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The Confluence of Language and Learning Disorders and the School-to-Prison Pipeline Among Minority Students of Color: A Critical Race Theory

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THE CONFLUENCE OF LANGUAGE AND LEARNING DISORDERS AND THE SCHOOL-TO-PRISON PIPELINE AMONG MINORITY STUDENTS OF COLOR: A CRITICAL RACE THEORY

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INTRODUCTION

Exposure to law enforcement and the juvenile justice system is reported to have a devastating impact on a student's mental health, as well as

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increasing the risk of criminal recidivism to more serious crimes.¹ According to the *Free Thought Project*, “approximately 260,000 students were referred to law enforcement during the 2011 to 2012 school year. Within that same year, approximately 92,000 students were arrested on school property.”² As a result, the recidivism rates for juveniles, aged fifteen to twenty, released from prison is significantly higher than any other age group.³ For example, 76% of juveniles under the age of twenty-five who were released from prison were rearrested within three years.⁴ Additionally, 80% of African Americans were rearrested within five years.⁵

This percentage of African Americans recidivating, represents an extreme disparity in the rates of incarceration between racial groups. Although African Americans make up a mere 13% of the U.S population, they comprise over 40% of young adult inmates in jails and prisons.⁶ To date, one in twenty-three white males are sentenced to jail in their lifetime as compared to one in four black males.⁷ These numbers are likely to be most prevalent amongst minority male students from low socio-economic backgrounds, whose school districts have less resources.⁸ To this extent, disproportionate mass incarceration continues to produce long-term detrimental effects such as: 1) reinforcement of violent behavior and

1. Justin Gardner, *School-to-Prison Pipeline Complete — New Law Makes Schoolyard Fights a Felony*, THE FREE THOUGHT PROJECT (Dec. 21, 2016), <http://thefreethoughtproject.com/school-fights-felony-prison-pipeline/#1EQA88keuViO6xEO>. 99.

2. *Id.*

3. THE COUNCIL OF STATE GOV'TS JUSTICE CTR., REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUNG ADULTS IN THE JUVENILE AND ADULT CRIMINAL JUSTICE SYSTEMS' 3 (Nov. 2015), <https://csgjusticecenter.org/wp-content/uploads/2015/11/Transitional-Age-Brief.pdf> (last visited Mar. 8, 2018) [hereinafter CSG JUSTICE CTR.].

4. *Id.*

5. *Id.*; see also MATTHEW R. DUROSE ET. AL., BUREAU OF JUSTICE STATISTICS, US DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 13 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

6. ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>; CSG' JUSTICE CTR., *supra* note 3, at 3.

7. THOMAS P. BONCZAR & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997), <https://bjs.gov/content/pub/pdf/Llgsfp.pdf>.

8. See generally Jason P. Nance, *Students, Police, and the School-To-Prison Pipeline*, 93 WASH. U.L. REV. 919, 944-45 (2016) (explaining poverty is correlated to poor academic achievement due to the various barriers it creates and lack of resources afforded to teachers in impoverished school districts).

attitudes; 2) limited education; 3) exacerbated mental health issues and learning disabilities; and 4) increased future involvement in the criminal justice system.⁹ This disparate treatment has persisted for over five decades.¹⁰

Since the judgment of *Brown v. Board of Education* and, with it, the desegregation of schools, schools nationwide have placed African American students in special education programs at an alarmingly disproportionate rate.¹¹ At this time, African American students represent 20.2% of the total population of students receiving special education in the United States.¹² This representation becomes more prevalent when the student is a minority who exhibits any level of a language or learning disorder.¹³ When language and learning disorders are misdiagnosed, undiagnosed, or improper services are provided, academic and vocational impacts may persist throughout the child's life into adulthood.¹⁴ Affecting literacy; behavioral, social and pragmatic decision-making; and expressive and receptive language skills.¹⁵ As a result, students in special education—especially those who are African American and living with an undiagnosed and untreated language and learning disorder—have a higher school drop-out rate and enter society with

9. *Id.* at 954.

10. See Russell J. Skiba et al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, 74 COUNCIL FOR EXCEPTIONAL CHILD. 264, 265 (2008) [hereinafter *Achieving Equity*] (suggesting that the lengthy history of oppression of and negative viewpoints towards African Americans in the United States contributes to the disproportionate representation of African American students in special education programs).

11. *Id.* at 265-66 (noting that the “overrepresentation of ethnic and language minority students in self-contained special education classrooms raised significant civil rights and educational concerns”).

12. CTR. FOR PUB. EDUC., *Table 4. Students Ages 6 Through 21 Served Under IDEA, Part B, by Race (2006)*, <http://www.centerforpubliceducation.org/Libraries/Document-Library/IDEA-Part-B/Table-4-Students-ages-6-through-21-served-under-IDEA-Part-B-by-race-2006.html> (last visited Oct. 7, 2017).

13. See Thomas Parrish, *Racial Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUALITY IN SPECIAL EDUCATION 15, 22-23 (Daniel J. Losen & Gary Orfield eds., 2002); see also Russel J. Skiba et al., *Disparate Access: The Disproportionality of African American Students with Disabilities Across Educational Environments*, 72 COUNCIL FOR EXCEPTIONAL CHILD. 411, 417-18 (2006) [hereinafter *Disparate Access*]; NAT'L CTR. FOR EDUC. STAT., TABLE 204.50. CHILDREN 3 TO 21 YEARS OLD SERVED UNDER INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), PART B, BY AGE GROUP AND SEX, RACE/ETHNICITY, AND TYPE OF DISABILITY: 2014-15 (2006), https://nces.ed.gov/programs/digest/d16/tables/dt16_204.50.asp.

14. Alfredo J. Artiles et al., *Justifying and Explaining Disproportionality, 1968-2008: A Critique of Underlying View of Culture*, 76 COUNCIL FOR EXCEPTIONAL CHILD. 279, 284-85 (April 2010).

15. *Id.* at 282.

significantly higher incarceration rates than their peers of other races.¹⁶

Many factors contribute to the prevalence of young minorities within the special education system who are trapped in the criminal justice system. One particular factor is the presence of symbolic and institutional racism.¹⁷ In this context, symbolic and institutional racism can be argued as being represented in the challenges African American students in special education experience when they are oppressed by a system of power secondary to their race, ethnicity, socio-economic status, and cognitive and educational abilities.¹⁸ The overrepresentation of African American students in special education within U.S. school systems and in the U.S. criminal justice system invokes questions about civil rights violations secondary to its plausible correlation to the “school-to-prison pipeline” phenomenon.¹⁹

Part I of this Article will outline the presence and impact of language and learning disorders on African American students. Part II will detail the development and use of zero-tolerance policies in schools and analyze these policies. Part III will detail the disproportionate and subjectively harsh disciplinary laws implemented in low socioeconomic status (“low-SES”) Title I schools within the United States, and how these laws may be fueled by symbolic and institutional racism. Part IV will assess the school-to-prison pipeline and its correlation to special education systems for minority students with language and learning disorders. Part V will examine the correlation between minority students of color with language and learning disorders as well as the school-to-prison pipeline from a critical race theory perspective. Part VI will cover the disproportionate impact of corporal punishment on

16. *Id.* at 285; *see also Disparate Access*, *supra* note 13, at 411, 417-19 (concluding that African American students with disabilities are simultaneously underrepresented in general education classrooms and overrepresented in separated classes). *See generally* DANIEL J. LOSEN & JONATHAN GILLESPIE, THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 1, 6-7 (2012) (explaining that classroom suspensions are among the leading indicators of risk of future school dropout and/or incarceration and showing that African American students with disabilities were suspended at disproportionately higher rates than other groups).

17. *See* Christopher Tarman & David O. Sears, *The Conceptualization of Symbolic Racism*, 67 J. OF POL. 731, 733 (2005) (defining symbolic racism as a belief that: African Americans no longer experience much prejudice or discrimination; their failure to progress is a result of their unwillingness to work hard enough; they make excessive demands; and that they have gotten more than they deserve).

