

LEARNING WHILE BLACK: HOW “ZERO TOLERANCE” POLICIES DISPROPORTIONATELY AFFECT BLACK STUDENTS

*Sydney Ford**

Abstract

The U.S. Constitution purports to treat everyone equally under the law. However, racial disparities in our criminal justice system, and particularly our juvenile justice system, demonstrate that this is not the case. These disparities plague every step of the juvenile delinquency process. Each contact Black youth have with the juvenile justice system, from petition to confinement, is more punitive than that of their white counterparts who are charged with similar or even more severe infractions. Because, as statistics have shown, Black youths often receive harsher sanctions for their behavior, they inherently have more contact with the system, and the system has more negative impacts on their lives. There are several causes for these disparities ranging from “zero tolerance” policies in our schools to geography and population density.

First, this Article will focus on analyzing the origination of “zero tolerance” policies, how they are used in practice, and how they are biased against Black youth. Second, this Article will explain how these policies expose Black youth to their first contact with the juvenile justice system. Third, this Article will explore how even though these policies have been challenged for discrimination in U.S. courts, they have remained in place, and will propose how the use of international human rights treaties may compel legislation to overturn these policies. Finally, this Article will analyze how the voluntary removal of “zero tolerance” policies and practices from U.S. school systems would be a large step toward eliminating racial disparity in the juvenile justice system and will propose that preventive discipline measures should replace “zero tolerance” policies.

INTRODUCTION	50
I. BIAS AGAINST BLACK YOUTH IN ZERO TOLERANCE POLICIES	53
A. <i>Zero Tolerance Policies and Their Racially Disparate Application</i>	54
B. <i>Why Zero Tolerance Policies Are Open to Racially Disparate Application</i>	56

* Assistant Public Defender, DeKalb County Public Defender’s Office- Juvenile Division. I thank Professor Randee Waldman for her excellent mentorship on this subject matter. I also thank Lindsey Grubbs, Alys Brown, Lauren Gandle, and Amanda Monaco for providing feedback.

II.	ZERO TOLERANCE PUNISHMENT LEADS TO THE JUVENILE JUSTICE SYSTEM.....	57
III.	POTENTIAL CHALLENGES TO ZERO TOLERANCE POLICIES	60
	A. <i>Challenges Under the U.S. Constitution</i>	60
	B. <i>Challenges Under International Human Rights Standards</i>	63
	1. Convention on the Rights of the Child.....	64
	2. Convention on the Elimination of All Forms of Racial Discrimination	64
	3. Convention Against Discrimination in Education	65
IV.	VOLUNTARY ELIMINATION OF ZERO TOLERANCE POLICIES.....	66
	CONCLUSION.....	69

INTRODUCTION

On March 1, 2013, a seven-year-old student at Park Elementary School in Anne Arundel County, Maryland, nibbled his breakfast Pop-Tart into the shape of a gun with his mouth, then showed it to his fellow classmates.¹ “Look—I made a gun!” he yelled, pointing the pastry towards students at desks and in the hallway.² The boy, who was only in second grade at the time, was suspended from school for two days.³ His disciplinary referral used the word “gun” four times to describe the “incident” and left a mark on the child’s permanent record.⁴

It sounds outlandish—a pistol-shaped pastry leading a child to miss valuable time in the classroom. Yet, this scenario is all too familiar for those who are aware of the “zero tolerance” policies and practices that are rampant in our schools today.⁵

Prior to zero tolerance policies and practices, corporal punishment was the dominant disciplinary method used in schools.⁶ The use of

1. Donna St. George, *Resolution, Years Later, in Boys’ Suspension Over ‘Pastry Gun,’* WASH. POST (Oct. 25, 2016), https://www.washingtonpost.com/local/education/resolution-years-later-in-boys-suspension-over-pastry-gun/2016/10/25/6bc337de-96f5-11e6-bc79-af1cd3d2984b_story.html [<https://perma.cc/ZY6A-W5MG>].

2. *Id.*

3. *Id.*

4. *Id.*

5. Mickey Losinski et al., *Weapons in Schools and Zero-Tolerance Policies*, 98(2) NASSP BULLETIN 126, 126–27 (2014), <https://journals.sagepub.com/doi/pdf/10.1177/0192636514528747> [<https://perma.cc/DH3D-LELX>].

6. Adai Tefera et al., Research Brief, *Why Do Racial Disparities in School Discipline Exist? The Role of Policies, Processes, People, and Places*, METRO. EDUC. RSCH. CONSORTIUM 6

corporal punishment began to fade in the 1970s, and at that time, out-of-school suspension and expulsion became commonplace as the primary method to enforce discipline in the classroom.⁷ The phrase “zero tolerance” was first recorded in 1983.⁸ The term was used when the Navy reassigned dozens of submarine crew officials on suspicion of drug abuse.⁹ Later, this phrase took hold to describe school programs aimed at addressing drug abuse and gang activity in schools.¹⁰ In the 1990s, after several high profile shootings in schools nationwide—most notably at Columbine High School—the mass introduction of zero tolerance policies in schools began.¹¹ These policies “mandated strict punitive measures for particular offenses, ‘regardless of the gravity of behavior, mitigating circumstances, or situational context.’”¹² As these policies took root in schools nationwide, the federal government went a step further and passed the Gun-Free Schools Act in 1994.¹³ This Act stated that to get federal funding, “states had to enact laws requiring that students be expelled if they brought firearms or other weapons to schools.”¹⁴ When the 1996 school year began, 79% of public schools in the U.S. had adopted these zero tolerance policies to guarantee that they received their funding.¹⁵ By 1999, zero tolerance policies were in full effect in schools across America.¹⁶ There was no room for context or consideration of the circumstances in the stated law. If a child brought their grandfather’s pocket watch to the school with a tiny knife attached to it, they would be suspended.¹⁷ If a nine-year-old child finds a manicure kit on the way to school and puts it in their book bag, only to find out it had a one-inch knife in it, they would be suspended.¹⁸ And finally, if a mother puts a small knife in her child’s lunchbox to cut an apple, and the

(2017), https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=1103&context=merc_pubs [<https://perma.cc/GW33-RMM4>].

7. *Id.*

8. S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 277 n.27 (2014).

9. *Id.*

10. *Id.*

11. Tefera et al., *supra* note 6, at 6.

12. *Id.*

13. *Id.*

14. *Id.*

15. Jacob Kang-Brown, et al., *A Generation Later: What We’ve Learned about Zero Tolerance in Schools*, VERA INST. JUST., Dec. 2013, at 2, <https://www.juvjustice.org/sites/default/files/resource-files/A%20Generation%20Later-What%20We%27ve%20Learned%20about%20Zero%20Tolerance%20in%20Schools.pdf> [<https://perma.cc/Y9J7-ZR8A>].

