

Summer 2011

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Recommended Citation

Peter Follenweider, Zero Tolerance: A Proper Definition, 44 J. Marshall L. Rev. 1107 (2011)

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ZERO TOLERANCE: A PROPER DEFINITION

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I. INTRODUCTION

A Virginia eighth grader was suspended for taking a knife from a suicidal friend.¹ Despite calling his actions “noble” and admirable, the school suspended him after finding that same knife in his locker.² The student filed suit in Federal District Court, but the case was dismissed.³

In September of 1997, a bleacher-clearing brawl occurred between members of rival gangs during a football game in Decatur, Illinois.⁴ The videotape capturing the incident was played repeatedly on national television and focused unwanted attention on Decatur.⁵ It was an example of school violence run amok. In response, the school board expelled the students, all African-American, for a period of two years.⁶ Some of the parents

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1. See *Tracking and Fighting Zero Tolerance*, THE RUTHERFORD INST. (Oct. 27, 2003), http://www.rutherford.org/articles_db/legal_features.asp?article_Id=71 (revealing some of the more absurd cases of Zero Tolerance punishments).

2. *Id.*

3. See *id.* (reporting that The Rutherford Institute filed suit on behalf of the student). After the Fourth Circuit Court rejected the student's appeal, the United States Supreme Court refused to grant certiorari. *Ratner v. Loudon Cnty. Pub. Sch.*, 16 F. App'x 140 (4th Cir. 2001), *cert. denied*, 534 U.S. 1114 (2002).

4. See Scott Kober, *Security at City Games a Concern*, HAROLD & REV., Sept. 22, 1999, at B1 (explaining the factual events that occurred on September 17, 1999, in Decatur, Illinois).

5. See Dirk Johnson, *7 Students Charged in a Brawl that Divides Decatur, Ill.*, N.Y. TIMES, Sept. 25, 2010, <http://partners.nytimes.com/library/national/race/111099race-ra.html> (explaining that national coverage brought Jesse Jackson to Decatur for the sole purpose of protesting the expulsion and its length). Jackson claimed that the school was destroying the lives of the expelled students. *Id.* What he did not say was that the expelled students had missed a combined 350 school days and that three of the defendants were third-year freshman. *Id.* Further, the Illinois Governor at that time, George Ryan, waived certain restrictions allowing the students to attend an alternative school. *Id.*

6. *Id.* The expelled students were offered a deal that would reduce the

unsuccessfully brought suit to overturn the expulsion.⁷

Headlines like these exhibit the dark side of Zero Tolerance Policies (ZTPs) and the existence of violence in schools. To further complicate the way ZTPs are being evaluated, few people can agree on a universally applicable definition and the goals of implementation.⁸ A ZTP is a policy enabling school officials to apply a predetermined punishment for an act deemed to violate school policies.⁹ According to the American Psychological Association (APA), ZTPs do not take into account a student's disciplinary record, the circumstances of the offense, or the context in which the behavior occurred.¹⁰ Using this definition, the APA has concluded that twenty years of ZTPs have produced little, if any, evidence that they are effective.¹¹ Further, in 2006, the APA reported that not only is there little evidence that ZTPs are effective, but there are also studies that suggest ZTPs have a negative impact.¹²

suspension to one year if they would accept the offer made by Governor Ryan. *Id.* The students refused. *Id.*

7. Fuller v. Decatur Pub. Sch., 78 F. Supp. 2d 812, 814 (C.D. Ill. 2000). The expelled student's parents argued that the school's expulsion was based on the race of the students. *Id.* The United States District Court disagreed. *Id.* Even though the pure numbers suggested that more African-American students were being expelled than white students, the court said that more than numbers need to be shown in order to determine that racism exists. *Id.* at 825. The defendants must show other factors in order to support a claim that the school is using race as a controlling factor in the expulsions. *Id.* at 824. The court required that the school district turn over all suspension records. *Id.* After looking at all available information, the court could not find, and the defendants could not produce, a similarly situated white student who was treated differently. *Id.* at 825.

8. See Reece L. Peterson & Brian Schnoover, *Fact Sheet #3: Zero Tolerance Policies in Schools*, CONSORTIUM TO PREVENT SCHOOL VIOLENCE (June 2008), http://www.preventschoolviolence.org/resources_assets/CPSV-Fact-Sheet-3-Zero-Tolerance.pdf (explaining that there is no generally accepted definition of ZTPs).

9. See Cecil R. Reynolds, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, AM. PSYCHOL., Dec. 2008, at 852, 852, available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf> (defining ZTPs).

10. *Id.*

11. See Dennis Cauchon, *Zero-tolerance Policies Lack Flexibility*, USA TODAY, Apr. 13, 1999, <http://www.usatoday.com/educate/ednews3.htm> (claiming that national statistics show that the proliferation of ZTPs has had no clear effect on school violence as measured by the reported incidents of weapons and violent attacks in schools).

12. See Reynolds, *supra* note 9, at 856 (reporting that the American Psychological Association (APA) Task Force has found that the intense punishments of ZTPs often cause alienation and other psychological problems for students). These effects often go further than just the student. *Id.* It can cause other students to lose confidence in the school discipline process, which in turn can cause additional acts of violence. *Id.* at 854. Further, little research has been done on the effect of student expulsion on families, but the

What has not been as widely reported is that the vast majority of school administrators apply and define ZTPs with common sense and compassion,¹³ and the vast majority of students do not engage in violence, especially violence to the level of the Decatur incident.¹⁴ Even with common sense application, it is beneficial for schools to use a proper comprehensive definition of ZTPs in order to more effectively institute policies that students can clearly understand.¹⁵

The reality is that ZTPs are demonized because of the absurd ways that some school administrators apply them, and not for what the policy actually represents.¹⁶ Effectively constructed ZTPs present schools with the needed policy choices to create safer schools.¹⁷ The United States Supreme Court intimated in *Goss v. Lopez* and in subsequent cases, that while the state has a responsibility to educate every resident child, the schools are left to decide how to educate the students without much judicial intervention.¹⁸ What is left tacitly unstated is that the educations

Task Force warns that potential psychological problems also lie within the families of expelled and suspended students. *Id.* at 856.

13. See Ken Trump, *Zero Tolerance and School Safety*, NAT'L SAFETY AND SEC. SERVS. (Sept. 25, 2010), http://www.schoolsecurity.org/trends/zero_tolerance.html. (explaining that most administrators do apply ZTPs with common sense). Trump believes the problem lies with those administrators that do not use common sense when applying ZTPs. *Id.* Therefore, it is not the policy that creates the absurd issues the Rutherford Institute reports, but the misapplication of ZTPs by schools. See also *Tracking and Fighting Zero Tolerance*, *supra* note 1 (illustrating how schools misuse ZTPs).

14. See Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, IND. EDUC. POL'Y CTR., 12-13 (2000), available at <http://www.indiana.edu/~safeschl/ztze.pdf> (detailing a U.S. Department of Education report that focused on expulsions for weapons). The report found that there were 3390 weapons-related expulsions reported in 1999 for the 1997-1998 school year. *Id.* at 12. Further, over forty percent of suspensions are repeat offenders, and expulsions and suspensions only affect ten percent of the sophomores that stayed in school and only thirty-one percent of sophomores who dropped out of school. *Id.* at 13. The vast majority of suspensions are not for violence or weapons. See *generally id.* at 6 (demonstrating the evolution of ZTPs away from weapons and into minor offenses).

15. See Reynolds, *supra* note 9, at 857 (defining schools' policies). A properly defined school discipline policy protects students from capricious punishments and protects the school from charges of unfair application. *Id.*

16. See Trump, *supra* note 13 (evaluating schools for over twenty-five years across the country). Trump has "consistently found the vast majority of school administrators strive for firm, fair, and consistent discipline applied with good common sense." *Id.* The problem he has found is that the media, legislatures, and the public in general, as well as some schools, have no idea of how to define ZTPs, especially as they relate to the concept of school safety and security. *Id.*

17. See Gun-Free Schools Act, 20 U.S.C. § 7151(b) (2006) (allowing schools the flexibility to alter punishments on a case-by-case basis).

18. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (holding that education is a property interest entitled to due process protections), and *New*

of many should not be compromised to educate the few who choose to consistently disrupt the educational environment.¹⁹

This Comment argues that ZTPs are not the cause of the supposed educational demise in this country but are a valuable tool, when used correctly, in maintaining order in the school and teaching all students that there are consequences to their actions.²⁰ However, ZTPs must be applied intelligently. This Comment will focus on the impact, both positive and negative, of ZTPs on students. Further, this Comment will propose that society cannot separate the school's interest in keeping order and the state's interest in educating all students.²¹

Part II of this Comment traces how ZTPs evolved from government usage to fight drugs and crime to their insertion into schools as discipline policies. Part III will focus on the inappropriate use of ZTPs to enforce discipline that some administrators claim is fair and impartial, but many detractors believe is clearly the school's method of taking the easy way out.²² Conversely, Part III will also focus on the positive uses of ZTPs. Part IV will proffer ways to improve school discipline and safety by properly involving the court system. Further, this Comment will suggest ways that individual schools can improve security by making some minor changes to discipline codes.

Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (establishing that although courts are hesitant to interfere with a child's right to privacy, educators have a substantial interest in maintaining classroom discipline). *See also* Anita J. v. Northfield Twp.-Glenbrook N. High Sch. Dist. 225, No. 94 C 6480, 1994 WL 604100, at *2 (N.D. Ill. Nov. 4, 1994) (upholding a suspension for drugs as the court deferred to the expertise of the school district); Wood v. Strickland, 420 U.S. 308, 326 (1975) (supporting the concept that courts will defer to schools in most disciplinary matters); *Ratner*, 16 F. App'x at 142 (limiting court's interpretation of ZTPs to a constitutional analysis); *and* Doe v. Bd. of Educ. of Oak Park River Forest High Sch. Dist. 200, 115 F.3d 1273, 1280 (7th Cir. 1997) (deferring to school expertise on disciplinary matters involving a special education student).

19. *See* Albert Shanker, Pres., Am. Fed'n of Teachers of N.Y., Address at the American Federation of Teachers National School Safety Conference: Restoring the Connection Between Behavior and Consequences: The Removal of Violent and Disruptive Youngsters (May 15, 1995)(transcript available at <http://www.accessmylibrary.com/article-1G1-17040512/restoring-connection-between-behavior.html> (defending the use of ZTPs in New York public schools)).

20. *See id.* at 3 (advocating the use of ZTPs in schools).

21. *Contra* Skiba, *supra* note 14, at 16 (claiming there is a belief that the state's interests in educating all students should be paramount to the state's interest in allowing individual schools keep order).

22. *See id.* (explaining why schools insist on using ZTPs to punish inappropriate behavior). School administrators are hesitant to use unproven methods of discipline. *Id.*

II. BACKGROUND

A. Development of Zero Tolerance Policies as Part of School Discipline Codes

During the 1980s, ZTPs began as a governmental response to drug-related violence. ZTPs enabled law enforcement agencies to unequivocally confiscate property belonging to people convicted of drug-related offenses.²³ The concept was furthered by United States Attorney Peter Nunez who used ZTPs as an effective weapon against crime, especially drugs, when he impounded seagoing vessels carrying drugs, regardless of the amount.²⁴ From the genesis of ZTPs, civil rights groups attacked law enforcement agencies for using ZTPs to confiscate property in violation of constitutionally protected rights of due process and privacy, *inter alia*, and for using ZTPs to regulate behaviors that had nothing to do with violence or drugs.²⁵ Just as quickly as they started, but with much less fanfare, the use of ZTPs was halted in 1990 by United States Customs officials when two research ships were confiscated when a researcher on board was found with a minimal amount of marijuana.²⁶

Prior to the use of the term “Zero Tolerance” and the institution of ZTPs by the federal government, similar policies were developed and used to fight drug use in New York.²⁷ The

23. *Id.* at 2; see also Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safer Schools*, PHI DELTA KAPPAN, 1999, at 372 (detailing the history of ZTPs and how they came to be used in schools). The ZTPS used in San Diego became the road map for schools to follow. *Id.* at 373. It allowed harsh penalties for even miniscule amounts of drugs. *Id.* The concept obviously being that such severe penalties would deter the unwanted, in this case illegal, activity. See generally *id.* at 373 (detering negative behavior is a key element of ZTPs).

24. See Skiba, *supra* note 14, at 2 (detailing how Edwin Meese, the United States Attorney General at the time, believed that Zero Tolerance was going to be the best and most effective weapon law enforcement agencies had to combat the flow of drugs into the United States). Meese publicly praised the San Diego Attorney General for his get-tough stance on drugs. *Id.*

25. See *id.* at 23 (claiming the ACLU and other groups contemplated filing lawsuits in order to have the courts decide the constitutionality of the ZTPs). The ACLU began investigating the use of ZTPS in order to fight racism, sexual harassment, and some petty crimes.

26. Skiba & Peterson, *supra* note 23, at 373. The Customs Agency felt that the minimal amount found did not warrant such a confiscation. *Id.* Subsequently, the Customs Agency quietly discontinued use of such extreme Zero Tolerance measures. *Id.*

27. See Jaime Adame, *Crime and Safety: Rockefeller Drug Law Reform and Drug Courts*, GOTHAM GAZETTE, (Jan. 2005), <http://www.gothamgazette.com/article/crime/20050106/4/1238> (detailing the failure of Rockefeller's drug courts). These drug courts were referred to as the Rockefeller Courts because they were the brainchild of then-Governor Nelson Rockefeller. *Id.* He believed these courts and the accompanying harsh penalties, often jail time, would stop

recently overturned program called for mandatory prison time and allowed no room for judicial discretion, even for first time drug offenders.²⁸ Instead of jail time, the new program offers comprehensive rehabilitation that assists the drug user in fighting drug addiction as well as assessing some form of punishment, which can include counseling instead of jail time for nonviolent offenders.²⁹ Since abandoning mandatory drug possession ZTPs, New York drug courts have seen the overwhelming number of cases on the dockets relieved, many of which involved minute amounts of drugs and nonviolent, first-time offenders.³⁰

However, just as law enforcement agencies began phasing out ZTPs in 1994, schools in Lexington, Kentucky and Orange County, California had already adopted ZTPs for both drugs and gang activity.³¹ New York soon followed, but expanded the scope of ZTPs to include class disruptions and wearing hats.³² These policies were instituted as an administrative response to a perceived rise in school violence.³³ By 1993, many schools across the nation had

drug addiction in New York. *Id.* The courts were an unmitigated disaster. *Id.*

28. *Id.*

29. Hon. Judy Harris Kluger, *Problem-Solving Courts*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/courts/problem_solving/index.shtml (last visited Aug. 14, 2011). *See also id.* (follow "Drug Treatment Courts" hyperlink) (describing the success of the revamped New York drug courts). As of September 24, 2010, New York had 179 drug courts in operation. *Id.* After the success New York experienced with the drug court concept, it has become a model that many states are beginning to mimic. *Id.*

30. *See Adame, supra* note 27 (reporting the success of the flexible sentencing now used in New York Drug Courts).

31. *See Skiba, supra* note 14, at 2 (adapting law enforcement ZTPs to schools began in Kentucky, New York, and California).

32. *See Gang Signs and Symbols*, ESSORTMENT, http://www.essortment.com/all/gangsignsands_reyp.htm (last visited Aug. 14, 2011) (defending application of ZTPs to clothing and other possible gang symbols). While rules against hats may seem superfluous, hats, and other articles of clothing, are used by gangs to demonstrate their power by the number of students wearing them. *Id.* Often these obvious gang symbols lead to violent conflict similar to the one in Decatur. *See Tracking and Fighting Zero Tolerance, supra* note 1 (claiming the fight in Decatur involved members of two rival gangs). Skiba, *supra* note 14, at 1.

33. *See Ralph C. Martin II, A.B.A. JUVENILE JUSTICE POLICIES: ZERO TOLERANCE POLICY*, A.B.A. (Feb. 2001), available at <http://www.maine.gov/education/speced/tools/b4se/reports/discipline/policyaba.pdf> (contradicting the notion that violence is increasing). School violence has not increased over the previous two decades. *Id.* The evidence collected shows that at worst, violence has remained steady. *Id.* It is more likely, however, that school violence has decreased according to this report. *But see Shanker, supra* note 19, at 7 (contradicting the notion that school violence has in fact decreased or remained stagnant). Shanker argues that the reduction in school violence is a mirage. *Id.* He believes that school administrators have encouraged, if not threatened, teachers not to report incidents of violence. *Id.* at 7. This threat and/or suggestion has led to an underreporting of school violence that belies the statistical evidence produced by the American Bar Association. *See*

adopted ZTPs that included severe punishment for violence, drugs, and class disruption.³⁴ By 1998, ZTPs thoroughly dominated school discipline codes: ninety-four percent of schools had adopted policies for weapons or firearms; eighty-seven percent for incidents involving alcohol; and seventy-nine percent mandated automatic suspensions for tobacco or violence-related events.³⁵

In addition to school districts individually making sweeping changes to discipline policies, Congress and President Clinton reacted to the increase in violence by passing the Gun-Free Schools Act (GFSA) in 1994.³⁶ The GFSA mandates one-year suspensions for students who bring firearms to school and requires that student offenders be turned over to the criminal justice system.³⁷ The most far-reaching and positive impact of the GFSA is that it gave school administrators the ability to adapt the punishments in special circumstances.³⁸

As society inaccurately perceived that school violence was increasing, many schools and some states created ordinances that expanded the GFSA to include other weapons.³⁹ The GFSA also expanded its influence through a series of amendments starting in 1995.⁴⁰ These ordinances and the amendments to the GFSA

generally id. (noting that schools under report school violence). Shanker is relying on anecdotal evidence gathered from his position as President of the New York Federation of Teachers. *Id.* He relies on no study to support his claims. *Id.*

34. See Skiba & Peterson, *supra* note 23, at 373 (showing the behaviors originally targeted by ZTPs almost never occur). See also Skiba, *supra* note 14, at 2-3 (using ZTPs for minor infractions). Instead, schools are using ZTPs in order to stop what Sheila Heaviside and the other members of her study believe to be relatively minor infractions. *Id.*; see also Sheila Heaviside et al., *Statistical Analysis Report: Violence and Discipline Problems in U.S. Public Schools*, NAT'L CTR. FOR EDUC. STAT. (Mar. 1998), available at <http://nces.ed.gov/pubs98/98030.pdf> (illustrating the misuse of ZTPs).

