

**ZEROING OUT ZERO TOLERANCE:  
ELIMINATING ZERO TOLERANCE POLICIES IN  
TEXAS SCHOOLS\***

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## I. INTRODUCTION

During fourth period, Taylor Hess watched as the assistant principal entered the classroom, pointed at him, and said, “Get your car keys [and c]ome with me.”<sup>1</sup> As Taylor followed the principal to the parking lot, the sixteen-year-old was not worried; he simply thought that he had left his lights on or parked in a prohibited area.<sup>2</sup> Then, the principal warned Taylor, “A knife has been spotted in your pickup.”<sup>3</sup> Taylor explained that he had gone camping with some friends over the weekend and that maybe a machete was left in his truck.<sup>4</sup> In the parking lot, Taylor found his truck surrounded by security guards and dogs trained to find drugs and weapons.<sup>5</sup> When Taylor looked in the back of his truck, he did not see a machete, but only a ten-inch bread knife with a round point.<sup>6</sup> Taylor knew where the knife had come from.<sup>7</sup> He explained to the principal that his grandmother had moved to an assisted living center the day before, and that Taylor and his father had packed up boxes of his grandmother’s books and kitchenware, loaded them into his truck, and taken them to Goodwill.<sup>8</sup> He tried to tell the crowd that the knife had probably fallen out of one of the boxes during the move, but no one seemed to be listening; they just continued to stare at the knife in the bed of Taylor’s truck.<sup>9</sup>

Taylor was not aware that the knife was in his truck and had no intention to use it to harm other students.<sup>10</sup> School officials had no reason not to believe Taylor’s story; he was a straight-A student and a star on the swim team.<sup>11</sup> But “under the school’s zero-tolerance policy and Texas code, any student found bringing weapons onto school grounds is expelled for one year.”<sup>12</sup> Consequently, a few hours after the security guards found the knife in the bed of Taylor’s truck, the assistant principal told Taylor that because state law and

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1. Barry Siegel, *Reason, Logic Collide with Texas School’s ‘Zero-Tolerance’ Rule*, J. GAZETTE, Aug. 19, 2002, available at 2002 WLNR 11577216.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; *Grandma’s Knife Leads to Kid’s Expulsion*, CHI. TRIB., Mar. 26, 2002, at 10, available at 2002 WLNR 12606921 [hereinafter *Grandma’s Knife Leads to Expulsion*].

9. Siegel, *supra* note 1.

10. *See id.*

11. *See Grandma’s Knife Leads to Expulsion*, *supra* note 8.

12. *Grandma’s Knife Leads to Expulsion*, *supra* note 8; see TEX. EDUC. CODE ANN. §§ 37.007-.021 (Vernon 2006).

school policy considered the knife a weapon, the school was expelling him and sending him to the district's alternative education program (AEP).<sup>13</sup>

Taylor's story may have been different had it not been for his district's zero-tolerance (ZT) policy.<sup>14</sup> "A ZT policy is a school or district policy requiring predetermined consequences or punishment for particular offenses without consideration of the circumstances or the disciplinary history of the student."<sup>15</sup> These policies became popular after Congress passed the Gun Free Schools Act of 1994 (1994 Act) to combat the perceived threat of increased school violence.<sup>16</sup> The 1994 Act required states receiving federal funding to implement mandatory expulsion for any student bringing a weapon to school.<sup>17</sup> Once Congress passed the 1994 Act, states and school districts across the country began implementing ZT policies to not only prevent school violence but also to combat drug use, verbal threats, fighting, and sexual harassment.<sup>18</sup> As a result, the U.S. Department of Education reported that ZT policies increased the number of suspensions and expulsions.<sup>19</sup> This increase, though, is not due to a rise in gun-related offenses on school campuses.<sup>20</sup> Instead, it is due to schools' expanding ZT policies beyond their original purpose—to punish students for possession of guns on school premises—and to schools' extending ZT policies to punish students for non-violent, subjective infractions.<sup>21</sup> Thus, ZT policies have become a "one-size-fits-all solution" that severely disciplines students for major and minor infractions alike.<sup>22</sup>

Intense media coverage of school shootings prompted the implementation of ZT policies in schools.<sup>23</sup> While ignoring the statistical evidence that demonstrated the infrequency of such attacks, this news coverage gave parents and teachers the impression that their schools may be attacked.<sup>24</sup> In reality,

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13. Siegel, *supra* note 1.

14. See Marilyn Elias, *At Schools, Less Tolerance for 'Zero Tolerance': Strict Policies May Actually Backfire*, USA TODAY, Aug. 10, 2006, at 6D, available at 2006 WLNR 13806051.

15. Jill Richards, Comment, *Zero Room for Zero Tolerance: Rethinking Federal Funding for Zero Tolerance Policies*, 30 U. DAYTON L. REV. 91, 91 (2004).

16. See *id.* at 92.

17. Gun-Free Schools Act of 1994 § 1032, 108 Stat. 125, repealed by No Child Left Behind Act of 2001, tit. X, § 1011, 115 Stat. 1425, 1986.

18. Elias, *supra* note 14.

19. Cherry Henault, Article, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547, 550 (2001). For example, in 2000, schools reported 3.1 million students suspended and 87,000 students expelled. *Id.*

20. RALPH C. MARTIN II, A.B.A., ZERO TOLERANCE POLICY REPORT (2001), available at <http://www.abanet.org/crimjust/juvjus/zerotolreport.html> (noting that gun-related offenses are the smallest category of school discipline cases).

21. *Id.*

22. *Id.*

23. See Scott R. Simpson, Comment, *Report Card: Grading the Country's Response to Columbine*, 53 BUFF. L. REV. 415, 416-21 (2005).

24. *Id.* at 416-17.

though, the prevalence of school violence is surprisingly minimal.<sup>25</sup> Studies show that “less than 1 percent of all violent incidents involving adolescents occur on school grounds.”<sup>26</sup> In fact, “a child is three times more likely to be struck by lightning than to be killed violently at school.”<sup>27</sup>

Recently, however, as more stories of students suspended or expelled for possessing a water gun, a nail file, or grandma’s bread knife have surfaced, opposition to ZT policies has spread, notably to blogs and websites that advocate reform or elimination of ZT policies.<sup>28</sup> In Texas, where schools strongly enforce ZT policies, opposition even reached the Texas legislature when House Bill 603 (H.B. 603) became law in May 2005.<sup>29</sup> Under H.B. 603, when deciding to expel a student under a ZT policy, school officials may consider issues of self-defense, intent, disciplinary history, and the student’s disabilities.<sup>30</sup> The legislature intended H.B. 603 to give school administrators discretion when punishing students.<sup>31</sup> Many school districts across the state, however, have chosen to ignore the new amendment and view the additional considerations as voluntary.<sup>32</sup>

A recent decision by a Texas court of appeals demonstrates Texas schools’ unwillingness to reinterpret chapter 37 of the Texas Education Code to include the discretion element.<sup>33</sup> Additionally, because lobbyists diluted the bill’s original version, the adopted bill excluded necessary safeguards like parental notification and impartial review boards.<sup>34</sup> As a result, Texas schools continue to execute the same ZT policies that led to Taylor Hess’s expulsion.<sup>35</sup> Thus, the problems that ZT policies created prior to H.B. 603 continue.<sup>36</sup> Policy makers should eliminate ZT policies in Texas schools, and across the country, and replace them with a disciplinary policy that is only as tough as necessary to ensure students’ safety.<sup>37</sup>

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25. See *id.* at 416-21.

26. MARTIN, *supra* note 20.

27. *Id.*

28. See H. David, *Zero Tolerance: A Retreat from Common Sense*, DAYTON CITY PAPER, Nov. 19, 2003, at 9; Katy Zero Tolerance, <http://www.katyzerotolerance.com/> [hereinafter Katy Zero Tolerance].

29. See Marc Levin, *A New Texas Pipeline: Zero Tolerance for Texas Kids*, TEX. PUB. POL’Y FOUND., July 6, 2006, [http://www.texaspolicy.com/commentaries\\_single.php?report\\_id=1140](http://www.texaspolicy.com/commentaries_single.php?report_id=1140); Todd Spivak, *Cut Short: A Model Student-Athlete Unthinkingly Brings a Knife to School and Ends up in Jail, Then Expelled. Why One-Size-Fits-All Discipline Fails Kids*, HOUS. PRESS, June 29, 2006, [http://www.houstonpress.com/Issues/2006-06-29/news/feature\\_print.html](http://www.houstonpress.com/Issues/2006-06-29/news/feature_print.html).

30. *Tarkington Indep. Sch. Dist. v. Ellis*, 200 S.W.3d 794, 801-02 (Tex. App.—Beaumont 2006, reh’g overruled).

31. Spivak, *supra* note 29.

32. *Id.*

33. See *Tarkington*, 200 S.W.3d at 802.

34. See Spivak, *supra* note 29.

35. See Siegel, *supra* note 1.

36. Press Release, Am. Psychological Assoc., *Zero Tolerance Policies Are Not as Effective as Thought in Reducing Violence and Promoting Learning in School, Says APA Task Force* (Aug. 9, 2006), <http://www.apa.org/releases/zerotolerance.html> [hereinafter APA Press Release].

37. See Henault, *supra* note 19, at 551-52; see also Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 289-90 (2006).

This Comment explores the effectiveness of ZT policies in schools and addresses the effectiveness of amendments to Texas ZT policies.<sup>38</sup> Part II of this Comment outlines the history of ZT policies, starting with their roots in corporal punishment, continuing through congressional prompting, and ending with implementation in schools across the country.<sup>39</sup> Part III discusses the problems ZT policies have created, including increased suspension and expulsion rates for minor infractions, warehousing of unwanted children in AEPs, and additional societal burdens created by higher dropout rates.<sup>40</sup> Part IV evaluates the success of ZT policies and considers the growing opposition to them in schools, both across the country and in Texas.<sup>41</sup> Part V explains chapter 37 of the Education Code, before and after it was amended by H.B. 603.<sup>42</sup> Part V further discusses H.B. 603, including what the legislature intended the bill to accomplish and the bill's failure to change the application of Chapter 37.<sup>43</sup> Part VI details the problems that still affect the amended Education Code.<sup>44</sup> Finally, Part VII suggests putting discipline back in schools' hands by eliminating ZT policies and proposes an alternative disciplinary strategy.<sup>45</sup> Ultimately, this Comment will demonstrate that because ZT policies do not diminish school violence and because school administrators consistently refuse to exercise the discretion that H.B. 603 provides, the Texas legislature should eliminate ZT policies and replace it with a disciplinary policy that requires school administrators to use discretion when punishing students.

## II. HISTORY

### A. *From Corporal Punishment to Zero Tolerance Policies*

Discipline in schools originally began as a legal fiction that placed schools *in loco parentis*—"in place of the parent."<sup>46</sup> Because school attendance was not mandatory, parents who chose to enroll their students did so with the understanding that the school would be allowed to act in the parents' place and discipline students.<sup>47</sup> Thus, schools mostly resorted to discipline by corporal

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(advocating for proportional punishments).

38. See *infra* Parts IV-V.

39. See *infra* Part II.

40. See *infra* Part III.

41. See *infra* Part IV.

42. See *infra* Part V.

43. See *infra* Part V.

44. See *infra* Part VI.

45. See *infra* Part VII.

46. Richards, *supra* note 15, at 94.

47. *Id.*

punishment; in front of the classroom, “[t]eachers would whip or hit the disobedient child with a ‘switch’ or similar instrument in order to scold him.”<sup>48</sup>

With the enactment of compulsory attendance statutes, parents no longer had the choice to enroll their children in school, and as a result, student enrollment increased.<sup>49</sup> Increased enrollment enlarged classroom sizes and presented a greater challenge for teachers to discipline misconduct.<sup>50</sup> Soon, the job of punishment was given to a school administrator, and “students would be sent to the administrative officer for paddling, thus undermining the deterring and exemplary effect of corporal punishment.”<sup>51</sup>

Eventually the concept of *in loco parentis* began to fade, and schools started to use out-of-school suspension (OSS) instead of corporal punishment.<sup>52</sup> OSS removed the disruptive student from the classroom and the school.<sup>53</sup> School officials believed OSS was more beneficial to other students because it remedied the problem without taking up class time.<sup>54</sup> This method, however, resulted in “an ‘out of sight, out of mind’ mentality toward the removed student.”<sup>55</sup>

Schools then shifted to an in-school method of discipline after *Goss v. Lopez*, in which the Supreme Court announced that students’ due process rights, though limited, require schools to give notice and hold hearings for any disciplinary action that could result in up to ten days out of school.<sup>56</sup> Thus, in the 1970s and 1980s, schools developed in-school suspensions (ISS).<sup>57</sup> ISS kept the disruptive students in school but removed them from the classroom.<sup>58</sup> Because ISS kept the punished student academically involved, communities encouraged this method of punishment as a more beneficial and rehabilitative punishment.<sup>59</sup>

In the late 1980s, however, schools began to abandon the in-school model of discipline for a “get tough on violence” model.<sup>60</sup> This move was largely a reaction to the media’s intense coverage of school violence.<sup>61</sup> As the media

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48. *Id.* at 94-95.

