

# Dignity



# Denied

*The Effect of "Zero Tolerance" Policies  
on Students' Human Rights*

A CASE STUDY OF NEW HAVEN, CONNECTICUT,  
PUBLIC SCHOOLS

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A Case Study of New Haven, Connecticut, Public Schools**

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## **I. SUMMARY**

This report examines how the involvement of the criminal justice system in school discipline policies and practices causes deprivations of human rights for children in four key areas: the right to be free from discrimination, the right to education, the right to proportionality in punishment, and the right to freedom of expression. Analyzing school policies and practices as well as the criminal justice system, this report identifies specific areas where state, federal, and international law obligates the state to take affirmative measures to protect children’s human rights in the context of school discipline. Drawing on a case study of the New Haven, Connecticut, public school system, this report describes the effects of the school-to-prison pipeline—the process whereby discipline policies channel students out of school and into the criminal justice system—and provides recommendations for improving policies and practices in order to ensure that students enjoy a safe and high-quality education without sacrificing their human rights.

The descriptions, analysis, and suggestions in this report are based on interviews and secondary research conducted by members of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School. While the key issues and recommendations identified in this report are based on New Haven public schools, they have broader implications: School districts in Connecticut and beyond employ similar discipline policies, and as a result, children across the country face deprivations of human rights due to the overlapping criminal justice and school discipline systems. Because of widespread zero-tolerance policies and increased school-based policing at U.S. public schools, this report’s central themes and its suggestions for improving disciplinary policies are relevant to many schools, including those outside Connecticut. The report’s international human rights law framework will also provide a basis for further research and advocacy aimed at ensuring that states create safe and productive educational environments without depriving students of their human rights.

Section I introduces the major issues and themes addressed throughout the report and uses a hypothetical example to map the phases of school-based punishment, focusing on the school disciplinary system, the criminal system, and how these two systems interact. Section II uses an international human rights framework to analyze the central concerns raised by the punishment of children in New Haven public schools under state zero-tolerance policies, local school discipline codes, and individual school discipline practices. This Section identifies four rights affected by current disciplinary practices: (1) the right to education; (2) the right to be free from discrimination; (3) the right to proportionality in punishment; and (4) the right to freedom of speech and expression. Relying on international human rights law, federal and state law, and local policy, this Section describes the scope of these rights in the public education context and examines the deprivation of each right, drawing primarily on legal frameworks and information gathered from interviews with actors who encounter children in the disciplinary process. Finally, Section III is the report’s conclusion.

## **II. RECOMMENDATIONS**

In light of the research and analysis on which the following report is based, the ACLU and the Lowenstein International Human Rights Clinic at Yale Law School believe that schools

must adopt policies that address the abuses of human rights that zero-tolerance approaches to school discipline have introduced. In particular, school administrators should:

- End the practice of employing criminal sanctions for student conduct, such as inappropriate speech, where a disciplinary response alone is sufficient.
- Limit the use of suspensions and expulsions for non-serious student misbehavior in order to minimize the phenomenon of student “pushout.”
- Reform zero-tolerance policies and ensure that school administrators retain discretion so that individual school boards can engage in a case-by-case analysis of student misbehavior and apply leniency in cases where mitigating circumstances may warrant a less severe punishment than suspension or expulsion.
- Ensure prosecutorial discretion to allow cases against students, including those with prior convictions (for example, in the case of New Haven, two prior convictions or two prior cases handled non-judicially through the probation department) to be resolved non-judicially.
- Provide effective services to children who are suspended or expelled from school; for example, rather than a mandated two-hour-per-day tutoring program, create and implement full-day programs in which instructors coordinate with students’ full-time teachers to ensure that students remain current in their coursework, do not lose pace with their peers, and are not at an increased risk of dropping out of school.
- Clearly define the distinct roles of school-based police officers and school administrators in every school to ensure that the broad discretion of officers and administrators, combined with the increased involvement of officers in the school disciplinary process does not continue the trend of imposing criminal sanctions for student conduct that is better handled administratively.
- Educate and train school officials and teachers to ensure that they identify student disabilities and consider them in the course of their schools’ disciplinary decision-making processes, as required by federal law.
- Minimize the effect of bias and provide needed transparency by constraining the wide discretion of school officials, particularly by eliminating such broad disciplinary categories as “insubordination,” thus limiting opportunities for bias to enter into the decision-making process, decreasing the likelihood that students of color will be targeted more frequently or subjected to harsher disciplinary sanctions, and ensuring that schools impose punishments that are appropriate to the culpability of each individual offender.
- Institute a comprehensive and transparent system in all schools to record all instances of administrative and criminal sanctions against any student, and require the collection

### III. INTRODUCTION

#### A. The School-to-Prison-Pipeline

Twenty years ago, on-site police officers were permanently stationed in few public schools.<sup>1</sup> However, with rising concerns about school safety, fueled in part by nationally publicized incidents of school-based violence, such as the Columbine shootings, the role of police in schools has expanded dramatically over the past fifteen years.<sup>2</sup> Today, the National Association of School Resource Officers, which describes itself as “the largest school-based police organization in the U.S.,” has more than 9,000 members.<sup>3</sup> In many public schools, administrators rely heavily on law enforcement officials to play a role in school discipline. In addition, widespread adoption, over the last two decades, of “zero tolerance” policies—policies that mandate suspension, expulsion, and arrest for certain student behavior occurring both on and off school grounds, most notably drug and weapons offenses—has led to stricter punishments for student offenses,<sup>4</sup> growing numbers of suspensions and expulsions,<sup>5</sup> and increased electronic monitoring of students as a preventative and probationary measure.

Although the use of police in schools can facilitate communication and understanding between communities and the schools that serve them, police presence in schools also exposes students to greater risk of arrest, because it decreases the likelihood that student disciplinary infractions will be dealt with exclusively through the school’s administrative remedies. Students face criminal charges for behavior previously addressed solely within the context of the school’s

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<sup>1</sup> Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25, 32.

<sup>2</sup> In April of 1999, two high school students shot and killed one teacher and twelve of their classmates at Columbine High School in Jefferson County, Colorado. In the aftermath of this tragedy, several school districts across the country took steps to tighten school security using metal detectors. *See e.g.*, Associated Press, *Schools Seek Safeguards After Tragedy: Metal-Detector Firm Sees Surge in Orders*, HOUSTON CHRONICLE, Apr. 29, 1999, at A6 (“Garrett Metal Detectors is awash in new orders as principals and teachers across the country try to shake feelings of vulnerability in the wake of the Columbine High School massacre.”); Arlington Morning News, *Rash of School Shootings Prompts Increased Security*, Apr. 22, 1999 (reporting increased school security measures, including additional metal detectors, at schools in Texas); Steve Strunsky, *Elizabeth To Put Metal Detectors in All Elementary Schools*, N.Y. TIMES, May 9, 1999, at 14NJ (reporting that permanent metal detectors would be installed at all elementary schools in Elizabeth, New Jersey pursuant to a plan approved in 1997).

<sup>3</sup> National Association of School Resource Officers (NASRO) Web Site, <http://www.nasro.org/membership.asp>.

<sup>4</sup> *See e.g.*, Improving American’s Schools Act of 1994, Pub. L. 103-382 (reauthorizing the Elementary and Secondary Education Act of 1965 and requiring expulsion of any public school student who possessed a gun on school grounds). Congress later amended the Act to read “weapon” instead of “gun.” *See* Robert Schwartz & Len Rieser, *Zero Tolerance as Mandatory Sentencing*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 127-28 (William Ayers, Bernardine Dohrn & Rick Ayers Eds.) (2001) [hereinafter ZERO TOLERANCE].

<sup>5</sup> *See e.g.*, Valerie Johnson, *Decatur: A Story of Intolerance*, in ZERO TOLERANCE, *supra* note 4, at 64-76.

disciplinary regime. Fighting, for example, is punishable under school disciplinary codes as “disruptive behavior.” Under the criminal code, a fight is punishable as a “breach of peace” or other more serious offenses, such as “assault.” When police are present in the schools and work closely with school administrators to enforce discipline, more students are arrested for offenses that would have previously resulted in detention, suspension, expulsion, or an informal disciplinary sanction.

Punishing students criminally for minor disciplinary infractions that do not involve weapons or serious threats to the safety of others can lead students to feel alienated and encourage them to disengage from the educational process. Students who are arrested must miss additional school to face criminal charges in juvenile court and are subject to parallel, and often independent, administrative sanctions from the school. Once a student begins his or her involvement with the criminal justice system, he or she is at greater risk of both further involvement in criminal activities and leaving school permanently. This process, whereby students are pushed from the educational environment and into the juvenile justice system through suspension, expulsion, and arrest has been called the “school to prison pipeline.”<sup>6</sup>

The sources of the school-to-prison pipeline are numerous and diverse. The presence of police in schools is, in many ways, more a symptom than a cause. Inadequate supervision in schools, the lack of resources, and extreme overcrowding of urban schools all contribute to the violence that has become commonplace in educational settings. These factors also hamper schools’ ability to address the causes and consequences of violence and lead to increasing reliance on police officers to maintain school safety. Beyond the school, and within the communities surrounding urban high schools, poverty, community violence, domestic violence, and crime also contribute to violent incidents within schools. The pervasive problem of violence in schools has roots that extend beyond a single student’s four years in high school and that run deeper than a “kids will be kids” analysis can explain; violence is often an expression of outrage against the under-resourced setting and strict administrative policies that govern many urban schools today.

This report seeks to analyze the interaction between the criminal justice system and school administrative policies from a human rights perspective. Using the New Haven public school system as a case study, this report describes the way in which these two systems interact and provides concrete suggestions about how to improve disciplinary policies so that students’ human rights—including the rights to be free from discrimination, to education, to proportionality in punishment, and to freedom of expression—are not sacrificed in order to provide a safe and quality education.

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<sup>6</sup> See, e.g., NAACP Legal Defense and Educational Fund, Inc., *Dismantling the School to Prison Pipeline*, available at <http://www.naacpldf.org/issues.aspx?issue=3>.

In the last decade, the punitive and overzealous tools and approaches of the modern criminal justice system have seeped into our schools, serving to remove children from mainstream educational environments and funnel them onto a one-way path toward prison. These various policies, collectively referred to as the School-to-Prison Pipeline, push children out of school and hasten their entry into the juvenile, and eventually the criminal, justice system, where prison is the end of the road. Historical inequities, such as segregated education, concentrated poverty, and racial disparities in law enforcement, all feed the pipeline. The School-to-Prison Pipeline is one of the most urgent challenges in education today. *Id.* at 1.

## **B. Methodology**

The report draws on research and interviews conducted by members of the Allard K. Lowenstein International Human Rights Clinic between September 2006 and May 2007. After completing extensive background research on several Connecticut school systems, New Haven was selected as the target research site because of its location, and the history of disciplinary troubles in the district. The urban location and similar demographic make-up of other urban Connecticut schools should make the findings in New Haven illuminating as studies begin or continue elsewhere in the state.

The background research on Connecticut schools included finding demographic information for several districts and reported disciplinary issues or zero tolerance policy-related publicity and statistics. The Clinic also researched international and domestic law research in conjunction with the field investigation. During the course of this study, the Clinic interviewed several key actors in the school and legal systems, including an individual involved with a community outreach program targeting children in New Haven, New Haven law enforcement officials, New Haven school administrators, and attorneys with experience in the New Haven juvenile justice system. Using general and open-ended questions, the Clinic team asked interviewees to describe their jobs and their impressions of the school discipline system, with a particular view toward how the school discipline system interacts with the criminal justice system. The team focused a portion of each interview on the imposition of sanctions for expressive conduct and asked interviewees about the prevalence of such infractions. The team also asked interviewees targeted questions about the role of race, gender, and disability in discipline processes, and provided an opportunity for each interviewee to suggest changes to the system.

### **Roadmap: The Path Through Administrative and Criminal Punishment in School**

In seeking to understand how students are disciplined, both administratively and within the criminal justice system, it is useful to map out the paths of punishment that a hypothetical student might experience. This hypothetical example illustrates that the fate of a particular student often depends on how the school or a police officer responds to the incident and exercises discretion at various points along the path to a criminal conviction.

#### **b. The Hypothetical Incident**

A physical fight occurs in the cafeteria between two students, without weapons, and without serious bodily injury (no bruising or blood). Student A instigates the fight. Student B fights back in self defense.

If a teacher or administrator is the first to respond, he or she would stop the fight, separate the students, and send them both to a principal or assistant principal in order to determine the cause of the conflict, the culpability of each student involved, and the appropriate disciplinary action that should be taken against the students. In most schools, either the principal or the assistant principal in charge of discipline will be notified about the fight. Once the students have been removed from the situation, school administrators will check the records of the students to learn of prior histories. The principal may try to mediate the incident with the students to avoid serious disciplinary action. Although the ultimate length of a suspension or the decision to expel a student rests with the principal, a student can be absent from class for only ninety or fewer minutes before this detention is considered an official in-school suspension by the Connecticut Board of Education. Thus, regardless of the severity of the incident, any physical altercation between students almost always results in suspension, because of the time it takes to resolve and mediate a single incident. In the case of fighting, the administration will generally call the students' parents, and it is required to do so if a student is suspended or expelled. If Student A is deemed to be the perpetrator after an investigation by a teacher or principal and is suspended or expelled, he is entitled, with his parents, to a hearing. The administration will make a record of the incident, report it to the Board of Education, and file the report in Student A's permanent school record.

A School Based Resource Officer (SRO)—a uniformed police officer employed by the city and stationed in the school—may become involved in the incident in one of two ways. The SRO may be called by the administrator who first responds, if the administrator feels unable to handle the incident alone; alternatively, the SRO may be the first to respond to the fight. If the SRO responds first, he or she will immediately remove both students from the cafeteria and bring them to separate rooms to investigate the incident. If the fight was extremely violent or involved weapons, both students would have been taken into immediate custodial arrest. The SRO would likely notify school administrators about the incident and consult with them about how best to punish the students. The SRO can arrest Student A and Student B, regardless of the desires of the administration, based on probable cause after investigation.

The officer also has the option of attempting to mediate the conflict, either independently or with the school administration, in order to avoid imposing criminal sanctions. Sometimes an SRO will conduct several sessions of mediation and may involve the students' families, as well. Other times, officers consider an incident "mediated"—that is, brought to a satisfactory conclusion—after a single session. If mediation is ineffective, the officer may make a custodial or non-custodial arrest; an officer makes a non-custodial arrest by issuing a summons to court (also called a "ticket") for either breach of peace or assault. If the officer arrests Student A, and Student A is a juvenile, the officer must notify the school administration and the student's parents. If the student is a legal adult, no parental notification is necessary; however, most SROs contact parents as a courtesy.

