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Brian Quinn

*Michigan State University College of Law*

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***Zero Tolerance or Zero Sense?: A Guide to Challenging Zero Tolerance Disciplinary Policies in Public Schools***

***by  
Brian Quinn***

*They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.*<sup>1</sup>

*While school officials may not have the right answers, they have to err on the side of caution.*<sup>2</sup>

INTRODUCTION

In response to incidents of school violence, public school systems are “getting tough” by implementing zero tolerance policies that impose harsh, predetermined penalties for student misconduct.<sup>3</sup> Most people would agree that schools should not tolerate the possession of weapons or drugs on school property. Additionally, most would agree that schools, and more importantly students, should not tolerate the threat of violence in their classrooms. The real debate surrounding the implementation and application of zero tolerance policies is whether schools should impose predetermined consequences irrespective of the particularized circumstances of a student’s misconduct. Stated differently, the debate “is over the automatic nature and severity of such punishments,”<sup>4</sup> and the question becomes “[i]s a singular, preordained punishment for any category of offense fair and lawful?”<sup>5</sup>

The use of zero tolerance disciplinary policies in schools has “come under fire” from the media, concerned parents, and special interest groups in recent years.<sup>6</sup> Most of the public’s apprehension over zero tolerance is not focused upon the substance of such policies, but rather

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<sup>1</sup> Benjamin Franklin

<sup>2</sup> ADVANCEMENT PROJECT, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 2 (2000) (“Advancement Project”).

<sup>3</sup> See Scott F. Uhler & David J. Fish, *Zero-Tolerance Discipline in Illinois Public Schools*, Ill. Bar. J. at 1 (May 2001), available at <http://www.illinoisbar.org/Member/may011j/p256.htm>.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> See *id.*

the focus is on whether the punishments and procedures have “some reasonable connection to the misconduct in question [and whether] school officials have reasonably determined that intentional misconduct occurred.”<sup>7</sup> Countless media reports have illustrated the absurdity of adhering to such a rigid approach in certain situations.

A story from Mississippi illustrates how the application of zero tolerance policies in some instances defies commonsense.

[S]tudents on a school bus were playfully throwing peanuts at one another. A peanut accidentally hit the white female bus driver, who immediately pulled over to call the police. After the police arrived, the bus was diverted to the courthouse, where children were questioned. Five African-American males, ages 17 and 18, were then arrested for felony assault, which carries a maximum of five years in prison. The Sheriff commented to one newspaper, “[T]his time it was peanuts, but if we don’t get a handle on it, the next time it could be bodies.” The young men lost their bus privileges and suspension was recommended. As a result of the assistance of an attorney and community pressure, the criminal charges were dismissed. However, all five young men, who were juniors and seniors, dropped out of school because they lacked transportation to travel the [thirty] miles to their school in this poor, rural county in the Mississippi delta. The impact of the punishment was underscored by one of the young men who stated, “I [would have] gone to college.”...This young man, who earned A-grades in his favorite subject, math, wanted to graduate...Reportedly, the other young men are simply “hanging out,” at risk of getting into trouble.<sup>8</sup>

Nevertheless, proponents of zero tolerance policies argue that it is in the students’ best interest to err on the side of caution when dealing with perceived threats to school safety.<sup>9</sup> Some administrators believe that the media’s over-sensationalizing of zero tolerance events adds to the public’s misunderstanding of the policies. Furthermore, administrators assert that the general public cannot fully appreciate the enormous duty educators face to keep schools safe on a daily

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

<sup>8</sup> Advancement Project, *supra* note 2, at 3.

<sup>9</sup> *See id.* at 2.

basis.<sup>10</sup> Yet, the success of zero tolerance policies is debatable and such policies have become a common subject of litigation in our courts.<sup>11</sup>

This comment will examine the competing philosophies surrounding the zero tolerance debate as well as the legality of such policies. In sum, this comment will examine the legal issues necessary to challenge a zero tolerance disciplinary policy. Part One will explore the history surrounding the implementation of zero tolerance policies in public schools. Next, some examples of media reports will illustrate how the application of such policies defies commonsense because school officials are precluded from exercising discretion. The comment will then set forth the theoretical arguments for and against zero tolerance disciplinary policies, as well as the general legal standards applicable to student suspensions and expulsions. Finally, Part One will highlight recent cases that have challenged zero tolerance policies. At the end of Part One, it will become clear that the arguments for and against zero tolerance in public schools run deep. It will also become clear that students are not adequately protected under the law.

Part Two of the comment will outline the various legal arguments a student advocate may advance when challenging the validity of a zero tolerance disciplinary policy. Because such policies necessarily implicate due process concerns, these claims will be examined in detail. In addition to due process claims, zero tolerance policies may be attacked due to their disproportionate impact on both students of color and students with disabilities. As such, these types of claims will be examined as well. In the end, however, it will become apparent that successfully challenging a zero tolerance policy on legal grounds is a difficult task.

## I. Background

### A. A Brief History of Zero Tolerance Policies

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<sup>10</sup> *See id.*

<sup>11</sup> *See Uhler & Fish, supra* note 3, at 1.

It's difficult to find an exact definition of the term "zero tolerance" or an exact point in time in which the revolution began.<sup>12</sup> In its purest sense, zero tolerance policies provide for nondiscretionary, predetermined punishment guidelines for certain behaviors.<sup>13</sup> The zero tolerance methodology first gained national notoriety in the 1980's during the Reagan administration's war on drugs.<sup>14</sup> Reagan's federal drug policy targeted the illegal transportation of narcotics into the country.<sup>15</sup> The program, appropriately titled "Zero Tolerance," required border officials to seize the vehicles and property of persons entering the United States with even trace amounts of narcotics and charge such persons in federal court to the utmost extent of the law.<sup>16</sup> By punishing all drug related offenses severely and uniformly, the program was intended to send a message that such illegal behavior will no longer be tolerated in the United States.<sup>17</sup> The federal approach to the drug trade aroused the public's interest in the zero tolerance method.<sup>18</sup>

"[F]ueled by media hype, fear of the unthinkable, and perhaps even a bit of guilt," parents placed enormous pressure on their school boards to adopt far reaching policies to deal with "problem students" in the wake of tragic incidents involving school violence.<sup>19</sup> In response to such concerns and anxious to send a no-nonsense message, school boards and school officials began to implement their own zero tolerance policies modeled after the federal drug program to

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<sup>12</sup> See RUSSELL J. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (Ind. Educ. Pol. Center Aug. 2000).

<sup>13</sup> See Advancement Project, *supra* note 2, at 2.

<sup>14</sup> See Skiba, *supra* note 12, at 2.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* ("The language of zero tolerance seemed to fire the public imagination and within months began to be applied to a broad range of issues, ranging from environmental pollution and trespassing to skateboarding, homelessness, and boom boxes.").

<sup>19</sup> Margaret Graham Tebo, *Zero Tolerance, Zero Sense: School Violence is a Hot-Button Issue but are Strict, Inflexible Policies the Answer? Some Say Yes, While Others Insist That All-Or-Nothing Punishment Merely Alienate Students*, 86-APR A.B.A. J. 40, 41 (2000).

ensure school safety.<sup>20</sup> In the educational setting then, a “zero tolerance policy is generally defined as a school or district policy that mandates predetermined consequences or punishment for specific offenses, regardless of the circumstances or disciplinary history of the student.”<sup>21</sup>

“Beginning in 1989, school districts in California, New York, and Kentucky mandated expulsion for drugs, fighting, and gang-related activity.”<sup>22</sup> Such policies focused on criminal and potentially dangerous student behavior, requiring mandatory expulsion or lengthy suspension for such offenses.<sup>23</sup> Eventually, the movement gained more momentum, and what originally began at the grassroots school district level now resulted in statewide regulations and legislation.<sup>24</sup> Schools throughout the nation abandoned the rehabilitative method of education and began to employ harsher policies in response to the perceived increase in school violence.<sup>25</sup> After years of campaigns designed at keeping at-risk students in the public school system, the zero tolerance movement instead sought to identify the “problem students” and remove them from school before violence erupted in the classroom.<sup>26</sup>

The federal government also became enamored with the zero tolerance approach to prevent school violence. In 1994, Congress passed the Gun-Free Schools Act (“the Act”).<sup>27</sup> The Act mandates a one-year expulsion for a student in possession of a firearm on school property

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<sup>20</sup> See Skiba, *supra* note 12, at 2; Advancement Project, *supra* note 2, at 1; J. Kevin Jenkins & John Dayton, *Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools*, 171 ED. LAW. REP. 13 (2003).

<sup>21</sup> Julie Underwood, General Counsel for the National School Boards Association, *available at* [www.nsba.org](http://www.nsba.org).

<sup>22</sup> Skiba, *supra* note 12, at 2.

<sup>23</sup> See Advancement Project, *supra* note 2, at 1.

<sup>24</sup> See Robert E. Shepherd, Jr. & Anthony J. DeMarco, *Weapons in Schools and Zero Tolerance* (1996), *available at* <http://www.abanet.org/crimjust/juvjus/cjweapons.html>; *see also* Advancement Project, *supra* note 2, at 17 (“[P]oliticians seeking to woo voters with their ‘tough on crime’ agendas have used Zero Tolerance as a popular sound bite.”).

<sup>25</sup> See Alicia C. Insley, *Suspending and Expelling Children From Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1045 (2001).

<sup>26</sup> See Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 64-65 (2002).

<sup>27</sup> See 20 U.S.C.A. § 7151 (West Supp. 2002); *see also* Blumenson & Nilsen, *supra* note 26, at 64.

and referral of the student to the appropriate law enforcement agency.<sup>28</sup> Furthermore, the Act conditions federal educational funding upon the enactment of similar state legislation that also imposes a mandatory one-year expulsion for students carrying a firearm.<sup>29</sup> Needless to say, all fifty states have complied with the Act, although it is unclear whether the states have done so out of a sense of moral obligation or out of fear over losing their much needed federal funding.<sup>30</sup> Originally written, the Act covered only the possession of firearms.<sup>31</sup> States and school districts, though, were confronted with public pressure to expand the coverage of their zero tolerance policies beyond the Congressional mandate.<sup>32</sup>

Many school districts have now broadened the scope of zero tolerance to punish types of behaviors that pose little or no threat to general school safety, including drug or alcohol possession, fighting, threats, swearing, and “disruptive behavior.”<sup>33</sup> While there is some variation on how individual school districts apply their zero tolerance policies,<sup>34</sup> it is evident that such policies prefer the elimination of students to the elimination of unwanted behavior,

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<sup>28</sup> See 20 U.S.C.A. § 7151 (West Supp. 2002); *see also* Skiba, *supra* note 12, at 2.

<sup>29</sup> See Blumenson & Nilsen, *supra* note 26, at 64-65; *see also* Shepherd & DeMarco, *supra* note 24 (The Act provides that “no federal assistance under the Elementary and Secondary Education Act of 1965 [42 U.S.C. §§ 6301-92 (2000)] would be available to school districts that do not provide for the mandatory expulsion for at least one year of students who bring firearms to school.”).

<sup>30</sup> See Blumenson & Nilsen, *supra* note 26, at 65; Insley, *supra* note 25, at 1047-48 (“[T]he percentage of schools with [zero tolerance] policies has never fallen below seventy-five percent.”).

<sup>31</sup> See Skiba, *supra* note 12, at 2. “[A]mendments have broadened the language of the bill to included any instrument that may be used as a weapon.” *Id.*

<sup>32</sup> See Advancement Project, *supra* note 2, at 1; *see also* Blumenson and Nilsen, *supra* note 26, at 65-68.

<sup>33</sup> See *e.g.* Skiba, *supra* note 12, at 2.

Almost all schools report having zero-tolerance policies for firearms (94 percent) and weapons other than firearms (91 percent), according to the National Center for Education Statistics... Eighty-seven percent of schools have zero-tolerance policies for alcohol, and 88 percent have policies for drugs. Most schools also have zero-tolerance policies for violence and tobacco (79 percent each).

TOBIN MCANDREWS, ZERO TOLERANCE POLICIES 1 (2001), *available at* [www.ericfacility.net/ericdigests/ed451579.htm](http://www.ericfacility.net/ericdigests/ed451579.htm).

<sup>34</sup> See Skiba, *supra* note 12, at 2; *see also* National School Safety and Security Services, *Zero Tolerance*, *available at* [www.schoolsecurity.org/trends/zero\\_tolerance.htm](http://www.schoolsecurity.org/trends/zero_tolerance.htm).

punishment over prevention. Indeed, the phrase “zero tolerance” has become a buzzword in education and “has taken on a life of its own.”<sup>35</sup>

## B. Absurd Stories

The following are but a few of the examples where application of zero tolerance policies defies commonsense, dealing with such subjects as so-called weapon or drug possession, fighting, dress codes, beeper possession, and sexual harassment.