35. See Heaviside, *supra* note 34, at 18 (demonstrating the prevalence of ZTPs in schools).

36. See 20 U.S.C. § 7151 (2006) (creating a national policy against guns in schools).

37. See *id.* §7151(b)(1) (stating in part: "State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to . . . school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State . . .").

38. See *id.* (allowing the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing).

39. See Skiba, *supra* note 14, at 2 (expanding school ZTPs through the GFSA). The expansion of the GFSA by some states now includes offenses ranging from possession of drugs and alcohol to class disruption and truancy.

40. 20 U.S.C. § 7151 (b)(1) (2006) (amended 1995); See Skiba, *supra* note 14, at 2 (allowing schools to use the GFSA to suspend or expel any student who has any object that could be considered a weapon). The amendment also left it to the school to decide what constituted a weapon. Skiba *supra* note 14, at 2.

provided school districts with increased flexibility to modify punishments on a case-by-case basis.⁴¹

While schools possess the ability to alter punishments based on the GFSA, many schools have chosen to expand the influence of the GFSA to include what detractors consider minor offenses, such as class disruption, tardiness, and truancy.⁴² The use of ZTPs has often resulted in an academic death penalty⁴³ of sorts for some students regardless of academic standing or disciplinary record.⁴⁴ Additionally, as schools are increasingly affected by technology, school boards have begun to apply ZTPs to off campus behavior.⁴⁵

41. *Id.* The GFSA allows schools to use discretion when assigning mandatory expulsions. *Id.* See also Skiba, *supra* note 14, at 7 (detailing that ZTPs based on the GFSA allow schools to use their discretion when assigning punishments). However, as Skiba notes, many administrators mistakenly claim that their hands are tied, the punishments are mandated, and the schools possess little or no flexibility. *Id.*

42. See Skiba & Peterson, *supra* note 23, at 376 (contending that suspension and expulsion have a negative effect on both the student and the school, especially when used for what some consider minor offenses). They warn that ZTPs, when used in relation to lesser offenses such as being late to class, missing school, and fighting, erode the trust needed to effectively run a school. *Id.*; see also Skiba, *supra* note 14, at 5-6 (illustrating the use of ZTPs for behaviors not related to violence). Therefore, the ZTPs are having the opposite effect than what was envisioned. *Id.* One strange positive consequence of the absurd application of ZTPs is that laws are sometimes amended. Cauchon, *supra* note 11, at 2-A.

43. See generally Whitney Joiner, *One Strike and You're Out of School: Youthful Suicides, Financial Ruin, Families Torn Apart for Minor Infractions: How post-Columbine Hysteria is Wrecking Lives*, SALON.COM (Feb. 2, 2004), http://dir.salon.com/mwt/feature/2004/02/02/zero_tolerance/index.html (illustrating the effect of ZTPs on families). Committing a single mistake often triggers the ZTPs. *Id.* The impact is felt far beyond just the academic hardships. *Id.* Studies have shown these single-act students feel more isolated and are prone to depression. *Id.* The author points out a 1996 case in which Dennis Seal, a student, was expelled for having a three-inch knife in his car even though another student admitted that he owned the knife and put it in Seal's car without Seal's knowledge. *Id.* The school refused to reconsider the punishment. *Id.* Seal accepted a settlement in 2001 and six months later committed suicide. *Id.* Seal's father filed a wrongful death cause of action against the school. See Seal v. Morgan, 229 F.3d 567, 581 (6th Cir. 2000) (ruling that there was no legitimate state interest in expelling a student who did not know he possessed a weapon).

44. See Cauchon, *supra* note 11, at 1-A (expelling an eighth grade honors student, who previously had never been in trouble, and sentencing her to five months of boot camp when she brought grain alcohol to school).

45. See generally, THOMAS A. JACOBS, TEEN CYBERBULLYING INVESTIGATED: WHERE DO YOUR RIGHTS END AND CONSEQUENCES BEGIN 2-4 (2010) (detailing the expanse of ZTPs to off-campus behaviors). Jacobs documents situations where students have been punished for off-campus activities. *Id.* at 3. Social networking sites like Facebook and MySpace have allowed students to reach large groups of people in a short time but have also created instances of inappropriate activity. *Id.* at 2. Schools have often stepped into the breach between free speech and criminal activity to suspend or expel

Because schools have not efficiently used ZTPs nor taken advantage of their inherent flexibility, the implementation of ZTPs has created much debate.⁴⁶ Some educators contend that ZTPs should only be a component of a more comprehensive discipline policy and that much of the evidence suggesting the ineffectiveness of ZTPs is ultimately inconclusive.⁴⁷ No single policy can solve the entire issue of school discipline;⁴⁸ however, ZTPs give school administrators the necessary tools to act quickly and decisively when removing violent students, thereby increasing school safety.⁴⁹ Further, the problem is not the underlying policy but its application that causes anomalies, such as expelling an honor student for having a butter knife in her lunch box.⁵⁰ It is a lack of common sense in the implementation of ZTPs that causes such anomalous results.⁵¹ ZTPs were never meant to be a “one-

students under ZTPs. *Id.* at 3-4. The courts have been left to decide these issues on a case-by-case basis. *Id.*; see also Dirk Johnson, *Schools' New Watchword: Zero Tolerance*, N.Y. TIMES, Dec. 1, 1999, at A-20 (identifying the Chicago Public School as a school district that extends ZTPs to off campus activity). The Chicago Public School ZTP is in effect twenty-four hours a day. *Id.* This allows principals to suspend or expel students who are convicted of felonies. *Id.*

46. See generally Skiba, *supra* note 14, at 7 (debating the effectiveness and the wisdom of implementing ZTPs); Martin, *supra* note 33; Reynolds, *supra* note 9. All believe that student discipline would improve if ZTPs were either eliminated or used properly. Martin, *supra* note 33; Reynolds, *supra* note 9.

47. See Martin, *supra* note 33 (arguing that Zero Tolerance should be part of a more comprehensive discipline policy). See also Trump, *supra* note 13 (criticizing reports that limit security measures to metal detectors, on-site police, and locker searches). Trump points out that the research shows that prevention policies have a success rate that is no better than that of ZTPs. *Id.*; see also Skiba, *supra* note 14, at 7 (attacking the validity of most studies supporting ZTPs). Skiba notes that most of the inclusive studies reported are not objective but are simply program descriptions. *Id.* at 7. However, Skiba does acknowledge that much more research needs to be done. *Id.*

48. See Reynolds, *supra* note 9, at 856 (stating that effective security measures encompass both policies and procedures that clearly spell out the expectations and involve both proactive and reactive measures).

49. See Gun-Free Schools Act, 20 U.S.C. § 7151(d)(2) (2006) (requiring that schools must report all incidents of weapons found on school campuses to law enforcement agencies).

50. Cauchon, *supra* note 11, at 1-A. Shanon Coslet, a ten year old, faced expulsion after turning in a small knife to her teacher. *Id.* at 2-A. She found the knife that her mother put in her lunch box. *Id.* National media services picked up the story and showed a tearful Shanon waiting to discover her fate. *Id.* The district administrators blamed the inflexibility of ZTPs, but they eventually relented and allowed her back to school. *Id.* Shortly thereafter, the Colorado state legislature changed its law in order to give schools more flexibility. *Id.*

51. See Martin, *supra* note 33 (reporting that administrations that do not implement a common sense approach to ZTPs often find themselves creating unsafe schools). See also Trump, *supra* note 13 (agreeing that a common sense approach is tantamount to a successful ZTP).

size-fits-all punishment.”⁵² The vast majority of school personnel does not strictly apply the harsh punishments of ZTPs but are more often overly lenient.⁵³

Some educators contend that schools deprive students of constitutionally secured rights when they improperly apply ZTPs.⁵⁴ These educators further argue that schools have adopted a policy that deprives many expelled students of a fundamental right guaranteed by most state constitutions: the right to be educated.⁵⁵

ZTPs have created severe friction between the state’s duty to educate its citizens and the state’s need for schools to instill order and maintain discipline so that all students receive an education.⁵⁶ This friction creates an adversarial relationship between two compelling state interests, which have also embroiled the court system.⁵⁷ By not creating alternative schools for suspended or expelled students, some states are denying these students the right to an education and leaving them with no alternative beyond suspension or expulsion.⁵⁸ Considering such friction, the best

52. See Martin, *supra* note 33 (detailing that the use of ZTPs was originally meant for behaviors and not punishments).

53. Shanker, *supra* note 19, at 7.

54. Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. QUARTERLY 65, 98, 102 (2003), available at <http://lawreview.wustl.edu/inprint/81-1/p%2065%20Blumenson.pdf>. The United States Supreme Court has stated that education is not explicitly a constitutionally protected right. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (ruling that the Constitution did not create a federal right to education). However, students do have a right to certain procedural protections when being deprived of liberty interests. U.S. CONST. amend. XIV, § 1; *Goss*, 419 U.S. at 574. The Court ruled that education is a property interest that a state cannot take away without proper due process. *Goss*, 419 U.S. at 574.

