

A CALL TO ACTION: ZERO TOLERANCE FOR THE SCHOOL-TO-PRISON PIPELINE

LAURA R. MCNEAL*

TABLE OF CONTENTS

I. INTRODUCTION	663
II. PROBLEM	665
A. Excessive Use of Force.....	666
B. Influence of Racial Bias	667
C. Expanded Police Presence in Schools	669
III. LEGAL RESPONSES TO HARMFUL SCHOOL DISCIPLINARY PRACTICES	672
A. Federal Level.....	672
B. State Level	676
IV. SOLUTION	681
A. Integration of Social Work System	682
B. School Discipline Data Mandate	683
C. Mandatory Anti-Bias Training.....	684
D. School-Justice Partnerships.....	685
V. CONCLUSION	687

I. INTRODUCTION

For decades, we have witnessed the increased criminalization of our nation's youth, especially youth of color and students with disabilities, through the implementation of “zero tolerance” policies and overly harsh school disciplinary practices. Instead of promoting a safer school environment, these practices have blurred the lines between school discipline and school safety, pushing students out of school and into the juvenile justice system. However, an unexpected global pandemic drastically altered the school-to-prison pipeline as schools transformed from traditional in-person instruction to virtual learning. For many school districts, this seismic pedagogical shift safeguarded many students from the harsh school disciplinary procedures; essentially pausing the school-to-prison pipeline as administrators struggled to adapt to this new norm. A survey by the Annie E Casey Foundation revealed a 27% reduction in the adolescent detention population

* Laura R. McNeal, Professor of Law and Law & Director of Online Education. I am grateful to my colleagues at Georgia State University College of Law for their valuable comments and insights.

between March and May 2020.¹ As school districts across the country experienced a significant reduction in juvenile grant referrals, many advocates for school disciplinary reform viewed the COVID-19 crisis as an opportunity to transform our punitive approach to school discipline to a more developmental restorative justice approach. However, those hopes were short lived as instances of overly harsh school disciplinary sanctions began to resurface. For instance, in Louisiana, a 4th grader was suspended for a plastic BB gun being visible during an online class.² In another incident, a 12 year old boy with a learning disability was suspended for five days in Colorado Springs, for flashing an orange and blue toy gun with the wording “Zombie Hunter” written on the side during an online art class.³ In both instances, the students were African American, which exemplify the harmful pattern and practice of students of color receiving harsher disciplinary sanctions than their white counterparts. These instances coupled with the current national advocacy for addressing systemic inequalities augment the need for swift disciplinary reform to end the school-to-prison pipeline. Substantive reform of existing school disciplinary policies and practices will require systemic national strategies to establish a more equitable framework for addressing school safety and disciplinary issues.

This article offers a path toward dismantling the school-to-prison pipeline by petitioning the Biden Administration to expand the U.S. Department of Education to include an Office of School Discipline and Safety which will be solely responsible for addressing the school-to-prison pipeline and promoting school safety. The proposed solution will transform the current punitive model of discipline to a more holistic, restorative justice approach through the implementation of a multidisciplinary reform initiative called Every Child Matters, which will be administered by the proposed Office of School Discipline and Safety. Part II will discuss the pervasive problem of the school-to-prison pipeline and the underlying causes. Part III will critique the federal and state legal responses to addressing the racial disparities in school disciplinary policies. Part IV will conclude with a proposal for expanding the U.S. Department of Education to include an Office of School Discipline and Safety and the adoption of a multidisciplinary policy initiative, called “Every Child Matters.” It is imperative that we dismantle the school-to-prison pipeline and ensure that all schools provide developmentally appropriate responses to school disciplinary issues, as opposed to the current draconian school disciplinary

1. *Youth Detentions Remain Low, But Releases Stall Despite COVID-19*, ANNIE E. CASEY FOUND. (July 8, 2020), <https://www.aecf.org/blog/youth-detention-admissions-remain-low-but-releases-stall-despite-covid-19/>.

2. Matt Houston, *Louisiana Law Makers Move to Give 4th Grader Suspended for Having a BB Gun Visible During an Online Class a Chance to Appeal*, WAFB9 (Oct. 7, 2020, 2:50 PM), <https://www.wafb.com/2020/10/07/bill-define-how-students-should-behave-during-virtual-learning-advances-house/>.

3. Jesse Sarles, *Colorado Student Suspended for Five Days After Showing a Toy Gun While Taking an Online Class*, CBS DENVER (Sept. 11, 2020, 8:56 PM), <https://denver.cbslocal.com/2020/09/11/colorado-student-suspended-toy-gun-online-class/>.

practices. In closing, the Biden Administration is uniquely positioned to assert “zero tolerance” for the school-to-prison pipeline and end this barbaric practice through the adoption of a comprehensive disciplinary reform plan.

II. PROBLEM

For decades, the school-to-prison pipeline has flourished as schools continue to utilize overly harsh school discipline policies and practices that push students, especially students of color, out of schools and into the juvenile justice system.⁴ One of the principal purposes of educational institutions are to help students maximize their personal and academic growth which includes responding to student misbehavior in developmentally appropriate ways. However, many schools have adopted a more punitive approach to discipline which has served as a catalyst for the school-to-prison pipeline.⁵ This is evidenced by the widespread use of zero tolerance policies in K-12 schools. Although originally created for the adult criminal justice system as part of President Ronald Reagan’s war on drugs campaign, K-12 schools begin to adopt zero tolerance policies to address growing drug and gang activity in schools.⁶ Zero tolerance policies in schools remove school administrators’ discretionary power in determining the appropriate disciplinary response by mandating predetermined consequences for specific offenses.⁷ For example, any student found with a weapon in their possession at a school with a zero tolerance policy will be automatically expelled.⁸ At first glance, a zero tolerance policy for weapons in schools may seem like a positive initiative for promoting school safety. However, these harmful policies were quickly expanded to include minor student

4. Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 94–95 (2016); Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 PUB. INT. L. REP. 137, 137 (2019) (“However, today and throughout history, an extraordinary amount of discrimination and inequality in the educational system has created terrible barriers for minority groups to overcome. One of these barriers is a disturbing national trend wherein children, specifically children of color, are funneled out of public schools and into the juvenile and criminal justice systems.”); see also Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2010) (The school-to-prison pipeline distorts the public education mission by way of a “collection of education and public safety policies and practices that push our nation’s schoolchildren out of the classroom and into the streets, the juvenile justice system, [and ultimately] the [adult] criminal justice system.”).

5. Deborah Thompson Eisenberg, *Against School Suspensions*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 163 (2016).

6. Peter Follenweider, Comment, *Zero Tolerance: A Proper Definition*, 44 J. MARSHALL L. REV. 1107, 111–12 (2011).

7. Brian J. Fahey, *A Legal-Conceptual Framework for the School-to-Prison Pipeline: Fewer Opportunities for Rehabilitation for Public School Students*, 94 NEB. L. REV. 764, 788 (2016).

8. Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 PUB. INT. L. REP. 137, 138 (2019).

offenses such as truancy and tobacco and alcohol violations.⁹ The over reliance on zero tolerance policies and other exclusionary sanctions that remove students from schools not only deprives students of equal education opportunity but increases the likelihood of future disciplinary problems.¹⁰ Furthermore, students who are expelled or suspended are more likely to end up in our criminal justice system.¹¹ The introduction of zero tolerance policies into our education system laid the foundation for the school-to-prison pipeline as schools adopted a more punitive approach to school discipline.¹² As a result, many schools experienced more instances of excessive use of force, racially biased school disciplinary decisions, and expanded police presence in schools.¹³ This next section will briefly discuss each of these changing dynamics within the school disciplinary landscape and the implications for the school-to-prison pipeline.

A. Excessive Use of Force

Despite the documented harms of the school-to-prison pipeline and the disproportionate impact on students of color, schools continue to show deliberate indifference to disciplinary reform. Every year the news media share horrific accounts of school resource officers using adult policing practices on youth as opposed to developmentally appropriate responses to routine student misconduct. For example, in January 2021 cell phone video captured a school resource officer slamming a Florida teen to the ground in an effort to break up a school fight.¹⁴ The teenager suffered from memory loss, headaches and blurry vision as result of the concussion caused by the officer's excessive use of force.¹⁵ In a similar case, a teen was violently pinned down to the ground and handcuffed for refusing to hand over

9. *Id.*

10. Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 282 (2012).