### **c. The Criminal Process**

An arrested juvenile's case goes first to the probation department. In the juvenile court system, probation officers play a significant role in determining how cases are handled. The court will assign a probation officer to the juvenile defendant at the start of the criminal process,

and this probation officer will make an independent determination of whether the matter should be handled judicially or non-judicially. If the officer decides to handle the case non-judicially, he or she can either issue a warning, in which case no further action is taken against the student, or impose supervision requirements similar to probation, but without the oversight of a judge. The officer must record either sanction in the student's juvenile record.<sup>7</sup>

If the probation officer decides the matter should be handled judicially, the juvenile prosecutor's office will bring the charges against Student A in the hypothetical incident described above. The prosecutor's office will send an investigator to the school to interview the police and other witnesses if necessary to develop the facts of the case. If the prosecutor decides to proceed with the case, she will most likely offer a plea bargain arrangement to Student A, unless he is a repeat offender. In the meantime, the Victim Advocate, a neutral agent employed by the juvenile court, will contact the victim, Student B, to keep him and his family abreast of the criminal charges and to communicate any of their wishes about the handling of the case to the prosecutor's office.

Student A will acquire a juvenile record regardless of whether there is a plea agreement or a conviction in court. A judicial handling is considered more serious than a non-judicial handling because it means that charges were brought and the student was convicted of an offense. Student A's punishment could range from community service to incarceration, in addition to any school-imposed sanctions resulting from the fight.

### **3. The Collateral Consequences of Criminal Treatment**

Criminal sanctions for students have many consequences. Involvement in the criminal justice system may force students to miss school to appear in court or while incarcerated. If the student misses school as a result of criminal punishment or suspension, the student must try to keep up with course work. Absences due to punishment are deemed "unexcused" by the school district, regardless of whether the punishment is an administrative penalty imposed by the school or a penalty imposed by the judicial system. Since a student's status as a "truant" is determined by the number of days he or she has been absent from school, a few unexcused absences may push the student over the limit of absences allowed by the school district and could lead to adjudication of the a truancy charge against the student.

Suspended or expelled students are required to attend a two-hour-per-day tutoring program designed to keep them involved in an academic environment while away from school. However, this program does not necessarily coordinate with the student or his or her teachers to ensure that the student uses the time to remain current in his or her coursework. Furthermore, a two-hour session is insufficient classroom time for students to remain current in their coursework as compared to the seven hours of instruction the juveniles' peers receive during the course of a normal school day. Falling behind may lead students to drop out due to frustration or feelings of alienation.

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<sup>7</sup> A juvenile record is a criminal record acquired by a juvenile who is adjudicated in juvenile court. Under Connecticut state law, all juvenile criminal records are confidential and are open to inspection only pursuant to a court order. CONN. GEN. STAT. § 46b-124. In addition, the Connecticut Supreme Court has held that there is a strong presumption that juvenile records are confidential. *In re Sheldon G.*, 583 A.2d 112 (Conn. 1990).

## II. THE RIGHTS OF SCHOOL CHILDREN UNDER INTERNATIONAL HUMAN RIGHTS LAW

### A. Human Rights Framework

This report analyzes two overlapping systems—school discipline and criminal justice—using the framework of human rights standards set forth in international treaties, including the International Covenant on Economic, Social, and Cultural Rights,<sup>8</sup> the International Covenant on Civil and Political Rights,<sup>9</sup> the Convention on the Rights of the Child,<sup>10</sup> the Convention on the Elimination of All Forms of Racial Discrimination,<sup>11</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>12</sup> This framework establishes core human rights for children in the context of education and school discipline, including the rights to be free from discrimination, the right to education, the right to proportionality in punishment, and the right to freedom of expression. The United States has signed but has not ratified some of these international treaties. Although the act of signing an international treaty does not obligate a state legally to comply with all of its provisions, it does require the state not to take actions that would undermine the treaty’s object and purpose;<sup>13</sup> this creates a strong presumption that the state will not act in ways that contradict core principles of the treaty.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires states to make compulsory primary education available to all children. The Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the ICESCR’s education mandate as having four elements: availability, accessibility, acceptability, and adaptability. The United States has signed but not yet ratified the ICESCR.

The International Covenant on Civil and Political Rights (ICCPR) requires that states house detained juveniles separately from adults in detention facilities; it also states that the aim of juvenile detention facilities must be rehabilitation.<sup>14</sup> The United States has ratified the ICCPR.<sup>15</sup>

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<sup>8</sup> International Covenant on Economic, Social, and Cultural Rights (ICESCR), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. The United States signed the ICESCR on October 5, 1977.

<sup>9</sup> International Covenant on Civil and Political Rights (ICCPR), 99 U.N.T.S. 171, *entered into force* Mar. 23, 1976. The United States, ratified the ICCPR on June 8, 1992.

<sup>10</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25, U.N. Doc A/RES/44/25, *entered into force* Sept. 2, 1990. The United States signed the CRC on February 16, 1995.

<sup>11</sup> International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969. The United States ratified the CERD on October 21, 1994.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S., *entered into force* Sept. 3, 1981. The United States signed the CEDAW on July 17, 1980.

<sup>13</sup> *See* Vienna Convention on the Law of Treaties, art. 18(a), 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980. The United States signed the Vienna Convention on April 24, 1970.

<sup>14</sup> ICCPR, art. 10

<sup>15</sup> *See supra* n.9.

The Convention on the Rights of the Child (CRC) guarantees several basic human rights for children, including the rights to education, to free expression, and to be free from discrimination. The United States has signed but not yet ratified the CRC.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) sets forth the human right to be free from discrimination, including specifically in the context of education, and prohibits any “distinction, exclusion, restriction or preference” that has the “purpose or effect” of racial discrimination.<sup>16</sup>

The Convention on the Elimination of Discrimination Against Women (CEDAW) is the central international instrument addressing discrimination against women. The CEDAW prohibits sex-based discrimination and requires gender equality in several contexts, including education. The United States has signed the CEDAW but has not yet ratified this Convention.

Together, the provisions of these key international human rights treaties establish that children in the school setting have a number of rights that are relevant to school discipline the right to education, the right to be free from discrimination, the right to proportionality in punishment, and the right to freedom of expression.

## **B. The Right to Education**

### **1. Legal Framework**

International human rights treaties and other instruments guarantee the right to education and specify that education must be accessible to all children. Article 26 of the Universal Declaration on Human Rights, which, although not a treaty, articulates well-recognized principles of customary international law, states:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.<sup>17</sup>

The Universal Declaration also mandates that the content of the education received by children “be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms [and to] promot[ing] understanding, tolerance and friendship among all nations, racial or religious groups.”<sup>18</sup> The Universal Declaration also provides for parental rights in education, stating that parents have the right to choose the kind of education received by their child.<sup>19</sup>

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<sup>16</sup> CERD, art. 1. The United States ratified the CERD in 1995 pursuant to a “proviso” from the Senate and several Reservations, Understandings, and Declarations; The significance of these limitations in the context of public education is discussed later in the report. *See infra* at 19-21.

<sup>17</sup> Universal Declaration of Human Rights, GA Res. 217/A, Dec. 10, 1948..

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Most relevant to the question of whether disciplinary policies violate the right to education is the requirement that education be available. The requirement of availability in education derives from the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that “[p]rimary education shall be compulsory and available to all.”<sup>20</sup> According to the Committee on Economic, Social and Cultural Rights (CESCR), the body that is charged with responsibility for reviewing states’ reports on their compliance with the provisions of the ICESCR, the right to education contains four elements—availability, accessibility, acceptability, and adaptability.<sup>21</sup> The CESCR has explained that availability means that “functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.”<sup>22</sup> The Committee has explained, “When considering the appropriate application of these ‘interrelated and essential features’ the best interests of the student shall be a primary consideration.”<sup>23</sup>

These four core principles find support in other international human rights treaties and instruments, including the Convention the Rights of the Child (CRC).<sup>24</sup> The CRC also requires states to “[m]ake primary education compulsory and available free to all” and specifically obligates states to “[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates.”<sup>25</sup> The United States has signed but not ratified both the ICESCR and the CRC.<sup>26</sup>

Although a student’s right to education may be limited to achieve a legitimate state purpose, Article 4 of the ICESCR provides that a state may limit the rights enumerated in the ICESCR “only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”<sup>27</sup> The CESCR has emphasized that Article 4 “is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.”<sup>28</sup> In the context of school

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<sup>20</sup> ICESCR art. 13(2).

<sup>21</sup> Committee on Economic, Social and Cultural Rights, General Comment 13, The Right to Education, U.N. Doc. E/C.12/1999/10, ¶ 6 (1999).

<sup>22</sup> CESR, General Comment No. 13, ¶ 6(a). According to the CESR, the availability requirement also encompasses the secondary elements that a particular school requires in order to function, such as buildings, “competitive” salaries for teachers, and appropriate school materials. *Id.*

<sup>23</sup> *Id.* ¶ 7.

<sup>24</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

<sup>25</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, *available at* <http://www.unhchr.ch/html/menu3/b/k2csrc.htm>

<sup>26</sup> The United States signed the CRC in 1995 but has not yet ratified it. In 2002, the United States ratified the Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts, A/RES/54/263 (2000), *entered into force* Feb. 12, 2002, *available at* <http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm>. As a State Party to this Optional Protocol, the United States is required to submit periodic reports to the Committee on the Rights of the Child. However, it has yet to fulfill this obligation.

<sup>27</sup> ICESCR, art. 4.

<sup>28</sup> CESR, General Comment No. 13, ¶ 42.

discipline, although schools may employ disciplinary measures that infringe the right to education to achieve a legitimate state purpose that furthers the general welfare, these measures must be compatible with the nature of the rights enumerated in the ICESCR and must be necessary and proportional to that purpose.

International human rights law also requires that punishments in a school setting comport with human dignity and protect the right to education of the student who is subjected to the disciplinary sanction. For example, article 28(2) of the CRC requires state parties to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity.”<sup>29</sup> The Committee on the Rights of the Child, the body that reviews states’ reports on their compliance with the provisions of the CRC, gives further content to this principle, explaining that “[e]ducation must . . . be provided in a way that respects the strict limits on discipline reflected in article 28(2) [of the CRC] and promotes non-violence in school.”<sup>30</sup> The Committee also interprets the CRC to promote student participation in school disciplinary proceedings as an element of the realization of the right to education.<sup>31</sup>

The CRC also recognizes the connection for young people between exiting the school system and becoming involved in the criminal justice system and requires state parties to take measures to prevent student delinquency. The Committee on the Rights of the Child has emphasized that it is “not in the best interests of the child if he/she grows up under circumstances that may cause an increased or serious risk of becoming involved in criminal activities”; in this context, states have an affirmative obligation under the CRC to promote the right to education and to pursue a juvenile justice policy that aims to prevent juvenile delinquency.<sup>32</sup> In developing “prevention policies facilitating the successful socialization and integration of all children,” the Committee has recommended that States devote “particular attention . . . to children who drop out of school or otherwise do not complete their education,” since this group of young people face an increased risk of entering the criminal justice system.<sup>33</sup> Finally, the Committee has interpreted the CRC to require state parties to divert child offenders from formal judicial proceedings and into alternative discipline processes “whenever appropriate and desirable.”<sup>34</sup>

Domestic law also recognizes a right to education. Although the Supreme Court, in the seminal case *San Antonio v. Rodriguez*,<sup>35</sup> declined to recognize education as a fundamental right under the U.S. Constitution, individual states, including Connecticut, recognize such a right.<sup>36</sup> Since 1642, when Massachusetts became the first state to adopt a compulsory attendance law,

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<sup>29</sup> CRC art. 28(2).

<sup>30</sup> Committee on the Rights of the Child, General Comment no. 1, The Aims of Education, 8 (2001).

<sup>31</sup> *Id.*

<sup>32</sup> Committee on the Rights of the Child, General Comment no. 10, Children’s Rights in Juvenile Justice, 5-6 (2007).

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.* at 11; *see also* CRC art. 40(3).

<sup>35</sup> 411 U.S. 1 (1968) (holding that education is not a fundamental right and that the property-tax-based public school financing regime in Texas was not subject to strict scrutiny).

<sup>36</sup> “There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.” CONN. CONST. art. 8, sec. 1.

each state in the country has enacted legislation requiring children to receive schooling at home or to attend school.<sup>37</sup> The underlying rationale for compulsory educational regimes is rooted in the doctrine of *parens patriae* (meaning “the father of the people”), a common law doctrine that allows the state to assume parental or custodial power over minors in order to promote the welfare of the minor citizen.<sup>38</sup> Although parents may opt out of the public school regime and select alternate forms of education for their children,<sup>39</sup> many parents do not possess the financial means to send their children to a private school, and logistical barriers—such as a single-parent family structure or full-time parental employment—may prevent parents from educating their children at home.<sup>40</sup> For the many parents and students in this situation, state compulsory education laws necessarily translate into compulsory attendance at the local public school where they are assigned by the state’s districting system.

As part of our national compulsory education regime, both parents and their children may be subjected to legal sanctions if they fail to comply with state compulsory education laws. These state education laws require student attendance at school and allow school boards to initiate proceedings against parents whose children are declared truants.<sup>41</sup> In an effort to combat truancy, some states, including Connecticut, have enacted daytime curfew laws, which authorize police officers to arrest students who are out of school during regular school hours and escort them to school.<sup>42</sup> In addition, courts may issue orders against students themselves, requiring

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<sup>37</sup> The Massachusetts law required at least twelve weeks of school attendance for children between the ages of eight and fourteen. MARK G. YUDOF, DAVID L. KIRP, BETSY LEVIN & RACHEL F. MORAN, *EDUCATIONAL POLICY AND THE LAW* 1, 12-14 (4th ed. 2002) [hereinafter *EDUCATIONAL POLICY AND THE LAW*] (briefly discussing the history of compulsory education in the United States); KERN ALEXANDER & M. DAVID ALEXANDER, *THE LAW OF SCHOOLS, STUDENTS AND TEACHERS* 5-6, 14-38 (3rd. Ed. 2003) (discussing compulsory school attendance and its limits).

<sup>38</sup> ALEXANDER & ALEXANDER, *supra* note 39, at 15-16.

<sup>39</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (holding that an Oregon’s “Compulsory Education Act,” which required each parent of a child between the ages of eight and sixteen to send the child to public school, was unconstitutional under the Fourteenth Amendment, and “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”); see also *EDUCATIONAL POLICY AND THE LAW*, *supra* note 39, at 10-19.

<sup>40</sup> Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights To a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 203-04 (2006) (arguing that under states’ compulsory education regimes, students attending public schools have a Fourteenth and Fifth Amendment Due Process right to public school facilities that meet minimum health and safety standards).

<sup>41</sup> Under Connecticut state law, a “truant” is an individual between the age of five and eighteen who has four unexcused absences from school in one month or ten unexcused absence in one school year. CONN. GEN. STAT. § 10-198a (2006). An “habitual truant” is an individual between the age of five and eighteen who has twenty unexcused absences from school in one school year. CONN. GEN. STAT. § 10-200 (2006).

