the district's alternative campus. In fact, on several occasions Ms. Parker had seen the officers lead off students in handcuffs, walking through the hallways during passing periods, with all the other students intently watching

and then whispering about the incidents.<sup>1</sup> And yet it had never occurred to her that these episodes were part of a larger phenomenon, a nationwide trend that criminalizes student misbehaviors and then uses punitive consequences that tend to push these children into the prison systems.<sup>2</sup>

Throughout her short five years as an educator, Ms. Parker encountered administrators, police officers, teachers, and staff that varied greatly in their views regarding discipline and with respect to the tolerance they believed children should be granted. All three school campuses she worked at were public schools catering primarily to low-income, almost exclusively racial minority children. One school, a charter school, deviated in that no police officers were part of the staff, and the principal was adamant about refusing, at almost any cost, to suspend or expel students. The other two schools were mainly distinguishable in that one school was located within a rural setting and the other in an urban locale. At all three schools, Ms. Parker was privileged to teach bright, eager children with great potential. But after this incident, she was troubled by the similarities between her first and last school: the presence of numerous cops or security guards, the removal of children from the classroom as a form of discipline, and the incidence of children who had no history of misconduct becoming entangled in the criminal justice system. Only later would she discover that these are all characteristics of the school-to-prison pipeline,<sup>3</sup> a trend in which children are extracted from the classroom and led into the prison systems.<sup>4</sup>

This Comment highlights the school-to-prison pipeline, narrowing in on zero tolerance policies.<sup>5</sup> Part II introduces the school-to-prison pipeline and then tracks the development of zero tolerance policies. It subsequently outlines the negative effects associated with each.

Part III considers utilizing due process protections to help counteract zero tolerance policies, ultimately concluding that these are unlikely to be a sufficient remedy. Part IV examines the initiatives among several counties and states. These

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1. Those handcuffed children typically returned within a few days, with a badge of honor and what appeared as admiration from their peers. Whether they had desired to obtain that reputation prior to the incident became irrelevant; after the fact they were forced to save face among their peers, irrespective of their original intentions.

2. See *infra* text accompanying note 18.

3. This narrative recounts an experience of the Author.

4. See *generally infra* Part II (describing the school-to-prison pipeline).

5. Zero tolerance regulations are rules that require specific punishments for outlined student misbehaviors irrespective of the circumstances surrounding the incident. See *infra* text accompanying notes 12–18.

initiatives include Clayton County, Georgia's Blue Ribbon Commission, an effort that was designed by a local juvenile judge who became concerned when his court began handling discipline that had traditionally been dealt with by schools.<sup>6</sup> Texas' legislative attempts to return disciplinary discretion to school authorities by cutting back on the zero tolerance regulations incorporated within the Texas Education Code will also be examined. Denver's implementation of a restorative justice program aimed at helping equip students with conflict-resolution abilities, while reinforcing community relationships, will then be assessed. Part V purports to propose a few alternatives that can be used in lieu of zero tolerance policies, and yet prove to be much more effective in securing safe school environments and deterrence from future misconduct.

This Comment recognizes that discipline in school is important and sometimes even harsh consequences like suspensions and expulsions may be necessary to address student misbehaviors, but it finds that instead of reaping their promised benefits, zero tolerance regulations are causing social ills that are graver than those they were ostensibly designed to address.

## II. SCHOOL-TO-PRISON PIPELINE AND ZERO TOLERANCE POLICIES

The school-to-prison pipeline is the idea that a school's harsh punishments—which typically push students out of the classroom—lead to the criminalization of student misbehaviors and result in increasing these children's probability of entering the prison systems.<sup>7</sup> Society has recognized the school-to-prison pipeline as a growing concern for many years, but it remains in need of attention because of its continued presence and severe consequences.<sup>8</sup> Our schools symbolize our society's commitment to helping equip our children with the tools and knowledge necessary to become productive citizens.<sup>9</sup> However, our increased focus on reacting to student misbehaviors with harsh punishments undermines that aim.<sup>10</sup>

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6. See *infra* note 125 (describing Judge Teske's initiative in response to concerning observations).

7. Sarah Biehl, *The School-to-Prison Pipeline*, 28 OHIO LAWYER, Jan.–Feb. 2014, at 10, 12.

8. See *infra* Part II.A (discussing the school-to-prison pipeline and its negative effects).

9. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”).

10. See generally Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. OF CHILD & ADOLESCENT PSYCHIATRIC NURSING 88, 93 (2011) (arguing that we ought to differentiate between children whose behavior scares us and those whose conduct simply makes us angry).

Although the school-to-prison pipeline is aggravated by a combination of ingredients, zero tolerance policies are one of its main contributors.<sup>11</sup> Zero tolerance policies are regulations that mandate specific consequences in response to outlined student misbehaviors, typically without any consideration for the unique circumstances surrounding a given incident.<sup>12</sup> For example, suspending a kindergartener for wearing a fireman's costume that included a plastic ax to school, absent a good faith effort to factor in the entirety of the situation.<sup>13</sup>

Popularity of zero tolerance policies surged in the 1990s as society became more worried about school violence.<sup>14</sup> In 1993, homicides committed at schools reached a high of fifty-four deaths.<sup>15</sup> In response to the distress regarding school violence, society abandoned rehabilitative measures and replaced them with "get-tough" policies.<sup>16</sup> Congress enacted the Gun-Free School Act of 1994, which required states to expel students in possession of a firearm on school grounds for at least one year to ensure federal funding for their public schools was not jeopardized.<sup>17</sup> Although lawmakers initially crafted zero tolerance regulations to address the possession of guns and deadly weapons on school grounds, these regulations have been expanded to include more offenses, some which pose no serious danger. Zero tolerance policies were used by nearly all public schools for a range of disciplinary matters by 1998, including 90% of schools employing

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11. See generally *infra* notes 14–18 and accompanying text (describing the wide use and expansive coverage of zero tolerance policies).

12. RALPH M. GERSTEIN & LOIS A. GERSTEIN, EDUCATION LAW: AN ESSENTIAL GUIDE FOR ATTORNEYS, TEACHERS, ADMINISTRATORS, PARENTS AND STUDENTS 195 (2nd ed. 2007).

13. SANDRA SIMKINS, WHEN KIDS GET ARRESTED: WHAT EVERY ADULT SHOULD KNOW 141 (2009); Brian C. Rittmeyer, *Deer Lakes Suspension for 5-Year-Old Caused Rethinking of Zero Tolerance Policies*, Trib Live (June 13, 2011), [http://triblive.com/x/valleynewsdispatch/s\\_741868.html](http://triblive.com/x/valleynewsdispatch/s_741868.html) [<https://perma.cc/2AAN-VSE7>]. The suspension was given on the basis that the child violated the district's weapon policy, even though the five-year-old had not used the toy in any way. *Id.* The inflexibility created by zero tolerance regulations has been described as a "one-size-fits-all" plan. GERSTEIN & GERSTEIN, *supra* note 12, at 195.

14. David M. Pedersen, *Zero-Tolerance Policies*, in SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 48 (James C. Hanks ed., 2004); see also CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 79 (2010) (citing Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 303 (2005)) (noting both perceived school violence and "highly publicized school shootings" as motivators for the adoption of the Gun-Free Schools Act and zero tolerance policies).

15. RICHARD LAWRENCE, SCHOOL CRIME AND JUVENILE JUSTICE 148 (2nd ed. 2007).

16. Pedersen, *supra* note 14, at 48.

17. *Id.* The Act also mandated that state law permit school administrators to modify the expulsion punishment on an individual basis as needed. *Id.*

this framework for possession of firearms and weapons, 88% for drugs, 87% for alcohol, 79% for violence, and 79% for tobacco.<sup>18</sup>

Subsequent incidents, such as the school shooting at Columbine High School in Littleton, Colorado, further increased adults' unease regarding school safety and encouraged the adoption of additional measures aimed at securing campuses' welfare.<sup>19</sup> Today, zero tolerance policies vary between states and amongst school districts, but the policies' continued use is relatively uniform.<sup>20</sup> Zero tolerance regulations' reach is alarming because the inflexibility created by these rules and their harsh penalties sometimes seem disproportionate to the misconducts they address.<sup>21</sup> The worry for deadly shootings, especially given our nation's recent track record, may justify having strict regulations such as zero tolerance policies aimed at preventing deadly incidents.<sup>22</sup> However, deadly weapons warrant much greater concern than, for instance, a child's disrespectful attitude.<sup>23</sup> Yet, in many jurisdictions, even talking back to a

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18. *Id.*

19. *See generally* LAWRENCE, *supra* note 15, at 148 (reporting on the trends regarding school shooting deaths). Columbine High School's shooting resulted in thirteen homicides and two suicides. *Id.* In spite of the high number of deaths from Columbine, school killings have "leveled off and even decreased" since 1993; yet, they continue to cause grave concern among the public. *Id.* *See also* SIMKINS, *supra* note 13, at 142 ("After the Columbine High School shooting that left fifteen people dead, every state passed zero-tolerance firearms policies.").

20. *See* GERSTEIN & GERSTEIN, *supra* note 12, at 196–98 (listing some relevant state statutes across the country).

21. *See* KIM, *supra* note 14, at 80 (describing the use and impact of zero tolerance policies). The American Bar Association explained the harshness of zero tolerance policies by noting that:

[r]ather than having a variety of sanctions available for a range of school-based offenses, state laws and school district policies apply the same expulsion rules to the six-year-old as to the 17-year-old; to the first time offender as to the chronic troublemaker; to the child with a gun as to the child with a Swiss Army knife.

*Id.* (citing ABA Juvenile Justice Commission, *Zero Tolerance Policies: A Report* (2001), [http://www.americanbar.org/content/dam/aba/directories/policy/2001\\_my\\_103b.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_103b.authcheckdam.pdf) [<https://perma.cc/NZ3T-GJ4L>]). Moreover, unlike the original zero tolerance policies mandated by the Gun-Free Schools Act of 1994, many regulations today completely rob school administrators of any discretion to consider a given case's context. *Id.* These rules have also been expanded to include less serious offenses like truancy, tardiness, and dress-code violations. *Id.*

22. *See generally* Jeanette Moll & Henry Joel Simmons, *Expelling Zero-Tolerance: Reforming Texas School Discipline for Good*, TEX. PUB. POLICY FOUND.: POLICY PERSPECTIVE (2012), <http://www.texaspolicy.com/library/doclib/2012-08-PP18-ExpellingZeroTolerance-CEJ-JeanetteMoll.pdf> [<https://perma.cc/6UGL-FPF3>] (proposing a differentiated use of zero tolerance regulations).

