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LEANDRO V. STATE AND THE CONSTITUTIONAL LIMITATION ON SCHOOL SUSPENSIONS AND EXPULSIONS IN NORTH CAROLINA

JOSEPH W. GOODMAN*

In the last decade, school districts throughout the country have imposed strict zero tolerance policies, which have led schools to suspend and expel record numbers of students. Recent scholarship has suggested that these school regulations are susceptible to state constitutional challenges where students are not provided with alternative educational settings. This Article evaluates the viability of a constitutional challenge to North Carolina's regulations. It concludes that the State's failure to provide alternative educational settings, in all but the most extreme cases, violates the North Carolina Constitution.

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> [S]uspensions and expulsions . . . alone should not be the end goal of student discipline. Significant remediation efforts need to take place to ensure that those students . . . get the help they need [to] return to the regular school environment and be successful, both behaviorally and academically.[1]

INTRODUCTION

Following a series of school shootings in the 1990s, culminating in the massacre at Columbine High School in 1999, and in response to Federal legislation,[2] school districts throughout the country imposed strict zero tolerance policies.[3] These policies have led schools to

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1. PUB. SCH. OF N.C., DIV. OF ACCOUNTABILITY SERVICES, ANNUAL STUDY OF SUSPENSIONS AND EXPULSIONS: 2000–01 8 (2002) [hereinafter 2000–2001 STUDY], http://www.ncpublicschools.org/docs/schoolimprovement/alternative/reports/suspensions/200203.pdf (on file with the North Carolina Law Review).

2. Specifically, Congress enacted the Gun-Free Schools Act of 1994, which provided for mandatory expulsion as follows:

> [E]ach State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such a local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

20 U.S.C. § 8921(b)(1) (2000), *repealed by* No Child Left Behind Act of 2001, Pub. L. No. 107–10, 115 Stat. 1425, 1986 (2002). However, the Gun-Free Schools Act stated that "[n]othing in this subchapter shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting." § 8921(b)(2).

3. As the American Bar Association explained:

> "Zero tolerance" is the phrase that describes America's response to student misbehavior. Zero tolerance means that a school will automatically and severely punish a student for a variety of infractions. While zero tolerance began as a Congressional response to students with guns, gun cases are the smallest category of school discipline cases. Indeed, zero tolerance covers the gamut of student misbehavior, from including "threats" in student fiction to giving aspirin to a classmate. Zero tolerance has become a one-size-fits-all solution to all the problems that schools confront. It has redefined students as criminals, with unfortunate consequences.

suspend and expel record numbers of students. Recent scholarship has suggested that these school regulations that punish violations with suspensions and expulsions are susceptible to state constitutional challenges where schools do not provide students with alternative educational settings.[4]

The harsh consequences that these policies can have on a child are demonstrated by a discussion of Tonya, a seventh grade student at a North Carolina public middle school.[5] Tonya was involved in a fight with another student during the third week of school. As a teacher intervened between the two students, Tonya inadvertently struck the teacher on the arm. As a result of this incident, the school suspended Tonya for the remainder of the year. In hopes of expediting her return to school, Tonya waived her right to appeal the suspension and, instead, requested placement in an alternative school. Her request was denied. Tonya, therefore, was to be left without any educational alternative for an entire school year due to her involvement in the fight. With legal representation, however, Tonya was able to recover her right to an appeal and the school board heard her case. Following a hearing, the school board decided to reduce Tonya's suspension to a semester. Nevertheless, her semester-long suspension raises the question: does the North Carolina Constitution allow a school to deny a child, such as Tonya, her fundamental right to an education, for participating in a fight?

Given the fundamental nature of education, the State cannot deprive a student of an education merely because the student was expelled or suspended long-term. Thus, this Article evaluates the viability of a state constitutional challenge to North Carolina's

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Ralph C. Martin, II, *Zero Tolerance Policy Report*, 2001 ABA JUVENILE JUSTICE COMMITTEE, http://www.abanet.org/crimjust/juvjus/zerotolreport.html (on file with the North Carolina Law Review).

4. *See, e.g.*, HARVARD UNIV., ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 39–49, app. II at II-3 to -5, -21 to -31 (June 2000) [hereinafter HARVARD REPORT] (outlining due process protections against zero tolerance policies), http://www.civilrightsproject.harvard.edu/research/discipline/opport_suspended.php (on file with the North Carolina Law Review); Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 87–115 (2003) (suggesting that expulsions and suspensions unaccompanied by educational alternatives violate the Federal Constitution, as well as state constitutions).

