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Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of *Fuller v. Decatur Public School Board of Education School District*

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ZERO TOLERANCE OR (IN)TOLERANCE POLICIES? WEAPONLESS SCHOOL VIOLENCE, DUE PROCESS, AND THE LAW OF STUDENT SUSPENSIONS AND EXPULSIONS: AN EXAMINATION OF *FULLER V. DECATUR PUBLIC SCHOOL BOARD OF EDUCATION SCHOOL DISTRICT*

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I. INTRODUCTION

Recent school shooting tragedies in communities such as Santee, California;[1] Littleton, Colorado[2]; Springfield, Oregon[3]; Jonesboro, Arkansas[4]; West Paducah, Kentucky[5]; Pearl,

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1. At the time of this article, the most recent school shooting occurred Monday, March 5, 2001, when fifteen year-old Charles Andrew Williams, a student at Santana High School, killed two classmates and wounded thirteen others. The Civ. Rights Project & The Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, (Harvard U. June 2000). <http://www.harvard.edu/groups/civilritghts/conferences/zero/zt_report2.html>.

2. The Columbine High School shootings of April 20, 1999 represent the deadliest U.S. school shootings. Columbine students Eric Harris and Dylan Klebold killed a total of twelve students and one teacher, wounding twenty-three others at Columbine High School. Additionally, at the end of their shooting rampage, both Harris and Klebold turned their guns on themselves. *Id.*

3. On May 20, 1998, fifteen-year old Kip Kinkel killed his parents. The next day, May 21, Kinkel killed two students and injured twenty-two others when he started shooting in the cafeteria of Thurston High School. In September 1999, Kinkel pled guilty to four counts of murder and twenty-five counts of attempted murder with a firearm. *Id.*

4. Westside Middle School students, Mitchell Johnson, thirteen, and Andrew Goldren, eleven, shot and killed four students and one teacher and wounded ten others during an evacuation from a false fire alarm during which they fired their guns from

Mississippi[6]; and others[7] have forced school districts across the country to reevaluate their school discipline policies and practices for responding to and preventing school violence.[8] Because of the widespread media coverage of these recent school shootings, coupled with the public's misperceptions of the actual degree of violence in the nation's schools, many schools have adopted a "take-no-prisoners" approach to discipline. As a result of these troubling incidents, school safety concerns have become critically important policy issues in our nation's schools.

These issues of school and student discipline continue to be a persistent and difficult problem for educators. Students, parents, educators, and policy makers all agree that school safety is a paramount issue. Also, there is equally strong consensus for preventative measures directed at facilitating a safer school environment. Thus, in order to significantly reduce violence in the nation's schools and create a safer school environment, several state legislatures voiced the need for legal mandates calling for more strict school disciplinary sanctions. These sanctions were for dangerous and criminal behavior by students, especially relating to the possession of

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the nearby woods. *Id.*

5. On December 1, 1997, during a prayer circle at Heath High School, three students were killed and five wounded when a fourteen-year old boy shot them. *Id.*

6. On October 1, 1997, sixteen-year old, Luke Woodham shot and killed two students and wounded seven at Pearl High School. Before leaving home that morning for school, Woodham beat and stabbed his mother to death. Woodham was sentenced to two consectutive life sentences for the death of his two classmates. In a separate trial, he received a life sentence for the murder of his mother. *Id.*

7. Other notable shootings on school grounds include the following: On March 1, 2000, in Mount Morris Township, Michigan, a six-year old boy was accused of fatally shooting his first-grade classmate. On May 20, 1999, six students were injured by shots fired at Heritage High School in Conyers, Georgia by a fifteen-year old student who was reportedly depressed over breaking up with his girlfriend. On May 19, 1998, in Fayetteville, Tennessee, one male student was killed in the parking lot of Lincoln County High School; the victim was dating the ex-girlfriend of the shooter. On April 24, 1988, a fourteen-old student at James W. Parker Middle School shot and fatally wounded one teacher and wounded two students. On February 19, 1997, in Bethel, Alaska, a principal and one student were killed at the high school by sixteen-year old Evan Ramsey. On February 2, 1996, in Moses Lake, Washington, fourteen-year old Barry Loukaitis, shot and killed two students and a teacher in a classroom. Id.

8. More recent statistics from the National Center for Education Statistics (NCES) and the Bureau of Justice Statistics (BJS) detailing the number of violent deaths in our nation's public schools indicate that from the period of July 1, 1997, through June 30, 1998, a total of sixty school-associated violent deaths occurred in our nation's schools. By comparison, 2,752 children aged five through nineteen were homicide victims in the United States from July 1, 1997, through June 30, 1998.

firearms on school property.

Eventually in 1994, the collective concerns of these state legislatures led to Congress's passage of the Federal Gun-Free Schools Act, which required all states to pass legislation mandating a one-year expulsion for any student found carrying firearms on school property.[9] Officially, the U.S. Department of Education defined these zero tolerance policies as policies that "mandate predetermined consequences or punishments for specific offenses."[10] Zero tolerance policies were initially conceived as a way to minimize school violence and contribute generally to a better learning environment in schools.

Following the enactment of the Gun-Free Schools Act, however, many school administrators expanded the scope of legitimate school expulsions under the Act. They began to apply their zero tolerance policies to violations other than firearms possession, including the possession and/or use of drugs, and more recently, to behaviors that fall loosely under the category of school disruption, such as fist fighting and verbal abuse. The application of zero tolerance policies and procedures to weaponless school violence is clearly outside the scope of the original legislative intent of the Act. That intent was to exclusively target the prohibition of firearms in America's schools, requiring each state to enforce both a one-year expulsion for any student who brought a firearm to school, and also a referral to the local criminal or juvenile justice system.

Even prior to the passage of the Gun-Free Schools Act, school administrators were interpreting zero tolerance policies to cover not only firearms, but also drugs, including tobacco-related offenses and school disruption issues, such as weaponless fighting and verbal threats. For example, in 1989, public school districts in Louisville, Kentucky, and Orange County, California promulgated zero tolerance policies that applied not only to the possession of all types of weapons, but

9. 20 U.S.C § 8921(1994). Failure to comply with the Federal Gun-Free Schools Act would result in a loss of federal funding.

10. Phillip Kaufman et al., *Indicators of School Crime and Safety*, 1999, Appendix A, Table A1 (U.S. Depts. of Educ. And J. NECS 1999-057/NCJ-178906 Sept. 1999).

also to students in possession of drugs or known to be affiliated with gangs or gang-like activities.

Interestingly, while the Gun-Free Schools Act mandated a one-year expulsion for students found in the possession of a firearm, it included the stipulation that the one-year expulsion could be modified by the "chief administrative officer" of each local school district on a case-by-case basis.[11] Moreover, numerous federal and state courts have reiterated their minimized role, especially at the federal level, in cases involving student discipline.[12] Despite the inevitable disagreements concerning the viability of zero tolerance policies, the courts are clear in pointing out that public school districts have considerable authority and latitude when it comes to controlling student behavior through the use of school disciplinary suspensions and expulsions. While the authority of school administrators to enforce student discipline policies in their respective schools is significant, the distribution and allocation of student discipline through suspensions and expulsions must be wielded in such a way that affected students are afforded their constitutional rights to due process and equal protection.

Zero tolerance policies have been used to punish students beyond the scope of the Gun-Free Schools Act and are disproportionately used against minority students and students with disabilities. Both courts and school districts should be more proactive in formulating school discipline policies that protect students' constitutional rights to due process and equal protection. School districts, policy makers, and researchers should use more uniform and reliable school discipline data collection and dissemination procedures.

More recently, a volatile debate has surfaced concerning the use and potential abuses of zero tolerance policies in our nation's schools to reduce incidents of school violence.[13] The initial use of zero tolerance policies in schools was a direct

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11. Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 Phi Delta Kappan 372, 373 (Jan. 1999).

12. *See Wood v. Strickland*, 420 U.S. 308 (1975); *Lamb v. Panhandle Community U. Sch. Dist. No. 2*, 826 F.2d 526, 530 (7th Cir. 1987); *Anita J. v. Northfield Township-Glenbrook N. High Sch. Dist.* 225, 1994 WL 604100 (N.D. Ill. Nov. 4, 1994); *Parker v. Trinity High Sch.*, 823 F. Supp. 511, 521 (N.D. Ill. 1993).

13. Zero tolerance policies as defined by the U.S. Department of Education are school discipline policies that mandate predetermined consequences or punishments for specific outcomes.

result of laws centered on only the most dangerous and criminal behavior by students.[14] When the Gun-Free Schools Act was enacted, it required each state to enforce both a one-year expulsion for any student who brings a firearm to school and a referral to the local criminal or juvenile justice system. Shortly after the passage of the Act in 1994, local school boards and administrators began to exercise wide discretion in the use of zero tolerance policies, and they applied these zero tolerance laws not only to other weapons (i.e. knives), but also to the possession or use of drugs, alcohol, tobacco, and a host of other student behaviors that many would argue cause no serious threats or safety concerns to schools.[15] While some credit the use of zero tolerance school discipline policies with increasing and maintaining safe and productive educational environments, many others contend that zero tolerance polices are ineffective.

II. THE IMPACT OF "ZERO TOLERANCE" ON SCHOOL DISCIPLINE: ARE ZERO TOLERANCE POLICIES EFFECTIVE?

In responding to the public's demands for safer schools, a significant number of school districts across the country have reinterpreted and surpassed the federal mandate provisions of the Federal Gun-Free Schools Act with zero tolerance policies. Many school districts using these zero tolerance policies indicate that the policies have been expanded to include not only truly dangerous behavior, but to control a wide array of student behaviors, some of which pose no real threat to school safety. For instance, although 94% of U.S. public schools surveyed reported having zero tolerance policies for student possession of a firearm, 91% of these schools also applied them to students found in the possession of weapons other than firearms.[16] As a result, suspensions and expulsions have

14. This "highly selective" use of zero tolerance policies in schools was a result of Congress's passage in 1994 of the Federal Gun-Free Schools Act—a law requiring states to pass legislation mandating a one-year suspension for students carrying firearms on school property.

