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## Gatekeepers to Success: Missouri's Exclusionary Approach to School Discipline

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# Gatekeepers to Success: Missouri's Exclusionary Approach to School Discipline

Christie B. Carrino\*

“It certainly looks, Adeimantus, as if everything follows from the direction a person's education takes.”

—Plato, *The Republic*<sup>1</sup>

## I. INTRODUCTION

On the precipice of the 2012 American Presidential Election, greater than seven in ten Americans cited education as an extremely important or very important issue.<sup>2</sup> Indeed, a strong education system is often seen as the crux of a strong America.<sup>3</sup> It almost goes without

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\* J.D. (2016), Washington University School of Law. I would like to thank the attorneys and staff at the Children's Legal Alliance within Legal Services of Eastern Missouri for all of their tireless work to protect the right to education for ALL children. Their work is essential to combatting the school-to-prison pipeline in Eastern Missouri, and their dedication to justice was integral to my legal education and to that of countless others.

1. PLATO, *THE REPUBLIC* 118 (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge University Press 2000) (380 B.C.E.).

2. *With Voters Focused on Economy, Obama Lead Narrows*, PEW RES. CTR. (Apr. 17, 2012), <http://www.people-press.org/2012/04/17/with-voters-focused-on-economy-obama-lead-narrows/>.

3. *See Issues: Education*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education> (last visited Nov. 12, 2014) (“If we want America to lead in the 21st century, nothing is more important than giving everyone the best education possible — from the day they start preschool to the day they start their career.”) (quoting President Barack Obama); Shannon Murphy, *Press Room: Strong American Schools Campaign Launches to Promote Education Reform in 2008 Presidential Election*, GATES FOUND. (Apr. 25, 2007), <http://www.gatesfoundation.org/media-center/press-releases/2007/04/strong-american-schools-campaign-launches-to-promote-education-reform-in-2008-presidential-election> (“The American dream is slipping away, and unless our leaders dramatically improve our public schools, our standard of living, our economy and our very democracy will be threatened . . . .”) (quoting Eli Broad); Michael A. Resnick, *An American Imperative: Public Education*, CTR. FOR PUB. EDUC. (Apr. 27, 2006), <http://www.centerforpubliceducation.org/Main-Menu/Public-education/An-American-imperative-Public-education-> (“History tells us that America succeeded not in spite of public education, but

saying that education improves individuals' lives as well as society as a whole.<sup>4</sup> Not only does education greatly influence career choice and salary, but it also has a large impact on whether individuals marry, whether children grow up in two-parent households, life expectancy, and chance of institutionalization.<sup>5</sup> Paradoxically, "education is a major determinant of one's lot in life [and] one's lot in life is also a determinant of education."<sup>6</sup> In that sense, education is both a gateway and a gatekeeper to achieving the benefits of American society.

One of the ways the Kindergarten through Twelfth Grade (K-12) education system acts as a gatekeeper is through school discipline, particularly suspension and expulsion.<sup>7</sup> These methods, which put students out of the classroom on a temporary or permanent basis, increase the risk of dropping out, which in turn increases the risk of juvenile delinquency.<sup>8</sup> While they are suspended or expelled, local school districts sometimes permit students to attend alternative education settings.<sup>9</sup> However, this is not always the case.<sup>10</sup> Further, for those schools that do implement alternative education programs, "in many places [the] programs lack the rigor, transparency, and quality of instruction and behavioral supports that are found in

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because of it. If the 20th century was America's century, it was in no small part because it was public education's century.").

4. MICHAEL GREENSTONE ET AL., THE HAMILTON PROJECT, A DOZEN ECONOMIC FACTS ABOUT K-12 EDUCATION 1 (Sept. 2012), [http://www.hamiltonproject.org/files/downloads\\_and\\_links/THP\\_12EdFacts\\_2.pdf](http://www.hamiltonproject.org/files/downloads_and_links/THP_12EdFacts_2.pdf).

5. *Id.* at 1, 6.

6. *Id.* at 3.

7. See Anne Gregory et al., *The Relationship of School Structure and Support to Suspension Rates for Black and White High School Students*, 48 AM. EDUC. RES. J. 904, 906 (2011) ("Correlational and longitudinal research has shown that suspended students are more likely to be truant, miss instructional time, and drop out of high school [and school suspension] was associated with an increased risk of antisocial behavior."); David Osher et al., *How Can We Improve School Discipline?*, 39 EDUC. RESEARCHER 448, 448 (2010) ("Little evidence supports punitive and exclusionary approaches [to school discipline], which may be iatrogenic for individuals and schools . . . . Similarly, suspension and expulsion . . . contribut[e] to school disengagement, lost opportunities to learn, and dropout.") (internal citations omitted).

8. *High Suspension, Expulsion Rates Driven by Ineffective School Policies, Not "Bad Kids,"* IND. U. BLOOMINGTON (Mar. 13, 2014), <http://news.indiana.edu/releases/iu/2014/03/discipline-disparities-collaborative.shtml>.

9. See *infra* note 77.

10. EMILY MORGAN ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM xiv-xv (2014), [http://csgjusticecenter.org/wp-content/uploads/2014/06/The\\_School\\_Discipline\\_Consensus\\_Report.pdf](http://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf).

traditional schools to assist these students and prepare them for college and career.”<sup>11</sup>

This is no different in Missouri. School districts across the state, from Pattonville to Monett reserve the right to suspend and expel their students for various offenses.<sup>12</sup> Pattonville provides alternative education through ACE Learning Centers, which provides a computer-based learning environment for a few hours per week.<sup>13</sup> Monett does not appear to offer alternative education for its students.<sup>14</sup> When these students are not in alternative education, the assumption is their parents provide that education.<sup>15</sup> However, there is no oversight to ensure that parents are providing, or are able to provide, it.<sup>16</sup> What happens to these students is unclear. However, there is evidence that they end up on the streets in the school-to-prison pipeline.<sup>17</sup>

This Note will first trace the history of the Federal Government’s involvement in education. It will then move into a discussion of the history of state and local control of education. The Note will continue with an explanation of Missouri law relating to education generally and exclusionary discipline specifically. The Note will then describe

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11. *Id.* at 76.