23. *See* GERSTEIN & GERSTEIN, *supra* note 12, at 195 (citing Alice Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2001)) (reporting that these regulations "call for suspension or expulsion of students for drug or alcohol use, tardiness, disrespect, truancy, and smoking cigarettes; possessing 'Tweety Bird' key chains, staplers, lemon

teacher may lead to a child's suspension and eventual placement in an alternative educational program.<sup>24</sup> In fact, a recent study reported that every one and a half seconds, a child in public school is suspended.<sup>25</sup> Ninety-five percent of these suspensions are punishment for "nonviolent, minor disruptions."<sup>26</sup>

A. *Negative Effects of the School-to-Prison Pipeline and Zero Tolerance Policies*

The utilization of punitive measures for student misbehaviors harms children in several ways. For instance, a child may be extracted from her classroom as punishment, which leads to increasing the likelihood she will not be a successful student or productive citizen. Additionally, the use of harsh consequences disproportionately impacts students of color and students with learning disabilities.

1. *Detriments of School Absences.* Schools often respond to student misbehavior by issuing punishments that involve removing a student from her classroom for days or even months at a time.<sup>27</sup> These absences inevitably lead to that child missing valuable instruction and feeling lost upon her return, which typically results in additional misconduct.<sup>28</sup> Harsh penalties are also likely to taint a child's view of her school and the educational system.<sup>29</sup> This negative perception makes it increasingly difficult for the student to appreciate the value of an education, which results in lower academic achievement, additional misbehaviors, and greater social ills.<sup>30</sup>

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drops, asthma inhalers or nail files, or making threatening gestures with their hands.").

24. See generally *id.* (listing examples of offenses addressed by zero tolerance regulations).

25. Monica Llorente, *Help Us Dismantle the School-to-Prison Pipeline*, CHILD. RTS. LITIG., Spring 2014, at 13.

26. *Id.*

27. See Katherine Dunn, *School-to-Prison Pipeline Panel*, 5 FAULKNER L. REV. 115, 124 (2013). See generally Kaitlin Banner, *Breaking the School-to-Prison Pipeline: New Models for School Discipline and Community Accountable Schools*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 301, 301 (Nancy E. Dowd ed., 2015) (explaining that harsh punishments in school are partly composed of "exclusionary discipline" measures). Exclusionary discipline refers to the use of "out-of-school suspension, expulsion, arrests, and referrals to law enforcement agencies." *Id.*

28. See Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 854 (2008) [hereinafter APA Zero Tolerance Task Force] (reporting that students who are suspended are typically not deterred from misbehaving, but are instead likely to become repeat offenders).

29. Dunn, *supra* note 27, at 122; see also GERSTEIN & GERSTEIN, *supra* note 12, at 195.

30. See Moll & Simmons, *supra* note 22 (describing the ineffectiveness of zero tolerance programs, including the burden of millions of additional dollars on taxpayers).

Firstly, a child extracted from her classroom is more likely to drop out of school.<sup>31</sup> As a dropout, that child is then ill-prepared to obtain a job and become a fruitful citizen.<sup>32</sup> Beyond increasing the difficulty to obtain employment, dropping out also results in social consequences, including: “[f]oregone national income . . . [f]oregone tax revenues for the support of government services . . . [i]ncreased demand for social services . . . [i]ncreased crime . . . [r]educed political participation . . . [r]educed intergenerational mobility . . . [and p]oorer levels of health.”<sup>33</sup> Moreover, a dropout’s employment difficulties, which cause financial obstacles, eventually lead to greater reliance on social services and increased temptation to engage in theft and other criminal behavior.<sup>34</sup> The Coalition for Juvenile Justice found that dropouts are three and a half times more susceptible to being arrested, and that 82% of prison inmates are high school dropouts.<sup>35</sup> In sum, pushing students out of the classroom leads to grave problems that create additional burdens for society to bear.

Secondly, a child’s time away from the classroom increases the likelihood that she will become part of the juvenile justice or adult justice reform systems.<sup>36</sup> Because parents are not always able to provide full-time supervision for their children when the latter are out of school, those kids are at a greater risk of becoming a victim of crime or even committing crimes.<sup>37</sup> Even more concerning, schools sometimes do not funnel their pupils to the prison systems inadvertently; rather, they send them directly.<sup>38</sup> Once in juvenile court, even sympathetic judges are

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31. U.S. Dep’t of Educ. Office for Civil Rights, *School Climate and Discipline*, <http://www2.ed.gov/policy/gen/guid/school-discipline/index.html> [https://perma.cc/99ZK-79RW] (last visited Feb. 1, 2017); *see also* Dunn, *supra* note 27, at 126 (reporting that a single suspension can increase a child’s likelihood of dropping out by up to sixteen percentage points).

32. *See* LAWRENCE, *supra* note 15, at 103.

33. *Id.* (citation omitted).

34. *Id.* at 104. Examples of social services sought include welfare, unemployment benefits, and medical assistance. *Id.*

35. COAL. FOR JUVENILE JUSTICE, ABANDONED IN THE BACK ROW: NEW LESSONS IN EDUCATION AND DELINQUENCY PREVENTION 10 (2001). In Texas, one-third of adolescents in a “locked-down facility” are already high school dropouts, with over 80% of the adult inmates sharing this characteristic. Wallace B. Jefferson, *Recognizing and Combating the “School-To-Prison” Pipeline In Texas*, NAT’L CENTER FOR STATE COURTS (2012), <http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Other-pages/SchoolToPrison-Pipeline-In-Texas.aspx> [https://perma.cc/4FXU-VDQT].

36. KIM, *supra* note 14, at 3. Studies also show that suspensions increase the likelihood a child will be retained in her grade, drop out, or commit a crime. *Id.*

37. Biehl, *supra* note 7.

38. *See* KIM, *supra* note 14, at 3 (“a growing number of youth are being arrested and processed through courts for misconduct at school”); *see also* Jefferson, *supra* note 35 (“[M]ore than 275,000 non-traffic tickets are issued to juveniles as young as six in Texas each year,

not likely to evaluate whether the school's punishment was warranted or fair.<sup>39</sup>

Becoming entangled in the juvenile system presents additional difficulties. The juvenile justice system was created as a separate institution from the adult criminal justice system because it recognized that children are different from adults.<sup>40</sup> The criminal justice system views children as more malleable to change and thus rehabilitation was set as the primary purpose for the juvenile system.<sup>41</sup> These ideologies led to the creation of a framework that even differs in the terminology used to describe the different stages of juvenile proceedings.<sup>42</sup> Hearings are characterized as civil proceedings because of their contrasting nature to the criminal system.<sup>43</sup> Yet critics argue that in reality the juvenile system is, at best, quasi-criminal because of the increased reliance on punishment.<sup>44</sup> Consequently, children who enter the system are more likely to become repeat offenders than

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120,000 of those for truancy.”). Noteworthy, in June 2015 Texas passed House Bill 2398, which decriminalizes truancy and requires schools to refer students to truancy preventive programs before sending them to truancy court. Terri Langford, *New Truancy Law Set to Put Pressure on Schools, Parents*, TEX. TRIB. (Aug. 8, 2015), <https://www.texastribune.org/2015/08/08/new-truancy-law-puts-pressure-schools/> [<https://perma.cc/4YWW-XXLX>]; Victor B. Saenz, *New Texas School Truancy Law is a Step in Right Direction*, THE HILL (Oct. 15, 2015, 6:00 PM), <http://thehill.com/blogs/congress-blog/education/256927-new-texas-school-truancy-law-is-a-step-in-right-direction> [<https://perma.cc/U86M-2JUF>].

39. See *infra* notes 120–21 and accompanying text (describing courts' hesitancy to second guess a school's disciplinary choices).

40. See KIM, *supra* note 14, at 129. But see Mark R. Fondacaro, *Why Should We Treat Juvenile Offenders Differently than Adults?: It's Not Because the Pie Isn't Fully Baked!*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 129, 129–30 (Nancy E. Dowd ed., 2015) (arguing that juvenile offenders should not be given the same treatment our adult offenders currently receive, but that this distinction should lie on findings that adults within our criminal justice system should be treated differently, not on the basis that children are “less mature or malleable”).

41. See KIM, *supra* note 14, at 129 (explaining that a belief in children's ability to change drove the establishment of a separate system for children).

42. See generally Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 303–12 (2003) (describing the progress of a delinquency case with the juvenile justice system's terminology, including “detention hearings,” “dispositional hearings,” and “placement reviews”).

43. KIM, *supra* note 14, at 130.

44. Recognizing that juvenile courts, in spite of their framers' intentions, were not merely civil in nature, the Supreme Court granted juveniles protections to help safeguard their constitutional rights. See generally *Kent v. U.S.*, 383 U.S. 541, 562 (1966) (concluding that procedures for a juvenile transfer from juvenile court had to conform with “the essentials of due process and fair treatment”); *In re Gault*, 387 U.S. 1, 33–34, 41, 55, 57 (1967) (deciding that juveniles were entitled to notice of charges, right to counsel, right to confront a witness and cross-examination, and a privilege against self-incrimination during the adjudicatory stage of their proceedings); *In re Winship*, 397 U.S. 358, 368 (1970) (setting the standard for establishing guilt as beyond a reasonable doubt).

to rectify their tendencies for misbehavior.<sup>45</sup> Schools are setting up their students for failure by serving as a gateway for children to enter the juvenile justice system.

2. *Disproportionate Impact on Select Groups.* The school-to-prison pipeline and use of zero tolerance policies disproportionately impacts certain student groups, including low-income students,<sup>46</sup> children of color, and students with special needs.<sup>47</sup> These children are especially vulnerable because of physiological disadvantages.<sup>48</sup> Low-income, minority students are more likely to experience traumatic stress than children from more affluent communities.<sup>49</sup> These higher levels of stress can lead to smaller brains, higher cortisol levels, and overly reactive amygdalas.<sup>50</sup>

Students of color also have disproportionately high suspension and expulsion rates.<sup>51</sup> Although African-American students only make-up 16% of the student population, they account for 42% of multiple out-of-school suspensions and 34% of expulsions.<sup>52</sup> These differences are even true for preschool students, where African-American children make-up 18% of enrollment but 48% of all multiple out-of-school suspensions.<sup>53</sup> Consequently, African-American students have a rate three times higher than their Caucasian peers with regards to suspensions and expulsions.<sup>54</sup> Similarly, students with disabilities who are served by the Individuals with Disabilities

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45. See APA Zero Tolerance Task Force, *supra* note 28, at 854 (explaining that kids who have been suspended are likely to engage in additional misconduct).

46. Dunn, *supra* note 27, at 122–26.

47. Banner, *supra* note 27, at 301.

48. See John Savage, *Senate Votes to Loosen School Zero-Tolerance Policies*, TEX. OBSERVER (Apr. 23, 2015, 6:31 PM), <http://www.texasobserver.org/senate-votes-to-loosen-school-zero-tolerance-policies/> [<https://perma.cc/P8UG-KVJH>] (“[Poor] students are at a physiological disadvantage when it comes to navigating the middle-class behavioral standards of public schools.”).

49. *Id.*

50. *Id.*

51. U.S. Dep’t of Educ. Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline, Issue Brief No. 1*, 1 (Mar. 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> [<https://perma.cc/L63G-D4SN>].

