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Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools

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On February 1, 2010 school safety officers arrested twelve-year-old Alexa Gonzalez in front of her classmates and teachers.¹ What did she do wrong? While waiting for her Junior High School Spanish teacher to distribute homework assignments, Alexa doodled on her desk with an erasable marker, “I love my friends Abby and Faith. Lex was here. 2/1/10.”² She finished the doodle with a smiley face. In response, school safety officers from the New York City Police Department (NYPD) pulled Alexa out of school in handcuffs.³

What happened to Alexa, unfortunately, is not an isolated incident, but part of a national pattern of schools relying on exclusionary discipline, police tactics, and criminal punishments to address even the slightest kind of misbehavior by students. In the 1990s, federal, state, and local policymakers began to institute tough disciplinary and safety policies mandating that schools respond to student misconduct through suspensions and arrests. While such zero tolerance policies first focused on situations involving drug or gun possession, they soon expanded to all types of student misbehavior. As a result, schools, and the newly stationed police forces within them, began to increasingly rely on student removals and referrals to the juvenile and criminal justice systems to handle school disciplinary problems, including for non-dangerous and non-criminal offenses. This took place despite data that indicated that violence in the schools was actually decreasing, and despite the growing evidence of the ineffectiveness and harmful impact of student suspensions and arrests on the entire school community.

Similar to this national trend, and sometimes serving as a model for the nation, New York City schools have increased their reliance on police personnel and zero tolerance policies to maintain safety in schools. As a result, New York City schools are now patrolled on a daily basis by the fifth largest police force in the nation, and every day in New York City schools, students are stopped, searched, summonsed, or arrested by poorly trained and inadequately supervised police personnel. Moreover, the number of suspensions handed down on an annual basis has increased by 132% under Mayor Michael R. Bloomberg.⁴ Children of color from low-income families have borne the brunt of both of these practices.⁵

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1. Rachel Monahan, *Queens Girl Alexa Gonzalez Gets Hauled out of School in Handcuffs After Getting Caught for Doodling on a Desk*, N.Y. DAILY NEWS, Feb. 5, 2010, available at http://articles.nydailynews.com/2010-02-05/local/27055388_1_desk-doodling-handcuffs; Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN (Feb. 18, 2010), http://articles.cnn.com/2010-02-18/justice/new.york.doodle.arrest_1_zero-tolerance-schools-police-precinct?_s=PM:CRIME; Edecio Martinez, *NYC Middle Schooler Alexa Gonzalez Arrested, Handcuffed. . . for Doodling!*, CBS NEWS (Feb. 8, 2010, 6:30 AM), http://www.cbsnews.com/8301-504083_162-6173466-504083.html.
 2. Monahan, *supra* note 1; Chen, *supra* note 1; Martinez, *supra* note 1.
 3. Monahan, *supra* note 1; Chen, *supra* note 1; Martinez, *supra* note 1.
 4. JOHANNA MILLER, UDI OFER, ALEXANDER ARTZ, TARA BAHL, TARA FOSTER, DEINYA PHENIX, NICK SHEEHAN & HOLLY A. THOMAS, NYCLU AND STUDENT SAFTY COAL., EDUCATION INTERRUPTED: THE GROWING USE OF SUSPENSIONS IN NEW YORK CITY'S PUBLIC SCHOOLS 15 (2011) [hereinafter NYCLU SUSPENSIONS REPORT].
 5. See ELORA MUKHERJEE, NYCLU & ACLU, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS (2007) [hereinafter CRIMINALIZING THE CLASSROOM REPORT]; *see also*

While an orderly and safe classroom is vital for an adequate learning environment for both children and educators, the goal of a safe school should not be synonymous with stacking the halls with police personnel and doling out excessive punishments. On the contrary, the goal of safety should complement and enhance the overarching purpose of a school: to provide all students with a quality education. Yet this right is all too often threatened by overzealous policies that rely on gut reactions rather than evidence-driven solutions.

The growing reliance by schools on policing tactics and exclusionary discipline to address misbehavior on its own raises significant concerns. But it is even more disconcerting given the availability of proven alternatives to securing the school environment that avoid the collateral consequences resulting from arrests and school removals. Positive behavioral interventions and supports, restorative justice practices, and other common-sense alternatives have been proven to reduce misbehavior and lead to greater educational achievements. Yet current safety and discipline practices in many of the nation's schools, including in its largest school district, New York City, largely ignore such alternatives and instead continue to rely on police tactics and exclusionary discipline to maintain safety.

Part I of this article reviews the growth of zero tolerance policies in our nation's schools. Part II chronicles the growth of policing and suspension practices in New York City, and documents the ways in which Mayor Bloomberg has greatly expanded on policies first implemented by Mayor Rudolph Giuliani to rely on law enforcement tactics and exclusionary discipline to address student misbehavior. Part III provides a critique of zero tolerance policies and documents the ineffectiveness of these measures, including the contribution to a negative school climate. Part IV provides numerous examples of schools replacing zero tolerance policies with graduated systems of discipline that recognize early intervention and moderate responses to misbehavior. The article concludes with a set of recommendations.

I. NATIONAL GROWTH OF ZERO TOLERANCE IN SCHOOLS

In the late 1980s, school districts began to adopt zero tolerance policies to address drug and gang problems.⁶ In the 1994 reauthorization of the Elementary and Secondary Education Act of 1965, Congress passed the Gun-Free Schools Act, which required that states that receive federal education funding adopt laws that mandate a

NYCLU SUSPENSIONS REPORT, *supra* note 4.

6. RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS'N, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS?: AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 23 (2006) [hereinafter APA REPORT]. The use of severe and mandatory punishments to address socially unacceptable behavior, including unlawful behavior, did not originate in the school context. In the 1980s, federal drug law policy began to adopt a zero tolerance approach to address the sale and distribution of drugs. See "Zero Tolerance" Drug Policy and Confiscation of Property: Hearing before the Subcomm. on Coast Guard & Navigation of the H. Comm. on Merch. Marine & Fisheries, 100th Cong. 3 (1988) (statement of Hon. Earl Hutto, Chairman, Subcomm. on Coast Guard and Navigation) (Republican and Democratic lawmakers criticizing the unfair consequences of the administration's zero tolerance policy to seize vessels found with even the smallest amount of drugs); see also RUSSELL SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (2000) [hereinafter ZERO TOLERANCE, ZERO EVIDENCE].

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one-year expulsion and referral to the criminal or juvenile justice system of any student who brings a weapon to school.⁷ The law permitted some flexibility by mandating that the same state laws authorize each local educational agency to modify the expulsion mandate on a case-by-case basis.⁸ Passage of the Gun-Free Schools Act signaled an important validation of zero tolerance school discipline practices by the federal government,⁹ and school districts throughout the nation reacted by adopting policies not only to address weapon possession but general misbehavior as well.

While the movement towards adoption of zero tolerance policies was gaining traction, a national tragedy took place that secured the proliferation of such policies in school districts. On April 20, 1999, two students at Columbine High School in Colorado killed twelve students and one teacher and injured twenty-three others in school.¹⁰ The tragic incident increased pressure on school districts throughout the nation to implement tough security measures as parents and policymakers were left with the wrongful impression that school violence was out-of-control.¹¹

While there are few systemic studies about the current prevalence of zero tolerance policies across the nation, such policies appear to be the norm in schools, both according to the few studies that have been published and to the prevalence of news stories about the consequences of such policies.¹² Stories of the extreme application of zero tolerance now appear regularly in the media, including stories of children getting

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7. Improving America's Schools Act of 1994, Pub. L. No. 103382, 108 Stat. 3518, §§ 14601–603 (codified as amended in 20 U.S.C. § 8921); *see also* Gun-Free Schools Act, 20 U.S.C. § 7151 (2006).
 8. 20 U.S.C. § 7151(b)(1).
 9. Speaking on the one-year anniversary of passage of the Act, President Clinton said, "Today, almost one year after I signed the Gun-Free Schools Act, I'm very pleased to announce that our message of zero tolerance has been made a reality around the country." Presidential Statement on the Gun Free Schools Act, 31 WEEKLY COMP. PRES. DOC. 1944 (Oct. 26, 1995), *available at* <http://www.govrecords.org/pd30oc95-message-to-the-congress-on-sanctions-against-15.html>.
 10. *See* Judith Graham & Bob Sexter, *Massacre Shatters School, A Suicide Mission: 2 Gunmen in Black Leave Possibly 25 Dead; Student Describes Terror: 'He Put the Gun . . . in My Face'; Clinton Seeks Action: 'Perhaps Now America Will Wake Up'*, CHI. TRIB., Apr. 21, 1999, at 1; Tom Kenworthy, *Police: Attack Planned in Detail; 15 Dead, 28 Hurt in Rampage*, WASH. POST, Apr. 22, 1999, at A01; Sam Howe Verhovek, *Terror in Littleton: The Overview; 15 Bodies Are Removed from School in Colorado*, N.Y. TIMES, Apr. 22, 1999, at A1.
 11. In fact, national data indicated that school violence was on a significant decline since 1992. A 1999 report by the U.S. Department of Justice and Department of Education attempted to alleviate the worries of parents and remind them that violence in the schools, despite the Columbine shooting, was down: "The vast majority of America's schools are safe places. In fact, notwithstanding the disturbing reports of violence in our schools, they are becoming even safer. But the fears of students, teachers and parents are real." U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, ANNUAL REPORT ON SCHOOL SAFETY (1999). According to Justice Department statistics, from 1992 to 2004 the violent crime rates at school dropped by fifty-four percent. *See* Press Release, U.S. Dep't of Justice, Serious Violent Crime at School Continues to Fall (Dec. 3, 2006), <http://www.ojp.usdoj.gov/newsroom/pressreleases/2006/BJS07004.htm>.
 12. A survey conducted by the National Center on Education Statistics between 1996 and 1997 found that between seventy-nine and ninety-four percent of public schools had in place zero tolerance policies. The survey defined zero tolerance "as a school or district policy that mandates predetermined consequences or punishments for specific offenses." Ninety-four percent of public schools reported having in place a zero tolerance policy for firearms, ninety-one percent for weapons other than firearms, eighty-eight percent for drugs, eighty-seven percent for alcohol, seventy-nine percent for violence, and seventy-nine

expelled, handcuffed, or arrested for small infractions or in absurd situations, such as a four-year-old who was handcuffed for failing to take a nap or an eleven-year-old who was charged with criminal theft of a lollipop.¹³

As a disciplinary approach, zero tolerance mandates that certain behaviors trigger severe responses, regardless of mitigating circumstances. This approach almost always begins with removal of the child from the classroom, and often removal from school, including removal through an arrest.¹⁴ Zero tolerance schools impose suspensions, expulsions, and even arrests for infractions across the spectrum—from disrespectful behavior and writing on a desk to drug use and weapon possession.

Proponents of zero tolerance believe that such policies send a strong message to potential offenders that misbehavior will be treated seriously and severely, therefore dissuading wrongdoers from acting out in the first place and thus serving as a deterrent.¹⁵

percent for tobacco. SHEILA HEAVISIDE ET AL., U.S. DEP'T OF JUSTICE, NAT'L CTR. FOR EDUC. STATS., VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996–97 (1998).

13. See, e.g., Denise Buffa, *Public Enemy No. 1—City Sued for Cuffing 4-Yr.-Old Nap Nixers*, N.Y. POST, Mar. 10, 2008, at 15 (reporting on two four-year-old children who were handcuffed by NYPD school safety officers for refusing to take a nap at school and similar incidents in the past); Sharif Durhams, *Tosa East Student Arrested, Fined After Repeated Texting*, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at B8 (A school resource officer arrested a fourteen-year-old girl for text messaging in school. The girl refused to stop text messaging after being asked to stop by her teacher. The student was arrested and given a \$298 fine for disorderly conduct.); Editorial, *Educational Intolerance*, ST. PETERSBURG TIMES, May 14, 2001, http://www.sptimes.com/News/051401/Opinion/Educational_intoleran.shtml (reporting on the expulsion of a ten-year-old girl who found a small knife in her lunchbox, placed there by her mother so the girl could cut an apple); Bob Herbert, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17 (Police officers handcuffed and arrested six-year-old Desre'e Watson for throwing a temper tantrum in kindergarten class. According to the police department, "Watson was upset and crying and wailing and would not leave the classroom to let them study, causing a disruption of the normal class activities." Desre'e was taken to central booking, fingerprinted, photographed, and charged with battery against a school official, which is a felony, and two misdemeanors. A month before this incident, in Baltimore the police arrested a 7-year-old boy for riding a dirt bike on a sidewalk.); Cindy Rodriguez, *\$1 Candy Theft a Misdemeanor?*, DENV. POST, Apr. 5, 2005, at F1 (reporting about an eleven-year-old charged with theft after he took a lollipop, which he thought was free, from a classroom); Ann N. Simmons, *Scuffle Exposes a Racial Rift; The Altercation Between Three Black Students and a White Security Guard at a Palmdale Campus Last Month Has Generated Intense Feelings. A Protest is Planned for Today*, L.A. TIMES, Oct. 11, 2007, at B1 (reporting on an arrest of a girl after failing to satisfactorily clean up a piece of a birthday cake that she had dropped on the floor); Zach Smith, *Report: Martin County Student Arrested for Passing Gas, Turning Off Classmate's Computer*, TCPALM, Nov. 21, 2008, available at <http://www.tcpalm.com/news/2008/nov/21/report-martin-county-student-arrested-passing-gas/> (reporting on a school resource officer who arrested a thirteen-year-old boy in Florida for passing gas in school and turning off a classmate's computer and the boy being charged with disruption of a school function); Bill Torpy, *Teen Punished for Taking Iraq Cell Call; Chat with Army Mom Violated School Policy*, ATLANTA J.-CONST., May 7, 2005, at 1A (reporting on a student expelled after speaking on a cell phone in school with his mother, who was serving in Iraq and whom the child had not spoken to for thirty days).
14. There is no one definition of zero tolerance. The National Center on Education Statistics defines zero tolerance broadly to mean policies that mandate a predetermined outcome for particular offenses. NAT'L CTR. FOR EDUC. STATS., *supra* note 12, at 33. Education researchers often define zero tolerance more narrowly as policies that punish both major and minor offenses equally severely. APA REPORT, *supra* note 6, at 3, n.1.
15. See ZERO TOLERANCE, ZERO EVIDENCE, *supra* note 6, at 7; APA REPORT, *supra* note 6, at 852. According to Charles Patrick Ewing, a professor of law and psychology at the State University of New York at

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Moreover, proponents of zero tolerance believe that by removing disruptive students, the school climate is improved for all other students.¹⁶ Finally, supporters of zero tolerance borrow this approach from proponents of broken windows policing, a crime fighting philosophy that focuses on responding aggressively to the appearance of minor public disorder under the belief that it will prevent or deter more serious criminal offenses.¹⁷ Broken windows proponents, like zero tolerance supporters, believe that minor infractions must be dealt with swiftly and forcefully; otherwise, they contend, such infractions will signal community disorder and lead to a breakdown of community controls.¹⁸

The two core tactics employed by school districts that implement zero tolerance policies are suspensions and arrests. Indeed, the use of each appears to have increased significantly since the rise of zero tolerance as a disciplinary and safety tool in public schools. Suspensions are now handed down for minor and subjective infractions, such as “insubordination,” “disrespect,” and “disobedience.”¹⁹ The presence of law enforcement personnel²⁰ and the referral of students to the juvenile and criminal

Buffalo who has written numerous books on violence by juveniles,

[b]eyond immediate safety concerns [the] application of Zero Tolerance appropriately denounces violent student behavior in no uncertain terms and serves as a deterrent to such behavior in the future by sending a clear message that acts which physically harm or endanger others will not be permitted at school under any circumstances More difficult is the application of Zero Tolerance to cases in which violence has been threatened but not carried out. Here, as well, both safety and deterrence warrant at least a brief suspension from school, with any additional action to be determined later.