- An eighth grade middle school student in Virginia was removed from school for violating the school’s zero tolerance policy on weapon possession. The student’s friend passed him a note stating that she had brought a knife to school, hid it in her notebook, and was contemplating using it for suicide. The student persuaded his friend to turn it over and took the notebook containing the knife to his locker for safekeeping. A fellow student reported that the student had a knife in his locker and the eighth grader was suspended for over three months.<sup>36</sup>
- A thirteen-year old honor student from Ohio was suspended under a zero tolerance policy for drug possession and drug transmitting for ingesting a Midol tablet and giving another Midol to a classmate. The student went to the school clinic due to severe menstrual pain. The school nurse took her temperature, allowed her to rest, and unsuccessfully attempted to contact her mother. The nurse left the room and the student took two Midol tablets from a medicine box left open on a cot. The student ingested one tablet and gave another tablet to a classmate complaining of menstrual cramps. This incident gained national coverage, and has become known as “the Midol case.”<sup>37</sup>
- A National Merit Scholar from Florida was expelled and jailed after a kitchen knife was found in her car. The girl was in the process of moving and the knife was left in the car over the weekend. School officials saw the knife on the floor of the car in the student parking lot. The student was charged with felony possession of a weapon on school

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<sup>35</sup> National School Safety and Security Services, *Zero Tolerance*, available at [www.schoolsecurity.org/trends/zero\\_tolerance.htm](http://www.schoolsecurity.org/trends/zero_tolerance.htm).

<sup>36</sup> See The Rutherford Institute, *Zero Tolerance Strikes Again: Eighth-Grade Student Suspended for Saving Friend’s Life* (May 7, 2001), available at [http://www.rutherford.org/articles\\_db/press\\_release.asp?article\\_id+164](http://www.rutherford.org/articles_db/press_release.asp?article_id+164).

<sup>37</sup> See Perry A. Zirkel, *The Midol Case*, Phi Delta Kappan: The Professional Journal for Education (June 30, 1997), available at <http://www.pdkintl.org/kappan/kzir9706.htm>; see also CNN, ‘Midol suspension’ ends: Honor student returns to class (Oct. 3, 1996), available at <http://www.cnn.com/US/9610/03/midol.suspension/index.html>.



property, was suspended for five days, and was unable to partake in graduation activities.<sup>38</sup>

- A fourteen-year old student from Ohio accidentally left a pocketknife in his backpack after a Boy Scout trip the previous weekend. The student's Scout Master testified on his behalf, but to no avail. The student was expelled under the district's zero tolerance policy which required mandatory expulsion for the possession of a knife on school property. The student was eventually readmitted to school due the efforts of Legal Aid, but the student had missed eighty days of school as a result of the ordeal.<sup>39</sup>
- A kindergartner from Virginia was suspended from school for bringing a beeper to school and showing it to a classmate during a field trip. The five-year old was suspended for violating the school's zero tolerance beeper policy. The student's mother stated that the kindergartner brought the beeper to school because he liked the sound that it made.<sup>40</sup>
- At an Indiana high school, two graduating seniors, who were also Marine recruits, were prohibited from attending their graduation for not compiling with the graduation dress code: a collared shirt, tie, and slacks. Instead, the two students donned their dress blue uniforms.<sup>41</sup>
- A nine-year old Louisiana boy was suspended from school for drawing a picture, pursuant to an in-class assignment, of a soldier carrying a knife.<sup>42</sup>
- A kindergartner from Pennsylvania was suspended from school for bringing a plastic ax as part of his Halloween costume.<sup>43</sup>
- A second grader from Louisiana was suspended from school for bringing her grandfather's pocket watch for "show-and-tell." The watch had a tiny knife attached.<sup>44</sup>
- A ten-year old student from Colorado was expelled from her elementary school because her mother placed a small knife in her lunchbox in order to cut an apple. The student,

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<sup>38</sup> See Associated Press, *Fort Meyers Honor Student Arrested Under Zero-Tolerance Policy* (May 23, 2001), available at <http://www.oblivion.net/news/display.php?articleID=447>.

<sup>39</sup> See Advancement Project, *supra* note 2, at 4.

<sup>40</sup> See CNN, *Kindergartner suspended for bringing beeper to school* (Oct. 29, 1996), available at <http://www.cnn.com/US/9610/29/briefs/beeper/index.html>.

<sup>41</sup> See Edwin J. Feulner, Ph.D., *Zero Tolerance? Try Zero Wisdom*, *The Heritage Foundation* (June 29, 2001), available at <http://www.heritage.org/Press/Commentary/ed06292001.cfm>.

<sup>42</sup> See *id.*

<sup>43</sup> See Advancement Project, *supra* note 2, at 4.

<sup>44</sup> See Dennis Cauchon, *Zero-tolerance policies lack flexibility*, *USA Today* (April 13, 1999), available at <http://www.usatoday.com/educate/ednews3.htm>.

who realized that the knife was violative of the school's zero tolerance policy, informed her teacher of the knife. The student was praised for her honesty, but, nevertheless, the student was expelled for weapon possession.<sup>45</sup>

- A six-year old student was suspended under a Colorado school district's zero tolerance drug policy for giving lemon drops to a fellow classmate.<sup>46</sup>
- A ten-year girl from Colorado was suspended from school for repeatedly asking a boy if "he liked her." The boy complained to a teacher and school officials suspended her under the district's zero tolerance sexual harassment policy.<sup>47</sup>
- A seventh grade student from Ohio faced an expulsion hearing for allegedly sniffing "White-Out" during class. Under the district's zero tolerance drug policy, the school recommended expulsion. The student denied the allegations and drug experts testified on the student's behalf that "White-Out" is not a drug in any event. In the end, the student was suspended from school for a total of nine days and her school records indicate that her suspension was due to drug abuse.<sup>48</sup>

### C. Overall Effectiveness

It has been well over a decade since public schools began implementing zero tolerance disciplinary policies and the overall effectiveness of such policies is debatable. A "strong body of compelling research" suggests that such policies generally fall short of widely accepted educational principles.<sup>49</sup> Additionally, as the numerous media reports highlighted above indicate, the application of these policies in some instances defies commonsense.<sup>50</sup> Opponents of zero tolerance assert that the long-term implications of such policies, particularly when viewed in light of zero tolerance's questionable success, requires the elimination of the zero

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<sup>45</sup> See *id.*

<sup>46</sup> See Randy Cassingham, Losing my Tolerance for "Zero Tolerance," available at <http://www.thistrue.com/zt.html>.

<sup>47</sup> See *id.*

<sup>48</sup> See Advancement Project, *supra* note 2, at 6.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> See *id.*

tolerance philosophy from the educational system entirely.<sup>51</sup> Proponents, on the other hand, assert that zero tolerance policies have been effective and are necessary to maintain a healthy, safe environment conducive to learning. A third group believes that zero tolerance policies are merely a political sound bite and that school officials rarely apply such policies blindly without exercising some degree of discretion prior to recommending suspension/expulsion.<sup>52</sup>

Each of these competing viewpoints needs to be taken into consideration for any person wishing to challenge a zero tolerance policy. The arguments for and against such policies go to such key issues as whether such policies are an educational necessity, whether school officials are prohibited from exercising discretion, the disparate impact on students of color and special education students, and whether less restrictive means that more fully adhere to educational theory are available. The different arguments not only are relevant to legal attacks, but also are crucial for public policy challenges.

### 1. *Opponents' argument*

The “law and order” approach to education, it is argued, has long-term implications for an entire generation of students.<sup>53</sup> There are six major arguments opponents advance in support of their contention that zero tolerance policies will have a devastating impact on an entire generation of students. First, the application of harsh punishment, irrespective of the individualized circumstances of an offense, conflicts with “the prescriptions for healthy child development.”<sup>54</sup> Specifically, the inflexible punishment guidelines administered by educators is at variance with two major psychological needs of children: the need to develop strong, trusting relationships with the prominent and influential adults in their lives, and the need to develop a

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<sup>51</sup> *See id.*

<sup>52</sup> *See* National School Safety and Security Services, *Zero Tolerance*, available at [www.schoolsecurity.org/trends/zero\\_tolerance.htm](http://www.schoolsecurity.org/trends/zero_tolerance.htm).

<sup>53</sup> *See* Advancement Project, *supra* note 2, at 17.

<sup>54</sup> *See id.* at 10.

positive attitude towards fairness, justice, and the legal system.<sup>55</sup> “Kids are not going to respect teachers and administrators who cannot appreciate the difference between a plastic knife and a switch-blade.”<sup>56</sup> These policies cast too wide a net and sweep up many innocent students. Zero tolerance policies further alienate students from society and the adults in their lives, with the damage being particularly severe for those students already considered at-risk.<sup>57</sup> Children now learn at an early age that there is no such thing as a second chance, and the concept of innocent until proven guilty is lost.<sup>58</sup> Furthermore, the intent to commit an act, a key element in the criminal justice system, is irrelevant under zero tolerance policies because school officials blindly defer to such policies without exercising discretion.<sup>59</sup> As such, students grow to mistrust their school, authority figures, and the overall legal system. Zero tolerance ignores the developmental needs of children and instills in them a value system at odds with sound educational theory.

Second, as a result of zero tolerance policies, students are actually less inclined to confide in educators.<sup>60</sup> As such, incidents of violence may be harder to predict because educators may miss the warning signs and cries for help from students because these students do not trust their own teachers. As one scholar noted, “All of the recent school shooters showed some signs of either repeated violent fantasies or of detectible mental illness months before their crimes.”<sup>61</sup> Therefore, opponents argue that zero tolerance policies fail as a preventative measure. Zero

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<sup>55</sup> *See id.*

<sup>56</sup> Ralph C. Martin, II, Chairperson, ABA Criminal Justice Section, *ABA Report on Zero Tolerance* (Feb. 2001), available at [www.abanet.org](http://www.abanet.org).

<sup>57</sup> *See* Insley, *supra* note 25, at 1069; *see also* Advancement Project, *supra* note 2, at 8; Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191 (2002).

<sup>58</sup> *See* Tebo, *supra* note 19, at 41.

<sup>59</sup> *See* BERIT KJOS, ZERO TOLERANCE FOR NON-COMPLIANCE: TEN STEPS TOWARD LIFELONG BEHAVIOR MODIFICATION 2, available at <http://www.crossroad.to/text/articles/zerotol.html>.

<sup>60</sup> *See* Tebo, *supra* note 19, at 44.

<sup>61</sup> *Id.*

tolerance is simply a vehicle for those districts that are ill equipped or unwilling to prevent school violence by methods such as counseling *before* those students commit acts of violence.<sup>62</sup> The rehabilitative method, which is considered a preventative measure to some degree, has been replaced by zero tolerance, which lies dormant until violence erupts and then punishes such violence “severely” after the fact.

Third, because most zero tolerance policies require the referral of the student to the appropriate law enforcement agency for certain offenses, an alarming amount of children are being pushed into the criminal justice system.<sup>63</sup> Therefore, school districts are shifting their disciplinary authority and educational responsibilities to law enforcement agencies to the detriment of the children they seek to educate.<sup>64</sup> What was once a schoolyard scuffle can now land a child in juvenile court or even a criminal proceeding.<sup>65</sup> The additional hurdles placed in a student’s path, due to the fact that they now have a criminal record, were not as prominent twenty years ago because the misconduct would have been dealt with exclusively by the school.<sup>66</sup> Opponents question whether it is in the child’s best interest, or the community’s interest for that matter<sup>67</sup>, to enmesh students in an unforgiving criminal justice system.<sup>68</sup>

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<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 41 (“Kids whose misbehaviors in the past would have occasioned oral reprimands from a teacher or perhaps a trip to the principal’s office are now being labeled a threat to school safety. And, those very same kids-will-be-kids incidents are now prompting punishments ranging from suspension to referral to juvenile court system for behaviors that even the schools agree do not actually compromise safety.”).

<sup>64</sup> *See* Advancement Project, *supra* note 2, at 15.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 16; *see also* Insley, *supra* note 25, at 1065 (“In today’s society, young adults without a high school diploma find it difficult to obtain an entry-level job or to continue education or training.”).

<sup>67</sup> “On average, a high school dropout costs society between \$243,000 and \$388,000 over his or her lifetime due to both a lack of productivity and dependence on government subsidies.” Insley, *supra* note 25, at 1065.