52. *Id.* at 2. Latino children account for 24% of enrollment, 21% of multiple out-of-school suspensions, and 22% of expulsions. *Id.* Compare those figures with Caucasian students, who account for 51% of the student population, but for only 31% of multiple out-of-school suspensions and 36% of expulsions. *Id.*

53. *Id.* at 7. Latino students account for 29% of enrollment and 20% of multiple out-of-school suspensions at the preschool stage. *Id.* Caucasian preschoolers compose 43% of the student population, but only account for 26% of multiple out-of-school suspensions. *Id.*

54. *Id.* at 3 (“On average, 4.6% of white students are suspended, compared to 16.4% of black students.”).

Education Act “are more than twice as likely to receive one or more out-of-school suspension as students without disabilities.”<sup>55</sup>

These gaps are also present in referrals to law enforcement and school-related arrests.<sup>56</sup> In spite of accounting for only 16% of student enrollment, African-American children receive referrals to law enforcement at a rate of 27% and make-up 31% of school-related arrests.<sup>57</sup> Latino students are at 24% in all three categories.<sup>58</sup> The disproportionate impact on students of color is concerning.

### B. A Starting Point in the Quest for Reform

As research has uncovered the correlation between punitive school policies and the entrance of children reprimanded through those regulations into the prison systems, an increased concern has led some to seek ways to reverse these negative consequences.<sup>59</sup> But the difficulty in dismantling the school-to-prison pipeline is partly due to the great number of factors that have caused it. There is not a sole factor that has singlehandedly created this problem; rather, the interaction of many elements is responsible for the strength of the school-to-prison pipeline threat. Contributing factors include the employment of prison-like security procedures in schools,<sup>60</sup> greater police presence within school campuses, schools’ use of exclusionary punishments, higher numbers of school-based arrests and referrals to juvenile courts for status offenses,<sup>61</sup> and the adoption and expansion of zero tolerance policies.<sup>62</sup>

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55. *Id.* Students without disabilities are receiving out-of-school suspensions at a rate of 6%, in comparison to students with disabilities whose suspension rate is at 13%. *Id.* But see *id.* at 8 (reporting that children with disabilities at the preschool ages were not disproportionately suspended).

56. See *infra* text accompanying notes 57–58 (noting discrepancies between groups).

57. U.S. Dep’t of Educ. Office for Civil Rights, *supra* note 51, at 6.

58. *Id.* Caucasian students are enrolled at 51%, referred to law enforcement at 41%, and subject to school-related arrests at 39%. *Id.*

59. Cf. *Texas Legislative Guide: Senate Bill 107*, TEX. TRIB., <http://txlege.texas.tribune.org/84/bills/SB107/> [https://perma.cc/93X3-ZG2H] (last updated Jan. 3, 2017) (highlighting Texas’ Senate Bill 107, which aims to decrease student expulsions from the classroom by, for example, designating campus behavior coordinators at public schools).

60. See *generally* Banner, *supra* note 27, at 303 (describing a school visit in which language, such as “prepare for the population to move[.]” and procedures—with guards, administrators, and police officers taking up posts throughout the hallway—used during passing periods resembled those employed in prisons).

61. “Status offenses are any acts committed by juveniles that would (1) bring the juveniles to the attention of juvenile courts and (2) not be crimes if committed by adults.” DEAN JOHN CHAMPION, *THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW* 11 (6th ed. 2010). Examples of status offenses include truancy, curfew violations, and running away from home. *Id.*

62. Biehl, *supra* note 7, at 12.

Zero tolerance policies' purpose was to help deter school crime, establish clear-cut and uniform rules, facilitate quick correction of student misbehaviors, and create a more efficient disciplinary process.<sup>63</sup> However, research has created doubt over zero tolerance policies' effectiveness. Findings include that these regulations only have a minimal impact in increasing punishment consistency;<sup>64</sup> neither academic achievement<sup>65</sup> nor improved school safety ratings resulted from "strict removal" of students, even when controlling for socioeconomic status;<sup>66</sup> and students who are disciplined with the use of these rules are not deterred from engaging in additional misconduct, but are rather more likely to be repeat offenders.<sup>67</sup>

Minimizing the negative effects of zero tolerance policies by limiting their scope or outlining appropriate accompanying procedures will not eliminate the school-to-prison pipeline. However, because zero tolerance regulations set strict, and many times non-negotiable, guidelines that give administrators little discretion, concentrating on their reform can help to re-focus the schools' intentions behind discipline towards rehabilitative measures.<sup>68</sup> This, in turn, will permit a decrease in the criminalization of common children misbehaviors, which would be a significant step towards helping dismantle the school-to-prison pipeline.<sup>69</sup> More importantly, reforming accompanying punishments can help shift a school's, and broader society's, mindset about how to perceive misbehaviors that are typical of children, which would help propel additional reforms of other school-to-prison pipeline contributors.<sup>70</sup>

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63. Moll & Simmons, *supra* note 22, at 1.

64. APA Zero Tolerance Task Force, *supra* note 28, at 854.

65. See Biehl, *supra* note 7 ("Removing children from school . . . does not . . . improve the academic performance of the children who remain in the classroom once the 'problem child' leaves.").

66. APA Zero Tolerance Task Force, *supra* note 28, at 854.

67. *Id.* Moreover, studies have demonstrated that adolescent development also inhibits zero tolerance policies from their effectiveness. Teske, *supra* note 10, at 90–91. Because children's neurological frameworks are not fully developed until the age of twenty-one, they many times make emotional rather than rational decisions. *Id.* at 91. Further arguments suggest that punishing children with harsh penalties like zero tolerance policies may result in dramatically increasing the obstacles these kids face as they mature. *Id.* In fact, the Supreme Court has recently used scientific evidence regarding children's neurological development to justify several of its decisions. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 560 U.S. 48, 68–69 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012).

68. See generally *supra* note 21 (describing the dominance of zero tolerance policies).

69. See generally Teske, *supra* note 10, at 90. ("School systems have become the greatest feeder of the youth into the system since the inception of zero tolerance policies.").

70. *But cf.* text accompanying notes 14–26 (tracking the spread of zero tolerance regulations).

## III. THE FOURTEENTH AMENDMENT

One potential means to help curtail the high levels of school suspensions and expulsions is through the due process protections afforded by the Fourteenth Amendment, which states that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>71</sup> That guarantee aims to ensure that state and local governmental agencies provide individuals with certain due process rights before taking particular adverse actions against them.<sup>72</sup> Due process is composed of two parts: procedural due process and substantive due process.<sup>73</sup>

Procedural due process refers to the procedure that must be followed prior to taking an enumerated privilege from an individual.<sup>74</sup> This protection is comprised of three parts: proper notice, an opportunity to be heard, and a fair hearing.<sup>75</sup> Any government entity, or individual acting for such an organization, is required to abide by these requirements when seeking to deprive an individual of life, liberty, or property.<sup>76</sup>

Substantive due process involves weighing the interests at stake to evaluate whether the government’s means for addressing the issue is warranted.<sup>77</sup> To satisfy this component, the government actor must demonstrate “that the objective and methods used are reasonable and appropriate” for achieving the task at hand.<sup>78</sup> The permitted tactics are contingent on what is at stake.<sup>79</sup> This section

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71. U.S. CONST. amend. XIV.

72. See LAWRENCE, *supra* note 15, at 173 (explaining due process). Specifically, the Fourteenth Amendment incorporates rights guaranteed by the federal government through the U.S. Constitution and holds state and local agencies accountable for providing those same protections. *Id.* However, once the required due process is afforded to the individual, the government entity may have the right to deprive them of “life, liberty, or property.” U.S. CONST. amend. XIV; LAWRENCE, *supra* note 15, at 173.

73. Patrick D. Pauken, *Student Rights*, in KEY LEGAL ISSUES FOR SCHOOLS 133, 140 (Charles J. Russo ed., 2013).

74. LAWRENCE, *supra* note 15, at 173.

75. *Id.*

76. See *infra* note 80 and accompanying text (explaining that any state agent is bound by the Fourteenth Amendment).

77. Pauken, *supra* note 73, at 140.

78. LAWRENCE, *supra* note 15, at 173. An official can violate his permitted authority either through the rulemaking or enforcement stages of the rules. Pauken, *supra* note 73, at 140.

79. For instance, within the school setting, the Supreme Court has pretty leniently permitted school officials to conduct searches varying in the number of students impacted and means utilized, but this lax approach was abandoned when a student’s interests were deemed to outweigh the school’s interests. Compare *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (setting reasonableness as the standard for a school search, which was met so long as the search was justified at its inception and reasonably related to the circumstances, which justified the initial interference, thus permitting a vice-principal’s search of a student’s purse for cigarettes), *Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648, 664–65

will evaluate whether the Fourteenth Amendment is a viable avenue to contest a student's extraction from her classroom.

#### A. *Due Process Requirements for School Suspensions*

School officials are bound by the due process requirements of the Fourteenth Amendment.<sup>80</sup> As a result, when school officials deprive a student of certain liberties or property,<sup>81</sup> they are required to provide the appropriate corresponding due process.<sup>82</sup> The due process protections owed to students are contingent on the competing interests involved.<sup>83</sup> Extraction from the classroom usually invokes students' property rights.<sup>84</sup> A school's interest is typically the ability to maintain a safe campus that enables the instruction of its students.<sup>85</sup> A student's right, on the other hand, is to receive an education.<sup>86</sup>

With regards to suspensions and expulsions,<sup>87</sup> procedural due process requires that the student receive written notice that specifies the reason for the punishment, describes the hearing process, and synthesizes both the decision of and evidence used by the school official.<sup>88</sup> Substantive due process obliges the school to demonstrate the suspension or expulsion is an appropriate means for safeguarding the educational objectives at stake.<sup>89</sup>

In *Goss v. Lopez* the Supreme Court held that students are guaranteed procedural and substantive due process rights when

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(1995) (approving random, suspicion-less urinalysis drug testing of students who voluntarily participated in interscholastic athletic programs), *and* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 837–38 (2002) (upholding random drug testing of all students who participated in any extracurricular school activity), *with* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 365–66 (2009) (deciding the school's suspicion was insufficient to conduct a strip search for drugs).

80. See West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”).

81. For example, by suspending or expelling a student, the school is depriving that child from “the liberty to attend school.” LAWRENCE, *supra* note 15, at 173. Similarly, by confiscating a belonging of that student—including illegal substances or weapons—school officials are depriving that student of their property. *Id.*

82. See *supra* note 80 (stating school personnel are bound by the Fourteenth Amendment).

83. Seal v. Morgan, 229 F.3d 567, 574 (6th Cir. 2000) (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

84. Pauken, *supra* note 73, at 140.

85. *Id.*

86. *Id.*

87. For a discussion that helps differentiate suspensions and expulsions, as well as their corresponding rights, see STEPHEN B. THOMAS, NELDA H. CAMBRON-MCCABE & MARTHA M. MCCARTHY, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 229–37 (6th ed. 2009).