5. Although based on a true story, certain facts, including the student's name, have been changed to protect the student's identity. Email from Jane Wettach, Director, Children's Education Law Clinic at Duke Law School, to Joseph Goodman, Visiting Scholar, Georgetown University (May 25, 2005, 11:17 am EST) (on file with North Carolina Law Review).

suspension and expulsion regulations. Part I of this Article details the recent rise in suspensions and expulsions in North Carolina public schools. Next, Part II evaluates North Carolina jurisprudence on suspensions, expulsions, and the right to an education. Part III provides a state constitutional analysis of suspensions and expulsions where there is no provision for an alternative education. Part IV examines how alternative educational settings protect students' constitutional rights while still achieving the State's interest, and Part V addresses policy arguments against suspension and expulsion. This Article concludes that the State's failure to provide, in all but the most extreme cases, alternative educational settings for students who have been suspended or expelled violates the due process clause of the North Carolina Constitution.

I. SUSPENSIONS AND EXPULSIONS IN NORTH CAROLINA

Every year, thousands of students are suspended and expelled from North Carolina public schools.[6] The number is on the rise, particularly with regard to minorities.[7] Suspensions and expulsions "are increasing overall, and ... certain subgroups of students are disproportionately represented in those events."[8] Between the 1999–2000 and 2000–2001 school years, for example, North Carolina schools experienced a twenty-two percent increase in long-term suspensions (more than ten days) and a seventy-one percent increase in expelled students.[9] Of all ethic-gender groups, Black/Multi-racial males accounted for the highest percentage of long-term suspensions and were the most over-represented group, approximately two and a half times their representation in the general student body.[10] Furthermore, "almost half of expelled students were Black/Multi-racial males, despite the fact that they constitute only sixteen percent

6. *See* PUB. SCH. OF N.C., DIV. OF ACCOUNTABILITY SERVICES, ANNUAL STUDY OF SUSPENSIONS AND EXPULSIONS: 2002–03 v (Mar. 2004) [hereinafter 2002–2003 STUDY], http://www.ncpublicschools.org/docs/schoolimprovement/alternative/reports/suspensions/2002-03.pdf (on file with the North Carolina Law Review). During the 2002–2003 school year, for example, there were 3,987 long-term suspensions (greater than ten days) and 381 expulsions. *Id.*

7. *See id.*

8. 2000–2001 STUDY, *supra* note 1, at 7.

9. *Id.* at i–ii; *see also* 2002–2003 STUDY, *supra* note 6, at v (noting that the "number of long-term suspensions rose for the third consecutive year in 2002–03, from 3,484 to 3,987—a 14% increase" and observing that "[p]erhaps the most notable trend evident in these data is the rise in the number of expulsions reported—from 256 in 2001–02 to 381 in 2002–03.").

10. 2000–2001 STUDY, *supra* note 1, at i.

of the overall student population."[11] American Indian students had the greatest increase in rates of long-term suspensions.[12]

Although most of the expelled or suspended students receive education in alternative settings, many do not.[13] As a result, large numbers of children in North Carolina do not receive the benefits of public education. "Those who are suspended and expelled out of school often go unsupervised, resulting in negative academic consequences and all too frequently, increases in crime and delinquency problems."[14]

II. NORTH CAROLINA JURISPRUDENCE ON SUSPENSIONS AND EXPULSIONS

Current North Carolina jurisprudence does not require alternative educational programs for students who are expelled or suspended. In the 1987 *In re Jackson*[15] decision, the Court of Appeals of North Carolina found that the school board did *not* have a duty to educate a student expelled for misconduct because "a child may lose his right to benefit from any public school program."[16] In its evaluation of the constitutionality of school suspensions and expulsions for misconduct, the *Jackson* court declined to undertake a strict scrutiny analysis.[17] Yet ten years later, in the 1997 *Leandro v. State*[18] decision, the Supreme Court of North Carolina held that a free public education is a fundamental right guaranteed under the North Carolina Constitution and that attempts to limit it will be subject to

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11. *Id.* at iii.

12. *Id.* at 15.

13. *Id.* at 7 ("During these suspensions and expulsions, about three quarters of the students have the opportunity to attend alternative learning programs (ALPs) and about a fourth do not."). This means that of the 2,861 students expelled or suspended long term in 2000–2001, *see* 2000–2001 STUDY, *supra* note 1, at i–ii, approximately seven hundred were not given the opportunity to attend an alternative education program. Of the 4,368 students expelled or suspended long term in 2002–2003, more than one thousand were not given the opportunity to attend an alternative education program. *See* 2002–2003 STUDY, *supra* note 6, at v.

14. 2000–2001 STUDY, *supra* note 1, at 7. *See also* Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 605 & n.156 (1996) (stating that suspensions are "one of the major factors explaining the decision to drop out," and citing studies that document the resulting increased likelihood of criminal activity, unemployment and greater need for public assistance).

