INADEQUATE DISCIPLINE: CHALLENGING ZERO TOLERANCE POLICIES AS VIOLATING STATE CONSTITUTION EDUCATION CLAUSES

EMILY BLOOMENTHAL

I. INTRODUCTION

A pair of high school students receives a ten day suspension because the crushed candies the students used to make an anti-drug public service announcement violate a policy prohibiting substances that look like drugs.[1] A twelve-year-old is suspended for four months for writing "I love Alex"

1. *Students Suspended for Fake Drug Use in PSA* (KDKA News television broadcast, Nov. 16, 2007).

in baby blue marker on a school gymnasium wall.[2] Swearing at a teacher gets a high school student expelled.[3] An eighth grader who brings a bottle of Cherry 7-Up mixed with a few drops of grain alcohol to school is kicked out, and sentenced to five months in boot camp as well.[4] A kindergarten tantrum ends with the "perpetrator" in handcuffs, which must be placed around her biceps because her wrists are too small.[5] Elementary school students are arrested and taken to the local jail for talking during an assembly.[6] A fourteen-year-old is sentenced to seven years in prison for pushing a hall monitor.[7]

While these examples may be among the more extreme, they are part of a national trend of harsh "zero tolerance" approaches to school discipline. The term zero tolerance has come to refer to policies that either require automatic punishments for certain infractions, or impose punishments, such as suspensions, expulsions, and arrests, that are disproportionately severe for a student's particular offense.[8] Zero tolerance is also used to refer to the increasingly prison-like conditions in many schools, where police presence, metal detectors, and arrests have become commonplace.[9] As I will discuss below, research shows that these

2. Associated Press, *'I Love Alex' Earns Girl 4-Month Suspension*, MSNBC, Jul. 7, 2007, http://www.msnbc.msn.com/id/19652719/.

3. Amanda Falcone, *Maloney Student and Mom Say Penalty is Excessive*, MERIDEN REC.-J., June 10, 2005.

4. Dennis Cauchon, *Zero-Tolerance Policies Lack Flexibility*, USA TODAY, Apr. 13, 1999, at A1, *available at* http://www.usatoday.com/educate/ednews3.htm.

5. Bob Herbert, Op-Ed., *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17, *available at* http://select.nytimes.com/2007/04/09/opinion/09herbert.html?_r=1&scp=1&sq=6yearolds%20under%20arrest&st=cse.

6. JUDITH A. BROWNE, ADVANCEMENT PROJECT, DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2003), http://www.advancementproject.org/digital-library/publications/derailed-the-schoolhouse-to-jailhouse-track.

7. Bob Herbert, Op-Ed., *School to Prison Pipeline*, N.Y. TIMES, June 9, 2007, at A15, *available at* http://select.nytimes.com/2007/06/09/opinion/09herbert.html?_r=1.

8. *See, e.g.*, ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 3 (2010) [hereinafter TEST, PUNISH] (using "zero tolerance" "as shorthand for all punitive school discipline policies and practices"); RUSSELL SKIBA, CECIL R. REYNOLDS, SANDRA GRAHAM, PETER SHERAS, JANE CLOSE CONOLEY & ENEDINA GARCIA-VAZQUEZ, AM. PSYCHOLOGICAL ASS'N ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS?: AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 20 (2006) [hereinafter ZERO TOLERANCE TASK FORCE, EVIDENTIARY REVIEW] ("[T]he term has come to describe disciplinary philosophies and policies that are intended to deter disruptive behavior through the application of severe and certain punishments."); Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out?: Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 68–75 (2003) (stating that "[a] full zero tolerance regime" is likely to include: mandatory suspensions and expulsion, expansion of disciplinary action to trivial infractions, surveillance and searches, and criminal referral and punishment).

9. Blumensen & Nilsen, *supra* note 8, at 68–75.

extreme measures do nothing to address the underlying causes of disruptive behavior and fail to make schools safer. Instead they can have devastating consequences for excessively-disciplined students, who often end up dropping out of school or on trajectories of increasing delinquency.

In this Article, I suggest possible legal challenges to these policies. I argue, specifically, that education clauses in state constitutions, along with courts' interpretations of these clauses in decisions regarding the constitutionality of state education funding systems, may, in some states, serve as effective grounds for challenging these harmful policies and practices. In Part II, I provide background information about the history of zero tolerance policies, their damaging consequences for students who are suspended, expelled, or arrested, and the disproportionate burden they place on students who are from low-income families, are racial minorities, or have disabilities. I also explore some of the reasons why the use of these problematic policies persists. I next explain in Part III why federal and state constitutional guarantees of equal protection and due process do not provide an adequate basis for addressing the problems of zero tolerance. In Part IV, I discuss the possibility of instead using the education clauses found in every state constitution, as they have been interpreted in education finance litigation, to contest zero tolerance policies.

To illustrate how these clauses might be used to challenge harsh school discipline policies, I focus, in Part V, specifically on the issue of school suspensions in New York, and discuss three examples of how to use standards from education finance litigation to challenge suspensions. I argue that (i) students who are suspended are entitled to an adequate education while suspended; (ii) excessive suspensions are unconstitutional because they increase the likelihood that students will drop out, thus precluding them from receiving the "sound basic education" required by the New York Constitution; and (iii) schools have an affirmative duty under the New York Education Article to address the underlying causes of the inappropriate behavior that leads to suspensions. I also consider the potential remedies attainable through each of these theories. Finally, in Part VI, I discuss the application of this approach in other states and to other discipline policies, and the necessity of engaging the broader community to achieve success.

II.
ZERO TOLERANCE—BACKGROUND AND CONSEQUENCES

A. Development of Zero Tolerance Policies

Today's zero tolerance policies are rooted in an approach to school discipline that first emerged in the late 1980s and 1990s, when a sharp

increase in juvenile arrest rates for violent crimes[10] created a "seemingly overwhelming tide of violence" and left educators searching for a solution.[11] A few school districts in California, New York, and Kentucky, inspired by the mandatory sentencing laws introduced in the criminal justice context as part of President Ronald Reagan's "War on Drugs," enacted the first "zero tolerance" policies in schools. These policies mandated expulsion for any student found to be involved with drugs, fighting, or gang-related activity.[12] In 1994, the Gun Free Schools Act codified zero tolerance nationwide by requiring that any student found to possess a firearm in school be expelled for one calendar year and referred to the criminal or juvenile justice system.[13] Many local school districts later established their own zero tolerance policies, specifying mandatory minimum punishments for violations including alcohol use, threats, and swearing.[14]

Zero tolerance approaches to school discipline soon became the norm in public schools.[15] School policies often imposed serious consequences for even minor, nonviolent offenses constituting typical adolescent behavior, such as talking back to teachers.[16] Strict rules "force children to be suspended or expelled for sharing Midol, asthma medication (during an emergency), and cough drops, and for bringing toy guns, nail clippers, and scissors to school,"[17] and thus lead to the expulsion of many youths who

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10. *See* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 67 (2006) (noting an increase in the rate of juvenile homicide offenders from 1984–1994). *See also The Magnitude of Youth Violence*, *in* YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 5 (2000), http://www.surgeongeneral.gov/library/youthviolence/chapter2/sec1.html (suggesting that this trend was due to the increased availability of firearms and other weapons, which made tense confrontations more likely to result in fatalities).

11. RUSSELL J. SKIBA, IND. EDUC. POL'Y CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (2000) [hereinafter SKIBA, ZERO EVIDENCE].

12. *See id.* (noting the states in which zero tolerance policies first emerged).

13. 20 U.S.C. § 8921 (2000). For a discussion of the impact of the Guns Free School Act on school disciplinary policy, see SKIBA, ZERO EVIDENCE, *supra* note 11, at 2–3.

14. SKIBA, ZERO EVIDENCE, *supra* note 11, at 2.

15. *Id.* at 2–3. *See also* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY, 2000 135 (2000) (citing a survey of principals and school disciplinarians, which indicated that during the 1996–1997 school year, ninety-four percent reported zero tolerance policies for firearms, ninety-one percent for weapons other than firearms, eight-eight percent for drugs, eight-seven percent for alcohol, and seventy-nine percent for violence or tobacco). More recent editions of *Indicators of School Crime and Safety* have not included updated statistics about zero tolerance policies.

16. NAACP LEGAL DEF & EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 4 (2005) [hereinafter NAACP]; ELIZABETH SULLIVAN & ELIZABETH KEENEY, TEACHERS TALK: SCHOOL CULTURE, SAFETY AND HUMAN RIGHTS 2 (Catherine Albisa & Sally Lee eds., 2008).

17. ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, HARVARD UNIV.,

would otherwise be considered "good students."[18] Suspensions have become so prevalent that in some states, the number of suspensions per year has exceeded ten percent of the number of students enrolled in schools in the state.[19] In one Midwestern city, more than a fifth of the enrolled students were suspended at least once during a single school year.[20] Suspensions and expulsions have similarly become common responses to disobedience by preschoolers in state-funded programs, who are expelled at over three times the rate of students in elementary and secondary school.[21] Some school districts have gone even further in their law-and-order approach to dealing with children in schools, relying on "school security officers, police officers, metal detectors, tasers, canine dogs, drug sweeps, SWAT teams, biometric hand readers, and surveillance cameras" in their attempts to maintain discipline in school.[22] Arrests have also become an increasingly frequent response to school disciplinary matters that would previously have been dealt with by a visit to the principal's office.[23] Many of the infractions for which students are referred to the juvenile justice system are neither dangerous nor threatening.[24] Schools have simply become less tolerant of minor youthful transgressions.[25]

This extreme shift toward more punitive discipline does not reflect an increase in aggressive behavior. There is no evidence that young people became any more violent during the period when zero tolerance policies first became prevalent than they had been in the preceding years. In fact, school violence rates actually declined from the mid to the late 1990s.[26]

OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE v (2000), http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf [hereinafter ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED].

18. SKIBA, ZERO EVIDENCE, *supra* note 11, at 10.

19. NAACP, *supra* note 16, at 3.

20. SKIBA, ZERO EVIDENCE, *supra* note 11, at 10.

21. NAACP, *supra* note 16, at 4. The high rate of expulsions in preschool may be attributable to the fact that schools are legally obligated to educate children in kindergarten through 12th grade, while prekindergarten programs are not required to retain disruptive children. Tamar Lewin, *Research Finds a High Rate of Expulsions in Preschool*, N.Y. TIMES, May 5, 2005, at A12. Other possible explanations include inadequate support for preschool teachers and a lack of preschool readiness among some attendees. *Id.*

22. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2005) [hereinafter ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN].

23. SULLIVAN & KEENEY, *supra* note 16, at 2–3.

24. *See* ZERO TOLERANCE TASK FORCE, EVIDENTIARY REVIEW, *supra* note 8, at 10.

25. *See id.*

26. *See* BROWNE, *supra* note 6, at 10 (noting that while school crime peaked in the early 1990s, the overall school crime rate declined from the mid to late 1990s). *See also* U.S.

One might surmise that zero tolerance policies caused this trend, but overall rates of youth violence and delinquency showed similar declines during this time of diminishing in-school violence. For example, the total juvenile offending rate for robbery declined sixty-eight percent between 1993 and 1998, while the total juvenile offending rate for aggravated assault decreased fifty-four percent during the same timeframe.[27] This suggests that the abatement of school violence and crime was merely part of a larger national trend of decreasing juvenile violence and crime, and was not attributable to the imposition of zero tolerance policies that only apply within schools. Furthermore, as explained in the following section, researchers have tended to find that zero tolerance policies do not make schools safer, so it is unlikely that the decrease in school crime was a result of zero tolerance.

B. Ineffectiveness of Zero Tolerance Policies

These harsh policies have accomplished little in terms of school safety. A meta-analysis of research exploring the impact of zero tolerance policies found that "[t]he most extensive studies . . . suggest a negative relationship between school safety measures and school safety."[28] The American Psychological Association's Zero Tolerance Task Force similarly concluded, based on a review of research pertaining to the effects of zero tolerance, that evidence tends to contradict key assumptions underlying these policies.[29] Most notably, the Task Force found that, contrary to the presumption that a safer school environment will be created by removing students who violate rules, schools with higher rates of school suspensions are rated less satisfactorily in terms of school climate, even when controlling for demographics such as socioeconomic status.[30] A more recent study of crime in U.S. high schools showed similar results, finding that greater use of serious penalties, such as out-of-school suspensions and expulsions, was associated with higher numbers of criminal incidents, even after controlling for community, student population, and school climate variables.[31]

A study assessing the effectiveness of a program designed to improve the behavior of middle school students likewise found that schools that

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DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, *supra* note 15, at vi (discussing indicators of crime and safety across time).

27. JAMES P. LYNCH, U.S. DEP'T OF JUSTICE, TRENDS IN JUVENILE VIOLENT OFFENDING: AN ANALYSIS OF VICTIM SURVEY DATA 9 (2002).

28. SKIBA, ZERO EVIDENCE, *supra* note 11, at 15.

29. *See* ZERO TOLERANCE TASK FORCE, EVIDENTIARY REVIEW, *supra* note 8, at 4–7.

30. *See id.* at 4–6.

31. Greg Chen, *Communities, Students, Schools, and School Crime: A Confirmatory Study of Crime in U.S. High Schools*, 43 URB. EDUC. 301, 314 (2008).

significantly reduced the amount of punishments, changed the school climate to become more supportive of students, and ensured that rules governing student behavior were fair and consistently enforced, consequently reduced student misconduct and rebellious behavior.[32] This further discredits the notion that punishment-based approaches improve school discipline and safety. Another study found that interventions designed to create a "secure building," such as metal detectors, locked doors, locker checks, security guards, and staff patrolling hallways, actually may foster the violence and disorder that school administrators hope to avoid.[33] Researchers trying to explain these counterintuitive consequences have posited that rules and punishments that students perceive as draconian are counterproductive because students who are at risk for inappropriate behavior may see unjust punitive policies as a challenge to escalate their inappropriate behavior rather than as a reason to avoid it. As a result, these researchers suggest, punitive discipline increases disruption instead of achieving the intended goal of reducing it.[34]

In line with this theory, research indicates that among demographically matched schools, variables that predict lower suspension rates include:

> (a) [the] use of primary and secondary prevention strategies to curtail inappropriate behavior (e.g., social skills training for students, behavior management training for teachers), (b) opportunities for parent involvement, including involvement in the development of the school-wide discipline plan, and (c) a belief that responding to students' needs and treating them with respect is effective in reducing problematic behavior.[35]

Teachers' perceptions echo these findings: a survey of New York City schoolteachers found that fewer than forty-five percent viewed exclusionary punishments such as suspensions as being effective,[36] while sixty-four percent felt that the presence of police officers in their school

32. Denise C. Gottfredson, Gary D. Gottfredson & Lois G. Hybl, *Managing Adolescent Behavior: A Multiyear, Multischool Study*, 30 AM. EDUC. RES. J. 179, 209 (1993).

33. *See* Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT CHILD. 333, 349 (1999) (finding that the Secure Building variable moderately predicted School Disorder).

34. *See* SKIBA, ZERO EVIDENCE, *supra* note 11, at 14.

35. Linda M. Raffaele Mendez, Howard M. Knoff & John M. Ferron, *School Demographic Variables and Out-of-School Suspension Rates: A Quantitative and Qualitative Analysis of a Large, Ethnically Diverse School District*, 39 PSYCHOL. SCH. 259, 273–74 (2002).