88. LAWRENCE, *supra* note 15, at 174.

89. *Id.*

being suspended or expelled from school.<sup>90</sup> That case challenged Ohio's Revised Code Annotated Section 3313.66, which permitted a school administrator to suspend a student for a maximum of ten days or even expel the pupil.<sup>91</sup> The regulation only required that the child's parents be notified within twenty-four hours and provided with the motives for that action.<sup>92</sup> The class action involved nine named plaintiffs,<sup>93</sup> each suspended for offenses that varied from exhibiting disruptive or disobedient behavior, refusing to leave the school auditorium while demonstrating, attacking a police officer for attempting to remove another student who was demonstrating, causing physical damage to school property, and being taken to the police station after demonstrating at a school—that was not her high school—even though no charges were pressed against her.<sup>94</sup> The plaintiffs were students at various high schools within the Columbus Public School System (CPSS) in Ohio.<sup>95</sup> Yet none of the students' individual schools or CPSS provided written procedures regarding what steps should be followed for suspensions.<sup>96</sup>

One student, Dwight Lopez, contested that he took no part in destroying the school property relating to a lunchroom ruckus.<sup>97</sup> He argued that he was merely a bystander who the school wrongly accused.<sup>98</sup> The school did not grant Lopez a hearing.<sup>99</sup> In fact, no school official provided testimony

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90. *Goss v. Lopez*, 419 U.S. 565, 581–84 (1975). That case marked the first instance in which the Court addressed due process rights for students punished within the public school setting. E. EDMUND REUTTER, JR., *THE SUPREME COURT'S IMPACT ON PUBLIC EDUCATION* 149 (1982). See generally *THE COURTS AND EDUCATION: THE SEVENTY-SEVENTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION* 32–38 (Clifford P. Hooker ed., 1978) (tracing the progression of the Supreme Court's application of the Fourteenth Amendment to schools).

91. *Goss*, 419 U.S. at 567. Section 3313.64 of that same statute granted children a public education. *Id.*

92. *Id.* If the student was expelled, the child or her parents were given the opportunity to be heard at the Board of Education's meeting and appeal the principal's decision to that same body. *Id.* The Board could then decide to overturn the expulsion. *Id.* However, a suspended student was given no avenue to challenge her punishment. *Id.*

93. *Id.* at 568.

94. *Id.* at 569–70.

95. *Id.* at 568.

96. *Id.* at 567–68. CPSS and the high schools had outlined the behaviors that might invoke a suspension either formally or informally though. *Id.* at 568.

97. *Id.* at 570.

98. *Id.*

99. *Id.* In fact, none of the plaintiffs were given hearings. *Id.* at 570–71. Dwight, Betty Crome, and Carl Smith were neither granted a hearing nor provided with a record that provided the rationale behind their respective school administrator's decision to suspend them. *Id.* The other six plaintiffs were all students at Marion-Franklin High School and although none of them received a hearing either, they were "offered the opportunity to attend a conference, subsequent to the effective date of the

regarding the incident or evidence explaining the disciplinary measures.<sup>100</sup>

Ultimately, the district court—composed of a three-judge panel—concluded that the school denied the students’ due process rights because they were not granted a hearing either before the suspension or within a reasonable time afterwards.<sup>101</sup> In spite of the government’s stance that due process was not required for suspensions and expulsions because students do not have constitutional grounds for a right to a public education, the Supreme Court upheld the lower court’s findings.<sup>102</sup> The Court reasoned that independent sources, such as a state statute, could give rise to a property right which, although not protected by the Constitution, might “entitl[e] the citizen to certain benefits.”<sup>103</sup> Furthermore, the Court found that because a school suspension had the potential to damage a student’s reputation with her peers and detrimentally impact her opportunities years later, due process rights were warranted.<sup>104</sup> Consequently, the Court held that oral or written notice and a potential hearing were required for suspension and expulsion sanctions.<sup>105</sup> However, the Court also recognized that students can be deprived of the opportunity to attend school if

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suspension, to discuss the student’s future.” *Id.* at 569–70. The district court found that even that opportunity was an insufficient protection of the students’ due process rights. *Id.* at 571.

100. *Id.* at 570.

101. *Id.* at 571. The court also found Section 3313.66 to be unconstitutional with regards to permitting school suspensions, and ordered the plaintiffs’ school files to omit any mention of the suspensions. *Id.* The court simultaneously, however, listed several exceptions that would not warrant the same due process protections. *Id.* at 572. It specified that a student who was disrupting the school’s learning environment, endangering other individuals on campus, or damaging property could be removed promptly so long as their parents were given notice within twenty-four hours and then a hearing—in which the student could provide a defense—was held within seventy-two hours. *Id.* The Supreme Court upheld these exceptions. *Id.* at 583; MICHAEL IMBER & TYLL VAN GEEL, A TEACHER’S GUIDE TO EDUCATION LAW 92 (3rd ed. 2005) (explaining that the Court’s exception is most likely applicable in situations where “violent or destructive students [are] unwilling or unable to control themselves long enough to participate in a brief hearing”).

102. *Goss*, 419 U.S. at 572.

103. *Id.* at 572–73 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Thus, because several sections within Ohio’s Revised Code Annotated provided for a public education and required that children attend school, the plaintiffs had a basis for their right to an education that could not be taken away without due process. *Id.* at 573–74.

104. *Id.* at 575. With regards to this rationale, the Court linked it to a deprivation of liberty, as opposed to a property interest. *Id.* at 574.

105. *Id.* at 581. The oral or written notice is a minimum requirement, but if the student denies the alleged charges, she is then also entitled to “an explanation of the evidence the authorities have and an opportunity to present [her] side of the story.” *Id.* These requirements thus set the standard a school must follow in order to comply with *Goss v. Lopez*. See LAWRENCE, *supra* note 15, at 176–77 (outlining the relevant requirements).

those requirements are met and thus those sanctions are rightfully imposed.<sup>106</sup>

Although the *Goss* Court favored the students, its decision did not entail protections beyond those that would be granted by a “fair-minded school principal.”<sup>107</sup> The Court’s decision was also limited in other ways. For instance, it only addressed suspensions of ten days or less.<sup>108</sup> The Court also refrained from providing additional measures—including the right to counsel, the right to confront and cross-examine witnesses, and the right to call his own witnesses—that could ensure students are only suspended as a last resort and after a very thorough process.<sup>109</sup> Thus, the protections afforded by *Goss v. Lopez* are narrow.<sup>110</sup>

### B. Courts’ Reconciliation of Due Process Protections and Zero Tolerance Policies

Although *Goss v. Lopez* provides protections with regards to school suspensions, these are heavily undermined by zero tolerance policies. Zero tolerance regulations essentially ignore the suspension of due process safeguards because students automatically receive the punishment paired with their alleged misconduct.<sup>111</sup> Consequently, even if a school administrator provides the child with the oral or written notice of the charges, explains the evidence, and allows the child to present her side of

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106. See *Goss*, 419 U.S. at 580 (characterizing suspensions as both “a necessary tool to maintain order [and] a valuable educational device”).

107. See *id.* at 583 (explaining that the set procedures were reasonable and similar to other standards imposed by the school or district itself).

108. *Id.* at 581. Although it is reasonable to infer that suspensions extending beyond ten days or expulsions might mandate additional due process protections, the Court did not describe these within its decision. *Id.* at 584.

109. *Id.* at 583; LAWRENCE, *supra* note 15, at 176. Yet this hesitancy from the Court to afford children all the rights available is consistent with other decisions. See generally *In re Gault*, 387 U.S. 1, 13 (1967) (although the Court granted juveniles several rights—including the right to counsel, notice of charges, the right to confront witnesses, and a privilege against self-incrimination—it limited these to the adjudicatory stage); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (finding juveniles were not entitled to a jury trial); *Schall v. Martin*, 467 U.S. 253, 281 (1984) (approving preventive pre-trial detention of juveniles); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (setting reasonableness as the standard for a school search).

110. See *supra* text accompanying notes 108–09 (describing the limitations of the Court’s decision). Nonetheless, *Goss v. Lopez* sets the minimal protections that must be afforded to a student when they are suspended. LAWRENCE, *supra* note 15, at 176. A state may opt, however, to provide their students with additional safeguards. *Id.* Some examples include a conference with the student, a maximum number of days a student can be suspended, a formal hearing, a right to an attorney at the hearing, and a formal record to be made of the hearing. *Id.* at 177.

111. See *supra* text accompanying note 12 (defining zero tolerance regulations).

the story, these steps are mainly for show.<sup>112</sup> This is particularly true with regards to hearing the student's side of the story. Ideally, an administrator listens to the student's explanation and then factors in that narrative to his decision-making. This would mean that after hearing a student's account of the events, a school administrator might decide that a suspension is not the most appropriate punishment. Yet zero tolerance policies rob school administrators of the ability to exercise their discretion, and instead demand suspensions, expulsions, or placement in an alternative school in response to outlined student misbehaviors.<sup>113</sup>

Many students and their parents resort to the courts to attempt to contest a disciplinary action resulting from a zero tolerance policy.<sup>114</sup> Their efforts are mostly fruitless.<sup>115</sup> One basis for these failed challenges is that courts reason there is no fundamental right to an education.<sup>116</sup> Absent an extreme case—

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112. See generally William K. Muir, Jr., *Teachers' Regulation of the Classroom*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 109, 119–20 (David L. Kirp & Donald N. Jensen eds., 1986) (identifying that an added layer of hierarchy between administrators and students creates an additional impediment to genuine and effective communication between these parties).

113. See *supra* text accompanying note 21 (describing zero tolerance policies' framework).

114. See generally *Seal v. Morgan*, 229 F.3d 567, 572 (6th Cir. 2000) (arguing the plaintiff lacked knowledge of his friend's knife being placed within his vehicle and should thus not be expelled); *Hinterlong v. Arlington Indep. Sch. Dist.*, 2010 WL 522641, \*1 (Tex. App.—Fort Worth Feb. 11, 2010, pet. denied) (challenging the applied regulation as not requiring the child to know they possessed alcohol); *Vann v. Stewart*, 445 F. Supp. 2d 882, 884, 888 (E.D. Tenn. 2006) (opposing a year-long suspension, which was given after he was found to have had a small pocket knife on school grounds, on the basis that it was disproportionate to the offense committed); *Stephens v. Trinity Indep. Sch. Dist.*, 2012 WL 5289346, \*1 (Tex. App.—Tyler Oct. 24, 2012, no pet.) (contesting the plaintiff was innocent of alleged misconduct and thus his placement in DAEP, which was warranted under Texas Education Code Section 37.006(a)(2)(C), was inappropriate).