<sup>68</sup> *See* Advancement Project, *supra* note 2, at 16. Many students are suspended or expelled from school prior to any final adjudication of the law enforcement agency or court responsible for the determination. *See* Shepherd & DeMarco, *supra* note 24.

Fourth, zero tolerance policies necessarily result in the short or long term deprivation of education.<sup>69</sup> Critics of zero tolerance policies assert that suspensions and expulsions have negative consequences on academic performance.<sup>70</sup> For example, suspended/expelled students may receive failing grades for each day of class they are absent, teachers often do not provide assignments in order for the student to keep up their studies, many school districts are not required to provide alternative education programs for suspended/expelled students, students may be retained in their grade due to excessive absence or an inability to catch up, and students may be pressured to drop out of school entirely.<sup>71</sup> Therefore, zero tolerance policies are contributing to an increasing underclass of uneducated persons that have been pushed away by the school itself.<sup>72</sup>

Fifth, opponents argue that zero tolerance policies disparately impact African-Americans, Hispanics, and disabled children.<sup>73</sup> The statistics are alarming: while African-American children only represent 17% of national public school enrollment, they constitute 32% of all suspensions; 25% of African-American male students have been suspended at least once during their academic careers.<sup>74</sup> A recent study interviewed attorneys representing students of color in disciplinary actions. These attorneys indicated that African-American and Hispanic children are more likely to be referred to and disciplined under zero tolerance policies, and such racial groups tend to be suspended or expelled for more discretionary, subjective offenses such as “defiance of

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<sup>69</sup> See Advancement Project, *supra* note 2, at 13.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

The uneducated are primed for unemployment or marginal employment, [citations omitted] and all that often comes with it: impoverishment, criminal victimization and temptation, poorer health, shorter lives, political powerlessness, and despair. Disproportionate numbers succumb to alcohol or drug abuse. Educational privation is also an excellent way to make a person feel fungible and insignificant. It is a formula for subtracting self-esteem and substituting the disdain of others [citations omitted].

Blumenson & Nilsen, *supra* note 26, at 75-76.

<sup>72</sup> See Blumenson & Nilsen, *supra* note 26, at 76.

<sup>73</sup> See Advancement Project, *supra* note 2, at 1; Zweifler & De Beers, *supra* note 57, at 203-05.

<sup>74</sup> See Advancement Project, *supra* note 2, at 7 (“White students, 63% of enrollment, represent only 50% of suspensions and 50% of expulsions.”).

authority.”<sup>75</sup> Opponents argue that regardless of whether the disparity is intentional or not, “[o]ur society cannot afford to leave any one segment of our population behind.”<sup>76</sup> Although not a popular argument, statistics have shown that zero tolerance policies have become a tool to eliminate students of color from the education system.<sup>77</sup>

Special education students are also adversely affected under zero tolerance policies. Disabled children are protected under the Individuals with Disabilities in Education Act (“IDEA”)<sup>78</sup> to ensure that they are not punished for behavior that is a manifestation of their disability.<sup>79</sup> But in many instances, school officials clearly ignore the law and rely on their relevant zero tolerance policies to exclude special education students.<sup>80</sup> To compound the problems faced by disabled children, parents and students are often unaware of their legal rights and the procedures to be followed when a special education student is to be excluded from school. Those parents that are aware of the arguably “greater” protections afforded under IDEA have sought to circumvent the zero tolerance process by fighting to get their children classified as special education in order to keep their child in school. To make matters worse, the process of getting a child qualified for special education can be a long, slow process<sup>81</sup>

Seventh, opponents argue that the statistics simply do not show that zero tolerance is responsible for greater safety in public schools.<sup>82</sup> Opponents are quick to point out that zero

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<sup>75</sup> See *id.* at 8. These same attorneys “assert that school personnel rely upon racial and ethnic stereotypes in taking disciplinary action.” *Id.* at 9.

<sup>76</sup> *Id.* at 9.

<sup>77</sup> See Zweifler & De Beers, *supra* note 57, at 204.

<sup>78</sup> 20 U.S.C. § 1400 et seq.; see also *Honig v. Doe*, 484 U.S. 305 (1988).

<sup>79</sup> See 20 U.S.C. § 1400; see also *Honig v. Doe*, 484 U.S. 305 (1988).

<sup>80</sup> See Advancement Project, *supra* note 2, at 9.

<sup>81</sup> See *id.*; see also Interview with Kathryn L. Quinn, Elementary School Teacher, Mason Public Schools, Mason, MI (Jan. 23, 2003).

<sup>82</sup> See Insley, *supra* note 25, at 1061-62.

There are many misconceptions about the prevalence of youth violence in our society and it is important to peel back the veneer of hot-tempered discourse that often surrounds the issue... While it is important to carefully review the circumstances surrounding these horrifying incidents so that we may learn from them, we must also be cautious about inappropriately creating a cloud of fear

tolerance policies were a response to students committing heinous acts with the use of firearms and that firearm cases represent the smallest category of zero tolerance discipline cases.<sup>83</sup> When principals were asked in a 1997 report conducted by the National Center for Education Statistics to list what they deemed the most serious problems in their respective schools, the most common problems were tardiness (forty percent), absenteeism (twenty five percent), and fighting (twenty one percent).<sup>84</sup> Weapon possession (two percent), drug use (nine percent), and gang activity (five percent), the aims of the initial zero tolerance movement, were noticeably further down on the list of principals' key concerns.<sup>85</sup> Furthermore, the idea that zero tolerance policies will reduce school violence fails to acknowledge the obvious: students, such as the Columbine shooters, will not be deterred from mindless acts of violence by the existence of a zero tolerance policy.<sup>86</sup> Because zero tolerance acts after the fact and such disenfranchised children will not care if they are suspended from the school they seek to destroy, zero tolerance policies seem like an inappropriate solution.

## 2. *Proponents' argument*

Despite these assertions, proponents of zero tolerance claim that the policies have, in fact, reduced incidents of school violence. Proponents argue that although the results of zero tolerance policies may be hard to swallow in some cases, they are needed to “send an unambiguous message that drugs and weapons have no place in school.”<sup>87</sup> Proponents are quick

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over every student in every classroom across the country. In the case of youth violence, it is important to note that, statistically speaking, schools are among the safest places for children to be.

Martin, *supra* note 56 (citing Final Report, Bi-Partisan Working Group on Youth Violence, 106<sup>th</sup> Congress, February 2000).

<sup>83</sup> See Martin, *supra* note 56.

<sup>84</sup> See Russell J. Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372 (1999), available at <http://www.pdkintl.org/kappan/kski9901.htm>.

<sup>85</sup> See *id.*

<sup>86</sup> See Tebo, *supra* note 19, at 44.

<sup>87</sup> Cauchon, *supra* note 44.



to remind the public that school safety still remains an important issue and zero tolerance seems to soothe the public's anxiety over the issue.<sup>88</sup> Zero tolerance policies can hardly be seen as an overreaction when the incidents of school violence we have witnessed in the past were so horrific and the loss suffered so tragic.<sup>89</sup>

A safe school allows children to develop mentally and emotionally with their peers, adults, and community.

When children feel safe at home, they are ready to grow. When in the neighborhood, children are ready to play, explore, and form relationships with other children. When they feel safe at school, they are ready to learn and become confident and competent adults.<sup>90</sup>

The costs of zero tolerance, according to proponents, have yet to outweigh the benefits. While opponents are quick to point to an array of statistics showing that zero tolerance policies actually do not curb school violence, proponents assert “statistics are hardly reassuring as long as the possibility exists that it could happen in *our* school, to *our* children.”<sup>91</sup> As one superintendent commented, “While school officials may not have the right answer, they have to err on the side of caution.”<sup>92</sup> Zero tolerance policies eliminate the guesswork, and potential civil liability<sup>93</sup>, inherent in an educator's balancing of school safety against individual student rights.

In response to the “Midol case” mentioned above, one principal defended his school's zero tolerance drug policy by arguing that a drug such as Midol could eventually lead to a

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<sup>88</sup> See 130 Education Reporter 3, *Zero Tolerance Creates Imaginary Problems, Penalizes Innocence* (Nov. 1996); see also Advancement Project, *supra* note 2, at 1.

<sup>89</sup> See Skiba & Peterson, *supra* note 84.

<sup>90</sup> Gina E. Polley & Francine Cullari, *Peer Mediation in the Classroom: A New Initiative for the State Bar of Michigan*, 79 MICH. B.J. 1192 (2000).

<sup>91</sup> Skiba & Peterson, *supra* note 84 (emphasis in original).

<sup>92</sup> Advancement Project, *supra* note 2, at 1

<sup>93</sup> Critics also a quick to note that zero tolerance policies are really just methods to avoid civil liability. See Tebo, *supra* note 19, at 41 (“[T]he harshness of the penalties for seemingly innocuous offenses is often fueled less by genuine safety concerns and more by fear of lawsuits.”).

“slippery slope into [more] lethal drugs.”<sup>94</sup> The principal commented, “It’s easy to minimize [the situation] and say, well, it’s just pain medication. But it’s a little more serious than that.”<sup>95</sup>

In response to opponents’ argument that zero tolerance casts too broad of a net and sweeps in many students that did not intentionally break the rules, proponents counter by asserting that the benefits of such still outweigh these costs.<sup>96</sup> As one educator noted, “[T]he benefits of zero tolerance policies in raising a school’s overall standard of conduct outweighs the harm done to any child who inadvertently breaks a rule.”<sup>97</sup> Therefore, while a few students may be deprived of their education temporarily, the majority will benefit from zero tolerance policies in the long run.

In any event, proponents argue that even though some school disciplinary policies have been labeled as “zero tolerance,” most school administrators retain their ability to exercise discretion.<sup>98</sup> Many school districts have disciplinary policies for serious student misconduct as well as a zero tolerance policy on the books. Therefore, merely expelling a student for serious misconduct does not necessarily mean that a zero tolerance policy was utilized and the particular school official failed to exercise some degree of discretion.<sup>99</sup>

Also, as mentioned above, scholars have shown that students of color are disparately affected under zero tolerance policies. Proponents assert that the statistics concerning the number of minority students suspended or expelled under such policies is misleading. For example, “the unfortunate correlation of race and poverty in our society suggests that inequitable

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<sup>94</sup> 130 Education Reporter 3, *Zero Tolerance Creates Imaginary Problems, Penalizes Innocence* (Nov. 1996).

<sup>95</sup> *Id.*

<sup>96</sup> See Kjos, *supra* note 59.

<sup>97</sup> *Id.* (citing Tamar Lewin, *School Codes Without Mercy Snare Pupils Without Malice*, NY Times, 12 March 1997).

<sup>98</sup> See Uhler & Fish, *supra* note 3, at 3.

<sup>99</sup> See *id.*

racial treatment may be a socioeconomic issue rather than a racial one.”<sup>100</sup> Also, intercity students, which tend to be students of color, may engage in misconduct more frequently.<sup>101</sup>

At this point in time, the data available is hardly conclusive of the proposed success of zero tolerance policies.<sup>102</sup> The research shows, however, that the school districts that have been successful with zero tolerance have engaged in a tier-approach, leaving some discretion with administrators.<sup>103</sup> In any event, the National Center for Education Statistics has reported that zero tolerance policies have had little impact on previously unsafe schools.<sup>104</sup>

### 3. *The Realists’ argument*

As can be seen from the enactment of zero tolerance policies across the United States, school safety is a political issue, like it or not. While special interest groups and politicians battle over sound bites, some statistics have shown that “zero tolerance [has] little true meaning in the day-to-day actions of most educators.”<sup>105</sup> Simply put, school administrators still exercise discretion in deciding whether to suspend or expel a particular student irrespective of whether a zero tolerance policy is in effect.

National School Safety and Security Services, an organization that works with school administrators in over thirty states, explained of how zero tolerance policies are applied in public school as a practical matter.

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<sup>100</sup> Skiba & Peterson, *supra* note 84. Skiba and Peterson, however, dismiss this very assertion by stating that “studies have continued to find evidence of black overrepresentation in suspension – even after controlling for socioeconomic background – suggesting that racial disproportionality in suspension involves more than just poverty.” *Id.*

<sup>101</sup> *See id.* The authors dismiss this argument as well. “Yet when rates of behavior for African American and other students are taken into account, the differences are minor at best, and behavior makes a weak contribution to explaining the discrepancy in the suspension of blacks and whites.” *Id.*

<sup>102</sup> “There is little, if any, data showing that zero tolerance policies increase school safety or reduce school violence.” Insley, *supra* note 25, at 1061.

<sup>103</sup> *See* Tebo, *supra* note 19, at 41.

<sup>104</sup> *See* McAndrews, *supra* note 33, at 1.