36. SULLIVAN & KEENEY, *supra* note 16, at 16.

never or rarely made students feel safe.[37] On the other hand, conflict resolution, guidance counseling, peer mediation, and adult mediation were each rated as being "effective" or "very effective" by more than eighty percent of the teachers.[38]

C. Consequences of Zero Tolerance Policies

Though zero tolerance policies have failed to make schools safer, they have had devastating consequences for students. One of the most immediate harms has been to students' educational progress. Many states do not require that students receive an alternate education while suspended or expelled,[39] so students are frequently denied an education during the period of their punishment. Even when students attend alternative schools, the quality of the education they receive is often inadequate,[40] as many of these schools are "no more than holding pens for children considered to be troublemakers."[41] For students who are arrested, a variety of sources indicate that there are also serious deprivations in the education provided in juvenile detention centers, including unqualified teachers, inappropriate facilities and materials, limited class time, and often a complete lack of a meaningful curriculum.[42] Finally, when juveniles reenter their communities after time in detention, they face difficulty in resuming their studies because "schools typically are reluctant to accept them and may take steps to remove them for relatively minor infractions."[43]

The repercussions of excessive suspensions, expulsions, and arrests extend beyond educational deprivations, however. The theoretical assumption that being suspended will deter students from future disobedience has proved to be incorrect.[44] Instead, researchers have found that there is a relatively strong relationship between past suspensions and

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37. *Id.* at 23.

38. *Id.* at 16.

39. *See* ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 17, at vii.

40. *Id.*

41. *Id.* at 14.

42. *See* Katherine Twomey, *The Right to Education in Juvenile Detention under State Constitutions*, 94 VA. L. REV. 765, 771–72 (2008).

43. Daniel P. Mears & Jeremy Travis, *Youth Development and Reentry*, 2 YOUTH VIOLENCE & JUV. JUST. 3, 10 (2004).

44. *See* Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 17, 24–25 (2003)) [hereinafter Raffaele Mendez, *Predictors of Suspension*] (finding a correlation of 0.49 between suspension in sixth grade and suspension in seventh or eighth grade for white students, and a correlation of 0.59 between suspension in 6th grade and suspension in seventh or eighth grade for black students).

future suspensions.[45] Many students who are suspended once are later suspended again,[46] sometimes on numerous occasions,[47] leading researchers to conclude that for some students, "suspension functions as a reinforcer . . . rather than as a punisher."[48]

Arrests, like suspensions, are not effective deterrents; among states that measure rearrest rates for juvenile offenders, the average recidivism rate is fifty-five percent.[49] Youth sentenced to juvenile detention centers have recidivism rates of fifty percent to seventy percent within a year or two of release.[50] Longer-term studies show even less impressive results. One study found that more than ninety percent of youths who had been in juvenile detention in Minnesota were rearrested within five years after release.[51] While these numbers are only correlational, evidence suggests that spending time in confinement increases the likelihood of recidivism after release in comparison to community-based sentences.[52]

The long-term impact of suspensions and arrests is even more discouraging. Studies have found that youth who have been suspended are at increased risk of being required to repeat a grade,[53] and suspensions are a strong predictor of later school dropout.[54] Researchers have concluded that "suspension often becomes a 'pushout' tool to encourage low-achieving students and those viewed as 'troublemakers' to leave school before graduation."[55] Students who have been suspended are also more

45. *Id.*

46. SKIBA, ZERO EVIDENCE, *supra* note 11, at 13 (noting that "[s]tudies of school suspension have consistently found that up to forty percent of school suspensions are due to repeat offenders . . . suggesting that this segment of the school population is decidedly not 'getting the message'").

47. *See, e.g.*, Raffaele Mendez, *Predictors of Suspension, supra* note 44, at 20 (finding that, of 862 students who received suspensions in the 1995–96 school year in the School District of Pinellas County, Florida, 157 were suspended twice, seventy-eight were suspended three times, thirty-six were suspended four times, forty-four were suspended five times, thirty-four were suspended six times, and fifty-two were suspended seven or more times).

48. Tary Tobin, George Sugai & Geoff Colvin, *Patterns in Middle School Discipline Records*, 4 J. EMOTIONAL & BEHAV. DISORDERS 82, 91 (1996). For more insight into why suspensions function as a reinforcer, see discussion *infra* Section V(B)(ii).

49. SNYDER & SICKMUND, *supra* note 10, at 234.

50. RICHARD A. MENDEL, AM. YOUTH POL'Y FORUM, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 50–51 (2000).

51. *Id.*

52. *Id. See also* NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 195 (Joan McCord & Cathy Spatz Widom eds., 2000) (citing multiple studies that found elements of the confinement experience to increase the probability of failure upon release).

53. ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 17, at 13.

54. *Id. See also* SKIBA, ZERO EVIDENCE, *supra* note 11, at 13 (noting that one national study found that "31% of sophomores who dropped out of school had been suspended, as compared to a suspension rate of only 10% for their peers who had stayed in school").

55. SKIBA, ZERO EVIDENCE, *supra* note 11, at 13.

likely to commit a crime and/or to end up incarcerated as an adult, a pattern that has been dubbed the "school-to-prison pipeline."[56]

The criminalization of students has even greater consequences for those who are arrested. First time arrest during high school nearly doubles the chances that a student will drop out, while having a court appearance during high school nearly quadruples it, even when controlling for prior delinquency, grade point average, grade retention, and a variety of other factors.[57] As discussed above, the majority of juveniles who are arrested reoffend. Moreover, even when students do graduate from high school and do not reoffend, their juvenile or criminal records may continue to interfere with their ability to apply to college, receive scholarship funds or government grants, enlist in the military, find employment, and reside in subsidized housing.[58]

D. Disproportionate Effects of Zero Tolerance Policies

In addition to their counterproductive consequences, zero tolerance polices also raise concern because of the disproportionate impact they tend to have on low-income students, youth of color, and disabled students. Low-income students are overrepresented among those suspended, and receive more severe punishments than their high-income peers, to the point that both low- and high-income adolescents have recognized that discipline processes are unfairly weighted against low-income students.[59] Students of color are typically even more adversely affected. Though racial minorities comprise only a third of the country's juvenile population, in 1997 they represented two-thirds of the youth detained and committed to juvenile facilities.[60] Black children, particularly males, are especially at risk of being subjected to severe discipline.[61] For example, among a representative sample of middle school students from around the country, 28.3% of black males were suspended in 2006, compared to eighteen percent of black females, ten percent of white males, and four percent of white females.[62] Though black youths make up only seventeen percent of public school enrollment and sixteen percent of the nation's overall youth population, they represent thirty-four percent of students who are

56. *See* NAACP, *supra* note 16, at 2–4.

57. Gary Sweeten, *Who Will Graduate?: Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 473–74 (2006).

58. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN, *supra* note 22, at 12.

59. SKIBA, ZERO EVIDENCE, *supra* note 11, at 11.

60. BROWNE, *supra* note 6, at 18.

61. ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 17, at 7.

62. DANIEL J. LOSEN & RUSSELL J. SKIBA, S. POVERTY LAW CTR., SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 5 (2010).

suspended, and forty-five percent of juvenile arrests.[63] Latino students and Native American students are also suspended at higher rates than white students, though less frequently than black students.[64] Furthermore, racial disparities in suspension rates have increased.[65] Most notably, black students were suspended at about twice the rate of white students in the 1970s, but are now over three times more likely to be suspended.[66]

These discrepancies cannot be explained simply by socioeconomic class or by differences in behavior, as nonwhite students have been found to be suspended at higher rates than white students even after controlling for socioeconomic status, and researchers have found no evidence that black students misbehave more than white students.[67] Instead, black students tend to receive more severe punishments for less serious transgressions.[68] At least some of the disparities may be explained by the fact that predominantly black and Latino school districts are especially likely to rely on zero tolerance policies,[69] though research suggests that a lack of teacher preparation in classroom management and cultural competence may be to blame as well.[70] One specific example of differential treatment that may contribute to racial disparities in suspensions is evidence that black students are significantly more likely than white students to be referred for suspensions on the basis of subjective violations of school rules, such as disrespect, excessive noise, threat, and loitering, while white students are more likely than black students to be referred for behavior that can be objectively documented, such as smoking, vandalism, leaving without permission, and obscene language.[71]

Students with disabilities are also highly overrepresented among those subjected to punitive discipline policies. Although the Individuals with Disabilities Education Act (IDEA)[72] was amended in 1997 to require that students not be punished for behavior that is a manifestation of their disability,[73] schools often inappropriately subject disabled students to

63. NAACP, *supra* note 16, at 6–7.

64. LOSEN & SKIBA, *supra* note 62 at 3 fig. 1 (indicating that in 2006, Hispanic children had a 6.8% risk for suspension and Native American children had a 7.9% risk, while white children had a 4.8% risk and black children had a fifteen percent risk).

65. *Id.* at 2–3.

66. *Id.* (noting that in 1973, black students had a six percent risk of being suspended, while white students had a 3.1% risk, and that in 2006, black students had a fifteen percent risk, while white students had a 4.8% risk).

67. SKIBA, ZERO EVIDENCE, *supra* note 11, at 12.

68. ZERO TOLERANCE TASK FORCE, EVIDENTIARY REVIEW, *supra* note 8, at 57.

69. ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 17, at 7.

70. *See* ZERO TOLERANCE TASK FORCE, EVIDENTIARY REVIEW, *supra* note 8, at 60.

71. *See id.* at 59.

72. 20 U.S.C. § 1400 (2006).

73. 20 U.S.C. § 1415(k) (limiting schools' ability to discipline students for infractions

punitive discipline nonetheless.[74] This happens in a number of ways. For example, a school may fail to evaluate a student for a disability, and therefore punish the student for behavior that is a manifestation of an unidentified disability.[75] Alternatively, a school may inappropriately deny a student the opportunity for a hearing to determine if the behavior was a manifestation of an already-identified disability.[76] Though special education students make up only about eleven percent of the population, they account for approximately twenty percent of suspended students. [77] Among students with disabilities who are suspended, students with learning disabilities and emotional disturbance are overrepresented.[78] However, the majority of behaviors for which students with disabilities are suspended are nonviolent, do not result in injury to others, and may not differ substantively from the behavior of other students.[79] The prevalence of students with disabilities in the correctional system is probably even higher; estimates vary widely, but studies suggest that "between twenty and sixty percent of youth in juvenile and adult correctional facilities are disabled."[80]

E. Alternatives to Zero Tolerance

School safety is clearly of crucial importance, but there are alternatives to zero tolerance that are both more effective and avoid the collateral consequences of excessive suspensions, expulsions, and arrests. The

found to be manifestations of their disability). *See also* Allan G. Osborne, Jr., *Discipline of Special-Education Students under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L.J. 513, 529–35 (2001) (discussing the 1997 Amendments)

74. ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 17, at 9. Violations of this policy can be challenged using the procedural protections set forth in the IDEA. *Id.*

75. *See, e.g.*, Mark McWilliams & Mark P. Fancher, *Undiagnosed Students with Disabilities Trapped in the School-to-Prison Pipeline*, 89 MICH. B. J. 28, 28-30 (2010).

76. *See, e.g.*, JOHANNA MILLER, UDI OFER, ALEXANDER ARTZ, TARA BAHL, TARA FOSTER, DEINYA PHENIX, NICK SHEEHAN & HOLLY A. THOMAS, N.Y. CIVIL LIBERTIES UNION & SCH. SAFETY COAL., EDUCATION INTERRUPTED: THE GROWING USE OF SUSPENSIONS IN NEW YORK CITY'S PUBLIC SCHOOLS 21 (2011) [hereinafter EDUCATION INTERRUPTED] (recounting a situation in which a disabled student was suspended multiple times for the same behavior, but the New York City Department of Education twice denied his mother's requests for a manifestation determination hearing).

77. Russell J. Skiba, *Special Education and School Discipline: A Precarious Balance*, 27 BEHAV. DISORDERS 81, 89 (2002).

78. Peter E. Leone, Matthew J. Mayer, Kimber Malmgren & Sheri M. Meisel, *School Violence and Disruption: Rhetoric, Reality, and Reasonable Balance*, 33 FOCUS ON EXCEPTIONAL CHILD. 1, 10 (2000).

79. *Id.*

80. ROBERT B. RUTHERFORD JR., MICHAEL BULLIS, CINDY WHEELER ANDERSON & HEATHER M. GRILLER-CLARK, YOUTH WITH DISABILITIES IN THE CORRECTIONS SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 7 (2002).

American Psychological Association (APA) recommends a three-tiered approach.[81] It advocates, first, school-wide implementation of primary prevention programs, "such as conflict resolution, bullying prevention, social-emotional learning, or improved classroom management," in order to promote a safe and responsive climate for all students.[82] It also recommends secondary prevention efforts, such as early screening programs to identify students who may be at-risk for violence coupled with the provision of anger-management, mentoring, or other services designed to reconnect these students with schools.[83] Finally, since no approach is likely to fully eradicate problematic behavior, it supports intensive tertiary prevention interventions such as multisystemic therapy or restorative justice programs, both discussed below, to address the behavior of students who are already engaged in violence and disruption.[84] Similar three-level approaches have been proposed by other researchers.[85]

There are many examples of primary, secondary and tertiary programs that have proven or promising track records in promoting good conduct without resorting to the techniques of zero tolerance. The Resolving Conflict Creatively Program (RCCP), for example, is a primary prevention program that has had impressive success.[86] A multiyear, K-12 program, RCCP is designed to change school culture by training adults in the school, including those in non-teaching positions such as office staff and lunchroom aides, to model appropriate behavior, while teachers provide regular direct instruction, both through RCCP lessons and by incorporating RCCP concepts into other coursework.[87] The RCCP curriculum is made up of flexible lessons about topics such as "communicating clearly and listening carefully, expressing feelings and dealing with anger, resolving conflicts, fostering cooperation, appreciating diversity, and countering bias." It is designed to be presented in a "workshop" format, meaning that the teacher's role is to facilitate student-directed discussions.[88] As an example of an RCCP lesson, one report on

81. ZERO TOLERANCE TASK FORCE, EVIDENTIARY REVIEW, *supra* note 8, at 87 (citing AM. PSYCHOLOGICAL ASS'N, COMM'N ON YOUTH & VIOLENCE, VIOLENCE AND YOUTH (1993)).

82. *Id.* at 88.

83. *Id.*

84. *Id.* at 87, 91–93.

85. *See, e.g.*, Joseph C. Gagnon & Peter E. Leone, *Alternative Strategies for School Violence Prevention,* 92 NEW DIRECTIONS FOR YOUTH DEV. 101 (2001) (proposing a similar approach to that promoted by the APA, but using slightly different terminology).

86. Jennifer Selfridge, *The Resolving Conflict Creatively Program: How We Know It Works*, 43 THEORY INTO PRAC. 59, 60–62, 64 (2004).

87. *Id.* at 59–60, 63, 65–66.

