

ADVOCATING FOR REFORM OF ZERO TOLERANCE STUDENT DISCIPLINE POLICIES: LESSONS FROM THE FIELD

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Introduction

An increasing number of youth are being denied educational opportunity – a fundamental cornerstone of a democratic and enlightened society – under zero tolerance student discipline policies. The concept of zero tolerance in schools grew out of federal drug enforcement policies of the 1980's.¹ In the school context, zero tolerance policies are intended to send a strong message that certain behaviors will not be tolerated by imposing mandatory, predetermined punishment for specific offenses.² The punishment most often takes the form of exclusion from school under suspension and expulsion policies.

In recent years, the negative consequences of zero tolerance and its unproven effectiveness in promoting school order and safety have been studied and written about by researchers, policy analysts, advocates and public commentators. At the same time, a growing body of research indicates that schools with a comprehensive approach to school safety that encompasses all points on the prevention-intervention continuum can effectively prevent and address school violence and disorder, without excluding students

from school. As indicated by recent reports in the media, however, a gap exists between what research shows about zero tolerance and what most schools do in practice.

- A twelve-year-old sixth grader in Madison, Wisconsin was suspended and recommended for expulsion by his middle school principal for bringing a table knife to school to dissect an onion as part of a demonstration for his science class. No one doubted the boy's reasons for bringing the knife to school or believed he intended to cause harm. Nonetheless, the principal insisted that he be expelled for violating the school's policy of zero tolerance for weapons.³
- A high school junior in Bedford, Texas was expelled and recommended for placement in an alternative school after a school security guard found a 10-inch bread knife in the bed of his pickup truck. The knife was accidentally left in the pickup when the teen had helped his father take his grandmother's linens, books and kitchenware to a local charity thrift shop.⁴
- An eight-year-old third grader from Silver Springs, Maryland was suspended and recommended for expulsion when he accidentally took to school his mother's key chain, which contained a nail clipper. The boy was accused of possessing a dangerous weapon at school.⁵
- An eight-year-old boy in Jonesboro, Arkansas was suspended for three days for pointing a breaded chicken finger at a teacher and saying pow, pow, pow.⁶

These cases illustrate that despite recent criticism of zero tolerance, it continues as a predominant approach to student discipline.⁷ Reversing this trend presents a challenge.

The federal government and many state governments have adopted laws that either require or allow zero tolerance, and schools everywhere are entrenched in a get-tough mentality. A one-size-fits-all approach to discipline simplifies a complex situation, while alternative approaches to school safety and order require the will to change and increased capacity and resources.

This article will discuss the experiences and lessons learned by one advocacy organization that has challenged zero tolerance in individual student discipline cases and in the larger state policy arena. Education Law Center (ELC), a non-profit organization

dedicated to improving educational opportunities for New Jersey's school children, has provided legal representation to numerous students expelled under a local school board's zero tolerance policy. ELC has also advocated before the state educational agency and has initiated a statewide reform effort to end reliance on zero tolerance and the overuse of suspension and expulsion and require in its place research-based practices that promote school safety and order. Although state law, policy and politics may differ from state to state, zero tolerance and the exclusion of youth from school is a national problem. It is hoped that the lessons learned by ELC in New Jersey will aid policy makers, educators, parents and advocates from around the country in efforts to move toward student discipline policies that are more effective in promoting safe and secure learning environments, more fair and humane to the individual students involved, and more beneficial to the overall well-being of society.

This article will begin with a detailed discussion of three of ELC's zero tolerance cases. The discussion will highlight not only the unthinking nature of the zero tolerance approach, but also the devastating impact of this approach on the youth involved. Next, a critical analysis of zero tolerance will be presented, followed by a discussion of the emerging consensus on alternative approaches to school safety and order. The final section of the article will discuss the legal and advocacy strategies used by ELC and the lessons learned and will recommend approaches for reforming student discipline policies and laws throughout the nation. The information and general recommendations contained in the following pages should not be construed as legal advice. Each student discipline case is unique, and parents and educators involved in these cases should seek the advice of an attorney or advocate, when possible.

The Victims of Zero Tolerance: Three Cases from New Jersey

The case of the computer shut down screen

K.A. was a fifteen-year-old sophomore when he was permanently expelled from school for changing the shutdown screen on a school computer from “It is now safe to turn off your computer,” to “if you turn me off I will blow up.” Although K.A. intended no harm and was simply showing off to a classmate, administrators in K.A.’s high school, located in a working class, southern New Jersey suburb, characterized this conduct as a bomb threat. Police were called into school and, without the presence of a parent or attorney, K.A. was questioned, handcuffed, arrested, and held in jail for several hours. School administrators immediately suspended K.A. from school without continued educational services. The principal and district superintendent, acting pursuant to their unwritten policy of zero tolerance for bomb threats, recommended K.A.’s expulsion to the school board. At a hearing more than a month after the incident, the school board ordered K.A.’s permanent expulsion without further educational services. In the juvenile proceeding, K.A.’s defense counsel recommended that he plead guilty to the misdemeanor of making a false public alarm, unfortunately without considering the ramifications for the appeal of the expulsion. The juvenile court accepted the plea, placed K.A. on nine month’s probation and ordered that he attend a fire safety program through the county fire marshal, the closest program he could match to K.A.’s “offense.”

K.A.’s right to a public education – a right guaranteed under the state constitution – was terminated because his conduct was labeled as a bomb threat. School officials acknowledged that they did not follow usual bomb threat protocol in K.A.’s case - namely, calling in the county bomb squad and evacuating the building – because no one

actually thought there was a bomb in the computer. In fact, only about fifteen minutes had passed from the time a teacher discovered the message and K.A. admitted that he had changed it and offered to restore the original. Nonetheless, the school principal and district superintendent maintained that there was only one way to read the altered computer screen message: as a threat to blow up something and, therefore, a bomb threat.

District administrators justified the zero tolerance policy and their refusal to consider anything other than the bare act involved – the changed computer screen message - as necessary to counter a rash of bomb threats that had disrupted the educational process within the district and in neighboring districts. The policy had been devised a few months earlier with input from the county prosecutor’s office. In the view of school officials, deterrence of future bomb threats required steadfast adherence to zero tolerance. At the same time, school officials acknowledged that they had not taken steps to reduce the risk of school violence and disruption, including bomb threats, through comprehensive school safety planning and programming. The only planning process undertaken within the district in the area of school safety was strictly reactive – the development of a crisis and emergency response plan in the event of a catastrophic act of violence, such as a shooting or bombing. The district’s approach to student discipline, as evidenced in K.A.’s case, was to punish students after the fact through exclusion from school; there were no prevention and intervention services aimed at addressing and correcting behavior before a problem arose.

Under zero tolerance, the school board ordered K.A.’s expulsion without any consideration of individual facts and circumstances. K.A. was an average student, held a part-time job, participated in community service projects and had no history of school

disciplinary infractions or delinquent behavior in any setting. School officials did not account for K.A.'s age and the fact that adolescents often make mistakes of judgment, particularly in the manner in which they express themselves, without intending harm. School administrators and the school board deemed irrelevant the fact that K.A. had only recently re-enrolled in the district after attending a private high school, and had not been advised verbally or in writing about the zero tolerance policy. Further, the context in which K.A. changed the computer screen was not considered. K.A.'s math teacher had given his class twenty minutes of unstructured "free" time in the computer lab after the class had completed an assignment, essentially giving K.A. idle time and the opportunity to get into trouble. K.A., who is highly proficient with computers, told a friend he could do something "really cool," and changed the shut down message in an effort to show off his skills. K.A.'s intent, motive, circumstances and history were deemed irrelevant, as were any mitigating circumstances, under the unwritten zero tolerance policy.

School officials made no effort to assess K.A.'s future capacity for causing harm or disruption and K.A. was expelled without any thought to whether his removal was necessary to preserve school safety and order. To an outside observer, K.A.'s computer screen message may have appeared to be, at most, an ambiguous statement of a threat warranting further investigation by school personnel. However, K.A. was not evaluated or even spoken to by the school's student services personnel, such as the school psychologist, school social worker or guidance counselor, and he was not referred to community resources for evaluation or services.

Moreover, school officials expelled K.A. without any attempt to have him learn from his actions. No person of authority explained to K.A. why his computer message

was inappropriate, or how it could be construed as a bomb threat in a school district that was struggling to reduce such threats.