49. *See id.*

50. *Id.* at 95.

51. *Id.*

52. *See id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.* at 96 (discussing *Goss v. Lopez*, 419 U.S. 565, 579, 581 (1975)).

57. *Id.* at 95.

58. *Id.* at 95-96.

59. *Id.* at 96.

60. *Id.*

61. *See id.* *See* Simpson, *supra* note 23, at 419-20 (providing an example of the media’s intense coverage of the 1997 Columbine shooting). After the Columbine attacks, three major news networks—NBC, CBS, and ABC—aired 319 stories, which represented 54% of the murder stories aired that year. *Id.* at 420. The intensity of this coverage becomes apparent when it is compared to the coverage of a suit the U.S. Department of Justice brought against Microsoft, one of the biggest antitrust cases in American history, which was the subject of only twenty-four stories. *Id.*

continued to sensationalize violence in schools, parents and teachers became justifiably concerned.<sup>62</sup> In response to the public outcry, school districts began replacing the rehabilitative methods of punishment with the rigid guidelines of ZT policies.<sup>63</sup>

### B. Congressional Prompting of Zero Tolerance Policies

Congress's first attempt to curb school violence came in the form of the Gun-Free School Zones Act of 1990 (1990 Act).<sup>64</sup> This law made it a federal crime "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone."<sup>65</sup> The Supreme Court later struck down the 1990 Act in *United States v. Lopez*.<sup>66</sup> Lopez, a high school senior, appealed his conviction for carrying a weapon on school premises by arguing that the 1990 Act exceeded Congress's Commerce Clause power.<sup>67</sup> The Court overturned the conviction, finding the 1990 Act unconstitutional because the 1990 Act was a criminal statute with little effect on commerce that impermissibly allowed Congress to regulate a traditionally state-regulated field.<sup>68</sup>

Congress's second attempt to curb school violence came in the form of the Gun Free Schools Act of 1994 (1994 Act).<sup>69</sup> The 1994 Act mandated that "each state receiving federal funds shall have in effect a policy requiring the expulsion from school for a period of not less than one year of any student who is determined to have brought a weapon to a school."<sup>70</sup> In order to attach funding, Congress tied the 1994 Act to the Elementary and Secondary

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62. Richards, *supra* note 15, at 96.

63. *Id.*

64. Simpson, *supra* note 23, at 421.

65. Gun-Free School Zones Act of 1990 § 1702(b)(1), 18 U.S.C. § 922(q)(2)(A) (2000). Congress passed this act under the broad mandate of the Commerce Clause. Simpson, *supra* note 23, at 421.

66. *See* *United States v. Lopez*, 514 U.S. 549, 551 (1995).

67. *Id.* at 551-52.

68. Simpson, *supra* note 23, at 422-24 (citing U.S. CONST. amend. X; *Lopez*, 514 U.S. at 561, 565).

69. *See* Gun-Free Schools Act of 1994 § 1032, 108 Stat. 125, *repealed by* No Child Left Behind Act of 2001, tit. X, § 1011, 115 Stat. 1425, 1986; Simpson *supra* note 23, at 425. Congress later repealed the 1994 Act and replaced it with the No Child Left Behind Act of 2001. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.); Richards, *supra* note 15, at 92. Consequently, Congress essentially reauthorized conditioning schools' receipt of federal funds on the requirement that schools implement ZT policies. Richards, *supra* note 15, at 92, 99.

70. Gun-Free Schools Act of 1994 § 1032, 108 Stat. 125, *repealed by* No Child Left Behind Act of 2001, tit. X, § 1011, 115 Stat. 1425, 1986. Congress could pass the 1994 Act because of the Supreme Court's decision in *South Dakota v. Dole*, which held that Congress could "condition the receipt of federal funds 'upon compliance by the recipient with federal statutory and administrative directives.'" Simpson, *supra* note 23, at 425 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

Education Act of 1965 (ESEA).<sup>71</sup> The ESEA affects almost every school district in America because it provides funding to aid low-income and underachieving students.<sup>72</sup> By linking these two acts, Congress tied approximately twelve billion dollars in funding to the 1994 Act and essentially ensured that all public schools would implement a ZT policy.<sup>73</sup>

Originally, the 1994 Act limited the definition of “weapon” to include only firearms.<sup>74</sup> Since then, Congress has amended the statute and expanded the definition to include any device that “may be used as a weapon.”<sup>75</sup> This change resulted in states’ interpreting “weapon” as broadly as possible—to include instruments such as toy squirt guns and nail-clippers—to avoid jeopardizing their funding.<sup>76</sup>

Additionally, despite the 1994 Act giving the “chief administering officer” the discretion to review punishments and to modify them on a “case-by-case basis,” many administrators have declined to exercise this discretion and have instead chosen to “suspend[ ] and expel[ ] students for any violent infraction [ ] . . . to ensure that federal funding [is] not revoked.”<sup>77</sup> The purpose of the 1994 Act was to prevent violence by fostering a close relationship among schools, police departments, and juvenile justice systems to make students fear discipline for misconduct.<sup>78</sup> In effect, the 1994 Act required school districts to refer all punishments under the 1994 Act to the criminal juvenile justice system and thus mandated criminal sanctions for misconduct.<sup>79</sup> Therefore, school administrators are using policies originally created to fight America’s war on drugs to usher children through the jailhouse doors for minor infractions.<sup>80</sup>

### C. Creation and State Expansion of Zero Tolerance Policies

Despite its current popularity in school districts, the concept of ZT was not created to address school violence; rather, federal and state drug enforcement agencies initially used the concept in the early 1980s to address America’s war on drugs.<sup>81</sup> The idea of ZT policies soon caught on—even as a national

71. Richards, *supra* note 15, at 92.

72. *Id.*

73. *Id.* at 99.

74. Gun-Free Schools Act of 1994 § 1032.

75. Richards, *supra* note 15, at 98.

76. *Id.* at 98, 100. For example, a twelve-year-old student observed filing his nails with a Swiss Army knife received a one-year suspension under the school’s ZT policy on weapons. Tobin McAndrews, *Zero-Tolerance Policies*, ERIC DIG., Mar. 2001, at 1, available at <http://scholarsbank.uoregon.edu/dspace/bitstream/1794/3369/1/digest146.pdf>.

77. Gun-Free Schools Act of 1994 § 1032; Richards, *supra* note 15, at 92.

78. Richards, *supra* note 15, at 98-99.

79. *Id.*; Simpson, *supra* note 23, at 425.

80. See Henault, *supra* note 19, at 547; Richards, *supra* note 15, at 96; Simpson, *supra* note 23, at 425.

81. Henault, *supra* note 19, at 547; Richards, *supra* note 15, at 96. A U.S. Attorney for San Diego, Peter Nunez, first developed a ZT policy to impound seagoing vessels found with only a trace of illegal drugs. Richards, *supra* note 15, at 96; RUSSELL J. SKIBA, IND. EDUC. POL’Y CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE, 2 (2000), available at



catchphrase—and law enforcement agencies began applying it to a range of issues, including environmental pollution, homelessness, sexual harassment, trespassing, skateboarding, and boom boxes.<sup>82</sup> Eventually, the federal government realized it had taken these ZT policies too far and stopped using them to justify drug seizures.<sup>83</sup> This realization came in 1990 after the discovery of a marijuana cigarette in a seaman's cabin led to the seizure of two research vessels.<sup>84</sup>

As law enforcement and administrative agencies were phasing out ZT policies in many other programs, school districts around the country began adapting ZT policies to combat violence, drug use, and gang-related conduct.<sup>85</sup> By 1993, most public schools in the United States had adopted ZT policies, and over the next four years, educators and parents continued to expand the use of ZT policies into other areas.<sup>86</sup> School boards began enacting “a range of zero-tolerance policies focused on combating weapons, drugs, violence, and antisocial behavior,” and schools began suspending and expelling students for carrying paperclips and aspirin.<sup>87</sup> Eventually, schools applied ZT policies “not only [to] drugs and weapons, but also to smoking and school disruption.”<sup>88</sup> Many schools continued to expand ZT policies by expelling or suspending students for threats, swearing, and behavior outside of school.<sup>89</sup>

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<http://www.indiana.edu/~safeschl/ztze.pdf>. Then, in 1988, U.S. Attorney General, Edwin Meese, began using this same type of policy to allow customs agents to seize vehicles or property and prosecute any individual crossing the U.S. border with trace amounts of drugs. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE at 2.

82. SKIBA, *supra* note 81, at 2.

83. *Id.* at 3.

84. Henault, *supra* note 19, at 547; SKIBA, *supra* note 81, at 2.

85. Richards, *supra* note 15, at 97 (reporting that school districts in California, Kentucky, and New York were the first districts to implement ZT policies for drugs, fighting, and gang-related activity).

86. *Id.* In 1998, the U.S. Department of Education reported that 94% of schools had a ZT policy for firearms. *Id.* at 100. In addition, according to the National Center for Education Statistics, 91% of schools have ZT policies for items other than firearms—87% have ZT policies for alcohol, 88% have ZT policies for drugs, and 79% have ZT policies for violence and tobacco. McAndrews, *supra* note 76, at 1. Many ZT policies also include suspension for common offenses ranging from attendance problems to noncompliance and disrespect. National Association of School Psychologists, Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers (2001), [http://www.nasponline.org/resources/factsheets/zt\\_fs.aspx](http://www.nasponline.org/resources/factsheets/zt_fs.aspx) (last visited Jan. 27, 2008) [hereinafter NASP Fact Sheet].

87. McAndrews, *supra* note 76, at 1; Mental Health America, Position Statement 46: Opposing the Blanket Application of Zero Tolerance Policies in Schools, <http://www.mentalhealthamerica.net/go/position-statements/46> (last visited Jan. 27, 2008) [hereinafter MHA Position Statement]. Suspensions are implemented by removing students from the classroom for no more than ten days, while expelled students are removed from school for more than ten days. Joseph Lintott, Note, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 561 (2004).

88. SKIBA, *supra* note 81, at 2 (“Many school districts expanded the scope of zero tolerance policies even further to include various non-violent acts; in addition, they also broadened the definition of weapons and drugs to include such things as nail files, plastic knives and aspirin.”).

89. *Id.* For example, Maryland's ZT policies allow schools to suspend students for non-violent offenses

While the 1994 Act required school officials to enforce no less than a one year suspension on students who violated the weapons-possession provision, “it [was] not unusual for individual school districts to expel students for a longer period of time.”<sup>90</sup> For example, federal law did not mandate the expulsion of Taylor Hess, the sixteen-year-old from this Comment’s introduction; rather, state law and his school district required his expulsion.<sup>91</sup> Thus, ZT policies extend even further when “individual school districts . . . have more expansive disciplinary codes than required by state law.”<sup>92</sup> Roughly 14,000 school districts across the country have adopted ZT policies and expanded them to fit the needs of their individual districts.<sup>93</sup> As a result, there are 14,000 versions of ZT policies, many of which now authorize or mandate schools to treat almost all student offenses as if they were violations intended to fall within the federal law.<sup>94</sup> In addition, because school districts may make discipline for a specific offense discretionary, suspension and expulsion rates can differ dramatically among different schools within the same district.<sup>95</sup>

Unfortunately, the expansion of ZT policies into areas not mandated by federal law has resulted in excessive punishments for trivial student transgressions.<sup>96</sup> Congress did not intend schools to use ZT policies to punish such minor infractions, and using these policies to do so “gives new meaning to the phrase ‘silly cases . . . make bad law.’”<sup>97</sup> And because of this bad law,

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like insubordination, disruption, and disobeying rules. THE CIVIL RIGHTS PROJECT & ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 2 (2000), [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/17/21/dd.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/21/dd.pdf) (last visited Dec. 18, 2007) [hereinafter OPPORTUNITIES SUSPENDED].

90. Anne S. Robertson, “Zero Tolerance”: *What Parents Should Know*, PARENT NEWS OFFLINE, Spring 2000, available at [http://www.spannj.org/BridgeArchives/zero\\_tolerance.htm](http://www.spannj.org/BridgeArchives/zero_tolerance.htm).

91. Siegel, *supra* note 1.

92. OPPORTUNITIES SUSPENDED, *supra* note 89, at 111-17; see also Bob Gardinier, *School Fights Weapon Replicas*, ALB. TIMES UNION, Mar. 28, 1997, at B1, available at 1997 WLNR 338525 (noting that many New York school districts have subjected students to disciplinary action for bringing look-alike weapons to school).

93. See Andrea Billups, *Parents Sue Over ‘Zero Tolerance’—Elementary School Student’s Drawing of Soldier Leads to Suspension and Charges of Abuse*, INSIGHT ON THE NEWS, July 2, 2001, available at [http://findarticles.com/p/articles/mi\\_m1571/is\\_25\\_17/ai\\_76402697](http://findarticles.com/p/articles/mi_m1571/is_25_17/ai_76402697).