15. 84 N.C. App. 167, 352 S.E.2d 449 (1987).

16. *Id.* at 176, 352 S.E.2d at 455.

17. Although the *Jackson* court did not explicitly undertake a substantive due process analysis, it seemed to apply a rational basis test in a somewhat cursory evaluation of the constitutionality of school suspensions and expulsions. *See id.* at 175–76, 352 S.E.2d at 455.

18. 346 N.C. 336, 488 S.E.2d 249 (1997).

strict scrutiny.[19] Following *Leandro*, in a substantive due process challenge to the constitutionality of North Carolina school regulations that punish a student by suspension or expulsion, a court should apply the difficult-to-meet strict scrutiny standard.[20]

This Article evaluates the potential viability of a substantive due process challenge to school suspensions based on the *Leandro* determination that there is a fundamental right to an education. It argues that the removal of some students from the public school system for misconduct may violate their right to an education guaranteed under the North Carolina Constitution. Under strict scrutiny, expulsion or suspension from school is often not "necessary,"[21] nor is it "narrowly tailored,"[22] to achieve a "compelling governmental interest."[23] In the event of a child's misconduct, generally there are alternative educational settings that enable the government to achieve its interest in maintaining a safe learning environment while, at the same time, protecting the child's fundamental right to an education.

A. In re Jackson

The Supreme Court of North Carolina has not yet specifically evaluated the constitutionality of expulsions and suspensions for student misbehavior under strict scrutiny. In *Jackson*, the Court of Appeals of North Carolina declined to apply strict scrutiny in evaluating the constitutionality of school expulsions and suspensions.[24] Although the court did not explicitly undertake a substantive due process analysis, it seemingly applied a lower rational basis standard to hold that "*[r]easonable* regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior."[25] This lower level of analysis "merely requires that distinctions which are drawn by a

19. *See id.* at 357, 488 S.E.2d at 261.

20. Alternatively, an equal protection analysis could identify the burdened class as suspended or expelled students and the unaffected class as all other students. The argument would be that the State is denying expelled students their fundamental right to equality, because if the State provides education to some, it must provide it to all.

21. *Leandro,* 346 N.C. at 357, 488 S.E.2d at 261. (quoting Town of Beech Mountain v. County of Watauga, 324 N.C. 409, 412, 378 S.E.2d 780, 782 (1989)).

22. Stephenson v. Bartlett, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (citing Northampton County Drainage Dist. No. One v. Bailey, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990)).

23. *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261.

24. *See In re* Jackson, 84 N.C. App. 167, 175–76, 352 S.E.2d 449, 455 (1987).

25. *Id.* at 176, 352 S.E.2d at 455 (emphasis added).

challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest."[26]

Citing the court of appeals' decision in *Fowler v. Williams*,[27] the court explained that "[t]he right to attend school and claim the benefits of the public school system is subject to lawful rules prescribed for the government thereof."[28] The court went on to explain:

> A student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system. As a general rule, a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided.[29]

In fact, the court went on to hold that "public schools have no affirmative duty to provide an alternate educational program for suspended students in the absence of a legislative mandate."[30]

In failing to undertake a substantive due process analysis and applying what seems to be a standard of review lower than strict scrutiny, the *Jackson* court did not evaluate whether the State had a compelling government interest or whether expulsions or suspensions were narrowly tailored.[31] Because the North Carolina Constitution places the duty to legislate education policy on the General Assembly,[32] the *Jackson* court largely relied on a separation of powers argument to justify its objection to judicial involvement. It concluded that "[o]ur legislature did not impose upon the public schools or other agency a legal obligation to provide an alternative forum for suspended students, and a court may not judicially create the obligation."[33]

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26. Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (citing City of New Orleans v. Dukes, 427 U.S. 297 (1976); Hagans v. Lavine, 415 U.S. 528 (1974)).

27. 39 N.C. App. 715, 251 S.E.2d 889 (1979).

28. *Jackson*, 84 N.C. App. at 176, 352 S.E.2d at 455 (quoting *Fowler*, 39 N.C. App. at 718, 251 S.E.2d. at 891).

29. *Id.*

30. *Id.* at 176, 352 S.E.2d at 455 (citing 2 JAMES A. RAPP, EDUCATION LAW § 9.06(3)(d) (1986)).

31. *See* Stephenson v. Bartlett, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (citing Northampton County Drainage Dist. No. One v. Bailey, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990)).

32. *See* N.C. CONST. art. IX, § 2(1).

33. *Jackson*, 84 N.C. App. at 177, 352 S.E.2d at 456.