K.A. filed an appeal of the expulsion with the New Jersey Commissioner of Education and requested injunctive relief ordering his reinstatement to school pending a final decision on the appeal. The Commissioner denied injunctive relief, finding it unlikely K.A. would prevail in his challenge to the expulsion because “the equities ... lie on the side of the school board. One of the major duties of a board of education is to ensure the safety and well being of the students entrusted into its care. Central to fulfilling this obligation is the necessity of maintaining order and discipline in its schools and providing an environment which is conducive to learning⁸.” The Commissioner, however, gave no indication of how K.A.’s actions undermined order and discipline.

Following the denial of injunctive relief, K.A. was barred from his high school for a year and a half before ELC obtained a favorable decision from the Commissioner of Education reversing the permanent expulsion and ordering his reinstatement.⁹ The Commissioner and State Board of Education ultimately determined that K.A. had engaged in a prank that did not warrant permanent termination of his right to an education.

The expulsion had a devastating impact on K.A. and his mother. After the Commissioner of Education denied injunctive relief and it became apparent K.A. would remain out of school for some time before a final decision was rendered, K.A.’s mother, a single parent of an only child, was forced to make the extremely difficult decision of sending K.A. to North Carolina to live with his father so he could attend school in that state while the appeal was pending. Both she and K.A. reported suffering feelings of loss

and loneliness during their year apart. In addition, K.A. felt confused, distraught, depressed and angry. Having never been involved in trouble in school or any other setting, K.A. had difficulty understanding why he was deemed so menacing that he could not attend school with his friends and classmates. He felt that the adults at school did not care about him as an individual and were only interested in using him as an example, even if it meant ruining his life. Consequently, K.A. believed he was the victim of a grave injustice and lost trust in the ability of school officials and law enforcement to be fair and honest. At the same time, K.A.'s mother was angry and hurt that school officials, acting on the basis of one mistake of judgment on K.A.'s part, could view her son as so dispensable and unworthy of an education and future. She was forced to spend a great deal of time and emotional energy fighting K.A.'s appeal through the administrative court process before gaining his reinstatement to school. K.A.'s mother was also subject to undue scrutiny and criticism during the hearing process when the school board's attorney questioned her at length about her divorce and her alleged inability to provide a proper home and supervision for K.A. as a single, working parent.

The case of the miniature baseball bat

H.R., a fifteen-year-old student with a learning disability, was permanently expelled from his high school for carrying a miniature baseball bat to school in his backpack. The expulsion was imposed under the school board's policy of zero tolerance for weapons, which is explicit in its intent to send a "clear message" that possession of a weapon at school will result in expulsion. A "weapon" is defined under this policy as "any ... unsafe or illegal articles or instruments which are possessed, used or which may be used in an offensive manner or an attack or defense." H.R. had made the alleged

weapon, a 16” bat similar to a souvenir bat sold at a baseball game, that morning in his shop class at the county vocational-technical high school. After shop class, H.R. boarded the bus to go to the high school for academic classes, and he carried the bat with him in his backpack. The bat remained in the backpack until the end of the last period of the day, when H.R.’ math class had concluded. H.R. took the bat out of the backpack to show to his friends; he did not threaten anyone with it or use it in a dangerous manner. The classroom teacher demanded that H.R. give him the bat. H.R. refused, not understanding why the teacher would take it, and not wanting to give up something that he had worked hard to make. The teacher summoned the principal, to whom H.R. immediately turned over the bat. The principal suspended H.R. from school pending a hearing with the superintendent. He also filed a criminal complaint against H.R. in Superior Court of New Jersey alleging unlawful possession of a weapon.

The only programs and policies undertaken by the school board to promote safety and order were the zero tolerance policy, student identification badges, locked building doors, crisis management teams, referral to counseling at a local hospital and a close working relationship with the local police department. The board had not undertaken any planning and programming to prevent school violence and disruption, and instead relied on exclusion of students from school after an incident of rule infraction.

H.R.’s hearing before the superintendent consisted of the superintendent explaining that he considered the bat a weapon under the definition set forth in the district’s zero tolerance policy, and that he intended to recommend H.R.’s expulsion to the school board. At the hearing before the school board, the principal and H.R.’s math teacher testified about H.R.’s possession of the bat and his initial refusal to turn it over to

the teacher. Neither the principal nor the teacher testified that H.R. used the bat in a threatening manner, or that they believed H.R. intended to cause harm. In fact, the school board's attorney objected to any questioning of these witnesses about H.R.'s intent, and explicitly instructed the school board that H.R.'s intent was irrelevant under the zero tolerance policy. According to the school board's attorney, the board was authorized to expel H.R. on the sole basis of possession of the bat at school.

H.R.'s shop teacher testified at the expulsion hearing that he had supervised H.R. as he made the bat in shop class. The teacher testified that he fully believed H.R.'s explanation that he was making the bat as a gift for his seven-year-old cousin, and did not think H.R. intended to use the bat to harm anyone. He also testified that he had told H.R. he could not take the bat to the high school because he might get into trouble. However, this testimony was contradicted by the testimony of the guidance counselor for the vocational school, who stated that she heard the shop teacher tell H.R. it was okay to take the bat, as long as no one saw him. The school board apparently gave no weight to the fact that the alleged weapon had been made as a part of H.R.'s school program, nor to the guidance counselor's credible testimony that H.R. had been led to believe he had permission to bring the bat to the high school.

The school board did not discuss or accept evidence pertaining to H.R.'s personality, character and abilities. School officials did not present evidence of H.R.'s academic record, which was average, or his minor disciplinary record for conduct described in school records as "immature" and "silly." There was no evidence of an evaluation by district professional staff to assess H.R.'s intent, the context of the alleged offense and H.R.'s capacity for causing harm. There was also no input from professional

staff on an appropriate form of discipline for H.R., given his conduct. Notably, the school psychologist, who was H.R.'s special education case manager, was present at the expulsion hearing. However, she testified only that the district had complied with the procedural requirements of federal law for the discipline and removal of a student with a disability, - namely a determination by a multidisciplinary team, including the child's parent, that the conduct subject to discipline was not caused by the student's disability. In H.R.'s case, the school psychologist testified that no one on the team, including H.R.'s father, believed that H.R.'s conduct – carrying the baseball bat to school in his backpack – was caused by his learning disability. The school psychologist informed the school board that once the multi-disciplinary team had made this determination, federal law allowed it to discipline H.R. as it would a non-special education student. The school board did not question the school psychologist about her knowledge of H.R. and his behavior, or about her opinion as to whether H.R. posed a threat to school safety and order. Nor did the school board seek the school psychologist's opinion on the appropriateness or necessity of expelling H.R. under the facts of his case. The school board was only interested in knowing that it was free to expel H.R. once the district had complied with federal special education law.

Because H.R. is a student with a disability as defined by the federal Individuals with Disabilities Education Act,¹⁰ following the expulsion, the school board was required by law to provide him with a free appropriate public education in an alternative setting.¹¹ The board, however, made no attempt to find an appropriate alternative program that met H.R.'s educational needs, and instead provided him with only ten hours a week of individual tutoring. The tutoring was provided from 3:00 to 5:00 p.m. daily at the same

high school from which H.R. had been expelled, when many teachers, administrators and students remained in the building, thereby undermining any pretense that H.R. had been expelled because he posed a danger to others.

H.R. and his father retained ELC to appeal the expulsion. ELC filed the appeal with the New Jersey Commissioner of Education and successfully negotiated with the school board to have H.R. placed in an alternative special education school pending a decision on the appeal. On the eve of the administrative hearing - ten months after H.R.'s initial suspension and six months after the expulsion order - the school board settled the case and granted H.R. all of the relief he sought in the administrative appeal. Under the terms of the settlement, the school board agreed to reinstate H.R. to the high school and the county vocational program; to expunge the expulsion from H.R.' school records; and to withdraw the criminal complaint still pending in juvenile court.

H.R. reentered the high school a nearly full year after the initial suspension. He had earned sufficient academic credit from the tutoring and alternative program to be promoted to the eleventh grade, but the once-in-a-lifetime academic, extracurricular and social experiences of being a fifteen-year-old sophomore in high school were irreversibly lost for him. H.R. and his father, who are African American, both experienced the expulsion as a grave injustice and an act of racial discrimination. H.R. had no record of violent conduct in or out of school, and no one seemed to doubt that H.R. did not intend to harm anyone with the bat. Under these circumstances, H.R. could not understand why the school board had characterized the miniature baseball bat as a weapon, and denied him educational opportunity on that basis. H.R. believes that possession of the bat was criminalized in his case only because he is a young, black male, and, therefore, presumed

dangerous in the eyes of school officials. Although there was no smoking gun evidence of racial discrimination, H.R. believes that school officials would have reacted differently, and not resorted to expulsion, if a white student had done exactly what he had done.