55. Blumenson & Nilsen, *supra* note 54, at 106-07. Currently Mississippi and Delaware are the only states whose constitutions do not guarantee equal protection (i.e. a free public education). *Id.* at n.168.

56. See generally *S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 425 (3d Cir. 2003) (ruling that a school can suspend a kindergartener). In this case, a kindergartener was suspended for telling classmates he was going to shoot them at recess. *Id.* at 419. The district court ruled the school had properly informed parents and students that the ZTPs would be strictly enforced. *Id.* The principal met with the students and the school sent a letter home to the parents. *Id.* at 418. The fact that the student was absent the day the ZTPs were explained and the parents never received the letter did not sway the court from upholding the suspension. *Id.* at 425.

57. See Amy P. Meek, Note, *School Discipline “As Part of the Teaching Process”: Alternative and Compensatory Education Required by the State’s Interest in Keeping Children in School*, 28 YALE L. & POLY REV. 155, 172 (2009) (explaining that a conflict exists between two compelling state interests: the school’s need to keep discipline and the state’s interest in providing an education).

58. See generally HARVARD UNIV. CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND

interests of the students are too often not met.⁵⁹ With some modifications, this friction can be eased; when ZTPs are defined and applied correctly, schools will be better able to provide a quality education and a safe environment for all students.

III. ANALYSIS

A. Due Process and Zero Tolerance

It is axiomatic that students do not lose their constitutional rights “at the schoolhouse gate.”⁶⁰ In order to assure student rights are protected, the Supreme Court, through the Fourteenth Amendment, has found education to be a right that will be granted due process protection.⁶¹ Opponents of ZTPs incorrectly contend that ZTPs, and the schools improperly enforcing them, do not afford students sufficient due process protection of their right to an education.⁶² However, in response to the Supreme Court’s

SCHOOL DISCIPLINE POLICIES (2000), available at <http://www.eric.ed.gov/PDFS/ED454314.pdf> (reporting that not all states require alternative schools to service expelled students). Not having alternative schools seems to be contradictory considering the vast majority of state constitutions mandate free public education. *Id.*

59. *Ingraham v. Wright*, 430 U.S. 651, 657 (1977). It is axiomatic that educators believe the best place for students to be is in school. *Id.* at 657. The United States Supreme Court ruled that corporal punishment is meant to punish the child without interrupting his education. *Id.* at n.43. Further, the Supreme Court opined that “education is perhaps the most important function of state and local governments.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

60. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); but see KENNETH STRIKE, EDUCATIONAL POLICY AND THE JUST SOCIETY (1982) 128, 130-34 (arguing that the decision in *Tinker* gives students freedom they are not mature enough to properly exercise). Strike believes that when people are given rights that they cannot properly exercise, society suffers. *Id.* at 130. People, or students in the instant case, need to be guided to the proper exercise of freedom. *Id.* at 131. Without proper guidance, the exercise of freedom by immature people is an exercise in futility. *Id.* at 130. Until students reach a proper maturation level, their decisions should be restricted. *Id.* at 132. Strike bases his argument on the philosophy of John Stuart Mill who believes that allowing children into the Marketplace of Ideas is defeating the purpose because they have nothing of substance to offer. *Id.* See also John Stuart Mill, *On Liberty*, in JOHN STUART MILL 12 (1863) (asserting that maturity is needed before a person can properly exercise freedoms). Mill says “those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injuries.” *Id.* at 12.

61. *Goss*, 419 U.S. at 574.

62. See *id.* (detailing that schools must give due process to students who are being expelled or suspended); see also Noreen S. Ahmed-Ullah, *Parents Say Schools Are Too Quick to Expel Students*, CHI. TRIB., Sept. 18, 2010, http://articles.chicagotribune.com/2010-09-18/news/ct-met-0919-proviso-discipline-20100918_1_parents-question-alternative-program-expulsion (detailing the process by which students in Illinois are suspended or expelled).

ruling in *Goss*, all schools implementing ZTPs, in addition to providing advanced notice of the charges, now must hold hearings in which students facing expulsion maintain the opportunity to present evidence, question witnesses, and be represented by counsel, before punishment is decided.⁶³

Even with these safeguards in place, lower courts have not always required schools to provide students the full bundle of due process protections.⁶⁴ For example, a student alleged that his due process rights were violated when the school did not list all the charges the student would be facing in his disciplinary hearing.⁶⁵ The Fifth Circuit disagreed, dismissed the action, and upheld a one-year expulsion.⁶⁶ According to some, the fact that the student did not have notice to all charges constituted a violation of due process.⁶⁷ Opponents of ZTPs blame the policy for the ruling, instead of the school's improper application of the ZTPs. The text of a ZTP cannot allow and does not call for the denial of due process rights.

Unless a school's actions are "arbitrary or irrational or [are] motivated by bad faith," courts are hesitant to overrule school-based discipline even if that results in students receiving a bare minimum, yet still adequate level of protection.⁶⁸ In *Remer v. Burlington Area School District*, the Seventh Circuit found a four-and-a-half-year expulsion for a student involved in planning a school shooting was related to a legitimate government interest and, therefore, justified.⁶⁹ In order to have the expulsion overthrown, the student needed to show the action was not related to a legitimate government interest.⁷⁰

The message is clear—school administrators may circumvent certain constitutional protections regarding disciplinary actions under extreme circumstances.⁷¹ That circumvention is based on the school's interpretation and application of ZTPs and not the ZTPs themselves. That is where the true problem exists.

63. *Goss*, 419 U.S. at 579.

64. See *Meek*, *supra* note 57, at 167 (explaining that courts often allow schools to bypass certain protections if the student is not prejudiced).

65. *Keough v. Tate Cnty. Bd. of Educ.*, 748 F.2d 1077, 1083 (5th Cir. 1984); see also *Meek*, *supra* note 57, at 167 (detailing the school's misuse of due process).

66. See *Keough*, 748 F.2d at 1083 (ruling that because the student admitted to fighting, disrespect, and leaving campus early, he knew of the charges and therefore was not prejudiced).

67. *Goss*, 419 U.S. at 579.

68. *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1998).

69. See *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1013 (7th Cir. 2002) (stating that even though the student removed himself from the conspiracy, expulsion was justified due to the nature of the offense).

70. *Id.*

71. See *Meek*, *supra* note 57, at 167 (arguing that a school's incomplete implementation of due process is often ignored by the courts).

B. Disparate Impact

1. Race

Some educators further criticize ZTPs because of the disparate impact on minority students.⁷² One study shows that while African Americans make up over seventeen percent of the student population, they account for thirty-two percent of the suspensions and expulsions.⁷³ Further, while white students make up sixty-three percent of the student population, they account for less than fifty percent of suspensions and expulsions.⁷⁴ Some attorneys are convinced that racial profiling is a major factor when schools penalize students for nebulous offenses such as disrespect and defiance.⁷⁵ The disparate impact is a direct result of school officials blindly applying ZTPs without giving consideration to the social and cultural differences at play within the student body.⁷⁶

ZTPs do not require that minority students are targeted. It is humans who inequitably enforce ZTPs.⁷⁷ Schools are a microcosm of society: inequities that exist in society also exist in schools.⁷⁸

72. See Skiba, *supra* note 14, at 11 (describing the dramatic impact of ZTPs on minority students). See also Reynolds, *supra* note 9, at 854.

73. See OPPORTUNITIES SUSPENDED, *supra* note 58, at 9 (reporting that minority students are suspended or expelled more frequently than white students under ZTPs).

74. See *id.* (citing the Department of Education, Office for Civil Rights, 1998 Elementary and Secondary School Civil Rights Compliance Report (abstract available at http://www.buildingblocksforyouth.org/issues/zero_tolerance/studies.html)).

75. See Cherry Henault, *Zero Tolerance in Schools*, J.L. & EDUC. (Jul. 2001), available at http://findarticles.com/p/articles/mi_qa3994/is_200107/ai_n8958383/pg_2/?tag=content;coll1 (detailing the misuse by schools and mistrust of ZTPs by students).

76. See Skiba, *supra* note 14, at 12 (speculating that the cultural differences between teachers and minority students may account for the disproportionate number of minority students suspended or expelled); see also Amy C. Nelson, *The Impact of Zero Tolerance School Discipline Policies: Issue of Exclusionary Discipline*, NASP COMMUNIQUÉ (Dec. 2008), http://www.nasponline.org/publications/cq/mocq374impact_zero_tolerance.aspx (comparing the white middle class expectations generally held by teachers to the culturally different expectations held by minority students); Reynolds, *supra* note 9, at 857 (training teachers to be culturally sensitive would alleviate some of the unnecessary racial impact of misapplied ZTPs).

77. See Alfie Kohn, *Safety from the Inside Out: Rethinking Traditional Approaches*, EDUC. HORIZONS (Fall 2004), <http://www.alfiekohn.org/teaching/safety.htm> (describing that school violence is more likely to affect low income students of color, both as perpetrators and victims than white students).

