BACK DOWN TO BULLYING? THE DETRIMENTAL EFFECTS OF ZERO TOLERANCE POLICIES ON BULLIED ADOLESCENTS

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INTRODUCTION

For roughly two decades, many educational institutions across the United States have implemented policies that enable school administrations to enforce strict disciplinary procedures in a range of situations.[1] For example, the "zero tolerance" policy mandates student suspension or expulsion[2] absent consideration of the student-specific factors leading to each offense, thus operating much in the same way as does the concept of strict liability.[3]

Take, for example, a student who faced a pattern of verbal and physical torment from her peers.[4] In the past, the student repeatedly ignored the harassment, but she eventually mustered up the courage to notify the school administration about the situation.[5] Despite the administration issuing warnings to the bullies, they nonetheless proceeded in their conquest to terrorize their victim.[6] Another verbal attack ensued, but this time the bullied student found her voice; instead of walking away in shame as her bullies screamed obscenities and disparaging remarks directed towards her, the victim yelled back.[7] Having been notified, the administration stepped in; however, the school operated under a zero tolerance policy, requiring that all students involved in an altercation, whether it is physical or verbal, receive the same disciplinary consequences.[8] As a result, the principal

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[1] *See* Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 196 (2002).

[2] *See* Kim Fries & Todd A. DeMitchell, *Zero Tolerance and the Paradox of Fairness: Viewpoints from the Classroom*, 36 J.L. & EDUC. 211, 212 (2007).

[3] *See* Rebecca Morton, *Returning "Decision" to School Discipline Decisions: An Analysis of Recent, Anti-Zero Tolerance Legislation*, 91 WASH. U. L. REV. 757, 758 (2014).

[4] To protect the interviewee, her identity is kept confidential.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

ordered that the bullies and the victim all be sentenced to two days out-of-school suspension.[9]

Given the facts, one would likely think that the bullies would be punished to a harsher degree than the victim, should the victim be punished at all. Yet in the realm of zero tolerance, there is no distinction between the parties. As such, a student who time and time again had been the subject of torment, and had notified the school administration in the hope of seeking help, has now been labeled with the stigma of delinquent behavior—the notation of suspension creating a permanent mark on the student's otherwise clean school disciplinary record. Scenarios such as this serve as an indication that zero tolerance policies produce particularized harm in cases of adolescents who are victims of bullying.

In Part I, this Note examines the history of zero tolerance policies, and the current situations where they have been applied. First, the initial adoption of these policies is addressed, with a focus on how Congress sought to justify the policies' implementation at a federal level. Next, the subsequent and widely ranging ways in which these polices have been applied are noted, highlighting that many stray far from the original purpose of legislation. This Note then proceeds to describe the widespread criticism that these policies have faced, and the harsh and detrimental effects that they have generally produced as a result of implementation in schools across the nation. In Part II, this Note studies the bullying epidemic, and demonstrates the detrimental, and even deadly, effect that bullying has on youths today. Next, in Part III, this Note argues that zero tolerance policies produce specific harms in the case of bullied adolescents. It demonstrates that due to the strict liability punishment that results from being a party to a physical or verbal altercation, victims of bullying are equated with the aggressors, and so, victims are at risk of receiving a disciplinary sentence that does not match their role in the original offense. Further, this Note argues that bullied adolescents who are suspended or expelled are branded with a stigma that can have detrimental effects on their futures. As a result, it is contended that zero tolerance policies discourage bullied adolescents, as well as their peers, from taking a stand against bullying out of fear of the disciplinary consequences. In Part IV, this Note examines judicial efforts to ensure fairness and promote justice within our nation's school districts. Despite the attempt to ensure students' due process rights made by the Supreme Court of the United States in *Goss v. Lopez*, this Note argues that the substantive burden placed on school administrators to ensure fairness in disciplinary actions has been lessened. Further, it argues that schools are enabled to jeopardize some students' due process rights since certain disciplinary sentences may be deemed *de minimis* under this standard. Next, in Part V, this Note examines efforts made by the executive and legislative branches to curtail the negative effects of zero tolerance policies. It is noted that the Obama administration has expressed dismay

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[9] *Id.*

over these strict disciplinary procedures, however the scope of the administration's concern may be too narrow. Further, while recently enacted and proposed legislation in North Carolina, Colorado, and Massachusetts have displayed a desire to curtail the negative effects of zero tolerance policies, these legislative efforts are nonetheless insufficient. Moreover, the New York Education Law is examined in light of its lack of protection afforded to students who are bullied and act in self-defense, resulting in their suspension or expulsion from school. In Part VI, this Note urges New York State to adopt legislation that requires school districts to take self-defense into consideration as a mitigating factor when determining the appropriate disciplinary consequence to impose. This Note argues that by taking this mitigating factor into account, school administrators will be given more flexibility in the decision-making process, thereby promoting justice and preventing inequalities in situations involving bullied students.

I. ZERO TOLERANCE POLICIES

A. Background

In the late 1980s[10] and early 1990s, in the wake of the war on drugs and violence in the form of school shootings,[11] a growing concern for safety in public schools was developing across the United States.[12] In 1990, relying on its Commerce Clause power,[13] Congress took charge by enacting the Gun-Free School Zones Act, prohibiting "the possession or discharge of a firearm in a school zone."[14]

1. Commerce Clause Power

In 1994, the Supreme Court reviewed the constitutionality of this legislation in *United States v. Lopez*.[15] In *Lopez*, a Texas high school student was charged with violating the Gun-Free School Zones Act after carrying a concealed handgun onto his school's premises.[16] He was convicted by the District Court, and was sentenced to six months' imprisonment and two years' supervised release.[17] On appeal, the defendant challenged the Act as exceeding the scope of Congress's Commerce Clause powers.[18]

Beginning in the late 1800s, the amount of federal regulation enacted

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[10] Zweifler & De Beers, *supra* note 1, at 196.

[11] *See* Lizette Alvarez, *Seeing the Toll, Schools Revise Zero Tolerance*, N.Y. TIMES (Dec. 2, 2013), http://www.nytimes.com/2013/12/03/education/seeing-the-toll-schools-revisit-zero-tolerance.html?_r=0.

[12] *See* Robert C. Cloud, *Due Process and Zero Tolerance: An Uneasy Alliance*, 178 ED. LAW REP. 1, 2 (2003).

[13] *See* U.S. CONST. art. I, § 8, cl. 3.

[14] 20 U.S.C.A. § 7151 (West Supp. 2000); Zweifler & De Beers *supra* note 1, at 196.

[15] *See generally* United States v. Lopez, 514 U.S. 549 (1995).

[16] *See id.* at 551.

[17] *Id.* at 552.

[18] *Id.*

pursuant to Congress's Commerce Clause powers greatly increased.[19] When examining the exercise of this power, the Court determined that there were three categories of activity that Congress could regulate: (1) "the use of channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "activities having a substantial relation to interstate commerce," the third being at issue in *Lopez*.[20] In support of its contention that the Commerce Clause power justified the Act, the government advanced arguments relating the cost of crime to national productivity.[21] First, the government argued that the costs of violent crime are spread across the population through insurance.[22] The government also argued that "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe."[23] Next, the government argued that the educational process is "handicapped" by the presence of guns in a school zone, leading to less productive citizens.[24] Thus, the government contended that this decreased productivity would lead to an adverse effect on the nation's economy.[25]

Despite the government's attempt to relate gun possession to interstate commerce, the Supreme Court ultimately held that the law unconstitutionally extended the scope of Congress's power under the Commerce Clause.[26] In support of its conclusion, the Court expressed its concern that finding support in the Commerce Clause would dangerously broaden the scope of this power, stating, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[27] The Court highlighted the fact that the Gun-Free School Zones Act was a non-economic criminal statute, and accordingly, the Court was unconvinced that gun possession in a school zone—the activity regulated under the law—was substantially related to interstate commerce.[28]

2. Spending Clause Power

Despite a holding of *Lopez* as to the Commerce Clause, the federal government did successfully regulate gun possession in school zones using its Spending Clause power[29] in relation to the Gun-Free Schools Act of 1994.[30] In

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[19] *Id.*

[20] *Id.* at 558-59.

[21] *Id.* at 564.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 551.