<sup>105</sup> National School Safety and Security Services, Zero Tolerance, *available at* [www.schoolsecurity.org/trends/zero\\_tolerance.htm](http://www.schoolsecurity.org/trends/zero_tolerance.htm).

[The concept of zero tolerance seems] to rest more in the minds and rhetoric of politicians and academicians than it does school administrators...[Anecdotal media stories] do not reflect discipline administration in most of our nation's schools.

The majority of educators strive for firm, fair, and consistent discipline applied with good common sense. Unfortunately, the anecdotal incidents used to define zero tolerance appear to lack the common sense piece of the formula. Contrary to suggestions by the media, politicians, and Ivory-Tower theorists, the real problem is therefore the absence of common sense, not the presence of intentionally harsh actions committed to fuel a master nationwide plan called "zero tolerance."<sup>106</sup>

This view may have some merit, but zero tolerance policies are still on the books in most school districts and some, albeit few, educators fail to exercise discretion in suspension or expulsion determinations. Thus, the potential for abuse remains.

#### D. Legal Challenges

Education law is a complex and constantly evolving area of the law.<sup>107</sup> As a general proposition, "[w]hen students are at school, they are expected to submit to school authority."<sup>108</sup> "In establishing and maintaining a climate conducive to teaching and learning, educators have considerable discretion in controlling student conduct."<sup>109</sup> While students are in school, teachers stand in *loco parentis* and, thus, it is necessary for the teacher to have the ability to punish the student as the parent would.<sup>110</sup> This does not mean, however, that students are left unprotected by the law.<sup>111</sup> The problem with safeguarding students' rights is that students, parents, and educators are often unaware of the procedures necessary to satisfy legal mandates. Thus, a brief

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<sup>106</sup> *Id.*

<sup>107</sup> See CHARLES J. RUSSO, THE YEARBOOK OF EDUCATION LAW 2002 42 (Charles J. Russo ed., Education Law Association 2002) ("[C]ourts continue to define the increasingly complex and often controversial matters surrounding attempts to ensure an equitable balance between the rights of students and the duty of school officials to provide a safe learning environment.").

<sup>108</sup> H.C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 344 (5th ed. 1999).

<sup>109</sup> Hudgins & Vacca, *supra* note 108, at 344.

<sup>110</sup> See E. EDMUND REUTER, JR., THE LAW OF PUBLIC EDUCATION 763 (4th ed. 1994).

<sup>111</sup> See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (Students do not "shed their constitutional rights...at the school house gate.").

overview of students' rights is necessary. In examining these general principles it should become evident that students are not adequately protected under the law. It should also be kept in mind that courts are highly deferential to the disciplinary decisions of school officials.<sup>112</sup>

The United States Supreme Court has held that public education is a property interest protected by the Fourteenth Amendment.<sup>113</sup> In *San Antonio v. Rodriguez*,<sup>114</sup> the Court found that public education is not an explicitly guaranteed Constitutional right.<sup>115</sup> Two years later in *Goss v. Lopez*,<sup>116</sup> the Court eventually found that public education is merely a property interest or entitlement rather than a right or privilege.<sup>117</sup> Thus, the Court has not fully accepted the idea that public education should be considered a "right."<sup>118</sup> The determination of whether education is deemed a "fundamental right" is crucial for a due process challenge.<sup>119</sup>

Substantive due process refers to the power the government to enact laws affecting or regulating certain activities. Where a fundamental right is being impaired by a particular statute or regulation, a reviewing court will employ a strict scrutiny analysis to determine whether the government may legislate the activity in question.<sup>120</sup> This standard of review presents a formidable obstacle for the government to overcome. If the reviewing court determines that the

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<sup>112</sup> See e.g., *Woodland v. Strickland*, 420 U.S. 308, 326 (1975) (While students "do have substantive and procedural rights while at school," "it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Colvin v. Lowndes Cty. Sch. Dist.*, 114 F.Supp2d 504 (N.D. Miss. 1999).

<sup>113</sup> See *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>114</sup> 411 U.S. 1 (1973).

<sup>115</sup> See *San Antonio v. Rodriguez*, 411 U.S. 1 (1973). *Rodriguez* was an Equal Protection case dealing with public school finance. Thus, the Court declined to "determine whether [public education] must be regarded as [a] fundamental [right] for purposes of examination under the Equal Protection Clause." *Rodriguez*, 411 U.S. at 25. The Court did state that public education "is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 42.

<sup>116</sup> 419 U.S. 565 (1975).

<sup>117</sup> Some states, however, have determined that public education is akin to a fundamental right under state law. See e.g., *Serrano v. Priest*, 5 Cal.3d 584 (1971).

<sup>118</sup> See *Hudgins & Vacca*, *supra* note 108, at 354.

<sup>119</sup> See *Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir. 2000).

<sup>120</sup> See *Seal*, 229 F.3d at 574 (the policy will be "upheld only where they are narrowly tailored to a compelling government interest.").

interest involved does not rise to the level of a fundamental right, then a lower standard of review, known as rational basis, is employed.<sup>121</sup> Because this is the framework in which courts work to assess the validity of a substantive due process challenge, the Court’s ruling in *Goss*, that public education is *not* a fundamental right, means that virtually all education regulations will be upheld on substantive due process grounds. In this regard, Courts have recognized that education laws are necessary, and have further acknowledged that the suspension or expulsion of students is required under certain circumstances.<sup>122</sup> Therefore, suspensions and expulsions are better addressed under procedural due process in most circumstances.<sup>123</sup>

The Due Process Clause requires the state to ensure that procedural safeguards are satisfied whenever it deprives a person of life, liberty, or property.<sup>124</sup> A court must first determine whether a “life,” “liberty,” or “property” interest is involved. If so, the court must then decide how much “process” is warranted under the circumstances – i.e., how much notice is required? Is there a need for some type of hearing? Is there a right to counsel? “Although some states have had statutes on their books for many years that guaranteed to students certain elements of procedural due process, the matter was not seriously challenged until the 1960s.”<sup>125</sup>

In 1967, the United States Supreme Court decided *In re Gault*,<sup>126</sup> which established the right of minors to due process under the Fourteenth Amendment prior to being institutionalized in a juvenile center.<sup>127</sup> Although *Gault* did not specifically apply to school suspensions or

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<sup>121</sup> See *id.* at 575 (“rationally related to a legitimate state interest”).

<sup>122</sup> See Hudgins & Vacca, *supra* note 108, at 355.

<sup>123</sup> “Courts have been more active with respect to the procedural rights of students who are to be excluded from school rather than with the authority of the school to exclude.” *Id.* at 356.

<sup>124</sup> U.S. Const., amend. XIV.

<sup>125</sup> Hudgins & Vacca, *supra* note 108, at 356.

<sup>126</sup> 387 U.S. 1 (1967).

<sup>127</sup> See *In re Gault*, 387 U.S. 1 (1967). (The Court held that minors in juvenile cases were entitled to: 1) specific notice of the charges against them within a sufficient time to prepare for a hearing; 2) notification of the right to counsel; 3) privilege against self-incrimination, and 4) the right to confrontation and cross-examination of witnesses); see also Hudgins & Vacca, *supra* note 108, at 356.

expulsions, savvy litigants and lower courts attempted to extend its holding into educational law.<sup>128</sup> The Court's decision in *Goss* settled this point of law to some degree.

The *Goss* Court held that in situations where the student is to be suspended less than ten days, the student must be given, at a minimum, informal notice of the charges against them and an opportunity of some sort of hearing.<sup>129</sup> Because the Court found that public education is merely a property interest, only minimum due process is required for suspensions shorter than ten days. The Court, however, indicated that the due process analysis was flexible in this regard and the amount of due process afforded to the student depends on the nature of the misconduct and the severity of the punishment.<sup>130</sup> *Goss* did not decide what amount of due process is required for suspensions longer than ten days.<sup>131</sup> As will be discussed below, many zero tolerance policies have been challenged on procedural due process grounds.

In addition to due process grounds, many suspensions or expulsions have been attacked on Equal Protection grounds predicated upon racial discrimination. As mentioned above, research has revealed disparities in the suspension and expulsion rates for students of color.<sup>132</sup> Students, like all citizens, are protected from discrimination under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>133</sup> At its most basic level, the Equal Protection Clause prohibits states, including public schools, from discriminating on the

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<sup>128</sup> See Hudgins & Vacca, *supra* note 108, at 358.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.* (Also, “[t]he Court held that school officials may remove a student from school prior to a suspension if his presence is a danger to persons or property or is disruptive to teaching and learning.”).

<sup>131</sup> Thus, the Court did not fully extend the protections provided under *Gault* to public school suspensions and expulsions. See *id.* (“It held that a school does not have to allow a student to be represented by counsel, to have witnesses, or to confront and cross-examine witnesses against him.”). The Court reaffirmed this point in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). *Fraser* involved a two-day suspension, and the Court noted that this 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.” *Fraser*, 478 U.S. at 686.

<sup>132</sup> See Zweifler & De Beers, *supra* note 57, at 204.

<sup>133</sup> U.S. Const. Amend. XIV, § 1.

basis of race, color, or national origin.<sup>134</sup> In determining whether a statute or school policy is violative of the Equal Protection Clause on the basis of race or national origin, courts will examine the statute or policy under a strict scrutiny analysis – i.e., the statute or policy in question must be narrowly tailored to achieve a compelling government interest.<sup>135</sup> But the United States Supreme Court also requires a plaintiff to demonstrate that the government, or school board, intended to discriminate in enacting or applying the regulation.<sup>136</sup> Thus, a showing that a particular class of persons was disparately affected without more will not make out a claim for an Equal Protection violation.<sup>137</sup>

Students are additionally protected from discrimination under Title VI of the Civil Rights Act of 1964.<sup>138</sup> Title VI prohibits discrimination on the basis of race, color, or national origin by agencies that receive federal funding – i.e., public schools.<sup>139</sup> There are two different types of Title VI claims: one that mirrors an Equal Protection claim, in that a plaintiff must show disparate treatment and a discriminatory motive, and the other claim permits a cause of action in which a racially neutral law merely has an adverse impact.<sup>140</sup> Title VI claims are an underutilized tool for students who have been discriminated against by their respective school systems.<sup>141</sup>

Any discussion of student rights with respect to exclusions from school must necessarily include a discussion on the implications such exclusions may have on special education students.

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<sup>134</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the states, protects the citizens against the state itself and all of its creatures – boards of education not excepted.”).

<sup>135</sup> See *Fuller v. Decatur Pub. Sch. Bd. of Educ.*, 78 F.Supp.2d 812, 825 (C.D. Ill. 2000), *aff’d*, 251 F.3d 662 (7th Cir. May 24, 2001).

<sup>136</sup> See *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>137</sup> See *Fuller v. Decatur Pub. Sch. Bd. of Educ.*, 78 F.Supp.2d 812, 824-26 (C.D. Ill. 2000), *aff’d*, 251 F.3d 662 (7th Cir. May 24, 2001).

<sup>138</sup> 42 U.S.C. § 2000d (2000).

<sup>139</sup> See 42 U.S.C. § 2000d (2000).

<sup>140</sup> See *Advancement Project*, *supra* note 2, at Appendix II p.5-7.

<sup>141</sup> See *id.* at 5.



Students with disabilities are protected under federal law to ensure that their school or society does not cast such students aside. Of key importance to our discussion on zero tolerance disciplinary policies is the Individuals with Disabilities in Education Act (“IDEA”).<sup>142</sup> IDEA mandates that certain procedural safeguards be followed when excluding a special education student from school.<sup>143</sup> Furthermore, IDEA prohibits excluding special education students from school for conduct that is a manifestation, or direct result, of their disability.<sup>144</sup> Because IDEA affords added protections to students with disabilities and many zero tolerance policies have the potential to circumvent these procedures, IDEA needs to be considered when evaluating any zero tolerance policy.

There are many more protections afforded to students, but these are the main causes of actions with regards to the devastating effects of zero tolerance policies. Below is a brief sample of some cases that have challenged zero tolerance policies.

1. *Seal v. Morgan*<sup>145</sup>

In 1996, Seal, a high school junior from Knox County, Tennessee, was suspended for possession of a knife while on school property in violation of the school’s zero tolerance policy.<sup>146</sup> Seal’s classmate and friend, Pritchert, was involved in a dispute with a third male student over a girl.<sup>147</sup> Out of fear, Pritchert began carrying a hunting knife in order to protect

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<sup>142</sup> 20 U.S.C. § 1400 et seq.