Charles Patrick Ewing, *Sensible Zero Tolerance Protects Students*, 16 HARV. EDUC. LETTER 1, 1 (Jan./Feb. 2000).

16. See APA REPORT, *supra* note 6, at 22.
17. Broken windows policing was first introduced in a 1982 *Atlantic* article. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/>. For additional information on the theory and criticisms of broken windows, see *infra* note 27.
18. Kelling & Wilson, *supra* note 17.
19. See CIVIL RIGHTS PROJECT AT HARV. UNIV. & ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 3–7 (2000); NYCLU SUSPENSIONS REPORT, *supra* note 4, at 5; Karega Rausch & Russell Skiba, *Unplanned Outcomes: Suspensions and Expulsions in Indiana*, 2 EDUC. POLICY BRIEFS 1, 2 (2004). In 1974, schools in the United States issued 1.7 million suspensions. By 2000, that number had increased to 3.1 million suspensions. Johanna Wald & Daniel Losen, *Defining and Redirecting a School-to-Prison Pipeline*, Framing Paper for the School-to-Prison Pipeline Research Conference, 9, 10 (May 16–17, 2003), available at http://justicepolicycenter.org/Articles%20and%20Research/Research/testprisons/SCHOOL_TO_%20PRISON_%20PIPELINE2003.pdf.
20. Some form of police presence in schools appears to have existed since the 1950s. KATHY SHERLING, NATIONAL ASSOCIATION OF SCHOOL RESOURCE OFFICERS: BASIC COURSE MANUAL (1998); see also Cathy Girouard, *School Resource Officer Training Program*, FACT SHEET (U.S. DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION), Mar. 2001, <https://www.ncjrs.gov/pdffiles1/ojdp/fs200105.pdf>. In the late 1990s, the federal government began awarding hundreds of millions of dollars to local law enforcement agencies to hire police officers to be stationed in schools. See AJAY KHASU ET AL., VERA INST. OF JUSTICE, REINFORCING POSITIVE STUDENT BEHAVIOR TO IMPROVE SCHOOL SAFETY: AN EVALUATION OF AFFIRM 1 (2003). For example, in 2000 alone, the U.S. Justice Department awarded \$68 million in grants to hire 599 new police officers to work in schools in 289

justice systems for minor infractions have also increased.²¹ In 2006, the National Association of School Resource Officers noted that “school-based policing is ‘the fastest growing area of law enforcement.’”²²

II. POLICING AND DISCIPLINE IN NEW YORK CITY PUBLIC SCHOOLS

New York City has emerged as an innovator in the move to introduce police personnel and policing tactics into the schools. Mayor Bloomberg has aggressively expanded the size and responsibilities of the police force in New York City schools—a move first begun by Mayor Giuliani. In New York City public schools today, aggressive policing has proliferated, with the size of the police force patrolling the schools having increased by thirty-five percent under Mayor Bloomberg.²³ Mayor Bloomberg has also increased dramatically New York City’s reliance on suspensions as

cities and towns. Press Release, Office of Cmty. Oriented Policing Servs., Attorney General Janet Reno Announces \$68 Million in Grants to Hire School Resource Officers: 289 Communities to Receive 599 SRO’s Nationwide (Sept. 6, 2000), <http://www.cops.usdoj.gov/default.asp?Item=524>.

21. Research has also shown that a relatively large percentage of such referrals are for non-dangerous, non-threatening, and even non-criminal offenses. APA REPORT, *supra* note 6, at 9, 76–77; *see also* CRIMINALIZING THE CLASSROOM REPORT, *supra* note 5; *see, e.g.*, NAT’L CTR. FOR EDUC. STATS., *supra* note 12. Thomas Perez, the Assistant Attorney General for Civil Rights in the United States Justice Department has recognized this problem and stated that “in schools across the country, we are seeing more and more students disrupted on their way to a diploma by increasingly minor infractions.” Thomas E. Perez, Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice, Remarks at the Dep’t of Justice of Dep’t of Educ. Conference: Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunities (Sept. 27, 2010), *available at* http://www.justice.gov/crt/speeches/perez_cosconf_speech.php; *see also* ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005) (examining the rise in the number of arrests in schools in numerous jurisdictions, including Denver Public Schools, where from 2000–2004 there was a seventy-one percent increase in the number of student referrals, most of them for non-violent behavior, to the police); CHILDREN’S DEFENSE FUND, AMERICA’S CRADLE TO PRISON PIPELINE 125 (2007) (documenting the number of school-based arrests in Miami-Dade County); PETER FINN ET AL., COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS 7 (2005) (“By 1999 there were at least 12,000 law enforcement officers serving fulltime as SROs. . . . Local police departments had about 9,100 full-time SROs assigned to schools. . . . Nationwide, about 2,900 sheriffs’ deputies worked as SROs during 1997.”); SIMONE ROBERS ET AL., NAT’L CTR. FOR EDUC. STATS., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 at 80–81 (2010) [hereinafter NCES 2010 SCHOOL SAFETY REPORT]. A 1997 survey of principals by the U.S. Department of Education found that thirty-one percent of high schools used some combination of law enforcement personnel and metal detectors. *See* NAT’L CTR. FOR EDUC. STATS., *supra* note 12, at 109. While a 1999 survey found that fifty-four percent of students reported that police officers or security guards patrolled their schools. *See* NCES 2010 SCHOOL SAFETY REPORT, *supra*, at 81. By 2007, sixty-nine percent of public school students aged twelve to eighteen reported the presence of permanent police officers or security guards in their schools, and many school districts today house their own police departments.
22. Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 74 (2006) (citation omitted).
23. In 2002, the year that Mayor Bloomberg took office, 3876 school safety officers patrolled New York City schools. CITY OF NEW YORK, MAYOR’S MANAGEMENT REPORT: FISCAL 2001—AGENCY NARRATIVES 423 (2001). By 2009, that total had increased by thirty-five percent to 5246 police personnel. *Proposed Amendment No. 816-A to New York City Charter and Administrative Code of the City of New York: Hearing Before the J. Comm. on Educ., Pub. Safety, and Juvenile Justice*, N.Y.C. Council 2008–

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a disciplinary tool. The discipline code has changed significantly to include more infractions that may result in or even mandate a suspension.²⁴ Not surprisingly, the number of students suspended on an annual basis has increased dramatically, from 31,879 in the 2002–2003 school year to 73,943 in 2008–2009.²⁵ This occurred despite a decreasing student population during the same period.²⁶ Yet these practices have not taken hold in all schools; they are promulgated primarily in New York City schools that are disproportionately attended by children of color from low-income families.

A. The NYPD Takes Over School Safety Responsibilities and Grows Dramatically with Little Regulation

In 1998, following years of debate, Mayor Rudolph Giuliani convinced the New York City Board of Education (BOE) to transfer school security responsibilities away from the BOE to the NYPD. The transfer fit well with Mayor Giuliani's broken windows vision of policing.²⁷ Rudolph Giuliani made "law and order" his signature

2009 Sess. (Nov. 10, 2009) (testimony of Assistant Chief James Secreto, Commanding Officer, School Safety Div., N.Y.C. Police Dep't) [hereinafter Testimony of Assistant Chief Secreto].

24. NYCLU SUSPENSIONS REPORT, *supra* note 4, at 11.

25. *Id.* at 15.

26. *Id.* at 5.

27. See Kelling & Wilson, *supra* note 17. This article first introduced the broken windows theory of policing and argued that because community members care deeply about public order, the appearance of disorder breaks down community controls and leads to community members feeling less committed to their neighborhoods, thus allowing for the introduction of criminal elements into the community. Therefore, according to the theory, law enforcement agencies should focus on responding aggressively to any public offense that may appear disorderly, no matter how minor. Kelling and Wilson recognized that police officers responding aggressively to the appearance of public disorder and minor offenses (even those that are not illegal) raises Fourth Amendment and racial profiling concerns. They recognized that black and Latino residents may be disproportionately targeted by these policies and practices, but ultimately they largely ignored these concerns:

The concern about equity is more serious. We might agree that certain behavior makes one person more undesirable than another but how do we ensure that age or skin color or national origin or harmless mannerisms will not also become the basis for distinguishing the undesirable from the desirable? How do we ensure, in short, that the police do not become the agents of neighborhood bigotry? We can offer no wholly satisfactory answer to this important question. We are not confident that there is a satisfactory answer except to hope that by their selection, training, and supervision, the police will be inculcated with a clear sense of the outer limit of their discretionary authority. That limit, roughly, is this—the police exist to help regulate behavior, not to maintain the racial or ethnic purity of a neighborhood.

Kelling & Wilson, *supra* note 17, at 8. Broken windows policing has been widely criticized. See Benjamin Bowling, *The Rise and Fall of New York Murder: Zero Tolerance or Crack's Decline?*, 39 BRIT. J. CRIMINOLOGY 531 (1999) (attributing the decrease in homicide rates in the 1990s to the decrease of the crack cocaine epidemic, which had begun before the implementation of broken windows policing); Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (disputing the claim that reducing public disorder deters serious crimes); Bernard Harcourt, *Policing Disorder: Can We Reduce Serious Crime by Punishing Petty Offenses?*, BOSTON REV., (April–May 2002)

issue as mayor, encouraging NYPD officers to implement broken windows policing by responding aggressively to so-called quality of life offenses.²⁸ William J. Bratton, Mayor Giuliani's first police commissioner, emphasized the importance of responding to the public's fear of crime—which he acknowledged tended to outpace the actual crime rate—because he believed that perceptions of disorder were inextricably connected to increases in serious crimes rates.²⁹ Similarly, the NYPD taking over school safety responsibilities would send a strong signal to children and families that the police will respond aggressively to unruliness in school.

The BOE was very hesitant to approve the transfer of school safety responsibilities to the NYPD for fear that it would create a prisonlike environment in certain schools. This set the stage for a three-year public battle between the mayor and the Board of Education, spanning the tenure of two schools chancellors.³⁰

In 1998, Mayor Giuliani succeeded in convincing the Board of Education, with the support of New York City's teachers' union,³¹ to transfer the BOE's Division of

(criticizing the lack of an adequate definition of disorder, suggesting that what proponents of broken windows policing might call disorder may be perceived entirely differently by another segment of the population, and may actually mean strong community bonds (graffiti is one example), and presenting alternative theories for the decline in crime in New York City by providing examples of declining crime rates in other cities that did not implement broken windows policing).

28. Interview with Rudolph Giuliani, Mayor of N.Y., in Washington, D.C. (May 3, 2003) [hereinafter Giuliani Interview], available at <http://www.achievement.org/autodoc/page/giu0int-1> (“Well, I very much subscribe to the ‘Broken Windows’ theory, a theory that was developed by Professors Wilson and Kelling, 25 years ago maybe. The idea of it is that you had to pay attention to small things, otherwise they would get out of control and become much worse. . . . Aggressive panhandling, the squeegee operators that would come up to your car and wash the window of your car whether you wanted it or not—and sometimes smashed people’s cars or tires or windows—the street-level drug-dealing; the prostitution; the graffiti, all these things that were deteriorating the city.”); see also William J. Bratton, *The New York City Police Department’s Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL’Y 447 (1995); Catherine S. Manegold, *Giuliani, On Stump, Hits Hard at Crime and How to Fight It*, N.Y. TIMES, Oct. 13, 1993, at A1.
29. Bratton, *supra* note 28, at 447–49; see also Giuliani Interview, *supra* note 28.
30. See EDWARD N. COSTIKYAN ET AL., REPORT OF THE MAYOR’S INVESTIGATORY COMMISSION ON SCHOOL SAFETY (1996) (recommending that the NYPD play a greater role in ensuring safety in the schools); David Firestone, *Mayor’s Critics Assail School Safety Inquiry*, N.Y. TIMES, June 13, 1995, at B3, available at <http://www.nytimes.com/1995/06/13/nyregion/mayor-s-critics-assail-school-safety-inquiry.html> (describing a commission appointed by the mayor, without informing the schools chancellor, to study the issue of school safety and make recommendations for improvements); Maria Newman, *Giuliani Chides Cortines for Resisting Use of Police*, N.Y. TIMES, June 1, 1995, at B3, available at <http://www.nytimes.com/1995/06/01/nyregion/giuliani-chides-cortines-for-resisting-use-of-police.html> (describing how in June 1995, Mayor Giuliani began publicly rebuking Schools Chancellor Ramon C. Cortines for his objections to the transfer of school safety responsibilities to the NYPD); Vivian S. Toy, *Police Takeover of School Safety Is Urged*, N.Y. TIMES, Dec. 31, 1995, (Sunday) at 29, available at <http://www.nytimes.com/1995/12/31/nyregion/police-takeover-of-school-safety-is-urged.html> (describing criticism by opponents of the NYPD taking over school safety matters for not seeking out their opinions).
31. See Timothy Williams, *Board of Ed Approves NYPD School Safety Plan*, ASSOCIATED PRESS, Sept. 17, 1998 (“The few who spoke in favor of the proposal were shouted down or booed by the crowd. ‘It does not seek the initial increase in the number of armed police in schools or the number of schools with

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School Safety to the NYPD, including the authority to recruit, hire, train, and supervise school safety personnel.³² The vote, which took place on September 16, 1998, did not take place without controversy.³³ Parents, teachers, and community members packed the hearing room to criticize the proposed transfer; more than one hundred people had to wait outside the crowded room.³⁴ Inside, parents and advocates expressed worry that having the NYPD take over school safety would create a “prisonlike atmosphere in the schools.”³⁵ Leaders from the black community expressed concerns about increasing interactions between black children and a police force that does not understand them; they also expressed concerns that police personnel in the schools would undermine the authority of school officials.³⁶ Others criticized the impact that police personnel in the schools would have on the learning environment in the nation’s largest school district.³⁷ The New York Civil Liberties Union expressed concern that having the NYPD take over school safety would undermine the constitutional rights of students.³⁸

Despite these concerns, the BOE voted unanimously to transfer school safety responsibilities to the NYPD and, according to news accounts, the vote occurred because of two promises made by Mayor Giuliani to the BOE and Schools Chancellor Rudy Crew, who for years opposed transferring school safety responsibilities to the NYPD.³⁹ First, Mayor Rudolph Giuliani promised that the number of police personnel in the schools would not increase;⁴⁰ at the time, there were between 3041

armed officers, nor does it seek to arm school safety officers,’ said Jim Baumann, director of school safety for the United Federation of Teachers. ‘It does not seek to turn schools into armed camps.’”)

