

ARE ZERO TOLERANCE POLICIES WORTH IT?

The high cost of zero tolerance for students, families, and society's pocketbook

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I. Introduction

Varsity high school athletes Graham Dennis and Casey Edsall were suspended for bringing a penknife and a lighter to school, tools used by the young men to repair their lacrosse sticks. Dennis was taken away in handcuffs and charged with possession of a deadly weapon in the juvenile justice system.¹ Nick Stuban, a 15-year-old “model student,” was suspended for purchasing a capsule of a *legal* substance known as JWH-018, a synthetic compound with a marijuana-like effect.² Stuban took his life two months later. Bronson Clark, 6 years old, was suspended for crying in class and disrupting the educational process.³ In South Carolina, a 10-year old was suspended after his pencil sharpener broke and a teacher found the razor blade inside it.⁴ Ethan Gray, a 1st grader, was found with a butter knife in his bag and was suspended under the schools zero tolerance policies for weapons.⁵

What these children all have in common is that they have come in contact with the unfortunate ramifications of today’s system of zero tolerance policies. They all have been suspended or expelled under policies that are void of discretion and fail to take into account purpose, intent, age, or maturity. All of these children, and millions more, will have the notation of “suspension” or “expulsion” on their academic records and many of them will have juvenile or adult criminal records too.

¹ Liz Bowie, *Two Easton Lacrosse Players Suspended Under Zero-Tolerance Policies*, BALTIMORE SUN, MAY 10, 2011, <http://www.baltimoresun.com/news/education/bs-md-co-lacrosse-discipline-20110509,0,2998688.story>.

² Donna St. George, *Suicide Turns Attention to Fairfax Discipline Procedures*, WASHINGTON POST, Feb. 20, 2011, http://www.washingtonpost.com/local/education/suicide-turns-attention-to-fairfax-discipline-procedures/2011/02/14/AB9UtxH_story.html.

³ Nisha Mohammed, *Zero Tolerance Alert: Elementary School Officials in Virginia Suspend Kindergartner for Crying, Disrupting Class*, The Rutherford Institute, Mar. 30, 2011, http://www.rutherford.org/articles_db/press_release.asp?article_id=898 (last visited May 12, 2011).

⁴ Emery P. Dalesio, *North Carolina Lawmakers Try to Lower Rate of School Suspensions, Drop Zero-Tolerance Rules*, May 11, 2011, <http://www.greenfieldreporter.com/view/story/5548adb154324afb84a905837d97712d/NC-XGR--School-Suspensions/>.

⁵ Boy Faces Suspension for Bringing Butter Knife to School, Sept. 27, 2005, <http://www.ketv.com/r/5027982/detail.html> (last visited May 12, 2011).

Today, school discipline policies, collectively known as “zero tolerance policies” are impinging on the promise of educational opportunity. The use of harsh discipline methods is widespread throughout the United States.⁶ Zero tolerance policies have resulted in the removal of tens of thousands of youth from their public schools, with the numbers of suspension and expulsions’ increasing as society becomes more fearful of school violence. In 2006, there were 3,328,750 students suspended and 102,080 expelled from elementary and secondary schools in the United States.⁷ That equates to 6.9 percent of all students in the United States being suspended and 0.21 percent being expelled during 2006.⁸ Moreover, during the 2007-2008 school year, there were 2,974,336 high school dropouts.⁹

Research suggests that 25,000 to 50,000 of the students who are expelled will be completely deprived of public education.¹⁰ Many will never return to school.¹¹ In facing the consequences of the zero tolerance policies, students are often referred to the juvenile justice system, thereby criminalizing their behavior. They fall behind in their education and, lacking an education and a developed skill set, many will find themselves unemployed and wrapped up in the juvenile justice system, and eventually in the adult penal system.

The Supreme Court does not recognize public education as a fundamental right. However, the importance of education as a means to succeed in today’s society is evidenced by

⁶ HARVARD UNIV. ADVANCEMENT PROJECTS & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES, Executive Summary 3 (2000), *available at* <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies> (hereinafter OPPORTUNITIES SUSPENDED)

⁷ See Thomas Snyder & Sally A. Dillow, U.S. Dep’t of Educ. & Just., Digest of Education Statistics, 169 tbl (NCES Pub. No. 2011015), *available at* <http://nces.ed.gov>.

