

# **OPPORTUNITIES SUSPENDED:**

## ***THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE***

Report from A National Summit on Zero Tolerance  
June 15-16, 2000, Washington, D.C.

**ADVANCEMENT PROJECT**

**THE CIVIL RIGHTS PROJECT  
HARVARD UNIVERSITY**

## TABLE OF CONTENTS

Acknowledgments . . . . .	iii
Executive Summary . . . . .	v
Introduction . . . . .	1
“Take No Prisoners” Discipline . . . . .	3
The Color of Zero Tolerance . . . . .	7
Impact On Children With Special Needs . . . . .	9
Psychological Impact of Exclusionary Disciplinary Politics: A Developmental Prospective. . . . .	10
The Conflict Between Zero Tolerance and the Need for Adolescents to Develop Strong Bonds With Adults . . . . .	10
The Conflict Between Zero Tolerance and the Need for Adolescents to Develop Healthy Attitudes Toward Justice and Fairness . . . . .	12
Zero Tolerance: Is It Worth It?	
Loss of Educational Opportunities . . . . .	13
Alternative Education . . . . .	14
Criminalization of Children . . . . .	15
Required Referral to Law Enforcement . . . . .	16
Zero Tolerance Does Not Work . . . . .	17
Case Studies Illustrating the Philosophy of Zero Tolerance . . . . .	18
Miami-Dade County Public Schools Code of Student Conduct . . . . .	20
Miami-Dade County Case Studies. . . . .	21
G.W. Carver Middle School . . . . .	22
Palm Springs Middle School . . . . .	23
Madison Middle School . . . . .	26
North Dade Middle School . . . . .	27
Lessons . . . . .	30
Bucking the Trend: Schools That Reach Out Instead of Push Out . . . . .	31
Center for Effective Collaboration and Practice (CECP) of the American Institutes of Research . . . . .	33

Rachel Carson Elementary School . . . . .	33
Justice Matters Institute . . . . .	35
DeWitt Clinton High School . . . . .	35
Milwaukee Catalyst/Designs for Change . . . . .	36
Canton Middle School . . . . .	38
Other Promising Programs . . . . .	39
Legal Protections for Students Facing Zero Tolerance Policies . . . . .	39
Prohibitions on Racial Discrimination . . . . .	40
Legal Rights of Students with Special Needs . . . . .	44
The Constitutional Right to “Due Process” . . . . .	46
State Mandated Zero Tolerance . . . . .	48
Reasons for Discipline . . . . .	48
Law Enforcement Referrals . . . . .	49
Data Collection . . . . .	49
Conclusion . . . . .	50
Recommendations . . . . .	50
Endnotes . . . . .	54
Appendices . . . . .	I-1

## **ACKNOWLEDGMENTS**

Gerald Alston, President, NAACP, Jefferson County, FL  
Dr. Barbara Argumedo, Designs for Change  
Principal Allan Bonilla, Palm Springs Middle School  
Prof. Paolo Annino, Florida State University Law School  
Kathleen Boundy, Center for Law and Education  
Ellen Boylan, Education Law Center (Newark, NJ)  
Jacqueline Browne, NAACP, Flagler County, FL  
Eugene Bryant, NAACP, MS State Conference  
Janell Byrd, NAACP LDF  
Principal Steve Cantees, DeSoto County H.S., FL  
Lisa Carmona, CARE, Palm Beach County, FL  
Eddie Crawford, NAACP, Louisiana State Conference  
Christine Davis, Florida Department of Education  
Principal Eunice Davis, North Dade Middle School, (Miami, FL)  
Principal Thelma Davis, Madison Middle School, (Miami, FL)  
Kathleen S. Devine, U.S. DOJ, Civil Rights Division  
John Due, Esq, (Miami, FL)  
Dr. Kevin Dwyer, National Ass'n of School Psychologists  
David Fellows, On-Campus Intervention Program  
Ed Fieros, Education Researcher  
Elaine Fink, Esq., Legal Services (Cincinnati, OH)  
Joan First, National Coalition for Advocacy for Students  
Colleen Flynn, Milwaukee Catalyst  
Samuel Gay, Miami-Dade County Public Schools  
Mandy Hall, Miami, FL  
Clara Hall, Prentiss, MS  
Principal Simine Heise, G.W. Carver Middle School  
Dr. Paul M. Kingery, The Hamilton Fish Institute On School  
and Community Violence  
Brian Kintisch, Center for Children and Education (GA)  
Patricia Larkens, FL  
Peter McCabe, U.S. DOEd., Office for Civil Rights  
Professor Ken Mack, Harvard Law School  
Principal Kathleen Mayer, Rachel Carson Elem. School  
Shaquail Montgomery, Student  
Donald Moore, Designs for Change  
David Osher, *American Institutes for Research*  
Diane M. Parent, Esq., The EDLAW Project  
Dennis Parker, NAACP LDF  
Len Reiser, Education Law Center  
Theresa Sanchez, Florida Department of Education  
Susan Sandler, Justice Matters (CA)

Renee Saucedo, Centro Legal De La Raza (CA)  
Tim Sindelar, Disability Law Center (Boston, MA)  
Betty Smith, Milwaukee Catalysts  
Prof. Pamela J. Smith, Boston College Law School  
Sharon Soltman, Designs for Change (Chicago, IL)  
William Taylor, Citizens' Commission on Civil Rights  
Abigail Trillen, Esq.  
Paul Weckstien, Center for Law and Education  
Junious Williams, Urban Strategies  
Ruth Zweifler, Student Advocacy Center of Michigan

Drew Community Voter's League (MS)  
Montgomery County Citizens for Quality Education (MS)  
NAACP, Jefferson County, FL  
National Council on Disability  
South Carolina United Action  
Southern Echo (MS)

This Report was made possible by generous support from the Ford Foundation,  
John D. and Catherine T. MacArthur Foundation, Charles Stewart Mott  
Foundation, Open Society Institute and the Rockefeller Foundation.

**OPPORTUNITIES SUSPENDED:  
THE DEVASTATING CONSEQUENCES OF  
ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES**

**EXECUTIVE SUMMARY**

In the aftermath of a number of high profile, extremely violent incidents at public schools, many state and local education entities have adopted the same harsh and mandatory, “take-no-prisoners” approach to discipline currently being used in this country’s criminal justice system.

*Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, is the culmination of the shared efforts of The Civil Rights Project (CRP) at Harvard University and the Advancement Project (AP). By consulting with attorneys, psychiatrists, academicians, educators, and children’s advocates, CRP and AP embarked upon a multi-disciplined approach to review this subject matter. This is the first comprehensive national report to scrutinize the impact that the brutally strict Zero Tolerance approach to discipline, currently being used in public schools, is having on American children. The report illustrates that Zero Tolerance is unfair, is contrary to the developmental needs of children, denies children educational opportunities, and often results in the criminalization of children.

**Take No Prisoners Discipline**

This report documents the over-zealous approach to promoting safety being assimilated in public schools in many districts across the country. Principals and administrators are no longer using literal interpretations of their state’s and district’s Zero Tolerance policies, and they are no longer willing to use the discretionary clauses found in many of these provisions. Instead, they are inventing highly creative interpretations of the ill-conceived laws and using them to suspend and expel children based on relatively minor, non-violent offenses. In 1998, more than 3.1 million children in America were suspended and another 87,000 were expelled.

A great deal of statistical and anecdotal evidence supports the conclusion that children are being unfairly suspended and arbitrarily kicked out of school for incidents that could have been very easily handled using alternative methods. As a result, every day Zero Tolerance Policies force children to be suspended or expelled for sharing Midol, asthma medication (during an emergency), and cough drops, and for bringing toy guns, nail clippers, and scissors to school. Even the common schoolyard scuffle has become a target, regardless of severity and circumstances.

## **Zero Tolerance Policies Disproportionally Impact Minority Children and Children with Disabilities**

Decades of research has shown that students of color are disproportionately disciplined in school. The evidence is highly suggestive of discrimination. Instead of trying to speculate on the motives responsible for this alarming trend, this report focuses on the fact, that for whatever reason, 25% of all African American students, nationally, were suspended at least once over a four-year period, according to the United States Department of Education's report, *The Condition of Education 1997*. No matter how one may choose to attribute the causes, the numbers of students of color suspended and expelled is disturbing.

Based on the findings of a new report by Professor Russ Skiba, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, when all socio-economic indicators are held constant, African-American children are still suspended and expelled at much higher rates than white students within the same schools. Moreover, the major use of the racial disparities appears to be higher rates of referral of black students for subjective offenses, such as "disrespect."

Statewide data from South Carolina reveal a similar pattern. While black children represent only 42% of the public school enrollment, they constitute 61% of the children charged with a disciplinary code violation. African-American and white students have equal referral rates for weapons; white students have a much higher rate of referral for illegal drugs; and African Americans are referred at much higher rates for subjective offenses, such as "disturbing schools." While Title VI of the Civil rights Acts of 1964, proscribes both intentional discrimination and policies that produce an adverse racial impact and are not justified as "educationally necessary," it has been largely ineffective and rarely enforced.

Furthermore, the amended Individuals with Disabilities Education Act provides extensive procedural protections for children with disabilities. These provisions were meant to ensure, that under the appropriate circumstances, the impact of their disabilities considered when meting out punishments. It is clear that in many circumstances, school officials are ignoring the law and that parents and students are probably unaware of their rights or unable to enforce them.

## **Psychological Impact of Exclusionary Disciplinary Policies: A Developmental Perspective**

Zero Tolerance policies, by their nature, do not provide guidance or instruction. Frequently, because these policies focus directly on harsh forms of punishment, which are inherently unjust, they breed distrust in students toward adults, and nurture an adversarial, confrontational attitude.

One of the developmental needs of school-aged children, which many leading psychologists believe must be met, is their need to develop strong, trusting

relationships with key adults in their lives, particularly those in their school. Zero Tolerance Policies foster an environment where there are no opportunities to bond with adults and provide troubled students with an unlimited amount of unsupervised free time. It is during this time that some experts believe, “suspensions may simply accelerate the course of delinquency by providing a troubled youth with little parental supervision and more opportunities to socialize with deviant peers.”

Additionally, it is essential for children to form positive attitudes toward fairness and justice. By subjecting students to automatic punishments that do not take into account extenuating or mitigating circumstances, Zero Tolerance policies take a “do as I say, not as I do” approach to discipline. Students are taught that adults are not being sincere when they speak of the need for justice and fairness and then do not take those elements into consideration when the child’s punishment is callously and subjectively meted out.

### **Zero Tolerance: Is it worth it?**

Students who are suspended suffer academically. In most instances they receive failing grades or do not have opportunities to make up missed schoolwork. They fall irretrievably behind, and there is a moderate to strong indication that they will eventually drop out of school. More than 30% of sophomores who drop out have been suspended and that high school dropouts are more likely to be incarcerated.

Only 26 states require alternative education assignments for students who are suspended or expelled. Anecdotal evidence illustrates that many of these schools fail to provide an adequate education. There is little data revealing the quality of the instruction that occurs in these centers or even if any instruction is given at all.

As a result of Zero Tolerance Policies, children are being increasingly subjected to criminal or juvenile delinquency charges. Actions that were once considered non-violent, childhood pranks have resulted in five young men being charged with felony assault for throwing peanuts, two ten-year-old boys facing felony charges for putting soap in a teacher’s water, and an eleven-year-old girl being arrested and dragged away in a police car for bringing a plastic knife to school in her lunch box to cut her chicken. Forty-one states require schools to report students to law enforcement agencies for various conduct committed in school. In Jefferson Davis County, Mississippi, for example, these referrals have resulted in students being fined \$150-\$500, given 6 months to 1 year probation, placed on curfew, and being required to perform 40-80 hours of community service.

### **Case Studies Illustrating the Philosophy of Zero Tolerance**

Federal and state disciplinary laws permit school officials to use their discretion when doling out punishments. How principals choose to exercise that discretion determines both the extent to which Zero Tolerance will be used, and subsequently, the rate at which children either will be allowed to take advantage of educational opportunities, suspended, or expelled. The various philosophies used by different principals in four



Miami Dade County Middle schools were examined for this section. The suspension rates of these schools ranged from below 2% to more than 42%. More than 75% of the students at three of the schools receive free or reduced school lunches; the rate at the fourth is 22%.

In schools where the principal has set the standard that no child should be suspended, except under extreme circumstances, teachers are less apt to refer a child for suspension for minor misconduct. Under these circumstances, teachers understand that their recommendations for suspensions are unlikely to be upheld by the principal. These schools also exhibit the most positive learning environment. In contrast, where the principal believes in strict, harsh discipline, the number of suspensions and expulsions reflects this philosophy.

Almost all the administrators agreed that if students are challenged academically, they are less likely to engage in disruptive behavior in the classroom. One principal asserted, "if teachers would learn how to teach," suspension rates would be lower. A teacher in another school stated, "if you keep them busy, they're good." In fact, as one principal explained, even the brightest students get into trouble when they are bored. Thus, in schools that lack resources such as highly qualified teachers, textbooks, supplemental instructional materials, computers and other resources, it is probable that students may be more prone to engage in misconduct. Additionally, many administrators complained that more counselors are needed.

The case studies found general consensus that teachers need to be trained in classroom management and conflict resolution. Because teachers are the first link in the disciplinary process, they should be better equipped to deal with behavioral problems using innovative strategies that do not shut out students for typical adolescent misbehavior. Of the four schools studied, only one provides this type of professional development training.

Finally, the case investigations suggest that schools should monitor disciplinary referrals by teachers to ensure fair application of disciplinary codes. Monitoring may expose problems such as poor classroom management, discriminatory treatment, or singling out of particular children. Where teachers overuse disciplinary referrals, additional training should be provided. As a result, students will not be singled out, and they will ultimately have faith that the system of punishment is just.

### **Bucking the Trend: Schools That Reach Out Instead of Push Out**

With the increasing use of suspension and expulsions, some schools are defying the status quo. Three organizations – the Center for Effective Collaboration and Practice of the American Institute of Research, the Justice Matters Institute, and Milwaukee Catalyst/Design for Change – have all published reports on how a number of schools are finding that it is possible to have achievement, safety and a low number of disciplinary referrals.

Essential elements of these schools include positive approaches to discipline,

opportunities for teachers and students to bond, training for teachers classroom management techniques, clearly understood codes of conduct and discipline focused on prevention of problems. However, the work involved in successfully transforming a school's culture is a daunting task that requires a steadfast commitment from the principal, teachers, staff, parents and community. To achieve this transformation, adults must analyze their own behaviors as well as the behaviors of their students, and be open to changing practices that may no longer fit with the school's overall mission.

While these schools do not provide any magic formulas, they do offer hopeful blueprints for how progress in this direction can be made. Their experiences, along with those of other schools undergoing similar transformations, can be tremendously instrumental in helping other school and communities in their efforts to achieve similar goals.

## **INTRODUCTION**

Every day throughout the United States, children are being shut out of the education system through the application of Zero Tolerance Policies. These policies require that children in kindergarten through 12<sup>th</sup> grade receive harsh punishments, often for minor infractions that pose no threat to safety, and yet cause them and their families severe hardship.<sup>1</sup> A strong body of compelling research indicates that these “get-tough” disciplinary measures often fail to meet sound educational principles and, in many cases, their application simply defies commonsense. More alarming than the punishment meted out in schools is the tracking of children into the juvenile justice system for minor misconduct in school. Often African-American, Latino, and disabled children bear the brunt of the consequences of these policies. Policymakers, educators, and parents should be very concerned with the long-term implications of denying educational opportunities to millions of children, particularly when the effectiveness of these policies in ensuring school safety is highly suspect.

School safety is a critically important issue. Recent tragedies have heightened the public’s fear and led to legitimate calls for stronger preventive measures. However, we must remember that “schools remain one of the safest places for children and youth.”<sup>2</sup> Yet, the evidence gathered in this Report makes clear that efforts to address guns, drugs, and other truly dangerous school situations have spun totally out of control, sweeping up millions of schoolchildren who pose no threat to safety into a net of exclusion from educational opportunities and into criminal prosecution.

In a move to reduce the incidents of violence in public schools, several state legislatures, and subsequently Congress,<sup>3</sup> passed laws implementing school disciplinary sanctions that became known as “Zero Tolerance Policies.” These laws originally focused on truly dangerous and criminal behavior by students, requiring mandatory expulsion for possession of guns on school property. Many states later extended these laws to include other weapons and possession or use of drugs. School districts throughout the country quickly expanded Zero Tolerance Policies to include many more types of behavior and, significantly, to cover infractions that pose little or no safety concerns. Some of these policies employ sweeping interpretations of the federal law by including violations not intended to be covered by the laws. Aspirin, Midol, and even Certs have been treated as drugs, and paper clips, nail files, and scissors have been considered weapons. Other policies apply the theory of “Zero Tolerance” to a broad range of student actions that have absolutely no connection to violence and drugs. (Appendix I is a compilation of summaries of new stories demonstrating the evolution of Zero Tolerance.) For example, last year Maryland schools (not including Baltimore City, the largest district) suspended

44,000 students for the non-violent offenses of “disobeying rules,” “insubordination,” and “disruption.”

In the strictest sense, these policies provide nondiscretionary punishment guidelines.<sup>4</sup> However, they have become much more. Zero Tolerance has become a philosophy that has permeated our schools; it employs a brutally strict disciplinary model that embraces harsh punishment over education. As a result of this approach to discipline, students are losing out on educational opportunities. Case studies of middle schools in Miami-Dade County, contained in this Report, demonstrate that where the zero tolerance philosophy is invoked, regardless of incidences of crime and violence, suspension rates are higher. The Report also indicates that even where schools experience repeated violations of codes of conduct, they can successfully employ solutions other than suspensions and expulsions. Of greater concern, this Report indicates that children are not only being treated like criminals in school, but many are being shunted into the criminal justice system as schools have begun to rely heavily upon law enforcement officials to punish students.

School districts throughout the country are experiencing intense pressure to “keep learning in and trouble out.”<sup>5</sup> This pressure explains the comments made recently by Thomas Payzant, Superintendent of Boston Public Schools, justifying the suspension of a student for writing a horror story assigned by the teacher. “While school officials may not have the right answer, they have to err on the side of caution.... Maybe in the context of three or four years ago there wouldn’t have been concern that embedded in this piece is perhaps a threat.”<sup>6</sup> Pedro Noguera, Professor of Education at the University of California, Berkeley, writes that these measures are “premised on the notion that violence in school can be reduced and controlled by identifying, apprehending and excluding violent or potentially violent individuals.”<sup>7</sup>

Yet, even in these fearful times, reasonable steps to protect students from guns, violence, and illegal drugs in their schools can be taken without resulting in the mass exclusion of American children from the educational process, which Zero Tolerance Policies are exacting. This Report will highlight schools that are pursuing an alternative route to school safety. Recognizing that the vast majority of suspensions involve behaviors related to the interpersonal dynamics within the school, these schools are focusing on creating climates that facilitate “greater connections between adults and students.”<sup>8</sup> Rather than concentrate on weeding out students who pose problems, they believe that most behaviors that might warrant exclusion from school can be prevented if students perceive themselves as valued and respected members of a larger community that nurtures strong relationships between school adults and students, sets high behavioral and academic

standards, and values fairness and consistency. In other words, their efforts are geared toward eliminating certain behaviors, rather than the students themselves. Parents, students, activists, and policymakers should encourage school systems to adopt these positive and effective strategies.

A zero tolerance story from the state of Mississippi exemplifies the extremely harsh disciplinary approach used in many school systems and the increasing invocation of the criminal justice system for minor school behavioral issues. At the beginning of this school year, students on a school bus were playfully throwing peanuts at one another. A peanut accidentally hit the white female bus driver, who immediately pulled over to call the police. After the police arrived, the bus was diverted to the courthouse, where children were questioned. Five African-American males, ages 17 and 18, were then arrested for felony assault, which carries a maximum penalty of five years in prison. The Sheriff commented to one newspaper, “[T]his time it was peanuts, but if we don't get a handle on it, the next time it could be bodies.”<sup>9</sup> The young men lost their bus privileges and suspension was recommended. As a result of the assistance of an attorney and community pressure, the criminal charges were dismissed. However, all five young men, who were juniors and seniors, dropped out of school because they lacked transportation to travel the 30 miles to their school in this poor, rural county in the Mississippi Delta. The impact of the punishment was underscored by one of the young men who stated, “I [would have] gone to college.... Maybe I could have been a lawyer.” This story may be incredulous, but it is true; it epitomizes the recent overreaction to non-violent childish behavior, and the impact of senseless punishment.

#### **“TAKE NO PRISONERS” DISCIPLINE**

Districts throughout the country have adopted a “take no prisoners” attitude toward discipline. As a result, more than 3.1 million students were suspended during the 1998 school year; another 87,000 were expelled.<sup>10</sup> Although record-keeping and data availability on suspensions and expulsions is inadequate and inconsistent, the numbers that are available paint an extremely troubling picture. Last year, in Jefferson County, Florida, a small, predominantly black school district, 43 % of the high school students and 31 % of middle school students were suspended at least once.<sup>11</sup> In Wisconsin, suspensions have increased 34% since 1991-92; 25.5% of African-American males and 19.75% of Native American males were suspended during the 1997-98 school year.<sup>12</sup> Chicago Public Schools have experienced a dramatic increase in the number of expulsions -- an increase from 14 in 1992-93 to 737 in 1998-99.<sup>13</sup> African-American students represent 73% of those expelled but only 53% of student enrollment; Latino students represent 20% of students expelled.<sup>14</sup> Despite this disturbing situation in Chicago, the school district set a goal of

expelling even more students during the 1999-2000 school year, bringing the number up to 1,500 students.<sup>15</sup> In Florida, 3,831 students were referred to the Juvenile Justice system for conduct in school.<sup>16</sup> The exclusion of students from the educational process is a crisis of epidemic proportions; it has long-term implications not only for the students affected, but also for our society as a whole.

Statistics on the high number of students discarded from educational institutions do not fully tell the story of Zero Tolerance. These arbitrary, harsh rules are zealously applied to expel and suspend students -- some as young as four years old -- for trivial misconduct and innocent mistakes. While some of the most absurd of these stories have received media attention, thousands of others have not been exposed. The following is a sampling of reports from attorneys, advocates, and parents around the country that demonstrate the senselessness of zero tolerance and how these policies criminalize children.<sup>17</sup>

- A six year-old African-American child was suspended for ten days for bringing a toenail clipper to school. A school board member said, "This is not about a toenail clipper! This is about the attachments on the toenail clipper!" (Harrisburg, PA)<sup>18</sup>
- A kindergarten boy in Pennsylvania was suspended for bringing a toy ax to school as part of his Halloween costume.<sup>19</sup>
- A 14-year-old boy mistakenly left a pocketknife in his book bag after a Boy Scout camping trip. At his hearing, the boy's Scout Master testified on the boy's behalf. The student was expelled under the district's Zero Tolerance Policy, which requires expulsion for possession of knives. As a result of an appeal by Legal Aid Society of Greater Cincinnati, the student was readmitted to school, but had already missed 80 days of school. (OH)
- A 4<sup>th</sup> grade ten-year-old African-American girl was charged with defiance of authority for failing to participate in a class assignment. She was suspended for three days. Soon thereafter, she was charged with "defiance of authority" for humming and tapping on her desk. She was again suspended for three days. She was subsequently suspended for five days for "defiance of authority" for talking back to her teacher and for "drug-related activity," namely, wearing one pants leg up, although there was no indication of any drug involvement. She was recommended for alternative school. The alternative school could not accept her because the alternative education system provides instruction for

grades 5-12 only. The School District promoted her, despite her failing grades, in order to get her out of the mainstream school. Requests for a due process hearing have been denied. (MS)

- An African-American 9<sup>th</sup> grader was expelled for one year from a predominantly white school district and sent to an alternative school because she had sparklers in her book bag. She had used them over the weekend and forgot they were in her bag. (East Baton Rouge Parish, LA)
- An African-American male 7<sup>th</sup> grader bet a schoolmate on the outcome of a school basketball game. The schoolmate, who lost the bet, accused the boy of threatening him for payment. The school district conducted no investigation and instead notified law enforcement officials. The 7<sup>th</sup> grader was charged with felony extortion and expelled. (San Francisco, CA)
- A 10<sup>th</sup> grade honors student, who was President of the Black Student Union, was expelled for assaulting a teacher during a fight. The student had been continually harassed by a white student. On this occasion, the two girls argued and as the black student walked away, the white student hit the black student. A fight then ensued, and in attempting to break up the fight, a teacher was hit. Despite witness statements that the assault on the teacher was an accident, the black student was expelled. The student had never been suspended prior to this incident and had no record of behavioral problems. (Dublin, CA)
- Five African-American female students, who were best friends, were suspended five days for fighting. Only two of the girls actually fought; the three others attempted to break up the fight. The five made-up later that day. In addition to the five day suspensions, three of them were kicked off the cheerleaders' squad (and cannot try out again for 2 years), two were not permitted to play on the girls' basketball team, and none were allowed to run for homecoming court. Further, after their suspensions were served, the girls were required to appear in Youth Court where they were fined \$150 - \$200, given 40 - 80 hours community service, placed on curfew for six months, and assigned to probation for one year. The girls had no prior suspensions or record of behavioral problems. (Prentiss, MS)
- A four-year-old African-American child was suspended for one day

because he allegedly pushed and shoved his classmates on the playground. The kindergartner's mother complained that she was not notified of this behavior and thus was not given an opportunity to correct his behavior.<sup>20</sup>

- On his way to school, an African-American male (5<sup>th</sup> grader) was shown two razor blades by a classmate who stated that she planned to use the blades to hurt two girls who were bullying her. The male student took the blades from his classmate and hid them in order to prevent a potential tragedy. Another student notified school officials that the boy had hidden the blades. Although the boy took steps to ensure the safety of others, he was suspended from school for one year. The District refused a request for a due process hearing. During that year, he was provided with no alternative education. As a result, he was required to repeat the fifth grade. (Winona, MS)
- An African-American honors student attending school in a predominantly white school district was suspended from school indefinitely for fighting. This was her first disciplinary referral. (SC)
- Recently, during a white substitute teacher's attempts to maintain discipline in a classroom, a fifteen-year-old African-American female told the teacher "I'm going to whip you." The child was expelled for the remainder of the school year and charged with assault. (Under Florida criminal codes, Fl. St. §784.081, assault against school personnel is a first degree misdemeanor.) (Quincy, FL)
- Under a Zero Tolerance Policy, an Ohio school district recommended expelling a 7<sup>th</sup> grade student for allegedly sniffing white-out that she was using in class. The student denied the allegation. Legal Aid Society of Greater Cincinnati verified with drug experts that white-out is not a drug. The student was ultimately suspended for nine days; her school records indicate suspension for drug abuse. (OH)
- An African-American high school student was referred for expulsion for assaulting a teacher. The teacher was hit accidentally while breaking up a fight between two students. (Both students were arrested.) Based on the allegation that the student assaulted the teacher, despite any evidence that it was intentional,



the student remained out of school for three months. As a result of an appeal to the school board and support from the NAACP, the District agreed to permit the student to return to the Adult High School. (Flagler County, FL)

In addition to these accounts, there have been many other stories in the media demonstrating overreaction of school administrators to children's behavior. The stories about suspension and expulsions for sharing Midol, asthma medication (in an emergency), and cough drops with classmates, and bringing toy guns, nail clippers, and scissors to school are not anomalies; these incidents happen every day. In some instances, school districts have interpreted the law to encompass these items under the definitions of drugs and weapons, even when all involved concede that the students intended no harm.

### **THE COLOR OF ZERO TOLERANCE**

Racial disparities in the application of school disciplinary policies have long-been documented.<sup>21</sup> The disparities are quite troubling. Most recent data from the Department of Education indicates that while African-American children only represent 17% of public school enrollment nationally, they constitute 32% of out-of-school suspensions. White students, 63% of enrollment, represent only 50% of suspensions and 50% of expulsions.<sup>22</sup> A recent study by the Applied Research Center shows that black children, particularly black males, are disciplined more often and more severely than any other minority group.<sup>23</sup> In fact, the U.S. Department of Education's report, *The Condition of Education* 1997, reveals that almost 25% of all African-American male students were suspended at least once over a four-year period. These statistics by themselves do not prove intentional discrimination, but they suggest that such discrimination may be widespread. And, regardless whether the disparities are intentional or unintentional, the numbers are nonetheless alarming.

Zero Tolerance Policies are more likely to exist in predominantly black and Latino school districts. During the 1996-97 school year, these districts were more likely to have policies addressing violence (85%), firearms (97%), other weapons (94%), and drugs (92%) than white school districts (71%, 92%, 88%, and 83%, respectively).<sup>24</sup> This disparity in the adoption of Zero Tolerance Policies may also account for some of the racial disparities, at least on a national level, in disciplinary actions taken.

Information on the types of conduct for which students of color are disciplined, when combined with the statistical disparities, produces stronger

evidence for inferring discrimination. For example, in South Carolina, while black children represent only 42% of public school enrollment, they constitute 61% of the children charged with a disciplinary code violation.<sup>25</sup> In addition to representing a disproportionate share of disciplinary actions for serious offenses, black children in South Carolina were more likely than their white counterparts to be disciplined for minor acts of misconduct, such as possession of a pager or disturbing order (i.e. loitering, disturbing peace, interfering or disturbing in any way with education). Indeed, while black and white children were charged in equal proportions for weapon violations and white students had much higher drug charges, the discipline of black students soared in the most subjective categories, where the school official's determination that an infraction occurred may be tainted with bias or stereotypes.