12. PATTONVILLE SCH. DISTRICT, PATTONVILLE HIGH SCH. BEHAVIOR GUIDE, STUDENT HANDBOOK & PLANNER 23–44 (2015–16), <http://www.psd3.org/newsinfo/pdf/HSbehaviorguide-handbook15-16.pdf> (outlining the policy for suspensions and expulsions); MONETT HIGH SCH., STUDENT HANDBOOK 27 (2014–15), [http://monett.high.schoolfusion.us/modules/groups/homepagefiles/cms/804594/File/MHS%202014-2015%20Student%20Hdbk\\_%20.pdf?sessionId=846a94cf941195e36f782df123d0a47c&t=ee8ee69a0b04f0acbc74c1fba56cfabf&sessionId=846a94cf941195e36f782df123d0a47c&t=ee8ee69a0b04f0acbc74c1fba56cfabf](http://monett.high.schoolfusion.us/modules/groups/homepagefiles/cms/804594/File/MHS%202014-2015%20Student%20Hdbk_%20.pdf?sessionId=846a94cf941195e36f782df123d0a47c&t=ee8ee69a0b04f0acbc74c1fba56cfabf&sessionId=846a94cf941195e36f782df123d0a47c&t=ee8ee69a0b04f0acbc74c1fba56cfabf) (outlining the policy for suspensions and expulsions).

13. *Fast Facts about ACE*, ACE LEARNING CTRS., <http://ace.wpengine.com/all-about-ace/fast-facts-about-ace/> (last visited Feb. 8, 2015); *cf. infra* note 77 (lamenting the limited education given to students at alternative schools such as ACE Learning Centers).

14. *See* MONETT R-1 SCH. DIST., <http://monett.schoolfusion.us/modules/cms/pages.phtml?pageid=305467&sessionId=cf7f3381bea312bfd8d48cbff942e2c> (last visited Feb. 8, 2015). The district did not provide information regarding an alternative school placement.; *see also* MONETT HIGH SCH. STUDENT HANDBOOK, *supra* note 12 (the student handbook does not mention the availability of alternative schools).

15. *See infra* note 55 and accompanying text.

16. MO. REV. STAT. §§ 160–186 (2014). This section of the revised statutes would contain a potential regulation regarding parent education of expelled students—lack of such a statute is illuminating.

17. *See infra* notes 74–111 and accompanying text (discussing the school-to-prison pipeline).

the policy implications of different disciplinary schemes and Missouri's interaction with these policies. Finally, the Note will conclude with a proposition for the implementation of a ballot measure in Missouri to better align state discipline statutes with the spirit of the Missouri Constitution and its educational guarantees.

## II. HISTORY

### *A. The Federal Government's Involvement in Education*

In the United States, education is mainly a concern of state and local government.<sup>18</sup> Because the United States Constitution does not contain any mention of a duty of the Federal Government to educate its citizens,<sup>19</sup> some say that anything beyond a limited federal role in education is decried as contrary to the intent of the founding fathers.<sup>20</sup> However, the United States Department of Education and the United States Congress have mechanisms in place that permit the Federal Government to play a limited role in elementary and secondary education in the United States.<sup>21</sup>

#### 1. United States Department of Education

The United States Department of Education (DoEd) was created in 1867; it collected information and data on schools and teaching to aid the states in establishing successful schools.<sup>22</sup> This is the form of support that continues today.<sup>23</sup> Consequently, the DoEd's mission is "to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring

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18. *About Ed: The Federal Role in Education*, U.S. DEP'T OF EDUC. (Feb. 13, 2012), <http://www2.ed.gov/about/overview/fed/role.html>.

19. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130 (2006).

20. See Ben Boychuk, *What the Constitution Says About Education*, HEARTLAND INST. (Sept. 16, 2010), <http://heartland.org/policy-documents/what-constitution-says-about-education>; David Boaz, *Education and the Constitution*, CATO INST. (May 1, 2006, 10:25 AM), <http://www.cato.org/blog/education-constitution>.

21. See *About Ed: The Federal Role in Education*, *supra* note 18.

22. *Id.*

23. *Id.*

equal access.”<sup>24</sup> To achieve this mission, the DoEd “play[s] a leadership role in the ongoing national dialogue over how to improve the results of our education system for all students” and administers “programs that cover every areas of education and range from preschool education through postdoctoral research.”<sup>25</sup> In fostering and promoting education, the DoEd only contributes about 8% of the overall funding to elementary and secondary education.<sup>26</sup> The remainder is left to the states and localities, demonstrating the Federal Government’s limited role in education.<sup>27</sup>

## 2. The Power to Enact Federal Education Law

Although the DoEd has a limited role in education compared to states and localities, Congress has greater power to enact federal legislation regarding education through the Spending Clause of the United States Constitution.<sup>28</sup> Congress’s spending power includes the ability to “attach conditions on the [states’] receipt of federal funds . . . ‘to further broad policy objectives . . . .’”<sup>29</sup> Notable secondary and

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24. *Id.*

25. *Id.* The DoEd maintains programs for preschool through postgraduate education. *About Ed: The Federal Role in Education*, *supra* note 18. In doing so, it separates elementary and secondary education from post-secondary education through the creation of offices. See *About Ed: Coordinating Structure*, U.S. DEP’T OF EDUC. (July 3, 2014), <http://www2.ed.gov/about/offices/or/index.html>, for a visualization of the DoEd’s organization structure. The scope of this Note is only within the Office of Elementary and Secondary Education and the Office for Civil Rights.

26. *About Ed: The Federal Role in Education*, *supra* note 18 (“[T]he Federal contribution to elementary and secondary education is about 8 percent, which includes funds not only from the Department of Education (ED) but also from other Federal agencies, such as the department of Health and Human Services’ Head Start program and the Department of Agriculture’s School Lunch program.”).

27. *Id.* (“This is especially true at the elementary and secondary level, where about 92 percent of the funds will come from non-Federal sources.”).

28. See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]”).

29. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). *South Dakota v. Dole* set out limitations under which Congress can use the spending power: (1) it must be used in pursuit of the general welfare; (2) the condition must be unambiguous; (3) the condition should be related to federal interest in particular programs; and (4) there cannot be an independent constitutional bar to the conditioned grant. *Dole*, 483 U.S. at 207–08. Most of the current education legislation has been passed under the *Dole*

elementary education legislation enacted through Congress's spending power<sup>30</sup> include the No Child Left Behind Act of 2001 (NCLB),<sup>31</sup> the National Defense Education Act of 1958 (NDEA),<sup>32</sup> and the Individuals with Disabilities Education Improvement Act of 2004 (IDEA).<sup>33</sup>

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framework. However, *National Federation of Independent Business v. Sebelius* modified that framework with regard to what constitutes coercion as a federalism bar to a conditioned grant. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602–03 (2012). While it is not yet clear how far *Sebelius* extends, it may have implications for future education legislation, especially legislation that modifies an existing program and its funding structure. *See Sebelius*, 132 S. Ct. at 2604–05 (striking down Medicaid expansion under the ACA as creating a de fact new program under the guise of a modified program due to the funding structure of the modification).