B. Leandro v. State

While *Jackson* failed to analyze the right to education under substantive due process or equal protection, the Supreme Court of North Carolina addressed the issue in *Leandro v. State*.[34] In undertaking this analysis, the supreme court had to first determine the applicable level of scrutiny to apply to the state's education system.[35] Strict scrutiny, which is the Supreme Court of North Carolina's highest tier of review, "applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."[36] In *Leandro*, the supreme court determined education to be a fundamental right protected by strict scrutiny.[37]

In particular, the *Leandro* court considered whether the state's system of school funding, which is based partly on local property taxes, denies students from relatively poor school districts the educational opportunities given to students from relatively wealthy districts.[38] The court analyzed several provisions of the North Carolina Constitution. First, the court addressed the question of whether the constitution guarantees children a "qualitatively adequate education."[39] The court focused this part of the inquiry on article I, section 15 of the state constitution, which provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[40] The court used this language to conclude that the constitution expressly guarantees children in North Carolina the right to a "sound basic education."[41]

Second, the court attempted to outline the essential components of a "sound basic education."[42] The court specifically identified basic skills in reading, writing, science, math, history, geography, and economic and political systems as necessary to prepare each child to pursue further formal education, to engage in vocational training, or to become gainfully employed.[43]

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34. 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997).

35. Dep't of Transp. v. Rowe, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001).

36. White v. Pate, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (per curiam); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973)).

37. *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261.

38. *See id.* at 345, 488 S.E.2d at 254.

39. *Id.*

40. N.C. CONST. art. I, § 15.

41. *Leandro*, 346 N.C. at 347, 488 S.E.2d at 254.

42. *Id.* at 347, 488 S.E.2d at 255.

43. *Id.*

The court concluded that public school students have a fundamental right to an education and that an infringement of that right would be reviewed under the strict scrutiny standard.[44] In remanding the case, the supreme court explained that if the trial court

> makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions denying this fundamental right are "necessary to promote a compelling governmental interest."[45]

Although the *Leandro* court also clearly recognized the importance of judicial deference to the legislative and executive branches in "the administration of the public schools,"[46] the court ultimately concluded that the judiciary has a duty to act where there is a denial of a fundamental right:

> If the defendants are unable to [establish that their actions denying this fundamental right are "necessary to promote a compelling governmental interest"], it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government.[47]

As the Supreme Court of North Carolina recently explained in *Stephenson v. Bartlett*,[48] "[u]nder strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest."[49] Thus, a student in a North Carolina public school will prevail on a substantive due process claim (and a North Carolina court will be obligated to enjoin the school from suspending or expelling the student without providing an adequate alternative educational setting) if the State is unable to demonstrate: (1) a compelling governmental interest for denying the student's

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44. *Id.* at 357, 488 S.E.2d at 261.

45. *Id.* (quoting Town of Beech Mountain v. County of Watauga, 324 N.C. 409, 412, 378 S.E.2d 780, 782 (1989)).

46. *See id.*

47. *Id.* (citing Corum v. Univ. of N.C., 330 N.C. 761, 784, 413 S.E.2d 276, 291 (1992)).

48. 355 N.C. 354, 562 S.E.2d 377 (2002).

49. *Id.* at 377–78, 562 S.E.2d at 393 (citing Northampton County Drainage Dist. No. One v. Bailey, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990)).

fundamental right to a free public education; and (2) that the governmental action is narrowly tailored to achieve this interest.[50]

An argument can be made that, although the *Leandro* court held that there is a fundamental right to education, this holding is limited to the school financing context and should not carry over into the area of school discipline. Some support for this argument can conceivably be found in other state supreme court rulings that have sought to distinguish school financing rulings from rulings in other school contexts.[51] It appears, however, that most state courts that have held that there is a fundamental right to education have determined that this right is fundamental in every educational context. For example, the Supreme Court of California has ruled that "[b]ecause the school financing system ... has been shown ... to involve a suspect classification ... and because that classification affects the fundamental interest of the students of this state in education, we have no difficulty in concluding ... that the school financing system ... must be examined under ... strict and searching scrutiny."[52]