78. See *Educating Teachers for Diversity*, N. CENT. REG'L EDUC. LAB., <http://www.ncrel.org/sdrs/areas/issues/educatrs/presrvce/pe3lk8.htm> (last visited Oct. 1, 2010) (explaining that whatever prejudices exist in society, such as racism, will also exist in schools).

2. Criminal Records

Another negative result of ZTPs is the proliferation of students who are now considered criminals for school-based offenses.⁷⁹ As part of their implementation of ZTPs, many schools have been referring students to the criminal justice system.⁸⁰ Consequently, not only does the suspension or expulsion follow the student academically, but the criminal conviction may follow the student for the rest of his life.⁸¹ Schools often incorrectly claim that ZTPs leave administrators with few other options except to turn the student over to the justice system.⁸² To further complicate matters, courts often merely acquiesce to the school district, unless the punishment is wholly arbitrary.⁸³ As one court sagely asserted, “[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking . . . wisdom or compassion.”⁸⁴

3. Educational Conflict

Perhaps the most valid educational complaint regarding the inappropriate application of ZTPs is that schools are working against the very concepts—fairness, compassion, intelligence, problem solving and critical thinking—that they are attempting to instill in students.⁸⁵ All school policies, including disciplinary policies, should be created to further these very concepts, not destroy them.⁸⁶ By misusing ZTPs, schools deliver the message

79. See Kohn, *supra* note 77 (criticizing the involvement of the criminal justice system in school discipline issues). Kohn believes that schools are creating criminals because the schools are involving the criminal justice system in disciplinary actions that should be handled by the school. *Id.*; see also Reynolds, *supra* note 9, at 855–56 (detailing the effect of a criminal record on students’ future academic progress).

80. See *Zero Tolerance School Discipline Policies*, ABC WORLD NEWS TONIGHT (Nov. 7, 2003), <http://www.youtube.com/watch?v=QJ6hvzG67C8> (interviewing the Honorable Judge Ronald Alvarez on the impact of ZTPs on the juvenile justice system).

81. See Reynolds, *supra* note 9, at 856 (detailing how the use of ZTPs can have a lasting effect on students, particularly students who have been referred to some aspect of the criminal justice system).

82. See Skiba & Peterson, *supra* note 23, at 374 (detailing the fundamental misunderstanding that most school administrators have regarding the flexibility of ZTPs).

83. See *Anita J.*, 1994 WL 604100, at *2 (explaining that courts hesitate to overrule school punishments).

84. *Wood*, 420 U.S. at 326.

85. See Kohn, *supra* note 77 (detailing the belief that schools that use ZTPs in the most literal and strict sense are actually creating more fear in schools); Reynolds, *supra* note 9, at 854–56 (noting that schools have become places to fear for students); and Martin, *supra* note 33 (suggesting that students fear policies they believe to be unfair).

86. See DAVID EASTON, *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* 35 (1953) (explaining that all policies instituted

that easy answers are more important than student development.⁸⁷

The American Psychological Association (APA) has stated that students, from kindergarten to high school, strongly believe in the concept of fairness.⁸⁸ Accordingly, students look to teachers and other school personnel to model fair and appropriate behavior.⁸⁹ If students see that administrators and other school personnel refuse to acknowledge the difference between a pocket knife and machete, students can become confused and may no longer accept that the school policies are fair.⁹⁰ Students can easily see the difference between a butter knife and a machete.⁹¹ Therefore, when the school refuses to acknowledge the difference, the student's confidence in the school is eroded.⁹² A 2008 study indicates that when schools behave contrary to the concepts of justice and fairness, the students actually feel less safe.⁹³ The study also indicates that most students have yet to develop the cognitive ability to properly assess the risks created by their actions.⁹⁴

By treating all students and circumstances exactly the same, schools treat all students equally but not fairly.⁹⁵ That means all

in public schools should accurately reflect the values the school wants to instill in the students).

87. *Id.*

88. *See Reynolds, supra* note 9, at 855 (explaining the effect of ZTPs on the cognitive development of students).

89. *See id.* at 854-55 (criticizing schools for harming students' psychological growth through the use of policies that students see as inherently unfair).

90. *See Kohn, supra* note 77 (developing a proper environment in which school personnel model appropriate behavior is a vital component of any discipline policy); *see also* Martin, *supra* note 33 (differentiating between weapons and non-weapons). Students lose respect for schools when they can see obvious circumstantial differences that schools refuse to acknowledge. *Id.*

91. *See Henault, supra* note 75 (demonstrating the absurdity that occurs when a school treats all violators the same).

92. *See Kohn, supra* note 77 (describing that trust is a necessary element for student success); *and* Reynolds, *supra* note 9, at 855 (identifying that a student's trust in the school is a key element to his academic success).

93. *See Reynolds, supra* note 9, at 855 (creating environments that do not foster feelings of safety and fairness make the students feel less safe). The Task Force found that when schools do not properly re-enforce the concept of fairness, students feel less safe and therefore act out more. *Id.*

94. *Id.*

95. *See Kohn, supra* note 77 (examining the impact of policies that treat all students and situations the same regardless of the surrounding circumstances); Reynolds, *supra* note 9, at 855; *and* Martin, *supra* note 33. The ABA study points out that any "school district polic[y] [that] appl[ies] the same expulsion rules to the six-year-old as to the 17-year-old" is not properly applying ZTPs which are meant to deter negative behaviors but not intended to become a "one-size-fits-all mandatory punishment." *Id. See also* IVAN ILLICH, *DESCHOOLING SOCIETY* 65, 71 (1972) (criticizing the use of consistency in schools). While Illich does not directly address ZTPs, he does comment on

students who commit the same infraction are given the exact same punishment with no regard to the surrounding circumstances or the student's discipline record.⁹⁶ School officials claim the unilaterally equal enforcement of ZTPs is intended to increase school safety.⁹⁷ However, studies done by Harvard University, the APA, and others actually indicate that the seemingly arbitrary and anomalous enforcement of ZTPs may make some students feel less safe because they now view the school as something to be feared instead of a place where they can safely learn and create an "us versus them" mentality.⁹⁸

As with all social policies, discipline policies are only as effective as the people and institutions that apply them. The main problem with ZTPs is the rigidity with which they are applied, not necessarily the language of the policies, or even the intent of those applying them.

C. Positive Aspects of ZTPs

ZTPs can improve school safety because they provide schools the authority to quickly remove dangerous students.⁹⁹ Further, proper application of ZTPs allows classroom teachers to teach effectively.¹⁰⁰

the fact that junior high school students and elementary school teachers are dropping out at a record pace. *Id.* at 65. Illich stresses that if schools continue to do what they have always done, the results will be worse. *Id.* at 70. He refers to this thinking as "Irrational Consistencies." *Id.* at 68. Illich warns that a total overhaul of the school must occur because the current school system is not set up to properly educate what Illich refers to as an "emerging counterculture." *Id.* at 71. "The relational structures we need are those which enable each [person] to define himself by learning and by contributing to the learning of others." *Id.*

96. See Kohn, *supra* note 77 (treating all students equally but not fairly causes students to fear school authority figures).

97. See Skiba & Peterson, *supra* note 23, at 374 (showing that some administrators continue to misuse ZTPs, even in the face of overwhelming evidence that their use of ZTPs is improper).

98. See Kohn, *supra* note 77 (detailing that students are much better educated in a stable environment). Kohn believes that schools who inappropriately use the ZTPs are "doing something to the students" as opposed to acting in the student's best interests. *Id.*

99. See Reynolds, *supra* note 9, at 859 (explaining that ZTPs are necessary because they allow administrators to react quickly in order to protect students and teachers from imminent violence).

100. See ERIC P. HARTWIG & GARY M. RUESCH, DISCIPLINE IN THE SCHOOL 28-29(1994) (creating the proper classroom environment is perhaps the most important component of an effective discipline plan). It is the classroom teachers who are on the front lines of discipline. *Id.* at 29. Classroom teachers spend the most time with the students and are first able to see changes in behavior that can signal a potentially violent incident. *Id.*

1. *Parts of Comprehensive Discipline Policy*

a. Behaviors Not Consequences

Supporters of ZTPs claim that school administrators, for fear of being considered soft on crime, unfair, or even racist, are enforcing ZTPs in a manner that undermines the very values that the school seeks to reinforce.¹⁰¹ Schools should have zero tolerance for inappropriate behaviors; however, the Zero Tolerance concept should not overflow into the punishment of those behaviors.¹⁰² Schools should use ZTPs to reinforce the message that certain behaviors will not be tolerated, but punishments will be assessed based on a number of factors.¹⁰³ The policies should focus on the prevention of negative behaviors and not overly harsh punishments of inappropriate behaviors.¹⁰⁴

Some educators believe that ZTPs would be significantly more effective when applied as part of a comprehensive discipline policy.¹⁰⁵ Albert Shanker, former President of the New York Chapter of the American Federation of Teachers Union, believes that schools need the ability, through ZTPs, to quickly and effectively remove students who present an immediate threat while still working to proactively prevent negative behaviors before they start.¹⁰⁶ The courts seem to agree because they allow schools, in extraordinary circumstances, to remove dangerous students without immediate due process protection.¹⁰⁷

101. See Joiner, *supra* note 43, at 1 (explaining why some school administrators continue to use ZTPs even though the policies seem overly harsh).