30. *See* Joan Indiana Rigdon, *No Child Left Behind Act*, WASH. LAW., <https://www.dobar.org/bar-resources/publications/washington-lawyer/articles/april-2008-no-child-left-behind.cfm> (Apr. 2008) (stating the NCLB and IDEA were enacted under the Spending Clause); Regina R. Umpstead, *Three Essays on Education Law and Policy: State Court Definitions of Educational Adequacy; The No Child Left Behind Act Unfunded Mandate Debate; and Conceptions of Equal Educational Opportunity for Students with Disabilities under the Individuals with Disabilities Education Act and the No Child Left Behind Act 70 (2008)* (unpublished Ph.D. dissertation, Michigan State University) (on file with ProQuest LLC) (stating the NDEA was enacted under the Spending Clause).

31. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

32. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended in scattered sections of 20 U.S.C.).

33. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.). In addition to these statutes, *Race to the Top*, the Obama Administration's education reform program, is also influential. *Race to the Top* works alongside No Child Left Behind to offer competitive grants to states "leading the way with ambitious yet achievable plans for implementing coherent, compelling, and comprehensive education reform." *Race to the Top*, U.S. DEP'T OF EDUC. (last modified June 6, 2016), <http://www2.ed.gov/programs/racetothetop/index.html>. To determine which states receive grant money, the program evaluates states in the following areas: (1) "[a]dopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy;" (2) "[b]uilding data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction;" (3) "[r]ecruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and" (4) "[t]urning around our lowest-achieving schools . . ." *Id.* While the success of the program is controversial, see, for example, Diane Ravitch, *Obama's Race to the Top Will Not Improve Education*, HUFFINGTON POST: THE BLOG (Aug. 1, 2010, 1:27 PM), [http://www.huffingtonpost.com/diane-ravitch/obamas-race-to-the-top-wi\\_b\\_666598.html](http://www.huffingtonpost.com/diane-ravitch/obamas-race-to-the-top-wi_b_666598.html), evaluating the merits of the program is beyond the scope of this Note.

### *B. State Control Over Education*

While there is no mention of a right to education in the United States Constitution, all fifty states mention this right in their state constitutions.<sup>34</sup> Further, the Supreme Court has declared that education is primarily a state and local matter.<sup>35</sup> Each state has an education agency charged by the state legislature with maintaining the public schools within that state.<sup>36</sup> According to the National Association of State Boards of Education, the role of state boards is to “serve as an unbiased broker for education decisionmaking, focusing on the big picture, articulating the long-term vision and needs of public education, and making policy based on the best interests of the public and the young people of America.”<sup>37</sup> More concretely, the state boards are generally charged with making curriculum, establishing graduation requirements, formulating assessments, and creating accreditation standards.<sup>38</sup> By crafting these requirements and regulations, state boards and legislatures thus have a voice in who they educate. While all state constitutions make education a universal right, this right may be taken away from some students depending on the discipline structure outlined by the state boards and legislatures.<sup>39</sup>

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34. Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. LAW CTR., <http://pabarcr.org/pdf/Molly%20Hunter%20Article.pdf> (last updated Jan. 2011).

35. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments.”); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“[Congress’s] authority, though broad, does not include the authority to regulate each and every aspect of local schools.”); *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

36. *State Contacts*, U.S. DEP’T OF EDUC., [http://wderobcolp01.ed.gov/Programs/EROD/org\\_list.cfm?category\\_cd=SEA](http://wderobcolp01.ed.gov/Programs/EROD/org_list.cfm?category_cd=SEA) (last modified Mar. 24, 2016).

37. *About Us: State Boards of Education*, NAT’L ASS’N OF ST. BDS. OF EDUC., <http://www.nasbe.org/about-us/state-boards-of-education/> (last visited Oct. 19, 2014).

38. *Id.*

39. See *infra* notes 40–73 and accompanying text for the example of Missouri.



### *C. Missouri's Education System*

Structurally, Missouri's education system is similar to that of other states in the union.<sup>40</sup> However, unlike other states, Missouri gives strong deference to local school districts' disciplinary actions, allowing them to strip disciplined students of the state constitutional right to education.<sup>41</sup>

#### 1. Missouri Constitution

Like all other states, Missouri's constitution includes a universal right to education. Article IX states:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.<sup>42</sup>

However, Missouri's original Constitution of 1820 did not provide for "free public schools for gratuitous instruction."<sup>43</sup> The 1820 Constitution only provided for free education for the poor.<sup>44</sup> It was not until the aftermath of the Civil War that Missouri included a provision in its Constitution that required the state legislature to "establish free public schools for all school children."<sup>45</sup>

In interpreting the Missouri Constitution, the Missouri Court of Appeals in Springfield highlighted that "[t]he right of children, of and within the prescribed school age, to attend the public school established in their district for them is not a privilege dependent upon the discretion of any one, but is a fundamental right, which cannot be denied, except for the general welfare."<sup>46</sup> While the Missouri Court

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40. *State Contacts*, *supra* note 36.

41. *See infra* notes 42–57 and accompanying text.

42. MO. CONST. art. IX, § 1(a).

43. *Concerned Parents v. Caruthersville Sch. Dist. 18*, 548 S.W.2d 554, 558 (Mo. 1977) (en banc).

44. *Id.*

45. *Id.*

46. *State ex rel. Roberts v. Wilson*, 297 S.W. 419, 420 (Mo. Ct. App. 1927).

of Appeals did not expound upon what would constitute a general welfare exception, it did make clear that, pursuant to the Missouri Constitution, education is a fundamental right in Missouri.<sup>47</sup>

## 2. Legislative Enactments

In “establishing and maintaining” public education in Missouri, the State Legislature has enacted a variety of laws pertaining to the structure and function of the education system.<sup>48</sup> Section 160.051 of the Missouri Revised Statutes establishes the Missouri Public School system.<sup>49</sup> Further, Section 161.020 creates the State Board of Education and Department of Elementary and Secondary Education.<sup>50</sup>

The State Legislature has also provided for the discipline of students.<sup>51</sup> Section 160.261.1 requires the local school district to clearly establish a written disciplinary policy and to disseminate that policy to each student and student’s parent or guardian at the beginning of each school year.<sup>52</sup> In regulating discipline at the local level, the Missouri Legislature has provided for differing standards of school discipline across the state.<sup>53</sup>

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47. *Id.*

48. *See, e.g., infra* notes 49–50.

49. MO. REV. STAT. § 160.051.1 (2015) (“A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of five and twenty-one years.”).

50. MO. REV. STAT. § 161.020.1 (2015) (“There is hereby created a department of elementary and secondary education headed by a state board of education as provided in article IX, Constitution of Missouri, and chapter 161 and others.”).

51. *See infra* note 52.