In addition to lost educational opportunity and the experience of racial injustice, H.R. experienced substantial negative involvement in the criminal justice system as a result of the school board's action. Prior to settlement of the expulsion appeal and the board's agreement to withdraw the criminal charges, H.R. appeared in juvenile court on several occasions over a period of months, only to have the hearing postponed because the school board's witnesses had not appeared. When the witnesses finally appeared, H.R. was adjudicated delinquent on the charge of possession of a weapon. He was not represented by counsel at the hearing, and the finding was entered by a juvenile referee, who was not a judge or lawyer. ELC succeeded in having the adjudication vacated and a public defender appointed for H.R., and the school board ultimately agreed to withdraw the charges, but the initial finding of guilt exacerbated H.R.'s feelings of injustice and distrust of authority.

The case of the cut jacket

Unlike K.A. and H.R., M.C., a fifteen-year-old sophomore in a northern New Jersey suburb, was expelled under zero tolerance for engaging in serious, potentially harmful conduct. He brought four boxcutters and a swiss army knife to school and used one of the boxcutters to cut a gash in the back of a down jacket worn by another student. M.C. was immediately suspended pending an expulsion hearing before the school board,

and was charged in a juvenile proceeding with aggravated assault and unlawful possession of weapons on school grounds.

M.C. is distinguishable from K.A. and H.R. also in the fact that prior to the incident leading to expulsion, he had a history of poor and failing grades and repeated disciplinary infractions in the high school. The school, however, had made no effort to address M.C.'s academic and behavioral problems. M.C. had had several prior suspensions while in the high school, but had never met with a guidance counselor, school psychologist or school social worker to discuss his behavior, and had never been referred to any school or community programs and services to help address his problems. No one from the school had ever called or met with M.C.'s parents to discuss his inappropriate behavior, referral to school and community-based services and programs, or the option of an alternative school program.

M.C. did not deny cutting his classmate's jacket. He testified at the expulsion hearing that he cut the jacket to get even with the student, who had teased him about his own jacket, and that he did not intend to harm him. The school board, in making the decision to permanently expel M.C. without an alternative education program, did not solicit or receive any reports or testimony from a district guidance counselor, district social worker, district psychologist, or district psychiatrist. There was no evidence from any professional regarding M.C.'s intent or motivation, his awareness of the consequences of his actions, or his potential for future dangerous behavior. Nor was there discussion of the school's failure to identify M.C. earlier as a student at risk for academic failure and discipline problems, or of possible programs and services to help M.C. redirect his antisocial behavior. The school board made no attempt to determine whether

M.C. was an appropriate candidate for alternative education following expulsion, or whether there was an alternative program to meet his needs. It simply expelled M.C., without regard to his future educational and social needs.

In the juvenile proceeding, M.C. pled guilty to a disorderly persons offense and a fourth degree weapons charge and was placed on probation. The terms of probation required M.C. to make restitution for his classmate's jacket and complete a court service learning program. M.C. complied with the terms of probation while he remained excluded from school. The juvenile court did not address M.C.'s educational needs in its probation order. Ironically, if M.C. had committed a more serious act warranting incarceration, under state statute, the juvenile court would have been required to ensure the provision of a constitutionally adequate education during the period of incarceration.¹²

The school board justified its action in M.C.'s case by citing a lack of state mandate to provide alternative education to expelled students and the expense of such programs. Notably, the board had previously funded alternative education placements for two expelled students who had been placed in a juvenile detention facility by court order, but only because, unlike non-incarcerated students, state statute required that it cover the cost of educating such students.

M.C.'s parents retained ELC to appeal the expulsion decision to the New Jersey Commissioner of Education. They did not challenge the school board's decision to remove M.C. from the general high school program. Rather, recognizing the severity of M.C.'s conduct and his need for more structure and services, M.C.'s parents challenged

the termination of his right to a public education and the school board's failure to provide M.C. with an appropriate alternative education program upon expulsion.

ELC filed a motion for injunctive relief together with the appeal seeking M.C.'s immediate placement in an alternative education program pending a decision on the merits of the appeal. The administrative hearing officer entered a recommended decision granting the motion and ordering the school board to immediately assess M.C.'s alternative education needs, identify an appropriate alternative program and place him in an alternative program by the start of the next school year. However, the Commissioner of Education, reflecting a lack of coherent state policy on student discipline, modified the initial decision and ruled that the school board had only to provide M.C. with home instruction until a final decision on the merits of the appeal was reached.

A plenary hearing in the administrative appeal was held a full year after M.C.'s removal from school.¹³ The hearing officer did not issue his recommended decision until five months after the hearing. At this point, M.C. had been receiving home instruction for an entire school year. The hearing officer recommended that the Commissioner of Education uphold the school board's decision to permanently expel M.C. and terminate his right to a public education.¹⁴ The Commissioner adopted this recommendation and M.C. once again faced a future with no educational services, not even home instruction.¹⁵

ELC filed an appeal of the Commissioner's decision and a motion for injunctive relief with the State Board of Education. The motion sought an order requiring the school board to place M.C. in an appropriate alternative education program pending the outcome of the appeal. The State Board granted the motion, finding that M.C. suffered irreparable harm by denial of an educational program, and that its duty to ensure the

constitutional right to an education for every child in the state required an order for M.C.'s placement in an alternative school. Initially, the school board refused to comply with the State Board's order and ELC had to file a separate motion for enforcement. The State Board issued a second order requiring M.C.'s placement in an alternative program and the school board finally accepted its obligation to place M.C. However, due to a statewide shortage of alternative education programs, it was a couple more months before an appropriate program was located and M.C. was accepted. Finally, the State Board entered a precedent-setting final decision in July 2002, holding that the education clause of the New Jersey constitution entitled M.C. to an alternative education program following expulsion. See discussion of Legal Strategies, infra.

M.C. re-entered school at the age of seventeen. At the time of this writing, he has been in the alternative program for over a year and is expected to earn his high school diploma within the next six months. M.C. was excluded from school for twenty-two months following the jacket cutting incident. The majority of this time, he received no educational services whatsoever, and for less than half the time, he received only minimal home instruction of eight hours per week. M.C.'s father reported M.C. feeling pessimistic about his future and depressed during the period of exclusion from school. He held a part-time job at Burger King, and complied with the terms of probation entered in the juvenile case, but for the most part, his days were unstructured and unsupervised. Consequently, sixteen months after M.C.'s removal from school and while the expulsion appeal was pending, M.C. was caught burglarizing a neighbor's home. He was adjudicated delinquent in juvenile court, and was about to be sentenced to a residential facility for

juvenile offenders when the judge learned of the State Board of Education decision and M.C.'s placement in an alternative school, and decided instead to place him on probation.

Zero Tolerance: An Unproven and Negative Approach to School Safety and Order

These three cases illustrate two immediate and harmful consequences of zero tolerance that, in turn, lead to a host of negative outcomes for the students involved and society in general. First, as in the cases of K.A. and H.R., under zero tolerance, relatively trivial, non-dangerous conduct becomes grounds for permanent exclusion from school and referral to the juvenile justice system. Second, as illustrated by all three cases, under zero tolerance, youth are deprived of the education, training, support and structure they need to develop and thrive, in particular those youth, such as M.C., at risk for delinquent behavior.

The following section of this article will present a critical analysis of zero tolerance. It will begin with an examination of the federal Gun-Free Schools Act (GFSA),¹⁶ which established a national precedent for the zero tolerance approach to student discipline and the proliferation of suspension and expulsion. That will be followed by a discussion of the evidence indicating the ineffectiveness and negative outcomes of zero tolerance and the emerging consensus on alternative approaches to school safety and order.

The Gun Free Schools Act

Congress adopted zero tolerance as national policy with the enactment of the GFSA in 1994. The Act requires each state to have a law providing that public schools impose a minimum one-year removal for any student carrying a firearm to school. The GFSA requires states to allow the chief school administrator to modify the length of the

student's removal from school on a case-by-case basis and permits states to provide an alternative education program for students subject to a one-year removal. However, Congress gave no teeth to these provisions protecting the rights of students, since states are merely allowed and not required to provide alternative education to students removed from school and a chief school administrator may choose, but is not required, to exercise discretion to modify the length of removal (although, as discussed in this article under Legal Strategies, a school administrator's failure to exercise discretion may be subject to a due process challenge by the student). Further, a one-year removal is a minimum sanction under the Act. The GFSA does not preclude a state from authorizing a more severe sanction for a firearm offense, such as permanent expulsion without further education.