**South Carolina Student Misconduct by Race<sup>26</sup>**

<u>Conduct</u>	<u>Percent charged - Black</u>	<u>Percent charged - White</u>
Disturbing Schools	69%	29%
Pager	59%	40%
Weapons	49%	49%
Drugs	32%	65%
Assault	71%	27%
Threatening School Official	69%	29%

In South Carolina, the consequences for the more minor offense of “Disturbing Schools,” with which black children were overwhelmingly charged, are still serious. Of the children charged with “Disturbing Schools,” 70% were referred to a law enforcement agency, 72% were referred for suspension, and 21% were referred for expulsion.<sup>27</sup>

Attorneys representing students in the disciplinary cases who were interviewed for this Report state that in their experience, African-American and Latino children are more likely to be referred for disciplinary action and to be disciplined. In addition, these students are more likely to be disciplined for minor misconduct and to receive punishments disproportionate to their conduct.<sup>28</sup> Attorneys also report that African-American and Latino children tend to be suspended for the more discretionary offenses, such as “defiance of authority” and “disrespect of authority.” These categories of conduct clearly provide more latitude for racial bias to play a part in the use of disciplinary

measures. Attorneys and community groups assert that school personnel rely upon racial and ethnic stereotypes in taking disciplinary actions. One attorney reported that she has often heard teachers comment about the size of black children accused of assault or battery.

The continuing pattern of racial disparities in school discipline is an issue that cannot be ignored. Regardless of whether intentional discrimination is the cause of the disproportionate suspension and expulsion of black and Latino children, the statistics are quite troubling. More research is needed to determine the cause of the disparities. In addition, the Department of Education's Office for Civil Rights, which is entrusted with enforcement of Title VI, and the United States Commission on Civil Rights should vigorously investigate these disparities. It is imperative that innovative solutions to this problem be implemented. Our society cannot afford to leave any one segment of our population behind.

### **IMPACT ON CHILDREN WITH SPECIAL NEEDS**

Zero Tolerance Policies are also having a profound impact on children with special needs. In 1997, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, was amended to ensure that a child would not be punished for behavior that was a characteristic of the child's disability. Although federal law provides this protection for special education students, school officials often unfairly discipline children with disabilities. For example:

- An autistic child hit a teacher. The child was expelled and charged with battery, which is a third degree felony. (Escambia County, FL)
- A ten-year-old child with a severe case of Attention Deficit Disorder was talking on the school bus and was told by the bus aide to be quiet or a written report would be filed. The child kicked the aide; he was arrested and charged with battery. (FL)

The amended IDEA provides extensive procedural protections for children with disabilities to ensure that under appropriate circumstances the impact of their disabilities are considered in meting out punishment, but in many circumstances, school officials are clearly ignoring the law. Furthermore, parents and students often are unaware of their rights or unable to enforce them. A more detailed analysis of the legal rights of students with disabilities is set out in the legal protections section below and in Appendix II.

### **PSYCHOLOGICAL IMPACT OF EXCLUSIONARY DISCIPLINARY POLITICS: A DEVELOPMENTAL PROSPECTIVE**

*When parents, teachers, principals, and others convey to the child that we want you, like you, and would like to have you in this school and this classroom, but there are certain things we expect of you, the response is often miraculous.*<sup>29</sup>

James Comer and Alvin Poussaint, *Raising Black Children*

Zero tolerance policies inherently conflict with prescriptions for healthy child development. They are designed primarily to punish and offer few opportunities for instruction or help for students. They frequently fall into the category of overly harsh punishments that, in the words of noted psychologists James Comer and Alvin Poussaint, “either destroys a child’s spirit, has no effect at all, worsens the problem, or makes it more difficult for you to work with the child in school – he or she no longer trusts you.”<sup>30</sup>

According to many leading psychologists, rigid and inflexible discipline policies directly conflict with two major developmental needs of school-aged youths:

- 1) the development of strong and trusting relationships with key adults in their lives, particularly those in their school; and
- 2) the formation of positive attitudes toward fairness and justice.

As a result, these policies often further alienate students from school and exacerbate the behaviors they seek to remedy. This damage is particularly acute for children who are already considered “at-risk” for school failure and often has the effect of pushing them out of school completely.

### **The Conflict Between Zero Tolerance and the Need for Adolescents to Develop Strong Bonds With Adults**

Gil Noam, Professor of Education and Psychology at Harvard University, has written that a relationship with a committed and encouraging adult who “believes in me and my future” has “proven to be an essential ingredient in most resilient children and youth who succeed despite great adversity.”<sup>31</sup> He cites research that indicates supportive relationships between adults and children that provide individual attention to high-risk youth have been shown to be central to prevention programs.

Psychologist James Comer bases his successful schools for at-risk youth on the premise that children succeed in school and life when they “become bonded to the significant adults in their lives, they identify with them, imitate

their behavior, and internalize their attitudes, values, and ways. Adequate development in social, psychological, emotional, ethical, language, and cognitive areas is critical for future academic learning. A child whose development meshes with the mainstream values encountered at school will be prepared to achieve at the level of his or her ability, fostering further development. A bond develops between the child and the teacher, who now joins in supporting the overall development of the child.” Comer, in a book co-authored by renowned child psychologist Alvin Poussaint, stresses the importance of using discipline “not as a punishment or a means of control, but as a way to help a child solve a problem, develop inner controls and learn better ways of expressing feelings.”<sup>32</sup>

The liberal use of suspension as a punishment for students already at-risk for failure in school is particularly problematic. Russ Skiba, Director of the Institute for Child Study at Indiana University, and Reece Peterson, Vice President of the National Council for Children with Behavioral Disorders, maintain that “for an adolescent at-risk for anti-social behavior... suspension may simply accelerate the course of delinquency by providing a troubled youth with little parental supervision and more opportunities to socialize with deviant peers.”<sup>33</sup> Agreeing with this assessment, Irwin Hyman, Professor of School Psychology at Temple University, states that “it is patently absurd to use suspension as a punishment for truancy or class cutting, as it simply forces such children to do what they want to do anyway.”<sup>34</sup>

As Comer and Poussaint suggest, exclusionary punishments actually intensify certain adolescents’ conflicts with adults. Sue Thorson, Assistant Professor of Special Education at the University of Maine, quotes one student as saying: “I figure if I’m going to get in trouble, I’m gonna annoy him as much as I can... He deserves it, if he’s gonna keep singling me out, so I get on his nerves... If you know you’re already getting in trouble, why shut up?”<sup>35</sup> This reaction appears to be particularly common among African-American children, particularly males. Brenda Townsend, Associate Professor of Special Education at University of South Florida argues that when the majority of school suspensions and expulsions are meted out to a minority of the school population, those students are likely to interpret the disparity as rejection and, as a result, develop a collective, self-fulfilling belief that they are incapable of abiding by schools’ social and behavioral codes.<sup>36</sup> Susan Black, education research consultant, notes that, “these kids often interpret suspension as a one-way ticket out of school – a message of rejection that alienates them from ever returning to school.”<sup>37</sup> This may explain why so many students are suspended repeatedly, and why, according to Lawrence M. DeRidder, being suspended or expelled is one of the top three school-related reasons for dropping out.<sup>38</sup>

## **The Conflict Between Zero Tolerance and the Need for Adolescents to Develop Healthy Attitudes Toward Justice and Fairness**

Most suspensions and expulsions take place at the middle and high school level, when many adolescents are acutely tuned into issues related to fairness and justice. M. Lee Manning, Professor at Old Dominion University in Norfolk, has written that developing “a sense of justice, a perception of fairness, and an overall sense of how people should be treated”<sup>39</sup> is one of the three major developmental characteristics of young adolescents.

This does not mean that adolescents do not recognize the need for punishment. However, they display a heightened sensitivity to situations where they believe the punishment may not be warranted and seem to crave individualized discipline. Sue Thorson observed that the students she interviewed “cried out for liberation from rote enforcement and standard procedures.... While they fully understood that, in certain instances, punishment was not only necessary, but desirable, they also believed that good educational practices and honest communication would avert many situations and solve some problems without the need for punishment.”<sup>40</sup>

Thus, by subjecting students to automatic punishments that do not take into account extenuating or mitigating circumstances, zero tolerance policies represent, in Gil Noam’s words, a “lost moment to teach children about respect, and a missed chance to inspire their trust of authority figures.”<sup>41</sup> And Manning suggests that such negative lessons, if learned during this critical developmental phase, are likely to last a lifetime.

Ultimately, to succeed, at-risk youth need to develop strong bonds with caring and compassionate adults whom they can trust. They require individualized discipline that takes into account their unique circumstances. As a consequence, their chances for developing essential resiliency skills and positive attitudes about adult authority, justice, and fairness are greatly enhanced. Unfortunately, zero tolerance policies that prescribe automatic and/or harsh punishments undermine the ability of teachers and administrators to form trusting relationships with students, and ultimately, these policies transmit negative messages about fairness, equity, and justice. As a result, many students are further alienated from the educational process, and behavioral problems meant to be remedied are, instead, exacerbated.

### **ZERO TOLERANCE: IS IT WORTH IT?**

Zero Tolerance Policies have high costs for children, families, and communities. The consequences are varied and in many cases they are long-term and detrimental.

### **Loss of Educational Opportunities**

Zero Tolerance Policies inherently result in the loss of children's educational opportunities. Children punished under these policies are faced with short- or long-term deprivation of education. Clearly, this consequence does not further the interests of the children involved or their communities.

In most situations, suspensions have negative consequences on academic performance. Children suspended may receive failing grades in each class for every day they miss during the suspension.. Students complain that during suspensions their teachers do not provide assignments so they may keep up with their schoolwork; consequently, they fall behind. Students repeatedly suspended may be retained in their grades.<sup>42</sup> This, of course, can lead to the child's alienation from the educational process, hostility on the part of the child, and eventually to dropping out. In fact, suspension is a moderate to strong predictor of a student dropping out of school; more than 30% of sophomores who drop out have been suspended.<sup>43</sup> Beyond dropping out, children shut out from the education system are more likely to engage in conduct detrimental to the safety of their families and communities.<sup>44</sup> The ultimate result is that Zero Tolerance Policies create a downward-spiral in the lives of these children, which ultimately may lead to long-term incarceration.<sup>45</sup>

- As a result of the “assault with a peanut” incident (see above), all five young men lost their right to ride the District's school buses. Because they are from low-income families that do not have transportation, all five ultimately dropped out of school. One of the young men stated, “I didn't have a choice -- I didn't have a ride.” This young man, who earned A-grades in his favorite subject, math, wanted to graduate. He stated, “I [would have] gone to college. Maybe I could have been a lawyer.” Reportedly, the other young men are simply “hanging out,” at risk of getting into trouble.
- The child suspended for one year for hiding razor blades in order to ensure the safety of others, (see above), is returning to school this year. Although his mother has tried to help him at home during this year suspension, he will be forced to repeat the fifth grade.
- In two similar stories involving alleged assaults against teachers

who attempted to break up fights (see above), students involved were out of school for extended periods. The Dublin, California student explained that it was quite difficult to keep up with her schoolwork and that teachers were not helpful; however, she managed. Despite a request for class assignments, the student in Flagler County, Florida, did not receive any school assignments during her three months out of school.

### **Alternative Education**

In many States, alternative education programs are available to suspended or expelled students. Whether alternative education is discretionary or mandatory varies state-by-state. As shown in Appendix III, 26 States require, by law, that school districts make alternative education opportunities available to students suspended or expelled. In 18 States, it is within the discretion of school districts to provide alternative education. Unfortunately, many alternative schools are no more than holding pens for children considered to be troublemakers. Students attending those schools are mistreated and denied adequate instruction, thus exacerbating issues of alienation, hostility, and low academic performance.

- Students at a Mississippi alternative school meet their bus in front of the local police department, where they are disciplined by police officers, if necessary. One student at this school is in a class with much older students in higher grade levels; some of these older students bully her daily. Furthermore, she does not receive instruction from her teachers. Teachers merely act as monitors. They provide worksheets and grade them but do not explain the work. The student's only positive comment was that she likes the fact that the school day at the alternative ends much earlier than at the regular school. In another alternative school, children indicate that they watch videos all day and learn nothing.

With the burgeoning number of children being suspended and expelled, there is clearly a need for high quality alternative education programs. For many students, these programs provide their last chance to receive an education. Some alternative education programs do provide an adequate education and provide much needed services to the at-risk population they serve. These schools clearly have a role to play in ensuring that these students are not deprived of educational opportunities. To date, little research has been conducted regarding alternative school programs. More information is needed in order to more accurately assess the quality of education being provided to students in these schools. Clearly, the academic standards for alternative



schools should mirror those of regular schools, and resources should be equally allocated to these schools. Under-educating this growing population of students is an ill-advised strategy for dealing with disciplinary problems.

### **Criminalization of Children**

The increase in criminal charges filed against children for in-school behavior has been one of the most detrimental effects of Zero Tolerance Policies. Students are often subjected to criminal or juvenile delinquency charges for conduct that poses no serious danger to the safety of others. What was once considered a schoolyard scuffle can now land a student in juvenile court or, even worse, in prison. In some instances this occurs regardless of age, intent, circumstances, severity of the act, or harm caused.

In many instances, school districts are simply transferring their disciplinary authority to law enforcement officials. For example, in the case of the child who bet on a game with a schoolmate, school officials conducted no investigation but simply referred the situation to the police. The five young men throwing peanuts on the school bus in Mississippi were arrested and charged with felony assault. An 11-year-old child in Columbia, South Carolina was arrested and taken away in a police car because she brought a knife to school in her lunch box to cut her chicken.<sup>46</sup> Recently, in Virginia two 10-year-old Latino boys faced felony charges for putting soap in their teacher's water -- an act that used to be considered a prank.<sup>47</sup>

### **Required Referral to Law Enforcement**

As indicated in Appendix IV, 41 States require schools to report students to law enforcement agencies for various conduct committed in school. Although most of the categories of offenses that require reporting to law enforcement agencies appear reasonable, evidence suggests that the application of the laws may be problematic. By enacting referral requirements and failing to monitor their implementation, these States have, perhaps unintentionally, set off an explosion in the criminalization of children for understandable mistakes or ordinary childhood behavior.

For example, assault is a common category of conduct for which schools are required to report students to law enforcement agencies. This category of offense is often broadly interpreted by school districts to refer students involved in fights to law enforcement agencies, regardless of severity. In Jefferson Davis County, Mississippi, the School Board has interpreted "aggravated assault," for which children must be referred to law enforcement, to include all fist fights, despite the legal requirement of "serious bodily injury." The severity of the fight

is not taken into account. As a result of sweeping and often erroneous interpretations of these laws, vast numbers of children are caught up in the juvenile justice system for typical adolescent behavior.

Furthermore, referrals of schoolchildren to law enforcement agencies often occur in the absence of violence. Data from South Carolina indicates that even those students accused of “Disturbing Schools” are referred to law enforcement agencies. During the 1998-99 school year, more than 3,000 students were referred to law enforcement for this reason. In Maryland, school districts may refer students to law enforcement agencies for the first incident of possession of a paging device; the second offense requires referral to law enforcement. (See Appendix IV.) There is no support for the proposition that this treatment of children positively affects their behavior or their futures. Given the increasingly harsh way in which juveniles are being treated in the criminal justice system, we need to consider whether it is really in the child’s -- or the community’s -- interest to embroil these students in the judicial system for behavior that would have been handled exclusively by schools in the past.

The growing involvement of law enforcement agencies in the discipline of students for nonviolent conduct in school raises several concerns about students’ rights. In many instances, students are arrested and taken from school without prior notification to parents. Consequently, students may be detained and questioned without understanding their legal rights. There is additional concern that statements made by accused students to school officials may later be used against them, without prior warning, in criminal or juvenile delinquency cases.

In addition to the increasing criminal charges filed against children, in many jurisdictions students are brought before juvenile courts. Typically, these students are charged with juvenile delinquency or “child in need of supervision.” For example, in Jefferson Davis and Covington Counties in Mississippi, students involved in fights, regardless of the severity, are not only suspended but also summoned to appear in Youth Court. In March of this year, 47 students from Jefferson Davis County, 45 of whom are African-American, appeared in Youth Court for fighting. The punishment meted out by the court depended on the grade level of the student. Students were fined \$150-\$500, given six months to one year on probation, placed on curfew (6 p.m. or 7 p.m.), and required to perform 40 to 80 hours of community service. The court conducts these hearings twice per month. It is estimated that since October 1999, 200 students from Jefferson Davis County were sent to Youth Court for in-school conduct. In most instances, suspension was a sufficient punishment for what was no more than an altercation, posing no serious threat to safety.

## **ZERO TOLERANCE DOES NOT WORK**

The philosophy of Zero Tolerance has infiltrated our society on many levels. In New York City, Baltimore, and other large cities, politicians seeking to woo voters with their “tough on crime” agendas have used Zero Tolerance as a popular sound bite. Similarly, politicians and educators seeking to respond immediately to public outrage over tragic school shootings have adopted the Zero Tolerance Philosophy. Unfortunately, political expediency has won over functional policy. The philosophy is adopted with the purposes of providing a sense of security, weeding out “troublemakers,” or ridding schools of under-achievers. Most Americans may agree with a Zero Tolerance policy directed at students carrying drugs and guns to school, but the Zero Tolerance Philosophy is not so limited; it is applied to a broad range of conduct. It has become a philosophy of how to deal with children – extending to conduct typical of adolescents. This “law and order” approach to education has detrimental implications for students and has not been shown to translate into greater safety for students and faculty.

There is little evidence that Zero Tolerance Policies are working to reduce violence or increase safety in our schools. Russ Skiba, Professor at Indiana University, indicates that the best gauge of its impact is documented in the National Center for Education Statistics (NCES) study of school violence.<sup>48</sup> After four years of implementation, the NCES found that schools that use Zero Tolerance Policies are still less safe than those without such policies.<sup>49</sup>

Moreover, claims of success from schools must be viewed critically. Some schools point to reduced expulsions in concurrent years to claim that zero tolerance is successful. Such statistics ignore the fact that many expelled students attend alternative schools, drop out, or are incarcerated and do not necessarily return as better citizens for their experience. Along the same lines, suspension rates may be artificially reduced by making suspensions longer, particularly because some students tend to be punished repeatedly. Success must be judged by looking at child victimization rates both in and out of school. Where violence rates among youth continue to rise outside of schools, expulsion and suspension reductions from year to year do not equal greater safety for children.

## **CASE STUDIES ILLUSTRATING THE PHILOSOPHY OF ZERO TOLERANCE**

To move beyond the statistics and anecdotes and to obtain a glimpse of what is happening at the school level, Advancement Project staff conducted

research on the disciplinary systems of four middle schools in Miami-Dade County Public School District. Miami-Dade schools were chosen for several reasons. First, there was a wealth of information and data readily accessible about these schools via the Internet. Second, all schools within the Miami-Dade School District are subject to the same code of conduct. Third, the student body and teaching/administrative staffs are multiracial. The factors taken into account in choosing the schools included out-of-school suspension rates, percentage of students of color, and/or percentage of children eligible for free or reduced lunch.<sup>50</sup> Two of the schools chosen have comparatively low suspension rates, while two have a much higher number of suspensions.

We interviewed principals and other administrative staff, questioning each principal about her or his philosophy regarding discipline and how that is communicated to staff. In addition, we asked administrators to discuss the circumstances under which they utilize their powers to suspend or expel as well as in-school suspension programs, counseling programs, school environment, and teacher/staff training regarding classroom management. Finally, we made additional inquiries regarding the most common infraction of the code of conduct and obstacles to reducing disruptive behavior. The goals were (1) to discern whether the philosophy of principals, who are the chief officers of schools, correlated to suspension rates, and (2) to better understand what other factors may be responsible for wide discrepancies in discipline.

Although these case studies represent a limited sample, the patterns revealed are quite stark and suggest the need for further research along these lines. The cases indicate that discipline philosophy determines outcomes; strict disciplinarians who believe in harsh punishments will have higher suspension and expulsion rates. However, strict discipline and harsh punishments do not necessarily translate into effective discipline. Research about safe and inclusive schools stresses the importance of the principal in setting the disciplinary tone for the school. (See next section.) Although schools may be subject to the same district-wide disciplinary code, the philosophy of the principal in many instances determines how these policies are actually applied. As a result, schools in the same district, serving similar student bodies, can have dramatically different suspension and expulsion rates, and students may receive widely varying punishments for the same offenses.

These case studies also demonstrate how the varying attitudes and philosophies of principals can impact disciplinary procedures and outcomes. While the principal's philosophy may not be the only factor influencing suspension rates, it is significant. Where the principals and administrators have adopted zero tolerance for misbehavior, suspension rates are higher. In

contrast, schools where principals believe in finding other ways to deal with misbehavior have lower suspension rates. The discretionary provisions of the student code of conduct then become the vehicle through which principals may exercise their philosophical differences.

Additionally, the following describes the other general trends the research detected.

- In schools where the principal has set the standard that no child should be suspended, except under extreme circumstances, teachers are less apt to refer a child for suspension for minor misconduct. Under these circumstances, teachers understand that their recommendations for suspensions are unlikely to be upheld by the principal.
- Boredom and lack of academic challenge increases the likelihood of disruptive behavior. Almost all the administrators agreed that if students are challenged academically, they are less likely to engage in disruptive behavior in the classroom. One principal asserted, “if teachers would learn how to teach,” suspension rates would be lower. A teacher in another school stated, “if you keep them busy, they’re good.” In fact, even the brightest students, one principal explained, get in to trouble when they get bored. Thus, in schools that lack resources such as highly qualified teachers, textbooks, supplemental instructional materials, computers, and other resources, it is probable that students may be more prone to engage in misconduct.
- Additional support resources are needed in public schools to ensure meaningful educational opportunities for all students. Many administrators complained that more counselors are needed. The student-to-counselor ratio at each of the schools examined is very high. Counselors are allotted on the basis of enrollment; however, where schools have more at-risk students additional counselors are needed.
- Teachers need to be trained in classroom management and conflict resolution. Of the four schools studied, only one provides this type of professional development training. Because teachers are the first link to the disciplinary process, they should be equipped to deal with behavioral problems using innovative strategies that do not shut out students for typical adolescent misbehavior. Additionally, schools must recognize that it is not always the

student who is at fault, and that often there is an overreaction to adolescent behavior.

- Schools should monitor disciplinary referrals by teachers to ensure fair application of disciplinary codes. Monitoring may expose problems such as poor classroom management, discriminatory treatment, or singling out of particular children. Where teachers overuse disciplinary referrals, additional training should be provided. As a result, students will not be singled out, and they will ultimately have faith that the system of punishment is just.

### **Miami-Dade County Public Schools Code of Student Conduct**

The Secondary School Code of Student Conduct,<sup>51</sup> which also applies to middle schools, is a 35-page booklet given to students in an effort to make the rules clear and understandable. The Code details why a code is needed; the roles, rights, and responsibilities of students, parents, and teachers; and the disciplinary actions that may be taken for a wide array of conduct. The Code begins with a statement, “Zero Tolerance for School Related Violent Crime.” This policy statement explains that the District has Zero Tolerance for violence, crime, and use of weapons, and that such offenses require the District to “invoke the most severe consequences.”<sup>52</sup>

Additional relevant portions of the Code of Student Conduct, which describe the District's philosophy regarding discipline, are included below.

A good school environment is best thought of as:

- being positive, not negative
- helping, not punishing
- turning unacceptable conduct into acceptable conduct.

Order and discipline may be described as the absence of distractions, frictions and disturbances which interfere with the effective functioning of the student, the class, and the school. It is also the presence of a safe, friendly, yet businesslike atmosphere in which students and school personnel work cooperatively toward mutually recognized and accepted goals.<sup>53</sup>

A major consideration in the application of the Code is that the most appropriate disciplinary action taken by school officials is the least extreme measure which can resolve the discipline problem. Teachers and administrators strive to use a variety of informal disciplinary or guidance

strategies, prior to, during, and after formal disciplinary action.<sup>54</sup>

### **Miami-Dade County Case Studies**

As the summaries below make clear, these guidelines are interpreted very differently by the principals in the four middle schools profiled. (See Appendix VI for school profiles.)

	<b>Black/Latino Students</b>	<b>Out-of-School Suspension Rate*</b>	<b>In-School Suspension Rate*</b>
G.W. Carver	63%	2.8%	0.003%
Palm Springs	94%	3.4%	19.6%
Madison	98%	16.2%	6.8%
North Dade	94%	34.1%	42.3%

\*The suspension rates represent the percentage of students suspended at least once.

### **G.W. Carver Middle School**

**Philosophy:** Carver’s principal, Ms. Simine Heise, opposes the use of suspensions and communicates this to her assistant principals and staff. Her philosophy is that teachers and administrators are in schools to educate -- not punish. She believes that suspensions are counterproductive and thus should be used only as a last resort. Principal Heise recognizes that suspensions permanently mar a student’s record and stay with the child even after she or he has long since matured and modified her or his behavior. Thus, she believes such punishment is unfair and detrimental to a student's progress and future.

Prior to her current appointment, Heise participated in an executive training program in the District, where she served as principal of two other schools. Those schools had significant numbers of at-risk children, many instances of violations of the Code of Student Conduct, and high suspension rates. The assistant principals at these schools were vigorous enforcers of the code and readily suspended students. Despite the differences from Carver, Heise employed the philosophy she has today. Heise informed assistant principals at these schools that they were not to suspend children during her tenure. Although the assistant principals complained that they often could not reach parents to discuss students' behavior, and therefore needed to resort to suspension, Heise believed that was the exact reason why those students should not be thrown out of school. She believed that doing so would leave them on the streets and lead to more trouble and possible incarceration.



G.W. Carver has the lowest suspension rate for middle schools in the Miami-Dade School System. In 1998-99, only 2.8% of students were suspended. Although G.W. Carver has fewer incidents of violence than the other schools reviewed, there are still incidents of misconduct. The most frequent reasons students are referred for disciplinary action are fights and cutting class. While the Code of Student Conduct permits ten-day suspensions for fights, the Carver Administration uses its discretion to employ other punishments permitted under the Code of Conduct. For fights and cutting class, G.W. Carver students receive one to three days of in-school suspensions (which is typically reduced) or are given a work assignment, such as cleaning the cafeteria. Supervised work assignments and in-school suspension are the most common punishments used at G.W. Carver. These punishments uphold the ideal that disciplining children should not prevail over educating them.

Principal Heise strongly believes that children who are challenged academically and engaged by teachers are less apt to misbehave. Teachers at Carver are encouraged to be innovative. For example, during our visit a science teacher was designing a scavenger hunt using Internet links that would teach children about various types of fish. Another science teacher engages her students by growing a vegetable garden, which, in addition to teaching science, develops students' sense of responsibility and self-pride. Another teacher commented, "if you keep them busy, they're good." In addition, Heise noted that parental involvement was as an important factor in maintaining a low number of disciplinary infractions.

### **Palm Springs Middle School**

**Philosophy:** Dr. Allan Bonilla's philosophy is that every student must feel like she or he is part of the school. No child should be neglected or disregarded. Principal Bonilla will not put kids on the street, but instead insists that the school work with them. Teachers at Palm Springs Middle School know Bonilla's philosophy is to go to great lengths to meet the needs of kids and that he does not want many students referred to him for disciplinary reasons.

Bonilla has served as Principal of Palm Springs Middle School for eleven years. When he began his tenure at Palm Springs, the school had a poor reputation. It had low attendance rates, high grade retention rates, low morale, and a considerable gang problem. At the time, teachers wanted nothing to do with "have nots." Bonilla instilled in staff that every child should feel cared for and wanted. The School's attendance has improved dramatically: in 1989, it was ranked 36th in the District, but by 1998 it claimed the #1 position for attendance in the District. Bonilla made agreements with several

of the students who had been retained – there were several students as old as 17-years old who were still in the middle school – to promote them if they improved their grades and conduct. Students kept their end of the bargain; as a result, in his first year as Principal, Bonilla awarded fifty administrative promotions. To quell gang activity, Bonilla reached out to gang members. For example, every morning Bonilla stood on the corner where gang members gathered. He spoke to them, listened to their concerns, remained accessible and as a result, gained their respect and trust. To this day, Bonilla spends the two hours of lunch period in the cafeteria, so that he can interact with students. For his successful efforts to turn Palm Springs Middle School around, Bonilla was named Dade County’s Principal of the Year in 1994.

Although misconduct still occurs (though much less frequently), Bonilla takes an approach different from some of his colleagues. Palm Springs’ out-of-school suspension rate is now down to 3.4% of students. The most frequent infraction of the Student Code of Conduct at Palm Springs is fighting. Although the District’s Code of Conduct permits out-of-school suspension for fighting, students at Palm Springs are typically assigned to the School Center for Special Instruction (SCSI) (in-school suspension program) for 3-5 days. Students in this program are isolated; they spend the day in the SCSI doing their class assignments. They do not change classrooms throughout the day. There are on average 10 students in SCSI per day. The teacher in SCSI assists students with assignments and counsels students. Other common infractions that result in assignment to SCSI include talking back to teachers, defying teachers, and not being prepared or refusing to work. Out-of-school suspensions are used for weapons (automatic suspension), severe fights, and severe defiance of authority.

Principal Bonilla acknowledges that students with behavioral and academic problems can disrupt a regular classroom setting. Instead of throwing them out of school, Bonilla developed an alternative education program that keeps them in school. This program has classes for each grade level (6-8); students stay in the same classroom for math, social studies, science, and language arts, but are permitted to take physical education and an elective with mainstream students. There are fewer students in each class, and each class has a teacher and an aide. These students are provided with academics, nurturing, and counseling. Teachers remain in regular contact with the parents of these students. The teachers in the program are more tolerant and patient. Students in the program are given the special attention they need and, as a result, are not lost.

To further reduce conflicts between students, Palm Springs Middle has implemented a unique program of conflict resolution. The HeartSmarts

Program, directed by the School's TRUST Counselor,<sup>55</sup> Ms. Russell, is based upon a curriculum developed by HeartMath Institute in California. The crux of the program is that students and teachers are taught to focus upon their hearts in order to deal with stressful situations. The program includes the following elements.