32. Memorandum of Understanding Among the Bd. of Educ. of N.Y.C., the Chancellor of the City School District of N.Y.C., and N.Y.C. on the Performance of School Security Functions by the N.Y.C. Police Department for the Benefit of the City Sch. Dist. of N.Y.C. and its Students and Staff, signed by Bd. of Educ. President William C. Thompson, Mayor Rudolph W. Giuliani, and Chancellor Rudy Crew (Sept. 17, 1998) (on file with author) [hereinafter MOU]; Lynette Holloway, *Board Votes to Give Police Control Over School Security Board Votes to Give Police Control Over School Security*, N.Y. TIMES, Sept. 17, 1998, at B5, available at <http://www.nytimes.com/1998/09/17/nyregion/board-votes-to-give-police-control-over-school-security.html>; Williams, *supra* note 31.

33. See Holloway, *supra* note 32; Williams, *supra* note 31.

34. Holloway, *supra* note 32; Williams, *supra* note 31.

35. Holloway, *supra* note 32.

36. *Id.* Rev. Adolph Roberts of Mount Calvary Baptist Church in Harlem expressed worry about compromising the dignity of school children by sending them to a school environment reminiscent of a police state. Timothy Williams, *NYC Turns School Security Over to Police*, ASSOCIATED PRESS, Sept. 17, 1998.

37. Holloway, *supra* note 32.

38. Williams, *supra* note 31.

39. See Holloway, *supra* note 32 (“Now, after years of behind-the-scenes work, the current Chancellor, Rudy Crew—who has maintained all along that he opposes police control of the schools—and Mr. Giuliani have hammered out a compromise plan in which the Police Department is in charge but does not increase its personnel in the schools.”).

40. *Id.*

and 3200 school safety personnel.⁴¹ Second, NYPD Commissioner Howard Safir promised that school safety officers would not arrest students or school staff.⁴²

The day after the vote took place that approved the transfer, the Board of Education released data that showed that serious crime had declined in the schools.⁴³ According to the report, which in past years had been released in August, violent and serious crimes accounted for just seven percent of all school incidents.⁴⁴ Opponents of the transfer criticized the city for releasing this vital information the day after the vote had taken place and argued that the data proved that there was not an emergency situation in the schools that demanded the intervention of the NYPD.⁴⁵

1. *Current State of Policing in New York City Schools*

Since the transfer of school safety responsibilities from the Board of Education to the NYPD, the number of police personnel in the schools has increased from sixty-four to seventy-three percent, from 3041 to 3200 in 1998,⁴⁶ to 5439 today (not including the 190 armed police officers assigned to the schools).⁴⁷ Most of the increase has occurred under Mayor Bloomberg. In 2002, the year that Mayor Bloomberg took office, 3876 school safety officers patrolled New York City schools.⁴⁸ By 2009, that total had increased by thirty-five percent to 5249 school safety officers. This dramatic increase in the number of police personnel occurred despite a decrease in the student population by approximately 70,000 students during that same period,⁴⁹ and even though serious school crime was declining prior to the 1998 transfer.⁵⁰ The increase also occurred despite the promises made by Mayor Giuliani

41. News reports in 1998 stated that there were 3200 school safety officers at the time. *Id.*; Susan Edelman, *Tempers Flare Over Timing of School-Crime Report Card*, N.Y. POST, Sept. 18, 1998, http://www.nypost.com/p/news/tempers_flare_over_timing_of_school_Y0N1xEPqzuzDa1OMiovshN. In 2009, the commanding officer of the NYPD's School Safety Division testified before the New York City Council that at the time of the transfer of school safety responsibilities to the NYPD in 1998, there were 3041 school safety officers on staff. Testimony of Assistant Chief Secreto, *supra* note 23.

42. Williams, *supra* note 31 ("Safety officers now carry only handcuffs, not guns, and do not have the power to arrest anyone, and Safir said that will not change.").

43. Edelman, *supra* note 41, at 6.

44. *Id.*

45. *Id.*

46. See *supra* note 41 for an explanation of the range of estimates.

47. Testimony of Assistant Chief Secreto, *supra* note 23 (testifying that in 2009, there were 5249 school safety officers in New York City's public schools). The School Safety Division has not faced budget cuts since 2009, so the number of school safety officers is approximately the same.

48. CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2001—AGENCY NARRATIVES 432 (2001).

49. In 2002, there were 1,098,832 students enrolled in New York City public schools. CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2002 at 15 (2002). By 2009, there were 1,029,500 students enrolled. CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2009 at 16 (2009).

50. Edelman, *supra* note 41.

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not to increase the size of the police force in the schools.⁵¹ Today, every high school in New York City has approximately ten to twenty school safety officers, and middle and elementary schools have between one and five school safety officers each.⁵²

As peace officers, school safety officers wear NYPD uniforms and have the authority to stop, frisk, question, detain, search, and arrest students.⁵³ School safety officers do not carry firearms, yet the NYPD's School Safety Division has at least 190 armed police officers who are assigned to patrol New York City public schools.⁵⁴ School safety officers receive fourteen weeks of police academy training,⁵⁵ compared to six months for police officers.⁵⁶

Today, the NYPD school safety division, as noted above, represents the fifth largest police force in the nation, and New York City schools have more police personnel per student than other cities have police officers per civilians. San Antonio, which has a population slightly greater than the population in New York City schools,⁵⁷ employs less than half as many police officers.⁵⁸ The city of Houston, which has a population of 2.1 million people,⁵⁹ approximately twice the population of students in New York City schools, has 5400 police officers.⁶⁰ Moreover, New York City hires more school safety officers than employees to positions that have historically addressed student misbehavior; for example, although New York City has more than 5400 police personnel patrolling public schools, it employs almost 3000 guidance counselors and nearly 1500 social workers.⁶¹

51. See Holloway, *supra* note 32.

52. KHASU ET AL., *supra* note 20, at 3.

53. N.Y. CRIM. PROC. LAW § 2.20 (McKinney 2011).

54. Amended Complaint at 2, B.H. v. Bloomberg, 2010 U.S. Dist. LEXIS 143103 (E.D.N.Y. May 27, 2010) (No. 10-0210) [hereinafter B.H. Amended Complaint].

55. Testimony of Assistant Chief Secreto, *supra* note 41.

56. *NYPD Officers Graduate from Police Academy*, NBC NEW YORK (Dec. 22, 2011, 9:18 PM), <http://www.nbcnewyork.com/news/local/NYPD-Graduation-2011-Madison-Square-Garden-Ceremony-136096523.html>.

57. *Quick Facts, San Antonio (city), Texas*, U.S. CENSUS BUREAU (last revised Jan. 31, 2012), <http://quickfacts.census.gov/qfd/states/48/4865000.html>; MAYOR'S MANAGEMENT REPORT: FISCAL 2009, *supra* note 49, at 16.

58. See *supra* note 47; *Police—Employment Opportunities*, CITY OF SAN ANTONIO, <http://www.sanantonio.gov/sapd/employment.asp> (last visited Mar. 1, 2012).

59. *Houston Facts and Figures*, CITY OF HOUSTON TX, <http://www.houstontx.gov/about/houston/houstonfacts.html> (last visited Mar. 1, 2012).

60. James Pinkerton, *New HPD Chief McClelland no stranger to obstacles*, HOUS. CHRON., Apr. 14, 2010, at A1.

61. The author of this article has had numerous conversations with officials at the United Federation of Teachers (UFT) about the number of guidance counselors and social workers in New York City schools. According to the UFT, there are 2929 guidance counselors and 1473 social workers in New York City public schools as of June 30, 2011. Copies of email correspondence are on file with the author.

Mayor Bloomberg has also introduced additional aggressive policing tactics into the schools. In January 2004, he unveiled the Impact Schools Initiative, which introduced heavy-handed policing tactics into select schools with higher than average rates of reported crimes and suspensions and below average rates of attendance.⁶² These schools also have a higher percentage of black students and lower levels of spending per student.⁶³ Under the initiative, the number of police officers assigned to the school is doubled and the removal of a misbehaving student to an alternative school is expedited.⁶⁴ A taskforce of one hundred and fifty armed police officers is exclusively dedicated to policing schools on the impact list, which range in number every year.⁶⁵

Moreover, on April 13, 2006, Mayor Bloomberg announced yet another school policing program, this time subjecting all middle and high school students to roving metal detector searches.⁶⁶ The deployment of the metal detectors is unannounced and meant to catch students by surprise. Students are made to enter the school by passing through the metal detectors and submitting to bag scanners similar to those used at airports.⁶⁷ The program has been plagued with problems, causing chaos at schools and leading students to miss class time as they wait to pass through a massive police presence that includes dozens of police vehicles and approximately sixty police personnel.⁶⁸

For example, on October 24, 2006, more than two dozen police vehicles surrounded Aviation High School in Queens and installed metal detectors.⁶⁹ Long lines began to gather outside the school as police officers made every student submit to a metal detector and bag search.⁷⁰ Police officers confiscated engineering tools that students brought for class (Aviation High School is certified by the federal government to train aviation mechanics), with one officer describing the tools as “hazardous to society.”⁷¹ They also confiscated the camera of Aviation’s yearbook photographer, water bottles,

62. SHARON BALMER, NAT’L CTR. FOR SCHS. & CMTYS. AT FORDHAM UNIV., *POLICING AS EDUCATION POLICY: A BRIEFING ON THE INITIAL IMPACT OF THE IMPACT SCHOOLS PROGRAM 4* (2006).

63. *Id.*

64. *Id.*

65. Press Release, N.Y.C. Dep’t of Educ., Mayor Michael R. Bloomberg, Schools Chancellor Joel I. Klein and Police Commissioner Raymond R. Kelly Announce Implementation of School Safety Plan (Jan. 5, 2004) [hereinafter Press Release, N.Y.C. Dep’t of Educ.], <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2003-2004/1-5-2004-11-45-37-901.htm>.

66. Press Release, N.Y.C. Dep’t of Educ., Mayor Michael R. Bloomberg, Schools Chancellor Joel I. Klein and Police Commissioner Raymond R. Kelly Announce A New School Safety Initiative Amid Significant Declines in Crime in City Impact Schools (Apr. 13, 2006) [hereinafter Press Release, New School Safety Initiative], http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2006a%2Fpr114-06.html&cc=unused1978&rc=1194&ndi=1.

67. *CRIMINALIZING THE CLASSROOM REPORT*, *supra* note 5, at 9.

68. *Id.*

69. *Id.* at 11.

70. *Id.*

71. *Id.*

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and lunches—even birthday cupcakes—brought into school by students.⁷² Cell phones, which are prohibited in New York City public schools, were also seized; the principal told parents that 617 electronic devices were confiscated on that day.⁷³ The surprise visit caused so much disruption that classes were cancelled in the early part of the day because hundreds of students were still waiting in line when first period began at 8:00 a.m.⁷⁴ Students reported that after the roving metal detectors came to their schools, they lost trust in their school administrators and in the NYPD.⁷⁵

There is some quantitative data available to the public about criminal and non-criminal incidents as well as police practices in the schools. While the number of incidents in the schools has been on a decline (serious incidents were on a decline prior to the transfer of school safety to the NYPD), the vast majority of reported incidents in schools are for minor or non-criminal offenses.⁷⁶ Moreover, while for many years the

72. *Id.*

73. *Id.*

74. *Id.* The typical attendance rate at Aviation High School is around ninety-three percent, yet on that day the attendance rate dropped to seventy percent. *Id.*

75. *Id.*

76. The mayor's office releases data on an annual basis on school safety matters as part of the Mayor's Management Report, which is required by the City Charter. However, the manner in which the data is released raises serious concerns about manipulation. In fiscal year 1999, the first year that the NYPD was in charge of school safety, there were 4159 serious criminal incidents in the schools—which the report defined as murder, rape, sex offenses, robbery, felonious assault, and weapons possession—and 6162 “other criminal and non-criminal incidents,” which the report defined as the number of all other assaults, misdemeanors, and other “serious non-criminal” incidents reported in schools. MAYOR'S MANAGEMENT REPORT: FISCAL 2002, *supra* note 49, at 20; CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2002 SUPPLEMENTARY INDICATOR TABLES 18 (2002). By fiscal year 2002, the first year that Mayor Bloomberg was mayor, those numbers had increased to 4545 serious criminal incidents and 10,057 other criminal and non-criminal incidents. MAYOR'S MANAGEMENT REPORT: FISCAL 2002, *supra* note 49, at 20. The report attributed some of the increase to better reporting methods. A companion to the Mayor's Management Report offered a breakdown of these numbers, revealing that the vast majority of serious criminal incidents (eighty-six percent) were for assault (thirty-three percent) and weapons possession (fifty-three percent). MAYOR'S MANAGEMENT REPORT: FISCAL 2002 *supra*, at 70–71. These two categories may be misapplied to incidents that may not seem as severe. For example, in 2006, when the NYPD seized 170 weapons through the roving metal detectors initiative, 115 were knives, box cutters, and razors and fifty-eight were pipes and scissors. No guns were found. Beth Fertig, *Majority of Confiscations in Schools Aren't Weapons*, WNYC (Jan. 12, 2007), <http://www.wnyc.org/articles/wnyc-news/2007/jan/12/majority-of-confiscations-in-schools-arent-weapons/>. Similarly, the “other criminal and non-criminal category” revealed that the significant majority of the incidents (eighty-six percent) were for harassment (forty-six percent), disorderly conduct (fourteen percent), and petit larceny (eight percent). MAYOR'S MANAGEMENT REPORT: FISCAL 2002 *supra*, at 70–71. Mayor Bloomberg stopped releasing detailed information on criminal and non-criminal school incidents in fiscal year 2007. (The move was later criticized by advocates, but nonetheless has not changed. Jo Craven McGinty, *Statistically Speaking, at Least, the City Is a Quieter Place These Days*, N.Y. TIMES, Sept. 9, 2009, at A33.) That year, the NYPD reported 1164 serious crimes. CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2007 at 20 (2007). However, this time the report no longer counted weapons possession and sex offenses but the seven major index crimes (murder and non-negligent manslaughter, forcible rape, robbery, felonious assault, burglary, grand larceny and grand larceny auto). CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2007 INDICATOR DEFINITIONS 22 (2007). Grand larceny made up fifty percent of the incidents, and felony assault twenty-one percent.