115. Compare *Seal*, 229 F.3d at 579–80 (upholding the district court's denial of the Board's motion for summary judgment because there was no evidence within the record indicating whether the plaintiff's knowledge of the knife existed), with *Vann*, 445 F. Supp. 2d at 883, 891–92 (granting the defendant's summary judgment and consequently refusing to entertain the possibility that the plaintiff's hearing was "meaningless"), *Stephens*, 2012 WL 5289346, at \*2, \*4 (ruling that Texas Education Code Section 37.009(b) deprived it of jurisdiction to review the validity of the DAEP placement and also dismissed the plaintiff's alternative argument that his DAEP placement violated a constitutional right by distinguishing the move from a suspension or expulsion, where the student would be deprived of an education, and also found that a liberty right was insufficient to invoke a court's review), and *Hinterlong*, 2010 WL 522641, at \*2 (finding no violation because the superintendent provided the student several ways to show he did not know his water bottle had alcohol).

116. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). The Court explained that, although education is of great value, it is neither explicitly nor implicitly protected by the Constitution. *Id.* In spite of there being no basis within the U.S. Constitution to establish education as a fundamental right, however, other bases have

potentially where there is no rational relation to a legitimate state interest—challenges to school discipline policies fail.<sup>117</sup> Although zero tolerance policies warrant specific consequences, they are theoretically grounded in protecting an interest—such as providing a safe and academic atmosphere for all students—which provides the requisite rational relation.<sup>118</sup> Thus, even though they do not require a case-by-case rationale, zero tolerance policies—and their outlined punishments—are generally accepted.<sup>119</sup>

Additionally, courts tend to give deference to schools. Rather than meddling in or approving each decision, they are mostly reluctant to interfere with school discipline decisions.<sup>120</sup> Federal courts' reluctance is also partly motivated by a state's traditional role in overseeing public education.<sup>121</sup>

Consequently, even though *Goss v. Lopez* theoretically guarantees due process protections for suspensions, if schools simply go through the motions required by due process, these protections prove to be of little help in challenging suspensions that are not grievous.<sup>122</sup> Unless courts thoroughly evaluate the fairness of these decisions, this avenue will likely prove to be of insignificant value in scrutinizing zero tolerance policies.<sup>123</sup>

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been used to draw this conclusion. ANNA LUKEMEYER, COURTS AS POLICYMAKERS: SCHOOL FINANCE REFORM LITIGATION 42–45 (2003). Mainly, education is deemed a fundamental right when a state's constitution or statutes grant that designation. *Id.* at 44; *see also* *Goss v. Lopez*, 419 U.S. 565, 572–73 (1975); *Seal*, 229 F.3d at 574 (finding that a state's provision of a free education and compulsory attendance laws establish a student's property interest in a public education).

117. *See* *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (quoting *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1985)) (“Review and revision of a school suspension on substantive due process grounds would only be available in a rare case where there was no ‘rational relationship between the punishment and the offense.’”).

118. *See generally supra* notes 114–15 and accompanying text (recording the arguments and outcomes of several suits aimed at challenging zero tolerance regulations).

119. *Id.*

120. *See* *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”).

121. *See* *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (“It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”); *see also* *Epperson*, 393 U.S. at 104 (“public education in our Nation is committed to the control of state and local authorities”).

122. *See* KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 527 (8th ed. 2012) (discussing how in spite of the wide range of zero tolerance challenges posed, courts typically uphold the regulation so long as procedural due process rights are followed).

123. *See* Pedersen, *supra* note 14, at 55 (explaining the courts' tendency to defer to school officials).

#### IV. INITIATIVES TO COMBAT THE ILL EFFECTS OF ZERO TOLERANCE POLICIES

Although parents' challenges to their children's school suspensions in the courts have proven mostly ineffective, concern for the negative effects of zero tolerance policies remains. In fact, several groups are taking action aimed at addressing the factors that strengthen the school-to-prison pipeline, with zero tolerance policies as a target.

##### A. Clayton County, Georgia: Stakeholders Unite

Clayton County has received wide attention for its creative solution to address the increased number of school referrals to juvenile court and, in turn, help dismantle the school-to-prison pipeline.<sup>124</sup> Clayton County created the Blue Ribbon Commission on School Discipline in 2004, charging it with the duties to evaluate the policies currently being used and to help find alternatives to address student misbehavior.<sup>125</sup> The Commission reflects a team effort by involving individuals from schools, police departments, the court system, and juvenile justice agencies.<sup>126</sup>

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124. Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 901–02 (2012); Moll & Simmons, *supra* note 22, at 7; Advancement Project, *Clayton County, GA*, <http://safequalityschools.org/pages/clayton-county-ga> [<https://perma.cc/8CKX-URDD>] (last visited Feb. 1, 2017).

125. CLAYTON CTY. PUB. SCH., BLUE RIBBON COMMISSION ON SCHOOL DISCIPLINE: A WRITTEN REPORT PRESENTED TO THE SUPERINTENDENT AND BOARD OF EDUCATION 5 (2007), <http://lsuhsc.wpengine.com/wp-content/uploads/2016/07/SOLibrary2.pdf> [<https://perma.cc/P33U-W2UK>]. The Commission was created in response to concerns raised by a juvenile court judge, Judge Steven Teske. Moll & Simmons, *supra* note 22, at 7. After noticing that a rising number of students were being sent to court for conduct that could be handled outside of court, Judge Teske took action. *Id.* Through their investigations, the Committee discovered that the spike from eighty-nine student referrals to law enforcement in the mid to late nineties to 1,400 in 2004 was correlated with the increased presence of school resource officers at public schools. Advancement Project, *supra* note 124. Although he believes certain offenses ought to lead to arrest, Judge Teske says “[z]ero tolerance is zero intelligence[.]” Donna St. George, *Judge Steve Teske Seeks to Keep Kids With Minor Problems Out of Court*, WASH. POST (Oct. 17, 2011), [https://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL\\_story.html](https://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL_story.html) [<https://perma.cc/5Q5L-KXE9>].

126. See CLAYTON CTY. PUB. SCH., *supra* note 125, at 3–4 (listing committee members); see also COOPERATIVE AGREEMENT BETWEEN THE JUVENILE COURT OF CLAYTON COUNTY, THE CLAYTON COUNTY PUBLIC SCHOOL SYSTEM, THE CLAYTON COUNTY POLICE DEPARTMENT, THE RIVERDALE POLICE DEPARTMENT, THE JONESBORO POLICE DEPARTMENT, THE FOREST PARK POLICE DEPARTMENT, THE CLAYTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, THE CLAYTON CENTER FOR BEHAVIORAL HEALTH SERVICES, ROBERT E. KELLER, DISTRICT ATTORNEY, AND THE GEORGIA DEPARTMENT OF JUVENILE JUSTICE 2, [http://www.ncjfcj.org/sites/default/files/Clayton%20Co.%20School%20Protocol%20Agreement%20\(2\).pdf](http://www.ncjfcj.org/sites/default/files/Clayton%20Co.%20School%20Protocol%20Agreement%20(2).pdf) [<https://perma.cc/B97M-AUD5>] [hereinafter COOPERATIVE AGREEMENT] (listing the entities and individuals involved in the agreement).

In doing so, it recognizes that working together will be more effective than any single actor's individual efforts.<sup>127</sup> Ultimately, the Commission created a tiered disciplinary model.<sup>128</sup>

The tiered disciplinary model is comprised of a three-step system that is utilized when addressing a limited number of child misbehaviors.<sup>129</sup> When a child commits her first offense, the school either gives her a warning or maybe even lets her off the hook with no action at all.<sup>130</sup> After her second offense, the school refers the child to a court-sponsored program.<sup>131</sup> Only after the third offense can the school file a juvenile complaint.<sup>132</sup>

The reports show impressive outcomes and have encouraged other jurisdictions to adopt similar programs.<sup>133</sup> As a result of its

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127. See generally COOPERATIVE AGREEMENT, *supra* note 126, at 2 (“This agreement is . . . for the purpose of establishing a cooperative relationship between community agencies . . . involved in the handling of juveniles who are alleged to have committed a delinquent act on school premises.”).

128. *Id.* at 5–7.

129. *Id.* at 5–7. Targeted misconduct entails “[m]isdemeanor type delinquent acts involving offenses against public order including affray, disrupting public school, disorderly conduct, obstruction of police (limited to acts of truancy where a student fails to obey an officer’s command to stop or not leave campus), and criminal trespass (not involving damage to property).” *Id.* at 5.

130. *Id.* at 5–6. The school resource officer maintains discretion to decide which action is most appropriate. *Id.* at 6.

131. *Id.* at 6. Examples of these programs include the School Conflict Diversion Program and the Mediation Program. *Id.* A requisite of this tier is that the sessions are attended by both the child and her parent. *Id.* After the program concludes, the program coordinators must then report whether it was successfully completed to the child’s school. *Id.* Failure to successfully complete the intervention program may result in additional disciplinary action, including a complaint filing. *Id.*

132. *Id.*

133. See generally Steven C. Teske, Brian Huff, & Cora Graves, *Collaborative Role of Courts in Promoting Outcomes for Students: The Relationship Between Arrests, Graduation Rates and School Safety*, 51 FAM. CT. REV. 418, 424 (2013) (listing several jurisdictions that replicated an analogous approach). One example is Birmingham, Alabama. St. George, *supra* note 125. After Juvenile Court Judge Brian Huff observed Judge Teske, he decided to implicate a similar tactic for Jefferson County. *Id.* Within a few years, Birmingham schools’ court referrals dropped from 528 to 174 cases a year. *Id.* Although Jefferson County also adopted a tiered discipline plan applicable to a list of specific “minor school-based offenses,” the plan also contains some unique characteristics, such as an exception in which the system can be circumvented entirely at the school administrator’s discretion. Moll & Simmons, *supra* note 22, at 7.

Former Governor Rick Perry also attempted to emulate Clayton County’s success in Texas. See *id.* at 7 (describing the Waco project). The Criminal Justice Division, Waco Independent School District, and the Waco Police Department joined forces for the “Suspending Kids to School” program, designed to create alternatives that serve as interventions to misconduct in lieu of the traditional punitive punishments, such as sending a child to an alternative education program. *Id.*; JENNI OWEN, JANE WETTACH & KATIE CLAIRE HOFFMAN, *INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE* 22–23 (2015), [https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead\\_of\\_suspension.pdf](https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf) [<https://perma.cc/27X8-FNM9>]. The benefits seem promising, with data reporting a decrease in suspensions greater

implementation, juvenile court referrals fell 67.4%, rates of weapons on campus decreased by 73%, student detentions based on school offenses declined by 86%, the juvenile felony rate in the county fell 51%, and graduation rates increased by 20%.<sup>134</sup> Moreover, school police officers spent more time on campus, permitting a rise in positive interactions with students.<sup>135</sup> This additional time fostered better relations between students and officers, ultimately resulting in more crimes solved both on campus and in the community due to a surge in shared information between these two groups.<sup>136</sup>

### B. Texas: A Legislative Avenue

The Texas Education Code Section 37 codified zero tolerance policies within the state in the mid-1990s.<sup>137</sup> The reforms helped facilitate a school's use of several harsh disciplinary options, including suspensions,<sup>138</sup> Class C misdemeanor citations,<sup>139</sup>

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than 25% and ticketing lowered by 77% even though the program has only been in effect for a few years. *Id.*

134. Teske, *supra* note 10, at 93.

135. Teske, Huff & Graves, *supra* note 133, at 423–24.

136. *Id.* at 424.