11. Jeremy Thompson, *Eliminating Zero Tolerance Policies in Schools: Miami-Dade County Public Schools' Approach*, 2016 B.Y.U. EDUC. & L.J. 325, 326 (2016).

12. Allison Fisher, *Using California State Anti-Discrimination Law to Combat the Overuse of School Suspensions*, 88 S. CAL. L. REV. 1197, 1200 (2015).

13. Shameka Stanford & Bahiyyah Muhammad, *The Confluence of Language and Learning Disorders and the School-to-Prison Pipeline Among Minority Students of Color: A Critical Race Theory*, 26 AM. U. J. GENDER SOC. POL'Y & L. 691, 701 (2018) ("Zero tolerance policies . . . increased the use of school resource officers who are usually officers on the local police departments' payroll."); Hon. Jay Blitzman, *Deconstructing the School-to-Prison Pipeline*, BOSTON B.J., Special Edition 2018, at 9, 10 ("African-American students have been three-to-five times more likely to be suspended than white students for comparable behavior, underlining the mythology of race-neutral zero tolerance.").

14. Meredith Deliso & Sabrina Ghebremedhin, *Florida Teen Body-Slammed by School Resource Officer 'Traumatized,' Family Says*, ABC NEWS (Jan. 30, 2021), <https://abcnews.go.com/US/florida-teen-body-slammed-school-resource-officer-traumatized/story?id=75582344>.

15. *Id.*

her cell phone to a school resource officer.¹⁶ The misconduct in both instances did not warrant the level of force used by school resource officers. To the contrary, the officers should have attempted de-escalation tactics before resorting to physical force. The teens in both incidents were African American which is not surprising since students of color are disproportionately impacted by the school-to-prison pipeline.

Dismantling the school-to-prison pipeline is an ongoing challenge due to the myriad of underlying causes and the lack of commitment to address the harmful effects. The draconian disciplinary practices used by schools often cause emotional trauma and stigma which can have long-term effects on children's development.¹⁷ For example, the stigma of being treated like a criminal while at school can impair a student's sense of social identity and self-worth as they struggle to reconcile implicit messages regarding their propensity for violence based on the harsh treatment they endure under the guise of school discipline.¹⁸ Stigmatic harm is particularly salient for students of color who routinely have to rebut the same perceived criminality experienced while in school in their outside lives as well.¹⁹ These dynamics create tremendous challenges for students of color as they are forced to coexist in a schooling environment with armed school resource officers who often assume their culpability due to stereotypical depictions of people of color as possessing a higher propensity for violence and criminality.²⁰ As a result, when an accusation or incident occurs school resource officers often respond with a level of force commensurate with the perceived threat. Thus, some of the aforementioned consequences of carceral punishment, especially in relation to students of color, are often fueled by explicit and implicit biases which drive harsher responses to misconduct.

B. Influence of Racial Bias

Explicit and implicit biases propel the school-to-prison pipeline when school personnel intentionally make racially biased decisions that privilege some, while marginalizing others. The devastating effects of racial bias in school discipline is evident by national discipline data which reveal the disproportionate impact of

16. David Lohr, *Ixel Perez, Student, Accuses School Resources Officer of Excessive Force by Tackling Her*, HUFFPOST (Sept. 4, 2014, 12:52 PM), https://www.huffpost.com/entry/ixel-perez-student-ctackled_n_5766324.

17. Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 987 (2016).

18. Aaron Sussman, *Learning in Lockdown: School Police, Race and the Limits of the Law*, 59 UCLA L. REV. 788, 819 (2012).

19. *Id.*

20. Amara S. Chaudhry-Kravitz, *Is Brown the New Black?: American Muslims, Inherent Propensity for Violence, (fn 2) and America's Racial History*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 7 (2013).

overly harsh sanctions on students of color.²¹ According to data collected by the U.S. Department of Education's Office of Civil Rights, students of color experience disciplinary sanctions more frequently and severely than their White counterparts.²² Further analysis of the data reveal that one out of every six Black students have been suspended at least once whereas only one out of every twenty White students have been issued a suspension.²³ Another body of research indicate that Black children, especially males, are 3.5 times more likely to be expelled from school than their White counterparts.²⁴ Furthermore, although Black students only make up 16% of the total student population, they represent 31% of school-based arrests and 32-42% of students suspended or expelled.²⁵ One of the most troubling aspects of the school-to-prison pipeline is that despite the overwhelming data documenting the harmful discriminatory effects on students of color, very little effort has been asserted to address one of the primary causes, implicit and explicit bias.

Implicit bias, often referred to as unconscious bias, is more prominent in school disciplinary settings than explicit biases because school personnel are often unaware that their disciplinary decisions are being fueled by stereotypes attached to certain group of students. As a result, school personnel acting in good faith often unknowingly issue harsher or more lenient sanctions to students based on their group characteristics.²⁶ According to social cognition research, it is completely natural to unconsciously develop pre-existing ideas or beliefs about various groups of people because our cognitive framework is designed that way in order to assist in how we organize and interpret the world.²⁷ However, when these implicit associations we attach to groups of people are based on perceived inherent

21. See Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 PUB. INT. L. REP. 137, 140 (2019); Christopher A. Mallett, *The School-to-Prison Pipeline: Disproportionate Impact on Vulnerable Children and Adolescents*, 49 EDUC. AND URB. SOC'Y 563, 563-92 (2017); *Civil Rights Data Collection, Data Snapshot: School Discipline*, U.S. DEP'T OF EDUC. OFF. FOR CIVIL RTS. (Mar. 21, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

22. Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 PUB. INT. L. REP. 137, 140 (2019).

23. *Id.*

24. Christopher A. Mallett, *The School-to-Prison Pipeline: Disproportionate Impact on Vulnerable Children and Adolescents*, 49 EDUC. AND URB. SOC'Y 563, 563-92 (2017).

25. *Civil Rights Data Collection, Data Snapshot: School Discipline*, U.S. DEP'T OF EDUC. OFF. FOR CIVIL RTS. (Mar. 21, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

26. Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1067 (2016).

27. Laura R. McNeal, *Managing Our Blind Spot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 294 (2016) (stating that "[h]owever, these mental frameworks also cause us to exclude pertinent information' and instead 'focus . . . only on things that confirm our pre-existing beliefs and ideas.' Schemas can perpetuate stereotypes and serve as a hindrance to retaining new information that does not conform to our established ideas about the world.").

behavioral deficiencies, it can cause discriminatory effects in school discipline.²⁸ For example, since society often attaches certain negative characteristics to African Americans such as laziness or having a higher propensity for violence these beliefs often manifest into school personnel issuing harsher disciplinary sanctions to Black students, as opposed to Asian students who may be perceived as docile and less threatening.²⁹ As a result, even though students of color are not misbehaving at a higher rate than their White counterparts, they are being subjected to harsher disciplinary sanctions as a result of racial biases held by school personnel.³⁰ Although a full discussion of the concept of implicit and explicit bias is beyond the scope of this essay, it's important to acknowledge its significant role in perpetuating racial disparities in the school-to-prison pipeline.

C. Expanded Police Presence in Schools

The presence of school resource officers in schools has also exacerbated the school-to-prison pipeline. Although school resource officers were initially placed in schools to improve school safety, research has shown that their presence has not increased school safety.³¹ To the contrary, increased police presence has contributed to schools suspending and expelling students at substantially higher rates.³² For example, in Clayton County School District the number of misdemeanor referrals to the juvenile court system increased from forty-six to over 1,000 referrals in a seven-year period.³³ Not only are schools expelling and suspending students at higher rates, school personnel are making disciplinary referrals to

28. Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 102 (2015) (stating that “[i]n the context of school discipline, race and gender stereotypes particularly function to criminalize African American youth and to reinforce cultural beliefs about perceived inherent behavioral deficiencies and African American cultural norms in need of ‘social correction’”).

29. Paul Gowder, *Critical Race Science and Critical Race Philosophy of Science*, 83 FORDHAM L. REV. 3155, 3164–65 (2015); Justin D. Levinson et. al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 88 (2017).

30. Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1069–70 (2016); Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 149–50 (2015) (“An officer’s split-second decision about a student’s conduct—which may be influenced by conscious or unconscious racial or disability-related biases—determines whether a student receives a warning, a suspension or expulsion from school, a municipal ticket, or even delinquency charges following an arrest.”).

31. Elsa Haag, *Who Protects Whom: Federal Law as a Floor, Not a Ceiling, to Protect Students from Inappropriate Use of Force by School Resource Officers*, 16 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 187, 187–88 (2021).

32. Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 154–55 (2015).

33. *Id.*

school resource officers for routine misconduct typically handled by school staff.³⁴ Students have been referred to the juvenile court system for miniscule behaviors such as throwing candy at another student on the bus, wearing too much perfume or drawing on a desk.³⁵ Schools should not criminalize normal adolescent behavior. The over reliance on school resource officers by school personnel for handling routine student misconduct has tremendous consequences for students, especially students of color that are at a higher risk of entering the adult criminal justice system due to various factors such as racial profiling, systemic racism and social inequality. Instead of reducing the likelihood of school shootings and other violent acts against students, school resource officers have served as a conduit for funneling students out of school and into the juvenile and criminal justice system through overly punitive responses to student misconduct.

The disturbing practice of utilizing adult policing practices on children is a pattern and practice that has permeated the K-12 education landscape for decades.³⁶ Currently, school resource officers are assigned to K-12 schools with little to no training on how to interact with youth, because only one state has a statute requiring this type of training.³⁷ According to a national study conducted by the organization, Strategies for Youth, police academies spend less than one percent of their time training officers on how to police youth.³⁸ As a result, students are often subjected to the level of force used on adult criminals, as opposed to more developmentally appropriate responses.³⁹ The small percentage of officers trained in policing youth also incorporate their understanding of the concept of developmental competence into their policing practices.⁴⁰ Developmental competence is “the understanding that children and adolescents’ perceptions and behaviors are influenced by biological and psychological factors related to their developmental stage”⁴¹ and therefore officers must adjust their behavior, language

34. *Id.* at 154.

35. *Id.*

36. *Ending Excessive Use of Force in Schools*, END ZERO TOLERANCE, <https://www.endzerotolerance.org/single-post/2017/11/14/Ending-Excessive-Force-in-Schools> (last visited May 28, 2021).

37. Lisa Thureau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, CHILD. LEGAL RTS. J., 29(3) at 31 (2009).

38. STRATEGIES FOR YOUTH, IF NOT NOW, WHEN? 4 (2013), http://strategiesforyouth.org/sfysite/wp-content/uploads/2013/03/SFYReport_02-2013_rev.pdf.

39. Lisa Thureau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, CHILD. LEGAL RTS. J., 29, 31 (2009).

40. STRATEGIES FOR YOUTH, IF NOT NOW, WHEN? 13 (2013), http://strategiesforyouth.org/sfysite/wp-content/uploads/2013/03/SFYReport_02-2013_rev.pdf.

41. *Id.*

an timing when interacting with youth.⁴² Officers with training on policing youth approach school safety in developmentally appropriate ways with an emphasis on de-escalation tactics as opposed to a punitive, combative approach.⁴³

In sum, school disciplinary practices will continue to reify the school-to-prison pipeline unless schools address implicit and explicit biases, increased police presence and the lack of training by school resource officers on how to interact with youth. Schools must balance the rights of students and school staff to promote a safe environment with the rights of students to receive equal access to education that are consistent with the statutory and constitutional rights guaranteed under federal civil rights laws.⁴⁴ For schools to maintain a safe learning environment in which students are supported and not vilified by school personnel will require a substantive strategy to end to exclusionary disciplinary practices.⁴⁵ Meaningful school disciplinary reform will require a careful inquiry into the structural inequalities and systemic factors that contribute to the perpetuation of the school-to-prison pipeline.⁴⁶ Although many advocates for school disciplinary reform posit that passing laws such as California's Senate Bill 409, is the best path forward, state and federal legal responses to this crisis has been wholly inadequate.⁴⁷ The next section will discuss the inadequate federal and state legislative efforts to protect students from exclusionary disciplinary policies and practices.

42. Julekya Lantigua-Williams, *Policing the Teenage Brain*, THE ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/08/policing-the-teenage-brain/497441/>; STRATEGIES FOR YOUTH, BEST PRACTICES FOR EFFECTIVE YOUTH INTERACTIONS: FOR RELATIONSHIP BUILDING AND INCIDENT INTERVENTIONS, https://supremecourt.nebraska.gov/sites/default/files/u2921/SFY_Best_Practices_Handout.pdf.

43. Lantigua-Williams, *supra* note 42.

44. *See* Goss v. Lopez, 419 U.S. 565, 580–81 (1975) (explaining the states' competing interest in providing a safe environment, conducive to education, while ensuring that due process protections are preserved); *see also* Seal v. Morgan, 229 F.3d 567, 574, 579–81 (6th Cir. 2000) (discussing that a court must weigh a school's powerful interest in maintaining the safety of its campuses and preserving its ability to educate against the importance of avoiding unfair, mistaken, or irrational student exclusion from the classroom in determining what procedural and substantive process is due in school discipline); THE U.S. COMM'N ON CIV. RTS., BEYOND SUSPENSIONS, EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 13–26 (2019) (discussing civil rights law protections against discrimination for K-12 students of color and students with disabilities, under the 14th Amendment, Title VI of the Civil Rights Act, Title II of the ADA, and Section 504 of the Rehabilitation Act), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

45. Morgan Craven, Paula Johnson & Terrence Wilson, *Eradicating the School-to-Prison Pipeline Through a Comprehensive Approach to School Equity*, 42 U. ARK. LITTLE ROCK L. REV. 703, 711 (2020).

46. THE U.S. COMM'N ON CIV. RTS., *supra* note 44, at 4.

47. Mike Leury, *3 Things to Know About California School Suspension Ban Bill*, KCR3 (Sept. 3, 2019), <https://www.kcra.com/article/senate-bill-419-willful-defiance-school-suspension-california/28906359>

III. LEGAL RESPONSES TO HARMFUL SCHOOL DISCIPLINARY PRACTICES

Despite the aspirational goals of the landmark *Brown v. Board of Education* decision to usher in a new era of equality in K-12 schools, racial disparities continue to permeate our education system, especially in relation to school disciplinary practices.⁴⁸ In the aftermath of the *Brown v. Board of Education* decision, which prohibited segregating schools by race, the legal system has failed to address the overly harsh disciplinary practices and excessive use of force more frequently imposed on students of color. The myriad of inadequate federal, state and local responses to the school-to-prison pipeline have created schooling environments in which students of color are subjected to draconian disciplinary practices that often push them out of schools and into the criminal justice system. This section examines the shortfalls of federal and state responses to the school-to-prison pipeline and highlights the need for robust, substantive reform. Although, traditionally the law is often viewed as a mechanism of change, a cursory review of the legal responses to the school-to-prison pipeline reveals a lack of commitment and deliberate indifference to solving this endemic problem.

A. Federal Level

In 1954, the landmark *Brown v. Board of Education* decision, symbolized a national commitment toward education equity by prohibiting the segregation public schools based on race.⁴⁹ Prior to this decision, K-12 public schools served as a conduit for systemic racism by mandating that Black children attend racially segregated schools that were inferior to their white counterparts.⁵⁰ Unfortunately, the racial disparities in K-12 schools continue to persist more than fifty years after

48. Sarah Garland, *Was 'Brown v. Board' a Failure?*, THE ATLANTIC (Dec. 5, 2012), <https://www.theatlantic.com/national/archive/2012/12/was-brown-v-board-a-failure/265939> [<https://perma.cc/F8Z6-P5HP>]; 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, 1112 (2010).

49. *Brown v. Board of Education*, 347 U.S. 495 (1954).