102. See Martin, *supra* note 33 (detailing that ZTPs were meant to deal with the behavior more than the punishment). Even opponents of ZTPs acknowledge that the original intent of the policies was to prevent the behavior and not to create a policy of harsh punishments that is a “one-size-fits-all” system. *Id.*

103. Interview with Ruth Siegel, Professor, The John Marshall Law School, in Chi., Ill. (Sept. 15, 2010). See also Martin, *supra* note 33 (explaining that ZTPs should apply to certain behaviors but not necessarily to create punishments that are rigid and unforgiving). Schools need to announce clearly that certain behaviors absolutely will not be tolerated. *Id.* However, the ZTPs should also allow flexible punishments by considering all pertinent circumstances. *Id.* Factors to be used include: the age of the student, how the behavior happened, why the offense occurred and the discipline record of the offending student. *Id.*; see also Nelson, *supra* note 76 (detailing that ZTPs were never intended to be stand-alone policies but integrated into a comprehensive discipline and safety program).

104. See Martin, *supra* note 33 (explaining that ZTPs were not meant to be the entire discipline policy, but only part of a more comprehensive policy).

105. Trump, *supra* note 13.

106. Shanker, *supra* note 19, at 11.

107. See *Goss*, 419 U.S. at 583 (allowing schools to temporarily circumvent a student’s due process protections under certain extreme circumstances).

b. Classroom Discipline

In a speech given to New York public school teachers, Shanker addressed the concern that ZTPs are being used to remove students for minor classroom infractions.¹⁰⁸ Shanker and others believe that most violence in schools can be traced back to policies that do not adequately address classroom discipline.¹⁰⁹ When two or three students are allowed to dominate the classroom teacher's time, the entire class suffers.¹¹⁰ When this happens, the most important aspect of the educational process, classroom instruction, fails because the classroom teacher is no longer teaching, but spending valuable instructional time disciplining a few disruptive students.¹¹¹ If ZTPs are used effectively, disruptive activity can be prevented and disruptive students can be properly removed from the classroom environment through either in-school or out-of-school suspension.¹¹² The vast majority of students will then receive the benefit of continued and appropriate classroom instruction.¹¹³

i. Proper Implementation of ZTPs

No single policy has shown to be overly effective in improving school safety.¹¹⁴ However, ZTPs, when used effectively in conjunction with a comprehensive policy of prevention and intervention, provide both deterrents for students and a tool for

108. See Meek, *supra* note 57, at 172 (creating alternative schools would satisfy the state's educational requirements and allow expelled students to receive an education).

109. *Id.*; see generally Thomas R. McDaniel, *A Primary Classroom: Principles Old and New*, PHI DELTA KAPPAN, Sept. 1986, at 63, 64 (explaining that effective classroom discipline policies are imperative for an effective school wide discipline policy); see generally MALCOLM GLADWELL, *THE TIPPING POINT* 140, 147 (2002) (supporting the point that minor offenses must be subject to discipline before they become major offenses). Gladwell credits then New York Mayor Rudy Giuliani for reducing escalating crime by punishing graffiti, turnstile jumping, and other minor offenses. *Id.* at 144, 147. Gladwell uses "the broken window theory" to explain that when a neighborhood is thought to be free of crime, it lessens the chances that crime will happen there. *Id.* at 141. Extending this to schools means that if minor offenses are properly dealt with in a classroom, it is less likely that major offenses, including fighting or bringing weapons to school, will occur. *Id.* at 146.

110. See Shanker, *supra* note 19, at 3 (defending the use of ZTPs by classroom teachers).

111. *Id.*

112. See generally Reynolds, *supra* note 9, at 858 (reporting that properly used ZTPs can assist in preventing emotional and physical harm and class disruptions).

113. See Trump, *supra* note 13 (creating a safe school environment through the use of multiple discipline strategies will improve the education of all students).

114. See Martin, *supra* note 33 (explaining that ZTPs should be but a part of a more comprehensive discipline approach and not the entire policy).

schools to employ when confronted with dangerous students.¹¹⁵ ZTPs are a cost-effective and efficient means for schools to quickly remove dangerous students while still adhering to a comprehensive policy focusing on prevention.¹¹⁶ Given the current state of school funding, most, if not all, schools are facing a dire financial reality.¹¹⁷ Discipline policies that require massive resource expenditures are simply not viable for many school districts.¹¹⁸

If ZTPs were completely removed from school disciplinary policies, schools would face the troubling reality that a few misbehaving students would receive a disproportionate percentage of educational resources.¹¹⁹ Many of the alternatives to ZTPs are simply not educationally sound because they allow a few students to monopolize educational time and resources.¹²⁰ Effectively drafted, implemented, and communicated ZTPs would reduce the incidents of school violence and administrators applying overly lenient or even no punishments.¹²¹

ii. Neutral Application

Proponents of ZTPs also take exception to the belief that ZTPs target minority students.¹²² As previously stated, the GFSA and ZTPs do not specifically mention that certain students should be

115. See Kohn, *supra* note 77 (detailing how a plan of prevention and action not only improves school safety but student performance as well).

116. See HARTWIG & RUESCH, *supra* note 100, at 22 (explaining that discipline policies often favor allocating an inordinate amount of resources to the few students who consistently disrupt the school environment).

117. See Sam Dillon, *With Federal Stimulus Money Gone, Many Schools Face Budget Gaps*, N.Y. TIMES, Feb. 8, 2010, <http://www.nytimes.com/2010/02/08/education/08educ.html> (reporting on the negative impact of budget cuts on schools).

118. See Shanker, *supra* note 19, at 8 (explaining that there is a finite amount of resources available to schools).

119. See *id.* (disciplining the few students who consistently act out occupies a large percentage of school resources).

120. See Trump, *supra* note 13 (reinforcing the notion that ZTPs must be used in conjunction with other disciplinary approaches including prevention and staff training).

121. See *id.* (explaining that often times administrators create more problems with overly lax discipline as opposed to overly harsh); see also Nelson, *supra* note 76 (introducing the concept of the Marshmallow Effect). Nelson believes that school violence is often precipitated by school administrators who are too lenient. *Id.* The Marshmallow Effect occurs when administrators do not apply the punishments required by the school's discipline policies. *Id.* The metaphor is that administrators are perceived to be soft on student discipline. *Id.* This perception causes the students to rebel against what they perceive to be an "unjust system." *Id.*

122. See Skiba, *supra* note 14, at 12 (explaining that no legislation or school policy has been identified as applying only to minority students).

targeted over others.¹²³ The reality is that some schools target minority students with misapplied ZTPs that are, on their face, racially neutral.¹²⁴ Throwing out the policy because of the anomalous manner in which some schools choose to apply it is self-defeating.

IV. PROPOSAL

In order to effectively use ZTPs, schools must acknowledge and accept that the APA's definition of ZTPs is inappropriate.¹²⁵ Proper ZTPs should focus on the behaviors more than the punishments.¹²⁶ There will still be punishments for inappropriate behaviors, but the punishment must be appropriate for the offense.

In order to create an effective learning environment, schools must draft a comprehensive discipline policy that includes identification, prevention, a graduated system of punishment, and a mechanism to immediately remove dangerous students.¹²⁷ Additionally, giving all stakeholders a voice in how the discipline policy is crafted is a critical first step.¹²⁸ Schools need to allow parents and the community to give input into drafting appropriate policies.¹²⁹ Further, the state must create a system of alternative schools that allow expelled students to continue their education.¹³⁰

123. See Martin, *supra* note 33 (explaining that while facially neutral, ZTPs are not actually neutral because they are applied by biased individuals).

124. *Id.*

125. *Id.*; see also Siegel, *supra* note 103 (applying ZTPs only to inappropriate behaviors is the proper use).

126. See Martin, *supra* note 33 (explaining the origin of school based ZTPs). Schools originally focused ZTPs towards behaviors and not necessarily punishments. *Id.*

127. *Id.*

128. See HARTWIG & RUESCH, *supra* note 100, at 23 (allowing parents and community leaders a voice in educational policies generally removes the feeling of disconnect that many parents, especially minority parents, experience).

129. *Id.*; see also OPPORTUNITIES SUSPENDED, *supra* note 58, at 49 (reporting that disciplinary committees composed of all stakeholders should be consulted whenever a student is removed from school).