16. *Id.* at 2.

17. U. VA. CURRY SCH. EDUC. & HUMAN DEV., *Zero Tolerance: What is Zero Tolerance?*, <https://curry.virginia.edu/faculty-research/centers-labs-projects/research-labs/youth-violence-project/violence-schools-and-1> [<https://perma.cc/RZ2W-QA92>] (last visited Sept. 16, 2020).

18. *Id.*

student turns the knife in to the teacher, the student would still be expelled.¹⁹ These are just a few examples.²⁰

Over time, many schools began to expand these policies beyond firearms, or even beyond lethal weapons, to cover more behaviors and circumstances.²¹ Zero tolerance policies began to include drugs, alcohol, disruptive behavior, and nonviolent offenses.²² Moreover, schools began to create policies that “mandate serious sanctions such as out-of-school suspension or expulsion for a wide range of student behaviors,” which lead to subjective application.²³ These new and more expansive policies were enacted with the “broken glass theory” at the heart of them.²⁴ The broken glass theory argued that “in order to prevent students from becoming unruly, they must be critically punished for minor offenses, to avoid major ones.”²⁵ During this same time, two criminal statisticians, James Alan Fox and John Dilulio, demanded more zero tolerance policies as they warned of an increase in juvenile crime perpetrated by “super-predators” who were “job-less, fatherless juveniles.”²⁶ Although this never materialized, it still led to an embrace of these expansive zero tolerance policies due to an increased fear of these “super predators.”²⁷

As these policies with subjective criteria grew, they became open to implicit bias and racialized application against Black youth. In fact, zero tolerance policies, “while believed to be neutral because they require the same consequences for all students, often have significant racialized outcomes when enacted in practice.”²⁸ Black youth are punished more severely for less serious and more subjective infractions” than their white counterparts under zero tolerance practices.²⁹ These racialized outcomes lead not only to racial gaps in discipline at school, but to exposure to the

19. Jesse Katz, *Taking Zero Tolerance to the Limit*, L.A. TIMES (Mar. 1, 1998, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1998-mar-01-mn-24340-story.html> [<https://perma.cc/P463-WSW6>].

20. See U. VA. CURRY SCH. EDUC. & HUMAN DEV., *supra* note 17.

21. *Id.*

22. COAL. FOR JUV. JUST., ZERO TOLERANCE POLICIES AND THE IMPLICATIONS FOR JUVENILE JUSTICE (May 2009, updated June 2012), <https://juvjustice.org/sites/default/files/resource-files/Zero%20Tolerance%20Policies%20and%20the%20Implications%20for%20Juvenile%20Justice%20Fact%20Sheet.pdf> [<https://perma.cc/JZ6F-LU8L>].

23. Rebecca Gordon et al., *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools*, APPLIED RSCH. CTR. (Mar. 2000), <https://files.eric.ed.gov/fulltext/ED454323.pdf> [<https://perma.cc/MU4Y-9JZU>].

24. Mikki L. Smith, *A Generation at Risk: The Ties Between Zero Tolerance Policies and the School-to-Prison Pipeline*, 8 MCNAIR SCHOLARS RSCH. J. 125, 128 (2015).

25. *Id.*

26. Gordon et al., *supra* note 23, at 11.

27. *Id.*

28. Tefera et al., *supra* note 6, at 7.

29. John M. Wallace et al., *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991–2005*, 59 NEGRO EDUC. REV. 47, 57 (2008).

juvenile justice system for Black youth, which is fraught with racial disparities at every step of the process.³⁰ Black youth that fall victim to zero tolerance policies are swept into a system that chews them up and spits them out. They are left with lower rates of academic achievement, higher risk of dropout, and higher rates of incarceration as adults.³¹

This Article argues that zero tolerance policies are biased in their subjective application toward Black youth, which leads to racial inequities in school discipline. This Article further argues that schools must remove zero tolerance policies and use preventive discipline instead. The elimination of zero tolerance policies could keep many Black youth from their first contact with the juvenile justice system and remove some racial disparity from school discipline. Part I of this Article will explore the history of bias against Black youth that is prevalent in the subjective nature of zero tolerance policies.³² Part II will then explain how these policies expose Black youth to their first contact with the juvenile justice system, leading to a cycle of disparate treatment and harm as they move through the system.³³ Part III focuses on the previous legal challenges to zero tolerance policies, and how international human rights treaties may affect these policies.³⁴ Finally, Part IV, will analyze how and why U.S. schools should voluntarily eliminate zero tolerance policies and replace them with preventive discipline programs.³⁵

I. BIAS AGAINST BLACK YOUTH IN ZERO TOLERANCE POLICIES

This Part discusses how zero tolerance policies have affected Black youth disproportionately since their inception,³⁶ and how, despite school violence staying relatively stable for the past thirty years, the number of Black youths punished under zero tolerance policies continues to increase.³⁷

30. See Josh Rovner, *Black Disparities in Youth Incarceration*, SENT'G PROJECT (updated July 15, 2021), <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/> [<https://perma.cc/H2WE-5FLK>].

31. Prudence Carter et al., *Discipline Disparities Series: Overview*, EQUITY PROJECT IND. U. (Mar. 2014), https://safesupportivelearning.ed.gov/sites/default/files/Discipline_Disparities_Overview.pdf [<https://perma.cc/C636-MZS6>]; Thomas Rudd, *Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY (Feb. 5, 2014), <https://kirwaninstitute.osu.edu/article/racial-disproportionality-school-discipline-implicit-bias-heavily-implicated> [<https://perma.cc/457J-M5A6>].

32. See *infra* Part I.

33. See *infra* Part II.

34. See *infra* Part III.

35. See *infra* Part IV.

36. See *infra* Part I.A.

37. Russel J. Skiba, *The Failure of Zero Tolerance: Reclaiming Child and Youth*, 22:4 RECLAIMING CHILD. & YOUTH 27, 27–33 (2014), http://reclaimingjournal.com/sites/default/files/journal-article-pdfs/22_4_Skiba.pdf [<https://perma.cc/F5BJ-76AD>]; see *infra* Part I.B.