137. See generally Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73, 73–74 (2006) (noting that states nationwide were adopting zero tolerance policies by incorporating them within their statutes of education and criminal procedures); see also Moll & Simmons, *supra* note 22, at 2 (tracing Texas' revision of the school discipline code to incorporate zero tolerance regulations). The Texas Safe Schools Act of 1995 required districts to include alternative schools, which were part of the scheme to increase schools' ability to extract a child from her regular classroom setting. TEX. EDUC. AGENCY, DISCIPLINARY ALTERNATIVE EDUCATION PROGRAM PRACTICES 1–2 (Aug. 2007) [www.tea.texas.gov/acctres/Spec\\_PRR\\_17\\_2007.pdf](http://www.tea.texas.gov/acctres/Spec_PRR_17_2007.pdf).

138. See generally TEX. EDUC. CODE § 37.005 (permitting suspensions).

139. Class C misdemeanor citations can be issued for a variety of reasons, including disrupting a class or school activity by making excessive noise, trying to get a classmate to leave class, and walking into a classroom without permission. TEX. EDUC. CODE § 37.124(b), (c)(1). Other grounds include trespassing onto school property, joining or soliciting a student to gain membership in a “fraternity, sorority, secret society, or gang[,]” possessing alcohol on school grounds, or disrupting the transportation of schoolchildren. TEX. EDUC. CODE §§ 37.107, 37.121, 37.122, 37.126.

The Texas Office of Court Administration stated that in 2009 juveniles in Texas were issued more than 275,000 non-traffic tickets. TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 18 (Dec. 2010), [http://www.njcn.org/uploads/digital-library/Texas-School-Prison-Pipeline\\_Ticketing\\_Booklet\\_Texas-Appleseed\\_Dec2010.pdf](http://www.njcn.org/uploads/digital-library/Texas-School-Prison-Pipeline_Ticketing_Booklet_Texas-Appleseed_Dec2010.pdf) [https://perma.cc/NLX9-55W4]. Although this figure is high, it likely greatly underestimates the actual number of tickets students receive annually because of underreporting. *Id.* Penalties from Class C misdemeanor tickets may include monetary fines of up to \$500, plus additional court fees. *Id.* at 69. Class C misdemeanor tickets are a grave consequence because even when issued to children, they are handled by municipal and Justice of the Peace courts, not the traditional civil-like juvenile court. *Id.* In spite of these high stakes, this consequence is not likely to help deter kids from repeated misconduct. *Id.*

alternative schools,<sup>140</sup> and expulsions,<sup>141</sup> which could possibly lead to a student attending a Juvenile Justice Alternative Education Program (JJAEP).<sup>142</sup>

The reforms also required each district to adopt a student code of conduct that explained their rules, as well as the Texas regulations, regarding a student's removal from her classroom.<sup>143</sup> Because the requirements permitted school districts to adopt individualized student codes of conduct, there is variation between school districts' punishments for behaviors not outlined within the Texas Education Code.<sup>144</sup>

More recently, however, Texas has undertaken several initiatives to combat the school-to-prison pipeline, including the passage of legislation aimed at curtailing zero tolerance policies' dominance. For example, in 2009 the 81st Legislature approved House Bill 171, aiming to increase disciplinary discretion.<sup>145</sup> House Bill 171 requires that school administrators factor in certain considerations when deciding an appropriate disciplinary action.<sup>146</sup> Examples include a child's intent, disciplinary history, disabilities, and instances of self-defense.<sup>147</sup> Even so, administrators maintain the ability to utilize the harsh remedies described previously and, even worse, the amendment does not

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140. Through the Texas' Safe Schools Act of 1995, the Legislature required that school districts establish alternative schools known as District Alternative Educational Programs (DAEPs). TEX. EDUC. AGENCY, *supra* note 137, at 1; *see* Tex. Educ. Code § 37.008 (outlining DAEP requirements). DAEPs are wholly separate from the traditional neighborhood schools, though still within the district. *See* TEX. EDUC. AGENCY, *supra* note 137, at 1–2 (“DAEPs serve as alternative education settings for students temporarily removed for disciplinary purposes from their regular instructional settings.”) School administrators are able to send students to these facilities on a discretionary or mandatory basis. TEX. EDUC. CODE §§ 37.001(a)(2), 37.006. Section 37.006 lists an array of behaviors that trigger mandatory placement within a DAEP, which include indecent exposure and committing a false alarm involving a public school. TEX. EDUC. CODE § 37.006.

141. The Texas Education Code outlines conduct that requires an expulsion, including possession of certain weapons and “serious misbehavior” while attending a DAEP. TEX. EDUC. CODE § 37.007(a), (c).

142. Section 37.011 specifies that a Texas county whose population exceeds 125,000 is required to implement a JJAEP. TEX. EDUC. CODE § 37.011(a). Through these programs, counties are still expected to provide an education to expelled students, even when those children are within juvenile justice placements. *See* TEX. EDUC. CODE § 37.011(d) (listing academic focus areas). Although counties with a population less than or equal to 125,000 are not required to provide JJAEPs, they too must make provisions for expelled students to receive an education. TEX. EDUC. CODE § 37.011(a), (a–4).

143. TEX. EDUC. CODE § 37.001(a).

144. Moll & Simmons, *supra* note 22, at 2. *See generally* TEX. EDUC. CODE § 37.001(a) (permitting districts' discretion regarding the contents of their student codes of conduct).

145. Moll & Simmons, *supra* note 22, at 2.

146. *Id.* These changes are incorporated in Section 37.001(a)(4). *Compare id.* with TEX. EDUC. CODE § 37.001(a)(4).

147. TEX. EDUC. CODE § 37.001(a)(4).

eliminate other sections within the Texas Education Code that mandate extraction from the classroom.<sup>148</sup>

Texas also sought to increase a school administrator's discretion with the passage of Senate Bill 107, which became effective on June 20, 2015.<sup>149</sup> When an administrator has the ability to evaluate all the circumstances of a situation and then assign an appropriate disciplinary action, it undercuts the power of zero tolerance policies.<sup>150</sup> Although the effectiveness of this bill is yet to be seen, it promises a decrease in school suspensions and expulsions, which were previously mandated by zero tolerance policies, and in turn helps weaken the school-to-prison pipeline.<sup>151</sup>

### C. Denver Public Schools: Restorative Justice

Denver employs restorative justice practices within individual schools to reduce the use of harsh punishments. Restorative justice contrasts starkly with zero tolerance policies because rather than relying on excluding and blankly punishing a student for misbehaving, it seeks to understand the underlying causes of the misconduct in order to repair the damage with a keen eye towards a sense of community.<sup>152</sup> In doing so, it prioritizes healing over punishment and works to reintegrate the wrongdoer in lieu of ostracizing him.<sup>153</sup>

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148. See *supra* notes 137–42 and accompanying text (outlining punitive punishments permissible under the Texas Education Code). A teacher also has the power to remove a student from her classroom. TEX. EDUC. CODE § 37.002.

149. *Texas Legislative Guide: Senate Bill 107*, TEX. TRIB., <http://txlege.texas-tribune.org/84/bills/SB107/> (last updated Jan. 3, 2017); Savage, *supra* note 48.

150. Cf. text accompanying note 12 (defining zero tolerance regulations).

151. Yet this legislation could have been even more effective if it had been left as originally drafted: to eliminate mandatory removals from the classroom altogether. See generally Tex. Classroom Teachers Assoc., *SB 107: How a Really Good Bill Became Law* (2015), [https://tcta.org/node/14151-sb\\_107\\_how\\_a\\_really\\_good\\_bill\\_became\\_law](https://tcta.org/node/14151-sb_107_how_a_really_good_bill_became_law) [<https://perma.cc/7YNE-VEGF>] (“The bill was very concerning to TCTA [union] lawyers because it changed mandatory removals throughout the Education Code to permissive removals . . . the effect would likely have been that teachers would be pressured to decrease removal of students from the classroom. TCTA’s lobbyists sat down with [Senator John Whitmire] and his staff, told him why we were concerned, and gave him our idea as an alternative. He responded by completely substituting his bill with TCTA’s language.”).

152. Thalia N. C. González & Benjamin Cairns, *Moving Beyond Exclusion: Integrating Restorative Practices and Impacting School Culture in Denver Public Schools*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 241, 244 (Nancy E. Dowd ed., 2011).

153. See T. Bennett Burkemper, Jr., Nina Balsam & May Yeh, *Restorative Justice in Missouri’s Juvenile System*, 63 J. MO. B. 128, 128 (2007) (“Instead of viewing [the harm] from the traditional retributive justice perspective, [restorative justice] focuses on the harm to the victim and how to repair that harm. The offender takes responsibility for the harm he/she caused and makes amends.”).

This model relies on three principles: “reparation of harm . . . stakeholder involvement . . . and transformation[.]”<sup>154</sup> The goal of reparation of harm is to amend and fortify relationships.<sup>155</sup> Stakeholder involvement aims to encourage wrongdoers to take responsibility for the ills they caused, while including as many affected parties as possible.<sup>156</sup> And transformation seeks to “empowe[r] individuals and buil[d] community capacity.”<sup>157</sup> These principles work in unison.<sup>158</sup>

The framework is not stagnant, but rather should be adopted to fit the needs of the environment in which it is used.<sup>159</sup> A whole-school approach, for instance, seeks to create a common culture with values, such as tolerance and integrity, while imparting partakers with various skills, like compassion and impartiality.<sup>160</sup> Some envision a continuum with several models that take on different roles.<sup>161</sup>

Because it is possible to implement strategies long term and involve leaders who can help secure the success of the initiatives, schools are an ideal setting to implement restorative justice practices.<sup>162</sup> With Australia leading the way, several countries around the globe have instituted these programs within their schools.<sup>163</sup> In the United States, Denver Public Schools (DPS) secured a grant from the Colorado Department of Education to establish a restorative justice program as a means to address a growing number of school suspensions and expulsions.<sup>164</sup>

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154. González & Cairns, *supra* note 152, at 242.

155. *Id.* at 243.

156. *Id.*

157. *Id.* at 242.

158. *Id.* at 243.

159. OWEN, WETTACH & HOFFMAN, *supra* note 133, at 27 (outlining several options within the restorative justice framework); *see also* Cara Suvall, Article, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. CIV. RTS.-CIV. LIBR. L. REV. 547, 558–59 (2009) (explaining the variety of models available under a restorative justice framework).