NYPD and the New York City Department of Education (DOE) would not release data on the number of arrests and summonses in New York City schools, advocates fought for passage of the Student Safety Act through the City Council, which since its passage in 2011 has begun to provide some basic information on arrests and summonses in schools, although at the time of the writing of this article, the data was insufficient to draw conclusions.⁷⁷ The new law mandates reporting by the NYPD on the number and type of arrests and summonses made by the School Safety Division, and reporting by the DOE on suspensions in New York City schools, with both sets of data disaggregated by student demographic information.⁷⁸

As a result of the NYPD's dramatic and, as will be discussed later, poorly regulated growth in New York City schools, children today, and primarily children of color from low-income families, are handcuffed and arrested for misbehavior that traditionally would not have been handled by police personnel or by the juvenile and criminal justice systems.⁷⁹ Indeed, the NYPD receives hundreds of complaints a year against school safety officers, even though the complaint process for a long period of time had been obscured, and the normal complaint process against abusive police officers does not apply to school safety officers.⁸⁰

CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT: FISCAL 2007 SUPPLEMENTARY INDICATOR TABLES 90 (2007). When comparing this data to the 2002 figure, and counting the missing categories and the newly-created category of "possession of dangerous instrument," there were 2407 "serious criminal incidents," as defined in 2002, significantly fewer than in 2002 but 107% higher than had been reported in 2007. MAYOR'S MANAGEMENT REPORT: FISCAL 2007, *supra*, at 20.

77. Local Law No. 6, N.Y.C. (2011) (codified as amended at N.Y.C. ADMIN. CODE §§ 8-1101-1103 (2011)) ("To amend the administrative code of the city of New York, in relation to reports on school discipline and police department activity relating to schools.") The author of this report drafted the first version of the Student Safety Act, Intro. 816A-2008, which originally included a provision that would have expanded the jurisdiction of the Civilian Complaint Review Board to receive complaints of misconduct against school safety officers. The final version of the Act, Intro. 442-2010, did not include such a provision.
78. *Id.* The reporting on arrests and summonses will not provide a full picture of all arrests and summonses in schools, as the reporting will include only arrests and summonses made by the NYPD's School Safety Division, which excludes arrests in schools made by precinct-based police officers who are not part of the School Safety Division.
79. See *infra* notes 100-06 for numerous examples.
80. See Letter from Raymond W. Kelly, N.Y.C. Police Comm'r, to Hon. Robert Jackson, Chairman of Educ. Comm., N.Y.C. Council (June 11, 2007) (on file with author) (explaining that the Civilian Complaint Review Board does not accept complaints against school safety officers, and that such complaints are investigated by the NYPD's Internal Affairs Division); see also Letter from Police Comm'r Raymond W. Kelly, to the Hon. Christine C. Quinn, Speaker of the N.Y.C. Council (undated) (on file with the author) (explaining that all complaints against school safety agents are initially directed to the NYPD's Internal Affairs Bureau, which may then direct some complaints to other internal investigative units). *But see* Letter from Dep't of Educ., to Council Member Robert Jackson (Mar. 1, 2007) (on file with author) (stating that complaints against school safety officers must be filed with the CCRB. "With regard to SSA's accountability, they can be reported to Civilian Complaint Review Boards."). This is an example of the DOE being so removed from its responsibility over school safety matters that it does not even understand the process to hold school safety officers accountable for their actions.

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Examples of complaints of police misconduct in the schools are not hard to find. On April 13, 2011, school safety officers handcuffed seven-year-old Joseph Anderson, a black student from Queens, after he threw a temper tantrum when he did not like his Easter egg decoration.⁸¹ School safety officers took the first grader, in handcuffs, to a local hospital for mental evaluation, despite the fact that his mother told school officials that she was on her way to pick up her son.⁸² Joseph, who has attention deficit hyperactivity disorder and delayed speech, was clearly traumatized by the incident.⁸³ The DOE and NYPD defended the handcuffing, claiming officers used it to protect Joseph and his classmates.⁸⁴

On March 10, 2009, a school safety officer arrested twelve-year-old M.M. at her Hunts Point School for drawing on a desk.⁸⁵ M.M. and a classmate drew lines with erasable makers on each other's desks.⁸⁶ A teacher told them to erase the marks, but before they could do so, school safety officers arrived and escorted M.M. and the other student to a security room,⁸⁷ where an armed police officer accused M.M. of graffiti.⁸⁸ A school safety officer then escorted M.M. back to the classroom for her to retrieve her book bag and handcuffed M.M. in the hallway in front of her classmates and school staff.⁸⁹ M.M. was then taken to the security office where she was made to remove her shoes and sweater and submit to a pat-down search.⁹⁰ M.M., who was crying, asked to speak with her mother but was not allowed to do so.⁹¹ M.M. and her classmate were then taken in handcuffs to the local precinct,⁹² fingerprinted, photographed,⁹³ and given a summons for family court.⁹⁴ When M.M.'s mother

81. Meredith Kolodner, *Special-Ed Student Joseph Anderson, 7, Handcuffed by Cops at Queens School After Easter Egg Tantrum*, N.Y. DAILY NEWS, Apr. 21, 2011, at 5, available at http://articles.nydailynews.com/2011-04-21/local/29473024_1_easter-egg-queens-school-maspeth-school; Camille Mann, *Easter Egg Tantrum Leads to Handcuffs for NYC 7-Year-Old*, CBS NEWS (Apr. 21, 2011), http://www.cbsnews.com/8301-504083_162-20056185-504083.html; Jeff Pegues, *NYPD Handcuffs 7-Year-Old Special Ed Student*, WABC NEWS (Apr. 21, 2011), http://abclocal.go.com/wabc/story?section=news/local/new_york&cid=8087177.

82. Kolodner, *supra* note 81; Mann, *supra* note 81.

83. In the days following the incident, he screamed when he heard an ambulance, sometimes wet himself, and had problems falling asleep and eating. According to his mother, "I don't let him watch the news anymore, because if he sees cops, he cries." Kolodner, *supra* note 81; Pegues, *supra* note 81.

84. Pegues, *supra* note 81.

85. B.H. Amended Complaint, *supra* note 54, at 15.

86. *Id.*

87. *Id.*

88. *Id.* at 16.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 17.

94. *Id.*

attempted to file a complaint with the principal about the mistreatment of her daughter, she was told that there was nothing that the principal could do because this was a police matter.⁹⁵

In another example, in January 2008, five-year-old Dennis Rivera was handcuffed for throwing a temper tantrum in his Queens kindergarten class.⁹⁶ Dennis suffers from speech problems, asthma, and attention deficit disorder.⁹⁷ When Dennis knocked some items off of the principal's desk, a school safety officer handcuffed Dennis's hands behind his back and took Dennis to a hospital for a psychiatric evaluation, without his parent's permission.⁹⁸ When asked for comment about the incident, school officials explained that Dennis had punched an administrator the day before.⁹⁹ Gregory Floyd, who is the president of the labor union that represents school safety officers, said, "The reality is something had to be done. . . . I'm saying this 5-year-old, not every 5-year-old, this 5-year-old could not be controlled."¹⁰⁰ Dennis was so traumatized by the incident that his mother withdrew him from school because he was afraid to go back.¹⁰¹

On March 30, 2007, school safety officers handcuffed and arrested thirteen-year-old Chelsea Fraser in front of her classmates at her Dyker Heights school in Brooklyn.¹⁰² Two days before the arrest, some of her classmates acted out in class by plastering the walls with stickers.¹⁰³ Chelsea, who was president of her class and captain of the school's volleyball team, did not participate, but sat at her desk and wrote on it the word "okay."¹⁰⁴ Two days later, Chelsea was handcuffed and taken out of school in a police van while her classmates watched and her teacher cried.¹⁰⁵ She was then handcuffed to

95. *Id.*

96. Carrie Melago, *5-year-old boy Handcuffed in School, Taken to Hospital for Misbehaving*, N.Y. DAILY NEWS, Jan. 25, 2008, at 5, available at <http://www.nydailynews.com/news/5-year-old-boy-handcuffed-school-hospital-misbehaving-article-1.341677>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Child Handcuffed*, Television Broadcast, CBS NEW YORK (Jan. 26, 2008), available at http://www.liveleak.com/view?i=e84_1201369113.

101. See Melago, *supra* note 96; see also *Child Handcuffed*, *supra* note 100; Carrie Melago, *Cuffed Kid's Life on Hold Since Clash: Shackled over a Tantrum in January, Qns. Boy Has No Word on New School*, N.Y. DAILY NEWS, Apr. 21, 2008, at 12 (detailing how Dennis had to wait months before he could resume his schooling at a different public school).

102. Jenn Chung, *13-Year-Old Arrested for Defacing School Desk*, GOTHAMIST (Apr. 6, 2007, 4:26 PM), http://gothamist.com/2007/04/06/13yearold_arres.php; *Principal's Arrest Highlights Power Struggle in Schools*, WABC NEWS (Oct. 10, 2007), <http://abclocal.go.com/wabc/story?section=news/local&cid=5700943>; Errol Louis, Op-Ed., *End the War on Our Schoolkids*, N.Y. DAILY NEWS, Oct. 14, 2007, at 35.

103. David Goodman, *Hard Time Out*, MOTHER JONES MAG., July–Aug. 2008, available at <http://motherjones.com/politics/2008/07/hard-time-out>.

104. *Id.*

105. *Id.*

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a pole over her head while being interrogated for three hours at the precinct.¹⁰⁶ Her mother, who immediately came to the police precinct when she learned of her daughter's arrest, was not allowed in the room while her daughter was being interrogated.¹⁰⁷ Chelsea was charged with criminal mischief and making graffiti.¹⁰⁸

Principals and teachers are not immune from aggressive policing in the schools, and their arrests have highlighted the tension that exists between education staff and NYPD personnel in the schools. In 2007, Mark Federman, the popular and highly respected principal of East Side Community High School in Manhattan, was arrested for pleading with the police not to escort a handcuffed honor roll student out of the school's front door in front of her classmates.¹⁰⁹ The student, seventeen-year-old Isamar Gonzalez, was trying to enter the school early to catch up on coursework when she was stopped by school safety officers.¹¹⁰ Ms. Gonzalez refused the school safety officer's request to stay out of school and the confrontation escalated. The NYPD accused her of punching the school safety officer, but she claimed that the school safety officer pulled her hair. This resulted in school safety officers handcuffing Ms. Gonzalez and placing her under arrest.¹¹¹ Mark Federman asked the school safety officers not to parade Ms. Gonzalez in front of the hundreds of gathering students outside of the school and instead to remove Ms. Gonzalez through the back entrance to avoid embarrassment.¹¹² He stood in front of the front door entrance while pleading with the school safety officers.¹¹³ School safety officers responded by handcuffing and arresting the principal and parading both—the student in leg shackles—before hundreds of students outside of the school.¹¹⁴ The principal was charged with obstructing government activity and resisting arrest.¹¹⁵

The DOE and NYPD defended both arrests, stating that the student attempted to hit a school safety officer and that the principal attempted to block the arrest.¹¹⁶ Yet the DOE also stated that no disciplinary action would be taken against the

106. *Id.*

107. *Child Handcuffed*, *supra* note 100.

108. *Id.*

109. Jennifer Medina, *Police Arrest a Student, Then Her Principal, Too*, N.Y. TIMES, Oct. 10, 2007, at B3; *Principal's Arrest Highlights Power Struggle in Schools*, *supra* note 102.

110. Medina, *supra* note 109.

111. *Id.*; Irene J. Liu et al., *Pushy Principal Gets Busted at His School; Blocked 'Humiliating' Student Arrest: Cops*, N.Y. POST, Oct. 10, 2007, at 8.

112. *People v. Federman*, 852 N.Y.S.2d 748, 750–51 (N.Y. Crim. Ct. 2008) (noting that Principal Federman had been praised as a visionary leader in a 2007 review by the Department of Education); *see* Medina, *supra* note 109; *Principal's Arrest Highlights Power Struggle in Schools*, *supra* note 102.

113. *Federman*, 852 N.Y.S.2d at 750; *Principal's Arrest Highlights Power Struggle in Schools*, *supra* note 102.

114. *See* Medina, *supra* note 109; Louis, *supra* note 102 (noting that this incident demonstrated that the police, and not principals, are running school safety and discipline).

115. *Federman*, 852 N.Y.S.2d at 748–49.