- A presentation of scientific research showing the heart's critical role in brain development, learning, creativity, and internal balance in children and adults. This research shows how positive attitudes and emotions facilitate optimal learning and better health.
- Practical methodology that helps children manage their behavior and stay focused. Invaluable tools for resolving conflicts and enhancing creativity that enable teachers to make quick attitude adjustments, sustain care for students and find solutions to problems.
- Highly effective tools for students to develop emotional balance and deal with anger, stress, and impulsive behavior.
- New strategies that provide workable solutions to discipline problems, reducing stress and conflict in students and teachers.
- Tools to enable students to distinguish intelligent choices from emotional impulses.
- Communication skills for preventing conflict with peers and closing the communication gap with teachers.

Ms. Russell and teachers at Palm Springs have been trained by the HeartMath Institute and in turn have trained other administrators, teachers, and students at Palm Springs Middle to use the tools of the HeartSmarts Program to resolve conflict and manage anger and stress. The HeartSmarts Program has contributed to improved behavior of students, including at-risk students.

In addition to HeartSmarts, Ms. Russell runs a counseling program for families of students in the alternative programs. This program employs counseling methods developed by Pairs International, a Florida-based counseling company.<sup>56</sup> Russell stays one night per week to meet with families for counseling sessions. Russell also trains students to serve as peer mediators. These innovative programs are supported by Mr. Bonilla because

they fit into his philosophy -- if the needs of students are met, they will flourish in school.

### **Madison Middle School**

**Philosophy:** Principal Thelma Davis states uncategorically that she will not tolerate children who misbehave. She believes in strict discipline. Principal Davis is integrally involved in the disciplinary process at her school. If a child is referred to her by one of the assistant principals, it is because every possible alternative to suspension has already been utilized. Before she approves an out-of-school suspension, she wants the student to “defy her” before more drastic steps are taken. Students understand that Davis is their last opportunity to shape-up. While strict discipline is employed, students are given opportunities to correct behavior before suspension is used.

The suspension rates at Madison Middle during the 1998-99 school year were 16.8% inschool and 16.2% out-of-school. Principal Davis explained that the low out-of-school suspension rate is misleading because it represents the percentage of children who were suspended once; Madison Middle has a small group of students who are repeatedly suspended from school.

At the beginning of the last school year, Davis implemented a new disciplinary plan and communicated that plan to teachers. The plan required that a child be referred to her for out-of-school suspension only after the following steps have been taken:

- classroom rules must be used and exhausted;
- the Team Behavioral Plan must be used and exhausted;<sup>57</sup>
- students must be referred to counselors and the counselor’s options must be exhausted; and
- students are then referred to the grade-level administrator.

At that point, administrators will begin implementation of the Administrative Behavior Management Plan: Alternatives to Suspension.

The Administrative Behavior Management Plan details nine alternatives that should be used before a child is referred for out-of-school suspension. These alternatives include:

- Administrator/Student Conference (Parent Contact)

- Administrator/Student/Parent Conference
- After-School Detention
- Work Detail -- Before or After School
- Indoor Suspension (SCSI) (in-school suspension)
- Saturday School
- Evening Intervention
- Student Principal/Conference
- MARS -- Madison At Risk Schedule<sup>58</sup>
- Outdoor Suspension (out-of-school)

The plan reminds teachers: “the ultimate objective is to keep students in school.”

The most common violation of the Student Code of Conduct at Madison is fighting. As one Assistant Principal explained, sixth graders are immature, “they look at each other -- they fight.” Students involved in fights at Madison are typically suspended for 3 days out-of-school, (10 days if the fight involves more than one person), and receive counseling upon their return. Punishment for fights is decided on a case-by-case basis. Students also commonly engage in disruptive behavior and skip classes. The school has had no incidents involving guns.

Davis attributes the school’s suspension rates to lack of parental control of children. In many instances, there is no parental involvement at all. Students are rude and disrespectful. Often students are referred for discipline because teachers become tired of dealing with disruptions.

To reduce disciplinary problems, Davis would like to implement a program that isolates disruptive students within the school. This program would provide a smaller classroom environment. In addition, Davis believes that the student-to-counselor ratio should be lowered. Currently, counselors are working with too many students and therefore cannot be as effective because they do not have a meaningful opportunity to build relationships with students and their parents.

### **North Dade Middle School**

**Philosophy:** Ms. Eunice Davis, Principal of North Dade Middle School, believes in the zero tolerance approach to discipline. She stated clearly that she has no tolerance for nonsense or disruption in the classroom. Davis believes that classroom disruption is the foremost problem – if teachers can teach without constant disruptions, students would learn, test scores would rise, and students would be happy. Davis believes this justifies the high suspension rate

at the school. She supports the removal of disruptive students from the classroom. She believes that consistent application of zero tolerance is important.

Davis believes that home environment plays a major role in how students feel about themselves, but that it does not determine their destiny. (Davis noted that the school is located close to an area known for heavy drug activity.) Davis emphasizes to students that they can succeed. During her four-year tenure, the school has worked hard to help students see themselves as achievers.

In addition to environmental factors, Davis believes that limited parental involvement and poor preparation in elementary school contributes to the high number of disciplinary problems. In seeming contradiction, Davis asserted that disciplinary infractions arise most often because students get restless in class and as a result, pass notes, talk, and engage in general disruptive conduct. Davis contends that teachers need to include more “hands-on” activities and interaction in the classroom. She believes that good teachers do not have chronic disciplinary problems and that many teachers need more training.

Despite an acknowledgment that teachers may be to blame, at least in part, for the disciplinary problems, the suspension rates for North Dade during the 1998-99 school year were 42.3% in-school and 34.1% out-of-school. These rates are among the highest for middle schools in the Miami-Dade County school system. Madison Middle School, which has a 16.2% out-of-school suspension rate, has a comparable number of incidents of violence (approximately .22 incidents per student). Thus, the dramatically salient differences in suspension rates may be attributable to difference in philosophy. (Although a self-described “strict disciplinarian,” the Principal of Madison believes in giving students second chances.) Davis anticipates that suspension rates at North Dade will increase for the 1999-2000 school year because of consistent application of the zero tolerance policy. Ultimately, she wants the students to be in a classroom where teachers teach, not discipline.

With hopes of lowering the suspension rates, the administration informs students and parents of the school’s Zero Tolerance Policies. Last year for example, Principal Davis met with parents of students who were repeatedly referred for discipline. Davis explained her “zero tolerance” philosophy and urged the parents to stay involved with their children's education. Unfortunately, the same students continue to be disciplined.

Discipline at North Dade Middle School was by far the harshest of the

schools reviewed. Students at North Dade involved in a fight are given an automatic ten-day out-of-school suspension, one of the most drastic measures that may be taken under the District's Code of Student Conduct. (Punishments for fights may include a series of increasingly harsh steps. A ten-day suspension is required only where a student has repeatedly engaged in fighting. Other schools reported using in-school suspensions or three- to five-day out-of-school suspensions. Ten-day suspensions were reserved for brutal fights or gang-related fights.) Davis explained that she does not care what students have to say in their defense because they could have avoided a fight by seeking assistance from an administrator or security monitor. If a parent meets with a school official, the suspension may be reduced. A recent fight between rival gangs led to arrests, suspension, and a recommendation of expulsion of approximately ten students. In-school suspensions, which - children spend the entire day (including lunch time) in a self-contained classroom, are utilized for Code of Conduct infractions such as dress code violations and talking back to a teacher.

To address the needs of the high numbers of at-risk students, North Dade has developed several programs. The Student-At-Risk Program (SARP) services 140 students (approximately 20-23 students per class), who take core classes such as math, science, language arts, and social studies together, but take electives with mainstream students. Students typically are assigned to this program for one school year. The school also recently established an alternative to suspensions program, which requires students referred for suspension to meet with a counselor four times, and parents must meet with the counselor two times. If the student or parent fails to meet these responsibilities, the student is subsequently suspended.

To decrease suspension rates, Davis believes that the school must:

- Consistently apply zero tolerance.
- Increase parental involvement.
- Refine its after-school intervention programs.
- Strengthen its school-wide conflict resolution program.
- Provide additional training for teachers in conflict resolution.

North Dade has recently implemented a number of programs that the Administration hopes will eventually reduce suspensions by addressing problems and serving as solutions. For example, the school recently purchased a computer program that will permit it to formally monitor disciplinary referrals. (It is the only school of the four mentioned that has a formal monitoring system.) This program will permit the school to analyze disciplinary referral data including the type of conduct and referring teachers.

Teachers with a high number of referrals will attend workshops relating to classroom management. In addition, for the first time last year, North Dade received Title I funds. (Although eligible for funding in previous years, the school did not access funding due to administrative problems.) Among other things, Title I funds have been used to hire a full-time Community Specialist, responsible for working with parents and increasing parental involvement.

North Dade's former TRUST Counselor implemented the Peace Program in which all school clubs participated in conflict resolution. When this Counselor left and the program dissolved, suspension rates increased. The school's new TRUST counselor has trained 30 peer mediators. In order to prevent potential problems, two students from each school club are assigned to advise administrators of potential problems. In addition, every incoming 6<sup>th</sup> grader must attend a TRUST class, which covers drug awareness, self-esteem issues, conflict resolution, and anger management.

Other programs at North Dade include: Police Mentoring Program, After-School Golf Program, After-School Tutorial Program, Concerned African-American Women (mentoring), Family Christian Association (counseling and tutoring program), and 500 Role Model.

To further combat disciplinary problems, Davis said additional resources are needed. For example, because of the school's low student enrollment, North Dade has few counselors, which are assigned to schools based upon enrollment figures, but it needs more because of the high number of at-risk students. In addition, Davis believes the District needs to provide suspended students with alternative school placements during the period of their suspensions. Such programs would potentially avoid the trouble students might get into during their suspensions.

### **Lessons**

Each of these schools confronts different problems and challenges with regard to students, teachers, and environment, yet the visits confirmed that there is a "Zero Tolerance Philosophy" that permeates many public schools. Administrators use different approaches to discipline and have varying views about what constitutes disruptive behavior and how to handle it. Ultimately, the approach chosen depends upon whether the school leadership believes that all children should be provided meaningful educational opportunities or whether they should proceed based on the conviction that disruptive behaviors cannot be tolerated under any circumstances. Thus, these interviews confirm the need to widely promote alternative methods to suspension for dealing with disruptive behaviors and to help principals and teachers understand that



children can change their behaviors without being subjected to exclusion from school. Without a change in philosophy, many schools will continue to write off and weed out children, cutting off their educational opportunities.

### **BUCKING THE TREND: SCHOOLS THAT REACH OUT INSTEAD OF PUSH OUT**

*A meaningful approach to school discipline is one that treats students and their families with respect throughout the process, seeks to learn from students and to nurture their learning and growth as human beings, and that finds ways to bring students more deeply into the school community.*

Justice Matters Institute Report: "How School Communities Prevent Racism in School Discipline"

With the increasing use of suspensions and expulsions, there are schools defying the status quo. These schools are finding that it is possible to have achievement, safety, and a low number of disciplinary referrals. We identified three organizations currently targeting these schools. These groups have drawn remarkably similar conclusions about essential characteristics of these schools.

- A shift away from disciplinary practices designed to rid schools of “the problem” toward a more inclusive model must be a school-wide effort heavily promoted by the principal and “bought into” by the majority of teachers and staff.
- Specific strategies are devised for providing students and teachers with opportunities to develop strong bonds. This often means that large schools are broken into smaller units in order to allow personal relationships between teachers and students to flourish.
- There is frequently a concerted effort to provide teachers with training and workshops focused on positive classroom management techniques and on helping teachers understand the root cause of disruptive behaviors.
- A school-wide code of conduct and expectations for student behaviors is widely promoted and understood.
- Discipline is focused on preventing and diffusing potentially disruptive situations before they erupt, and specific, well-understood strategies for addressing crises are in place. In addition, many schools employ a parent coordinator or

interventionist. This individual, who is neither a teacher nor a guidance counselor, is available to the students during the day, often providing a safe haven for students who may “lose their cool.” Funds to pay such an individual often come out of Title I money or school fundraising efforts.

- Student sanctions are considered on a case-by-case basis with input from students and parents.
- Parents, community members, mental health and juvenile justice professionals, business leaders, and others are welcomed into the daily life of the school, with a particular emphasis on engaging parents in school activities.
- Explicit efforts are made to show students that they are respected and valued members of the school community, and that, as such, they are expected to adhere to high behavioral and academic standards.
- The school implements a wide range of programs, including peer courts, conflict resolution programs, early interventions, mentoring, mediations, and character education programs that promote a mutually respectful and collaborative school climate and teach students and teachers how to handle and resolve conflict in appropriate ways.
- Schools frequently transform the physical environment into a more welcoming and friendly space.

Below are summaries of the analyses provided by these organizations and brief profiles of schools that are making progress in their efforts to improve school climate to create safe and inclusive learning environments.

**Center for Effective Collaboration and Practice (CECP) of the American Institutes of Research**<sup>59</sup>

In “Safeguarding Our Children: An Action Guide,”<sup>60</sup> CECP identifies the qualities of “safe and responsible schools.”

- The school has strong leadership, caring faculty, family and community involvement, including law enforcement officials and representatives of community-based organizations, and student participation in the design of programs and policies.

- The physical environment of the school is safe, and school-wide policies are in place to promote and support responsible behaviors.
- Prevention and intervention programs are sustained, coordinated, and comprehensive.
- Interventions are based on careful assessment of student needs.
- Evidence-based approaches are used.
- Staff are provided with training and support to help them implement programs and approaches.
- Interventions are monitored and evaluations are conducted to ensure that the programs are meeting measurable goals and objectives.

There are several school-wide programs identified by CECP, as described in Appendix VII, that independent evaluations indicate have achieved some success in helping schools achieve these goals. In addition, CECP has identified successful schools, one of which is described below.

### **Rachel Carson Elementary School**

Rachel Carson Elementary School in Chicago is one school that CECP has identified that has made significant progress in transforming its school culture. Rachel Carson is a K-8 public school serving 1,250 students, 95% of whom qualify for free/reduced lunch and 92% of whom are Hispanic. In 1995, the Principal made a very deliberate decision to shift to a “whole child approach.” Until that time, the School suspended large numbers of students. Her decision was not spurred by any one event, but rather by a growing realization that the high number of discipline problems required a different approach.

*Academic Environment:* As part of this shift, a concerted effort was made to make the school environment more physically inviting. The school time and space was rearranged to provide opportunities for students to form stronger relationships with teachers. Previously, a student would see 7-8 teachers a day in as many classrooms, and mobility was high throughout the day. Now a student only moves 2-3 times a day, and is often taught different subjects by the same teacher. In addition, a curriculum focus that integrates the arts has given students opportunities to express themselves, to engage in learning, and

to have fun.

Attendance has increased from 93% to 98%, and academic achievement is improving. The percentage of students testing at grade reading level has increased from 12% to 42% between 1992-1999.

*Parental Involvement:* The school has significantly bolstered its outreach to parents. School staff visit homes, telephone parents to involve them, host an open house for parents, and offer parent educational classes. A school newsletter is sent to all parents. Though initially resistant, the teachers now realize that the most effective approach to classroom management is to gain the trust of parents and to make an early investment in establishing relationships. Many staff members are bilingual.

*Discipline:* Rules and consequences are now posted around the school and a copy is signed by parents and explained in native languages. Students keep copies in their homework assignment planner. The school used Title I discretionary funds to hire a full-time interventionist. This person deals with attendance and behavior and develops individualized plans in conjunction with students, families, and teachers. He or she also tutors after school and during summer school. When a disciplinary problem does arise, a supervised study hall at 7:30am (before classes) is assigned, or an in-school suspension is used for more serious problems. Out-of-school suspensions and expulsions are used as a last resort only, and frequently for offenses mandated by zero tolerance policies in effect in Chicago.

This year ten students were suspended – less than 1% of the student body – and none for longer than two days; none were expelled. This record contrasts dramatically to the rest of the city of Chicago, where the expulsion rate has been “soaring” during the past two years.<sup>61</sup>

### **Justice Matters Institute<sup>62</sup>**

In its preliminary report on school discipline entitled “How School Communities Prevent Racism in School Discipline,”<sup>63</sup> Justice Matters has identified eight schools teaching predominantly students of color located throughout the country that were able to maintain low suspension and expulsion rates and stay safe. It found commonalities in many of these, including the following elements.

- Caring ethic is explicitly a central part of the school mission.
- Resources are devoted to building strong relationships.
- Collaborative approach to discipline violations, involving student,

teacher, sometimes parent or other staff. Students allowed to argue their case.

- Discipline dealt with on a case-by-case basis; individualized plans developed by teacher or special team.
- Schools have strong relationships with parents; parents very involved and invested.

### **DeWitt Clinton High School**

One school identified by Justice Matters as meeting many of these criteria is DeWitt Clinton High School, located in the Bronx, in New York City. It enrolls 4,311 students: 35 % African-American, 57% Latino, and 6% Asian Pacific Islander. Students apply to Clinton from all over the Bronx. Thirty percent of the students are chosen from the applicant pool on a competitive basis, and the remaining seventy percent are randomly drawn from the applicant pool. Approximately, 12,000 students apply each year for the 1,000 freshman slots.

*Academic Environment:* In order to strengthen relationships between students and faculty, Clinton has broken the school into ten “houses,” each with a supervisor, coordinator, family outreach assistant, and guidance counselors. Students take courses throughout the school, but the house staff follow them throughout their four years. The house staff mentors students by helping students choose courses and counseling them on a wide range of issues. Staff are so vigilant that if a student misses a few days at school, one of the house staff will contact them by phone or go to their home.

The staff makes a conscious effort to show students that they care; this extended family includes custodians and cafeteria workers. School slogans such as, “Who cares? We care,” “Never, never, never, never quit” and “Commitment to excellence,” reinforce the sense of concern for the well-being of students.

*Discipline:* Dewitt Clinton employs a standard discipline policy with particular consequences used for particular behaviors. However, application of the rules is not mechanical and inflexible. If there is a behavior issue, the student may be sent to speak with one of the staff members of the house staff, with the Coordinator of Student Affairs, or with a Dean. This discussion may arrive at a solution. Parents may also be involved in this process. Suspensions are avoided and other options are pursued. Last year, the number of students suspended and/or expelled was 17, or less than half of 1% of the student body.

The school also offers a wide range of activities, assemblies, dances, sports events, speakers, etc. that are open to the community, as well as a range of student clubs and electives.

### **Milwaukee Catalyst/Designs for Change<sup>64</sup>**

Approximately 50% of all middle school students and one-third of all high school students in Milwaukee's public school system are suspended at least once; 97% of these suspensions are for non-violent offenses and infractions. In an effort to implement educational practices that ensure equitable and effective school discipline and support high achievement for all students, Milwaukee Catalyst initiated a campaign entitled *Safe and Orderly Schools That Educate All Students*.

Milwaukee Catalyst joined forces in partnership with Designs for Change<sup>65</sup> to conduct a national review of scholarly work regarding effective school discipline practices in urban schools. These findings, contained in *Best Practices for Ensuring Equitable and Effective Discipline that Supports High Achievement for All Students* (1999)<sup>66</sup> are summarized below.

1. *Effective School Leadership*
  - There is a comprehensive and proactive plan for school discipline.
  - A fair, clear code of conduct is consistently enforced.
  - Policies address root causes of discipline problems.
  - Suspension is used as the last resort.
  - School council and staff take part in analyzing and improving discipline.
  - Teachers are evaluated on effective discipline practices.
  
2. *School Environment Supports Learning*
  - Every student is a valued member of the school community.
  - The community develops proactive discipline strategies.
  - School staff take responsibility for school-wide discipline.
  - A quality in-school suspension program provides academic help.
  - Extra-curricular activities build ties between students and school.
  - The school is structured around small units.
  - Self-discipline is taught in the classroom.
  - Root causes of student truancy and tardiness are addressed.
  - Most students with discipline problems are kept in the mainstream program.
  
3. *Effective Adult Learning and Collaboration*
  - Workshops focus on proactive discipline methods.

- Training provides a clear analysis of the root causes of discipline problems.
  - There is regular follow-up in the form of concrete planning and teacher support.
  - All adults participate in professional development workshops.
4. *Family and Community Partnerships*
- Families, students, and community help identify problems and solutions.
  - All discipline information is clearly communicated to families and students.
  - Community agencies assist students and families with discipline problems.
  - Families are notified and enlisted as partners when children are suspended.
  - The school contacts parents to recognize children's *positive* behavior.
5. *Quality Instructional Program*
- Teachers view students' social and emotional development as part of their job.
  - Engaging learning activities are used to minimize student misbehavior.
  - Teachers communicate clear expectations for student behavior.
  - Teachers maintain classroom discipline without disrupting the learning process.
  - Teachers model proper behavior by treating all students with respect.
  - Suspended students get help from teachers to make up missed work.

## **Canton Middle School**

Canton Middle School in Baltimore, Maryland, is one school that is adopting many of the qualities described above.<sup>67</sup> Canton serves a student population of 770 that is 88% low-income and 50% minority. Making strides in the area of *School Leadership*, the Principal has moved aggressively to put new systems into place and empower teachers. His goal was to create a structure that supports student achievement and reduces disciplinary referrals.

In-school suspension is used before students are sent home for conduct infractions. Parents of suspended children must meet with a team of teachers. The number of students suspended has decreased from 47 three years ago to 11 last year, approximately 1.5% of the student body. (Baltimore's citywide suspension rate is 9.9%.<sup>68</sup>)

*School Environment Supports Learning:* The school is divided into two “schools-within-a-school” in order to create more opportunities for close bonds to develop between teachers and students. A comprehensive plan to address students’ needs helps prevent discipline problems with programs including: (1) school-based medical and mental health services, (2) a Diagnostic Assessment Center providing services to students with severe behavioral problems, and (3) a dropout prevention program offering work experience in the community and in private businesses. Students in the dropout prevention program meet once a week as a group to explore strategies to help them perform better in school. They are also permitted to work one day a week in a community setting or in a private business. In addition, teachers are encouraged to teach social skills in class.

*Effective Adult Learning and Collaboration:* Teachers benefit from 18 half-days of staff development and five-week workshops in the summer. New teachers are mentored by a designated teacher mentor and by the department chair. A School Improvement Team is organized into four research and development teams that design strategies to improve school climate and to help teachers more effectively manage classrooms.

*Family and Community Partnerships:* Parents participate in the School Improvement Team and the Parent Advisory Board. Parents are trained and hired as substitute teachers. There are phones in every classroom to allow teachers to communicate regularly with parents. The PTA offers opportunities for parents to meet teachers and to learn about after school activities for students and families.

### **Other Promising Programs**



In addition to avoiding the overuse of suspensions and expulsions by changing school climate, schools are using other programs to modify students' behavior. One of these programs, the On-Campus Intervention Program, is described in detail in Appendix VII.

The work involved in successfully transforming a school culture is a daunting task that requires the commitment of the principal, teachers, staff, parents, and community. To achieve this transformation, adults must analyze their own behaviors as well as the behaviors of their students and be open to changing practices that may no longer fit with the school's overall mission.

As our understanding of essential elements involved in maintaining safe and inclusive schools deepens, certain areas will require further analysis. For instance, it is clear that the role of the principal is pivotal in making significant changes. What happens to schools when there is a leadership change? The principals in two of the three schools cited in this report have retired in the past year. Will these schools continue to maintain their focus on overall school climate?

Another important question that merits closer examination involves the relationship between school climate and academic achievement. While this has not been the focus of this report, schools committed to transforming the use of discipline are simultaneously working to improve the academic performance of their students. We need to better understand how overall school climate impacts learning in the classroom.

While these schools do not provide any magic formulas, they do offer hopeful blueprints for how progress in this direction can be made. Their experiences, along with those of other schools undergoing similar transformations, can be tremendously instrumental in helping other schools and communities in their efforts to achieve similar goals.

## **LEGAL PROTECTIONS FOR STUDENTS FACING ZERO TOLERANCE POLICIES**

While legal protections are an important tool for students, parents, and activists seeking to ameliorate the impact of brutal Zero Tolerance Policies, the law is an inadequate safeguard in many circumstances. In addition to making maximum use of existing legal rights in individual cases, activists also need to develop a comprehensive strategy for improving the law. Such a strategy might include amendments to federal and state laws, reform of school policies, improvement of administrative enforcement, and litigation designed to develop more favorable precedents. While not a comprehensive legal guide, this section

of the Report highlights legal issues for the purpose of stimulating strategic thinking about use and development of the law in this area.

Federal laws provide an incomplete patchwork of legal protections against the imposition of harsh school disciplinary measures. Many federal courts bend over backwards to defer to disciplinary decisions by school officials. However, a few courts, perhaps responding to the growing trend in harsh sanctions for innocuous conduct, have started to give the laws more teeth. For example, in one case striking down an inflexible, mandatory expulsion of a student who did not know that a friend had placed a knife in his car's glove box, a federal court proclaimed: "Zero hour has indeed arrived for the Zero Tolerance policy."<sup>69</sup>

This section provides an overview of the three categories of federal rights that appear to have the most potential for ameliorating some of the harshest consequences of the Zero Tolerance trend: 1) protections against discrimination on the basis of color or national origin, 2) rights of students with disabilities, and 3) the due process rights applicable to all students. This section also summarizes the strategic potential of each set of laws. A more detailed treatment of the legal doctrine and enforcement systems is set out in Appendix II, which also includes a brief discussion of due process protections under state laws.

### **Prohibitions on Racial Discrimination**

The Fourteenth Amendment to the United States Constitution and Title VI, a provision of the Civil Rights Act of 1964, each prohibit discrimination on the basis of race, color, or national origin. The Constitution applies to all public school systems, while Title VI applies to any school system receiving "federal financial assistance," a criterion which encompasses virtually all public schools.

The Supreme Court has held that only intentional discrimination, which is often difficult to prove, violates the Fourteenth Amendment. While data and anecdotal evidence suggest that intentional discrimination, which includes unconscious stereotyping or profiling, may be widespread, meeting the Supreme Court's requirements for proving intentional discrimination will be highly challenging in many situations. For example, one key point in the disciplinary process where discrimination might occur is the initial decision to refer a student for an infraction. As data described in this Report indicate, students of color are more likely than whites to be referred for subjective infractions such as "defiance of authority." When teachers and other school officials responsible for reporting disciplinary infractions are more prone to identify violations by students of color than by white students, misconduct by white students will go unreported. Consequently, proving that students of

color were treated differently than similarly situated white students may be impossible since those white students were never referred for any disciplinary action.

Despite these limitations, the legal protections against intentional racial discrimination are valuable. Particularly where other evidence of racial animus on the part of school officials exists, such as use of racial epithets or tolerance of a racially hostile environment, courts may infer intentional discrimination from large racial disparities in discipline and the other evidence. And, if students of color are disciplined more often or more harshly than similarly situated white students, a claim of intentional discrimination is likely to be successful. Finally, where a school system is under a desegregation order, its disciplinary practices may be scrutinized more carefully than in other cases to further ensure that it eliminates all of the effects of its prior dual system.

Title VI of the Civil Rights Act of 1964, through its regulations, incorporates a legal standard known as the “adverse impact” doctrine. Under the adverse impact doctrine, when a racially “neutral” policy or practice produces a disproportionately harmful impact on students of color, the burden shifts to the school system to justify its policy or practice under a relatively high standard. The adverse impact doctrine was adopted by the Supreme Court in the landmark case of *Griggs v. Duke Power* in 1971, in an opinion written by then Chief Justice Warren Burger. At least two rationales support the adverse impact doctrine. First, by focusing on consequences instead of intent, the doctrine scrutinizes practices that may result from intentional discrimination, even when that intent is impossible to detect or prove. Forcing the defendant to justify its practices helps ensure that its actions are based on clearly legitimate reasons and not a subterfuge for undetectable intentional discrimination. Second, given the history of racial exclusion in this country, the adverse impact doctrine represents a policy decision, repeatedly reaffirmed by Congress, that regardless of intent, actions that pile additional disadvantages on historically oppressed groups should not be permitted unless supported by a compelling justification.

If vigorously enforced, the adverse impact standard under Title VI could be a potent tool for challenging disciplinary systems that produce the large racial disparities cited elsewhere in this Report. Once plaintiffs prove such disparities, schools must show that the practice is justified under the “educational necessity” standard, which requires more from school systems than mere recitation of the goals of a positive learning environment and safe schools. While these goals are compelling, the “educational necessity” criterion requires that the disciplinary system actually serve those goals. As set out elsewhere in this Report, the overwhelming weight of child development and education policy research indicates that harsh, inflexible school discipline practices, extending well beyond serious weapons and drugs, are not

educationally sound and do not improve school safety. In addition, even if the school system meets its burden on “educational necessity,” plaintiffs can prevail by showing that an alternative approach to discipline would achieve these goals with a less discriminatory impact. This Report documents several positive approaches to school discipline that have been independently assessed and found to create safe schools and healthy learning environments. Therefore, if the “educational necessity” and “less discriminatory alternative” elements of the adverse impact doctrine were taken seriously by enforcement agencies and courts, it would be difficult for any school system with significant racial disparities to justify a harsh, disproportionate, or inflexible system of discipline.

There have been few court cases applying Title VI’s adverse impact standard to school discipline systems. While the results of the court cases are mixed, this area of law has the potential to develop into a significant protection against brutal discipline systems that produce harmful racial impacts. Title VI litigation is no panacea, but it is a legal tool that in appropriate factual situations may be extremely useful.

The Office for Civil Rights (OCR) of the U.S. Department of Education is responsible for enforcing Title VI. Because it is often difficult for students and their parents to find attorneys to represent them in court cases, the role of OCR is critically important. Unfortunately, it does not appear that OCR is vigorously applying the adverse impact doctrine in its complaint investigations and findings. Although comprehensive information on OCR’s handling of complaints is difficult to obtain, the known cases suggest that OCR often processes school discipline complaints under the intentional discrimination standard. The cases that we have been able to review do not reveal serious consideration by OCR of whether harsh disciplinary systems actually serve school safety, a required element of “educational necessity.” Nor do OCR case files indicate much attention to alternative disciplinary systems that could equally serve educational and safety goals with a less discriminatory impact. Moreover, while OCR has authority to initiate investigations without waiting for complaints, OCR has not used this power even to look at the educational justification for the disciplinary practices of school systems with the most egregious racial disparities. Another apparent problem with OCR enforcement in the discipline area is that the agency does not publicize the informal resolutions it reaches in the vast majority of school discipline complaints and has made it very difficult for the public to obtain access to these settlements. As a result, whatever legal standard OCR is applying, it is not being clearly communicated to school officials around the country.