⁸ *Id.* at 170 tbl.

⁹ *Id.* at 113 tbl.

¹⁰ Joan M. Wasser, *Note: Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 761-62 (1999).

¹¹ 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, 66-67 (2002) (“Studies show that many [suspended or expelled students] will not return to school even when the sanction expires...”) (hereinafter *How to Construct an Underclass*).

research and has been recognized by courts. The Supreme Court has stated, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹² In a variety of cases, the Court has recognized the role of education as “necessary to prepare citizens to participate effectively and intelligently in our open political system...”¹³ Yet despite this belief and the supporting evidence, society has adopted policies that suspend and expel students from school, limit their access to alternative education when they have been ousted from their schools, all while simultaneously involving the justice system and criminalizing the behavior that, more often than not, is purely innocent or unintentional.

II. Zero Tolerance Policies and their Origin

What are “zero tolerance” policies? Zero tolerance policies are rules intended to address specific problems associated with school safety and discipline.¹⁴ The concept of zero tolerance grew out of state and federal drug enforcement policies in the 1980s.¹⁵ Those policies were designed to respond with suspension or expulsion to weapons, drugs, and violent acts of students occurring in the school setting. The reality, however, was to establish a system of discipline that removed students for any misbehavior, regardless of the severity.

In 1999, the Columbine High School shootings shook the United States. Suddenly, zero tolerance policies were defended on the grounds that administrators and school boards were simply trying to prevent another Columbine. No longer were administrators using literal interpretations of their state’s zero tolerance policies. Instead, these policies were being implemented frequently and with utter disregard to the harsh consequences or punishments they

¹² *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954).

¹³ *Wis. v. Yoder*, 406 U.S. 205, 221 (1972).

¹⁴ Tobin McAndrews, *Zero Tolerance Policies*, ERIC Dig. No. 146, Mar. 2001, available at <http://eric.uoregon.edu/publications/digests/digest146.html> (last visited May 12, 2001).

¹⁵ Russ Skiba & Reece Patterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN (Jan. 1999).

carried with them.¹⁶ Zero tolerance policies treat major and minor violations with the same severity so as to send a message to violators. These policies most frequently address violations of drugs, weapons, violence, smoking and school disruptions by students. Yet there is absolutely no discrepancy in how teachers and administrators can react based on the gravity of the offense violation. Instead the punishment is applied in the same manner to every offense.

III. The Law Behind Zero Tolerance Policies

Students do not have a fundamental right to an education under the Constitution.¹⁷ Despite the Court's failure to declare public education as a "right" under the Constitution,¹⁸ it has simultaneously declared that it is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare."¹⁹ The responsibility of providing youth with educational services is recognized by all fifty states and the right to an education arises under states' compulsory education laws.

The court in *Goss v. Lopez*²⁰ held that students have a valid property and liberty interest in a public education.²¹ Thus, the government cannot suspend or expel students without due process, including notice, an opportunity to be heard, and the chance to defend oneself.²² The Court recognized the competing interests of students and school officials. On the one hand, "the student's interest is to avoid unfair or mistaken exclusion from the educational process."²³ On the

¹⁷ *Wis.*, 406 U.S. at 221.

¹⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁹ *Plyler v. Doe*, 457 U.S. 22, 221 (1982) (citing *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35).

²⁰ *Plyler*, 457 U.S. at 221.

²¹ *Goss v. Lopez*, 419 U.S. 565 (1975).

²² *Id.* at 576.