116. *See* Medina, *supra* note 109.

principal.¹¹⁷ The president of the principal's union, Ernest Logan, criticized the arrest, stating, "Our major concern has always been that we are criminalizing the behavior in schools. The question has always been if this usurps the power of the principal, who is supposed to be in charge of the building."¹¹⁸ But the school safety union responded by stating that "they are the ones being treated like criminals. . . . They are the ones being assaulted and degraded."¹¹⁹ These arrests occurred the day before a scheduled City Council oversight hearing on the issue of police in schools, including whether there was an adequate school safety governance structure in place in the city's schools.¹²⁰

On February 26, 2008, Criminal Court Judge Tanya R. Kennedy dismissed the criminal case against Mark Federman.¹²¹ Judge Kennedy recognized that a court's power to dismiss a case in the interest of justice should only be exercised in that "rare and unusual case where it cries out for fundamental justice beyond the confines of conventional consideration."¹²² She concluded that the principal did not threaten the safety of the school safety officer or the school and that the "present case is precisely that rare circumstance where fundamental justice will only occur upon dismissal."¹²³ Judge Kennedy noted that this incident raised serious questions about the governance structure over school safety matters in New York City and that continuing the prosecution against Mark Federman would serve no useful purposes.¹²⁴

Aggressive policing appears to be most prevalent in high schools with permanent metal detectors, the number of which appear to have grown significantly under the Bloomberg administration. In April 2006, the city reported that twenty-one percent of middle and high schools had permanent metal detectors.¹²⁵ In the same report, the city stated that in 2005 there were seventy-nine schools with permanent metal detectors, while in 2006 that number increased to eighty-two.¹²⁶ Investigations by

117. *Id.*

118. *Id.*

119. Jennifer Medina, *Safety Agents Are Defended After 2 Arrests at City School*, N.Y. TIMES, Oct. 11, 2007, at B2, available at <http://www.nytimes.com/2007/10/11/nyregion/11council.html>; *Principal's Arrest Highlights Power Struggle in Schools*, *supra* note 102.

120. Medina, *supra* note 109. The author of this article worked closely with lawmakers and other advocates to schedule and prepare for this hearing. The arrests of Mr. Federman and Ms. Gonzalez resonated throughout the hearing as examples of the problem of aggressive policing in the schools and the problems that are caused by the lack of an adequate governance structure over school safety and discipline.

121. *People v. Federman*, 852 N.Y.S.2d 748, 750 (N.Y. Crim. Ct. 2008).

122. *Id.* at 749 (quoting *People v. Khan*, 841 N.Y.S.2d 221, 221 (N.Y. Crim. Ct. 2007)) (internal quotation marks omitted).

123. *Id.* at 750.

124. *Id.* at 751. For an example of NYPD officers arresting teachers, see First Amended Complaint, *Kronen v. City of New York*, No. 06 Civ. 1705, 2006 WL 2843223 (S.D.N.Y. Aug. 18, 2006). For a discussion of why the NYCLU filed the complaint, see *Kronen v. NYC (Challenging arrest of high school teachers who questioned handcuffing of students)*, NYCLU, <http://www.nyclu.org/node/1099> (last visited Mar. 2, 2012).

125. Press Release, N.Y.C. Dep't of Educ., *supra* note 65.

126. *Id.*

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the NYCLU since 2006 have revealed that the number of schools with permanent metal detectors has increased to at least 140, with more than 100,000 students attending such schools.¹²⁷

In schools with permanent metal detectors, which are disproportionately attended by black and Latino children from low-income families,¹²⁸ there is a more intense police presence, both in the number of police personnel assigned to the schools and in the frequency of police-student interactions. The metal detectors are operated by school safety officers, who also administer the bag scans as well as follow-up frisks and more intrusive searches if necessary.¹²⁹ In these schools, simple daily interactions can result in misunderstandings and power struggles. A student who does not want to give up his or her cellphone when identified by the metal detector scan, knowing full well that schools without metal detectors rarely enforce the ban on cellphones, will be confronted with police personnel who have little patience for misbehaving students and who have the authority and willingness to arrest children who resist or act in an aggressive manner. All too often, these interactions act as flashpoints of confrontation that lead to greater problems.

According to NYPD data from 2005, children at schools with permanent metal detectors are more often confronted by police personnel for “non-criminal” incidents than their peers citywide. In schools with permanent metal detectors, seventy-seven percent of police personnel interventions are in non-criminal incidents.¹³⁰ This percentage is twice as high as those in similarly-sized schools without metal detectors.¹³¹

In a 2007 survey conducted by the NYCLU of 1000 students who attend schools with permanent metal detectors, a significant percentage of students complained of misconduct by school safety officers.¹³² Fifty-three percent of students surveyed reported that police personnel spoke to them in ways that made them feel uncomfortable, including cursing and screaming at students, and even referring to students as “baby Rikers.”¹³³ Educators expressed concern that school safety officers acted too aggressively toward students, even assaulting them.¹³⁴ One school aide

127. The N.Y.C. Department of Education seldom releases data on the number of schools with metal detectors, despite repeated requests by the NYCLU for such data. Thus, the NYCLU, every couple of years, has assigned staff and interns to call schools to find out whether they have metal detectors. A list of schools with metal detectors is on file with the author.

128. According to an NYCLU and ACLU analysis of the 2004–2005 school year, eighty-two percent of students who attended schools with permanent metal detectors were black or Latino, compared to a citywide average of seventy-one percent. Students from low-income families constituted fifty-nine percent of children attending high schools that had permanent metal detectors, compared to a citywide average of fifty-one percent. CRIMINALIZING THE CLASSROOM REPORT, *supra* note 5, at 20.

129. See N.Y.C. Dep’t of Educ. Reg. of the Chancellor, A-432, Search & Seizure, (2005).

130. CRIMINALIZING THE CLASSROOM REPORT, *supra* note 5, at 20.

131. *Id.*

132. *Id.* at 16

133. *Id.*

134. *Id.*

reported seeing a school safety officer hitting a student in the jaw for not handing over his cell phone, then handcuffing and removing the student from the school.¹³⁵ Students also complained of intrusive searches, with fifty-eight percent reporting that they have had to take off or lift up clothes to enter school, and fifty-three percent reporting that police personnel had frisked them and searched their pockets at the metal detectors.¹³⁶ Twenty-seven percent reported that police personnel touched them in a way that made them feel uncomfortable.¹³⁷ Girls whose under-wire bras set off the metal detectors reported having to lift up their shirts before school safety officers.¹³⁸ An openly-gay student at one high school said that school safety officers discriminated against him, and that “[w]hen it’s time for me to get scanned, the male security guards flip a coin to see who has to scan me.”¹³⁹ Eighty-two percent of students reported that they have been late to class because of the metal detectors.¹⁴⁰

In 2010, the New York Civil Liberties Union, along with the American Civil Liberties Union and the law firm of Dorsey & Whitney LLP, filed a federal class action lawsuit challenging the NYPD’s policies and practices of seizing and arresting school children in violation of the Fourth Amendment.¹⁴¹ The lawsuit, filed on behalf of six school children and one organization, claims that NYPD personnel handcuff and arrest students for minor violations of school rules, absent probable cause of criminal activity, and use excessive force against students, which too often results in the child’s physical injury and, in some cases, hospitalization.¹⁴² The complaint documents more than two dozen stories of students who were engaged in non-criminal conduct and were handcuffed, arrested, or physically assaulted by police personnel at school.¹⁴³ The plaintiffs seek declaratory and injunctive relief, asking that New York City develop a meaningful mechanism to file complaints against school safety officers; develop guidelines to ensure that children are not wrongfully arrested; improve the disciplinary process over school safety officers who have been found to engage in wrongdoing; ensure that school administrators have a role in maintaining school safety; and implement better training for school safety officers.¹⁴⁴

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 16–17.

139. *Id.* at 16.

140. *Id.* at 17.

141. B.H. Amended Complaint, *supra* note 54. The author of this article is co-counsel on the case.

142. *Id.* at 33–34, 62–63.

143. *Id.* at 15–31, 38–53.

144. *Id.* at 65–66.

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2. *No Adequate Governance Structure Regulating Police Activities in Schools*

The relationship between the NYPD and the DOE in matters of school safety is defined in a 1998 Memorandum of Understanding (MOU), a legal agreement that was renewed in 2003 without public debate and even without the knowledge of top officials within the NYPD and the DOE.¹⁴⁵ For six years, high-ranking officials in both the NYPD and DOE repeatedly stated that the MOU had expired.¹⁴⁶ It was only during the 2009 debate in the New York State Legislature on reauthorization of mayoral control of schools that Brooklyn Assembly Member Karim Camara learned that Mayor Bloomberg had reauthorized the Memorandum of Understanding.¹⁴⁷

The Memorandum of Understanding and subsequent police documents and comments raise serious concerns about the lack of an adequate governance structure to regulate police activities in schools, and about the authority given to police personnel to enforce non-criminal disciplinary matters in schools. The 1998

145. The 1998 MOU was only supposed to stay in effect for four years and during that period a “Joint Committee” on school safety was required to complete annual evaluations of school safety and the NYPD’s handling of it. MOU, *supra* note 32, at 1–3. After three years of evaluations, the mayor or the Board of Education would have had the authority to terminate the transfer, effective on the fourth anniversary. *Id.* at 13. At a meeting that the author of this article had on May 4, 2007 with NYPD Chief Douglas Ziegler and Assistant Chief James Secreto, who at that time were in charge of the NYPD’s School Safety division, they explained that with the advent of mayoral control of city schools, no new MOU was necessary to replace the expired MOU. Letter from NYCLU to Michael Bloomberg, N.Y.C. Mayor, Joel Klein, Chancellor of N.Y.C. Dep’t of Educ., & Raymond Kelly, N.Y.C. Police Comm’r (June 16, 2009) (on file with author). Similarly, on October 10, 2007, Deputy Chancellor Kathleen Grimm testified at a City Council hearing that “[t]o the best of my knowledge there was no joint committee that met and recommended a renewal of that MOU . . . there is no written MOU.” *Joint Hearing on School Safety Before the Comm. on Educ., Comm. on Public Safety, & Comm. on Juvenile Justice*, 2006–2009 Sess. N.Y.C. City Council 66–68 (Oct. 10, 2007) (testimony of Kathleen Grimm, Deputy Chancellor on Admin. & Fin.) [hereinafter Testimony of Deputy Chancellor Grimm]. The City Council’s chair of the Public Safety Committee, Peter Vallone, Jr., relied on this testimony and other representations made by the NYPD and DOE when he issued a news release stating,

City Council Members at a hearing . . . discovered that Administration officials no longer use a 1998 Memorandum of Understanding that transferred school safety responsibility from the Department of Education to the NYPD—instead favoring an unspoken agreement to cooperate with each other—leaving no formal document to solve disputes in school safety situations.

Press Release, Peter F. Vallone, Jr., City Council Chair, Public Safety Comm., Getting on the Same Page on School Safety (Oct. 11, 2007).

146. See Testimony of Deputy Chancellor Grimm, *supra* note 145; Letter from NYCLU to Michael Bloomberg, N.Y.C. Mayor, Joel Klein, Chancellor, N.Y.C. Dep’t of Educ., & Raymond Kelly, N.Y.C. Police Comm’r, *supra* note 145.

147. See Letter from Donna Lieberman & Udi Ofer, to Michael Bloomberg, N.Y.C. Mayor, Joel Klein, Chancellor of N.Y.C. Dep’t of Educ. & Raymond Kelly, N.Y.C. Police Comm’r, regarding the MOU remaining in effect (June 16, 2009), available at <http://www.nyclu.org/files/NYCLULetteronMOUextension.6.16.09.pdf>; see also Philissa Cramer, *City Secretly Renewed Police Control Over School Safety in 2003*, GOTHAM SCHOOLS (June 26, 2009, 5:02 PM), <http://gothamschools.org/2009/06/26/city-secretly-renewed-police-control-over-school-safety-in-2003/>; Press Release, NYLCU, Secret Agreement between NYPD and DOE over Police in Schools yet another Symptom of Broken System (June 17, 2009), <http://www.nyclu.org/news/secret-agreement-between-nypd-and-doe-over-police-schools-yet-another-symptom-of-broken-system>.

Memorandum of Understanding transferred to the NYPD the responsibility to recruit, hire, train, and deploy school safety officers,¹⁴⁸ and to enforce the state's criminal laws as well as the rules of the Board of Education, which includes the New York City discipline code, the vast majority of which concerns activities that are minor and non-criminal.¹⁴⁹ Similarly, a 2007 NYPD training manual for school safety officers explicitly states that police personnel in schools have the authority to enforce school discipline.¹⁵⁰ Likewise, on June 11, 2007, NYPD Commissioner Ray Kelly sent a letter to New York City Council Member and Chair of the Education Committee Robert Jackson indicating that the duties of school safety officers include "removing unruly students" and "enforc[ing] the rules and regulations" of the "Student Disciplinary Code."¹⁵¹

The delegation of the enforcement of school disciplinary rules to school safety officers raises serious Fourth Amendment concerns.¹⁵² The Fourth Amendment to the U.S. Constitution protects individuals against unreasonable searches and seizures by police personnel,¹⁵³ including school safety officers.¹⁵⁴ The Fourth Amendment protects individuals against arbitrary invasions of their security and privacy by government officials,¹⁵⁵ and generally requires that searches and seizures be made pursuant to a warrant based upon probable cause.

Current NYPD policies and practices have resulted in students being seized and arrested by law enforcement personnel without probable cause of a crime and in

148. See MOU, *supra* note 32, at 6.

149. *Id.* at 10. ("[T]he NYPD . . . is hereby authorized to enforce rules, regulations, or procedures of the Board and its schools which are subject to implementation by superintendents and principals in furtherance of school security.").

150. NYPD SCH. SAFETY DIV., NYPD SCHOOL SAFETY AGENT DUTIES AND RESPONSIBILITIES: A GUIDE FOR DOE AND NYPD PERSONNEL 7 (2007), <http://corlears56-building.council.wikispaces.com/file/view/SSA's+Duties+%26+Responsibilities.pdf> (listing the responsibilities of each position within the borough command structure, including a level 1 school safety officer: "On behalf of the DOE, SSA's will enforce the rules and regulations governed by the Chancellor's Student Disciplinary Code.").

151. Letter from Raymond W. Kelly, N.Y.C. Police Comm'r to Hon. Robert Jackson, Chairman of Educ. Comm., N.Y.C. Council, *supra* note 80.

152. Other constitutional concerns, which are beyond the scope of this article, raised by these practices are questions regarding what level of suspicion is required for a school safety officer to engage in a search of a student (the author would argue that the standard applied by the Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is too low and that the traditional standard of probable cause should apply) and when a school safety officer-student encounter rises to the level of a custodial interrogation triggering *Miranda* warning requirements, see *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

153. The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

154. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court recognized that the Fourth Amendment governs "all intrusions by agents of the public upon personal security." *Id.* at 19.