One beneficial result of applying Title VI’s adverse impact standard is to nudge school systems toward more positive approaches to teaching and discipline that produce better educational outcomes overall. OCR’s action on

one complaint provides a glimmer of what is possible. Acting on a 1996 complaint against a high school in Alameda, California, OCR found insufficient proof that the school district maintained a hostile atmosphere or intentionally discriminated against Latino students in the severity of discipline received for similar offenses. Without explicitly citing the adverse impact doctrine, OCR apparently proceeded under this standard. Pointing to a significantly higher rate of discipline against Latino and African-American students, particularly in the area of “disrespect of authority,” OCR negotiated with the school district to implement positive strategies, such as conflict resolution teams, peer counseling groups, workshops addressing issues of race, and a retreat for administrative staff that covered racial stereotyping, profiling, and communication styles. Particular attention was paid to discipline for “defiance of authority.” These steps led to an overall decrease in suspension rates and a steep decline in the racial disparities. OCR did not close the case until these improvements had been documented.

The Alameda case illustrates the potential of OCR Title VI enforcement to produce outcomes that advance racial justice and benefit students and schools. Unfortunately, this type of enforcement appears to be an innovative exception, rather than common practice, for OCR. And, even the Alameda case illustrates OCR’s timidity about even mentioning the adverse impact doctrine and regulations.

The OCR administrative complaint process represents a promising but under-utilized mechanism for addressing racially disproportionate imposition of school discipline. Persons interviewed for this Report indicated that activists often counsel against filing such complaints, because of a lack of confidence in OCR. Clearly, OCR needs to take immediate action to provide clear policy guidance on the proper application of the adverse impact doctrine in the school discipline context, to improve its handling of complaints, and to regain the trust of those whom Congress intended Title VI to protect. One possible advocacy strategy would be for activists to coordinate the filing of an increased number of strong complaints with OCR, coupled with pressure on OCR to improve its enforcement practices.

### **Legal Rights of Students with Special Needs**

Three federal statutes provide basic protections for students with disabilities. The Individuals with Disabilities in Education Act (IDEA) is specifically targeted toward students with disabilities and their families, while the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 prohibit discrimination against persons with disabilities, including students.

The IDEA provides the most comprehensive set of rights for students with disabilities. The core of this law mandates that school systems provide a

free and appropriate public education to all children with disabilities in the least restrictive environment. The Act's school discipline protections are designed to serve the overall goal of full inclusion of students with disabilities in public education. Each state has its own set of laws and regulations to implement IDEA and must maintain a mechanism for administrative dispute resolution that complies with the Act's requirements.

While students with disabilities can be held to most generally applicable standards of conduct and subjected to discipline for infractions, IDEA recognizes that a student's disability may contribute to a child's engagement in some types of misconduct. If a student's misconduct is caused by the disability or by the school system's failure to provide appropriate services and supports to address the impact of the disability, the system's power to impose discipline is limited.

Determining whether the student's disability caused a disciplinary infraction is a critical issue under IDEA. For any suspension longer than ten consecutive days, the school system must hold a "manifestation hearing" to determine whether the triggering misconduct was a manifestation of the student's disability. The Act provides important procedural safeguards and substantive protections, and favorable court precedents make this law very valuable to students and parents with access to good legal advice or representation. Unfortunately, it appears that many special needs students do not have access to attorneys with expertise in this complex area of law and that school systems often do not fully comply with these IDEA provisions.

When the student's misconduct is not caused by his or her disability, the general disciplinary sanction, including suspension or expulsion, may be imposed on a student with a disability. However, even in this situation, IDEA provides students with disabilities with a right not available to all students – a free and appropriate public education. In other words, if a student with a disability is suspended or expelled, the school system still has the duty to ensure that the student is provided with an interim alternative education that fully provides the services the student needs to make effective progress. Because the right to an appropriate education is not generally available to non-disabled students, some in Congress seek to amend IDEA to remove this right. Advocates for children respond that the right should be broadened to *all* children.

In addition to "manifestation hearings" and other legal avenues available to individual students, systemic challenges to a system of discipline that violates the rights of special needs students can be effective in some situations. Examples of systemic violations are practices that affect large numbers of special education students, such as a categorical rule assigning all children with emotional disorders to special classrooms or a pattern of failing to

diagnose students with disabilities and provide them with the legally required services and protections.

Section 504 provides protections against disciplinary practices with a disproportionate adverse impact on students with disabilities that generally mirror the adverse impact standard applied under Title VI. In addition, IDEA regulations require record keeping and monitoring of the racial impact of the identification and placement of students with disabilities, which covers long-term suspensions, expulsions, and the placement of students with disabilities into alternative schools.

Finally, given the increased routing of students into the criminal justice system, it is noteworthy that IDEA has been held to limit a school system's ability to commence criminal proceedings against students with disabilities.

In sum, federal law provides a plethora of protections for children with special needs that, if fully complied with, would provide extremely valuable safeguards for this group of students. These laws are highly complex, involving varying administrative schemes and differing procedural rules on questions such as exhaustion of administrative remedies. Because one of the most potent legal requirements in this area strictly limits imposition of discipline when a student's disability contributed to the infraction, one might expect the level of discipline against students with special needs to mirror that of the general student population. The existence of much higher levels of discipline for these students suggests, at a minimum, that serious inquiry is needed into whether and how implementation of this facially strong system of laws is failing.

## **The Constitutional Right to “Due Process”**

The Due Process Clause of the Fourteenth Amendment, which applies to the states and all their subdivisions, provides real but limited protections to students living under zero tolerance policies.

The concept of “due process” has two distinct components. The first, procedural due process, requires states and their local governmental subdivisions to provide fair and adequate procedures for determining when they will deprive a person of life, liberty, or property. The second aspect of the Due Process Clause, substantive due process, is concerned with whether a state may impair a given right, regardless of the fairness of the procedures employed.

For purposes of procedural due process analysis, the right to a public education is considered a “fundamental” property right granted by the states. However, the same interest in access to public education is not considered “fundamental” for purposes of substantive due process. Thus, the procedural protections provided by the Due Process Clause tend to be stronger and given more weight by the courts than the substantive protections.

*Procedural due process.* The procedural element of due process governs issues such as the type of hearing that is required before an adverse action can be taken, whether there is a right to counsel, and the evidence that can be considered. The procedures required prior to suspending a student for ten or fewer days are informal and fairly meager. However, more formal procedures and greater rights accrue when a longer suspension or expulsion is at issue.

The right to a hearing, particularly the more formal procedures required for deprivations longer than ten days, can be a valuable mechanism for challenging disciplinary actions. A hearing will at least provide the student an opportunity to show that he did not commit the infraction charged. However, school officials can also use hearings to solidify their case against the student. The informal hearing required for short suspensions, in which the student often does not have a right to counsel or even the presence of a parent, is particularly fraught with opportunities for school officials to exert pressure on the student to “confess.”

In some cases, procedural due process also requires the hearing and disciplinary decision to include an individualized consideration regarding the appropriate punishment. While the Due Process Clause does not prevent school boards from adopting and applying mandatory punishments, it does require individualized treatment when state law or school board policy allows for case-by-case determinations or modification of mandatory penalties. In these situations, which are common across the fifty states, school boards may



not simply defer to a written or unwritten zero tolerance policy or to the recommendation of other school officials such as the principal. Instead, as part of making an independent disciplinary decision, the school board (or equivalent decisionmaking body) must consider the nature of the offense; the student's age, record, and past behavior; and any mitigating factors.

The ability to challenge mandatory imposition of harsh punishment and to insist on consideration of extenuating circumstances and the individual student's record can be a critically important issue in many cases. Especially in cases where the student's infraction was unintentional (Boy Scouts who forget to remove pocket knives from backpacks; students who find weapons and take steps to prevent their use; students who drive a parent's car to school not realizing a weapon is in the glove box or trunk), whether individual circumstances are considered can mean the difference between a long-term expulsion and minimal or no punishment.

*Substantive due process.* Substantive due process provides two major protections. First, students are entitled to have adequate notice of the types of conduct that are prohibited. The notice requirement may be particularly important in the case of unintentional infractions. The notice requirement may not be satisfied if the code of conduct does not make clear that students are held to "strict liability" for ensuring that a car or backpack they bring onto school property is free of pocket knives, etc. However, student disciplinary rules do not have to be as detailed as criminal codes.

Second, students are protected from punishments that are "irrational." This is a lenient standard that often leads courts to defer to school district decisions, even when those decisions are extremely harsh and the punishment is disproportionate to the infraction. The legal standard generally is stated as prohibiting disciplinary actions that are "grossly disproportionate" to the offense or where the disparity between the offense and the punishment is "shocking."

Despite the tendency of courts to defer to school officials in applying the rationality standard of substantive due process, lawyers and activists should consider strategies to convince courts to put more teeth into the substantive due process rationality review. Particularly as Zero Tolerance Policies produce more and more examples of egregious disciplinary decisions that seem to many to be both "shocking" and "grossly disproportionate," there will be opportunities to present courts with very compelling fact patterns.

*State Due Process Claims.* The constitutions and laws of many states provide a higher level of due process protections than the U.S. Constitution. While full treatment of state laws is beyond the scope of this Report, those laws provide a valuable set of protections that should be fully explored by students

facing punishment under zero tolerance policies. Furthermore, policy makers should consult state laws for ideas to replicate in other states and to seek to incorporate into federal laws.

### **State Mandated Zero Tolerance**

Most States have passed laws mandating Zero Tolerance. These State laws establish grounds for suspensions and expulsion, whether students should be referred to law enforcement agencies, and upon what grounds. Furthermore, in an effort to monitor the use of disciplinary measures, some States have passed data collection laws.

#### *Reasons for Discipline*

Many States passed laws that establish the reasons for which students may be suspended or expelled. Of course, in most jurisdictions, School Districts may establish disciplinary policies that are much more expansive than State laws.

Appendix III is a survey of state laws identifying the conduct for which States sanction suspensions or expulsions.

- 41 States have laws establishing grounds for suspension; 49 establish grounds for expulsion.
- All of the States have laws permitting expulsion for possession of firearms, weapons, or deadly weapons. Only 18 States have laws specifying possession, use, or distribution of drugs as grounds for expulsion. Other grounds for expulsion include willful or continued defiance of authority or disruptive behavior (10 States) and habitual profanity (2 States).
- Grounds for suspension include assault, possession of a paging device, hate violence, extortion, violence against school official, sexual harassment, tobacco and alcohol use, gang membership, disobedience, defiance of authority, profanity, and disruptive behavior.

### *Law Enforcement Referrals*

A growing number of students are referred to law enforcement agencies for conduct in school. These law enforcement agencies may include police departments or juvenile courts. There are 43 States that require school officials to report students to law enforcement agencies. (See Appendix IV.) In most instances, this referral is due to the commission of a crime. However, school districts interpret these laws to require reporting of students for conduct that typically would not rise to the level of a criminal act. Beyond a misunderstanding of the requirements of the law, some districts may strictly interpret legal requirements to refer students to law enforcement officials because of fines that may be assessed against school officials failing to report students as required. Maryland is the only State that requires reporting of students to law enforcement agencies for an act that is not a *per se* violation of criminal codes. School Districts in Maryland are required to report students to law enforcement agencies for possession of a paging device. Again, school districts often expand upon the law. Thus, the circumstances under which students will be referred to law enforcement agencies may be much more expansive.

### *Data Collection*

In an effort to monitor the overuse of Zero Tolerance Policies, advocates, government officials, and policymakers must be equipped with data. Appendix V summarizes discipline data collection requirements. Data collection varies by State.

- 27 States require collection of discipline data by type of offense/conduct.
- 11 States require collection of discipline data by race.
- 11 States require collection of discipline data by gender.

Unfortunately, data collection is inconsistent and, in some instances, unreliable. In addition, many State Departments of Education, responsible for the collection and reporting of data, do not make data readily accessible. For example, in several States requiring data collection, there is confusion within the Departments of Education as to who within the Departments maintains data. Furthermore, many States require that persons or organizations seeking discipline data be “cleared” to obtain such data. There is a need for consistency in reporting across States and additional detail in reporting.

## **CONCLUSION**

In the wake of a series of tragic school shootings in our public schools, policymakers and school officials have understandably taken steps to ensure the safety of our children. However, in the rush to make an immediate response, rhetoric has won over commonsense. The result: Zero Tolerance. These policies, adapted from criminal justice policies, set in motion a series of events negatively affecting children, families, and communities. These adverse consequences warrant an immediate review of disciplinary policies and reform to ensure not only that schools are safe but also that children's civil rights are protected and that they are able to avail themselves of an education. During a time when education is frequently viewed as the only route out of poverty for many children, and when students must pass increasingly rigorous tests in order to be promoted or graduate, it is especially important that they receive the best possible education available to them.

Obviously teachers and administrators need to retain the authority to remove students who endanger the safety of themselves and others. However, as the examples we have provided illustrate, needlessly harsh measures are being taken against students who pose no threat whatsoever to the school or to others; all under the guise of Zero Tolerance. A "one size fits all" approach is inappropriate and is causing great harm to many students who deserve more compassion and a "second chance."

There are schools who have rejected the extreme policies of Zero Tolerance. These schools, like those depicted in this Report, maintain discipline and safety while providing educational opportunities. Instead of pushing students out, these schools embrace students. These schools see as their objective the education of all children, not just those who are always good and are academically gifted. They believe that the best place for a child during school hours is in the school. These schools use suspensions as a last resort and still maintain orderly and safe schools. These schools serve as models so that more schools may abandon the draconian measures taken against students for typical adolescent behavior and avoid the devastating consequences of leaving children outside the schoolhouse doors.

## **RECOMMENDATIONS**

*For the Federal Government:*

The Department of Education should require all school districts receiving federal aid to provide more comprehensive civil rights compliance data, including data on disciplinary actions taken by offense, with the race and disability status of the child, and information on referrals to law enforcement agencies for in-school conduct.

The Department of Education's Office for Civil Rights (OCR) should conduct many more compliance reviews and investigations to ensure that children are not discriminated against in the adoption or application of disciplinary policies.

OCR should promulgate guidance for enforcement offices that directs these offices to analyze complaints filed under the regulations using disparate impact analysis and promotes interventions that consistently address both differential treatment and disparate impact.

OCR, working with other offices, should develop a technical assistance program for schools specifically aimed at helping reduce disparities in discipline while making disciplinary practices more effective.

The United State Commission on Civil Rights should investigate the disproportionate impact the rapid growth in harsh disciplinary actions is having on minority students and students with disabilities, including a thorough investigation of the effectiveness of the Department of Education's oversight role.

The General Accounting Office should study OCR's work on race and disability discrimination in the student discipline arena, with special attention to the effectiveness of public education and technical assistance, the clarity and consistency of internal policies, and the length of time for investigations.

*For Researchers and Program Evaluators (Including Those Within Federal and State Agencies):*

Research is needed to assess the quality of alternative education programs and to ensure that they comply with federal education laws and policies such as, Title I.

Ethnographic studies are needed in order to measure the extent to which teachers treat minority children unfairly in classrooms.

*For States and School Districts:*

States should include in their public school accountability laws provisions that take suspension rates into account in grading and ranking school performance.

High suspension rates, especially for non-violent and non-criminal conduct, should negatively impact school performance ratings.

States should pass legislation permitting advocates to represent students in due process hearings.

The 24 States that now do not mandate alternative education should pass laws requiring school districts to provide such programs.

Schools should formally monitor disciplinary referrals, keeping careful records, to ensure that teachers are not overreacting to student conduct or unfairly singling out students. Teachers who engage in such practices should be required to take appropriate professional development courses in classroom management, child development, and multi-cultural human relations.

Graduate schools of education should require training in classroom management and behavioral issues, and this training should include some familiarization with legal requirements and the underlying fairness rationale for them.

School Districts should establish a specific minimum number of staff development days devoted to classroom management, guidance techniques, and conflict resolution; the plan should be related to the seriousness of the discipline issues in the school or district and should be reviewed periodically.

School Districts should establish disciplinary committees that draw membership from guidance counselors, school administrators, teachers, and parents.<sup>70</sup> Such a committee would, at the request of a child's parent, review a suspension recommendation prior to the commencement of the suspension period,<sup>71</sup> and disapproval of a suspension by the committee would block School Board action.

School Districts should establish a Community Review Board to provide an independent, outside watchdog function on student discipline issues.<sup>72</sup> The independence of the membership and their proceedings, as well as adequate resources to consider and investigate complaints concerning both general policy and individual cases, should be assured by statute or regulations. Schools should develop in-school suspension programs that keep students on track with their education and provide counseling, including behavior modification and conflict resolution. Recent widespread reductions in counseling and social work budgets in many school districts should be reversed.

*For Parents and Community Leaders:*

Parent and school reform groups, including civil rights groups, should learn the facts about school discipline practices.

Community groups should meet with school and school board officials to insist that all policies and procedures reflect fair process and sound principles based on schooling goals rather than crime-fighting strategies.

Community groups should request data on discipline and disparities, using the state Freedom of Information Act (FOIA) if necessary. If the data suggest

adverse impact based on race or disability, concerned groups should discuss the matter with the local news media and with school officials. If dissatisfied, they should immediately file a discrimination complaint with the federal Office for Civil Rights and press OCR for a timely investigation.

## ENDNOTES

1. For purposes of this report, Zero Tolerance Policies include not only mandatory punishments, but also harsh, rigid punishments that are unwarranted because they fail to take into account circumstances, including students' disciplinary records. These policies put common-sense aside, in favor of a "take no prisoners" attitude toward discipline.
2. Statement of William Modzeleski, Director, Safe and Drug-Free Schools Program, U.S. Department of Education, Feb. 18, 2000. "An overwhelming majority of schools (90 percent) do not experience any serious violent crime, and nearly half of all our schools (43 percent) experience no crime at all." *Id.* In addition, crime and violence in schools is continuing to decrease. *Id.*
3. In 1994, Congress passed the Federal Gun-Free Schools Act, 20 U.S.C. §8921, requiring states to pass legislation requiring a one-year expulsion for students carrying firearms on school property. Failure to comply would result in loss of federal funding.
4. The U.S. Department of Education defines a Zero Tolerance Policy as a policy that "mandates predetermined consequences or punishments for specific offenses." U.S. Department of Education, National Center for Education Statistics (NCES) and U.S. Department of Justice, Bureau of Justice Statistics, *Indicators of School Crime and Safety, 1999*, Appendix A, Table A1, September 1999. However, even the Federal Gun-Free Schools Act vests school administrators with discretionary powers in determining the punishment. In most instances however, this is not the practice.
5. *Daily Southtown*, Monday, November 22, 1999.
6. "Fact, fiction collide in classroom," *Boston Globe*, April 27, 2000.
7. Pedro Noguera, "How Student Perspectives on Violence Can Be Used to Create Safer Schools," *In Motion Magazine*, March 2000. Available online at <<http://www.inmotionmagazine.com/pedro.html>>.
8. *Ibid.*
9. Statement of Sheriff Bridges, *Clarion Ledger*, August 31, 1999.
10. U.S. Department of Education, Office for Civil Rights, *Fall 1998 Elementary and Secondary School Civil Rights Compliance Report: National and State Projections*, June 2000.
11. Florida Department of Education, *School Indicators Report*, 1999.
12. State of Wisconsin, Department of Public Instruction, "School Discipline-Suspensions," *Education at a Glance*, April 1999.
13. *Suspended Education: A Preliminary Report on the Impact of Zero Tolerance on Chicago Public Schools*, Generation Y, a project of the Southwest Youth Collaborative, citing Chicago Public Schools, End of the Year Reports to Illinois State Board of Education, 1992-93 through 1998-99.
14. *Ibid.*
15. *Suspended Education: A Preliminary Report on the Impact of Zero Tolerance on Chicago Public*



*School Students, Generation Y*, a project of the Southwest Youth Collaborative, Chicago, Illinois, citing Chicago School Reform Board of Trustees, *Chicago Public Schools: FY 2000 Final Budget, Schools and Regions Objectives*.

16. Florida Department of Education, Bureau of Instructional Support and Community Services, *Statewide Report on School Safety and Discipline Data*, May 1999.
17. Most of these anecdotes report the action recommended by school officials. In some instances the ultimate action taken may have been less severe as the result of the involvement of an attorney or community organization.
18. *CBS Evening News*, June 8, 2000.
19. *Education News*, April 13, 1999.
20. "School Suspension: Ounce of Prevention or Pound of Overreaction?" *The Hartford Courant*, November 17, 1999.
21. See e.g., Children's Defense Fund, "School Suspensions: Are They Helping Children?," Cambridge, MA: Washington Research Project (1975); Clarence H. Thornton and William T. Trent, "School Desegregation and Suspension in East Baton Rouge Parish: A Preliminary Report," 57 *Journal of Negro Education* 482 (1988); Anna C. McFadden, George E. Marsh 11, Barrie Jo Price, and Yunhan Hwang, "A Study of Race and Gender Bias in the Punishment of Handicapped Children," 24 *The Urban Review* 239 (1992); Kids First Coalition, "Locked Out: Exposing the Suspension Epidemic in the Oakland Public Schools," Oakland, CA (June 1999).
22. Department of Education, Office for Civil Rights, *1998 Elementary and Secondary School Civil Rights Compliance Report*.
23. Applied Research Center, *Making the Grade: A Racial Justice Report Card*, (1999)(hereinafter "ARC Report").
24. NCES Report, *supra*, note 4, Appendix A, Table A1. *Indicators of School Crime and Safety, 1999*.
25. South Carolina Public Schools, *School Crime Incident Report*, School Year 1998-99.
26. *Ibid.*
27. *Ibid.*
28. See also, Gale M. Morrison and Barbara D'Incau, "The Web of Zero Tolerance: Characteristics of Students Who Are Recommended for Expulsion from School," *Education and Treatment of Children*, vol. 20, 1997, pp. 316-35, Russ Skiba, *The Color of Discipline*, Indiana University, June 2000.
29. James Comer and Alvin F., M.D: *Raising Black Children*, 197-198 (1992).
30. *Ibid.*
31. Gil Noam, Kendra Winner and Andrew Rhein, "The Harvard RALLY Program and the Prevention Practitioner: Comprehensive, School-based Intervention to Support Resiliency in At-Risk Adolescence" *Journal of Child and Youth Care Work* Vol. 1-1 1, (1996), 36.

32. Comer, *Raising Black Children*, 198.
33. Russ Skiba and Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* *Phi Delta Kappan* ( January 1999).
34. Irwin Hyman and Pamela Snook. *Dangerous Schools - What We Can Do About the Physical and Emotional Abuse of Our Children*, 161.
35. Sue Thorson, *The Missing Link: Students Discuss School Discipline Focus on Exceptional Children*, v. 29, 1996, 1-12.
36. Brenda Townsend, "The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Exclusions," *Exceptional Children*, Vol. 66, No. 3, 381-391.
37. Susan Black, "Locked Out: Why Suspension and Expulsion Should Be Your Court of Last Resort," *The American School Board Journal*, (January 1999).
38. DeRidder, Lawrence M. "How Suspension and Expulsion Contribute to Dropping Out," *The Education Digest*, February 1991.
39. M. Lee Manning. "Developmentally Responsive Multicultural Education for Young Adolescents," *Childhood Education*," v. 76, no.2, (Winter 1999/2000).
40. Thorson, *The Missing Link*.
41. *The New York Times*, December 1, 1999.
42. Grade retention often results in dropping out. See Hauser, *Should We End Social Promotion? Truth & Consequences*, Working Paper presented at Conference on High Stakes Testing sponsored by The Civil Rights Project at Harvard University and Columbia University, December 4, 1999.
43. Skiba, "The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?" *supra*, note 33.
44. For example, statistics for Los Angeles for 1993 indicated that 85% of all daytime crimes were committed by truant youths. See Ronald D. Stephens, "National Trends in School Violence: Statistics and Prevention Strategies," *School Violence Prevention: A Practical Handbook*, eds. Arnold and Conoley (1997), 75.
45. See ARC Report, *supra*, note 18, citing that approximately 50% of high school drop outs are unemployed and 68% of the U.S. prison population dropped out of high school.
46. *Dubuque Telegraph Herald*, October 26, 1996.
47. *Washington Times*, November 20, 1999.
48. Skiba, "The Dark Side of Zero Tolerance," *Kappan*, 1999.
49. *Ibid*.
50. Percentage of children eligible for free/reduced lunch is an indicator of poverty levels.

51. Miami-Dade County Public Schools Code of Conduct may be found at <<http://www.dade.k12.fl.us/parents>>.
52. *Ibid.*
53. *Ibid.* at 2.
54. *Ibid.* at 4.
55. Every school in Miami-Dade has a Trust Counselor, who is responsible for drug and alcohol abuse counseling.
56. *See* <<http://www.Heartmath.com>>.
57. *See* <<http://www.pairs.com>>.
58. This program, similar to Palm Springs Middle School's alternative education program, has yet to be established.
59. The American Institutes for Research (AIR) is an independent, not-for-profit corporation that performs basic and applied research for clients that include federal and state government agencies, not-for-profit organizations, and private corporations. The Center for Effective Collaboration and Practice (CECP) supports and promotes the production, exchange, and use of knowledge about effective practices for children and youth with emotional and behavioral problems at risk of school and social failure.
60. <<http://www.air.org/cecp/guide/actionguide>>.
61. Catalyst, "Program loses seats as expulsions soar," February 1999. Available online at <<http://www.catalystchicago.org>>.
62. Justice Matters Institute is a research/advocacy organization devoted to promoting social justice and multi-racial unity in California. Its Educational Justice Program seeks to overcome the marginalization of people of color in schooling through dissemination of information and ideas, building community and networks, advocacy, and policy development. <<http://www.justicematters.org>>.
63. Justice Matters Institute. "Turning To Each Other, Not On Each Other: How Communities Prevent Racism in School Discipline," 2000.
64. Milwaukee Catalyst (MC) is a citywide coalition pressing for effective school reform through research and advocacy and is currently developing a resource guide and community plan for implementing research-based school discipline practices that keep students in school.
65. A twenty-three year old education reform organization based in Chicago.
66. *Best Practices: Ensuring Equitable and Effective Discipline that Supports High Achievement for All Students*, Milwaukee Catalyst and Designs for Change, 1999.
67. In an earlier resource guide entitled, *Act on the Facts*, MC identified four public schools that were making progress in creating successful urban schools. *Act on the Facts-Press for the Public Schools that Work! A Resource Guide*, Milwaukee Catalyst 1998.
68. Justice Policy Institute, "Schoolhouse Hype: Two Years Late," (2000). Available online at

<<http://www.cjcj.org/schoolhousehype>>.

69. *Seal v. Dunaway*, No. 3:97-cv-267 (E.D. Tenn. 1999)(unreported memorandum decision).

70. The parent seeking review by the disciplinary committee must waive the privacy rights of her/his child.

71. Unless imminent danger to the safety of students and staff exists, out-of-school suspensions should not begin until after the District's appeals process has been exhausted.

72. Such Boards would be modeled after successful examples of civil review boards that monitor police departments and investigate allegations of police misconduct.

## APPENDIX I

### ZERO TOLERANCE IN THE NEWS

As the year 2000 unfolds, mounting attention is being given to the need for a review of this nation's current school discipline practices, in particular those based on calls for 'Zero Tolerance'. As with several other ongoing national debates involving issues of public school reform, this topic has created some unlikely allies and rivals. Some, boasting a history of liberalism and reform, are finding themselves arguing alongside conservative counterparts. While others, despite a history of collaboration, are at odds in the debate. The following articles chronicle the evolving discussion about 'Zero Tolerance' and school discipline.

**June 8, 2000** – “Does ‘Zero Tolerance’ Go Too Far?” By Jim Stewart, *CBS Evening News*.

*Educators, lawmakers, community activists and others will gather next week in Washington to debate the now-common policy of ‘Zero Tolerance’ for misbehavior in school. Some now think this is a classic example of a good idea taken too far ... Six-year-old ... had a toenail clipper ... ‘This is not about a toenail clipper! This is about the attachments on a toenail clipper! An unidentified board member insisted ... found guilty and given a 10-day suspension ... excuse to get rid of difficult students ... nowhere is that more evident that among African-American students. Some Mississippi girls weren’t just suspended, but arrested for what amounted to scuffling in a hallway ... ‘Teenagers! Typical teenagers’ ... ‘These zero tolerance policies ... run amok. They’ve become too extreme,’ according to Harvard Law School Professor Chris Edley.”*

**May 26, 2000** – “Graduation Won’t End Decatur Woes Racial Tension Goes Beyond High School Fight”, by Flynn McRoberts, *Chicago Tribune*.

*“The most turbulent school year in Decatur history comes to a close ... (l)eaders of the mostly white establishment that runs Decatur say the city has become more sensitive to matters of race ... many blacks say that long-simmering racial tension inflamed by the controversy has only worsened.”*

**May 24, 2000** – “Schools Look at Policy on Guns, Drugs; some in Prince William Say Expulsion Goes Too Far”, by Christina A. Samuels, *Washington Post*.

*“Under Prince William’s code of student behavior, similar to the codes in many other Washington area school districts, a principal must recommend expulsion for students who commit certain drug and weapons violations. The cases are sent to a School Board committee, and the students are suspended from school in the interim ... board members said they have heard expulsion cases in which the principal should have had leeway to impose a lesser punishment ... examples ... students bringing to school*

*toy weapons that clearly were not intended to be a threat, and students possessing over-the-counter medications ...”*

**May 13, 2000** – “Discretion, Not Zero Tolerance”, by Erick Kaardal and Brad Matthys, *Minneapolis-St. Paul Star Tribune*.