²³ *Id.* at 579.

other hand, the Court acknowledged that some “modicum of discipline and order is essential if the educational function is to be performed.”²⁴

Because education is not a fundamental right under the Constitution, courts must follow a mere “rational basis” standard when approaching a claim that involves a school disciplinary action that may violate a student’s substantive due process rights. To satisfy this test, two elements must exist. First, the disciplinary action must be rationally related to a valid educational objective – in our case, establishing a safe learning environment.²⁵ Such legitimate ends include the enforcement of school regulations, protection of other students and school property, as well as preservation of the academic environment. Second, the severity of the disciplinary action must be reasonable in relation to the student’s conduct.²⁶ In *Fisher v. Burkburnett*, a student sought relief from a suspension and loss of a trimester’s credits for violation of a school drug regulation.²⁷ The student claimed that her punishment was grossly excessive. In response, the court asserted that the punishment was legitimate in light of the school’s pressing interest in discouraging drug abuse at school.²⁸ According to the court in *Fisher*, a punishment may be an

²⁴ *Goss*, 419 U.S. at 579.

²⁵ *Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d Cir. 1989) (holding that an imposition of a 60-day athletic suspension and a 10-day academic suspension was rationally related to a valid state interest); *Mitchell v. Board of Trustees of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660, 665 (5th Cir. 1980) (holding that the required expulsion for bringing knives to school is rationally related to a legitimate goal of providing a safe educational environment); *Doe v. Superintendent of Sch. of Worcester*, 653 N.E.2d 1088 (Mass. 1995) (holding that expulsion for possession of knife in violation of school weapons policy was rationally related to school officials’ interest in protecting other students and staff)

²⁶ *Barnett ex rel. Barnett v. Tipton County Bd. Of Educ.*, 601 F.Supp.2d 980, 985 (W.D. Tenn. 2009) (holding that Defendants’ considered the severity and gravity of each offense before taking disciplinary actions that were rationally related to the Plaintiffs’ conduct); *Lausin ex rel. Lausin v. Bishko*, 727 F.Supp.2d 610, (N.D. Ohio 2010) (holding that Gina’s violations were substantial and the discipline given was rationally related to the severity of Gina’s violation).

²⁷ *Fisher v. Burkburnett*, 419 F. Supp. 1200, 1201-02 (N.D. Tex. 1976).

²⁸ *Fisher*, 419 U.S. at 1205.

unreasonable means to attain a school objective if there was a “great enough disparity between the offense and punishment in an individual case.”²⁹

In light of *Goss*, school officials’ disciplinary actions will stand as long as they follow the procedures that have been established in that particular jurisdiction. In order to protect students from being suspended or expelled at the whim of the school’s over-inclusive zero tolerance laws, procedural due process protections must be strengthened. The right to notice and an opportunity to be heard are inadequate in light of how schools apply this requirement³⁰, and thus juveniles are suspended or expelled in violation of their due process rights.

IV. The Application and Extension of The Federal Gun Free Schools Act to Drugs, Alcohol and Other School Rule Violations

In 1994 the Clinton administration passed the Gun-Free Schools Act of 1994, authorized by the Improving America’s Schools Act of 1994.³¹ The law, passed in response to a growing concern about school violence, was the first instance in which the federal government inserted itself into the realm of school discipline.³² Using federal funding as an enforcement method, the law required all states to enact legislation to enforce the federal gun-free schools law. Section 8921 required that any state receiving federal funds must have laws in place requiring expulsion of students, for a period of no less than one year, who brought a weapon to school.³³

²⁹ *Id.*

³⁰ *Ala. and Coushatta Tribes of Tex. v. Tr. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993) (students were not given prior notice of suspension or opportunity to discuss their violation of dress code); *Waln by and Through Waln v. Todd County Sch. Dist.*, 388 F. Supp. 2d 994 (D.S.D 2005) (public high school student deprived due process when school denied him a hearing prior to his short-term suspension being converted to a long-term suspension); Maryland Considers Changing Timeline for Student Discipline, EDUCATION NEWS, Apr. 28, 2011, http://www.educationnews.org/ednews_today/154968.html (last visited May 12, 2011) (Maryland students may be kept out of school for weeks or months during the appeals process)

³¹ 20 U.S.C. §8921 (1994).

³² Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 158 (1999).

³³ 20 U.S.C. §8921(a)(1) (repealed 1994).