88. J. LAWRENCE ABER, SARA PEDERSEN, JOSHUA L. BROWN, STEPHANIE M. JONES & ELIZABETH T. GERSHOFF, NAT'L CTR. FOR CHILD. POVERTY, CHANGING CHILDREN'S

the program described the following:

> At the Patrick Daly School in Brooklyn, teacher Sarah Button is telling her fifth graders a story about a girl named Maria who experiences one put-down after another as she goes through her day. After each put-down, Button tears off a piece of a red paper heart taped to her chest. By the end of the story, the heart lies in pieces on the floor. The students describe the feelings Maria is having and make connections to their own lives. Then Button says, "I'm going to tell the story again, and this time you're going to help Maria by suggesting put-ups instead of put-downs." The children oblige, and Maria has a better day. The lesson concludes with a discussion of how to make the classroom a "put-down-free zone."[89]

Peer mediation is an important component of RCCP programs, and some schools also offer workshops for parents.[90]

An evaluation of RCCP in New York City elementary schools found that teachers reported increases in prosocial behavior and declines in aggressive behavior for youth exposed to more RCCP lessons.[91] RCCP was shown to have similarly positive effects in a rural community in Oregon, where preliminary evaluation results indicated that ninety-nine percent of teachers found students to be more cooperative after RCCP was implemented, eighty-four percent reported less physical aggression among students in the classroom, and eighty-two percent reported that students were better able to solve their own conflicts without adult intervention, among other benefits.[92] These findings have been echoed in studies of RCCP in Anchorage, Alaska; Atlanta, Georgia; and additional studies in New York City.[93] A number of these studies found that RCCP improved academic achievement as well.[94]

At the secondary prevention level, mentoring has been shown to improve student behavior and lead to other positive outcomes, particularly

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TRAJECTORIES OF DEVELOPMENT: TWO-YEAR EVIDENCE FOR THE EFFECTIVENESS OF A SCHOOL-BASED APPROACH TO VIOLENCE PREVENTION 4 (2003).

89. Joshua L. Brown, Tom Roderick, Linda Lantieri & J. Lawrence Aber, *The Resolving Conflict Creatively Program: A School-Based Social and Emotional Learning Program*, *in* BUILDING ACADEMIC SUCCESS ON SOCIAL AND EMOTIONAL LEARNING: WHAT DOES THE RESEARCH SAY? 151, 151 (2004).

90. ABER, PEDERSEN, BROWN, JONES & GERSHOFF, *supra* note 88, at 5.

91. *Id.* at 8.

92. EDUCATORS FOR SOC. RESPONSIBILITY & MILBANK MEM'L FUND, TOWARD SAFER SCHOOLS AND HEALTHIER COMMUNITIES: THE RESOLVING CONFLICT CREATIVELY PROGRAM IN LINCOLN COUNTY, OREGON 8–9, 16 (1999).

93. Selfridge, *supra* note 86, at 60–62.

94. *See id.* at 61; ABER, PEDERSEN, BROWN, JONES & GERSHOFF, *supra* note 88, at 9.

for at-risk youth. Researchers looking at mentoring programs for academically at-risk youth found behavioral benefits including lower aggressiveness and greater rule compliance (as opposed to acting out),[95] though they caution that different academically at-risk students have different needs, and that mentoring programs must be adapted accordingly in order to be effective.[96] A meta-analysis looking at fifty-five youth mentoring programs similarly found mentoring to have a positive effect on problem or high risk behavior.[97] Although the study found that mentoring provides only a small or modest benefit for average youth,[98] participating in a mentoring program provided greater benefits to youth experiencing situations of environmental risk,[99] particularly when programs engaged in "best practices,"[100] such as "ongoing training for mentors, structured activities for mentors and youth as well as expectations for frequency of contact, mechanisms for support and involvement of parents, and monitoring of overall program implementation."[101]

Some programs are experimenting with creative strategies to make mentoring more feasible and effective. While most mentoring programs rely on community mentors, some use school personnel as mentors. A study of one such program targeting middle school students with high numbers of office disciplinary referrals and unexcused absences found that the number of office referrals slowly decreased throughout the mentoring period for those participating in the program, while the number of referrals rose for the non-mentored group.[102] Researchers have also suggested that integrating mentoring programs with other programs and services may be a particularly promising approach to positive youth

95. Simon Larose & George M. Tarabulsy, *Academically At-Risk Students*, *in* HANDBOOK OF YOUTH MENTORING 440, 446 (David L. DuBois & Michael J. Karcher eds., 2005).

96. *Id.* at 448–49.

97. David L. DuBois, Bruce E. Holloway, Jeffrey C. Valentine & Harris Cooper, *Effectiveness of Mentoring Programs for Youth: A Meta-Analytic Review*, 30 AM. J. COMMUNITY PSYCHOL. 157, 157, 183 (2002).

98. *Id.* at 168 (finding that youth participating in mentoring programs scored approximately one eighth of a standard deviation higher in a favorable direction on outcome measures than did the average youth before or without participation in one of these programs).

99. *Id.* at 182.

100. *Id.* at 182–83. However, many programs serving at-risk youth were not engaged in best practices and therefore had negative effects, so it is important that programs be of high quality. *See id.* at 183.

101. *Id.* at 187–88.

102. Noelle Converse & Benjamin Lignugaris/Kraft, *Evaluation of a School-Based Mentoring Program for At-Risk Middle School Youth*, 30 REMEDIAL & SPECIAL EDUC. 33, 35, 38 (2009).

development,[103] though research on such programs is limited.[104]

While mentoring can play an important role in addressing the needs of at-risk children, some children need more targeted interventions to help them address specific challenges such as learning to control their emotions. Anger-management programs, which use cognitive-behavioral techniques to teach students strategies to manage their anger in stressful situations, are one such example. Though programs vary somewhat, one report described a typical approach:

> First, youth develop their ability to understand the perspective of others, to put themselves in someone else's shoes. Second, students are taught to be aware of their emotional and physical states when they are angry. To help students learn self-control, some programs will teach relaxation techniques. Finally, students learn how to use a specific strategy (e.g., Stop! Think! What should I do?) to moderate their responses to potential conflicts. Students are typically trained in problem-solving skills including 1) identifying the problem; 2) generating alternative solutions; 3) considering the consequences of each solution; 4) selecting an effective response; and 5) evaluating outcomes of that response.[105]

A review of studies of cognitive-behavioral interventions for adolescents with anger-related difficulties found that research consistently showed these interventions to be effective directly post-intervention.[106] In addition, the four studies that looked at long-term effects months later (with follow-up data collected three, six, or nine months after the intervention) all found significant lasting benefits.[107]

At the tertiary level, restorative justice programs have been found to effectively reduce recidivism among violent or disruptive youth. These programs reflect the philosophy that crime violates people and

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103. Gabriel P. Kuperminc, James G. Emshoff, Michele M. Reiner, Laura A. Secrest, Phyllis Holditch Niolon & Jennifer D. Foster, *Integration of Mentoring with Other Programs and Services, in* HANDBOOK OF YOUTH MENTORING 314, 329 (David L. DuBois & Michael J. Karcher eds., 2005).

104. *Id.* (noting that research on the effects of youth mentoring programs "has not kept pace with the rapid development of such programs").

105. RUSSELL SKIBA & JANET MCKELVEY, SAFE & RESPONSIVE SCH. PROJECT, EARLY IDENTIFICATION AND INTERVENTION: ANGER MANAGEMENT—WHAT WORKS IN PREVENTING SCHOOL VIOLENCE 1 (2000).

106. *See* Rachel L. Cole, *A Systematic Review of Cognitive-Behavioural Interventions for Adolescents with Anger-Related Difficulties*, 25 EDUC. & CHILD PSYCHOL. 27, 38 (2008) (noting that "all studies found cognitive-behavioural interventions to be effective directly post-intervention, according to the criteria set by each study and the research question posed"). While the outcomes focused on varied by study, the three main outcomes focused on were aggression, anger, and behavior/conduct. *Id.* at 39.

107. *Id.* at 41.

relationships, rather than just the law.[108] As a result, they work by requiring "all parties with a stake in a particular offense [to] come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future."[109] While restorative justice models vary, the following description, by a restorative justice coordinator, of the practice in his school, provides an example of how these programs work:

> A typical conference . . . begins with the offender telling his or her side of the story. The victim, who recounts his or her memory of the events, then follows the initial contribution by the offender. At that point, supporters (family members, friends, etc.) of both the offender and the victim have an opportunity to address the group and discuss how they were affected. Finally, school administrators offer their perspective on the event. After everyone has had a chance to speak, all participants, including the two major stakeholders, discuss possible solutions. The goal is for the offender to take responsibility for the harm and make amends to those who have been injured. An agreement or contract is then drafted, and the offender is both expected to sign the contract and fulfill its various conditions.[110]

A meta-analysis of studies of restorative justice programs found them to be significantly more effective at preventing recidivism than non-restorative programs.[111] As the researchers noted, there is likely some level of selection bias in these results because restorative justice is, by its nature, a voluntary process.[112] Nevertheless, they concluded that "the results provide notable support for the effectiveness of these programs in increasing . . . victim satisfaction and . . . decreasing offender recidivism."[113] Another meta-analysis, examining studies of two different types of restorative justice programs, found that they contributed to a twenty-six percent reduction in recidivism,[114] though the same selection bias also

108. Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127, 128 (2005).

109. *Id.* (quoting Tony F. Marshall, *The Evolution of Restorative Justice in Britain*, 4 EUR. J. ON CRIM. POL'Y & RES. 21 (1996)).

110. David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 YOUTH & SOC'Y 249, 260 (2001). An added benefit of this approach is that victims who participated in restorative justice were found to be significantly more satisfied than those who participated in the traditional justice system. *See* Latimer, Dowden & Muise, *supra* note 108, at 136.

111. Latimer, Dowden & Muise, *supra* note 108, at 137.

112. *Id.* at 138–39.

113. *Id.* at 142.

114. William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROBATION 15, 15–16, 18 (2005).

could have influenced this analysis.

A more recent study looking at the long-term impact of restorative justice addressed the methodological shortcoming of selection bias by comparing groups based on the intervention they were assigned to, regardless of whether they actually participated in or completed a restorative justice program.[115] This addressed self-selection bias, but may have instead skewed the results towards finding no program effect.[116] Nevertheless, the study found that only 29.6% of those in the restorative justice group had officially-recorded police contact in the three years following the program, compared to 45.5% of those referred to traditional juvenile court processing.[117] This disparity was statistically significant even after controlling for other factors.[118] Those in the restorative group also had significantly fewer official police contacts per youth,[119] had significantly less-serious offenses,[120] and went significantly longer before their first official police contact after referral,[121] even after accounting for other variables.

Multisystemic therapy (MST) is another tertiary intervention with strong data supporting its effectiveness. Based on research showing that association with deviant peers, poor family relations, difficulty at school, and poor neighborhood and community support are all linked to antisocial behavior, MST uses family- and community-based treatment to addresses the multiple factors contributing to the destructive behavior.[122] MST interventions integrate techniques from a variety of empirically-supported therapies to "improve caregiver discipline practices, enhance family affective relations, decrease youth association with deviant peers, increase youth association with prosocial peers, improve youth school or vocational performance, engage youth in prosocial recreational outlets, and develop an indigenous support network of extended family, neighbors, and friends

115. Kathleen J. Bergseth & Jeffrey A. Bouffard, *The Long-Term Impact of Restorative Justice Programming for Juvenile Offenders*, 35 J. CRIM. JUST. 433, 437 (2007).

116. *Id.*

117. *Id.* at 442. By the end of the study, four years after participants were referred to the program, thirty-two percent of those in the restorative justice group had had official police contact, compared with 44.6% of those in the traditional court group, though this difference was no longer statistically significant. *Id.*

118. *Id.* at 445.

119. *Id.* at 446.

120. *Id.* at 447.

121. *Id.*

122. Sonja K. Schoenwald & Melisa D. Rowland, *Multisystemic Therapy, in* COMMUNITY TREATMENT FOR YOUTH, EVIDENCE-BASED INTERVENTIONS FOR SEVERE EMOTIONAL AND BEHAVIORAL DISORDERS 91 (Barbara J. Burns & Kimberly Hoagwood eds., 2002).

to help caregivers achieve and maintain such changes."[123] MST therapists work with a team to assess and develop a testable hypothesis as to the causes of the problem behavior.[124] Interventions are designed based on this hypothesis, which is supported or rejected based on the effectiveness of the intervention.[125] Assessment is ongoing, and new hypothesis and interventions are developed when previous ones fail.[126]

A meta-analysis of MST found that juvenile delinquents treated with it were "functioning better and offending less than 70% of their counterparts who received alternate treatment or services."[127] MST was found to be relatively effective at decreasing youth's aggression toward peers, involvement with deviant peers, and criminality, among other benefits,[128] and follow-up data suggested that treatment effects were sustained up to four years later.[129] Another meta-analysis found that youth who received MST experienced a significantly higher level of improvement than those receiving other services on a measure that combined school behavior, family functioning, mental health symptoms, youth functioning, substance abuse, severe aggressive-disruptive behavior, and self-harm,[130] and that those who participated in MST were also less likely to become involved in the juvenile justice system.[131]

In addition to interventions, such as those discussed above, that focus specifically on improving student behavior, working to strengthen the learning environment and the education provided may also help to reduce student disruptiveness, given research showing a close link between the school environment, student attitudes, and rates of disruptive or delinquent behavior. For example, one study looking at the impact of the structure and quality of the school environment found that tenth graders

123. MULTISYSTEMIC THERAPY, WHAT IS MULTISYSTEMIC THERAPY? (2010), http://www.mstservices.com/index.php/what-is-mst.

124. Kirstin Painter, *Multisystemic Therapy as an Alternative Community-Based Treatment for Youth with Severe Emotional Disturbance: Empirical Literature Review*, 8 SOC. WORK MENTAL HEALTH 190, 195 (2010).

125. *Id.*

126. *Id.*

127. Nicola M. Curtis, Kevin R. Ronan & Charles M. Borduin, *Multisystemic Treatment: A Meta-Analysis of Outcome Studies*, 18 J. FAM. PSYCHOL. 411, 416 (2004). The researchers analyzed studies of MST from 1986 to 2003 that met certain selection criteria, including random assignment, both pretreatment and posttreatment assessment measures, and use of statistics suitable for meta-analysis. After correcting for small sample bias of one study, they determined effect sizes by calculating the mean change scores of the two groups divided by the average or common standard deviation of the two groups.

128. *Id.*

129. *Id.*

130. Kirstin Painter, *Multisystemic Therapy as Community-Based Treatment for Youth With Severe Emotional Disturbance*, 19 RES. ON SOC. WORK PRAC. 314, 319 (2009).

131. *Id.* at 320.

attending schools described as neglected and run down had significantly higher rates of alcohol use in school[132] and truancy,[133] even when accounting for school and student demographics. Another study found that students who saw their schoolwork as being of low relevance to their lives engaged in significantly greater opposition to teachers.[134] The evidence in that study also indicated that "little perceived relevance of school may lead pupils to seek inclusion in subcultures that espouse anti-school norms and, for example, reward oppositional behaviour to teachers."[135] Therefore, ensuring that curricula are engaging and relevant to students, and addressing factors like neglected school facilities, may be important steps in improving problematic behavior.

F. Pockets of Progress in Reforming Zero Tolerance Policies

Though zero tolerance policies remain prevalent throughout the country, a few communities have organized to change their schools' disciplinary policies and practices, leading to productive reforms in some districts.[136] For example, in response to a campaign by parents, students and community organizers from the group Padres y Jóvenes Unidos,[137] the Denver Public Schools revised its discipline policies, with assistance from the Advancement Project.[138] The district limited the use of out-of-school suspensions and expulsions and implemented restorative justice programs, among other changes.[139] Even before the reforms were fully implemented,

132. Revathy Kumar, Patrick M. O'Malley & Lloyd D. Johnston, *Association Between Physical Environment of Secondary Schools and Student Problem Behavior: A National Study, 2000–2003*, 40 ENV'T & BEHAV. 455, 469 (2008).