[27] *Id.* at 564.

[28] *Id.* at 549.

[29] U.S. CONST. art. I, § 8, cl. 1. The Spending Clause instills in Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and

order to effectuate Congress's intent, the Gun-Free School Zones Act required that states in receipt of federal funds "have in effect a state law requiring local education agencies to expel, for at least one year,"[31] any student in possession of a firearm.[32] States and localities alike adopted this zero tolerance approach and it "evolved from its original purpose to include less serious types of misbehavior,"[33] and was "often expanded to include smoking on school grounds, physical fighting, making verbal threats, failure to disclose knowledge of another student's verbal threat, and school disruption.'"[34]

B. Adverse Effects and Criticism

Zero tolerance policies, critically dubbed "zero intelligence"[35] policies, have been labeled as "arbitrary, unfair and unreasonable methods to mete out punishment for various misbehaviors in the nation's schools."[36] While intended to "treat all offenders equally in the spirit of fairness and intolerance of rule-breaking,"[37] these inflexible rules, as implemented, deprive students of a voice and the opportunity to present the school administration with mitigating facts that could serve as a defense to the violation for victims of bullying.

Research has shown that "zero tolerance policies are ineffective in the long run and are related to a number of negative consequences . . . ."[38] It has been demonstrated that,

> [t]he exclusion of students from school for disciplinary reasons [is] directly related to lower attendance rates, increased course failures, and can set a student on a path of disengagement from school that will keep them from receiving a high school diploma and further affect their chances of

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general Welfare of the United States." *Id.* Through use of its spending power, Congress may condition a state's receipt of federal funds on compliance with specified conditions. According to a test articulated by the Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987), the conditioning of funds must meet certain requirements. The spending must serve the general welfare, the condition must be unambiguous, the condition must relate to the federal interest in the program, Congress may not condition the receipt of funds on a requirement that violates the Constitution, and the amount in question may not be so great that it is considered to be coercive. *Dole*, 483 U.S. 203.

[30] Zweifler & De Beers, *supra* note 1, at 194.

[31] Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 163 (1999).

[32] Cloud, *supra* note 12, at 2.

[33] *Id.*

[34] Zweifler & De Beers, *supra* note 1, at 196 (quoting RUSSELL J. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: A CRITICAL ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE, RESEARCH REVIEW SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS 4 (2000)).

[35] Nona Willis Aronowitz, *School Spirit or Gang Signs? 'Zero Tolerance' Comes Under Fire*, NBC NEWS (Mar. 9, 2014), http://www.nbcnews.com/news/education/school-spirit-or-gang-signs-zero-tolerance-comes-under-fire-n41431.

[36] Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547 (2001).

[37] *Id.*

[38] NAT'L ASS'N OF SCH. PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE STRATEGIES: A FACT SHEET FOR EDUCATORS AND POLICYMAKERS, http://ccsd.net/internal/cms/doc-vault/resources/archive/zero.tolerance.fact.sheet.pdf (last visited Nov. 5, 2015).

enrolling in post-secondary schooling and realizing many life-long career opportunities.[39]

Supporting the assertion that these procedures foster a disconnect between the disciplined student and the advancement of his or her education, nation-wide studies "have identified out-of-school suspensions as one of the primary indicators of high school dropout."[40]

Suspension and expulsion practices not only deprive students of the "valuable instruction"[41] that they otherwise would obtain in a typical educational setting, but these disciplinary tactics have been found to exacerbate behavioral issues.[42] There is evidence that a number of the students who are found to engage in activity that will result in the imposition of strict disciplinary procedures are in fact in need of adult supervision.[43] By removing these students from the school's structured environment, there is a risk that, for the period of their suspension or expulsion, the students will be without adequate supervision, and thus free to participate in illicit behavior. It is logical, therefore, that zero tolerance policies contribute to the astounding statistic that high school dropouts commit 75% of crime in the United States.[44]

Moreover, many studies advance the argument that zero tolerance policies result in the "discriminatory application of school discipline practices,"[45] particularly affecting students of color, those with disabilities,[46] and those from families of low socioeconomic status.[47] For example, in a study conducted by the U.S. Department of Education Office for Civil Rights, national data indicated that black students are suspended and expelled at a rate three times greater than white students."[48] Statistics show that in comparison to white students, 4.6% of whom are suspended from school, the suspension rate increases to 16.4% among black

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[39] ROBERT BALFANZ ET AL., EVERYONE GRADUATES CTR., SCH. OF EDUC., JOHNS HOPKINS UNIV., SENT HOME AND PUT OFF-TRACK: THE ANTECEDENTS, DISPROPORTIONALITIES, AND CONSEQUENCES OF BEING SUSPENDED IN THE NINTH GRADE 1-2 (2012).

[40] *Id.*

[41] Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547, 550 (2001).

[42] *See Out-of-School Suspension and Expulsion*, AM. PEDIATRICS SOC'Y (2003), http://pediatrics.aappublications.org/content/112/5/1206.full (explaining that "[a] Centers for Diseases Control and Prevention study found that when youth are not in school, they are more likely to become involved in a physical fight and to carry a weapon"). "Out-of-school adolescents are also more likely to smoke; use alcohol, marijuana, and cocaine; and engage in sexual intercourse." *Id.*

[43] *See id.* ("Children who use illicit substances, commit crimes, disobey rules, and threaten violence often are victims of abuse, are depressed, or are mentally ill. As such, children most likely to be suspended or expelled are those most in need of adult supervision and professional help.").

[44] *11 Facts About High School Dropout Rates*, DOSOMETHING.ORG, https://www.dosomething.org/facts/11-facts-about-high-school-dropout-rates (last visited Nov. 5, 2015).

[45] NAT'L ASS'N OF SCH. PSYCHOLOGISTS, *supra* note 38.

[46] *See, e.g.*, U.S. Dep't of Ed., Office for Civil Rights, *Civil Rights Data Collection Data Snapshot: School Discipline* (2014), http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf.

[47] *See* Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1086 (2010).

[48] U.S. Dep't of Ed., *supra* note 46.

students.[49] In New York State, black male students have the highest rate of out-of-school suspensions among other ethnic groups, and black female students share the highest rate with American Indian and Alaska Native female students.[50] Further, this study demonstrated that "[s]tudents with disabilities served by the IDEA [Individuals with Disabilities Education Act] are more than twice as likely to receive one or more out-of-school suspension as are students without disabilities."[51] In comparison to the 6% of students without disabilities that receive out-of-school suspension, the number increases to 13% for students who have documented disabilities.[52] Moreover, disproportionate rates are likewise found when analyzing suspension data of minority ethnic groups with disabilities. Figures show that male and female students with disabilities who are of two or more races are suspended at the highest rates among other ethnic groups in their respective gender categories.[53]

C. Real Life Stories

The fact that zero tolerance policies are applied in trivial matters, and in instances that are explainable with the most basic inquiry into the circumstances behind the violation, serves as an example of the inequities that are produced by implementing a zero tolerance policy. Listed below are real life stories of youths affected by these policies.

1. Dontadrian Bruce

At Olive Branch High School in Mississippi, fifteen-year-old Donadrian Bruce and his fellow classmates posed for a picture taken by their teacher alongside their biology project.[54] The academic achiever and football player "smiled and held up three fingers—his thumb, forefinger, and middle finger, palm facing outward," representing the number he wore on his jersey.[55] Donadrian was later summoned by the assistant principal, who instructed the teen that he was suspended for "holding up gang signs" associated with the Chicago-based street gang, the Vice Lords.[56] "I was trying to tell my side, and it was like they didn't even care," Donadrian exclaimed. Three days after being sent home from school, Donadrian met with a disciplinary officer who implemented "[i]ndefinite suspension with a recommendation of expulsion."[57]

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Aronowitz, *supra* note 35.

[55] *Id.*

[56] *Id.*; *see also Conservative Vice Lords*, CHICAGOGANGS.ORG, http://chicagogangs.org/index.php?pr=CVL (last visited Mar. 13, 2015).

[57] Aronowitz, *supra* note 35.