155. See *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

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violation of the Fourth Amendment. A person is seized under the Fourth Amendment when the officer “by means of physical force or show of authority, terminates or restrains [the person’s] freedom of movement, through means intentionally applied.”¹⁵⁶ When an officer’s intent to restrain or an individual’s submission to authority is difficult to decipher, then the courts will consider whether “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”¹⁵⁷ Police personnel detaining a child who has not engaged in criminal activity (for example, by handcuffing a five-year-old for throwing a temper tantrum) violates the Fourth Amendment, even if the child is never processed through the juvenile or criminal justice system.¹⁵⁸

The MOU also fails to consider the complexity of school-based incidents that could be considered both normal childish misbehavior as well as minor illegal activity. In particular, the MOU does not address situations that could technically be considered a violation of the Penal Law but that may not require a law enforcement response. For example, should a minor hallway disturbance be considered disorderly conduct leading to a summons or an arrest or should it be considered childish misbehavior resulting in after-school detention? Who should decide these questions and what factors should be taken into consideration? As a result of these unanswered questions, students in New York City are subject to arrests and summonses for minor illegal incidents (such as disorderly conduct) that should be treated by pedagogical staff or social workers and guidance counselors, and not by police personnel or the criminal justice system.

The deficiencies contained in the MOU have led to principals in New York City’s public schools having little to no authority to supervise or regulate the behavior of 5400 police personnel in the schools. Ernest Logan, president of the Council of Supervisors and Administrators, the union that represents principals in New York City, testified before the New York City Council in 2007 to this point and the lack of control that principals feel when it comes to maintaining safety in their schools, as well as confusion caused by the presence of police personnel in the schools without an adequate governance structure.

156. *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal quotation marks omitted) (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991), *Terry*, 392 U.S. at 19, n.16, and *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989)). An illegal seizure and arrest take place when an individual can demonstrate that “(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged.” *Posr v. Doherty*, 944 F.2d 91, 97–98 (2d Cir. 1991) (“An arrest . . . may occur even if the formal words of arrest have not been spoken provided that the subject is restrained and his freedom of movement is restricted.”). If a law enforcement officer has probable cause of a crime, then the arrest was privileged. *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (holding that probable cause to exist there must be “knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime”).

157. See *Brendlin*, 551 U.S. at 255 (quoting *United States v. Mendhall*, 446 U.S. 544, 554 (1980)).

158. See *Rarick v. DeFrancesco*, 94 F. Supp. 2d 279, 287 (N.D.N.Y. 2000) (holding that the handcuffing of an individual to a wall constituted an arrest).

My members who are the principals and the assistant principals in the schools feel that they cannot direct [School Safety Agents] who are providing the safety and security in their buildings. . . .

Now, the [New York City Schools] Chancellor has said principals are empowered. Well, it's interesting, we're now empowered over everything but we can't say anything to the School Safety Agent¹⁵⁹ about what we want them to do.

. . . .

Every incident is unique, but I am truly troubled by the fact that we are criminalizing our children, because I heard today also that the School Safety Agent decides whether it is a crime or not. Now, maybe I'm a little confused by that. I know there is a principal of a school, two second graders playing in the school yard. The game gets heated, Jonnie hits Michael, Michael winds up with a bloody nose, the School Safety Agent observed that. Is that a crime? Are we now going to arrest the child who hit the other kid with the bloody nose? I don't think so.

. . . .

We believe that principals and assistant principals are in charge of their buildings and must have more direct control and supervision of safety agents.¹⁶⁰

Unfortunately, schools receive little guidance from the DOE on how to ensure that law enforcement officials do not become school disciplinarians.

159. Many individuals, including those within the Bloomberg administration, refer to school safety officers as school safety agents. However, the MOU that established the NYPD's School Safety Division refers to the police personnel in the schools as "school safety officers," which is the term used in this article. It also is a more accurate term both because it reflects the language of the MOU and because it correctly represents their powers as peace officers. *See* MOU, *supra* note 32, at 5.

160. *Joint Hearing on School Safety Before the Comm. on Educ., Comm. on Public Safety, & Comm. on Juvenile Justice*, 2006–2009 Sess. N.Y.C. City Council 178–82 (Oct. 10, 2007) (testimony of Ernest Logan, President, N.Y.C. Council of Sch. Supervisors & Adm'rs). In New York City, the main nongovernmental voice that supports the work of school safety officers—and comes to the defense of school safety officers accused of misconduct—is the labor union that represents them, Teamsters Local 237. The author of this article has had numerous conversations with the leadership of the union, and in particular with union president Gregory Floyd, about the roles and responsibilities of school safety officers. In 2008, Mr. Floyd agreed to be interviewed by the author, in-person and on the record in his New York City office, to discuss his views on school safety in New York City, including the problems facing school safety officers. According to Mr. Floyd:

[The city needs to] clearly define for [DOE] staff, administrators at schools and teachers the guidelines under which they have to operate. And when they call school safety, for whatever the reason, they have to step back. Otherwise, do not call the School Safety Agents because the child will not take gum out of his mouth, the child will not take off his hat or her hat, [or because] the child will not sit down in the classroom. Those situations should be dealt with by the principals, the deans, and the teachers. If you call the School Safety Agents, you run the risk of having problems escalate in those cases.

Interview by Udi Ofer with Gregory Floyd, President, Teamsters Local 237, in N.Y.C, N.Y. (July 7, 2008).

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B. Dramatic Growth of Suspensions in New York City Schools

During the same period that the number of police personnel grew significantly in New York City schools, and policing tactics were introduced into the school environment, the number of suspensions also grew dramatically. According to a January 2011 report by the New York Civil Liberties Union, from 1999 to 2009, the number of suspensions served each year in New York City schools nearly doubled, despite a decreasing student population.¹⁶¹ During that period, students served 449,513 suspensions, missing more than 2.2 million days of regular school instruction.¹⁶²

In New York City, the Citywide Standards on Discipline and Intervention, also known as the “discipline code,” regulates the type of student activities that may be subject to a suspension.¹⁶³ While some of the activities that mandate a suspension are governed by state and federal laws,¹⁶⁴ school districts such as New York City have significant leeway in formulating their discipline code and deciding on appropriate interventions to address student misbehavior. For example, districts may choose to mandate peer mediation, guidance counseling, and conflict resolution programs as ways to address the vast majority of student misbehavior.

New York City has taken advantage of this discretion to move in the opposite direction by increasing substantially the number of infractions listed in the discipline code and the number of those infractions that may or must result in a suspension. From 1998–2001, the New York City Discipline Code listed thirty-eight infractions, twenty-four of which could result in a suspension, and seven of which mandated a suspension.¹⁶⁵ By 2008, the Discipline Code listed sixty-three infractions, fifty-one of which could result in a suspension, and twenty-nine of which mandated a suspension.¹⁶⁶

161. NYCLU SUSPENSIONS REPORT, *supra* note 4, at 5. The report analyzed data that had never before been made publicly available, and came in response to public records requests filed and appealed by the author over a two-year period. For additional information on the report, see Fernanda Santos, *Sharp Rise in Suspensions at City's Schools is Cited*, N.Y. TIMES, Jan. 27, 2011, at A29, available at <http://www.nytimes.com/2011/01/28/nyregion/28suspend.html>; Rachel Monahan, *Report Says Special Education and Black Students More Likely to Face Suspensions in School*, N.Y. DAILY NEWS, Jan. 27, 2011, at 12, available at http://articles.nydailynews.com/2011-01-27/local/27737935_1_suspensions-student-infractions-black-students; Anna Phillips, *City Schools are Suspending More Students, and for Longer*, GOTHAM SCHOOLS (Jan. 27, 2011, 5:49 PM), <http://gothamschools.org/2011/01/27/city-schools-are-suspending-more-students-and-for-longer/>.

162. NYCLU SUSPENSIONS REPORT, *supra* note 4, at 5–6. New York City rarely expels students but frequently suspends them for long periods of time that in other jurisdictions would be considered an expulsion. In New York City children cannot be expelled until they have reached the maximum compulsory attendance age of seventeen. Therefore, during long-term suspensions, students attend alternative learning centers, also known as suspension sites. Students may be suspended for an entire school year but not be counted as being expelled.

163. N.Y.C. DEP'T OF EDUC., CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES: THE DISCIPLINE CODE AND CITYWIDE BILL OF STUDENT RIGHTS AND RESPONSIBILITIES, K-12 at 1 (2011), <http://schools.nyc.gov/RulesPolicies/DisciplineCode/default.htm>.

164. See 20 U.S.C. § 7151; see also N.Y. EDUC. LAW § 2801 (McKinney 2011).

165. NYCLU SUSPENSIONS REPORT, *supra* note 4, at 11.

166. *Id.*

Nearly half of all infractions mandated a suspension, and eighty-one percent of the listed infractions could have resulted in a suspension, including minor misbehavior such as being insubordinate or using profane language.¹⁶⁷ That same year, unsurprisingly, also saw the most suspensions.¹⁶⁸

Zero tolerance infractions grew at the highest rate. In 1998, there were seven infractions that mandated a suspension.¹⁶⁹ In the 2002–2003 school year, the year that Mayor Bloomberg took control over city schools, there were fourteen zero tolerance infractions, but by the 2007–2008 school year there were twenty-nine zero tolerance infractions.¹⁷⁰ In 2010, largely in response to concerns raised by advocates, the number of zero tolerance infractions dropped to twenty-one offenses, still a two hundred percent increase from 1998, and a fifty percent increase from when Mayor Bloomberg took office.¹⁷¹

As the number of suspendable infractions grew, so did the number of suspensions, despite a decreasing student population. In the 2002–2003 school year, the same year that Mayor Bloomberg took control of New York City schools, students served 31,879 suspensions.¹⁷² By the 2008–2009 school year, students served 73,943 suspensions, an increase of 132%.¹⁷³

Long-term suspensions also increased significantly, and comprised a larger percentage of overall suspensions. Long-term suspensions increased by 150% from the 1999–2000 school year to the 2008–2009 year (from 6493 to 16,232).¹⁷⁴ While long-term suspensions comprised fifteen percent of all suspensions in 1999–2000, by 2008–2009 they comprised twenty-two percent of all suspensions.¹⁷⁵

Black children bore the brunt of the increasing reliance on suspensions. While black children represented thirty-three percent of the student population during this period, they represented fifty-three percent of all suspensions and fifty-eight percent of long-term suspensions.¹⁷⁶ Black students also represented the largest percentage of students with multiple suspensions.¹⁷⁷ For example, more than fifty-six percent of children who served six or more suspensions in a school year were black.¹⁷⁸ Moreover,

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 15.

173. *Id.*

174. *Id.* at 17.

175. *Id.*

176. *Id.* at 18–19.

177. *Id.* at 19.

178. *Id.*

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black students represented fifty-five percent of all suspensions for subjective offenses, such as engaging in disruptive or disrespectful behavior.¹⁷⁹

Students with special needs were also disproportionately suspended, despite federal protections for students with disabilities who are subject to school disciplinary actions.¹⁸⁰ From 1999–2009, students with disabilities served close to thirty percent of suspensions in New York City public schools and were four times more likely to be suspended than students without disabilities.¹⁸¹ Students with learning or emotional disabilities served eighty percent of those suspensions, despite comprising half of the population.¹⁸² Black students with disabilities were also disproportionately suspended, representing thirty-six percent of the population of students with disabilities but fifty-three percent of suspensions.¹⁸³

The day after the NYCLU released its report finding that students with special needs were much more likely to be suspended, the New York Daily News obtained an internal Department of Education memo that had warned officials back in 2008 about school officials' over-reliance on suspensions as a way to address disciplinary problems among children with special needs.¹⁸⁴ Staff members of suspension sites in the Bronx prepared the November 2008 memo to raise concerns about the fact that approximately forty percent of the students at Bronx suspension sites had special needs.¹⁸⁵ The memo quoted principals and teachers complaining that they did not receive enough support and guidance to address misbehavior by children with special needs.¹⁸⁶

It is likely that the increase in police presence and tactics in the schools, which took place during the same period as the increase in suspensions, contributed significantly to the dramatic increase in the number of suspensions in New York City schools. Too often police personnel in the schools, as well as security technologies such as metal detectors, lead to confrontations with students that result not only in wrongful arrests, but suspensions as well. Take, for example, Yvette, who, while trying to pick up her sister from a classroom in a school that they both attended, was handcuffed and arrested after engaging in a verbal dispute with a school safety officer

179. *Id.* An illustration of this concern is found in the case of thirteen-year-old black student at Junior High School 190 in Queens, who was suspended for bringing a souvenir baseball bat to school. Four white children also played with the bat, yet the black student was the only one suspended. Monahan, *supra* note 161.

180. Federal law recognizes that students with disabilities may have greater behavioral problems and therefore affords additional protections to students with disabilities under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C § 1415 (2006).

181. NYCLU SUSPENSIONS REPORT, *supra* note 4, at 3, 20.

182. *Id.* at 20.

183. *Id.* This statistic only applies to the years 1999–2008 because the Department of Education stopped releasing such disaggregated data after 2008.

184. Rachel Monahan, *Officials Were Given Advance Warning on Special-Ed suspensions, Memo Shows*, N.Y. DAILY NEWS, Jan. 28, 2011, at 16.

185. *Id.*

186. *Id.*

who blocked her way to the classroom.¹⁸⁷ While Yvette was released from police custody after seven hours, she was then recommended for a year-long superintendent suspension.¹⁸⁸

III. GROWING EVIDENCE OF THE INEFFECTIVENESS OF ZERO TOLERANCE

Though zero tolerance resonates politically and has proliferated across the nation, numerous studies have demonstrated that it is ineffective as a corrective measure and has a demoralizing effect on the student body.¹⁸⁹ These studies have found that (1) zero tolerance policies create an unwelcoming school environment for all students, leading to feelings of detachment from school and a greater willingness to leave the school environment;¹⁹⁰ (2) students who are suspended tend to be suspended repeatedly, until they either drop out or are pushed out of school by overwhelmed and under-resourced educators;¹⁹¹ and (3) zero tolerance tends to be implemented in a discriminatory manner: it is enforced more often against male students, students of color, students with disabilities, and students from low-income households.¹⁹²

Critics of zero tolerance argue that these policies lead to injustices against children, and that the mandatory punishments fail to correct misbehavior because they focus solely on the punishment and not on the learning opportunities that could result from alternative responses to student misbehavior.¹⁹³ Moreover, critics argue that zero tolerance policies perpetuate the “school to prison pipeline,” a phenomenon whereby students from certain communities are removed from school and are pushed either directly (through arrests) or indirectly (through suspensions and other policies that lead to an unwelcoming school environment, such as untreated bullying) into the juvenile and criminal justice systems. Children who are removed from the learning environment, even for a few days, are more likely to drop out, use drugs, face emotional challenges, become involved with the juvenile justice system, and develop criminal records as adults.¹⁹⁴ At-risk students in particular become more

187. NYCLU SUSPENSIONS REPORT, *supra* note 4, at 14.

188. *Id.*

189. See APA REPORT, *supra* note 6; ADVANCEMENT PROJECT, TEST, PUNISH AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE (2010); NYCLU SUSPENSIONS REPORT, *supra* note 4; DAVID RICHART ET AL., BUILDING BLOCKS FOR YOUTH, UNINTENDED CONSEQUENCES: THE IMPACT OF “ZERO TOLERANCE” AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY STUDENTS (2003) [hereinafter BUILDING BLOCKS FOR YOUTH]; ZERO TOLERANCE, ZERO EVIDENCE, *supra* note 6; Amy C. Nelson, *The Impact of Zero Tolerance School Discipline Policies: Issues of Exclusionary Discipline*, 37:4 COMMUNIQUÉ (Nat’l Ass’n of Sch. Psychologists), Dec. 2008, http://www.nasponline.org/publications/cq/mocq374impact_zero_tolerance.aspx.