52. MO. REV. STAT. § 160.261.1 (2015).

The local board of education of each school district shall clearly establish a written policy of discipline, including the district’s determination on the use of corporal punishment and the procedures in which punishment will be applied. A written copy of the district’s discipline policy and corporal punishment procedures, if applicable, shall be provided to the pupil and parent or legal guardian of every pupil and parent or legal guardian of every pupil enrolled in the district at the beginning of each school year and also made available in the office of the superintendent of such district, during normal business hours, for public inspection.

*Id.*

53. *See School Discipline*, MO. DEP’T OF ELEMENTARY & SECONDARY EDUC., <http://dese.mo.gov/financial-admin-services/school-governance/student-discipline> (last visited

The State Legislature does, however, provide some guidance to local school boards with regard to school discipline. Section 167.161 provides the statutory permission for a district to suspend and expel students, “which is prejudicial to good order and discipline in the schools or which tends to impair the morale or good conduct of the pupils.”<sup>54</sup> Section 167.164 explicitly states that the fact that a student is suspended or expelled from a school “shall not relieve the state or the suspended student’s parents or guardians of their responsibilities to educate the student.”<sup>55</sup> Section 167.164 also encourages the local school district to set up an in-school suspension system, create discipline alternatives to suspension and expulsion, and provide alternative education programs; however, it does not mandate these actions.<sup>56</sup>

The state legislature also provides support for situations in which a suspended or expelled student desires to enroll in another Missouri school district. Section 167.171 allows a school district in which a suspended or expelled student is attempting to enroll to uphold that suspension or expulsion if the underlying offense also would have resulted in a suspension or expulsion for such district.<sup>57</sup> Thus, for an expelled student, moving to a new district may not provide him or her the ability to return to school as it does in other states.<sup>58</sup>

### 3. Court Cases

Generally, Missouri courts are reluctant to interfere with the disciplinary decisions of a school or school district.<sup>59</sup> Moreover,

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Jan. 18, 2015) (identifying the local school board as the decision-maker for penalties and punishments for infractions).

54. MO. REV. STAT. § 167.161.1 (2015).

55. MO. REV. STAT. § 167.164.1 (2015).

56. MO. REV. STAT. § 167.164.1 (2015).

57. MO. REV. STAT. § 167.171.4 (2015).

58. See, e.g., Brooke R. Whitted et al., *School Discipline: Board has Obligations, Discretion in Discipline*, ILL. ASS’N OF SCH. BDS. (Mar./Apr. 2011), [http://www.iasb.com/journal/j030411\\_05.cfm](http://www.iasb.com/journal/j030411_05.cfm) (discussing Illinois students’ options to enroll in a new school district to avoid suspension or expulsion).

59. See *Consol. Sch. Dist. No. 2 v. King*, 786 S.W.2d 217, 218 (Mo. Ct. App. 1990) (“[W]e review this case mindful of the reluctance of Missouri courts to interfere in a school district’s exercise of its discretion.”); *Smith v. Consol. Sch. Dist. No. 2*, 408 S.W.2d 50, 53

courts are to “afford a strong presumption of validity in favor of the [School] Board’s decision.”<sup>60</sup> Therefore, if a suspended or expelled student were to challenge his or her suspension or expulsion, the evidence against him or her must be extremely weak in order to overturn the board’s decision on the suspension or expulsion.

In *Reasoner ex rel. Reasoner v. Meyer*, the Missouri Court of Appeals upheld a suspension of a student who was disciplined for assault.<sup>61</sup> The suspended student, Justyn, was wearing a spiked bracelet when he got in a scuffle with another student.<sup>62</sup> Justyn attempted to use the device to try to scare off the other student, who presented with scratches on his abdomen.<sup>63</sup> The principal suspended Justyn for ten days and recommended to the superintendent an additional ten days, which the superintendent imposed.<sup>64</sup> Even though Justyn testified that the other boy fell on the bracelet in attempting to kick Justyn, the court determined that there was sufficient evidence to uphold the assault suspension.<sup>65</sup> The court reasoned, “[t]he Board, acting within its discretion, chose to believe that Justyn attempted to cause injury to another. Evidence in the record substantiates this determination. This court may not substitute its discretion for the discretion of the Board and must weigh the evidence in favor of the Board’s decision.”<sup>66</sup> With such a difficult standard in place for courts

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(Mo. 1966) (“The courts will not interfere with the exercise of a school district’s discretion except in a case of clear abuse, fraud, or some similar conduct.”).

60. *Reasoner ex rel. Reasoner v. Meyer*, 766 S.W.2d 161, 164 (Mo. Ct. App. 1989). *See also* *Conder v. Bd. of Dirs. of Windsor Sch.*, 567 S.W.2d 377, 379 (Mo. Ct. App. 1978) (“[T]here is a strong presumption of validity in favor of the administrative decision and a reluctance by the court to interfere with such discretion.”); *Merideth v. Bd. of Educ. of Rockwood R-6 Sch. Dist.*, 513 S.W.2d 740, 745 (Mo. Ct. App. 1974) (“The court may not substitute its judgment on the evidence and may not set aside the board’s decision unless it is not supported by competent and substantial evidence on the whole record.”).

61. *Reasoner*, 766 S.W.2d at 164–65.

62. *Id.* at 162.

63. *Id.* at 161–62.

64. *Id.* at 162.

65. *Id.* at 164–65.

66. *Id.* at 165. This reasoning is echoed in the Supreme Court case *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (“The appropriate means of school discipline is committed generally to the discretion of school authorities subject to state law.”) and the Eighth Circuit case *London v. Directors of DeWitt Public Schools*, 194 F.3d 873, 876 (8th Cir. 1999) (“[W]e give school administrators substantial deference in matters such as student discipline and maintaining order.”).

to overturn a board's decision, many cases are not litigated because of the generally low likelihood of success.<sup>67</sup>

One case directly involving a challenge to the constitutionality of Section 167.171.4 pertained to a prior version of the statute that did not make it clear whether it applied to students who were originally suspended or expelled from a parochial school. In *Hamrick ex rel. Hamrick v. Affton School District Board of Education*, a student was denied enrollment in the Affton School District because of offenses he committed while attending a parochial school.<sup>68</sup> At the time of the case, Section 167.171.4 simply stated that a “pupil attempting to enroll in a school district during a suspension or expulsion from another school district” could be denied entry into another district because of that suspension or expulsion.<sup>69</sup> The court found that the Legislature intended ‘school district’ as used in Section 167.171.4 to “pertain[] only to a public, and not a non-public entity[,] . . . reflect[ing] the plain and ordinary meaning of the phrase ‘school district.’”<sup>70</sup> Thus, the Affton School Board erred in denying the student's enrollment in its district.<sup>71</sup> In response to the court's decision in *Hamrick*, the Missouri Legislature revised the statute to explicitly include suspensions from parochial and other private and non-traditional schools.<sup>72</sup> Interestingly, the *Hamrick* court stated in dicta that the meaning of ‘school district’ should not include parochial schools because those schools are not bound by Section 167.161 and the section's due process guarantees.<sup>73</sup> Thus, the court was concerned with students' due process guarantees that the Legislature did not consider or ignore when it revised Section 167.161.4 to include non-public schools' suspensions and expulsions.