15. In 1999 for instance, the state of Maryland's public schools (excluding Baltimore City, the largest district) suspended approximately 44,000 students for the non-violent offenses of "disobeying rules," "insubordination," and "disruption."

16. Heaveside et al., *Violence and Problems in U.S. Public Schools: 1996-1997* (U.S. Dept. of Educ. NCES 98-030 Mar. 1998); Refer to Table 1.

increasingly become the "weapons of choice" used by school districts in varying degrees to create and maintain safer schools.[17] For example, in Illinois, where *Fuller v. Decatur Public School Board of Education* was decided, the number of students expelled from the state's public schools rose significantly from 1,182 in the 1990-91 school year to 2,744 student expulsions during the 1996-97 school year.[18]

It is significant that zero tolerance policies have been expanded to include violence without guns because school statistics on violence reported for the 1996-97 school year indicate that physical attacks, or fights without a weapon, led the list of reported crimes in public schools with approximately 190,000 such incidents reported.[19] Table 2 illustrates both the number and percentage of schools in which specified disciplinary actions were taken against students, total number of actions taken, and the percentage of specific disciplinary actions taken against students by the type of student infraction during the 1996-97 school year. As Table 2 shows, in schools that had the largest number of disciplinary actions, physical attacks or fights were the most common offense when compared to other student infractions surveyed, including possession or use of a firearm, possession or use of a weapon other than a firearm, or the possession, distribution, or use of alcohol or drugs, including tobacco.

Though 2001 marked the seventh year since the passage of the Federal Gun-Free Schools Act, policy makers and the public have spent little time and attention discerning whether or not the zero tolerance policies that grew out of the Act are actually effective in decreasing school violence levels. In fact, there is virtually no data that suggests zero tolerance policies effectively reduce school violence. Moreover, this relative lack of data is further compounded by inconsistent and, in some instances, unreliable school discipline data collection at the school district and state levels.[20] For example, only twenty-

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17. See Jessica Portner, *Districts Turn To Expulsions To Keep Order*, 19 Educ. Week 1, 12 (April 19, 1995) <http://www.educationweek.org/ew/vol-14/30suspen.h14>.

18. See Robert C. Johnston, *Decatur Furor Sparks Wider Policy Debate*, 14 Educ. Week (November 24, 1999)
<http://www.educationweek.org/ew/ewstory.cfm?slug=13zero.h19>.

19. Heaveside, *supra* n. 19.

20. The Civ. Rights Project, *supra* n. 4. (There is constant confusion in many State Departments of Education as to which is the proper agency or agencies in charge of reporting school discipline data.); *School Discipline-Suspensions*, 1 Educ. at a Glance

seven states require collection of discipline data by type of offense/conduct; eleven states require collection of school discipline data by race, and eleven states require collection of school discipline data by gender.

The best available measure of the impact of zero tolerance policies on school violence is the U.S. Department of Education, National Center for Education Statistics (NCES) and the U.S. Department of Justice, Bureau of Justice Statistics (BJS), *Indicators of School Crime and Safety 1999* report.[21] After four years of implementation, this report indicates that schools utilizing zero tolerance policies are still less safe than those schools without zero tolerance policies. Recent school crime and safety statistics from the NCES and the BJS indicate a "mixed picture of school safety" from the early to late 1990s. For instance, between 1995 and 1999, the percentage of students who reported being victims of a crime at school declined from 10% to 8%.[22]

While creating safe, violence-free schools is a laudable goal, policy makers, educators, and school administrators need to consider two significant and related concerns of school disciplinary policies. First, they should consider the effectiveness of disciplinary policies at lowering crime and violence in schools. Second, they should consider the increased potential for unequal or disparate administration of those zero tolerance policies. Such potential for the uneven enforcement and dissemination of school discipline policies, especially through an inconsistent application of zero tolerance policies to students at the school or district level, warrants concern over constitutional violations, especially discrimination.

While considering the effectiveness of zero tolerance policies to reduce school crime and violence, policy makers, educators, and school administrators should be aware of the public's misperception of violence in schools, as suggested by recent empirical data from the U.S. Department of Education. In reality, school-associated violent deaths in U.S. elementary and secondary schools are relatively rare. In a recent report, the National School Safety Center indicated that there were a total of 253 school-associated deaths between September 21, 1992, and April 20, 1999, the date of the Littleton, Colorado

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(newsletter of the Wis. Dept. of Pub. Instruction) (Apr. 1999); Refer to Appendix C.

21. See Kaufman, *supra* n. 13.

22. *Id.*

shootings. Only 1% of these violent deaths occurred on school grounds. Moreover, the three most frequently reported reasons for school-associated violent deaths were interpersonal disputes (26%), gang activity (13%), and suicides (14%), with approximately 77% of these deaths caused by shootings.[23] On February 18, 2000, William Modzeleski, the Director of the Safe and Drug-Free Schools Program, U.S. Department of Education, stated, "[a]n overwhelming majority of schools, 90% do not experience any serious violent crime, and nearly half of all our schools, 43%, experience no crime at all."

School administrators likewise see violent crimes as infrequent problems. More specifically, a recent U.S. Department of Education survey was taken of a nationally representative sample of 1,234 elementary, middle, and high school principals. Principals were asked to list what they considered to be serious or moderate problems in their own schools. The results indicated that the most frequently cited problems at all school levels were tardiness (40%), absenteeism (25%), and physical conflicts between students (17%) (i.e. fist fighting without weapons). The critical school violence issues that usually comprise the focus of the mainstream media and school safety debates were infrequently reported to be a "moderate problem" in the survey; drug use (9%), gangs (5%), possession of weapons (2%), and physical abuse of teachers (2%). Overall, violent crimes in U.S. public schools occurred at an annual rate of 53 per 100,000 students.[24] Further, recent statistics from the U.S. Department of Justice indicate that occurrences of youth violence are decreasing significantly. For instance, the U.S. youth homicide rate fell a significant 33% between 1993 and 1997, from 20.5 to 13.64 per 100,000 students.[25] In fact, several large urban school districts, including Boston, Chicago, and Los Angeles, have all experienced recent declines of in-school, youth violence levels.[26] One implication of these statistical findings is that U.S. public schools constitute one of the safer places for our nation's children and youth, and therefore, zero tolerance policies

23. *See School Violence: Assessment, Management, Prevention*, 28 (Mohammad & Sharon Lee Shafii eds., Am. Psychiatric Publg., Inc. 2001).

24. Heaveside, *supra* n. 19.

25. *See* Michael Rand, *Natl. Crime Victimization Survey: Criminal Victimization 1997: Changes 1996-97 with Trends 1993-97*, (U.S. Dept. of J. NCJ 173385 Dec. 1998).

26. *See Youth Violence: A Community-Based Response, One City's Success Story*, NCJ 162601 (U.S. Dept. of J. Sept. 1996).

cannot make a great difference in school violence because it is not as prevalent as some would have the public believe.

Besides these inaccurate portrayals of school violence, the second reason claims of zero tolerance policies' success are arguably inaccurate is that these policies are unevenly enforced, and are thus educationally and psychologically detrimental school policies. Since the increased use of zero tolerance policies by schools across the country, there has also been a corresponding increase in the number of students suspended and expelled.[27] In the 1998 school year, for example, more than 3.1 million students were suspended and approximately 87,000 students were expelled.[28] Further, zero tolerance policies disproportionately impact students of color, namely African-American and Hispanic students, as well as students with disabilities enrolled in special education classes.[29] Since the implementation of zero tolerance policies, numerous studies indicate that the number of students, particularly students of color, who where suspended and expelled from schools has steadily increased.[30] Data from the U.S. Department of Education's report, *The Condition of Education, 1997*, revealed that approximately 25% of all African-American males nationally were suspended from their school at least once over a four-year period spanning 1993 through 1996. In another national study conducted in 1993, David Stone surveyed several hundred thousand students across the country and found that African-American students

27. *See School Expulsion: A Cross-Systems Problem* (Colo. Found. for Families and Children, 1995).

28. *See Fall 1998 Elementary and Secondary School Civil Rights Compliance Report: National and State Projections*, (U.S. Dept. of Educ., June 2000).

29. Patrick Pauken & Philip T. K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 W. Educ. L. Reptr. 711, 759 (2000).

30. Consistent longitudinally-based research over the past two decades has shown that students of color, particularly African American students, have been disproportionately disciplined in schools compared to white students.

were either suspended or expelled at a rate 250% higher than Caucasian students.[31]

Russo and Ilg have appropriately summarized the problem in these words, "[s]chool officials thus struggle to deal with zero tolerance policies and are thrust into positions as disciplinarians who mete out punishments for students while also trying to better handle student drug use and possession of weapons on campus. The immediate issue for educational leaders is to determine their role in formulating appropriate policies to deal with violent and disruptive students based on legitimate public concerns over the epidemic of incidents in schools and the backlash against draconian zero tolerance policies."[32]

III. THE LAW OF STUDENT SUSPENSIONS AND EXPULSIONS FOR WEAPONLESS STUDENT OFFENSES: WHERE DO ZERO TOLERANCE DISCIPLINARY POLICIES FIT (OR DO THEY)?

> While there has been a quantum leap from the posture espoused during the first third of the twentieth century to the active protection of students' rights characterized by the litigation of the late 1960s and early 1970s, judicial developments have not eroded educators' rights or their responsibilities. Reasonable disciplinary regulations, even those impairing students' protected liberties, have been upheld if justified by a legitimate educational interest. Educators not only have the authority but the duty to maintain discipline in schools.[33]

Today, states and school districts have the great authority and flexibility to monitor and control student behavior on school property and at school-sponsored activities through the adoption and use of reasonable school disciplinary suspensions

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31. Donald H. Stone, *Crime and Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings*, 17 Am. J. of Tl. Advoc. 351, 366 (1993). For a considerably more detailed account of the legal issues surrounding racial discrimination in school discipline, *see* Pauken *supra* n. 32.