18. *See id.*; *see also Achieving Equity*, *supra* note 10, at 265 (explaining that institutional discrimination is a result of the country’s history of oppression and discrimination).

19. Nance, *supra* note 8, at 942; *see also* LOSEN & GILLESPIE, *supra* note 16, at 10 (suggesting civil rights concerns around the disparate rate of suspension of African American students with disabilities).

African American students in the United States. Finally, Part VII will discuss recommendations for reducing disproportionately harsh disciplinary actions in low-SES Title I schools. This section will also include a discussion of utilizing federal and state laws such as the federal Equal Protection Clause and Title VI of the Civil Rights Act of 1964 to assist in reducing the school-to-prison pipeline epidemic for minorities with language and learning disorders.

I. DECREASED ACCESS TO SERVICES FOR MINORITY STUDENTS WITH LANGUAGE AND LEARNING DISORDERS

Language and learning disorders, secondary to an individual's communication and cognitive abilities, are defined as a deficit or significant impairment in the primary functions of attention; memory; problem-solving; emotional functioning; comprehension and production; literacy; pragmatics; and social, expressive, and receptive language skills.²⁰ Currently, language and learning disorders are less actively addressed in public school systems where the majority population is comprised of minority students with low-socioeconomic statuses (SES).²¹ Language and learning disorders can impact a student's communication and comprehension skills in a way that impairs their ability to fully participate in all aspects of an academic setting (e.g., socially, behaviorally, vocationally, and educationally).²² When an individual is affected by a language and learning disorder, their ability to comprehend and complete classwork becomes an added burden to their academic success.²³

African American students with disabilities are the most vulnerable student population within the public school system, as they are more

20. *Language-Based Learning Disabilities (Reading, Spelling, and Writing)*, AM. SPEECH-LANGUAGE-HEARING ASS'N, <https://www.asha.org/public/speech/disorders/LB-LD/> (last visited Apr. 28, 2018) [hereinafter *Language-Based Learning Disabilities*] (describing the symptoms of language-based learning disabilities such as dyslexia).

21. See *Achieving Equity*, *supra* note 10, at 274 (describing the disparities in instruction between high SES and low SES schools). *But see Disparate Access*, *supra* note 13, at 420-21 (asserting that African American students are overrepresented in more restrictive classroom settings regardless of disability type).

22. See generally JOAN MCCORD ET. AL., JUVENILE CRIME, JUVENILE JUSTICE 68 (2001) (summarizing research on behavioral and social challenges faced by children with certain types of learning disabilities).

23. See ULRICH BOSER, CTR. FOR PUB. EDUC., SPECIAL EDUCATION: A BETTER PERSPECTIVE, <http://www.centerforpubliceducation.org/Main-Menu/Evaluating-performance/Special-education-At-a-glance/Special-education-A-better-perspective-full-report.html> (last visited Apr. 28, 2018) (identifying low rates of diploma achievement among students with learning disabilities).

susceptible to civil rights violations and criminal institutionalization.²⁴ Because of the limited educational and therapeutic resources for disabled African American students in public schools, the majority of these students are on a path toward entering the criminal justice system as soon as they enroll in school.²⁵ African American students with language and learning disorders are vulnerable to failing within general education classrooms because educators are not always culturally competent and prepared to recognize and address their needs.²⁶ Most school teachers in the United States are white.²⁷ More specifically, in the 2011-12 school year, while 81.9% of teachers were white only 6.9% of teachers were African American.²⁸ Research has indicated that teachers and school officials are more likely to accuse students of color of subjective infractions.²⁹ This leads to disproportionate discipline, secondary to race.³⁰ In this way, cultural aspects, such as race and SES, impact how a student engages within an academic setting, thus affecting how they are perceived by adults in authority.³¹

24. Gwendolyn Cartledge & Charles Dukes, *Disproportionality of African American Children in Special Education: Definitions and Dimensions*, THE SAGE HANDBOOK OF AFRICAN AMERICAN EDUCATION 383 (Linda C. Tillman ed., 2009) (discussing the high incidence of disproportionality of African American students with special needs being taught in the most restrictive settings).

25. See LOSEN & GILLESPIE, *supra* note 16, at 1, 10-11 (identifying the correlation between high suspension rates of minority students and the risk suspension poses to dropping out and entering the juvenile justice system); Nance, *supra* note 8, at 945, 957-58 (addressing racial disparities in school discipline and increased risk of entering the juvenile justice system).

26. See Artiles, *supra* note 14, at 288-89 (explaining different approaches to research regarding the disproportionality of students of color in special education); Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 336 (2002) [hereinafter *The Color of Discipline*] (suggesting that cultural competency training, classroom management training and mental health support can help develop a more supportive class environment); see also Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILD. 381, 384 (2000) (suggesting that students may purposely resist school-sanctioned behaviors that are oppositional to their culture).

27. TABLE 209.10, NUMBER AND PERCENTAGE DISTRIBUTION OF TEACHERS IN PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOLS, BY SELECTED TEACHER CHARACTERISTICS: SELECTED YEARS, 1987-88 THROUGH 2011-12 (2013), https://nces.ed.gov/programs/digest/d15/tables/dt15_209.10.asp [hereinafter TABLE 209.10].

28. *Id.*

29. *The Color of Discipline*, *supra* note 26, at 335.

30. See *id.* at 338.

31. See Townsend, *supra* note 26, at 386 (suggesting methods by which teachers can minimize the effects of cultural differences in academic settings).

Further, public schools located in low-SES minority communities have a history of decreased access to routine and specialized treatment and intervention.³² Reduced access prevents early diagnosis and intervention of learning disorders, and it hinders the early specialized assessment and treatment of communication and cognitive disorders in minority students.³³ The National Association of State Directors of Special Education reported that a number of children with a documented disorder is steadily increasing at a rate almost three times faster than the overall general education student population.³⁴ Specifically, the number of students ages six to twenty-one, served under the Individuals with Disabilities Education Act (“IDEA”) – Part B, has increased over 51% in the last ten years explicitly in the area of Speech Language Impairments (“SLI”), which is a “primary” disorder.³⁵ IDEA stipulates the allowance of a free and appropriate public education in the least restrictive environment appropriate for a student’s needs.³⁶ IDEA is designed to: 1) provide an education that meets the unique learning requirements of children with special needs preparing them for further education, employment, and independent living; and 2) protect the rights of children with disabilities and their parents.³⁷

However, despite the increasing number of children served under IDEA, there are not enough speech and language pathologists (“SLPs”) to address the needs of the growing population of minority students experiencing language and learning disorders.³⁸ According to the American Speech-Language and Hearing Association Schools Survey, there is a shortage of

32. Nance, *supra* note 8, at 942-45.

33. See Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes*, 1136 ANNALS N.Y. ACAD. SCI. 243, 244 (2008), http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1002&context=psyed_fac (noting generally the link between poverty and low academic achievement).

34. *Telepractice and the Shortage of Speech Pathologists*, THERAPLATFORM (Feb. 13, 2017), <https://www.theraplatform.com/blog/236/telepractice-and-the-shortage-of-speech-pathologists>. [hereinafter *Telepractice*].

35. Christina A. Samuels, *Number of U.S. Students in Special Education Ticks Upward*, EDUC. WEEK (Apr. 19, 2016), <https://www.edweek.org/ew/articles/2016/04/20/number-of-us-students-in-special-education.html>.

36. See generally BOSER, *supra* note 23 (recognizing that local districts have flexibility in the methods they administer to identify students with disabilities leads to variations in state statistics).

37. See *id.* (explaining the goals of special education); OFF. OF SPECIAL EDUC. AND REHAB. SERVS., DEP’T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT XV (2016) [hereinafter 38TH ANNUAL REPORT].