A. Zero Tolerance Policies and Their Racially Disparate Application

The data shows that due to the subjective nature of zero tolerance policies, they are disproportionately applied to Black youth. “Black students are consistently suspended at rates two to three times higher than those for other students.”³⁸ In the year 2000, Black students represented only 17% of the student population, yet constituted 34% of the population of students suspended from school.³⁹ Since then, the disparities have only increased.⁴⁰ While the use of out-of-school suspensions has doubled since 1973, for Black youth, it has tripled.⁴¹ Studies from 2019 show that Black youth are now nearly four times more likely to be suspended than white youth.⁴² Six percent of all K–12 students “received one or more out-of-school suspensions,” but 18% of those are Black boys and 10% are Black girls, compared to the 5% for white boys and 2% for white girls.⁴³ Moreover, Black students are represented more in expulsions, as well.⁴⁴ For expulsions, Black students are 1.9 times as likely to be expelled from school than white students.⁴⁵ Black boys represent 8% of all students, but are 19% of students likely to be expelled without educational services, and similarly, Black girls represent 8% of students, but are 9% of students expelled without educational services.⁴⁶

Black students are also more likely to be disciplined through harsher forms of punishment like suspension or expulsion than white students, even if the Black students’ infractions are less serious and more subjective.⁴⁷ Some may say that this just means that Black youth are acting out more, but when you look at the data, the disparity in discipline

38. *Id.* at 30.

39. Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 10 (2003), <https://www.ojp.gov/library/abstracts/defining-and-redirecting-school-prison-pipeline> [<https://perma.cc/6WZQ-69Y7>].

40. See Anya Kamenetz, *Suspensions are Down in U.S. Schools but Large Racial Gaps Remain*, NPR (Dec. 17, 2018, 3:52 PM), <https://www.npr.org/2018/12/17/677508707/suspensions-are-down-in-u-s-schools-but-large-racial-gaps-remain#:~:text=The%20proportion%20of%20all%20students,of%20the%20biggest%2Dpopulation%20states> [<https://perma.cc/2WG6-SUS7>].

41. CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 2* (2010).

42. Brett Arends, *Black Kids More Likely to Be Suspended Than White Kids Over Same Behavior*, N.Y. POST (Oct. 16, 2019), <https://nypost.com/2019/10/16/black-kids-more-likely-to-be-suspended-than-white-kids-over-same-behavior/> [<https://perma.cc/VLC9-MSLB>].

43. U. S. DEP’T EDUC. OFF. CIV. RTS., *KEY DATA HIGHLIGHTS ON EQUITY AND OPPORTUNITY GAPS IN OUR NATION’S PUBLIC SCHOOLS 1, 3* (Oct. 16, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [<https://perma.cc/FAQ3-3V7H>].

44. Skiba, *supra* note 37, at 30.

45. U.S. DEP’T EDUC. OFF. CIV. RTS., *supra* note 43, at 4.

46. *Id.*

47. Wallace et al., *supra* note 29, at 53.

is due to subjective application of zero tolerance policies.⁴⁸ There is no evidence that Black youth “receive more suspensions due to increased rates or intensity of misbehavior.”⁴⁹ “The Color of Discipline” study from 2002 shows that white students were referred more than Black students for more objective offenses, such as smoking and vandalism, while Black students were referred more than White students for more subjective offenses, such as disrespect or loitering.⁵⁰ Since then, other research studies have shown that these disciplinary disparities between Black and white youth occur more often in these subjective categories.⁵¹ Not only were Black students more likely to be disciplined for subjective offenses, they were also more likely to receive harsher punishments than white students for the same infractions.⁵² The punishment for a first offense by a Black student rated, on average, 20% more “severe[.]” than that of white students.⁵³ A second offense rated 29% more severe.⁵⁴

Some might argue that geography and population pay a part in the disparate application of zero tolerance policies, not implicit bias. However, a study by the ERASE Initiative found that “[i]n no city studied were the sanction rates for [Black youth] equal to or less than their proportion of all students.⁵⁵ In some cities, like San Francisco, Black youth were “suspended or expelled at *more than three times* their proportion of the general school population.”⁵⁶ This unfair application of zero tolerance policies is happening everywhere, not just in urban areas.⁵⁷ Researchers have not found that poverty is the cause for this overrepresentation.⁵⁸ In fact, these racial disparities in discipline are just “as likely or more likely to occur in rich, suburban districts as they are in

48. Russell J. Skiba & Natasha T. Williams, *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior*, EQUITY PROJECT IND. U. (2014), <https://www.justice4all.org/wp-content/uploads/2016/04/Are-Black-Kids-Worse-Myths-and-Facts-About-Racial-Differences-in-Behavior.pdf> [<https://perma.cc/64UN-439L>].

49. Russell Skiba, *Zero Tolerance and Alternative Discipline Strategies*, 39 NAT’L ASS’N SCH. PSYCHS. 1, 1 (2010) (citation omitted).

50. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 334 (2002).

51. *Id.* at 335.

52. *Id.* at 319.

53. Arends, *supra* note 42.

54. *Id.*

55. Gordon et al., *supra* note 23, at 9.

56. *Id.*

57. Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. ASS’N. 852, 852 (2008).

58. Russell Skiba & Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE & CONTEMP. ISSUES 1063, 1074 (Carolyn Evertson & Carol Weinstein eds. 2006).

poor, urban districts.”⁵⁹ If no factual evidence provides why a specific group of students is targeted for disciplinary action in a school setting, one must question why those students represent most of the suspended population. A Texas study conducted in 2011 controlled for “more than 80 individual and school characteristics normally associated with poor academic performance, as well as differences in rates of delinquency and more serious offending” and still found that “[B]lack youth were more likely to be disciplined and more likely to receive harsh discipline.”⁶⁰ That means that the answer for this disparate application could simply lie in implicit biases and the subjective application of zero tolerance policies.

B. *Why Zero Tolerance Policies Are Open to Racially Disparate Application*

Research shows that Black youth are more likely to be “monitored, scrutinized, suspected, and then sanctioned for the same infractions as White students by school safety staff, teachers, and administrators.”⁶¹ Because zero tolerance policies are vaguely defined as almost all or nothing, there is a “lack of consistency in district policy guidelines for schools, teachers, and administrators around which infractions to report, which to penalize, and how to respond to students’ behaviors[.]”⁶² This means these policies are open to implicit bias and cultural mismatch because administrators have to rely on their own discretion rather than clear policies.⁶³

“Implicit biases are unconscious attitudes that influence many facets of [our] lives, including perceptions, behaviors and decisions.”⁶⁴ When zero tolerance policies are defined in subjective terms like “defiance” or “disrespect,” the application of them depends on the interpretation by teachers and administrators.⁶⁵ Because implicit bias can seep into the minds of teachers and administrators, zero tolerance policies can be applied based on these biases. For example, cultural mismatch between school personnel and students can show just how implicit bias can lead to disproportionate application of zero tolerance policies.⁶⁶ Black

59. Russell J. Skiba, *Reaching a Critical Juncture for Our Kids: The Need to Reassess School-Justice Practices*, 51 FAM. CT. REV. 380, 384 (2013) (citing Wallace et al., *supra* note 29).