<sup>42</sup> “Each city and town may adopt ordinances concerning habitual truants from school and children between the ages of five and eighteen years wandering about its streets or public places, having no lawful occupation and not attending school, and may make such ordinances respecting such children as shall conduce to their welfare and to public order, imposing penalties, not exceeding twenty dollars, for any one breach thereof. The police in any town, city or borough, bailiffs and constables in their respective precincts shall arrest all such children found anywhere beyond the proper control of their parents or guardians, during the usual school hours of the school terms, and may stop any child under eighteen years of age during such hours and ascertain whether such child is a truant from school, and, if such child is, shall send such child to school. For purposes of this section, “habitual truant” means a child age five to eighteen, inclusive, who is enrolled in a public or private school and has twenty unexcused absences within a school year.” CONN. GEN. STAT. § 10-200 (2006). California has enacted a similar daytime curfew law. See CAL. EDUC. CODE § 48364 (Deering 2007). The effect of daytime curfew laws on crime rates

them to attend school. Because truancy is a status offense,<sup>43</sup> it is unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause for courts to levy criminal sanctions against a student because of her status as "truant."<sup>44</sup> However, students who fail to attend school while under court order to do so may be held in criminal contempt and incarcerated for the offense of violating a court order relating to truancy.<sup>45</sup>

The Supreme Court has repeatedly recognized the exceptional and compulsory nature of the school's authority over the student. In *New Jersey v. T.L.O.*, the case in which the Supreme Court established a "reasonable suspicion" standard for Fourth Amendment searches conducted by school officials in the public school setting, the Court noted the extent to which nationwide compulsory school laws have transformed the nature of the public school authority. The Court explained that "public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."<sup>46</sup> The *T.L.O.* Court acknowledged that the notion of *parens patriae* is somewhat outdated given the modern compulsory school regime and that this common law justification for the school's authority over students "is not entirely 'consonant with compulsory education laws.'"<sup>47</sup> Upholding the constitutionality of mandatory drug tests for student athletes in public schools in *Vernonia School District v. Acton*, the Court, drawing a parallel to the *T.L.O.* decision, emphasized that the public school's power over students was "custodial and tutelary," thus justifying students' decreased expectation of privacy in the school setting.<sup>48</sup> In *Board of Education of Independent School District No. 92 v. Earls*, the Court reaffirmed this idea, citing the public school's "custodial and tutelary" power over its students and upholding a school

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remains in dispute. See e.g., Mike A. Males & Dan Macallair, *An Analysis of Curfew Enforcement and Juvenile Crime in California*, 1999 W. CRIMINOLOGY REV. 1 (arguing that no evidence supports the claim that jurisdictions with daytime curfew laws experience lower crime levels or lower youth crime levels).

<sup>43</sup> A status offense is a crime, such as "narcotics addict," that is defined by a "status or condition" rather than a specific act. *Robinson v. California*, 370 U.S. 660, 663 n.4 (1962). Juvenile status offenses include acts, such as truancy, that would not be considered criminal if performed by an adult.

<sup>44</sup> *Robinson*, 370 U.S. at 666-67 (1962) (holding that a California statute that made the "status" of narcotics addiction a misdemeanor, punishable by imprisonment, was unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment). For further discussion of juvenile status offenses, see Susan K. Datesman & Mikel Aickin, *Offense Specialization and Escalation Among Status Offenders*, 75 J. CRIM. L. & CRIMINOLOGY 1246 (1984).

<sup>45</sup> See e.g., *Washington v. E.P.-H. & J.L.J.*, No. 34422-0-II (Wash. App. Ct. 2006) (unpublished opinion) (explaining that the juvenile court held E.P.-H. and J.L.J. in criminal contempt for violating a court order to attend school, later issued bench warrants for each juvenile's arrest, and authorized seven days of incarceration for each student as penalty for violation of a remedial or punitive truancy order); see also Seattle Public Schools Web Site, <http://www.seattleschools.org/area/truancy/index.dxml#State> (explaining the truancy petition process in juvenile courts and noting that once a juvenile violates a court order to attend school, the court may hold a hearing and take "whatever steps are necessary to insure regular attendance by the child").

<sup>46</sup> *T.L.O. v. New Jersey*, 469 U.S. 325, 336-37 (1985).

<sup>47</sup> *T.L.O.*, 469 U.S. at 336 (quoting *Ingraham v. Wright*, 430 U.S. 651 (1977)).

<sup>48</sup> *Vernonia School District v. Acton*, 515 U.S. 646, 655-56 (1995) ("*T.L.O.* did not deny, but indeed emphasized, that the nature of [the State's power over schoolchildren] is *custodial and tutelary*, permitting a degree of supervision and control that could not be exercised over free adults. '[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.'") (quoting *T.L.O.*, 469 U.S. at 339) (emphasis added).

district's policy of mandatory drug testing for all students participating in extracurricular activities, finding that this policy did not violate the Fourth Amendment rights of the students affected.<sup>49</sup>

Although the Supreme Court has declined to recognize education as a fundamental right under the U.S. Constitution, the Court, in *Plyler v. Doe*, held that education is an important right that is “more than some governmental benefit indistinguishable from other forms of social welfare legislation,” and that states must demonstrate that a “substantial state interest” exists in order to justify an infringement on the right to education.<sup>50</sup> In the context of school discipline, the Court, addressing the constitutionality of corporal punishment in *Ingraham v. Wright*, wrote that the “appropriate means of school discipline is generally left to the discretion of school authorities subject to state law.”<sup>51</sup> The Connecticut Supreme Court has provided additional constitutional protection of the right to education, holding that any infringement of this right “must be strictly scrutinized” since “the right to education is so basic and fundamental.”<sup>52</sup>

Students also possess education rights under the Fourteenth Amendment. According to Supreme Court case law, the right to education, although not a fundamental right under the U.S. Constitution, implicates substantive due process rights, including a property interest in education and a liberty interest in students' standing with teachers and peers and in access to higher education.<sup>53</sup> Accordingly, although school administrators may expel or suspend students pursuant to the state's legitimate and “concededly very broad” authority to “enforce standards of conduct in its schools,” states are “constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause” and must provide procedural safeguards for students when exercising this authority.<sup>54</sup> Because the amount of process constitutionally required increases in proportion to the seriousness of the deprivation,<sup>55</sup> the state must provide more process for a student facing expulsion than for a student facing a ten-day suspension. Connecticut law grants students, prior to suspension, the right to an informal hearing in front of the principal or another school administrator designated by the principal and, prior to expulsion, a formal hearing, although the right to a pre-expulsion hearing may be suspended in case of an emergency.<sup>56</sup>

Even after a student is suspended or expelled, the state may possess a state-law obligation to provide educational services.<sup>57</sup> Connecticut law requires that the state provide an alternative

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<sup>49</sup> 536 U.S. 822, 830 (2002).

<sup>50</sup> 457 U.S. 202 (1982).

<sup>51</sup> 430 U.S. 651, 682 (1977).

<sup>52</sup> *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977).

<sup>53</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>54</sup> *Goss*, 419 at 574.

<sup>55</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>56</sup> CONN. GEN. STAT. §§ 10-233c-d. The Connecticut statute also states that “no students shall be suspended more than ten times or a total of fifty days in one school year, whichever results in fewer days of exclusion” unless the school provides a formal hearing. CONN. GEN. STAT. § 10-233c(a).

<sup>57</sup> “Any pupil who is suspended shall be given an opportunity to complete any classwork including, but not limited to, examinations which such pupil missed during the period of suspension.” CON. GEN. STAT. § 10-233c(d).

educational opportunity to any student under the age of sixteen who is expelled from school and to any student up to the age of eighteen if it is the student's first expulsion, as long as the student complies with the conditions mandated by the school board. The state has no such obligation if the student is between the ages of sixteen and eighteen and was expelled for any offense relating to possession of a dangerous weapon or illegal drugs. Since private school or home schooling is not a viable option for many New Haven parents, alternative education is unlikely to be available to students who are expelled from New Haven Public Schools unless it is provided by the state.

## **2. Deprivations of the Right to Education in New Haven Public Schools**

Suspensions, expulsions, and arrests are severe punishments theoretically reserved for serious student offenses. However, a series of factors, including state and local zero tolerance policies, a statewide policy that requires suspension if administrators remove students from class for more than ninety minutes, intentional "pushout" of difficult students, and joint decision-making and broad discretion of school administrators and school-based police resulting in increased use of criminal sanctions for disciplinary infractions, have resulted in the increasingly widespread use of suspensions, expulsions, and arrests, often for non-serious offenses.

The expanding use of suspensions and expulsions as a disciplinary tool may rise to the level of a deprivation of the right to education under domestic law if the state fails to provide appropriate due process for a student facing the disciplinary sanction or if the state, through the school board or individual school, punishes students in a discriminatory fashion. In addition, the state must fulfill its obligation under international human rights law to ensure the availability of education. Increasing suspensions, expulsions, and arrests limit the right to education, and the state's failure to provide an adequate alternative for students who are absent violates its human rights obligations. The state provides insufficient educational services to students who are suspended or expelled from school; at best, some expelled students have access to a two-hour educational program in New Haven or receive some form of schooling if incarcerated in juvenile detention.<sup>58</sup> In addition, when students are repeatedly suspended or expelled from school or miss school due to involvement in the criminal system, they accumulate absences; particularly when students fall behind because they do not have access to an adequate alternative, these absences place students at an increased risk of exiting the school system altogether.<sup>59</sup> Increasing suspensions, expulsions, and arrests thus play a significant role in students leaving school and thereby undermine the availability of education for these students and systematically push students out of the school system, in violation of the obligation to take affirmative measures to encourage regular attendance at public schools and reduce drop-out rates.<sup>60</sup> Finally, to the extent that the state limits the right to education, it must demonstrate a substantial state interest justifying the deprivation of the right and limit the right no more than is necessary. In many instances, school or state policies that mandate suspension or expulsion ensure neither that

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<sup>58</sup> Interview with Attorney Experienced in Criminal Prosecution, New Haven, Conn., Feb. 28, 2007; Interview with Juvenile Defense Attorney, New Haven, Conn., Apr. 13, 2007.

<sup>59</sup> See NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE (NESRI), DEPRIVED OF DIGNITY: DEGRADING AND ABUSIVE DISCIPLINE IN NEW YORK CITY & LOS ANGELES PUBLIC SCHOOLS 25-26, Mar. 2007 *available at* [http://www.nesri.org/programs/dignity\\_report.html](http://www.nesri.org/programs/dignity_report.html).

<sup>60</sup> CRC, art. 28(1)(e).

limitations of students' rights are strictly justified by a legitimate state interest nor that they do not infringe on the right more than necessary.

**a. Increasing Suspensions and Expulsions Pursuant to Zero Tolerance Policies**

Suspensions and expulsions, once used sparingly by school administrators, have become increasingly commonplace in the New Haven public school system. Some suspensions and expulsions result from Connecticut's zero tolerance policies: Under current law, Connecticut school boards must initiate expulsion proceedings against any student if there is evidence that the student possessed a deadly weapon or firearm on school grounds, used a deadly weapon or firearm off school grounds, or sold or attempted to sell illegal drugs on or off school grounds in violation of state law.<sup>61</sup> School boards must suspend students for a significant amount of time, up to one calendar year, if they are found to have committed weapons violations; however, the length of the suspension may be modified by the school or hearing board.<sup>62</sup> Individual schools may also pursue more severe punishments for weapons infractions.

In a case that involves a weapon, whether a gun, a knife, a BB gun, or a more benign instrument, the student who committed the infraction will automatically be suspended or expelled in addition to any criminal charges pursued by the Office of the Juvenile Prosecutor.<sup>63</sup> At James Hillhouse High School in New Haven (Hillhouse), students who bring weapons to school are automatically suspended for ten days, subject to arrest, and recommended for expulsion by the school administration.<sup>64</sup> Although suspension or expulsion may be a valid response to some student conduct, particularly conduct involving weapons or illegal drugs, zero tolerance laws prohibit individual school boards from engaging in a case-by-case analysis and applying leniency in cases where mitigating circumstances may warrant a less severe punishment.

Pursuant to state zero tolerance policies, students may also be suspended for incidents that occur outside of school hours and off school grounds. In New Haven, community police officers report any criminal incidents involving students to the public school where those students are enrolled; once school-based police inform school administrators of a student's criminal activity, the student in question is automatically suspended or expelled in accordance with school policy.<sup>65</sup> When an incident occurs in the general community, school-based police officers, acting in accordance with school and district policy, will investigate the incident and

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<sup>61</sup> CONN. GEN. STAT. §10-233(d).

<sup>62</sup> *Id.*

<sup>63</sup> Interview with, Attorney Experienced in Criminal Prosecution, 2007.

<sup>64</sup> "If you are caught with a weapon, you will have an automatic 10 day suspension, be recommended for expulsion, and subject to arrest." James Hillhouse High School Disciplinary Code, available at <http://www.nhps.net/hillhouse/rules.htm> (not defining the term "weapons").

<sup>65</sup> James Hillhouse High School Disciplinary Code, available at <http://www.nhps.net/hillhouse/rules.htm>. See also Interview with School Administrator, New Haven, Conn., Apr. 30, 2007 (same).

may pursue automatic suspensions and expulsions where mandated by the school discipline code.<sup>66</sup>

These zero tolerance policies force school administrators to seek suspensions or expulsions of students even when the sanctions serve no legitimate or substantial state interest as required under domestic law. By enforcing these policies, the state may also violate its obligation to ensure that limitations on the right to education are “compatible” with the rights articulated in the ICESCR, and that these limitations impose on these rights “solely for the purpose of promoting the general welfare in a democratic society.”<sup>67</sup> The sweeping and mandatory nature of these policies fails to require school officials to make individualized determinations of student conduct in order to ensure that the disciplinary sanction serves a substantial state interest and promotes the general welfare. Finally, by imposing harsh punishments on students pursuant to zero tolerance policies, the state contravenes its affirmative obligation under international law to promote education and to “[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates.”<sup>68</sup>

#### **b. Increasing Suspensions as a Result of the Ninety-Minute Policy**

Suspensions for offenses that do not involve weapons, drugs, or alcohol may be increasing as a result of a statewide policy that limits the ability of school administrators to remove a student from class for more than ninety minutes without suspension. Generally, school administrators—acting in conjunction with school-based police officers—have discretion in deciding whether to pursue suspensions for this type of incident. Under a new Connecticut policy, however, if a student misses more than ninety minutes of class as the result of a disciplinary infraction, the school administration is required to report this as a suspension. Although this policy helps to prevent school administrators from imposing de facto suspensions on students without providing them the due process to which they are entitled if they are formally suspended, the policy may be translating into more formal suspensions and more missed class time for New Haven students. One school administrator in New Haven stated that this ninety-minute policy unnecessarily infringed on the discretion of school administrators by effectively requiring them to either avoid the use of these cooling-off periods altogether or to transform a student’s “time-out” into an official suspension if the student is absent from her class for more than ninety minutes.<sup>69</sup>

#### **c. Suspensions and Expulsions as Intentional “Pushout”**

Several interviewees raised concerns about school administrators overusing suspensions and expulsions for students who have been involved repeatedly with the disciplinary process as a way of forcing these students out of school. For example, one attorney who has defended students arrested in New Haven public schools stated that in his experience with the juvenile docket, expulsions have become the easiest way for public schools to divest themselves of

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<sup>66</sup> Interview with School Administrator, 2007.