130. See Meek, *supra* note 57, at 172-73 (extolling the importance of alternative schools for students removed from traditional schools); see also Wright, 430 U.S. at 674 (keeping students in schools, even if that means corporal punishment, is preferred to removing students from the educational environment). Skiba, *supra* note 14, at 14 (explaining that suspension and expulsion beget suspension and expulsion). Students who are suspended lose "the school bond" which is an important factor in reducing inappropriate behavior. *Id.*

A. *The Policy*

The most important aspect of drafting a discipline policy is clearly defining what behaviors the school absolutely will not tolerate.¹³¹ Full application of ZTPs in this context is necessary and self-explanatory.¹³² However, Zero Tolerance must refer more to behaviors rather than punishments.¹³³ Students must understand that certain behaviors will be punished and that the punishment will fit the crime. When schools clearly communicate how the consequences of each behavior will be administered, all stakeholders are assured that the policy will be properly applied.¹³⁴

A discipline policy that does not allow weapons in schools and that will punish *all* students who bring weapons to school is not the equivalent of expelling the student who brings a butter knife in his lunch box.¹³⁵ While there is some form of discipline involved, such as taking the knife and making the parents come to school to retrieve it, the emphasis is on an appropriate punishment for the violation.¹³⁶ A student who brings a knife to school will not be ignored, regardless of why the knife is there.¹³⁷

Further, an effectively drafted discipline policy contains a graduated system of punishment.¹³⁸ In such a system, the student's entire discipline record and the specific circumstances surrounding the infraction are considered before punishment is assessed.¹³⁹ A student who consistently violates school policies receives a more severe punishment.¹⁴⁰ A graduated system of

131. See Reynolds, *supra* note 9, at 858 (replacing one-size-fits-all policies with a more comprehensive approach that clearly defines the negative behaviors that will trigger traditional ZTP punishment).

132. See Siegel, *supra* note 103 (using ZTPs properly involves focusing on the behaviors and not the punishments).

133. See Martin, *supra* note 33 (reporting that ZTPs were originally aimed at behaviors and not punishments).

134. See HARTWIG & RUESCH, *supra* note 100, at 22 (communicating school expectations to stakeholders will reduce inappropriate behaviors and can create partnerships with parents and community groups).

135. See Martin, *supra* note 33 (disciplining students while accounting for all circumstances allows administrators a more complete picture of the behavior).

136. See Reynolds, *supra* note 9, at 858 (removing one-size-fits-all punishment creates needed flexibility for properly evaluating student discipline, especially necessary in situations where students cannot properly appreciate the risks created by their own behavior).

137. See *generally* Nelson, *supra* note 76 (applying penalties that are consistent and appropriate to the offense avoids the negative outcomes associated with the Marshmallow Effect).

138. See Reynolds, *supra* note 9, at 858 (retaining ZTP punishments for only the most egregious behaviors allows schools to keep more students in the classroom).

139. See Skiba, *supra* note 14, at 7 (accounting for all circumstances that contribute to the behavior in question increases fairness).

140. *Id.*

punishment avoids the academic death penalty that too many schools improperly employ under the guise of a ZTP: an immediate expulsion for first-time offenders.¹⁴¹ Further, a graduated system gives the school district much needed flexibility to consider all exigent circumstances.¹⁴²

As important as the graduated system is, all schools must also include provisions that allow for the immediate removal of any student who poses an imminent physical threat to others. While this aspect of a discipline policy may seem harsh, it is universally agreed upon that it must be included in order to enhance school safety.¹⁴³ A further benefit of retaining a provision for immediate removal is the deterrent effect such an addition will have on the student body.¹⁴⁴

After establishing what behaviors will not be tolerated, the policy also must establish ways in which potential violent outbursts can be anticipated and defused before they occur.¹⁴⁵ These proactive policies allow schools to more easily identify and prevent situations that can potentially lead to more serious violent incidents.¹⁴⁶

B. Proper Enforcement

1. Classroom Teaching

After a properly drafted discipline policy is in place, it must be enforced, beginning with the school's most visible and accessible

141. See generally Joiner, *supra* note 43 (using a "one strike and you're out" discipline policy has far-reaching negative consequences).

142. See 20 U.S.C. § 7151 (2006) (allowing schools to alter punishments on a case-by-case basis).

143. See Skiba, *supra* note 14, at 15 (reserving ZTPs punishments for behaviors that put school personnel or students in imminent danger); Reynolds, *supra* note 9, at 858; Martin, *supra* note 33.

144. See Shanker, *supra* note 19, at 3 (detering negative behaviors allows students to be in school and teachers to focus on education instead of discipline).

145. See Reynolds, *supra* note 9, at 856 (establishing proactive measures that identify at-risk students can help prevent violent behaviors before they occur and allow the school to counsel students who may be more predisposed to violence).

146. See Skiba, *supra* note 14, at 16 (creating proactive measures gives schools the best chance to prevent violence and students the best chance to remain in school). Some proactive measures include peer mediation, alternative dispute responses and resolutions, access to counselors, and early identification programs. *Id.* See also Skiba & Peterson, *supra* note 23, at 382 (identifying potential violent students would have prevented a number of "multiple-victim shootings"). Many violent students leave warning signs that are overlooked by schools. *Id.* at 382. Proper training of school personnel would give schools the ability to proactively identify and counsel potentially violent students. *Id.*

asset—the classroom teacher.¹⁴⁷ It is the classroom teacher who, through daily interaction, creates the bond of trust between student and teacher that is vital to an effective discipline policy and a safe school.¹⁴⁸ Because the majority of learning occurs in the classroom, it is imperative that classrooms are free from even the slightest threat of violence.¹⁴⁹

Students point to three qualities that effective teachers possess: “[F]irmness, compassion, and an interesting, engaging style of teaching.”¹⁵⁰ The teacher must develop a classroom discipline policy that is consistent and properly communicated to both parents and students yet is applied with compassion while engaging the students.¹⁵¹

A teacher properly applying a classroom discipline policy that utilizes ZTPs can actively engage students, which will allow unobstructed learning to continue without concern for classroom violence.¹⁵² When students understand what behaviors will be consistently disciplined, they are less likely to monopolize the teacher’s time with inappropriate behavior.¹⁵³ Clearly communicated rules and expectations improve classroom discipline and are appreciated by students and parents alike.¹⁵⁴

2. Administrators

Administrators must acknowledge the double-edged sword of being too harsh or too lenient.¹⁵⁵ Paradoxically, both

147. See Reynolds, *supra* note 9, at 857 (having teachers contact parents after a classroom disruption creates a more positive relationship between parents and school).

148. See HARTWIG & RUESCH, *supra* note 100, at 29 (creating trust between teacher and student is the most important aspect of an effective classroom teacher).

149. *Id.*

150. Pedro A. Noguera, *The Critical State of Violence Prevention*, THE SCH. ADM’R, Feb. 1996, available at <http://www.thefreelibrary.com/The+Critical+State+of+Violence+Prevention.-a077195658>.

151. See HARTWIG & RUESCH, *supra* note 100, at 29 (teaching involves creating an educational environment that fosters learning).

152. See Noguera, *supra* note 150 (learning best occurs when all students feel confident that the teacher is invested in student learning and growth).

153. See Shanker, *supra* note 19, at 3 (reporting that the relatively few students who consistently act up take up a disproportionate amount of the classroom teacher’s time).

154. See HARTWIG & RUESCH, *supra* note 100, at 22 (communicating rules involves parents and students in the education process); see generally Kohn, *supra* note 77 (eliminating both physical and emotional fear is a necessary step in preventing school violence). Kohn believes that students who do not feel safe will not take the academic risks necessary to improve learning. *Id.* This safety starts with a positive classroom environment. *Id.* In terms of ZTPs, this safe environment reduces violence because all students feel safe. *Id.*

155. See Nelson, *supra* note 76 (reporting that the Marshmallow Effect creates negative feelings among students similar to those experienced in

administrative postures result in similar outcomes: students who believe that policies are not fair which creates schools that are not safe.¹⁵⁶ Some administrators are hesitant to use ZTPs because they mistakenly believe that ZTPs require overly harsh discipline, which would be unfair to students, or do not allow enough administrative flexibility.¹⁵⁷ Therefore, administrators often do nothing.¹⁵⁸ Applying fair and appropriate discipline is a time-consuming administrative chore because all surrounding circumstances should be discovered and evaluated before a student is punished.¹⁵⁹

3. *Parents and Community*

Parents and the surrounding community are too often the silent partners of schools.¹⁶⁰ Too often parents do not involve themselves in all appropriate aspects of the educational decision-making processes.¹⁶¹ They remain silent while decisions are made that directly affect their children.¹⁶² In order to bridge that communications gap, schools must involve parents, including those who previously had either negative or no involvement with the school.¹⁶³ In order to properly engage parents and the community, schools must give a voice to groups that are most affected by the school policies by creating committees made up of community leaders, teachers, students, and parents that review and evaluate the effectiveness of school discipline.¹⁶⁴

Additionally, parents need to know their rights in cases where their child may have been denied his rights.¹⁶⁵ By using tools such as the Freedom of Information Act, parents and communities can

response to the overly harsh punishments often associated with ZTPs).

156. See Martin, *supra* note 33 (reporting that students who feel discipline policies are not fair also do not feel safe in school).

157. See generally Trump, *supra* note 13 (showing the impact of administrators who do not properly implement discipline policies); see also Nelson, *supra* note 76 (showing the same).

158. See Nelson, *supra* note 76 (reporting that the Marshmallow Effect often causes school administrators to do nothing for fear of being overly harsh).