160. González & Cairns, *supra* note 152, at 244; *see also* Burkemper, Balsam & Yeh, *supra* note 153, at 128–29 (describing a wide array of models and practices that have evolved from the restorative justice principles).

161. González & Cairns, *supra* note 152, at 244–45. A proactive model is geared towards increasing academic achievement, while a reactive model helps repair transgressions. *Id.*

162. *See id.* at 244. (listing advantages to using restorative justice practices within schools); *cf.* Burkemper, Balsam & Yeh, *supra* note 153, at 130–34 (2007) (documenting the implementation of restorative justice within juvenile justice systems).

163. González & Cairns, *supra* note 152, at 243; *see* Suvall, *supra* note 159, at 563–64 (documenting the implementation of restorative practices in Queensland, Australia schools).

164. González & Cairns, *supra* note 152, at 249–50.

1. *North High School.* The reputation of North High School depicts an all too common profile of a low-income, low-performing school composed almost entirely of racial minority students: violence, gangs, dropouts, low academic performance, and truancy.<sup>165</sup> It was selected to serve as the DPS's pilot for implementing a restorative justice model.<sup>166</sup>

The program began with a full-time Restorative Justice Coordinator who—along with a team composed of the assistant principal, dean, and school resource officer—worked to provide alternative tools to address student misconduct.<sup>167</sup> Simultaneously, the team aimed to create a culture-shift to help increase safety and improve academic achievement.<sup>168</sup> The program incorporates formal and informal practices such as “mediations, conferences, and circles.”<sup>169</sup> Its format also varies by the culpability of each party or how many people are involved.<sup>170</sup> Irrespective of the method employed, the same five questions help guide the process:

1. What happened?
2. What are the effects?
3. Who is responsible? What part of this problem are you responsible for?
4. How will the situation be repaired?<sup>171</sup>

2. *Results.* The outcomes are promising: a vast majority of participants report satisfaction with the results; a decrease in suspensions, expulsions, and law enforcement referrals were reported as 39%, 82%, and 15%, respectively; and the number of fights declined from thirty-six the first year, twenty-four the following, and seven the next fall.<sup>172</sup> The district has expanded

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165. See *id.* at 250 (describing North High's reputation).

166. *Id.*; but see Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 323–24 (2012) (stating that DPS first implemented a “small pilot restorative justice project” within Cole Middle School and then later, after confirming the program's benefits, expanded it to North High School and its three feeder middle schools).

167. González & Cairns, *supra* note 152, at 250–51.

168. *Id.* at 251.

169. *Id.*

170. *Id.* at 251–52 (explaining the different approaches available).

171. *Id.* at 251.

172. *Id.* at 252–53; see also González, *supra* note 166, at 324–27 (expanding on and detailing the positive outcomes within several DPS schools); Lisa Abregú, *Restorative Justice in Schools: Restoring Relationships and Building Community*, DISP. RESOL. MAG., Summer 2012, at 10, 11 (stating that after the implementation of restorative practices at two schools in Berkeley, California, Rosa Parks Elementary School's suspension rates fell by 75% and Cole Middle School's suspension rates decreased from 30.3% to 10.3%); but see

the implementation of restorative justice practices to a total of seven schools.<sup>173</sup>

Proponents stress that quantitative data does not fully capture the program's gains.<sup>174</sup> Qualitative information—such as students seeking out restorative practices on their own initiative and a friendlier school environment—indicates that restorative justice transcends decreasing school suspensions by helping create mindset and attitude shifts.<sup>175</sup>

An anecdotal case study helps illustrate this same point.<sup>176</sup> A confrontation between two students with some gang undertones had the potential to escalate but when presented with a choice to participate in restorative options or face the traditional punitive penalties, the students chose to participate in the restorative conference.<sup>177</sup> Ultimately, the participants identified and assumed responsibility for the actions that created trouble, apologized for those behaviors, and agreed on a resolution.<sup>178</sup> The intervention also included a contract to keep students accountable.<sup>179</sup>

It is important to note that although the vice-principal decided to excuse the five-day suspensions altogether after a successful restorative resolution in this case, the school resource officer did issue a court citation and the Restorative Justice Coordinator reported the progress back to the juvenile court.<sup>180</sup> Although these measures may not be deemed necessary in every case, this example illustrates that restorative justice measures do not eliminate the possibility of utilizing more traditional consequences if needed—those decisions are left to the discretion of the school authorities.<sup>181</sup>

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Suvall, *supra* note 159, at 564–65 (“[T]ension between a desire to use restorative methods and a desire to return to the more traditional punitive methods is seen in all attempts to introduce restorative justice into schools.”).

173. González & Cairns, *supra* note 152, at 250; *see also* González, *supra* note 166, at 305–21 (documenting the use of restorative practices in twelve different states).

174. González & Cairns, *supra* note 152, at 253.

175. *See id.* at 259 (describing other outcomes of the program at North High).

176. *See generally id.* at 254–59 (recounting the story of Jose, Pedro, Tony, and Joe).

177. *Id.* at 254–55.

178. *Id.* at 256.

179. *Id.*

180. *Id.* at 255–56.

181. *See generally id.* at 255 (describing the decision to use traditional punitive measures); *but see* Cheryl M. Graves, Donyelle L. Gray & Ora Schub, *Restorative Justice: Making the Case for Restorative Justice*, 39 CLEARINGHOUSE REV. 219, 224–25 (2005) (reporting on the use of restorative justice practices in Chicago's Bloom High School where, after successfully completing the program, the student's traditional punitive punishment of a suspension, for example, is lessened or eliminated).

*D. Other Efforts*

Other local, state, and national efforts also aim to reduce or eliminate the use of zero tolerance policies. Although these vary in the specifics regarding their purpose or methods, they have overarching themes that connect them. Some actors have taken on an approach similar to Clayton County's: bringing together key stakeholders to work in unison in order to help reduce the referrals made to the courts and juvenile justice system.<sup>182</sup> Others have taken on a legislative approach aimed at increasing school personnel's discretion in assigning a punishment when a child misbehaves in school, such as Texas' Senate Bill 107.<sup>183</sup> Luckily, many are making great strides in helping turn the tides against children. Below are a couple of triumphs that stand out.

1. *Symbolic Federal Leadership.* On July 21, 2011, Attorney General Eric Holder and Secretary of Education Arne Duncan presented the Supportive School Discipline Initiative (Initiative), a joint effort between the Department of Justice and the Department of Education.<sup>184</sup> The Initiative partners with other organizations to help decrease the reliance on zero tolerance policies by building positive learning environments and implementing best practices designed to keep kids in school.<sup>185</sup> Among its goals, the Initiative aims to build consensus among stakeholders from the local to federal level and to help collect and disseminate data regarding best practices.<sup>186</sup> This type of program is commendable because it highlights the seriousness associated with the extensive use of zero tolerance policies and addresses the problem on multiple fronts, and creates nationwide awareness.<sup>187</sup>

2. *Los Angeles's School Climate Bill of Rights.* During the 2011–2012 academic year, almost half of the Los Angeles Unified School District school suspensions were due to violations of “willful defiance.”<sup>188</sup> A zero tolerance regulation ensured that the school would suspend any students who did not comply with a school administrator or teacher's instructions.<sup>189</sup> The district even deemed baggy pants a sufficient transgression.<sup>190</sup> Although this rule applied to all students, it impacted students of color disproportionately.<sup>191</sup> However, the School Climate Bill of Rights

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182. See *supra* note 133 (noting the efforts of Alabama and Texas). See generally Advancement Project, *Success Stories*, <http://safequalityschools.org/pages/success-stories> [<https://perma.cc/UUQ3-MD3H>] (last visited Feb. 1, 2017) [hereinafter Advancement Project, *Success Stories*] (highlighting nationwide successes geared towards reversing the use of harsh discipline practices).

183. See generally *id.* (reporting on reforms directed at reducing and eliminating the reliance on harsh discipline policies).

will require school personnel to rely on alternative disciplinary measures—such as restorative justice practices—because it now forbids, among other things, suspensions and expulsions on the basis of “willful defiance.”<sup>192</sup> In essence, this win has eliminated a powerful zero tolerance regulation.

## V. PROPOSED ALTERNATIVES

Several responses are viable options to address zero tolerance policies and, in turn, help dismantle the school-to-prison pipeline.

### A. *Due Process Protections*

Although *Goss v. Lopez* theoretically provides students with due process protections prior to being suspended, courts’ enforcement of these debatably meaningless safeguards is unlikely.<sup>193</sup> Encouraging courts to participate in a fact-finding investigation of school discipline cases would not only help ensure school discipline is geared towards achieving pedagogical goals but would also increase schools’ accountability for providing students meaningful due process rights before depriving them of their opportunity to attend school.<sup>194</sup>

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184. Jennifer Castillo, *Tolerance in Schools for Latino Students: Dismantling the School-to-Prison Pipeline*, 26 HARV. J. HISP. POL’Y 43, 53 (2014); DEP’T OF EDUC. & DEP’T OF JUSTICE, SUPPORTIVE SCHOOL DISCIPLINE INITIATIVE (2011), <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-3-overview.pdf> [<https://perma.cc/9MF5-EQQN>].

185. Castillo, *supra* note 184, at 53.

186. *Id.* The Initiative also aspires to build “awareness, capacity, and leadership.” DEP’T OF EDUC. & DEP’T OF JUSTICE, *supra* note 184. To learn more about specific projects that have been supported by the Initiative, visit <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-3-overview.pdf> [<https://perma.cc/9MF5-EQQN>].

187. *See id.* (describing Initiative projects).

188. Advancement Project, *Success Stories*, *supra* note 182.

189. *Id.*

190. *Id.*; *see also* Susan Ferris, *Los Angeles School Board Cracks Down on Suspensions for Minor Infractions*, JUV. JUST. INFO. EXCH. (May 17, 2013), <http://jjiie.org/los-angeles-school-board-cracks-down-on-suspensions-for-minor-infractions/> [<https://perma.cc/8LX8-AZ7F>] (“A ‘willful defiance’ suspension can stem from a student violating dress codes to lashing out with crude behavior or language, or refusing to be quiet or perform assigned work.”).

191. Ferris, *supra* note 190.

192. MONICA GARCÍA, RESOLUTION: 2013 SCHOOL DISCIPLINE POLICY AND SCHOOL CLIMATE BILL OF RIGHTS (2013), <https://irjrd.org/files/2016/01/2013-School-Climate-Bill-of-Rights-Policy-FINAL.pdf> [<https://perma.cc/VM4C-8J7T>].

193. *See supra* Part III.B (explaining why *Goss v. Lopez* has not provided students with meaningful protections).