*“Public school zero tolerance policies have gone too far ...school administrators are left with virtually no discretion to make the just exception or accommodation to meet the circumstances of a particular case.”*

**April 18, 2000** – “Student Briefing Page”, by Bill Zimmerman, *Newsday*.

*“Zero tolerance has roots in a 1994 federal mandate ...since then, different schools have expanded zero tolerance to include mandatory punishment for those possessing drugs, getting into fights, and even wearing clothing deemed offensive ...But as zero tolerance becomes more popular, people ask whether it has gone too far ...civil rights leader Jesse Jackson, who wants to do away with zero tolerance because he believes it is discriminatory and too harsh ...since [Decatur, Ill] incident, the Applied Research Center in Oakland, Calif ...came out with a study showing that black students in 10 large cities are disproportionately expelled or suspended ...supporters stand by zero tolerance as an effective and common-sense approach to keeping safety and peace in schools ...”*

**April 1, 2000** – “School Discipline at a Crossroads: From Zero Tolerance to Early Response”, by Russell J. Skiba and Reece L. Peterson, *Exceptional Children*, Volume 66, Issue 3.

*“Despite a dramatic increase in the use of zero tolerance procedures and policies, there is little evidence demonstrating the these procedures have increased school safety or improved student behavior ...punitive disciplinary climate ...cause for conflict between general and special educators. A preventive early response disciplinary model increases the range of effective options for addressing violence and disruption across both general and special education ...”*

**March 1, 2000** – “News in Brief: A Washington Roundup – Commission to Investigate Suspension Rates”, by Erik W. Robelen, *Education Week*.

*“The U. S. Commission on Civil Rights plans to examine further whether so-called zero-tolerance discipline policies in schools are discriminating against minority and disabled students ... Commissioners decided ...that we need to make a further investigation ...”*

**February 2000** – “Let’s Stay the Course”, by Sandra Feldman, AFT President, *Where We Stand, American Federation of Teachers*.

*“It’s a shame to see opposition beginning to develop against two of the most important trends in education ...standards and zero-tolerance*

*policies. Policies that call for zero tolerance of violence, drugs, and weapons in schools are being ridiculed or even called racist because they have been imperfectly – and in some places stupidly – applied ...But the problem here is not with the principles behind standards and zero tolerance ...”*

**January 19, 2000** – “U.S. Judge Upholds Expulsions in Decatur”, by Alan Richard, *Education Week*.

*“U.S. District Judge Michael McCuskey ruled that courts have little business interfering with local school decisions on student conduct. He also ruled that the students had shown no evidence that school officials discriminated against them based on race ...Rev. Jesse Jackson contends that so-called zero-tolerance disciplinary policies are discriminatory because a disproportionate number of students expelled under such policies are black ...”*

**January 14, 2000** – “No To Zero Tolerance”, by Russell Skiba, *Washington Post*.

*“...The pervasive fear created by a string of tragic school shootings has left both schools and society more receptive than ever to tough talk. Zero tolerance has gained wide popularity for its promise of a no-nonsense solution to a difficult problem. But how well does zero tolerance really work? ...term first adopted by the Reagan administration, taken from a San Diego program that impounded any seagoing vessel for even trace amounts of drugs ...term quickly caught on among educators ..”*

**December 17, 1999** – “Disparity In School Discipline Found; Blacks Disproportionately Penalized Under Get-Tough Policies Study Says”, by, William Claiborne, *Washington Post*.

*“A new nationwide study of high school disciplinary practices shows that in the two years since “zero tolerance” policies were popularized ... black students at the schools surveyed have been expelled or suspended at a rate that is disproportionate to their numbers ...In some cases, they were removed from school three to five times more frequently than white students ...Terry Keleher, Program Director (ARC), ...said the study’s preliminary figures seem to reinforce what we have been hearing anecdotally – that when white students get in trouble they get the benefit of the doubt, whereas black students are presumed guilty.”*

**December 16, 1999** – “Review of America in 1999”, by, Robert Tanner, *Los Angeles Times*.

*“The streets grew safer as the crime rate continued to fall, yet we worried more than ever about deadly violence in schools and at work ...But it was at schools, with children pulling the triggers, where America looked in the mirror and passed ...this menace continues to haunt us, the country questioning violent movies and videos, and how cliques ostracize outsiders. Schools instituted*

*policies of zero-tolerance for weapons ... Yet copycat threats followed (Columbine shootings)."*

**December 2, 1999** – “Schools Overpunish”, (letter to the editor) from Maria Hrabowski, Norwood, Mass, *New York Times*.

*“The goal of a zero-tolerance approach to school discipline ... seems to have less to do with teaching children to be responsible for their actions than with the desire by many schools and other institutions to avoid responsibility ... and is likely to backfire, causing children to respond with even more aggressive behavior.”*

**November 24, 1999** – “Decatur Furor Sparks Wider Policy Debate”, by Robert C. Johnston, *Education Week*.

*“By changing one word in its school code last month, the Tustin, Calif., district softened its zero-tolerance policy on drugs and alcohol. Now, administrators **may** expel students on the first offense. Before the word was must. ... Whether you agree or disagree, the protests are bringing this to a head and will present an opportunity for people in education and all government to re-examine the idea ... [says] Michael Resnick, the associate executive director of the National School Boards Association ... while zero tolerance is a rhetorical battle cry, its interpretation differs radically from community to community. Thus, a student found with a gun is booted from one school, while in the next district over, another gets a short suspension ... Some educators and advocacy groups, meanwhile, contend that the disproportionate rates at which minority students receive stiff disciplinary sanctions are evidence of discrimination. Recent data from the U.S. Department of Education’s Office for Civil Rights showed that black students received an estimated 33 percent of all out-of-school suspensions of more than 10 days ... even though they constituted 17 percent of public school enrollment that year (1993-94). White students received 50 percent of the suspensions, while making up about 68 percent of enrollment ... According to a report released this fall (1999) by the Juvenile Justice and Delinquency Program of the U.S. Department of Justice, some 90 percent of schools reported having zero-tolerance policies ... As a result, many states and districts have seen a rise in the number of students expelled and suspended.”*

**September 23, 1999** – “Dole Emphasizes Strict School Discipline”, by Diana Jean Schemo, *New York Times*.

*“ Weighing in on an issue ... Elizabeth Dole ... proposed streamlining the Federal Government’s role in education by giving states and local districts the power to determine how Federal money should be spent and academic targets met ... [she] chose as her backdrop a school whose principal, Daniel R. Burke, has made a crusade of restoring discipline.”*



**September 18, 1999** – “Gore Discusses School Safety, Gun Control in Santa Monica”, by Rone Tempest, *Los Angeles Times*.

*“The vice president said he advocates ‘Zero Tolerance’ for guns in school but also favors the creation of ‘second chance’ rehabilitative schools for students caught with weapons.”*

**September 15, 1999** – “What Every New Teacher Should Know About Discipline”, by John E. Keating, *Education Week*.

*Daily discipline can be a real grind if a teacher doesn’t have a good system ...Here are the basics, Listen ... Be consistent ...Know when to go higher ...If teachers implement their rules with equal treatment for all, the only room for discussion in such meetings is over the rules themselves.”*

**February 11, 1998** – “Waging a War on Incivility”, by C. Stephen Wallis, *Education Week*.

*“The lack of civility in our schools – urban, suburban, and rural alike – continues to be the most pivotal reason for the country’s lackluster educational performance.”*

**February 6, 1998** – “Schools Are Moving to Police Students’ Off-Campus Lives”, by Tamar Lewin, *Education Week*.

*“At a time when the public clamoring for tougher school discipline, many educators across the nation are edging into the role of policing not just what goes on within their own buildings, but off-campus problems as well...schools have broad discretion on how to handle out-of-school behavior that may disrupt school life ... seeing more of these disciplinary actions than in the past, in part because society is looking so desperately for some source of supervision for kids who are seen as out of control ... But some parents feel that the extension of school discipline ...encroaches on their parental authority.”*

**1998** – “Quality Counts: School Climate”, *Education Week*.

*“Parents want their children to go to school in a place where they will be safe, and where the environment is focused on teaching and learning. Many such schools exist in our big cities. But not enough ...Many of these giant schools resemble vast warehouses where students float anonymously through what passes for an education ...Where the first sight to greet them when they walk through the door each morning is a metal detector or a police officer ... In November (1998), the principal of a Baltimore high school suspended 1,200 of the school’s 1,800 students ...Compared with their nonurban colleagues ... urban teachers are more critical of the caliber of their students and of the schools they work in.”*

**January 26, 1997** –“Zero Tolerance”, By Albert Shanker (former AFT president)  
Where We Stand (AFT).

*“In 1993, the Texas Federation of Teacher (TFT) sent a questionnaire to its members, asking them about their experiences with disruption and violence in their schools. The results were alarming ...so TFT launched a campaign calling for zero tolerance for certain kinds of violent and disruptive behavior. The campaign led ultimately to the passage of the Texas Safe Schools Act in 1995 ...impact ... It is still early to say, but there are some good signs ...The bad news is that enforcement is spotty ...Critics say the Safe Schools Act is a big example of micromanagement and a blow against local control. They hope to curtail the authority it gives teachers and allow administrators more “flexibility” in deciding when to exercise zero tolerance and when to make exceptions ...Undoubtedly, giving administrators the freedom to relax the rules would make life easier for them ... And, unfortunately, with more flexibility will also come racial and ethnic discrimination ... We talk a lot about improving the educational performance of all our students ...the truth of the matter is that none of [the] changes will achieve what we want unless schools are safe and orderly ...”*

## APPENDIX II

### LEGAL PROTECTIONS FOR STUDENTS FACING ZERO TOLERANCE POLICIES

#### Introduction

Notwithstanding the growing popularity of zero tolerance policies, legal rights do not disappear when students pass through the schoolhouse door. Students who are disciplined because of zero tolerance policies enjoy basic rights under the federal Constitution and a variety of federal and state laws:

- Students who are subject to suspension or expulsion possess constitutional rights to due process.
- Both the Constitution and the civil rights laws prohibit discrimination based on race, color, or national origin.
- Students with special needs are further protected by laws that guarantee the right to an appropriate education and prohibit discrimination based on disability.

Although often bound by narrow interpretations of rights and limited governmental enforcement efforts, the legal system can be a useful, albeit incomplete, tool in addressing the harsh consequences of zero tolerance policies.

This Appendix provides an overview of basic legal rights applicable to zero tolerance policies. Part I discusses the law related to discrimination based on race and national origin, and focuses on rights under the Equal Protection Clause of the Fourteenth Amendment and under Title VI of the Civil Rights Act of 1964. Part II analyzes areas of the law applicable to students with disabilities, and focuses on federal statutes such as Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA). Part III discusses the constitutional protections of due process guaranteed to all students under the Fourteenth Amendment.

Although these areas of laws are treated separately, students and their advocates should understand that they overlap and that all three may be applicable to a given set of circumstances. For example, students of color may be treated more harshly than white students under zero tolerance policies, which can trigger both the Equal Protection Clause and federal antidiscrimination laws. In many cases, students of color are also disproportionately represented among those students determined to have special needs, which implicates federal disability statutes. And procedural protections guaranteed by the Constitution apply to all students, regardless of race or disability status, who may be subjected to suspension or expulsion.

Students and their advocates should also be aware of state constitutions and state statutes that offer similar or even more extensive protections against zero tolerance policies. Some states, for instance, guarantee the fundamental right to education, a right

that is not guaranteed under the federal Constitution. Many states also have administrative agencies that focus on educational rights or on the enforcement of state antidiscrimination laws. A discussion of state laws and agencies is beyond the scope of the analysis in this Appendix, and students and their advocates should consult with attorneys and education specialists for more information on state and local laws.

The Constitution and federal laws provide some protections for students facing zero tolerance policies, but students and their advocates should also fully understand the limitations of the laws and law enforcement efforts. As noted throughout this Appendix, the expansive language contained in the Constitution and in federal statutes appears to protect a broad array of students' rights, but court decisions and administrative agency interpretations of statutes typically limit many of these rights to much narrower sets of circumstances. Litigation can be a slow and expensive process, and agencies charged with enforcement of the federal laws often limit their efforts because of scarce resources and restrictive interpretations of the law. And, many times, the patchwork of laws relating to zero tolerance simply does not apply at all. Nevertheless, many of the harsh consequences of zero tolerance policies can be addressed only through the defense of legal rights; students and their advocates should be fully aware of those rights.

## **I. Legal Protections Against Discrimination Based on Race, Color, or National Origin**

### Overview

Racial discrimination in school discipline is a deep-seated problem. Long before zero tolerance policies became popular, students of color were subjected to suspension and expulsion in disproportionate numbers and typically received harsher punishment than their white counterparts. As one advocate has noted, it is no coincidence that the U.S. Supreme Court's leading case on school discipline and students' due process rights, *Goss v. Lopez*, "involved the sweeping, indiscriminate suspension of black students from Columbus, Ohio public schools for allegedly taking part in demonstrations following Black History Month."<sup>1</sup>

Racial discrimination in education is prohibited under both the Equal Protection Clause of the Fourteenth Amendment and under federal antidiscrimination statutes. The most important statute is Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance.<sup>2</sup> Public school systems are typically covered by both the Equal Protection Clause and Title VI because they are local governmental entities and recipients of federal monies.

---

<sup>1</sup> Nadine Strossen, *Protecting Student Rights Promotes Educational Opportunity: A Response to Judge Wilkinson*, 1 Mich. L. & Pol'y Rev. 315, 316 (1996).

<sup>2</sup> 42 U.S.C. § 2000d.

Constitutional claims under the Equal Protection Clause have been common in educational settings, particularly in litigation to desegregate public schools. Equal protection claims are difficult to prove, however, because of the requirement first imposed by the U.S. Supreme Court in 1976 that plaintiffs prove *discriminatory intent* on the part of the governmental defendant. School officials rarely speak or write openly about differentiating between racial groups, although they may in fact intend to treat students differently based on race or national origin. Nonetheless, the Equal Protection Clause can be used to challenge zero tolerance policies in which racial disparities in school discipline are traceable to the racial animosity of officials, demonstrated by evidence such as racial slurs or a racially hostile environment.

Plaintiffs can also raise statutory claims under Title VI where racial disparities in discipline are due to intentional discrimination; these claims are commonly known as “disparate treatment” claims. In addition, however, the administrative regulations to Title VI permit legal claims in which race-neutral policies have an adverse effect on racial minority students; these claims are commonly known as “disparate or adverse impact” claims. For example, under an adverse impact theory, plaintiffs could challenge a policy that requires a longer suspension for certain types of offenses and leads to a disproportionate number of minority students being suspended for longer periods. The primary advantage of an adverse impact claim is that proof of discriminatory intent is not required.

Constitutional and statutory claims are typically filed in federal or state court, but administrative complaints under Title VI can also be filed with federal agencies charged with enforcing Title VI. In the school discipline context, the Office for Civil Rights (OCR) of the U.S. Department of Education is the appropriate enforcement body. Although OCR enforcement efforts can be inconsistent in different regions and over time, and are subject to the limits of governmental resources, the OCR administrative complaint mechanism provides an important alternative for students and their advocates who lack the time and financial means to file litigation in court.

The more detailed analysis of the law that follows is divided into three parts: (1) constitutional claims under the Equal Protection Clause; (2) disparate treatment and adverse impact claims under Title VI; and (3) administrative complaints filed with the U.S. Department of Education’s Office for Civil Rights.

#### A. Constitutional Claims Under the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment<sup>3</sup> prohibits discrimination by state or local government on the basis of race, color, or national origin in almost all circumstances.<sup>4</sup> In examining the constitutionality of a state law, policy, or activity that discriminates on the basis of race, courts will employ a rigorous standard of

---

<sup>3</sup> The Fourteenth Amendment provides in relevant part that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, §1.

<sup>4</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944).

review, known as “strict scrutiny” analysis. Under this analysis, a law or policy must be *narrowly tailored* to meet a *compelling governmental interest*. For example, a school policy that suspended white students for one type of violent act, but expelled black students for the same act, would be unconstitutional, even though it might be justified by an important governmental interest – preserving school safety. Even if preserving school safety were to be considered a “compelling” interest, the policy would not be narrowly tailored to meet that interest, since any student, regardless of race, who committed the violent act could pose a serious risk to safety.

There is ample evidence to show that racial minority students bear the weight of zero tolerance policies in disproportionate numbers. However, equal protection claims challenging zero tolerance policies that cause these disparities are difficult to establish because of the requirement that plaintiffs prove discriminatory intent. Since the U.S. Supreme Court’s 1976 decision in *Washington v. Davis*,<sup>5</sup> plaintiffs must provide evidence that governmental bodies intended to discriminate on the basis of race in creating or implementing a policy. Racial disparities, although powerful evidence, are not by themselves sufficient to establish an equal protection violation.

Even if school officials harbor racial animus toward students of color, they are not likely to admit that animus, either explicitly through the zero tolerance policy or implicitly through the application of the policy to students of color. Discovering evidence of discriminatory intent is therefore very difficult. For example, one juncture in the disciplinary process where discrimination might occur is the initial decision to refer a student for an infraction. Students of color are far more likely than white students to be referred for subjective infractions such as “defiance of authority.” Because teachers and other school officials are the first to identify disciplinary infractions, if these officials are more prone to report violations committed by students of color than by white students, there will be no record of white students’ misconduct, thus making it very difficult to prove that similarly situated white students were not referred.

Still, “smoking gun” evidence of discriminatory intent can occasionally appear in the form of racial epithets or in school officials’ tolerance for a racially hostile educational environment. For example, in *Sherpell v. Humnoke School District*, a federal court found in 1985 that an Arkansas school district’s discipline system was racially discriminatory and unconstitutional. The court found that teachers referred to black students as “niggers,” “blue gums,” and “coons,” and a former teacher testified about forms of corporal punishment administered to black students – including one who was left bloodied by a teacher – that were never administered to a white student during her nine years with the district.<sup>6</sup>

In addition to egregious cases in which school officials demonstrate overt racial discrimination, equal protection claims related to zero tolerance policies can arise in cases in which desegregation orders or consent decrees are already in place. Many school

---

<sup>5</sup> 426 U.S. 229 (1976).

<sup>6</sup> 619 F. Supp. 670 (E.D. Ark. 1985).

districts under desegregation orders seek to have their districts declared “unitary.” When a court declares unitary status, the district is deemed to have fulfilled its obligations to eliminate the vestiges of its racially segregated “dual” educational system. Before issuing a declaration, however, a court holds a hearing in which the burden falls on the district to prove that it has achieved unitary status; challengers can introduce evidence at the hearing that highlights noncompliance with the desegregation order. A school district’s decision to adopt a zero tolerance policy may call into question its claim that it has ended practices that tend to segregate and adversely affect minority students. The harsh effects of a zero tolerance policy could, therefore, be raised as one of several factors indicating that a school system has not yet complied with a desegregation order.

One example of a discipline-based revision to a desegregation consent decree can be found in *Bronson v. Board of Education of Cincinnati*. In *Bronson*, the court had issued a study which revealed that racial disparities had not changed in the ten years since the original consent decree’s signing in 1984; moreover, the court found that suspension and expulsion rates had risen dramatically following the implementation of a new policy that added the use of profanity toward staff as grounds for suspension.<sup>7</sup> The amended consent decree required that schools keep track of disparities in referrals by teachers and that officials intervene when individual teachers were consistently responsible for frequent and highly disparate disciplinary referrals. Under the terms of the agreement, teachers are rewarded if they manage students well and can be subjected to discipline themselves if they manage students poorly.<sup>8</sup>

#### B. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964<sup>9</sup> prohibits discrimination on the basis of race, color, or national origin by educational institutions that receive federal financial assistance. Because the courts have recognized a private right of action under Title VI,<sup>10</sup> plaintiffs can file a lawsuit in federal court or file an administrative complaint with the appropriate federal agency charged with enforcing Title VI – the U.S. Department of Education’s Office for Civil Rights.

Unlike constitutional litigation under the Equal Protection Clause, two legal frameworks are available under Title VI: (1) disparate (or different) treatment claims, and (2) adverse impact claims. Like an equal protection claim, a disparate treatment claim under Title VI requires proof of both differential treatment based on race and discriminatory intent. An adverse impact claim under Title VI and its regulations does not, however, require proof of discriminatory intent and can be the more useful claim for students and advocates who have strong evidence of racial disparities arising from zero tolerance policies.

---

<sup>7</sup> See Peter Schmidt, *Cincinnati Agreement Will Rate Teachers on Discipline*, Educ. Week, (Nov. 10, 1993).

<sup>8</sup> *Bronson v. Bd. of Educ. of Cincinnati*, No. C-1-74-205, Amended Consent Decree (Doc. #840) (S.D. Ohio 1994) (originally 604 F. Supp 68 (S.D. Ohio 1984)).

<sup>9</sup> 42 U.S.C. § 2000d.

<sup>10</sup> See *Guardians Assn. v. Civil Service Comm’n*, 463 U.S. 582 (1983).

Students and advocates should note, though, that the evidence used for an adverse impact claim can often be used to support a disparate treatment claim, and vice versa.<sup>11</sup> The essential difference is that an adverse impact claim challenges a seemingly neutral school policy or practice and infers unlawful discrimination on the basis of disparate outcomes, while a disparate treatment claim looks closely at the actual practice to reveal specific instances of differential treatment and considers both direct and statistical evidence of racial bias.<sup>12</sup>

Each of the frameworks is discussed below.

### 1. Disparate Treatment Theory

In *Regents of the University of California v. Bakke*,<sup>13</sup> the U.S. Supreme Court held that violations of the Equal Protection Clause also fall within the prohibitions of Title VI. Disparate treatment cases under Title VI, like equal protection cases under the Constitution, require proof of both differential treatment and discriminatory intent. (As discussed below, adverse impact claims arise out of Title VI's administrative regulations, which extend the statute's coverage.)

The parallel between the equal protection and disparate treatment theories forces advocates to deal with the same evidentiary problems in proving discriminatory intent. For example, anecdotal evidence suggests that schools often have one strict written policy, but may apply the policy in a lax fashion to whites and in strict fashion to students of color. The schools have, in effect, adopted a "dual" disciplinary code.<sup>14</sup> When confronted with such evidence, however, school districts often introduce evidence to show that each incident of misbehavior was unique. Advocates will have a very difficult time proving discriminatory intent based on a single incident, lacking any overt evidence of racial motivation.

While defenses of uniqueness are not easy to counter, advocates may be able to demonstrate intentional discrimination by establishing a consistent pattern using evidence from other incidents. For example, in a 1995 complaint against the Benedictine Military School in Georgia, the Department of Education's Office for Civil Rights reviewed the school's disciplinary records and found that white students who had committed offenses

---

<sup>11</sup> Telephone Interview with Barbra Shannon, Region IV Director of OCR (May 15, 2000).

<sup>12</sup> See *In re Dillon County Sch. Dist. No. 1*, 53 EDUC. REP. 1433 (1986). Analogous case law suggests that an adverse impact claim could rely on statistics solely, to challenge a new zero tolerance policy, if the adoption of the new policy was linked to either a growing disparity, or a significant increase in the actual number of minority students removed from school. Where schools may have had a significant statistical disparity before hand, the new policy might cause significantly more students of all races suspended and expelled without necessarily increasing the disparity between races.

<sup>13</sup> 438 U.S. 265 (1978).

<sup>14</sup> In one case a review of a school district's records showed that black students were picked up by the police and given one week of in-school suspension consistent with the policy, while the white students, for very similar offenses, received counseling and no suspension or police intervention. See Norma Cantu, Assistant Secretary For Civil Rights, U.S. Department of Education, Testimony before the United States Commission on Civil Rights, (Washington D.C., Feb. 18, 2000).



similar to those of black students received substantially lighter sanctions. The school's discipline scheme was based on a point system for infractions, a disciplinary committee that met when a student obtained 20 points, and a headmaster's discretion to accept or reject the committee's recommendations. Based on the fact that black students were routinely expelled under the point system, but white students rarely, if ever, were suspended or expelled for similar and even graver offenses, OCR found the discipline policy to violate Title VI.<sup>15</sup>

## 2. Adverse Impact Theory

The regulations implementing Title VI state that a recipient of federal financial assistance may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination."<sup>16</sup> In *Guardian's Association v. Civil Service Commission*, the U.S. Supreme Court upheld Title VI's adverse impact test, stating that the Title VI regulation forbids the use of federal funds "not only in programs that intentionally discriminate, but also in those endeavors that have a racially disproportionate impact on racial minorities."<sup>17</sup> Discrimination under Title VI can thus exist where the application of neutral criteria – such as zero tolerance policies – have discriminatory effects and where the criteria are not educationally justified.

Borrowing case law from the employment discrimination area under Title VII of the Civil Rights Act of 1964 – including the U.S. Supreme Court's landmark decision in *Griggs v. Duke Power Company*<sup>18</sup> – the courts apply a three-step test to determine if an educational policy is discriminatory under an adverse impact theory. First, does the practice or procedure in question have a disproportionate impact based on race, color, or national origin? Second, is the practice or procedure an educational necessity? Third, is there an alternative practice or procedure that would be feasible and achieve the same purpose, with less discriminatory impact.<sup>19</sup> Each of these steps is discussed below.

### a. *Disproportionate Impact and Racial Disparities*

In most cases, statistical analyses will be useful in demonstrating race-based disparities among students who are disciplined under zero tolerance policies.<sup>20</sup> One method is to compare the percentage of students in a particular racial or ethnic group with an expected value based on a random selection of students from the student body population. If the statistical analysis shows that the suspension/expulsion rate for students of color is significantly higher than what one would expect from a random distribution of students, then the policy may be causing an adverse impact on the students of color.

---

<sup>15</sup> See *In re Benedictine Military Sch.*, 22 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 643 (1995).

<sup>16</sup> 34 C.F.R. 100.3(b)(2).

<sup>17</sup> 463 U.S. 582 (1983).

<sup>18</sup> 401 U.S. 421 (1971).

<sup>19</sup> See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 982 n.9 (9th Cir. 1984);

<sup>20</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

For example, if black students constitute 10 percent of a student body population, one would expect black students to constitute 10 percent of those individuals who are suspended under a new zero tolerance policy. But if 50 percent of students suspended under the new policy are black, there is a disproportionate impact on the black students. There are, however, no rigid mathematical thresholds for the amount of disproportionality; the greater the disparity, the more likely that the challenged practice caused the disproportionate impact. More extensive and elaborate statistical analyses can be performed, but discussion of those techniques is beyond the scope of this Appendix.<sup>21</sup>

*b. Educational Necessity*

Once the plaintiff establishes disproportionate impact, the burden shifts to the defendant to show that the policy causing the disparity is an “educational necessity.” The educational institution must show that the policy is educationally justified, but it is not required to show that the policy is “essential” or “indispensable.” In evaluating educational necessity, the educational goals pursued by a school district are usually not questioned, and the courts are generally deferential to the educators’ expertise and experience. School officials are likely to defend zero tolerance policies on the grounds that they serve the legitimate purpose of maintaining a safe, calm, and orderly environment for learning.<sup>22</sup>

*c. Alternative Policies*

Defenses by school districts can then be overcome by showing that the educational justification is unsound, or that an alternative policy would achieve the same purpose, with less discriminatory impact, and would not be unreasonably expensive to implement. Because of the problem of school violence, it is unlikely that a school’s basic justification for zero tolerance policies – a safe learning environment – would be considered unsound. However, a harsh zero tolerance policy could be challenged because of its weak relationship to the goal of maintaining school safety. Moreover, the policy could be challenged for having alternatives that could accomplish the same educational purposes. For instance, a mandatory out-of-school suspension policy that disproportionately burdened students of color could be replaced by a policy that allowed suspended students to remain at school, but separated from their classmates, for disciplinary and safety reasons.

As a practical matter, adverse impact claims have been underutilized by students and advocates, as well as by federal civil rights enforcement agencies. Yet, a number of

---

<sup>21</sup> For some suggested statistical tests in zero tolerance policies cases, see Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 Educ. L. Rep. 759 (2000).

<sup>22</sup> The other related defense is that the disparity in impact is due to a disparity in behavior among students. This defense can be bolstered by evidence showing that the disparity was caused by treating repeat offenders more harshly. See *In re Cumberland County School Dist.*, 19 Individuals with Disabilities Educ. L. Rep. 505 (1992) (finding by OCR that disparity between black and white students in length of penalties was due to black students’ having longer histories of prior offenses).

class action lawsuits have resulted in productive settlements. In *Ross v. Saltmarsh*, for example, the court required the school district to set a goal to reduce the overall number of suspensions in order to reduce the racial disparity in suspensions.<sup>23</sup> Although school officials denied any wrongdoing, the district also agreed to convene a committee to address the disparity in discipline and to hire a consultant recommended by the plaintiff to “advise the defendants and work with the school district to develop plans to eliminate racial disparities in suspension rates.”<sup>24</sup>

### C. Administrative Complaints with OCR

There are limitations on who can file a lawsuit in court, but any concerned citizen can bring a federal Title VI administrative complaint on behalf of another.<sup>25</sup> The primary agency charged with enforcement of Title VI is the U.S. Department of Education’s Office for Civil Rights (OCR), which has twelve regional offices throughout the country. Generally, filing an OCR or other administrative complaint will not prevent a student and her advocate from taking the matter to court.

As a result of OCR’s policy favoring negotiations, most OCR cases do not result in findings of violations of Title VI.<sup>26</sup> Instead, OCR begins negotiations toward a “resolution agreement” early in the investigatory process.<sup>27</sup> Because resolution agreements are generally available to the public only upon direct request pursuant to the Freedom of Information Act, it is difficult to survey these agreements to understand how OCR typically resolves discipline cases. The following summary of a recent challenge may provide a useful window into OCR’s practices.<sup>28</sup>

In June of 1996, a complaint was filed against the Alameda High School in Alameda, California, stating two claims: (1) a racially hostile environment existed with respect to Latino students; and (2) Latino students were treated differently compared to white students in the number of referrals and suspensions and in the severity of discipline received for the same or similar offenses.<sup>29</sup> OCR requested and received relevant data from the school over a three-year period of investigation and negotiation. In the course of the investigation, OCR interviewed parents, students, and administrative staff, and

---

<sup>23</sup> See *Ross v. Saltmarsh* 500 F. Supp. 935 (S.D.N.Y. 1980).