<sup>67</sup> ICESCR, art.

<sup>68</sup> CRC, art. 28(1)(e).

<sup>69</sup> Interview with School Administrator, 2007.

troublemakers or difficult students.<sup>70</sup> The attorney noted that expulsions had become such a routine response to school-related disciplinary incidents that juvenile court judges were extremely unlikely to take a student's expulsion into account as a mitigating factor when determining what criminal punishment was appropriate for an offense that occurred within a public school.<sup>71</sup> Another attorney who has experience with the juvenile justice system in New Haven also noted that the large number of expulsions was one of her primary concerns with the New Haven public school system.<sup>72</sup> These statements attest to the fact that expulsions have become routine, rather than exceptional punishments. Furthermore, this “pushout” phenomenon—where schools use disciplinary measures to intentionally divest themselves of challenging students—deprives individual students of the right to education under both international and domestic law and is not justified by a legitimate state interest.

#### **d. Joint Decision-Making and Discretion Resulting in the Increased Use of Criminal Sanctions**

Connecticut's public schools reflect a changing disciplinary environment in public schools nationwide, one in which law enforcement officials make decisions relating to school discipline in conjunction with school administrators. School-based police officers and school administrators also possess wide discretion in determining whether to impose criminal sanctions for disciplinary offenses in schools. The broad discretion of officers and administrators, combined with the increased involvement and integration of officers into the school disciplinary process, is leading to the increased imposition of criminal sanctions for conduct previously handled administratively. Attorneys familiar with New Haven's juvenile justice system attested to a steady increase in the number of school-related incidents in the system over the past several years, estimating that school-related cases represent between ten and twenty-five percent of the overall caseloads for prosecutors and public defense attorneys practicing in the juvenile system.<sup>73</sup>

New Haven school officials stated that some disciplinary infractions can clearly be resolved without the use of criminal sanctions: If a student is late for class without a written excuse, school administrators handle the infraction using administrative punishments. At the other end of the spectrum, certain infractions—such as those involving weapons, alcohol or illegal drugs—are automatically referred to school police under the state's and school district's zero-tolerance policy. Many infractions, however, fall into a gray area between criminal and non-criminal, leaving school administration with wide discretion in determining whether or not to impose criminal sanctions for the student conduct at issue.<sup>74</sup> School administrators work closely with school-based police in making these determinations.

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<sup>70</sup> Interview with Juvenile Defense Attorney, 2007.

<sup>71</sup> *Id.*

<sup>72</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007.

<sup>73</sup> Interview with Juvenile Defense Attorney, 2007; Interview with Attorney Experienced in Criminal Prosecution, 2007.

<sup>74</sup> See Bernardine Dohrn, “*Look Out Kid/It's Something You Did*”: Zero Tolerance for Children, in ZERO TOLERANCE, *supra* note 4, at 95-98 (discussing the extent to which public schools “accelerat[e] school incidents into delinquency offenses or criminal acts”).

Police have become increasingly involved in disciplinary processes, in part, because they are deeply integrated into the schools in which they are present. The Police Department in New Haven encourages its school-based officers to become integrated into the school community in which they serve.<sup>75</sup> School administrators throughout the state, and particularly in New Haven, have adopted a similar approach.<sup>76</sup> For example, one school administrator in New Haven explained that the school administration made a concerted effort to integrate school-based police officers into the day-to-day life of the students at the school.<sup>77</sup> The school administrator created workshops throughout the year where SROs and teachers discussed school disciplinary obligations with the students in each grade.<sup>78</sup> At one New Haven high school, school-based officers work as counselors in the school's mediation program and serve on mediation teams with teachers, counselors, and school administrators with the goal of developing and implementing conflict resolution strategies with students.<sup>79</sup>

This integration of law enforcement into public schools and the discretion accorded to SROs and school administrators in determining whether to arrest students for disciplinary infractions may contribute to the increased use of criminal sanctions in schools. The practice of arresting students for school-based disciplinary infractions that could be better resolved with disciplinary sanctions alone undermines the right to education without promoting the general welfare; it channels students into the criminal justice system, placing them at an increased risk for juvenile delinquency and violating the state's obligation to take preventative measures to prevent juvenile delinquency.<sup>80</sup>

#### **e. Lack of Educational Services for Students Who Are Suspended or Expelled**

Because the State of Connecticut fails to provide educational services for students who are suspended or expelled from school, the consequences of a lengthy suspension or an expulsion are extremely severe for the student involved. The increased number of suspensions and expulsions, coupled with the lack of educational services for children who are removed from school due to these punishments, was a cause for concern among many interviewees. Law enforcement officials and individuals working in juvenile prosecution and defense expressed concerns about the lack of educational services for students who are suspended or expelled from school or who are out of school due to truancy, suspension, or expulsion.<sup>81</sup> Suspensions and expulsions perpetuate a cycle whereby students—especially those who are already considered “at risk” to drop out or fail the school year—fall further behind in school while serving out-of-school suspensions or expulsions without access to educational services.

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<sup>75</sup> Interview with Law Enforcement Official, New Haven, Conn., Dec. 11, 2006.

<sup>76</sup> *Id.*

<sup>77</sup> Interview with School Administrator, 2007.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Committee on the Rights of the Child, General Comment. 10, 6-7 (2007).

<sup>81</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007; Interview with Law Enforcement Official, 2006.

By failing to provide sufficient alternative educational services for students who are suspended or expelled, the state limits the availability of education, thus depriving these students of educational rights that are well established in international law and articulated in the ICESCR. Although states may have a legitimate interest in removing students from the school in some situations, including an interest in protecting the educational rights of other students, they are obligated to provide an educational alternative for those students who are not otherwise able to exercise this right. In addition, interviewees noted that the lack of educational services for students serving suspension or expulsions also contributes to juvenile crime and overall juvenile delinquency in New Haven.<sup>82</sup> Thus, failure to provide an educational alternative also increases the risk that students will leave school and become involved with the criminal justice system.

## **B. Right to Be Free From Discrimination in Education**

### **1. Legal Framework**

The right to be free from discrimination in general and in access to educational services, in particular, is a central principle in international human rights law. Under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), individuals possess a human right to be free from all forms of discrimination, including in their exercise of the right to education. According to the Convention, state parties are prohibited from engaging in discrimination that has the “purpose or effect” of depriving an individual of equal access to all aspects of public life,<sup>83</sup> including education. Article 5 of the CERD requires state parties to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . [t]he right to education and training.”<sup>84</sup>

The United States ratified CERD in 1995. When the U.S. Senate gave its “advice and consent” to ratify CERD, it did so subject to several Reservations, Understandings and Declarations (RUDs) that limit or modify the obligations of the United States under the CERD. Specifically, the Senate refused to accept any obligations under the CERD beyond those obligations already required by the U.S. Constitution.<sup>85</sup> The Senate also included a “proviso,”

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<sup>82</sup> Interview with Law Enforcement Official, 2006.

<sup>83</sup> Article 1 of the CERD states:

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. International Convention on the Elimination of All Forms of Racial Discrimination, *available at* <http://www.ohchr.org/english/law/pdf/cerd.pdf> (emphasis added).

<sup>84</sup> International Convention on the Elimination of All Forms of Racial Discrimination, *available at* <http://www.ohchr.org/english/law/pdf/cerd.pdf>.

<sup>85</sup> The full text of the three U.S. Reservations to the CERD reads:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under

stating that “[n]othing in [the CERD] requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”<sup>86</sup>

In addition to the CERD, several other international human rights instruments contain language concerning the right to education without discrimination. The CRC recognizes a non-discrimination principle in access to education, which the Committee on the Rights of the Child has interpreted as prohibiting discrimination, “whether it is overt or hidden,” on the basis of race, gender, or disability.<sup>87</sup> The Convention Against Discrimination in Education (CADE) bars “any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the *purpose or effect* of nullifying or impairing equality of treatment in education.”<sup>88</sup> The CADE also expressly prohibits discrimination that has the purpose or effect of either depriving groups or persons of access to education or limiting them to inferior education.<sup>89</sup> Other international human rights instruments reaffirm the importance of access to equal education, including the

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this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(2) That the Constitution and the laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to the fields of “public life” reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

(3) That with reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

United States Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. S7634-02 (June 24, 1994), *available at* <http://www1.umn.edu/humanrts/usdocs/racialres.html>.

<sup>86</sup> *Id.*

<sup>87</sup> Committee on the Rights of the Child, General Comment on the Aims of Education, no. 1, 10 (2001).

<sup>88</sup> Convention Against Discrimination in Education, 429 U.N.T.S. 93, *entered into force* May 22, 1962, *available at* [http://www.unhchr.ch/html/menu3/b/d\\_c\\_educ.htm](http://www.unhchr.ch/html/menu3/b/d_c_educ.htm) (emphasis added).

<sup>89</sup> CADE. According to the CADE, States Parties are prohibited from discrimination that has the purpose or effect:

- (a) Of depriving any person or group of persons of access to education of any type or at any level;
- (b) Of limiting any person or group of persons to education of an inferior standard;
- (c) Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man. *Id.*

Declaration on the Rights of the Child (DRC)<sup>90</sup> and the African Charter on the Welfare of the Child (ACWC).<sup>91</sup> Although the United States has not signed or ratified the ACWC or the CADE and has not ratified the CRC, the language of these documents and of the DRC attests to the centrality of the right to equal education in the human rights framework.<sup>92</sup>

International conventions also mandate that higher education must be accessible to all on a non-discriminatory basis. The ICESR provides that “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”<sup>93</sup> This principle of equal accessibility is supported by the CRC, which states that higher education must be made “accessible to all on the basis of capacity by every appropriate means” and that states party to the CRC must “[m]ake educational and vocational information and guidance available and accessible to all children.”<sup>94</sup>

These international standards provide an important rights framework for the issue of discrimination in school punishment. The language employed in the CERD is particularly relevant in the context of policies, such as criminal sanctions for disciplinary incidents in schools that have a disproportionate impact on racial minorities. Following the U.S. Supreme Court’s decision in *Washington v. Davis*, U.S. Constitutional jurisprudence requires that an individual claiming racial discrimination in violation of the Equal Protection Clause must show that those responsible had a discriminatory intent in establishing the policy or law; disparate impact alone is insufficient.<sup>95</sup> Under the terms of the CERD, however, an individual alleging racial

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<sup>90</sup> Declaration on the Rights of the Child, G.A. Res. 1386(XIV), Nov. 20, 1959, available at <http://www.unhchr.ch/html/menu3/b/25.htm>. Principle 7 of this Declaration states:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right. *Id.*

<sup>91</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, available at <http://www1.umn.edu/humanrts/africa/afchild.htm>.

<sup>92</sup> See Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER J. 37 (1994) (arguing that international human rights standards provide evidence of a right to equal education under international customary law).

<sup>93</sup> ICESR, art. 13(2).

<sup>94</sup> CRC art. 28(d).

<sup>95</sup> *Washington v. Davis*, 426 U.S. 229 (1976):

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact . . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v.*

discrimination does not need to show discriminatory intent. The CERD prohibits policies that have the purpose or effect of creating or perpetuating discrimination. Therefore, the CERD's disparate impact framework is directly applicable to the issue of criminal sanctions as a form of punishment in schools, because suspensions, expulsions, and criminal sanctions disproportionately affect students of color.

## **2. Deprivation of the Right to Be Free from Discrimination**

### **a. Racial Discrimination in Punishments**

Under state and local law, race cannot be considered in determining punishment. All parties interviewed, from police officers to school administrators to attorneys, denied that race was a factor in punishment or that students of color were disproportionately subject to sanction. These responses may be instructive in and of themselves, since they attest to a widely held view that race is not a central issue in school discipline and punishment. Still, race may be a factor to the extent that students of color are disproportionately affected by zero tolerance policies because they are over-represented in schools in which those policies are mandated or are disproportionately affected by such policies within each school. Interviewee responses may also reflect a lack of awareness, or perhaps even a denial or disregard, of racial bias at the level of the disciplinary decision-maker.

Structural racism, as the backdrop against which the New Haven public school system operates, may be a driving factor in the punishment of juveniles for school-related disciplinary incidents. Students attending New Haven public schools are predominately African-American and Latino, and the majority of the approximately 20,000 students attending public school in New Haven are eligible for free lunch by virtue of their family's income status.<sup>96</sup> Race and socio-economic status are likely highly correlated in terms of the demographics of the students attending New Haven public schools. Public schools in Connecticut are required to adopt zero tolerance policies to receive federal and state funds; private schools, in contrast, do not receive federal funds and are not required to adopt zero tolerance policies, although some private schools may have implemented such policies voluntarily. In light of the demographic composition of the public schools, African-American and Latino students are disproportionately affected by state and local zero tolerance policies and are more likely to face criminal sanctions for school-based disciplinary offenses. The socio-economic status of these students and their families, in turn, affects the availability of alternative educational programs and access to effective legal representation once students are subject to criminal sanctions in schools. According to data projections from the U.S. Department of Education, African-American and Latino students are subject to school sanctions more frequently than white students relative to their overall

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*Florida*, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations. *Washington*, 426 U.S. at 239-42.

<sup>96</sup> According to the New Haven Public Schools' web site, the New Haven Public School system enrolls 20,759 students, and the median family income in the City is \$35,950. Approximately fifty-five percent of these students are African-American, and approximately thirty-one percent are Hispanic. See New Haven Public Schools web site, <http://www.nhps.net/about/demographics.asp>. Approximately seventy percent of New Haven's 20,000 enrolled public school students are eligible for free lunch. See Building for Choice Web Site, [http://www.buildingchoice.org/cs/bc/view/bc\\_d/34](http://www.buildingchoice.org/cs/bc/view/bc_d/34).

population in Connecticut.<sup>97</sup> However, it is not possible to tell whether minority students in a particular school district are punished with more frequency or severity than non-minority students, because school-specific data related to the race of the offender is available only at a statewide level; additional research is necessary to determine whether students of color are disproportionately affected by zero tolerance policies within particular schools.<sup>98</sup> Although U.S. federal law would not recognize an Equal Protection Violation without a showing of discriminatory intent, CERD expressly prohibits laws that have the effect of racial discrimination. Because of the structural inequality of the school system, harsh discipline policies in place in public schools lead to disproportionate punishment of students of color and thereby violate international human rights law.