159. See Reynolds, *supra* note 9, at 857 (applying effective punishment involves an understanding of all circumstances surrounding student behavior).

160. See HARTWIG & RUESCH, *supra* note 100, at 33 (reporting that in a 1989 poll, educators saw the lack of parent and community involvement in schools as the biggest problem in education).

161. See *id.* at 22 (reporting that school personnel believe that the lack of parental involvement is the number one problem that schools must solve in order to improve academic achievement and discipline).

162. *Id.*

163. See Noguera, *supra* note 150 (communicating with parents and the surrounding community is a hallmark of effective schools).

164. *Id.*

165. Reynolds, *supra* note 9, at 859.

access school policies and discipline information.¹⁶⁶ Parents have the ultimate power in schools: the right to elect the local Board of Education that not only regulates employment but creates and, at times, enforces the discipline policies.¹⁶⁷

Most importantly, parents have greater access to students. If parents are involved in creating the school's policies, those same parents are much more likely to support, or at least understand, the decisions the school makes.¹⁶⁸ Leaving parents without a voice in establishing policies creates a negative atmosphere that puts the school and family in direct conflict.¹⁶⁹

C. Training

1. Teachers and Administrators

A continuous professional development program is integral to an effective discipline policy.¹⁷⁰ Teacher and administrator education is a two-tiered approach that begins with university training and continues until retirement with professional development opportunities.¹⁷¹

Before teachers can improve school discipline, it is essential that universities work with school districts to improve teacher training.¹⁷² Educational training programs are often the first experience teachers have with the other side of the desk, and it appears as if current teacher training programs are woefully inadequate.¹⁷³ Teachers are walking into schools completely unprepared to properly design, implement, and administer a discipline plan in their classroom.¹⁷⁴

166. *Id.*

167. 105 ILL. COMP. STAT. 5/10 (2006).

168. See Martin, *supra* note 33 (explaining that parents want fair and appropriate discipline for their children).

169. See Noguera, *supra* note 150 (involving parents and the community assists administrators in keeping schools safe).

170. See Reynolds, *supra* note 9, at 856 (explaining the negative impact misused ZTPs have on families).

171. *Id.* at 859.

172. See Jennifer Epstein, *Reforming Teacher Ed*, INSIDE HIGHER ED (Mar. 12, 2010), <http://www.insidehighered.com/news/2010/03/12/teachers> (identifying the lack of actual classroom experience most teacher training programs integrate into the curriculum). "You can't learn to swim on the sidewalk and you can't learn to teach outside the classroom," said Sharon Feiman-Nemser, a professor of Jewish education at Brandeis University who has for decades studied how teachers learn." *Id.*; see also Bonnie Miller Rubin & Tara Malone, *Report: Many Illinois Colleges Don't Prepare Teachers for the Classroom*, CHI. TRIB., Nov. 9, 2010, at 6 (reporting that universities are disconnected from school districts in terms of how to properly train teachers).

173. See generally Epstein, *supra* note 172 (training teachers means that teachers need more experience on the other side of the desk); see also Rubin & Malone, *supra* note 172, at 6 (criticizing the current state of teacher training).

174. See generally Rubin & Malone, *supra* note 172 (preparing teachers for

Teachers should be the first school personnel to contact the parents when a classroom discipline problem occurs.¹⁷⁵ With teachers on the front lines, it is in the best interest of all educational stakeholders that teacher training programs develop valuable tools to cope with a variety of classroom discipline issues.¹⁷⁶

Conversely, administrators and educational leaders of the school must be willing to accept the responsibilities of being trained and of training the staff so that all school personnel can identify and educate potentially violent students.¹⁷⁷ In order to properly communicate and implement a comprehensive plan, school administrators must be willing to cede valuable professional development time and other resources in order to train teachers.¹⁷⁸

D. The State

1. Alternative Schools

Expulsion and suspension will always be part of a discipline plan.¹⁷⁹ Therefore, the obvious question is: "Where do the students who are removed from school receive classroom instruction?"¹⁸⁰ School districts and state educational agencies must provide alternative schools and instruction for students who cannot accept

the classroom must include proper training on all aspects of education); *see also* Reynolds, *supra* note 9, at 854 (training teachers on how to properly manage a classroom). Teachers are not being trained to properly manage classrooms that consist of students culturally different from themselves. *Id.*

175. *See* Reynolds, *supra* note 9, at 857 (contacting parents regarding a disciplinary matter should be done by the teacher). Generally, the classroom teacher should make the original call to the parents if there is a classroom discipline problem. *Id.*

176. *See* OPPORTUNITIES SUSPENDED, *supra* note 58, at 31 (reporting that schools can institute policies other than ZTPs that reduce violence); *see also* Skiba & Peterson, *supra* note 23, at 381-82 (identifying the school's behaviors that improve discipline). These include more in-class contact with students, drafting and critiquing existing discipline policies, involving parents and community leaders, prevention policies, and continuing school-based professional development programs. *Id.*

177. *See* Reynolds, *supra* note 9, at 857 (training school personnel to properly enforce disciplinary policies is critical to a school's success).

178. *See* Skiba, *supra* note 14, at 16 (detailing the effect of implementing a comprehensive discipline plan). Administrators are reluctant to use "emergent interventions for addressing school violence" even though the standard practice is unproven. *Id.* Misapplied ZTPs create the image of a get tough stance against school violence that administrators can point to as a response to parental pressure to ensure safety. *Id.*

179. *See* Reynolds, *supra* note 9, at 858 (reserving suspensions and expulsions for behaviors that threaten emotional and physical safety).

180. *See id.* at 859 (recommending mandatory creation of alternative schools to allow suspended and expelled students the chance to receive an education).

the policies and procedures of traditional schools.¹⁸¹ Simply put, the expelled students need an opportunity that will afford them the chance to receive their education without interfering with the education process of others.¹⁸²

While obvious budget concerns exist, the simple fact is that, in the long run, the societal costs of alternative schools will be less expensive.¹⁸³ Students who are denied all access to education are more likely to commit crimes that require incarceration.¹⁸⁴

2. Court System

It is not feasible or realistic to completely remove the judicial system from school discipline because some offenses warrant judicial involvement.¹⁸⁵ In order to properly adjudicate student cases, two important changes are necessary.¹⁸⁶ First, the offending student's impact on the entire educational process must be considered.¹⁸⁷ This means that other students should be allowed to testify as to the negative impact of the offending student.¹⁸⁸ Second, judges, prosecutors, and other court personnel should be trained to properly manage cases involving juveniles and school-

181. *Id.*; see also Meeke, *supra* note 57, at 172 (creating alternative schools would lessen the negative impact of expelling students); Martin, *supra* note 33 (supporting the creation of alternative schools). The cost of creating alternative schools is often used as a reason not to fund them. *Id.* However, when compared to the cost of incarceration, alternative schools are much more cost-effective. *Id.* See generally Nelson, *supra* note 76 (removing students from school increases their chance of becoming part of the "school to prison" pipeline).

182. See *Tinker*, 393 U.S. at 513 (explaining that students who interfere with the education of others will be removed). The Supreme Court ruled that while an education is extremely valuable, those that deprive others of the right to learn can, and should, be removed from school. *Id.*

183. See Skiba, *supra* note 14, at 14 (reporting the escalating social costs of removing troubled students from school). Skiba reports that students removed from school end up on the street where they often engage in illegal behaviors. *Id.* These schools have not created the strong bond with the student that is often needed in order to prevent delinquency. *Id.*

184. See Nelson, *supra* note 76 (revealing that students who are expelled are more likely to end up in prison).

185. See Reynolds, *supra* note 9, at 859 (involving all aspects of the justice system will increase available resources and thereby improve school safety).

186. See Shanker, *supra* note 19, at 8 (positing the idea of training members of the justice system to appropriately sentence school-based offenders).

187. See *id.* (offering the courts a more productive manner in which to adjudicate school-related discipline issues). Shanker advocates that courts should hear from other students in the school or class when deciding the fate of a student challenging his or her expulsion. *Id.* He believes this testimony would show the negative impact of violent and disruptive students on other students in the school environment. *Id.* Shanker contends that, with this information, courts would then be less likely to overturn an expulsion. *Id.*

188. *Id.*

based offenses.¹⁸⁹

V. CONCLUSION

ZTPs are simply policies meant to ensure a safe school environment. They were not meant to be stand-alone policies, but part of a comprehensive discipline policy that includes prevention, identification, and punishment.¹⁹⁰ ZTPs that are properly applied and defined guarantee a student's due process rights, mandate neutral application, and create flexible punishments that allow administrators to use a more common sense approach.¹⁹¹ ZTPs are not policies intended to rob students of necessary education.

Properly defined and applied ZTPs give schools necessary tools to deter and prevent school violence and allow teachers to create safe and effective learning environments by removing students who, through inappropriate actions, monopolize instructional resources. With minor changes to the policies generally in place, ZTPs will serve their intended functions and improve the educational environment.

189. *Id.*

190. *See* Martin, *supra* note 33 (standing alone, ZTPs do not increase school safety).

191. *E.g.*, Gun-Free Schools Act, 20 U.S.C. § 7151 (2006) (allowing schools flexibility when disciplining students).