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50. *Id.*

51. The Supreme Court of Nebraska held in *Kolesnick v. Omaha Public School District* that a student does *not* have a fundamental right to an education but seemed to limit its holding to "the context of student discipline." 558 N.W.2d 807, 813 (Neb. 1997). Nevertheless, this limitation may be somewhat vacuous because the Nebraska court does not appear to have held education to be a fundamental right in any context. *See, e.g.*, Banks v. Bd. of Educ., 277 N.W.2d 76, 79 (Neb. 1979) (discussing the Nebraska Constitution's "free instruction" requirement as relevant to the constitutionality of taxation schemes but not even mentioning fundamental rights analysis). Moreover, most courts that sought to distinguish between different educational contexts held school financing issues to a lower level of scrutiny than other education issues. The Supreme Court of Wisconsin has held that "notwithstanding our recognition that education is ... a fundamental right, we apply ... a rational basis standard because the rights at issue ... are premised upon spending disparities and not upon a complete denial of educational opportunity." Kukor v. Grover, 436 N.W.2d 568, 580 (Wis. 1989). The Supreme Court of Minnesota has similarly held that rational basis review applies in determining whether school financing is thorough and efficient, although strict scrutiny applies to determine if the state legislature has met a student's fundamental right to "a general and uniform system of public schools." *See* Skeen v. State, 505 N.W.2d 299, 315–16 (Minn. 1993) (en banc). The Supreme Court of Arizona has also held that there is a fundamental right to a "basic education," although it has applied rational basis in the school-financing context. Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (en banc). However, the Supreme Court of Arizona noted: "[w]e do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to us to be mutually exclusive. If education is a fundamental right, the compelling state interest (strict scrutiny) ought to apply." Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) (en banc).

52. Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (en banc). The Supreme Court of Pennsylvania also "consistently examined problems related to schools in the context of that fundamental right." Sch. Dist. of Wilkinsburg. v. Wilkinsburg Educ. Ass'n, 667 A.2d

III. CONSTITUTIONAL ANALYSIS OF SUSPENSIONS AND EXPULSIONS WITHOUT PROVISION OF ALTERNATIVE EDUCATIONAL SETTINGS

A. State's Compelling Interest in Suspensions and Expulsions

Suppose a school expels a student without providing an alternative educational setting and that student challenges the action in court in light of *Leandro*'s characterization of education as a fundamental right requiring strict scrutiny. The State of North Carolina will likely demonstrate a compelling interest in removing some students from the classroom for certain types of misbehavior, thereby satisfying the first prong of the strict scrutiny analysis.[53] The State should be able to establish that the maintenance of safe public schools and the protection of the learning environment are compelling governmental interests that are sufficient to justify removal of certain problem students. For example, other authors have argued that the State will "almost certainly" be able to satisfy this first prong of the strict scrutiny analysis for students expelled or suspended for drug possession:

> The [S]tate's interest surely includes protecting the learning environment; in particular, removal of students who bring drugs to school may be necessary to keep schools from becoming drug markets and classmates from losing learning abilities from the effects of drugs. The continued presence of illicit drugs in schools may also encourage classroom disruptions or violence among students or portray school administrators and rules as toothless. The [S]tate surely has a compelling interest in using disciplinary sanctions to deter offenses and minimize these risks, which threaten to deprive schoolchildren of their education.[54]

5, 9 (Pa. 1995). The Supreme Court of Connecticut has similarly held that "the right to education is so basic and fundamental that *any* infringement of that right must be strictly scrutinized." Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (emphasis added). These rulings are in line with the more logical reasoning that holds that a right is fundamental regardless of the context with which it is evaluated.

53. For example, removing students from school for drug possession, gun possession, or violence is more likely to satisfy the State's compelling interest than removal for general disobedience, such as missed assignments, excessive talking, or tardiness.

54. Blumenson & Nilsen, *supra* note 4, at 108.

B. *Not Narrowly Tailored When No Alternative Educational Settings Are Provided*

On the other hand, the State will have difficulty satisfying the second prong. Except in the most extreme cases, it will be difficult to demonstrate that the removal of students from public schools without providing them with an alternative educational setting is narrowly tailored to achieve the State's interest.[55] In evaluating whether the state action is narrowly tailored, North Carolina courts will assess the availability of alternative courses of action that would infringe less on a fundamental right.[56] In certain cases, including for example, a student threatening a teacher or another student with a gun or knife, an alternative course of action may not be available. The danger that the student may act out violently to others may make suspension or expulsion the only option.

Nevertheless, because suspensions and expulsions amount to a complete denial of an education, these sanctions are often not narrowly tailored because the child is deprived of a "sound basic education"[57] that is "the minimum constitutionally permissible."[58] As discussed in the next Part, alternative educational settings would protect the child's fundamental right to an education while, at the same time, satisfying the State's interest in maintaining safe public schools.

IV. ALTERNATIVE EDUCATIONAL SETTINGS

Consistent with the jurisprudence discussed in *Jackson*, school regulations in North Carolina do not require school districts to provide alternative educational settings for students who have been suspended or expelled.[59] The placement of suspended and expelled students into Alternative Learning Programs (ALPs) is done on a "*case-by-case basis*, based on processes and procedures developed by each of the 117 Local Education Agencies (LEAs) and the nearly 100

55. *See supra* text accompanying note 53.