133. *Id.* at 477.

134. Edvin Bru, *Factors Associated with Disruptive Behaviour in the Classroom*, 50 SCANDINAVIAN J. EDUC. RES. 23, 35 (2006).

135. *Id.*

136. In fact, much of the available data about alternatives to zero tolerance policies, including that discussed above, exists because some schools and districts have implemented these programs in order to create healthier learning environments and reduce their reliance on punitive discipline.

137. Padres Unidos, or Parents United, is a Denver-based organization led by people of color who work for educational excellence, racial justice for youth, immigrant rights and quality healthcare for all. Jóvenes Unidos is the youth initiative of Padres Unidos. It was founded in order to encourage young people to become active in reforming their schools, ending the school-to-jail track and organizing for immigrant student rights. *See* PADRES & JOVENES UNIDOS, http://www.padresunidos.org (last visited June 30, 2011).

138. The Advancement Project is a national civil rights law, policy, and communications "action tank" that advances universal opportunity and a just democracy for those left behind in America. The Project uses multiple tools—law, policy analysis, strategic communications, technology, and research—coordinated with grassroots movements, with the goal of creating sustainable progress. *See Homepage,* ADVANCEMENT PROJECT, http://www.advancementproject.org (last visited June 30, 2011).

139. TEST, PUNISH, *supra* note 8, at 35.

rates of referral to law enforcement from the Denver Public Schools dropped by sixty-three percent and out-of-school suspensions dropped by forty-three percent.[140]

Notwithstanding the success of the Denver program, attaining even minor changes to school or district policies can be challenging. For example, the New York City Council recently adopted the Student Safety Act,[141] which requires public reporting on suspensions, expulsions, and arrests, with data disaggregated based on a number of student characteristics. The Act thus helps ensure transparency regarding schools' discipline practices, and may serve as a precursor to developing reforms. It does not, however, actually require schools to alter their discipline policies or practices. Despite the limited nature of the changes mandated under the Act, it took more than two years for the New York City Council to pass it,[142] with significant pressure from community groups during that period.[143]

With regard to actual school discipline policies in New York City, there has been some progress. Most notably, while the New York City School Discipline Code listed twenty-nine zero tolerance offenses resulting in mandatory suspension from 2007 to 2009, that number has been reduced to twenty-one for the 2010-2011 school year,[144] and the discipline code now lists guidance interventions alongside disciplinary responses to infractions.[145] Nevertheless, there are still three times the number of zero tolerance offenses in the current New York discipline code as there were in the 2000-2001 version, which listed only seven.[146] The total number of suspendable infractions has also more than doubled, with twenty-four in

140. *Id.*

141. NEW YORK, N.Y., 8 Admin. Code §§ 1103-1105 (2011).

142. The Act was introduced in August, 2008, but only approved in December, 2010. *See* Helen Zelon, *Who's Keeping them Safe? School Oversight Advances*, CITY LIMITS, Sept. 29, 2008, http://www.citylimits.org/news/articles/3627/who-s-keeping-them-safe (noting the introduction of the School Safety Act the previous month); *Legislation Details,* NEW YORK CITY COUNCIL LEGISLATIVE RESEARCH CTR, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=821375&GUID=BE5ED174-255F-4944-A1D5-31DD105E8CB&Options=ID|Text|&Search=442 (last visited June 30, 2011) (noting the passage of the Act on December 10, 2010).

143. *See* Lauren Raheja, *Activists Demand Changes to School Disciplinary Practices*, CITY LIMITS, Sept. 7, 2010, http://www.citylimits.org/news/articles/4175/activists-demand-changes-to-school-disciplinary-practices; Zelon, *supra* note 142. As examples of other rallies and protests, a YouTube video, http://www.youtube.com/watch?v=QkY5MvIaF8M, shows a student rally on October 22, 2009, and a news article reports on protests before a November 2009 City Council meeting. Lindsey Christ, *City Council Holds Hearing on Student Safety Act*, NY1, Nov. 10, 2009, http://manhattan.ny1.com/content/top_stories/108690/city-council-holds-hearing-on-student-safety-act.

144. EDUCATION INTERRUPTED, *supra* note 76, at 11.

145. *Id.*

146. *Id.*

2000-2001 compared to fifty today.[147] Additionally, though the New York Department of Education mandates the imposition of certain punishments, it does not similarly require the use of any positive interventions, nor does it track the use of these alternatives.[148] Moreover, the number of suspensions per one-hundred students skyrocketed from 2.6 during the 2001-2002 school year to 7.1 in 2008-2009 (the most recent year for which data are available),[149] and the length of suspensions grew during that period as well.[150] Despite the release of reports during this period by groups such as the NAACP Legal Defense and Education Fund and the Advancement Project, highlighting the problems with zero tolerance policies and calling for alternatives to exclusionary discipline,[151] the use of suspensions in New York City continued to rise.[152]

G. Barriers to Changing Zero Tolerance

Given the damaging consequences of zero tolerance policies and the availability of more effective alternatives, one may be left wondering why so many schools continue to punish students excessively and why legislatures have done little to address the issue. There are undoubtedly a variety of complex factors contributing to the perpetuation of the problem but there is little literature examining them. Nevertheless, some probable contributing factors can be identified. Schools with fewer resources are less able to provide supportive interventions like mediation or counseling, often leaving teachers without a viable alternative to suspending a disruptive student.[153] Under the federal No Child Left Behind Act of 2001,[154] schools are also under intense pressure to raise test scores if they want to receive continued federal funding, giving them a perverse incentive to push out students who underperform.[155] Excessive use of

147. *Id.*

148. *Id.*

149. *Id.* at 16.

150. *Id.* at 3.

151. *See, e.g.*, BROWNE, *supra* note 6, and NAACP, *supra* note 16.

152. This situation is not unique to New York. Philadelphia, for example, has recently had a huge increase in out of-school suspensions, from forty in 2005-2006 to more than 1,000 in 2008-2009. YOUTH UNITED FOR CHANGE & ADVANCEMENT PROJECT, ZERO TOLERANCE IN PHILADELPHIA: DENYING EDUCATIONAL OPPORTUNITIES AND CREATING A PATHWAY TO PRISON 16 (2011), http://www.advancementproject.org/sites/default/files/publications/YUC%20Report%20Final%20-%20Lo-Res.pdf. Other practices associated with zero tolerance, such as relying on police to handle school disciplinary problems, have also increased in the district in recent years. *See id.* at 7 (noting the increase in the percentage of disciplinary offenses in the school district of Philadelphia that resulted in police notification since 2005-2006).

153. SULLIVAN & KEENEY, *supra* note 16, at 3.

154. 20 U.S.C. § 6301 (2006).

155. Marilyn Cochran-Smith, *No Child Left Behind: 3 Years and Counting*, 56 J.

suspensions and expulsions helps them achieve this goal.[156] Moreover, while students who drop out are more likely to end up unemployed or incarcerated, these costs are not internalized by their former school, so schools have little incentive to temper their discipline policies to avoid these outcomes.

On a policy level, media portrayals of juvenile violence and crime help shape public attitudes towards the problem and thus contribute to the entrenchment of zero tolerance legislation.[157] As noted by one set of commentators:

> Coverage of juvenile crime is badly skewed toward hyperviolent, idiosyncratic acts, presented out of context with social forces that foster delinquency. This noncontextual, exaggerated coverage negatively affects both public opinion and policy making in the field of juvenile justice, resulting in a populace badly misinformed about the behavior of its own children and a body politic responding in increasingly punitive ways.[158]

Cable television and the internet have allowed for quicker and more widespread dissemination of sensational stories. This transforms rare local tragedies into national, seemingly-commonplace news, causing viewers who watch more evening news to be more fearful than those who watch less frequently, and giving the public a skewed perception of juvenile behavior.[159] Thanks most likely in part to extensive media coverage of school shootings, seventy-one percent of respondents to a *Wall Street Journal* poll believed that someone was likely to be killed in their school.[160] In reality, the odds of someone being killed in a school are less than one in two million.[161] Furthermore, coverage of urban minority students who shoot their peers is of a different tenor than coverage of white schoolboys who murder. The latter are described as "alienated, victimized, and

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TCHR. EDUC. 99, 100 (2005).

156. *See* discussion, *infra* notes 269-70, and accompanying text.

157. DEWEY G. CORNELL, SCHOOL VIOLENCE: FEARS VERSUS FACTS 9 (2006).

158. Vincent Schiraldi & Jason Ziedenberg, *How Distorted Coverage of Juvenile Crime Affects Public Policy*, *in* ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 114, 114 (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001).

159. *See id.* at 116–20.

160. *See id.* at 118.

161. For example, between July 1, 2007 and June 30, 2008, there were thirty-four homicides of youth ages 5–18 at school. NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY 2009 2 (2009). Public elementary and secondary schools enrolled approximately 46.127 million students during this period. AMBER M. NOEL, JENNIFER SABLE & CHEN-SU CHEN, NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC ELEMENTARY AND SECONDARY SCHOOL STUDENT ENROLLMENT AND STAFF COUNTS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2007–08: FIRST LOOK 2 (2009). This means that there was one homicide in school for every 2.3 million children.

isolated," while the former are referred to "as animals (wolves, beasts of prey, vermin) or diseases (plague, pestilence, scourge, cancer, virus, infestation, parasite)," and grouped as part of a class of remorseless, morally-impoverished superpredators.[162] These pathologized depictions make urban, minority youth appear to be both social menaces and beyond help, and therefore poor candidates for supportive and rehabilitative services.

Against this backdrop of misinformation, fear, and racial bias, politicians are loath to oppose zero tolerance policies or advocate for increased supportive services and interventions. There is bipartisan consensus among politicians that "failure to talk tough on crime is akin to political suicide,"[163] and though disruptive students might otherwise draw more sympathy than adult offenders, the aforementioned biased public perceptions of youth make being light on school discipline likely to be similarly politically dangerous.

III.
LIMITATIONS OF DUE PROCESS AND EQUAL PROTECTION CHALLENGES

Opportunities to challenge these policies and practices in the courts are limited. The Supreme Court has essentially foreclosed the possibility of federal constitutional challenges to zero tolerance policies and practices. In *San Antonio Independent School District v. Rodriguez*, the Court held that, because there was no explicit protection of education in the federal constitution, nor any basis for concluding that it was implicitly protected, education is not a fundamental constitutional right.[164] As a result, litigants cannot argue that, by depriving students of education, zero tolerance policies infringe upon federal substantive due process rights. *Rodriguez* thereby removed one avenue for subjecting these policies to heightened judicial review.

Three years after its decision in *Rodriguez,* the Court similarly precluded the use of the federal Equal Protection Clause to challenge zero tolerance policies when it held, in *Washington v. Davis*, that a law or official action does not run afoul of the Equal Protection Clause solely because it has a disproportionate impact on a protected class of individuals.[165] Instead, to prevail on a disparate impact claim, a plaintiff

162. *See* Bernardine Dohrn, *"Look Out Kid/It's Something You Did": Zero Tolerance for Children, in* ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 89, 91 (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001).

163. Tim Newburn & Trevor Jones, *Symbolic Politics and Penal Populism: The Long Shadow of Willie Horton*, 1 CRIME MEDIA CULTURE 72, 74 (2005).

164. 411 U.S. 1, 18, 29–35 (1973).

165. 426 U.S. 229, 239 (1976).

must prove that the invidious quality of a law or action claimed to be discriminatory ultimately stems from an intentionally discriminatory purpose.[166] This standard leaves little room for contesting the great racial imbalances in school discipline on equal protection grounds because there is rarely sufficient evidence to make the showing of discriminatory intent that is necessary to establish an equal protection violation.[167] For example, in *Fuller v. Decatur Public School Board of Education*, high school students expelled for fighting challenged the punishment as violating their equal protection rights.[168] The plaintiffs provided evidence that, although black students made up less than half of the school district's enrollment, eighty-two percent of the students suspended in the district were black. An Illinois district court nonetheless dismissed the suit, finding that this large disparity was not sufficient to establish an inference of discriminatory intent in the absence of evidence that similarly situated white students were not also subjected to the challenged conduct.[169]

The procedural due process component of the Fourteenth Amendment provides slightly more protection for students, but its efficacy is limited. In *Goss v. Lopez*, the Supreme Court concluded that, as long as state law extends the right to an education to children within a certain age range, the state may not "withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred."[170] The Court found that students have both a property interest in education and a liberty interest in maintaining their reputation, and that these interests are protected by the Due Process Clause.[171] Consequently, the Court held that a student facing even a short suspension must receive, at a minimum, "notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[172] This provides some assurance that students are not deprived of education arbitrarily.

166. *Id.* at 240.

167. A 2009 article argues that school-to-prison pipeline equal protection cases should be viewed through a structural racism framework rather than through a motive-centered framework, but the only example the author provides in which a court analyzed a case using a structural racism framework was based on the Voting Rights Act of 1965, rather than equal protection. *See generally* Chauncee D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009 (2009). Unfortunately, there is no reason to expect that courts will shift away from requiring discriminatory intent in disparate impact equal protection cases any time in the near future.

168. 78 F. Supp. 2d 812, 815 (C.D. Ill. 2000).

169. *Id.* at 824–25.

170. 419 U.S. 565, 574 (1975).

171. *Id.* at 574–75.

172. *Id.* at 581.

However, the Court stopped short of requiring that students be given further protections, such as the opportunity "to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[173] By not affording students these rights, the Court has permitted schools to deny students access to counsel,[174] and produced a system that may lack the checks-and-balances necessary to monitor enforcement of procedural rights.[175] *Goss* only dealt with short-term suspensions of ten days or less,[176] so litigants could still argue that students facing longer suspensions and expulsion are entitled to greater procedural protections, given the greater severity of the deprivation involved. Nevertheless, even if the Court were to agree that greater procedural protections are required in these cases, additional procedures will not address the underlying problem—namely, the overarching use of punitive discipline as the primary mechanism for addressing problematic behavior. Procedural protections would be similarly unhelpful for securing an education for students who are found to have been legitimately suspended or expelled under zero tolerance rules.

State laws regarding equal protection and due process are generally no more helpful than their federal counterparts for challenging these policies. State constitutions generally do not contain an equal protection clause,[177] though many were amended in the 1960s to include provisions prohibiting discrimination in the exercise of civil rights.[178] However, state courts have generally interpreted these newer provisions in lockstep with the federal Equal Protection Clause,[179] making them similarly useless for challenging discipline policies that have a disparate impact on students of color. Finally, while some states have statutes or regulations that provide process beyond that required in *Goss*,[180] state due process laws have the same limitation as the federal Due Process Clause. While they can serve as a basis for contesting a lack of process prior to the imposition of discipline, they do not provide grounds for challenging the use of punitive discipline in general.

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173. *Id.* at 583.

174. Simone Marie Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 641–42 (2007).

175. *See id.* at 642.

176. 419 U.S. at 584.

177. 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 20 (G. Alan Tarr & Robert F. Williams eds., 2006). Many state constitutions do, however, "contain a variety of equality provisions." *Id.*

178. *Id.* at 23.

179. *Id.*

180. Julie Underwood, *The 30th Anniversary of* Goss v. Lopez, 198 EDUC. L. REP. 795, 800 (2005).

IV.
STATE EDUCATION CLAUSES AS A POTENTIAL SOLUTION

In contrast to federal due process and equal protection or their state analogues, provisions present in every state constitution requiring the state to provide free public education[181] do provide a potentially promising basis for a legal challenge to zero tolerance policies.