The prohibition on discrimination would also be violated if students are punished, or are punished more frequently or harshly, because of their race. Our interviews did not reveal evidence of explicit racial bias in school punishment; however, such evidence is generally difficult to find and beyond the scope of the research undertaken for this report. Some social scientists maintain that it is not possible to infer racial bias from disparities in punishment, because the disparities might be explained by socioeconomic status;<sup>99</sup> recent studies, however, demonstrate that racial disparities persist in school disciplinary practices even after controlling for socioeconomic differences, thus suggesting that at least some of the disparity in New Haven schools is attributable to bias.<sup>100</sup> A meaningful statistical study of discipline in New Haven schools could determine the extent of the racial disparities in schools. This study would have to be coupled with in-depth interviews with students, teachers, and administrators to determine the extent to which explicit racial bias manifests itself in the discipline process.<sup>101</sup>

Race may play a role in the way school administrators and SROs exercise discretion in deciding when and how to impose disciplinary sanctions on students. The wide discretion that officers exercise provides opportunities for bias to enter into the decision-making process, thereby increasing the likelihood that students of color will be targeted more frequently or subjected to harsher disciplinary sanctions. Examining the issue of over-representation of minority students in school suspensions, for example, social scientist Russell Skiba noted that

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<sup>97</sup> The U.S. Department of Education Data reports that in elementary and secondary public schools in Connecticut during 2006: African-American students accounted for 12,701 out-of-school suspensions, 34.92% of out-of-school suspensions overall, and 491 expulsions, 36.97% of expulsions overall; Latino students accounted for 8,624 out-of-school suspensions, 23.71% of out-of-school suspensions overall, and 340 expulsions, 25.60% of expulsions overall; and white students accounted for 14,431 out-of-school suspensions, 39.68% of out-of-school suspension overall, and 474 expulsions, 35.69% of expulsions overall. OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, 2006 CIVIL RIGHTS DATA COLLECTION: PROJECTED VALUES FOR THE STATE OF CONNECTICUT, available at <http://ocrdata.ed.gov/ocr2006rv30/xls/connecticut-projection.xls>.

<sup>98</sup> Cf. Richard Hunter & Dawn Williams, *Zero Tolerance Policies: Are they Effective?* 69 SCHOOL BUS. AFF. no. 7, July/Aug., 2003 (citing non-Connecticut statistics and arguing that minority students within a single school are subject to harsher sanctions than their white counterparts for identical offenses).

<sup>99</sup> See e.g., S.C. Wu et al., *Student Suspensions: A Critical Reappraisal*, 14 URB. REV. 245-303 (1982).

<sup>100</sup> Russell Skiba, *When Is Disproportionality Discrimination? The Overrepresentation of Black Students in School Suspension*, in ZERO TOLERANCE, *supra* note 4, at 177-80.

<sup>101</sup> For one example of a social science study focusing in part on explicit racial bias in the punishment of students in public schools, see DEPRIVED OF DIGNITY, *supra* note 50.

[t]he process of suspension or expulsion is a two-step process. First, a referral to the office for a disciplinary infraction is made by a teacher or other staff member. Once a student is referred, an administrator reviews the details of that referral and determines a specific disciplinary action. Racial disparities in discipline, then, could originate at either the classroom or the office level, or both.<sup>102</sup>

Racial bias, then, could affect the exercise of discretion at both stages. The results from this study, which focused on suspension data from a large urban Midwestern school district, determined that teachers and staff referred African-American male students for suspension at a disproportionate rate.<sup>103</sup>

Statements from interviewees indicate that bias may be entering into the decision-making process through negative stereotypes of students of color as troublemakers. The wide discretion accorded school administrators and SROs to determine whether to suspend or expel students might inadequately guard against bias in school discipline practices, because some of the factors that school officers and administrators consider in exercising that discretion are susceptible to being influenced by stereotypes. Consideration of factors that may be susceptible to racial bias, such as a student's background or history of school sanctions or prior involvement with the criminal justice system, in the exercise of discretion with regard to the sanction imposed may result in students of color being targeted disproportionately.<sup>104</sup> If racial bias does play a role in school punishments, the state would be required to take affirmative measures to protect racial minorities from such discrimination under the CERD, as well as under state and federal constitutional law.<sup>105</sup>

## **b. Discrimination on the Basis of Disability**

Under domestic and international law, states are prohibited from discriminating on the basis of disability. Title II of the Americans with Disabilities Act (ADA) prohibits public schools from discriminating on the basis of disability,<sup>106</sup> and Section 504 of the Rehabilitation Act

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<sup>102</sup> Skiba, *supra* note 96, at 179-80.

<sup>103</sup> Skiba, *supra* note 96, 177-78.

<sup>104</sup> See also, Advocates for Children and Youth, Issue Brief, Apr., 2006, available at [http://www.soros.org/initiatives/baltimore/articles\\_publications/articles/issue\\_20060418/issuebrief\\_20060418.pdf](http://www.soros.org/initiatives/baltimore/articles_publications/articles/issue_20060418/issuebrief_20060418.pdf) (discussing Positive Behavioral Interventions and Supports (PBIS) that have proven successful in reducing racial bias in school punishment and lowering the number of suspensions and expulsions in school districts throughout the country).

<sup>105</sup> CERD, art. 2(2): States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

<sup>106</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, 12132 (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”)

mandates nondiscrimination on the basis of disability under federal grants and programs.<sup>107</sup> States are also required to make “reasonable accommodations” for persons with disabilities. The Convention on the Rights of Persons with Disabilities (CRPD) defines a reasonable accommodation as a “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>108</sup> The Individuals with Disabilities Education Act (IDEA) requires that public schools provide “free and appropriate public education” to students with disabilities.<sup>109</sup> Furthermore, the IDEA vests public school districts with responsibility for identifying disabilities in students and requires schools to take into account a student’s disability when issuing any disciplinary measure against the student.

Despite these fairly robust protections under both international and domestic law, reports from interviewees suggest that New Haven public schools routinely fail to identify disabilities in students as required by the IDEA; because students are never formally identified as having special needs, their disability cannot be considered in the school’s disciplinary decision-making process, as required by federal law, and, as a result, these students are regularly subjected to overly harsh disciplinary measures. These successive legal violations – the failure to identify a disability, followed by the failure to consider a student’s disability status – place students with disabilities at an increased risk for harsh punishment in schools and ultimately result in the over-representation of students with disabilities in the criminal justice system.

Most interviewees noted that students with learning disabilities were over-represented among all students who are in the criminal justice system as the result of school-related disciplinary incidents. For example, a professional working with youth in the criminal justice system in New Haven stated that in her experience, many students involved in the juvenile justice system as criminal defendants were not in special education even though court-ordered evaluations during the criminal process later revealed that they should easily have qualified for special education services on the basis of a learning disability.<sup>110</sup> She noted that she frequently encounters student juvenile defendants with learning disabilities in the course of her work, leaving her with the impression that students with disabilities were over-represented in the criminal justice system.<sup>111</sup> This sentiment was affirmed by attorneys who have worked with school-age youth in New Haven.<sup>112</sup> According to one defense attorney, it is not uncommon for lawyers to represent students in school-related cases and discover during the criminal process

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<sup>107</sup> Sec. 504.(a) No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

<sup>108</sup> CRPD, art. 2.

<sup>109</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400, 1411 *et. seq.*

<sup>110</sup> Interview with Criminal Justice Professional, New Haven, Conn. Apr. 27, 2007.

<sup>111</sup> *Id.*

<sup>112</sup> Interview with Juvenile Defense Attorney, 2007; Interview with Attorney Experienced in Criminal Prosecution, 2007.

that they cannot read or write.<sup>113</sup> This attorney noted that the vast majority of these students have not been identified by the public schools as “special education,” leading him to wonder whether some schools were intentionally under-evaluating and under-identifying students in need of special education services.<sup>114</sup> The attorney further suggested that school districts would more efficiently serve all children under their supervision by evaluating and identifying more students in need of special education.<sup>115</sup>

The state, through its public schools, possesses an affirmative obligation to identify and accommodate students with disabilities and to consider students’ disability when issuing punishments. Further research is necessary to determine the full extent of undiagnosed disabilities in New Haven Public Schools. However, our preliminary research indicates that the state is failing to identify students with disabilities and thereby violating students’ right to receive reasonable accommodations in school and the right to have their disability considered as part of the disciplinary process.<sup>116</sup> The cumulative effect of these failures is that the state fails to ensure that educational services are available for students with disabilities. Instead, these students are pushed out of school through a school disciplinary process that serves no substantial state interest and that undermines rather than promotes the general welfare.

### **c. Discrimination on the Basis of Gender**

Although gender is not recognized as a suspect class under the federal Constitution, discrimination on the basis of gender must serve an important state interest and be rationally related to such an interest. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) prohibits discrimination on the basis of gender, including, specifically, in the area of education.<sup>117</sup> The CEDAW further requires states to take affirmative measures toward “[t]he reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely.”<sup>118</sup>

The failure to provide separate juvenile and adult facilities for incarcerated females also violates juvenile females’ rights. The International Covenant on Civil and Political Rights (ICCPR) prohibits states from incarcerating juvenile offenders with adults and requires states to ensure that rehabilitation is the aim of juvenile detention.<sup>119</sup> Although the United States ratified the ICCPR with a reservation that would purport to allow the joint incarceration of juvenile and

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<sup>113</sup> Interview with Juvenile Defense Attorney, 2007.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See e.g.*, BUREAU OF SPECIAL EDUCATION, CONNECTICUT STATE DEPARTMENT OF EDUCATION, MAPS ON KEY PERFORMANCE INDICATORS IN SPECIAL EDUCATION, *available at* <http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/Maps06.pdf> (attesting to disproportionate suspension and expulsion rates for students with disabilities in the New Haven School District).

<sup>117</sup> CEDAW, preamble, art. 10. The United States signed the CEDAW in 1980 but has not ratified it.

<sup>118</sup> CEDAW art. 10(f).

<sup>119</sup> ICCPR, art. 10, para. 3.

adult offenders, this reservation applies only “in exceptional circumstances.”<sup>120</sup> Furthermore, under the Juvenile Justice and Delinquency Prevention Act, states must ensure that children who are incarcerated or detained in an adult facility have no “sight or sound” contact with adults.<sup>121</sup> Because Connecticut has no facility for incarcerated juvenile female offenders – girls are sent to the women’s prison – the state’s practice violates this requirement with regard to juvenile females. It is unclear how, if at all, the special needs of female juveniles are addressed under such circumstances.

The failure to provide separate juvenile and adult facilities for incarcerated females violates juvenile females’ right to be free of discrimination. Incarcerated male students, in contrast to females, are held in a facility that is separate from the facility for adult males and that is designed specifically to deal with juvenile detention. The lack of educational services for girls and the harshness of imprisonment in an adult female facility violates the right to proportionality in punishment and the right to education, because female offenders are provided with less access to educational resources than their male counterparts who commit identical offenses.<sup>122</sup> These practices also contribute to, rather than reduce, juvenile delinquency, violating the principle established in the CRC,<sup>123</sup> and should be an area for further research.

### **C. The Right to Proportionality in Punishment**

The right to proportionality in punishment is derived from both international and domestic sources of law. The deprivation of this right occurs in three ways in New Haven schools: First, the punishment, such as expulsion or arrest, may be too harsh for the crime. Under zero-tolerance policies, suspension or expulsion is mandated, and behavior that has been traditionally handled administratively within the schools will be dealt with by the criminal justice system, resulting in harsher remedies with long-term consequences. Secondly, the imposition of both administrative and criminal sanctions may have a cumulative effect that is disproportionate to the offense. Finally, the lack of uniformity in punishment for similarly situated students who commit virtually identical offenses violates the principal of proportionality. Each of these violations may occur when punishments are meted out arbitrarily and without appropriate checks on the discretion of the agencies responsible for punishment.

#### **1. Legal Framework**

The right to proportionality in punishment for children and within the school setting is protected by several important international instruments. First, Article 10 of the International Covenant on Civil and Political Rights states:

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<sup>120</sup> United Nations Treaty Collection, International Covenant on Civil and Political Rights, United States of America: Reservations, para. 5.

<sup>121</sup> Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 42 U.S.C. § 5601, 5633(a)(13) (amended 2002).

<sup>122</sup> CEDAW art. 10(f).

<sup>123</sup> See Committee on the Rights of the Child, General Comment 10, 6-7 (2007).

2(b). Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.<sup>124</sup>

Although the ICCPR does not directly guarantee a right to proportional punishment, it is nonetheless important because it identifies rehabilitation as an important justification for punishment within an international human rights framework and explicitly states that juveniles must be accorded separate treatment from adults when they are punished. Article 40(1) of the Convention on the Rights of the Child also states that the objective of sentencing a juvenile offender must be his or her rehabilitation and/or reintegration into society.<sup>125</sup> Proportionality of punishment is critical in ensuring that the rehabilitative purposes of punishment are fulfilled. Excessive punishment is a disincentive to positive changes in behavior; in the context of school discipline, disproportionate punishment undermines the purpose of rehabilitation by increasing the risk that students will leave school or become involved in the criminal justice system, which may, in turn, further alienate them from their family and communities.<sup>126</sup>

The CRC specifically addresses the issue of punishment in schools. Article 28 provides, “States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.”<sup>127</sup> Punishments are not consistent with an individual’s human dignity if they are excessive or disproportionate to the committed offense. Article 40(4) of the CRC further requires that punishments of juvenile offenders must be monitored “to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offense.”<sup>128</sup>

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<sup>124</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976.

<sup>125</sup> CRC, art. 40(1); *see also* Meredith Wilkie & Chris Sodoti, *Human Rights Brief Number 2: Sentencing Juvenile Offenders*, Australian Human Rights and Equal Opportunity Commission, June, 1999, *available at* [http://svc013.wic009tp.server-web.com/Human\\_RightS/briefs/brief\\_2.html](http://svc013.wic009tp.server-web.com/Human_RightS/briefs/brief_2.html) (noting in its interpretation of Article 40(1) that “[j]ust deserts or retributive sanctions should always be outweighed by the interest of safeguarding the well-being and the future of the young person. Rehabilitation of offenders is also the best way to promote community safety”).

<sup>126</sup> Excessive punishment also violates the principle of retribution, because it is unfair to punish an individual more than she or he may deserve, and deterrence, because excessive punishments may actually have a negative deterrent effect on crime.

<sup>127</sup> Convention on the Rights of the Child art. 28, G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

<sup>128</sup> *Id.* at Article 40.4; *see generally* Wilkie, AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, June 1999 (noting that the punishment “must be proportionate *both* to the seriousness of the offense and to the circumstances of the offender” and that “[t]he sentencer must make the decision in the *individual case*” and questioning the notion that “mandatory sentences of any kind, and particularly of detention,” are ever appropriate).

Although the United States signed the CRC in 1995, it has not yet ratified this convention. By signing the treaty, however, the United States obligated itself not to take actions that would defeat the object and purpose of the treaty.<sup>129</sup> In addition, the Supreme Court looks to international norms to define the “evolving standards of decency”<sup>130</sup> embodied by the Eighth Amendment. The Eighth Amendment forbids cruel and unusual punishment. It prohibits not only punishment that is barbaric or unnecessarily painful, but also punishment that is excessive. The principle of proportionality was first upheld in *Weems v. United States*,<sup>131</sup> in which the Supreme Court invalidated a lengthy prison sentence of hard labor for forgery, stating, “It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind.”<sup>132</sup> In *Trop v. Dulles*, the Supreme Court also emphasized that when a punishment is excessive, it no longer comports with human dignity.<sup>133</sup> Chief Justice Warren wrote, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”<sup>134</sup> Thus, domestic law, like international law, emphasizes that human dignity must be the principle against which acceptable punishments are measured. The principle of proportionality ensures that punishment does not, by being arbitrary, deprive the individual of his or her dignity, but rather serves the social ends of retribution, deterrence, and rehabilitation.