56. *See* Stephenson v. Bartlett, 355 N.C. 354, 377–78, 562 S.E.2d 377, 393 (2002) (citing Northampton County Drainage Dist. No. One v. Bailey, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990)).

57. *See* Leandro v. State, 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997).

58. *See id.*

59. Section 115C-47 of the General Statutes of North Carolina, for example, requires local education boards to "establish at least one alternative learning program" and then requires that the boards "adopt guidelines for assigning students to [these] programs." N.C. GEN. STAT. § 115C-47(32a) (2003). These assignment guidelines must include "strategies for providing alternative learning programs, *when feasible and appropriate*, for students who are subject to long-term suspension or expulsion." *Id.* (emphasis added).

charter schools."[60] Under state law, each LEA was to have an ALP in place by the middle of 2000 or have received a waiver from the State Board of Education.[61] By the end of 2001, each LEA had an ALP in place or had requested a waiver.[62] However, not every ALP serves expelled or suspended students.[63] Moreover, even when an ALP accepts expelled and suspended students, it may not accept every expelled or suspended student. Indeed, not all ages and grades are served by every ALP, the ALP may be at its enrollment capacity, or the ALP staff may not have the ability to handle the student and meet his or her needs.[64]

North Carolina, however, could provide ALPs for nearly all expelled and suspended students. Twenty-six states require school districts to provide alternative educational settings for expelled or suspended students.[65] These states maintain a safe educational environment while, at the same time, providing an education to expelled students in various alternative settings.[66] Every state, including North Carolina, already accomplished both of these goals for all expelled students with disabilities, as the Individuals with Disabilities in Education Act (IDEA) requires.[67] As other authors have pointed out, "even juvenile institutions housing the most dangerous delinquents are able to provide them with educational services."[68] Given these successes, North Carolina will have difficulty demonstrating that suspensions or expulsions without an alternative educational setting are the most precise means available to accommodate the misbehaving students.

Jonathan Wren described the characteristics of alternative educational programs that accommodate some of the more difficult students. He explains:

> Probably the most distinguishable characteristic of these alternative schools is that they combine the personalized curriculum and smaller class size of traditional alternative

60. 2001–2002 STUDY, *supra* note 1, at 4.

61. 2002–2003 STUDY, *supra* note 6, at 4–5.

62. *Id.*

63. *Id.* at 51 (citing N.C. DEP'T OF PUB. INSTRUCTION, ALTERNATIVE LEARNING PROGRAMS EVALUATION: 1999–00 (2001)).

64. *Id.* at 5.

65. *See* HARVARD REPORT, *supra* note 4, at 14.

66. Blumenson & Nilsen, *supra* note 4, at 109.

67. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (2000) (forbidding states from terminating educational services through expulsion or suspension greater than ten days for disabled children, even without a connection between their misbehavior and their handicapping condition).

68. Blumenson & Nilsen, *supra* note 4, at 109.

> school models with the stringent restrictions and social controls of correctional institutions. Often, students are granted more freedom in designing their course load and the programs usually have self-paced schedules, no grades, and no homework.[69]

However, the alternative educational programs subject students to strict regimens. Students have early morning check-ins, random drug tests, and police monitored movement throughout school.[70] In addition to their regular coursework, students attend a variety of classes on subjects such as behavior modification, conflict management, and self-control.[71] Also, the programs often offer services to families to facilitate the process.[72]

As evidenced by the examples in this Article, there are a variety of alternative education programs that allow most, if not all, disruptive students to continue their education while still achieving the State's interest in maintaining safe schools. For example, Texas has established "a comprehensive system intended to achieve 'zero tolerance' for disruptive children in the classroom and continue the education of *virtually all* children who are removed from class or expelled from school."[73] Although it may be contended that such alternative educational programs are expensive and ineffective, a study of the Texas system from 1996 to 1997 determined that the programs can be effective.[74] Indeed, the Texas system has been successful in establishing a safety net for suspended and expelled students so that they can stay within the education system and continue to receive public education.[75]

There are also individual programs that have succeeded in reducing violence. For example, the Maya Angelou Public Charter School (MAPCS), located in northwest Washington, D.C., was established to educate students who have a tendency for violent behavior. In fact, prior to their enrollment, many MAPCS students

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69. Jonathan Wren, *Alternative Schools for Disruptive Youths: A Cure for What Ails School Districts Plagued by Violence?*, 2 VA. J. SOC. POL'Y & L. 307, 345 (1995) (footnotes omitted).

70. *Id.*

71. *Id.*

72. *Id.*

73. Steve Bickerstaff et al., *Preserving the Opportunity for Education: Texas' Alternative Education Programs for Disruptive Youth*, 26 J.L. & EDUC. 1, 2 (Oct. 1997) (emphasis added).