Using state constitutions as the basis for challenging disciplinary decisions that impact educational rights is not a new idea. Litigants in a number of states have raised claims of this kind to contest denials of educational opportunity that were consequences of suspensions, expulsions, or incarcerations. These lawsuits have had varying degrees of success.

The highest courts in West Virginia and Washington State have interpreted their state constitution education clauses to give students a right to education during periods in which they are expelled or incarcerated, respectively. In *Cathe A. v. Doddridge County Board of Education*, an expelled student challenged the constitutionality of the West Virginia Productive and Safe Schools Act of 1995,[182] which required that children who bring dangerous weapons to school be removed from school for up to twelve months.[183] The student further challenged the constitutionality of his local school board's refusal to provide educational instruction to him during the period he was removed from school unless his parents paid for the instruction.[184] Because West Virginia recognizes education as a fundamental right under the state constitution, the Supreme Court of Appeals of West Virginia applied strict scrutiny when analyzing these constitutional claims.[185] With regard to the first issue, the Court found the Act to be constitutional, concluding that the state had a compelling interest in providing a safe and secure environment to schoolchildren,[186] and that the Productive and Safe Schools Act was narrowly tailored to serve this interest.[187] However, the court's holding that the Act was narrowly tailored relied on a conclusion it articulated while answering the second question:[188] specifically, that in all but the most

181. Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 582 (1996) (noting that "[e]very state constitution has an education clause").

182. W. VA. CODE ANN. 18A-5-1a (West 2008).

183. 490 S.E.2d 340, 344 (W. Va. 1997).

184. *Id.* at 344.

185. *Id.* at 346–47 (quoting Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 918 (W. Va. 1996)).

186. *Id.* at 348.

187. *Id.*

188. *Id.*

extreme cases, the West Virginia constitution requires the state to provide reasonable state-funded educational opportunities to children who have been removed from the classroom under the Act.[189] In reaching this latter conclusion, the court noted that, "[w]here the state is able to safely provide reasonable basic educational opportunities and services to a child who has been removed from regular school," there is no compelling state interest in providing services only to students whose parents are able and willing to pay for them.[190] In other words, the court read the West Virginia state constitution education clause to require the state to provide students with reasonable educational services and opportunities during the time they are suspended, with an exception only for extreme cases in which specific circumstances prevent the child from being able or willing to access these services or opportunities without endangering the safety of others.[191]

In *Tunstall v. Bergeson*, the Washington State Supreme Court likewise construed the education clause in the state constitution to grant students a positive right to education.[192] The case involved facial and as-applied constitutional challenges to a state statute governing the education provided to juveniles in adult detention facilities.[193] The plaintiffs argued that because in Washington, as in West Virginia, education is a fundamental right protected by the state constitution, the state acted unconstitutionally by creating "a separate and inferior system of education for persons incarcerated in adult prisons."[194] The court disagreed. It held that the state constitution does not require that the education provided to incarcerated juveniles be identical to that provided to children who are not incarcerated. Instead, based on its conclusion that a different education program might be necessary to meet the needs of juvenile offenders,[195] the court required only that the statute "make ample provision for educational programs designed to address the special educational and rehabilitative needs of children incarcerated in adult prisons."[196] In order to prevail on their facial challenge, the plaintiffs needed to prove beyond a reasonable doubt that there was no set of circumstances in which the statute could meet the constitutional minimum, a high standard that the court did not

189. *Id.* at 351.

190. *Id.* at 349.

191. *Id.* at 350–51. It is important to note that the West Virginia Court did not clarify what constitutes reasonable educational opportunities and services. It found that it did not need to do so because the appellee had not, in her appeal, challenged the constitutional adequacy of the opportunities being provided. *Id.* at 349.

192. 5 P.3d 691, 695 (Wash. 2000).

193. *Id.* at 701.

194. *Id.*

195. *Id.* at 702.

196. *See id.* at 702.

feel that the plaintiffs had met.[197] With regard to the as-applied challenge, the court found that the plaintiffs failed to provide specific facts demonstrating that the State's application of the statute violated the constitution, and so that claim failed as well.[198] The plaintiffs therefore lost the case. Nonetheless, the court acknowledged that the state constitution education clause gives incarcerated juvenile offenders a right to education, thereby leaving the door open for future as-applied challenges to the adequacy of the education provided to incarcerated juveniles in Washington State.[199]

Not all state courts, however, have been receptive to claims challenging discipline policies under state constitutional education clauses. In *Clinton Municipal Separate School District v. Byrd*, a case brought to enjoin a school district from suspending two students for defacing school property, the Supreme Court of Mississippi recognized education to be a fundamental right, but nevertheless afforded a great deal of deference to the school board's disciplinary policies.[200] The court held that a school disciplinary regime need not be narrowly tailored to serve a compelling interest of the state or school; instead, school disciplinary schemes were enforceable if they furthered a "substantial legitimate interest" of the school district.[201] The court then upheld the disputed disciplinary rule under this lower standard of review, though it never clarified what substantial legitimate interest the challenged rule furthered.[202] The Supreme Court of Nebraska took a slightly different approach to reach a similar outcome in *Kolesnick v. Omaha Public School District.*[203] In that case, the Nebraska court held that, within the school discipline context, students do not have a fundamental right to education.[204] It therefore applied rational basis review to uphold the constitutionality of the plaintiff's expulsion, which it found it to be "rationally related to the board and school officials' interest in protecting other students and staff from violence."[205]

In *Doe v. Superintendent of Schools of Worchester*, the Supreme Judicial Court of Massachusetts held that, while the state constitution

197. *Id.* at 702.

198. *Id.* at 703.

199. Twomey, *supra* note 42, at 787–88 (noting that the Court's acknowledgement of the constitutional right to education makes "future as-applied challenges based on specific conditions in detention centers . . . plausible").

200. 477 So. 2d 237, 238, 240–42 (Miss. 1985).

201. *Id.* at 241.

202. *Id.*

203. 558 N.W.2d 807 (Neb. 1997).

204. *Id.* at 813.

205. *Id.*

established a right to education, this did not guarantee each individual student the right to an education; rather it created a right to the *opportunity* to receive an adequate education, an opportunity that could be lost by students as a result of their actions.[206] Having reached this conclusion, the court applied rational basis review to deny the plaintiff's claim that her expulsion was unconstitutional.[207] The court also suggested in dicta that the state constitution did not require school systems to provide an educational alternative to students who are properly expelled, speculating that a requirement that a student who is expelled be provided with an alternate education by the public school system "would be likely to have a serious detrimental effect on the ability of school officials to deter dangerous behavior within a school by imposing expulsion as a sanction."[208] The Supreme Court of Wyoming relied on the reasoning from *Doe* to conclude that the Wyoming Constitution similarly created a fundamental right in the opportunity for an education, rather than a fundamental right to the education itself,[209] and that the state constitution did not require school districts to provide an alternate education to lawfully expelled students.[210]

Most recently, in *King v. Beaufort County Board of Education*, the Supreme Court of North Carolina established an intermediate scrutiny standard for analyzing a school district's decision to deny a student an alternative education during a long-term suspension.[211] Citing "longstanding precedent affording school officials discretion in administering student disciplinary codes,"[212] the court declined to find a fundamental right to alternative education to exist under the state constitution.[213] Nevertheless, the court concluded that, given its previous recognition of state constitutional rights to equal educational access and a sound basic education, school administrators must articulate an "important or significant reason for denying students access to alternative education"

206. 653 N.E.2d 1088, 1095–96 (Mass. 1995).

207. *Id.* at 1097.

208. *Id.*

209. *In re* R.M., 102 P.3d 868, 872–74 (Wyo. 2004).

210. *Id.* at 876.

211. 704 S.E.2d 259 (N.C. 2010).

212. *Id.* at 260.

213. *Id.* at 261. In a partial dissent, Justice Timmons-Goodson, joined by Justice Hudson, offered a strong critique of the majority decision, arguing that the court should have applied strict scrutiny, since the case involved a fundamental right—namely, the right to "the opportunity for a sound basic education." *Id.* at 266 (Timmons-Goodson, J., concurring in part and dissenting in part). Therefore, she concluded, "if it is possible to provide a student who has infringed a school rule with some form of education without jeopardizing the safety of others, then that opportunity should be provided." *Id.* at 268.

during a suspension.[214]

Several law review articles have also discussed the possibility of using state constitution education clauses to challenge school disciplinary policies and practices, such as the use of in-school suspensions,[215] suspensions and expulsions,[216] or zero tolerance policies in general.[217] They have also suggested that state constitution education clauses be used to argue that students are entitled to an education while suspended or expelled,[218] or in juvenile detention.[219] However, only one of these articles actually laid out precise arguments that plaintiffs could make and challenges that they would face, and it focused specifically on challenges by students in juvenile detention.[220] More significantly, all of the existing relevant literature discusses using education clauses in a relatively basic way—arguing simply that some practice deprives a child or class of children of an education, and that it is therefore unconstitutional. As seen in the aforementioned cases, this strategy has often been unsuccessful.

Therefore, in Part V, I illustrate how advocates can leverage state constitution education clauses by using the specific language and standards from education finance litigation, in which courts have interpreted those clauses, to contest zero tolerance practices. The majority of state constitution education clauses impose some minimum standard of quality, ranging from requiring a "thorough and efficient" system of education, to mandating "an efficient system of high quality public educational institutions and services."[221] In many states, litigants have successfully relied on these clauses to challenge what they assert to be the inadequate state funding of public schools.[222] In their decisions in these cases, state

214. *Id.* at 265.

215. Brent E. Troyan, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1654–61 (2003).

216. Blumenson & Nilsen, *supra* note 8, at 113–15.

217. Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL'Y 327, 350–61 (2005).

218. Reed, *supra* note 181, at 591–602.

219. Twomey, *supra* note 42, at 788–806.

220. *Id.* at 801–09.

221. Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 B.Y.U. EDUC. & L.J. 281, 291–92 (2007).

222. *See, e.g.*, Rose v. Council for Better Education, 790 S.W.2d 186, 215 (Ky. 1989) (finding the statutes creating, implementing and financing the Kentucky state school system to violate the state constitution by failing to provide an efficient system of public schooling); Abbott v. Burke, 693 A.2d 417, 421 (N.J. 1997) (striking down a state school financing law because it failed to provide adequate resources to students in poor urban schools); McDuffy v. Sec'y of the Executive Office of Educ. 615 N.E.2d 516, 617 (Mass. 1993) (finding that, by inadequately funding its public schools, Massachusetts had failed to fulfill its state constitutional duty to educate all children in the state).

courts have established standards for what constitutes a constitutionally adequate education in their state, generally concluding that an adequate education must, at a minimum, prepare students to effectively compete for and sustain employment[223] and to participate in American political and civic life as voters and jurors.[224] By demonstrating that zero tolerance policies and practices reduce the likelihood of these standards actually being met, plaintiffs will, I argue, be more persuasive in challenging these policies on state constitutional grounds.

I use New York as an example of how litigants could use the existing education finance law to challenge zero tolerance policies, although similar litigation would be viable in many other states, and I focus specifically on suspensions, though analogous concepts could be applied to other punitive discipline procedures. I focus on New York because it is a state in which there may be a realistic possibility of using education finance litigation as a tool for contesting zero tolerance policies despite the fact that the New York Court of Appeals has never declared education to be a fundamental right for equal protection purposes.[225] I explore three ways of using education finance litigation to argue that suspensions in New York violate the state constitution Education Article. I assert first that students who are suspended are entitled to the opportunity for an adequate education while suspended. Second, I contend that excessive suspensions are unconstitutional because they increase the likelihood that a student will drop out—an inadequate outcome, which means that the frequency and duration of suspensions must be reduced. Finally, I argue that schools have an affirmative duty under the Education Article to address the underlying causes of inappropriate behavior. Because these arguments each have limitations and are not mutually exclusive, they may be most effective

223. Umpstead, *supra* note 221, at 308–09.

224. *Id.* at 310.

225. For states in which education has been declared a fundamental right, such as California (Serrano v. Priest, 557 P.2d 929, 948 (Cal. 1976)), Connecticut (Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977)), Kentucky (Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (Ky. 1989)), and New Hampshire (Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358–59 (N.H. 1997)), the primary arguments should be more straightforward: since deprivations of fundamental rights should theoretically be subject to strict scrutiny review, a state would have the burden of demonstrating that any challenged policy or practice was narrowly tailored to meet a compelling state interest. It seems unlikely that states could justify zero tolerance policies under this standard of review. Though the primary justification for zero tolerance policies, suspensions, expulsions, arrests on school grounds, and other harsh disciplinary measures is that they promote school safety, as explained above, there is little evidence that these tactics actually make schools safer, and in many cases there are other options for improving school safety (counseling, conflict resolution, and so on) that do not deprive students of a fundamental right. However, as discussed above, courts have generally failed to apply strict scrutiny to fundamental rights challenges to zero tolerance policies. *See supra* notes 200–02 and 206–14, and accompanying text.

when used in combination.

V.
SUSPENSIONS AS VIOLATIONS OF THE NEW YORK CONSTITUTION EDUCATION ARTICLE

A. Education Finance Litigation in New York

The New York State Constitution mandates that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[226] In a 1982 case, *Board of Education, Levittown Union Free School Dist. v. Nyquist*, plaintiffs argued that the state's system for funding schools violated this clause because it "result[ed] in grossly disparate financial support (and thus grossly disparate educational opportunities) in the school districts of the State."[227] The New York Court of Appeals interpreted the Education Article to mean that the state must provide that which is necessary for students to receive the opportunity for "a sound basic education."[228] However, it held that the state constitution did not require equal funding across districts,[229] and found that the plaintiffs had made no showing that the current system was affording students an inadequate education.[230]

Thirteen years later, in *Campaign for Fiscal Equity v. State* (*CFE*), plaintiffs argued that students in New York City were not being provided the opportunity to receive a sound basic education because they were not receiving minimally adequate educational services and facilities,[231] and the court concluded that this constituted a legitimate claim under the Education Article.[232] The court defined a sound basic education as one which equips students with "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[233] The court identified some of the inputs that are necessary for students to receive an adequate education, including adequate physical facilities, reasonably current textbooks, and personnel sufficiently trained to teach their subject areas.[234] However, the court also noted that in order to succeed in their specific

226. N.Y. CONST. art. XI, § 1.
227. 439 N.E.2d 359, 361–62 (N.Y. 1982).
228. *Id.* at 369.
229. *Id.* at 363–64.
230. *Id.* at 369.
231. 655 N.E.2d 661, 665 (N.Y. 1995).
232. *Id.*
233. *Id.* at 666.
234. *Id.*

case, "plaintiffs [would] have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children."[235] The court therefore remitted the matter to the trial court in order to give the plaintiffs the opportunity to demonstrate such a link.[236]

In 2003, the case returned to the Court of Appeals, which found that the student plaintiffs had in fact been deprived of a sound basic education.[237] The court concluded that the educational inputs, including teacher quality, school facilities and classrooms, and instrumentalities of learning, such as desks, chairs, pencils, and reasonably current textbooks, provided to students in New York City were inadequate, and produced poor outcomes, such as low standardized test scores and high dropout rates.[238] The court therefore ordered the State to ascertain the cost of providing a sound basic education in New York City, furnish the necessary resources to meet that goal, and establish a system of accountability to measure whether the reforms actually afford the opportunity for all students to receive a sound basic education.[239] The court also clarified what level of education was necessary to meet that standard, noting that "a sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."[240] The court further concluded that the requirement, established in *CFE I*, that students "function productively" meant that they must be prepared to "compete for jobs that enable them to support themselves," and that "for this purpose, a high school level education is now all but indispensible."[241]

The *CFE* litigation played a significant role in addressing inadequate funding for New York City schools. In its decisions in the case, the New York Court of Appeals established educational standards and rights that can aid advocates challenging inappropriate and excessive school discipline

235. *Id.*

236. Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 902 (2003) [hereinafter CFE II].