94. See *id.* For example, while the federal law prohibits weapons such as rifles, knives, pistols, explosives, and dangerous chemicals, a school district in Albany, New York, expanded that list to include look-alike weapons. Gardinier, *supra* note 92. By adding look-alike weapons to this list, the New York school district is requiring that any student caught at school with a weapon, real or fake, face a one year suspension. *Id.*

95. OPPORTUNITIES SUSPENDED, *supra* note 89, at 29.

96. Simpson, *supra* note 23, at 431. Incidents of trivial student transgressions include a ten-year-old girl expelled for bringing a paintball gun to show-and-tell, a seventh grader suspended for sharing caffeine energy gum with a classmate, a five-year-old boy suspended from kindergarten for wearing a firefighter costume to school because it had a toy axe, and an eleven-year-old girl arrested for bringing a steak knife to cut the chicken she brought for lunch. Tim Grant, *Back to School: Zero Tolerance Makes Discipline More Severe, Involves the Courts*, PITTSBURGH POST-GAZETTE, Aug. 31, 2006, available at <http://www.post-gazette.com/pg/06243/717806-298.stm>; Overcriminalized.com, *Criminalizing Kids II: Misdemeanor Mistakes and Felony Forgetfulness*, [http://overcriminalized.com/studies/2004.01\\_ZT2.html](http://overcriminalized.com/studies/2004.01_ZT2.html) (last visited Jan. 27, 2008) [hereinafter Overcriminalized].

97. Richards, *supra* note 15, at 91.

states and school districts across the country have one thing in common: increasing problems created by ZT policies.<sup>98</sup>

### III. PROBLEMS ZERO TOLERANCE POLICIES CREATE

As more states and school districts expand ZT policies to include subjective offenses like disruption and defiance, more children are being excluded from their schools, and more problems are arising—higher suspension and expulsion rates, more students in the juvenile justice system, inadequate AEPs, higher drop-out rates, and societal burdens.<sup>99</sup>

#### A. Increase in Suspension and Expulsion Rates

On average, over three million students are absent from school due to suspensions or expulsions every year.<sup>100</sup> Since the early 1990s, when Congress began its “get tough on school violence” campaign, the number of student suspensions has skyrocketed in many states.<sup>101</sup> The U.S. Department of Education has reported that annual suspension rates have almost doubled from 1.7 million students in 1974 to 3.1 million in 2001.<sup>102</sup> In addition, schools expelled an estimated 97,000 more students during the 2000-2001 school year.<sup>103</sup> Suspension and expulsion rates have never been higher.<sup>104</sup> Though alarming, these numbers are not surprising. It is no coincidence that the expansion of ZT policies mirrors the increase in suspension and expulsion rates

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98. See *infra* Part III.

99. See Jane Gordon, *In Schools, Bad Behavior Is Shown the Door*, N.Y. TIMES, Nov. 16, 2003, at 1, available at 2003 WLNR 5646639.

100. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005), available at <http://www.advancementproject.org/reports/FINALEOLrep.pdf> [hereinafter EDUCATION ON LOCKDOWN].

101. Lintott, *supra* note 87 at 562. For example, Florida reported a 14% increase in suspensions over five years, increasing from 385,365 to 441,694 during 2001 to 2005; Connecticut reported a 90% increase between the 1998-1999 school year and the 2000-2001 school year. Peter Bailey, *Zero-Tolerance Policy for Schools Blasted in Report as Overreaching*, MIAMI HERALD, Apr. 20, 2006, available at [http://www.pdmiami.com/Herald-zero-tolerance\\_policy\\_for\\_schools.htm](http://www.pdmiami.com/Herald-zero-tolerance_policy_for_schools.htm); Mark Sanchez & Susan Sandler, *Zero-Tolerance Policies Provide Zero Benefit: School Crime Hasn't Diminished and Too Many Students End up on the 'Prison Track'*, S.F. CHRON., Sept. 10, 2001, at A-15, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/09/10/ED160967.DTL>.

102. Adira Siman, Note, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL'Y 327, 331 (2005); Rokeach & Denvir, *supra* note 37, at 282-83 (noting that because some school districts and states fail to keep adequate data the true number of students suspended or expelled may actually be much greater than those reported).

103. Siman, *supra* note 102, at 331-32.

104. Gordon, *supra* note 99.

across the country.<sup>105</sup> This relationship is due to schools' failure to reserve ZT policies for the most serious offenses, and instead making suspensions, expulsions, and criminal court referrals "common reactions to student misconduct that used to be dealt with in school."<sup>106</sup>

Texas schools have been no different.<sup>107</sup> Since the implementation of the 1994 Act, Texas school districts have also seen an increase in the number of school suspensions and expulsions.<sup>108</sup> In many school districts, school officials are expelling students two to three times more often than before the implementation of ZT policies.<sup>109</sup> This rate has increased because some teachers and administrators believe that the intent of ZT policies is to intercept bad behavior before violence results.<sup>110</sup> And this misinterpretation has expanded ZT policies into areas previously considered minor offenses—spitting, swearing, and skipping school—and has caused more students' bad behavior to fall into a category punishable by suspension or expulsion.<sup>111</sup>

Of the three million students suspended or expelled from schools each year, "[o]nly about 3% of these punishments are due to major offenses. The remainder of suspensions or expulsions 'result[s] from a student's violation of minor offenses, such as smoking, "tardiness, truancy, and dress code violation[s].'"<sup>112</sup> This policy of suspending or expelling students for minor infractions has had ridiculous outcomes.<sup>113</sup> Students across the country are "kicked out of school for possession of Midol, Tylenol, Alka Seltzer, cough drops, and Scope mouthwash . . . [and] expelled for Halloween costumes that included paper swords and fake spiked knuckles, as well as for possessing rubber bands, slingshots, and toy guns . . . ."<sup>114</sup>

Texas schools using ZT policies have strayed from enforcing punishments that fit the crime.<sup>115</sup> Studies have shown that schools in Texas excessively

105. Siman, *supra* note 102, at 330-31.

106. Grant, *supra* note 96.

107. Margaret Downing, *Mind Reading: Is Yvette Lacobie Really a Terrorist? Did Legislators Really Mean to Kick Kids out for a Butter Knife? Is Zero Tolerance Really Stupid? (No, Maybe and Yes.)*, HOUST. PRESS, Feb. 17, 2005, available at <http://www.houstonpress.com/2005-02-17/news/mind-reading>.

108. *See id.*

109. Siman, *supra* note 102, at 331. For example, in Texas schools, more than 16,000 first through fourth grade students were sent to AEPs during the 2001-2002 school year. Downing, *supra* note 107.

110. Kris Axtman, *Why Tolerance Is Fading for Zero Tolerance in Schools*, CHRISTIAN SCI. MONITOR, Mar. 31, 2005, available at <http://www.csmonitor.com/2005/0331/p01s03-ussc.html>.

111. *Id.* (explaining that "many school boards and school administrators misinterpreted the intent of the law and began taking first graders out of class for bringing nail clippers to school." (quoting the executive director of the National Education Association's Health Information Network)).

112. Lintott, *supra* note 87, at 561-62. In Maryland, for example, schools suspended 60% of the state's students for nonviolent offenses, including "tardiness, truancy, disrespect, classroom disruptions, and portable communication devices." Simpson, *supra* note 23, at 437 (quoting Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1058 (2001)).

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

114. *Id.*

115. David, *supra* note 28.

punish one out of every three students.<sup>116</sup> In other words, Texas schools suspend or expel over 10,000 students for nonviolent acts every year.<sup>117</sup> Thus, ZT policies in Texas have led to a system in which schools do not differentiate between unruly students who need to be severely punished and good students who just make mistakes.<sup>118</sup> As a result, many good students are often treated as repeat offenders because they receive the maximum punishment for a minor transgression.<sup>119</sup>

The recidivism rates among students who have been suspended or expelled averages about 35% to 45%.<sup>120</sup> This means that, on average, nearly half of all students harshly punished under schools' ZT policies will be suspended for at least a second time.<sup>121</sup> Thus, a student's previous suspension history appears to be a predictor of future suspension, a fact that questions the effectiveness of ZT policies in deterring bad behavior.<sup>122</sup> In fact, ZT policies' use of suspensions and expulsions may only exacerbate bad behavior.<sup>123</sup> This fact is further supported by comparison of the increasing rates of suspension and expulsion with the number of students entering the criminal justice system.<sup>124</sup>

#### B. Increase of Students in the Juvenile Justice System

In recent years, the use of criminal penalties as punishment for misbehavior in schools has increased.<sup>125</sup> Since the implementation of the 1994 Act, more schools are ticketing and arresting students for harmless acts.<sup>126</sup> This

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116. Downing, *supra* note 107.

117. *Id.* As an illustration, a middle school in the Dallas suburbs expelled Lisa Smith, an eighth-grade honor student, and sent her, for five months, to a military-style boot camp for "bringing to school a 20-ounce bottle of Cherry 7-Up mixed with a few drops of grain alcohol." Cauchon, *supra* note 113. Although Lisa's parents agree that school officials were right to punish her, they felt the punishment was too severe for a single mistake. *Id.* In fact, had Lisa been caught outside of school and charged with "underage possession of alcohol, she would have faced [only] a ticket and a fine, not boot camp." *Id.*

118. Cauchon, *supra* note 113.

119. See *infra* notes 120-24 and accompanying text.

120. Rokeach & Denvir, *supra* note 37, at 284.

121. *Id.*

122. *Id.* at 284-85. Researchers found, in a longitudinal study of a group of students, that suspensions in fourth and fifth grades predicted suspensions in sixth grade and, similarly, that suspensions in sixth grade related to the number of suspensions in the seventh and eighth grade. *Id.*

123. *Id.* In 1984, the National School Boards Association warned that punishment alone does not teach new behavior but serves to reinforce the bad behavior: "traditional approaches—such as punishment, removing troublemakers, and similar measures—often harden delinquent behavior patterns, alienate troubled youths from the schools, and foster distrust." Lintott, *supra* note 87, at 559.

124. See *infra* Part III.B.

125. EDUCATION ON LOCKDOWN, *supra* note 100, at 15.

126. Simpson, *supra* note 23, at 425.

trend is the result of the 1994 Act's requirement that schools refer all students punished under its guidelines to the criminal juvenile justice system.<sup>127</sup> With schools punishing students for offenses subjectively labeled "disrespect," "disobedience," and "disruption," many charges levied against students would never be considered crimes if committed by an adult or off school grounds.<sup>128</sup> As a result, schools have created an environment in which adolescent mistakes become a criminal record and have the potential to follow students for the rest of their lives.<sup>129</sup>

### 1. Increase in Student Arrests and Citations

Since the implementation of the 1994 Act, more schools are ticketing and arresting students in an attempt to reduce school violence.<sup>130</sup> But, in doing so, ZT policies may actually make the problem worse.<sup>131</sup> Both strategies of ticketing and arrest enter the student into the criminal justice system, and studies show that "[c]ontinued involvement in the juvenile justice system may be a factor in enhancing the student's violent tendencies and increasing his rejection of the school system."<sup>132</sup> Students arrested or cited are detained, prevented from participating in classroom curricula, and forced into an unforgiving system in which many will remain.<sup>133</sup> Thus, ZT policies are creating a "schoolhouse to jailhouse" trend.<sup>134</sup>

While national data concerning the number of students arrested on school campuses is not available, data from various districts indicate that arrests are increasingly common as a form of discipline.<sup>135</sup> Texas school districts have

127. *Id.*

128. EDUCATION ON LOCKDOWN, *supra* note 100, at 15. While the list of arrestable offenses varies in different schools, most schools list about twenty activities "ranging from swearing and insubordination to making terrorist threats or skipping school." Kavan Peterson, Schools Rethink Post-Columbine Discipline, Mar. 14, 2005, <http://www.stateline.org/live/printable/story?contentId=18518>.

129. See EDUCATION ON LOCKDOWN, *supra* note 100, at 15 (noting that students' criminal records may cause the consequences of adolescent misconduct to haunt students long past their teenage years—when they apply to college, try to enlist in the military, apply for a job, or attempt to reside in publicly subsidized housing).

130. Simpson, *supra* note 23, at 425.

131. See Lintott, *supra* note 87, at 568-69.

132. *Id.* at 569.