After community uproar and wide spread attention, Donadrian was allowed back in school after twenty-one days of suspension.[58]

2. Hunter Yelon

Hunter Yelon, a six-year-old boy attending the Lincoln School of Science and Technology in Cañon City, Colorado, was suspended from school after kissing a young girl on the hand.[59] The incident, which resembles a playful and innocent schoolyard crush, resulted in a report of sexual harassment in the boy's record.[60]

3. Kasia Haughton

Eleven-year-old Kasia Haughton of Newark, Delaware, was a candidate for her school's student government.[61] In order to help promote her campaign, the fifth grade student brought a cake to school, along with essentials packed by her grandmother to help her serve her fellow classmates.[62] They included plates, napkins, and a cake knife, which was intended for use by Kasia's teacher to help cut the cake into individual pieces.[63]

After cutting and serving, however, the young student's teacher called school officials to investigate what she rashly deemed to be an alarming matter.[64] Kasia was suspended, and faced possible expulsion for bringing what administrators called a "deadly weapon" to school.[65] The school subsequently reported the matter to the Delaware State Police, who refrained, however, from pursuing criminal action.[66]

4. Jordan Benett

Jordan Bennett, an eight-year-old student, was involved in a playful game of cops and robbers at his Florida elementary school,[67] when he held his thumb and

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[58] *Id.*

[59] Meredith Carroll, *Kiss Off! 6-Year-Old Boy Suspended for Sexual Harassment After a Smooch on the Hand*, BABBLE, http://www.babble.com/mom/kiss-off-6-year-old-boy-suspended-for-sexual-harassment-after-a-smooch-on-the-hand/ (last visited Nov. 16, 2015).

[60] *Colorado Boy, 6, Suspended for Kiss Gets Allegations on Record Changed from 'Sexual Harassment' to 'Misconduct,'* FOX NEWS (Dec. 11, 2013), http://www.foxnews.com/us/2013/12/11/colorado-school-district-flooded-with-calls-after-6-year-old-suspension-over/.

[61] Dan Stamm, *Campaign Cake Knife Gets 5th Grader Suspended*, NBC S. FLA. (Apr. 3, 2009), http://www.nbcmiami.com/news/weird/Cake-Knife-Suspension.html.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Liz Klimas, *8-Year-Old Florida Boy Suspended for Making Gun Shape With Fingers: 'It Was a Game,'* BLAZE (Oct. 1, 2013), http://www.theblaze.com/stories/2013/10/01/8-year-old-florida-boy-suspended-for-making-gun-shape-with-fingers-it-was-a-game/.

index finger in the shape of a gun, and uttered a sound resembling "pow pow."[68] School administrators deemed the incident to be an "act of violence,"[69] suspending Jordan from school for one day, and noted the disciplinary action on his record.[70]

The use of zero tolerance policies has greatly departed from Congress's initial intent to curb gun violence. As demonstrated, this leap has led to many young adults and children across the United States being classified as violent and sexually offensive individuals because of trivial matters that are seemingly blown out of proportion.

II. BULLYING

While an overwhelming number of the studies conducted on zero tolerance policies concentrate their findings on discrimination against students of a particular race, class, or disability, as previously mentioned, there remains a group that receives far too little attention: students who are bullied. What happens when a student is persistently tormented, harassed, or brutally attacked? Should the policies apply to these students, too, and deprive these individuals of the right to a voice or the right to stand in their own defense?

Bullying is a nation-wide epidemic that affects the lives of millions of youths each year.[71] Stemming from a perceived "imbalance of power," aggressors derive a sense of supremacy from preying on individuals that they see as weak,[72] individuals who will not stand up to harassment.[73] Our society has come to equate a range of behavior with the notion of bullying,[74] potentially leading some to rationalize situations where detrimental behavior is in fact occurring.[75] On a spectrum of behavior that is associated with this conduct, cruel and persistent harassment falls in an area where bullying is likely to have lasting effects on its victims.[76]

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[68] Sebastian Murdock, *Jordan Bennett Suspended from School for Pretend Finger Gun*, HUFFINGTON POST (Oct. 1, 2013), http://www.huffingtonpost.com/2013/10/01/jordan-bennett-suspended-_n_4022494.html.

[69] *Id.*

[70] *Id.*

[71] *See* Joaquin Phoenix & Michael Honda, *Our Children Face a Bullying Epidemic*, USA TODAY (Aug. 28, 2012), http://usatoday30.usatoday.com/news/opinion/forum/story/2012-08-28/joaquin-phoenix-bullying-epidemic/57379318/1.

[72] *Bullying: An Imbalance of Power*, MELISSA INST. (2003), http://melissainstitute.com/documents/BULLYING.pdf.

[73] *See Is It Bullying?*, PARENT FURTHER, http://www.parentfurther.com/high-risk-behaviors/bullying/definition (last visited Mar. 13, 2015).

[74] *See* Anushka Asthana, *Bullying Is Exaggerated, Says Childhood Expert*, GUARDIAN (Oct. 28, 2007), http://www.theguardian.com/uk/2007/oct/28/schools.pupilbehaviour; *see also Is It Bullying?*, *supra* note 73.

[75] Matthew Earhart, *Bullying: What's Being Done and Why Schools Aren't Doing More*, 25 J. JUV. L. 26 (2005).

[76] *See id.* at 26-27.

A. Statistics and Effects

The statistics are alarming. Over 77% of students have been bullied verbally, mentally, and physically.[77] While past generations endured mostly physical bullying, the rise of technology has given bullies a new outlet. In an age where the use of social media networks is overwhelmingly prevalent in the daily lives of adolescents, our nation's youth are now subject to virtual harassment as well. "No longer does a bully say something nasty in the schoolyard and the child goes home to his sanctuary. Instead, [cyberbullying] is pervasive and invasive . . . It is gossip and hatred at the speed of electronic media, as close as their cell phone or computer screen."[78] Statistics show that seven in ten young people are victims of cyberbullying, and that 37% of them are experiencing cyberbullying on a highly frequent basis.[79]

This torment frequently leads to emotional and social issues that can result in depression, feelings of inadequacy, "withdrawal from others," and substance abuse, among other effects.[80] In severe cases, which are unfortunately not uncommon, these effects overcome their victims, and lead to some adolescents taking their own lives.[81]

B. Real Life Stories

News stories covering suicide in cases of young adults who have been bullied appear across our screens and printed in headlines far too often.[82] To demonstrate this epidemic, listed below are real life stories of adolescent victims who endured bullying, and sadly turned to death as their only means of escaping the pain that they experienced as a result.

1. Jessica Logan 1990-2008

Jessica "Jesse" Logan, a proclaimed "vivacious," "fun," "artistic," and "compassionate" eighteen-year-old high school senior from Ohio took her own life as the result of bullying.[83] Jesse sent nude photos of herself to her then-boyfriend,

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[77] *Bully Statistics 2014*, NOBULLYING.COM (DEC. 14, 2014), http://nobullying.com/bullying-statistics-2014/.

[78] Tim Ebner, *Maryland Schools Focus Attention on Cyberbullying*, http://cnsmaryland.org/interactives/cyberbullying/cyberbullying-in-maryland-schools/index.html (last visited Mar. 13, 2015) (quoting Chris McComas, *Grace K. Memorial Webpage*, FACEBOOK, https://www.facebook.com/GraceMcComasMemorial).

[79] *Cyberbullying and Bullying Statistics 2014, Finally!*, NOBULLYING.COM, http://nobullying.com/cyberbullying-bullying-statistics-2014-finally/ (last visited Mar. 13, 2015).

[80] BULLYING AND SUICIDE, BULLYING STATISTICS, http://www.bullyingstatistics.org/content/bullying-and-suicide.html (last visited Mar. 13, 2015).

[81] *Id.*

[82] *See id.* ("Over 14 percent of high school students have considered suicide, and almost 7 percent have attempted it.").

