



Statement of
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President

on behalf of the

AMERICAN BAR ASSOCIATION

Submitted for the record of the hearing on

ENDING THE SCHOOL-TO-PRISON PIPELINE

before the

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

of the

U.S. SENATE

December 12, 2012



Chairman Durbin, Ranking Member Graham, and Members of the Subcommittee:

I am Laurel Bellows, President of the American Bar Association (ABA), and I am submitting this statement on behalf of the ABA for the Subcommittee's consideration for its December 12, 2012 hearing on "Ending the School-to-Prison Pipeline."

The ABA, with nearly 400,000 members, commends the Subcommittee for holding this hearing. There is growing evidence that our public schools overly rely upon suspensions, expulsions, and referrals to law enforcement in managing student behavior. These practices have a disproportionate impact on students of color, students with disabilities and other subgroups and result in increased juvenile justice system involvement for suspended or expelled students. Student involvement with the juvenile justice system in turn substantially increases the likelihood that these students will later serve time in our Nation's prisons and face life-long collateral consequences creating barriers to adult success and productivity. The ABA believes that our educational and criminal justice policies should be reformed and strengthened to replace these practices and that these reforms will substantially reduce the numbers of young persons entering or having contact with the juvenile justice system.

Since the mid-1990s, "zero tolerance" policies have made public schools a major feeder of youth into the juvenile courts. These policies, which typically require disciplinary exclusion for first-time problem behavior, have reduced the discretion of school officials to fashion appropriate discipline. Although zero tolerance policies initially related solely to serious misconduct such as possession of firearms, they have been widely expanded to apply to behavior that used to be addressed by in-school punishment or counseling referrals. These policies have become commonplace throughout the country and currently result in millions of suspensions or expulsions each year, despite that only a small percentage of these policies are required by state law. Consequently, in 2001 the ABA adopted a resolution opposing zero tolerance policies in schools. The resolution states that "the ABA opposes, in principle, 'zero tolerance' policies that have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student's history."

Disciplinary exclusion from school operates as an indirect route to involvement with the justice system by preventing youth from progressing in and completing school, and thus impairing their chances of succeeding in life. "Prior suspension is more likely to cause a child to drop out of high school than any other factor, including low socioeconomic status, not living with both biological parents, a high number of school changes, and having sex before age 15."¹ Children who do not finish high school are 3.5 times more likely to be arrested as adults. Additionally, approximately 82 percent of the adult prison population consists of high school dropouts.²

¹ Suhyun Suh, Jingyo Suh, & Irene Houston, "Predictors of Categorical At-Risk High School Dropouts," 85 *Journal of Counseling and Development* 196, 196-203 (Spring 2007).

² Coalition for Juvenile Justice, *Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention* (2001). See also *School Expulsion: A Life Sentence?* By Sarah Biehl, *Children's Rights*, March 15, 2011 <http://apps.americanbar.org/litigation/committees/childrights/content/articles/spring2011-expulsion-suspension-zero-tolerance.html>

The second, more direct route from school-to-prison is when school personnel call police to arrest children for school-based behavior, often involving minor offenses. An increase of police on school campuses has also contributed to the increase in arrests of students for minor infractions.³ Children, even those as young as five years-old, are being arrested, handcuffed and led out of the school for offenses such as throwing a temper tantrum, truancy, being late to school or breaking a pencil. These children do not belong in jail and these offenses should be handled at school rather than by the criminal justice system. Children with a delinquency or criminal record face many barriers to re-entry into traditional schools. The severe collateral consequences of even a relatively minor juvenile or adult record can include denial of student loans for post-secondary or vocational education, a prohibition on living in public housing and barriers to obtaining employment, including enlisting in the military.