<sup>24</sup> 500 F. Supp. at 939. Additionally, the district agreed to an exchange of statistical information, and the creation of a suspension log for the consultant to review a semester report showing for each principal or superintendent: name of the student, race, grade, referring teacher, offense, date of suspension, suspending official, date of return and length of suspension. *Id.* at 940-41.

<sup>25</sup> 42 U.S.C. 2000d; 34 C.F.R. §100.7(b).

<sup>26</sup> Statement by Art Coleman, Panelist at Kennedy School Conference on Education Standards (Apr. 29, 2000).

<sup>27</sup> See e.g., U.S. Department of Education Office for Civil Rights Case Resolution Manual (<http://www.ed.gov/offices/OCR/ocrm.html>)

<sup>28</sup> See Paul Grossman, Chief Regional Attorney (Region IX), Letter to Dennis Chaconas, Superintendent, Alameda City Unified Sch. Dist., re: Docket No. 09-06-1291 (October 8, 1999) [on file with The Civil Rights Project].

<sup>29</sup> The discipline concerns were exacerbated when a white student, who admitted “tagging” a bathroom wall received no punishment while a Latino youth was suspended for five days for a similar graffiti act. *Id.*

inspected student files and discipline records. After completing investigation and negotiations, the agency concluded that the school district did not discriminate against Latino students in the dispensation of discipline or allow a racially hostile environment to exist.

However, in the course of its investigation, OCR found that the rates of discipline of Latino and African American students were disproportionately high. The disparity was most notable in a number of discipline categories including “defiance of authority.” Between 1996 and 1999, the District reported to OCR its progress in addressing the disparity and over this period, according to OCR, successfully reduced the discipline rates for all students within an acceptable range.

OCR worked with the school to implement a plan to reduce discipline rate in all its high schools. The district had initially reduced its rate of disciplinary incidents from 2,527 during 1995-96 to 858 incidents in 1996-97.<sup>30</sup> The district employed a range of strategies including (1) analyzing its discipline data, disaggregated by race and ethnicity for disparities and reviewing it with staff; (2) developing conflict resolution teams made up of students; (3) creating peer counseling groups; (4) establishing a Latino Boys Club; and (5) holding workshops that directly addressed issues of race. Nonetheless, even though the rates of suspension continued to decrease in 1997-98 year, OCR pressed the school to reduce the disparity in discipline for African American and Latino students.<sup>31</sup>

The district responded by employing additional strategies, including holding a retreat for administrative staff on diversity awareness and issues regarding racial stereotyping, profiling, and communication styles. Particular attention was spent on how defiance of authority incidents had been distributed across racial and ethnic lines. OCR reviewed data from the 1998-99 school year and found that in all categories of student discipline, including defiance of authority, Latino and African American students were within 1.02 points of the target goals. OCR closed the case based on a finding of no violation on the original claims and assurances that the district would continue to work toward reducing the discipline rates for African American and Latino students.

#### D. Limitations on Enforcement

Discussions with OCR investigators shed little light on whether Alameda is typical of investigations of discrimination in school discipline. Students and advocates should understand, however, that the complaint process does not always lead to success, and OCR enforcement can be inconsistent. One problem is that OCR has not issued clear guidance on discipline investigations and there may be significant differences in the level of scrutiny depending on the region or the investigator. Moreover, the availability of a less discriminatory alternative is of critical legal significance under adverse impact analysis. The fact that, after continuous pressure, the Alameda District brought the

---

<sup>30</sup> According to a letter from OCR’s chief regional attorney reviewing the school’s progress informing the superintendent that the case was closed. *Id.*

<sup>31</sup> OCR did not find statistically significant disparate rates for other ethnic groups. *Id.*

disparities in discipline down suggests that, if pressured, many schools could achieve similar results. To the extent that OCR fails to employ the adverse impact analysis to leverage reductions in the gross racial and ethnic disparities in discipline, the agency misses critical opportunities to protect minority children from injustice.

OCR's resolution agreement approach is a sound general policy, but given the historical persistence of gross disparities in discipline, the magnitude of the negative impact on children, and the increasing the numbers of minorities removed from school, OCR could take a more aggressive enforcement approach. The agency should conduct more comprehensive compliance reviews on discipline, and modify its strong preference for resolution agreements by issuing findings of violation in discipline cases to recalcitrant districts. The conditions described in this report cry out for more attention to racial and ethnic disparities in school discipline. By doing less, OCR abrogates its duty to enforce the law and to educate the public about what the law requires.

## **II. Legal Protections for Students with Disabilities**

### Overview

Students with disabilities are often disproportionately represented among students who are disciplined under zero tolerance policies. Special education students are significantly overrepresented among the ranks of suspended students, in many districts representing one third or more of all suspensions.<sup>32</sup> Moreover, students of color, frequently mislabeled as being “mentally retarded,” are overrepresented among students with disabilities. Laws that protect individuals with disabilities from discrimination and that guarantee an appropriate education for students with disabilities offer important safeguards for students who may be subjected to discipline under zero tolerance policies.

Three federal statutes provide basic protections for students with disabilities. Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 prohibit discrimination against persons with disabilities by public schools. The Individuals with Disabilities in Education Act (IDEA) establishes rights and protections for students with disabilities and their families.

The laws protecting students with disabilities offer an array of rights, both substantive and procedural. At a minimum, the law requires that schools provide a free and appropriate public education (FAPE)<sup>33</sup> to students with disabilities who are excluded from school for more than 10 days for disciplinary reasons.<sup>34</sup> Furthermore, the law

---

<sup>32</sup> See KIM BROOKS, ET AL., *SCHOOL HOUSE HYPE: TWO YEARS LATER* 19 (Justice Policy Institute/Children's Law Center, Apr. 2000) [hereinafter *School House Hype*].

<sup>33</sup> The definition of FAPE is set out at 20 U.S.C. § 1401(8).

<sup>34</sup> See 34 C.F.R. § 300.300(a); see also 20 U.S.C. § 1412(a)(1)(A). Despite unequivocal language in the Act itself, the new 1999 regulations promulgated by the U.S. Department of Education do not require that FAPE be provided until a child has been suspended for a total of ten school days in the same school year. See Eileen Ordovery, *Disciplinary Exclusion of Students with Disabilities*, CLEARINGHOUSE REV., at 51 (May-June 2000).

provides protections against discriminatory discipline and exclusion for children with disabilities. Specifically, administering punishment for conduct that is a manifestation of disability is a prohibited form of discrimination.<sup>35</sup> Examples of this type of punishment have included taping closed a student's mouth for excessive talking related to mental retardation, dropping a student from the school's rolls for disability-related tardiness, and corporal punishment.<sup>36</sup>

The following analysis discusses the law protecting students with disabilities, and is divided into two parts. The first part discusses ways in which suspensions and expulsions can be challenged on an individual basis pursuant to IDEA. The second part examines theories of discrimination that can be used to challenge discipline policies systemically.

Students and advocates should understand that disability law is a highly technical and complex field, with many regulations and procedures. The information contained in this Appendix provides only a basic overview of the law, and it should not be a substitute for more detailed treatments of disability law. There are, for example, important distinctions between IDEA, the new IDEA regulations, and Section 504 of the Rehabilitation Act that are not discussed in detail in this Appendix.<sup>37</sup> Students and advocates should consider consulting with attorneys and education specialists who focus on disability-related issues when considering a challenge to a zero tolerance policy.

## A. Individual Protections Under the Disability Laws

I. Section 504 of the Rehabilitation Act of 1973<sup>38</sup> and Title II of the Americans with Disabilities Act<sup>39</sup> are federal antidiscrimination laws that prohibit discrimination based on disability and are applicable in public schools. To simplify the analysis here, all further references in this Appendix to Section 504 can be assumed to cover Title II as well, because of parallel language and interpretations of the laws.

II. The Individuals with Disabilities in Education Act (IDEA)<sup>40</sup> is a federal law which contains provisions that grant federal funds for its

---

<sup>35</sup> See e.g., 29 U.S.C. § 794; 34 C.F.R. §§ 104.3(j), 104.4(b), 104.33, 104.35 (1999); 42 U.S.C. § 12132.

<sup>36</sup> See Ordover, *supra* note 34, at 54.

<sup>37</sup> For a thorough review, see Eileen Ordover, *Disciplinary Exclusion of Students with Disabilities*, Clearinghouse Review, (May-June 2000). Additional materials and sources on this subject are available on the web site of The Civil Rights Project at Harvard University: [www.law.harvard.edu/groups/civilrights](http://www.law.harvard.edu/groups/civilrights).

<sup>38</sup> 29 U.S.C. § 794.

<sup>39</sup> 42 U.S.C. §§ 12101 *et seq.*

<sup>40</sup> 20 U.S.C. 1400 *et seq.* For a full discussion of required procedures and procedural safeguards see Eileen Ordover, Overview: Education Rights of Children With Disabilities Under the Individuals With Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973 (1999) (available from the Center for Law and Education, 1875 Connecticut Ave., Suite 510, Washington, DC 20009; 202.986.3000); see also Bazelon Center For Mental Health, *A New IDEA: A Parent's Guide to the Changes in Special Education Law for Children with Disabilities*, (1999) (available on line at <http://www.bazelon.org>).

implementation and provides procedural rights and entitlements to eligible individuals and their parents or guardians. IDEA also has detailed requirements regarding reporting and monitoring of its provisions by state government. Among these requirements are the state obligation to monitor school districts for potential discrimination in suspensions and expulsions of children with disabilities,<sup>41</sup> and the state obligation to collect and examine data to determine if significant disparities exist in the identification and placement of students of color.<sup>42</sup>

III. The 1997 amendments to the IDEA added discipline provisions to the Act and codified schools' obligations to educate all children with disabilities, including those with behavioral problems. A cornerstone of the law is that if a child with a disability exhibits behavioral manifestations of her disability, the behavior is to be treated as an educational issue and the child is to be provided with appropriate services and supports.<sup>43</sup> An equally important component of IDEA is that a free and appropriate public education (FAPE) must be provided "to all children with disabilities . . . between the ages of 3 and 21 . . . including children with disabilities who have been suspended or expelled from school."<sup>44</sup>

#### 1. Suspensions and Manifestation Hearings

Under IDEA and its recently published regulations, school authorities are permitted to suspend a child for up to ten consecutive days before they are required to determine whether the triggering misconduct was a manifestation of the child's disabilities.<sup>45</sup> The determination must take the form of a "manifestation hearing." Schools may also be required to hold a manifestation hearing where cumulative suspensions constitute a pattern of exclusion and add up to more than 10 days.<sup>46</sup>

A manifestation hearing is a review of the relationship between the misconduct at issue and the child's disability.<sup>47</sup> Under IDEA, the individualized education program (IEP) team conducts the hearing along with other "qualified personnel."<sup>48</sup> The manifestation hearing differs from regular IEP team meetings and decisions because the

---

<sup>41</sup> See 34 C.F.R. §300.146 (a)-(b); 20 U.S.C. 612(a)(22).

<sup>42</sup> See 34 C.F.R. §300.519; 20 U.S.C. 1415(k).

<sup>43</sup> See, e.g., 20 U.S.C. § 1414(d)(3)(B) (if child's behavior impedes the child's learning or that of others, the individualized education program must include strategies and supports, including positive behavioral interventions, to address that behavior).

<sup>44</sup> 20 U.S.C. § 1412(a)(1). Exceptions exist for children ages 3-5 and 18-21. See 20 U.S.C. §1412(a)(1)(B); 34 C.F.R. § 300.122.

<sup>45</sup> 20 U.S.C. §§ 1415(k)(1)(A)(I), (k)(4)(A); 34 C.F.R. §300.523(a).

<sup>46</sup> 34 C.F.R. §§ 300.519, 300.523(a). "What constitutes a pattern is not defined in the regulations. However, the U.S. Department of Education Office for Civil Rights has long applied a similar rule in enforcing Section 504." Ordovery, *supra* note 34, at 52.

<sup>47</sup> 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. 300.523(a)(1).

<sup>48</sup> 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.523(b). Section 504 similarly requires that the school system conduct a comprehensive evaluation meeting before attempting to exclude a student for more than ten days because such lengthy exclusions trigger the requirements for "change of placement." 34 C.F.R. § 104.35, 104.36.

manifestation review must be conducted by the IEP team together with other qualified personnel.<sup>49</sup> The team must consider all relevant information, including the parent's observations and the results of evaluations presented by experts invited by the parents to attend.<sup>50</sup>

The IEP team may determine that the misconduct was a not a manifestation of disability only if *all* of the following conditions are met:<sup>51</sup> (1) in relationship to the behavior at issue, the child's IEP and placement were appropriate, and all services were implemented in accordance with the IEP; (2) the child's disability did not impair the child's ability to understand the impact and consequences of the behavior at issue; and (3) the disability did not impair the child's ability to control the behavior in question.<sup>52</sup>

In many cases overturning a district's decision to suspend a student with a disability, the reviewing authority determined that the manifestation hearing was not conducted in the proper manner. For example, in one recent case in Minnesota, a fifteen-year-old student who was identified as IDEA-eligible on the basis of an emotional/behavioral disorder was suspended and ultimately transferred to an alternative school for possession of a "weapon" consisting of pieces of a paintball gun.<sup>53</sup> The student had been playing with the paintball gun, which belonged to a friend, the night before and had cleaned it for the owner. The next day, the friend called and asked the student to return the paintball gun. The student put the disassembled components of the paintball gun in a backpack, brought them on the school bus, and handed the backpack to his friend. There was no evidence, and the district did not suggest, that the student intended to do anything but to return the parts, which did not include the paintballs or its propellants. In holding for the parents, the administrative law judge found that the student's IEP team improperly determined that the student's behavior was not a manifestation of his disability. The judge stated: "The evidence was clear that the student's disability, which was characterized by impulsivity and failure to consider the consequences of his actions, impaired his ability to control his behavior."<sup>54</sup>

#### a. Finding of a Manifestation of Disability

Even if the reviewing team and other qualified personnel determine that a student's behavior is a manifestation of disability, the school may still seek to change the child's educational program or placement according to the regular procedures under

---

<sup>49</sup> "[T]he inclusion of this provision in the law [other qualified personnel] shows that Congress recognized that individualized education program teams alone did not have the expertise to determine the relationship between disability and behavior. The 'qualified personnel' who supplement the [IEP] team must bring this expertise to the group and enable it to evaluate the factors listed above in regard to a particular child."

Ordovery, *supra* note 34, at 58.

<sup>50</sup> See 20 U.S.C. § 1415(k)(4)(I); 34 C.F.R. § 300.523(1).

<sup>51</sup> See 34 C.F.R. § 300.523(d).

<sup>52</sup> 20 U.S.C. § 1415(k)(4)(ii); 34 C.F.R. § 300.523(2).

<sup>53</sup> See *In re Independent Sch. Dist. No. 279, Osseo Area Sch.* (May 28, 1999). As part of the holding, the ALJ determined that the components of the paint ball gun failed to meet the definition of a weapon as defined by the United States weapons code.

<sup>54</sup> *Id.*



IDEA. In most cases, once a manifestation of disability is found, the school may not suspend or expel the student.<sup>55</sup> Moreover, parents may challenge the school's proposed changes and request a hearing pursuant to IDEA and implementing state law and regulations.

More importantly, under the law's "stay put" provisions, the school system may not change the child's placement unilaterally.<sup>56</sup> The "stay put" requirement is critical because it minimizes the disruption of the child's educational program and sends the message to schools that they cannot use suspensions and expulsions as a way of ridding the schools of special education students. Moreover, the hearing process, from the initial request to the exhaustion of appeals, can take a very long time. Once rendered, the state administrative decision can be appealed to state or federal court, and the "stay put" provision covers the period of appeal as well.<sup>57</sup>

IDEA protections are also critical in preventing the routing of students with disabilities into the criminal justice system. In *Morgan v. Chris L.*,<sup>58</sup> a federal court of appeals held that a school had violated IDEA by failing to timely evaluate a student with Attention Deficit Hyperactivity Disorder (ADHD) and attempting to use the juvenile court process to change his educational placement, without following proper IDEA procedures. The court ruled that the school's filing of a delinquency petition constituted a change in educational placement that entitled the student to IDEA protections, including the meeting of the IEP team prior to the proposed placement change. The *Chris L.* case thus has important implications for addressing zero tolerance policies that attempt to shuttle students into the juvenile justice system.

#### b. Finding That Behavior is Not a Manifestation of Disability

When students with disabilities behave in ways that are not manifestations of disability, they may be disciplined in the same manner as students without disabilities, in most respects.<sup>59</sup> However, "functional behavior assessments" must be planned and implemented for *all* students with disabilities who are suspended or expelled.<sup>60</sup> Because a long-term suspension or expulsion is considered a "change of placement" for a child with disabilities, the school system must convene the IEP team, which must include parents, in order to plan or revise a functional behavior assessment. The team must meet

---

<sup>55</sup> 20 U.S.C. §§ 1414(d), 1414(f), 1415(b)(3), 1415(b)(4), 1415(c), 1415(d), 1415(k)(5)(A); 34 C.F.R. §§ 300.524(a), 300.343-300.346, 300.501, 300.503-504.

<sup>56</sup> See 20 U.S.C. § 1414(j).

<sup>57</sup> 20 U.S.C. § 1415(j); 34 C.F.R. § 300.514.

<sup>58</sup> 106 F.3d 401 (6th Cir. 1997) (affirming 927 F. Supp. 267 (E.D. Tenn. 1994)), *cert. denied*, 520 U.S. 1271 (1999).

<sup>59</sup> See 20 U.S.C. 1415(k)(5); 34 C.F.R. § 300.524.

<sup>60</sup> 20 U.S.C. § 1415(k)(1)(B)(i). Neither the statute nor the regulations define the term specifically. Experts in the field describe the assessment as one that "looks for the motivation behind the behavior, including the biological, social, affective, and environmental factors that trigger, sustain, or end it." Ordover, *supra* note 34, at 53.

and develop an immediate plan to address the behavior within a maximum of ten days after the change of placement.<sup>61</sup>

### c. Exceptions Under the 1999 IDEA Regulations

Under recently published IDEA regulations, there are important exceptions to the manifestation hearing requirements. Students with disabilities who are found to possess drugs or weapons, or whose behavior is substantially likely to result in injury to self or others, can be suspended for 45 days or less, regardless of whether the behavior is a manifestation of disability.<sup>62</sup> The law makes it relatively easy for schools to suspend and expel such students, often unilaterally and regardless of parent's objections.<sup>63</sup> If, after 45 days the child continues to fail the above safety requirements, the school may seek an additional 45-day period of exclusion.<sup>64</sup>

### d. Students With Disabilities That Have Not Been Diagnosed

In addition, IDEA and Section 504 each have provisions that protect against the removal of students with disabilities, even if the school system has not yet identified them as having a disability.<sup>65</sup> The school system is deemed to have such knowledge if the parent expressed concern to school system personnel (usually in writing or in a request for an evaluation) that a child needs special education and related services; if the child's behavior demonstrates the need for services; or if a teacher or other relevant school personnel expressed concern about the child's behavior or performance to special education or other school personnel.<sup>66</sup>

## B. Systemic Challenges to Discipline Policies

Most challenges to school discipline policies have been brought as individual cases under IDEA's protections. Systemic challenges alleging disability discrimination pursuant to state and federal law are rare, and the law is not well defined. What follows is a discussion of systemic challenges that may be available under federal law.

### 1. Overview of Legal Theories

---

<sup>61</sup> 20 U.S.C. § 1415(k)(1)(B)(I); *see also* Ordover, *supra* note 34, at 52-53.

<sup>62</sup> Under IDEA regulations school authorities may unilaterally place a student with disabilities in an "alternative interim educational setting" for up to 45 days for weapons or drug violations. 34 C.F.R. §§ 300.520(a)(2), 300.524(a). But only where a substantial likelihood of harm exists and remains despite efforts by the school to mitigate the risks. *See* Ordover *supra* note 34, at 55.

<sup>63</sup> *See id.* If the misconduct is not based on weapon or drug possession school authorities can still act unilaterally, but must gain the approval of a hearing officer. 20 U.S.C. § 1415 (k)(2); 34 C.F.R. § 300.521 (1999). The school may suspend the student immediately and seek an expedited hearing through state authorities to approve a 45-day removal. For full discussion, *see* Ordover, *supra* note 34, at 57.

<sup>64</sup> At the end of the 45 days the rules for the original exclusion apply once again. *See* 20 U.S.C. 1415(k)(7)(B).

<sup>65</sup> *See* 20 U.S.C. § 1415(k)(8)(a); 34 C.F.R. § 300.527(a) (1999).

<sup>66</sup> *See* 20 U.S.C. § 1415(k)(8)(B); 34 C.F.R. § 300.527(b). Here, Section 504 and IDEA differ in subtle but potentially important ways. *See* Ordover, *supra* note 34, at 64-65.

Systemic challenges grounded in allegations of discrimination may be based on one or more of the following legal theories: (1) discrimination pursuant to a disparate treatment or adverse impact theory;<sup>67</sup> (2) exclusion from participation; and (3) denial of benefits. Disparate treatment and adverse impact claims are typically raised under Section 504, which prohibits discrimination on the basis of disability by recipients of federal funding. Exclusion and denial of benefit theories can constitute separate causes of action.<sup>68</sup> They may differ from disparate impact and different treatment theories because a policy or practice that violates the requirements of IDEA or Section 504 is itself considered a form of discrimination against students with disabilities.<sup>69</sup>

The distinction between exclusion and denial of benefits can be understood by analyzing a defendant's discriminatory behavior in light of the basic IDEA entitlements.. By law, all students with disabilities are entitled to be educated with their regular education peers to the maximum extent appropriate for special education students. This ensures exposure to the same curriculum, the same high academic standards, and the same opportunities for socialization.<sup>70</sup> The short hand version of this concept is described as Full Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE).

Denial of FAPE or LRE in the discipline context could occur if, for example, students with emotional disorders are automatically sent to alternative schools by the school district because they are regarded as too disruptive for regular education classrooms. The resulting suspensions could be described as systemic discriminatory *exclusion* denying both the FAPE and LRE requirements.<sup>71</sup> Similarly, if a plaintiff could establish a pattern that a school or district suspended undiagnosed students with disabilities who were enrolled in regular education classrooms, and these students should have been diagnosed and provided with the support services they needed to succeed in those classrooms, the resulting suspensions could be described as caused by a systemic and discriminatory *denial of benefits*, also violating FAPE and LRE requirements.<sup>72</sup>

## 2. Exhaustion of Administrative Remedies is Not Always Required

---

<sup>67</sup> Disparate treatment theory and adverse impact theory are outlined in this Appendix under the discussion of race discrimination and Title VI.

<sup>68</sup> See Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect To Handicap Under Section 504 Of The Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 515 (1983-84).

<sup>69</sup> 29 U.S.C. § 794 (a).

<sup>70</sup> See e.g., 20 U.S.C. §§ 1401(8); 1414 (b-d); 34 C.F.R. §§ 300.26 (b)(3), 300.344(a)(2), (4)(ii), 300.347, 300.532(b), 300.533(a)(2)(ii), §300.550-554; see also *Devries v. Fairfax Count Sch. Bd.*, 882 F. 2d 876, 878 (4th Cir. 1989).

<sup>71</sup> For this reason IDEA and Section 504 claims are generally brought together. See, e.g., *Smith v. Robinson*, 468 U.S. 992 (1984).

<sup>72</sup> IDEA has explicit "Child Find" provisions obligating schools, districts and states to evaluate children manifesting behavior suggestive of the presence of a disability as well as in response to parental requests. See 20 U.S.C. §1412(a)(3); 34 C.F.R. §300.125.

Most individuals seeking to remedy a specific disciplinary decision must exhaust the administrative remedies spelled out under IDEA and the state laws and regulations implementing IDEA.<sup>73</sup> However, systemic challenges to a school or district's discipline policy brought by individual plaintiffs, or as a class action, that allege discrimination will not necessarily be required to exhaust administrative remedies.<sup>74</sup> Courts have specifically allowed actions where failure to provide IDEA's unique procedural rights is the basis for a complaint against a school, district, or state.<sup>75</sup>

### 3. Discrimination Claims Under Section 504

#### a. Disparate Treatment

Disparate treatment claims in the disability arena mirror Title VI claims based on race, color, or national origin. For example, meting out harsher punishments to students with disabilities than to non-disabled students would likely be a violation of Section 504. A significant difference is that students with disabilities are entitled to a manifestation hearing and a functional behavior assessment and in that respect have more due process rights than other students. For example, if a school removed a child without a manifestation hearing, and the school knew or should have known the child had a disability, the school would be in violation of the law. A systemic challenge could be filed in which plaintiffs would have to establish a pattern or practice of failing to provide manifestation hearings or functional behavior assessments.

---

<sup>73</sup> See 468 U.S. 992, at 1021. However, individual Section 504 claims that could not be filed under the IDEA would not be required to exhaust administrative remedies before filing in court.

<sup>74</sup> For example, "parents need not exhaust IDEA's administrative remedies where the state or local agency's procedures would be inadequate or futile. 'Administrative remedies are generally inadequate where structural, systemic reforms are sought. . . . Exhaustion may also be excused because of inadequacy of administrative remedies where the plaintiffs' substantive claims themselves concern the adequacy of the administrative process.'" *Learning Disabilities Assoc. v. Bd. of Educ. of Baltimore County*, 837 F. Supp. 717 (D. Md. 1993) (citing *Hoefl v. Tucson Unified Sch. Dist.*, 967 F. 2d 1298, 1309 (9<sup>th</sup> Cir. 1992))

<sup>75</sup> For example, in *Doe v. Rockingham County School Board*, the District Court held that the student was not required to exhaust administrative proceedings because the district had failed to provide a prompt hearing and notice, and sought to maintain the disciplinary suspension during the pendency of the hearing. *Doe v. Rockingham Sch. Bd.*, 658 F. Supp. 403 (W.D. Va. 1987).

## b. Adverse Impact

Like the Title VI regulations, the regulations implementing Section 504 have an “effects” test, which states that “[a] recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipients program with respect to handicapped persons . . . .”<sup>76</sup> A similar three-step test is used to determine if an educational policy is discriminatory under an adverse impact theory. First, does the practice or procedure in question have a disproportionate impact based on disability? Second, is the practice or procedure an educational necessity? Third, is there an alternative practice or procedure that would be feasible and achieve the same purpose, with less discriminatory impact?

Case law in the area of adverse impact based on disability is sparse. Application of the adverse impact analysis seems particularly uncommon in the disability context. In one case, *In re Abbeville School District*, the complainant specifically alleged that discipline was administered more harshly to black students and students with disabilities than to other students who had committed similar offenses.<sup>77</sup> Pursuant to its investigation, OCR did not invoke the regulations regarding disparate impact as it pertained to disability, but did consider disparate impact as it pertained to race.<sup>78</sup> The brief description of the Abbeville discipline policy suggests that the aspect of the code that allowed for suspension for cumulative misconduct, including a wide variety of minor rules infractions could well have had a disparate impact on students with disability.<sup>79</sup>

At least one court, however, has called into question whether a disciplinary policy with an disproportionate impact on students with disabilities is the kind of program that warrants a adverse impact analysis under Section 504. In *Student with a Disability v. School Board of Palm Beach County*,<sup>80</sup> plaintiffs filed an adverse impact claim based in part on a statistical analysis of the school’s criminal referral policy. The data showed that students with disabilities were referred for prosecution at over five times the rate of other students. The plaintiffs argued further that the high referral rate resulted from inadequate behavioral supports.

The *Palm Beach* court applied a “denial of benefits” analysis to the claim and held that neither the referral practice nor the behavioral supports constituted “a program under which they [the plaintiffs] are being subjected to discrimination,” in its grant of summary judgment to the defendants. The court further stated that even if the plaintiffs had established a denial of benefits, their claim would fail. According to the court, the

---

<sup>76</sup> 34 C.F.R. §104.4(b)(4)

<sup>77</sup> See *In re Abbeville County Sch. Dist.*, 28 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1208 (1998).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (students who engage in level I activities, including tardiness, lying and failure to complete an assignment three or more times may be suspended or expelled if an administrator decides to re-classify the repeat offenses as level II disruptive conduct offenses).

<sup>80</sup> 31 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 209 (1999)

criminal referrals were made because they had committed crimes, not because of their disability. *Palm Beach* suggests that plaintiffs seeking to redress the discriminatory impact of a substantive rule may be on stronger footing than those who challenge a procedural practice such as criminal referrals.

#### 4. FAPE/LRE Protections

According to the recently released report by the National Council on Disabilities (NCD), most states are not fully complying with many important requirements of IDEA.<sup>81</sup> However, there have been successful systemic challenges against states for failure to implement IDEA adequately. Advocates have also successfully litigated to redress states' denials of these protections to children with special needs who were incarcerated.<sup>82</sup>

The United States Department of Education Office for Special Education Programs (OSEP) is charged with ensuring the proper enforcement of IDEA by states. Even if OSEP does not intervene, states may be held responsible for ensuring the enforcement of IDEA in every school district.<sup>83</sup> For example, in *Corey H. v. Chicago*, the plaintiffs brought a class action against both the city of Chicago and the state of Illinois under the IDEA, Section 504, and Title II of the ADA for using a categorical system to assign students with disabilities to classes.<sup>84</sup> The plaintiffs prevailed against the state after the case against the city settled. The court concluded that LRE requirements were violated because the state had done little to ensure compliance with the IDEA, because children with disabilities were rarely placed in regular education, and because district personnel were inadequately trained to assist students with disabilities who were placed in regular education.