By 1995, all fifty states adopted legislation in line with this Act³⁴, but the great majority did so by instituting broader zero tolerance sanctions. Schools began to realize that drugs, alcohol, and possession of weapons are just as damaging to students and dangerous in the school system as firearms. The result was the extension and adoption of legislation and zero tolerance policies to other behaviors. By 1998, eighty-seven percent of public schools had created zero tolerance policies for alcohol and eighty-eight percent for drugs.³⁵ Schools also broadened zero tolerance policies for weapons beyond firearms, with many of the schools extending the definition of weapons in the school setting beyond what is commonly categorized and defined as “criminal.”³⁶ Additionally, many states broadened zero tolerance policies to include not only illegal drug use and possession but also legal drugs, including over-the-counter medication and look-alike substances.³⁷

V. Abandoning Discretion and Balance in Zero Tolerance Policies

It is the outer edges of these policies that have led to the most outrage and the stories of youth who now have criminal records as a result of conduct that was not only innocent but also

³⁴ See Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1047 n.46 (2001).

³⁵ See Phillip Kaufman et al., U.S. Dep’t of Educ. & Just., Indicators of School Crime and Safety 129 tbl. A1 (NCES Pub. No. 2002-113/NCJ-190075, 2001), available at <http://nces.ed.gov>

³⁶ See Meredith Jessup, *Teen Faces Criminal Assault Charges for Shooting Spitwads in School*, THE BLAZE, Feb. 4, 2011, <http://www.theblaze.com/stories/teen-faces-criminal-assault-charges-for-shooting-spitwads-in-school/> (last visited May 12, 2011) (14-year-old suspended and then expelled under the school’s no-tolerance policy for shooting spitwads, defined by the school as a “weapon, or object used to intimidate, threaten or harm others”); *Safford Unified Sch. Dist. #1 v. Redding*, 129 S.Ct. 2633 (2010) (citing Downey, *Zero Tolerance Doesn’t Always Add Up*, THE ATLANTA JOURNAL-CONSTITUTION, Apr. 6, 2009, A11 (11-year-old was arrested, handcuffed, and taken to jail for bringing a plastic butter knife to school).

³⁷ Michael A. Chandler, *Birth-Control Pill Lands Fairfax Girl 2-Week Suspension*, THE WASH. POST, Apr. 5, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/04/AR2009040402591.html> (last visited May 12, 2011) (high school student suspended after taking her birth-control pill during lunch); *Safford Unified Sch. Dist. #1 v. Redding*, 129 S.Ct. 2633 (2010) (citing Grant, *Pupils Trading Sweet Mix Get Sour Shot of Discipline*, PITTSBURGH POST-GAZETTE, May 18, 2006, B1 (14 elementary-school students were suspended for “imitating drug activity” after they combined Kool-Aid and sugar in plastic bags)); *Wagner v. Ft. Wayne Comm. Schs.*, 255 F. Supp. 2d 915 (N.D. Ind. 2003) (middle school student challenged expulsion for bringing caffeine pills to school and distributing them to other students).

harmless. The applications of zero tolerance rules and the effects they have on students have been widespread and mostly harmful.

Over time, the discretion that was initially imbedded in the definition and interpretation of what constituted weapons or drugs for the purpose of zero tolerance laws was removed. Moreover, administrators failed to use the discretionary clauses within each zero tolerance policy, clauses that were placed there on purpose because these policies are blind to the most basic distinctions between types of offenses. Dangerousness is irrelevant, with penalties for weapons and disorderly offenses being the same and the notion of after-school detention for these offenses has disappeared, being replaced instead with formal disciplinary hearings and drastic results.³⁸

A student's intent or mens rea are irrelevant in the application of zero tolerance policies.³⁹ In criminal law, intent is a key element.⁴⁰ With zero tolerance policies we are looking at children ranging from kindergarten through high school, with wide ranging educational levels and maturity levels. These students are being suspended or expelled, and many times being introduced into the juvenile justice system, without an inquiry into whether they had the requisite intent to commit the violation they are charged with.⁴¹

While there is undoubtedly a concern surrounding school safety, a balance must be struck between providing a safe environment for youth and providing educational opportunity for all students. Zero tolerance policies fail to take into account this balance. They do not make a

³⁸ *How to Construct an Underclass*, *supra* note 11, at 64 (citing George F. Will, Zero Tolerance Policies are Getting Out of Hand, BOSTON GLOBE, Dec. 25, 2000, at A23).

