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## Disrupted Lives; Diverted Futures: Zero Tolerance Policies' Impact On Students With Disabilities

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# Disrupted Lives; Diverted Futures: Zero Tolerance Policies' Impact On Students With Disabilities

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## **Abstract**

The United States of America was founded upon the highest of ideals - the promise of equality for all citizens.

**KEYWORDS:** disabilities, students, tolerance

# DISRUPTED LIVES; DIVERTED FUTURES: ZERO TOLERANCE POLICIES' IMPACT ON STUDENTS WITH DISABILITIES

CATHERINE E. JOHNSON\*

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## I. INTRODUCTION: THE ILLUSIVE PROMISE OF EQUALITY

The United States of America was founded upon the highest of ideals—the promise of equality for all citizens.<sup>1</sup> This pledge is built upon the ideological belief that public education equalizes future opportunities for all students.<sup>2</sup> The societal expectation is for students to matriculate from high school with the core competencies, knowledge, and skills necessary to prepare them for a successful adult life. Students with disabilities experience

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1. U.S. CONST. amend. XIV, § 1.

2. Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., Speech at the NSBA Council of School Attorneys (Apr. 20, 2012), <http://www.justice.gov/opa/speech/assistant-attorney-general-civil-rights-division-thomas-e-perez-speaks-nsba-council>.



many road blocks in their public education. These obstacles result in students with disabilities experiencing a lower graduation rate, higher dropout rate, and a higher rate of discipline than students without disabilities.<sup>3</sup> The inherent promise of success based on public education remains tantalizing but elusive for many students with disabilities.<sup>4</sup>

This Article focuses on an increasingly common obstacle for students with disabilities: Zero Tolerance (“ZT”) policies. When applied to students with disabilities, ZT policies can prevent them from completing their public education and divert them into the juvenile justice system.<sup>5</sup> Proactive use of the federal safeguards contained in the Individuals with Disabilities Education Act (“IDEA”) are a vital tool in combating ZT policies and retaining students with disabilities in school. In 1975, Congress enacted the Education for All Handicapped Children Act to counter educational practices that were removing students with disabilities from school.<sup>6</sup> In 1990, Congress reauthorized the Education for All Handicapped Children Act and changed the title to IDEA.<sup>7</sup> IDEA contains safeguards to prevent students with disabilities from being denied admission to school based on disability, being removed from school due to a manifestation of a disability, and being educated in a segregated setting.<sup>8</sup> ZT undermines these important protections, returning public schools to a pre-IDEA era.<sup>9</sup>

3. See CHESAPEAKE INST., NATIONAL AGENDA FOR ACHIEVING BETTER RESULTS FOR CHILDREN AND YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE 2 (1994).

4. Kristy A. Mount, Comment, *Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103, 104 (2002); see also Perez, *supra* note 2.

5. PETER E. LEONE ET AL., NAT'L CTR. ON EDUC., DISABILITY, & JUVENILE JUSTICE, SCHOOL FAILURE, RACE, AND DISABILITY: PROMOTING POSITIVE OUTCOMES, DECREASING VULNERABILITY FOR THE INVOLVEMENT WITH THE JUVENILE DELINQUENCY SYSTEM (2003), [http://www.edjj.org/Publications/list/leone\\_et\\_al-2003.pdf](http://www.edjj.org/Publications/list/leone_et_al-2003.pdf); see also Michael P. Krezmien et al., *Suspension, Race, and Disability: Analysis of Statewide Practices and Reporting*, 14 J. EMOTIONAL & BEHAV. DISORDERS 217, 217 (2006) [hereinafter *Suspension, Race, and Disability*]; *infra* Parts VII–VIII.

6. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (amended 1990).

7. 20 U.S.C. § 1415 (2012).

8. *Id.*; see also 34 C.F.R. §§ 300.534, .536 (2015); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 8 (2003); *infra* Parts VII–VIII.

9. See LEONE ET AL., *supra* note 5; Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010) [hereinafter *Juvenile Court Referrals and the Public Schools*]; Mount, *supra* note 4, at 108–09; *infra* Parts VI–VII.



## II. THE IMPORTANCE OF SAFETY IN EDUCATION

Learning and moral development cannot occur in places ripe with chaos or violence. Schools must maintain order and be a safe space free from threats of violence and harm for education to successfully occur. School violence undermines educators' ability to teach, students' ability to learn, and the overall quality of a public education.<sup>10</sup>

In today's educational climate, protecting students and staff from harm has become increasingly more important, creating difficult and complex situations for students with disabilities. The past twenty years have brought repeated and highly publicized incidences of school shootings.<sup>11</sup> Such events have marred our educational environments.<sup>12</sup> Schools are now confronted with public fears of potential violent incidents, along with rare incidents of real violence, creating long-term negative consequences for students, teachers, administrators, school staff, and learning.<sup>13</sup> This results in a perspective that education cannot occur in the absence of safety and discipline that shifts public schools' priorities toward ensuring safety rather than providing equal education.<sup>14</sup> In 1969, Supreme Court Justice Black stated that: "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens . . . ."<sup>15</sup> Student "violence includes all behaviors that create an environment in which students, teachers, and administrators feel fear or intimidation in addition to being victimized by physical assault, theft, or vandalism."<sup>16</sup> In such a volatile atmosphere, "[s]tudents cannot learn, teachers cannot teach, and administrators cannot manage effectively . . . ."<sup>17</sup>

## III. ZERO TOLERANCE POLICIES

ZT is a disciplinary system where school administrators outline the expected or desired behaviors of all students, along with the designated

10. Joseph Lintott, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 560, 562-63 (2004).

11. Peter E. Leone et al., *School Violence and Disruption: Rhetoric, Reality, and Reasonable Balance*, FOCUS ON EXCEPTIONAL CHILD., Sept. 2000, at 1, 1.

12. *Id.*

13. *See id.*; Lintott, *supra* note 10, at 560, 563.

14. *See* Robert C. Cloud, *Federal, State, and Local Responses to Public School Violence*, 120 EDUC. L. REP. 877, 877 (1997).

15. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting).