[83] Mike Celizic, *Her Teen Committed Suicide Over 'Sexting,'* TODAY (Mar. 6, 2009), http://www.today.com/id/29546030/ns/today-parenting_and_family/t/her-teen-committed-suicide-over-sexting/#.

who in turn sent the photos to others at school once the couple had ended their relationship.[84] This resulted in Jesse being harassed by fellow female classmates, who called her "a slut and a whore."[85] "She was miserable and depressed, afraid even to go to school," because when she did, she faced the ridicule of her peers, who did not stop at verbal attacks, but also physically bullied her by throwing objects at her.[86]

In an attempt to help stop others from having to endure the same thing, Jesse took her story to a Cincinnati television station.[87] However, the effects of the bullying proved to be too devastating and two months later, Jesse hanged herself in her bedroom.[88]

2. Hope Witsell 1996-2009

Hope Witsell, a thirteen-year-old Florida teen, sent a topless photo of herself to a boy that she liked.[89] "Another girl borrowed the boy's phone, found the image, and forwarded it to other students,"[90] resulting in the photo being spread not only to students in her own school, but to another dozen schools as well.[91] Hope was verbally abused and physically beaten by her fellow students.[92]

As a result of the scandal, school administrators suspended Hope from school for one week.[93] After returning to school, "a counselor observed cuts on Hope's legs and had her sign a 'no-harm' contract in which Hope agreed to tell an adult if she felt inclined to hurt herself. The next day, Hope hanged herself in her bedroom."[94]

3. Kenneth Weishuhn Jr. 1997-2012

Kenneth Weishuhn Jr., a fourteen-year-old homosexual teen from Iowa, was the victim of "anti-gay teasing" from his classmates.[95] According to the boy's mother, the bullying began when Kenneth's friends "turned on him" after finding

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[84] *Id.*; *see also* Celizic, *supra* note 83.

[85] *See* Celizic, *supra* note 83.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] James Nye, *Mother Speaks of Agony After 13 Year Old Daughter Killed Herself Because Topless Picture She Sent to Her Boyfriend Was Plastered Across the Internet*, DAILYMAIL.COM (Sept. 26, 2009), http://www.dailymail.co.uk/news/article-2432876/Hope-Witsells-mother-tells-agony-daughters-suicide-topless-picture-social-media-bullying.html.

[90] *Hope Witsell*, PURESIGHT ONLINE CHILD SAFETY, http://www.puresight.com/Real-Life-Stories/hope-witsell.html (last visited Mar. 13, 2009).

[91] *Id.*

[92] Nye, *supra* note 89.

[93] Witsell, *supra* note 90.

[94] *Id.*

[95] *Kenneth Weishuhn, Gay Iowa Teen, Commits Suicide After Allegedly Receiving Death Threats*, HUFFPOST GAY VOICES (Apr. 17, 2012), http://www.huffingtonpost.com/2012/04/17/kenneth-weishuhn-gay-iowa-teen-suicide_n_1431442.html.

out he was gay.[96] His male peers yelled slurs at Kenneth, who also received "threatening cellphone calls, voicemails and online comments"[97] and hate messages from an anti-gay Facebook page created by his classmates.[98] Kenneth Weishuhn committed suicide on April 15, 2012.[99]

4. Tyler Clementi 1991-2010

Tyler Clementi was a freshman at Rutgers University when his roommate hid a video camera in their shared room and live-broadcasted Tyler having romantic relations with another man.[100] Just days after the feed had been streamed over the Internet, Tyler committed suicide by jumping off the George Washington Bridge.[101]

5. Lamar Hawkins III 2000-2014

Lamar Hawkins III and his family relocated to Florida from New York in an attempt to escape bullying.[102] However, the move proved unsuccessful, as the torment continued in his new school.[103] His fellow students "pushed him down stairs, knocked him out of his chair in the cafeteria, mocked him due to his size," according to his mother, who believes that his stunted growth made him an "easy target."[104] Lamar Hawkins III died from a self-inflicted gun wound to the head in his school's bathroom.[105]

III. APPLICATION OF ZERO TOLERANCE POLICIES IN SITUATIONS INVOLVING BULLYING

Despite the horrific results that follow from many instances of adolescent bullying—and only a few represented by the aforementioned stories—schools often implement zero tolerance policies in situations involving students who are bullied. Many schools mandate suspension or expulsion for all students who are parties to a

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[96] *Iowa Mom Blames Gay Teen Son's Suicide on Bullying*, FOX NEWS (Apr. 18, 2012), http://www.foxnews.com/us/2012/04/18/iowa-mom-blames-gay-teen-son-suicide-on-bullying/.

[97] *Id.*

[98] Weishuhn, *supra* note 95.

[99] *Id.*

[100] Alison Gendar, Edgar Sandoval & Larry Mcshane, *Rutgers Freshman Kills Self After Classmates Use Hidden Camera To Watch His Sexual Activity: Sources*, DAILY NEWS (Sept. 29, 2010), http://www.nydailynews.com/news/crime/rutgers-freshman-kills-classmates-hidden-camera-watch-sexual-activity-sources-article-1.438225.

[101] *Id.*

[102] *Family: Boy Who Committed Suicide Was 'Repeatedly Attacked' by Bullies*, WESH.COM (Sept. 15, 2014), http://www.wesh.com/news/family-of-student-who-committed-suicide-at-greenwood-lakes-middle-school-to-address-bullying/28061180.

[103] *Id.*

[104] *Id.*

[105] Nina Golgowski, *Mother of Florida Boy who Shot Himself Allegedly After Years of Abuse at School Says the Bullies 'Won,'* DAILY NEWS (Sept. 15, 2014), http://www.nydailynews.com/news/national/bullies-won-son-killed-years-abuse-mom-article-1.1940725.

physical altercation,[106] sometimes imposing a like punishment upon parties involved in a verbal altercation.[107] "Seventy-five percent of America's schools have zero-tolerance policies for 'violent acts,' but violent acts are broadly defined and do not take self-defense into account as a category that should be exempt."[108] For example, in *Buckosh v. Westlake City Schools*, the Court of Appeals of Ohio ruled that, "considering suspension of [a] high school student for fighting, an offense subject to suspension, [the school] was not required as a matter of substantive due process to consider [the] student's conduct in fighting to be mitigated or undermined by proof of a claim that she acted in self[-]defense."[109] Accordingly, victims' constitutional due process protections are ultimately jeopardized by the blatant disregard of self-defense considerations.[110] While schools implementing these punitive procedures argue that they are helping to facilitate a "safe" and "appropriate learning environment for students,"[111] it seems to more closely resemble an easy way out for the school administration to get by without having to conduct an inquiry into the circumstances behind each matter. This willful blindness can produce unjust and inconsistent results that may lead to dire consequences for a number of reasons.

Firstly, by suspending or expelling all parties to a fight or "disruption" regardless of the facts surrounding the situation, victims are equated with aggressors, and are treated as such regardless of intent or imbalanced participation. As previously mentioned, an "imbalance of power" is central in cases of bullying.[112] Yet zero tolerance policies ignore the reality of this imbalance, instead

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[106] *See, e.g.*, *Zero Tolerance Policy*, ELIOT ELEMENTARY SCH., https://eliot-gusd-ca.schoolloop.com/zerotolerance (last visited Nov. 15, 2015) ("Acts or threats of violence, including fights, will result in suspension and/or possible expulsion."). *See also Pushed Out*, TEACHING TOLERANCE (2009), http://www.tolerance.org/pushed-out ("'Joseph' was 13 when the bullying against him started. Under his school's strict discipline rules, all students involved in a fight received the same punishment, regardless of who started it."); Christopher Boccanfuso & Megan Kuhfeld, *Multiple Responses, Promising Results: Evidence-Based, Nonpunitive Alternatives to Zero Tolerance*, NAT'L ED. ASS'N (2011), http://www.nea.org/assets/docs/alternatives-to-zero-tolerance.pdf ("under a school that has a zero tolerance policy for violence, a student who is bullied may face the same suspension for retaliating in a physical altercation as the bully who initiated the confrontation"); LA. STAT. ANN. § 17:416.15 (2001) ("Any . . . local public school board may adopt and implement a zero tolerance policy for fighting in the schools under its jurisdiction.").

[107] *See, e.g.*, *Public Safety*, MYLES W. WHITLOCK FLEXIBLE LEARNING CTR., http://whitlock.spartanburg7.org/spartanburg-county-alternative-school/public-safety/ (last visited Mar. 13, 2016); *see also* Rebecca Klein, *2nd-Grader Says He Was Handcuffed After Getting in Verbal Altercation at School*, HUFFINGTON POST (May 2, 2014), http://www.huffingtonpost.com/2014/05/02/kalyb-primm-wiley-handcuffed-_n_5255923.html.