190. See Nelson, *supra* note 189.

191. See ADVANCEMENT PROJECT, *supra* note 21, at 12.

192. See BUILDING BLOCKS FOR YOUTH, *supra* note 191, at 8.

193. See ZERO TOLERANCE, ZERO EVIDENCE, *supra* note 6, at 7.

194. NAACP LEGAL DEFENSE & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (2005), http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf; see also CRIMINALIZING THE CLASSROOM REPORT, *supra* note 5; NYCLU SUSPENSIONS REPORT, *supra* note 4.

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alienated from school, placing them in a greater risk of delinquent behavior and eventual incarceration.¹⁹⁵

The American Psychological Association (APA) commissioned a Zero Tolerance Task Force in 2006 to study the evidence on the effects of zero tolerance on student behavior and achievement.¹⁹⁶ The APA found that removing a misbehaving student from school does not result in a safer school environment for other students.¹⁹⁷ In fact, data on school climate shows that schools that have a higher rate of suspension and expulsion also have less satisfactory school climate ratings and spend a disproportionate amount of school and staff time on disciplinary matters rather than academic performance.¹⁹⁸ Studies have also found “a negative relationship between disciplinary exclusion and measures of achievement.”¹⁹⁹ Schools that rely more heavily on exclusionary discipline demonstrate less educational achievement, even when controlling for other factors such as student demographics.²⁰⁰

Moreover, there is little evidence to support the proposition that zero tolerance policies actually improve individual student behavior.²⁰¹ On the contrary, there is strong evidence to support the conclusion that zero tolerance policies are ineffective in either shaping the future misbehavior of the subject of a removal or leading to the greater academic success of offenders. Studies have consistently shown that as many as forty-two percent of suspensions are of repeat offenders.²⁰² Some studies have shown that a suspension is the primary predictor of future suspensions,²⁰³ and past suspensions have been among the greatest predictors of school dropout.²⁰⁴ While school suspensions are effective in removing a misbehaving student from school, there is little to no evidence to suggest that they prevent such students from acting out, yet they do serve as predictors of future suspensions and failure to graduate.

Zero tolerance also tends to be applied in a discriminatory manner, despite the appearance that the mandatory nature of the policy would eliminate any discriminatory application. The APA reviewed the question of whether zero tolerance policies increase the consistency of school discipline, and concluded that black

195. APA REPORT, *supra* note 6, at 5.

196. *Id.* at 3.

197. *Id.* at 4, 44–48.

198. *See id.* at 4–5, 47.

199. *Id.* at 44.

200. *Id.* at 44–48.

201. ZERO TOLERANCE, ZERO EVIDENCE, *supra* note 6, at 13.

202. *See* Virginia Costenbader & Samia Markson, *School Suspension: A Survey of Current Policies and Practice*, 78 NAT'L ASS'N OF SECONDARY SCH. PRINCIPALS BULL. 103, 104–05 (1994); *see also* Christine Bowditch, *Getting Rid of Troublemakers: High School Disciplinary Procedures and the Production of Dropouts*, 40 SOC. PROBS. 493, 499 (1993) (calculating 35.2% repeated school violations).

203. *See generally* Tary Tobin & George Sugai, *Patterns in Middle School Discipline Records*, 4 J. EMOTIONAL & BEHAV. DISORDERS 82, 87–94 (1996); APA REPORT, *supra* note 6, at 5.

204. Gary Wehlage & Robert Rutter, *Dropping Out: How Much Do Schools Contribute to the problem?* 87 TCHRS. C. REC. 383, 385 (1986).

students and students with disabilities are disproportionately disciplined under zero tolerance policies.²⁰⁵ This occurs despite the lack of data that supports that black students exhibit a higher rate of misbehavior than white students.²⁰⁶ Instead, the data demonstrates that black students may be disciplined for more subjective infractions, such as disrespect and loitering while white students appear to be referred more frequently for objective offenses, such as smoking.²⁰⁷ A contributor to such disproportionality appears to be cultural incompetence and the lack of adequate training and support for teachers.²⁰⁸

Finally, similar concerns have been raised regarding an aggressive police presence in schools, which has been found to damage the credibility and effectiveness of pedagogical employees, alienate students, and interfere with normal adolescent development.²⁰⁹ Schools with a greater police presence also tend to have a disproportionate number of students of color and students on free and reduced lunch programs.²¹⁰ Studies have found that students of color are more likely to be arrested at school than white students. In Florida, black youth make up twenty-two percent of the state's juvenile population but represent forty-seven percent of school-based delinquency referrals.²¹¹ A study of police practices in schools in Hartford, Connecticut found that black and Latino students made up twenty-four percent of the student population but sixty-three percent of school-based arrests.²¹² In the Denver Public Schools between 2000 and 2004, Latino and black students had a seventy percent greater likelihood than white students to be disciplined, including ticketed.²¹³

205. APA REPORT, *supra* note 6, at 55–65; *see also* NYCLU SUSPENSIONS REPORT, *supra* note 4.

206. APA REPORT, *supra* note 6, at 58.

207. *Id.* at 58–59; NYCLU SUSPENSIONS REPORT, *supra* note 4, at 19; *see also* Anna C. McFadden et al., *A Study of Race and Gender Bias in the Punishment of School Children*, 15 EDUC. & TREATMENT CHILD. 140 (1992) (considering demographic differences in rates of referral for disciplinary action and finding that males represented over seventy-five percent of all discipline referrals, that black students received more corporal punishment and were suspended from school more frequently, and that black students were disproportionately disciplined); Steven R. Shaw & Jeffrey P. Braden, *Race and gender bias in the administration of corporal punishment*, 19 SCH. PSYCHOL. REV. 378 (1990) (studying disciplinary practices to see if there is evidence of race and gender bias-corporal punishment practices and finding a small and statistically significant relationship between race and corporal punishment, and a larger statistical relationship between gender and corporal punishment).

208. APA REPORT, *supra* note 6, at 58.

209. *See, e.g.*, Kathleen Nolan, *The Impact of Order-Maintenance Policing on an Urban School Environment: An Ethnographic Portrait*, 19 VOICES URB. EDUC. 18, 24–25 (2008); EVE TUCK ET AL., *YOUTH RESEARCHERS FOR A NEW EDUCATION SYSTEM* (2008).

210. APA REPORT, *supra* note 6, at 73; *see also* CRIMINALIZING THE CLASSROOM REPORT, *supra* note 5.

211. FLA. DEP'T OF JUVENILE JUSTICE, *DELINQUENCY IN FLORIDA'S SCHOOLS: A FOUR YEAR STUDY 5* (2009).

212. ACLU & ACLU OF CONN., *HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS 36* (2008).

213. ADVANCEMENT PROJECT, *supra* note 21, at 8.

IV. ALTERNATIVES TO ZERO TOLERANCE POLICING AND DISCIPLINE

Schools throughout the nation have replaced zero tolerance discipline policies with a graduated system of discipline that recognizes early intervention and moderate responses to misbehavior. These approaches recognize that misbehavior must be addressed immediately or else it will lead to future disruptions or even violence, but address such misbehavior by replacing severe punishments with a graduated system of alternative responses and interventions.²¹⁴

In 2009, the NYCLU, the Annenberg Institute for School Reform at Brown University, and Make the Road New York released a report²¹⁵ based on a one-year quantitative and qualitative study of six schools in New York City that had developed strategies to reduce school violence and achieve better graduation rates without resorting to zero tolerance policing and discipline while promoting a positive school climate.²¹⁶ The six schools served at-risk student populations similar to schools in New York City that relied on heavy-handed policing and zero tolerance discipline.²¹⁷ Several of the schools were transfer schools that served students who fared poorly in other schools and had fewer credits and a history of disciplinary problems.²¹⁸ Yet the schools had higher attendance and graduation rates, as well as dramatically lower numbers of criminal incidents and school suspensions.²¹⁹ Moreover, the seven-year graduation rates—which include students who graduated in five or six years—were

214. ZERO TOLERANCE, ZERO EVIDENCE, *supra* note 6, at 16.

215. The author of this article was the primary author of the report.

216. UDI OFER ET AL., SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS (2009) [hereinafter SAFETY WITH DIGNITY REPORT]. The six schools examined in the report were Progress High School for Professional Careers in Brooklyn, Urban Assembly School for Careers in Sports in the Bronx, Humanities Preparatory Academy in Manhattan, two schools in the Julia Richman Education Complex: Urban Academy and Vanguard High School in Manhattan, and Lehman High School in the Bronx. In 2010, the new principal at Lehman High School supported the installation of metal detectors, despite the number of serious incidents in the schools having decreased by thirty-six percent from the previous year. Fears about gang activities and fights led to the installation of metal detectors. See Anna Phillips, *Bronx High School May Be the Last of Its Kind to See Scanners*, GOTHAM SCHOOLS (Apr. 28, 2010, 6:34 PM), <http://gothamschools.org/2010/04/28/bronx-high-school-one-of-the-last-of-its-kind-to-see-scanners/>. The six schools were chosen because they had no permanent metal detectors, had reputations for their positive learning environments, and served populations similar to that of the average New York City school with permanent metal detectors. The report identified several measures of success: higher graduation, attendance, and student stability rates, and low rates of suspensions, dropouts, absenteeism, as well as criminal and non-criminal incidents relative to schools serving comparable populations. The report also examined the eighty-nine New York City high schools with permanent metal detectors and the twelve schools that were identified in 2006 by the DOE and NYPD as “impact” schools. In-depth interviews were conducted with forty-eight school administrator, school safety officers, parents, students, teachers, guidance counselors, and social workers.

217. SAFETY WITH DIGNITY REPORT, *supra* note 216, at 12.

218. Humanities Preparatory Academy is a transfer school, serving students with the greatest needs who have had behavioral, emotional, or learning problems at other schools. *Id.* at 31. Urban Academy is another example of a transfer school. It accepts students who have failed at previous schools, and many of its students are overage or behind in credits. *Id.* at 35.

219. *Id.* at 12.

significantly higher than comparable schools.²²⁰ For example, in 2007, the four-year graduation rate at Humanities Preparatory Academy was nearly sixty-five percent, yet its seven-year graduation rate was almost ninety-three percent.²²¹ At Urban Academy the four-year graduation rate was a very low thirty-seven percent, but the seven-year graduation rate was almost ninety-one percent.²²²

The six schools highlighted in the report responded to student misbehavior by utilizing alternative strategies that focused on attempting to address the underlying problems that led to the misbehavior and formulating individualized plans to prevent future misconduct.²²³ Moreover, while the six schools did have school safety officers working in them—it is New York City policy to have school safety officers at every school—their role was greatly limited.²²⁴ The six schools provide real-life examples of how to maintain safety by relying on non-policing and non-zero tolerance tactics, while also maintaining the mission and integrity of the school environment.

While the six schools employed unique strategies for maintaining a safe and nurturing school environment, there were several common themes among all of them.²²⁵ First, they all exhibited strong and supportive leadership, led not only by a principal but also by teachers and staff who were devoted to a common vision of creating a nurturing school community for all students.²²⁶ The leadership of these schools put in place mechanisms and organizational structures that anticipated disciplinary problems and were geared to reducing flashpoints of confrontation and ensuring that when misbehavior inevitably arose, it was dealt with swiftly and through positive interventions.²²⁷

Second, the six schools employed alternative approaches to addressing disciplinary problems that ensured educators, and not police personnel, enforced school discipline, including disciplinary infractions that may rise to the level of a minor illegal offense,

220. *Id.* at 12–13.

221. *Id.* at 30.

222. *Id.* at 34. These schools are also good examples of the shortcoming of evaluating student achievement through the four-year graduation rate. Schools that serve at-risk populations and students with special needs should be rated by their student retentions levels and long-term graduation rates.

223. *Id.* at 12.

224. *Id.* at 17.

225. *Id.* at 15.

226. *Id.*

227. *Id.* Interestingly, Mayor Bloomberg has emphasized building strong leadership skills in principals and has even launched an initiative in December 2002 to support principals to take on greater leadership roles in their schools. Press Release, New School Safety Initiative, *supra* note 66. However, this emphasis on greater leadership by principals has not extended to principal authority over school safety matters. SAFETY WITH DIGNITY REPORT, *supra* note 216, at 16. Principals whom the authors of the report interviewed expressed great concern and frustration over the obstacles they faced from the Department of Education in their attempts to institute alternatives school safety tactics and structures. *Id.* The principal of one of the featured schools in the report, William Jusino of Progress High School, has even remarked: “You’d think the Department of Education would want to know all about us, but they don’t. . . . [W]e’re one of the best kept secrets in New York.” *Id.* at 43.

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such as disorderly conduct.²²⁸ They instituted policies and practices that ensured that educators, and not the police, were ultimately responsible for maintaining order in the classroom and hallways by making clear that educators have the final say.²²⁹ For example, educators and staff monitored the hallways and addressed matters such as cutting class, rather than schools safety officers.²³⁰ Some of these schools instituted alternatives, such as conflict resolution programs or fairness committees, which are charged with adjudicating violations of school rules and formulating appropriate responses, to secure the school environment.²³¹ In these schools, the role of school safety officers was limited to acting as a last resort to deal with serious and immediate problems.²³² Minor disciplinary infractions, such as disorderly conduct, loitering, profanity, and tardiness were handled exclusively by school officials. In effect, the six schools filled in the gap left by Mayor Bloomberg and the Department of Education by “establish[ing] clear rules of governance over school safety matters.”²³³

These schools have also rejected metal detectors—even though some of them had metal detectors in the past—in the belief that metal detectors did more harm than good to the educational environment of the school and actually led to greater dropout rates while providing a false sense of security.²³⁴ School administrators, parents, students, and teachers expressed a belief that the lack of metal detectors did not make their schools less safe but rather helped produce a school climate based on trust, respect, and dignity.²³⁵ This, in turn, led students to feel more committed to the school, and more positive and a safer school environment.²³⁶ Without metal detectors, there was a greater emphasis on trust and communication between students

228. SAFETY WITH DIGNITY REPORT, *supra* note 216, at 17–19.

229. *Id.* at 17.