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67. Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1079 (2009–2010).

68. *Hamrick ex rel. Hamrick v. Affton Sch. Dist. Bd. of Educ.*, 13 S.W.3d 678 (Mo. Ct. App. 2000).

69. *Id.* at 680.

70. *Id.* at 681.

71. *Id.*

72. *See supra*, note 57.

73. *Hamrick*, 13 S.W.3d at 681.

#### *D. School Discipline Policy*

The revision of Section 167.161.4 was likely guided by policy decisions similar to those occurring on the national level regarding school discipline. The primary purpose of school discipline is twofold: to help guarantee school safety and to maintain an environment ripe for learning.<sup>74</sup> Moreover, desires to “[reduce] rates of future misbehavior” and “[teach] students needed skills for successful interaction in school and society” are on the minds of school boards when implementing school discipline policy.<sup>75</sup> To achieve this, school discipline can take on many forms, including a student conference, parent conference, detention, in-school suspension, out-of-school suspension (short- and long-term), and expulsion, among others.<sup>76</sup> For the more severe offenses, such as suspension and expulsion, schools may provide an alternative form of education, such as homebound or placement in an alternative school, but not all do.<sup>77</sup>

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

For those students who do not receive alternative education under school policy, they become extremely susceptible to the “school-to-prison pipeline.”<sup>78</sup> First coined in the 1980s, the school-to-prison pipeline describes the process by which high numbers of students who do not complete school—either due to exclusionary discipline

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74. Skiba et al., *supra* note 67, at 1074.

75. Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, HANDBOOK OF CLASSROOM MGMT.: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 1063, 1064 (Carolyn M. Evertson & Carol S. Weinstein eds., 2006).

76. *See, e.g.*, PATTONVILLE HIGH SCH. BEHAVIOR GUIDE, *supra* note 12, at 22–40.

77. Amanda Schneider, “School-to-Prison Pipeline” Has Disparate Impact in North County, ST. LOUIS POST-DISPATCH (Nov. 25, 2014, 12:00 AM), [http://www.stltoday.com/news/opinion/school-to-prison-pipeline-has-disparate-impact-in-north-county/article\\_83c6caea-70f2-59b8-8f4a-ec81151617d6.html](http://www.stltoday.com/news/opinion/school-to-prison-pipeline-has-disparate-impact-in-north-county/article_83c6caea-70f2-59b8-8f4a-ec81151617d6.html) (highlighting that some districts in St. Louis County use alternative schools while others do not).

78. Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. ON PUB. POL’Y 1 (2009), <http://files.eric.ed.gov/fulltext/EJ870076.pdf>.

practices or dropping out—ending up in the prison system.<sup>79</sup> According to the NAACP Legal Defense Fund, “the punitive and overzealous tools and approaches of the modern criminal justice system have seeped into our schools, serving to remove children from mainstream educational environments and funnel them onto a one-way path toward prison.”<sup>80</sup> The pipeline “push[es] children out of school and hasten[s] their entry into the juvenile, and eventually the criminal, justice system, where prison is the end of the road.”<sup>81</sup> Moreover, according to Nancy A. Heitzeg, Professor of Sociology and Program Director of Critical Studies of Race/Ethnicity at St. Catherine University:

In part, the school to prison pipeline is a consequence of schools which criminalize minor disciplinary infractions via zero tolerance policies, have a police presence at the school, and rely on suspensions and expulsions for minor infractions. What were once disciplinary issues for school administrators are now called crimes, and students are either arrested directly at school or their infractions are reported to the police. Students are criminalized via the juvenile and/or adult criminal justice systems. The risk of later incarceration for students who are suspended or expelled and unarrested is also great. For many, going to school has become literally and figuratively synonymous with going to jail.<sup>82</sup>

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79. Julie Gollihue, *School-to-Prison Pipeline Discussed*, INDEP. COLLEGIAN (Mar. 18, 2010), <http://independentcollegian.com/2010/03/18/archives/school-to-prison-pipeline-discussed/>.

80. *Dismantling the School-to-Prison Pipeline*, NAT'L ASS'N FOR ADVANCEMENT OF COLORED PEOPLE LEGAL DEF. & EDUC. FUND (Oct. 10, 2005), <http://www.naacpldf.org/publication/dismantling-school-prison-pipeline> [hereinafter NAACPLDF]. Interestingly, the average cost per year to educate a child is \$10,995, while the average cost per year to house a former student in juvenile detention is \$87,981, suggesting a strong economic argument against the school-to-prison pipeline in addition to the educational argument. Monica Llorente, *Help Us Dismantle the School-to-Prison Pipeline*, AM. BAR ASS'N: CHILDREN'S RIGHTS LITIG. (Apr. 10, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/spring-2014-0414-dismantle-school-to-prison-pipeline.html>.

81. NAACPLDF, *supra* note 80.

82. Heitzeg, *supra* note 78, at 2.

With the high stakes involved in suspending and expelling children,<sup>83</sup> why, then, are schools suspending and expelling at high rates?<sup>84</sup> Advocates of exclusionary discipline point to the deterrent function and school climate improvement function of such practices and believe zero-tolerance policies are the best means to achieve these functions.<sup>85</sup>

## 2. Zero-Tolerance Policies

Between 2002 and 2006, the number of students suspended increased from 3.1 million to 3.3 million and the number expelled from 89,100 to 102,100.<sup>86</sup> Much of this is the result of schools' dependence on zero-tolerance policies.<sup>87</sup> Zero-tolerance policies "generally require out-of-school suspension or expulsion on the first offense for a variety of behaviors—initially instituted for possession of a weapon or illegal drugs, but now frequently also including smoking tobacco or fighting in school."<sup>88</sup> Beginning in the mid to late 1980s, youth arrests for violent crimes increased to their peak in

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83. The stakes are especially high for students in high-risk groups such as those who have disabilities, are of color, and who have low socioeconomic status. See Heitzeg, *supra* note 78, at 1 ("The School to Prison Pipeline disproportionately impacts the poor, students with disabilities, and youth of color, especially African Americans, who are suspended and expelled at the highest rates, despite comparable rates of infraction."); NAACPLDF, *supra* note 80 ("These policies have served to isolate and remove a massive number of people, a disproportionately large percentage of whom are people of color, from their communities and from participation in civil society."); Carla Amurao, *Fact Sheet: How Bad Is the School-to-Prison Pipeline?*, PUB. BROAD. SERV., <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/> (last modified Mar. 28, 2013, 11:40 PM) ("Statistics reflect that these policies disproportionately target students of color and those with a history of abuse, neglect, poverty or learning disabilities.").