50. Bryan L. Adamson, *A Thousand Humiliations: What Brown Could Not Do*, 9 SCHOLAR 187, 188 (2007) ("While *Brown* represented, most unequivocally, a blow to segregation in public schools, some fifty years later, many public schools have become racially identifiable again. Today, thirty-seven% of African Americans and Latinos attend schools which are overwhelmingly comprised of minorities."); Steven Cann, *Politics in Brown and White: Resegregation in America*, 88 JUDICATURE 74 (2004) ("A half-century after the historic decision in *Brown v. Board of Education* (*Brown I*), we are again where we were in 1896 when the U.S. Supreme Court created the separate-but-equal doctrine. Except that then, when the Court wrote "separate but equal," everyone knew that it really meant separate and unequal. Today, the reality in urban America is that the schools are still separated by race.").

the *Brown* decision, especially in relation to school discipline.⁵¹ There have been a series of federal laws and policies which have either directly or indirectly include contributed to the school-to-prison pipeline, many of which were often initiated by the executive office. For instance, zero tolerance policies emerged in the 1980s from a get tough on crime initiative promoted by the Reagan administration.⁵² The premise behind the zero tolerance approach to crime was to deter deviant behavior by removing judicial discretionary power and instituting mandatory prison sentences for drug-related crimes, including first time offenders.⁵³ Although originally created to address adult criminal offenses, zero tolerance rhetoric eventually begin to permeate the K-12 education landscape to address increased drug and gang activity.⁵⁴ Overtime, zero tolerance policies in K-12 schools were expanded to also include less serious offenses like class disruptions. The full integration of zero tolerance policies in public schools was solidified in 1994 with the passage of the Guns Free Act.⁵⁵ This law ushered in a paradigm shift from developmentally appropriate responses to school discipline to a more punitive approach.⁵⁶ Under this Act, Title I funded K-12 schools are required to expel any

51. Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, CIV. RTS. PROJECT, 7–8 (Aug. 2007), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf> [<http://perma.cc/89J2-LDNA>].

52. See, e.g., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, ADVANCEMENT PROJECT, 7 (Mar. 2005), http://b3cdn.net/advancement/5351180e24cb166d02_mlbqgxlh.pdf; PALAK SHAH, DEFENDING JUSTICE: AN ACTIVIST RESOURCE KIT 43 (2005) (quoting President Richard Nixon as saying “[d]oubling the conviction rate in this country would do more to cure crime in America than quadrupling the funds for [Hubert] Humphrey’s war on poverty”); Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR. AM. L. & POL’Y 3 (2013).

53. Peter Follenweider, Comment, *Zero Tolerance: A Proper Definition*, 44 J. MARSHALL L. REV. 1107, 1111–12 (2011).

54. *Id.* (“[I]n 1994, schools in Lexington, Kentucky and Orange County, California had already adopted [zero tolerance policies] for both drugs and gang activity.”).

55. See Kathleen DeCataldo & Toni Lang, *Keeping Kids in School and Out of Court: A School-Justice Partnership*, 83 N.Y. ST. B. ASS’N J. 26, 28 (2011); Sheena Molsbee, *Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies in Texas Schools*, 40 TEX. TECH. L. REV. 325, 346 (2008); see generally *Test, Punish, and Push Out: How “Zero Tolerance” and High-Stakes Testing Funnel Youth into the School-to-Prison Pipeline*, ADVANCEMENT PROJECT (Mar. 2010) [hereinafter *Test, Punish, Push and Out*], http://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf; *Opportunities Suspended: The Devastating Consequences of Zero-Tolerance and School Discipline*, ADVANCEMENT PROJECT (2002) [hereinafter *Opportunities Suspended*], http://b3cdn.net/advancement/8d91c72205a1b9d955_ujm6bhguv.pdf.

56. See DeCataldo & Lang, *supra* note 55; Molsbee, *supra* note 55; *Test, Punish, and Push Out*, *supra* note 55; *Opportunities Suspended*, *supra* note 55.

student that brings a weapon to school, or risk losing their federal funding “except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion . . . on a case-by-case basis”⁵⁷ The discretionary power granted to school officials by this statute to determine disciplinary sanctions on a case-by-case basis helped create an environment conducive to abuses of power and implicit and explicit biases.⁵⁸ As a result, many students were subjected to overly harsh disciplinary sanctions, especially students of color. For example, a student in Pensacola, Florida was suspended for ten days for bringing a nail clipper and nail file to school in violation of the school’s zero tolerance weapon policy.⁵⁹ Another student, in elementary school, was suspended in Massachusetts for pointing his fingers like a gun and making laser noises while at school.⁶⁰ This disturbing pattern of schools criminalizing normal adolescent behavior through the use of zero tolerance policies is one of the many examples of the inadequate and often harmful federal responses to school disciplinary issues.⁶¹

Federal intervention to promote equal educational opportunity began in 1965, when President Johnson signed the most expansive federal education bill in our nation’s history into law, the Elementary and Secondary Education Act (ESEA).⁶² The legislative goal of the law was to ensure that every child receives a high quality education by furthering President Johnson’s war on poverty and promoting the desegregation of schools through incentives and sanctions.⁶³ For example, the ESEA provided Title I funding for high poverty schools in exchange for compliance with civil rights laws.⁶⁴ Although the initial legislation did not address school disciplinary issues, recent reauthorizations of the law are either devoid of any initiatives to address racial disparities in school disciplinary referrals or take a laissez-faire

57. 20 U.S.C. § 7151(b)(1) (2002); see also Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 197 (2002) (“Although [the language in the Guns Free Act of 1994] implies that each [s]tate is required to give the school district the [discretionary] power to alter the mandatory expulsion [mandate], many states, [such as] Michigan, do not provide [statutory authority] for this case-by-case consideration.”).

58. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289, 332 (2005).

59. Russell Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 2001 NEW DIRECTIONS FOR YOUTH DEV. 17, 20 (citing also to a five-year old student who was suspended for wearing a five-inch plastic ax as part of firefighter costume to his classroom Halloween party.).

60. Bill Shaner, *Milford 5th-Grader Suspended for Pointing Imaginary Gun*, MILFORD DAILY NEWS (Nov. 18, 2014), <http://www.milforddailynews.com/article/20141118/NEWS/141116372>.

61. Hanson, *supra* note 58, at 316.

62. Lindsey H. Chopin, *Untangling Public School Governance: A Proposal to End Meaningless Federal Reform and Streamline Control in State Education Agencies*, 59 LOY. L. REV. 399, 410 (2013).

63. *Id.* at 399.

64. Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 58 (2012).

approach to addressing the issue. Although, there have been several reauthorizations of the ESEA and state and local initiatives implemented in an effort to ensure equal education opportunity, the school-to-prison pipeline continues to persist.⁶⁵

The two most recent authorizations of the Elementary and Secondary Education Act, the No Child Left Behind Act and the Every Student Succeeds Act, were missed opportunities to usher in systemic school discipline reform. These two statutory frameworks possess an enforcement mechanism through the dispensing of Title I funds to schools in compliance with the statutory mandates.⁶⁶ Title I of the Elementary and Secondary Education Act requires states receiving Title I funding to develop statewide accountability systems to promote a safe and healthy learning environment, which includes addressing the use of overly harsh discipline.⁶⁷ States and local school districts must explain in their Title I plans how they will reduce the use of harmful disciplinary policies and practices that compromise student health and safety.⁶⁸ Furthermore, although the current Every Student Succeeds Act utilizes multiple accountability systems to measure school success such as achievement outcomes and school success, the statute fails to include a mechanism for assessing school disciplinary procedures.⁶⁹

One of the primary shortfalls of the federal and state approaches to school discipline is the absence of mandates for reporting school discipline data. Although the federal education mandates recognize the role of reporting mandates to hold schools accountable for disparities in achievement outcomes which is required under the No Child Left Behind Act, schools are not held to the same level of accountability for harmful disciplinary practices. According to the Education Commission on the States, only thirty-three states and the District of Columbia

65. Grace Chen, *School-to-Prison Pipeline Persists Despite Local, State and National Efforts*, PUB. SCH. REV. (May 11, 2020), <https://www.publicschoolreview.com/blog/school-to-prison-pipeline-persists-despite-local-state-and-national-efforts>.

66. Lindsay C. Ferguson, *Whistle Blowing Is Not Just for Gym Class: Looking into the Past, Present, and Future of Title IX*, 39 TEX. TECH L. REV. 167, 169 (2006) (“The pertinent part of Title IX provides that ‘[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance.’”); § 2:15 Federal Aid—Every Student Succeeds Act, OH. SCH. L. § 2:15 (“ESSA creates far-reaching, comprehensive requirements on the state and on individual districts in Ohio. The focus of the bill is improving school performance through raised standards and accountability. Title I funding is the incentive for schools to get this accomplished.”).