38. See ELAINE CARLSON ET AL., DEP’T OF EDUC., STUDY OF PERSONNEL NEEDS IN SPECIAL EDUCATION: KEY FINDINGS 1 (2002).

SLPs available to treat language and learning disorders in schools, particularly in urban areas.³⁹ School districts with a poverty level of 21% to 38% have the largest number of speech-language pathology vacancies.⁴⁰ Title I administrators have reported that in low-SES communities there are not enough SLPs to “go around.”⁴¹ The limited availability of SLPs available to address the language and learning needs of minority students has resulted in an overload of minority students referred to special education for minimal impairments or disturbances, whom otherwise should receive intervention within the general education classroom. Therefore, many children run the risk of not receiving language and learning treatment intervention.⁴² As a result, minority students with untreated language and learning needs are disproportionately disciplined, which can result in suspension or expulsion from school.⁴³ Such absences ultimately result in denied access to their right to an equal, fair, and free education.

Students enrolled in special education, with undiagnosed and untreated language and learning disabilities, are increasingly entering the juvenile criminal justice system.⁴⁴ This is parallel to the increasing incarceration rates of young students arrested during school as result of zero-tolerance policy infractions. The representation of students who are identified within two categories—racial minorities and children with disabilities—have been disproportionately caught in the school-to-prison pipeline.⁴⁵ Historically, research has documented two specific correlations of minorities students in public schools who enter the school-to-prison pipeline: academic underachievement and over-disciplining.⁴⁶ Academic underachievement has

39. See generally GAIL BROOK, AM. SPEECH-LANGUAGE-HEARING ASS'N, SCHOOLS SURVEY REPORT: SLP CASELOAD CHARACTERISTICS TRENDS 1995–2016 1, 2-3 (2016) (finding that the median caseload for the surveyed SLPs was fifty students at a time).

40. See CARLSON ET AL., *supra* note 38, at 1 (noting that higher-poverty districts found insufficient salary and benefits to be a barrier to hiring qualified SLP applicants).

41. Sharon L. Bass, *Schools Cite Shortage of Speech Therapists*, N.Y. TIMES (Feb. 7, 1988), <https://www.nytimes.com/1988/02/07/nyregion/schools-cite-shortage-of-speech-therapists.html>.

42. See *id.*

43. See *The Color of Discipline*, *supra* note 26, at 335 (concluding that African American students are suspended from school at higher rates than white students).

44. CATHERINE Y. KIM & I. INDIA GERONIMO, AM. C.L. UNION, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS 9 (2009).

45. *Id.*

46. Frances P. Solari & Julienne E. M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second-Generation Race Discrimination in Public Schools*, 29 N.C. CTR. L.J. 147, 149-51 (2007) (concluding that minority students are disciplined at a statistically higher rate than their white peers).

been directly correlated to the school-to-prison pipeline because of its direct relevance to disciplinary actions.⁴⁷ Prior research has found that school suspensions increases the student's probability of entering the juvenile justice system, withdrawing from school, and the likelihood of being placed in lower-level classes.⁴⁸ This exhibits a plausible correlation between special education, discipline, race, and the juvenile justice system that is unexplainable on grounds other than race.⁴⁹ Therefore, addressing the subject of underachievement in a school setting secondary to the presence of untreated, undertreated, and undiagnosed language and learning disorders warrants a greater depth of examination. Additionally, the connection between incarceration; unaddressed language and learning disorders; academic underachievement; behavior; and disciplinary actions warrants a greater depth of examination as well.

II. ZERO TOLERANCE POLICY IN SCHOOLS

Zero tolerance policies were introduced to schools across the country at the end of the 1980s and early 1990s, with many schools bound by laws to enforce harsh penalties for drugs or weapons on campus.⁵⁰ These policies began with the Gun-Free Schools Act of 1994.⁵¹ This was a federal law that made it a requirement for a school receiving federal money to have a policy in place that assured that it suspend any student caught with a firearm on a school campus.⁵² The Gun-Free Act of 1994 was reauthorized in 2001 through the No Child Left Behind Act.⁵³ These federal policies opened the door for harsh punishments in schools, and while some schools only implemented harsh punishments for disciplinary actions pertaining to firearms on school grounds, others schools went beyond the policy by introducing zero tolerance rules and regulations in other areas.⁵⁴ For

47. See Libby Nelson & Dara Lind, *The School to Prison Pipeline, Explained*, JUST. POL'Y INST. (Feb. 24, 2015), <http://www.justicepolicy.org/news/8775> (finding that students who get suspended or expelled are more likely to repeat a grade).

48. Townsend, *supra* note 26, at 382.

49. See *id.*; *The Color of Discipline*, *supra* note 26, at 335.

50. See generally U.S.C. § 4601 (1986); 18 U.S.C. § 921 (1990); 20 U.S.C. § 5961 (1994); 20 U.S.C. § 2701 (1994); 20 U.S.C. § 7101 (1994); see also Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 92 NEW DIRECTIONS FOR YOUTH DEV. 17, 19 (2001) [hereinafter *Zero Tolerance*].

51. 20 U.S.C. § 7961 (1994).

52. *Zero Tolerance*, *supra* note 50, at 19.

53. 20 U.S.C. § 6301 (2001).

54. Francisco A. Villaruel & Christopher Dunbar, *Culture, Race and Zero Tolerance Policy: The Implications*, 6 J. OF FORENSIC PSYCHOL. PRAC. 53, 57 (2006) [hereinafter *Culture, Race and Zero Tolerance*].

example, some school districts included other weapons such as daggers, knives with blades (more than 3 inches in length), and brass knuckles in their zero-tolerance policies.⁵⁵ In addition to the inclusion of various weapons, some states' school districts expanded their zero-tolerance policies to include drugs and behaviors that have been labeled "problematic" (i.e., classroom disruption or insubordination).⁵⁶ Expansion of the original implementation of zero-tolerance policies across the United States has created added burdens that adversely affect African American school-age children and result in detrimental outcomes.⁵⁷ Zero tolerance policies criminalize childish behaviors through its rigid approach of harshly punishing students regardless of the type of in-school disciplinary action.⁵⁸ In dealing with students, the initial reaction to addressing school infractions should be rehabilitative rather than intolerant.

The various case studies below highlight instances where children were characterized as being involved in delinquent behaviors and penalized accordingly when other disciplinary means could have been sought:

Brief Case Study 1: The parents of a nine-year-old boy in New York were called because he was threatened with suspension for bringing a two inch LEGO police officer carrying an equally diminutive plastic gun.⁵⁹

Brief Case Study 2: A seven-year-old boy in New Jersey was charged with carrying an imitation gun onto school grounds. The charge was considered a criminal misdemeanor.⁶⁰

Brief Case Study 3: A sophomore in Texas was suspended from school for answering his cell phone when his dad called. His father was deployed in Iraq, and he had asked his mother to have his dad call when he could. Answering the phone violated the school's

55. Francisco A. Villaruel & Christopher Dunbar, *Urban School Leaders and The Implementation of Zero Tolerance Policy: An Examination of Its Implications*, 77 PEABODY J. OF EDUC. 82, 83 (2002) [hereinafter *Urban School Leaders*].

56. Robert Schwartz & Len Rieser, *Zero Tolerance as Mandatory Sentencing*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 126, 127-28 (William Ayers et al. eds., 2001).

57. *Culture, Race and Zero Tolerance*, *supra* note 54, at 55.

58. *Id.* at 57-58.

59. Carlin Miller, *Two-Inch LEGO Gun Gets 4th-Grader Patrick Timoney in Trouble; Where's the NRA?*, CBS NEWS (Feb. 4, 2010, 10:30 AM), <https://www.cbsnews.com/news/two-inch-lego-gun-gets-4th-grader-patrick-timoney-in-trouble-where-s-the-nra/>.