At the extreme end of the punishment spectrum, the Supreme Court addressed the issue of the juvenile death penalty in *Thompson v. Oklahoma*<sup>135</sup> and later in *Roper v. Simmons*.<sup>136</sup> In *Thompson*, the court invalidated the death penalty for offenders under the age of sixteen. Justice Stevens, writing for the majority, explained why the principle of retribution is less applicable to juvenile offenders.

[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed

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<sup>129</sup> Vienna Convention on the Law of Treaties, art. 18(a), 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980 (A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty”). The United States is not a party to the Vienna Convention on the Law of Treaties but recognizes it as reflecting customary international law. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (“The United States recognizes the Vienna Convention as a codification of customary international law. The United States Department of State considers the Vienna Convention ‘in dealing with day-to-day treaty problems’ and recognizes the Vienna Convention as in large part ‘the authoritative guide to current treaty law and practice.’ In addition, the Department of State has stated that where it has not recognized the Vienna Convention as codifying customary international law, it has adopted it as customary law going forward.”) (citation omitted).

<sup>130</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>131</sup> 217 U.S. 349 (1910).

<sup>132</sup> *Id.* at 377

<sup>133</sup> *See Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>134</sup> *Id.* at 100.

<sup>135</sup> 487 U.S. 815 (1988).

<sup>136</sup> 543 U.S. 551 (2004).

by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.<sup>137</sup>

Thus, retribution should not be the motivating principle behind juvenile punishment policies. More than fifteen years later, the Court revisited this analysis in *Roper* to invalidate the execution of offenders under the age of eighteen. The Court looked again to the justifications for punishment and held that retribution and deterrence do not apply with equal force to young people. If an individual is less culpable due to irrationality and immaturity, the sanction should be less severe; in addition, the deterrent function of punishment is not likely to be as effective in dissuading a youthful offender from a particular crime.<sup>138</sup>

In *Roper*, the Court looked to death penalty jurisprudence from other nations in finding that the practice of executing juveniles was no longer in accord with the evolving standards of decency in this country. The Court wrote, “Yet at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”<sup>139</sup> The acknowledgment of the importance of international law in the interpretation of the Eighth Amendment suggests that the Convention on the Rights of the Child and the ICCPR are useful advocacy tools for challenging disproportionate punishment in schools in the United States. Punishment, proportionality, and human dignity are at the core of these international instruments, and the Court in *Roper* explicitly linked international instruments, the Eighth Amendment, and juvenile punishment.

The Supreme Court has not applied the Eighth Amendment to punishments that occur outside of the criminal context, however. In refusing to address corporal punishment as an Eighth Amendment issue in schools, the Supreme Court wrote, “The schoolchild has little need for the protection of the Eighth Amendment. . . . The openness of the public school and its supervision by the community afford significant safeguards against the kind of abuses from which the Eighth Amendment protects the prisoner.”<sup>140</sup> Although the Supreme Court has refused to apply the Eighth Amendment to administrative punishments in schools, the presence of police in schools and student arrests should implicate greater constitutional protection. Not only are students at risk of being taken into custody, but openness and community involvement in public schools, a quality of schools relied on by the Supreme Court as a justification for treating them differently, has arguably become increasingly tenuous.

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<sup>137</sup> *Thompson*, 487 U.S. at 835.

<sup>138</sup> *Id.* at 571-572.

<sup>139</sup> *Id.* at 575.

<sup>140</sup> *Ingraham v. Wright*, 430 U.S. 651, 670 (1977).

Although the Connecticut state constitution does not have the equivalent of the Eighth Amendment, the Supreme Court of Connecticut has judicially adopted a prohibition against cruel and unusual punishment. In *State v. Ross*, the court concluded that the guarantees of due process under the state constitution implied the prohibition of cruel and unusual punishment similar to that guaranteed under the federal Constitution, because “prior to the adoption of the state constitution in 1818, the common law in Connecticut recognized that the state did not have unlimited authority to inflict punishment for the commission of a crime.”<sup>141</sup> The concept of proportionality, the protection against arbitrariness, and the preservation of human dignity have been incorporated into the Connecticut state constitution in a manner equally as protective as the federal guarantees embodied in the Eighth Amendment.<sup>142</sup>

Although the discipline code of the New Haven Board of Education does not explicitly guarantee proportional punishment, it does acknowledge the importance of respecting the dignity of every student. The policy states, “New Haven Public Schools will be nurturing, healthy, safe school environments that exhibit: [e]quitable systems of support and resources, [and] [r]espect, trust, understanding, acceptance, and appreciation of individual differences among all stakeholders.”<sup>143</sup> This promise echoes the language of the CRC in its recognition of and commitment to protect the human dignity of all students in New Haven and should apply to disciplinary actions to the same extent it applies to other aspects of the public schools.

## **2. Disproportionate Punishment and the Deprivation of Student Rights**

### **a. Excessive Punishment for a Single Offense**

There are two systems that impose punishment on children in schools: the criminal justice system and school administration. The punishment from either system alone, or the two systems together, may be disproportionate to the offense committed.

#### **i. School Administration**

Suspension or expulsion may be disproportionate punishments for minor infractions of the school disciplinary code. Although these punishments have a place in the school disciplinary regime, denying students’ access to education for minor infractions imposes a penalty disproportionate to the offense committed.

Administrators might be forced to impose excessive penalties for minor infractions, because the policy of the state Board of Education provides that any absence from class for more than ninety minutes is automatically considered an in-school suspension. This means that principals and school administrators are forced to make a difficult choice: either taking a student out of class by sending him or her home to defuse a situation and issuing sanctions they do not believe are warranted by the offense or taking administrative action in less than 90 minutes. To avoid the suspension, principals run the risk of sending students back to class without a cooling-

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<sup>141</sup> 230 Conn. 183, 246-47 (1994).

<sup>142</sup> *Id.*

<sup>143</sup> New Haven Board of Education Policy, *available at* <http://www.nhps.net/about/mission.asp>.

off period, which may result in more serious violent flare-ups. In order to protect the safety of the educational environment, administrators tend to err on the side of caution and issue more suspensions than they would otherwise if granted the discretion to address infractions in a more informal manner. When an administrator makes this choice, the impact of this single suspension on the student's record may, in turn, influence the way further infractions by the student are handled, resulting in stiffer penalties because the student is a repeat offender. These effects would be the result of a violation the administration may not have felt should result in suspension in the first place.<sup>144</sup>

Increases in suspensions and expulsions also may suggest that these sanctions are being imposed when they are unwarranted. The *New York Times*, while covering the increase of school suspensions nationwide, noted that in Connecticut,

[t]he number of suspensions jumped about 90 percent from 1998-1999 to 2000-2001. In the 2000-2001 school year, 90,559 children were suspended from school around the state, up from 57,626 two years earlier. The State Department of Education did not provide statistics for earlier years, but education experts said the numbers have never been higher.<sup>145</sup>

This enormous increase may reflect the use of suspensions and expulsions, not as rational, individualized punishments, but rather as a rapid, mechanistic means of dealing with difficult students. Individuals interviewed for the report seemed to confirm that administrators and teachers may feel they have no option other than suspension or expulsion for dealing with a challenging student in an under-resourced environment. For example, one superintendent noted:

I think it's a horrific practice except in extreme cases when we remove the child from harming himself or harming his classmates. . . . But education comes under attack when you do, and when you don't. Many schools don't have the means to deal with these kids. The principal can't sit there and babysit children all day, there are no in-school suspension rooms and someone to watch over them, there is a severe lack of resources. So they suspend them, because sometimes it's the only avenue.<sup>146</sup>

When administrators suspend or expel students because they feel there are no other viable options for disciplining students, the severity of the offense has little to do with the gravity of the punishment. This violates the guarantees of individualized sentencing and the protection of basic human dignity embodied in the concept of proportional punishment.

## **ii. The Criminal Justice System**

Students also experience disproportionate punishment when they receive criminal sanctions for behavior that could have been dealt with equally as effectively with an

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<sup>144</sup> Interview with School Administrator, 2007.

<sup>145</sup> Jane Gordon, *In Schools, Bad Behavior Is Shown The Door*, N.Y. TIMES, Nov. 16, 2003.

<sup>146</sup> *Id.*

administrative penalty. A disciplinary offense, such as a scuffle in the hallway, punished as “disruptive behavior” under school disciplinary policies, is classified as a “breach of the peace” or possibly an assault in the context of criminal law. The overlap in the application of school disciplinary codes and criminal law and the presence of police in schools means that students can be punished either criminally or administratively for the same behavior. Because of the overlapping definitions and broad array of conduct that falls under “breach of peace,” officers have significant discretion to decide whether to initiate criminal sanctions against students. The officers we interviewed noted that they try to mediate conflicts first and involve the criminal justice system as a last resort. However, one law enforcement official estimated that SROs issue a summons for a speech-related offense at least once per week.<sup>147</sup> When the ends of a particular punishment would be served equally well by an administrative or a criminal punishment, the school and the state have an affirmative obligation to use the system that both protects the community and best fosters rehabilitation and reintegration for the offender. Removing students from school is not the most likely path to achieve rehabilitation for minor offenses.<sup>148</sup>

School administrators may have little incentive to oppose the criminal punishment of school conduct, particularly conduct that does not result in a significant disturbance in the school. Issuing tickets or summonses for infractions that do not warrant custodial arrest does not affect school expulsion and suspension rates. As a result, school administrators have limited incentives to work to reverse the trend toward criminal sanctions. Although the administration will necessarily be involved in resolving some types of conduct, such as large disturbances that occur during the school day, they may not be involved in the issuance of a ticket or summons, which can be done unilaterally by an SRO; as a result, conduct that results in a significant disturbance at the school might have a better chance of being mediated and resolved administratively than more minor incidents.

The imposition of criminal sanctions might also be arbitrary. For example, the decision to pursue criminal charges may depend on nothing more than whether the first responder is an SRO or a school administrator. One law enforcement official explained that the police officers, not the school administrators, decide whether to make an arrest, provided that the officer has the requisite probable cause. He noted:

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<sup>147</sup> Interview with Law Enforcement Officials, 2006.

<sup>148</sup> See Wilkie, AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, Interventions without resorting to judicial proceedings. (“According to article 40(3) of the CRC, the States Parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (= diversion) should be a well-established practice that can and should be used in most cases.”) Punishing minor offenses criminally rather than administratively has an important parallel in punishing juveniles as adults instead of as children. See, for example, Peter Ash, M.D., *Adolescents in Adult Court: Does the Punishment Fit the Crime?*, 32 J. AM. ACAD. PSYCHIATRY & L., no. 2, 145, 147 (2006). (“Fortunately, most adolescent offenders, and most violent offenders, do not continue offending into adulthood. The social pattern of adolescent crime is different. One of the hallmarks of adolescent development is the increased importance of peer relationships. Adolescents tend to offend in groups, unlike adult offenders who tend to act alone. If you don’t know an adolescent’s behavior, ask about what sort of activities his peers are getting into. If adolescent crime is a time-limited event for most youth, then it makes little sense to intervene with youthful offenders as though they are hardened criminals.”).

The school-based officer can decide whether or not there is an arrest. But sometimes a principal or school administrator can push for an arrest, so sometimes a principal may say, “Hey, I have spoken to these kids before and they obviously didn’t get it so I want to push for an arrest.” And we will take that into consideration when dealing with students. Of course we don’t want the kids to be set up for failure. But for example, we can arrest a student for a breach of peace which is a fight between two students.<sup>149</sup>

If the fight was broken up by a school administrator or teacher, the likelihood that the students will face criminal sanctions is less; with SROs as first responders, the conduct is more likely to be subject to criminal sanctions.

The decision to press charges might also be arbitrary when, because it is mandated, the prosecutor is denied the ability to exercise discretion about whether to prosecute based on the severity of the offense. An attorney who has experience dealing with youth in New Haven’s criminal justice system expressed dissatisfaction with the policy in New Haven that after two non-judicial handlings of a particular offender, any subsequent matter that comes before the court must be handled judicially. For example, if a student’s probation officer imposed two community service sentences for fairly serious offenses such as fighting that involved physical injury, a third offense must be handled judicially, regardless of its severity. This removes prosecutorial discretion to mediate or refuse to prosecute an extremely minor offense, merely because it is the third one.<sup>150</sup> Punishing students without individualized consideration of the misconduct in question violates their right to proportional punishment; lack of individualized consideration makes the handling of the third offense arbitrary and, to the extent that this decision removes the student from school for a minor offense, it reduces the likelihood that the goal of rehabilitation will be served.<sup>151</sup>

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<sup>149</sup> Interview with Law Enforcement Official, 2006.

<sup>150</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007. A juvenile defense attorney also expressed concern about the amount of power probation officers have in making decisions about whether to handle a case judicially or non-judicially: “It’s a strange topic that actually places a little more power in the hands of a probation officer than lawyers would like to see, and the non-judicial thing gets filtered through a probation officer, and I kind of think this is practicing law without a license. So we don’t see the cases unless they come to court. My view is that I would prefer to see an attorney making those decisions.” Interview with Juvenile Defense Attorney, 2007. According to research and interviews carried out for this report, there are no clearly published guidelines dictating which offenses may be handled non-judicially and how these decisions are made by probation officers.

<sup>151</sup> The Committee on the Rights of the Child recommended the use of probation officers, community mediation, and other alternatives to the imposition of judicial sanctions; however, international law also requires specific guidelines to minimize any possible discriminatory effects of discretion and that the discretion be given to the most experienced actor, in this case, the prosecutor. “The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner. In this process of offering alternatives to a court conviction at the level of the prosecutor, the child’s human rights and legal safeguards should be fully respected.” In New Haven, not only is the power to decide on judicial versus non-judicial handling placed directly with the probation officers, there are also no written guidelines in place to guide that discretion.