16. Cloud, *supra* note 14, at 877.

17. *Id.*



punishments for violating these rules.<sup>18</sup> As each infraction occurs, ZT provides a set of corresponding punishments.<sup>19</sup> Consideration is not given for the student's unique circumstances or the impetus for the behavior.<sup>20</sup> The discipline is predetermined with no deviation from the designated punishment.<sup>21</sup> ZT's primary purpose is to create safer learning environments in schools.<sup>22</sup> ZT was controversial in its origin and remains an extremely controversial approach to addressing school violence.<sup>23</sup>

The policies were enacted after the Safe Schools Act of 1994 which addressed firearms.<sup>24</sup> ZT today has significantly expanded to address a wide-range of violent and on-violent behaviors, including school disruption, truancy, and refusal to obey teachers and administrators.<sup>25</sup> These policies have exploded in the past fifteen years with over 90% of all schools in the United States implementing some form of ZT policy.<sup>26</sup> Clearly today's school administrators believe ZT is their best opportunity for effectively addressing the ever-increasing problem of violence in their schools.

#### IV. HISTORY OF DISCIPLINE IN EDUCATION

A review of discipline in public education in the United States provides an interesting perspective on how the United States has addressed the delicate balance between providing an interaction and diverse classroom and creating a safe learning environment. Numerous methods have been attempted, and ZT is the newest method used by school administrators in an attempt to end school violence, and ensure education.<sup>27</sup>

The type of disciplinary measures endorsed by educators changed radically from the 17th century to present. Whipping posts and paddling

18. Lintott, *supra* note 10, at 564.

19. *Id.*

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

21. *Id.*

22. Paul M. Bogos, "Expelled. No Excuses. No Exceptions" — Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311, 74 U. DET. MERCY L. REV. 357, 367 (1997)

23. See Lintott, *supra* note 10, at 564; Richards, *supra* note 20, at 93. In 2001, the American Bar Association recommended ending ZT in schools. 'No' to 'Zero Tolerance', WASH. POST, Feb. 20, 2001, at A14.

24. See Safe Schools Act of 1994, Pub. L. No. 103-227, § 701, 108 Stat. 125, 204 (1994) (codified at 20 U.S.C. §§ 5961-5968 (2012)); RONNIE CASELLA, AT ZERO TOLERANCE: PUNISHMENT, PREVENTION, AND SCHOOL VIOLENCE 18 (2001); *Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274.

25. *Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274.

26. *Id.*

27. See Bogos, *supra* note 22, at 367-68.



devices used on misbehaving students in front of his peers were used exclusively by teachers from the 17th through the 19th century in the United States.<sup>28</sup> These acts served to deter students from engaging in similar behavior.<sup>29</sup> Educators believed these disciplinary measures served as a tool for developing social norms, morality, and retained the student in school.<sup>30</sup>

The increase in school population during the 1960s caused by the baby-boom led schools to move away from corporal punishment and toward out-of-school suspensions and expulsions to rid the problematic, disruptive student from the classroom.<sup>31</sup> School administrators believed that out-of-school suspensions were beneficial to other students because the problem student was removed from class, and class time was not spent disciplining the student.<sup>32</sup>

During the 1970s and 1980s, many students challenged out-of-school suspensions on constitutional and humane grounds to the Supreme Court of the United States.<sup>33</sup> The Supreme Court recognized that a student's success in education is indicative of future success in higher education, employment, and stable family and community life, and negative experiences with education increase that student's likelihood for contact with the juvenile justice and criminal justice systems.<sup>34</sup> The Supreme Court was concerned about the consequences of increased suspensions, expulsions, and drop-outs from school.<sup>35</sup> In *Goss v. Lopez*,<sup>36</sup> the Supreme Court held that students subject to expulsion or suspension from school were entitled to due process protections prior to either suspension or expulsion.<sup>37</sup> Subsequent to *Goss*, school administrators amended their disciplinary measures and relied on in-school suspensions to combat and prevent school violence.<sup>38</sup> In-school suspensions were considered preferable as students remained in school and continued progressing educationally during their punishment period.<sup>39</sup>

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28. Irwin A. Hyman & Eileen McDowell, *An Overview*, in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION: READINGS IN HISTORY, PRACTICE, AND ALTERNATIVES*, 3, 5 (Irwin A. Hyman & James H. Wise eds., 1979).

29. *See id.* at 4.

30. *Id.* at 3–5.

31. A. Troy Adams, *The Status of School Discipline and Violence*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Jan. 2000 at 140, 144.

32. *Id.* at 144–45.

33. *See Goss v. Lopez*, 419 U.S. 565, 568–69 (1975); Adams, *supra* note 31, at 145.

34. *Goss*, 419 U.S. at 575; *see also* Adams, *supra* note 31, at 145.

35. *See Goss*, 419 U.S. at 575 n.7.

36. 419 U.S. 565 (1975).

37. *Id.* at 581.

38. Adams, *supra* note 31, at 146.

39. *Id.*



ZT policies began to emerge in the late 1980s and early 1990s.<sup>40</sup> During this period of time, society increasingly viewed youth as violent and dangerous.<sup>41</sup> Americans perception was that juvenile crime was out of control and at an all-time high.<sup>42</sup> Approximately 71% of people thought that a school shooting occurring in their community was a realistic and possible threat to the safety of their children and community.<sup>43</sup>

Although the perceptions of dangerous youths were prevalent in the 1980s and 1990s, the statistics on reported violent crimes during this period illustrate the threat from juvenile violent crimes was low.<sup>44</sup> During this time frame, there were approximately 55 million students enrolled in school.<sup>45</sup> There were 133,700 violent crimes against teachers at private and public schools were reported; 217,400 thefts from teachers were reported;<sup>46</sup> 2.7 million students reported being a victim of a crime at school,<sup>47</sup> and 3523 students expelled for bringing a weapon to school.<sup>48</sup> In January 2001, the U.S. Surgeon General released a report on youth violence that indicated that arrest rates for violent youth crimes had decreased since 1983.<sup>49</sup>

Although not based in fact, the public perception of dangerous youth encouraged a movement away from rehabilitation and treatment for youth in the juvenile justice system and placed more emphasis on punishment and retribution of youth.<sup>50</sup> The trend trickled into school policies, including ZT policies.<sup>51</sup> The pendulum swung away from the prevailing practice of

40. *Id.* at 147.

41. *See id.*

42. *See* Ira M. Schwartz et al., *School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV. 1, 2–3, 5 (2000).

43. Robin F. Goodman, *Wellness News* 4–8, NEW CITIZENS PRESS (May 1, 2005), <http://www.tncp.net/articles/tabid/1800/articletype/articleview/articleid/1710/wellness-news-48.aspx>.

44. *Fast Facts*, NAT'L CTR. ED. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=65> (last visited May 1, 2016).

45. *Id.*

46. U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, 2000 ANNUAL REPORT ON SCHOOL SAFETY 8 (2000), <http://www.ncjrs.gov/pdffiles1/ojdp/193163.pdf>.