60. Kang-Brown et al., *supra* note 15, at 3.

61. Tefera et al., *supra* note 6, at 7.

62. *Id.*

63. *Id.*

64. *Id.*

65. Gordon et al., *supra* note 23, at 12.

66. See Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 63–64 (2010); see also Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 623–24; Dick Startz, *Teacher Perceptions and Race*, BROOKINGS (Feb. 22, 2016),

students with same-race teachers were “rated as less disruptive” compared to those with different-race teachers, and Black students taught by Black teachers were suspended less often.⁶⁷ Along those same lines, when presented with profiles of the same infractions from students of different racial groups researchers found that teachers were more likely to be troubled by infractions of Black students and more likely to recommend severe consequences.⁶⁸ In some cases, different schools will implement zero tolerance policies differently, and there is some evidence that “schools are more willing to recognize mitigating circumstances when they perceive the student involved in an incident as having ‘a real future’ that would be destroyed by expulsion.”⁶⁹ However, implicit biases seem to have led school leaders to believe that Black youth do not have these “real futures,” because it is their futures that “are wrecked by zero-tolerance policies.”⁷⁰

II. ZERO TOLERANCE PUNISHMENT LEADS TO THE JUVENILE JUSTICE SYSTEM

Not only do zero tolerance practices lead to removal of students from school, which in turn leads to an increase in dropping out, but it also can supply students with their first exposure to the juvenile justice system. This Part will explore the effects of zero tolerance policies and how they factor into the school-to-prison pipeline for Black youth.⁷¹

“In schools that employ zero tolerance policies, school administrators and teachers are required to refer students to law enforcement.”⁷² What may have otherwise not made it to the juvenile justice system due to time and effort, is sent there almost instantly.⁷³ Activity that may otherwise

<http://www.brookings.edu/blogs/brown-center-chalkboard/posts/2016/02/22-teacher-perceptions-race-startz> [<https://perma.cc/P2PZ-C6XE>].

67. Adam C. Wright, *Teachers’ Perceptions of Students’ Disruptive Behavior: The Effect of Racial Congruence and Consequences for School Suspension*, (Nov. 2015) (unpublished seminar paper) (on file with the University of California, Santa Barbara).

68. Okonofua et al., *supra* note 68, at 621.

69. Gordon et al., *supra* note 23, at 10.

70. *Id.*

71. Nicki L. Cole, *Understanding the School-to-Prison Pipeline*, THOUGHTCO (May 30, 2019), <https://www.thoughtco.com/school-to-prison-pipeline-4136170> [<https://perma.cc/N3A9-YHBY>] (defining “school- to-prison pipeline” as “a process through which students are pushed out of schools and into prisons. In other words, it is a process of criminalizing youth that is carried out by disciplinary policies and practices within schools that put students into contact with law enforcement. Once they are put into contact with law enforcement for disciplinary reasons, many are then pushed out of the educational environment and into the juvenile and criminal justice systems”).

72. See S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 274 (2014).

73. *Id.*

have been deemed childish or mundane is now criminalized.⁷⁴ Thus, “[m]any students have been subjected to overzealous punishment for ‘crimes’ that deserved nothing more than a detention.”⁷⁵

Additionally, most schools have school resource officers that are present on the school grounds as a direct law enforcement contact.⁷⁶ During the time that zero tolerance policies exploded, so did the presence of school resource officers.⁷⁷ Although the intention of their presence might have been to keep out intruders and protect schools from violence, it has instead led to a “hypercriminalization of childhood conduct.”⁷⁸ This criminalization of childhood conduct has resulted in teachers and school administrators treating children as adults instead of students who should be educated.⁷⁹ In a report by Yamili Quezada, she stated that “[s]ince the enforcement of Zero Tolerance, nearly 100,000 students have been referred to law enforcement by schools in Colorado. The majority of these referrals have been for minor offenses that reflect normal adolescent behavior and do not threaten school safety.”⁸⁰ In 2005, a study by the Southern Poverty Law Center “found that children are far more likely to be arrested at school than they were a generation ago [with] [t]he vast majority of these arrests . . . for nonviolent offenses.”⁸¹ It is apparent that zero tolerance measures equate minor infractions with criminal acts.⁸²

We have explored that the implementation of zero tolerance policies is racially disparate and, because of that, the number of those arrested because of these policies is also racially disparate. A “U.S. Department of Education study found that more than 70 percent of students arrested in school-related incidents or referred to law enforcement are Black.”⁸³

74. *Id.*

75. Smith, *supra* note 24, at 137; see Joshua Wachtel, *Colorado Bill Ends Zero Tolerance In Schools*, IIRP (June 25, 2012), <https://www.iirp.edu/news/colorado-bill-ends-zero-tolerance-in-schools> [<https://perma.cc/KZU3-ZCLS>].

76. See Mitchell, *supra* note 72, at 291.

77. See Amanda Petteruti, *Education Under Arrest: The Case Against Police in Schools*, JUST. POL’Y INST., Nov. 2011, at 1, 1 (“Fueled by increasingly punitive approaches to student behavior such as ‘zero tolerance policies,’ the past 20 years have seen an expansion in the presence of law enforcement, including school resource officers (SROs), in schools. According to the U.S. Department of Justice, the number of school resource officers increased 38 percent between 1997 and 2007.”) (citation omitted).

78. See Mitchell, *supra* note 72, at 290.

79. *Id.* at 291.

80. Yamili Quezada, *The Purpose Behind Zero Tolerance: Improving Safety or Creating Harm?* 3 (Dec. 9, 2011) (unpublished paper) (on file with author).

81. Mitchell, *supra* note 72, at n.106.

82. DANIEL J. LOSEN & TIA ELENA MARTINEZ, UCLA CTR. C.R. REMEDIES, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 1 (2013).

83. Marilyn Elias, *The School-to-Prison Pipeline*, 43 LEARNING FOR JUST. 38, 40 (2013), <https://www.learningforjustice.org/magazine/spring-2013/the-school-to-prison-pipeline> [<https://perma.cc/72D7-HC67>] (“One 2005 study found that children are far more likely to be arrested at

The federal government has issued data that shows that even as early as the 2010–2011 school year, “a quarter of a million youth were referred to law enforcement, even though 95 percent were for non-violent behavior.”⁸⁴ The overwhelming majority of that number was Black, Latino, and disabled youth.⁸⁵ It also does not help that Black youth are already five times more likely to be detained or committed compared to white youth.⁸⁶ Once Black youth are in the system, they are lost in a process that is full of bias against them.