32. Charles J. Russo & Timothy J. Ilg, *Zero Tolerance Policies: Are They Effective? School Violence Alert*, 1 (Jan. 9, 2001).

33. Martha M. McCarthy, Nelda H. Cambron-McCabe & Stephen B. Thomas, *Public School Law: Teachers' and Students' Rights*, 196 (4th ed, Allyn & Bacon 1998).

and expulsions.[34] Reasonable disciplinary rules and regulations, even those that may encroach upon students' constitutionally protected rights, have been upheld in court if the disciplinary actions are "justified by a legitimate educational interest."[35] This heightened level of school district discretion relating to disciplinary suspensions and expulsions is justified largely by the school's responsibility to protect students while in school as well as to ensure that school environments are conducive to learning. Indeed, the courts have "exercised limited review of student disciplinary regulations, and pupils were seldom successful in challenging policies governing their behavior."[36]

Historically, public schools have exercised broad authority in disciplining students, largely unrestricted by due process requirements. Moreover, the common law embraced the principal of *in loco parentis*, or "in the place of the parent," whereby teachers and principals have "the authority and the duty to guide, correct, and punish the child in the accomplishment of educational objectives."[37] However, beginning in the 1960s, federal courts began to rule in favor of requiring some due process for students expelled from school.[38] By the late 1960s and early 1970s, most federal courts were applying, albeit to varying degrees, the Due Process Clause to school expulsions. It appears unclear, however, as to whether a student's education was a property interest and whether due process shouls apply to school suspensions of a short duration.

Despite the growing popularity of zero tolerance policies and their use in public schools across the country, students who are disciplined under zero tolerance policies do not "shed their constitutional rights . . . at the schoolhouse gate."[39] Indeed, students have basic legal rights under the U.S. Constitution, as well as under a variety of federal and state statutes. Thus, one of the deeply entrenched issues associated with implementing and enforcing student discipline policies is the inherent tension between the school administrators' need to

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34. *See Bd. of Educ. v. McCluskey*, 458 U.S. 966 (1982); *Wood*, 420 U.S. 308.

35. McCarthy, *supra* n. 36, at 196.

36. *Id.* at 195.

37. Kern Alexander & M. David Alexander, *The Law of Schools, Students, and Teachers in a Nutshell*, 178 (2d ed. West 1995).

38. *Dixon v. Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

39. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

develop and maintain an orderly school environment, especially given the special status of students, and the need to protect student rights.[40] At a minimum, students enrolled in public schools who are subject to either suspensions or expulsions are entitled to:

(1) Due process under the Fourteenth Amendment;[41]

(2) Constitutional and federal civil rights protections that prohibit inherently discriminatory policies based on race, class, or national origin;[42]

(3) Additional protection by federal statutes, such as Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA) if the student is classified as special needs.[43]

As applied to abuses of zero tolerance policies, school administrators, students, and their advocates need to be aware of these federal protections as well as state constitutions and statutes that provide comparable or additional restrictions on zero tolerance policies.[44]

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40. *See, id.* (landmark case that challenged the previous practice of *in loco parentis* and shifted both the law and school administrators to a more active protection of students' rights).

41. No state shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1.

42. No state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, §1. Also, the federal antidiscrimination statute Title VI of the Civil Rights Act of 1964, prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. 42 U.S.C. § 2000(d) (1964).

43. 29 U.S.C. § 794 (2001) (a federal anti-discrimination law that prohibits discrimination based on disability, is applicable to public schools); 20 U.S.C. § 1400 et. seq. (2001) (federal special education law). Recent studies have begun to indicate that zero tolerance policies disproportionately impact students with disabilities. This article focuses on the issue of racial discrimination associated with zero tolerance abuses.

44. Some states, for example, guarantee the fundamental right to education, a right not guaranteed under the Federal Constitution.

IV. THE LAW OF SHORT-TERM SUSPENSIONS: A BRIEF OVERVIEW

Prior to the U.S. Supreme Court's decision in *Goss v. Lopez,*[45] which provided legal guidance regarding the amount of due process involved in short-term suspensions (ten days or less), the predominantly held belief, as well as practice, was that attending public schools was a privilege, which could rightfully be taken away at the discretion of school authorities.[46] The *Goss* decision established, however, that a student's education is a property interest and that as such, was not subject to limitless revocation.[47]

The *Goss* decision grew out of a situation in the Columbus, Ohio, Public School System (CPSS), where nine African-American high school students were suspended for various types of misbehavior related to their involvement in student demonstrations at Marion-Franklin High School following Black History Month. Each student was suspended by the school principal, and none of the students were provided a hearing prior to or after the suspensions. At the time of the suspensions, Ohio law authorized school principals to suspend students for up to ten days without prior notice or a hearing. The only procedure required in state statutory law was that parents of suspended students had to be notified of their child's suspension within 24 hours.[48] The *Goss* court found that the Ohio statute violated the students' rights under the Fourteenth Amendment of the U.S. Constitution.[49] As a direct result of the *Goss* decision, students given short-term suspensions, defined by the Court as being up to 10 days, must be accorded the following minimum protections of procedural due process:

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45. 419 U.S. 565 (1975). The ruling in simply held that the "total exclusion from the educational process for more than a trivial period" is enough deprivation to qualify for due process protection under the Fourteenth Amendment of the U.S. Constitution. Goss, 419 at 576.

46. Kern Alexander & M. David Alexander, *American Public School Law* (5th ed. Wadsworth Group 2001).

47. For a solid discussion of the *Goss* decision and its impact upon the legal aspects of student misconduct, see Lawrence F. Rossow & Jerry R. Parkinson, *The Law of Student Expulsions and Suspensions* (2d ed. Educ. L. Assn. 1999).

48. Ohio Rev. Code Ann. § 3313.66 (West 1972).

49. 419 U.S. at 571-72.

(1) Oral or written notification of the specific violation(s) the student(s) is charged with and the intended punishment;

(2) An opportunity to refute the charges before an objective decision maker;

(3) An explanation of the evidence upon which the disciplinarian is relying.[50]

While the ruling in *Goss* provided the rudimentary procedural due process requirements for short-term suspensions, the decision left many unanswered questions. For example, the *Goss* court provided little legal guidance pertaining to long-term suspensions and expulsions.[51] The Court mentioned, rather ambiguously, that "longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[52]

Additionally, there are limitations associated with the level of procedural due process given to suspended students. For instance, the mandatory hearing necessary for a student given a short-term suspension need not be a full adversarial hearing; an informal give-and-take between the student and the disciplinarian will suffice.[53] Moreover, student suspensions of ten days or less do not require a right to counsel.[54]

V. THE LAW OF LONG-TERM SUSPENSIONS AND EXPULSIONS: A BRIEF OVERVIEW

There is considerably less unanimity regarding general due process guidelines relating to school suspensions and expulsions for a period exceeding ten days. Presently, there exists no U.S. Supreme Court precedent relating to long-term suspensions and expulsions. Lower courts have endorsed the notion that long-term suspensions should require more formal

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50. McCarthy, *supra* n. 38, at 205.

51. The ruling in simply held that the "total exclusion from the educational process for more than a trivial period" is enough deprivation to qualify for due process protection under the Fourteenth Amendment of the U.S. Constitution. Goss, 419 at 576.

52. *Id.* at 584.

53. *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, Cambridge: Massachusetts (2000), p. II-23.

54. The Court reaffirmed this by indicating that a two-day suspension "does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986),

procedural due process requirements than short-term suspensions.[55] Consequently, most courts, as well as school authorities, look to *Dixon v. Board of Education*[56] for direction regarding the amount of due process required for longer student suspensions and expulsions. In *Dixon,* the Fifth Circuit held:

> [n]evertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of [the educational institution]. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the acts to which each witness testifies. He should also be given the opportunity to present . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.[57]

While the *Goss* decision recommended that long-term suspensions may require more formal protections of procedural due process, courts and school authorities are still uncertain of the minimum levels of due process necessary for long-term student suspensions and expulsions. Given the conflicting case law relating to issues of due process for student long-term suspensions and expulsions, school districts should develop "preestablished standardized disciplinary procedures to avoid the appearance of prejudice, minimize the potential for litigation, and, most important, prevent unjust punishments."[58]

Some of the more important unsettled issues of due process involving long-term student suspensions and expulsions include the following:

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55. *See e.g. Gonzales v. McEuen*, 435 F. Supp. 460 (C.D. Cal. 1977). (the court held that for notice of a student expulsion hearing to be adequate, the notice must communicate the nature of the proceedings to the expelled student and must include a statement detailing both the specific charges and basic rights of the student(s), including the right to counsel, to present evidence, and to confront and cross-examine hostile witnesses.) *Dixon*, 249 F.2d 105.

56. 249 F.2d 105.

57. *Id.* at 159.

58. Michael Imber & Tyll Van Geel, *Education Law* 237 (McGraw Hill 1993).

(1) Whether or not a list of witnesses is required prior to the hearing;[59]

(2) Whether or not the accused student(s) has the right to confront and question hostile witnesses;[60]

(3) whether hearsay testimony is admissible;[61]

(4) Whether or not there is a compromise in impartiality when the school board's own attorney presents the case against the accused student;[62]

(5) Whether the student has the right to legal counsel;[63]

(6) Whether or not the accused student(s) has the right to a recording or transcript of their disciplinary hearing;[64]

(7) Whether the student has the right to a written statement of reason(s) explaining the decision to suspend or expel.[65]

Given the inconsistent court decisions at the appellate levels, one recommendation for educators is to provide considerable due process provisions in cases of long-term suspensions and expulsions. In their book, *The Law of Student Expulsions and Suspensions,* Lawrence F. Rossow and Jerry R. Parkinson provide school administrators with the following recommendations regarding what to include in the notice to students facing long-term suspensions or expulsions:

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59. Presently, most courts have held that a list of witnesses is not required. *See Keough v. Bd. of Educ.*, 748 F.2d 1077 (5th Cir. 1984).