<sup>143</sup> See 34 C.F.R. § 300.523(c). See also *Honing v. Doe*, 484 U.S. 305 (1988). In *Honing*, two students with emotional disabilities were suspended indefinitely following misconduct that was related to their disabilities. See *Honing v. Doe*, 484 U.S. 305, 312-13 (1988). The United States Supreme Court held that a ten-day suspension of a student with a disability does not constitute a “change in educational placement.” The Court, however, found that a school may not automatically expel or indefinitely suspend a student with a disability without adhering to the mandates of IDEA.

<sup>144</sup> See 34 C.F.R. § 300.519(c); see also Marilyn A. Mahusky, et al., *Discipline for Students with Disabilities: Ensuring Both School Safety and Access to Education*, 28-JUN VT. B.J. 44 (2002).

<sup>145</sup> 229 F.3d 567 (6th Cir. 2000).

<sup>146</sup> See *Seal v. Morgan*, 229 F.3d 567, 570 (6th Cir. 2000).

<sup>147</sup> See *Seal*, 229 F.3d at 570-71.

himself.<sup>148</sup> Pritchert had shown the knife to Seal and another friend, Richardson.<sup>149</sup>

Unbeknownst to Seal, Richardson took the knife from Pritchert and placed it in the glove compartment of Seal's car.<sup>150</sup> The next evening, Seal, Pritchert, and Seal's girlfriend drove the car to the high school's football game to perform in the band.<sup>151</sup> Four other students informed school officials that saw Seal, Pritchert, and Seal's girlfriend drinking alcohol in the car prior to entering the game.<sup>152</sup> The assistant principal searched their coats and instrument cases, finding no evidence of alcohol.<sup>153</sup> The assistant principal then asked Seal if he could search his car, Seal consented, and the assistant principal found the knife in the glove compartment.<sup>154</sup>

Seal was suspended, pending an expulsion determination for the possession of the knife.<sup>155</sup> Seal, accompanied by his parents, attended a disciplinary hearing where Seal stated that while he knew that Pritchert was carrying a knife, he did not know that Richardson had placed the knife in his car.<sup>156</sup> The hearing officer upheld the school's decision to suspend Seal pending a expulsion hearing conducted by the school board. At the expulsion hearing, Seal, who was represented by counsel, again argued that he had no knowledge that the knife was in his car. The school board unanimously approved Seal's expulsion from school under its zero tolerance policy.<sup>157</sup>

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<sup>148</sup> *See id.* at 571.

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See Seal*, 229 F.3d at 571.

<sup>154</sup> *See id.*

<sup>155</sup> *See id.* at 572.

<sup>156</sup> *See id.* at 572-73. Both Richardson and Seal's girlfriend confirmed Seal's description of the events and further stated that Seal had no knowledge of the knife in the car. *See id.* at 572.

<sup>157</sup> *See id.* at 572-73. The school district's policy stated that students that were found in possession of a firearm would be suspended or expelled "not less than one year." *Seal*, 229 F.3d at 573.

Seal brought suit and argued, *inter alia*, that the board violated his rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>158</sup> The Sixth Circuit found, using rational review, that a suspension or expulsion for weapon possession under a zero tolerance policy was not rationally related to a legitimate state interest when the student did not knowingly possess the weapon.<sup>159</sup> The court stated that:

No student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its presence. Indeed, the entire concept of possession – in the sense of possession for which the state can legitimately prescribe and mete out punishment – ordinarily implies knowing or conscious possession... We would have thought this principle so obvious that it would go without saying.<sup>160</sup>

The court remanded the case for a determination as to whether Seal had actually known of the knife.<sup>161</sup>

The Sixth Circuit ended its opinion with some powerful language concerning the need for school safety and students' rights.

We understand full well that the decision not to expel a potentially dangerous student also carries very serious potential consequences for other students and teachers. Nevertheless, the Board may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a Zero Tolerance Policy that purports to make students' knowledge a non-issue. We are also not impressed by the Board's argument that if it did not apply its Zero Tolerance Policy ruthlessly...this would send an inconsistent message to its students. Consistency is not a substitute for rationality.<sup>162</sup>

## 2. *Ratner v. Loudon Cty. Pub. Sch.*<sup>163</sup>

Ratner, a thirteen-year old, had taken a knife from a friend after she informed Ratner that she was going to use the knife to commit suicide.<sup>164</sup> Ratner convinced his friend to turn over the

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<sup>158</sup> *See id.* at 573.

<sup>159</sup> *See id.* at 574-76.

<sup>160</sup> *Id.* at 575-76.

<sup>161</sup> *See id.* at 580.

<sup>162</sup> *Id.* at 581.

<sup>163</sup> 16 Fed.Appx. 140 (4th Cir. 2001), *cert. denied*, 534 U.S. 1114 (Jan. 22, 2002).

knife, took possession of a binder which contained the knife, and placed it in his locker for safekeeping.<sup>165</sup> Eventually, the school found out about the knife and called Ratner to the principal's office. After Ratner was questioned, he admitted to possessing the knife and retrieved it from his locker. The principal "acknowledged that she believed Ratner acted in what he saw as the [friend's] best interest and that at no time did Ratner pose a threat to harm anyone with the knife."<sup>166</sup> Nevertheless, Ratner was suspended for four months for possessing a weapon in violation of the school's zero tolerance policy.

Ratner brought suit, alleging the school violated his due process and equal protection rights.<sup>167</sup> The district court found for the school and the Fourth Circuit affirmed.<sup>168</sup> The Fourth Circuit stated that "[t]he district court...concluded, correctly, that the school officials gave Ratner constitutionally sufficient, if imperfect, process in the various notices and hearings it accorded him."<sup>169</sup> The court further stated that "the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy of the sort alleged to be in place [here] or of its application to Ratner."<sup>170</sup>

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<sup>164</sup> See *Ratner v. Loudon Cty. Pub. Sch.*, 16 Fed.Appx. 140, 141 (4th Cir. 2001), *cert. denied*, 534 U.S. 1114 (Jan. 22, 2002).

<sup>165</sup> See *Ratner*, 16 Fed.Appx. at 141. Ratner claimed that he intended to inform both his parents and his friend's parents of the incident after school that day. See *id.*

<sup>166</sup> *Id.* at 141.

<sup>167</sup> See *id.* at 142. Ratner also argued that his right to be free from cruel and unusual punishment under the Eighth Amendment had been violated. See *id.* at 142.

<sup>168</sup> See *id.* at 142.

<sup>169</sup> *Id.* at 142

<sup>170</sup> *Ratner*, 16 Fed.Appx. at 142. Although agreeing in the outcome, Judge Hamilton felt compelled to write separately.

I write separately to express my compassion for Ratner, his family, and common sense. Each is the victim of good intentions run amuck...The panic over school violence and the intent to stop it has caused school officials to jettison the common sense idea that a person's punishment should fit his crime in favor of a single harsh punishment, namely, mandatory school suspension. Such a policy has stripped away judgment and discretion on the part of those administering it; refuting the well established precept that judgment is the better part of wisdom...Suffice it to say that the degree of Ratner's violation of school policy does not correlate with the degree of punishment.

*Id.* at 143.

3. *Lee v. Macon Cty. Bd. of Educ.*<sup>171</sup>

Two students were suspended for “undisciplined, defiant, and abusive” behavior.<sup>172</sup> The behavior in question included fighting, directing abusive language at school officials, truancy, disobeying their classroom teacher’s instructions, and resisting corporal punishment. The Fifth Circuit concluded that the automatic suspensions were unlawful because the school board may not simply confirm the principal’s recommendation to exclude the students.<sup>173</sup>

Because of the severe punishment the court found that the board must make its own independent determination of the appropriateness of the punishment.<sup>174</sup> The Fifth Circuit stated:

Formalistic acceptance or ratification of the principal’s request or recommendation as to the scope of punishment, without independent Board consideration of what, under all the circumstances, the penalty should be, is less than full due process.<sup>175</sup>

4. *Colvin v. Lowndes Cty. Sch. Dist.*<sup>176</sup>

In *Colvin*, a sixth grade student was expelled for bringing a Swiss Army key chain to school.<sup>177</sup> The key chain was given to the student by his mother.<sup>178</sup> The key chain fell out of the student’s backpack, the student was questioned by his teacher, admitted to owning the key chain, and gave it to the teacher without incident. The student was expelled for one calendar year.<sup>179</sup>

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<sup>171</sup> 490 F.2d 458 (5th Cir. 1974).

<sup>172</sup> *Lee v. Macon Cty. Bd. of Educ.*, 490 F.2d 458, 460 (5th Cir. 1974).

<sup>173</sup> *See Lee*, 490 F.2d at 460.

<sup>174</sup> *See id.*

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

<sup>176</sup> 114 F.Supp.2d 504 (N.D. Miss. 1999).

<sup>177</sup> *See Colvin v. Lowndes Cty. Sch. Dist.*, 114 F.Supp.2d 504, 507 (N.D. Miss. 1999). The key chain contained a knife, as well as a nail file and scissors. *See Colvin*, 114 F.Supp.2d at 507 n.3.

<sup>178</sup> *See id.* at 507 n.3. The mother worked as a nurse and received the key chain from a pharmaceutical sales representative. *See id.*

<sup>179</sup> *See id.* at 507-08.

The school board asserted that its zero tolerance policy for weapon possession required it to expel a student for one year regardless of the surrounding circumstances.<sup>180</sup> The Northern District of Mississippi reversed the expulsion and ordered reinstatement.<sup>181</sup> The court found that

Employing a blanket policy of expulsion, 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."<sup>182</sup>

The court extended the holding of *Lee* to find that a school board may not simply defer to a zero tolerance policy.<sup>183</sup> The district did not take anything into consideration but the "unwritten blanket policy of expulsion" and, therefore, violated the student's rights.<sup>184</sup>

##### 5. *Bd. of Sch. Trustees v. Barnell*<sup>185</sup>

This case, similar to the facts in *Colvin*, reached an opposite result. A student was expelled for bringing a Swiss Army knife to school.<sup>186</sup> The district's student-conduct policies required a mandatory expulsion for any student that possesses a knife while at school. The student argued that his suspension was arbitrary and the punishment too severe under the circumstances because he did not intend to use the knife in any violent fashion. The student

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<sup>180</sup> *See id.* at 510-11.

<sup>181</sup> *See id.* at 512-13.

<sup>182</sup> *Colvin*, 114 F.Supp.2d at 512 (quoting *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So.2d 237, 241 (Miss. 1985).

<sup>183</sup> *See id.* at 512.

<sup>184</sup> *Id.* at 512-13.

<sup>185</sup> 678 N.E.2d 799 (Ind. App. 1997).

<sup>186</sup> *See Bd. of Sch. Trustees v. Barnell*, 678 N.E.2d 799, 801 (Ind. App. 1997).

further argued that he did not have notice of the student policy and, in any event, his expulsion was in no way related to ensuring general school safety.<sup>187</sup>

The Indiana Appellate Court upheld the expulsion. Although the student asserted that he did not receive notice that he could be expelled for a seemingly harmless first offense, the court found that the district's zero tolerance policy was clearly spelled out and the repercussions of violating that policy were also well detailed.<sup>188</sup> Thus, the court ruled that the expulsion under the zero tolerance policy was lawful and not arbitrary.<sup>189</sup>

6. *Lyons v. Penn. Hills School District*<sup>190</sup>

Lyons, a seventh-grader, found a Swiss Army knife lying in the hallway while at school.<sup>191</sup> Later that day, Lyons was observed by a teacher filing his nails with a file contained within the knife. The teacher requested the knife, Lyons turned it over without incident, and Lyons was charged with possession of a weapon at school and was suspended indefinitely pending an expulsion hearing. At the hearing, a school official stated that "the knife in question constitutes a weapon under the district's 'zero tolerance policy,' and thus, a one-year suspension was warranted."<sup>192</sup> The school official further stated that the district in making their determination never considered the student's record.<sup>193</sup> The student brought suit, alleging violations of his substantive and procedural due process rights.<sup>194</sup>

The court found that the district exceeded its authority in implementing such a rigid zero tolerance policy for weapons without including a provision for discretionary review.<sup>195</sup> Because

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<sup>187</sup> See *Barnell*, 678 N.E.2d at 801-02, 805.

<sup>188</sup> See *id.* at 805-06.

<sup>189</sup> See *id.* at 806.

<sup>190</sup> 723 A.2d 1073 (Pa. Commw. Ct. 1999).

<sup>191</sup> See *Lyons v. Penn. Hills Sch. Dist.*, 723 A.2d 1073, 1074 (Pa. Commw. Ct. 1999).

<sup>192</sup> *Lyons*, 723 A.2d at 1074.

<sup>193</sup> See *id.* at 1074.