Moreover, the school-to-prison pipeline has a well-documented disproportionate impact on minority and special needs students. Black students are 3.5 times more likely to be suspended than their white peers.⁴ Students with disabilities are suspended and expelled at disproportionate rates.⁵ The U. S. Secretary of Education Arne Duncan recently asserted that school discipline has become “the civil rights [issue] of our generation.”⁶ Civil rights laws protect students against disparate outcomes, but those laws cannot be enforced in court. Without an enforcement mechanism, school districts have no incentive to implement policies and practices that prevent disproportionate exclusions of students of color, students with disabilities and other minority groups. The ABA in 2009 approved policy that urges federal agencies to assure accountability and to ensure that no group of students is disparately subjected to school discipline or exclusion. We believe that significant improvement is needed in the U.S. Department of Education for enforcing these provisions and enabling students and their parents to pursue remedies when they are denied and what is required.

In addition to these obvious aspects of the school to prison pipeline based on disciplinary responses, other school issues also contribute to the problem. The high dropout and low graduation rates for many of our students, particularly those of color, reflect a broader failure of the school system to engage those students in meaningful education opportunities.

Research has begun to cast doubt on the effectiveness of harsh discipline policies. As the Report that accompanied the ABA policy on the right of youth to remain in school (August 2009) noted, “Research suggests that using exclusion as a means of punishment is ineffective in helping students change problematic behavior or in making schools safer.”⁷ In fact, the majority of

³ N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 16-18 (2007) <http://www.aclu.org/pdfs/racialjustice/overpolicingschools_20070318.pdf>(last visited Apr. 9, 2009).

⁴ Daniel J. Losen & Russell Skiba, *Suspended Education: Urban Middle Schools in Crisis*, Southern Poverty Law Center (2011). See also Tamar Levin, *Black Students Face More Discipline, Data Suggests*, NY Times, March 6, 2012.

⁵ Donna St. George, *Maryland Moves to Limit Student Suspension*, Washington Post B1, Feb. 29, 2012.

⁶ See Levin, *supra* note 4.

⁷ Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in *HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES* 1063, 1071-72 (Carolyn M. Evertson & Carol S. Weinstein, eds., 2006).

incidents for which students are excluded from school are related to nonviolent disciplinary offenses such as tardiness, absenteeism, disrespect and altercations between students.⁸

For all these reasons, the ABA promotes the following policies:

End Harsh Discipline Policies That Do Not Make Schools Safer But Instead Push Youth Out

Our educational system should not mandate one sentence -- exclusion from school -- for misbehavior ranging from such minor offenses as school uniform violations to such significant safety threats as bringing a gun to school. Given the devastating impact of these policies as well as the fact that research has shown them to be ineffective, zero tolerance policies should be eliminated. Exclusion from school should be reserved only for those very serious safety related offenses that cannot be addressed without a child's removal from the regular educational setting.

Removing a student from their courses of instruction through suspension or expulsion, when behavior does not cause, or is not likely to cause, injury to self or others, runs counter to important school goals of ensuring *all students* a high-quality education aligned with national, state and local standards. Suspensions or exclusions that push youth out of school have been associated with poor academic achievement and grade retention.⁹ Frequent and lengthy suspensions, or expulsion, lead to alienated and disengaged students who may even feel "rewarded" by a personal desire not to attend school. Exclusion can also contribute to a youth's involvement in delinquency and gang involvement, as it provides substantial time alone without adult supervision.¹⁰

With respect to students with special needs, the ABA recommends that the federal government closely monitor schools to ensure that they follow the mandates of federal special education law that require schools to determine whether behavior is a manifestation of a student's disability before the student may be removed from school for ten days or more.¹¹ In addition, under the Individuals with Disabilities Education Improvement Act, students have a right to alternative education when suspended or expelled from school.¹²

Provide Full Procedural Protections and Counsel to Youth in Disciplinary Hearings

The ABA calls for consistent application of full procedural protections and due process for expulsion hearings across the country, including the right to counsel. In *Goss v. Lopez*,¹³ the Supreme Court stated that a child who is facing a long exclusion from school may require more

⁸ Skiba & Peterson, *supra* note 2, at 373.