230. *Id.*

231. *Id.* at 18. Fairness committees consider minor infractions such as cursing or disrespect and even more serious matters such as fighting, vandalism, or cheating. *Id.* The committees are comprised of students but are usually led by teachers or social workers. These committees allow students to be a part of the disciplinary process, thus encouraging them to accept responsibility and ownership over maintaining a safe and positive school environment. The committee’s adjudicative process also provides educators and administrators flexibility when handling infractions. Moreover, the process legitimizes the school’s response in the eyes of the student being judged. *Id.* at 20. According to testimony delivered in October 2007 by the Department of Education, 800 teachers in New York City have been trained on conflict resolution programs. *Joint Hearing on School Safety Before the Comm. on Educ., Comm. on Public Safety, & Comm. on Juvenile Justice*, 2006–2009 Sess. N.Y.C. City Council 130–32 (Oct. 10, 2007) (testimony of Elayna Konstan, CEO, Office of Sch. & Youth Dev., N.Y.C. Dep’t of Educ.). This is less than one percent of the approximately 83,000 teachers in the New York City school system. SAFETY WITH DIGNITY REPORT, *supra* note 216, at 20.

232. SAFETY WITH DIGNITY REPORT, *supra* note 216, at 17.

233. *Id.*

234. *Id.*

235. *See id.* at 43.

236. *Id.* at 43.

and school staff to ensure that weapons were not brought into the school, and if they were, that students felt comfortable reporting such infractions to school officials.

Third, the six schools involve students in the process of revising the school's individual code of conduct that supplements the citywide discipline code.²³⁷ This process continued throughout the school year—sometimes through retreats—allowing students and staff to revisit rules that may become counterproductive or that may have created unnecessary tensions or confrontations.²³⁸ This process also encouraged student ownership over and responsibility for school rules.²³⁹

Fourth, several of the schools provided extensive support for students' nonacademic needs, either through in-house services or in partnerships with community based organizations.²⁴⁰ These non-academic services included social services, mentoring programs, counseling services, community-service opportunities, family therapy, medical services, and even daycare centers.²⁴¹

Fifth, in these schools teachers were strongly supported and encouraged to think innovatively.²⁴² Teachers were supported through professional development workshops, are given a voice in decisionmaking, and were encouraged to develop close relationships with their students and with their peers, thus forming strong community bonds.²⁴³ One of the schools even had teacher retreats to which students are invited.²⁴⁴

Finally, these schools emphasized a culture of trust and respect that formed the basis for all school policies and staff-student interactions and relationships.²⁴⁵ Even "bad students" were included in this emphasis.²⁴⁶ This included recognizing that there were no one-size-fits-all solutions for dealing with misbehaving students, but that a response must support the greater goal of building a school environment that emphasizes respect.²⁴⁷ Some of the schools created clear rules, such as "no personal attacks," which was reinforced by school staff.²⁴⁸ Other schools established core values, as opposed to school rules, to create a sense of community and social responsibility.²⁴⁹ Finally, some of the schools demonstrated this culture of respect by adjusting their

237. *Id.* at 20, 43. For example, some classrooms allow students to listen to music as long as it does not interfere with their work or the work of other students. *Id.* at 20.

238. *Id.*

239. *Id.*

240. *See id.*

241. *Id.* at 20, 38.

242. *See id.* at 20–21.

243. *Id.*

244. *Id.* at 20.

245. *Id.* at 21.

246. *Id.*

247. *Id.*

248. *See id.* at 36–37.

249. *Id.* at 31. For example, they emphasize the values of respect for humanity, diversity, and intellect.

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curriculum to include culturally relevant discussions and materials that sought to integrate students' backgrounds into the school's academic work.²⁵⁰

The policies and practices of the schools highlighted in the NYCLU report included components of a three-level model of prevention, intervention, and discipline that has been recognized by schools and researchers throughout the nation: primary prevention, which focuses on all students at a school by emphasizing a school-wide climate of tolerance and respect, bullying prevention,²⁵¹ and conflict resolution; secondary prevention practices targeted at students who are at-risk for violence and misbehavior and provide students with tailored programs such as anger management and mentoring;²⁵² and tertiary strategies that focus on students who have already engaged in misbehavior and that strive to minimize the future damage to the misbehaving student and others.²⁵³

One alternative to zero tolerance that utilizes all three tiers is Positive Behavioral Intervention and Supports (PBIS), which focuses on creating a positive school culture as well as individualized behavioral supports through proactive interventions to anticipate, prevent, and respond to disciplinary problems.²⁵⁴ The approach is data driven, which also assists in its marketability to policymakers and education reformers, and continuously tracks the progress of interventions.²⁵⁵ This model has already been implemented in schools throughout the nation and has provided documentation of decreased rates of misbehavior and suspensions and improvements to school climates.²⁵⁶

250. *Id.* at 20–21.

251. APA REPORT, *supra* note 6, at 88–90. The APA Report examined the effects of untreated bullying on the school environment and recommended addressing bullying through school-wide, classroom, and individual programs. *Id.*

252. *See id.* at 90–92. The APA study recommended instituting threat assessment measures, which evaluate the underlying issues that lead to misbehavior, as a way to identifying at-risk students. *Id.*

253. *See id.* at 88, 92–94.

254. *See id.* at 94; TECHNICAL ASSISTANCE CTR. ON POSITIVE BEHAV. INTERVENTIONS, U.S. DEP'T OF EDUC., SWPBS IMPLEMENTATION BLUEPRINT VERSION 13 (2010); George Sugai & Robert Horner, *The Evolution of Discipline Practices: School-Wide Positive Behavior Supports*, 24 CHILD & FAM. BEHAV. THERAPY 23, 32 (2002) (emphasizing supporting student behavior manifested on a school-wide, classroom, non-classroom, and individual student level); *Positive Behavioral Interventions and Supports (PBIS)*, NAT'L CTR. FOR MENTAL HEALTH PROMOTION & YOUTH VIOLENCE PREVENTION, <http://www.promoteprevent.org/publications/ebi-factsheets/positive-behavioral-interventions-and-supports-pbis> (last visited Mar. 3, 2012); Rob Horner & George Sugai, *School-wide Positive Behavior Support*, CTR. ON POSITIVE BEHAV. SUPPORT, www.pbis.org/common/pbisresources/presentations/robinintro.ppt (last visited Mar. 3, 2012). Numerous studies have demonstrated the benefits of reinforcing desirable student behaviors. *See, e.g.*, KHASU ET AL., *supra* note 20, at 4.

255. APA REPORT, *supra* note 6, at 94

256. *See id.* at 94–95. A key component of PBIS is a three-tiered behavioral support model, which focuses largely on preventing misbehavior. *See* Sugai & Horner, *The Evolution of Discipline Practices*, *supra* note 257, at 37–38; Horner & Sugai, *School-wide Positive Behavior Support*, *supra* note 257. The first tier of primary prevention applies to approximately eighty percent of students and includes school-wide programs. ELIZABETH BURMASTER, STATE OF WIS. DEP'T OF PUB. INSTRUCTION, POSITIVE BEHAVIORAL INTERVENTION AND SUPPORTS (PBIS) IN WISCONSIN SCHOOLS 1–2 (2009). This includes

An example of the tertiary prevention response is restorative justice, which was implemented by some of the schools profiled in the NYCLU report. Restorative justice is a dispute-resolution method that focuses on providing opportunities for all sides of a conflict—victims and offenders alike—to become involved in responding to the dispute.²⁵⁷ Such an approach is designed to allow for reconciliation between the perpetrator of an attack or incident and the victims of such behaviors, and to allow both sides to feel a sense of resolution and a greater sense of security.²⁵⁸ This model allows schools to gain a fuller understanding of the circumstances that led to a student's misbehavior and also provides an opportunity to devise appropriate remedies for the conduct. Through these methods, which hope to repair as much as possible the relationship between the perpetrator of an attack and the victim, the likelihood of repeat offenses, as well as revenge attacks, is reduced.²⁵⁹

The fairness committees established by Humanities Preparatory Academy provide a prime example of how a restorative justice program operates and its effectiveness.²⁶⁰ The committees are comprised of students and led by school staff that is charged with considering infractions and formulating solutions and responses. Here is how the process was described by a teacher in the school when the fairness committee convened in response to a student breaking a window at the school:

During that session, the members of the committee found out that the day before he broke the window, his family received notice that they were being kicked out of their shelter and had no place to go. While this did not fully excuse his actions, we were able to discuss more fully and fairly what the consequences should be, as well as discuss more constructive ways to deal with anger. We jointly decided that he needed to give back to the school community in some way. Knowing that it would be ridiculous to ask a student who was homeless to pay for the window, we all agreed he would help answer the phone after school for a month. In the meantime, his advisor and the school social worker were able to reach out to his family and offer support. If

clearly teaching behavior expectations to students, setting common rules for the entire school community, and creating guidance programs. *Id.* The second tier of prevention creates systems to provide support for students with at-risk behaviors, which the approach identifies as about fifteen percent of the student population, and which includes social skills building and instructional programs. *Id.* The third tier of prevention is specialized for students with high-risk behaviors, which applies to approximately five percent of students, and includes wraparound services, intensive interventions, case management, and mental health programs. *Id.* Throughout this process data mechanisms are built and shared that allow for a close monitoring and evaluation of student behavior and progress. *See SWPBS for Beginners*, OSEP CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, http://www.pbis.org/school/swpbs_for_beginners.aspx (last visited Feb. 23, 2012). Trends are closely monitored—for example, are there certain parts of the school or times of day or year when students misbehave the most?—to allow for intervention and prevention. *See id.*

257. RESTORATIVE JUSTICE, www.restorativejustice.org (last visited Mar. 3, 2012).

258. *Id.* This is in contrast to zero tolerance policies, which remove a child from the school environment without attempting to address the underlying behaviors or even providing the victim of misbehavior a sense of security once the offender returns to school. *See APA REPORT*, *supra* note 6, at 91.

259. *Id.*

260. *See SAFETY WITH DIGNITY REPORT*, *supra* note 216, at 31–32.

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the fairness committee had been a systematic, rigid mechanism, we would not have been able to brainstorm these solutions.²⁶¹

In addition to allowing for a better understanding of the underlying problems that led to the student's misbehavior, the fairness committee structure allowed for the building of more supportive relationship between students and school staff, which is a vital component to creating better and safe school environments.²⁶²

V. CONCLUSION AND RECOMMENDATIONS

Worries about being labeled soft on crime and concerns about a potential backlash have prevented many public officials from considering alternatives to zero tolerance policies. Yet New York City and other school districts can take steps to ensure that students learn and educators teach in a safe and supportive environment without the collateral consequences of pushing children out of school and into the streets or juvenile and criminal justice systems.

First, principals and educators must have final authority over school discipline and safety, not the police. When misbehavior occurs in a school, it should be the principal's responsibility to determine appropriate responses, and not the responsibility of police personnel.

Second, police personnel should not be involved in the enforcement of school discipline rules, and only become involved in school safety matters that rise to the level of a serious criminal offense. Disciplinary problems such as disorderly conduct, loitering, and profanity, to name a few examples, should never be handled by police personnel, even if a violation of the penal law.

Third, punishments should always be promulgated on a case-by-case basis, and not through a zero tolerance approach. Suspensions should only be used as a last resort following the exhaustion of other non-exclusionary attempts to address misbehavior by a student.

261. *Id.* at 18.

262. In 2004, the England and Wales Youth Justice Board released a report on its use of restorative justice programs in schools to reduce the number of infractions and bullying and to improve student attendance. Twenty-six schools had instituted restorative justice conferences to resolve incidents in schools involving physical or verbal altercations. According to the report, the vast majority of conference resulted in agreement and ninety-three percent of students reported that the process was "fair" and "justice had been done." YOUTH JUST. BD. FOR ENG. & WALES, *RESTORATIVE JUSTICE IN SCHOOLS* (2004), <http://www.yjb.gov.uk/Publications/Resources/Downloads/RJ%20in%20Schools.pdf>. A similar 2002 study in two school districts in Colorado found that ninety-two percent of participants in restorative justice conferences felt that the process helped to create a safer school, ninety-one percent felt that the process held offenders accountable for their actions, and ninety-six percent felt satisfied with the outcome. Alice Ierley & Carin Ivker, *Restoring School Communities: A Report on the Colorado Restorative Justice in Schools Program*, 13 VOMA CONNECTIONS 1 (2003), available at <http://voma.org/docs/connect13insert.pdf>. In 2002, a Minneapolis school adopted a restorative justice program for a limited population: students recovering from drug addictions. As a result, the number of disciplinary problems had dropped, and students reported a greater sense of connectivity to the school community. Carol Chmelynski, *Schools Find 'Restorative Justice' More Effective Than Expulsion*, SCH. BD. NEWS, May 17, 2005.

Fourth, schools should adopt alternatives to punitive and exclusionary discipline, such as restorative justice practices and positive behavioral interventions and supports. The Department of Education should mandate trainings on these practices and encourage schools to implement them.

Fifth, schools should hire more guidance counselors, social workers, and mental and medical health providers to handle students' non-academic needs and to respond to misconduct. New York City schools employ 5400 police personnel, 3000 guidance counselors, and 1400 social workers. The allocation of resources should be re-shifted to place greater emphasis on relying less on police personnel to address discipline and behavior problems, and more on trained counselors and educators.

Sixth, metal detectors should be discouraged and installed only as a last resort, for a limited period of time, and following community input and approval. Schools should review and attempt alternative safety mechanisms before installing metal detectors. Once metal detectors are installed, then schools should maintain data that will allow them to determine the impact of the metal detectors on the school environment. Annual evaluations should be conducted to determine whether metal detectors are still necessary.

Finally, after implementing the above alternatives, schools that currently have police personnel in them should remove them from their campuses. Once a school implements a clear governance structure that directs principals and educators to be responsible for discipline and safety, limits the involvement of police personnel to serious criminal matters, implements proven alternatives to zero tolerance policies, and hires social and health providers to handle students' needs, then permanently stationed police personnel will no longer be needed in schools.