133. See *id.* at 568-69; Rokeach & Denvir, *supra* note 37, at 286. In addition, schools also suspend or expel many of the students they refer to the police. See Rokeach & Denvir, *supra* note 37, at 286. Studies have shown that suspension and expulsion from school "are associated with [an] increased risk of juvenile delinquency and incarceration" because suspended and expelled youths have ample free time and no productive activities to engage in. *Id.* Thus, schools leave these youths with the increased opportunity to become involved with drugs, violence, and other delinquent youths. *Id.* Involvement in these criminal activities often leads to subsequent incarceration. See *id.*

134. See EDUCATION ON LOCKDOWN, *supra* note 100, at 15.

135. *Id.* Examples of arrested students include the following:

A 7-year-old, African-American boy [with] Attention Deficit Disorder was arrested and hauled off to the county jail for hitting a classmate, a teacher, and a principal and scratching a school resource officer. The 4 foot, 6 inch, 60-pound second grader was fingerprinted and eventually cried himself to sleep in his jail cell. . . . A high school student was arrested and charged with

experienced a rise in school-based arrests; for example, in the Houston Independent School District (HISD), the number of students arrested rose from 1,063 arrests in 2001 to 4,002 arrests in 2002.<sup>136</sup> Some attribute this drastic rise to the increased use of ZT policies for minor offenses.<sup>137</sup> For instance, of the 4,002 arrests made by HISD Police, almost 43% were for disorderly conduct or disruption.<sup>138</sup>

School districts have also more frequently issued criminal citations to students “for routine disciplinary violations that are not otherwise criminal offenses.”<sup>139</sup> In Texas, the issuance of class C misdemeanors has become common in many schools.<sup>140</sup> As a result, reports of police ticketing students for actions like chewing gum in class have also become common.<sup>141</sup> While a class C misdemeanor is the equivalent of a traffic ticket and only carries a fine of up to \$500, schools are now sending matters before criminal judges rather than sending students to detention halls.<sup>142</sup> Some officials contend that issuing citations to first- and second-time offenders for minor misconduct will cut back on arresting students for the same offenses; however, these officials fail to address the fact that the citations place children into the criminal justice system.<sup>143</sup> In the era of ZT policies, this move solidifies the idea that schools do not allow students to make mistakes without the states’ criminal judges marking them as delinquents.<sup>144</sup>

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second degree breach of peace for a shouting argument with his girlfriend. [This student was one of] 140 students [that] were arrested during the first six weeks of the school year. . . . A 14-year-old girl was arrested and charged with battery for pouring a carton of chocolate milk on the head of a classmate. . . . [And an] 8-year-old elementary school student was charged with felony assault when he hit and kicked his teacher as she attempted to remove him from the classroom for misbehaving.

*Id.* at 12-13.

136. *Id.* at 15-16. In an effort to improve school safety, HISD, like many other school districts across the country, have created “their own police departments, with all the powers of local police but with jurisdiction limited to school grounds.” *Id.* at 17.

137. *See id.* at 15.

138. *Id.*

139. Levin, *supra* note 29. For example, a high school student received a criminal citation for cursing in front of a teacher, a charge that carried up to thirty days in jail. EDUCATION ON LOCKDOWN, *supra* note 100, at 13.

140. Spivak, *supra* note 29.

141. *Id.*

142. *Id.*

143. Bailey, *supra* note 101.

144. *See id.*

## 2. Judges Acting as Administrators

Minor offenses that assistant principals formerly handled are now criminal offenses handled by the judiciary.<sup>145</sup> In fact, “[m]any judges say they now feel like vice principals” as schools are inundating them with thousands of cases dealing with issues like disrespect in the classroom.<sup>146</sup> Texas judges are also feeling this pressure, and some express a desire for schools to handle more of the minor offenses that end up in their courtrooms.<sup>147</sup> Some judges say that schools could solve many of the problems without expulsion or a court date.<sup>148</sup> In the past, schools dealt with these types of offenses on their own.<sup>149</sup> The new trend, however, is to call the police.<sup>150</sup>

An increasing number of students are answering to judges for their misconduct, instead of school administrators, because “more teachers are using zero tolerance policies as a way to manage their classrooms.”<sup>151</sup> Many teachers resort to disciplining students through ZT policies because “[z]ero tolerance is quick and administratively efficient” and allows teachers to spend less time on disciplinary matters and more time educating students.<sup>152</sup> In addition, many teachers are afraid to assert control over their classroom fearing that students will retaliate against them.<sup>153</sup> One study found that, because of this fear, “12% of teachers hesitated to confront misbehaving students.”<sup>154</sup> By allowing ZT policies to be enforced for these reasons, schools are encouraging teachers to wash their hands of struggling students and are funneling these youths into the juvenile justice system, where a large number of them remain.<sup>155</sup>

### C. Disproportionate Application of Zero Tolerance Policies

Many schools use ZT policies to boost their schools’ performance ratings.<sup>156</sup> Because the phrase “potentially low-performing students” usually includes minority students, low-income students, and learning-disabled

145. Grant, *supra* note 96.

146. Levin, *supra* note 29.

147. Downing, *supra* note 107. For example, a Harris County judge expressed her dissatisfaction with school officials when a girl came before her for too many absences, and the judge discovered that she did not have the money to buy school uniforms. *Id.* “The judge contacted an organization that provided the girl with five sets of uniforms”—something that could have been handled by the school counselor. *Id.*

148. *See id.*

149. *See* Levin, *supra* note 29.

150. *See id.* For example, the school formerly handled school fights with detention or ISS, but now they call in the police who cite participants, which results in fines, court costs, and possible jail sentences. Grant, *supra* note 96.

151. *See* Simpson, *supra* note 23, at 441.

152. *Id.*

153. Lintott, *supra* note 87, at 563.

154. *Id.*

155. Simpson, *supra* note 23, at 442; *see* Rokeach & Denvir, *supra* note 37, at 286.

156. David J. D’Agata, *Alternative Education Programs: A Return to “Separate But Equal?”*, 29 NOVA L. REV. 635, 639 (2005); Peterson, *supra* note 128.



students, critics argue that administrators use ZT policies to target and expel these groups for minor infractions.<sup>157</sup>

### 1. Racial Disparity

Many scholars have raised concerns that ZT policies cause targeting of minorities in the school disciplinary systems.<sup>158</sup> During the 1998–1999 school year, one study reported that 33% of students suspended and 31% of students expelled nationwide were black, even though black students only made up 17% of the total student population.<sup>159</sup> These studies indicate that schools are suspending black students at 2.6 times the rate of white students.<sup>160</sup>

A possible explanation for the higher rates of punishment of black students is the higher rate of misbehavior among black students.<sup>161</sup> If so, then any discrepancy in suspension and expulsion rates would not represent racial bias but, rather, an appropriate response to misconduct.<sup>162</sup> “Yet investigations of student behavior, race, and discipline have found no evidence that African Americans misbehave at a significantly higher rate”; instead, research indicates that schools tend to administer more severe punishments to black students for less serious and more subjective offenses.<sup>163</sup> Additionally, studies have

157. Peterson, *supra* note 128. In an effort to dispel the incentive for school officials to send low-achieving students to alternative schools to raise school test scores, bills have been introduced in the Texas legislature that relate those students’ scores to the original school. *Id.*

158. SKIBA, *supra* note 81, at 11. Because there is conflicting information concerning discipline of non-black minority students, such as Hispanic and Asian students, this Comment focuses almost exclusively on the overrepresentation of black students in the disciplinary process. See Rokeach & Denvir, *supra* note 37, at 283. Early studies on the overrepresentation of black students in school discipline found that rates of suspension for black students that were between two and three times higher than suspension rates for white students at the elementary, middle, and high school levels. While 29 states suspended over 5 percent of their total black enrollment, only four states suspended over 5 percent of white students.

SKIBA, *supra* note 81, at 11.

Students interviewed at an urban high school suggested that they knew race was a factor in the application of discipline. *Id.* at 12. White students, however, perceived the racial discrimination as unintentional and unconscious. *Id.* Black students and other minority students, however, perceived that schools used race as an arbitrary way of removing students that teachers did not like from the classroom and that many teachers purposefully pushed black students to the edge to encourage hostility. *Id.*

159. Rokeach & Denvir, *supra* note 37, at 283. In San Francisco schools, for example, black students accounted for 16% of student enrollment, but received 52% of all suspensions handed out. Sanchez & Sandler, *supra* note 101.

160. Downing, *supra* note 107. A U.S. Department of Education Report indicated that over a four-year period 24.4% of all black male students were suspended at least once. THOMAS M. SMITH ET AL., U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 1997, at 158 (1997), available at <http://nces.ed.gov/pubs97/97388.pdf>.

161. SKIBA, *supra* note 81, at 12.

162. *Id.*

163. *Id.*; Rokeach & Denvir, *supra* note 37, at 283. In an analysis of referring middle school students in

indicated that black students, when referred for an infraction, receive harsher punishments than their white counterparts.<sup>164</sup>

Ironically, perpetuation of ZT policies may be an unexpected consequence of racial disparity in student punishment.<sup>165</sup> School administrators are afraid that if they do not harshly punish those white students caught for minor violations and then respond differently to black or Hispanic students, the school will be accused of prejudice.<sup>166</sup> Thus, supporters claim ZT policies allow for consistency in punishment rather than allowing subjective judgment to dictate suspensions and expulsions.<sup>167</sup> Nevertheless, subjective intentions can still play a role because if the teacher never refers the student to the office, administrators can never enforce the one-size-fits-all punishment. Therefore, mandating punishments under ZT policies only serves to take subjectivity out of principals' or administrators' hands at the punishment phase and place it in the teachers' hands at the charging phase.<sup>168</sup> As a result, teachers determine who will be subjected to the sentencing guidelines of ZT policies by deciding who will be referred to the office for punishment.<sup>169</sup> Consequently, ZT policies have not removed subjective judgment.<sup>170</sup> Instead, to make every student feel equally treated, ZT policies have eliminated the judgment of administrators and caused them to implement harsher punishments on all students to prevent claims of discrimination.<sup>171</sup>

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one particular urban district to the administrative office, researchers determined that teachers referred the majority of white students to the office for vandalism, obscene language, smoking, endangerment, drugs, and alcohol, and referred the majority of black students for loitering, disrespect, threats, excessive noise, and a catch-all category of conduct interference. SKIBA, *supra* note 81, at 12. Some researchers suggest that many teachers, especially white teachers, may over-refer black students, especially black male students, because they "may be unfamiliar and . . . uncomfortable with the more active and boisterous style of interaction that characterizes" black students. *Id.* The stereotype of a black male as dangerous coupled with their more boisterous character may cause teachers to "react more quickly to relatively minor threats to authority." *Id.* For example, a study covering disciplinary referral in Texas elementary schools reported that teachers who lacked the skills to manage racially diverse student bodies accounted for over 80% of the referrals. D'Agata, *supra* note 156, at 642 (noting that on one school campus where black males made up less than 20% of the student population, black males accounted for 75% of the discipline referrals).

164. SKIBA, *supra* note 81, at 12. For example, one probation department in Pennsylvania reported that between September and June of the 2005-2006 school year, 555 students were subject to court supervision, and of those 555 students, 463 were black, but only 90 were white. Grant, *supra* note 96.

165. See Siegel, *supra* note 1.

166. *Id.* (noting that the school administrator in Taylor Hess's case felt that if he did not give Taylor the one-year sentence mandated under the district's ZT policy, subsequent minority students caught with weapons would cry prejudice if they did not receive the same discipline Taylor received).

167. *Id.*

168. See Siegel, *supra* note 1 (discussing the lack of discretion a school administrator possesses when operating under a ZT policy).

169. See *id.*

170. *Id.*

171. *Id.*

## 2. Economic Disparity

Socioeconomic status also affects the number of suspensions and expulsions imposed under ZT policies.<sup>172</sup> For the last twenty-five years, studies of school punishment have consistently reported overrepresentation of low-income students.<sup>173</sup> These studies have shown that high-income students usually receive milder punishments, such as getting a lecture from the teacher or having to move his or her desk; whereas, low-income students usually receive more severe punishments, such as being reprimanded in front of the classroom, having personal belongings searched, and standing in the hall all day.<sup>174</sup> These disparities are also apparent in the ZT policy arena, as high-income students are less likely to receive referrals that result in suspension or expulsion.<sup>175</sup> And students notice this inconsistent punishment.<sup>176</sup> In fact, one study “reported that both high- and low-income adolescents felt that disciplinary practices were unfairly weighted against poor students.”<sup>177</sup>

## 3. Disability Disparity

Despite the protections of the Individuals with Disabilities Education Act of 1997 (IDEA), ZT policies may have a disproportional impact on disabled students.<sup>178</sup> Students with learning disabilities are more often subjected to punishments under ZT policies than students without learning disabilities.<sup>179</sup> In 1997, Congress addressed this issue by amending the IDEA in an attempt to

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172. SKIBA, *supra* note 81, at 11.

173. *Id.*

174. *Id.* Some researches have suggested that what appears to be a disproportionate application of ZT policies to minority students is actually a disproportionate application to students of lower socioeconomic status. Rokeach & Denvir, *supra* note 37, at 283; SKIBA, *supra* note 81, at 12. One study refutes this contention by reporting that “nonwhite students still received significantly higher rates of suspension than white students in all locales except rural senior high schools,” regardless of their socioeconomic status. SKIBA, *supra* note 81, at 12. Thus, while socioeconomic status may be a factor in making disciplinary referrals, race appears to be a factor independent of socioeconomic status. *Id.*

175. SKIBA, *supra* note 81, at 12.

176. *Id.*

177. *Id.* at 11.

178. NASP Fact Sheet, *supra* note 86; MHA Position Statement, *supra* note 87. Congressional studies have found that schools exclude one out of every eight disabled students. D’Agata, *supra* note 156, at 656.