⁹ See Linda M. Raffaele Mendez, Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE* 26 (Johanna Wald & Daniel J. Losen, eds. 2003) (internal citations omitted). See also Lawrence M. DeRidder, How Suspension and Expulsion Contribute to Dropping Out, 56 *EDUC. DIGEST* 44-47 (Feb. 1991).

¹⁰ Russell Skiba & Reece Peterson, The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?, 80 *PHI DELTA KAPPAN* 372, 376 (1999).

¹¹ 20 U.S.C. 1415(k)(1)(E); 34 C.F.R. 104.35.

¹² 20 U.S.C. 1415(k)(1)(D).

¹³ 419 U.S. 565 (1975).

formal procedures. Federal and state courts have enforced some of those protections.¹⁴ These provisions are inconsistently applied throughout the country, and many jurisdictions fail to provide adequate procedural protections.

Representation for children at disciplinary hearings where they risk exclusion from their regular educational program is a key way to help reverse the pipeline. Without an attorney, a child and his/her family will not know or be able to exercise the child's due process rights under *Goss v. Lopez*,¹⁵ including the right to: written notice of the allegations; a hearing prior to imposing the exclusion; an impartial hearing officer; cross examine the school's witnesses; and presentation of witnesses and other evidence in the hearing.¹⁶ An attorney will also be able to ensure that the school district is abiding by the mandates of special education law. In 2009, the ABA adopted a resolution that called for "full procedural protections, including the opportunity to have representation by counsel in proceedings . . . [and] the appropriate provisions of due process in other school disciplinary processes."

End the Criminalization of Truancy, Disability-related Behavior and other School Related Conduct

In 2009 the ABA policy on a youth's right to remain in school also called for reducing the criminalization of truancy, disability-related behavior and other school-related conduct. We urge that in place of the criminalization of school-related conduct, schools should treat student behavior as an education issue and provide training to school personnel on a variety of topics, including child and adolescent emotional and cognitive development and culturally responsive discipline.

Ensure a Path for Return to School

Students who have been removed from school either through discipline policies or as a result of incarceration must have a path to resume and continue their education and obtain a high school diploma. The ABA urges enactment and implementation of statutes and policies that support the right of youth who have left school to return to school to complete their education in high-quality, age appropriate programs.

Implement Strong Civil Rights Monitoring and Enforcement of School District Practices

The ABA urges federal agencies to assure accountability and to ensure that no group of students is disparately subjected to school discipline or exclusion. This includes developing policy and legal definitions for determining disparities using data and using those legal definitions for monitoring and enforcement. We support strong monitoring and enforcement Department of Education Office of Civil Rights (OCR) within the Federal Department of Education and by the Department of Justice of discriminatory practices by school districts that contribute to the pipeline, including rigorous enforcement of title 34 of the Code of Federal Regulations, section

¹⁴ Brent Pattison, QUESTIONING SCHOOL DISCIPLINE: DUE PROCESS, CONFRONTATION, AND SCHOOL

DISCIPLINE HEARINGS, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 49 [citing cases in footnotes 23-28]

¹⁵ 419 U.S. 565 (1975).

¹⁶ Brent Pattison, *Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings*, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 49 (52) (2008).

100.3, subdivision (b)(2), that prohibits the recipient of federal funds from “utilize[ing] criteria or methods of administration which have *the effect of* subjecting individuals to discrimination”(emphasis added). We urge federal agencies to enforce civil rights laws by applying the “disparate impact” analysis.

Support the Implementation of Evidence-Based Disciplinary Practices

The ABA urges the federal government to devote resources to identifying programs that minimize disciplinary exclusion and referrals while promoting school safety and incentivize school districts to adopt improved practices to these ends.