A 2011 study by the Coalition for Juvenile Justice found that 10% of students who received at least one disciplinary action dropped out of school, while only 2% of students who had not been subject to a disciplinary action dropped out of school.⁸⁷ Not only do these suspensions lead to negative academic outcomes and long-term effects, but students who have been suspended or expelled have higher rates of entry into the juvenile justice system and incarceration as adults.⁸⁸ The data shows that removing students from positive learning environments and criminalizing normative immaturity increases the risk of incarceration.⁸⁹ The study also found that 23% of students involved in the school disciplinary system were involved with the juvenile justice system, compared to only 2% of students who did not have contact with the school disciplinary system.⁹⁰ Furthermore, the data shows that “single suspension or expulsion for a discretionary offense that did not involve a weapon almost tripled a student’s likelihood of becoming involved in the juvenile justice system in the following academic year.”⁹¹ Students who are suspended and/or expelled from school have a one in seven chance of being involved in the juvenile justice system from middle school to high school.⁹² This is because that initial suspension and expulsion can worsen

school than they were a generation ago. The vast majority of these arrests are for nonviolent offenses. In most cases, the students are simply being disruptive.”)

84. Claudio Sanchez, *Obama Administration Has Little Love for ‘Zero Tolerance’*, NPR (Jan. 8, 2014), <https://www.npr.org/2014/01/08/260808007/obama-administration-has-little-love-for-zero-tolerance> [<https://perma.cc/G6YQ-P2D4>].

85. *Id.*

86. See Rovner, *supra* note 30, at 1.

87. COAL. FOR JUV. JUST., *supra* note 22, at 3 (citing TONY FABELO ET AL., COUNCIL STATE GOV’T JUST. CTR. & PUB. POL’Y RSCH. INST., *BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATED TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 56 (2011)).

88. See Rudd, *supra* note 31.

89. Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 88, 90 (2011) (citing RUSSELL J. SKIBA, IND. EDUC. POL’Y CTR., *ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE* (2000)).

90. COAL. FOR JUV. JUST., *supra* note 22, at 3.

91. Kang-Brown et al., *supra* note 15, at 5.

92. See FABELO ET AL., *supra* note 87, at 61.

academic problems and lead to delinquency, crime, and/or substance abuse.⁹³ Students miss course work while suspended, and typically absences due to these suspensions are deemed as “unexcused.”⁹⁴ Since truancy is determined by how many days a student is absent, these unexcused absences can push a student into the truant category and lead to truancy charges against the student.⁹⁵ This is just one way that students can be pushed into the juvenile justice system by suspensions, even if they are not immediately arrested.⁹⁶

III. POTENTIAL CHALLENGES TO ZERO TOLERANCE POLICIES

This Part discusses how zero tolerance policies have been consistently, unsuccessfully challenged in courts.⁹⁷ It also discusses how international human rights treaties support the abolishment of zero tolerance policies and how they may be used to motivate legislators to create legislation eliminating the policies.⁹⁸

A. Challenges Under the U.S. Constitution

Zero tolerance policies have been challenged in several circuits on various constitutional bases, but these have rarely led to a successful ruling for abolishment. Furthermore, they have never been successfully challenged on a national scale in the United States Supreme Court.⁹⁹ It should be noted here that the Supreme Court has declined to recognize education as a fundamental right under the U.S. Constitution, but has stated that education does implicate substantive due process rights.¹⁰⁰ In the Sixth Circuit, zero tolerance policies were challenged several times

93. Committee on Sch. Health, *Out of School Suspension and Expulsion*, 112 PEDIATRICS 1207 (Nov. 2003).

94. ACLU & ALLARD K. LOWENSTEIN, INT’L HUM. RTS. CLINIC, DIGNITY DENIED: THE EFFECT OF “ZERO TOLERANCE” POLICIES ON STUDENTS’ HUMAN RIGHTS 7 (2008), https://www.njcn.org/uploads/digital-library/resource_896.pdf [<https://perma.cc/X3V8-J7JJ>].

95. *Id.*

96. *Juvenile Justice*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice> [<https://perma.cc/8FZS-U8EF>] (“Youth under the age of 18 who are accused of committing a delinquent or criminal act are typically processed through a juvenile justice system. While similar to that of the adult criminal justice system in many ways—processes include arrest, detainment, petitions, hearings, adjudications, dispositions, placement, probation, and reentry—the juvenile justice process operates according to the premise that youth are fundamentally different from adults, both in terms of level of responsibility and potential for rehabilitation. The primary goals of the juvenile justice system, in addition to maintaining public safety, are skill development, habilitation, rehabilitation, addressing treatment needs, and successful reintegration of youth into the community”).

97. *See infra* Part III.A.

98. *See infra* Part III.B.

99. *U.S. Supreme Court Silence on Zero Tolerance Policy*, LAW WISE, Nov. 2014, at 2, 2.

100. ACLU & LOWENSTEIN, *supra* note 94, at 14.

for a potential violation of those substantive due process rights.¹⁰¹ However, only one plaintiff was successful.¹⁰² Further, the Sixth Circuit is the first and only Circuit Court to “expressly rule that such policies are unconstitutional,” and has never done so since.¹⁰³ Nationwide, plaintiffs have not been successful in “challenging zero tolerance policies as arbitrary or capricious, as violating due process, or as discriminatory.”¹⁰⁴ The Supreme Court has broadly stated that “school administrators may expel or suspend students pursuant to the state’s legitimate and ‘concededly very broad’ authority to ‘enforce standards of conduct in its schools.’”¹⁰⁵ This means that schools must provide a process for students facing suspension and expulsion, but this does not mean that this guarantee has an accompanying legal remedy.

Lack of remedy is an ongoing theme, as no challenge to zero tolerance policies under the Equal Protection Clause of the Fourteenth Amendment has proven successful. The Supreme Court ruled in *Washington v. Davis*¹⁰⁶ that “an individual claiming racial discrimination in violation of the Equal Protection Clause must show that those responsible had a discriminatory intent in establishing the policy or law.”¹⁰⁷ This means that while zero tolerance policies have a racially disproportionate impact, they are not automatically considered discriminatory.¹⁰⁸ Instead, they must have a discriminatory purpose, which is incredibly difficult to prove with a law that is racially neutral on its face.¹⁰⁹ Even though a law can make a classification on its face or in its application, “evidence of the discriminatory impact of a policy alone will not be sufficient to sustain a claim under the Equal Protection Clause.”¹¹⁰ Proof of a disparate impact can be probative but it is more likely that courts “will require direct proof that state actors treated similarly situated persons differently in applying the law or policy” and it is difficult to provide examples that are comparable in the same school and district.¹¹¹

101. *Lawsuits Challenging Zero-Tolerance Policies Have Not Generally Succeeded*, LAW WISE, Nov. 2014, at 1, 1.