The GFSA conveys a "get tough" message to states and schools by mandating a one-year removal. This message, combined with the Act's failure to establish a basic floor of educational rights for students, has invited states to adopt zero tolerance laws and policies mandating permanent expulsion without further educational services. On the surface, this may appear to be sound policy. No one can reasonably argue with the goal of the GFSA: protecting the safety of students and school personnel by removing gun-possessing students from the general school program. A student who brings a gun to school intending to shoot or even threaten another person is a danger and should be removed from school, referred to the criminal justice system and provided with immediate intervention. However, as explained in following sections of the this article, simply expelling delinquent students from the public education system without the provision of alternative education and other services to address their anti-social behavior

only displaces the problem to the larger community at greater risks and costs. The GFSA fails to protect not only the educational rights of individual students, but also the safety of the larger community, by not mandating placement in an alternative education program for all students removed under the Act.

Further, even under the narrowest application of the GFSA, there may be cases of gun possession where removal from school is unfair. It makes no sense and is unfair, for example, to remove a thirteen-year-old student who brings his father's unloaded gun to school in his backpack because he just witnessed an act of domestic violence and fears his father will shoot his mother while he is at school. Similarly, it makes no sense and is unfair to remove a high school student who unknowingly brings a hunting rifle to school in the trunk of his car because his father used the car for a weekend hunting trip and, without the student's knowledge, forgot to remove the rifle. These students do not pose a risk of harm to others, yet in New Jersey¹⁷ and other states, the GFSA has been implemented in such a way that they may be treated identically to the student who brings a loaded gun to school with the intention of shooting a teacher or classmate -- they may be permanently expelled and their right to future educational services may be terminated. By requiring states to allow a chief school administrator to modify the length of removal, Congress recognized that any situation involving youth - even one as serious and potentially dangerous as possession of a gun at school - could involve extenuating circumstances that require the exercise of judgment. The GFSA fails to adequately protect this concern, however, by not mandating that school administrators exercise judgment in every case.

Moreover, the underlying notion in the GFSA that youth may be denied educational opportunity without regard to individual facts or circumstances has been expanded beyond firearms to a range of dangerous and non-dangerous student infractions. In recent years, states have enacted laws and local districts have adopted policies applying zero tolerance to possession of other types of weapons; use, possession and sale of illegal drugs; use and possession of alcohol; smoking; gang-membership; and verbal threats.¹⁸ Media reporting and information from ELC's cases indicate that the substance and implementation of these policies varies from state to state, district to district and school to school. In the cases cited at the outset of this article, zero tolerance was applied to a nail clipper, a kitchen knife brought to school to dissect an onion as part of a science project, a bread knife unknowingly left in the bed of a truck and a breaded chicken finger. In H.R.'s case involving the miniature baseball bat, zero tolerance was extended to prohibit any "instrument ... which may be used in an offensive manner or an attack or defense." In K.A.'s case, an unwritten zero tolerance policy was applied to an act construed as a bomb threat – changing the computer shut down screen to read "if you turn me off I will blow up."

The GFSA allows schools to treat all students alike, regardless of age, intent and context, and fails to require school officials to exercise judgment in all cases. In this way, the GFSA elevates a "no nonsense" approach to school safety above fairness, common sense and sound policy. The GFSA also sanctions exclusion from the public education system for students who may present the greatest challenge and have the greatest need for high quality education and services.

The Proliferation of Suspension, Expulsion and Termination of Educational Rights under Zero Tolerance

The proliferation of zero tolerance policies for a range of student misbehaviors has caused, in turn, a dramatic increase in the exclusion of youth from school. Data collected by the United States Department of Education Office of Civil Rights shows that suspensions rose nationally to 3.1 million students in 1997 from 1.7 million in 1994.¹⁹ In New Jersey, where the State maintains only limited data on student suspension and expulsion, the use of suspension is routine and on the rise. For the 2000-2001 school year, out-of-school suspension was imposed in 85% of all cases falling within the State's reporting requirements for acts of school violence and vandalism.²⁰ The vast majority of the 24,973 offenses reported were for relatively minor infractions, such as fighting, simple assault and threats. In contrast, only 10 incidents of firearm possession were reported in 2000-2001. This data indicates that in many school districts in New Jersey, out-of-school suspension is the first response to a violation of school rules. Statewide data also indicates an increase in reliance on suspension: out-of-school suspension in 2000-2001 increased by 14% from 1999-2000.²¹

Although there is less data on the use of expulsion, it appears that expulsion has increased under zero tolerance as well, in some states by more than double since 1990.²² The vast majority of students being suspended and expelled under zero tolerance, however, have committed acts that do not seriously threaten school safety and order. District and national data continues to show that most student disciplinary infractions are for acts that are neither violent nor criminal, and that serious infractions such as drugs and weapons, occur relatively infrequently.²³ In fact, data shows that school-based violence has decreased in recent years.²⁴ Schools continue to be one of the safest places for children, with a less than one in a 1.7 million chance of a school age youth dying as a

result of a school associated homicide.²⁵ In 1998, students were more than twice as likely to be victims of serious violent crime away from school than at school.²⁶

Although schools are a relatively safe place for children, horrific school shootings in recent years and the media sensationalizing these tragic events – such as the deadly shooting at Columbine High School in April 1999 – appear to have fueled the proliferation of zero tolerance policies.²⁷ Government and school officials, under public pressure to do something about a perceived threat of violence in schools, have turned to zero tolerance as an expedient response to student misbehavior or, in many cases, typical student behavior unreasonably construed as dangerous. As a part of the zero tolerance approach, schools have also responded with intrusive security-type measures including police and security guards, metal detectors, locker searches, and mandatory student identification badges, without research to suggest that such measures eliminate violence.²⁸

No Evidence Zero Tolerance Promotes Safety and Order in Schools

Denying educational opportunity to a large number of youth under zero tolerance could arguably be justified in the face of clear evidence that these policies actually result in greater safety and order in schools. In fact, though, suspension and expulsion have not been shown to be effective in reducing student misbehavior.²⁹ With regard to zero tolerance in particular, research does not support its use in promoting school safety and order. A study by the National Center for Education Statistics indicates that after four years of employing zero tolerance policies for a host of infractions related to violence, those schools with zero tolerance still were less safe than those without such policies.³⁰ Further, suspension and expulsion have increased under zero tolerance, thereby

undermining any claim that these policies have been effective in deterring inappropriate behavior and rule infraction by students.³¹ Suspending and expelling violent students may temporarily protect other students and teachers in the school - although the list of incidents of school violence committed by students who had been suspended or expelled undermines this claim³² - but these measures do not protect the general community.³³ Notably, there is also no evidence that the intrusive security-type measures that have accompanied the zero tolerance approach have succeeded in promoting school safety and order.³⁴

The Negative Costs of Zero Tolerance

Perhaps the most significant negative outcome of zero tolerance is the high cost of excluding youth from school, both for the individual students and for society in general in terms of lessened economic vitality, higher tax burden and decreased public safety. Youth that receive an education are far more likely to contribute to society as workers and citizens than those who are denied educational opportunity under zero tolerance. Research indicates that excluding youth from school increases their risk for delinquency,³⁵ and common sense alone tells us that communities are less safe when troubled youth are out of school, unoccupied and unsupervised. Youth who are excluded from school are more likely to be involved in acts of physical aggression, to carry a weapon, and to smoke and use illegal drugs.³⁶ In essence, zero tolerance risks putting many youth on a fast track to juvenile delinquency and future unemployment, poverty and crime, even though data indicates that most students are suspended for non-violent, non-criminal acts.

For those few students who engage in dangerous conduct, exclusion from school

under zero tolerance, without the provision of alternative education to address behavioral and academic problems, only displaces the problem to the streets at greater cost. Students who engage in violent acts in school often have complex social and emotional problems and a corresponding need for connection to formal structure and programs, caring and nurturing adults, and positive peer relationships. Placement in an alternative education program helps address the student's problems without compromising the safety and order of the general school environment. It is also more cost effective to address problem behavior and its causes through alternative education programs than to wait until the student becomes involved in the criminal justice and welfare systems later in life.³⁷ Unfortunately, many states do not require, and school districts do not provide, alternative education to a student removed from school under long-term suspension and expulsion.

Zero tolerance and expulsion and suspension also disproportionately impact children of color³⁸ and those with disabilities.³⁹ Following decades of struggle, civil rights activists secured the right to equal educational opportunity for these children through court victories and legislation. Now, educational rights are being eroded by exclusion from school under zero tolerance.