237. *Id.*

238. *Id.* at 909–920.

239. *Id.* at 930. The case returned to the Court of Appeals in 2006, at which point the Court addressed the cost of providing students in New York City with a sound basic education. Despite plaintiff's objections that the figure estimated by the state was inadequate, the Court deferred to the state's determination of the minimum amount of money required to provide a sound basic education to New York City schoolchildren. However, that iteration of the case merely concerned the question of how much it costs to provide an adequate education, and did nothing to change the definition of what an adequate education must include, so it is less relevant to the arguments in this paper. *See* Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14 (2006) [hereinafter CFE III].

240. *Id.* at 904.

241. *Id.* at 906.

practices.

B. Application of Education Finance Litigation to Suspensions in New York

1. Suspended Students Do Not Receive the Sound Basic Education to Which They Are Entitled

Suspensions violate New York's Education Article because the education provided to students who are suspended does not meet the standard set forth in *CFE I* and *II* for a sound basic education.[242]

New York, unlike some states, requires that students receive an education while they are suspended.[243] It appears, however, that many students are not being given the opportunity for a sound basic education during their suspensions. For example, New York City students who are given long-term suspensions must attend "suspension centers" or "alternative instructional sites."[244] Data on these alternative schools are lacking or not easily accessible, but many advocates describe them as simply warehousing children rather than educating them.[245] A trial court adopted this language in a class-action lawsuit filed against the New York City Department of Education on behalf of disabled students, noting in its factual findings that one of the plaintiffs was repeatedly "warehoused in inappropriate suspension centers."[246] Although specific details about the learning environment at these sites is difficult to obtain, the New York Civil Liberties Union has "received reports of inappropriate or non-existent learning materials, overcrowding, and lack of supervision at these placements,"[247] and students attending suspension centers have recounted

242. *CFE II*, 100 N.Y.2d at 905–06 (holding that the standard set forth in *CFE I* obliges the state to provide students with a high school education that would allow them to compete for jobs with which they could support themselves). In many other states, suspended students are simply kept out of school, raising even stronger arguments that suspension does not meet state constitutional standards. *See* ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 17, at vii.

243. *See* N.Y. EDUC. LAW § 3214(3)(e) (Consol. 2007).

244. NEW YORK CITY DEP'T OF EDUC., CITYWIDE STANDARDS OF DISCIPLINE AND INTERVENTION MEASURES: THE DISCIPLINE CODE AND BILL OF STUDENT RIGHTS AND RESPONSIBILITIES, K–12 27 (2008).

245. For example, Advocates for Children of New York (AFC), describes its "Out of School Youth Project" as a program designed to assist students who have been "warehoused in programs like suspension centers and alternative settings." *Programs and Projects*, ADVOCATES FOR CHILDREN OF NEW YORK, http://www.advocatesforchildren.org/programs.php (last visited June 30, 2011).

246. N.T. v. New York State Educ. Dep't, CV-02-5118, at 8 (E.D.N.Y. Jan. 29, 2004).

247. Testimony of Donna Lieberman, on behalf of the New York Civil Liberties Union (NYCLU), before The New York City Council Committees On Education And Civil Rights Regarding The Impact Of Suspensions On Students' Education Rights (Jan 23,

problems such as attending suspension sites for months without ever receiving coursework from their home school.[248]

Obviously potential litigants would want to gather greater support for a contention that the alternative schools provide inadequate education before bringing a lawsuit. Information about factors discussed in *CFE I* and *II*, such as the qualifications of teachers in the suspension schools and the test scores of the students who attended them, should be attainable through Freedom of Information Law requests.[249] Advocates may want to pursue other strategies as well, such as interviewing students who attended these schools to gain insight about areas where further investigation could be beneficial. Since the available anecdotal evidence provided by students and non-profit organizations suggests that the education provided in these schools is inadequate, I will assume for the purpose of this Article that, when the data are compiled, there will be sufficient support for an argument that there is a system-wide failure to provide an adequate education in suspension schools in New York. I therefore proceed with the analysis of whether students who have been suspended have forfeited their right to an adequate education during the period of their suspension.

The fact that a student was suspended does not provide a basis for depriving her of a sound basic education. Though the New York Court of Appeals has never specifically addressed the question of whether suspended students have forfeited their right to an adequate education, the Education Article of the New York State Constitution states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein *all* the children of this state may be educated," [250] and the Court of Appeals has interpreted this to mean that the State has an obligation to "ensure the availability of a 'sound basic education' to *all* its children."[251] A purely textual analysis of this language suggests that it must include suspended students. The term "all," as defined by the Merriam-Webster dictionary to mean "every member or

2008), http://www.nyclu.org/content/impact-of-school-suspensions-and-demand-passage-of-student-safety-act.

248. In 2006, for example, Na-Sia Chinn, then a junior at Lafayette High School in New York, reported, during a public forum on New York public schooling organized by the NYCLU, that she never received any work from her home school during the six months she attended an alternative school. Na-Sia Chinn, Junior, Lafayette High School, and Intern, Each One, Teach One Youth Leadership Training Program, Remarks at NYCLU Public Forum, *Working Toward a Common Goal: Safe, Supportive Schools for Every New York Teen* (Mar. 2, 2006).

249. The Freedom of Information Law, N.Y. PUB. OFF. LAW § 87 (Consol. 2009), is the New York State equivalent of the federal Freedom of Information Act and requires the state to make government records publicly available upon request.

250. N.Y. CONST. art. XI, § 1 (emphasis added).

251. CFE II, 100 N.Y.2d 893, 902 (2003) (emphasis added).

individual component of,"[252] does not appear to leave room for exceptions.[253]

There is a risk, however, that the New York Court of Appeals would take an approach similar to the analysis conducted in Massachusetts and Wyoming, and conclude that the legislature is only required to make a sound basic education "available" to all students, who can then forfeit this right by misbehaving.[254] New York State education statutes, however, make clear that suspended students have not forfeited their right to education. First, the education laws specifically distinguish incarcerated youth, who are merely *eligible* for educational services,[255] from all other students, who are *entitled* to them.[256] Because suspended students are not incarcerated, they fall into the class of students who are entitled to educational services. Second, New York education law states that when a pupil of compulsory education age has been suspended, "immediate steps shall be taken for his or her attendance upon instruction elsewhere or for supervision or detention of said pupil pursuant to the provisions of article seven of the family court act."[257] Therefore, unless a student is placed in detention or under other supervision, the student is entitled under New York education law to have immediate steps taken so that she may attend school elsewhere. She has not, in other words, forfeited her educational rights.

Furthermore, given the *CFE II* court's conclusion that the New York Constitution requires the state to make an adequate education available to

252. *all,* MERRIAM-WEBSTER (digital edition), http://www.merriam-webster.com/dictionary/all (last visited June 30, 2011).

253. In *Handberry v. Thompson,* the Second Circuit Court of Appeals rejected a somewhat analogous claim by incarcerated youth that the New York Education Article gave them a property interest in their education for Fourteenth Amendment due process purposes. 436 F.3d 335, 353 (2d Cir. 2006). The court instead found that on its face, the New York Education Article requires only that the legislature maintain a public school system. *Id.* If adopted by the New York state courts, the Second Circuit's interpretation of the Education Article would presumably similarly mean that the Article does not give students the right to an education while suspended. Nevertheless, the Second Circuit in *Handberry* did not even mention *CFE II* or discuss the New York Court of Appeals' conclusion that the article requires the state to "ensure the availability of a 'sound basic education' to all its children." *CFE II,* 100 N.Y.2d at 901. There is no reason to believe that the New York Court of Appeals would abandon its interpretation of the education article in favor of the Second Circuit's interpretation, and lower state courts are obviously bound by the New York Court of Appeals' interpretation, so *Handberry* would probably be of little relevance in a state court claim.

254. *See supra* notes 206–210, and accompanying text.

255. N.Y. EDUC. LAW § 3202(7) (Consol. 2007).

256. N.Y. EDUC. LAW § 3202(1) (Consol. 2007) (establishing that "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition").

257. N.Y. EDUC. LAW § 3214(3)(e) (Consol. 2007).

all students,[258] the contention that students who are suspended may have forfeited their right to an adequate education would likely need to be predicated on the assumptions that students who are suspended have demonstrated considerable deviance from normal behavior and that the school itself did not contribute to that forfeiture. As discussed in Part II, schools routinely impose lengthy suspensions for conduct that has historically been viewed as typical childhood or adolescent behavior.[259] In addition, zero tolerance policies are significantly more prevalent in schools with primarily poor, minority students than in schools with wealthier, whiter student bodies. If students forfeit their right to education simply by engaging in ordinary teenage antics, that right becomes hollow. The notion that the same behavior could constitute a forfeiture in schools with more disadvantaged populations but not in more privileged schools is particularly problematic, especially given research discussed in Part II suggesting that harsh school cultures actually increase the likelihood of school disorder and unruly behavior. Essentially, a subset of students attend school in an environment that pressures them to engage in disruptive behavior and then punishes them excessively when they do, so their supposed forfeiture is largely due to their being schooled in an ineffective educational setting and punished more harshly than their peers in other schools. Moreover, if numerous students in a school are seen to be forfeiting their education, then the state's obligation to provide *all* students an adequate education becomes completely meaningless.

Finally, the rationales provided by the New York Court of Appeals in *CFE I* and *II* for why students are entitled to a sound basic education apply just as strongly to students who are suspended. Suspended students will grow up to be voters and jurors, and will be expected to be productive members of the workforce, so they too need to be prepared for "meaningful civic participation in contemporary society."[260] Moreover, unless the due process procedures for suspensions deprive students of the right to ever receive an adequate education, they cannot have sacrificed their right to a certain level of education during a long-term suspension because, as the court noted in *CFE II,* education is cumulative.[261] If students who are suspended for a significant period of time do not receive an adequate education while suspended, then they will have fallen well

258. CFE II, 100 N.Y.2d 893, 902 (N.Y. 2003) (holding that "by mandating a school system 'wherein all the children of this state may be educated,' the State has obligated itself constitutionally to ensure the availability of a 'sound basic education' to *all* its children") (emphasis added).

259. *See supra* notes 16–18, and accompanying text.

260. *CFE II,* 100 N.Y.2d at 905 (quoting CFE I, 655 N.E.2d 661, 665 (N.Y. 1995)).

261. *Id.* at 915 (quoting Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 492, (N.Y. Sup. Ct. 2001)).

behind their classmates by the time they complete their suspension. For some subjects, if students are out of school and not receiving alternate adequate instruction, they may miss the chance to learn foundational concepts. When they return to school without this foundation, they will not be in a position to learn the more advanced concepts that build on the information they missed. If students are not entitled to an adequate education while suspended, they similarly will not be entitled to compensatory education to enable them to catch up after a suspension. Therefore, they will be left trailing behind their classmates, unable to complete schoolwork that assumes mastery of topics that they have never studied, and possibly permanently deprived of a sound basic education.

2. Suspensions Cause Inadequate Outcomes

Suspensions also violate students' rights to a sound basic education because they lead to high dropout rates. In *CFE II*, the New York Court of Appeals observed that, since a sound basic education requires, at minimum, a meaningful high school education, it may "be presumed that a dropout has not received a sound basic education."[262] Though the state contended that it was only responsible for providing the opportunity for a sound basic education, and could not be held responsible if students chose to drop out,[263] the court rejected this argument, noting that the state must actually place the opportunity to receive a sound basic education "within the reach of all students," and that large dropout rates "reflect problems with the school."[264] Statistics linking school suspensions with an increased likelihood of dropping out are available in abundance,[265] so it can be presumed that many students who are suspended do not ultimately receive a sound basic education. Furthermore, as discussed below, the suspensions themselves are likely contributing to the high dropout rates. Since being suspended increases the chances that a student will drop out, schools, by suspending students, are actually reducing the opportunity of students to receive a sound basic education. Therefore, suspensions, when used excessively, are unconstitutional.

The primary obstacle to this argument is establishing causation. Most research that purports to study the impact of suspensions relies purely on correlations.[266] This invites the response that suspensions are strongly correlated with dropout rates simply because insubordinate students are

262. *CFE II*, 100 N.Y.2d at 914.

263. *Id.* at 915.

264. *Id.*

265. *See, e.g.*, ZERO TOLERANCE TASK FORCE, EVIDENTIARY REVIEW, *supra* note 8, at 50–52; SKIBA, ZERO EVIDENCE, *supra* note 11, at 13.

266. *See, e.g.*, Raffaele Mendez, *Predictors of Suspension*, *supra* note 44.

getting suspended, and since they are insubordinate, those students would have dropped out even if they were not suspended. However, expert opinions, anecdotal evidence from teachers, and some empirical research all lend support to the conclusion that a causal link does exist.

First, researchers conducting a comparative study of London schools found that "when students transferred from a school with a high dropout rate to one with a low dropout rate, their behavior tended to conform to the low rate."[267] This buttresses the theory that disobedience in school is largely due to a problematic educational environment, rather than the intrinsic deviance of individual students. As a result, higher dropout rates among students who have been suspended cannot be attributed simply to the inherent nature of the students. Furthermore, experts have concluded that "suspensions and expulsions tend to speed up the dropping out process,"[268] and that "suspensions may simply accelerate the course of delinquency by providing a troubled youth with little parental supervision and more opportunities to socialize with deviant peers."[269] Some have even suggested that schools use suspensions strategically as a push-out tool to get difficult students to leave school for good.[270] As explained in a report by the Advancement Project:

> Because of the focus on test scores [under No Child Left Behind] and the severe consequences attached to them, if a student acts up in class, it is no longer in educators' self-interest to address it by assessing the student's unmet needs or treating the incident as a "teachable moment" .... [I]t is much easier and more "efficient" to simply remove the child from class through punitive disciplinary measures and focus on the remaining students .... As a result, the practice of pushing struggling students out of school to boost test scores has become quite common.[271]

"By removing low-achieving disruptive students from the schools," another article similarly argued, zero tolerance policies "may increase the likelihood that average levels of student achievement will rise in order to meet state or district standards."[272]

Anecdotal reports by teachers further the conclusion that suspensions

267. Dona M. Kagan, *How Schools Alienate Students at Risk: A Model for Examining Proximal Classroom Variables*, 25 EDUC. PSYCHOLOGIST 105, 107 (1990) (citing Porter W. Sexton, *Trying to Make It Real Compared to What? Implications of High School Dropout Statistics*, 5 J. EDUC. EQUITY & LEADERSHIP 92 (1985)).

268. Lawrence M. DeRidder, *The Impact of School Suspensions and Expulsions on Dropping Out*, 68 EDUC. HORIZONS 153, 154 (1990).

269. ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED, *supra* note 17, at vii.

270. *See* SKIBA, ZERO EVIDENCE, *supra* note 11, at 13.