³⁹ Todd A. DeMitchell & Kim Fries, *Zero Tolerance and the Paradox of Fairness: Viewpoints From the Classroom*, 36 J.L. & EDUC. 211, 226 (2007).

⁴⁰ BLACK'S LAW DICTIONARY 727 (5th ed. 1979).

⁴¹ DeMitchell & Fries, *supra* note 39.

distinction between which children violated the rule and what age or grade that child is.⁴² They do not make a distinction regarding the type of weapon or drug that can possibly trigger a violation.⁴³ Finally, school policies make no distinctions about maturity, developmental needs of the student or academic achievement.⁴⁴

Today's interpretation of zero tolerance policies fail to take into account the discretion that is necessary for educators to effectively carry out school discipline while simultaneously balancing the needs of the children to receive an appropriate education.

VI. The (In)Effectiveness of Zero Tolerance Policies

There is no convincing evidence that zero tolerance policies make schools safer.⁴⁵ The National Center for Education Statistics (NCES) conducted a study of school violence and found that after implementing zero tolerance policies for four years, schools that enacted zero tolerance reported more discipline problems than those schools without such policies.⁴⁶ Moreover, most suspensions and expulsions resulting from zero tolerance violations are for offenses that are not very serious and that do not pose a threat to school safety.

Zero tolerance policies have altered the way in which America looks at youth. Today we see them as delinquents or criminals who wreak havoc on society and who impede other children's ability to obtain an education. The result is a society in which many youth,

⁴² Mohammed, *supra* note 3.

⁴³ See Jessup, *supra* note 36; See Wagner, 255 F. Supp. 2d 915.

⁴⁴ Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 311-12 (2005); Steven Hoffer, *Virginia Middle School Students Suspended for Oregon Possession*, AOL NEWS, Mar. 17, 2011, <http://www.aolnews.com/2011/03/17/virginia-middle-school-students-suspended-for-oregano-possession/> (last visited May 12, 2011) (Straight-A middle school student suspended for imitation of controlled substances after being caught with a stash of oregano).

⁴⁵ Russell J. Skiba & Kimberly Knesting, Ind. Educ. Policy Ctr., *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, SR52 (2000).

⁴⁶ Sheila Heaviside, et. al., U.S. Dep't of Educ. & Just., *Violence and Discipline Problems in U.S. Public Schools: 1996-1997* (NCES Pub. No. 98-030, 1998), available at <http://nces.ed.gov>

undeserving of the label of delinquent or criminal, are excluded from school and from obtaining an education.

Exclusion of youth magnifies the risk they face after suspension or expulsion, including an increased likelihood of permanently dropping out of school or seeing an increased probability of becoming involved in the juvenile justice system.⁴⁷ Ongoing access to education provides youth with an environment that reduces involvement in high-risk or illegal behavior, the exact opposite of the effect seen for students who are excluded from that environment.

Suspended students automatically suffer academically. They receive failing grades, are not provided with the opportunity to make up missed schoolwork and fall behind their peers. Students who face suspension or expulsion under zero tolerance policies are more likely to drop out of school.⁴⁸ Often times, suspension or expulsion for one year does not necessarily span one school year. The result is a one-year suspension or expulsion that stretches across two academic years. Moreover, within that one-year away from school, students get into trouble with the law, or are arrested.⁴⁹ Once a student is suspended or expelled, there is a struggle to keep them on track and an even greater struggle to get them back on track when they return to school. Upon completion of their suspension or expulsion, students do not feel comfortable in classes with younger students, they are too far behind their peers, or they suffer from psychological damage and thus more often than not, the student does not return to the classroom. Those students that are suspended or expelled and are not enrolled in any alternative education programs are not the

⁴⁷ Eric Blumenson & Eva Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH.U. L.Q. 65, 86 (2003) (citing A.B.A. Criminal Justice System Report on Zero Tolerance 1 (Feb. 2000)).