67. Aharon Charnov, *Every Student Succeeds Act Primer: Reducing Incidents of School Discipline*, ALLIANCE FOR EXCELLENT EDUC. (July 18, 2016), https://all4ed.org/wp-content/uploads/2016/07/NAACP_School-Discipline-Reform-under-ESSA.pdf.

68. Aharon Charnov, *Every Student Succeeds Act Primer: High Schools*, ALLIANCE FOR EXCELLENT EDUC. (Apr. 26, 2016), <https://all4ed.org/reports-factsheets/every-student-succeeds-act-primer-high-schools/>.

69. Every Student Succeeds Act, 114 S. 1177, 114th Cong. § 95 (2015).

require schools to collect and report discipline data.⁷⁰ Furthermore, only a small percentage of those thirty-three states require schools to aggregate their data by race, gender and disability.⁷¹ One of the primary factors contributing to the perpetuation of the school-to-prison pipeline is the failure to acknowledge and address how school disciplinary practices disproportionately impact some of the most vulnerable sectors of our student population. The distribution of Title I funding as an incentive for schools to collect and report discipline data is futile if such data fails to measure and identify the disproportionate impact of those policies on students of color and those with disabilities. We cannot hold schools accountable if we do not have accurate data to depict the severity of the problem.

B. State Level

The state level initiatives to dismantle the school-to-prison pipeline mirror the same failures as the federal efforts. The overwhelming majority of public schools rely heavily on Title I funding to help support school operations. Under Title I, states are required to develop statewide accountability systems to promote a safe and healthy learning environment, which includes addressing the use of overly harsh discipline. As a Title I recipient, states must also develop Title I plans which detail who they will support school districts to maintain an environment conducive to learning by reducing instances of bullying and harassment, and the overuse of exclusionary disciplinary practices such as suspensions and expulsions. The mandated Title I state plans have had little to no impact on improving school discipline systems. The school-to-prison pipeline has continued to flourish despite the existence of Title I state plans. The federal government's failure to hold states accountable for their Title I plans, which did not effectively mitigate the overuse of exclusionary discipline sanctions, demonstrate the federal government's lack of commitment to addressing the school-to-prison pipeline. Despite the federal government's laissez-faire approach to school discipline reform a patchwork of state level efforts has emerged in recent years.

Some states have responded to the disciplinary crisis in schools through the passage of legislation to address some of the root causes of the school-to-prison pipeline. For example, in 2019, the State of California passed ground-breaking legislation, Senate Bill 419, which prohibits willful defiance suspensions in grades four through five and bans them in grades six through eight for five years.⁷² Despite the laudable goals of California's A.B. 420 school disciplinary bill its overall impact has been minimal due to several flaws within the design of the bill. The bill consists

70. *50 State Comparison: State Policies on School Discipline*, EDUC. COMM'N OF THE STATES, <https://www.ecs.org/50-state-comparison-state-policies-on-school-discipline/> (last visited Feb. 19, 2021).

71. *Id.*

72. *Gov. Newsom Signs SB 419, Ending Willful Defiance Suspensions*, SENATOR NANCY SKINNER (Sept. 9, 2019), <https://sd09.senate.ca.gov/news/20190909-gov-newsom-signs-sb-419-ending-willful-defiance-suspensions>.

of more form than substance. For instance, instead of banning the use of the highly subjective catch all category, willful defiance, for all grades the bill only prohibited its use for grades K through three.⁷³ The bill's failure to prohibit all disciplinary referrals based on willful defiance is problematic because prior to the passing of California's A.B. 420 bill, this disciplinary category accounted for forty-three percent of all suspensions.⁷⁴ Furthermore, the original A.B. 420 bill and subsequent amendments which limit the use of disciplinary referrals based on willful defiance have all included a sunset provision limiting the permanency of the ban. For example, the most recent amendment to the California discipline law prohibits public schools from suspending students in grades four through eight for willful defiance and class disruption, with the caveat that that a July 2025 sunset provision will prompt legislators to revisit the need to continue the restriction.⁷⁵ In reality, California's school disciplinary law is more symbolic than substantive because the legislation lacks the necessary robust reform measures to bring forth meaningful change. This is evidenced by the racial disparities in school disciplinary sanctions that continue to persist, despite the enactment of the law. The law's total disregard for the well-being of all children is incomprehensible, especially considering the overwhelming empirical evidence which document the disproportionate numbers of students of color, especially African Americans, that are suspended for willful misconduct.⁷⁶

The State of Virginia is another state that has attempted to address the school-to-prison pipeline with the passage of a multitude of amendments to existing school discipline laws to stop the criminalization of normal adolescent behavior. The first, House Bill 415, revised the initial statute by requiring school boards to adopt policies and procedures to help suspended students stay engaged by ensuring they have access and the ability to complete graded work during the

73. ASSEMB. B. 420, 2014 LEG., REG. SESS. (Cal. 2014).

74. Findings of prevalence and racial disparity in suspensions for willful defiance during the 2011-2012 academic year compelled Los Angeles Unified School District to consider banning school suspensions for willful defiance. *California Enacts First-in-the-Nation Law to Eliminate Suspensions for Minor Misbehavior*, ACLU OF N. CAL. (Sept. 27, 2014), <https://www.aclunc.org/news/california-enacts-first-nation-law-eliminate-student-suspensions-minor-misbehavior> [hereinafter *California Enacts*]; see Teresa Watanabe, *L.A. Unified Bans Suspensions for 'Willful Defiance'*, L.A. TIMES (May 12, 2013), <http://articles.latimes.com/2013/may/12/local/la-me-adv-laUSD-discipline-20130513>; see also *Fact Sheet: School Discipline and the Pushout Problem*, DIGNITY IN SCHOOLS, 1 (2020), <http://dignityinschools.org/resources/dsc-created-fact-sheets/>.

75. ASSEMB. B. 420, 2014 LEG., REG. SESS. (Cal. 2014).

76. Danielle Dankner, *No Child Left Behind Bars: Suspending Willful Defiance to Disassemble the School-to-Prison Pipeline*, 51 *LOV. L.A. L. REV.* 577, 592-93 (2018) ("Willful defiance, the behavior listed in section 48900(k), is so vaguely defined that it lacks guidance, grants school disciplinarians far too much discretion, and, thus, has recently come under attack as breeding discrimination due to implicit biases.").

suspension.⁷⁷ Prior to this amendment to the statute suspended students often suffered negative academic consequences because they were not provided the opportunity to continue their curriculum studies while suspended. This amendment to the Virginia legislation is admirable because it helps compel school officials to continue their commitment to helping students fulfill their academic potential, irrespective of disciplinary issues. However, it is important to highlight one of the major flaws of this legislation. The amended statute fails to address the root cause of the initial suspension, and instead only focuses on supporting and retaining suspended students. This legal strategy for addressing the school-to-prison pipeline is inadequate because it does not identify and prohibit the policies and practices that help propel overly harsh disciplinary sanctions, such as suspensions and racial disparities. The focus on providing support for students who have already been subjected to a draconian approach to student misbehavior is a missed opportunity to dismantle the very system that served as a catalyst to the initial suspension.

Another Virginia state law, Senate Bill 729, was passed to help address the school-to-prison pipeline by eliminating the requirement that school leaders report student behaviors that constitute a criminal misdemeanor to law enforcement. This progressive bill is designed to halt the criminalization of normal adolescent behavior by school officials. For example, vandalism such as spray painting “GO CARDS” on a school building in celebration of a winning football season is technically a criminal misdemeanor, however, it is also a common type of behavioral misconduct amongst youth. Another routine disciplinary infraction in K-12 schooling environments is trespassing. It is not out of the ordinary for high school students to trespass on school property after hours to meet up with friends. Therefore, it is nonsensical to criminalize this type of normal adolescent behavior by mandating that school leaders report such activity to law enforcement. Ideally, schools should serve as a safe space where students can grow and learn from their mistakes, as opposed to facing criminal penalties synonymous with adult offenders. To the contrary, the focus should be on developmentally appropriate responses to student misbehavior such as restorative justice practices and positive behavioral interventions systems (PBIS). These two alternative approaches to discipline promote social-emotional growth, build accountability and help students learn socially appropriate behavior. For example, schools who implement PBIS disciplinary programs focus on reducing exclusionary disciplinary practices and provide incentives for good behavior as opposed to a strictly punitive approach to student misbehavior.⁷⁸ These are the types of restorative disciplinary practices that must be instituted to prevent the harmful effects of the current policies and practices.