271. TEST, PUNISH, *supra* note 8, at 29.

272. Gagnon & Leone, *supra* note 85, at 103.

set students on a trajectory towards dropping out. In a study of teachers' views about school discipline, one teacher at a large high school in Manhattan with twenty years of experience could not "remember a case when a kid was suspended and after they came back their academic performance didn't plummet, that's always the case."[273] Another teacher described a specific incident in which a group of students received a three month suspension for smoking marijuana at school. When the students finally returned, she recalled, "they were failing everything, they never returned full time, they finally transferred to another school. They were really smart kids and they could have done really well. It kind of ruined their lives."[274] Finally, researchers have found that suspensions themselves exacerbate antisocial behavior.[275] While we do not know the ultimate fate of the students referred to by the teachers above, or those in the aforementioned empirical study, both the teachers' statements and the empirical research support the conclusion that suspensions are a cause of delinquency, rather than merely a correlate. This bolsters the proposition that suspensions do actually produce higher dropout rates.

A true experimental analysis of the consequences of suspensions is probably unrealistic, because it would require students who misbehave to be randomly assigned to be suspended or not be suspended. It is unlikely that teachers and administrators would agree to participate in a study that requires them to give up control over disciplinary decisions. Even if school personnel were willing to participate, parents and students would almost certainly be unwilling to accept the unequal application of discipline necessary to run such a study. However, a quasi-experimental study, comparing the outcomes for students with similar backgrounds and infractions who received different types of discipline, would be easier to undertake and could potentially provide strong evidence that suspensions increase the chances that a student will drop out. If litigants are able to conduct or commission such a study, it would likely strengthen a claim that suspensions are unconstitutional because they lead to inadequate outcomes.

A second objection to the argument that suspensions cause inadequate outcomes might be that, even if suspensions do increase dropout rates,

273. SULLIVAN & KEENEY, *supra* note 16, at 15.

274. *Id.* at 16.

275. Sheryl A. Hemphill, John W. Toumbourou, Todd I. Herrenkohl, Barbara J. McMorris & Richard F. Catalano, *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. ADOLESCENT HEALTH 736, 741 (2006). Among students who self-reported similar levels of antisocial behavior, such as stealing, bringing a weapon to school, or beating someone up, those who were suspended engaged in significantly more antisocial behavior one year later than those who were not suspended. *Id.*

they do so only because of the inadequate education students receive while suspended. Following this logic, the state would have no obligation to reduce suspensions so long as it ensured that suspended students continued to receive an adequate education. However, the denial of an adequate education during the time of suspension is not the only harm caused by suspension. First, even if the academics at alternative schools improve, the rolling enrollment and departure of students at these schools will continue to create a chaotic and disorganized environment not conducive to learning.[276] Furthermore, students in suspension schools are inevitably surrounded by peers who have also been suspended. This facilitates their introduction to, and association with, other students sanctioned for disobedience. Research has shown a strong link between interacting with rebellious peers and increased levels of inappropriate behavior; one study found that for each unit increase in association with antisocial peers, antisocial behavior one year later had increased seven-fold.[277] Therefore, placing suspended students in an environment where all of their classmates have also been suspended may in and of itself contribute to problematic outcomes, regardless of the quality of education being provided there. Finally, as recognized by the Supreme Court in *Goss*, being suspended can cause reputational harm to students,[278] and this stigma can be far from innocuous. Studies reveal that a teacher can evoke behavior from a student that confirms the teacher's expectations of how the student will behave, creating what is known as a "self-fulfilling prophecy."[279] Research also suggests that students may incorporate the notion that they are disobedient into their self-concepts and behave accordingly.[280] These findings indicate that labeling a child as "bad" may actually increase the chances that the child will misbehave in the future and eventually drop out.

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276. *See* Marsha Weissman, Elaine Wolf, Kathryn Sowards, Christine Abaté, Pamela Weinberg & Charlee Marthia, *School Yard or Prison Yard: Improving Outcomes for Marginalized Youth* 3 (Ctr. for Cmty. Alternatives, Justice Strategies Working Paper, April 2005), http://www.communityalternatives.org/pdf/sfs.pdf (noting the "chaotic and disorganized environment" in alternative schools nationwide "due in part to rolling enrollment and exit").

277. Hemphill, Toumbourou, Herrenkohl, McMorris & Catalano, *supra* note 275, at 741.

278. 419 U.S. 565, 575–76 (1975) (noting that suspensions implicate "the liberty interest in reputation" by possibly "damag[ing] the students' standing with their fellow pupils and their teachers").

279. *See* Lee Jussim, Jacquelynne Eccles & Stephanie Madon, *Social Perception, Social Stereotypes, and Teacher Expectations: Accuracy and the Quest for the Powerful Self-Fulfilling Prophecy*, 28 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 281, 283 (1996).

280. *See* Jeffrey S. Victor, *Sluts and Wiggers: A Study of the Effects of Derogatory Labeling*, 25 DEVIANT BEHAV. 67, 71 (2004).

3. *Schools Have an Affirmative Duty to Address the Underlying Causes of Improper Behavior*

Finally, suspensions are unconstitutional because, by simply suspending students who misbehave, schools fail to fulfill the constitutional requirement that they prepare students to compete for and maintain employment. In *CFE II*, the New York State Court of Appeals defined a sound basic education as one that conveys the skills necessary to meet the practical goal of "meaningful civic participation in contemporary society."[281] The court further noted that a sound basic education must "prepare students to compete for jobs that enable them to support themselves."[282] In addition to reducing the chances that students will complete school, which itself can make getting a job more difficult,[283] many of the underlying factors that lead to suspensions also function directly as barriers to employment. The mandate that schools prepare students for jobs should therefore encompass a duty to address students' psychological well-being, behavioral issues, and other factors that are likely to inhibit students from functioning successfully in the workplace. Since suspensions do not address these underlying concerns, they are constitutionally inadequate mechanisms for addressing problematic behavior.

Some examples of this are obvious. For instance, aggressive behavior is rarely tolerated in the workplace, making it unsurprising that low self-control of emotions, as characterized by aggression at age eight, has been found to be directly correlated with long-term unemployment in adulthood.[284] Interventions designed to help aggressive students control their emotions are therefore a necessary component of a sound basic education. The impact of poor psychological well-being may be more subtle, but it too interferes with people's ability to obtain and maintain jobs, and is often at the root of the improper behaviors for which students are suspended. For example, researchers have found that school-age bullies tend to have low self-esteem and that children and adolescents who

281. 100 N.Y.2d 893, 905 (2003).

282. *Id.* at 906.

283. *See, e.g.*, ANDREW SUM, ISHWAR KHATIWADA, JOSEPH MCLAUGHLIN & SHEILA PALMA, CTR. FOR LABOR MARKET STUDIES, THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL: JOBLESSNESS AND JAILING FOR HIGH SCHOOL DROPOUTS AND THE HIGH COST FOR TAXPAYERS 2 (2009) (noting that the average unemployment rate of young high school dropouts in 2008 was fifty-four percent. This meant that their employment rate was twenty-two percentage points below the employment rate of high school graduates, thirty-three percentage points below that of young adults who had completed one to three years of post-secondary schooling, and forty-one percentage points below that of their peers who held a four year college degree).

284. Katja Kokko, Lea Pulkkinen & Minna Puustinen, *Selection into Long-Term Unemployment and its Psychological Consequences*, 24 INT'L J. BEHAV. DEV. 310, 318 (2000).

frequently engage in bullying behavior have lower self-esteem than those who engage in bullying only occasionally.[285] Similarly, teachers report poorer behavior in class by students with low self-concept than students with high self-concept.[286] Without supportive intervention, many students who exhibit inappropriate behavior due to low self-esteem will, as adults, face difficulty in the competitive job market. In a longitudinal study of young adults, those with healthier—i.e. lower—initial levels of negative self-esteem were significantly more likely to be employed nine months later.[287] Another study comparing welfare recipients who got well-paying jobs with those who attained less lucrative jobs concluded that self-esteem has "a demonstrated association with a welfare recipient's ability to obtain a job that pays significantly more than minimum wage."[288] This may be because individuals who have lower self-esteem are less likely to persist at difficult tasks, such as finding a job, than those with higher self-esteem.[289] Thus, a school that fails to provide counseling or otherwise address self-esteem issues for students whose poor behavior is rooted in low self-esteem does not provide those students with the sound basic education necessary for them to obtain employment.

Critics could argue that the New York Education Article only requires schools to provide the academic skills necessary for employment, and that character and behavioral development are beyond the scope of its obligation. While the court in *CFE II* held that an adequate education must prepare students to obtain competitive employment, the court equated a sound basic education with "the basic *literacy, calculating, and verbal skills* necessary to enable children to eventually function productively."[290] Furthermore, the court's conclusions were based on a statement made by the Committee on Education at the time the Education Article was enacted in 1894 that "public problems confronting the rising generation will demand *accurate knowledge* and the *highest development*

285. M. O'Moore & C. Kirkham, *Self-Esteem and Its Relationship to Bullying Behaviour*, 27 AGGRESSIVE BEHAV. 269, 278 (2001).

286. Ian Hay, Adrian F. Ashman & Christina E. Van Kraayenoord, *Educational Characteristics of Students with High or Low Self-Concept*, 35 PSYCHOL. SCH. 391, 394–95 (1998).

287. *See* L.J. Mean Patterson, *Long-Term Unemployment Amongst Adolescents: A Longitudinal Study*, 20 J. ADOLESCENCE 261, 274 (1997).

288. Michael Sullivan, *Welfare Reform Transitions: The Effects of Emotional Well-Being on Job Status in Current TANF Recipients*, 12 J. HUMAN BEHAV. SOC. ENV'T 1, 10 (2005).

289. Ruth Kanfer, Connie R. Wanberg & Tracy M. Kantrowitz, *Job Search and Employment: A Personality-Motivational Analysis and Meta-Analytic Review*, 86 J. APPLIED PSYCHOL. 837, 841, 844 (2001).

290. CFE II, 100 N.Y.2d 893, 905 (2003) (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 665 (N.Y. 1995)) (emphasis added).

of reasoning power more than ever before."[291] Therefore, one might surmise that the state's responsibility to provide a sound basic education extends only to academic instruction, and does not require schools to actually prepare students socially and psychologically for the workforce.

However, that conclusion both distorts the historical understanding of the purpose of public education and disregards language from the same 1894 Committee on Education that clearly supports broader education goals. New York State legislative history is littered with comments illustrating that legislators viewed education as encompassing instruction on how to behave in society, rather than comprising purely academic lessons. In 1812, the New York Legislature created a commission to report on a system for the establishment of common schools and ultimately enacted a bill submitted by the commission.[292] The commissioners' report concluded that

> [e]ducation, as the means of improving the *moral* and intellectual facilities, is . . . a subject of the most imposing consideration . . . . [I]n a government like ours . . . it is absolutely essential that people be enlightened. They must possess both intelligence and *virtue*: intelligence to perceive what is right, and *virtue to do what is right* . . . . Reading, writing, arithmetic, and *the principles of morality* are essential to every person.[293]

In 1826, Governor DeWitt Clinton, while stressing the importance of qualified teachers in an address to the state legislature, noted that "the vocation of a teacher, in its influence on the *character* and destinies of the rising and all future generations, has either not been fully understood or duly estimated."[294] In 1851, Superintendent Christopher Morgan presented a report to the legislature addressing the primary concern of opponents to free schools—that they required certain taxpayers to contribute to the education of other people's children.[295] He argued in favor of free education by stressing that, educating every child "to the top of his facilities" bestowed upon the community "productive artisans, *good citizens*, upright jurors and magistrates, enlightened statesmen, scientific discovers and inventors, and *the dispensers of a pervading influence in favor of honesty, virtue and true goodness*."[296] "Educate every child physically, *morally*, and intellectually," he urged, "and many of your

291. *CFE II*, 100 N.Y.2d at 905.

292. Paynter v. State, 100 N.Y.2d 434, 456 (2003) (Smith, J., dissenting).

293. *Id.* at 456–57(quoting SAMUEL SIDWELL RANDALL, THE COMMON SCHOOL SYSTEM OF THE STATE OF NEW YORK 9–11 (1851)) (emphasis added).

294. *Id.* at 458 (quoting RANDALL, *supra* note 293, at 23–24) (emphasis added).

295. *Id.* at 461–62.

296. *Id.* at 462 (quoting RANDALL, *supra* note 293, at 83) (emphasis added).

prisons, penitentiaries and alms-houses will be converted into schools of industry and temples of science."[297] Finally, and most importantly, in the same report cited in *CFE* for the premise that education must provide students with the skills to obtain jobs, the 1894 Committee on Education quoted the constitution of Massachusetts to illustrate the end to which all committee members aimed:

> Wisdom and Knowledge, as well as *virtue*, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties . . . it shall be the duty of legislatures and magistrates, in all future periods of the commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university, public schools and grammer (sic) schools in the towns . . . *to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; also sincerity, good humor, and all social affectations, and generous sentiments, among the people.*[298]

The legislators who enacted the Education Article saw schools as serving two functions: developing students' intellectual facilities, and teaching them how act properly. While nineteenth century legislators' conceptions of character education may not have specifically included conflict resolution training, anger management programs, and restorative justice, they clearly viewed providing guidance to students on how to behave in society as a necessary responsibility of public schools and an important motivation for enacting the Education Article. These modern analogues fit neatly within that tradition.

C. Remedies

One major question remains unaddressed by the above discussion: if plaintiffs bringing one or more of these claims prevail, what sort of remedy might they be able to achieve? The potential remedies differ for each argument.

If a court finds that suspended students have a right to a sound basic education and that suspension schools provide an inadequate education due to inadequate inputs, the reforms implemented in response to *CFE II* provide a model for suitable remedies, including increased spending for

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297. *Id.*

298. Frederick W. Holls, *Report of the Committee on Education and the Funds Pertaining Thereto (Aug. 23, 1894), in* DOCUMENTS AND REPORTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 116–17 (George A. Glynn compiler, 1894) (emphasis added).

suspension schools, studies to determine the level of funding necessary to provide a sound basic education to students in alternative schools, and the development of a report to measure and inform the public about the performance of the schools and the students enrolled in them.[299] An appropriate remedy could also potentially include an order that certain specific inputs, such as qualified teachers and appropriate textbooks, be provided at the alternative schools. The fact that the court already established these sorts of remedies in *CFE* means that they are likely to be seen as relatively judicially manageable.

Requiring increased funding for alternative schools presents a slightly different situation than that encountered in *CFE*, however. The state is already obligated under *CFE* to provide New York City with adequate funding to ensure that every school in the city has the resources necessary to provide the opportunity for a sound basic education.[300] One could therefore argue that, if alternative schools are inadequately funded, this is because the city is not distributing its funding appropriately, rather than the result of inadequate state aid. Nevertheless, since the state remains ultimately responsible for ensuring that all its students receive an adequate education,[301] plaintiffs may want to pursue claims against both the local district, alleging that it is not supplying adequate resources to alternative schools, and the state, contending that it is not providing sufficient funding to the district and/or not exercising adequate oversight to ensure that the district is furnishing the resources necessary for alternative schools to adequately educate students.

Furthermore, the state's remedial role need not be limited to funding issues. In *Moore v. State*, an Alaska trial court found that the funding the state provided to public education was sufficient, but that its oversight of local school districts was nevertheless constitutionally inadequate.[302] The court subsequently ordered the state to identify the schools in the state that were not providing students with a constitutionally adequate

299. *See* CFE III, 8 N.Y.3d 14, 21 (2006). As discussed above, suspension schools by definition face unique challenges, such as constantly changing student populations and high concentrations of at-risk students. Additional resources would not remove these hurdles, but would nevertheless address many of the shortcomings that have been reported by students who attend these schools, and could allow the schools to provide supportive services to address their students' needs, which are likely greater than those of students in traditional schools. *See* CFE II, 100 N.Y.2d 893, 920 (2003) (recognizing the relationship between "better funding, improved inputs and better student results").