102. *See id.*; *see also Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir. 2000) (stating that “suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon would violate substantive due process.”)

103. Christopher D. Pelliccioni, *Is Intent Required? Zero Tolerance, Scierter, and the Substantive Due Process Rights of Students*, 53 CASE W. RES. L. REV. 977, 978 (2003).

104. LAW WISE, *supra* note 101, at 1.

105. ACLU & LOWENSTEIN, *supra* note 94, at 14 (citing *Goss v. Lopez*, 419 U.S. 565 (1975)).

106. 426 U.S. 229 (1976).

107. ACLU & LOWENSTEIN, *supra* note 94, at 22 (citing *Davis*, 426 U.S., at 239–42).

108. *Id.*

109. *Id.*

110. Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J. L. & PUB. POL’Y 327, 337 (2005).

111. *Id.* at 339.

It has even been considered to challenge zero tolerance policies under Title VI of the Civil Rights Act of 1964.¹¹² Ultimately, this challenge failed as well.¹¹³ Just like with the Equal Protection Clause, the Supreme Court “has held that Title VI . . . covers only cases of intentional discrimination.”¹¹⁴ To prove a Title VI violation, a plaintiff must provide “direct evidence such as conduct or statements that both directly reflect the alleged discriminatory attitude and that bear directly on the contested decision.”¹¹⁵ However, this evidence is difficult to obtain because, like under the Equal Protection Clause, the plaintiff must find comparable data of similarly situated white students being disciplined with less severity than Black students.¹¹⁶ Even if this evidence is provided, the school can still argue that the policies provide a legitimate, nondiscriminatory function for the school.¹¹⁷ Therefore, a challenge under Title VI would likely ultimately fail in the court.

The Supreme Court has not accepted a case that “directly challenges zero tolerance policies, although it had an opportunity to do so in *Mikel v. School Board of Spotsylvania County*.^{118,119} In Justice Clarence Thomas’s dissent in *Safford Unified School Dist. No 1 v. Redding*,¹²⁰ a school search case, he wrote that implementation of school policies is

112. *Id.* at 348.

113. *Id.* at 341 (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001)).

114. *Id.*

115. *Id.*

116. *Siman*, *supra* note 110, at 341.

117. *Id.* at 344.

118. 567 U.S. 936 (2012).

119. LAW WISE, *supra* note 99, at 2 (“That appeal was by a high school student who had been disciplined for shooting plastic BBs or pellets at several other students during lunch, causing welts on their arms. The student was suspended in December for the rest of the school year. The student and his father sued the school district, claiming it was arbitrary and capricious for the school board to suspend him under its rules against violent criminal conduct. The state judge found that reasonable people could disagree about whether the pea shooter and pellets met the definition of a weapon, but upheld the discipline. Virginia’s highest court upheld that ruling, and the Supreme Court declined to review the case in 2012 without comment.”).

120. 557 U.S. 364 (2009); *see generally* *Legal Docket Safford Unified School District v. Redding*, JUV. L. CTR., <https://jlc.org/cases/safford-unified-school-district-v-redding> [<https://perma.cc/4YJ6-NSVL>] (“Savana Redding, a thirteen-year-old middle school student . . . was subjected to a strip search at school. School administrators had received a tip from another student that Savana had brought prescription-strength ibuprofen to school. In addition to searching her personal belongings, the school also conducted a strip search of Savana. No drugs were found under Savana’s clothing or on her person. . . . The Supreme Court [ruled] that the assistant principal’s reasonable suspicion that Savana was distributing contraband drugs did not justify a strip search. However, because the law regarding such searches of students was not clearly established, the Supreme Court ruled that the officials involved were protected from liability under the doctrine of qualified immunity.”).

beyond the function of judges, and that parents should “seek redress in school boards or legislatures.”¹²¹

There has been some success in local efforts to challenge zero tolerance policies.¹²² However, if anything is going to change on a national scale, the only way to convince legislators to enact legislation may be arguments based on the framework of international human rights treaties.

B. Challenges Under International Human Rights Standards

The signing of international human rights treaties “does not obligate a state to legally comply with all of its provisions,” but it does “require the state not to take actions that would undermine the treaty’s object and purpose.”¹²³ This “creates a strong presumption that the state will not act in ways that contradict core principles of the treaty.”¹²⁴ The United States has signed, but not ratified, the Convention on the Rights of the Child,¹²⁵ and has ratified the International Convention on the Elimination of All Forms of Racial Discrimination.¹²⁶ In addition, the United States could consider the Convention Against Discrimination in Education, even though it was not signed or ratified by the United States. Taken together, these treaties establish human rights for children in schools, including the right to education and the right to be free from discrimination.¹²⁷ This does not mean that the United States is under any legal obligation to recognize these rights, but it could be a basis to appeal to legislators to create legislation eliminating zero tolerance policies.

121. *Safford*, 557 U.S. at 402; see also LAW WISE, *supra* note 99, at 2.

122. See Debra Nussbaum, *Becoming Fed Up With Zero Tolerance*, N.Y. TIMES (Sept. 3, 2000), <https://www.nytimes.com/2000/09/03/nyregion/becoming-fed-up-with-zero-tolerance.html> [<https://perma.cc/A98T-RDBZ>] (discussing a report that found that “widespread use of zero-tolerance discipline policies was creating as many problems as it was solving and that there were many cases around the country in which students were harshly disciplined for infractions where there was no harm intended or done”), see also LAW WISE, *supra* note 101, at 1.

123. ACLU & LOWENSTEIN, *supra* note 94, at 8.

124. *Id.*

125. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC]. The United States signed the CRC on February 16, 1995. *Convention on the Rights of the Child*, UN, <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800007fe> [<https://perma.cc/KS A6-C6XN>] (last visited Jan. 2, 2022).

126. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, T.I.A.S. 94-1120, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD]. The United States ratified the ICERD on October 21, 1994. *International Convention on the Elimination of All Forms of Racial Discrimination*, UN, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en [<https://perma.cc/9PDA-XE6N>] (last visited Jan. 2, 2022).

127. ACLU & LOWENSTEIN, *supra* note 94, at 8.

1. Convention on the Rights of the Child

“The Convention on the Rights of the Child (‘CRC’) guarantees several basic human rights for children, including the rights to education . . . and to be free from discrimination.”¹²⁸ The CRC recognizes that young people often exit the school system and become “involved in the criminal justice system and requires state parties to take measures to prevent student delinquency.”¹²⁹ This would compel schools to eliminate zero tolerance policies, and to instead implement preventive disciplinary measures to help minimize student delinquency.