60. Teresa Masterson & David Chang, *Cops Charge 7-Year-Old for Bringing Toy Gun to Class*, NBC UNIVERSAL (Feb. 2, 2011, 3:27 PM), <https://www.nbcphiladelphia.com/news/local/Cops-Charge-7-Year-Old-for-Bringing-Toy-Gun-to-Class-115125844.html>.

zero-tolerance policy on cell phones.⁶¹

Brief Case Study 4: In New York, a twelve-year-old girl was arrested and escorted in handcuffs out of her school for doodling her name on her desk in erasable marker. The school admitted that handcuffing the girl was excessive, but still suspended her.⁶²

Brief Case Study 5: A six-year-old boy in Delaware was suspended for forty-five days because he brought his camping utensil—a combination spoon, fork, and knife—to school to eat his lunch. The school district has a zero-tolerance policy for knives on school grounds.⁶³

Brief Case Study 6: There are also documented cases of suspension and expulsion from schools for bringing aspirin, organic cough drops, nail files, paper clips, a model rocket, an inhaler for asthma, and a kitchen knife in a lunch box to cut chicken.⁶⁴

These case-studies highlight the real experiences that minority children face. Although zero tolerance policies have been around since the beginning of 1990, they have been joined by various additional forms of social control on school grounds.⁶⁵ In addition to zero tolerance policies, schools have not only begun using drug-sniffing dogs, private security detail, metal detectors, and surveillance cameras, but they have also increased the use of “school resource officers” who are usually officers on the local police departments’ payroll.⁶⁶ Zero-tolerance policies are similar to tough-on-crime policies that adopt severe disciplinary consequences for low-level incidents.⁶⁷

Similar to how criminal justice policies govern who is incarcerated and for what reasons, educational policies are dictating who is suspended or expelled from school campuses. Both, criminal justice and education policy,

61. *Texas School Suspends Student for Answering Call in Class from Dad in Iraq*, FOX NEWS (Apr. 12, 2008), <http://www.foxnews.com/story/2008/04/12/texas-school-suspends-student-for-answering-call-in-class-from-dad-in-iraq.html> [hereinafter *Texas School Suspends Student*].

62. Rachel Monahan, *Queens Girl Alexa Gonzalez Hauled out of School in Handcuffs After Getting Caught Doodling on Desk*, NY DAILY NEWS (Feb. 4, 2010, 11:57 PM), <http://www.nydailynews.com/new-york/education/queens-girl-hauled-school-handcuffs-caught-doodling-desk-article-1.194141>.

63. Ian Urbina, *It’s a Fork, It’s a Spoon, It’s a . . . Weapon?*, N.Y. TIMES, (Oct. 11, 2009), <http://www.nytimes.com/2009/10/12/education/12discipline.html>.

64. *Zero Tolerance*, in WEST’S ENCYC. OF AM. L., 454-55 (Jeffrey Lehman & Shirelle Phelps eds., 2d. ed. 2005) [hereinafter WEST’S ENCYC. OF AM. L.].

65. Meredith Bouchein, *School--to--Prison Pipeline: A Comparison in Discipline Policy Between Maryland and Texas Public Schools*, MD. EQUITY PROJECT 1, 10 (Aug. 2015), <https://education.umd.edu/file/8518/download?token=b-3-kszL>.

66. AARON KUPCHIK, *HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 2-3* (New York University Press 2010).

67. Solari & Balshaw, *supra* note 46, at 149.

disproportionately affect black and brown children more so than their white counterparts.⁶⁸ Zero tolerance policies lead to increased disparities in the experiences amongst black and white students within the same school districts.⁶⁹ For instance, in most Title I schools, the presence of school resource officers is larger than in schools primarily populated with white students.⁷⁰ Within Title I schools, resource officers arrest more minority students and commonly refer minority students to law enforcement and juvenile courts as a form of disciplinary action.⁷¹ This makes the probability of a minority student receiving a juvenile delinquency record much higher. This is secondary to the fact that even if the disciplinary action for the first offense was light, the discipline for the second offense is *likely* to be much harsher. Within that same vein, in the most severe form, school discipline regularly excludes minority students with language and learning disabilities from the general education classroom.⁷²

Despite that *Brown v. Board of Education* opened school doors for children of all colors, the zero-tolerance policy maintains separate and not equal doctrines through its use of in-school rules and guidelines that segregate low-SES minority students, especially those with language and learning disabilities.⁷³ Unfortunately, the combination of language and learning disorders creates a fertile opportunity for discriminatory practices to exist and feed students with disabilities into the criminal justice system.⁷⁴

This is done by way of educators and school officials enforcing subjective discipline under the guise of the zero-tolerance policy.⁷⁵

When disciplinary actions are subjective, educators and school officials have the free-will to differentiate atypical and typical behavior based on their individual perceptions.⁷⁶ In this respect, atypical behavior leads to disciplinary action where the authority may have insufficient cultural and pedagogical perspective to relate to the student's actions.⁷⁷ Educators and

68. Townsend, *supra* note 26, at 382.

69. *Id.*

70. Evie Blad & Alex Harwin, *Analysis Reveals Racial Disparities in School Arrests*, PBS NEWSHOUR (Feb. 27, 2017, 4:09PM), <http://www.pbs.org/newshour/updates/analysis-reveals-racial-disparities-school-arrests/>.

71. Nelson & Lind, *supra* note 47.

72. Amanda Petteruti, *Education Under Arrest: The Case Against Police in Schools*, 23 JUST. POL'Y INST. 1, 5 (Nov. 15, 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

73. *Zero Tolerance*, *supra* note 50, at 29.

74. KUPCHIK, *supra* note 66, at 174.

75. *Id.* at 174-175.

76. *Urban School Leaders*, *supra* note 55, at 84-85.

77. Townsend, *supra* note 26, at 383-384.

school officials lacking cultural competency or awareness of special education dynamics, increase the risk they will consider the behaviors of minority students with language and learning disabilities “atypical.”⁷⁸ When this occurs, African American students are more likely to be referred to special education, suspended, or expelled from school. Thus resulting in disciplinary decisions provided by educators and school officials whose justifications are subjective and not always culturally and pedagogically competent.⁷⁹ In these instances, the justification for the disciplinary action is usually a result of subjective offenses (e.g., disrespect), as compared to white students, who are likely to be suspended for objective reasons (e.g., smoking).⁸⁰ In turn, these subjective offenses eventually result in the perpetual referral of African American children with language and learning disorders to special education, detention centers, and, ultimately, into the criminal justice system.

III. SYMBOLIC RACISM: HARSH DISCIPLINARY LAWS IN LOW-SES TITLE I SCHOOLS

Few have questioned the role of symbolic racism in the school-to-prison pipeline phenomenon. Symbolic racism is one of the most prevalent forms of racism today.⁸¹ It is a construct that is silently targeting minorities through the belief that minority students no longer face prejudice or discrimination in the schools and that the failure of a minority student within the school systems and entry into the criminal justice system is a result of his or her own lack of motivation to work hard and willingness to be valuable citizens.⁸² This viewpoint has been shared by professionals within the school setting for over a decade. Scholar John Ogbu once stated, “[m]inorities have not developed a strong cultural ethic of hard work and perseverance in the pursuit of education.”⁸³ John McWhorter, a linguistics professor, was quoted stating that, “while there are some excellent black students . . . on the

78. *Id.*

79. *Zero Tolerance*, *supra* note 50, at 17, 31.

80. *The Color of Discipline*, *supra* note 26, at 334-35; *see generally*, Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 461, 472 (2008) (explaining how teachers perceive African American students to be more defiant).

81. Psychology Research and Reference, SYMBOLIC RACISM, IResearchNet.com, <https://psychology.iresearchnet.com/social-psychology/prejudice/symbolic-racism/> (last visited Sept. 5, 2017).

82. *Zero Tolerance*, *supra* note 50, at 29.