Application of zero tolerance and imposition of harsh punishment for relatively minor offenses may be perceived as unfair by students, thereby undermining respect for school policies and school administrators and making it less likely students will comply with the rules. Research shows that schools with clear, fair and consistently enforced discipline rules are better managed and more orderly.⁴⁰ Harsh and punitive discipline policies may also serve to alienate students from school, thereby increasing the risk of juvenile delinquency, substance abuse and other negative behaviors that contribute to

school violence and disorder.⁴¹

Further, with its disregard of individual facts and circumstances and severe punishment, zero tolerance may work to instill anti-democratic values in all students. Zero tolerance is contrary to principles of fairness and justice embodied in our laws and constitutions – for example, the right to procedural due process, including the right to present and have considered individual facts, the right to be free from punishment that is disproportionate to the offense, and the right to a presumption of innocence until proven guilty. Youth who witness the suspension and expulsion of friends and classmates for non-dangerous, non-criminal conduct under circumstances in which school authorities do not consider individual circumstance, motive and intent, are receiving the not so subtle messages that the rule of authority will prevail over basic principles of fundamental fairness.

An Alternative Approach to School Safety and Discipline

In place of zero tolerance, widespread consensus among school violence experts supports a comprehensive, well-integrated planning process that involves school and community resources, addresses a broad range of causes of youth violence, and results in selection and implementation of programs that have been proven effective in preventing school disorder and violence.⁴² While schools are a relatively safe place for children, the fact remains that violence is prevalent in our society, and schools reflect this violence.⁴³ For example, in 2001, 17.4 percent of high school students reported carrying a weapon such as a gun, knife or club, within the past 30 days, and 6.4 percent reported carrying a weapon of this type on school property within the past 30 days.⁴⁴ Simple assault against students and teachers, theft, threats, bullying and intimidation are commonplace in some

schools,⁴⁵ and can lead to serious acts of violence if not addressed. Moreover, although the highly publicized acts of school violence may be small in number, a single school shooting should require schools to take action to minimize the risk of violence. Since most children attend school, particularly in the early years, schools are also in a unique position to provide violence prevention education, training and intervention services to minimize the risk of violence in both school and in the general community. Research indicates that school-based interventions can reduce the overall rate of juvenile delinquency.⁴⁶

A comprehensive approach to school safety requires schools to conduct a needs assessment to identify the nature and extent of school violence and disorder; set goals and objectives; identify appropriate resources, strategies and effective programs; implement a comprehensive plan; measure the success of each element of the plan; and revise the plan as needed.⁴⁷ The components of a comprehensive plan include: (1) reform in school administration to support a challenging and engaging academic program for all students, fair treatment of students and due process protections, a system of graduated sanctions for rule infractions, the modeling of non-violent, respectful behavior by teachers and administrators, effective communication of school rules, accurate and prompt reporting of serious offenses to law enforcement and parents, and providing teachers with training in effective classroom management skills; (2) changes to school building design to enhance security and eliminate opportunities for violent behavior; (3) school-wide education and skills training for students to improve behaviors and attitudes, e.g., anger management, nonviolent communication, danger avoidance, conflict resolution; (4) counseling services for at-risk students and their families; (5) alternative education services for the

small group of students who pose a serious risk of violence to others; and (6) community involvement, including parents and law enforcement.⁴⁸

Strategies for Reform and Lessons Learned

After several years of representing students in discipline cases, ELC has developed and continues to refine strategies end zero tolerance student discipline policies. While this is a work in progress, several lessons have emerged. The final section of this article will discuss the strategies used by ELC to challenge zero tolerance and the lessons learned from the work.

Focus on Reforming State Policy and Law

There are several good reasons to focus student discipline reform efforts on state policy and law rather than federal law and local policy. First, the legislature and state education agency in every state regulates public education to some degree, including some aspect of student discipline. With the exception of legislation governing special education and possession of a firearm at school, the federal government does not regulate the manner in which states and schools discipline students.

Second, federal courts have interpreted federal constitutional law less favorably to students than many state courts have interpreted state constitutions. Many state courts, including New Jersey, have recognized a fundamental right to a public education under the state constitution. A state fundamental rights analysis requires a higher level of scrutiny of school board action than that employed by the federal courts, and provides a strong legal argument against zero tolerance. See discussion of Legal Strategies, *infra*.

Third, challenging zero tolerance school district by school district is inefficient, especially in a state such as New Jersey where there are over six hundred districts.

Moreover, a district-by-district approach is unlikely to succeed if state policy and law remains unchanged. Reform of zero tolerance will undoubtedly require major changes at the local school level – for example, increased training and capacity for school staff and a commitment to alternative approaches and changing school climate. However, without a state mandate and, in particular, without resources from the state to increase knowledge, skills and capacity, it is unlikely local districts will choose to abandon zero tolerance.

For all of these reasons, ELC had concentrated its advocacy work at the state level. There are states, however, in which the courts have not recognized a fundamental right to public education, and the focus of reform efforts in these states will depend on state politics and the position of state education officials on zero tolerance and student discipline. It is more efficient to influence state policy that applies broadly to all districts, but directing efforts toward the state may not be the most productive course if there is no support for reform among policy makers and no statewide movement to influence policy. In this case, it may be more effective to build support and create a movement to reform zero tolerance at the school board level.

Challenge Common Assumptions Underlying Zero Tolerance

Despite zero tolerance's many negative consequences and unproven effectiveness, it remains a standard strategy of states and schools for maintaining school safety and order. Zero tolerance must be deconstructed and its underlying assumptions exposed if key education stakeholders and policy makers are to be convinced of the need to end this approach to student discipline. ELC has been challenging zero tolerance's common assumptions and presenting counter-arguments in various forums, including litigation,

administrative rulemaking, workshops and seminars for education professionals, newspaper editorials and public policy discussions.

One common assumption driving zero tolerance is that harsh punishment and exclusion from school deters future inappropriate conduct and is effective in maintaining school safety and order. As discussed previously, however, there is no evidence that schools with zero tolerance are any more safe and orderly than schools without zero tolerance. See discussion under *No Evidence Zero Tolerance Promotes Safety and Order in Schools, supra.*

Another common assumption is that schools need zero tolerance in order to remove dangerous and overly disruptive students. School administrators will sometimes insist that zero tolerance enables them to remove students who carry guns, sell illegal drugs and engage in other dangerous and antisocial behavior. The fact is, though, that schools were able to remove dangerous and overly disruptive students before the advent of zero tolerance. Prior to zero tolerance, state statutes authorized the suspension and expulsion of such students by local districts, and local discipline codes delineated the causes of student removal. Just as they have in the past, schools can meet their obligation to maintain safety and order with a sound, firm discipline code based on a system of graduated sanctions and individualized assessment of the student. Following the provision of due process, a careful assessment of the student and a determination as to whether the student poses a threat or danger that cannot be addressed in the general school environment, school authorities can make the reasoned decision, in accordance with guidelines set forth in local policy, to remove a student from the school. Zero

tolerance is not needed, although the ability to make and be held accountable for decisions is required.

It is also commonly believed that suspension and expulsion of students for relatively harmless offenses are aberrations caused by misapplication of zero tolerance by unthinking school officials. Reports of suspension for possession of nail clippers, aspirin, paper guns and the like abound in the media. Zero tolerance supporters insist that it is sound policy, and that the problem of punishing relatively minor offenses lies in misapplication of the policy by school administrators.⁴⁹ This reasoning fails to acknowledge, however, that punishment of minor offenses is inherent in zero tolerance.⁵⁰ If the goal of student discipline is to deter inappropriate behavior, as it is under zero tolerance, and if the method of discipline is to abandon judgment and discretion in favor of a predetermined punishment, as it is under zero tolerance, then, by necessity, trivial, non-violent acts will be punished along with serious offenses. Under zero tolerance, the student from Wisconsin noted at the outset of this article who brought the knife to school to dissect an onion for his science project is treated the same as the student who brings a knife to school with the intent to harm someone. Possession of the knife alone triggers the punishment. Similarly, under zero tolerance, H.R.'s possession of the miniature baseball bat - a "weapon" capable of causing injury under the district's policy - is treated the same as a student possessing a gun with the intent to injure another person. By definition, zero tolerance policies set a predetermined consequence for a specified act, regardless of individual circumstances.⁵¹ Within this framework, it is inevitable that a student who commits a minor offense or who has no intention of causing harm will be

subject to the same punishment as a student who intends to commit a serious, criminal offense.

Some commentators and education stakeholders believe the problem of punishing relatively harmless conduct can be cured by requiring school administrators to exercise judgment in all discipline cases.⁵² A system of student discipline that allows judgment and discretion on a case-by-case basis, however, is not zero tolerance and, in fact, is inconsistent with the definition of zero tolerance.⁵³ The limitations of zero tolerance and the benefits of a firm, consistent and fair discipline policy that allows consideration of individual circumstances must be explained at every opportunity.