<sup>194</sup> See *id.* at 1074-75.

<sup>195</sup> See *id.* at 1075-76.

a Pennsylvania statute required the superintendent to exercise discretion and modify disciplinary actions on a case-by-case basis, the court determined that the policy was unlawful.<sup>196</sup>

7. *Clinton Mun. Separate Sch. Dist. v. Byrd*<sup>197</sup>

In *Byrd*, two high school students were expelled from school for one semester for defacing school property in violation of the school board's zero tolerance policy.<sup>198</sup> The policy mandated automatic suspension or expulsion for any student that defaced school property. The Mississippi Supreme Court was highly deferential to the school's decision and upheld the expulsion.<sup>199</sup>

The court found that simply because a school policy contains "mandatory" language does not necessarily mean that the school board cannot exercise some degree of discretion.<sup>200</sup> The court stated

That a school rule may be worded in mandatory language does not deprive school boards and their subordinates of the authority to administer the rule with flexibility and leniency. 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.<sup>201</sup>

As such, the court concluded that a mandatory zero tolerance policy is not per se unlawful merely because it is mandatory. The court did recommend, however, that the punishment should be lessened under these circumstances.<sup>202</sup> The court suggested that the board could instead require the students to clean the defaced property, or increase their coursework, or take away the students' extracurricular activities.<sup>203</sup> Furthermore, the Mississippi Supreme Court suggested that the students memorize an excerpt from *The Merchant of Venice* so that the students "could

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<sup>196</sup> *See id.*

<sup>197</sup> 477 So.2d 237 (Miss. 1985).

<sup>198</sup> *See Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So.2d 237, 238 (Miss. 1985).

<sup>199</sup> *See Byrd*, 477 So.2d at 240-42.

<sup>200</sup> *See id.* at 240-41.

<sup>201</sup> *Id.* at 241.

<sup>202</sup> *See id.* at 241-42.

<sup>203</sup> *See id.* at 242.



learn from Portia that ‘the quality of mercy is not strain’d’ and that the ‘earthly power doth...show likest God’s when mercy seasons justice’ – and teach this to their principal, their superintendent, their school board, and their community.”<sup>204</sup>

8. *Fuller v. Decatur Pub. Sch. Bd. of Educ.*<sup>205</sup>

In *Fuller*, several African American students were expelled for their participation in a fight that occurred during a high school football game.<sup>206</sup> The students brought suit and argued that the Board’s decision to expel under the district’s zero tolerance policy was unconstitutional. The students asserted that by punishing them as a group the Board violated their individual due process rights were violated. The expelled students further argued that the Board’s decision was based upon race rather than the misconduct itself.<sup>207</sup>

The Central District of Illinois disagreed. In fact, the court found that the students failed to demonstrate that the Board enacted or implemented any sort of formal zero tolerance policy.<sup>208</sup> While the students pointed to a Board resolution setting forth a “no-tolerance position on school violence,”<sup>209</sup> the court remained unpersuaded.<sup>210</sup> Instead, the court found that the resolution played no role in the Board’s decision to expel; rather the students were lawfully expelled based upon sufficient evidence of gross misconduct.<sup>211</sup>

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<sup>204</sup> *Id.* at 242.

<sup>205</sup> 78 F.Supp.2d 812 (C.D. Ill. 2000), *aff’d*, 251 F.3d 662 (7th Cir. May 24, 2001).

<sup>206</sup> *See Fuller v. Decatur Pub. Sch. Bd. of Educ.*, 78 F.Supp.2d 812, 816 (C.D. Ill. 2000), *aff’d*, 251 F.3d 662 (7th Cir. May 24, 2001).

<sup>207</sup> *See Fuller*, 78 F.Supp.2d at 817 (The students asserted that they were stereotyped as gang members and were racially profiled).

<sup>208</sup> *See id.* at 825-26.

<sup>209</sup> *Id.* at 825.

<sup>210</sup> *See id.* at 825-26.

<sup>211</sup> *See id.* at 825-26.

The *Fuller* court found that the Board’s disciplinary decision was entitled to deference.<sup>212</sup>

With respect to the resolution, the court found it nothing more than a political statement condemning school violence in general.<sup>213</sup>

## II. Analysis

### A. Legal Challenges to Zero Tolerance Disciplinary Policies

While there are numerous legal theories that could be advanced to challenge zero tolerance disciplinary policies, the three best avenues consist of due process, racial or national origin discrimination, and IDEA claims. Each claim will depend on the facts of each case. It should be noted that each type of claim is wrought with their own difficulties and that a student wishing to challenge a zero tolerance policy faces an uphill battle.

#### 1. *Due process*

##### a. Substantive due process

A substantive due process challenge deals with the school board’s power to adopt a zero tolerance policy.<sup>214</sup> This does not go to the sufficiency of the procedures employed in meting out the suspension or expulsion. Rather it is the school board’s method of affecting the students’ rights. The policy being attacked will be a valid exercise of board authority if the policy is rationally related to a legitimate government interest.<sup>215</sup> Thus, “review and revision of a school

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<sup>212</sup> *See id.* at 821.

<sup>213</sup> *See Fuller*, 78 F.Supp.2d at 826. *See also* *West v. Derby Unified Sch. Dist. No. 260*, 260 F.3d 1358 (10th Cir. 2000) (finding that a student’s suspension was not based upon a zero tolerance policy because additional factors apart from the wording of the policy were relied upon in the suspension decision). There are obviously many more cases affecting students’ rights. *See e.g.*, *Washington v. Smith*, 618 N.E.2d 561, 563 (Ill. App. Ct. 1993) (holding that a semester expulsion for possessing an ice pick was unwarranted because the student had not threatened anyone in any way); *Petrey v. Flaughner*, 505 F.Supp. 1087 (E.D. Ky. 1981) (finding that expulsion for remainder of the year for smoking marijuana on school property was not a grossly disproportionate punishment); *Fisher v. Burkburnett Ind. Sch. Dist.*, 419 F.Supp. 1200, 1205 (N.D. Tex. 1976) (concluding that trimester suspension for drug use “furthers a legitimate state interest in a rational if severe manner.”)

<sup>214</sup> *See Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000).

<sup>215</sup> *See Seal*, 229 F.3d at 575. As we have seen, public education is not considered a fundamental interest that warrants strict scrutiny review. *See Goss v. Lopez*, 419 U.S. 565, 577 (1975).

suspension on substantive due process grounds would only be available in a rare case where there was no ‘rational relationship between the punishment and the offense.’”<sup>216</sup>

The student must normally show that the suspension or expulsion was “arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning”<sup>217</sup> in order to overcome rational review.<sup>218</sup> This is an extremely difficult task given the deferential treatment courts give to school discipline decisions.<sup>219</sup> Courts are usually unwilling to reverse a school’s disciplinary decision on substantive due process grounds even though the court views the punishment as harsh.<sup>220</sup>

A substantive due process challenge is fact intensive and will necessarily depend on the circumstances of each case. A possible method of invalidating a zero tolerance policy on substantive due process grounds is demonstrating to the court that the decision to exclude is wholly unreasonable because the student lacked the intent to commit the act in question.<sup>221</sup> If the student did not knowingly and intentionally break the rule, than the punishment may not be rationally related to the school’s need to preserve safety.

#### b. Procedural due process

Procedural due process claims represent, arguably, the most valuable weapon an advocate has in their arsenal to mount a zero tolerance policy attack.<sup>222</sup> In order to maintain 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

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<sup>216</sup> *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1985) (quoting *Mitchell v. Bd. of Trustees*, 625 F.2d 660, 664 n.8 (5th Cir. 1980)).

<sup>217</sup> *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984).

<sup>218</sup> *See Seal v. Morgan*, 229 F.3d 567, 575-76 (6th Cir. 2000).

<sup>219</sup> *See Woodland v. Strickland*, 420 U.S. 308, 326 (1975).

<sup>220</sup> *See e.g., Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So.2d 237, 238 (Miss. 1985).

<sup>221</sup> *See Seal v. Morgan*, 229 F.3d 567, 575-76 (6th Cir. 2000).

<sup>222</sup> *See Advancement Project, supra* note 2, at Appendix II p.21.

deprivation occurred without due process.”<sup>223</sup> A student suspended under a zero tolerance policy can easily satisfy the first two steps of this analysis. As mentioned above, the United States Supreme Court has held that public education is classified as a property interest.<sup>224</sup> Secondly, the Court has further held that exclusion from school “for more than a trivial period” equates to a sufficient deprivation of a property interest to implicate the Due Process Clause.<sup>225</sup>

The third step, determining how much process is due to the student, is the most problematic for both litigants and courts alike. At its core, procedural due process requires the person be given notice that they are to be deprived of their protected interest, an opportunity to be heard, and that such hearing be conducted in a fair manner.<sup>226</sup> In school discipline cases, the amount of process due to a particular student depends on whether the exclusion is a short-term suspension or a long-term suspension or expulsion.<sup>227</sup> The student’s claim, therefore, depends on whether the exclusion from school was short or long-term.

For short-term suspensions of less than ten days, the subject of *Goss*, the Court has held that the student must receive “oral or written notice of the charges against him and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”<sup>228</sup> The hearing, where the student gets an opportunity to recount their version of the events, does not need to be a formal adversarial hearing.<sup>229</sup> All that is required under the Due

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<sup>223</sup> See Advancement Project, *supra* note 2, at Appendix II p.22 (citing Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972)).

<sup>224</sup> See *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>225</sup> See *Goss*, 419 U.S. at 573-75.

<sup>226</sup> See NATHAN L. ESSEX, SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS 61 (Allyn and Bacon 1999). Note that if the student’s presence constitutes a threat of disruption, notice and hearing should follow the exclusion as soon as practicable. See *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

<sup>227</sup> See Advancement Project, *supra* note 2, at Appendix II p.22.

<sup>228</sup> *Goss v. Lopez*, 419 U.S. 565, 581 (1975). Note that the Court found that the student is entitled to submit his version of the events to an objective decision maker. See *Goss*, 419 U.S. at 581. But the decision maker who is familiar with the events may serve as the arbiter as long as they can assess the situation objectively. See Advancement Project, *supra* note 2, at Appendix II p.23.

<sup>229</sup> See *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

Process Clause is an “informal give-and-take between the student and the disciplinarian.”<sup>230</sup>

Students and advocates should be aware of informality in which these hearings are conducted and should further realize that these hearings are held to be a sufficient method of protecting the student’s due process rights. Thus, for suspensions of ten days or less, the student is not entitled to counsel, to confront and cross-examine the witnesses against them, or to put on witnesses in their own defense.<sup>231</sup> Short-term suspensions are difficult to challenge based upon perceived procedural irregularities.

It is unlikely, however, that a student will be suspended from school for a period of less than ten days under a zero tolerance disciplinary policy. The vast majority of these policies require long-term suspensions or expulsions for targeted misconduct. As such, an advocate should be aware of the due process requirements for short-term suspensions, but should instead familiarize themselves with the due process requirements for long-term suspensions.

The Supreme Court has been silent and lower courts are split over the due process requirements for long-term suspensions and expulsions.<sup>232</sup> In the meantime, two cases, *Matthews v. Eldridge*<sup>233</sup> and *Dixon v. Ala. State Bd. of Educ.*,<sup>234</sup> have filled the gap in the absence of direct Supreme Court precedent.<sup>235</sup> *Matthews*, while not a school discipline case, is illustrative on how a reviewing court will conduct a balancing test to determine the amount of due process necessary for a long-term school suspension.<sup>236</sup> The *Matthews* Court set forth the following factors to be considered in determining the procedural due process necessary in any given situation:

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<sup>230</sup> *Goss*, 419 U.S. at 584.

<sup>231</sup> See Advancement Project, *supra* note 2, at Appendix II p.23.

<sup>232</sup> “The lodestar is the elusive criterion of fairness in given circumstances. The more severe the punishment, the more carefully scrutinized are the procedures.” See Reutter, *supra* note 110, at 771.

<sup>233</sup> 424 U.S. 319 (1976).

<sup>234</sup> 294 F.2d 105 (5th Cir. 1961).

<sup>235</sup> See Advancement Project, *supra* note 2, at Appendix II p.24.

<sup>236</sup> See *id.*

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>237</sup>

While *Matthews* does not set forth any bright line rule, the decision should be a guidepost when arguing that procedural due process was not adhered to under a zero tolerance policy.