84. See *infra* note 86 for data demonstrating high suspension and expulsion rates.

85. Skiba et al., *supra* note 67, at 1076–77.

86. Michael Planty et al., *The Condition of Education 2009*, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC. 70 (June 2009), <http://nces.ed.gov/pubs2009/2009081.pdf>.

87. *Fact Sheet on School Discipline and the Pushout Problem*, DIGNITY IN SCHS., [http://www.dignityinschools.org/files/Pushout\\_Fact\\_Sheet.pdf](http://www.dignityinschools.org/files/Pushout_Fact_Sheet.pdf); Latanya Fanion, *The Effects of Zero-Tolerance Policies on Student Dropout Rates*, S. EDUC. FOUND. (2013), [http://www.southerneducation.org/Resource-Center/SEF-Blog/SEF-Blog-\(1\)/August-2014/The-Effects-of-Zero-Tolerance-Policies-on-Student.aspx](http://www.southerneducation.org/Resource-Center/SEF-Blog/SEF-Blog-(1)/August-2014/The-Effects-of-Zero-Tolerance-Policies-on-Student.aspx).

88. Jacob Kang-Brown et al., *A Generation Later: What We've Learned About Zero Tolerance in Schools*, VERA INST. JUST. 1 (Dec. 2013), <http://www.vera.org/sites/default/files/resources/downloads/zero-tolerance-in-schools-policy-brief.pdf>.



1994.<sup>89</sup> From there, youth crime arrests decreased significantly; however, the focus on youth violent crime remained.<sup>90</sup> Moreover, the 1999 Columbine shooting caused “people across the country [to] worry that the next devastating school shooting would occur in their town.”<sup>91</sup> However, Columbine itself did not spark schools to institute zero-tolerance policies; the majority of schools had adopted them as early as the 1996–1997 school year.<sup>92</sup>

Schools that implement zero-tolerance policies believe that they benefit by minimizing disruption and making their schools safe.<sup>93</sup> However, the data does not support this belief.<sup>94</sup> On the contrary, “the most consistently documented outcome of suspension and expulsion appears to be further suspension and expulsion, and perhaps school dropout.”<sup>95</sup> The lack of empirical data promoting zero-tolerance policies is troubling.

### 3. Group Disparities

Perhaps unsurprisingly, the majority of those who are affected by zero-tolerance policies and find themselves in the school-to-prison pipeline are students of color and students with disabilities.<sup>96</sup> The rate of suspension and expulsion of black students is three-and-one-half the rate of white students.<sup>97</sup> This is even seen at the preschool level, where four-year-old black students represent just under half of all suspensions in preschool.<sup>98</sup> Although black students represent only

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89. *Id.* at 2.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 4.

94. Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, IND. EDUC. POL'Y CTR. 13 (Aug. 2000), [http://youthjusticenc.org/download/education-justice/suspension-and-expulsion/Zero%20Tolerance,%20Zero%20Evidence%20-%20An%20Analysis%20of%20School%20Disciplinary%20Practice\(2\).pdf](http://youthjusticenc.org/download/education-justice/suspension-and-expulsion/Zero%20Tolerance,%20Zero%20Evidence%20-%20An%20Analysis%20of%20School%20Disciplinary%20Practice(2).pdf).

95. *Id.* at 15.

96. *See infra* notes 97–102 (discussing the effect of zero-tolerance policies and the school-to-prison pipeline on students of color and students with disabilities).

97. Llorente, *supra* note 80 (noting the rate may increase to as much as six times in some states).

98. Mychal Denzel Smith, *The School-to-Prison Pipeline Starts in Preschool*, NATION (Mar. 28, 2014, 1:46 PM), <http://www.thenation.com/blog/179064/school-prison-pipeline-starts-preschool#>.

18% of students in school, they account for 46% of those with more than one suspension on their record.<sup>99</sup>

For students with disabilities, the statistics are equally bleak—while just under 9% of public school children have been educationally identified as having a disability that affects their education, they represent 32% of the total population in juvenile detention.<sup>100</sup> This is especially troubling in light of the fact that the Individual's with Disabilities Education Act (IDEA) requires schools to evaluate whether a student's educational disability played a part in that student's misbehavior.<sup>101</sup> If the school determines that the educational disability played a role, the school must mitigate the discipline it would have given had the student not been identified as having a disability.<sup>102</sup>

The suspension and expulsion data in Missouri exceeds national trends along race and disability lines.<sup>103</sup> During the 2009–2010 school year, Missouri ranked as the second worst state in the black-white percentage gap of suspensions.<sup>104</sup> Moreover, Special School District of St. Louis County, which supplies special education services to all students within St. Louis County, was the sixth highest suspending district of black children, while Missouri was seventh overall for highest suspending states of black students with disabilities.<sup>105</sup> Further, these students are often not receiving any education when they are out of school, according to a St. Louis area Education Law attorney, who comments:

It has been my experience that many school districts use suspension as the “go-to” response when a child misbehaves

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99. Marilyn Elias, *The School-to-Prison Pipeline*, 43 TEACHING TOLERANCE 38, 40 (2013), <http://www.tolerance.org/magazine/number-43-spring-2013/school-to-prison>.

100. *Id.*

101. 34 C.F.R. § 300.530(e)–(g) (2014).

102. *Id.*

103. *See infra* notes 104–06 and accompanying text.

104. DANIEL J. LOSEN & JONATHAN GILLESPIE, CTR. FOR CIVIL RIGHTS REMEDIES AT CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 18 (2012), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crrr-research/losen-gillespie-opportunity-suspended-2012.pdf> (noting that Missouri falls behind all other states but Illinois).

105. *Id.* at 21, 26.

and then refuse to provide academic instruction for the suspended or expelled student in an alternative setting. These school districts take the position that providing alternative education is “optional” rather than required by law. . . . Every day I see firsthand children with disabilities being suspended long-term and receiving only five hours a week of homebound instruction, which falls woefully short . . . . If a school district does not have an alternative education program, this minimal instruction is often the only option for African-American children who are also long-term suspended. Most such children, however, do not even receive this limited educational access.<sup>106</sup>

The data could not be clearer on the adverse impact the school-to-prison pipeline has on students of color in Missouri and the country as a whole.