Further, education stakeholders and policy makers must be reminded that punishment of relatively harmless offenses is just one of the negative consequences of zero tolerance. From a public policy perspective, perhaps the bigger problem with zero tolerance is the complete exclusion of youth from school. In particular, zero tolerance allows the public education system to turn its back on those students with the greatest social and emotional need for prevention and intervention services – services that could be provided in a school setting, including an alternative school setting for those students with violent or overly disruptive behavior. As illustrated by M.C.’s case, expelling troubled students without any further education or services simply moves the problem to the larger community and invites further delinquent behavior.

Legal Strategy – Develop Rights under State Law

Advocates must develop creative arguments under state laws and constitutions if they are to succeed in ending zero tolerance. Federal constitutional and statutory law may provide a defense in some individual suspension and expulsion cases, (see

discussion of The Role of Federal Law, *infra.*), but it does not offer a solid avenue for direct, systemic challenge to zero tolerance. In general, federal courts tend to defer to school authorities on student discipline matters. In San Antonio Independent School District v. Rodriguez,⁵⁴ a case challenging the Texas system for financing public education under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the U.S. Supreme Court ruled that public education is not a fundamental right under the federal constitution. As such, the Court found that government intrusion on education could be upheld under the deferential rational relationship standard of review. The rational relationship standard allows a court to sustain the action of school officials provided the action is rationally related to a legitimate governmental interest. Applying this standard in the discipline context, the Supreme Court has explicitly found that “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”⁵⁵ Under the rational relationship test, a school discipline policy will be upheld even if it is not fair or the most effective policy; it need only be rationally related to the goal of safe and orderly schools. A zero tolerance policy can withstand scrutiny under this federal constitutional standard.⁵⁶

A state constitutional challenge to zero tolerance, on the other hand, may prove more successful. Historically, state law challenges to suspension and expulsion have been based on an arbitrary and capricious standard of review, which is not more favorable to students than the federal rational relationship test. As developed under New Jersey case law,⁵⁷ a student challenging school board action under an arbitrary and capricious standard bears the burden of proving by a preponderance of the evidence that

the board's discipline decision constitutes willful and unreasoning action, without consideration and in disregard of circumstances. Similar to the rational relationship standard, the arbitrary and capricious standard is deferential to school board action, and typically results in the reviewing body upholding the board's decision to suspend or expel a student. In the pervasive climate of fear of school violence, a school board could justify suspension and expulsion under a zero tolerance policy upon the slightest indication of a threat of violence or disorder. It is not likely that a challenge to zero tolerance would succeed under this standard.

In recent years, ELC has shifted the analysis in student discipline cases away from an arbitrary and capricious standard of review to a fundamental rights analysis under the New Jersey Constitution. Over the past two decades, in the wake of San Antonio Independent School District v. Rodriguez, *supra.*, holding that education is not a fundamental right under the federal constitution, many state courts have been called upon to determine the constitutionality of the state system of financing public education under the state constitution. In the course of this litigation, numerous state courts, including New Jersey,⁵⁸ have designated education a fundamental right and have applied a high level of scrutiny to state action that impacts that right. A constitutional challenge to zero tolerance, similar to that being waged in New Jersey, can be developed in these states.⁵⁹

Long-term suspension and expulsion under zero tolerance clearly impact a student's fundamental right to a public education. New Jersey courts apply a two-pronged test to determine whether governmental action permissibly infringes on a fundamental right: (1) on a balancing of the governmental and private interests, infringement on the right is necessitated by a substantial governmental interest; and (2)

the governmental entity has utilized the narrowest means available to achieve its interest.⁶⁰ Interestingly, another state court, which has recognized public education as a fundamental right, has applied a similar balancing test in the discipline context to rule that a student is entitled to an alternative education program following expulsion from school.⁶¹

Applying the first prong of the balancing test to zero tolerance, there is no question that school safety and order are substantial governmental interests that could justify some infringement on a student's right to a public education. Zero tolerance cannot, however, withstand scrutiny under the second prong of the test, which requires a showing that such a policy is the narrowest means of achieving school safety and order. To the contrary, a strong factual showing can be made that zero tolerance is not narrowly tailored to achieve school safety and order. See, *No Evidence Zero Tolerance Promotes Safety and Order in Schools* and *An Alternative Approach to School Safety and Discipline*, *supra*. By its very nature, zero tolerance is over-broad and punishes serious and less serious offenses alike. A school board that has blindly applied zero tolerance to exclude a student from school without conducting an individual assessment of the student's intent, motive and capacity, cannot meet its burden of showing use of the narrowest means to achieve its interest in school safety and order. Further, a school board cannot show that its zero tolerance policy is narrowly tailored to achieve school safety and order. National data shows that schools with zero tolerance are less safe than those without zero tolerance,⁶² and that suspension and expulsion, and, therefore, rule infraction, have actually increased since the advent of zero tolerance.⁶³ On the other hand, violence prevention experts agree that schools can more effectively prevent

violence and disorder by undertaking a comprehensive approach to school safety – an approach less intrusive on the right to a public education than zero tolerance.

A fundamental rights analysis has allowed ELC to move beyond challenging a school board’s decision to discipline a particular student to raising, within the context of an individual case, a facial challenge to the constitutionality of a zero tolerance policy. Further, this analysis has allowed ELC to join the state education agency and its officials as parties in a discipline appeal to raise constitutional challenges to state policies that allow local districts to employ zero tolerance. In case law recognizing education as a fundamental constitutional right, New Jersey courts have imposed a duty on the part of the state to ensure an adequate education for all children.⁶⁴ Authority over local districts accompanies this duty and supercedes local control of public education. The state, therefore, is subject to a claim that it has violated a student’s constitutional right to a public education by allowing local districts to employ ineffective, over-broad zero tolerance policies. The goal of this litigation strategy is to broadly influence and change state policy and law that apply to all school districts within the state.

In K.A.’s case, ELC raised a fundamental rights challenge to K.A.’s expulsion and the school board’s zero tolerance policy. In support of the constitutional claim, ELC presented expert testimony about zero tolerance’s lack of proven effectiveness and alternative, less intrusive means the school board could have undertaken to promote school safety and order. See discussion of the use of experts in school discipline cases, infra. The constitutional arguments and evidence were compelling, but the Commissioner of Education and State Board of Education refused to rule on the constitutionality of zero tolerance, and instead reversed K.A.’s expulsion under an

arbitrary and capricious standard. The facts suggest, however, that these decisions were influenced by the constitutional arguments and the evidence introduced in support of these arguments.⁶⁵

In H.R.'s case, ELC raised state constitutional challenges against the school board and the state education agency and its officials. The claim against the state alleges that it has violated its constitutional duty to ensure a thorough and efficient education for all children in the state by allowing local districts to employ zero tolerance policies.

Specifically, the appeal alleges that the state has impermissibly infringed on the right to a public education by: (1) failing to set standards for research-based, effective discipline policies and practices throughout the state; and (2) permitting local districts to employ over-broad and ineffective discipline policies that are not narrowly tailored to achieve school safety and order. Following the settlement of H.R.'s claims against the school board, ELC moved for summary judgment in the claim against the state. The Commissioner ruled that the claim was moot and dismissed the appeal. ELC appealed the dismissal to the State Board of Education, which, at the time of this article, has not issued a ruling. The State Board will most likely affirm the Commissioner's order of dismissal, at which point ELC can appeal the claim against the state to the appellate division of the state court system.