179. MHA Position Statement, *supra* note 87. A common explanation for this overrepresentation of disabled students is that there is a higher rate of misbehavior among disabled students. *Id.* For example, learning-disabled children are more likely to be involved in acts of violence. Lintott, *supra* note 87, at 557. This higher rate may be the result of schools’ not providing students with the services required to meet their mental health and special educational needs. MHA Position Statement, *supra* note 87. Without these essential services, disabled students experience daily failure and frustration, which may explain why many of them engage in delinquent or aggressive behavior. Lintott, *supra* note 87, at 557.

combine the needs of special education students with ZT policies.<sup>180</sup> By amending the IDEA, Congress attempted to “ensure that a child would not be punished for behavior that was a characteristic of the child’s disability.”<sup>181</sup> The amended IDEA provided extensive procedural protections for disabled children and guaranteed that schools consider the disability when punishing a child with disabilities.<sup>182</sup> Even with these statutory protections, however, stories of schools expelling and charging children who have autism or severe Attention Deficient Disorder with battery clearly shows that school officials are not considering a child’s disability before issuing punishment.<sup>183</sup> Thus, school officials continue to apply ZT policies disproportionately to students with disabilities and thus increase the percentage of learning-disabled students being suspended, expelled, or removed to AEPs.<sup>184</sup>

*D. Inadequate Alternative Education Programs Enhance Problems Zero Tolerance Policies Create*

Teachers’ use of ZT policies to control their classrooms has fostered more AEPs, which may allow teachers to completely avoid troubled students.<sup>185</sup> An AEP is an alternative school setting designed to give students a more personalized curriculum through smaller classes with more restrictions and social controls.<sup>186</sup> The primary distinction from the conventional school setting

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180. See MHA Position Statement, *supra* note 87.

181. OPPORTUNITIES SUSPENDED, *supra* note 89, at 9.

182. *Id.*

183. *Id.*

184. *Id.* In addition, instead of placing disabled students in the school and community-based programs these children need, schools place these students in highly structured, restrictive settings—often as a result of ZT policies. MHA Position Statement, *supra* note 87. In Texas, for instance, during the 1996-1997 school year 20% of all students in AEPs were characterized as “special education or special needs students under federal law.” D’Agata, *supra* note 156, at 655. Additionally, students not excluded from the school system are housed in special classes until they are old enough to drop out, at which time they are encouraged to do so. *Id.* at 656.

185. D’Agata, *supra* note 156, at 639. Teachers and school administrators find AEPs appealing for two reasons: (1) saving school funding and (2) boosting performance ratings. *Id.* If a school offers an AEP and transfers a suspended or expelled student to that program, the school will not sacrifice the funding that student would generate for being present each day. *Id.* In addition, by removing potentially low performing students from their schools, administrators can boost their schools’ performance ratings. *Id.* Thus, AEPs essentially strip administrators of any incentive not to use ZT policies to expel troubled youth because placing a student in AEP shields the school from any adverse consequences of expelling their “unwanted children.” See *id.*; Peterson, *supra* note 128 (noting that abuse of ZT policies to boost test scores was exacerbated by President Bush’s No Child Left Behind Act, which increased school accountability for test scores by penalizing schools that fail to raise student test scores).

186. D’Agata, *supra* note 156, at 643. Even though federal law does not require school districts to offer AEPs, twenty-six states require school districts to provide alternative education to suspended or expelled students, and eighteen states leave the decision of whether to provide alternative education to the schools. OPPORTUNITIES SUSPENDED, *supra* note 89, at 14. But, only a small percentage of expelled or suspended students actually attend any such program. Rokeach & Denvir, *supra* note 37, at 285. As a result, during the 1998-1999 school year, an estimated 38,200 expelled students received no educational services. Siman, *supra* note 102, at 333.

is the heightened student monitoring.<sup>187</sup> In fact, many critics of AEPs claim that the police presence and strictly enforced rules and regulations at alternative schools are too similar to controls at correctional institutions.<sup>188</sup>

Through ZT policies, schools use AEPs as “dumping grounds” for problematic students.<sup>189</sup> AEPs do not work to improve behavior because the programs are traditionally used by schools to simply house problematic students.<sup>190</sup> This failure to improve student behavior may be because of the substandard level of education and increased levels of violence that students at AEPs experience.<sup>191</sup> Because many alternative school programs are self-paced and do not have grades, homework, or significant academic content, students are often academically behind when they return to conventional schools.<sup>192</sup> Studies also show that students at alternative schools experience higher levels of violence than at conventional schools.<sup>193</sup> Thus, students placed in alternative settings because of minor offenses—tardiness, disruptive behavior, or possession of a bread knife at school—are being exposed to those who have committed more violent acts—assault, battery, and robbery.<sup>194</sup> As a result, these “soft jails,” as one expert describes AEPs, are storage tanks that leave little hope that students will be able to conform to the conventional school rules once they return.<sup>195</sup> And studies support this opinion.<sup>196</sup>

In this way, AEPs may actually exacerbate the problem of school violence because students that were previously only disruptive may learn more delinquent behavior.<sup>197</sup> While they may need discipline, these students may not

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187. Lintott, *supra* note 87, at 571.

188. D’Agata, *supra* note 156, at 641; Lintott, *supra* note 87, at 571.

189. D’Agata, *supra* note 156, at 640. Data from one school district in Texas shows that 43% of its students sent to an AEP were black, even though black students only made up 28% of its student population. *Id.* at 642.

190. *Id.* at 640.

191. *See id.* at 640-41.

192. *Id.* Critics of AEPs use Texas, which has over 100,000 students in alternative schools, as an example of a system that provides inadequate education for students attending its alternative schools because Texas’s academic mission for its AEPs does not require those programs to offer courses necessary for a student’s graduation. *Id.* at 640; Levin, *supra* note 29. In fact, Texas AEPs are only required to offer those courses that enable the students to perform at their current grade level and to “provide only two hours of daily instruction, compared to the standard seven hour school day.” Levin, *supra* note 29. As a result, Texas schools are leaving these students behind, and to make matters worse, some students are being left behind for things as minor as horseplay, loitering, copying another student’s work, or inappropriate displays of affection because of ZT policies. D’Agata, *supra* note 156, at 643.

193. D’Agata, *supra* note 156, at 641.

194. *Id.*

195. Lintott, *supra* note 87, at 572.

196. *Id.*

197. D’Agata, *supra* note 156, at 642-43. Concentrating all the problematic students in AEPs reinforces delinquent behavior patterns and fosters distrust. *Id.*

need the extensive disciplinary setting of an AEP.<sup>198</sup> Yet school administrators continue to see AEPs as viable options to remove disruptive students from the classroom.<sup>199</sup> This strategy not only wastes the limited resources allocated to alternative schools on students who will likely not benefit from the personalized atmosphere that AEPs provide, but also takes time away from youths who can benefit from the resources that AEPs offer.<sup>200</sup> Consequently, if conventional schools would stop overloading alternative schools through ZT policies, then AEPs would have more funding and more time to focus on students that truly need help.<sup>201</sup>

*E. Zero Tolerance Policies Lead to Higher Dropout Rates and Increased Costs to Society*

Students suspended under ZT policies and left with no alternative opportunity for education may fall behind in their schoolwork, fail classes, and have to repeat their current grade level.<sup>202</sup> Suspension can lead to feelings of alienation and hostility towards the educational process and may eventually cause the student to drop out of school.<sup>203</sup> Approximately 2,500 students drop out of school each day.<sup>204</sup> Together, suspension and expulsion are reported as “one of the top three school-related reasons for dropping out,” indicating that student suspensions are a strong predictor of student dropouts.<sup>205</sup> In fact, more than 30% of sophomore students who dropped out of school had been previously suspended, meaning that sophomores who have previously been suspended are three times as likely to drop out of school than their peers.<sup>206</sup> Overall, 10% of all students who had dropped out reported suspension or expulsion as the reason for leaving school.<sup>207</sup>

Moreover, high dropout rates can result in substantial costs for society.<sup>208</sup> Many students who drop out of school eventually become dependant on social services, such as welfare and unemployment, or become involved in the criminal justice system.<sup>209</sup> Conversely, students that get an education are more

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198. Lintott, *supra* note 87, at 573.

199. *Id.*

200. *Id.*

201. *See supra* notes 185-201 and accompanying text.

202. OPPORTUNITIES SUSPENDED, *supra* note 89, at 13.

203. *Id.* Emotional responses recorded during interviews with students who were suspended or expelled “revealed increased apathy, lowered self-esteem, loneliness, boredom, feeling marginalized and unwanted, distrust of school officials, and family turmoil.” Rokeach & Denvir, *supra* note 37, at 285.

204. Lintott, *supra* note 87, at 562.

205. Rokeach & Denvir, *supra* note 37, at 285 (noting that special education students are even more likely to drop out after being suspended or expelled).

206. OPPORTUNITIES SUSPENDED, *supra* note 89, at 13; Simpson, *supra* note 23, at 439.

207. Richards, *supra* note 15, at 110. These high dropout rates are shocking because most students suspended or expelled were between twelve and fifteen years old. Rokeach & Denvir, *supra* note 37, at 286.

208. *See* Rokeach & Denvir, *supra* note 37, at 286-87.

209. ELLEN M. BOYLAN, EDUC. L. CTR., ADVOCATING FOR REFORM OF ZERO TOLERANCE STUDENT DISCIPLINE POLICIES: LESSONS FROM THE FIELD (2002), available at <http://www.edlawcenter.org/ELCPublic/>

likely to benefit society by being good citizens and workers.<sup>210</sup> Thus, society bears the burden of supporting uneducated, unemployed adults.<sup>211</sup> ZT policies put troubled students at risk of future unemployment, further juvenile delinquency, and place additional costs on society to keep other students safe, even though research indicates that schools most often suspend or expel students for non-violent, non-criminal acts.<sup>212</sup>

#### IV. ARE ZERO TOLERANCE POLICIES MAKING A DIFFERENCE IN SCHOOL SAFETY?

##### A. Zero Tolerance Policies Are Not Preventing School Violence

###### 1. Increased School Violence

ZT policies are “premised on the notion that violence in school can be reduced and controlled by identifying, apprehending and excluding violent or potentially violent individuals.”<sup>213</sup> However, such policies may not actually reduce violence or increase school safety.<sup>214</sup> Although a federal report indicated that violent crime on school campuses fell by 50% between 1992 and 2002, this decline is not necessarily due to implementation of ZT policies.<sup>215</sup> Studies indicate that the decline began as part of a national trend before Congress enacted the 1994 Act.<sup>216</sup> In fact, this decline in school crime rates parallels a national drop in crime rates.<sup>217</sup> Additionally, any decline in school violence that cannot be credited to the national drop is more likely due to students’ reporting suspicious classmates quickly and authorities taking those reports seriously, not ZT policies.<sup>218</sup>

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Publications/PDF/AdvocatingReform\_ZeroTolerance.pdf; Richards, *supra* note 15, at 109-10; Rokeach & Denvir, *supra* note 37, at 286; Simpson, *supra* note 23, at 441. In fact, high school dropouts make up as much as 80% of the prison population. Rokeach & Denvir, *supra* note 37, at 286.

210. BOYLAN, *supra* note 209, at 24 (“Youth that receive an education are far more likely to contribute to society as workers and citizens than those who are denied educational opportunity under zero tolerance.”). Statistics show that 50% of high school dropouts are unemployed. Rokeach & Denvir, *supra* note 37, at 286.

211. Richards, *supra* note 15, at 109. Studies estimate that over a lifetime, one uneducated adult costs society between \$243,000 and \$388,000 in social services. *Id.* In contrast, a Michigan study estimated that providing alternative education to students suspended or expelled from school costs approximately \$5,000 per year per student. Simpson, *supra* note 23, at 441.

212. See BOYLAN, *supra* note 209, at 24.

213. OPPORTUNITIES SUSPENDED, *supra* note 89, at 2.

214. *Id.* at 17 (noting that there is little statistical evidence that such policies are effective); Richards, *supra* note 15, at 108-09 (discussing a Department of Education study on ZT policies).

215. See Axtman, *supra* note 110.

216. See Richards, *supra* note 15, at 109.

217. Peterson, *supra* note 128.

218. See Kay S. Hymowitz, ‘Zero Tolerance’ Is Schools’ First Line of Defense, NEWSDAY, Apr. 18,

Furthermore, studies showed that ZT policies actually encouraged student misconduct because “excessive discipline for misbehaving students often increases violent behavior in students.”<sup>219</sup> One study confirmed this premise by finding that schools with ZT policies were less safe than schools without similar policies.<sup>220</sup>

Some schools point to lower expulsion and suspension rates as evidence that ZT policies are successful in reducing student misconduct.<sup>221</sup> These statistics, however, exclude information that negates the claim that expelled students are reformed by the process—many attend AEPs, drop out of school, or go to jail.<sup>222</sup> In addition, schools can lower suspension rates by making suspensions longer because certain students tend to be punished repeatedly.<sup>223</sup> Therefore, by extending those students’ original suspensions, schools have prevented recording subsequent suspensions of that same student and thus artificially reduced their suspension or expulsion rates.<sup>224</sup> Thus, reductions in year-to-year suspension and expulsion rates do not equal greater school safety.<sup>225</sup> The success of ZT policies in decreasing violence in schools can only really be judged by looking at child victimization rates in schools, and thus far, there has been no evidence that school violence has decreased due to implementation of ZT policies.<sup>226</sup>

## 2. *No Decline in the Number of School Shootings*

States began adopting ZT policies to control school violence almost fifteen years ago.<sup>227</sup> Schools originally implemented ZT policies to combat a growing belief among parents, students, and teachers that our schools were rife with violence.<sup>228</sup> Further, the news media’s excessive coverage of school shootings, such as the shooting at Columbine High School, fostered this impression.<sup>229</sup> Neither before nor after Columbine, however, did ZT policies prevent these incidents from occurring on school campuses.<sup>230</sup> In fact, from February 1996 through January 2007, there have been thirty-five school shootings.<sup>231</sup> In those

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2001, available at [http://www.manhattan-institute.org/html/\\_newsday-zero\\_tolerance.htm](http://www.manhattan-institute.org/html/_newsday-zero_tolerance.htm).