The passage of Senate Bill 3 continues Virginia’s progressive approach to dismantling the school-to-prison pipeline by prohibiting students from being

77. H.B. 415, 2020 Leg., Reg. Sess. (Va. 2020).

78. Bobbie Hayse, *DC Schools Celebrate Success with PBIS Awards*, MESSANGER-INQUIRER (Sept. 29, 2020), https://www.messenger-inquirer.com/news/dc-schools-celebrate-success-with-pbis-awards/article_2f58b176-5dac-5da2-9145-14f97edbe3ef.html.

charged with disorderly conduct while in school or school-sponsored events.⁷⁹ One of the driving forces behind the school-to-prison pipeline is school official's overreliance on referrals to school resource officers.⁸⁰ Senate Bill 3 not only serves as a deterrent to utilizing the criminal justice system as a means of discipline but forces school officials to embrace evidenced based, developmentally appropriate responses to school discipline by removing zero tolerance policies.⁸¹ This notion is further supported by the adoption of another law, Senate Bill 729.⁸² The original Virginia statute *required* school principals to report any of the following acts that occur on school premises to law enforcement: any threats against school personnel while on school property or on a school bus, possession of a firearm onto school property, or any conduct involving drugs or alcohol, including theft or attempted theft of student prescription medications.⁸³ The revised language in the statute reads as follows:

Further, except as may be prohibited by federal law, regulation, or jurisprudence, the principal shall also immediately report any act enumerated in clauses (ii) through (v) of subsection A that may constitute a criminal offense to the parents of any minor student who is the specific object of such act. Further, the principal shall report ~~that~~ *whether* the incident has been reported to local law enforcement ~~as required by law pursuant to this subsection and, if the incident is so reported,~~ that the parents may contact local law enforcement for further information, if they so desire.⁸⁴

Granting school principals the discretionary power to determine whether an incident is reported to local authorities creates quite a dichotomy. Traditionally, courts have afforded school leaders expansive discretionary authority to maintain school discipline and order since they are uniquely situated to make context specific decisions based on factors such as the student's age and maturity level.⁸⁵ However, discretionary authority also provides a breeding ground for the influences of explicit and implicit biases in determining responses to student misconduct such as

79. S.B. 3 § 1(D), 2020 Leg., Reg. Sess. (Va. 2020).

80. Elbert H. Aull IV, *Zero Tolerance, Frivolous Juvenile Court Referrals, and the School-to-Prison Pipeline: Using Arbitration as a Screening-Out Method to Help Plug the Pipeline*, 27 OHIO ST. J. ON DISP. RES. 179, 188–89 (2012).

81. Brendan Ponton, *School Discipline Bill Passes General Virginia Assembly, But Some Question Whether It's Too Lenient*, 3WTKR (Feb. 24, 2020), <https://www.wtkr.com/school-discipline-bill-passes-virginia-general-assembly-but-some-question-if-its-too-lenient>.

82. S.B. 729, 2020 Leg., Reg. Sess. (Va. 2020).

83. VA. CODE ANN. § 22.1-277.07 S.B. 729, 2020 Leg., Reg. Sess. (Va. 2020).

84. *Id.*

85. *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) (“In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion.”).

whether to report a student infraction to local law enforcement.⁸⁶ A more equitable version of Senate Bill 729 would explicitly identify which infractions warrant contacting authorities, as opposed to relying on the discretionary judgment of school leaders. Discretionary authority is often susceptible to explicit and implicit biases which can lead to unfair disciplinary outcomes. The inclusion of universal guidelines to determine when referrals to law enforcement is appropriate would promote fairness and uniformity in the application of Senate Bill 729.

Another amendment to Virginia law, Senate Bill 3, prohibits public schools from charging students with disorderly conduct during school, at school-sponsored events or while on school buses.⁸⁷ Under the original law, an individual is guilty of disorderly conduct if he or she intends to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof," in any street, public building or highway, or through public intoxication.⁸⁸ Prior to this amendment Virginia public schools were permitted to make referrals to local law enforcement for students to be criminally charged with disorderly conduct for common adolescent behavior such as engaging in disorderly conduct at a school football game due to underage drinking. This progressive amendment to the §18.2-415⁸⁹ of the Code of Virginia utilizes the law to stop the criminalization of normal adolescent behavior by Virginia public schools.

The State of Washington has also taken a more proactive approach to addressing disparities in school discipline. State legislators passed House Bill 1191 in an effort to simplify and streamline the notification protocol for schools receiving students who are reentering school after returning from jail or a juvenile detention facility.⁹⁰ The new law is also designed to enhance students' ability to successfully reintegrate into the school environment after serving time in an adult or juvenile criminal justice facility.⁹¹ To this end, the bill redefined what previous crimes committed by students must be reported to school districts and to what specific school official.⁹² The rationale behind this revision is to create greater procedural safeguards to protect students' privacy while still ensuring that school officials receive proper notice about students' past offenses for school safety purposes.⁹³ Under this bill, school principals still receive notification for serious crimes which involve sexual misconduct, drug dealing, firearms violations and other violent offenses.⁹⁴ However, school officials are no longer privy to information regarding

86. Laura R. McNeal, *Managing Our Blind Spot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 289 (2016).

87. S.B. 3, 2020 Leg., Reg. Sess. (Va. 2020).

88. *Id.*

89. *Id.*

90. Michael Goldberg, *New Bill Seeks to Address School-to-Prison Pipeline*, WASH. ST. WIRE (Feb. 6, 2020), <https://washingtonstatewire.com/new-bill-seeks-to-address-school-to-prison-pipeline/>.

91. *Id.*

92. H.B. 1191, 66th Leg., Reg. Sess. (Wash. 2020).

93. Ponton, *supra* note 81.

94. H.B. 1191, 66th Leg., Reg. Sess. (Wash. 2020).

students' who have participated in court diversion programs for minor drug and alcohol offenses.⁹⁵ The paradigm shift from treating all student criminal history the same, regardless of the severity to only mandating reporting notification for more serious crimes will hopefully serve as a deterrence to school leaders criminalizing normal adolescent behavior. Students who have minor drug and alcohol offenses should not be stigmatized as deviants or potential safety risks. To the contrary, efforts should be made to swiftly integrate them back into the schooling environment with a fresh start and a strong support system to help them achieve their potential.

Washington House Bill 1191 also established a new set of rights for students. Under the old law, students had limited control over the dissemination of their past adjudication history by school officials to other school staff.⁹⁶ However, the new law expands students' rights by allowing them to know whom information regarding any adjudicated minor drug offenses will be shared with and appeal the decision to disclose their adjudication information to individuals they deem inappropriate or unnecessary.⁹⁷ The law's added layer of accountability regarding the dissemination of students' adjudication history helps promote a school culture and climate that does not stigmatize students with prior behavioral issues. The stigmatization of students can lead to the use of overly harsh school disciplinary sanctions due to preconceived notions regarding those students' culpability for violence. Despite the laudable goals of House Bill 1191, the bill like the aforementioned Virginia statutes, only addresses one minute element of the school-to-prison pipeline landscape, which in this case is student privacy and the stigmatization of students with prior disciplinary histories. The state legislative efforts to reform school discipline practices are more symbolic than substantive since each one only addresses one aspect of the discipline epidemic plaguing K-12 schools. The school-to-prison pipeline is a systemic problem fueled by structural inequality within school disciplinary policies and procedures and therefore require a robust, systemic response.