The Committee on the Rights of the Child, the body that reviews states’ reports on their compliance with the provisions of the CRC, . . . has emphasized that it is “not in the best interests of the child if he/she grows up under circumstances that may cause an increased or serious risk of becoming involved in criminal activities”¹³⁰

The Committee has also “interpreted the CRC to require state parties to divert child offenders from formal judicial proceedings and into alternative discipline processes ‘whenever appropriate and desirable.’”¹³¹ The Committee further interpreted the CRC nondiscrimination principle, regarding access to education, to mean that “whether it is overt or hidden” there is a prohibition to discrimination on the basis of race.¹³² It is apparent that zero tolerance policies do not comply with the CRC because they do not work to divert children from judicial proceedings or provide for other disciplinary measures.¹³³ Furthermore, the racial bias in zero tolerance policies violates the nondiscrimination principle of the CRC.¹³⁴

2. Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides an important framework for the issue of racial disparity in school punishment because the language is “relevant in the context of policies, such as criminal sanctions for disciplinary incidents in schools that have disproportionate impact on racial minorities.”¹³⁵ In 1995, the United States ratified CERD.¹³⁶ When the

128. *Id.* at 9.

129. *Id.* at 11.

130. *Id.* at 14 (quoting U.N. Comm. on the Rights of the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, at 5–6, U.N. Doc. CRC/C/GC/1010 (2007)).

131. ACLU & LOWENSTEIN, *supra* note 94, at 11.

132. *Id.* at 21 (citing U.N. Comm. on the Rights of the Child, General Comment No.1, The Aims of Education, at 10, U.N. Doc. CRC/GC/2001/1 (2001)).

133. See ACLU & LOWENSTEIN, *supra* note 94, at 18.

134. *See id.* at 23.

135. ACLU & LOWENSTEIN, *supra* note 94, at 22.

136. *Id.* at 20; ICERD, *supra* note 126.

United States Senate did so, it did so “subject to several Reservations, Understandings, and Declarations (“RUD”) that limit[ed] and modif[ied] the obligation of the United States under the CERD.”¹³⁷ In this instance, the Senate “refused to accept any obligations under the CERD beyond those already required by the U.S. Constitution.”¹³⁸ This is important because CERD goes a step further than the Equal Protection Clause and states that parties are prohibited from engaging in discrimination that has the “purpose or effect” of depriving an individual of equal access to all aspects of public life, including education.¹³⁹ Instead of adopting this, the Senate stated in its RUD that the Constitution and the laws of the United States already “establish(es) extensive protections against discrimination.”¹⁴⁰ Therefore, the CERDs framework that is applicable to criminal sanctions for disproportionate punishment in schools for students of color is not adopted by the United States. However, it is possible that the United States Senate could still take this portion of the treaty into consideration when creating legislation regarding the removal of zero tolerance policies.

3. Convention Against Discrimination in Education

The Convention Against Discrimination in Education (CADE) bars “any distinction, exclusion, limitation or preference which, being based on race, color . . . has the purpose or effect of nullifying or impairing equality of treatment in education.”¹⁴¹ However, CADE was not signed or ratified by the United States. CADE also “expressly prohibits discrimination that has the purpose or effect of either depriving groups or persons of access to education or limiting them to inferior education.”¹⁴² Although it is not adopted by the United States, the CADE includes a human rights framework that is important in the right to equal education, and something that United States Senators should consider regarding zero tolerance policies.

It may be possible to use these three international human rights treaties to appeal to legislators and compel them to create legislation eliminating zero tolerance policies. This could be done through lobbying

137. ACLU & LOWENSTEIN, *supra* note 94, at 20 (citing U.S. RESERVATIONS, DECLARATIONS, AND UNDERSTANDINGS, INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, 140 CONG. REC. S7634-02 (June 24, 1994) [hereinafter U.S. RESERVATIONS], <http://www.umn.edu/humanrts/usdocs/racialres.html> [<https://perma.cc/3AKA-HBE6>]).

138. *Id.*

139. ICERD, *supra* note 126.

140. U.S. RESERVATIONS, *supra* note 137.

141. Convention Against Discrimination in Education, 429 U.N.T.S. 93 (entered into force May 22, 1962) [hereinafter CADE].

142. ACLU & LOWENSTEIN, *supra* note 94, at 21 (citing CADE).

legislators and using these treaties as an example. These treaties can also be used to increase media coverage on the issue and incite public passion.

IV. VOLUNTARY ELIMINATION OF ZERO TOLERANCE POLICIES

This Part explains why the best step toward eliminating zero tolerance policies would be for school boards to voluntarily eliminate zero tolerance policies and replace them with preventive disciplinary measures.

It is unlikely that the federal government will take up arms against the discriminatory application of zero tolerance policies any time soon. The legitimacy of such policies was called into question by the Obama Administration in January 2014, but no change was made by legislators at that time.¹⁴³ The Obama Administration made note of the “3 million students who were suspended or expelled during the 2010-11 school year, a quarter of a million were referred to law enforcement, even though 95% were for non-violent behavior.”¹⁴⁴ This statistic was mentioned earlier in this Article because a large number of those youth were Black.¹⁴⁵ Despite the data, there has not been any legislative change. Even if it was publicly announced that these zero tolerance policies could be considered a violation of international human rights treaties, there would likely not be enough public outrage to motivate legislators to act. People would need to be passionate enough about this issue to spend time lobbying state legislators and creating public presentations to motivate more people to get involved. There is the potential for change if the right legislator learns the truth about zero tolerance policies and drafts a bill to eliminate them, but the easiest route would be for schools and school boards nationwide to voluntarily eliminate their own zero tolerance policies, and instead, replace them with preventive disciplinary measures.

Data from the Department of Education shows that “suspension rates have more than doubled over the past two decades,” yet “the rate of violent crimes in U.S. public schools has declined since 1994.”¹⁴⁶ The total number of violent crimes in schools continue to decline.¹⁴⁷ This means that not only do zero tolerance policies discriminate against Black youth, but they are not needed in schools. Instead, alternatives like

143. Bill Chappell, *Ease up on ‘No Tolerance’ Policies, U.S. Agencies Tell Schools*, NPR (Jan. 8, 2014, 9:09 PM), <http://www.npr.org/blogs/thetwo-way/2014/01/08/260904329/ease-up-on-no-tolerance-policies-u-s-agencies-tell-schools> [<https://perma.cc/8RMV-Z2N3>].

144. *Id.*

145. *Id.* (stating “[Of these students], 7 out of 10 were Black, Latino or kids with disabilities.”).

146. William D. Hitchcock, *Zero Tolerance and Juvenile Justice: A View from the Bench*, 30 ALASKA JUST. F. 1, 6 (2013); Jill F. DeVoe, *Indicators of School Crime and School Safety*, U.S. DEP’T EDUC. & U.S. DEP’T OF JUST. (2002); Smith, *supra* note 24, at 132.