60. Generally, the courts are split on this issue. Some courts permit the testimony of hostile witnesses in the form of anonymous affidavits; other courts, however, do not permit hostile witness testimony. *See Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1988); *Brewer ex rel. Dreyfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260 (5th Cir. 1985).

61. *See Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981).

62. The courts are split on this issue. *See Gonzales*, 435 F. Supp. 460; *Alex v. Allen*, 409 F. Supp. 379 (W.D. Pa. 1976).

63. State and federal level courts are divided on the issue of the right to an attorney at a student suspension or expulsion hearing. *See Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972); *Gonzales*, 435 F. Supp. 460.

64. Most court decisions have not recognized the right to a recording or transcript of a disciplinary hearing. *See Jaksa v. U. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984); *aff'd*, 787 F.2d 590 (6th Cir. 1986).

65. In this area, most court decisions do not require nor do they recognize the right to be given a written statement of reasons explaining the decision to suspend or expel. *See, Id.*

(1) An expression of intent to suspend or expel a student;
(2) The specific charges against the student;
(3) The specific rule(s) allegedly violated by the student;
(4) The nature of the evidence supporting the charge(s) against the student;
(5) The date, time, and place where the hearing regarding the suspension or expulsion will take place;
(6) A copy of the procedures that will be followed at the hearing;
(7) A reminder of the rights that the students and parent(s) have, including the right to counsel, presentation of witnesses, cross-examination of hostile witnesses, and a copy of the hearing transcript.[66]

Thus, whether the issue concerns short-term student suspensions covered under the *Goss* decision or long-term student suspensions or expulsions, the multiplicity of issues surrounding the provision of due process of law is critical. The Due Process Clause of the Fourteenth Amendment has the potential to provide "real but limited protections to students living under zero tolerance policies."[67]

VI. STUDENT RIGHTS TO DUE PROCESS IN SCHOOL DISCIPLINE: DO ZERO TOLERANCE DISCIPLINE POLICIES NEGLECT THE IMPORTANCE OF SUBSTANTIVE DUE PROCESS CONSIDERATIONS?

> Defining due process of law can be extremely difficult. The Supreme Court commented several decades ago: "Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . whether the Constitution requires a particular right contained in a specific proceeding depends upon a complexity of factors.[68]

The Due Process Clause of the Fourteenth Amendment constitutes the legal and historical foundation of the law dealing with student suspensions and expulsions in U.S. public schools. A real concern with the use of zero tolerance policies in schools is whether the punishment has some reasonable

66. Rossow, *supra*, n. 50.
67. *See* The Civ. Rights Project, *supra*, n.4.
68. Lawrence R. Rossow, *Administrative Discretion and Student Suspensions: A Lion In Waiting*, 13 J.L. & Educ., 417, 418-19 (1984).

connection to legitimate government interest.

There are two types of due process under U.S. common law: procedural due process and substantive due process.[69] Procedural due process requires that states provide adequate and fair procedures when determining when and if a person can be deprived of life, liberty, or property.[70] In order to raise a procedural due process claim, a plaintiff must (1) identify a protected property or liberty interest; (2) demonstrate that they were deprived of that interest by state action; and (3) establish that the deprivation occurred without due process.

The phrase "due process of law," when applied to substantive rights, means that

> the state is without power to deprive a person of life, liberty or property by an act having no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. Substantive due process may be implicated by the rules and regulations written by educators to regulate or control student behavior, such as the student handbook with rights and responsibilities.[71]

A major legal principle regarding substantive due process issues is the elusive concept of "fundamental fairness." Two general issues raised by "fundamental fairness" under substantive due process are (1) Whether the punishment fits the crime; and (2) Whether fair warning should be given to students so that they are aware that their behavior might result in either a school suspension or expulsion.[72]

A major issue in substantive due process analysis is whether or not the rules or policies in question provide adequate notice of what conduct is specifically prohibited. *Dixon v. Board of Education*, the 5th Circuit held that college attendance was so essential that college and university

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69. In the specific context of school discipline, procedural due process is the fundamental right to have adequate notice of charges against you and ample opportunity to refute those charges before a fair tribunal if life, liberty, or property interests are at stake. Substantive due process refers specifically to the constitutional safeguards specified in both the Fifth and Fourteenth Amendments that school discipline policies, such as zero tolerance, be fair and reasonable in content and application. Specifically, substantive due process protects against "arbitrary, capricious, or unreasonable governmental action."

70. For a good discussion of due process and its impact on U.S. public schools, see Alexander, *supra*, n. 40.

71. *Id.* at 66.

72. Rossow, *supra*, n. 50.

administrators could not take this "substantive" right away without a hearing and due process requirements.[73] Additionally, substantive due process considerations include whether or not the disciplinary policy is "grossly disproportionate to the offense."[74] Also, some school disciplinary policies have been challenged, though largely unsuccessfully, on the substantive due process grounds that they are vague or overbroad.[75] In *Alex v. Allen*, for instance, where the student was facing a thirty-day suspension, the court rejected a student's claim that the disciplinary rules he was accused of violating were both vague and overbroad.[76] Since courts allow school authorities considerable discretion in disciplining students for a wide range of student activities, school disciplinary rules and regulations do not need to be as detailed as criminal codes.[77]

Courts continue to interpret violations of substantive due process very narrowly. Currently, for example, only the rights of privacy and autonomy are considered fundamental rights. In practice, the review and revocation of long-term suspensions or expulsions on substantive due process grounds has occurred only rarely when the Court determined that there existed no "rational relationship between the punishment and the offense."[78] In order to determine whether there exists a rational relationship between the punishment and the offense, courts have usually addressed the issue of whether or not the suspension or expulsion was "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[79] In related cases, courts have used the "arbitrary, capricious, or wholly unrelated" test with similar language, including whether student suspensions

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73. *Dixon*, 294 F.2d 150.

74. See *James v. Unified Sch. Dist.*, 899 F. Supp. 530 (D. Kan. 1995); *Petrey v. Flaugher*, 505 F. Supp. 1087 (E.D. Ky. 1981).

75. Vague school disciplinary rules can be challenged as violative the due process clause on substantive grounds because they potentially fail to provide adequate notice as to what is and what is not permissible student conduct. Overbroad disciplinary rules can be challenged on substantive due process grounds that the rules do more than is necessary to achieve certain end results and as a result violate students' constitutionally protected rights of due process.

76. 409 F. Supp. 379.

77. *See Bethel Sch. Dist.*, 478 U.S. at 686.

78. *See Brewer*, 779 F.2d 260.

79. *Woodward v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984).

or expulsions were "grossly disproportionate to the offense,"[80] whether there was a "shocking disparity between the expulsion and the offense,"[81] or whether the action was "willful and unreasoning without consideration and in disregard of the facts or circumstances of the case."[82]

Courts have been extremely reluctant to overturn school disciplinary decisions, particularly long-term suspensions and expulsions, on substantive due process grounds, and the legal threshold for establishing substantive due process violations in school discipline cases has been set.[83] *Goss v. Lopez* has provided limited guidance concerning the amount of procedural due process required for short-term suspensions.[84] In the area of long-term student suspensions and expulsions, however, the issue remains unclear.

VII. ZERO TOLERANCE POLICIES AND THE POTENTIAL FOR RACIAL DISCRIMINATION: LEGAL PROTECTIONS UNDER THE EQUAL PROTECTION CLAUSE

Racial discrimination in school discipline is a deep-seated problem. Long before zero tolerance policies became popular, students of color were subjected to suspension and expulsion in disproportionate numbers and typically received harsher punishment than their white counterparts. As one advocate has noted, it is no coincidence that the U.S. Supreme Court's leading case on school discipline and students' due process rights, *Goss v. Lopez*, "involved the sweeping, indiscriminate suspension of black students from Columbus, Ohio public schools for allegedly taking part in demonstrations following Black History Month."[85]

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80. *James*, 899 F. Supp. 530; *Petry*, 505 F. Supp. at 1091.

81. *Kolesnick ex rel. Shaw v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807, 813-14 (Neb. 1997).

82. *Greenhill v. Bailey*, 519 F.2d 5, 10 n. 12 (8th Cir. 1975).

83. *Bd. of Educ. v. C.P.*, 698 S.2d 131 (Ala. Civ. App. 1996), (court upheld an eight-week suspension of a high school student who drove to school in a family car containing a gun left in it by the mother, a fact unknown to the student); *Petrey*, 505 F. Supp. at 1091, (court ruled that the expulsion of a student for the majority of the academic year for smoking marijuana on school property was not grossly disproportionate).

84. 419 U.S. 565.