219. *Id.*; Lintott, *supra* note 87, at 559.

220. OPPORTUNITIES SUSPENDED, *supra* note 89, at 18. One study showed that 92% of high school seniors indicated fear of crime and violence in their schools, while only 4% of high school students indicated that they had stayed home from school out of fear. Lintott, *supra* note 87, at 562.

221. *See* OPPORTUNITIES SUSPENDED, *supra* note 89, at 17.

222. *Id.* at 18.

223. *Id.*

224. *See id.*

225. *Id.*

226. *See id.*

227. *See* Simpson, *supra* note 23, at 417-22.

228. *Id.*

229. *Id.*

230. *See* Downing, *supra* note 107.

231. *See* Infoplease, A Time Line of Recent Worldwide School Shootings, <http://www.infoplease.com/ipa/A0777958.html> (last visited Feb. 1, 2008) [hereinafter Infoplease].



thirty-five incidents, sixty-eight students and teachers were killed, and ninety-nine were injured.<sup>232</sup> By far the deadliest attack was Columbine High School, where twelve students and one teacher were killed, and twenty-three students were wounded.<sup>233</sup> Prior to Columbine, the worst attacks on schools had resulted in no more than five killed and twenty-two wounded.<sup>234</sup> Perhaps this accounts for the substantial media coverage the Columbine shootings received.<sup>235</sup> Since that time, however, there have been several more school attacks.<sup>236</sup> As the above incidents and statistics demonstrate, the enforcement of ZT policies in schools has not affected the prevalence of school shootings.<sup>237</sup>

Critics say that one of the reasons ZT policies have not affected school shootings is because of the harsh punishments that ZT policies dispense which may instigate retaliatory behavior.<sup>238</sup> For example, in one case, a student suspended for bringing a weapon to school returned the next day and shot three students.<sup>239</sup> In another incident, a seventeen-year-old student expelled from his high school returned and killed another student.<sup>240</sup> Suspended or expelled students may engage in acts of violence because the school environment is based on a trust relationship, and when schools expel or suspend students, students lose that trust and become isolated.<sup>241</sup> Moreover, students subjected to these harsh disciplinary measures are more likely to subsequently be involved in anti-social behavior.<sup>242</sup> Thus, ZT policies are not only failing to prevent school shootings, but are also failing to improve student behavior.<sup>243</sup>

#### *B. Zero Tolerance Policies Do Not Improve Student Behavior*

Similar to those students who return to school and open fire on their classmates, many other suspended or expelled students return to school and repeat the same or worse behavior.<sup>244</sup> Thus, there is no evidence that ZT

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232. *See id.*

233. *Id.* (noting that Eric Harris and Dylan Klebold planned to kill at least 500 of their classmates and then blow up their school).

234. *Id.*

235. Simpson, *supra* note 23, at 416-22.

236. Infoplease, *supra* note 231 (including Jeff Weise, a sixteen-year-old student, who shot and killed a teacher, a security guard, and five students before killing himself and Carl Roberts IV, a thirty-two-year-old man, who shot ten Amish schoolgirls, killing five).

237. Downing, *supra* note 107.

238. Richards, *supra* note 15, at 107.

239. *Id.* at 108.

240. Infoplease, *supra* note 231.

241. Richards, *supra* note 15, at 107.

242. *Id.*

243. *See id.*

244. *See* SKIBA, *supra* note 81, at 2; Rokeach & Denvir, *supra* note 37, at 277.

policies' use of suspensions and expulsions is successful in improving student behavior.<sup>245</sup> In fact, studies found that up to 40% of all school suspensions are for repeat offenders and thus show that ZT policies are not working for a number of students.<sup>246</sup> As a result, a growing number of critics believe that ZT policies' use of suspensions and expulsions is not successful because suspensions and expulsions actually reinforce misconduct.<sup>247</sup>

### C. Growing Opposition: The Move Toward Amending Zero Tolerance Policies

As ZT policies became standard operating procedures in the 109,000 public schools across the country, more criticism began to brew.<sup>248</sup> A swell of opposition began after stories of overbroad ZT policies became public.<sup>249</sup> Many critics believe that ZT policies have a legitimate purpose but that legislators and administrators are abusing this purpose.<sup>250</sup> Schools have eliminated common sense and fairness from their systems of punishment and instead rigidly enforce rules without regard to surrounding circumstances.<sup>251</sup>

Many parents that initially supported ZT policies have become critics after the policies began to negatively affect their lives.<sup>252</sup> These parents suggest that legislatures and administrators are frustrated with student misconduct and are simply imposing harsh punishment on students because they want to appear to their communities as tough and in control, and not because such punishment will prevent future misconduct.<sup>253</sup> Using ZT policies to reassure parents that schools will not tolerate disruptive behavior is what leads to abuse of those policies, such as imposing harsh punishments for minor infractions.<sup>254</sup> As a result, some say that ZT policies are nothing more than "[f]eel-good legislation," not a solution to the problem.<sup>255</sup> The problem is that this

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245. SKIBA, *supra* note 81, at 13.

246. *See id.*

247. *Id.*

248. Cauchon, *supra* note 113.

249. *See* Henault, *supra* note 19, at 548. Such stories include a seventh-grader being suspended, pursuant to the school's anti-drug policy, for sharing a cough drop with her classmate; a second-grader being suspended for bringing his grandfather's watch that had a one-inch pocket knife on it to school for show-and-tell, pursuant to the school's no weapons policy; and a twelve-year-old being suspended and arrested for making a terrorist threat after warning his classmates in the lunch line, "I'm going to get you," if they ate all the potatoes. *Id.*; Overcriminalized, *supra* note 96.

250. Kate Zernike, *Crackdown on Threats in School Fails a Test*, N.Y. TIMES, May 17, 2001, at A1.

251. BOYLAN, *supra* note 209, at 21.

252. *See* Zernike, *supra* note 250. For example, one parent's "support turned to outrage when his son was suspended [for a] month and a letter was put in a police file after the boy, [at the time] 9, joked with other boys about selling tickets to kill a girl." *Id.* While the boy's father admitted that the boy had made a mistake, he felt that his son's actions were not grounds for giving the boy a police record. *Id.* This parent, like many others, is beginning to see that punishments pursuant to ZT policies do not always fit the situation. *See* Cauchon, *supra* note 113.

253. Rokeach & Denvir, *supra* note 37, at 279.

254. BOYLAN, *supra* note 209, at 25; Grant, *supra* note 97; Katy Zero Tolerance, *supra* note 28.

255. Siegel, *supra* note 1.

appearance of toughness and control comes at the cost of children's education and consequently their lives.<sup>256</sup>

In response to this growing opposition, potential retrenchment may have begun in Indiana, Mississippi, Pennsylvania, and Texas.<sup>257</sup> In these four states, a handful of state legislators are lobbying to reverse ZT policies by introducing "several bills aimed at softening strict school-discipline policies."<sup>258</sup>

Despite inconclusive studies on the reduction of school violence, Texas is still one of the nation's toughest states when it comes to discipline.<sup>259</sup> Nevertheless, Texas is now part of a group that is moving to relax ZT policies.<sup>260</sup> Many Texas parents believe schools need discretion in disciplining students and are working to reform the disciplinary policies in Texas schools.<sup>261</sup>

These parents have lobbied the state legislature, written letters, filed cases, and created websites to further their cause.<sup>262</sup> In response to the growing opposition in Texas, the Texas legislature adopted a bill that amended the Texas Education Code to allow school officials to consider a student's intent when determining punishment.<sup>263</sup>

## V. IMPLEMENTATION OF ZERO TOLERANCE POLICIES IN TEXAS

### A. Chapter 37 of the Texas Education Code

Texas's ZT laws can be found in chapter 37 of the Texas Education Code.<sup>264</sup> The legislature adopted Chapter 37 in 1995 to govern schools' punishments of students suspected of or convicted of certain offenses.<sup>265</sup> The legislature has amended Chapter 37 five times—in 1997, 1999, 2001, 2003,

256. See *supra* Parts III, IV.A-B.

257. Axtman, *supra* note 110; Peterson, *supra* note 128.

258. Axtman, *supra* note 110; Peterson, *supra* note 128. For example, in Mississippi, a bill was introduced that would prohibit schools from using ZT policies. Peterson, *supra* note 128.

259. Axtman, *supra* note 110.

260. *Id.*

261. See Downing, *supra* note 107; Katy Zero Tolerance, *supra* note 28.

262. See Katy Zero Tolerance, *supra* note 28. One parent, for example, began lobbying for change in Texas when, after his twelve-year-old son discovered he had forgotten to remove his pocketknife from his coat after his Boy Scout meeting, the school sent his son to an AEP for forty-five days. Axtman, *supra* note 110. The boy's father later explained that there must be discretion in imposing punishment because in his son's case "[a]ll the teachers knew it was an honest mistake, but none of that mattered because of the school's policy." *Id.*

263. See Peterson, *supra* note 128 (referring to H.B. 603).

264. TEX. EDUC. CODE ANN. § 37.001 (Vernon 2006).

265. TEX. EDUC. AGENCY & TEX. JUVENILE PROB. COMM'N, GUIDE TO CHAPTER 37: DISCIPLINE; LAW AND ORDER 10-14 (2004), available at [http://www.tea.state.tx.us/safe/ch37/Chapter37Guide\(2004\).pdf](http://www.tea.state.tx.us/safe/ch37/Chapter37Guide(2004).pdf) [hereinafter TEA GUIDE TO CHAPTER 37]; Downing, *supra* note 107.

and 2005.<sup>266</sup> The 2003 version of Chapter 37 specifies that a school shall expel a student for a number of offenses, including student use, exhibition, or possession of a firearm, knife, club, or other weapon as defined under the Texas Penal Code.<sup>267</sup> Chapter 37 also specifies that a school must expel a student for offenses such as sexual assault, arson, indecency with a child, aggravated kidnapping, aggravated robbery, or drug violations.<sup>268</sup> Chapter 37, however, does not limit a school's ability to remove students to only enumerated offenses.<sup>269</sup> While it limits a school's ability to expel a student to only those offenses listed under Section 37.007, Chapter 37 permits schools to suspend a student for any additional offense, as long as the school lists that offense in its student code of conduct prior to rendering the punishment.<sup>270</sup> Additionally, the 2003 version requires only that the school specify whether it will consider self-defense as a mitigating factor when deciding whether to suspend, expel, or relocate a student to an AEP.<sup>271</sup> Thus, the 2003 version not only permits schools to suspend students for whatever offenses the school deems appropriate, but also allows schools to dispense punishments without looking at the surrounding circumstances.<sup>272</sup> As a result, the Texas Education Code effectively adopted a ZT policy approach to discipline, although the exact phrase is not included in the state regulation.<sup>273</sup>

## *B. 2005 Amendment to the Texas Education Code*

### *1. Adding Discretion: An Explanation of the Changes*

In 2005, Representative Rob Eissler, introduced H.B. 603 to the Texas legislature, which became effective in September of the same year:

H.B. 603 adds to [the 2003 version of] the Education Code a provision that the locally adopted student code of conduct must specify whether consideration is given in a decision when suspension, expulsion, or disciplinary alternative education program placement is ordered, to intent or

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266. See TEA GUIDE TO CHAPTER 37, *supra* note 265, at 6.

267. TEA GUIDE TO CHAPTER 37, *supra* note 265, at 15-16. Prohibited weapons listed under section 46.05 of the Texas Penal Code explosive weapons, machine guns, certain knives, armor piercing ammunition, and chemical dispensing devices. TEX. PENAL CODE ANN. § 46.05 (Vernon 2003).

268. Act of June 20, 2003, 78th Leg., R.S., ch. 1055, 2003 Tex. Gen. Laws 3025, 3030 (amended 2005) (current version at TEX. EDUC. CODE ANN. § 37.007 (Vernon 2006)).

269. See *id.*

270. See *id.*

271. *Id.*

272. *Id.*

273. See Downing, *supra* note 107 (referring to ZT policies in Texas as common law); see also *supra* notes 264-73 and accompanying text.

lack thereof, a student's disciplinary history, and/or a student's disability that substantially impairs capacity.<sup>274</sup>

Thus, H.B. 603 was intended to give school administrators discretion in disciplining students, which would allow them to evaluate individual circumstances of the student and the incident.<sup>275</sup> This 2005 amendment complies with the 1994 Act because it still requires automatic expulsion for students that possess firearms on school campuses.<sup>276</sup> Supporters of the 2005 amendment claim that H.B. 603 protects students who inadvertently bring illegal weapons to school.<sup>277</sup> The question, however, is whether H.B. 603 offers students more protection by giving school officials discretion when prescribing punishments for certain incidents.