74. *Id.* at 39 (noting that programs succeeded when there was "cooperation of local school, juvenile board and county officials").

75. *Id.*

had been arrested and regularly resorted to violence in an attempt to deal with their problems. However, "[d]espite its urban location and population of 'at-risk' students, MAPCS has created an environment where there is very little violence."[76]

Since states such as Texas provide virtually all expelled and suspended students with alternative educational settings, and there are programs like MAPCS that are able to provide a safe learning environment for even violent students, it will be difficult for North Carolina to establish that there are not more narrowly tailored means to deal with most disruptive students.

Nevertheless, a requirement that the State provide *all* expelled students with an alternative educational setting may impair the ability of school officials to deter dangerous behavior. The suspension or expulsion of the most disruptive students may, in fact, be a narrowly tailored response. Accordingly, North Carolina may be able to continue to expel or suspend students without providing alternative educational settings under extreme circumstances. As the Supreme Court of West Virginia explained:

> [I]n extreme circumstances and under a strong showing of necessity in a particular case, strict scrutiny and narrow tailoring could permit the effective temporary denial of all State-funded educational opportunities and services to a child removed from regular school . . . particularly when the safety of others is threatened by the dangerous actions of a child, and where the child is unwilling or unable to utilize educational opportunities and services that are consistent with protecting the safety of others.[77]

In allowing the State to meet its constitutional burden on a case-by-case basis, the Supreme Court of West Virginia modified its earlier decision in *Phillip Leon M. v. Greenbrier County Board of Education*[78] to the extent that it had previously held that the West Virginia Constitution always required an alternative education program when a student was expelled for a year for the sole violation of possessing a deadly weapon.[79]

Under this reasoning, school suspensions or expulsions should be upheld as constitutional to the extent that they protect teachers,

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76. Joseph Lintott, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 573–74 (2004).

77. Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 350–51 (W. Va. 1997).

78. 484 S.E.2d 909 (W. Va. 1996).

79. *Id.* at 914.

school personnel, and students from the most egregious disciplinary violations.[80] "[C]ommon sense suggest[s] that in all but the most extreme cases the State will be able to provide reasonable state-funded educational opportunities and services to children who have been removed from the classroom . . . ."[81] Although the creation of alternative schools will cost a significant amount of money, "standing alone, the lack of financial resources does not present a compelling State interest to justify the denial of [a student's] constitutional right to an education."[82]

As applied to many disruptive students, expulsions and suspensions are likely to fail a strict scrutiny analysis because they are not narrowly tailored. In all but the most extreme cases, therefore, a substantive due process challenge to the constitutionality of the student's removal will prevail until the State provides sound alternative educational programs.

V. POLICY ARGUMENTS

Both the *Jackson* and *Leandro* courts recognized that the administration of the school system should be left to the legislature.[83] North Carolina courts will remain hesitant to make rulings that bring about significant change to the state's education policies. Therefore, the legislature remains an important alternative venue for change. Indeed, several policy arguments could be put before the legislature arguing against school expulsions and suspensions.

First, school expulsions and suspensions have not proven to be effective at increasing safety and order in our schools. The National Center for Education Statistics found that "between 1993 and 1999, the percentage of students in grades 9 through 12 who were

80. *See id.* at 916 n.12 (recognizing that factors such as the seriousness of the offense could preclude a student from even an alternative education program). Such a discipline scheme would seemingly allow a school to suspend a student for a shorter period (e.g., four weeks) for a less serious violation as long as it was narrowly tailored. Indeed, in coming to its decision, the *Leon* court took into account the length of the suspension, as well as its likely effect on the student, and that "the prohibited conduct is defined in essentially *per se* terms." *Id.*

81. *Cathe A.*, 490 S.E.2d at 351.

82. *Leon*, 484 S.E.2d at 915.

83. Leandro v. State, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) ("[T]he administration of the public schools of the state is best left to the legislative and executive branches of government."); *In re* Jackson, 84 N.C. App. 167, 178, 352 S.E.2d 449, 456 (1987) ("[A] juvenile court judge does not have the power to legislate or to force school boards to do what he thinks they should do. Our legislature did not impose upon the public schools or other agency a legal obligation to provide an alternative forum for suspended students, and a court may not judicially create the obligation.").

threatened or injured with a weapon on school property in the past 12 months remained constant at about 7 to 8 percent."[84] A recent study by the Harvard University Advancement Project and Civil Rights Project concluded that "[t]here is little evidence that Zero Tolerance Policies are working to reduce violence or increase safety in our schools."[85] Two professors who have written widely on the subject similarly have concluded that "[d]isorder and violence in America's schools do not appear to have been appreciably diminished, despite 4 years of national policy explicitly encouraging tougher responses."[86]