83. John U. Ogbu, *Minority Education in Comparative Perspective*, 59 J. OF NEGRO EDUC. 45, 53 (1990).

average, black students do not try as hard as other students. The reason . . . is not because they are inherently lazy . . . these students belong to a culture infected with an anti-intellectual strain, which . . . teaches them from birth not to embrace schoolwork.”⁸⁴ This perception of the African American student’s ability to succeed academically is grounded in symbolic racism.⁸⁵

More times than not, the student’s delinquent behaviors and frustration in class are related to unaddressed language and learning disorders and not to the subjective perception that African American students are defiant.⁸⁶ Students with language and learning disorders often act out in ways that manifest as juvenile delinquent behaviors because they are unduly pressured from the workload, teaching styles, and demands of the academic material.⁸⁷ When teachers, and other educational administrative staff, begin to experience this frustration, the default response is to refer the struggling student to special education or to suspend or expel them without addressing the underlying issue.⁸⁸ Special education continues to function in the space of a virulent epidemic for minority students, especially African American students with disabilities.⁸⁹

The silent presence of symbolic racism for African American students has become so prevalent that the lack of resources, interventions, and functional educational transition programs have resulted in untreated language and learning disorders. Consequently, the experience of African American students’ inclusion in special education can be considered an Adverse Childhood Experience (“ACE”).⁹⁰ The recognition of a language and learning disorder experienced by minorities as an ACE explains the increase

84. Lynell George, *Stirring up a Rage in Black America*, LA TIMES (Oct. 17, 2000), <http://articles.latimes.com/2000/oct/17/news/cl-37495>.

85. See *The Color of Discipline*, *supra* note 26, at 335-336 (explaining that teachers often accept stereotypes and overlook underlying issues).

86. See generally MCCORD ET AL., *supra* note 22, at 88-89 (describing how lower test scores lead to emotional responses).

87. Petteruti, *supra* note 72, at 23.

88. *Culture, Race and Zero Tolerance*, *supra* note 54, at 56.

89. See generally U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE, RESTRAINT, AND SECLUSION 1 (2014), <http://blogs.edweek.org/edweek/rulesforengagement/CRDC%20School%20Discipline%20Snapshot.pdf> (showing that minorities with learning disabilities are often put into special education).

90. See generally *Injury Prevention & Control*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://web.archive.org/web/20151227092712/http://www.cdc.gov/violenceprevention/acestudy/index.html> (last visited Mar. 9, 2018) (identifying the ACE study as one of the largest investigations into connecting the link between early childhood “maltreatment and later-life health and well-being”).

in minorities with disabilities within U.S. criminal justice system.⁹¹ Many of these students are have a three-strike barrier to success; being African American, experiencing a language and learning disorder, and attending a low-SES minority Title I school with limited resources.⁹²

African American students experience ACEs vastly different from their peers of other races.⁹³ An ACE is a conglomerate of adverse experiences an individual can experience during childhood that affects their quality of life.⁹⁴ When a student has experienced significant ACEs, it can affect academic performance, memory, and language development.⁹⁵ Children who “have experienced three or more ACEs” are six times more likely to have behavioral problems and four times more likely to experience academic failure.⁹⁶ African American students are disproportionately punished as compared to students of other races.⁹⁷ Also, children with disabilities are disproportionately suspended and expelled from school, even when teachers were aware of their ACEs.⁹⁸ Stuart Losen, a psychologist with specialization in the area of childhood disabilities, reported that suspensions for African American students with disabilities increase their likelihood of entering the criminal justice system.⁹⁹

Therefore, symbolic racism represents the belief that minorities,

91. See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 89, at 1-2 (showing that minority students with learning disabilities are punished at a much higher rate).

92. See Linda Darling-Hammond, *Inequality in Teaching and Schooling: How Opportunity is Rationed to Students of Color in America*, in THE RIGHT THING TO DO, THE SMART THING TO DO: ENHANCING DIVERSITY IN THE HEALTH PROFESSIONS 208, 344 (2001) (discussing how a minority student in a predominate minority school can also have an undetected learning disability).

93. See MCCORD ET AL., *supra* note 22, at 85, 92 (explaining how ACE’s such as neighborhoods have a greater effect on black children than white).

94. See generally *Injury Prevention & Control*, *supra* note 90 (finding certain adverse experiences are risk factors for illness, death, and poor quality of life).

95. *Id.*

96. CHRISTOPHER BLODGETT, WASH. STATE UNIV., NO SCHOOL ALONE: HOW COMMUNITY RISKS AND ASSETS CONTRIBUTE TO SCHOOL AND YOUTH SUCCESS 25 (2015), https://traumasensitiveschools.org/wp-content/uploads/2015/11/no_school_alone-Washington-State.pdf.

97. *The Color of Discipline*, *supra* note 26, at 332, 335, 338.

98. See generally TONY FABELO, BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE INVOLVEMENT 50 (2011) (showing statistics of 1 million Texas students supporting that minorities, even with ACE’s, are given disproportionate expulsions and suspensions).

99. Stuart M. Losen, *The Special Services Aide in the Schools: A New Approach to an Old Problem*, 7 PSYCHOL. IN THE SCH. 392, 392-396 (Oct. 1970).

specifically African Americans, are morally inferior to their white counterparts.¹⁰⁰ This theory of racism illustrates that African American students are subjectively disciplined for violating the traditional values set forth by white Americans.¹⁰¹ This is most evident in school systems where the disciplinary actions for minor infractions are harsher for minorities.¹⁰² Harsh disciplinary measures created in school systems affect minority students more than their counterparts of other races. Disciplinary measures range from suspension to expulsion. Since the early 1970s, suspension rates between African Americans and other races have continued to widen.¹⁰³

In essence, children today are more likely to be arrested for school-based infractions than compared to the past two decades.¹⁰⁴ The vast majority of these arrests have been for nonviolent offenses.¹⁰⁵ In most cases, the students are merely disruptive.¹⁰⁶ In addition, a recent United States Department of Education study found that more than 70% of students arrested in school-related incidents or referred to law enforcement were African American or Hispanic.¹⁰⁷ This disproportionate prevalence became persistent with the introduction of school resource officers. Between 1997 and 2007, the U.S. Department of Justice saw a 38% jump in school resource officers.¹⁰⁸ The Southern Poverty Law Center (“SPLC”) asserts that the surge in police officers on school campuses has led to children being “far more likely to be subject to school-based arrests.”¹⁰⁹ These arrests disproportionately impact students of color and “students with disabilities.”¹¹⁰

The majority of African American students in special education have received referrals because of disciplinary infractions that have occurred in class, resulting from an unaddressed concomitant language and learning behavior. These students, with learning and language disabilities, are not

100. Psychology Research and Reference, *Symbolic Racism*, IResearchNet.com, <https://psychology.iresearchnet.com/social-psychology/prejudice/symbolic-racism/> (last visited Sept. 5, 2017).

101. *Id.*

102. *The Color of Discipline*, *supra* note 26, at 332.

103. Losen, *supra* note 99, at 393-95.

104. *Police Presence in Schools*, AM. C.L. UNION, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/police-presence-schools> (last visited Mar. 9, 2018).

105. Marilyn Elias, *The School-to-Prison Pipeline*, TEACHING TOLERANCE (2013), <https://www.tolerance.org/magazine/spring-2013/the-schooltoprison-pipeline>.

106. *Id.*

107. *Id.*

108. Petteruti, *supra* note 72, at 1.

109. Elias, *supra* note 105.

110. *Id.*

entirely capable of speaking and advocating for themselves, which makes them more susceptible to harsh disciplinary rules.

African American students are predicted to be 3.5 times more likely to be suspended or expelled than their white peers.¹¹¹ Approximately one in every four African American student with disabilities will be suspended at least once.¹¹² African American students make up 48% of all children who are suspended more than once.¹¹³ Additionally, 35% of African American students in grades seven through twelve were suspended or expelled from school at some point during the school year as compared to 15% of white students.¹¹⁴ Suspensions caused by harsh school disciplinary actions result in a 49% chance of a student dropping out if they are suspended at least twice.¹¹⁵ Conversely, drop-out rates have a correlation to juvenile and criminal justice interactions.

African American students make up 26% of all juvenile arrests, 46% of all youth sent to criminal court, and 58% percent of all youth sent to state prisons.¹¹⁶ In 2013, 73% percent of all arrests were of African Americans, and 87% percent of those arrests were for non-violent offenses.¹¹⁷ Research has indicated that for students with disabilities, these harsh laws can affect their ability to learn.¹¹⁸ Although students with disabilities make up a mere 12% of public school populations, within the juvenile detention centers, they make up more than 25% of the overall population.¹¹⁹ This is exacerbated

111. See generally U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 89, at 1, 3.

112. *Id.* at 4.

113. Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html>.

114. *Id.*

115. All Things Considered, *Why Some Schools Want to Expel Suspensions*, NAT'L PUB. RADIO (June 2, 2013, 5:36 PM), <http://www.npr.org/2013/06/02/188125079/why-some-schools-want-to-expel-suspensions>.

116. *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited Apr. 28, 2018).

117. *Unbalanced Youth Justice*, THE W. HAYWOOD BURNS INST. FOR JUV. FAIRNESS AND EQUITY, <http://data.burnsinstitute.org/#comparison=3&placement=3&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2013&view=map> (last visited Apr. 28, 2018).

118. *Id.*

119. N.Y. CIVIL LIBERTIES UNION, ZERO TOLERANCE DISCIPLINE, DISCRIMINATION, AND THE SCHOOL TO PRISON PIPELINE 2 (2007), https://www.nyclu.org/sites/default/files/publications/nyclu_school_to_prison_2007.pdf.

exponentially when the student is a minority.¹²⁰

Students with disabilities receive harsh punishments that violate their constitutional and human rights of protection against arbitrary arrests and detentions.¹²¹ Arbitrary arrests are those that occur without a legal basis or where the arrest is not a reasonable or appropriate act in the circumstances. This can be seen in instances where students are disciplined for discriminatory reasons and without a reasonable and substantial cause.¹²²

Zero tolerance policies, which set one-size-fits-all punishments for a variety of behaviors, have fed these instances.¹²³ Further, policies that encourage police presence and drastic disciplinary enforcement schools—such as harsh tactics for using physical restraint and automatic suspensions and out-of-class time—contribute significantly to the pipeline; however, the problem is complicated.¹²⁴ The school-to-prison pipeline can start, and be best avoided, in the classroom.¹²⁵ When combined with zero-tolerance policies, a teacher’s decision to refer students for punishment can push students out of the classroom, ultimately, making these students more likely to be introduced into the criminal justice system.¹²⁶ The SPLC advocates to end the school-to-prison pipeline and they have filed various lawsuits and civil rights complaints against districts with punitive discipline practices that have discriminatory impacts.¹²⁷

The presence of police on campuses interferes with maintaining a free and safe student environment and, thus, provides ample opportunity for physical

120. *See id.* (finding that “[b]lack students with learning disabilities are three times more likely to be suspended than white students with learning disabilities and four times more likely to end up in correctional facilities”).

121. *Compare* Human Rights Declaration, 9, UNITED NATIONS CYBERSCHOOLBUS, <https://web.archive.org/web/20070717235004/http://www0.un.org/cyberschoolbus/humanrights/declaration/9.asp> (last visited Mar. 10, 2018) (quoting Universal Declaration of Human Rights Art. 9, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948)), *with* U.S. CONST. amend. IV (protecting against “unreasonable” searches and seizures).

122. *See* Human Rights Declaration, *supra* note 121 (describing the right to not be subject to arbitrary arrest, detention, or exile).

123. *Urban School Leaders*, *supra* note 55, at 86 (2002).

124. KIM & GERONIMO, *supra* note 44, at 26 (mentioning that experts are forming a consensus that non-punitive approaches to discipline, such as conflict resolution, may reduce misconduct more than punitive actions).

125. *See id.* at 10-11 (explaining that zero tolerance policies that require arrests negatively impact both students that are arrested and students that witness such arrests).

126. *See id.* at 10 (elaborating that zero tolerance policies that require arrest make students more likely to quit school).

127. ‘*Children’s Rights*, S. POVERTY L. CTR., <https://www.splcenter.org/issues/childrens-rights> (last visited Mar. 9, 2018).

“evidence” of misconduct to be utilized to incriminate a student on school premises. Accordingly, during the process of arrests secondary to disciplinary action, when students with language and learning disorders are presented with threatening accusations that they committed a crime, a multitude of constitutional rights may be violated.¹²⁸ These instances reflect a disconnect in the level of communication from the disciplinarian to the student who has a low level of comprehension and cognition. Additionally, not all students have the explicit understanding that 1) they have a Fourth Amendment right to remain silent when arrested, 2) there are consequences for choosing to speak once those rights have been explained, 3) they are not required to answer questions without the presence of their attorney and parent present when they are under aged minors, and 4) they cannot be unfairly detained.¹²⁹ The United States Supreme Court ruling in *Goss v. Lopez* stated that students were entitled to due process when threatened with either suspension or expulsion.¹³⁰ The Supreme Court requires that schools provide a written notice and some sort of hearing prior to suspending a student.¹³¹ Nonetheless, authorities may bypass these requirements if the student does not promptly evoke them, disadvantaging students with language and learning skill deficiencies that affect their ability to comprehend these rights.¹³²

Policies, such as the zero-tolerance policy, are ineffective and unfair methods of discipline. These harsh disciplinary policies that disproportionately affect African American students and students with disabilities create a school environment more similar to prison than a learning community.¹³³ These policies, as applied, mentally and physically condition African American students to behave criminally and have created

128. *Id.*

129. See Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment*, 70 TENN. L. REV. 987, 988 (2003) (explaining the Fifth Amendment has been incorrectly relegated to being only a trial right, and that the framers intended to prevent compulsion itself and not simply its “fruits”).

130. See *Goss v. Lopez*, 419 U.S. 565, 576, 579 (1975).

131. See *id.* at 568-72, 579 (detailing how the ten-day out-of-school suspensions that nine students received, without formal hearings, violated the students’ rights).

132. Nancy A. Heitzeg, *Race, Class and Legal Risk in the United States: Youth of Color and Colluding Systems of Social Control*, F. ON PUB. POL’Y 1, 1 (2009) [hereinafter *Race, Class and Legal Risk*]. See Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways and the School to Prison Pipeline*, in FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 27 (Anthony J. Nocella II et al. eds., 2014) [hereinafter *Criminalizing Education*] (arguing that vagueness and inconsistency in application plague due process expectations in cases of school discipline).’

133. *Criminalizing Education*, *supra* note 132, at 12.

a system in which students suspended or expelled as a result of harsh disciplinary punishments are three times more likely to enter the juvenile system within a year.¹³⁴ These statistics are alarming for students with learning and language disabilities because they highlight how special education is the virulent epidemic that feeds the school-to-prison pipeline.¹³⁵ Children who require special education receive the harshest in-school and out-of-school punishments rather than being referred to the services they require to succeed.¹³⁶ Therefore, safeguards, such as due process laws, have been put in place for screening committees to avoid unfair or mistaken exclusion from the educational process.¹³⁷ On this matter, the Supreme Court of the United States wrote:

The concern would be mostly academic if the disciplinary process were an accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinary actions, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the . . . facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.¹³⁸

Screening Committees are of great importance when dealing with students that have learning and language disabilities secondary to the assurance that they are not receiving unfair or rigid exclusion from the educational process (especially important for majority of African American children).¹³⁹ Screening Committees are set up to protect the children.¹⁴⁰ It is within these committees that children have the opportunity to have the rights and protections afforded to them by the U.S. Constitution recognized.¹⁴¹

Many African American children and their families are not provided with due process procedures to have their circumstances heard and tried in court.¹⁴² In fact, many of these children and their families have never received written explanation of the charges against them.¹⁴³

134. *See id.*

135. *See id.* at 19-20.

136. *See id.* at 19-20, 27.