## 2. *The 2005 Amendment Added What?*

Under the 2003 version, schools routinely expelled and placed students in AEPs, regardless of the students' intent or knowledge of the wrongful possession of a firearm.<sup>278</sup> In response to school officials' complaints that they had no choice but to remove students from their schools, legislators introduced H.B. 603.<sup>279</sup> Analyzed in this way, H.B. 603 may appear to offer students more protection from being suspended or expelled for unknowingly possessing prohibited items at school.<sup>280</sup> But if school officials are primarily concerned with pressure from parents, and not from the legislation, then H.B. 603 does not appear to offer much protection.<sup>281</sup>

One of the several shortcomings of H.B. 603 is that the law mandates expulsion of students who possess firearms on school property and thus fails to offer the protection claimed by its supporters.<sup>282</sup> The Texas Education Code's requirement of automatic discipline keeps the state in compliance with the 1994 Act, which ensures that Texas schools will continue to receive federal funding.<sup>283</sup> This compliance also ensures, however, that school officials will

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274. Senate Research Comm., Bill Analysis, Tex. H.B. 603, 79th Leg., R.S. (2005); Helen Eriksen, *Discipline Bill on Perry's Desk: The Plan Calls for More Leeway to Protect Students Who Unknowingly Carry Weapons*, HOUST. CHRON., June 4, 2005, available at <http://www.chron.com/disp/story.mpl/metropolitan/3210834.html>.

275. Eriksen, *supra* note 275.

276. *Id.*

277. *See id.*

278. *Id.*

279. Peterson, *supra* note 128.

280. *See* Eriksen, *supra* note 274.

281. *See* Peterson, *supra* note 128.

282. *See* Eriksen, *supra* note 274.

283. *See* TEX. EDUC. CODE ANN. § 37.007(a)(1) (Vernon 2006); Richards, *supra* note 15, at 91.

not take into account self-defense, intent, disciplinary history, or disabilities.<sup>284</sup> Thus, the automatic expulsion requirement eliminates all discretion when punishing gun possession at school and, as a result, offers no protection to students who inadvertently bring a gun to school.<sup>285</sup> For example, intent could not be considered as a mitigating factor when an eighteen-year-old high school student was arrested and then expelled from school after forgetting to remove an unloaded shotgun from his truck following target practice the day before.<sup>286</sup> While the elimination of ZT policies mandated by federal law is beyond the scope of this Comment, as long as the 1994 Act ties federal funding to school implementation of ZT policies, students will never be fully protected from punishment for inadvertent acts.<sup>287</sup>

In addition, H.B. 603 fails to offer students more protection because it does not change the discretion given to school officials in the 2003 version.<sup>288</sup> School boards and school administrators continue to blame their use of strict discipline on the system despite the authority given to them under the law to use discretion.<sup>289</sup> The 2003 version did not prohibit school officials from using discretion when punishing students, nor did it prohibit school officials from taking into account self-defense, intent, disciplinary history, or disabilities; rather, the 2003 version simply mandated that school districts specify in the student handbook whether school officials will consider surrounding circumstances when exercising their discretion.<sup>290</sup> While the 2003 version does not explicitly state that intent, disciplinary history, and disabilities are factors that the school must specify in order to consider, the Texas Education Code does not prohibit their consideration.<sup>291</sup> School officials were free to consider

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284. See TEX. EDUC. CODE ANN. § 37.007(a)(1). The rationale behind this practice must be that the U.S. Congress believes punishing the student who forgets to remove an unloaded shotgun from his truck will deter a student who has the intent to kill his classmates from bringing a concealed and loaded pistol to class. Overcriminalized, *supra* note 97. This rationale is as absurd as saying that punishing someone who accidentally causes a traffic accident will deter someone else from intentionally ramming another car in a fit of rage. See *id.*

285. See Eriksen, *supra* note 274.

286. Overcriminalized, *supra* note 97.

287. See Eriksen, *supra* note 274. Congress is permitted to condition the receipt of federal funding on compliance with the 1994 Act under the Spending Clause of the U.S. Constitution as long as the requirements for funding are expressly stated and relate to the spending program's purpose. U.S. CONST. art. I, § 8; Richards, *supra* note 15, at 101-02. One critic argues that while the 1994 Act meets these two requirements, it is still unconstitutional because the Supreme Court has prohibited Congress from making attachments so coercive that they turn into compulsion. Richards, *supra* note 15, at 102. Richards also argues that the 1994 Act is a compulsory mandate because "America's public schools cannot properly function without federal funding and thus they are left with no choice but to enact ZT policies that meet the requirements of the [1994 Act]." *Id.*

288. See TEX. EDUC. CODE ANN. § 37.007(a)(1); *cf.* Act of June 20, 2003, 78th Leg., R.S., ch. 1055, 2003 Tex. Gen. Laws 3025, 3030 (amended 2005) (current version at TEX. EDUC. CODE ANN. § 37.001 (Vernon 2006)).

289. Eriksen, *supra* note 274.

290. Act of June 20, 2003, 78th Leg., R.S., ch. 1055, 2003 Tex. Gen. Laws 3025, 3030 (amended 2005) (current version at TEX. EDUC. CODE ANN. § 37.001 (Vernon 2006)).

291. See *id.*

these three factors without specifying them in the student handbook prior to the enactment of H.B. 603.<sup>292</sup> H.B. 603 only added the requirement that schools list intent, disciplinary history, and disabilities, in addition to self-defense, if the schools planned to consider these factors when determining punishments.<sup>293</sup> Consequently, H.B. 603 did not offer students more protection by adding discretion to the Texas Education Code; it only enumerated the list of mitigating factors school officials already had the discretion to consider.<sup>294</sup>

### 3. Enumeration: A Dilution of the Bill

School lobbyists altered the original bill as legislators were pushing it through the legislature as H.B. 603, and the resulting law failed to do anything more than enumerate the factors school officials already had the discretion to consider when punishing students.<sup>295</sup> The original wording of the bill would have mandated consideration of self-defense, intent, disciplinary history, and disabilities.<sup>296</sup> Lobbyists worked to make consideration of these factors discretionary.<sup>297</sup> By making the 2005 amendment voluntary, H.B. 603 made no changes to the ZT policy created by the Texas Education Code and did nothing to address the problems ZT policies have fostered.<sup>298</sup>

## VI. REMAINING PROBLEMS

### A. Voluntary Means No Change and the Same Problems

The legislature proposed H.B. 603 as part of a movement to minimize the effects of ZT policies on students in Texas.<sup>299</sup> It introduced the bill into an environment where school principals and administrators sent over 10,000 Texas students each year to AEPs and claimed that their hands were tied due to the state's mandatory punishment requirements.<sup>300</sup> The legislature proposed H.B. 603 as a solution to the problem of disproportionate punishment for minor

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292. *See id.*

293. *See id.*

294. *See id.*; *see also* Eriksen, *supra* note 274 (stating the bill clarifies the discretion granted to the schools).

295. *See* TEX. EDUC. CODE ANN. § 37.007(a)(4) (Vernon 2006); *cf.* Act of June 20, 2003, 78th Leg., R.S., ch. 1055, 2003 Tex. Gen. Laws at 3030.

296. Act of June 20, 2003, 78th Leg., R.S., ch. 1055, 2003 Tex. Gen. Laws at 3030.

297. *Id.*

298. *See supra* notes 278-98 and accompanying text.

299. Spivak, *supra* note 29.

300. *Id.*

offenses under ZT policies.<sup>301</sup> By giving school administrators more discretion, the bill was intended to inject common sense into disciplinary decisions.<sup>302</sup> So far, however, the legislation has failed because many school districts view the new law as voluntary and ignore it.<sup>303</sup> Thus, regardless of whether school districts have implemented the new factors in the student handbook, they are continuing to hand out harsh punishments for minor offenses.<sup>304</sup>

*Tarkington Independent School District v. Ellis* raised the issue of “whether Texas law mandates the expulsion of a student for unknowingly possessing a weapon on a school district’s property.”<sup>305</sup> *Tarkington* dealt with the expulsion of a student with brass knuckles in his glove compartment while on school premises, despite the fact that the student was not aware that the weapon was in his truck.<sup>306</sup> Brass knuckles are listed as a “prohibited weapon” under the Texas Education Code, and the school district’s student code of conduct advised that a student should be expelled for such possession.<sup>307</sup> As allowed by the 2005 amendment, the student code of conduct specified that school officials would take into consideration self-defense, the student’s intent, and the student’s disciplinary history when deciding whether to suspend or expel a student.<sup>308</sup> The student’s attorney argued that the school should not expel the student because he was unaware that the knuckles were in his truck, and thus he lacked the requisite intent.<sup>309</sup> The school district still expelled the student because the Texas Education Code said that “a school district is required to expel students . . . regardless of whether the student knows a prohibited weapon is present.”<sup>310</sup> The *Tarkington* court, however, held that “the Texas Education Code permits school districts to decline to expel students for unknowingly possessing prohibited weapons if the districts have adopted intent as a factor in expulsion decisions.”<sup>311</sup> Specifically, the court held that because the 2005 amendment requires a district to specify whether it will take intent into consideration as a factor in expulsion decisions, and because the school district in this case specified intent as a factor, the school district could not expel a student based solely on the belief that the Texas Education Code

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301. *Id.*

302. *Id.*

303. *See id.*

304. *See id.*

305. *Tarkington Indep. Sch. Dist. v. Ellis*, 200 S.W.3d 794, 796 (Tex. App.—Beaumont 2006, no pet.).

306. *Id.* at 796, 798 (noting that another student admitted to placing the knuckles in the truck without the charged student’s knowledge and that the charged student passed a polygraph test to prove he was unaware of the presence of the knuckles in his truck).

307. *Id.* at 797.

308. *Id.* at 804.

309. *Id.* at 798-99.

310. *Id.* at 799.

311. *Id.* at 796. Similarly, the Sixth Circuit Court of Appeals has held that “a [school b]oard may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a Zero Tolerance Policy that purports to make the students’ knowledge a non-issue.” *Seal v. Morgan*, 229 F.3d 567, 581 (6th Cir. 2000).



required it to do so.<sup>312</sup> This case demonstrates that school districts are interpreting the 2005 amendment as a recommendation rather than a mandate.<sup>313</sup> As a result, strict ZT policies remain the status quo in Texas schools.<sup>314</sup>

Another school district that has chosen to ignore the amendment is the Fort Bend Independent School District.<sup>315</sup> After the passage of H.B. 603, a high school senior was expelled after he let a friend use his pocket knife to cut a rope into a belt to keep his pants in line with the school's dress code policy.<sup>316</sup> The expelled student used the knife at his school-sponsored internship to break down boxes, and did not hesitate to volunteer his knife when the teacher asked for scissors.<sup>317</sup> When the teacher saw the knife, the student was escorted to the principal's office where he was interrogated, arrested, and eventually expelled.<sup>318</sup> Because the school district had chosen not to implement the amended law, it made no difference that the student had a clean disciplinary history or that he had no intention of using the knife to threaten anyone.<sup>319</sup> In addition to the expulsion, the student was charged with a third-degree felony and possession of a prohibited weapon.<sup>320</sup> The school subsequently sentenced him to an AEP boot camp for the remainder of his senior year.<sup>321</sup> Prior to this incident, he had been a student athlete, a good student, a tutor for younger students, and a volunteer at local hospitals, retirement homes, and churches.<sup>322</sup> Nevertheless, he was forced to attend school at a high security camp where he was required to shave his head, ordered to sit with his hands flat on the desk and his legs at a 45-degree angle, and forced to go to school with dangerous students, including one who threatened another student with a seven-inch stiletto knife.<sup>323</sup> This situation illustrates that the 2005 amendment has not changed much about ZT policies in Texas schools.<sup>324</sup> Because the amendment makes discretion voluntary, it has not changed the way schools are handing out

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312. *Tarkington*, 200 S.W.3d at 800-02.

313. *See id.* at 802; *see also* Spivak, *supra* note 29 (noting that the law could be interpreted more as a recommendation than a mandate).

314. *See supra* notes 299-313 and accompanying text.