## b. Disproportionate Punishment as a Result of “Double” Punishment

Concurrent punishment under two different systems, administrative and criminal, also results in disproportionate punishment. The criminal and administrative system may each act on the same student, for a single offense, and often without regard as to how the student was sanctioned through the parallel system. A student who is suspended from school may face criminal sanctions for the same conduct and be issued a summons, requiring him or her to appear in court. Court appearances are not considered “excused absences” by the school, and the student, in addition to the in-school suspension and the punishment imposed by the court, will also have an unexcused absence on his or her record, which may later lead to a truancy prosecution. Multiple punishments for a single offense impede the rehabilitation of the student, who is more likely to fall behind in school, become alienated from his or her peers as a result, and leave the educational setting entirely.<sup>152</sup>

Offenses committed outside of school – on the weekends, after school, and off school property – that result in arrest or criminal sanctions are also reported to school administrators and usually result in subsequent school action.<sup>153</sup> A school administrator noted that the SROs report weekly on the criminal activities of students outside of school.<sup>154</sup> Imposing administrative sanctions for actions that have no relationship to the student’s conduct within the classroom can result in disproportionate punishment, because the student may have been punished adequately by the criminal system alone. Although open communication is important to preserve safety in schools and to foster links between the neighborhoods where students reside and the high schools, imposing additional in-school sanctions may result in unduly harsh and disproportionate punishment. If a student steals a car on the weekend, the SRO will report it to the administration. Students perceived as “troublemakers” by the administration may be suspended or expelled for their out-of-school conduct, while students who are not known to cause problems in the school may be granted leniency because of the vast discretion accorded to administrators in calling for additional administrative sanctions. The cumulative effect of these two systems acting on a student for a single infraction may violate the principle of proportionality because a single sanction might adequately punish the student while promoting rehabilitation.

Although out-of-school criminal activity and subsequent judicial consequences are often known to school administrators and may be a factor in an administrator’s decision about imposing any additional punishment through the school, the imposition of school-based sanctions for students’ in-school conduct rarely if ever affects the criminal punishment meted out by the judicial system. A juvenile defense attorney noted that the punishment issued by school administrators is generally not considered part of the defense’s bargaining power with the state.<sup>155</sup> An attorney who is experienced in criminal prosecution expressed a similar concern,

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<sup>152</sup> See The Committee on the Rights of the Child, Comment no. 10. “The Committee reminds States Parties that, pursuant to article 40(1) CRC, reintegration requires that no actions may be taken that can hamper the child’s full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.”

<sup>153</sup> Interview with School Administrator, 2007.

<sup>154</sup> *Id.*

<sup>155</sup> Interview with Juvenile Defense Attorney, 2007.

explaining that in-school punishments are not generally coordinated with actions taken within the criminal justice system and that schools generally take whatever actions they think are appropriate regardless of the criminal sanctions imposed.<sup>156</sup>

The lack of transparency in the record-keeping of both the criminal and administrative systems is also troubling. The school is required to keep detailed records on each offense a student commits and how the offense is handled administratively,<sup>157</sup> and the police are required to report each physical arrest and summons issued to students, but it is unclear where, how, and if either of the types of data is collected.<sup>158</sup> The State Board of Education was unwilling to supply data on arrests in schools, and the most recent publications from the Board of Education merely show the number of offenses and, separately, the type of punishments administered; there is no way to determine from the published data which offenses received what type of punishment through school action or through the criminal justice system. Schools denied requests for this information on the basis of student confidentiality; the State Board of Education denied these requests on the basis of lack of resources to correlate the data and respond to the high volume of such requests.<sup>159</sup>

### **c. Excessive Punishment Based on Special Education Status**

To fulfill the requirement that sanctions be proportional, schools must ensure that punishments are proportional to both the severity of the offense and the offender's culpability by taking into account the offender's individual characteristics. Because schools are failing to identify students who have special-educational needs, these needs are not taken into account during the disciplinary process. The sanctions for unidentified special-education students are therefore not proportional to the students' culpability and do not reflect their individual characteristics.

Schools must provide students in special education with heightened safeguards in school disciplinary proceedings. Under the No Child Left Behind and Americans with Disabilities Act, administrators must determine, before punishment is administered, whether the special needs or the disability of the student was a contributing cause of the disciplinary infraction. This is determined through a "PPT" (Planning and Placement Team) hearing.<sup>160</sup> Appropriately accounting for the special needs of a particular student ensures that the punishment, if any, will align with the culpability of the student. The number of special education students identified and

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<sup>156</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007.

<sup>157</sup> CONNECTICUT BOARD OF EDUCATION FORM ED 166.

<sup>158</sup> Committee on the Rights of the Child, Comment 34. "The Committee is deeply concerned about the lack of even basic and disaggregated data on inter alia the quantity and the nature of offences committed by children, the use and the average length of duration of pre-trial detention, the number of children dealt with by the use of measures without resorting to judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them. The Committee urges the States Parties to systematically collect disaggregated data relevant for the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and at effective responses to juvenile delinquency in full accordance with the principles and provisions of the CRC." *Id.*

<sup>159</sup> See Board of Education website, [www.csde.state.ct.us/public/cedar/cedar/discipline/index.htm](http://www.csde.state.ct.us/public/cedar/cedar/discipline/index.htm).

<sup>160</sup> Interview with School Administrator, 2007.

afforded these extra protections, however, is significantly less than the actual number of students with special needs or disabilities in the school population.<sup>161</sup> A student with undiagnosed disabilities will likely be subject to the same punishments for the same conduct as a student without such disabilities. Such a punishment would not match the student's individual culpability and would therefore be disproportionate.

The criminal justice system also fails to consider students' special needs and the way in which those needs might affect culpability in determining punishment. In the criminal justice system, the educational classification of students with special needs generally has little bearing on their criminal punishment, in part, because decision makers in the criminal justice system may fail to recognize the role disabilities play in the criminal conduct of students. Once criminal proceedings have been commenced against a student in special education, the prosecutor or public defender may take into account the student's status as a special education student; however, nothing in the criminal law mandates such treatment, and this lack of regard for individual culpability can lead to disproportionate punishment for these offenders. As a result, students with disabilities may be punished disproportionately if their offenses are handled exclusively through the criminal justice system.

There is also evidence that the special needs of students might be disregarded by school-based police in the imposition of punishment. SROs may be skeptical of the merits of a special-needs diagnosis and resentful of the extra protections afforded to special-needs students. For example, one law enforcement official noted school administrators work more closely with certain children because they are in special education. This law enforcement official further noted that although the school may take disciplinary actions against these students, they usually return to school, and this creates a belief among special education students that they are immune from punishment.<sup>162</sup> The official explained that when a student who is classified as "special education" commits a crime, the SROs in the school do not treat the student differently than they would another child who committed a similar offense<sup>163</sup> and will remind the school administration that special education students "cannot be led to believe that there are no consequences for their actions."<sup>164</sup> These interviews indicate that school-based police may not be considering the special educational needs of students in determining appropriate punishments; the resulting sanctions may not reflect the student's individual culpability or individualized circumstances and thus may be disproportionate.

#### **d. Disproportionality Resulting from Lack of Uniformity of Punishment for Similar Offenses**

The guarantee of proportional punishment is also violated when students with similar levels of culpability are punished differently. Administrators must have some discretion to ensure that the appropriate individual characteristics of particular offenders are taken into

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<sup>161</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007 (citing the fact that required evaluations are often not completed).

<sup>162</sup> Interview with Law Enforcement Officials, 2006.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

account when deciding on punishments consistent with students' human dignity. Nonetheless, sanctions must be proportional across different offenses, and similar offenses must be punished similarly.

Different students might be punished differently because administrators have overly broad discretion in determining appropriate punishments. Decisions about whether to mediate a conflict, issue a suspension, or expel a student are highly discretionary.<sup>165</sup> Specifying in a written policy which punishments are appropriate for which types of offenses could maintain the necessary discretion for school administrators while providing needed transparency and ensuring that the school imposes punishments that are appropriate to the offender's culpability.

Recidivist students are punished more harshly than first-time offenders. This principle is well accepted in criminal law and is authorized in the regulations that govern school administration of punishment. For example, at Wilbur Cross, the list of punishments for offenses is prefaced with the sentence, "Repeated infractions in any of the following categories will result in more disciplinary consequences which may include referral to school and community resources, suspension and/or expulsion from school."<sup>166</sup> Treating similar offenses differently based on students' prior records is permissible as long as it does not, either by rule or in practice, deny administrators the ability to tailor sanctions to the offenders and to impose more lenient sanctions where appropriate and as long as it does not impermissibly allow racial stereotypes to influence this process.

Students may also receive different punishments based on their age. Although the school disciplinary code is enforced identically upon students regardless of whether they are classified for criminal law purposes as juveniles or adults, the criminal justice system in Connecticut may treat them differently. Since the introduction of school-based policing, students legally considered adults have faced more serious repercussion for their in-school misconduct, because they are subject to criminal penalties as adults. Among other things, students who are legally considered adults receive permanent criminal records and stiffer penalties than their juvenile counterparts. Although the law should draw a distinction between juvenile and adult offenders, the federal government and most states have set the age at which people are subjected to the adult criminal justice system at eighteen.

Connecticut's law, which, until recently, treated offenders as adults as of age sixteen, has been changed, raising the state's juvenile age to eighteen.<sup>167</sup> However this amendment is not retroactive, and students aged sixteen or older remain subject to adult judicial sanctions for offenses committed in school until the new law takes effect in January 2010.<sup>168</sup> Children under the age of sixteen have usually been handled in the juvenile justice system; however, the Juvenile Prosecutor has discretion to transfer children who are fourteen or older to the adult system based

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<sup>165</sup> See, e.g., Wilbur Cross School Discipline Code, available at [www.nhps.net/wcross/Guidance/Handbook.pdf](http://www.nhps.net/wcross/Guidance/Handbook.pdf).

<sup>166</sup> Wilbur Cross High School Discipline Code, available at [www.nhps.net/wcross/Guidance/Handbook.pdf](http://www.nhps.net/wcross/Guidance/Handbook.pdf).

<sup>167</sup> CONN. GEN. STAT. § 46b-120(1) (defining a child as "any person under sixteen years of age"), amended by Pub. Act. 07-4 § 73 (effective Jan. 1, 2010) (defining a child as "any person under eighteen years of age").

<sup>168</sup> *Id.* For information about the proposed implementation of the new juvenile age provisions, see Connecticut Juvenile Jurisdiction Planning and Implementation Committee, Final Report, Feb. 12, 2007, available at [http://www.housedems.ct.gov/jpic/070212\\_JPIC\\_report\\_revised.pdf](http://www.housedems.ct.gov/jpic/070212_JPIC_report_revised.pdf).

on the seriousness of the offense.<sup>169</sup> An attorney who has worked in the juvenile justice system stated that this is done with extreme caution and only in the most serious and deserving cases.<sup>170</sup>

In some instances, “adult” students who engage in behavior considered criminal by the SROs may actually be at an advantage over their juvenile counterparts in terms of the gravity of the punishment. This highlights the absurd effect of the legal fiction of juvenile and adult students in the context of criminal sanctions for in-school conduct. For example, a student who is considered a legal adult and who is cited by an SRO for a breach of peace for vulgar language in the hallway would be issued a criminal ticket and fine. There is no requirement that the student’s parents be called. To resolve the issue and avoid further contact with the authorities, the student is required only to pay the fine. Given the socio-economic status of many of the students in New Haven public schools, this may be a heavy burden. On the other hand, a student who is a legal juvenile and who receives a citation for the identical offense could not be fined but would instead be issued a ticket that is a summons to court. The parents of a juvenile offender must be notified, and the juvenile offender would be required to report to court ten days later, resulting in an unexcused absence from school. For minor offenses, status as an adult, although not without potentially serious economic repercussions, results in less direct involvement in the criminal justice system, such as hearings before a judge, than for a juvenile offender.

## **D. The Right to Freedom of Speech and Expression in Schools**

### **1. The Legal Framework**

International law has long recognized the right to freedom of speech and expression. Article 18 of the Universal Declaration of Human Rights provides, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” U.S. law is generally considered to be as strong or stronger than international law in protecting free expression;<sup>171</sup> as a result, U.S. law on freedom of expression is probably the most effective tool for advocacy on freedom of expression in the public school context.<sup>172</sup>

The First Amendment to the U.S. Constitution guarantees freedom of speech. In the Connecticut Constitution, an analogous provision is contained in Article One, Section Three,

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<sup>169</sup> CONN. GEN. STAT. § 46(b)-127(b).

<sup>170</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007.

<sup>171</sup> Jamie Frederic Metzler, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. INT’L L. 628, 644 & n.121 (1997) (noting that “the United States is generally considered to have the strongest legal regime for the protection of free speech in the world” and that “it is important to note that the European tradition of freedom of expression permits a less absolute understanding of this freedom than traditional U.S. jurisprudence”).

<sup>172</sup> See Human Rights Education Associates, *Guide to Freedom of Expression*, which cites the Universal Declaration of Human Rights art. 19, International Covenant on Civil and Political Rights Art. 19, the UN Special Rapporteur on Freedom of Opinion and Expression, the International Covenant on Elimination of All Forms of Racial Discrimination Art. 5, and the Convention on the Rights of the Child Art. 13, among other international instruments, that guarantee freedom of expression, but also set out the limits of permissible restrictions that are not inherent in the First Amendment law of the United States, available at [www.hrea.org/learn/guides/freedom-of-expression.html](http://www.hrea.org/learn/guides/freedom-of-expression.html).

which states, “Every Citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.”<sup>173</sup> The Supreme Court of the United States has issued several important rulings on the speech rights of students in public high schools. In holding that a school regulation prohibiting students from wearing black armbands to protest the Vietnam War was unconstitutional, the Court noted, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>174</sup> The Court considered the protests of students to be in the realm of “pure speech” and fully protected by the First Amendment because there were no demonstrable disruptions to education resulting from the symbolic protest by students.<sup>175</sup>

The Supreme Court tempered the right to freedom of speech in the educational context in subsequent cases, however. In *Hazelwood School District v. Kullmer*, the Court held, “Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>176</sup> Citing student privacy among other concerns, the Court upheld a principal’s decision not to publish student articles on pregnancy and divorce in the school paper.<sup>177</sup>

In *Bethel School District v. Fraser*, the Supreme Court held that the suspension of a student who gave a “lewd” campaign speech during a general assembly did not violate the student’s First Amendment rights. The Court noted that the school’s policy on disruptive behavior stated, “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”<sup>178</sup> The Court stated:

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech . . . . A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly it was perfectly appropriate for the school to disassociate itself to make the point to its pupils that vulgar speech and lewd conduct is wholly inconsistent with the “fundamental values” of public school education.<sup>179</sup>

The Supreme Court upheld the use of school sanctions for speech that did not rise to the level of criminal conduct but that the administration nonetheless found to be contrary to the values of public education.

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<sup>173</sup> CONN. CONST. art. 1, § 3.

<sup>174</sup> *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).

<sup>175</sup> *Id.*

<sup>176</sup> 484 U.S. 260, 273 (1988).

<sup>177</sup> *Id.*

<sup>178</sup> 478 U.S. 675 (1986).

<sup>179</sup> *Id.* at 678.

In *Morse v. Frederick*, the Supreme Court addressed the constitutionality of suspending a student for displaying a “BONG HiTS 4 JESUS” banner during the torch-run preceding the 2002 Winter Olympics.<sup>180</sup> Students were allowed to attend the event as part of a school field trip, but the display of the poster occurred off of school grounds. The Court held that because the poster could be interpreted to advocate the use of illegal drugs in violation of school policy and was displayed in connection with a school-sponsored event, it did not violate the student’s First Amendment rights to suspend him for his actions. Although the ruling does not address the issue of the imposition of criminal sanctions for student speech, it provides that schools may limit the constitutional rights of students in the school setting, a position that the Court had endorsed since *T.L.O. v. New Jersey*.<sup>181</sup> These decisions might provide a basis for the constitutionality of suspensions for student speech that is viewed as contrary to school policies.