In M.C.'s case, ELC challenged the constitutionality of the school board's policy of applying zero tolerance to expel students without further educational services and the state's policy of failing to require local districts to provide alternative education to students who have been expelled. The Commissioner of Education dismissed the claims against the state, held that he did not have the authority to decide constitutional issues,

and applied an arbitrary and capricious standard of review to uphold the school board's decision to permanently expel M.C. without alternative education. In a precedent setting ruling entered in July 2002, the State Board reversed the Commissioner's decision and held that the state's constitutional duty to ensure a thorough and efficient education for all children required it to order the school board to provide M.C. with an appropriate alternative education program until he graduates or turns 19 years of age. The State Board did not reinstate the claims against the state education agency or officials, and those claims are currently pending on appeal to the New Jersey Superior Court, Appellate Division.⁶⁶

The Role of Federal Law

Federal constitutional law and the rational relationship standard are deferential to school boards and do not support a systemic challenge to zero tolerance policies. Nonetheless, federal rights may provide grounds to challenge aspects of a student discipline determination and may support invalidation of a suspension or expulsion in an individual case. The following summary of federal law relative to student discipline is not intended as an exhaustive discussion of the topic, but rather a summary of some of the key federal claims that advocates should consider when challenging the imposition of suspension and expulsion under zero tolerance.⁶⁷

In some narrow circumstances, it may be possible to show that application of a zero tolerance policy to an individual student bore no rational relationship to school safety and order, and therefore violated the Fourteenth Amendment to the U.S. Constitution. In Seal v. Morgan,⁶⁸ the U.S. Court of Appeals for the Sixth Circuit overturned the expulsion of student under a policy of zero tolerance for weapons when

the student alleged, and no one questioned, that he did not know that a knife was in the glove compartment of his car. The Court invalidated the expulsion under the substantive requirements of the Due Process Clause, reasoning that expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to the legitimate state interest of maintaining school safety. The Court remanded the case to the school board and directed it to ascertain the student's knowledge with regard to the weapon.

The holding in Seale appears to be limited to the fact that the student alleged that he did not know he possessed the weapon. In other cases, courts have not been willing to apply federal constitutional principles to second-guess the wisdom of a zero tolerance policy, even when application of the policy results in injustice. For example, in Ratner v. Loudoun County Public Schools,⁶⁹ the U.S. Court of Appeals for the Fourth Circuit upheld the four month suspension of a middle school student under the district's policy of zero tolerance for weapons when the weapon at issue was a knife the student had taken from a suicidal friend and placed in his locker. The Court stated that "[h]owever harsh the result in this case, the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy"⁷⁰

Suspension and expulsion under zero tolerance may also be subject to challenge under the procedural protections guaranteed by the Due Process Clause of the Fourteenth Amendment. At a minimum, procedural due process requires that a student facing long-term suspension or expulsion be provided with notice of the charges and a hearing at which he or she may present evidence and confront the school board's witnesses.⁷¹ A school board's failure to comply with procedural due process may be a basis to set aside a

discipline determination. Further, the hearing procedures, although not as extensive as those provided in a court setting, grant a student the opportunity to put on evidence that potentially undermines a school board's blind adherence to zero tolerance. For example, the student can testify about his or her individual intent, circumstances, character, history and special needs and introduce evidence of the school's failure to adequately address those special needs.

Procedural due process also requires that a student be provided with a meaningful hearing.⁷² In Colvin v. Lowndes,⁷³ the federal district court invalidated an expulsion under zero tolerance because the school board failed to consider the individual circumstances of the case. The Court did not find that zero tolerance discipline policies, standing alone, violate due process. Rather, the Court looked to the governing state statute, which granted the superintendent authority to modify expulsion on a case by case basis, and to the school's handbook, which required the board of education to consider a variety of factors, including the student's history, in determining an appropriate disciplinary sanction. The Court found that where a statute and local policy authorize consideration of individual facts and circumstances, due process required "independent consideration by the Board of the relevant facts and circumstances...."

In addition to rights conferred by the U.S. Constitution, a student may also have rights under federal statutes that provide a defense to suspension and expulsion under zero tolerance. The federal special education law, the Individuals with Disabilities Education Act,⁷⁴ provides substantial procedural and substantive rights to a student with a disability involved in a discipline dispute and may prohibit or limit a school board's application of zero tolerance. Further, if a local district's zero tolerance policy results in

different treatment or disparate impact on minority students, students may have a basis to challenge the policy in an administrative complaint filed under Title VI of the Civil Rights Act of 1964.⁷⁵ A civil rights complaint is filed with the Office for Civil Rights (OCR) in the U.S. Department of Education. OCR has authority to investigate a complaint and issue a corrective action plan against a district in which it finds discrimination.

Collaborate with Violence Prevention and School Safety Experts

Success in challenging zero tolerance, whether in an individual case or in the larger policy arena, requires advocates to rely upon and incorporate the work and findings of researchers and violence prevention experts. In ELC's experience, it is not enough to show that individual youth are harmed by zero tolerance; isolated cases of unfair treatment and devastating impact are unlikely to convince policy makers and judges of the need for systemic reform. Statewide policy and precedent setting decisions are more likely to be influenced by research and data on zero tolerance's lack of proven effectiveness and the negative consequences for society at large. Further, a successful constitutional challenge to zero tolerance requires a factual showing that zero tolerance is not the narrowest means of achieving the governmental interest of safe and orderly schools. See discussion of Legal Strategies, supra.

ELC has retained youth violence prevention experts as witnesses in expulsion cases to testify, first, about zero tolerance's shortcomings and the benefits of alternative approaches to school safety and order and, second, about measures the school could have taken to address the individual student's behavior without excluding him from school. In K.A.'s case, ELC called as an expert witness Dr. Paul Kingery, Director of the Hamilton

Fish Institute and a national expert in youth and school violence prevention. Dr. Kingery offered his opinion that the school board's policy of zero tolerance for bomb threats, which resulted in the permanent denial of an education for K.A., was not the narrowest means of achieving school safety and order. Dr. Kingery testified about the lack of research establishing zero tolerance's effectiveness and about the growing research and consensus among violence prevention experts supporting a comprehensive approach to school safety. Dr. Kingery also provided information about the types of programs the school could have adopted to reduce the incidence of bomb threats without resorting to zero tolerance and expulsion of students such as K.A. With regard to K.A.'s conduct in particular, Dr. Kingery testified about more appropriate and effective steps the school could have taken to redirect his behavior. First, student support staff should have assisted school officials in evaluating K.A.'s motive and intent in changing the computer shut down screen. Second, once they determined that K.A. did not intend to cause harm, school personnel should have explained to him the ramifications of his actions in light of the rash of bomb threats that had been plaguing the district. Dr. Kingery explained that school safety and order were not furthered in K.A.'s case because school officials failed to help K.A. and the other students in the school understand how K.A.'s actions were inappropriate. Third, once school personnel explained why the conduct was wrong within the particular environment of the school, they should have channeled K.A.'s computer skills and creativity to appropriate and useful outlets.

ELC retained Dr. Michael Greene as an expert witness for both H.R. and M.C. Dr. Greene is a developmental psychologist and one of New Jersey's leading experts on youth and school violence prevention. H.R.'s case was settled and Dr. Greene did not

testify, but a pre-hearing proffer of his testimony, submitted to the school board prior to the hearing in accordance with New Jersey's administrative rules, was instrumental in bringing about the settlement. Dr. Greene was prepared to testify that H.R.'s conduct in taking the baseball bat from his shop class to the high school and initially refusing to turn the bat over to his math teacher could, at worst, be characterized as minor instances of defiance of authority and bad judgment. Further, in Dr. Greene's opinion, minor challenges to adult demands and psychosocial experimentation are normal features of the adolescent process of identity formation, and H.R.'s behavior in this case was within the range of normal, non-threatening, non-dangerous adolescent behavior. Dr. Greene further opined that the school board's zero tolerance policy, mandating permanent expulsion on the basis of a single act, without regard to individual facts and circumstances, denies youth the opportunity to learn from their mistakes and is contrary to elements of healthy adolescent development. Similar to his testimony in M.C.'s case, summarized below, Dr. Greene offered his expert opinion that zero tolerance and exclusion of youth from school is not the narrowest, most effective means of promoting school order and safety.

In M.C.'s case, Dr. Greene testified that a narrow reliance on suspension and expulsion as the means of preventing school violence is short-sighted, fails to successfully engender student accountability and responsibility, and runs counter to the prevailing consensus among researchers and practitioners in the field who advocate for a comprehensive, multi-layered, and contextualized approach to address school violence. Dr. Greene further testified that the use of an accredited alternative education program, rather than termination of educational services, is an appropriate means to address the

needs of a chronically disruptive student who engages in aggressive behavior in violation of school regulations. Dr. Greene opined that M.C. was a good candidate for an alternative program and that the problems with social judgment and the type of behavior displayed by M.C. were best addressed in a guided social setting, with structured and engaging educational and other activities. Dr. Greene testified that without structure, and without guided interaction with other peers to develop appropriate social skills, problem behaviors tend to worsen and increase the risk of future delinquent behavior.

ELC has also relied upon the research and opinion of violence prevention experts when advocating for reform of zero tolerance in testimony and written comments before the state education agency; when presenting workshops on education law to a variety of audiences, including school administrators, parents and lawyers; and when writing newspaper editorials on school discipline issues. Additionally, ELC partnered with the Violence Institute of New Jersey, a university-based violence prevention research and policy institute, to develop a strategic plan to reform state school discipline policy and to develop a proposal for a demonstration project implementing research-based school safety programs. See the following discussion, *Develop Long-term and Multi-pronged Strategies*, *infra*. Eradicating zero tolerance will require a large-scale campaign to convey information and research to not only judges, but also state education officials, education stakeholders and the legislature about the harm of zero tolerance and benefits of alternative, more effective and humane approaches to school safety and order.