137. RICHARD LAWRENCE, SCHOOL CRIME AND JUVENILE JUSTICE 142-169 (1d ed. 1998).

138. *Id.* at 175

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

IV. THE SCHOOL-TO-PRISON PIPELINE: PUNISHMENT POLICY IN SCHOOLS

The school-to-prison pipeline is a phenomenon, which argues that aggressively harsh rules, security enhancements, and penalties for schools in low-SES communities lay the foundation for future criminal activity and subsequent incarceration.¹⁴⁴ Minority-serving schools are training students to become comfortable with and accept extremely high levels of social control that often lead students down a pathway to suspension or expulsion; this is the first stage in the school-to-prison pipeline.¹⁴⁵ According to the American Civil Liberties Union (“ACLU”), these harsh policies are described as impacting minority children who are disproportionately affected by ACEs, including but not limited to: learning disabilities; histories of poverty; and abuse and neglect within their families and communities.¹⁴⁶ These vulnerable students are among a national trend of black children who have been “funneled out of public school” environments into a vicious and cyclical pipeline straight “into the juvenile and criminal justice systems.”¹⁴⁷ The ACLU further asserts: “[m]any of these children have learning disabilities . . . and would benefit from additional educational and counseling services. Instead, they are isolated, punished, and pushed out.”¹⁴⁸

For example, a study conducted in Missouri found that out-of-school suspensions were racially unbalanced and led to the overrepresentation of African American youth in the juvenile justice system through a disproportionate number of referrals.¹⁴⁹ In other words, low-achieving African American children have become targets in their schools, with suspensions leading them to become potential detainees and inmates in the juvenile and criminal justice systems, respectively.¹⁵⁰ African American children deserve the right to be adequately educated, like their peers of other races. Affording them the chance to avoid incarceration.

144. N.Y. CIVIL LIBERTIES UNION, *supra* note 119, at 1.

145. *See id.* at 1-2.

146. *See Police Presence in Schools*, *supra* note 104.

147. *See School-to-Prison Pipeline*, AM. C.L. UNION, <https://www.aclu.org/issues/racial-justice/race-and-inequality-education/school-prison-pipeline> (last visited Apr. 28, 2018).

148. *See id.*

149. *See* Sean Nicholoso-Crotty et al., *Exploring the Impact of School Discipline on Racial Disproportion in the Juvenile Justice System*, 90 SOC. SCI. Q. 1003, 1015-16 (2009).

150. *Id.* at 1003-04, 1015-16.

V. THE CORRELATION BETWEEN SPECIAL EDUCATION AND THE
CRIMINAL JUSTICE SYSTEM

The criminal justice referral pipeline for African American students with disabilities begins in pre-school.¹⁵¹ Research has indicated that 48% of African American preschoolers were suspended more than once.¹⁵² Further, five-year-old boys of incarcerated parents were identified as being substantially less behaviorally ready for school than five-years-olds of non-incarcerated parents—making them more likely to be identified and transitioned into special education classes for behavioral disabilities.¹⁵³ Although the federal government mandates that students with disabilities must receive a free appropriate public education via the Individuals with Disabilities Education Improvement Act (“IDEA”), the resources to adequately abide by this law are scarce.¹⁵⁴ This is particularly true for predominantly low-SES minority public schools.¹⁵⁵ Despite the inclusive wording of IDEA, for all children with disabilities regardless of race, ethnicity, or culture, the school-to-prison pipeline is facilitated by trends in education that primarily impact low-SES students of color.¹⁵⁶ Trends like harsher zero-tolerance policies in predominantly low-SES schools, increased prevalence of African American students in special-education, and disproportionate disciplinary rates for African American students.¹⁵⁷ Consequently allowing school systems to discriminate by segregating students by ability and inferred disability and yielding implications of symbolic racism.¹⁵⁸

The apparent correlation between race and discriminatory discipline is the result of the differences in race of teacher and student, and social-economic status of the student affecting the school they attend.¹⁵⁹ The racial disparity in educational achievement is most prevalent in low-SES communities with

151. See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 89, at 1, 7.

152. *Id.* at 7.

153. See Dara Lind, *Boys with Incarcerated Fathers Are Screwed before They Even Get to School*, VOX (April 24, 2014, 3:40 PM), <https://www.vox.com/2014/4/24/5647660/boys-incarcerated-fathers-school-behavior-prison-pipeline>.

154. See Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1412(a)(1) (2017); *Criminalizing Education*, *supra* note 132, at 27.

155. See *Criminalizing Education*, *supra* note 132, at 19-20, 27.

156. See 20 U.S.C. § 1418; *Id.*

157. See N.Y. CIVIL LIBERTIES UNION, *supra* note 119, at 1.

158. See *Criminalizing Education*, *supra* note 132, at 19-20.

159. See Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 19 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/>.

students who attend Title I schools.¹⁶⁰ Title I schools receive additional financial assistance under the Elementary and Secondary Education Act to ensure children meet state educational standards because the schools are predominantly populated with low-SES minority students.¹⁶¹ This creates a pattern of shifting students from school to suspension and expulsion, then to the streets, to crime, and ultimately to the criminal justice system.

Excluding students from general education and referring them to ill-equipped or under-resourced special education settings where functional and culturally appropriate intervention is limited can result in future interaction with the juvenile justice system because these students; 1) miss a critical window for effective and proactive treatment and 2) are not adequately prepared socially, emotionally, or academically.¹⁶² Teachers and school administrators tend to identify the disruptive behavior of white students as a need for medical intervention and do not administer zero tolerance discipline.¹⁶³ Whereas, when the student is African American, the disruptive behavior is identified as being defiant, disrespectful, or even insubordinate and is perceived as necessitating zero-tolerance discipline.¹⁶⁴ African American and white students' successes, failures, resources, infractions, and severity of punishments is important to highlight because it is where the most concrete evidence of disproportionality resides.¹⁶⁵ Here, we argue that African American youth are disproportionately placed into special education programs that work in conjunction with zero tolerance policies and fuel the school-to-prison pipeline. It is evident that there is a connection between a student's status as being disruptive, having special education needs, and their inevitable entrance into the juvenile and criminal justice systems.

Available data on student populations and disciplinary actions taken on students of different races is proof of the inconsistent application of harsh disciplinary measures on students of color with disabilities.¹⁶⁶ Statistically,

160. *See id.*

161. Elementary and Secondary Education Act, 20 U.S.C. §§ 6301-6304 (2017).

162. Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, THE HECHINGER REP. (2014), <http://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/>.

163. *Race, Class and Legal Risk*, *supra* note 132, at 19; *Criminalizing Education*, *supra* note 132, at 24.

164. *See Criminalizing Education*, *supra* note 132, at 23-24.

165. *See id.*

166. KIM & GERONIMO, *supra* note 44, at 9 (noting that Black youth in Florida made up 47% of "school-based delinquency referrals" yet only represented 22% of the overall juvenile population, while youths with special needs made up 23% of all school-based referrals).

minority students are punished at higher rates than their white peers.¹⁶⁷

VI. CORPORAL PUNISHMENT IN SCHOOLS: ARE BLACK CHILDREN STILL BEING SPANKED IN CLASSROOMS?

Currently, corporal punishment has been banned in thirty-one states; however, nineteen states still allow corporal punishment in schools.¹⁶⁸ These nineteen states allow school districts to make policies that include spanking as a punishment option.¹⁶⁹ There are no strict rules related to corporal punishment in schools; rather, there are loose guidelines.¹⁷⁰ These guidelines serve to determine the specific number of times a student will be paddled in a single spanking.¹⁷¹ Additionally, many of these states do not require that parents be notified before their child is spanked at school.¹⁷² Furthermore, if a parent has requested that their child not be spanked, and the spanking occurs anyway, the parent has no legal standing to sue the school.¹⁷³

Corporal punishment in schools is very troubling in its own right but it is also used more frequently to punish African American students. Throughout the country, African American students are punished at a higher rate and are at greater risk for receiving corporal punishment than white students.¹⁷⁴ As far back as “1976, 29% of youth who were spanked in school were black,” and this percentage reached up to 39% in the 1990s.¹⁷⁵

167. *See id.*

168. Valerie Strauss, *19 States Still Allow Corporal Punishment in School*, WASH. POST (Sept. 18, 2014), https://www.washingtonpost.com/news/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school/?utm_term=.26f41ebcc82c (noting some of the states that still allow corporal punishment in schools including Alabama, Arkansas, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee and Texas).