⁴⁸ OPPORTUNITIES SUSPENDED, *supra* note 6.

⁴⁹ Paul M. Bogos, "Expelled. No Excuses. No Exceptions." – *Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A Section 380.1311*, 74 U. DET. MERCY L. REV. 357, 384 (1997) (citing *Expelled Students May Cost Coloradans Millions, Study Says*, 4 Educ. Wk., Jan. 24, 1996, at 4 ("[Eight percent] of the 1,452 students expelled from Colorado's public schools in 1993-1994 got into legal trouble within a year.")).

subject of state truancy laws and are thus not the concern of the state education system.⁵⁰ With a lack of education or marketable skill set, these youth have fewer opportunities and are at a far greater risk for committing crimes.⁵¹

VII. High Costs to Society Resulting from Zero Tolerance Policies

There are real economic costs associated with zero tolerance policies – costs that society bears the burden of. In 1998, Professor Mark A. Cohen calculated the cost to American taxpayers of a young person who drops out of high school and enters a life of crime and drugs. Those costs amount to a value between \$1.7 million and \$2.3 million.⁵² Initially these costs include support for the uneducated and unemployed youth via public support and unemployment payments. Those uneducated young people cannot or do not seek work and end up encountering the juvenile justice system until they eventually graduate to the adult justice system. As schools are dumping the cases formerly handled within the school system into the juvenile justice system, increased costs arise that are necessary for funding the juvenile system. It is estimated that America spends in excess of \$10 billion per year on juvenile courts and correction.⁵³ In addition, fifty percent of high school dropouts are not employed, and as much as eighty percent of the prison population is composed of high school dropouts.⁵⁴

VIII. Criminalization of Youth and the School-to-Prison Pipeline

⁵⁰ Bogos, *supra* note 49, at 380 (“Upon the possibility of being “permanently” expelled, such students will no longer be responsible to abide by the state truancy laws...”).

⁵¹ *Id.*

⁵² Mark A. Cohen, *The Monetary Value of Saving a High Risk Youth*, 14 J. OF QUANTITATIVE CRIMINOLOGY 1, 27 (1998) (estimating the potential benefits from “saving” a high-risk youth by looking at the lifetime costs associated with the typical career criminal, drug abuser, and high-school dropout).

⁵³ Richard Mendel, *Reducing Juvenile Crime, What Works – and What Doesn’t*, AMERICAN YOUTH POLICY FORUM, July 14, 2000, <http://www.aypf.org/forumbriefs/2000/fb071400.htm> (last visited May 12, 2011) (estimating that states will spend \$10-\$15 billion for juvenile justice this year).

⁵⁴ Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 286 (2006) (citing Sybil Fix, *Dropouts Tied to Suspensions*, THE POST AND COURIER, Apr. 30, 2000, at A12).

Zero tolerance policies are consistent with “get tough on crime” philosophies visible in America’s criminal law. As a result of America’s over zealous approach to its application of zero tolerance policies, children are being increasingly subjected to criminal or juvenile delinquency charges for conduct that poses no serious danger to themselves or to the safety of other children and adults.

Many zero tolerance policies mandate some extent of information sharing with law enforcement. The Gun-Free Schools Act required schools to develop policies “requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to ... school,” in order to receive federal funds.⁵⁵ Forty-one states require schools to report students to law enforcement agencies for conduct that they commit in the school setting.⁵⁶ While the categories of offenses requiring information sharing appear reasonable, it is the implementation of the laws that results in an unfair and over-inclusive application. For example, assault may be a common category of conduct that requires school reporting to law enforcement agencies. However, school districts interpret the definition of assault far too broadly and refer students in fights to law enforcement regardless of the severity. Thus for students in violation of such policies, the consequence of their misconduct is two-fold: First, offenses committed out-of-school may be referred to their school, resulting in suspension or expulsion under zero tolerance policies and second, in-school violations referred to law enforcement agencies may result in juvenile or criminal prosecution.