Although schools may constitutionally limit a student’s speech rights in the school context, the criminalization of speech also implicates other rights explored in this report: the right to education, to freedom from discrimination, and to proportionality in punishment. The issue of “freedom of speech” may also prove to be a useful advocacy tool because of its recognition as a crucial right of citizenship and its resonance with the American public.

## **2. Human Rights Implications of Speech Restrictions**

Although administrative punishment for some kinds of harmful speech within the school context might be warranted, criminal punishment for speech in schools threatens to impermissibly curtail freedom of expression in educational settings. Justice Brennan articulated the underlying principle driving the importance of freedom of expression in schools, writing:

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the “marketplace of ideas.” The nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues,” [rather] than through any kind of authoritative selection.<sup>182</sup>

Through zero-tolerance policies and the increased handling of school misconduct through the criminal justice process, the robust exchange of ideas and the promise of an unencumbered educational environment are threatened.

Inappropriate curtailment of speech is one repercussion of the increased police presence in schools and the mandatory disciplinary sanctions required under zero tolerance policies. Although sanctioning certain conduct, such as fights, may seem less troubling than limits on First Amendment rights, the frequency and severity of school-based punishments generally is increasing, and more and more conduct, including conduct involving speech, is being punished with criminal sanctions. To the extent that the sanctioned conduct involves speech, these

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<sup>180</sup> 127 S. Ct. 2618 (2007).

<sup>181</sup> 469 U.S. 325 (1985).

<sup>182</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

policies may be challenged on each of the grounds identified in the previous two sections; in addition, although school officials may constitutionally limit speech that occurs in a school context, including in ways that might not be permissible were the speech to occur off school grounds, policies that punish speech-related conduct might provide inadequate notice of the conduct prohibited and fail to adequately guard against racial discrimination in the application of sanctions. The following section will focus on the way in which speech is treated as a disciplinary matter and the particular speech-related concerns that this raises.

### **3. The Mechanics of Criminal Punishment for Student Speech**

Three main types of student “speech,” disruptive behavior, insubordination, and harassment, may provoke action from the criminal justice system in addition to school administrative sanctions. “Insubordination” describes a category of inappropriate speech and conduct that may include “disrespect and obscene language or behavior.”<sup>183</sup> According to the Connecticut State Department of Education, prosecutors and school officials classify speech directed at other students, or speech that is not directed at other students but that consists of swearing or lewd gestures, as the least serious student behavior in this category. Profane words or gestures directed at teachers are treated more harshly. Finally, expressions of affiliations with various “neighborhood” groups, akin to informal gangs in New Haven, are considered a serious criminal matter within the schools.

Both insubordination and harassment are clearly defined in school codes and have corresponding and narrow definitions in the criminal system; these definitions, by virtue of their well-established elements (a finding of insubordination, for example, requires profane or threatening speech to have been directed at an authority figure), limit discretion in punishment in both the school and criminal systems. In contrast, “disruptive behavior,” in the school discipline codes, which is the equivalent of breach of peace in the criminal law, is broadly defined in both systems. Any activity that alters the regular school atmosphere could be “disruptive” and thus a breach of peace in the school context, even though this conduct might not constitute a breach of peace were it to occur on the street, for example. As a result, administrators and police have more discretion in punishment, and speech violations punished under this category could include swearing, yelling at another student, or other behavior that does not qualify as harassment but that is nonetheless disruptive to the educational environment. The absence of clear standards for what constitutes “disruptive behavior” also contributes to the risk of both discriminatory application – students sanctioned differently based on prohibited ground such as race – and lack of proportionality in punishment – like offenses punished inconsistently. These broad categories of infractions can also contribute to the imposition of criminal sanctions for behavior that would normally be unlikely to be recognized as criminal conduct, merely because such speech occurs in the school context.

Serious disciplinary sanctions for inappropriate speech are widespread in New Haven schools. Data from the New Haven school district point to a large number of out-of-school suspensions for inappropriate speech: for the 2006-2007 school year, the Connecticut Department of Education reports 1,363 out-of-school suspensions for insubordination or

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<sup>183</sup> See e.g., CONNECTICUT DEPARTMENT OF EDUCATION, NEW HAVEN DISCIPLINARY REPORT FOR 2006-2007, tbl.13, at 16, available at <http://www.csde.state.ct.us/public/cedar/cedar/discipline/data/0607/NEW%20HAVEN.PDF>.

disrespect, and 430 out-of-school suspensions for obscene language or profanity.<sup>184</sup> A law enforcement official noted that school-based police are most commonly called to address speech-related incidents in cases of insubordination; teachers in these cases are likely to call an SRO out of fear that a student's behavior may escalate from harsh or profane language to physical violence.<sup>185</sup> Some law enforcement officials estimated that SROs give a summons or a ticket at least once a week, for either speech offenses or simple trespass. Because using profanity in the hallway is considered unacceptable, SROs respond to such conduct, first by pulling the student aside, talking to him or her, and delivering a verbal warning; however, if the language is bad enough to constitute creating a public disturbance, SROs will issue a court appearance ticket and call the student's parents.<sup>186</sup> For adult offenders, the punishment is a \$90 ticket for the use of profanity in schools.<sup>187</sup> If a ticket or summons is issued to a juvenile offender for a speech violation such as profanity in the hallway, the juvenile prosecutor's office usually dismisses the charge. An attorney with experience in the juvenile justice system noted that the juvenile prosecutor's office does not prosecute offenses such as swearing. If a ticket for profanity is issued to an adult offender, however, the student would have to pay the fine.<sup>188</sup>

A defense attorney who has worked with juveniles in New Haven noted that he saw many speech-related offenses in the course of his work and stated that if students use sufficiently derogatory language with a teacher, principal, or school official, they will be sent to court.<sup>189</sup> According to the defense attorney, the prosecutor's office does not perceive speech problems as a major issue and does not actively pursue prosecutions of children accused of speech-related misconduct of the first type – either vulgar language directed at other students or comments not directed at any other individual. However, cases involving teachers, particularly cases in which a student verbally harasses a female teacher, are handled differently and are likely to result in serious criminal punishment rather than community service.<sup>190</sup> The safety of teachers in schools has become an increasing concern, and matters of insubordination are treated quite harshly, because, according to school administrators and the law enforcement officials, maintaining order in the schools depends largely on ensuring that teachers' authority is not undermined.<sup>191</sup>

Speech violations are also more likely to be handled in the criminal justice system if the teacher or the school itself is the complainant. If the summons issued is for a breach of peace, the school becomes the complainant. If the charge is for insubordination, the teacher is the complainant. After an arrest has been made, and while the case is under investigation, the

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184 BUREAU OF DATA COLLECTION, RESEARCH AND EVALUATION, DIVISION OF ASSESSMENT AND ACCOUNTABILITY, CONNECTICUT STATE DEPARTMENT OF EDUCATION, NEW HAVEN ED166 DISCIPLINARY REPORT FOR 2006-2007: SCHOOL POLICY VIOLATIONS, tbl. 13, *available at* <http://www.csde.state.ct.us/public/cedar/cedar/discipline/data/0607/NEW%20HAVEN.PDF>.

<sup>185</sup> Interview with Law Enforcement Official, 2006.

<sup>186</sup> Interview with Law Enforcement Officials, 2006.

<sup>187</sup> *Id.*

<sup>188</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007.

<sup>189</sup> Interview with Juvenile Defense Attorney, 2007.

<sup>190</sup> *Id.*

<sup>191</sup> Interview with Law Enforcement Officials, 2007; Interview with School Administrator, 2007

Victim Advocate communicates to the prosecutor's office whether the school or teacher wishes to pursue the matter criminally. The opinion of the victim may have a greater effect on the decision to prosecute a juvenile for a speech violation when the complainant is a respected authority such as the teacher or the school itself. Identity of the complainant does not appear to significantly affect decisions whether to prosecute students who are legally adults.

When students express neighborhood affiliations in schools, they are subject to both criminal and administrative sanctions. The administrators and SROs apparently coordinate their responses, including punishments, in these cases. Administrators, police, and attorneys were emphatic in their conviction that neighborhood affiliations can become disruptive to the academic environment. The SROs, who patrol in the schools as well as in the communities after school hours, seem to bear primary responsibility for recognizing which, if any, students are associated with various "neighborhoods," monitoring their activity related to such associations, and reporting their findings to the school administrators. One law enforcement official noted that, in the past, school-based police have used the threat of expulsion and arrest to end the neighborhood activities in the school and that, in at least one high school, police had an agreement with the principal that as long as the gang-affiliated students were there to get an education, they were allowed to stay; however, those students had to "toe the line and could be put out at any point because they were gang affiliated."<sup>192</sup>

The New Haven Board of Education has a written policy forbidding gang or neighborhood affiliations.<sup>193</sup> The policy includes restrictions on dress, gestures, and other symbolic communication that students could use to identify themselves with a particular neighborhood. The principals rely on the information from their SROs to administer various administrative punishments or to adjust school policies, such as the dress code, to ensure that students are not expressing neighborhood affiliations during school hours. A law enforcement official stated that SROs observe the dress and conduct of the students, befriend students, and determine which students are affiliated with which groups. The law enforcement official further stated that it was important for SROs to invest time in students so that the students would talk to SROs, and that separating students during mediation is one strategy for eliciting information about neighborhood groups from students.<sup>194</sup> One law enforcement official also noted that unless the neighborhood groups are strictly monitored and any tensions immediately addressed, a simple hand gesture could be enough to spark a conflict rising to the level of criminal assault in the schools.<sup>195</sup>

Arrests made within the schools based on the expression of neighborhood affiliations may seem disproportionate or discriminatory because these expressions would probably not result in criminal sanctions if they occurred on the street. A federal court in Georgia recently disallowed punishment for students found to be in violation of the dress code of the Gwinnett

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<sup>192</sup> Interview with Law Enforcement Official, 2006.

<sup>193</sup> *Id.*

<sup>194</sup> Interview with Law Enforcement Officials, 2006.

<sup>195</sup> *Id.*

County public school system's Brookwood High School.<sup>196</sup> The policy prohibited "any conduct meant to represent a gang or group affiliation, loyalty or membership."<sup>197</sup> The policy failed to identify, however, what exactly constituted a gang or a gang-related activity. As a result, the judge found the policy could not stand, because administrators had unbridled discretion in labeling and punishing student conduct, and students of ordinary intelligence would not be appraised that certain conduct was prohibited.<sup>198</sup> Policies that allow the imposition of sanctions for conduct considered "expressions of neighborhood affiliation" might provide insufficient notice to students of the nature of the conduct prohibited, because the term is vague and potentially over-inclusive of completely benign conduct, such as wearing a particular style of pants or certain combinations of colors.

Policies that provide administrators and school-based police with discretion to impose sanctions for displaying neighborhood affiliations might also inadequately guard against the discriminatory application of such policies. A recent study of the prevalence of gangs in U.S. schools noted that "[t]here is a serious danger that anti-gang policies will be applied in a manner that discriminates against the poor and members of racial minorities"<sup>199</sup> because of the broad discretion in defining gang-related activities that is granted to administrators and police. The study examined the criteria, including wearing baggy pants or associating with known gang members, that police used to classify juveniles as gang members. The study found that these activities, protected under the First Amendment, are used to enhance any criminal sanction received by a student as "gang related."<sup>200</sup>

The presence of SROs in schools may result in increased arrests for speech that would not be punishable if it occurred off school grounds. Although a student could not be arrested on the street for wearing a particular color or making a gesture, the SROs are extremely vigilant in their enforcement of dress codes and monitoring of students' non-verbal communication in school. In the school context, these types of behaviors are classified as "disruptive behavior," punishable as a breach of peace in the criminal code. They are within the realm of expression that, although generally protected by the First Amendment, is not protected in schools.<sup>201</sup> Because SROs are present in schools, monitoring this type of conduct, students likely face more arrests as a result of expressing neighborhood affiliations than they would if the SROs were not present.

Despite the potential for increased arrests as a result of stringent efforts to keep neighborhood affiliations out of the schools, both school administrators and the police are willing to address the problem of neighborhoods first through SRO mediation, including efforts to foster communication among students, parents, and administrators, before referring a student to the

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<sup>196</sup> *GA District's Anti-gang Dress Code Gets Bad Review from Judge*, AP, Dec. 5, 2005, available at [www.firstamendmentcenter.org/news.aspx?id=16131](http://www.firstamendmentcenter.org/news.aspx?id=16131).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Linda Beres & Thomas Griffith. *Gangs, Schools, and Stereotypes*, 37 *LOYOLA L.A. L. REV.* 935, 949 (2004).

<sup>200</sup> *Id.* at 949.

<sup>201</sup> *See Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

criminal justice system. For swearing in the hallway and similar offenses, however, an SRO usually issues a summons or ticket unilaterally without consulting with the school's administration. Once "neighborhood" offenses reach the prosecutor's office, though, they are treated much more seriously than swearing would be, since a juvenile prosecutor might handle a charge related to neighborhood affiliation more seriously than if the "breach of peace" were issued for swearing in the hallway.<sup>202</sup> In addition, because prosecutors are required to proceed against a student with two prior convictions – or two prior cases handled non-judicially through the probation department – tickets issued for swearing may eventually have more serious legal consequences for students than an SRO's mediation of technically more serious neighborhood-association issues. Thus, the range of consequences for speech-related violations of school disciplinary codes and the criminal law may be tailored inappropriately to the conduct at issue, both because of the tremendous amounts of discretion of school administrators and SROs and the narrowing of the prosecutor's discretion regarding the decision to prosecute relatively minor offenses.

#### IV. CONCLUSION

Using an international human rights framework to analyze two interrelated and overlapping systems—the criminal justice system and school disciplinary policies—this report highlights the four areas where students suffer deprivations of human rights in the context of education. Throughout the analysis of school practices and policies and their effect on students' human rights, this report identifies specific areas where state, federal, or international law obligates the state to take affirmative measures to protect these rights. Although our interviews and research in the context of the New Haven public school system have informed both the selection and analysis of these four key rights, the problems and suggestions discussed throughout the report have implications beyond New Haven, since school districts in other parts of Connecticut and in other states employ similar discipline policies, and, consequently, students attending schools outside New Haven face similar rights deprivations stemming from the overlap between the criminal justice system and school discipline policies. Therefore, many of the specific suggestions about how to improve disciplinary policies and the general themes that recur throughout the report, particularly the issue of discretion and decision-making, apply outside of New Haven. Finally, the human rights identified in this report—including the rights to be free from discrimination, to education, to proportionality in punishment, and to freedom of expression—form a starting point for further international human rights research and advocacy aimed at ensuring that states do not sacrifice these human rights in an attempt to provide a safe and quality education.

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<sup>202</sup> Interview with Attorney Experienced in Criminal Prosecution, 2007.

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