[108] Katie Pavlich, *Zero-Tolerance Zombies*, TOWNHALL.COM (Jul. 2, 2014), http://townhall.com/tipsheet/katiepavlich/2014/07/02/zerotolerance-zombies-n1857404.

[109] Buckosh v. Westlake City Sch., No. 91714, 2009 WL 625524, at *1 (Ohio Ct. App. 8th Dist. Mar. 12, 2009); *see also* Dawson v. Richmond Heights Local Sch. Bd., 700 N.E.2d 359 (Ohio Ct. App. 8th Dist. June 30, 1997).

[110] *See generally* Goss v. Lopez, 419 U.S. 565 (1975) (addressing students' due process rights in regards to school suspensions).

[111] *Zero Tolerance for Weapons, Drugs and Violence*, SAN DIEGO UNIFIED SCH. DIST., https://www.sandiegounified.org/schools/henry/zero-tolerance-policy (last visited Dec. 21, 2015).

[112] MELISSA INST., *supra* note 72.

allowing for the application of standardized disciplinary procedures that in turn produce unjust results where the punishment does not necessarily fit the "crime." Whether the victim is incorrectly perceived as the aggressor, held accountable for defending him or herself in the threat of danger, or responding to provocation, the harassment he or she has endured is disregarded by school administration.[113] It follows that discipline perceived to be adequate for adolescents who torment their victims is viewed by school administrations as acceptable for those who are tormented.

Additionally, labeling a student as an active participant in a violent offense creates a stigma that may affect his or her future. Having a violent offense on his or her disciplinary record may hinder the student's acceptance to college, and may even cause the student to be subjected to penalties of the criminal justice system. A suspension or expulsion imposed on a victim, therefore, puts that student at risk of becoming a dropout, or even worse, a criminal. Studies show that "a suspension is more likely than any other factor to cause a child to drop out of high school [and] . . . children who do not complete high school are 3.5 times more likely to be arrested as adults."[114] Additionally, "[h]igh-school dropouts comprise more than 80 percent of the adult prison population."[115] Therefore, "[w]hen we suspend or expel a student, we have increased dramatically the odds that he later will enter a prison—what has been called the "school-to-prison pipeline."[116] It is important for school administrators to keep in mind the effects of these disciplinary procedures, especially when dealing with bullied students who have unwillingly been forced into the situation.

Moreover, standardized disciplinary measures can produce harmful effects that may deter bullied students from taking a stand in their own defense. Out of fear of being cast out of school or having their records reflect involvement in a violent offense, many students may be unwilling to take this risk. Aware of the adverse effects that suspension or expulsion may have on one's future, a bullied student may continue to endure harassment out of concern that he or she will be branded by the punishment. He or she may also fear receiving backlash at home, or increased frequency of torment at school that may worsen. Furthermore, as in many documented cases of bullying, the student may internalize his or her pain, leading to emotional or physical distress, which may ultimately lead the victim to

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[113] *See, e.g.*, *Father Spends His Leave from Afghanistan Protesting Outside School After Son, 13, Is Suspended for Standing up to School Bully*, DAILYMAIL.COM (Oct. 15, 2012), http://www.dailymail.co.uk/news/article-2218189/Randy-Max-Duke-Student-13-suspended-standing-bully-dad-protests-it.html#ixzz3xpCZgLvS. *See also*, *e.g.*, *Recognize Self Defense as a Student Right*, CHANGE.ORG, https://www.change.org/p/montgomery-county-public-schools-recognize-self-defense-as-a-student-right (last visited Jan. 20, 2016).

[114] Ron Marmer, *The Kids Aren't All Right*, AM. BAR ASS'N (2011), http://www.americanbar.org/content/dam/aba/publications/litigation_journal/fall2011/opening_statement_kids_arent_all_right.pdf.authcheckdam.pdf.

[115] *Id.*

[116] *Id.*

commit suicide.[117]

Lastly, zero tolerance procedures not only unjustly affect students who are victims of bullying, but they also negatively affect those who take a stand to defend fellow classmates who are targeted. In one documented instance, a school administration suspended a student who witnessed his special needs classmate being harassed, and decided to approach the bullies and tell them to "be quiet and leave him alone."[118] The school defended its imposition of a two-day suspension on this student by citing video surveillance footage that it argued portrayed this student as the aggressor, despite numerous witness testimonies to the contrary.[119] By penalizing students who are coming to their peers' defense, zero tolerance policies may deter them from taking a stand against this epidemic, rather than helping a fellow student.

IV. JUDICIAL EFFORTS

In 1975, the Supreme Court of the United States addressed the constitutional issue of due process in context of school suspension in *Goss v. Lopez*.[120] The case involved nine students from Columbus, Ohio who were suspended from a public high school "for up to 10 days [allegedly] without a hearing pursuant to [Ohio State legislation],"[121] for situations arising out of "a period of widespread student unrest."[122]

The students sought a declaration that the legislation was "unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment."[123] The students further "sought to enjoin the public school officials from issuing future suspensions pursuant to [the legislation] and to require them to remove references to the past suspensions from the records of the students in question."[124]

The Supreme Court ruled in favor of the students, concluding that the suspensions were invalid and violated their constitutional right to due process because they were implemented without hearings.[125] While the Court recognized the need for a certain "modicum of discipline" in order for schools to serve their purpose effectively, it recognized that the school's authority "must be exercised

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[117] *See* BULLYING STATISTICS, *supra* note 80.

[118] *High School Student Suspended After Defending Special Needs Classmate from Bullies*, RT (Feb. 16, 2014), http://rt.com/usa/texas-suspension-special-needs-923/.

[119] *Id.*

[120] Goss v. Lopez, 419 U.S. 565 (1975).

[121] *Id.* at 568.

[122] *Id.* at 569.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 566.

consistently with constitutional safeguards."[126] The decision in *Goss* emphasized the students' rights to education, stating that "the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[127] The Court stated that:

> [s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[128]

In mandating notice and a hearing, the Court sought to provide students with the opportunity to voice their version of the events, in order to "provide a meaningful hedge against erroneous action."[129]

However, the type of hearing mandated by the Court does not have the same structure, nor does it require the same procedures, as a trial.[130] The Court expressed that due process is satisfied by "an informal give-and-take between student and disciplinarian."[131] In practice, subsequent courts have interpreted the informal hearings mandated by *Goss* as capable of being satisfied by trivial exchanges between a school administrator and the student.[132] For example, in *C.B. v. Driscoll*, the United States Court of Appeals for the Eleventh Circuit stated, "[t]he dictates of Goss are clear and extremely limited: [b]riefly stated, once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands."[133] In effect, satisfaction of this requirement does not seem to "provide a meaningful hedge against erroneous action[,]"[134] but instead gives school administrators the ability to easily meet procedural standards and avoid due process challenges by students.

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[126] *Id.* at 574.

[127] *Id.*

[128] *Id.* at 581.

[129] *Id.* at 583.

[130] *See id.* at 583 ("We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.").

[131] *Id.* at 584.

[132] *See* Heyne v. Metro. Nashville Pub. Sch., 655 F.3d 556, 565 (6th Cir. 2011) ("[The Due Process Clause] requires only minimal procedural protections.").

[133] C.B. v. Driscoll, 82 F.3d 383, 386 (11th Cir. 1996).

[134] Goss v. Lopez, 419 U.S. 565, 583 (1975).

A. Zero Tolerance Policies' Diluted Substantive Burden on School Administrators

Despite *Goss's* early attempt to ensure fairness in disciplinary actions, subsequent adoptions of zero tolerance policies across the nation seem to further dilute the constitutional protections that this Supreme Court decision upheld. Although the ruling in *Goss* mandates informal hearings for suspensions lasting ten days or less, zero tolerance policies have effectively decreased the burden on school officials to make detailed inquiries into situations evoking the policies' application. Pursuant to the methodology behind the zero tolerance policy, violations of certain offenses seem to give school administrators the authority to disregard information presented in a *Goss*-mandated hearing. Despite a students' right to an informal hearing in these situations, if the school follows zero tolerance guidelines, the information presented during these hearings will not have any weight in determining whether the suspension should stand, as the violations are treated as strict liability offenses. In turn, so long as school administrators comply with the loose procedural requirements set forth in *Goss*, zero tolerance policies allow school administrators to disregard substantive information that could otherwise prove the innocence of the disciplined adolescent.