315. Spivak, *supra* note 29.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

punishment and has done nothing to remedy the problems that ZT policies create.<sup>325</sup>

*B. Other Problems the 2005 Amendment Failed to Address*

ZT policies' create two additional problems: (1) a pipeline of students are being transferred from school to jail without any requirement for parental notification and (2) no impartial oversight committees exist to review disciplinary cases.<sup>326</sup> Provisions were included in the original version of H.B. 603 to correct these problems; however, these provisions were removed before the governor signed the final version.<sup>327</sup>

The final version of H.B. 603 failed to implement a requirement that schools notify parents before punishing their children, even in cases of major disciplinary infractions.<sup>328</sup> Yet, ZT policies should require that a school notify a parent immediately after school officials have removed the student from the classroom for a violation.<sup>329</sup> In the case in which the student was arrested for bringing a pocketknife to school, the school did not notify his mother of his arrest until he was already on his way to the jail, where he spent the next twenty-five hours.<sup>330</sup> When his mother asked why the school had not notified her sooner, the school told her that the principal did not even have to call her at all.<sup>331</sup> In fact, according to the school district's student code of conduct, "[a] principal can take as long as three days to notify a parent about an expellable offense."<sup>332</sup> ZT critics point to policies like these to show ZT policies are eroding parental rights.<sup>333</sup> These critics say that there is something wrong with the system "when our children . . . can be accused, found guilty, ticketed, often times arrested, and removed from school before parents are notified."<sup>334</sup>

H.B. 603 also failed to implement a requirement that school districts develop an outside board to oversee and review disciplinary cases.<sup>335</sup> If Texas schools continue to implement ZT policies, an impartial review board is necessary to ensure fairness and legitimacy in all suspensions, expulsions, and placements into AEPs.<sup>336</sup> While some districts in Texas may already have review boards, parents and students still accuse many of these boards of bias and unfairness.<sup>337</sup> Impartiality is essential for a review board to be effective.<sup>338</sup>

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325. *Id.*

326. *See Levin, supra* note 29.

327. Spivak, *supra* note 29.

328. Spivak, *supra* note 29.

329. Axtman, *supra* note 110.

330. Spivak, *supra* note 29.

331. *Id.*

332. *Id.*

333. *See Katy Zero Tolerance, supra* note 28.

334. *Id.*

335. Spivak, *supra* note 29.

336. *See id.*

337. *See id.*

Thus, to ensure impartiality and fairness, at least one member of the panel should be an independent judge.<sup>339</sup>

An oversight committee, however, would be unnecessary if school officials used discretion when making punishment decisions.<sup>340</sup> ZT policies have stripped schools of their responsibility to address the causes of delinquency, caused innumerable societal problems, and created an increased need for dense law.<sup>341</sup> Thus, state legislatures—especially Texas’s—should eliminate ZT policies and replace them with disciplinary policies that would not only place punishment decisions back in the hands of school administrators, but also require those administrators to use discretion when punishing students.<sup>342</sup>

#### VII. ELIMINATION: ZERO TOLERANCE POLICIES ARE NOT THE CURE

State legislatures believed that if the role of disciplining was taken from school administrators and placed in the juvenile justice system, ZT policies would succeed in creating safer school environments.<sup>343</sup> ZT policies were expected to be the cure to school violence.<sup>344</sup> But because behavior cannot be comprehensively addressed solely by removing the student from school for days, weeks, or months at a time, ZT policies have not cured the problem.<sup>345</sup> Students who make mistakes can benefit more from in-school restorative programs than from expulsion, removal, or legal action.<sup>346</sup> An effective disciplinary policy “must be a learning experience aimed at improving behavior while keeping students in school, letting them know that we care about them, we want them in school, and we are going to help and support them.”<sup>347</sup> Such a policy must include a combination of punishments and programs that will work together to uncover the reasons why the student is misbehaving and to provide

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338. *See id.* For instance, in the case involving the pocket knife, the review board that conducted his appeal consisted of three assistant principals from various schools throughout the district. *Id.* Pavlos’s attorney argued that the makeup of this panel was unfair because assistant principals are unlikely to strike down the decisions of their fellow administrators. *Id.*

339. *Id.*

340. *See* APA Press Release, *supra* note 36.

341. Lintott, *supra* note 87, at 579-80.

342. *See id.*; *see also* APA Press Release, *supra* note 36 (arguing that teachers and administrators should have discretion concerning discipline policies because of their understanding of their school’s dynamic).

343. *See* Commonwealth Educ. Policy Inst., School Safety Issues: Zero Tolerance, [http://www.cepi.org/policy\\_issues/school/school\\_safety.html](http://www.cepi.org/policy_issues/school/school_safety.html) (last visited Dec. 20, 2007).

344. *See id.*

345. Rokeach & Denvir, *supra* note 37, at 286-87; *see* Commonwealth Educ. Policy Inst., *supra* note 343.

346. Levin, *supra* note 29.

347. Rokeach & Denvir, *supra* note 37, at 287.

the student with the support needed to encourage positive change.<sup>348</sup> Thus, an effective disciplinary policy must have consequences for bad behavior, but must also be committed to the student's educational and overall development.<sup>349</sup> Specifically, studies have found that "where students are academically engaged and their educational needs are being met, few discipline problems arise."<sup>350</sup>

ZT policies, however, are not effective disciplinary policies because they do not meet students' educational needs.<sup>351</sup> Such policies are either too concerned with getting the problematic student out of school and thus do not focus on the student's educational and overall development, or too concerned with understanding why that student misbehaves.<sup>352</sup> These one-size-fit-all strategies direct administrators to focus on punishing students instead of preventing future delinquent behavior.<sup>353</sup> These policies impose swift, overly harsh punishments that "leave no room for discussion[, n]o time to understand what wrong was done, [and n]o chance to never do it again."<sup>354</sup> As a result, ZT policies never cure the problem.<sup>355</sup>

A proposed alternative to ZT policies that would place the responsibility of disciplining students back into the hands of the school administrators is the "tough as necessary" approach (TN approach), which punishes according to the motivations and circumstances surrounding the infraction.<sup>356</sup> The TN approach calls for school officials to establish a range of punishments and circumstances that school administrators must consider when punishing students.<sup>357</sup> This approach would still allow for suspension, expulsion, removal to AEPs, and even police referrals in appropriate cases, but it would only impose such penalties as needed rather than automatically.<sup>358</sup> The TN approach also provides students with notice of offenses and their consequences.<sup>359</sup> This policy, coupled with teacher training and preventative programs, such as counseling, conflict resolution, and peer mediation, should finally work toward a cure to those problems that ZT policies have only aggravated.<sup>360</sup>

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348. See *id.* at 286-87; see Commonwealth Educ. Policy Inst., *supra* note 343.

349. Rokeach & Denvir, *supra* note 37, at 287.

350. *Id.* at 291.

351. See *id.* at 282.

352. *Id.*

353. Richards, *supra* note 15, at 93.

354. Pati Poblete, *Zero Doesn't Add Up*, S.F. CHRON., Mar. 11, 2001, at 3.

355. See Rokeach & Denvir, *supra* note 37, at 287; Poblete, *supra* note 354.

356. Henault, *supra* note 19, at 552.

357. *Id.*

358. *Id.*

359. *Id.*

360. See Rokeach & Denvir, *supra* note 37, at 289.

## VIII. CONCLUSION

ZT policies have not only failed to cure school violence, but they have also created countless other problems.<sup>361</sup> By imposing harsh penalties for minor infractions, ZT policies have more than doubled suspension and expulsion rates in schools across the county.<sup>362</sup> Because studies indicate that suspensions and expulsions reinforce bad behavior, recidivism of previously disciplined students will likely cause these rates to continue to increase.<sup>363</sup> In addition, ZT policies have created a pipeline that is funneling children from schools to prisons through the increased use of citations and arrests to address disciplinary matters.<sup>364</sup> In turn, this pipeline has created a system that allows teachers and administrators to wash their hands of unwanted children by parading them before judges forced to act as administrators.<sup>365</sup> ZT policies have also created a system in which schools disproportionately apply disciplinary policies to minority, low-income, and learning-disabled students.<sup>366</sup> The problems of ZT policies also include the diminished education that students affected by the policies receive.<sup>367</sup> Suspended or expelled students are either placed on the streets and receive no education during the duration of their punishment, or they are warehoused in AEPs where they are exposed to increased levels of violence and receive only substandard levels of education.<sup>368</sup> With little or no educational opportunity, a large percentage of the students affected by ZT policies drop out of school and eventually become a burden on society.<sup>369</sup> Thus, the problems ZT policies create affect not only students and parents but also society, which then bears the burden either by providing social services or by supporting large prison populations made up of victims of ZT policies.<sup>370</sup>

Despite these problems, ZT policies have permeated schools across the country.<sup>371</sup> State legislatures and school districts have heralded ZT policies as the solution to school violence, despite the fact that they have not generated the intended results.<sup>372</sup> There is no evidence that ZT policies are reducing violence or increasing school safety.<sup>373</sup> Ironically, studies show that schools employing

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361. APA Press Release, *supra* note 36.

362. Rokeach & Denvir, *supra* note 37, at 282; Siman, *supra* note 102, at 331-32; *see supra* Part III.A.

363. Rokeach & Denvir, *supra* note 37, at 284; *see supra* Part III.A.

364. EDUCATION ON LOCKDOWN, *supra* note 100, at 15; *see supra* Part III.B.1.

365. *See* Simpson, *supra* note 23, at 442; *see supra* Part III.B.2.

366. *See supra* Part III.C.1-3.

367. *See supra* Part III.D.

368. *See supra* Part III.D.

369. Richards, *supra* note 15, at 109; *see supra* Part III.E.

370. *See supra* Part III.E.

371. Commonwealth Educ. Policy Inst., *supra* note 343.

372. *See id.*; Rokeach & Denvir, *supra* note 37, at 284.

373. *See* OPPORTUNITIES SUSPENDED, *supra* note 92, at 17.

ZT policies have reported greater levels of disciplinary problems than schools without such policies.<sup>374</sup> Thus, the reality is that ZT policies produce more problems than they solve.<sup>375</sup>

As stories of these results have spread, opposition towards ZT policies has begun to grow.<sup>376</sup> In Texas, this opposition led to the Texas legislature's adoption of H.B. 603.<sup>377</sup> Supporters maintain that this bill provides the protection that students were lacking under strict ZT policies by allowing school officials to consider a student's intent, disciplinary history, and disabilities before expelling or suspending a student.<sup>378</sup> The 2005 amendment, however, provided school officials with no more discretion than they had before the introduction of H.B. 603; in fact, the only change the amendment made is to require schools to enumerate the same factors school officials were permitted to consider prior to H.B. 603.<sup>379</sup> Furthermore, the 2005 amendment still requires that Texas schools remain in compliance with the 1994 Act to ensure continued receipt of federal funding.<sup>380</sup> This compliance translates into continued mandatory expulsion for students possessing a firearm on school property, removal of any administrative discretion in punishing students, and denial of the student protection supposedly created by the bill.<sup>381</sup>

The failure of H.B. 603 can be exemplified by Taylor Hess's story. Had the 2005 amendment taken effect prior to Taylor's possession of a bread knife on school premises, it would likely have had no effect on the outcome of his story.<sup>382</sup> At the time of Taylor's expulsion, school officials were permitted to consider the three factors outlined in H.B. 603.<sup>383</sup> The assistant principal, however, chose not to use such discretion when punishing Taylor; instead, he chose to place the blame on the mandatory expulsion required by the school district's and Texas's ZT policies.<sup>384</sup> With the 2005 amendment now in place, Taylor's assistant principal could again consider the same three factors before expelling Taylor—if the school had voluntarily chosen to implement the new amendment and enumerated the factors they would consider during punishment.<sup>385</sup> In the end, though, the result would most likely have been the same: Taylor would have been expelled and relocated to an AEP.

School administrators are so fearful of not punishing harshly enough and then losing school funding that until school funding is no longer tied to school

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374. Rokeach & Denvir, *supra* note 37, at 284.

375. *See supra* Parts III-IV.

376. *See* Henault, *supra* note 19, at 548.

377. Peterson, *supra* note 128 (discussing H.B. 603); Eriksen, *supra* note 274.

378. Peterson, *supra* note 128 (discussing H.B. 603); Eriksen, *supra* note 274.

379. *See supra* Part V.B.2.

380. *See supra* Part V.B.2.

381. *See supra* Part V.B.2.

382. *See supra* Parts V-VI.

383. *See supra* Part V.

384. *See* Siegel, *supra* note 1.

385. *See supra* Part V.B.2.

discipline, stories like Taylor's will continue to be the norm.<sup>386</sup> That is why amendments to state policies, like H.B. 603, are not enough. The only real way to solve the problems created by these policies is to eliminate them.<sup>387</sup> And while state legislatures are working to eliminate ZT policies, school districts must be working to implement a disciplinary system that will punish students appropriately.<sup>388</sup> If the TN approach had been implemented in Taylor's school district, he would have been punished according to the circumstances of the incident.<sup>389</sup> While Taylor's would-be punishment under the TN approach is unclear, it would likely be less severe than the harsh punishment he received under the ZT policy.<sup>390</sup> This likely result is because the TN approach creates a system that simultaneously works to punish and prevent bad behavior by giving school officials discretion over discipline.<sup>391</sup> Thus, this system works to cure school discipline problems instead of creating them.<sup>392</sup> Accordingly, the Texas legislature, and others, should amend their statutes to require school administrators to use discretion when disciplining students, and thus eliminate ZT policies, and effectively place the responsibility of disciplining students back in the hands of school administrators.

*by Sheena Molsbee*

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386. See *supra* note 166 and accompanying text.

387. See *supra* Parts V-VI.

388. See Rokeach & Denvir, *supra* note 37, at 287; see also Poblete, *supra* note 354 (reasoning that a one-size-fits-all policy is not effective).

389. See *supra* Part VII.

390. See *supra* Part VII.

391. See *supra* Part VII.

392. See *supra* Part VII.