47. PHILLIP KAUFMAN ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY, 2000, at 4 (2000), <https://nces.ed.gov/pubs2001/2001017.pdf>.

48. KAREN GRAY & BETH SINCLAIR, U.S. DEPT. OF EDUC., REPORT ON STATE/TERRITORY IMPLEMENTATION OF THE GUN-FREE SCHOOLS ACT: SCHOOL YEAR 1999–2000, at 3 (2000), <https://www2.ed.gov/about/reports/annual/gfsa/report992000.pdf>.

49. U.S. OFFICE OF THE SURGEON GEN., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 2 (2001).

50. *See* David M. Altschuler, *Trends and Issues in the Adultification of Juvenile Justice*, in RESEARCH TO RESULTS: EFFECTIVE COMMUNITY CORRECTIONS 233, 249–50 (Patricia Harris ed., 1999).

51. *See* Adams, *supra* note 31, at 147–48.



keeping students in school for discipline, as ZT mandates the immediately removal of perceived troublesome students from school.<sup>52</sup> During this same period, 3.1 million children were suspended and 87,000 were expelled.<sup>53</sup> This returned schools to policies of the 1960s where students were removed from school and left alone without any formal content or morality guidance from educators.<sup>54</sup>

## V. EFFECTIVENESS OF ZERO TOLERANCE POLICIES

The U.S. Department of Education determined that there is little statistical evidence that ZT is effective at suppressing violence in schools.<sup>55</sup> Statistics demonstrate conclusively that juvenile crime was declining prior to the implementation of the Guns Free Schools Act and ZT policies.<sup>56</sup> The Federal Bureau of Investigation's Uniform Crime Report indicates a decline of 23% in juvenile homicide arrests between 1989 and 1998.<sup>57</sup> According to the U.S. Department of Education, children between the ages of twelve and eighteen are more likely to suffer a violent crime outside of school than inside school property.<sup>58</sup>

Despite these compelling statistics, school administrators continue touting ZT as an effective way to decrease school violence and protect students and teachers.<sup>59</sup> ZT is responsible for an increase in referrals of students with disabilities from school to the criminal and juvenile justice system.<sup>60</sup> Students today are far more likely to be arrested in school than a generation ago.<sup>61</sup> In 2000, 3.1 million students were arrested in school, compared to 1.7 million in 1974.<sup>62</sup> In 2006, data illustrates that one in every

52. *Id.*

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

54. See Adams, *supra* note 31, at 144; Lintott, *supra* note 10, at 565.

55. See Adams, *supra* note 31, at 148.

56. See HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS & VICTIMS: 1999 NATIONAL REPORT 62 (1999).

57. U.S. DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS: Table 32 (1998).

58. See Schwartz et al., *supra* note 42, at 6.

59. See Richards, *supra* note 20, at 114.

60. See *id.* at 108.

61. ACLU & ACLU OF CONNECTICUT, HARD LESSONS: SCHOOL RESOURCE OFFICE PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS 5 (2008), [http://www.aclu.org/files/pdfs/racialjustice/hardlessons\\_november2008.pdf](http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf).

62. Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 10 (2003).



fourteen students was suspended at least once during the school year.<sup>63</sup> ZT policies have proven ineffective in increasing safety in our schools, and are penalizing our students.

## VI. THE IMPACT OF ZERO TOLERANCE POLICIES ON STUDENTS WITH DISABILITIES

Despite the lack of evidence to support its efficacy, ZT continues to be used in direct response to the perceived increase and threat of violence at schools, and in particular, the highly sensationalized school shootings.<sup>64</sup> ZT policies failed to deliver the promised *safe school*.<sup>65</sup> In addition to the increased number of students being disciplined under ZT, the impact of ZT on students with mental illness and emotional or behavioral disabilities has been catastrophic.<sup>66</sup>

The fundamental failure of ZT policies for students with emotional disabilities is its failure to consider the underlying circumstances, behavior, and the child's disability in conjunction with the alleged misconduct.<sup>67</sup> Students with emotional disabilities frequently attend schools without the proper educational supports necessary for them to succeed.<sup>68</sup> It is rare that educators possess the awareness and knowledge of how mental health disabilities manifest in educational settings.<sup>69</sup> Educators commonly label students with emotional disabilities as *bad* and disruptive and subject them to discipline instead of addressing their needs for educational supports and services.<sup>70</sup>

ZT has exacerbated the issues around how public education addresses children with emotional disabilities. These conflicts will continue as the number of children experiencing mental health disorders and corresponding substantial limitations in their lives is significant and has remained constant for the past twenty years.<sup>71</sup> The recent U.S. Surgeon

63. MICHAEL PLANTY ET AL., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION: 2009, at vii (Andrea Livingston & Thomas Nachazel eds., 2009), <http://www.nces.ed.gov/pubs2009/2009081.pdf>.

64. See CASELLA, *supra* note 27, at 24; Mount, *supra* note 4, at 108.

65. See Richards, *supra* note 20, at 93, 97.

66. See ACLU & ACLU OF CONNECTICUT, *supra* note 61, at 12; Mount, *supra* note 4, at 108–09.

67. Mount, *supra* note 4, at 109.

68. See *id.*

69. See U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE SURGEON GENERAL'S CONFERENCE ON CHILDREN'S MENTAL HEALTH: A NATIONAL ACTION AGENDA 19 (1999), [http://www.ncbi.nlm.nih.gov/books/NBK44233/pdf/Bookshelf\\_NBK44233.pdf](http://www.ncbi.nlm.nih.gov/books/NBK44233/pdf/Bookshelf_NBK44233.pdf).

70. Richards, *supra* note 20, at 93; see also Mount, *supra* note 4, at 109.

71. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 69, at 19–20.



General's report on children's mental health states that approximately 20% of all children and youth have a diagnosable mental disorder, 9% to 13% of these children experience a serious emotional disturbance with substantial functional impairment, and 5% to 9% of these children experience an extreme functional impairment.<sup>72</sup> Approximately 8.6% of public school students are identified as having a disability that qualifies them for special education services.<sup>73</sup>

Students with emotional and behavioral disorders come into frequent contact with school officials for disciplinary measures.<sup>74</sup> This is not surprising as mental illness manifests at school causing classroom disruption, disengagement from school, and lack of academic success for that student.<sup>75</sup> Students with disabilities have higher incident rates for receiving teacher-office referrals for *bothering others* and *unacceptable physical contact*.<sup>76</sup> ZT mandates the student be removed from the classroom, and time away from the classroom is disruptive to the educational process; students subject to disciplinary referrals often suffer negative associations with teaching, learning, and school.<sup>77</sup> ZT policies and the corresponding time away from education are linked to an increase in school dropouts and arrests for students with disabilities.<sup>78</sup>

Data consistently demonstrates that students with disabilities are disproportionately suspended from schools.<sup>79</sup> Leone et al. found that close to 20% of suspended students are students with disabilities.<sup>80</sup> This is troubling as only 6% to 11% of students are receiving special education services.<sup>81</sup> Most of the behaviors involved in these suspensions are for non-violent-

72. THE NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., MENTAL HEALTH, SCHOOLS AND FAMILIES WORKING TOGETHER FOR ALL CHILDREN AND YOUTH: TOWARD A SHARED AGENDA 2 (2002), [http://www.ideapartnership.org/documents/Shared%20Agenda\\_final.pdf](http://www.ideapartnership.org/documents/Shared%20Agenda_final.pdf).