85. The Civ. Rights Project *supra*, n. 4.

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination by the state and local governments on the basis of race, color, or national origin.[86] In examining whether a state law, policy, or activity violates the Equal Protection Clause on the basis of race, color, or national origin, the courts use a rigorous legal standard known as strict scrutiny. Under strict scrutiny analysis, the law, policy, or state action must be narrowly tailored to meet a compelling governmental interest. For example, a school policy that suspended white students for one type of violent act, such as the fight in *Fuller v. Board of Education*, but expelled African-American students for the same offense could be viewed as unconstitutional, even if it might be justified by an important governmental interest, such as maintaining school safety. Patrick Pauken and Philip T.K. Daniel state:

> In order for a government actor, including an official of a public school district, to treat people differently on the basis of race or ethnicity, he or she must show that the rule or action was necessary and narrowly tailored to achieve a compelling governmental interest. Explicit classifications based on race and national origin in schools are no longer common; schools will rarely succeed with, and will even more rarely promote, such a defense.[87]

Unfortunately, there exists considerable evidence that racial minorities are disciplined more severely than white students.[88] In June 2000, the Civil Rights Project (CRP) at Harvard University, in partnership with the Advancement Project (AP), published the first national report, titled *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline,* analyzing the impact of zero tolerance policies upon America's public school system. Their findings unequivocally report that zero tolerance polices are (1) unfair; (2) in opposition to the developmental needs of school children; (3) a violation of equal educational opportunity, particularly for minority children; and (4) often result in the

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86. No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

87. Pauken & Daniel, *supra* n. 32, at 763.

88. 1993-94 data from the U.S. Department of Education's Office for Civil Rights (OCR) indicated that African-American students received approximately 33% of all out-of-school suspensions for more than ten days, even though they constituted 17% of the U.S. public school population in 1993-94. White students received 50% of school suspensions, while constituting approximately 68% of U.S. public school enrollment.

criminalization of children.[89]

In Wisconsin, one of the few states that has comprehensive school discipline data on suspensions and expulsions by race, gender, and type of offense, school suspensions have increased approximately 34% since the 1991-92 school year. For example, 25.5% of African-American males and 19.75% of Native American males were suspended in the public schools of Wisconsin during the 1997-98 school year.[90]

At the local level, especially in school districts with large numbers of students of color, the impact of zero tolerance policies on suspensions and expulsions has been especially acute. During 1999, in Jefferson County, Florida, a small, predominately African-American school district, approximately 43% of high school students and 31% of middle school students were suspended at least once.[91] In larger U.S. public school systems, such as the Chicago Public Schools, there was a dramatic increase in the reported number of student expulsions; from 14 in 1992-93 to 737 in 1998-99.[92]

Some of the more troubling information regarding the disparate suspensions and expulsions of students of color, as well as students classified with disabilities, is evidence that many of these children are disciplined unfairly and are arbitrarily suspended and expelled for incidents that otherwise could have been handled using alternative methods. In a recent report, Russell Skiba, director of the Institute for Child Study and a professor at Indiana University, found that when all socioeconomic indicators are held constant, African-American children are still suspended and expelled at higher rates than white students at the same schools. Moreover, the major factor in racial disparities in school discipline appears to be the higher referral of African-American students for subjective offenses, such as "disrespect."[93]

Equal Protection Clause claims challenging excessive use of zero tolerance policies in schools, particularly those showing

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89. The Civ. Rights Project, *supra*, n. 4.

90. *Id.*

91. *Id.* (citing Fla. Dept. of Educ., *Florida School Indicators Report* (1999)).

92. *Id.* (citing Generation Y, *Suspended Education: A Preliminary Report on the Impact of Zero Tolerance on Chicago Public School Students* (S.W. Youth Collaborative)).

93. Russel J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (Ind. Educ. Policy Ctr. Research Rep. #SRS1 June 2000). Skiba supra, n. 14, at 372.

racial disparities in the distribution of suspensions and expulsions, can be as difficult to establish as substantive due process claims. The main reason for this difficulty is the requirement that plaintiffs prove discriminatory intent.[94] Pauken and Daniel distinguish the legal standards of disparate treatment and disparate impact in the following manner:

> Disparate impact is shown if the plaintiff presents evidence that a facially neutral policy has a discordant influence on a protected class of students (often presented by statistical analyses). Disparate treatment requires intent on the part of the defendant. In fact, some courts have held that evidence of disparate impact, while a start, is not sufficient to state a claim for race or national origin discrimination in student discipline. There must be a demonstration of discriminatory intent, purpose, or motive.[95]

Following the U.S. Supreme Court's 1976 decision in *Washington v. Davis*, plaintiffs must provide significant evidence that a governmental body, such as a public school, intended to discriminate on the basis of race in developing and administering a school discipline policy. However, statistical evidence of racial disparities alone is generally not sufficient to establish an Equal Protection Clause violation.[96]

VIII. DISPARATE TREATMENT AND ADVERSE IMPACT THEORIES: LEGAL PROTECTIONS FROM TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

> Some courts have found the disciplinary rules and/or actions of school districts unlawful on the basis of such disparate impact. Others hold that disparate impact is not enough to support a claim of discrimination in discipline; instead, they assert that the plaintiffs must show intentional or purposeful discrimination. Discriminatory intent or motive, however, may be inferred from statistical or other evidence demonstrating that students of color are disciplined more severely than white students for similar conduct.[97]

In addition to legal protections under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil

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95. Pauken & Daniel, *supra* n. 32, at 763-64.

96. 426 U.S. 229 (1976).

97. Pauken & Daniel, *supra* n. 32, at 759-60.

Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin by schools that receive federal financial assistance.[98] In contrast to the Equal Protection Clause of the Fourteenth Amendment, two possible legal protections are available under Title VI that could be used to address zero tolerance abuses: (1) disparate (or different) treatment claims; (2) adverse impact claims.[99]

Authors Pauken and Daniel state:

> Disparate impact is shown if the plaintiff presents evidence that a facially neutral policy has a discordant influence on a protected class of students (often presented by statistical analyses). If such an impact emerges, the defendant school district must demonstrate that its decisions were based on some sort of non-discriminatory business necessity such as the maintenance of order and security.[100]

Disparate treatment, on the other hand, requires intent on the part of the defendant. In many cases, courts have viewed disparate impact as a necessary element in developing a legal claim for racial discrimination in the area of abusive school disciplinary practices, such as zero tolerance. But, disparate impact alone is insufficient. Often, a successful claim of racial discrimination in a school's discipline policies requires a "demonstration of discriminatory intent, purpose, or motive."[101]

In some school disciplinary cases, disparate impact has been shown through statistical analyses, such as racial disparities which show that the suspension and expulsion rate for students of color is considerably higher than one would expect from a random sample of students.[102] More recently, "the presentation of statistically significant disparities in the suspension of students across the country has not been

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98. 42 U.S.C. §2000(d).

99. Disparate treatment claims require proof of differential treatment based on race as well as discriminatory intent. Under Title VI, adverse impact claims do not have to prove discriminatory intent, but rather need to prove disparate impact, which has been shown statistically as evidence depicting racial disparities in the administration of zero tolerance policies. *Id.*

100. Pauken & Daniel, *supra* n. 32, at 763.

101. *Id.* at 764.

102. *Id.* (citing *Hawkins v. Coleman*, 376 F. Supp. 1330 (N.D.Tex. 1974). (expert witness testimony was instrumental in demonstrating that the statistically significant disparities in the suspension between African-American and Caucasian students in the Dallas Independent School District was sufficient, by itself, to show racial discrimination in the school district's disciplinary policies—disparate impact, not intent, was sufficient in this case).

sufficient, by itself, to show unlawful race discrimination."[103] For example, in *Parker v. Trinity High School*, the court ruled that plaintiffs needed to show discriminatory intent. Discriminatory or disparate impact alone was not sufficient.[104]

While the requirement of showing intent makes it difficult to prove a disparate treatment claim, plaintiffs can make a disparate impact claim. In contrast to disparate treatment claims, the courts can apply the following three-step test to determine whether or not a school's disciplinary policy is discriminatory under an adverse impact claim:

(1) Does the practice or procedure have a disproportionate impact based on race, color, or national origin?

(2) Is the practice or procedure an educational necessity?

(3) Is there an alternative practice or procedure that would be feasible and achieve the same purpose, with less discriminatory purpose?[105]

In most cases, statistical analyses can be extremely useful in demonstrating race-based student disciplinary disparities under zero tolerance policies. However, in many recent cases, including *Fuller v. Board of Education School District*, the use of statistical analyses to prove discriminatory intent, purpose, or motive has not been actively embraced by the courts."[106]

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103. *Id.*

104. 823 F. Supp. 511 (N.D. Ill. 1993).

105. See The Civ. Rights Project, *supra*, n. 4.

106. 78 F.Supp. 2d 812; *see also Tasby*, 643 F.2d 1103.

IX. ZERO TOLERANCE POLICIES AND WEAPONLESS SCHOOL VIOLENCE INFRACTIONS: FULLER V. DECATUR PUBLIC SCHOOL BOARD OF EDUCATION SCHOOL DISTRICT

> It concerns me that there is a disproportionate number of African-Americans being disciplined. But our student behavior code is colorless. We do not separate rules for minority and majority students. We also don't have special rules for star athletes. We have one rule for all students (Kenneth Arndt, Superintendent, Decatur Public School District).[107]

> The Zero Tolerance Policy of the Decatur (IL) Schools is an ugly, expensive, uneducational failure. It is the biggest civil rights issue facing the country.[108]

> [T]he discipline (expulsion of the Decatur high school students) was tougher than anything the judicial system would have meted out.[109]

One of the more recent, divisive, and widely publicized controversies involving the use of zero tolerance policies occurred in the Midwestern, working-class town of Decatur, Illinois, a relatively small city three hours southwest of Chicago. The national media spotlight descended upon the Decatur Public School Board of Education shortly after Reverend Jesse L. Jackson and his Rainbow/PUSH Coalition got involved in the defense of six African-American high school students who were given a two-year expulsion under the Decatur Public School District's zero tolerance policy for fighting at a high school football game. Jesse L. Jackson's involvement in the Decatur incident brought negative attention to schools' zero tolerance policies toward violence. As a result of the media attention over the melee in Decatur, the Illinois State Schools Superintendent, Glenn W. McGee, has called for

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107. Dorothy Puch, *Decatur Ruling Relief for Other School Districts*, The News Gazette Online (Jan. 16, 2000) <http://www.news-gazette.com>.

108. (Jesse Jackson, Statement presented before the U.S. Commission on Civil Rights, February 18, 2000).

109. Macon County Sheriff, Roger Walker.

statewide public forums on student expulsions and suspensions.