For example, an advocate, while conceding that the school has an interest in maintaining discipline and ensuring educational harmony, should be able to demonstrate that the student's interest in their education is extremely important. Furthermore, if a long-term suspension or expulsion could result, then the advocate should detail the negative consequences that may arise from any significant deprivation – e.g., falling behind in class work, higher dropout rates for students that are expelled, alienation from prominent authority figures, etc.<sup>238</sup> Finally, it should be argued that the additional financial and administrative burdens placed upon the school are minimal and, in any event, are outweighed by the interest of the student in continuing their education.

The other highly cited case in long-term suspension cases is *Dixon v. Ala. State Bd. of Educ. Dixon*, which dealt with the expulsion of college student, noted that

[T]he rudiments of an adversary proceeding may be preserved without encroaching upon the interests of [the school]. In the instant case, the students 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.<sup>239</sup>

Thus, courts following the Fifth Circuit approach generally believe that the student is entitled to a hearing before the district board of education; with the opportunity to cross examine the

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<sup>237</sup> *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>238</sup> See *supra* notes 53-86 and accompanying text.

<sup>239</sup> *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 105, 159 (5th Cir. 1961).

district's witnesses and put on their own witnesses.<sup>240</sup> Other courts, such as the Seventh Circuit, have held that a student facing long-term expulsions is not entitled to the names of witnesses and information such as witnesses' testimony.<sup>241</sup>

Although courts are split on the amount of procedural protections necessary for a long-term suspension/expulsion, the following guidelines are generally accepted. First, notice of charges is required. It is well accepted that prior to suspending or expelling a student from school, the student must first be provided with notice of the charges against them.<sup>242</sup> A student challenging a zero tolerance policy may be reinstated if they can prove that notice was never received.

Second, the student has the right to some kind of hearing or opportunity to be heard. The Supreme Court has found that a hearing entails the opportunity to be heard at a "meaningful time and in a meaningful manner."<sup>243</sup> As detailed above, an advocate should be aware of the holdings of both *Lee* and *Colvin*, whereby the school districts violated due process rights by merely rubber stamping a recommendation or policy without making an independent determination.<sup>244</sup> If a zero tolerance policy dispenses with school officials' power to modify punishments or eliminates any exercise of discretion in evaluating the circumstances surrounding the infraction, then a meaningful hearing may be absent.<sup>245</sup> A hearing necessarily implies a fair hearing.<sup>246</sup> The question to be asked is "[d]id the student have sufficient opportunity to respond to specific charges of misconduct and to have his side of the matter impartially considered before a decision

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<sup>240</sup> See e.g., *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040 (9th Cir. 1973).

<sup>241</sup> See *Linwood v. Bd. of Educ., City of Peoria, Sch. Dist. No. 150*, 463 F.2d 763 (7th Cir. 1972).

<sup>242</sup> See *Hudgins & Vacca*, *supra* note 111, at 360.

<sup>243</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

<sup>244</sup> See *supra* notes 171-84 and accompanying text.

<sup>245</sup> See *Jenkins & Dayton*, *supra* note 20.

<sup>246</sup> See *Hudgins & Vacca*, *supra* note 108, at 360.

to punish... was made?”<sup>247</sup> If the school failed to conduct a meaningful hearing, the student is entitled to reinstatement.

Third, courts are split as to whether a student has a right to counsel when confronted with a long-term suspension or expulsion.<sup>248</sup> “There is some legal weight that in an expulsion hearing in which the school board attorney plays a prominent role, a student should also be entitled to have an attorney represent him.”<sup>249</sup>

Fourth, courts are unclear as to whether formal rules of evidence apply in long-term suspension or expulsion hearings.<sup>250</sup> Additionally, courts are split as to whether students are entitled to confront, cross-examine, and compel witnesses to appear.<sup>251</sup> Some courts have concluded that the right to confrontation and cross-examination is too fundamental to procedural due process so as to be cast aside, others have not.<sup>252</sup> This is a “know your jurisdiction” type of argument.

It cannot be emphasized enough that there are no bright line rules, the amount a process due depends on the severity of the punishment.<sup>253</sup> The length of the exclusion, what misconduct triggered the zero tolerance policy, and what type of procedures were followed are case specific.

If it is found that the school board failed to afford the student procedural due process the student is entitled to reinstatement.<sup>254</sup> If the school board member or administrator knew, or

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<sup>247</sup> See Reutter, *supra* note 110, at 769.

<sup>248</sup> See Hudgins & Vacca, *supra* note 108, at 361.

<sup>249</sup> See *id.* at 362.

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *e.g.*, Givens v. Poe, 346 F.Supp. 202 (W.D.N.C. 1972).

<sup>253</sup> In an educators guide on school law, the author set forth what he believed to be sound guidelines.

A prudent administrator...should err on the side of providing students an opportunity for full protection of due process, including, but not limited to the following: 1. Notice of charges; 2. Prior notice of hearing; 3. Right to legal counsel at all appropriate stages; 4. Hearing before impartial party; 5. Right to compel supportive witnesses to attend; 6. Right to confront and cross-examine adverse witnesses, and/or to view and inspect adverse evidence prior to hearing; 7. Right to testify in their own behalf; 8. Right to have a transcript of proceedings for use on appeal.

*Essex*, *supra* note 226, at 63.



reasonably should have known, that the student was removed from the school without following the Constitutional safeguards, the school official may be held personally liable.<sup>255</sup> In situations where school administrators have violated the constitutional rights of students, the Court has held that the student may bring an action for damages against the individual school board members.<sup>256</sup> Furthermore, where students have been suspended from school without procedural due process being adhered to, the student, if not injured, are entitled to recover only a nominal amount, which the Court has set at \$1.00.<sup>257</sup>

## 2. *Equal protection based upon racial discrimination*

A potential argument to be advanced when attacking the application of a zero tolerance policy is that the school discriminated against the student on the basis of race or national origin. Statistics have shown that African-American and Hispanic students are more likely to be suspended or expelled under such policies.<sup>258</sup> But maintaining a cause of action under the Equal Protection Clause against a school district is difficult even for the most experienced advocates.

For an Equal Protection claim under the Fourteenth Amendment, it must be shown that the school board or state had a discriminatory motive in implementing the zero tolerance policy or applying it to a particular student.<sup>259</sup> Proving a discriminatory motive is difficult as a practical matter. Even assuming *arguendo* that a particular school board harbors racial animus, the board is unlikely to publicly admit to it.<sup>260</sup> Teachers, school officials, and legislators will generally not

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<sup>254</sup> See Hudgins & Vacca, *supra* note 108, at 360.

<sup>255</sup> See Wood v. Strickland, 420 U.S. 308 (1975).

<sup>256</sup> See Wood v. Strickland, 420 U.S. 308 (1975).

<sup>257</sup> See Carey v. Piphus, 435 U.S. 247 (1978).

<sup>258</sup> See Zweifler & De Beers, *supra* note 57, at 204.

<sup>259</sup> See Washington v. Davis, 426 U.S. 229 (1976).

<sup>260</sup> See Advancement Project, *supra* note 2, at Appendix II p.4; Patrick Pauken & Philip T.K. Daniel, *Race Discrimination in School Discipline: A Legal Statistical Analysis*, 139 ED. LAW REP. 759, 765 (2000) (“In order to overcome a race and/or national origin discrimination claim, school officials will defend their decision and actions on non-discriminatory bases. Schools often defend their actions on the need to maintain order, discipline, and safety in the schools.”).

openly comment that the purpose of a particular policy is to discriminate on the basis of race or national origin.<sup>261</sup> Furthermore, because of the uniformity of most zero tolerance policies, racial animus is difficult to infer from the language of the policy in most instances.<sup>262</sup> These policies tend to worded in generic terms and apply to all students with equal force. Although proving discriminatory intent is difficult, it can be done.

A person challenging a zero tolerance policy suspension or expulsion may be successful if they can show that the teacher or official that referred them for exclusion did so out of racial animus.<sup>263</sup> As one scholar noted, the source of racial disproportionality in suspension rates is a direct result of the number of office referrals made by classroom teachers.<sup>264</sup>

Once the student is referred to the main office, there are no significant “differences between [W]hite and [B]lack students in the mean number of days per suspension...[but] African-American students [are] almost twice as likely to be referred to the office as [W]hite students.”<sup>265</sup>

If a plaintiff can show that the teacher referred the student solely on the basis of race, then the necessary discriminatory motive may be satisfied.

A challenging student would need to gather particularized evidence that the teacher either harbors racial animus or demonstrate by statistical evidence that racial animus is the only logical inference. Evidence that the teacher or official refers students of color more often than white students may be useful in this regard. But this evidence is hard to come by.

Because teachers and other school officials are the first to identify disciplinary infractions, if these officials are more prone to report violations by students of color than by white students, there will be no record of white students’

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<sup>261</sup> See Advancement Project, *supra* note 2, at Appendix II p.4.

<sup>262</sup> See *id.*

<sup>263</sup> See *id.*

<sup>264</sup> See Zweifler & De Beers, *supra* note 57, at 205 (citing Russell Skiba, *Zero Tolerance: Issues of Equity and Effectiveness*, Briefing to the U.S. Commission on Civil Rights 2 (Feb. 18, 2000)).

<sup>265</sup> *Id.* (quoting Russell Skiba, *Zero Tolerance: Issues of Equity and Effectiveness*, Briefing to the U.S. Commission on Civil Rights 2 (Feb. 18, 2000)).

misconduct, thus making it very difficult to prove that similarly situated white students were not referred.<sup>266</sup>

It becomes obvious that an Equal Protection claim based on race or national origin is difficult to prove due to the discriminatory intent requirement. It may be true, as the research suggests, that students of color are disproportionately affected under zero tolerance policies, but this alone is not enough to satisfy the mandates of the Fourteenth Amendment.<sup>267</sup> The appropriateness of an equal Protection claim will depend on the facts of each case.

### 3. *Title VI claims based upon racial discrimination*

Plaintiffs wishing to challenge zero tolerance policies based upon racial discrimination might fare better under a Title VI claim. Title VI of the Civil Rights Act of 1964 states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programs or activity receiving Federal financial assistance.<sup>268</sup>

Title VI gives a person a private cause of action, permitting the claimant to file in either federal district court or with the appropriate government agency.<sup>269</sup> Furthermore, some courts have recognized two different types of Title VI claims.<sup>270</sup>

The first type of claim is what is known as a “disparate treatment claim.”<sup>271</sup> Disparate treatment claims closely mirror Equal Protection claims. A claimant will need to show that the

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<sup>266</sup> Advancement Project, *supra* note 2, at Appendix II p.4. *But see Sherpell v. Humnoke Sch. Dist. No. 5*, 619 F.Supp. 670 (D.C. Ark. 1985). In *Sherpell*, a court found that a school district’s disciplinary system was unconstitutional on Equal Protection grounds. The teachers at this particular school referred to African-American students as “niggers” and “coons.” Additionally, a teacher testified about instances of corporal punishment administered to African-American students that were never received by white students in the district during her nine-year tenure in the school district.

<sup>267</sup> “[T]he law is clear that a claim of racial discrimination and violation of equal protection cannot be based upon mere statistics alone.” *Fuller v. Decatur Pub. Sch. Bd. of Educ.*, 78 F.Supp.2d 812, 825 (C.D. Ill. 2000), *aff’d*, 251 F.3d 662 (7th Cir. May 24, 2001).

<sup>268</sup> 42 U.S.C. § 2000d (2000).

<sup>269</sup> *See Guardians Assn. v. Civil Serv. Comm’n*, 463 U.S. 582 (1983). The main agency that enforces Title VI is the United States Department of Education’s Office for Civil Rights (“OCR”). *See Advancement Project, supra* note 2, at Appendix II p.9.

<sup>270</sup> *See Advancement Project, supra* note 2, at Appendix II p 6-9.

school's policy has a disparate impact on students of color.<sup>272</sup> If the challenging student can demonstrate a disparate impact, the school must then show that the policy and decision to exclude the student from school was based upon a non-discriminatory educational necessity.<sup>273</sup> The burden then shifts back to the student to demonstrate that less restrictive means were available to the school.<sup>274</sup>

Under disparate treatment claims, however, the student must also demonstrate a discriminatory motive.<sup>275</sup> As such, the same difficulties inherent in maintaining an Equal Protection cause of action based upon racial discrimination are present under disparate treatment claims.<sup>276</sup> The same type of evidence would need to be gathered as with an Equal Protection claim to demonstrate intent – i.e., a consistent pattern of racial discrimination in a school's suspension or teacher's referrals.<sup>277</sup>

The second type of Title VI claim is referred to as an "adverse impact claim."<sup>278</sup> Under this type of claim, direct proof of a discriminatory intent is dispensed with.<sup>279</sup>

The essential difference is that an adverse impact claim challenges a seemingly neutral policy or practice and infers unlawful discrimination on the basis of disparate outcomes, while a disparate treatment claim looks closely at the actual practice to reveal specific instances of differential treatment and considers both direct and statistical evidence of racial bias.<sup>280</sup>

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<sup>271</sup> See *id.* at Appendix II p.5.