B. De Minimis *Depravations*

While the Supreme Court held in *Goss* that the Due Process Clause required constitutional safeguards where school administration wished to impose a suspension greater than ten days, [135] the majority's language seems to set forth a *de minimis* exception to the application of this protection. The Court stated, "the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right to a hearing of some kind.'"[136] It went on to state that, "*as long as a property deprivation is not de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."[137] As such, courts have come to interpret deprivations of liberty or property in a manner that may potentially downplay the severity of consequences on children who do not deserve punishment.[138] A common justification for failure to provide heightened due process protections to students who are recipients of discipline "such as time-outs, detentions, and brief in-school suspensions," is that these measures are "de minimis depravations of liberty or property," and are therefore "insufficient to trigger Fourteenth Amendment procedural due process."[139] However, the *de minimis*

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[135] *Id.* at 576.

[136] *Id.* (citing Fuentes v. Shevin, 407 U.S. 67, 86 (1972)).

[137] *Id.* (emphasis added).

[138] Peri Zirkel, *The Aftermath of* Goss v. Lopez*: Procedural Due Process for Suspensions and Expulsions*, NAT'L ASS'N OF SECONDARY SCH. PRINCIPALS (2006), http://www.principals.org/portals/0/content/54066.pdf.

[139] *Id.*

exception fails to consider the detrimental effects produced by disciplinary measures other than out-of-school suspension and expulsion.

The Court in *Goss* recognized education as "perhaps the most important function of state and local governments," and notably stated that "[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."[140] While effectively limiting the scope of due process protection afforded to students receiving certain disciplinary measures by school administrations, a deprivation of these rights is contrary to the Court's emphasis on the importance of a student's right to an education. For example, the supplying of educational materials to students who serve in-school suspensions, where the student would otherwise receive formal instruction and be able to play an active role in the classroom, does not adequately protect the property right to education established in *Goss*. Furthermore, the Court in *Goss* placed emphasis on the student's interest in reputation.[141] However, in-school suspensions appearing on a student's disciplinary record may have adverse effects on those students. For example, a disciplinary record of any sort may taint the student's reputation and affect his or her chances of being accepted into a higher educational institution.[142] Thus, where the student is a victim of bullying, and an in-school suspension is imposed because the student has taken part in any sort of disruption or altercation, there is a risk that the student will be deprived of his or her due process rights with the school's justification that it is only a *de minimis* deprivation.

V. EXECUTIVE AND LEGISLATIVE EFFORTS

As a result of widespread criticism of zero tolerance policies, executive and legislative branches of both the federal and state governments have taken steps toward putting an end to these harsh disciplinary procedures. However, adequate attention to anti-bullying initiatives has yet to be seen in the context of legislative restrictions on zero tolerance policies, particularly in New York. The government has failed to provide assurance that bullied students receive ample protection from falling subject to this strict liability discipline.

In 2014, the Obama administration expressed its dismay with zero tolerance policies, leading the Departments of Education and Justice to issue guidelines in order to steer schools away from these practices.[143] The administration was

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[140] Goss v. Lopez, 419 U.S. 565, 576 (1975).

[141] *Id.* at 565.

[142] *See* Elizabeth Heaton, *Can a Disciplinary Infraction Keep You from Getting into Your College of Choice?*, HUFFPOST COLLEGE (Mar. 4, 2013), http://www.huffingtonpost.com/elizabeth-heaton/college-disciplinary-infractions_b_2396256.html.

[143] Claudio Sanchez, *Obama Administration Has Little Love for 'Zero Tolerance,'* NPR (Jan. 8, 2014), http://www.npr.org/2014/01/08/260808007/obama-administration-has-little-love-for-zero-tolerance.

concerned that these zero tolerance policies have been applied inappropriately and disproportionately, resulting in the criminal justice system being injected far too often into the "resolution of problems" in schools.[144] As a result, it "advised schools to focus on creating positive environments, setting clear expectations and consequences for students, and ensuring fairness and equity in disciplinary measures."[145]

Moreover, the Departments of Education and Justice emphasized their respective concerns regarding racial discrimination, stating, "[i]n our investigations, we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students."[146] The administration further advanced its theory that "out-of-school suspension is outdated and not in line with 21st-century education," calling for nation-wide support in combating these issues.[147] Despite voicing its opposition to zero tolerance policies, the Obama administration has focused its concern in a way that overlooks many students—such as students who have been victims of bullying—who are also subjected to the harsh consequences of these policies. The guidelines failed to specifically mention bullied students as a subject of executive concern. As such, there is a risk that resulting changes made to the education system will fail to provide relief for students other than those explicitly referenced who are nonetheless subjected to unjust disciplinary procedures.

Additionally, certain states have taken action by adopting legislation that either mandates or encourages school administrators to take mitigating factors, such as self-defense, into consideration before deciding which disciplinary action is appropriate to take.[148] Approaches vary from state to state, and they follow either a mandatory or permissive approach.[149]

A. Mandatory v. Permissive Approaches

1. Mandatory Approach

In those states that have taken a mandatory approach towards combating zero tolerance policies in schools, such as Texas, legislation requires school administrations to consider certain mitigating factors in determining the appropriate disciplinary sentence.[150]

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[144] *Id.*

[145] Motoko Rich, *Administration Urges Restraint in Using Arrest or Expulsion to Discipline Students*, N.Y. TIMES (Jan. 8, 2014), http://www.nytimes.com/2014/01/09/us/us-criticizes-zero-tolerance-policies-in-schools.html?_r=0.

[146] Associated Press, *Obama Administration Recommends Ending 'Zero-Tolerance' Policies in Schools*, PBS (Jan. 8, 2014), http://www.pbs.org/newshour/rundown/obama-administration-recommends-ending-zero-tolerance-policies-in-schools/.

[147] *Id.*

[148] Morton, *supra* note 3, at 761.

[149] *Id.* at 762.

[150] *See id.* at 761.

Beginning in 2003, the Texas state legislature began to adopt statutory changes to the state's Education Code that combated the strict guidelines of zero tolerance policies.[151] In the early stages of the bill, school administrators could consider whether the student acted in self-defense before the school implemented disciplinary action.[152] The legislature added additional mitigating factors that the school administration may consider.[153] This amendment enabled "school districts to consider a student's self-defense, intent, disciplinary history, and disability prior to exclusion from school."[154]

The most recent amendment to the Texas Education Code in 2009 shifted the state's law from permissive to mandatory consideration of these mitigating factors.[155] In effect, the 2009 amendment requires school districts to give consideration to self-defense, intent, disciplinary history, and disability, mandating a situation-specific inquiry in each case.[156] The law currently reads:

> [T]he student code of conduct must . . . specify that consideration will be given, as a factor in each decision concerning suspension, removal to a disciplinary alternative education program, expulsion, or placement in a juvenile justice alternative education program, regardless of whether the decision concerns a mandatory or discretionary action, to:
>
> (A) self-defense;
> (B) intent or lack of intent at the time the student engaged in the conduct;
> (C) a student's disciplinary history; or
> (D) a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct . . . .[157]

Changes adopted by the Texas legislature give hope to the possibility of curtailing the negative effects of zero tolerance policies on students who are bullied, as administrations are now required to consider fact-specific information before imposing harmful penalties. Furthermore, the amendments promote the ideology that each student has his or her own individual and unique story that requires discretion and the consideration of various factors before implementing disciplinary procedures.