Similarly, a systemic challenge to widespread abuses in disciplining students with disabilities – such as rarely acknowledging that misconduct is a manifestation of disability, or inappropriately using alternative schools – could take the form of a state or federal class action against both the state and the local agency for violations of Section 504 and IDEA.

---

<sup>81</sup> See, NATIONAL COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE SCHOOL BEHIND (2000).

<sup>82</sup> See *Handberry v. Thompson*, 2000 WL 271670 (S.D.N.Y. 2000).

<sup>83</sup> A complainant dissatisfied with the state's disposition may request review of the state's decision by the U.S. Secretary of Education who is authorized to withhold federal funding from a state found to be in non-compliance with the IDEA. See 34 C.F.R. § 76.781. Furthermore, if the cause of action is that the state has adopted a policy or is pursuing a practice of general applicability that is contrary to the law, or where structural or systemic reforms are sought plaintiffs may file suit against the state in court. See *e.g.*, *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1092 (1st Cir. 1989).

<sup>84</sup> See *Corey H. v. The Bd. of Educ. Of the City of Chicago*, 27 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 713 (N.D. Ill. 1998).

### III. Constitutional Rights to Due Process

Suspensions and expulsions are two of the most widely used disciplinary tools in the school setting, and under the spate of new zero tolerance policies, the number of students suspended and expelled is rising. However, students do not “shed their constitutional rights . . . at the school house gate.”<sup>85</sup> Of course, no source of federal or state law requires schools to keep students in the classroom who truly pose dangers to themselves or others, but the Due Process Clause of the Fourteenth Amendment,<sup>86</sup> which applies to the states and all their subdivisions,<sup>87</sup> provides a constitutional check on the practice of improperly denying a student the right to attend public schools.

Applying the Due Process Clause is a very practical, fact-specific exercise; it is “a flexible concept that varies with the particular situation,”<sup>88</sup> and this area of the law can be very complex. Furthermore, courts traditionally exercise great restraint in reviewing student disciplinary regulations,<sup>89</sup> and the Supreme Court has held that the interpretation of school regulations initially resides with the body that approved and is responsible for enforcing them.<sup>90</sup> Finally, while “public high school students do have substantive and procedural rights while at school,” “it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion ....”<sup>91</sup>

Ultimately, then, the Due Process Clause provides real but limited protections to students living under zero tolerance policies. The procedures required by the Due Process Clause prior to suspending or expelling a student are, in most cases, fairly meager. Also, the Due Process Clause itself does not prohibit mandatory punishments or require school officials to consider mitigating circumstances. Under the Due Process Clause, students are only protected against punishments that are grossly disproportionate to the offense committed. However, many school discipline codes and state laws require a discretionary approach, even in jurisdictions that proclaim that they have supposed “zero tolerance” policies. In these districts, the Due Process Clause can be a valuable weapon in challenging improperly applied discipline policies.

#### A. Procedural Due Process

The concept of “due process” in American law has two distinct components. The first, procedural due process, requires that states provide fair and adequate procedures for

---

<sup>85</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>86</sup> The Fourteenth Amendment provides in relevant part that “no state shall . . . deprive any person of life, liberty, or property, without due process of law....” U.S. CONST. amend. XIV, §1.

<sup>87</sup> *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). “The Fourteenth Amendment, as now applied to the states, protects the citizens against the state itself and all of its creatures – boards of education not excepted. These have important, delicate, and highly discretionary functions but none that they may not perform within the limits of the Bill of Rights.” *Id.* at 637.

<sup>88</sup> *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

<sup>89</sup> *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>90</sup> *See Wood v. Strickland*, 420 U.S. 308 (1975).

<sup>91</sup> *Id.* at 326.

determining when it will deprive a person of life, liberty, or property. Therefore, to raise a procedural due process claim, a plaintiff must (1) identify a protected property or liberty interest; (2) demonstrate that they were deprived of that interest by state action; and (3) establish that the deprivation occurred without due process.<sup>92</sup>

The entitlement to a public education created by state laws has long been recognized as a property interest protected by the Due Process Clause of the Constitution.<sup>93</sup> As the Supreme Court commented on the importance of a public education in *Brown v. Board of Education*:

Education is perhaps the most important function of state and local governments. . . . It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>94</sup>

Once a protected interest has been identified, such as the property interest in a public education, the second step in due process analysis is to establish that the state actually impaired the plaintiff's protected right. In the seminal Supreme Court case on school discipline, *Goss v. Lopez*, the Court held that "total exclusion from the educational process for more than a trivial period" is a substantial enough deprivation of property to qualify for due process protection.<sup>95</sup> Additionally, courts have held that in-school suspensions may require the same amount of process as out-of-school suspensions: the touchstone is not the physical presence of the student on the school premises, but rather the degree to which the student is denied educational opportunities.<sup>96</sup>

Once a protected interest has been impaired, the final step in evaluating procedural due process claims is the most difficult of the three: determining how much process is due. On the one hand, students are entitled to less process than are citizens outside the public education context.<sup>97</sup> On the other hand, the more serious the deprivation, the more procedural safeguards are needed to ensure that the denial of the interest is justified. In the school discipline cases, the analysis differs depending on the length of the punishment; there is a division between short-term suspensions and long-term suspension/expulsions.

---

<sup>92</sup> See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

<sup>93</sup> See *Goss v. Lopez*, 419 U.S. 565, 573-575 (1975). Note that the federal Constitution does not create a fundamental right to an education; education becomes a property interest when state law grants all children a right to attend the state-run public education system, as all fifty states have.

<sup>94</sup> *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

<sup>95</sup> 419 U.S. at 576.

<sup>96</sup> Compare *Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749 (S.D. Miss. 1987), summarily aff'd, 853 F.2d 924 (5th Cir. 1988) (holding that due process protections apply when a student is isolated from other students and excluded from her regular classes for six days, even though she was physically on school grounds) with *Rasmus v. State of Ariz.*, 939 F. Supp. 709 (D. Ariz. 1996) (holding that a student's inability to work on class assignments during a ten-minute "timeout" did not rise to the level of a property deprivation deserving of due process protections).

<sup>97</sup> See *Winegar v. Des Moines Ind. Community Sch. Dist.*, 20 F.3d 895, 901 (8<sup>th</sup> Cir. 1994).



## 1. Short-term Suspensions

In *Goss v. Lopez*, the Supreme Court provided guidance regarding the amount of process that is required for short-term suspensions. The *Goss* Court held that for suspensions of ten days or less, the student must “be given oral or written notice of the charges against him and, if he denies them,<sup>98</sup> an explanation of the evidence the authorities have and an opportunity to present his side of the story” to an objective decision maker.<sup>99</sup> The hearing need not be a full adversarial hearing: “an informal give-and-take between the student and disciplinarian”<sup>100</sup> is all that is required. Therefore, for suspensions of ten days or less, there is no right to counsel, to confront and cross-examine witnesses, or to call defense witnesses. Ten years after *Goss*, the Court reaffirmed this point by observing that a two-day suspension “does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution.”<sup>101</sup>

## 2. Long-term Suspensions and Expulsions

Unfortunately, there is less guidance regarding the amount of process required for a longer suspension or expulsion, although the *Goss* Court commented that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”<sup>102</sup> In the absence of a direct Supreme Court precedent, most courts look to *Dixon v. Alabama State Board of Education*<sup>103</sup> for guidance regarding the amount of process due for longer suspensions and expulsions. In *Dixon*, the Fifth Circuit held that while a “full-dress judicial hearing” was not required to expel a college student for misconduct,

[n]evertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of [the educational institution]. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the acts to which each witness testifies. He should also be given the opportunity to present . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.<sup>104</sup>

---

<sup>98</sup> But “when a student admits to the conduct giving rise to the suspension, the need for a due process hearing is obviated, since the purpose of a hearing is to safeguard against punishment of students who are innocent of the accusations against them.” *Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 752 (S.D. Miss. 1987), summarily aff’d, 853 F.2d 924 (5th Cir. 1988). See *Black Coalition v. Portland Sch. Dist.*, 484 F.2d 1040, 1045 (9th Cir. 1973); *Montoya v. Sanger Unified Sch. Dist.*, 502 F. Supp. 209, 213 (E.D. Cal. 1980).

<sup>99</sup> 419 U.S. at 581. Note that an administrator who is familiar with the case may serve as the decision maker as long as he or she assesses the situation fairly and on the basis of valid evidence.

<sup>100</sup> 419 U.S. at 584.

<sup>101</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986).

<sup>102</sup> 419 U.S. at 584.

<sup>103</sup> 294 F.2d 105 (5th Cir. 1961).

<sup>104</sup> *Dixon v. Alabama St. Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961).

Additionally, when deciding procedural due process claims, courts often turn to *Mathews v. Eldridge*,<sup>105</sup> which is not a school discipline case but provides a “policy-oriented analysis of procedural due process issues”<sup>106</sup> that weigh three factors against each other:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>107</sup>

Courts generally recognize that a student’s interest in continuing her education is weighty, particularly when a long-term suspension or expulsion is at issue. Likewise, courts acknowledge that a school’s interest in maintaining discipline and a safe environment conducive to learning is also commanding. Consequently, most of the debate centers on the risk of erroneous deprivation and the value of additional safeguards. This inquiry is extremely fact specific, and courts have reached differing conclusions on the similar issues. For example, an Illinois court held that although expulsion procedures are not subject to the rules of evidence, the admission of accusatory hearsay statements bolstered by a school official’s testimony proclaiming the proponent’s reliability was a “particularly egregious departure from the adversarial standard.”<sup>108</sup> In contrast, the Fifth Circuit “reject[ed] the argument of appellant that hearsay testimony was constitutionally prohibited.”<sup>109</sup>

Because of the fact-specific nature of the inquiry, appellate and other courts decisions vary from circuit to circuit. However, authors of a recent text on the subject suggest that school districts should provide notice that contains the following elements:

- an express intent to suspend or expel the student
- the specific charges against the student
- which rule was allegedly broken
- the nature of the evidence supporting the charge
- the date, time, and place where the hearing regarding the suspension or expulsion will be held
- a copy of the procedures that will be followed at the hearing
- a reminder of the rights that the students and parent(s) have, including the right to counsel, presentation of witnesses, cross-examination of hostile witnesses, and a copy of the hearing transcript.<sup>110</sup>

---

<sup>105</sup> 424 U.S. 319 (1976).

<sup>106</sup> *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924 (6th Cir. 1988).

<sup>107</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>108</sup> *Colquitt v. Rich Twnshp.*, 699 N.E.2d 1109, 1116 (Ill. App. 1998).

<sup>109</sup> *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458, 459 n.1 (5th Cir. 1974).

<sup>110</sup> See Lawrence F. Rossow & Jerry R. Parkinson, *The Law of Student Expulsions and Suspensions* 4-7 (2d ed. 1999).

### 3. The “Meaningfulness” of the Disciplinary Hearing

In addition to these types of literally “procedural” items, another fundamental requirement of the Due Process Clause is the opportunity to be heard at a “meaningful time and in a meaningful manner.”<sup>111</sup> Consequently, in most cases, the administrative process must occur prior to the implementation of the suspension. However, if a student’s “presence [in the school] poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process [the student] may be immediately removed from school.”<sup>112</sup> Even in these cases, the student is entitled to due process protections; the notice and hearing should follow the suspension (or expulsion) “as soon as practicable.”<sup>113</sup>

Determining what constitutes a “meaningful manner” has proven more difficult. The Supreme Court has held that this minimally means that if an essential element to the decision is excluded from consideration, then due process has not been satisfied.<sup>114</sup> In the school disciplinary setting, this analysis will often depend on whether the discipline policy calls for a mandatory punishment.

A series of cases arising in the Fifth Circuit illustrate this principle. In *Lee v. Macon County Board of Education*, the Fifth Circuit overturned the permanent expulsion of two girls for a series of “undisciplined, defiant, and abusive” behavior.<sup>115</sup> The court held that when a “serious penalty” such as expulsion is at stake, the school board must make an independent disciplinary determination instead of simply confirming the principal’s recommendation.<sup>116</sup> In a much cited passage, the court stated: “Formalistic acceptance or ratification of the principal’s request or recommendation as to the scope of punishment, without independent Board consideration of what, under all the circumstances, the penalty should be, is less than full due process.”<sup>117</sup> However, as discussed next, this holding is not as broad as it seems on its face.

Six years later, in *Mitchell v. Board of Trustees*, the same court was confronted with the case of two students who had threatened others with knives at school and were expelled for the remainder of the semester under a mandatory expulsion rule.<sup>118</sup> The court explicitly stated that “[t]he legal issue in the case as advanced by the plaintiffs is whether, as a matter of substantive due process, a student is guaranteed some discretion

---

<sup>111</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see also *Sieck v. Oak Park & River Forest High Sch. Dist.*, 807 F. Supp. 73 (N.D. Ill. 1992) (holding that a policy of mandatory suspension for theft called into question the “meaningfulness” of student’s hearing).

<sup>112</sup> 419 U.S. at 584.

<sup>113</sup> *Id.* at 582.

<sup>114</sup> See *Bell v. Burson*, 402 U.S. 535, 542 (1971).

<sup>115</sup> *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458, 460 (5th Cir. 1974). The objectionable behavior included fighting at school, directing abusive language at teachers, missing school at least once without permission, disobeying teachers’ directions, and resisting corporal and other forms of punishment.

<sup>116</sup> *Id.* at 460.

<sup>117</sup> *Id.*

<sup>118</sup> See *Mitchell v. Board of Trustees*, 625 F.2d 660 (5th Cir. 1980).

by the School Board in fixing the punishment for violation of a rule. The plaintiffs argue they have such a right; we disagree.”<sup>119</sup> These seemingly contradictory holdings can only be explained by the fact that in *Mitchell*, unlike in *Lee*, there was a mandatory punishment required by the district’s discipline code.

This reading is upheld by an important district court case also arising in the Fifth Circuit. In *Colvin v. Lowndes County*,<sup>120</sup> the court considered the case of a boy who was expelled under an unwritten zero tolerance policy for inadvertently bringing a Swiss army knife to school even though he threatened no one with the item and turned it over to his teacher without incident. The court extended the logic of *Lee* to hold that school boards could not defer to a zero tolerance policy, which the court described as a “blanket policy of expulsion, absent reference to the circumstances of the infraction,”<sup>121</sup> just as they could not defer to the recommendation of the principal in *Lee*.

Importantly, the relevant state law granted the superintendent the authority to modify expulsions on a case by case basis, and the school’s handbook provided that if a student is found “guilty of . . . the charges against him/her, the school record and previous conduct of the student will be taken into consideration in determining the discipline administered to the student.”<sup>122</sup> Accordingly, the court did not hold that mandatory punishments offend the Due Process Clause, but rather that while the “school board may choose not to exercise its power of leniency . . . it may not hide behind the notion that the law prohibits leniency for there is no such law.”<sup>123</sup> The court ordered the school board to reconsider the case under the appropriate legal standard, namely one that requires an “independent consideration by the Board of the relevant facts and circumstances surrounding [the student’s] case.”<sup>124</sup>

A year earlier, a Pennsylvania court agreed with this reasoning in a case involving a student who found a Swiss army knife in a school hallway and then turned over the item without incident upon request.<sup>125</sup> The school district had an unwritten zero tolerance policy that contradicted a state statute allowing the superintendent to modify expulsions on a case-by-case basis. Therefore, the court held that the school board exceeded its statutory grant of authority by adopting a zero tolerance policy that prevented an exercise of discretion by school officials.<sup>126</sup>

## B. Substantive Due Process

The second aspect of the Due Process Clause is concerned with whether a state may impair a given substantive right, regardless of the fairness of the procedures

---

<sup>119</sup> *Id.* at 662.

<sup>120</sup> No. 99CV306, 2000 U.S. Dist. LEXIS 2403 (N.D. Miss. Feb. 24, 2000).

<sup>121</sup> *Colvin v. Lowndes County Sch. Dist.*, No. 99CV306, 2000 U.S. Dist. LEXIS 2403 (N.D. Miss. Feb. 24, 2000).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See Lyons v. Penn Hills Sch. Dist.*, 723 A.2d 1073 (Pa. Commw. 1999).

<sup>126</sup> *Id.* at 1076.

employed.<sup>127</sup> A threshold issue in substantive due process analysis is whether the rule or policy in question provides adequate notice of what conduct is prohibited. Because courts recognize that schools need to be able to discipline students for a wide range of disruptive activities, many of which are unanticipated, school disciplinary codes do not need to be as detailed criminal codes.<sup>128</sup> However, a court will strike down a rule as unconstitutionally vague if it “forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>129</sup> Unless constitutionally protected conduct is at stake, such as freedom of speech or religion, a plaintiff may only challenge the rule as it was applied to her.<sup>130</sup> In other words, if a student’s conduct was clearly prohibited by the discipline policy, the student usually may not successfully challenge the rule for vagueness even though the rule may very well be vague as applied to others’ hypothetical conduct.<sup>131</sup>

Assuming that the policy in question gives adequate notice to students regarding the type of conduct that is punishable, the next step in evaluating a substantive due process claim is to determine whether the impaired right is a fundamental or non-fundamental right. If a right is fundamental, then the courts will apply strict scrutiny to determine whether the state’s impairment of that right is constitutional. To pass strict scrutiny, the state’s objective must be compelling, and the method used by the state must be necessary to achieve that compelling objective.<sup>132</sup> The analysis for non-fundamental rights, mere rationality, is much less stringent. The state must merely be pursuing a legitimate governmental objective by a method that is rationally related to achieving its goal.<sup>133</sup>

Courts have construed fundamental rights narrowly, and for the purposes of federal substantive due process analysis, only the rights of privacy and autonomy are considered fundamental. In practice, whether a right is fundamental almost always determines the outcome of the case.<sup>134</sup> Although the right of students to attend school is protected, it is not a fundamental right for purposes of federal constitutional law.<sup>135</sup> Therefore, “review and revision of a school suspension on substantive due process grounds would only be available in a rare case where there was no ‘rational relationship between the punishment and the offense.’”<sup>136</sup>

---

<sup>127</sup> See *Daniels v. Williams*, 474 U.S. 327 (1986).

<sup>128</sup> See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1983).

<sup>129</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>130</sup> See *Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997).

<sup>131</sup> See *Aiello v. City of Wilmington*, 623 F.2d 845, 850 (3d Cir. 1980).

<sup>132</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>133</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>134</sup> But for two cases striking down statutes under the “mere rationality” test, see *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that a statute that prohibited teaching foreign languages to children violated substantive due process because it was “without reasonable relation to any end within the competency of the State.”); and *Romer v. Evans*, 517 U.S. 620 (1996) (holding that laws motivated by “animus” or “hostility” fail the mere rationality test under the Equal Protection Clause).

<sup>135</sup> See *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 38-40 (1973).

<sup>136</sup> *Brewer v. Austin. Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1985) (citing *Mitchell v. Board of Trustees*, 625 F.2d 660, 664 n.8 (5th Cir. 1980)).

Courts often employ different phrases in assessing whether a rational relationship exists between the offense and the punishment. Courts have asked whether the punishment was “arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning”<sup>137</sup> or “grossly disproportionate” to the offense;<sup>138</sup> was there a “shocking disparity between the expulsion and the offense”;<sup>139</sup> or was the action “willful and unreasoning . . . without consideration and in disregard of the facts or circumstances of the case.”<sup>140</sup>

As might be expected given these high thresholds, it is extremely rare for a federal court to set aside an administrative decision as a violation of substantive due process. Because of the increased deference courts show to school officials in matters regarding discipline, it is even more unlikely that a federal court would reverse a school official’s discipline decision on substantive due process grounds.

For example, an Alabama court held that an eight-week suspension of a girl who drove to school in a family car containing a gun left in it by the mother – a fact unknown to the girl – did not violate substantive due process.<sup>141</sup> The court noted that the school board apparently considered the mitigating factors in this case since they reduced the statutorily recommended one-year expulsion to an eight-week suspension.<sup>142</sup> Similarly, a federal court in Kentucky found that expelling a student for the remainder of the academic year was not “grossly disproportionate” to the offense of smoking marijuana on school property.<sup>143</sup>

It is crucial to note that courts often comment that they find a punishment harsh or less than ideal, but their disagreement with the efficacy of the disciplinary action does not provide a legal basis for setting aside the punishment imposed by the school officials. In upholding a trimester suspension of a student who seriously overdosed on a prescription antidepressant, the court did not find the punishment “a particularly therapeutic dose of justice,” but concluded that “[t]he school’s policy of suspension for a trimester thus

---

<sup>137</sup> Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir.1984). Because the phrase “arbitrary and capricious” is more closely associated with administrative law, this can cause confusion. Although the inquiries under each body of law are conceptually related in that they essentially evaluate the quality of the school officials’ decision, they are analytically distinct and differ in the rigor with which courts review the decision. “Kentucky state courts have a far broader scope of review for ‘arbitrariness’ in school decisions than do federal courts.” Petrey v. Flaughner, 505 F. Supp. 1087, 1090 (E.D. Ky. 1981). Using a totality of the circumstances test under state administrative law, an Illinois court overruled a school board’s decision to suspend a student because the board’s order was “palpably against the manifest weight of the evidence.” Washington v. Smith, 618 N.E.2d 561, 563 (Ill. App. Ct. 1993) (holding that a semester expulsion for having an ice pick at school was unwarranted given that the evidence did not show that the student threatened anyone in any way).

<sup>138</sup> James v. Unified Sch. Dist., 899 F. Supp. 530, 534 (D. Kan. 1995); Petrey v. Flaughner, 505 F. Supp. 1087, 1090-91 (E.D. Ky. 1981).

<sup>139</sup> Lokesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 813-14 (Neb. 1997).

<sup>140</sup> Greenhill v. Bailey, 519 F.2d 5, 10 n.12 (8th Cir. 1975) (cited with approval by the Sixth Circuit in Stevens v. Hunt, 646 F.2d 1196 (6th Cir. 1981)).

<sup>141</sup> See, Enterprise City Bd. of Educ. v. C.P., 698 So.2d 131 (Ala. Civ. App. 1996).

<sup>142</sup> See *id.* at 133.

<sup>143</sup> Petrey v. Flaughner, 505 F. Supp. 1087, 1091-92 (E.D. Ky. 1981)

further a legitimate interest in a rational if severe manner.”<sup>144</sup> Likewise, a Mississippi court upheld, while clearly disagreeing with, a semester suspension for two students who painted the number “1” on a school building: “[T]here are many punishments which . . . seem to us more appropriate than that which the school board has determined.”<sup>145</sup> The court ventured that, among other punishments, the girls might be required to memorize an excerpt from *The Merchant of Venice* so that they “could learn from Portia that ‘the quality of mercy is not strain’d’ and that ‘earthly power doth . . . show likest God’s when mercy seasons justice’ – and teach this to their principal, their superintendent, their school board, and their community.”<sup>146</sup>

### C. State Due Process Claims

The federal Constitution is not the only source of due process protections. In some states, courts have held that the state constitution or other state law creates a fundamental right to a free public education.<sup>147</sup> Therefore, in many of those states, courts will apply a heightened standard of scrutiny to zero tolerance policies since the disciplinary action infringes on a fundamental right under state law. Under a strict scrutiny analysis, the school district must show that its zero tolerance policy was necessary to achieve a safe environment conducive to learning,<sup>148</sup> or the policy will be struck down. This should be a very difficult showing to make, especially since the bulk of educational authority counsels against zero tolerance policies and many school districts across the country have been able to create safe learning environments without the use of zero tolerance policies.

Further, state laws, state constitutions, and school board policies often require greater procedural safeguards than the federal Constitution, and once they are enacted, courts will require that they be followed.<sup>149</sup> Most state so-called “zero tolerance” laws are based on the 1994 Gun-Free Schools Act, which requires, among other things, that local school superintendents have discretion to modify the expulsion on a case-by-case basis. Therefore, in states with such laws, zero tolerance policies that do not afford an opportunity for superintendents or other school officials to exercise discretion in the application of disciplinary measures exceed the board’s statutory grant of authority. Accordingly, such zero tolerance policies must be modified.

---

<sup>144</sup> Fisher v. Burkburnett Ind. Sch. Dist., 419 F. Supp. 1200, 1205 (N.D. Tex. 1976).

<sup>145</sup> Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So.2d 237, 242 (Miss. 1985).

<sup>146</sup> Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So.2d 237, 242 (Miss. 1985) (citing William Shakespeare, *The Merchant of Venice*, Act IV, Sc.I, lines 184, 196-97).

<sup>147</sup> See, e.g., *id.* at 240; Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); State v. Rivinius, 328 N.W.2d 220, 228 (N.D. 1982), cert. denied, 460 U.S. 1070 (1983); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977). *But see, e.g.,* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982); Board of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 43 (1982); Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859, 863-64 (Tex. Ct. App. 1988), *rev’d on other grounds*, 777 S.W.2d 391 (Tex. 1989).

<sup>148</sup> For purposes of this analysis, we are assuming that a court would accept the argument that creating drug and violence free schools is a compelling state interest.

<sup>149</sup> See, e.g., White v. Salisbury Township Sch. Dist., 588 F. Supp. 608 (E.D. Pa. 1984); Rutz v. Essex Junction Prudential Comm., 457 A.2d 1368 (Vt. 1983).

## D. Conclusions

Virtually every punishment under a zero tolerance policy will implicate a student's interest in state-provided public education, thus triggering due process protections. As in the case of any type of suspension or expulsion, whether under a zero tolerance policy or other disciplinary guidelines, the school must provide the appropriate, though limited, procedural safeguards as discussed above. Perhaps the most useful of these procedural safeguards is the requirement of a "meaningful hearing:" in districts where school policy or state law prohibits mandatory punishments, students are entitled to a discretionary review, including the consideration of mitigating factors.<sup>150</sup> This is true even if school officials claim that they are operating under a formal or informal zero tolerance policy.<sup>151</sup>

Also, in those districts, the disciplinary body is not permitted to blindly rubber-stamp recommendations from other school officials; it must conduct its own review using its independent judgment. When subjective determinations are involved, such as the appropriate weight of mitigating factors, determining whether the decision maker adequately considered those elements is difficult. At least one court has held that the decision maker need not make specific findings regarding mitigating factors to avoid running afoul of the due process requirements.<sup>152</sup>

Courts clearly agree that school administrators may promulgate discipline codes with mandatory punishments, as long as they are not prohibited from doing so by state law or their own policies.<sup>153</sup> The only due process limitation on these mandatory punishments is that they may not be grossly disproportionate to the offense, since this would violate substantive due process rights.<sup>154</sup> Because this is such a difficult showing and courts give such great deference to school officials, courts have been extremely hesitant to overturn a disciplinary decision on substantive due process grounds. This could change as more and more students are suspended and expelled under zero tolerance policies for truly innocuous behavior.

If a discipline code does not contravene relevant state law or prescribe grossly disproportionate punishments, there is no further check on the severity of the punishment and no due process requirement that mitigating factors be taken into account. Courts agree that "a harsh result does not suggest that due process was lacking or that the procedures followed to reach that result were unlawful,"<sup>155</sup> even when the court disagrees with the severity of the punishment imposed. Unfortunately, many policy makers are

---

<sup>150</sup> See, e.g., *Colvin v. Lowndes County Sch. Dist.*, No. 99CV306, 2000 U.S. Dist. LEXIS 2403 (N.D. Miss. Feb. 24, 2000).

<sup>151</sup> See, e.g., *id.*

<sup>152</sup> *Doe v. Bd. of Educ. of Oak Park & River Forest High Sch. Dist.* 94 C 6449, 1995 U.S. Dist. LEXIS 15086, at \*13-14 (N.D. Ill. Oct. 11, 1995).

<sup>153</sup> See, e.g., *Fisher v. Burkburnett Ind. Sch. Dist.*, 419 F. Supp. 1200 (N.D. Tex. 1976).

<sup>154</sup> See, e.g., *James v. Unified Sch. Dist.*, 899 F. Supp. 530 (D. Kan. 1995); *Petrey v. Flaughner*, 505 F. Supp. 1087 (E.D. Ky. 1981).

<sup>155</sup> *Doe v. Bd. of Educ. of Oak Park & River Forest High Sch. Dist.* 94 C 6449, 1995 U.S. Dist. LEXIS 15086, at \*14 (N.D. Ill. Oct. 11, 1995).



lagging behind the courts in realizing that “[s]tripping a child of access to educational opportunity is a life sentence to second-rate citizenship . . . .”<sup>156</sup>

---

<sup>156</sup> Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974).