Congress should take legislative action to support to reduce referrals and over-reliance on the criminal justice system for school and school-related youth behavior problems, as follows:

Congress should act to reauthorize and amend the Juvenile Justice and Delinquency Prevention Act (JJDP)

The JJDP Act plays perhaps the most important federal role in developing and implementing practices to provide prevention strategies for problem youth behavior and support for alternative to resort to the criminal justice system and to ameliorate the results of juvenile justice system involvement.

The JJDP provides for a federal-state partnership for delinquency prevention and improvements in state and local juvenile justice programs and practice and supports operation of the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP), dedicated to training, technical assistance, model programs and research and evaluation, to support state and local efforts.

We support amending the Act to strengthen its current Disproportionate Minority Contact core protection by requiring states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system. The OJJDP should receive strong support through increased funding for the Title II Formula Grant program that supports OJJDP’s role in promoting state implementation of reforms aimed at reducing disproportionate minority contact and involvement with the juvenile justice system.

The Act should be amended further to strengthen its deinstitutionalization of Status Offenders core protection, which prohibits the locked detention of status offenders, by removing the Valid Court Order exception. In establishing that status offenders (truants, curfew violators, runaways, youth who disobey their parents) should not be detained in the original 1974 JJDP, Congress recognized that status offenses are nondelinquent and noncriminal and, therefore, detention was not appropriate. However, the Valid Court Order (VCO) exception enacted in 1980 allows status offenders to be locked up for their second and subsequent status offense, that is, for violating the court’s order not to commit another status offense. Although only a minority of states resort to the VCO exception, hundreds of thousands of youth nationwide are locked up in criminal facilities each year for status offenses.

Juvenile status offenders are at high risk to enter the juvenile and criminal justice systems and research has clearly linked involvement in the juvenile status offense system with later delinquency.¹⁷ Many of these youth are faced with a myriad of complex problems: abuse, neglect, high family conflict and domestic violence; desperately poor and violent neighborhoods; serious mental health needs, learning disabilities, emotional or behavioral problems; gangs; bad peer group choices; and poor educational and employment options.

Congress should amend the JJDPA to articulate minimum guidelines by which states must comply to implement early intervention and diversion programs for alleged juvenile status offenders. These recommendations intend to promote the development of laws, policies and programs that decrease the number of status offenders who fall deeper into the criminal and juvenile justice systems by providing them with proven pre-court diversion services that remedy their noncriminal misbehaviors and are tailored towards their needs and the needs of their families.

Congress should further amend the JJDPA to require states to enact laws and support policies and programs that divert alleged juvenile status offenders from court jurisdiction by requiring the development and implementation of evidence-based programs¹⁸ that provide family-focused and strength-based pre-court interventions to alleged status offenders.

Finally, JJDPA should be amended to establish an advisory panel to assist OJJDP on implementing evidence-based reforms to reduce youth contact and entry into the criminal justice system. Representative Bobby Scott (D-VA) has introduced legislation (H.R. 2721, the Youth Promise Act) offering this proposed amendment to the JJDPA. The advisory panel proposed in the Youth Promise Act would perform a critical role aimed at ending the progression from minor behavior problems to disciplinary action and criminal justice involvement by focusing on programs and practices that can demonstrate that they work. It would operate within OJJDP to: assess and develop standards for evidence-based practices to prevent juvenile delinquency; make grants to local governments and Indian tribes to plan and assess evidence-based and promising practices for juvenile delinquency prevention and intervention, especially for high-risk youth; and implement plans by local coordinating councils for supporting the delivery of juvenile delinquency prevention and intervention.

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Thank you for the opportunity to share the views of the American Bar Association. We look forward to working with the Subcommittee as it moves forward on legislation to bring an end to the school-to-prison pipeline.

¹⁷ See, e.g., Henry, K. and Huizinga, D. "Effect of Truancy on Onset of Drug Use and Delinquency." Presented at Annual Meeting of American Society of Criminology, November, 2005.

¹⁸ "Evidence-based" prevention, intervention, and treatment programs for youth and their families are resources that have been carefully evaluated to determine their long-term positive outcomes.