2. Permissive Approach

In comparison, certain state legislatures, including North Carolina, Colorado, and Massachusetts, have taken a different approach in amending their respective education codes, allowing for permissive consideration of certain mitigating

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151 *Id.* at 762.
152 *Id.* at 763.
153 *Id.*
154 *Id.*
155 *Id.* at 764.
156 *Id.*
157 TEX. EDUC. CODE ANN. § 37.001 (West 2013).

factors, rather than mandating that they be taken into account.[158] States following this lead "encourage[ ] but do[ ] not require administrators to consider [certain] factors before excluding students [from school]."[159]

a. North Carolina

In June 2011, North Carolina legislators took action to "encourage greater flexibility in student exclusion decisions" by amending the state's school discipline laws.[160] Allowing school administrators to consider certain mitigating factors at their discretion, North Carolina's discipline policy states that "[b]oard policies shall not prohibit the superintendent and principals from considering the student's intent, disciplinary and academic history, the potential benefits to the student of alternatives to suspension, and other mitigating or aggravating factors when deciding whether to recommend or impose long-term suspension."[161] Accordingly, "administrators have the option, but not the obligation, to make decisions based on the unique circumstances of each case."[162]

b. Colorado

In 2012, Colorado joined in the effort to move away from the strict procedures promoted by zero tolerance policies.[163] In amending its education code, Colorado included the following provision:

> Each school district is encouraged to consider each of the following factors before suspending or expelling a student pursuant to a provision of subsection (1) of this section: (a) The age of the student; (b) The disciplinary history of the student; (c) Whether the student has a disability; (d) The seriousness of the violation committed by the student; (e) Whether the violation committed by the student threatened the safety of any student or staff member; and (f) Whether a lesser intervention would properly address the violation committed by the student.[164]

With encouragement to apply discretion in determining which disciplinary measures to impose, the Colorado legislature promotes the ideology that cases of misbehavior may require individualized disciplinary action to fit the particular circumstances of the infraction.

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[158] Morton, *supra* note 3, at 765-71.

[159] *Id.* at 762.

[160] *Id.* at 766 (quoting N.C. GEN. STAT. ANN. § 115C-390.1 (West 2011)).

[161] N.C. GEN. STAT. ANN. § 115C-390.2 (West 2015).

[162] Morton, *supra* note 3, at 767.

[163] Jenny Deam & Howard Blume, *Colorado Is Latest to Reconsider Zero-Tolerance School Policies*, L.A. TIMES (May 23, 2012), http://articles.latimes.com/2012/may/23/nation/la-na-zero-tolerance-20120523.

[164] COLO. REV. STAT. ANN. § 22-33-106 (West 2012).

c. Massachusetts

Massachusetts has proposed legislation to include discretionary consideration of mitigating factors in determining disciplinary action.[165] The legislation moves away from mandating expulsion practices, rather listing violations that *may* give rise to a student's expulsion.[166] The violations set forth in the legislation are: possession of a dangerous weapon or controlled substance and assaulting a school employee.[167] The legislation gives the school's principal discretion in choosing whether to suspend or expel the student, moving away from mandated discipline set forth by zero tolerance policies.[168]

Furthermore, the proposed legislation promotes the interests of Massachusetts's students by providing them with the right to a hearing that spans beyond the protection afforded under the law of *Goss*. Beyond the opportunity for an initial informal hearing, students that are suspended or expelled are given the right to be represented by counsel in an appeal before the superintendent.[169] Permitting the presentation of mitigating factors, the language of the proposed legislation reads: "[t]he subject matter of the appeal shall not be limited solely to a factual determination of whether the student has violated any provisions of this section."[170] With the ability to consider individualized facts under this legislation, the school district is more likely to be able to form an educated conclusion as to the appropriate action to take. Furthermore, the availability of trial-like procedures, found in the student's right to be represented by counsel in an appeal before the superintendent, helps to ensure that students are not deprived of a meaningful opportunity to present their stories. While these protections are limited, their expansion can help to provide all students with an equal opportunity for justice.

B. New York Law

Despite modern legislative efforts in other states, the statutory policy set forth in New York falls short of curing the problems of the zero tolerance system. First, New York law maintains traces of strict liability discipline for certain offenses.[171] Furthermore, despite enacting legislation aimed at preventing bullying in schools, New York law fails to address this issue in the context of disciplinary measures, which causes a significant gap between the legislation's intent and its effectiveness. As such, in the context of bullying, attention must be given to the New York

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165 *See generally* MASS. GEN. LAWS ANN. ch. 71, § 37H (West 2014); MASS. GEN. LAWS ANN. ch. 71, § 37H 1/2 (West 2014).

166 *See* MASS. GEN. LAWS ANN. ch. 71, § 37H (West 2014) (emphasis added).

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *E.g.*, N.Y. EDUC. LAW § 3214 (McKinney 2007) ("[A]ny public school pupil who is determined under this subdivision to have brought a firearm to or possessed a firearm at a public school shall be suspended for a period of not less than one calendar year . . . .").

Education Law to mend its failure to include provisions relating to the suspension or expulsion of students who act in self-defense. Moreover, while New York Penal Law recognizes self-defense as a justification to criminal charges,[172] the New York Education Law has failed to adopt a similar provision. Lastly, the minimum disciplinary sentence that triggers procedural protections under the New York Education Law fails to provide relief for many students who may be acting in self-defense to harassment or physical abuse.

1. Weapon Possession

New York law notably retains the mandatory implication of pre-determined minimum sentences for certain violations, specifically for weapon possession.[173] The statute provides that "any public school pupil who is determined under this subdivision to have brought a firearm to or possessed a firearm at a public school shall be suspended for a period of not less than one calendar year . . . ."[174] While providing students found to be in violation with the opportunity to a trial-like appeal before the school district's superintendent,[175] mandatory sentences of this nature promote the strict liability approach taken by zero tolerance policies in circumstances involving lesser offenses. Despite the policies' widespread criticism, the New York Legislature has yet to adopt an amendment that prohibits the application of predetermined disciplinary measures in schools.

2. Dignity for All Students Act

Moreover, legislation adopted to curtail the bullying epidemic across New York State fails to provide justice for victims in the area of school discipline. Adopted by the New York legislature in 2010, and put into effect in 2012,[176] the Dignity for All Students Act sought to afford "all students in public schools an environment free of discrimination and harassment."[177] Intended to promote tolerance and respect for students, the Act expressly prohibits harassment or bullying on the basis of "a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation,

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[172] *See* N.Y. PENAL LAW § 35.15 (McKinney 2004).

[173] *See* N.Y. EDUC. LAW § 3214 (McKinney 2007) ("Consistent with the federal gun-free schools act of nineteen hundred ninety-four, any public school pupil who is determined under this subdivision to have brought a weapon to school shall be suspended for a period of not less than one calendar year . . . .").

[174] *Id.*

[175] *Id.* ("No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his or her behalf.").

[176] *The Dignity for All Students Act*, NYSED.GOV (July 20, 2015), http://www.p12.nysed.gov/dignityact/.

[177] N.Y. EDUC. LAW § 10 (McKinney 2012).

gender, or sex."[178] The Dignity for All Students Act further requires that each school district in New York State adopt "policies, procedures and guidelines"[179] in an attempt to ensure effectiveness:

> 1. Policies and procedures intended to create a school environment that is free from harassment, bullying and discrimination, that include but are not limited to provisions which:
>
> a. identify the principal, superintendent or the principal's or superintendent's designee as the school employee charged with receiving reports of harassment, bullying and discrimination;
>
> b. enable students and parents to make an oral or written report of harassment, bullying or discrimination to teachers, administrators and other school personnel that the school district deems appropriate;
>
> c. require school employees who witness harassment, bullying or discrimination, or receive an oral or written report of harassment, bullying or discrimination, to promptly orally notify the principal, superintendent or the principal's or superintendent's designee not later than one school day after such school employee witnesses or receives a report of harassment, bullying or discrimination, and to file a written report with the principal, superintendent or the principal or superintendent's designee not later than two school days after making such oral report;
>
> d. require the principal, superintendent or the principal's or superintendent's designee to lead or supervise the thorough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports made under this section;
>
> e. require the school, when an investigation reveals any such verified harassment, bullying or discrimination, to take prompt actions reasonably calculated to end the harassment, bullying or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such harassment, bullying or discrimination was directed. Such actions shall be consistent with the guidelines created pursuant to subdivision four of this section;
>
> f. prohibit retaliation against any individual who, in good faith, reports, or assists in the investigation of, harassment, bullying or discrimination;
>
> g. include a school strategy to prevent harassment, bullying and discrimination;
>
> h. require the principal to make a regular report on data and trends related to harassment, bullying and discrimination to the superintendent;
>
> i. require the principal, superintendent or the principal's or superintendent's designee, to notify promptly the appropriate local law enforcement agency

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[178] N.Y. EDUC. LAW § 12 (McKinney 2013).