194. *See* Kim, *supra* note 124, at 892, 894 (articulating the advantages to increasing a court’s role in overseeing school discipline). Increasing schools’ accountability would also help ensure procedural justice in the school setting. *See generally* Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1495–96

Potential criticism of this proposal might include that this would undermine a school's discretion, clog up the court system, and interfere with an area traditionally considered to lie within a state's domain.<sup>195</sup> These critiques, however, were likely also anticipated by the Supreme Court and yet were deemed to be insufficient to outweigh the potential detrimental effects an absence from the classroom could signify for a child.<sup>196</sup> Thus, even if these concerns have merit, they should not quash an initiative aimed at guaranteeing a child's Fourteenth Amendment rights.<sup>197</sup> One suggestion is that the courts' role could be tailored by location with an added layer of objective data to rebut the presumption that courts ought to defer to a school's disciplinary discretion.<sup>198</sup> Although this approach might prevent some meritorious cases from receiving adequate court review, it could help initiate a less radical transformation of the courts' role over school discipline cases.<sup>199</sup>

*B. Concerted Efforts Between Judicial, Legislative, and State and Local Agencies*

Rallying key stakeholders to work together in an effort to address the criminalization of common student misbehaviors may also help eradicate zero tolerance regulations' ill effects.

1. *Unified Stakeholders.* As the Clayton County model has demonstrated, unifying an array of educational stakeholders around one mission can quickly reverse the negative effects created by zero tolerance policies.<sup>200</sup> Certain attributes

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(2009) (advocating for procedural justice within schools). Procedural justice focuses on an individual's perception that the process used to solve a conflict is fair. *Id.* at 1454. Studies suggest that juveniles who believe the system is equitable have lower recidivism rates, but students who do not view the scheme as fair are more likely to reoffend. *Id.* at 1479, 1481–82.

195. See generally Kim, *supra* note 124, at 899–900 (explaining why courts are well suited to review whether school discipline is appropriate in spite of these reservations).

196. See *supra* text accompanying notes 101–06 (describing the Court's decision to grant due process protections to students for school suspensions).

197. See generally Kim, *supra* note 124, at 896–98 (rejecting the view that the administrative practicality of a categorical rule of school deference is sufficient to impede a reform aimed at increasing courts' overseeing role in school discipline).

198. *Id.* at 894–95.

199. See generally *id.* at 898–900 (refuting objections to a geographical approach).

200. See *supra* text accompanying note 134 (reporting Clayton County's success). The Juvenile Detention Alternatives Initiative (JDAI), spearheaded by the Annie E. Casey Foundation, serves as another example of how unifying stakeholders can secure better results for kids. See Richard A. Mendel, *Juvenile Detention Alternatives Initiative: Progress Report*, THE ANNIE E. CASEY FOUND. 23–24, 29 (2014), <http://www.aecf.org/m/resourcedoc/aecf-2014JDAIPROGRESSREPORT-2014.pdf> [<https://perma.cc/4UBU-PN3T>] (relying on government and community actors' joint efforts to help enact reforms aimed at reducing juveniles' detention numbers and duration).

characterize the model and can be emulated to produce similar results across the country.

One of the attributes is for a wide-ranging group of stakeholders to bind together in an effort to combat the ill effects of zero tolerance policies.<sup>201</sup> Judge Teske contends that a juvenile judge is an ideal leader in helping facilitate this because “the juvenile court is the common denominator of all child service agencies” and because juvenile judges enjoy the highest influence amongst the parties involved.<sup>202</sup> Another characteristic is that the work of the group should include written protocols that ensure accountability.<sup>203</sup> Moreover, a neutral facilitator, likely to be a different individual than the initial leader, can help guide discussions.<sup>204</sup> The group should also be working toward a specific goal while remaining flexible, as their discourse may generate additional inquiries.<sup>205</sup> The group’s tasks should not only be to seek out alternatives to zero tolerance policies or other ineffective disciplinary measures, but also to take the time to assess the root causes of the disruptive behaviors.<sup>206</sup> Once the group devises plans to address the issue, there should be training of all the individuals whose involvement will determine the success of those proposals.<sup>207</sup>

Significant benefits to this approach are that it creates a “single point of entry” because all the relevant actors are working in cohesion.<sup>208</sup> Moreover, it helps introduce services to rehabilitate the children that would otherwise be inaccessible to schools.<sup>209</sup> In addition to helping reduce school referrals to the juvenile justice system, these efforts will also likely reap added benefits such as increased crime solving within the community and a higher success rate with children in the court system that genuinely need rehabilitation.<sup>210</sup>

2. *Legislative Efforts.* A separate, but equally important, initiative could be for legislative bodies to consider successful models, such as Clayton County, and enact legislation to counter the zero tolerance regulations in place. There are several ways to

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201. Teske, *supra* note 10, at 92.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 93–94.

209. *See id.* at 92 (“The panel linked the child and family to services in the community not available to the school system.”).

210. *Id.* at 93–94.

accomplish this. One possibility is to increase schools' discretion in determining appropriate punishments for student misbehaviors, as did Texas' Senate Bill 107.<sup>211</sup> Alternatively, bills that outright eliminate the use of zero tolerance regulations are another approach.<sup>212</sup> This eradication could be limited to most misconduct, while conserving the use of these protocols for misbehaviors that actually do pose dangerous threats to schools, such as guns.<sup>213</sup> Either way, a significant advantage to counteracting zero tolerance policies with legislation is their far-reaching impact.

### C. *Alternative Discipline Management Techniques*

In addition to initiatives designed to assist schools in gaining more flexibility to deal with misbehaviors and access to community resources, an internal transformation can counteract the negative effects of zero tolerance policies.<sup>214</sup> Teachers and staff use a wide array of effective pedagogical practices to prevent and respond to misbehaviors, but restorative justice is a framework that could also help revamp a school-wide approach to addressing student misconduct.<sup>215</sup> More importantly, it can equip students with new skills to solve problems in tough situations.<sup>216</sup>

Although the methods available in a restorative justice framework vary and should be tailored to fit the specific needs of each school, some ingredients are vital.<sup>217</sup> One is teamwork.<sup>218</sup> Even with a full-time Restorative Justice Coordinator, buy-in from strategic players is important.<sup>219</sup> Administrators, school-based officers, teachers and staff will

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211. See *supra* text accompanying notes 149–51 (describing the purpose of Texas' Senate Bill 107).

212. See *supra* text accompanying notes 192–93 (describing the Los Angeles's School Climate Bill of Rights).

213. See notes 21–24 and accompanying text (implying a differentiated approach contingent on the dangers posed by the student's infraction).

214. See *supra* Part IV.C (describing the use of restorative justice practices within Denver Public Schools).

215. See *supra* text accompanying notes 155–58, 160 (noting the goals entailed in a school-wide approach).

216. See *supra* text accompanying note 160; see also Belinda Hopkins, *Restorative Justice as Social Justice*, 21 NOTTINGHAM L.J. 121, 122 (2012) (listing "emotional articulacy; empathy; open-mindedness; active non-judgmental listening and conflict-management skills" as essential tools to form, preserve, and mend relationships).

217. See González & Cairns, *supra* note 152, at 250 (explaining the need to tailor the program for each school).

218. See *id.* at 251 (describing the team assembled at North High); see also Hopkins, *supra* note 216, at 126 (advocating for a team effort approach).

219. See generally González & Cairns, *supra* note 152, at 255 (recounting the discretion the vice-principal and school-based resource officer maintained to assign traditional punitive consequences in spite of a restorative justice program being in place).

need to believe in the overarching vision: “to create a context in which students accept responsibility for their actions and develop stronger relationships within the school community.”<sup>220</sup> It will also be necessary to have patience.<sup>221</sup> It is estimated that the implementation plan takes between three to five years because restorative justice seeks to transform mindsets.<sup>222</sup> Finally, reflection and flexibility will help ensure that as time progresses, the models and practices used are continually evaluated and fine-tuned as needed.<sup>223</sup>

In spite of the challenges, restorative justice programs are worthwhile because, in addition to providing alternative reactions to student misconduct, they help prevent problems altogether.<sup>224</sup> Also, they “build social and emotional capital through challenging students in the context of social and emotional learning.”<sup>225</sup> And in the process these methods also establish and reinforce relationships amongst community members.<sup>226</sup> Because schools are institutions charged with the missions to help shape our children, to teach our kids how to act and function within the larger scheme of society, and to counteract negative influences these children may have, it seems fitting that schools also be accountable to equip our children with the skills to address issues beyond the academic material, while modeling that same tolerance through how the adults react to childrens’ misbehaviors.<sup>227</sup>

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220. *Id.* at 246; *see also* Hopkins, *supra* note 216, at 123–25 (outlining the role of a single individual through the example of a teacher).

221. *See generally* González & Cairns, *supra* note 152, at 245 (relaying the time and steps required when rolling out this program).

222. *Id.*

223. *See id.* at 251 (retelling how North High began with a one-dimensional model and then progressed to a continuum model).

224. *See id.* at 253, 257 (“restorative practices . . . are preventative in nature”; “[Student] Pedro continues to utilize informal and formal restorative justice processes to deescalate conflict”); *see also* OWEN, WETTACH & HOFFMAN, *supra* note 133, at 27–28 (“data show that students who attended a victim-offender face-to-face meeting were three times less likely to have future conflicts than students who did not have such meetings”); Burkemper, Balsam & Yeh, *supra* note 153, at 129–30 (2007) (describing benefits reaped from utilizing restorative justice practices).

225. González & Cairns, *supra* note 152, at 246.

226. *Id.*; *see also* Abregú, *supra* note 172, at 11 (“Restorative justice enhances social and emotional intelligence [and] also sensitizes participants to the value of relationships within and between social groups.”).

227. *See generally* Teske, *supra* note 10, at 91 (describing the role of schools in helping shape our children).

## VI. CONCLUSION

Zero tolerance regulations were created in an effort to help make our schools safer.<sup>228</sup> With an ever-growing and unfortunate list of school shootings and other incidents, these legitimate concerns remain today.<sup>229</sup> However, zero tolerance policies were designed to address misconduct that posed serious threats to the safety at our schools, not common misbehaviors associated with children. The decades of reliance on these punitive and harsh consequences, which are primarily comprised of extracting children from the classroom, have failed to create more consistency in punishments and have not served as effective deterrents either. Instead, research shows that these practices push students into our prison systems, strengthening the school-to-prison pipeline.

These grave consequences affect not only the children who become victims of the system, but also our larger society by creating greater financial burdens, for example. For those reasons, local, state, and federal organizations and government entities should prioritize creating alternative solutions that prove more effective. The aforementioned exemplars are only a few examples of how together we can help create safer schools while also ensuring higher academic success amongst our students and investing in the children who will become our future leaders.

*Rocío Rodríguez Ruiz*

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228. See *supra* text accompanying notes 14–17 (recounting the original intent of zero tolerance policies).

229. See William Glaberson, *Nation's Pain Is Renewed, and Difficult Questions Are Asked Once More*, N.Y. TIMES Dec. 14, 2012, at A18 (reporting on Sandy Hook shooting).