73. SUE BURRELL & LOREN WARBOYS, U.S. DEP'T OF JUSTICE, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM 1 (2000), <https://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf>.

74. See LEONE ET AL., *supra* note 5; Mount, *supra* note 4, at 108.

75. See BURRELL & WARBOYS, *supra* note 73, at 1, 3, 6, 9; LEONE ET AL., *supra* note 5; *Suspension, Race and Disability*, *supra* note 7, at 223.

76. See *Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274; Leone et al., *supra* note 11, at 10; National Education Association, *Truth in Labeling: Disproportionality in Special Education*, NEA.ORG (2007), <http://www.nea.org/assets/docs/HE/EW-TruthInLabeling.pdf>; *Suspension, Race, and Disability*, *supra* note 5, at 223.

77. See *Suspension, Race, and Disability*, *supra* note 5, at 218, 223, 225.

78. See *id.* at 218; LEONE ET AL., *supra* note 5.

79. LEONE ET AL., *supra* note 5.

80. Leone et al., *supra* note 11, at 10.

81. See *Suspension, Race, and Disability*, *supra* note 5, at 218; Leone et al., *supra* note 11, at 10; *Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT., <http://www.nces.ed.gov/fastfacts/display.asp?id=64> (last visited May 1, 2016).



related behaviors.<sup>82</sup> Students with disabilities suffer exponential harms during long-term suspension or expulsion from school through the disruption in their daily routine and loss of contact with their friends, peers, and teachers.<sup>83</sup> Students typically receive significantly less special education and related services during the long-term suspension or expulsion period than they received prior to being removed from school.<sup>84</sup> Categorical long-term suspension because of ZT creates risk for students frequently resulting in the first step toward the path to the criminal and juvenile justice systems.<sup>85</sup>

Students with emotional and behavioral disabilities are at a high risk for not completing high school.<sup>86</sup> The national high school—grades nine through twelve—dropout rate is 24%, but the rate is 48% of students with emotional and behavioral disabilities and 30% of students with other types of disabilities.<sup>87</sup> An additional 8% of students with emotional and behavioral disabilities drop out prior to grade nine.<sup>88</sup> According to the U.S. Department of Education's Twenty-third Annual Report to Congress in 2001, only 57.4% of the students identified as special education students matriculate.<sup>89</sup>

Removing a child from school frequently acts as an impetus for contact with the juvenile justice system.<sup>90</sup> The numbers of children with emotional and behavioral disabilities entering the juvenile justice system has exploded over the past fifteen years.<sup>91</sup> Texas reports a 27% increase in youth with mental disabilities entering the "juvenile justice system between 1995 and 2001."<sup>92</sup> Sixty-seven percent of these children were incarcerated for a

82. See Leone et al., *supra* note 11, at 10.

83. Lintott, *supra* note 10, at 567.

84. *Id.* at 565, 567.

85. See LEONE ET AL., *supra* note 5; *Suspension, Race, and Disability*, *supra* note 5, at 217.

86. See CHESAPEAKE INST., *supra* note 3, at 2; *Suspension, Race, and Disability*, *supra* note 5, at 218.

87. See CHESAPEAKE INST., *supra* note 3, at 2.

88. *Id.*

89. U.S. DEP'T OF EDUC., TWENTY-THIRD ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT I-2 (2001), <https://www2.ed.gov/about/reports/annual/osep/2001/index.html>.

90. *Suspension, Race, and Disability*, *supra* note 5, at 225.

91. Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 88, 90 (2011).

92. *Id.*



non-violent offense.<sup>93</sup> A similar study in Louisiana determined that 73% of youth were incarcerated for non-violent offenses.<sup>94</sup>

Arrest statistics of school-based arrests of students with emotional disabilities are shocking. The dramatic increase in school-based arrests are credited as a contributing factor in the explosion of students with mental illness being placed in the juvenile justice system. "Twenty percent of students with [emotional disabilities] are arrested at least once before" leaving school, compared to the 6% of students without emotional disabilities.<sup>95</sup> Three to five years after matriculation from high school, 58% of students with emotional disabilities have been arrested, and 30% of students with learning disabilities have been arrested.<sup>96</sup> Seventy-three percent of students with emotional and behavioral disorders that drop out of high school are arrested within three to five years after leaving high school.<sup>97</sup>

Two million three hundred thousand children are arrested each year.<sup>98</sup> Over six hundred thousand of these youths are entered into the juvenile justice system, and over one hundred thousand youths are placed in secure juvenile correctional facilities.<sup>99</sup> A recent comprehensive study conducted by the National Center for Mental Health and Juvenile Justice indicates that "70.4% of youth in the juvenile justice system meet criteria for at least one mental health disorder."<sup>100</sup> These statistics demonstrate a rampant trend across all states of arresting students with emotional and behavioral disabilities instead of providing the required special education and related services.<sup>101</sup>

93. *Id.*

94. Xochitl Bervera, *Reclaiming Children from the Prison System: The Juvenile Justice Reform Act (Act 1225)*, RACEFORWARD.ORG (2003), <https://www.raceforward.org/sites/default/files/pdf/281pdf.pdf>.

95. CHESAPEAKE INST., *supra* note 3, at 2.

96. *See id.*

97. *See id.*

98. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 2001, at 1 (2003), <https://www.ncjrs.gov/pdffiles1/ojdp/201370.pdf>.

99. NAT'L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE, BETTER SOLUTIONS FOR YOUTH WITH MENTAL HEALTH NEEDS IN THE JUVENILE JUSTICE SYSTEM, <http://cfc.ncmhjj.com/wp-content/uploads/2014/01/Whitepaper-Mental-Health-FINAL.pdf>.

100. JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY 2 (2006) [http://www.unicef.org/tad/usmentalhealthprevalence06\(3\).pdf](http://www.unicef.org/tad/usmentalhealthprevalence06(3).pdf).

101. *See id.*; CHESAPEAKE INST., *supra* note 3, at 2.



## VII. IDEA PROCEDURAL PROTECTIONS

IDEA requires school districts to provide a free appropriate public education to children from three years old through twenty-one years of age.<sup>102</sup> “Free Appropriate Public Education [(“FAPE”)] means special education and related services that” meet state standards in an appropriate setting and in accordance with the student’s individualized education program (“IEP”).<sup>103</sup> Students with disabilities are entitled to receive special education services in the least restrictive environment “to the maximum extent appropriate” for them.<sup>104</sup> This requirement emphasizes the schools’ obligation to provide students with an education in an integrated setting.<sup>105</sup>

IDEA places limits on a school district’s ability to exclude students with disabilities from school through disciplinary action.<sup>106</sup> Students able to assert the procedural protections of IDEA in a disciplinary proceeding are students identified as eligible for special education and related services, students who are being evaluated for special education and related services, and any student where the school had knowledge of the student’s disability before the behavior occurred.<sup>107</sup>

If a school district seeks the removal of a student for longer than ten school days, this removal constitutes a change in the student’s educational placement, which triggers the procedural protections of IDEA.<sup>108</sup> The procedural protections were added by Congress to ensure that school districts are not removing students with disabilities in a discriminatory manner<sup>109</sup> or for behavior that is a manifestation of their disabilities.<sup>110</sup> IDEA procedural protections require the district to conduct a manifestation determination review within ten days of the decision to change a student’s educational placement.<sup>111</sup>

102. 20 U.S.C. § 1412(a)(1)(A) (2012); Tulman, *supra* note 8, at 8.

103. 20 U.S.C. § 1401(9)(B)–(D).

104. *Id.* § 1412(a)(5)(A).

105. *See id.*

106. *See id.* § 1415(k)(5).

107. *See id.*; 34 C.F.R. § 300.534(a)–(d).

108. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.536(a)(1); *see also* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 615(k)(1)(A)(i), 111 Stat. 37, 93 (1997) (codified as amended at 20 U.S.C. §§ 1400-1482 (2012)).

109. 20 U.S.C. § 1415(k)(1)–(6); 34 C.F.R. § 300.530(b)(1).

110. *See* 20 U.S.C. § 1415(k)(1)(E)–(F); 34 C.F.R. § 300.530(e)–(f).

111. 20 U.S.C. § 1415(k)(1)(E)(i)–(ii).



## VIII. IDEA AND ZERO TOLERANCE

Ninety-four percent of public schools in the United States have ZT policies regarding drugs, alcohol, weapons, violence, and tobacco in school.<sup>112</sup> These policies require the immediate removal of students from school for possessing drugs, alcohol, weapons, tobacco, or that commit violence in schools.<sup>113</sup>

ZT policies create inherent legal issues for school districts when implemented against a student with a disability.<sup>114</sup> The Supreme Court of the United States addressed the issue of disciplining a student with a disability in 1988.<sup>115</sup> In *Honig v. Doe*,<sup>116</sup> the Supreme Court held that school officials may not unilaterally remove even *dangerous* or *disruptive* children with disabilities from their educational placements.<sup>117</sup> The Supreme Court held that exclusion from school for more than ten days constitutes a *change of placement* for purposes of IDEA and is subject to all the procedural requirements governing such change.<sup>118</sup> In *Honig*, the Supreme Court determined that only a court may authorize a school to temporarily remove a child from school despite the protections contained within IDEA and only in the event the district can prove (1) that exhaustion of administrative remedies would be futile, and (2) that maintaining the child's placement is "substantially likely to result in injury either to himself, herself, or to others."<sup>119</sup>

Congress recognized that historically students with disabilities were excluded from school based on manifestations of their disabilities.<sup>120</sup> IDEA was amended to prevent students with disabilities from being pushed out of school based on behaviors that were manifestations of their disabilities.<sup>121</sup> IDEA now contains procedural due process rights for students prior to long-term suspensions and expulsion proceedings.<sup>122</sup> IDEA requires a *manifestation determination* review to determine whether the "conduct in question was caused by, or had a direct and substantial relationship, to the child's disability"<sup>123</sup> for removals from school longer than ten days.<sup>124</sup> On

112. *Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274.

113. Mount, *supra* note 4, at 108.

114. See *Honig v. Doe*, 484 U.S. 305, 308 (1988).

115. *Id.*

116. 484 U.S. 305 (1988).

117. See *id.* at 328–29.

118. See *id.*

119. *Id.* at 326–28.

120. *Honig*, 484 U.S. at 309, 324; see also 20 U.S.C. § 1415(k)(1)(B) (2012).

121. *Honig*, 484 U.S. at 325–26; see also 20 U.S.C. § 1415(k)(1)(B).

122. 20 U.S.C. § 1415.

123. *Id.* § 1415(k)(1)(E)(i)(I); see also 34 C.F.R. § 300.530(e)(1)(i) (2015).



the eleventh day of removal, schools are required to provide services to assist a student toward achieving their education goals as outlined in their IEP and to progress with the general curriculum.<sup>125</sup>

IDEA substantially impacts a school districts' ability to exclude students with disabilities from school.<sup>126</sup> If it is determined that the student's behavior is substantially related to his disability, then the school is prohibited from suspending or expelling the student through the school's disciplinary system.<sup>127</sup> The school is required to provide additional educational supports and related services to maintain that student in his current education placement.<sup>128</sup> The student is entitled to the development of a positive behavior plan that addresses the manifestations of his disability and provides support to the student in their classroom.<sup>129</sup>

ZT changed how educators address students' behaviors.<sup>130</sup> In implementing ZT, an educator focuses on the removal of a perceived troublesome student, not on meeting educational goals or moral development.<sup>131</sup> ZT affords educators several avenues to remove the student from school.<sup>132</sup> They may attempt to use the discipline code and suspend or expel the student from school for behaviors that violate ZT.<sup>133</sup> As stated previously, students with disabilities have procedural protections under the IDEA against exclusion from school based on behaviors that are a manifestation of their disabilities,<sup>134</sup> and some successfully employ these procedural protections and retain their right to remain in school.<sup>135</sup> Educators must comply with the procedural requirements of IDEA and the procedural due process requirements of state regulations concerning long-term suspensions and expulsion proceedings.<sup>136</sup> However many students

124. 20 U.S.C. § 1415(k)(1)(E)(i)(I).