169. Talk of the Nation, *Corporal Punishment in Schools: Does it Work?*, NAT'L PUB. RADIO (Sept. 11, 2012, 1:00 PM), <http://www.npr.org/2012/09/11/160952356/corporal-punishment-in-schools-does-it-work>.

170. *See id.* (commenting that, in Florida, school officials may use corporal punishment against a parent's wishes).

171. *See id.*

172. *See id.*

173. *See id.* (outlining an exception for excessive force or cruel and unusual punishment claims).

174. *See* ELIZABETH T. GERSHOFF & SARAH A. FONT, CORPORAL PUNISHMENT IN U.S. PUBLIC SCHOOLS: PREVALENCE, DISPARITIES IN USE, AND STATUS IN STATE AND FEDERAL POLICY, 30 SOCIAL POLICY REPORT 9 (2016) (explaining that the racial disparities found in application of corporal punishment are similar to those found in application of expulsions and suspensions).

175. *See* KRISTIN A. BATES & RICHELLE S. SWAN, JUVENILE DELINQUENCY IN A DIVERSE SOCIETY 239 (2d ed., 2017).

Spanking in schools in the twenty-first century is unacceptable. No child should be subjected to such treatment. This zero tolerance approach allows for an open disregard for the physical and social welfare of African American youth in classrooms.¹⁷⁶ Spanking gives the school more disciplinary power than that of a legal guardian or biological parent because schools are more attenuated from liability, save for cruel and unusual punishment or unnecessary force.¹⁷⁷ Even at a time when parents, in all states, have only a limited right to spank their children at home, educational personnel are still getting away with spanking children at school.¹⁷⁸ With children spending most of their days in school, the rules that govern school environments supersede the rules of the home. The school-to-prison pipeline, which has been facilitated by a zero-tolerance framework, sets the stage for further disadvantaging minority students by using corporal punishment.

VII. CONCLUSION: RECOMMENDATIONS FOR REDUCTION OF HARSH POLICY DISPROPORTIONALITY

Zero tolerance policies enforced in schools across forty-one states encourage subjective enforcement despite their objective appearance.¹⁷⁹ There are many concerns about the legality of the subjectivity of the zero tolerance policies in schools such as:

1. The lack of efficient due process procedures for students being charged with major infractions for minor incidences.¹⁸⁰
2. Harsh disciplinary action for harmless, general conduct.¹⁸¹

176. See Dan Frosch, *Schools Under Pressure to Spare the Rod Forever*, N.Y. TIMES: EDUCATION (March 29, 2011), <http://www.nytimes.com/2011/03/28/education/30paddle.html>.

177. See Talk of the Nation, *supra* note 169.

178. See Ave Mince-Didier, *Criminal Consequences of Spanking Your Children*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-offense/charges-that-can-be-brought-up-for-spanking-you> (last visited on Mar. 10, 2018) (discussing the unclear line between child abuse and legal spanking that parents must take note of to prevent Child Protective Services intervention).

179. See generally Russell Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations: A Report by the American Psychological Association Zero Tolerance Task Force*, 63 AM. PSYCHOL. ASS'N 852, 854, 856 (2008) [hereinafter *Zero Tolerance Policies Effective*].

180. Russell J. Skiba et al., *African-American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1080-82 (2009) [hereinafter *African-American Disproportionality*] (explaining that school officials can easily take away students' due process rights by "merely . . . employ[ing]" fair procedures to handle violations of school rules).

181. See Solari & Balshaw, *supra* note 46, at 149 (observing that zero tolerance policies place harsh punishments on harmless or minor disruptions).

Further, these zero tolerance policies negatively impact students with disabilities and disregard students' right to an education that meets their unique learning needs under IDEA by depriving students of much-needed services and punishing students for behaviors that are manifestations of their disabilities. Students of color, particularly those with language and learning disabilities, are increasingly subjected to legal consequences through the inequalities posed by zero tolerance policies.¹⁸² Zero tolerance policies negatively impact the constitutional rights of minority students with language and learning disorders.¹⁸³ For that reason, zero tolerance policies, referrals to juvenile systems, and placement in special education classes secondary to behavior could be deemed unconstitutional under the Fourteenth Amendment and could violate IDEA.

Due to the statutory vagueness of zero tolerance policies, creating distinctions and consistent processes for disciplinary violations, definitions, and actions at the state and local school district levels would be beneficial. Current zero-tolerance policies do not clearly distinguish between students who are intentionally being disruptive, disrespectful, or subordinate, and those who are experiencing cognitive, behavioral, and communication disorders.¹⁸⁴ The majority of referrals to place students in special education classrooms; exclude them from classes; send them to the juvenile justice system; or punish them under perceived violations of school and district policies, are subjectively enforced by teachers and school administrators without distinguishing between intention and disorder.¹⁸⁵ We recommend that school districts revise disciplinary policies and procedures to provide more objective approaches for suspensions, expulsions, and referrals to special education classes and the juvenile justice system.

Several factors such as systemic biases, disproportionate African American student representation in special education, and subjective zero-tolerance policies play a role in the racial and ethnic disproportionality and disparities in school disciplining.¹⁸⁶ These policies have transformed schools into pipelines to the juvenile justice system. The increase in criminal charges filed against juveniles for in-school behaviors is reported as one of the most detrimental results of the zero tolerance policies. Abandoning zero tolerance policies can assist the current disproportional impact on students of color and students with disabilities and the school-to-prison pipeline. Instead of

182. *Criminalizing Education*, *supra* note 132, at 12.

183. *See id.* at 27-28.

184. *Id.* at 21.

185. *See African-American Disproportionality*, *supra* note 180, at 1072-73 (explaining how American schools adopted the British concept of *loco parentis*, which gives the schools some of the same rights as parents).

186. Solari & Balshaw, *supra* note 46, at 150.

applying such strict consequences, school districts should address the root of students' behaviors by providing services, particularly for students with disabilities and African American students. Districts should not involve police or resource officers when the infraction from students with disabilities are minor or nonviolent as it goes against the rights discussed in IDEIA, and disregards due process.

Even when a student with disabilities is expelled from school, the school district is mandated to continue to provide special education services to the student.¹⁸⁷ Although this is expected, the continuous provision of special education services are not consistently practiced once the student receives an infraction from school resource officers, who have referred the student to the juvenile justice system.¹⁸⁸ Referrals to the juvenile justice system based on zero tolerance policies create a funnel into the criminal justice system for students.¹⁸⁹ There should be no referral to special education or the criminal justice system before due diligence has been done to address the areas of concern and behaviors with therapeutic intervention. Schools should work on eliminating harsh disciplinary policies, enforcing response to intervention within the general education classroom, and creating restorative justice programs that focus on building relationships and understanding among students, administrators, and teachers.¹⁹⁰ Lastly, but equally as important, cultural competence training to assist staff in understanding minority students with disabilities should be increased and consistent within school systems.

In the book titled *Homeroom Security*, Kupchik examines discipline in American schools and argues that the tough on crime rhetoric utilized in the criminal justice system should not be incorporated as a method to addressing untreated behavioral, language and learning disorders that affect African American students, thereby tracking them into juvenile detention facilities and perpetuating the school-to-prison pipeline silent epidemic.¹⁹¹

In conclusion, zero tolerance policies are counterproductive, and the use of hyper-security and intolerance has dire effects on African American school children. More specifically, it has significant negative effects on African American students with language and learning disorders. Zero

187. See *African-American Disproportionality*, *supra* note 180, at 1082-83.

188. See *Criminalizing Education*, *supra* note 132, at 24 (concluding that many states have no real guidelines for due process, which leads to inconsistent disciplinary practices).

189. See *id.* at 21.

190. See Nelson & Lind, *supra* note 47 (describing how several districts have taken steps to move away from disciplinary actions that involve suspension or police action).

191. See generally KUPCHIK, *supra* note 66, at 5-9.

tolerance policies, and a lack of understanding of the aforementioned reasons, assist in making the journey from the schools to the prisons more likely for minority students with language and learning disorders enrolled in low-SES Title I school districts.