IX. Lack of Adequate Alternative Education Programs

If school districts are going to continue to implement zero tolerance policies with surprising frequency, it is critical to consider what happens to students who have been removed

⁵⁵ 20 U.S.C. §8922, re-enacted as 20 U.S.C. §7157(h) (2002).

⁵⁶ OPPORTUNITIES SUSPENDED, *supra* note 6.

from their schools due to an offense violation. Suspended and expelled students have high education needs. Despite this, there are few guarantees that these children will see, or have access to, alternative education during the period of expulsion. Twenty-six states require, by law, that school districts make alternative education opportunities available to suspended or expelled students.⁵⁷ In eighteen states, enrollment in alternative education is entirely subject to the school districts discretion.⁵⁸ In many districts, alternative schools are simply a place to put the “troublemakers.” They differ from regular schools in many regards and are said to serve the purpose of acting as behavior remediation centers⁵⁹ as opposed to educational facilities. Students attending those schools often do not receive adequate instruction, the length of the school day and school week may be far shorter than at a regular school and students face heightened social restrictions.⁶⁰ Additionally, students in alternative education programs are subject to levels of violence in far greater proportions than those found in traditional schools.⁶¹

The implications of denying educational access after expulsion are vast. The achievement gaps are widened and students fall further behind their peers.⁶² It increases the likelihood that children will engage in high-risk behavior and limits that child’s ability to support themselves in the long run, thus contributing to the school-to-prison pipeline.⁶³ It is also fiscally unwise for society, as excluding a single student requires hundred of thousands of dollars in expenditures,

⁵⁷ OPPORTUNITIES SUSPENDED, *supra* note 6, at Appendix III

⁵⁸ *Id.*

⁵⁹ Emily Barbour, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 202 (2009) (citing CAMILLA LEHR ET AL., ALTERNATIVE SCHOOLS: FINDINGS FROM A NATIONAL SURVEY OF THE STATES 4 (2004)).

⁶⁰ Barbour, *supra* note 59, at 202-03.

⁶¹ David D’Agata, *Alternative Education Programs: A Return to “Separate But Equal?”*, 29 NOVA L. REV. 635, 641 (2005).

⁶² Bogos, *supra* note 49, at 381.

⁶³ Maureen Carroll, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure that Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV 1909, 1914 (2008).

resulting in a drastically higher cost to society than the amount required to keep a child in the school system, receiving public education.⁶⁴

With the rapid growth in suspensions and expulsion, there is clearly a need for high quality alternative education programs. For many students who have violated their schools zero tolerance policies, these programs are their last chance to receive an education. While some alternative education programs do provide children with a fundamental and adequate education, many do not. Armed with the knowledge of the vast implications of denying educational access to students after suspension and expulsion, it seems clear that if society is going to use alternative education programs, their academic standards should closely mirror those of regular schools, resources should be allocated appropriately and students should be placed in an environment where they are safe and can continue to grow.

X. Conclusion

In 1999, following the horrific acts at Columbine High School, policymakers and school officials took steps to ensure safety in America's school. Parents were demanding solutions to the violence they saw and zero tolerance policies did just that; they took the guesswork out of how to handle school offenses and created a façade of safety. Yet today, zero tolerance policies are not so limited; they do not just touch the students who bring drugs or guns to school. Instead, the policies are being applied to a broad range of conduct and are affecting not just those students whose acts are dangerous and potentially criminal but also those children making harmless mistakes.

⁶⁴ Bogos, *supra* note 49, at 386 (noting that expelled students get into legal trouble within one year of expulsion, and incarceration costs more than \$23,000 per person per year as compared to \$5000 per year for a public school student); Cohen, *supra* note 53 (noting that a student who drops out and becomes involved in drugs or crime creates a cost of \$1.7 to \$2.3 million in supportive services).

Zero tolerance policies affect everyone: the children, families, communities, and the pocketbook of society. There is little doubt that teachers and administrators must have the authority to remove students who create a dangerous environment. However, there is simply no need to implement measures that are over-reaching and do nothing but harm students who pose no threat to the school or to others. What we need is an approach that is discretionary, that reacts to the needs of the individual students and remembers that education for a child is an undeniable necessity in today's society.