On Friday, September 17, 1999, Eisenhower High School played a football game against MacArthur High School. Approximately six minutes into the third quarter, a fight broke out in the bleachers on the east end of the football field.[110] Witnesses indicated that spectators in the east bleachers scrambled to get away from the bench-clearing melee. Some spectators were seen "jumping over the rail, coming down trying to get onto the track" and "running up the bleachers trying to get away."[111]

While the fight lasted only approximately ten minutes, Ed Boehm, principal at MacArthur High School, testified that "he had never seen a fight of this magnitude in his 27 years in education."[112] At the fight's conclusion, witnesses testified that the bleachers at the game were half-empty and many of the spectators in the east bleachers expressed "fear, stress, and turmoil."[113] Seven spectators reported that they received injuries as a result of the fight.[114]

In addition to eyewitness testimony in the case, the district court admitted a videotape taken by a spectator seated in the west end of the bleachers. The videotape covered approximately the final one-third of the fight. The contents of the video corroborated the testimonies of the eyewitnesses. Specifically, the videotape showed a violent fight where the participants were punching and kicking at each other, with no regard for the safety of individuals seated in the stands watching the game. The videotape also showed that spectators in the bleachers were scrambling to get away from the fight.[115]

The following Monday, September 20, 1999, administrators at three Decatur School District high schools, Eisenhower High School, Stephen Decatur High School, and MacArthur High

110. *Fuller*, 78 F. Supp. 812 at 816.

111. *Id.*

112. *Id.*

113. *Id.*

114. Fortunately, nobody was seriously injured as a result of the fight. However, accident reports were made part of the legal record. The accident reports indicated that seven bystanders, six MacArthur High School Students and one adult sustained minor injuries, mainly bruises, due to the fight. For example, a 15-year-old MacArthur High School student testified that he suffered a contusion to his face when he was punched in his left cheek. *Id.*

115. *Id.* at 816.

School, initiated an investigation. Seven students were identified as instigating and participating in the fight at the football game. At this stage, all the students identified in the fight were suspended from school for ten days pending future Decatur School Board action.[116] The principal at each of the three high schools attended by the suspected students, Ed Boehm from MacArthur High School, Walter Scott from Eisenhower High School, and Jim Thomas from Stephen Decatur High School recommended a two-year expulsion of each student involved in the incident. Principal Thomas of Decatur High School, for example, stated that "[the] severe nature of the infraction warrants the recommendation for expulsion."[117]

Several days later on September 23, 1999, the Superintendent for the Decatur Public School District, Kenneth Arndt, distributed a letter to the parents or guardians of each of the six high school students. In accordance with the law of student suspensions and expulsions, the letter stated that a school disciplinary hearing had been set before a school hearing officer. In addition, the letter included the date, time, and location of the hearing, and the parents or guardian and the students were "requested to appear" at the scheduled meeting. The letter told the parents, "[y]ou are not required to attend, however, if you desire you may attend and also have an attorney and witnesses present."[118] Superintendent Arndt's letter also contained the provisions of the Decatur School District's Student Discipline Policy and Procedures that each student was charged with violating. Specifically, the students were charged with violating the following Decatur School District's Student Discipline Policy and Procedures:

Rule 10: Gang-Like Activities

Rule 13: Physical Confrontation/Physical Violence with Staff or Students

Rule 28: Any Other Acts That Endanger the Well-Being of Students, Teachers, or Any School Employee(s)

116. *Id.* at 817.

117. *Id.*

118. *Id.*

X. *FULLER V. DECATUR PUBLIC SCHOOL BOARD*: THE RULING AND SOME IMPLICATIONS FOR ZERO TOLERANCE POLICIES

On January 11, 2000, U.S. District Judge Michael McCuskey upheld the Decatur School Board's two-year expulsion of the six African-American high school students without alternative school placement. Shortly after the ruling, the Decatur School Board reduced the expulsions to one year with the option of the six accused students attending county-run alternative school programs. This reduction in suspension occurred after Rev. Jesse Jackson met with Illinois Governor George Ryan. Publicly, Governor Ryan stated that a major problem with zero tolerance school disciplinary policies and procedures was the potential for wide variations among districts in the adoption and implementation of such policies.

A closer look at the *Fuller* ruling reveals some shortcomings associated with excessively discretionary school disciplinary rules, such as the zero tolerance two-year expulsions of the six Decatur students. Judge McCuskey did not agree with the the students' position that since no weapons were used during the fight it was not a "significant fight."[119] More specifically, Judge McCuskey ruled against the Decatur students and upheld the two-year expulsion without alternative schools on four specific grounds. These four grounds include:

(1) In relation to the students' claim that their Fifth Amendment rights to due process were violated, the court ruled that each student "received notice of a hearing before an independent hearing officer and before the [Decatur] School Board."[120] As a result, the court concludes that the students' procedural due process rights were not violated.[121]

(2) The court ruled that the students did not present significant evidence that the Decatur School Board's decision was based upon race and thus, was a violation of both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[122] Dr. Walter Amprey,

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119. *Fuller*, 78 F. Supp. 2d at 815.

120. *Id.*

121. *Id.* It is important to point out that the court's discussion of due process concentrated solely upon satisfying minimum requirements for procedural due process. No treatment was given to substantive due process. One of the problems associated with zero tolerance litigation is the scant treatment given to substantive due process claims.

122. *Id.*

former superintendent of the Baltimore, Maryland public schools represented the students' claim that African-American students were disproportionately suspended and expelled compared to white students in the Decatur Public School District. Judge McCuskey held that "statistics and anecdotal evidence alone do not prove racial discrimination."[123]

(3) Judge McCuskey ruled that the students failed to establish the claim that the Decatur School Board had a "zero tolerance policy." Instead, the evidence indicated that on August 28, 1998, the Decatur School Board passed a mere resolution establishing a "zero tolerance position on school violence."[124]

(4) The students cannot challenge the school regulation prohibiting "gang-like activity" as void for vagueness. It was clear that the students violated Rule 13—Physical Confrontation/Physical Violence with Staff or Students and Rule 28— Any Other Acts That Endanger the Well-Being of Students, Teachers, or Any School Employee(s). The court ruled that the violation of these two rules alone would form sufficient basis for the Decatur School Board's expulsion of these students.[125]

The court found that the Decatur School Board's zero tolerance resolution was a political statement against criminal activity in the schools and not a formal policy pertaining to school discipline.[126] Thus, the court ruled that the Decatur School Board based its decision to expel the students on sufficient evidence. More importantly, the *Fuller* decision reflected the reality that courts give considerable deference to local school board disciplinary decisions.

Although school authorities possess sizable authority in the domain of school disciplinary issues, school officials need to be aware of the potential legal concerns raised by a "one size fits all" approach to zero tolerance policies, especially as it relates to weaponless student violence (i.e. fighting and verbal threats). The evidence is clear that the legislative intent of the 1994 Federal Gun-Free Schools Act was a zero-tolerance

123. Alan Richard, *U.S. Judge Upholds Expulsions in Decatur, Education Week* (Jan. 19, 2000), http://www.educationweek.org/ew/ewstory.

124. *Fuller*, 78 F. Supp. 2d at 815.

125. *Id.* at 816.

126. 105 Ill. Comp. Stat. Ann. § 5/10-22.6 (West 2001) (gives school boards the authority to suspend and expel students for "gross disobedience" for a period of up to two years pursuant to written procedures).

orientation toward guns in our nation's schools. However, in applying zero tolerance policies to student infractions outside the legal purview of firearms and/or serious weapons, schools run the risk of overstepping their authority if explicit measures are not taken to ensure that the disciplinary policies supporting the penalty are not carefully drafted and enforced. In the specific case of weaponless student violence infractions, such as those addressed in the *Fuller* case, school authorities should pay more attention to the disciplinary process in relation to the students' constitutional rights to due process.

With the *Fuller* ruling upholding the expulsions of the Decatur high school students, it is evident that a school's zero tolerance policy for serious student misconduct is permissible and within a school district's authority. Nevertheless, Illinois attorneys, Scott F. Uhler and David J. Fish offer some tangible recommendations for school districts considering imposing zero tolerance policies covering student offenses beyond weapon possession.[127] Some of these recommendations include addressing the following questions:

(1) Does the school really need a zero tolerance policy that allows for no exceptions? Schools can impose consistent and stiff disciplinary penalties for serious student misconduct, such as fighting, which gives students constitutional due process without creating a zero tolerance policy.

(2) Was the offense in question knowing and intentional?

(3) Is the offense covered by the school policy adequately defined?

(4) Is there a reasonable relationship between the punishment and the age and nature of the offense?

(5) Does the zero tolerance policy allow any flexibility? Can the school board or superintendent change the penalty if necessary?

(6) Is the school policy consistent with applicable state statutes or regulations?

(7) If the policy is strictly designed to be a zero tolerance policy, is it applied in a nondiscriminatory manner (i.e. not only along such traditional characteristics as race and gender, but to both so-called "good" and "bad" kids)?[128]

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127. Uhler and Fish define (zero tolerance school discipline policies defined as "adopting or enforcing any policy that mandates a preordained penalty, particularly expulsion."

128. *Id.*

XI. CONCLUSIONS

> Employing a blanket policy of expulsion (i.e. zero tolerance), clearly a serious penalty, precludes the use of independent consideration of relevant facts and circumstances. Certainly, an offense may warrant expulsion, but such punishment should only be handed down upon the Board's independent determination that the facts and circumstances meet the requirements for instituting such judgment. By casting too wide a net, school boards will effectively snare the unwary student. The school board may choose not to exercise its power of leniency. In doing so, however, it may not hide behind the notion that the law prohibits leniency, for there is no such law. Individualized punishment by reference to all relevant facts and circumstances regarding the offense and the offender is a hallmark of our criminal justice system.[129]

Attorneys and child advocates should be more concerned with the potential "intolerance" of zero tolerance policies applied to weaponless student infractions, which are often disguised and legitimated as disciplinary punishments in the nation's public schools. An examination of *Fuller v. Decatur Public School Board of Education School District* reveals a disciplinary punishment (a two-year suspension without the opportunity to attend alternative schools) that is "grossly disproportionate to the offense"[130] as well as "arbitrary, capricious, or wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning."[131] Very few people, including the author of this article, would argue that the high school students involved in the Decatur fighting incident did not deserve punishment for the melee they initiated. Surely a case could be made by the Decatur School Board for recommending a long-term suspension or expulsion of the six students. However, the Decatur School Board's two-year expulsion with no alternative schooling is not only excessive, but educationally troubling.