#### 4. Proportional Discipline

In response to the data on school suspensions and expulsions in conjunction with the lack of data relating to the benefits of zero-tolerance policies, the United States Department of Education released in early 2014 official guidance on school discipline in the form of a “Dear Colleague” letter.<sup>107</sup> Education Secretary Arne Duncan highlighted the “tremendous costs” of suspensions and expulsions carried out in connection with zero-tolerance policies and declared them “too high.”<sup>108</sup> He then instituted a call to action for state and local education agencies to

reexamine school discipline in light of three guiding principles . . . . First, take deliberate steps to create the positive school climates that can help prevent and change inappropriate behaviors. . . . Second, ensure that clear, appropriate, and consistent expectations and consequences are in place to

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106. Schneider, *supra* note 77.

107. Arne Duncan, *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, U.S. DEP'T OF EDUC. i–iv (Jan. 8, 2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

108. *Id.* at ii.

prevent and address misbehavior. . . . Finally, schools must understand their civil rights obligations and strive to ensure fairness and equity for all students by continuously evaluating the impact of their discipline policies and practices on all students using data and analysis.<sup>109</sup>

The guidelines provided in Secretary Duncan's letter emphasized the need for proportional discipline that prioritizes learning—exclusionary policies must be a last resort.<sup>110</sup> Moreover, those students who must be removed from the classroom “should be provided meaningful instruction, and their return to the classroom should be prioritized.”<sup>111</sup>

These guidelines, while not binding, should serve to advise the states on data-driven policies that reduce school discipline and build safe schools. However, reform is often a slow process, especially where policy is driven by fear and emotion.<sup>112</sup>

### III. ANALYSIS

The state of school discipline in Missouri is broken. While the Missouri Constitution bestows the right of a free education on its student-citizens,<sup>113</sup> Missouri statutes do much to limit that right through their policies on suspension and expulsion.<sup>114</sup> While giving greater discretion to school districts, seemingly moving against a zero-tolerance policy to a more graduated system, it is that very discretion that systematically excludes students with a disciplinary history from Missouri schools.<sup>115</sup> Moreover, when a student is

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109. *Id.* at ii–iii.

110. *Id.* at 3.

111. *Id.*

112. *See, e.g.*, ALLYN O. LOCKNER, STEPS TO LOCAL GOVERNMENT REFORM: A GUIDE TO TAILORING LOCAL GOVERNMENT REFORMS TO FIT REGIONAL GOVERNANCE COMMUNITIES IN DEMOCRACIES 115 (2013) (“Their fear of losing what they have outweighs their desire of gaining from reform.”).

113. *See supra* notes 42–46 and accompanying text (discussing the right to a free education found in the Missouri Constitution).

114. *See supra* notes 54–58 and accompanying text (discussing policies on suspension and expulsion found in Missouri statutes).

115. PATTONVILLE HIGH SCH. BEHAVIORAL GUIDE, *supra* note 12, at 7 (describing a progressive discipline policy in which “each student’s consequence is based on the severity of the behavior and the number of referrals the student(s) have had in the past.”). This approach is

expelled in Missouri and the school refuses to provide alternative education, Missouri statutes dictate that the obligation to educate falls squarely on the shoulders of parents.<sup>116</sup> Through school districts' wide discretion regarding expulsion, providing alternative education, and interpreting their duties to educate, Missouri schools are acting as gatekeepers to education.<sup>117</sup> Moreover, they are shirking their Constitutional duties to provide free public education to all students.<sup>118</sup>

Without a doubt, it is imperative for American schools to be safe in order to promote the best learning environment possible. But it is also clear from the data that zero-tolerance policies promote a racially disparate school-to-prison pipeline. While proportional discipline systems are being used as an attempt to combat the pipeline, by attempting to align the punishment with the crime, so to speak, this is only one facet of the problem.

At a local level, the very policies that attempt to institute proportional discipline often have caveats for administrator discretion. For example, located in South St. Louis County, the Pattonville School District lists as Level II offenses, among others, "Insubordination/Defiance of Authority," "Disruption of the School Environment" and "Disrespect."<sup>119</sup> All of these offenses make a student subject to up to ten out of school suspension days for the first offense and 10 to 180 days (a full school year) for a second offense.<sup>120</sup> Likewise, the Monett School District in Southwest Missouri lists "Profane remarks or blatant disrespect directed toward school personnel" as a Class II offense, punishable on a first offense by a minimum of a five-day suspension and a possible filing of a police report.<sup>121</sup> Monett also lists "Disturbance of class, cafeteria, or school function" and "Defiance of school personnel" as Class IV offenses, punishable on a first and subsequent offenses as follows:

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distinguishable from a zero-tolerance policy, yet still provides for suspensions and expulsions that operate under Section 167.171.4.

116. *See supra* note 55 and accompanying text.

117. *See supra* notes 48–58 and accompanying text.

118. *See supra* notes 42–47 and accompanying text.

119. PATTONVILLE HIGH SCH. BEHAVIORAL GUIDE, *supra* note 12, at 28, 31.

120. *Id.*

121. MONETT HIGH SCH. STUDENT HANDBOOK, *supra* note 12, at 28.

“The principal or his/her designee will assign consequences as deemed appropriate. Consequences may include detention, in-school suspension, or out-of-school suspension.”<sup>122</sup> Standards may, and likely do, vary with regard to all of these categories, which are especially suspect with regard to implicit bias on the part of school staff. They leave the door open for large amounts of long-term suspensions and the continued disparate impact on students of color and with disabilities.

At a state level, the government all but ensures that students who have exclusionary discipline records remain out of school. Section 167.171.4 permits active suspensions and expulsions given anywhere to remain active in any Missouri public school.<sup>123</sup> By giving school administrators discretion over whether a student with an active suspension or expulsion from another public or private district may enroll in that administrator’s district, the State washes its hands of liability for that child’s education. In declining to enroll such a student, the local district has no obligation to the student. That leaves the parent of the student to educate the child. This policy keeps in line with Section 167.164.1, which states that no suspension or expulsion relieves the State, local agency, or parent from its duty to educate the child.

However, while this practice does not violate the statutes relating to education, it is morally and socially bankrupt, runs counter to the state Constitution, and, according to the data on suspensions and expulsions, creates a disparate impact on students of color and those with disabilities. Leaving parents to educate their suspended or expelled students ignores the realities that come with low socioeconomic status. While some parents may have the time and resources to homeschool their children, many do not, as they are dealing with the stressors of poverty. This places a greater strain on the government if these students become adults on welfare because of lack of opportunities from lack of education or enter the penal system. This is especially chilling in light of the Missouri Constitution, which states: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and

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122. *Id.* at 29.

123. *See supra* note 57 and accompanying text.

liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of *all* persons in this state . . . .”<sup>124</sup> By refusing to educate those who have active suspensions and expulsions, the practice runs counter to the Constitution as Missouri is not educating *all* students. Further, because the rate of expulsions is so much higher for students of color and those with disabilities, the Sections 167.164.1 and 167.161.4 create a disparate impact on those populations.