300. CFE II, 100 N.Y.2d 893, 930 (2003).

301. *See id.* at 922 (noting that "the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights").

302. Moore v. State, No. 3AN-04-9756, slip op. at 194 (Alaska Sup. Ct. June 21, 2007) (order granting stay).

education, and to take certain remedial steps, such as ensuring that the curricula in underperforming schools were aligned with state standards and that each district had an appropriate plan for overcoming the constitutional deficiencies.[303] A court could take a similar approach in this context by requiring the state to identify alternative schools that are not providing a constitutionally adequate education, assess why these schools are failing to meet the constitutional mandate, and develop plans to address the constitutional deficiencies.

Since this argument challenges only the education provided at alternative schools and not the suspensions themselves, a remedy that would reduce the frequency or length of suspensions is probably not directly attainable through this line of litigation. However, requiring that suspended students receive a sound basic education while suspended likely would make high suspension rates more costly to districts,[304] and might therefore provide an effective incentive for districts to take steps on their own to reduce the frequency of suspensions.

If a court were to find excessive suspensions unconstitutional because they increase the likelihood that a student will drop out before completing a sound basic education, a remedy designed to reduce the number of suspensions would be appropriate. A court could set a threshold that must be met for a student to be suspended. For example, in its Model Code on Education and Dignity, the Dignity in Schools Campaign[305] suggests the following standard:

> No child may be excluded from school until and unless non-exclusionary discipline alternatives have been carefully considered and tried to the extent reasonable and feasible and only if, after that consideration, it is determined that exclusion from school is absolutely necessary to protect the safety of the school community.[306]

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303. *Id.*

304. Providing students with an adequate education in suspension schools is presumably significantly more costly than educating them in their home school because the district is essentially paying twice. Removing one or two students from the home school is unlikely to significantly reduce the amount of money spent at the home school, given that most of the costs involved in running public schools, such as teacher salaries and building utilities, etc. are fixed, and most of these costs will have to be replicated in order to provide suspended students with adequate educational instruction.

305. The Dignity in Schools Campaign is an organization dedicated to "challeng[ing] the systemic problem of [student] pushout" in U.S. schools by bringing together parents, youth, educators and advocates in a campaign to promote local and national alternatives to a culture of zero-tolerance, punishment and removal." *About Us*, DIGNITY IN SCHOOLS CAMPAIGN, http://www.dignityinschools.org/node/2 (last visited June 30, 2011).

306. DIGNITY IN SCHOOLS CAMPAIGN, PRESENTING A HUMAN RIGHTS FRAMEWORK FOR SCHOOLS: A MODEL CODE ON EDUCATION AND DIGNITY 19 (2010).

In that case, the due process to which students are entitled before they are suspended would need to include a determination that the suspension is necessary to ensure school safety and that non-exclusionary alternatives are not reasonable or feasible. The court could also require schools to show that the length of the suspension is tied to that purpose. This would mean that suspensions could be no longer than the period necessary to protect the safety of the school community.[307]

Courts also could delineate, either as an alternative to a constitutional threshold for suspensions or as a way of illustrating what meets the threshold, specific violations that are sufficiently serious to warrant suspension, and others that are not. However, in order to avoid the pitfalls of zero tolerance policies, courts should make clear that even for offenses for which suspensions may be constitutional, the imposition of suspension is merely permitted, not required. Furthermore, courts might require schools to consider mitigating factors when deciding what punishment to impose. Courts could also place limits on the length of suspensions schools can constitutionally apply. Finally, courts could simply order a reduction in suspensions, but allow the legislature or schools to determine how to accomplish this goal.

In conjunction with any of these remedies, a court could also require the state to collect and publish comprehensive data on suspensions from schools and districts, including information such as the offenses and the lengths of suspensions imposed, disaggregated by student characteristics, in order to enhance enforcement of the remedy.[308] A court could also direct

307. A similar analysis is done routinely in the context of mental health involuntary commitment. In New York, for example, at the request of an involuntarily committed individual, the state must hold a hearing on the question of the need for involuntary care and treatment. In order to continue to hold the individual involuntarily, the state must demonstrate by clear and convincing evidence that she is afflicted with mental illness to such a degree that she poses such a real and present threat of substantial harm to herself or others that she is in need of treatment in a state mental facility. 66 N.Y. JUR. *Infants and other Persons Under Legal Disability* § 91 (2009).

308. While the recently-enacted Student Safety Act, discussed *supra* notes 141-142, and accompanying text, requires the reporting of some suspension-related data, the information it requires schools to provide is far from complete. The Act does not, for example, require schools to provide information on the types of offenses for which students have been suspended. *See* NEW YORK, N.Y., 8 Admin. Code §1102 (2011) (requiring the annual reporting of the number of students subjected to suspension in each school, disaggregated by race/ethnicity, gender, the student's grade level at the time of the imposition of the discipline, the age of the student and whether the student is receiving special education services or is an English Language Learner—but requiring no information about the cause of the suspension). This information would be important for ensuring that punishments are not disproportionate to the infractions for which students are being punished. It would also allow advocates to identify if, for example, students of color are disproportionately suspended for subjective offenses. Therefore, even in New York City, where the Act applies, a court may find that additional data collection and reporting would aid in identifying and addressing constitutional violations resulting from

the state to provide technical assistance to schools to help them reduce the frequency of suspensions. While remedies based on this line of argument would not require schools to develop preventative interventions designed to reduce suspensions, schools required to suspend fewer students might be motivated to, on their own, establish preventative programs and alternatives to suspensions.

If a court finds that current suspension practices are unconstitutional because they do not address the underlying causes of inappropriate behavior and thereby deny students a sound basic education, an appropriate remedy could require the state to create and implement programs designed to address these underlying causes. Ideally, the court would order interventions at all three levels advocated by the American Psychological Association: primary prevention programs, such as school-wide conflict resolution programs; secondary prevention programs for students identified as being at risk, such as anger-management programs; and tertiary interventions for students already engaged in violent and disruptive behavior, such as multisystemic therapy.[309]

Most likely, in accordance with separation-of-power principles, the court would leave the decisions of which specific programs to establish to schools or districts. There is some advantage to this approach since needs may be different in different schools. However, many interventions are based on general assumptions rather than careful research,[310] or are offered too infrequently or for too short of a duration to be effective.[311] The court should therefore cabin this discretion by mandating that proven, evidence-based programs be fully implemented or, if schools choose to veer from programs proven to be effective, by requiring that they have methods to evaluate the efficacy of their interventions. Additionally, since schools have been prevented from establishing these types of interventions partly due to limited resources,[312] the court should require both that districts provide adequate support to schools for their implementation and that the state provide adequate resources to districts to allow for this allocation.

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the excessive or arbitrary use of suspensions.

309. *See* discussion *supra* Section II(E).

310. *See, e.g.,* Michael Bullis, Hill M. Walker & Jeffrey R. Sprague, *A Promise Unfulfilled: Social Skills Training With At-Risk and Antisocial Children and Youth*, 9 EXCEPTIONALITY 67, 70 (2001) (noting that the content of social skills training programs "often is based on general assumptions or professional opinion rather than derived from careful research").

311. *Id.* at 71 (noting that social skills training programs are "all too often . . . conceptualized in terms of weeks, rather than months or years, an exposure that simply is too weak, in most cases, to impact at-risk or antisocial children and youth in any enduring, positive way" and recommending that such programs "be offered over a much longer period of time").

312. *See* SULLIVAN & KEENEY, *supra* note 16, at 18–19.

One limitation of arguing that schools have an affirmative duty to address causes of misbehavior is that such an argument does not necessarily require the prohibition of excessive suspensions. Indeed, while this argument would require that schools provide preventative interventions and student support services, it does not preclude the imposition of punishment as well. However, if appropriate preventative measures are enacted, incidents of inappropriate behavior will hopefully be reduced, thereby lowering the frequency and duration of suspensions.

VI.
CONCLUSION

As discussed above, the excessive use of suspensions is only one of the harmful components of zero tolerance policies, but the approach I have explored in this Article for challenging schools' use of suspensions provides a strong starting point for advocates developing litigation strategies to challenge other zero tolerance policies and practices. The arguments I have presented are certainly not mutually exclusive; since each claim has gaps in what it can achieve, using them in combination may achieve more effective results than any of the three could accomplish alone. Ideally, students would receive preventative services to forestall disruptive behavior, schools would stop suspending students for minor infractions, and students nevertheless suspended for serious behavior would continue to receive an adequate education. Furthermore, the proposals set forth in this Article are certainly not exhaustive. Even with respect to suspensions in New York, there are probably other arguments for how suspensions violate the state's Education Article.

These claims are not necessarily directly transferrable to other states or to discipline policies aside from suspension, but they can still serve as a useful model for litigants in other states. The approach outlined in this Article is probably not worth pursuing in states where the highest court has found that the education clause does not require the state to provide students with an adequate education. It could be viable in states where the education clause has never been interpreted by the courts,[313] though litigants in these states will face the challenge, evidenced by the cases discussed in Part IV, that some courts have been unreceptive to more generalized claims based on education clauses. However, this method for challenging school discipline policies would be most effective in states where courts have, based on their education clause, mandated the provision of a certain level of education. Litigants in the latter set of states

313. These states include Delaware, Hawaii, and Iowa. See *State by State,* NAT'L ACCESS NETWORK, http://www.schoolfunding.info/states/state_by_state.php3 (last visited June 30, 2011).

would need to tie their arguments to the language that the courts in their state have used in interpreting their state's education clause, the legislative history of their state's education clause, state statutes, etc.

Nevertheless, some of the same essential arguments may be feasible in other states. For example, many states' highest courts have found that their education clauses guarantee students the opportunity to receive an education that will prepare them for employment.[314] It is likely that many of these clauses were implemented partly with the goal of inculcating social character, so the third claim outlined above—namely, that states are constitutionally obligated to address the underlying causes of student misbehavior—could potentially gain traction in a number of other states. Similarly, some of these arguments may need to be adapted or may simply not work for contesting anything aside from suspensions, while others may be directly applicable to challenging other aspects of zero tolerance policies.

Finally, real progress in addressing zero tolerance policies is most likely to be effective if the general public is involved in the creation of the changes and supportive of them. Michael Rebell, the former director of the Campaign for Fiscal Equity, the organization behind New York State's education finance cases, stresses the importance of public engagement in achieving educational reform. In discussing how to use adequacy litigation to create meaningful improvements, he notes that:

> [B]road-based public dialogues can promote effective reform in controversial public policy areas by inspiring diverse groups of people both to understand the critical importance of equity-based reforms and to participate in devising feasible mechanisms for implementing them. The dialogues provide the courts and the media with detailed information about the complex range of factual and political issues that need to be considered in framing

314. To name a few examples: The Kentucky Supreme Court held in *Rose v. Council for Better Education* that an adequate education must provide students with "sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently" and "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market." 790 S.W.2d 186, 212 (Ky. 1989). In *Leandro v. State*, the Supreme Court of North Carolina interpreted the North Carolina Constitution to require that students receive "sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society." 488 S.E.2d 249, 255 (N.C. 1997). The Supreme Court of Alabama similarly concluded in *Pinto v. Alabama Coalition for Equity* that a constitutional education had to include "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market." 662 So. 2d 894, 896 (Ala. 1995) (quoting Opinion of the Justices No. 338, 624 So. 2d 107, 165–66 (Ala. 1993)).

> specific reforms, while also helping to develop the broad-based political constituencies necessary to convince the legislature and governor to enact them.[315]

This approach is equally important for bringing about more appropriate discipline policies. All parents want their children to attend safe schools. Many will be hesitant to accept a reduction in punitive discipline unless they are convinced that alternate policies can achieve results that are just as good or better. Advocates pursuing litigation to reduce schools' reliance on excessive discipline will therefore need to assure parents that their children's safety will not be sacrificed. Ideally they will be able to go even further by framing the issue as one that provides widespread benefits. For example, emphasizing the cost-effectiveness of methods that reduce future disruption and delinquency over those that punish harshly[316] will help persuade those whose primary concern is fiscal. At the same time, teachers will be more likely to support the curtailment of zero tolerance policies if they are confident that counselors and social workers will be readily available to assist them when discipline issues arise in the classroom.[317]

Furthermore, encouraging a diverse collection of stakeholders to contribute to the development of reform proposals can potentially provide two advantages. First, students, teachers, parents, and others who are affected by zero tolerance policies may have unique insight into productive solutions. Second, those who participate in the process of improving school discipline are likely to become more invested in seeing their proposals implemented, and may become strong allies for those challenging zero

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315. Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, *in* BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291, 310 (Janice Petrovich & Amy Stuart Wells eds., 2005).

316. David M.Osher, Mary Magee Quinn, Jeffrey M. Poirier & Robert B. Rutherford, *Deconstructing the Pipeline: Using Efficacy, Effectiveness, and Cost-Benefit Data to Reduce Minority Youth Incarceration*, 99 NEW DIRECTIONS FOR YOUTH DEV. 91, 92–93 (2003). *See also* SARAH INGERSOLL & DONNI LEBOEUF, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, REACHING OUT TO THE YOUTH OUT OF THE EDUCATION MAINSTREAM 2 (1997) ("Each year's class of dropouts costs the Nation more than $240 billion in lost earnings and foregone taxes over their lifetimes. Billions more will be spent on crime control (including law enforcement and prison programs), welfare, healthcare, and other social services. The staggering economic and social costs of providing for the increasing population of youth who are at risk of leaving or who have left the education mainstream are an intolerable drain on the resources of Federal, State, and local governments and the private sector.") (internal citation omitted).

317. *See* SULLIVAN & KEENEY, *supra* note 16, at 33 ("More than 85% of teachers surveyed said that guidance counseling was either effective or very effective for addressing safety and discipline. When students are being disruptive in the classroom or exhibiting patterns of misbehavior, teachers explained that they would prefer to send them to a counselor or social worker who could 'listen to the problems that our students are going through to help them work through it.'").

tolerance policies.[318] In some cases, litigation may prove unnecessary, as advocates may be able to achieve their goals by working with or putting pressure on schools or legislators. In others, however, a lawsuit, or the threat of a lawsuit, may be an effective catalyst for change.

Predicting the chances of success for these novel arguments is difficult, especially given the wide range in responses of state courts to education finance litigation. Nevertheless, given the deleterious effects of zero tolerance policies and the lack, in many contexts, of alternative means for challenging them, it is certainly worth considering bringing litigation based on the model discussed above in states where the highest court has found that the constitutional education clause entitles students to an adequate education. As the Supreme Court noted in *Brown v. Board of Education*, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for an education."[319] Given the crucial importance of education for succeeding in modern society, students should not, in the name of school discipline, be unnecessarily denied the opportunity to receive an adequate education.

318. *See generally* Michael A. Rebell & Joseph P. Wayland, CFE v. State of New York*: Ensuring a Meaningful High School Education for All Students, in* A QUALITY EDUCATION FOR EVERY CHILD: STORIES FROM THE LAWYERS ON THE FRONT LINES 33, 40–45, 60–61(David Long, Molly A. Hunter, Sheilah D. Vance, & Cheryl Hardy eds., 2009) (describing the use and benefits of public engagement in the *CFE* litigation).

319. 347 U.S. 483, 493 (1954).