<sup>272</sup> See Pauken & Daniel, *supra* note 262.

<sup>273</sup> See *id.*

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*; Advancement Project, *supra* note 2, at Appendix II p.6.

<sup>276</sup> "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 school discipline." See Pauken & Daniel, *supra* note 262, at 763.

<sup>277</sup> See Advancement Project, *supra* note 2, at Appendix II p.6. "For example, in a 1995 complaint against the Benedictine Military School in Georgia, the Department of Education's Office for Civil Rights reviewed the school's disciplinary records and found that white students who had committed offenses similar to those of blacks received substantially lighter sanctions. . .[the] OCR found the discipline policy to violate Title VI." *Id.* at 6-7.

<sup>278</sup> See Advancement Project, *supra* note 2, at Appendix II p.5.

<sup>279</sup> See *id.*

<sup>280</sup> *Id.* at 6 (citing *In re Dillon Cty. Sch. Dist. No. 1*, 53 Educ. Rep. 1433 (1986)).

The adverse impact test, as set forth by the United States Supreme Court in *Guardian's Assn. v. Civil Serv. Comm'n*,<sup>281</sup> prohibits federal funding “not only in programs that intentionally discriminate, but also in those endeavors that have a racially disproportionate impact on racial minorities.”<sup>282</sup> The Court employs a three part test to determine whether a particular policy is violative of Title VI under an adverse impact theory.<sup>283</sup> First, does the policy have a disparate impact based on race, color, or national origin?<sup>284</sup> Second, is the policy a governmental necessity?<sup>285</sup> Third, is there an alternative method available to reach the same result with less discriminatory impact?<sup>286</sup> The three-part test is virtually identical to a disparate treatment claim minus the requirement of discriminatory motive.

Whether a student pursues a disparate treatment or adverse impact claim, the student must still prove a disparate affect on students of color. Irrespective of whether a discriminatory motive needs to be shown, an advocate must still gather sufficient and compelling statistical evidence that a particular zero tolerance policy has a disparate impact. The general data demonstrating that students of color are disproportionately excluded will not suffice. The advocate needs to demonstrate that a particular school or district is adversely affecting students of color.

### 3. *Students with disabilities*

Students with disabilities are often those that are most adversely affected by zero tolerance disciplinary policies.<sup>287</sup> However, regulations “that protect individuals with disabilities

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<sup>281</sup> 463 U.S. 582 (1983).

<sup>282</sup> See *Guardian's Assn. v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

<sup>283</sup> See Advancement Project, *supra* note 2, at Appendix II p.7 (citing *Griggs v. Duke Power Co.*, 401 U.S. 421 (1971)).

<sup>284</sup> See *id.*

<sup>285</sup> See *id.*

<sup>286</sup> See *id.*

<sup>287</sup> See Advancement Project, *supra* note 2, at Appendix II p.11 “Special education students are significantly overrepresented among the ranks of suspended students, in many districts representing one third or more of all

from discrimination and that guarantee an appropriate education for students with disabilities offer important safeguards for students who may be subjected to discipline under zero tolerance policies.”<sup>288</sup> The Individuals with Disabilities in Education Act (“IDEA”) establishes rights and procedural safeguards for students with disabilities.<sup>289</sup> IDEA requires school boards to ensure that students with disabilities receive a “free and appropriate education.”<sup>290</sup> The Supreme Court settled the question early on as to whether schools could suspend special education students under the mandates of IDEA.

In *Honig v. Doe*,<sup>291</sup> an emotionally impaired student attending a general education program was expelled for misbehavior.<sup>292</sup> At issue was the “stay put” provision of what is now IDEA.<sup>293</sup> Under this provision, when the school and parents disagree over the student’s educational placement, the student remains in their current placement until the matter is resolved.<sup>294</sup> The school in *Honig*, however, argued that because the student was a risk to himself and other students, it should have the right to exclude the student while placement discussions continued.<sup>295</sup> The Court disagreed.

The Court found that schools cannot unilaterally exclude special education students from school, but schools may temporarily suspend such students for up to ten days.<sup>296</sup> If the school and parents cannot agree to the student’s placement during this ten-day period, the student is to be reinstated unless the school can prove that the student would be substantially likely to injure

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suspensions.” *Id.* (citing KIM BROOKS, ET AL., SCHOOL HOUSE HYPE: TWO YEARS LATER 19 (Justice Policy Institute/Children’s Law Center, Apr. 2000)).

<sup>288</sup> See Advancement Project, *supra* note 2, at Appendix II p.11.

<sup>289</sup> See *id.*

<sup>290</sup> 20 U.S.C. § 1400 et seq.

<sup>291</sup> 484 U.S. 305 (1988).

<sup>292</sup> See *Honig v. Doe*, 484 U.S. 305, 312-13 (1988).

<sup>293</sup> See *Honig*, 484 U.S. at 310-12.

<sup>294</sup> See 20 U.S.C. § 1415(j) (2000).

<sup>295</sup> See *Honig v. Doe*, 484 U.S. 305 (1988).

<sup>296</sup> See *Honig*, 484 U.S. at 322-23.

themselves or others.<sup>297</sup> Much like procedural due process, ten days is the key time frame to keep in mind.

Students with disabilities, therefore, may be suspended in the same manner as a general education student if the exclusion from school is less than ten consecutive school days.<sup>298</sup>

Within this ten-day period, the school is *not* required to issue to the student their individualized education program (“IEP”).<sup>299</sup> Generally, the same procedural due process requirements apply to short-term suspensions of special education students as would apply to general education students.<sup>300</sup>

The ten-day rule becomes complicated, for example, when the student with a disability is suspended for a day or two throughout the school year. This point of law remains somewhat unclear.<sup>301</sup> Regardless of how the particular jurisdiction construes this point, federal law makes it clear that if the student’s exclusions total more than ten days the school must at least consider whether such exclusions constitute a “change of placement.”<sup>302</sup> The school and IEP team<sup>303</sup> should consider the following factors in determining whether a “change in placement” occurred: (1) the duration of each individual exclusion; (2) the aggregate duration of the exclusions; (3) the temporal proximity of the exclusions in relation to each other; and (4) the underlying reasons for

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<sup>297</sup> *See id.* This is now known as a Honig injunction. *See* Mahusky et al, *supra* note 144, at 45.

<sup>298</sup> *See* 34 C.F.R. § 300.520(a)(1).

<sup>299</sup> *See* Mahusky et al, *supra* note 144, at 45. All special education students have an IEP that describes the objectives the student is attempting to reach, as well as the services the school will provide to enable the student to reach those objectives. *See id.*

<sup>300</sup> *See id.*

<sup>301</sup> *See* Advancement Project, *supra* note 2, at Appendix II p.13.

<sup>302</sup> *See* 34 C.F.R. § 300.519(b).

<sup>303</sup> Definition of IEP team. *See* 34 C.F.R. § 300.344.

the student's exclusions from school.<sup>304</sup> If the aggregate suspensions are deemed a change in placement, then the school must follow the procedures for a long-term suspension under IDEA.

If a student with a disability is suspended for more than ten days (i.e.-a long-term suspension) or a change in placement is deemed to have occurred, IDEA mandates that certain procedures be followed. The IEP team must convene no later than ten school days after the decision affecting the student's placement is rendered.<sup>305</sup> At this IEP meeting, the team must determine, based on all the available information, whether the student's misconduct was a manifestation of the student's disability.<sup>306</sup> If the misconduct is a manifestation of the student's disability, IDEA prohibits excluding the student for school.<sup>307</sup>

There is a presumption that the student's misconduct is a manifestation of the disability.<sup>308</sup> In order to overcome this presumption and show that the misconduct was not a manifestation, the school must affirmatively demonstrate that (1) the services the school provided to the student were appropriate; (2) the student was properly placed and their IEP was appropriate; (3) the student's disability did not impair their ability to appreciate the impact of their misconduct; and (4) the student's disability did not impair their ability to control the behavior in question.<sup>309</sup> If the special education student behaves in a manner that is not a manifestation of their disability, the student may be disciplined in the same manner as general students.<sup>310</sup> But unlike a general student, the school must continue to provide the special

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<sup>304</sup> See 34 C.F.R. § 300.520(a)(1)(i). Advocates should be aware that the longer the suspensions and the frequency of suspensions within a short period of time weigh heavily in favor of a change in placement. See Mahusky et al, *supra* note 144, at 44-45.

<sup>305</sup> See 34 C.F.R. § 300.523(a)(2).

<sup>306</sup> See 34 C.F.R. § 300.523(c). The IEP team reviews the student's relevant information, parental observations, and expert evaluations procured by the student's parents. See Advancement Project, *supra* note 2, at Appendix II p.14.

<sup>307</sup> See 34 C.F.R. § 300.523(c).

<sup>308</sup> See *id.*

<sup>309</sup> See 34 C.F.R. § 300.519(c).

<sup>310</sup> See Advancement Project, *supra* note 2, at Appendix II p.15.



education student with educational services.<sup>311</sup> The IEP team must meet to determine what services will be necessary to ensure that the student works towards their IEP goals and the school must continue to provide those services to the student.<sup>312</sup>

If the student's misconduct is deemed a manifestation of their disability, a school may not suspend or expel the student.<sup>313</sup> The school must reevaluate the student's IEP and reinstate the student in school.<sup>314</sup> The school, however, may attempt to change the student's IEP pursuant to IDEA provisions.<sup>315</sup> But the school may not unilaterally change the student's placement within the school, i.e. – the student “stays put.”<sup>316</sup>

In order to keep the student suffering from a disability in school, an advocate should demonstrate, where appropriate, that the conduct in question is a manifestation of the student's disability. Like most endeavors challenging a zero tolerance policy this will be fact intensive. The goals for special education students challenging a zero tolerance policy is twofold: determine if an appropriate manifestation hearing was or will be conducted within ten days of the decision to exclude and demonstrate to the IEP team that the conduct in question was indeed a manifestation of the disability.<sup>317</sup>

There are special rules, however, for a special education student that has been excluded from school under zero tolerance policy for possession of a weapon on school property or who have knowingly possessed, used, sold, or solicited drugs. In these circumstances, school officials

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<sup>311</sup> See 34 C.F.R. § 300.520(a)(i)(ii).

<sup>312</sup> See 34 C.F.R. § 300.121(d)(2-3).

<sup>313</sup> See Advancement Project, *supra* note 2, at Appendix II p.15.

<sup>314</sup> See *id.*

<sup>315</sup> See *id.* at 14-15.

<sup>316</sup> See *id.* at 15. This is what is known as the “stay put” provision of IDEA, whereby the student's educational program is not disrupted and schools may not simply rid themselves of special education students via suspensions.

<sup>317</sup> In addition to the manifestation hearing, IDEA requires the IEP team to develop a functional behavior assessment plan and a behavior intervention plan in situations where a long-term suspension has issued See 34 C.F.R. §§ 300.520(b)(1), 300.523(e). A functional behavior assessment is designed to determine out why a student behaves as they do. See Mahusky et al, *supra* note 144, at 46. A behavior intervention plan seeks to encourage positive behaviors based upon the results of the functional behavior plan. See *id.* at 46. IDEA is flexible as to the both the timing and substance of these plans, but both plans are required. See *id.*

may unilaterally exclude the student from general education and place them in an alternative education placement for up to forty-five days, assuming alternative education programs are available.<sup>318</sup> But, the student has the right to keep up with their regular curriculum and IEP while in the alternative placement. If the school can demonstrate by “substantial evidence” that the student is substantially likely to injure themselves or others to an impartial officer, then the student will be kept in the alternative placement for an additional forty-five days.<sup>319</sup>

#### CONCLUSION

Zero tolerance disciplinary policies undermine essential societal values and traditional notions of fairness. While politicians and some educators may believe that these policies are necessary to ensure school safety, strong research suggests that the costs outweigh the benefits. Far too often innocent students are swept up by these far-reaching rules.

The problem with attacking zero tolerance policies is that school disciplinary regulations are well protected under the law. Although not completely immune from challenge, zero tolerance policies are difficult to invalidate on due process and equal protection grounds. As it stands, students are not adequately protected from the mindless application of such policies. Therefore, educators should exercise discretion when meting out any sort of exclusion from school rather than deferring to a senseless zero tolerance policy.

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<sup>318</sup> See 34 C.F.R. § 300.520(a)(2).

<sup>319</sup> See 34 C.F.R. § 300.521.