125. *See id.* §§ 1401(14), 1412(a)(3), 1414(d); 34 C.F.R. § 300.536; *Honig*, 484 U.S. at 311.

126. *See* 20 U.S.C. § 1415(b)(3), (5); 34 C.F.R. § 300.536.

127. 20 U.S.C. § 1415(k)(1)(F); *Honig*, 484 U.S. at 315–16, 328.

128. 34 C.F.R. § 300.530(f).

129. *See id.*

130. *See Bogos, supra* note 22, at 358–60.

131. *See Mount, supra* note 4, at 109.

132. *See Cloud, supra* note 14, at 883–84.

133. Vito A. Gagliardi, Jr., *In Defense of Zero Tolerance: The Law Gives Educators the Flexibility to Respond to Cases on an Individual Basis*, N.J. L.J., May 21, 2001, at 3.

134. 20 U.S.C. § 1415(k)(1)(E) (2012); *Mount, supra* note 4, at 115.

135. *See Honig v. Doe*, 484 U.S. 305, 308, 328–29 (1988); *Mount, supra* note 4, at 118–20.

136. *See* U.S. CONST. amend. XIV; 20 U.S.C. § 1415(a)–(b), (k); 34 C.F.R. § 300.530 (2015); *Bogos, supra* note 22, at 369.



with disabilities are unable to successfully use IDEA procedural protections and are expelled for behaviors that are a manifestation of their disabilities.<sup>137</sup>

One way educators may attempt to subvert IDEA requirements is to assert that the student is *dangerous*.<sup>138</sup> ZT provisions of IDEA maintain that certain behaviors are so inherently dangerous and unsafe that regardless of whether the behavior is a manifestation of the student's disability, safety for all dictates that he or she be removed immediately from the classroom.<sup>139</sup> Students with disabilities still have due process rights in such situations.<sup>140</sup> Schools are required to file a notice of due process asserting the basis of the *dangerousness* and the reasons for the student's removal.<sup>141</sup> The student remains in his current educational placement during the pendency of the expedited due process hearing regarding *dangerousness*.<sup>142</sup>

Educators may attempt to immediately remove a student with a disability by asserting that student has brought a weapon or drugs to school.<sup>143</sup> Students accused of this type of behavior are immediately removed from the classroom but are entitled to education in a different setting.<sup>144</sup> IDEA limits a school's ability to remove a student for *dangerous behavior* or weapons to forty-five school days.<sup>145</sup>

ZT policies offer educators a final opportunity for removing a student from school.<sup>146</sup> Educators that are not successful in expelling a student with a disability, have turned to the police and the juvenile courts for assistance in removing the perceived troublesome student from their school.<sup>147</sup> Schools report students with in-school behavioral disorders to the police for juvenile filings and removal to juvenile detention centers.<sup>148</sup> This punitive approach to disciplining students with disabilities circumvents the

137. See 20 U.S.C. § 1415(b), (k); Mount, *supra* note 4, at 111.

138. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g); Mount, *supra* note 4, at 108–09.

139. 20 U.S.C. § 1415(k)(1)(G); *Honig*, 484 U.S. at 325–26.

140. 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h); see also U.S. CONST. amend. XIV.

141. See 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h); *Honig*, 484 U.S. at 316, 325–26.

142. 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.533.

143. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

144. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

145. 20 U.S.C. § 1415(k)(1)(G).

146. EILEEN L. ORDOVER, CTR. FOR LAW & EDUC., CHALLENGING ABUSIVE FILING OF JUVENILE PETITIONS AGAINST CHILDREN WITH DISABILITIES BY SCHOOL OFFICIALS 2 (1996).

147. *Id.* at 2.

148. *Id.* at 2, 4–5.



procedural protections contained in IDEA and *Honig*.<sup>149</sup> The cited behavior is frequently a manifestation of the student's disability or related to the school's failure to follow the student's IEP and provide appropriated related services, such as mental health counseling and behavioral support.<sup>150</sup> Students subject to these tactics are removed from school in handcuffs, placed in a police car, and taken to a juvenile detention or processing center.<sup>151</sup> A student may remain in detention for hours, days, weeks, or months.<sup>152</sup> These students are charged with juvenile offenses, although frequently, these charges are dismissed months or years in the future.<sup>153</sup> This experience proves to be life altering, as many of these students do not return to their classroom that school year; and never return at all.<sup>154</sup> This process has proven highly efficient and effective in removing students with perceived difficult behaviors from their schools.<sup>155</sup>

Schools' reliance upon the police and the juvenile justice system to address behavioral issues related to a student's disability subverts their responsibility to comply with IDEA procedural protections.<sup>156</sup> School administrators implicitly understand their decision to call the police, report a student's behavior, and file a police report will cause that student to be immediately removed from the classroom or building.<sup>157</sup> This decision triggers a change in placement under IDEA,<sup>158</sup> and educators that call the police should be required to comply with the procedural protections contained in IDEA. To allow schools to ignore a student's protections under IDEA in this way is educational malpractice and should not be allowed to continue.

#### IX. REMAINING IN SCHOOL THROUGH IDEA ADVOCACY

Combating ZT tactics requires that parents, students, and special education attorneys understand the protections IDEA provides and be

149. *Id.* at 2, 8; see also *Honig v. Doe*, 484 U.S. 305, 325–28 (1988); BURRELL & WARBOYS, *supra* note 73, at 7.

150. ORDOVER, *supra* note 146, at 4–5.

151. UDI OFER ET AL., N.Y. CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 11 (Jennifer Carning et al. eds., 2009), [http://www.nyclu.org/files/Safety\\_with\\_Dignity.pdf](http://www.nyclu.org/files/Safety_with_Dignity.pdf); Richards, *supra* note 20, at 108.

152. BURRELL & WARBOYS, *supra* note 73, at 8.

153. *Id.* at 7–8.

154. *Id.*

155. *Id.*

156. *Id.* at 7.