IV. SOLUTION

A comprehensive approach to eradicating the school-to-prison pipeline and ensuring safe, supportive learning environments requires the use of a number of law and policy tools to address the systemic inequities in our school discipline systems. Since the school-to-prison pipeline is created and exacerbated by multiple systemic inequities within the K-12 education milieu, reforming the current system will require a solution which not only addresses those inequities but include a system for accountability and enforcement. This article offers a path forward by

95. *Id.*

96. *Id.*

97. *Id.*

petitioning the Biden Administration to expand the U.S. Department of Education to include an Office of School Discipline and Safety which will be solely responsible for addressing the school-to-prison pipeline and promoting school safety. The Office of School Discipline and Safety will be commissioned to work collaboratively with the Office of Civil Rights to vigorously investigate and pursue Title VI claims for disciplinary practices that have a disparate impact on students of color, require school districts to develop and implement multidisciplinary initiatives, such as school-justice partnerships, or risk losing Title I funding. Additionally, the office will be responsible for creating systems of support within schools which will provide the necessary number of counselors, social workers and mental health professionals to address the root causes of student misconduct. The proposed Office of School Discipline and Student Safety will be responsible for implementing a multidisciplinary initiative called “Every Child Matters.” This initiative will take a holistic approach to dismantling the school-to-prison pipeline through the implementation of the following research-based strategies: (1) Integrating our Social Work System into K-12 Schools; (2) School Discipline Data Reporting Mandate; (3) Mandatory Anti-Bias Training; and (4) School-Justice Partnerships.

A. Integration of Social Work System

The emotional harms children have endured from overly punitive school disciplinary practices will be felt for generations to come. Students subjected to the school-to-prison pipeline often experience psychological harms such as low self-esteem, higher dropout rates.⁹⁸ Furthermore, negative experiences with law enforcement can garner feelings of mistrust and fear for the very individuals that are supposed to serve and protect our communities.⁹⁹ It is imperative that we create a support that not only addresses those past harms but helps mitigate the likelihood of future harms. Integrating aspects of our existing social work system into our K-12 public schools will help accomplish this goal. Additionally, integrating our social work system into schools will also help renew schools’ commitment to not only providing a safe, nurturing learning environment but also ensuring that every child fulfills their potential. The appointment of a social worker in every school district will help schools take a holistic approach to student discipline issues by addressing many of the underlying problems that often lead to student misbehaviors such as bullying, low self-esteem, housing disparities (i.e. homelessness), anger issues, food insecurity, lack of healthcare and abuse and

98. Josh Gupta-Kagan, *The School-to-Prison Pipeline's Legal Architecture: Lessons from the Spring Valley Incident and Its Aftermath*, 45 *FORDHAM URB. L.J.* 83, 95–96 (2017) (“Nonetheless, the dismissal could not erase harms caused by the arrests and charges. Multiple studies have identified that arrests and charges—even when ultimately dismissed—increase the odds that children will drop out of high school.”).

99. Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *FORDHAM URB. L.J.* 1009, 1029 (2009).

neglect.¹⁰⁰ The primary role of integrating our social work services into K-12 schools is to conduct a risk assessment of any child that engages in a serious infraction or demonstrates a pattern and practice of minor infractions for the purpose of creating an Individualized Behavioral Support Plan (IBSP). The risk assessment will evaluate the child from a holistic perspective by examining things such as economic well-being of their family, screening for behavioral disabilities or mental health issues, and other factors which may be a motivating factor in the student's misconduct. The IBSP is designed to provide students with the appropriate support based on their unique needs and overall well-being and to reduce the likelihood of future disciplinary infractions. This section of the Every Child Matters Initiative will assist schools in prioritizing the well-being of students and allow them to respond to student misbehavior in developmentally appropriate ways. The adoption of this initiative is an essential step in dismantling the school-to-prison pipeline.

B. School Discipline Data Mandate

National efforts to promote education equity through increased accountability have made it imperative that school leaders make decisions based on accurate and meaningful data.¹⁰¹ Data based school reform is more effective than traditional approaches because it enables schools to create evidence-based solutions, as opposed to a one size fits all approach. Achieving substantive school discipline reform requires collecting, analyzing and responding to data in order to understand the mechanisms driving racial and gender disparities in K-12 schools. Although the current Every Student Succeeds Act utilizes multiple accountability systems to measure school success such as achievement outcomes, the statute fails to include a mechanism for assessing school disciplinary procedures.¹⁰² The inclusion of the proposed school discipline data mandate in the Every Child Matters Initiative will establish an accountability system for K-12 schools to eliminate harmful school disciplinary policies and procedures that have a disproportionate impact on students of color and those with disabilities.

Under this plan, school districts will be required to develop discipline data systems with uniform standards for the retrieval and maintenance of data. Specific reporting categories such as race, gender and sexual orientation will be required to allow disaggregation of data by teacher and student characteristics.¹⁰³ This will enable school districts to identify the patterns and practices that exacerbate the school-to-prison pipeline.¹⁰⁴ For example, if data reveals that Black students are

100. Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court's "Age Matters" Jurisprudence*, 46 LOY. L.A. L. REV. 933, 967 (2013).

101. MARY ANN LACHAT, DATA-DRIVEN HIGH SCHOOL REFORM, THE BREAKING RANKS MODEL (2001).

102. Every Student Succeeds Act, Pub. L. No. 114-95 (2015).

103. *School Discipline Data*, CHILDREN'S DEFENSE FUND 2 <http://www.childrendefense.org/wp-content/uploads/2018/06/school-discipline-data.pdf> (last visited Feb. 19, 2021).

104. *Id.*

disproportionately receiving disciplinary referrals in comparison to their White counterparts for subjective behavior categories such as willful defiance or that a high percentage of office referrals in a particular grade level is made by a single teacher, school officials can intervene to address the underlying causes. Interventions can range from additional classroom management training for teachers to reevaluating the use of subjective disciplinary categories.

C. Mandatory Anti-Bias Training

Devastating disparities emanate throughout school systems, but especially in the skewed disciplinary outcomes meted out by a flawed system that acts as a conduit for the carceral state. The role of implicit and explicit biases in perpetuating racial disparities in school discipline is undeniable. As highlighted earlier in this essay the overly harsh disciplinary sanctions emanating from the school-to-prison pipeline disproportionately impact students of color and those with disabilities.¹⁰⁵ This is primarily due to school personnel and school resource officers issuing school disciplinary sanctions through a racially biased lens. The influence of racial biases can be mitigated through mandatory implicit bias training. One of the promising aspects of implicit bias training is that we can learn evidence-based strategies to minimize the influences of our biases in our decision-making. Groundbreaking research offers us new avenues and opportunities to intervene to reduce the effects of biases in our educational institutions and interactions.¹⁰⁶ According to research conducted by social cognition psychologist, Dr. Patricia Devine, “data provide evidence demonstrating the power of the conscious mind to intentionally deploy strategies to overcome implicit biases.”¹⁰⁷

The proposed mandatory bias training will be required of all school personnel, which includes resource officers serving Title I funded schools. School districts will have the option of attending virtual train the trainer events to receive guidance on how to conduct implicit bias trainings and a workshop curriculum to use for their respective school districts. Alternatively, a list of approved implicit bias training companies will also be provided for school who choose not to conduct their own in-house training. School districts who opt to conduct their training in-house will be required to use the uniform curriculum issued by the Office of School Safety and Discipline. Under the proposed plan, Title I funds will be used as an enforcement mechanism to ensure full compliance with the mandated bias training. Lastly, this proposed solution calls for a temporary moratorium to be placed on all suspensions and expulsions, except in cases of serious violence or threat thereof, for six months to allow school districts time to complete bias training and evaluate their existing disciplinary framework to identify any areas susceptible

105. *Id.*

106. Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 117 (2016).

107. Patricia G. Devine, et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1277 (Nov. 2012).

to bias. Each school will be required to provide a school offense protocol to standardize responses to student misconduct to the greatest extent possible for the purposes of limiting the use of exclusionary discipline sanctions.

There are several success stories of school districts which have developed research-based school offense protocols to directly address systemic racial bias. For example, there are models such as the successful Clayton County School District, which mandates school offense protocols be employed throughout their schools.¹⁰⁸ In Clayton County the school district used their school offense protocol to address extremely high school arrest rates by working collaboratively with mental health agencies and law enforcement agencies to limit the types of student behaviors which permit school-based arrests and provided alternative disciplinary responses for court referrals.¹⁰⁹ After implementing a school offense protocol, incidents of students possessing weapons decreased by seventy percent and there was a twenty percent increase in Clayton County School's graduation rate.¹¹⁰

Mandatory bias training coupled with school offense protocols will help dismantle the school-to-prison pipeline by reducing the criminalization of Black bodies in the school system and provide a balance between reasonable disciplinary measures and disparate racist responses by school administrators. School districts can no longer afford to turn a blind eye to the gross racial disparities in school discipline outcomes, especially with documented models of success, like the Clayton County School District Model, on how to correct these harms.