In summary, educators and the courts need to be more

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129. *Colvin v. Lowndes County Sch. Dist.*, 114 F. Supp 2d 504, 512 (N.D. Miss. 1999).

130. *See James*, 899 F. Supp. at 534; *Petrey*, 505 F.Supp. at 1090-91.

131. *See Washington v. Smith*, 618 N.E.2d 561 (Ill. App. Ct. 1993) (court ruled that a semester-long school expulsion for a student found in possession of an ice pick in school was unwarranted given the evidence that showed that the student did not threaten anyone in any way).

proactive in the following areas to prevent zero tolerance school disciplinary abuses:

(1) Courts need to be more receptive to potential "substantive due process" violations, especially in relation to the application of zero tolerance policies that are "grossly disproportionate to the offense"[132] or "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."

(2) Courts need to increase the admissibility of reliable statistical analyses in school discipline cases, including zero tolerance policies, when determining whether racially discriminatory school discipline policies exist. In appropriate cases, the courts' increased reliance on adverse impact claims of racial discrimination in school discipline related cases would be a definitive step in the right direction.

(3) School districts, policy makers, and researchers must employ more uniform and reliable school discipline data collection and dissemination procedures. School discipline data varies widely at the state and local levels.

While the aforementioned recommendations are far from comprehensive in dealing with the complexities of whether or not zero tolerance policies are viable methods of dealing with school violence in the 21st century, they should be areas of real concern for the educational and legal communities. By addressing these particular issues, the schools, courts, and child advocates will simultaneously minimize zero tolerance disciplinary abuses and preserve the delicate balance between maintaining school safety and protecting students' constitutional rights to due process under the law.

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132. *James*, 899 F. Supp. at 534 (D. Kan. 1995); *Petrey*, 505 F. Supp. at 1090-91 (E.D. Ky. 1981).

TABLE 1:
Percentage of Public Schools that Reported A Zero Tolerance Policy For Specified Student Offenses, By Selected School Characteristics: 1996-97

School characteristics	Types of offenses					
	Violence	Firearms	Weapons Other than Firearms	Alcohol	Drugs	Tobacco
All public schools	79	94	91	87	88	79
Instructional level						
Elementary school	79	93	91	87	88	82
Middle school	75	95	90	86	90	77
High school	80	96	92	86	89	72
School enrollment						
Less than 300	76	93	89	84	84	76
300-999	79	94	91	88	89	82
1,000 or more	86	98	93	85	92	72
Locale						
City	87	97	95	89	91	83
Urban fringe	82	95	90	88	90	80
Town	71	90	86	82	83	77
Rural	76	94	92	88	89	78
Region						
Northeast	78	89	90	83	84	79
Southeast	83	95	89	90	92	80
Central	72	93	88	82	83	75
West	83	97	95	91	93	83
Percent minority enrollment						
Less than 5 percent	71	92	88	82	83	75
5-19 percent	79	94	92	89	90	80
20-49 percent	83	95	90	87	89	79
50 percent or more	85	97	94	90	92	83
Percent of students eligible for free or reduced-price school lunch						
Less than 20 percent	76	92	88	86	87	77
20-34 percent	77	94	90	87	88	82
35-49 percent	79	97	95	89	92	81
70-74 percent	80	95	90	85	88	79
75 percent or more	84	95	93	87	89	81

SOURCE: Heaveside *supra* n. 19 (citing *Principal/School Disciplinary Survey on School Violence* (U.S. Dept. of Educ., FRSS 63 1997)).

TABLE 2:
Number and Percentage of Schools In Which Specified Disciplinary Actions Were Taken Against Students; Total Number of Actions Taken, and Percentage of Specific Disciplinary Actions Taken Against Students, By Type of Infraction: 1996-97

Infraction	Total Number of schools taking one or more of these specified actions	Percent of schools taking one or more of these specified actions	Total number of these specified actions taken	Expulsions (Number of actions taken)	Transfers to alternative schools or programs (Number of actions taken)	Out-of-school suspensions lasting 5 or more days (Number of actions taken)
Possession or use of a firearm	4,170	5	16,587	5,143	3,301	8,144
Possession or use of a weapon other than a firearm	16,740	22	58,554	13,698	12,943	31,970
Possession, distribution, or use of alcohol or drugs, including tobacco	20,960	27	170,464	30,522	34,255	105,723
Physical attacks or fights	30,160	39	330,696	50,961	62,108	217,627

SOURCE: Heaveside *supra* n. 19 (citing *Principal/School Disciplinary Survey on School Violence* (U.S. Dept. of Educ., FRSS 63 1997)).

APPENDIX A

THE 1994 FEDERAL GUN-FREE SCHOOLS ACT OF 1994
PUBLIC LAW 103-882- October 20, 1994

"PART F—GUN POSSESSION

"Sec. 14601. GUN-FREE REQUIREMENTS

"(a) Short Title.—This section may be cited as the "Gun-Free Schools Act of 1994."

"(b) Requirements.—

"(1) In General.—Except as provided in paragraph (3), each State receiving Federal funds under this Act 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 local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

"(2) Construction.—Nothing in this title 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.

"(3) Special Rule.—(A) Any State that has a law in effect prior to the date of enactment of the Improving America's Schools Act of 1994 which is in conflict with the not less than one year expulsion requirement described in paragraph (1) shall have the period of time described in subparagraph (B) to comply with such requirement.

"(B) The period of time shall be the period beginning on the date of enactment of the Improving America's Schools Act and ending one year after such date.

"(4) Definition.—For the purpose of this section, the term 'weapon' means a firearm as such term is defined in section 921 of title 18, United States Code.

"(c) Special Rule.—The provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act.

"(d) Report to State.—Each local educational agency requesting assistance from the State educational agency that is to be provided from funds made available to the State under this Act shall provide to the States, in the application requesting such assistance B

"(1) an assurance that such local educational agency is in compliance with the State law required by subsection (b); and

"(2) a description of the circumstances surrounding any expulsions imposed under the State law required by subsection (b), including B

"(A) the name of the school concerned;

"(B) the number of students expelled form such school; and

"(C) the type of weapons concerned.

"(e) Reporting.—Each State shall report the information described in subsection (c) to the Secretary on an annual basis.

"(f) Report to Congress.—Two years after the date of enactment of the Improving America's Schools Act of 1994, the Secretary shall report to Congress if any State is not in compliance with the requirements of this title.

"SEC. 14602. POLICY REGARDING CRIMINAL JUSTICE SYSTEM REFERRAL.

"(a) In General.—No funds shall be made available under this Act to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to school served by such agency.

"(b) Definitions.—For the purpose of this section, the terms 'firearm' and 'school' have the same meaning given to such terms by section 921(a) of title 18, United States Code.

"SEC. 14603. DATA AND POLICY DISSEMINATION UNDER IDEA

"The Secretary shall—

"(1) widely disseminate the policy of the Department in effect on the date of enactment of the Improving America's Schools Act of 1994 with respect to disciplining children with disabilities;

"(2) collect data on the incidence of children with disabilities (as such term is defined in section 602(a)(1) of the Individuals With Disabilities Education Act) engaging in life threatening behavior or bringing weapons to schools; and

"(3) submit a report to Congress not later than January 31, 1995, analyzing the strengths and problems with the current approaches regarding disciplining children with disabilities.

APPENDIX B
PUBLIC SCHOOL DISCIPLINARY MEASURES UNDER STATE LAW

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Alabama	Possession of drugs, alcohol, weapons, physical harm to a person, or threat of physical harm.	Possession of a firearm.	V
Alaska	Willful disobedience; open and persistent defiance of authority; conviction of a felony.	Possession of firearm or deadly weapon.	V
Arizona	N/A	Continued open defiance of authority; continued disruptive or disorderly behavior; use or display of a dangerous instrument or deadly weapon; use or possession of a gun; excessive absenteeism.	V
Arkansas	Assault or threat, offering or selling alcoholic beverages or other illicit drugs; possession of paging device; willful or intentional damage or destruction or stealing of school property.	Hazing; possession of firearm or other weapons; illegal drugs or other contraband.	V

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Colorado	Continued willful disobedience or open and persistent defiance of proper authority; willful destruction or defacing of school property.	Continued willful disobedience or open and persistent defiance of proper authority; willful destruction or defacing of school property; carrying, bringing, using or possessing a dangerous weapon; sale of a drug or controlled substance; robbery; assault.	M
Connecticut	Assault; possession of firearms; offer of sale and distribution of controlled substances; disruptive behavior.	Possession of firearm, deadly weapon or dangerous instrument; offer of sale and distribution of a controlled substance.	M But not required if student is expelled for possession of a firearm or the offering and selling of controlled substances.
Delaware	N/A	Possession of a weapon or illegal drugs.	V
District of Columbia	N/A	Possession of a weapon.	M
Florida	Violence against any school district personnel; violation of school's sexual harassment policies; formally charged with a felony or delinquent act.	Violence against any school district personnel or school property; violation of school's sexual harassment policies; possession of a firearm; willful disobedience; open defiance of authority; charged with a felony; unlawful possession or use of controlled dangerous substances.	M

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Georgia	Assault or battery.	Possession of a weapon.	V
Hawaii	Possession of a dangerous weapon; possession of liquor or illicit drugs.	Possession of dangerous weapon; possession of liquor or illicit drugs.	M
Idaho	Disruption of good order.	Carrying weapon or firearm.	V
Illinois	Gross disobedience and misconduct.	Possession of weapon.	V
Indiana	Misconduct; substantial disobedience; other unlawful activity.	Possession of firearm and deadly weapon (e.g., Swiss Army knife); misconduct, substantial disobedience; other unlawful activity.	V
Iowa	Possession of a dangerous weapon; possession of alcoholic beverages.	Possession of a dangerous weapon.	V
Kansas	Willful disobedience of student conduct regulation; disruptive conduct, conduct which endangers safety of others; commission of a felony or misdemeanor; disobedience of an order of a school official; possession of a weapon; possession or use of illegal drugs.	Possession of a weapon; possession of drugs; willful violation of student conduct regulation; disruptive conduct, conduct which endangers safety of others; commission of a felony or misdemeanor; disobedience of an order of a school official.	V