Second, the rationale behind the juvenile criminal system is not to punish juvenile offenders but to rehabilitate and treat them. As Professor Smithburn explains, "the goals and ideals underlying the juvenile justice system focus on rehabilitation and treatment."[87] Juveniles are also widely regarded as being less capable of controlling their actions and less morally culpable than adults. School regulations that punish students by expulsion or suspension, however, tend to employ "a brutally strict disciplinary model that embraces harsh punishment over education."[88] Therefore, the current philosophy behind school disciplinary regulations is contrary to the rationale behind the juvenile criminal system. North Carolina's current regulations should be replaced with regulations that are more in line with the rehabilitative ideal, where the goal is to reform, rather than discipline, disruptive students.

Finally, expulsions can lead to increased crime and illiteracy. As other authors point out:

> Suspended or expelled students do not simply disappear, of course. They embark on an inauspicious trajectory that is more likely to endanger themselves and others when compared with students who continue to attend their schools. This trajectory begins by dissolving the bonds with the teachers and counselors who would be most able to provide help to troubled students. It leads to greatly increased chances of permanently dropping out of school and of joblessness. There is another correlation between the lack of secondary education and criminal behavior, a connection aggravated by expulsions that produce

84. NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY (2001), http://nces.ed.gov/pubs2002/crime2001 (on file with the North Carolina Law Review).

85. HARVARD REPORT, *supra* note 4, at 17.

86. Russell J. Skiba & Reece L. Peterson, *School Discipline at the Crossroads: From Zero Tolerance to Early Response*, 66 EXCEPTIONAL CHILDREN 335, 340 (2000).

87. J. ERIC SMITHBURN, CASES AND MATERIALS IN JUVENILE LAW 21 (2002).

88. HARVARD REPORT, *supra* note 4, at 2.

unsupervised free time for many who can least handle it, bleak future prospects, and feelings of unjust treatment.[89]

The study by the Harvard University Advancement Project and Civil Rights Project also concluded that "children shut out from the education system are more likely to engage in conduct detrimental to the safety of their family and communities. The ultimate result is that Zero Tolerance Policies create a downward-spiral in the lives of these children, which ultimately may lead to long-term incarceration."[90]

Other authors similarly concluded that when school systems lack alternative education programs, "school personnel may simply be dumping problem students out on the streets, only to find them later causing increased violence and disruption in the community .... [W]e face serious questions about the long-term negative effects of ... school exclusion."[91] Even the *Jackson* court understood that "suspended students should not be left without supervision"[92] and recognized that there was a strong need for "reasonable alternatives for effective placement" of suspended students.[93] The legislature should consider these policy arguments when reviewing its zero tolerance regulations.

CONCLUSION

A substantive due process claim that triggers strict scrutiny poses a strong challenge to North Carolina school regulations where violations are punishable by expulsions and suspensions without adequate alternative educational settings. Although the State will likely demonstrate a compelling governmental interest in its policy, it will have difficulty establishing that suspensions and expulsions are narrowly tailored when the State denied approximately one thousand children the opportunity to attend an alternative education program during 2002–2003.[94] Since there is evidence that at least one state, Texas, can effectively educate "virtually all children who are removed

89. Blumenson & Nilsen, *supra* note 4, at 82–83 (footnotes omitted).

90. HARVARD REPORT, *supra* note 4, at 13.

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

92. *In re* Jackson., 84 N.C. App. 167, 176, 352 S.E.2d 449, 455 (1987).

93. *Id.* at 176–77, 352 S.E.2d at 455. The court commented that "[h]owever regrettable the existence of this void, a court may not overcome it by fiat." *Id.* at 177, 352 S.E.2d at 455. However, this preceded the Supreme Court of North Carolina's decision in *Leandro*, holding that the right to an education is a fundamental right.

94. *See supra* note 13 and accompanying text.

from class or expelled from school,"[95] North Carolina will have difficulty satisfying the second prong of the strict scrutiny test.

Moreover, there are several policy arguments that can be put forth against school expulsions and suspensions without adequate alternative educational settings, including that they have not proven to be effective in increasing school safety, are contrary to the rationale of the juvenile justice system and may ultimately prove harmful to society. By not providing alternative educational programs to expelled and suspended students in all but the most extreme cases, North Carolina fails to satisfy the fundamental right to an education, thereby violating the state constitution and hindering the educational progress of the state.

95. Bickerstaff, *supra* note 73, at 2. Texas's mandated alternative education programs and funding only applied to counties with over 125,000 in population. *Id.* at 3 n.4.