### APPENDIX III

#### DISCIPLINARY MEASURES REQUIRED UNDER STATE LAW\*

STATE	REASONS FOR SUSPENSION	REASONS FOR EXPULSION	AVAILABILITY OF ALTERNATIVE EDUCATION PROGRAMS  MANDATORY = M VOLUNTARY = V
Alabama	Possession of drugs, alcohol, weapons, physical harm to a person, or threat of physical harm.	Possession of a firearm.	M
Alaska	Wilful disobedience; open and persistent defiance of authority; conviction of a felony.	Possession of firearm or deadly weapon.	
Arizona		Continued open defiance of authority; continued disruptive or disorderly behavior; use or display of a dangerous instrument or deadly weapon; use or possession of a gun; excessive absenteeism.	V
Arkansas	Assault or threat; using , offering or selling alcoholic beverages or other illicit drugs; possession of paging device; wilful or intentional damage or destruction or stealing of school property.	Hazing; possession of firearm or other weapons; illegal drugs or other contraband.	M
California	Possession, selling firearm; recommended expulsion; terrorist threats; hate violence; threat to cause physical harm; property damage; extortion; habitual profanity.	Possession or selling of firearm; assault with a deadly weapon; terrorist threats; hate violence; threat to cause physical harm; property damage; extortion; habitual profanity.	V
Colorado	Continued wilful disobedience or open and persistent defiance of proper authority; wilful destruction or defacing of school property.	Continued wilful disobedience or open and persistent defiance of proper authority; wilful destruction or defacing of school property; carrying, bringing, using or possessing a dangerous weapon; sale of a drug or controlled substance; robbery; assault.	M
Connecticut	Assault; possession of firearm; offer of sale and distribution of controlled substances; disruptive behavior.	Possession of firearm, deadly weapon or dangerous instrument; offer of sale and distribution of a controlled substance.	M  But not required if student is expelled for possession of a firearm or the offering and selling of controlled substances.
		Possession of a weapon or illegal	

\* Individual school districts may have more expansive disciplinary codes than required by state law

STATE	REASONS FOR SUSPENSION	REASONS FOR EXPULSION	AVAILABILITY OF ALTERNATIVE EDUCATION PROGRAMS  MANDATORY = M VOLUNTARY = V
Delaware		drugs.	M
District of Columbia		Possession of a weapon.	M
Florida	Violence against any school district personnel; violation of school's sexual harassment policies; formally charged with a felony or delinquent act.	Violence against any school district personnel or school property; violation of school's sexual harassment policies; possession of a firearm; wilful disobedience; open defiance of authority; charged with a felony; unlawful possession or use of controlled dangerous substances.	M
Georgia	Assault or battery.	Possession of a weapon.	M
Hawaii	Possession of a dangerous weapon; possession of liquor or illicit drugs.	Possession of dangerous weapon; possession liquor or illicit drugs.	M
Idaho	Disruption of good order.	Carrying weapon or firearm.	
Illinois	Gross disobedience and misconduct.	Possession of weapon.	V
Indiana	Misconduct; substantial disobedience; other unlawful activity.	Possession of firearm and deadly weapon (e.g. , Swiss Army knife); misconduct, substantial disobedience; other unlawful activity.	M
Iowa	Possession of a dangerous weapon; possession of alcoholic beverages,	Possession of a dangerous weapon.	M
Kansas	Willful violation of student conduct regulation; disruptive conduct, conduct which endangers safety of others; commission of a felony or misdemeanor; disobedience of an order of school official; possession of a weapon; possession or use of illegal drugs.	Possession of a weapon; possession of drugs; willful violation of student conduct regulation; disruptive conduct, conduct which endangers safety of others; commission of a felony or misdemeanor; disobedience of an order of school official.	M
Kentucky	Wilful disobedience or defiance of authority; use of profanity or vulgarity; assault or battery; threat or force of violence; possession of alcohol and drugs; possession of weapons or dangerous instruments.	Possession of a weapon or dangerous instrument; possession of prescription drugs with the intent to distribute; assault or battery.	M
Louisiana	Willful disobedience; intentional disrespect toward school official; use of unchaste or profane language; use of tobacco or possession of alcoholic beverages or controlled dangerous substances; cuts or defaces school	Possession of a weapon.	M

\* Individual school districts may have more expansive disciplinary codes than required by state law

STATE	REASONS FOR SUSPENSION	REASONS FOR EXPULSION	AVAILABILITY OF ALTERNATIVE EDUCATION PROGRAMS  MANDATORY = M VOLUNTARY = V
	property; possession of firearm; habitually tardiness and absenteeism; other serious offenses.		
Maine	Forming secret fraternities or societies; deliberate and disorderly conduct.	Deliberate disobedience or deliberate disorder; possession of firearm; possession and trafficking of drugs; forming secret fraternities or societies.	V
Maryland		Possession of a firearm	M
Massachusetts	Possession of dangerous weapon; possession of illegal drugs, alcohol or legal drugs (e.g., Prozac or anti-depressants); hitting or pushing teacher, school official or employee; felony complaint or conviction.	Possession of dangerous weapon; possession of illegal drugs, alcohol or legal drugs (e.g., Prozac or anti-depressants); assault (including hitting or pushing teacher school official); felony conviction.	V For expelled students
Michigan	Gross misdemeanor or persistent disobedience.	Possession of dangerous weapon; arson; criminal sexual conduct; physical assault by student in grade 6 or above; gross misdemeanor or persistent disobedience.	V
Minnesota	Disruptive behavior.	Possession of a firearm.	M
Mississippi		Possession of dangerous weapon or firearms; possession of controlled substances.	V
Missouri	Possession of a weapon.	Possession of a weapon.	V
Montana	Possession of a firearm.	Possession of a firearm.	
Nebraska	Violence, force, coercion, threat, intimidation; willfully causing or attempting to cause substantial damage to property, stealing or attempting to steal property of substantial value, or repeated damage or theft involving property; causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student; threatening or intimidating any student for the purpose of or with the intent of obtaining money or anything of value from such student; possession of a firearm; engaging in the unlawful possession, selling, dispensing, or use of a controlled substance or an imitation controlled	Violence, force, coercion, threat, intimidation; willfully causing or attempting to cause substantial damage to property, stealing or attempting to steal property of substantial value, or repeated damage or theft involving property; causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student; threatening or intimidating any student for the purpose of or with the intent of obtaining money or anything of value from such student; possession of a firearm; engaging in the unlawful possession, selling, dispensing, or use of a controlled	M

\* Individual school districts may have more expansive disciplinary codes than required by state law

STATE	REASONS FOR SUSPENSION	REASONS FOR EXPULSION	AVAILABILITY OF ALTERNATIVE EDUCATION PROGRAMS  MANDATORY = M VOLUNTARY = V
	substance; or alcoholic liquor being under the influence of a controlled substance or alcoholic liquor; public indecency; sexually assaulting or attempting to sexually assault any person.	substance or an imitation controlled substance; or alcoholic liquor being under the influence of a controlled substance or alcoholic liquor; public indecency; sexually assaulting or attempting to sexually assault any person.	
Nevada	Possession of a firearm; possession and sale of a controlled substance; membership in a gang; battery on school official.	Possession of a firearm; possession and sale of a controlled substance; membership in a gang; battery on school official.	V
New Hampshire	Gross misconduct.	Gross misconduct; theft; destruction; violence; possession of a pellet or BB gun or rifle.	
New Jersey	Possession of a firearm; assault with weapon; continued and wilful disobedience; open defiance of authority; physical assault upon another student, taking or attempting to take personal property or money from another student, wilfully causing damage to school property; unauthorized occupancy of school grounds, knowing possession or consumption of alcohol or dangerous substances.	Possession of a firearm; assault with weapon; continued and wilful disobedience; open defiance of authority; physical assault upon another student, taking or attempting to take personal property or money from another student, wilfully causing damage to school property; unauthorized occupancy of school grounds, knowing possession or consumption of alcohol or dangerous substances.	M Unless not available in school districts
New Mexico		Possession of a weapon.	
New York	Insubordinate or disorderly conduct.	Possession of weapon.	M
North Carolina	Wilful violation policies of conduct; physical assault or serious injury to another student, teacher or; false bomb threats school; personnel.	Possession of weapon; presents a clear threat to school safety.	M/V
North Dakota	Insubordination; habitual indolence; disorderly conduct; possession of a weapon.	Possession of a firearm.	V
Ohio	Disruptive behavior.	Possession of weapon.	V
Oklahoma	Violation of school regulation; immorality.	Possession of a firearm.	V
Oregon	Assaults or menaces a school employee or another student; wilful disobedience and defiance of authority; use or display or profane or obscene language; property damage; possession of a weapon.	Assaults or menaces a school employee or another student; wilful disobedience and defiance of authority; use or display or profane or obscene language; property damage; possession of a weapon.	V

\* Individual school districts may have more expansive disciplinary codes than required by state law

STATE	REASONS FOR SUSPENSION	REASONS FOR EXPULSION	AVAILABILITY OF ALTERNATIVE EDUCATION PROGRAMS  MANDATORY = M VOLUNTARY = V
Pennsylvania	Disobedience or misconduct.	Possession of weapon.	M
Rhode Island	Disruptive behavior; possession of a firearm or realistic replica of firearm.	Possession of a weapon or firearm.	√
South Carolina	Commission of any crime; gross immorality; gross misbehavior; persistent disobedience.	Possession of firearm; commission of any crime; gross immorality; gross misbehavior; persistent disobedience.	V
South Dakota	Insubordination or misconduct; aggressive violent behavior; consumption or possession of alcoholic beverages; use or possession of a controlled dangerous substance; use or possession of a firearm; property damage.	Consumption or possession of alcoholic beverages; use or possession of a controlled dangerous substance; use or possession of a firearm.	
Tennessee	Immoral or disreputable conduct; violence or threat of violence; property damage; assault of school official with vulgar language; possession of a firearm; drug use.	Battery upon school official; possession of narcotics or weapons.	M
Texas		Possession of firearm, illegal knife, club or weapon.	M
Utah	Frequent or flagrant willful disobedience, defiance of proper authority, or disruptive behavior, including the use of foul, profane, vulgar, or abusive language; willful destruction or defacing of school property; possession, control, or use of an alcoholic beverage; the possession, control, or actual or threatened use of a real, look alike, or pretend weapon, explosive, or noxious or flammable material; or the sale, control, or distribution of a drug or controlled substance, an imitation controlled substance defined, or drug paraphernalia; commission of an act involving the use of force or the threatened use of force.	Possession of a firearm; aggravated assault; arson; possession, use and distribution of marijuana or controlled substance.	V
Vermont	Ongoing threat; disruptive behavior; possession.		
Virginia		Possession of firearm.	M
Washington	Gang activity; defacing of property.	Possession of firearm or deadly	V

\* Individual school districts may have more expansive disciplinary codes than required by state law

STATE	REASONS FOR SUSPENSION	REASONS FOR EXPULSION	AVAILABILITY OF ALTERNATIVE EDUCATION PROGRAMS  MANDATORY = M VOLUNTARY = V
		weapon; gang activity.	
Wisconsin	Disobeying school rules, conveying threat or false information concerning the destruction of school property; possession of a firearm.	Disobeying school rules, conveying threat or false information concerning the destruction of school property; possession of a firearm; disruptive conduct.	M
West Virginia	Use, sale or possession of narcotics; felonious act; threat to injure; wilful disobedience; possession of alcohol; use of profane language directed at school employee or pupil; intentionally defaced any school property; participation in any physical altercation; habitually violated school rules or policies.	Use, sale or possession of narcotics; possession of firearm or deadly weapon; felonious act; threat to injure; wilful disobedience; possession of alcohol; use of profane language directed at school employee or pupil; intentionally defaced any school property; participation in any physical altercation; habitually violated school rules or policies.	M
Wyoming		Possession, use or carrying of a deadly weapon.	

**\*Individual school districts may have more expansive disciplinary codes than required by state law**

## APPENDIX IV

### REPORTING OF STUDENT MISCONDUCT TO LAW ENFORCEMENT\*

STATE	REPORTING OR REFERRAL TO APPROPRIATE LAW ENFORCEMENT AGENCY (SHERIFF, DISTRICT ATTORNEY)  MANDATORY = M VOLUNTARY = V	POSSESSION OF FIREARM/ DEADLY WEAPON	USE OR POSSESSION OF DRUGS	USE OR POSSESSION OF ALCOHOL	ASSAULT	ASSAULT WITH A DEADLY WEAPON	ASSAULT OF SCHOOL OFFICIAL	SEXUAL OFFENSES	PROPERTY DAMAGE	PAGERS/ PHONES	DISORDERLY CONDUCT	CRIMINAL OFFENSE/ FELONY
Alabama	M	M	M	M	M							M
Alaska	M											
Arizona	M	M	V									V
Arkansas	M	M										
California	M	M	M									
Colorado												
Connecticut	M	M					M					
Delaware	M/V (Not required for child under the age of 9)	M	M	M	M			M				M
District of Columbia	M	M										
Florida	M	M										M
Georgia	M	M	M		M	M						V
Hawaii	M	M	M		M			M	M		M	M
Idaho	M	M	M									
Illinois	M	M										

\* Individual school districts may have more expansive disciplinary codes than required by state law



STATE	REPORTING OR REFERRAL TO APPROPRIATE LAW ENFORCEMENT AGENCY (SHERIFF, DISTRICT ATTORNEY)  MANDATORY = M VOLUNTARY = V	POSSESSION OF FIREARM/ DEADLY WEAPON	USE OR POSSESSION OF DRUGS	USE OR POSSESSION OF ALCOHOL	ASSAULT	ASSAULT WITH A DEADLY WEAPON	ASSAULT OF SCHOOL OFFICIAL	SEXUAL OFFENSES	PROPERTY DAMAGE	PAGERS/ PHONES	DISORDERLY CONDUCT	CRIMINAL OFFENSE/ FELONY
Indiana	M	M										
Iowa	M	M										
Kansas	M	M										M
Kentucky												
Louisiana	M	M	M									
Maine												
Maryland	M									M		
Massachusetts												
Michigan	M	M										M
Minnesota	M	M										M
Mississippi	M	M	M		M			M				M
Missouri	M	M	M		M			M	M			M
Montana	M											
Nebraska												
Nevada	M											M
New Hampshire	M								M			M
New Jersey	M	M										M
New Mexico	M	M										

\* Individual school districts may have more expansive disciplinary codes than required by state law

STATE	REPORTING OR REFERRAL TO APPROPRIATE LAW ENFORCEMENT AGENCY (SHERIFF, DISTRICT ATTORNEY)  MANDATORY = M VOLUNTARY = V	POSSESSION OF FIREARM/ DEADLY WEAPON	USE OR POSSESSION OF DRUGS	USE OR POSSESSION OF ALCOHOL	ASSAULT	ASSAULT WITH A DEADLY WEAPON	ASSAULT OF SCHOOL OFFICIAL	SEXUAL OFFENSES	PROPERTY DAMAGE	PAGERS/ PHONES	DISORDERLY CONDUCT	CRIMINAL OFFENSE/ FELONY
New York	M	M										
North Carolina	M	M	M		M	M		M				M
North Dakota	M/V											V
Ohio	M											M
Oklahoma			V	V								
Oregon	M	M										
Pennsylvania	M	M										
Rhode Island	M	M										
South Carolina	M	M										M
South Dakota	M	M										
Tennessee	M				M							M
Texas	M	M										M
Utah	M											M
Vermont	M	M	M	M								
Virginia	M	M	M		M		M					M
Washington	M	M										
West Virginia	M	M										
Wisconsin												
Wyoming												

\* Individual school districts may have more expansive disciplinary codes than required by state law



## APPENDIX V

### Discipline data collection \*

State	Suspensions	Expulsions	Alternative educational program	By Race	By Gender	Offense
Alabama	√	√				√
Alaska		√				
Arizona	√	√				√
Arkansas	√	√		√	√	√
California	√	√	√	√	√	
Colorado	√	√				
Connecticut	√	√				√
Delaware	√	√				√
District of Columbia						
Florida	√	√				
Georgia	√			√	√	√
Hawaii		√				√
Idaho	√	√				√
Illinois	√					√
Indiana	√	√		√	√	√
Iowa	√	√				√
Kansas	√					√

Kentucky	√	√				√
Louisiana	√	√				√
Maine						
Maryland	√	√				√
Massachusetts	√	√				
Michigan	√	√				
Minnesota	√	√		√	√	√
Mississippi		√				√
Missouri						√
Montana						
Nebraska		√				√
Nevada	√	√				√
New Hampshire						
New Jersey						
New Mexico	√				√	
New York						
North Carolina						
North Dakota						
Ohio				√		
Oklahoma						
Oregon		√				√
Pennsylvania	√	√				√

Rhode Island	√		√	√	√	√
South Carolina	√			√	√	√
				Not mandated		
South Dakota						
Tennessee	√	√		√	√	
Texas	√	√	√	√	√	√
Utah						
Vermont						
Virginia	√	√				√
Washington	√	√				
Wisconsin	√	√	√	√	√	√
West Virginia	√					
Wyoming						

## APPENDIX VI

### Miami-Dade County Schools Profiles

#### G.W. Carver Middle School

Principal: Simine Heise

Grades: 6-8

Out-of-School Suspension Rate<sup>1</sup>: 1.2.8 In-School Suspension Rate<sup>2</sup>:.003 Students in dropout prevention programs for disciplinary reasons: .002

Free/Reduced Lunch Students: 22.9%

Number of students: 958

#### Racial Demographics (%):

	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Asian</b>	<b>Other</b>
Students:	36	18	45	1	0
Principal:	100				
Asst. Principals:	33	33	33		
Teachers:	32	20	49		
Counselors:	67	33			

Children with Disabilities: .2%<sup>3</sup>

Number of Reported Incidents of Crime and Violence<sup>4</sup>:

Property Offenses: 4

Fighting and Harassment: 2

Other Nonviolent Incidents & Disorderly Conduct: 1

Total: 7

Number of students per counselor<sup>5</sup>: 479

Teacher training regarding discipline. No formal training.

Avg. Class Size: Math 24.5; Science 34.1; Language Arts 33.0; Soc. Studies 38.2

Stanford Achievement Test Median Percentiles:

Reading: 76; Math Computation: 69; Math Application: 81; Science: 85

Magnet Program: International Education

---

<sup>1</sup> Throughout the school profiles in this Appendix, Out-of-School Suspension Rate refers to the percentage of children suspended at least once for one or more days.

<sup>2</sup> Throughout the school profiles in this Appendix, In-School Suspension Rate refers to the percentage of children placed in an in-school suspension program at least once, this could include one or more class periods or days.

<sup>3</sup> In this school, these children are speech impaired.

<sup>4</sup> This data may not accurately reflect all incidents because of varied interpretation of the incidents required to be reported. For example, administrator's interpretation of what constitutes "fighting and harassment," for purposes of reporting, has been one area of contention in Florida's reporting system. (Interview with Christine Davis, Program Specialist, Safe & Drug Free Schools, Florida Department of Education).

<sup>5</sup> This includes Guidance Counselors and TRUST counselors (responsible for drug counseling and peer mediation programs, but often function as a Guidance Counselor).

G. W. Carver is Miami-Dade County's highest performing middle school. The school was established in 1924, as Dade County Training School, an all-black school for students in grades 1-12. The school later became a high school, and then a middle school. Court ordered desegregation led to the assignment of white students from nearby Ponce de Leon Middle School to Carver, and assignment of some Carver students to Ponce de Leon. In 1991, Carver became a magnet school specializing in International Education. The mission of G.W. Carver is to "provide educational parity with the European systems and to compete successfully in the international arena using the best of the U.S. System."<sup>6</sup> The program includes intensive instruction in French, Spanish and German and study of those cultures. In addition, the school has several teachers from these countries. Carver's admissions requirements include academic and conduct standards, and interviews of applicants and their parents.

Students are admitted to Carver from throughout the Miami-Dade County area. The school utilizes racial goals as a means of maintaining a racially integrated environment. Students are admitted with varying academic records, some are from low performing elementary schools. Where appropriate students are provided with remedial services in 6<sup>th</sup> grade; these students are typically on par by 7<sup>th</sup> grade and in many cases, become higher achievers than their counterparts. Approximately 5% of students enrolled do not graduate from Carver for various reasons including low academic performance, disciplinary problems and transportation impediments.<sup>7</sup>

G.W. Carver's magnet program distinguishes the school from the other schools in the sample reviewed in this report. Students at Carver tend to be high academic achievers, are highly motivated and have strong support systems at home. While the principals of the two schools with higher suspension rates asserted that Carver should not be compared with their schools because Carver chooses its students, Carver is still important to the analysis. Carver has the lowest suspension rate of the 51 middle schools in the Miami-Dade County School District.

---

<sup>6</sup> See G.W. Carver Middle School, *Parent/Student Orientation Packet*, 2000/2001, at 1.

<sup>7</sup> In the past year Carver lost approximately 45 students, 15 (33%) of whom are African-American. Some critics of Carver complain that instead of suspending children with disciplinary problems, the school simply drops them from the program and sends them back to their home school, thus the school masks its suspension rates. Samuel Gay, former principal of Carver, explained that that is rarely done and that most of the drop-outs are due to issues such as lack of transportation (students outside of the feeder school area must provide their own transportation). Students may also leave for academic reasons.



**Palm Springs Middle**

Grades: 6-8

Out-of-School Suspension Rate: 3.4 In-School Suspension Rate: 19.6

Students in dropout prevention programs for disciplinary reasons: 371

Free/Reduced Lunch Students: 76.6%

Number of students: 1,826

Racial Demographics(%):

	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Asian</b>	<b>Other</b>
Students:	5	2	92	1	0
Principal:	100				
Asst. Principals:	33	33	33		
Teachers:	34	23	41	2	
Counselors:	75	13	13		

Children with Disabilities: 10.9%

Number of Reported Incidents of Crime and Violence:

Violent Acts Against Persons: 16

Alcohol Tobacco and Other Drugs: 4

Property Offenses: 24

Fighting and Harassment: 89

Weapons Possession: 1

Other Nonviolent Incidents & Disorderly Conduct: 6

Total: 140

Number of students per counselor: 365.2

Teacher training regarding Discipline: HeartSmarts

Avg. Class Size: Math 27.5 ; Science 30.2; Language Arts 27.1;

Soc. Studies 29.7

Stanford Achievement Test Median Percentiles:

Reading: 41; Math Computation: 46; Math Applications: 42; Science: 38

**Madison Middle**

Principal: Thelma Davis

Grades: 6-8

Out-of-School Suspension Rate: 16.2 In-School Suspension Rate: 6.8

Students in dropout prevention programs for disciplinary reasons: n/a

Free/Reduced Lunch Students: 87.5%

Number of students: 1,461

	Racial Demographics (%)				
	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Asian</b>	<b>Other</b>
Students:	2	73	25	1	0
Principal:	100				
Asst. Principals:	33	33	33		
Teachers:	25	43	30	2	
Counselors:	20	60	20		

Children with Disabilities: 15.5%

Number of Reported Incidents of Crime and Violence:

Violent Acts Against Persons: 45

Alcohol Tobacco and other Drugs: 11

Property Offenses: 32

Fighting and Harassment: 189

Weapons Possession: 6

Other Nonviolent Incidents and Disorderly Conduct: 33

Total: 316

Number of students per counselor: 365.25

Programs: Full-service school - additional psychiatric/mental health counselors

Teacher Training regarding Discipline: No formal training; discuss and share materials during 2 day retreat at beginning of school year. Teachers are doing a better job.

Avg. Class Size: Math 24; Science 30.2; Language Arts 24.6; Soc. Studies 30.2

Stanford Achievement Test Median Percentiles:

Reading: 17; Math Computation: 24; Math Applications: 27; Science: 15

**North Dade Middle School**

Principal: Eunice Davis

Grades: 6-8

Out-of-School Suspension Rate: 34.1 In-School Suspension Rate: 42.3II.

Students in dropout prevention programs for disciplinary reasons: 373

Percentage Free/Reduced Lunch: 69.8

Number of students: 837

	Racial Demographics(%):				
	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Asian</b>	<b>Other</b>
Students:	3	76	18	2	0
Principal:		100			
Asst. Principals:		50	50		
Teachers:	36	42	18	3	
Counselors:	25	50	25		

Children with Disabilities: 7.5%

**Number of Reported Incidents of Crime and Violence:**

Violent Acts Against Persons: 9

Alcohol Tobacco and Other Drugs: 3

Property Offenses: 14

Fighting and Harassment<sup>8</sup>: 165

Weapons Possession: 1

Other Nonviolent Incidents and Disorderly Conduct: 8

Total: 200

Number of students per counselor: 419

Teacher training regarding Discipline: None.

Avg. Class Size: Math 30.7; Science 30.9; Language Arts 29.0;

Soc. Studies 32.1

Stanford Achievement Test Median Percentiles:

Reading: 30; Math Computation: 28; Math Applications: 33; Science: 27

---

<sup>8</sup> North Dade is very exacting in its reporting of fights – every fight is reported. Davis noted that accurate reporting is important because it shows that the disciplinary actions taken were justified.

## APPENDIX VII

### PROMISING PROGRAMS

#### CECP Programs

***Positive Behavioral Interventions and Supports (PBIS)***, a comprehensive school wide prevention and intervention program consisting of four components: 1) providing procedures and processes for school wide behavior support systems, 2) specific setting support systems to monitor specific settings and develop intervention strategies, 3) classroom behavior support systems to identify procedures and processes for individual classrooms that parallel the strategies and procedures used school wide, and 4) individual behavior support systems to provide intensive, immediate, and effective intervention to students whose behavior presents the most significant or chronic challenge to staff.

PBIS has been successful in reducing discipline referrals to the principal's office, especially in the time period prior to school vacations. Teachers report feeling more effective in their teaching and management of student problem behavior.

***Second Step*** is a violence prevention social skills curriculum designed to help children develop empathic, impulse control, and anger management skills. These lessons are woven into the regular curriculum in 35-minute sessions. The curriculum also incorporates a family-based component that employs a video-based parent program and a series of parent group meetings.

Evaluations show moderate decreases in aggression and moderate increases in pro-social and neutral interactions. These contrast with increases in physical and verbal aggression during the same period for a control group.

***Project ACHIEVE*** is a school wide, comprehensive prevention and early intervention program for students in elementary and middle schools, emphasizing increasing student performance in social skills and conflict resolution, improving student achievement and academic progress, facilitating positive school climates, and increasing parental involvement and support. There are now 20 sites across the country implementing ACHIEVE.

Evaluations found that the original schools employing the program for 3 years have demonstrated a decrease in disciplinary referrals by 28% and a 2/3 drop in suspensions. In addition, grade retention, test scores, and academic performance in these schools have all improved.

***Resolving Conflict Creatively Program (RCCP)*** One of the most consistently and highly rated violence prevention programs in the country, RCCP, founded in 1985, currently serves 6,000 teachers and 175,000 students in 375 schools nationwide. RCCP employs a school-wide model which works with staff, parents, families and the community to teach young people conflict resolution skills, promote intercultural understanding, and offers a model for effective ways to deal with conflict and differences. The model includes the following components:

- \_ Professional development for teachers
- \_ Regular classroom instruction
- \_ Peer mediation/Teen Courts

- \_ Administrator training
- \_ Parent training
- \_ Training of trainers

RCCP has received extensive, independent evaluations in New York City, Atlanta, and Oregon, and has been shown to be effective in reducing incidences of violence, decreasing disciplinary referrals, and increasing cooperation within the classroom.

## **OTHER PROGRAMS**

**On Campus Intervention Program (OCIP)**, which has been adopted by several schools in Florida, provides schools with an alternative to out-of-school suspensions by emphasizing academic guidance and counseling support. The goals of the Program are to reduce suspensions, truancy, related juvenile crimes and dropout rates, to modify disruptive behaviors, and to maintain educational opportunities for students who otherwise would be suspended. In the short-term, OCIP's goal is to modify behavior. Its long-term goal is to improve the learning environment in classrooms by reducing disruptions.

OCIP was originally adopted by Clearwater High School in Pinellas County, Florida as a joint effort of the Clearwater High School Advisory Council, the Pinellas County School Board and Family Resources, a non-profit counseling agency.

Clearwater High School has been pleased with its results. Suspension rates have declined dramatically at Clearwater since the school instituted OCIP. During the 1994-95 school year, 930 students were suspended, by 1998-99 only 313 students were suspended. School officials attribute, in part, other positive trends to the program: a decrease in its drop out rate from 3.5% in 1994-95 to 1.8% in 1997-98, an improvement in test scores, a 75% reduction in the number of physical altercations and a 50% decrease in classroom disruptions<sup>1</sup> Furthermore, program officials claim that 82% of the OCIP graduates have not repeated the offense that led to their assignment to the program.<sup>2</sup> Students have expressed their support for the program. Many students laud the individualized attention they receive from the OCIP teacher, the guidance and support of the OCIP counselor, and the opportunity to focus on their school work without disruption.<sup>3</sup>

The program consists of four components:

- Academics - Students in the program participate in a minimum of four hours of academic work per day. Assignments are sent to students from their regular classes; students must keep up with their assignments. The OCIP class is supervised by a certified teacher. The OCIP class consists of only 15-23 students.

---

<sup>1</sup>Letter from Nick Grasso, Principal Clearwater High School, to David Fellows, January 25, 1999

<sup>2</sup>"Kids Get Attention Instead of Suspension," *Tampa Tribune*, May 30, 1998 p. 2.

<sup>3</sup>*Id.* See also, OCIP student surveys.

- Individual Counseling - Individual counseling is provided by a counselor with a Masters Degree or by Masters candidates from the University of South Florida. New OCIP students are screened for mental health, abuse, suicide, anger, family problems and stress. Individual counseling sessions address student's behavior, individual, family and academic issues. Where appropriate, students are referred to outside agencies for counseling.
- Group Counseling - Group counseling is facilitated by the OCIP teacher and counselor. Sessions address issues such as anger management, conflict resolution, substance abuse, peer and family relationships. OCIP students are required to attend.
- Aftercare - OCIP graduates may attend a maximum of four small group aftercare sessions (one per week). These sessions reinforce positive changes and address topics such as anger management, conflict resolution, character development and values clarification, goals, respect, choice and consequences.

Students are assigned to OCIP at the discretion of the Principal. Students are eligible for OCIP for conduct such as profanity, disobedience, class disruption, missing Saturday School, or cutting class. Students involved in fights or in possession of weapons or drugs are not permitted to attend OCIP. The program is voluntary, i.e., parents of students referred for suspension are given choice for the child to attend OCIP or serve his/her out-of-school suspension. Most OCIP students remain in the OCIP classroom for five days (that is the maximum time); they may be assigned to OCIP only three times during an academic year. During their days in OCIP students are kept in the OCIP classroom for the entire school day, including during lunch. The program is different from the in-school suspension program because it provides counseling and permits students to interact, whereas in-school suspension isolates students.

As a result of OCIP's success at Clearwater High School, the program has been adopted in six additional high schools and four middle schools. Palm Beach County is currently in the process of instituting OCIP in its School District.

OCIP is a program that has clear benefits. Most significantly, OCIP permits students to forego out-of-school suspension, thus avoiding a school record which includes suspensions, and keeping students in school and on track with their academics. Critics of the program assert that the program places too much blame on the children and avoids examination of educational institutions. Consequently, schools with OCIP will not examine whether teachers are overzealous in their disciplinary referrals of students. Thus, teachers are still not given training to employ alternative methods of discipline and conflict resolution.