157. See OFER ET AL., *supra* note 151, at 9.

158. See Mount, *supra* note 4, at 117–18.



immediately proactive in asserting them.<sup>159</sup> Parents constitute an integral part of their child's IEP team and have the authority to request an IEP team meeting to discuss any issue that impacts their child's education.<sup>160</sup> If a student receives a short-term suspension—less than ten days—IDEA procedural protections are not triggered;<sup>161</sup> although, even short-term suspensions can impact a student's relationship with his school and educational progress.<sup>162</sup>

Parents may use their power under IDEA to immediately request an IEP team meeting to discuss the basis for the out-of-school suspension and request necessary amendments to the IEP services to prevent future out-of-school suspensions.<sup>163</sup> This meeting is an opportunity for parents to explain in depth their child's disabilities, manifestations of their disabilities, how the behavior precipitating the suspension was substantially related to their disability, and what additional services their child needs in the IEP to alleviate a future occurrence.<sup>164</sup> Future suspensions may be prevented by a discussion and agreement with school officials of the student's manifestations of his disability.<sup>165</sup> Agreed manifestations of behavior should be identified and a positive behavior intervention plan developed to appropriately support the student in their classroom.<sup>166</sup>

For long term suspension or expulsion, parents possess a powerful tool under IDEA to fight the school if the disciplinary action is related to the student's disability. IDEA prohibits schools from removing students from school for longer than ten days unless it has been determined that the precipitating behavior is not a manifestation of the student's disability.<sup>167</sup> Parents must not underestimate the importance of the outcome of the manifestation determination review. A properly conducted manifestation determination review considers two questions: (1) Was the conduct "caused by, or had a direct and substantial relationship to the child's disability; or (2) . . . [W]as [this conduct] the direct result of the [school's] failure to implement the [student's] IEP?"<sup>168</sup>

To prepare for this review, parents should request copies of the incident reports, witness statements, and other documents prior to the

159. See OFER ET AL., *supra* note 151, at 7–9; Mount, *supra* note 4, at 108–09, 117.

160. 34 C.F.R. § 300.321(a)(1)–(5) (2015); Mount, *supra* note 4, at 106, 116.

161. Mount, *supra* note 4, at 117.

162. See OFER ET AL., *supra* note 151, at 9; Richards, *supra* note 20, at 107–08.

163. See Mount, *supra* note 4, at 106, 116–17.

164. See 34 C.F.R. § 300.530(e)(1)–(2); Richards, *supra* note 20, at 113.

165. See 34 C.F.R. § 300.530(f)(1)(i); Richards, *supra* note 20, at 113.

166. 34 C.F.R. § 300.530(e)(1)(i), (f)(1)(i)–(ii).

167. *Id.* § 1415(k)(1)(B)–(C).

168. *Id.* §§ 1415(k)(1)(E)(i).



meeting and review them carefully with an eye toward the relationship between their child's disabilities and their cited behavior.<sup>169</sup> Parents may invite any person with knowledge of their child to the meeting.<sup>170</sup> Students receiving mental health services outside of the school may find the presence of their mental health professionals, mental health assessments, mental health plans, and services beneficial during this meeting.<sup>171</sup>

School officials commonly do not possess a significant enough understanding of mental illness and its impact on an individual to properly answer the first required question in a manifestation determination review: whether a student's "conduct . . . was caused by, or had a direct and substantial relationship to, [their] disability."<sup>172</sup> Mental health professionals are uniquely positioned to explain the student's mental health diagnoses, and their impact upon the student in the educational setting.<sup>173</sup> If the evidence presented from the mental health professionals, the student, and the parents convinces the school officials that the behavior "was caused by, or had a direct and substantial relationship to [his] disability," then the student's conduct is a manifestation of his disability, and the student must be returned to his prior educational placement.<sup>174</sup>

If the evidence presented fails to convince the school officials that the conduct was a manifestation of the student's disability, then the relationship between the conduct and the school's ability to implement the IEP will be considered.<sup>175</sup> The school is required to implement all sections of the IEP.<sup>176</sup> Any unimplemented sections of the IEP may result in a determination that the identified undesired behavior of the student is a manifestation of his disability.<sup>177</sup> Parents and advocates should carefully review all sections of the IEP to establish whether all identified services were provided, how the failure to provide a service impacted the student's behavior, and the relationship between any unimplemented service and the identified troublesome behavior.<sup>178</sup> Sections of the IEP that discuss a student's behavior must receive a heightened review<sup>179</sup>—in particular, the

169. *See id.*

170. *See id.* §§ 1414(d)(a)(B), 1415(k)(1)(E)(i).

171. *See* 20 U.S.C. §§ 1414(d)(a)(B), 1415(k)(1)(E)(i); Mount, *supra* note 4, at 111.

172. *See* 20 U.S.C. § 1415(k)(1)(E)(i)(I); Mount, *supra* note 4, at 109.

173. *See* 20 U.S.C. §§ 1414(b)(3)(A)(iv), (d)(1)(B)(v), 1415(k)(1)(E)(i)(I) (2); Mount, *supra* note 4, at 111.

174. 20 U.S.C. § 1415(k)(1)(E)(i)(I), (ii), (F)(iii).

175. *See id.* § 1415(k)(1)(E)(i)(II).

176. *See id.* § 1414(d)(2)(A).

177. *Id.* § 1415(k)(1)(E)(ii).

178. *See id.* § 1415(k)(1)(E), (F)(ii).

179. *See* 20 U.S.C. § 1415(k)(1)(F)(ii).



student's positive behavior intervention plan, listed related services, and listed goals.<sup>180</sup> If the team determines that the student's conduct was "the direct result of the [school's] failure to implement the IEP," then the conduct is a manifestation of the student's disability.<sup>181</sup> The student must be returned to his prior educational placement, and the school must immediately correct the IEP deficiencies.<sup>182</sup>

If the determination is made that the student's behavior is not a manifestation of his disabilities, then the school may proceed with the long-term suspension or expulsion proceedings.<sup>183</sup> Parents may appeal the decision of the manifestation determination review and the alternative education placement by filing an expedited request for due process.<sup>184</sup> *Stay-put* provisions of IDEA are not implicated in a disciplinary proceeding, and the student will remain in the disciplinary placement during the pendency of the due process hearing.<sup>185</sup>

All of these protections are not immediately available if the student is arrested and removed from school.<sup>186</sup> Schools do not schedule a manifestation determination meeting, long-term suspension, or expulsion proceeding.<sup>187</sup> The student is merely gone from the building without any apparent ability to assert his procedural due process rights contained in IDEA.<sup>188</sup> Parents cannot prevent the school from reporting their child to the police; although parents do retain the right to challenge the school's decision pursuant to IDEA.<sup>189</sup> IDEA contains specific legal remedies for parents to use in challenging school decision's regarding special education identification, evaluation, educational placement, and provision of a free appropriate public education.<sup>190</sup> A parent may file a state or federal education complaint or a request for due process alleging the school's actions of reporting the student to the police caused an educational change of placement for their child that implicates the procedural protections of IDEA.<sup>191</sup>

180. See *id.*; BURRELL & WARBOYS, *supra* note 73, at 6.

181. See 20 U.S.C. § 1415(k)(1)(E)(i)(II), (ii).

182. 34 C.F.R. § 300.530(e)(3), (f)(2) (2015).