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Kentucky	Willful disobedience or defiance of authority; use of profanity/vulgarity; assault or battery; threat or force of violence; use or possession of alcohol, drugs, weapons, stealing, or destroying school property.	Willful disobedience or defiance of authority; use of profanity/vulgarity; assault or battery; threat or force of violence; use or possession of alcohol, drugs, weapons, stealing, or destroying school property. Possession of prescription drugs with the intent to distribute; assault or battery.	M
Louisiana	Willful disobedience; intentional disrespect toward school official; use of unchaste or profane language; use of tobacco or possession of alcoholic beverages or controlled dangerous substances; defacing school property; possession of firearm; habitually tardiness and absentee-sm; other serious offenses.	Possession of a weapon.	M
Maine	Forming secret fraternities or societies; delicate and disorderly conduct.	Deliberate disobedience or deliberate disorder; possession of firearm; possession and trafficking of drugs; forming secret fraternities or societies.	V

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Maryland	N/A	Possession of a firearm.	V
Massachusetts	Possession of dangerous weapon; possession of illegal drugs, alcohol or legal drugs (e.g., Prozac or anti-depressants); hitting or pushing teacher, school official or employee; felony complaint or conviction.	Possession of dangerous weapon; possession of illegal drugs, alcohol or legal drugs (e.g., Prozac or anti-depressants); assault (including hitting or pushing teacher, school official or employee); felony conviction.	V
Michigan	Gross misdemeanor or persistent disobedience.	Possession of dangerous weapon; arson; criminal sexual conduct; physical assault by student in grade 6 or above; gross misdemeanor or persistent disobedience.	V
Mississippi	N/A	Possession of dangerous weapon or firearms; possession of controlled substance.	M (Except for possession of weapons; felonies).
Missouri	Possession of a weapon.	Possession of a weapon.	V
Montana	Possession of a firearm.	Possession of a firearm.	V

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Nebraska	Violence, force, coercion, threat, intimidation; willfully causing or attempting to cause substantial damage to property, stealing or attempting to steal property of substantial value, or repeated damage or threat involving property; causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student; threatening or intimidating any student for the purpose of or with the intent of obtaining money or anything of value from such student; possession of a firearm; engaging in the unlawful possession, selling, dispensing, or use of a controlled substance or an imitation controlled substance or alcoholic liquor; sexual assault.	Violence, force, coercion, threat, intimidation; willfully causing or attempting to cause substantial damage to property, stealing or attempting to steal property of substantial value, or repeated damage or theft involving property, causing or attempting to cause personal injury to a school employee, a school volunteer, or to any student; threatening or intimidating any student for the purpose of or with the intent of obtaining money or anything of value from such student; possession of a firearm; engaging in the unlawful possession, selling, dispensing, or use of a controlled substance; or attempting to assault any person.	V

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Nevada	Possession of a firearm; possession and sale of a controlled substance; membership in a gang; battery on school official.	Possession of a firearm; possession and sale of a controlled substance; membership in a gang; battery on school official.	V
New Hampshire	Gross misconduct	Gross misconduct; theft; destruction; violence; possession of a pellet or BB gun or rifle	V
New Jersey	Possession of a firearm; assault with weapon; continued and willful disobedience; open defiance of authority; physical assault upon another student, taking or attempting to take personal property or money from another student, wilfully causing damage to school property; unauthorized occupancy of school grounds, knowing possession or consumption of alcohol or dangerous substances.	Possession of a firearm; assault with weapon; continued and willful disobedience; open defiance of authority; physical assault upon another student, taking or attempting to take personal property or money from another student; wilfully causing damage to school grounds, knowing possession or consumption of alcohol or dangerous substances.	M
New Mexico	N/A	Possession of a weapon.	V
New York	Insubordinate or disorderly conduct.	Possession of weapon.	M

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
North Carolina	Willful violations of conduct; physical assault or serious injury to another student, teacher or school personnel; false bomb threats.	Possession of weapon; presents a clear threat to school safety.	V
North Dakota	Insubordination; habitual indolence; disorderly conduct; possession of a weapon.	Possession of a firearm.	V
Ohio	Disruptive behavior.	Possession of weapon.	V
Oklahoma	Violation of school regulation; immorality.	Possession of a firearm.	V
Oregon	Assaults or menaces a school employee or another student; willful disobedience and defiance of authority; use or display or profane or obscene language; property damage; possession of a weapon.	Assaults or menaces a school employee or another student; willful disobedience and defiance of authority; use or display or profane or obscene language; property damage; possession of a weapon.	V
Pennsylvania	Disobedience or misconduct.	Possession of a weapon.	V
Rhode Island	Disruptive behavior; possession of a firearm or realistic replica of firearm.	Possession of a weapon or firearm.	V

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
South Carolina	Commission of any crime; gross immorality; gross misbehavior; persistent disobedience.	Possession of firearm; commission of any crime; gross immorality; gross misbehavior; persistent disobedience.	V
South Dakota	Insubordination or misconduct; aggressive violent behavior; consumption or possession of alcoholic beverages; use or possession of a controlled dangerous substance; use or possession of a firearm; property damage.	Consumption or possession of alcoholic beverages; use or possession of a controlled dangerous substance; use or possession of a firearm.	V
Tennessee	Immoral or disreputable conduct; violence or threat of violence; property damage; assault of school official with vulgar language; possession of a firearm; drug use.	Battery upon school official; possession of narcotics or weapons.	V
Texas	N/A	Possession of firearm. Illegal knife, club or weapon.	M

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Utah	Frequent or flagrant willful disobedience, defiance of proper authority, or disruptive behavior, including the use of foul, profane, vulgar, or abusive language; willful destruction or defacing of school property; possession , control, or actual or threatened use of a real, look alike, or pretend weapon, explosive, or noxious or flammable material; or the sale, control, or distribution of a drug or controlled substance, an imitation controlled substance defined, or drug paraphernalia; commission of an act involving the use of force or the threatened use of force.	Possession of a firearm; aggravated assault; arson; possession, use and distribution of marijuana or controlled substance.	V
Vermont	Ongoing threat; disruptive behavior; possession.	Misconduct on school property, school bus or activity; possession of firearm.	V
Virginia	N/A	Possession of a firearm	V
Washington	Gang activity; defacing of property.	Possession of firearm or deadly weapon; gang activity.	V

State	Reasons for Suspension	Reasons for Expulsion	State Provision of Public Education to Suspended or Expelled Students Mandatory ("M") Voluntary ("V")
Wisconsin	Disobeying school rules, conveying threat or false information concerning the destruction of school property; possession of a firearm.	Disobeying school rules, conveying threat or false information concerning the destruction of school property; possession of a firearm; disruptive conduct.	V
West Virginia	Use, sale or possession of narcotics; felonious act; threat to injure; willful disobedience; possession of alcohol; use of profane language directed at school employee or pupil; intentionally defaced any school property; participation in any physical altercation; habitually violated school rules or policies.	Use, sale or possession of narcotics; possession of firearm or deadly weapon; felonious act; threat to injure; willful disobedience; possession of alcohol; use of profane language directed at school employee or pupil; intentionally defaced any school property; participation in any physical altercation; habitually violated school rules or policies.	V
Wyoming	Willful disobedience or open defiance of authority; willful destruction or defacing of school property; detrimental behavior to the education, welfare, safety or morals of other pupils including the use of foul, profane, or abusive language. Torturing, tormenting, or abusing a pupil or teacher with physical violence.	Willful disobedience or open defiance of authority; willful destruction or defacing of school property; detrimental behavior to the education, welfare, safety or morals of other pupils including the use of foul, profane, or abusive language. Torturing, tormenting, or abusing a pupil or teacher with physical violence. Possession, use, transfer, carrying or selling a deadly weapon.	V

APPENDIX C
PUBLIC SCHOOL DISCIPLINE DATA COLLECTION BY STATE

State	Suspensions	Expulsions	Alternative Educational Program	By Race	By Gender	Offense
Alabama	•	•				•
Alaska		•				
Arizona	•	•				•
Arkansas	•	•		•	•	•
California	•	•	•	•	•	
Colorado	•	•				
Connecticut	•	•				•
Delaware	•	•				•
District of Columbia						
Florida	•	•				
Georgia	•			•	•	•
Hawaii		•				•
Idaho	•	•				•
Illinois	•					•
Indiana	•	•		•	•	•
Iowa	•	•				•
Kansas	•					•
Kentucky	•	•				•
Louisiana	•	•				•
Maine						
Maryland	•	•				•
Massachusetts	•	•				
Michigan	•	•				

State	Suspensions	Expulsions	Alternative Educational Program	By Race	By Gender	Offense
Minnesota	•	•		•	•	•
Mississippi		•				•
Missouri						•
Montana						
Nebraska		•				•
Nevada	•	•				•
New Hampshire						
New Jersey						
New Mexico	•				•	
New York						
North Carolina						
North Dakota						
Ohio				•		
Oklahoma						
Oregon		•				•
Pennsylvania	•	•				•
Rhode Island	•		•	•	•	•
South Carolina	•			• Not mandated	•	•
South Dakota						
Tennessee	•	•		•	•	
Texas	•	•	•	•	•	•

State	Suspensions	Expulsions	Alternative Educational Program	By Race	By Gender	Offense
Utah						
Vermont						
Virginia	•	•				•
Washington	•	•				
Wisconsin	•	•	•	•	•	•
West Virginia	•					
Wyoming						

See: The Advancement Project and The Civil Rights Project at Harvard University, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, Appendix V (June 2000).