147. Smith, *supra* note 24, at 132.

preventive discipline practices are beneficial to the students in our schools while still protecting against any violent conduct.

This three-part approach is based on mental health and behavior planning.¹⁴⁸ It begins with “school-wide prevention efforts, such as conflict resolution, improved classroom behavior managements, and parental involvement.”¹⁴⁹ This first establishes a climate that is “less conducive to violence” and allows for intervention early on with students who may experience violent outbursts.¹⁵⁰ The second part is that “schools [can] assess the seriousness of threats of violence and provide support to students who may be at-risk” through “mentoring, anger management screening, and teaching pro-social skills.”¹⁵¹ Instead of immediately suspending or expelling a student and sending them to the juvenile justice system, this would go to the root of the issue that the child is experiencing and help them work through it while keeping that child in school. As the final part of this three-part initiative, schools implement discipline plans that include evaluations based on individual behavior and circumstances, allowing discipline to be based on the individual student.¹⁵² This would also allow for “cross-system collaboration, especially between education and juvenile justice,”¹⁵³ thus preventing youth from being sent into the juvenile justice system for behavior that can be disciplined solely in school.

The Coalition for Juvenile Justice gave its annual report in 2001, which included several recommendations in place of the removal of zero tolerance policies.¹⁵⁴ The first recommendation was for school boards to be “open to alternative and more meaningful ways of targeting youth with behavior issues.”¹⁵⁵ This is like the above-mentioned approach of preventive discipline which is a viable alternative. The second recommendation includes the advice that administrators should turn to “alternatives like in-school-suspensions and referrals to program that treat a youth’s underlying . . . problems.”¹⁵⁶ The final recommendation is that “[t]eachers should be given training to identify learning disabilities and mental health issues.”¹⁵⁷ They should also receive training that teaches them methods of offering incentives for positive behavior instead of punishment for negative behavior.¹⁵⁸ An American Civil Liberties

148. Skiba, *supra* note 37, at 32.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. COAL. FOR JUV. JUST., *supra* note 22, at 3.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Union (ACLU) report went a step further and recommended that “broad disciplinary categories” be eliminated so that bias would have fewer opportunities to enter the process.¹⁵⁹ It also recommended that the distinct role between school-based officers and administrators be defined due to the broad discretion of officers and their increased involvement.¹⁶⁰ The ACLU’s belief is that this would help discontinue “the trend of imposing criminal sanctions for student conduct that is better handled administratively.”¹⁶¹ Finally, the ACLU recommended ending criminal sanctions for student conduct “where a disciplinary response alone is sufficient.”¹⁶²

A recent study showed that “positive behavioral support in the classroom is associated with greater order and discipline, fairness, and productive student-teacher relationships, while exclusionary disciplinary strategies (i.e., out-of-school suspension and expulsion) are associated with more disorder overall.”¹⁶³ In 2011, the U.S. Department of Justice and the U.S. Department of Education came together to create the Supportive School Discipline Initiative “which seeks to ‘promote positive disciplinary options to both keep children in school and improve the climate for learning.’”¹⁶⁴ Even though this program was created almost ten years ago, no real changes have been made. However, it shows that there is some support from the federal government for an abolishment of zero tolerance policies.

States and school boards that have adopted preventive discipline measures instead of zero tolerance policies have shown some success. In 2012, Colorado legislators “revised the state law governing school discipline to encourage school districts to rely less on suspension and expulsion and also mandated and funded additional training for police officers that serve as school resource officers.”¹⁶⁵ While not every school in the state revised its code of conduct, the state saw a “27 percent drop in expulsions and [a] 10 percent decrease in suspensions statewide compared with the previous year.”¹⁶⁶ In 2010, Boston’s public school system revised its code of conduct and implemented restorative justice practices.¹⁶⁷ After, “the number of students suspended or expelled dropped from 743 to 120 in two years.”¹⁶⁸ In Florida, the Broward County School District is rejecting zero tolerance policies and “offering

159. ACLU & LOWENSTEIN, *supra* note 94, at 2.

160. *Id.*

161. *Id.*

162. *Id.*

163. Kang-Brown et al., *supra* note 15, at 6.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

counseling and other assistance aimed at changing behavior, instead.”¹⁶⁹ The preliminary data from Broward “shows school-based arrests down by 41% with a 66% reduction in suspensions.”¹⁷⁰ States like New York and California have made changes in their school codes that include Positive Behavioral Interventions and Supports (PBIS)¹⁷¹ and the removal of terms like “willful defiance” as a reason for punishment.¹⁷²

Although there is not enough data to show how these changes have directly impacted the suspensions and expulsions of Black youth, it is apparent that when the numbers of suspensions and expulsions are dramatically cut, the Black youth who make up a large percentage of the recipients of those punishments will see a decrease, as well. This means that legislation to eliminate these zero tolerance policies nationwide, and replace them with preventive discipline measures, will lead to the elimination of the disparate application of school discipline. It will also lead to a decrease in the number of Black youths being sent into the juvenile justice system for conduct at school.

CONCLUSION

Zero tolerance policies make zero sense. They lack any real benefit to the school system, and present significant adverse effects on Black youth. In *Brown v. Board of Education*,¹⁷³ the Supreme Court of the United States observed that:

Education is perhaps the most important function of state and local governments It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹⁷⁴

The disproportionate application of zero tolerance policies denies this educational opportunity sixty years after *Brown v. Board of Education*, and it must be eliminated. There is no real legal challenge available to fight these policies. Instead, legislators at the national level, as well as state legislators and school board officials, should take it upon themselves to reform the law to remove zero tolerance policies from practice and instead apply preventive discipline measures. We can see that there is the

169. *Zero Tolerance Policies: The Good, The Bad, The Ugly*, JUV. L. CTR. (Jan. 7, 2014), <https://jlc.org/news/zero-tolerance-policies-good-bad-and-ugly> [<https://perma.cc/65QK-LEE2>].

170. *Id.*

171. See Kang-Brown et al., *supra* note 15, at 6–7.

172. *Id.* at 7.

173. 347 U.S. 483 (1954).

174. *Id.* at 483.

framework for the removal of these policies as countries around the world have adopted treaties that keep policies like these from being enacted in those countries. The United States can do the same. We need to do better. Eliminating these policies will ensure that Black youth are not disproportionately removed from school and sent into the juvenile justice system due to disparate application of the policies because of implicit bias. Rather, any youth that needs help will be able to receive it instead of being sent into a juvenile justice system fraught with racial disparities and detriment to youth.