183. 20 U.S.C. § 1415(k)(1)(C).

184. *Id.* § 1415 (f)(1)(A), (k)(3)(A).

185. See *id.* § 1415 (j), (k)(4)(A).

186. See *id.* § 1415(k)(1)(G).

187. See *id.*

188. See 20 U.S.C. § 1415(k)(1)(G).

189. See *id.* § 1415(b)(6)(A), (f)(1)(A), (k)(6).

190. *Id.* § 1415(b)(6).

191. See *id.* § 1415(b)(6), (f)(1)(A), (k)(3)(A).



Only a few cases have determined that a school's action of reporting a student to the police implicates the procedural protections of IDEA.<sup>192</sup> The Sixth Circuit upheld an administrative law judge's determination in *Morgan v. Chris L.*,<sup>193</sup> that the school district violated IDEA when it filed a juvenile court petition against a student with Attention Deficit Hyperactivity Disorder for in-school behavior.<sup>194</sup> The *Morgan* court determined the school's actions of filing a juvenile petition constituted a *change in placement*.<sup>195</sup> The school was required to follow the procedural protections in IDEA by evaluating the student in a timely manner, by conducting an IEP Team meeting to review the behavior, before filing a juvenile petition.<sup>196</sup> The court upheld the administrative law judge's ruling directing the school to withdraw the juvenile court petition that it had filed.<sup>197</sup>

The national trend of educators reporting students to police for in-school behaviors was identified as a concern by Congress as early as 1997.<sup>198</sup> The 1997 Amendments to IDEA clarified that IDEA does not prohibit schools from referring alleged criminal activity by a child with a disability to proper authorities, nor does the law keep police and courts from handling such matter.<sup>199</sup> However, Congress did not intend for schools to rely on the 1997 Amendment to subvert their responsibilities under IDEA.<sup>200</sup> The legislative history behind the 1997 Amendments to IDEA made clear that schools are not prohibited from reporting criminal activity of their students, but schools may not report students to even *appropriate* authorities when doing so would circumvent the school's obligations to the child under IDEA.<sup>201</sup> The U.S. Department of Education publically stated that the new IDEA provision on reporting crimes clarified the legal authority of schools to report crimes, but it "does not authorize school districts to circumvent any of their responsibilities under the Act."<sup>202</sup> Recently, the U.S. Department of

192. See, e.g., *Morgan v. Chris L.*, 927 F. Supp. 267, 269–71 (E.D. Tenn. 1994), *aff'd*, 106 F.3d 401 (6th Cir. 1997).

193. 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd*, 106 F.3d 401 (6th Cir. 1997).

194. *Id.* at 270–71.

195. *Id.* at 269.

196. *Id.*

197. *Id.* at 271.

198. See Individuals with Disabilities Education Act Amendments of 1997, 105 CONG. REC. S4401–S4403 (daily ed. May 14, 1997) (statement of Sen. Harkin [hereinafter IDEA Senate Debate]).

199. 20 U.S.C. §1415(k)(6)(A) (2012).

200. See IDEA Senate Debate, *supra* note 198, at S4403.

201. *Id.* ("The bill also authorizes . . . proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals, do not circumvent the school's responsibilities under IDEA.").

202. Analysis of Comments and Changes, 64 Fed. Reg. 12537, 12631 (March 12, 1999).



Education weighed in more concretely on the national debate concerning the impact of ZT on students.<sup>203</sup> In 2014, the U.S. Department of Education issued a *Dear Colleague Letter* recommending that schools put an end to the failed ZT policies.<sup>204</sup>

## X. CONCLUSION

Disciplinary measures have been an integral part of the public school system since its inception.<sup>205</sup> Educators have employed a variety of techniques from corporal punishment and suspensions to the immediate removal of a student from school.<sup>206</sup> While using a particular method, educators tout it as an effective tool for maintaining control and providing education,<sup>207</sup> but history illustrates that new disciplinary measures replace older ones once they are criticized by parents, the public, or the legal system.

Data and evidence demonstrate that ZT has failed to improve school safety. A school shooting in Oregon in September 2015 provides yet another example of ZT's inability to impact its state goal.<sup>208</sup> Study after study illustrates the negative and punitive impact of ZT on students with disabilities.<sup>209</sup> Ignoring the mounting evidence, school administrators continue to advocate the use of and expand the behaviors punished by ZT policies.

There exists a growing national public awareness of the cost associated with the current disciplinary practice of ZT and a national outcry for schools to stop penalizing students and return to teaching them.<sup>210</sup> U.S. Assistant Attorney General for Civil Rights, Thomas Perez, has acknowledged that: "[W]e have failed all our children—and our society—if . . . education becomes a pathway to prison. It is a moral imperative that education instead serves as a road to success."<sup>211</sup> History has shown that disciplinary policies reach a critical mass. It is the responsibility of all who

203. See CATHERINE E. LHAMON & JOCELYN SAMUELS, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., *DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE* 7, 19 (Oct. 2, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

204. See *id.* at 19.

205. See Hyman & McDowell, *supra* note 28, at 33, 59.

206. *Id.* at 59.

207. *Id.* at 14–16.

208. See Sara Sidner et. al, *Oregon Shooting: Gunman Was Student in Class Where He Killed 9*, CNN (Oct. 2, 2015), <http://www.cnn.com/2015/10/02/us/oregon-umpqua-community-college-shooting>.

209. See *supra* Part VI.

210. ACLU & ACLU OF CONNECTICUT, *supra* note 61, at 5; see also Bogos, *supra* note 22, at 380–81.

211. Perez, *supra* note 2.



work with students with disabilities—parents, educators, advocates, and attorneys—to be knowledgeable and timely in challenging new policies, to assert IDEA protections, and to proactively hasten the demise of discriminatory educational practices. For public education to remain the pathway to true equality for citizens with disabilities, it must remain free, equal, and accessible to all students. ZT practices divert students with disabilities out of school and halts their forward progress toward future prosperity and equal opportunities. Achieving the promise of equality for students with disabilities mandates the cessation of ZT policies.

1. U.S. DEPT. OF EDUC., *DEAR COLLEGE LETTER: KNOWLEDGEABLE, RESPONSIBLE, AND PROGRESSIVE CITIZENSHIP* (2014), <http://www2.ed.gov/about/offices/list/oea/oea-201401-01-01.pdf>.
2. *Id.* at 12.
3. *Id.* at 12.
4. *Id.* at 12.
5. *Id.* at 12.
6. *Id.* at 12.
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100. *Id.* at 12.