The courts may be the institution to solve this problem. However, the Eighth Circuit is one of the most conservative of the circuits and prefers to refrain from interfering with education matters.<sup>125</sup> That this issue pertains to racial discrimination in the wake of racial tensions in the region may push them to rule favorably on the case; however, this is not a given.

The State Legislature is likely to be of little help as well. While legislators are focused on school reform, that focus is geared more toward the unaccredited school transfer issue.<sup>126</sup> Moreover, the contingent of rural Republicans in the Legislature believes reform is best seen in arming teachers rather than through reforming disciplinary measures.<sup>127</sup>

The best bet for school discipline reform is perhaps the most democratic option—a ballot measure. This route is likely to be most successful because it will be seen as a rallying cry from the people, and if it passes, become state law. The ballot initiative should attempt to repeal Section 167.161.4. While it may be a difficult fight, there is

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124. MO. CONST. art. IX, § 1(a) (emphasis added).

125. *Ingraham v. Wright*, 430 U.S. 651 (1977); Andreas Broscheid, *Comparing Circuits: Are Some Courts of Appeals More Liberal or Conservative Than Others?*, 45 LAW & SOC’Y REV. 171, 172 (2011) (internal citations omitted).

126. Elisa Crouch & Alex Stuckey, *Legislators to Tackle Missouri’s School Transfer Conundrum Again*, ST. LOUIS POST-DISPATCH (Jan. 3, 2015), [http://www.stltoday.com/news/local/education/legislators-to-tackle-missouri-s-school-transfer-conundrum-again/article\\_4fcb640-8108-5594-84ac-c29fa4212399.html](http://www.stltoday.com/news/local/education/legislators-to-tackle-missouri-s-school-transfer-conundrum-again/article_4fcb640-8108-5594-84ac-c29fa4212399.html) (“Missouri lawmakers are gearing up once again to rewrite the rules of the school transfer law after devoting hundreds of hours to the effort last winter.”).

127. *Cf.* Melissa Jeltsen, *Jay Nixon: Arming Teachers ‘Would Put Our Children at Risk,’* HUFFINGTON POST (Dec. 26, 2012, 11:27 AM), [http://www.huffingtonpost.com/2012/12/26/jay-nixon-arming-teachers\\_n\\_2365118.html](http://www.huffingtonpost.com/2012/12/26/jay-nixon-arming-teachers_n_2365118.html) (outlining the Republican-led Missouri legislature’s plan to arm teachers in the wake of Sandy Hook and Democrat Governor Jay Nixon’s concern over the bill that passed over his veto in 2014).

a higher likelihood of this course of action working than the rest. However, the process would not be without hurdles to overcome. Because a vast majority of those who are likely to support the initiative are those who reside in low voter turn-out areas,<sup>128</sup> a great deal of money would need to be spent on voter outreach and education. This would likely require the creation of a non-profit organization committed to organizing the campaign. To combat opposition campaigning, it would further require a large amount of donations, which would likely come from out of state.<sup>129</sup> Then, after all this, the procedure to put an issue on the ballot is intricate and requires detail to deadlines.<sup>130</sup> Finally, notwithstanding the hard work and time put in, the measure may still fail. However, if it does, the work will likely garner the attention of national news and put Missouri in the spotlight, which, in turn, may cause the Legislature to act on its own. Thus, while it is not a sure fire plan, the ballot measure serves the greatest chance in actualizing school discipline reform in Missouri.

However, this plan should only apply to Section 167.161.4. The organizers of the initiative should leave Section 167.164.1 intact for two reasons. First, Missouri requires that each ballot issue must be a single issue, which means that there would need to be two separate ballot issues for each statute.<sup>131</sup> This would lead to possible competition and confusion with regard to the separate measures. Second, garnering enough votes to override Section 167.164.1 is likely to be much more difficult because of oppositional rhetoric pertaining to unfit mothers, broken families, et cetera, which would come out in the fight. Still, that does not mean that 167.164.1 is

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128. Kansas City County and St. Louis City had the second and third lowest voter turn-out rates in the 2014 election. *November 4, 2014 General Election Statewide Voter Turnout*, MISSOURI SECRETARY OF STATE: MISSOURI ELECTION VOTES, [http://www.sos.mo.gov/elections/s\\_default](http://www.sos.mo.gov/elections/s_default).

129. One such donor might be Michael Bloomberg who has taken to donate money to state and local candidates and causes supporting education reform. Howard Koplowitz, *Top Election Donors 2014: Mike Bloomberg, Sheldon Adelson, David Koch Were Biggest Contributors*, INT'L BUS. TIMES (Dec. 29, 2014, 10:12 AM), <http://www.ibtimes.com/top-election-donors-2014-mike-bloomberg-sheldon-adelson-david-koch-were-biggest-1768694>.

130. See Jason Kander, *Make Your Voice Heard: Missouri's Initiative Petition Process*, MO. SEC'Y OF ST.'S OFF., [https://www.sos.mo.gov/cmsimages/Elections/Petitions/Make%20Your%20Voice%20Heard\\_11.12.2014.pdf](https://www.sos.mo.gov/cmsimages/Elections/Petitions/Make%20Your%20Voice%20Heard_11.12.2014.pdf), for instructions on forming a ballot measure.

131. *Id.* at 11.



doomed to remain as is, placing the ultimate burden of education on parents. Future ballot measures, a change in ideation in the Legislature, or placing the issue in a rider to another bill, all may ensure that the State and local governments do not close the door to children they are charged with educating.

#### IV. CONCLUSION

Education is often extolled as the means to get ahead, thus obtaining liberty and property interests. However, this is simply not the case for so many students in Missouri who are denied access to the public education promised them in the Missouri Constitution. Statutes that permit local administrators to deny enrollment to children with suspensions and expulsions from other districts serve no one. The safety risk in allowing these students to have the education they deserve is not great and these students are not beyond educating. That these statutes have a disparate impact on students of color and those with disabilities is another indication that this practice is misguided. We cannot say we live in a free society that has come so far since *Brown v. Board* when the state education system creates a separate and unequal trajectory of education. The statutes must be rewritten. Unfortunately, education has proved to be the pariah of courts and sore spot of a divisive Legislature. Thus, the best means of enacting change is a grassroots campaign for a ballot measure to repeal Section 167.161.4 and give back to all Missouri students their right to education.

In the United States, we make an active choice to educate everyone; therefore we must. We cannot stand as gatekeepers at the doors of school buildings turning away those we see as unfit to educate. By doing so, we are assigning those children a path no one wants, a path to the streets and prison. As Plato said in *The Republic*, “everything follows from the direction a person’s education takes.” If one’s education abruptly ends, there is very little good that follows.