[179] *Id.* § 13.

> when such principal, superintendent or the principal's or superintendent's designee, believes that any harassment, bullying or discrimination constitutes criminal conduct;
>
> j. include appropriate references to the provisions of the school district's code of conduct adopted pursuant to section twenty-eight hundred one of this chapter that are relevant to harassment, bullying and discrimination . . . .[180]

In requiring school administrators to conduct inquiries into situations where bullying has been reported, the law has made a stride toward ensuring that school administrators are knowledgeable and informed about the underlying issues in their respective schools. With students providing information relating to bullying, the school administration may possibly address the situation before it escalates into a violent altercation. Furthermore, knowledge of the circumstances behind each case of bullying, and early action taken by the school to address the situation, may help to reduce the negative emotional and physical effects on the bullied student that are associated with bullying. Information related to bullying enables the school administration to speak with those students who are harassing other students, expanding the options the administration has in taking action to end the harassment. Also, disciplinary measures may be implemented against the aggressors before the victim is subjected to a situation that will result in his or her punishment as well. Yet despite optimism, New York law is missing a significant piece that will ensure that the Legislature's intent in adopting the Dignity for All Students Act is effectuated. Specifically, unlike under Texas law, New York law is silent on the consideration of self-defense in circumstances where bullied students face disciplinary consequences for involvement in a physical or verbal altercation resulting from bullying. As a result, the students that this legislation was intended to protect are still at risk of suffering unjust disciplinary consequences.

3. Self-Defense in Criminal Proceedings

The right to self-defense is recognized as an affirmative defense to criminal charges in the state of New York.[181] Accordingly, "conduct which would otherwise constitute an offense is justifiable and not criminal when such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor."[182] While New York Penal Law recognizes that "[a] person may . . . use physical force upon another person in self-defense or defense of a third person,"[183] New York Education Law notably fails to recognize this defense in the

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[180] *Id.*

[181] *See* N.Y. PENAL LAW § 35.15 (McKinney 2004).

[182] *Justification: Defense of Necessity as an Emergency Measure Penal Law 35.05(2)*, N.Y. COURTS (1968), http://www.nycourts.gov/judges/cji/1-General/Defenses/CJI2d.Justification.Emergency.35.05(2).pdf.

[183] N.Y. PENAL LAW § 35.10 (McKinney 2004).

context of schools. The absence of legislation requiring or permitting school administrators to take into account self-defense as a mitigating factor to disciplinary action dangerously deprives bullied students of liberty and justice.

4. Minimum Sentence for Statutorily Prescribed Procedural Assurance

New York Education Law focuses its attention on specific disciplinary implications that the legislature seemingly considers to be of more significance, due to extended periods of suspension. In an attempt to afford students procedural due process, the governing statute reads:

> No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his or her behalf.[184]

While this procedure may protect select students' due process rights, it fails to provide the same assurance to students who receive penalties that do not meet the minimum six-day statutory requirements, as those who are suspended for five days or less are not given the same guarantee of a hearing. In fact, in practice, many students who are suspended from school for fighting in the situation of bullying are suspended for five days or less.[185] Therefore, students who act in self-defense and are suspended for less time than the statutorily prescribed minimum are at risk of being deprived procedural due process.

VI. PROPOSAL

A. Proposed Changes

In order to combat the adverse effects of zero tolerance policies seen over the past two decades, the New York legislature must adopt amendments to its Education Law that reflect consideration for victims of bullying, particularly when they are acting in self-defense against their aggressors. While New York law requires school administrations to investigate cases where bullying has been reported,[186] supplementary legislation requiring the consideration of self-defense has not yet been adopted. Accordingly, the law is insufficient in providing a remedy to those students who are being bullied and thus forced into a situation that may ultimately result in their punishment. Furthermore, the procedural protections

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[184] N.Y. EDUC. LAW § 3214 (McKinney 2007).

[185] *See, e.g.*, *27 H.S. Students Suspended After Videotaped Fight*, WVBC (Feb. 27, 2012), http://www.wcvb.com/27-H-S-Students-Suspended-After-Videotaped-Fight/11255838. Students involved in a physical fight faced criminal charges of assault and battery with a dangerous weapon, and were suspended for five days each. *Id.*

[186] N.Y. EDUC. LAW § 13(1)(e) (McKinney 2013).

currently in place under New York Education Law fail to adequately serve many students who are disciplined for engaging in a verbal or physical altercation resulting from bullying. Given that a hearing is guaranteed only to students who are suspended in excess of five days, New York law fails to provide procedural protection to students whose disciplinary sentences do not meet this statutory minimum.

In order to further its intent in curtailing the negative effects of bullying and harassment, New York Education Law should require school administrators to take certain mitigating factors into account in the determination of disciplinary action, thereby adopting a statute similar to that in effect in Texas. Furthermore, New York Education Law should be amended to provide the procedural protection of a hearing to any student who is suspended, no matter the length of the suspension or whether it be served in-school or out-of-school.

B. Proposed Legislation

The language of the statutory amendments reflecting the changes noted above should read as follows:

> 1. Where a school employee or administrator has been notified of bullying or harassment, or knows or has reason to know, that such behavior is occurring or has occurred, and a violation of the student code has resulted, including but not limited to a verbal or physical altercation between students, the following shall apply:
>
> a. The principal or administrator imposing a sentence of suspension or expulsion upon a pupil involved shall consider the following mitigating factors in determining the appropriate disciplinary consequence, if any:
>
> i. self-defense
>
> ii. intent or lack of intent at the time the pupil engaged in the conduct;
>
> iii. a pupil's disciplinary history;
>
> iv. facts specific to the circumstance at hand, including but not limited to, findings of any related inquiry made by a school employee or administrator, and evidence brought to the attention thereof by a pupil involved or by a third party bystander.
>
> b. No pupil involved shall be suspended, whether the suspension be served in-school or out-of-school, or expelled, for any period of time unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his or her behalf.

It is important for schools to recognize that cases of bullying are fact-specific, and as such, a pre-determined, blanket consequence may not be appropriate in all situations. By taking self-defense, among other considerations, into account,

school administrations would be given more flexibility in deciding which course of action is appropriate to take. This would promote justice in assuring that students are given appropriate "sentences" for their respective involvement in an altercation. Furthermore, the guarantee of a hearing to dispute a suspension or expulsion in a case involving bullying or harassment provides procedural protection to students who would otherwise not qualify for such protection under the law currently in place in New York. Because many students involved in a physical or verbal altercation are not suspended for a period exceeding the statutory minimum of six days,[187] the proposed amendment helps to ensure that students who are victims of bullying have the opportunity to present a defense, thereby protecting these students' due process rights.

CONCLUSION

Although zero tolerance policies were originally enacted to promote safety in schools across the United States, their enforcement has produced results far removed from those that were intended. Specifically, these results harm adolescents who are bullied. By way of zero tolerance policies, victims of bullying are equated with aggressors in that all parties involved in an altercation are subjected to the same disciplinary measures. These policies cause injustice and discourage victims and their peers from taking a stand against bullying. Although in recent years legislative efforts have been made to help cure the pitfalls of the zero tolerance system, New York has failed to amend its education law to ensure the protection of students who are adversely affected by zero tolerance policies.

It is strongly recommended that New York adopt legislation requiring school administrators to take into account self-defense as a mitigating circumstance when choosing the appropriate discipline by adopting the statute proposed above. Legislation of the sort will help to curtail the negative effects associated with zero tolerance policies. It will advance the effectiveness of the current law aiming to end bullying by providing additional security to those individuals whom the law was designed to protect. Further, it will promote the idea that victims should not be held to the same standards as their attackers, an idea already incorporated into the criminal justice system via the self-defense provision. Lastly, requiring that schools consider these mitigating factors will help to ensure justice and protection of due process rights for bullied students, helping to put an end to the harm that results from the bullying epidemic in the United States.

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[187] *See, e.g.*, *27 H.S. Students Suspended After Videotaped Fight*, *supra* note 185.