D. School-Justice Partnerships

Promoting a safe schooling environment that includes a wide range of interventions to address student discipline issues in a developmentally appropriate way requires a collaborative approach between schools and our community systems, such as law enforcement, court system, juvenile justice personnel.¹¹¹ Under this proposal, school districts receiving Title I funding will be required to establish School Justice Partnerships within their communities to help eradicate the school-to-prison pipeline. School Justice Partnerships provide the framework to develop and implement effective strategies to address and prevent student misconduct. The goal of School Justice Partnerships is to reduce the number of exclusionary sanctions (i.e. suspensions, expulsions) and referrals to the justice

108. See Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, 20 POVERTY & RACE 5, 6 (2011) (defining school-to-prison pipeline and providing data regarding school discipline and criminalization trends).

109. *Id.*

110. *Id.*

111. Julia Rollison et al., *Improving School-Justice Partnerships: Lessons Learned from the Safe Schools/Healthy Students Initiative*, 51 FAM. CT. REV. 445 (2013); *School Justice Partnership*, NORTH CAROLINA JUDICIAL BRANCH, (Feb. 14, 2021, 2:30 PM), <https://www.nccourts.gov/programs/school-justice-partnership>.

system through timely and developmentally appropriate responses to student misconduct to promote student success and mitigate negative outcomes for both the students and their communities.¹¹² For example, based on this approach to school discipline, if a student is found in possession of a small amount of marijuana, school personnel would not suspend, expel or make any referrals to law enforcement. To the contrary, school officials would provide the student with substance abuse counseling and in-school suspension or detention.¹¹³

School districts will be required to establish a Memoranda of Agreement (MOA) with their community justice partners (e.g., local law enforcement, juvenile justice court system) which acknowledges that the vast majority of student misconduct can be addressed in schools and provides a plan of graduated responses to misbehavior in which arrests or referrals to the juvenile or criminal justice system are a last resort. Examples of alternative disciplinary actions which may be included in a Memoranda of Agreement are restorative justice practices,¹¹⁴ community level interventions (e.g., community service), counseling, or restitution.¹¹⁵ Schools must provide a copy of their Memoranda of Agreement to the Office of School Discipline and Safety for the purposes of oversight and enforcement.

In advocating for this proposed solution, it is important to acknowledge the shortcomings of other remedies to the school-to-prison pipeline proposed by other legal scholars. Amidst the myriad of policy solutions focusing on the eradication of the school-to-prison pipeline, the approaches fail to fully engage the structural dimensions of the problem: they are either overly broad or restrictively narrow, but

112. *School Justice Partnership*, *supra* note 111.

113. Jeana R. Bracey et al., *Connecticut's Comprehensive Approach to Reducing in-School Arrests: Changes in Statewide Policy, Systems Coordination and School Practices*, 51 FAM. CT. REV. 427, 430 (2013).

114. Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 548 (2009) ("The dominant goals of restorative justice include repairing the harm caused by an offense and community participation in disciplinary procedures. There are many models of conflict resolution that fall under the rubric of restorative justice. All of these include mechanisms for expressing a community's disapproval of an offender's actions while simultaneously reaffirming the norms of the community and reintegrating the offender back into the community. Restorative justice practices build support for victims and offenders, providing both with an opportunity to share their perspectives and to work together to reach a reparative solution.").

115. *See, e.g.*, Alice Ierley & Carin Ivker, *Restoring School Communities: A Report on the Colorado Restorative Justice in Schools Program*, VOMA CONNECTIONS 3 (2003) (finding behavior changes included things like "[a]gree not to throw snowballs on school property" or "[w]ill not talk behind each other's back" or "[w]ill stop harassment on the bus and stand up for others"; including examples of restitution from the offender such as "[w]ill work 20 hours to repay the losses" or "[w]ill go with victim to replace her things" or "[a]greed to meet with the teacher (victim) and work in her classroom"; listing community services like "[r]epaint bathroom wall" or "[m]ake anti-vandalism posters"; and providing examples of pro-social reflection listing "what makes me feel like a good person" or journaling "about what's been learned through the process" while educational activities or mentoring involved "[i]nterview college dean about impact of cheating at college level" or "[r]ide along with police department").

neither effectively addresses the structural and systemic underpinnings that form the school-to-prison complex. For example, one author proposes a multifaceted solution which involves continuing to reform the national education system, focusing on developing disciplinary policies aimed to keep students in schools, and addressing America's drug policy by decreasing the number of minority offenders serving time in jail.¹¹⁶ This approach is inadequate because it fails to acknowledge the role of implicit and explicit biases, increased police presence in schools, and inadequate training of school resource officers. In essence, the author proposes an overly expansive approach that fails to address the origins of the discriminatory disciplinary practices.

Another proposed solution to eradicating the school-to-prison pipeline is a school-based approach which recognizes the importance of addressing both school climate issues and harmful disciplinary practices by focusing on improving academic achievement to increase the likelihood that students will complete their secondary and post-secondary education training and decreasing the number of referrals to law enforcement and exclusionary sanctions (i.e. suspensions and expulsions).¹¹⁷ Although well intended, this oversimplistic approach to eliminating the school-to-prison pipeline is inadequate because it does not address the multitude of factors which undergird the harmful discipline practices. Another legal scholar states, "Policies that impact school discipline are established at many levels, so they must be evaluated for appropriateness, fairness, and equity at every level."¹¹⁸ While this suggested approach to evaluating school discipline policies for fairness has merits, the overly narrow perspective fails to provide a comprehensive plan which addresses the other causal factors for school disciplinary inequities such as the discriminatory manner in which policies are administered. Schools can develop facially neutral discipline policies, however, that will not eliminate those policies from being implemented in a discriminatory manner.

V. CONCLUSION

The proposed creation of an Office of School Discipline and Safety in the U.S. Department of education to implement a multidisciplinary model to eliminate harmful discipline practices will transform the current punitive model of discipline to a more holistic, restorative justice approach. This comprehensive policy proposal provides a succinct blueprint on how the development of new policies and existing legal frameworks can be utilized more efficiently to ensure that students of color do not bear the brunt of disparate disciplinary policies. Furthermore, creating an

116. Lisa A. Rich, "Cerd-Ain" Reform: Dismantling the School-to-Prison Pipeline Through More Thorough Coordination of the Departments of Justice and Education, 49 *LOU. L.A. L. REV.* 119, 175 (2016).

117. *Id.*

118. Morgan Craven, Paula Johnson & Terrence Wilson, *Eradicating the School-to-Prison Pipeline Through a Comprehensive Approach to School Equity*, 42 *U. ARK. LITTLE ROCK L. REV.* 703, 719 (2020).

Office of School Discipline and Safety, is the best approach to dismantling the school-to-prison pipeline because it establishes an authoritative enforcement agency to oversee the recommended Every Child Matters Policy Initiative. Lastly, this proposal offers the best path toward substantive school discipline reform, because unlike previous reform initiatives, this proposal provides the opportunity to compel compliance with the establishment of an enforcement agency, the Office of Student Safety and Discipline that can utilize Title I funds as an enforcement tool. To date, the federal government has failed to provide a focused, comprehensive response to the school-to-prison pipeline. This proposed solution provides a meaningful path toward eradicating the school-to-prison pipeline so every student can learn in a nurturing supportive environment, as opposed to being subjected to punitive, racially biased school disciplinary systems.

In closing, the Biden Administration is uniquely positioned to assert “zero tolerance” for the school-to-prison pipeline and end this barbaric practice through the creation of an Office for School Discipline and Safety and the adoption of the proposed multidisciplinary policy initiatives. It is not a matter of whether we know how to stop the use of draconian discipline practices in our schools, but rather whether the Biden administration chooses to do so. Until then, students across the country will continue to be abused and victimized by the very institutions that should be protecting them at all costs.