Develop Long-term and Multi-pronged Strategies

The zero tolerance approach to student discipline appears widespread throughout New Jersey and in many other parts of the country as well. Effectuating reform will

require, therefore, long-term and multi-pronged strategies. To begin to address reform in New Jersey school discipline policy, ELC undertook a strategic planning process in August 2001. Youth advocates, violence prevention experts and representatives from parent groups, school administration and the state legislature formed the group that developed the strategic plan. The plan has several interrelated components, some of which will require new sources of funding and some of which ELC can undertake now.

First, ELC will continue its work of advancing law reform through litigation and advocacy before the state education agency and legislature. Second, the plan contains a research agenda. The state does not maintain complete data on suspension and expulsion, so the reform effort will need to demonstrate the nature and extent of the problem with zero tolerance. The research component calls for data collection on the extent to which school discipline policies exclude children from New Jersey schools and compilation of empirical evidence of the comparative effectiveness of zero tolerance and comprehensive school safety approaches within the state.

Third, the strategic plan provides for a project demonstrating implementation of needs-driven and research-based comprehensive safety and discipline policies and practices that do not allow the exclusion of youth from school. The demonstration project is designed to take place in three schools in New Jersey – urban, suburban and rural. It includes an assessment phase to determine the rate of rule infraction and suspension and expulsion under alternative safety and discipline practices and the programmatic, resource, personnel and attitudinal changes needed at the school and district levels to implement these practices.

ELC submitted a proposal to the New Jersey Department of Education in March

2002 requesting that it fund the demonstration projects under Title IV, the federal Safe and Drug Free Schools and Communities program.⁷⁶ The Department included the demonstration projects in its 2002 Consolidated Application for federal funding under Title IV, and plans to move forward with the projects in 2003.

Fourth, the strategic plan includes a communications component designed to convey the findings of the research and demonstration projects through written reports, statewide policy forums, a project web site, and other written materials. Fifth, the strategic plan calls for the formation of a coalition of key stakeholders – parent groups, child advocates, school safety experts, law enforcement, mental health professionals, state education officials and school administrators, teachers, counselors and other service providers – to use the findings of the research and demonstration projects to develop, plan and bring about reform of state policy on student discipline and school safety.

Reform of zero tolerance will require the coordination of all of these strategies to demonstrate to education stakeholders, state education officials and the legislature that zero tolerance is harmful to individual students and society at large, and that effective, fair and humane approaches to student discipline are possible.

¹ Skiba, R.J. & Peterson, R. (1999). *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* Phi Delta Kappan, 80, 372.

² Heaviside, S., Rowand, C., Williams, C., & Farris, E. (1998). *Violence and Discipline Problems in U.S. Public Schools: 1996-1997*. NCES 98-030. Washington, DC: U.S. Department of Education.

³ *Boy With Knife Shouldn't Be Expelled, Examiner Says* (April 8, 2002). Milwaukee Journal Sentinel.

⁴ *High School Expels Junior After Guard Finds Knife in Truck*, (March 21, 2002). The New York Times, p. A25.

⁵ *Going Too Far: The Case of the Nailclipper* (January 14, 2002). Columnist Marc Fisher, The Washington Post.

⁶ *High School Expels Junior After Guard Finds Knife in Truck*, (March 21, 2002) The New York Times, p. A25.

⁷ Donohue, Elizabeth, Schiraldi, Vincent & Zeidenberg, Jason. (2000). *School House Hype: Two Years Later*. Washington DC: The Justice Policy Institute.

⁸ The decisions in K.A.'s case by the hearing officer, the NJ Commissioner of Education and the NJ State Board of Education case are available on the Rutgers School of Law web site, <http://lawlibrary.rutgers.edu/oal/search.html>, and may be accessed by searching under the docket number EDU 2799-99. The only decision not available is that of the Commissioner on K.A.'s application for emergent relief. However, for the most part, the Commissioner adopted the hearing officer's decision on the emergent relief request, and the hearing officer's decision is available on the Rutgers' site.

⁹ One of the many deficiencies in New Jersey's administrative procedures for student discipline cases is the lack of a speedy time frame for appeal and final decision from the state education agency. A student may appeal a school board's discipline decision to the Commissioner of Education and then, the State Board of Education. The administrative rules do not include procedures for expediting the appeal of a suspension or expulsion. Consequently, the appeal process can go on for months or even a year, while the student remains out of school. The student may seek injunctive relief as a part of the appeal and request interim relief pending a final decision. However, if the student loses the request for injunctive relief, as K.A. did, he or she may be barred from school for months or longer while the case is decided. This procedural deficiency must be addressed as part of the overall effort to reform state student discipline law.

¹⁰ 20 U.S.C. § 1400 *et seq.*

¹¹ 20 U.S.C. § 1412 (a)(1)(A).

¹² N.J.S.A. 18A:7B-1 *et seq.*

¹³ See endnote 9.

¹⁴ The hearing officer in M.C.'s case also recommended that the Commissioner order the school board to conduct a special education evaluation of M.C and provide him with a special education program in the event he was found eligible, even though neither M.C.'s parents nor the school board had raised this as an issue. The Commissioner rejected this recommendation, finding that he did not have jurisdiction under the IDEA to enter an order concerning special education.

¹⁵ The decisions in M.C.'s case by the hearing officer, the NJ Commissioner of Education and the NJ State Board of Education case are available on the Rutgers School of Law web site: <http://lawlibrary.rutgers.edu/oal/search.html>. The decisions may be accessed by searching under the docket number EDU 7381-00.

¹⁶ 20 U.S.C. § 7151.

¹⁷ N.J.S.A. 18A:37-7 *et seq.*

¹⁸ Kingery, Paul M., (2000). *Zero Tolerance: The Alternative is Education*. Washington DC: The Hamilton Fish Institute; Skiba, R.J. (2000). *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*. Bloomington, IN: Indiana Education Policy Center.

¹⁹ Statement by Norma Cantu, Assistant Secretary of Education for Civil Rights, *The Civil Rights Implications of Zero Tolerance Programs*, Briefing for the United States Commission on Civil Rights, February 17, 2000, cited in Donahue, *et al*, *supra*.

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- ²⁰ New Jersey Department of Education. (2002). *Violence, Vandalism and Substance Abuse in New Jersey Schools 2000-2001*.
- ²¹ New Jersey Department of Education. (2001). *Violence, Vandalism and Substance Abuse in New Jersey Schools 1999-2000*.
- ²² Kingery, Paul M., supra.
- ²³ National Research Council & Institute of Medicine. (2001). *Juvenile Crime, Juvenile Justice*. J. McCord, C.S. Widom, & N.A. Crowell (Eds.). Washington, DC: National Academy Press, p. 85; Skiba, R.J., *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, supra; Skiba, R.J. & Peterson, R., supra.
- ²⁴ DeVoe, J.F., Ruddy, S.A., Miller, A.K., Planty, M., Synder, T., Katharin, P., Kaufman, P., Duhart, D.T., Rand, M.R. (2002). *Indicators of School Crime and Safety*, Report, Washington, DC: U.S. Department of Education, Office of Educational Research And Improvement, National Center for Education Statistics, and U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.
- ²⁵ The National School Safety Center, *School Associated Violent Deaths in the United States* (1994-1999).
- ²⁶ DeVoe, J.F. et al., supra.
- ²⁷ Donohue, Elizabeth, et al., supra.
- ²⁸ Skiba, R.J. *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, supra.
- ²⁹ National Research Council & Institute of Medicine, supra, p. 86.
- ³⁰ Skiba, R.J., et al., *The Dark Side of Zero Tolerance*, supra.
- ³¹ Kingery, Paul M., supra
- ³² Id.
- ³³ Id.
- ³⁴ Skiba, R.J. *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, supra.
- ³⁵ National Research Council & Institute of Medicine, supra, p. 87.
- ³⁶ Centers for Disease Control and Prevention. *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School: United States 1992*. Morb Mortality Weekly Report, 43: (08) March 4, 1994, p. 129-132.
- ³⁷ Office of Safe and Drug-Free Schools, United States Department of Education. (1996). *Creating Safe and Drug-Free Schools: Alternative Education Programs for Expelled Students*. Available at <<http://www.ed.gov/offices/OSDFS/actguid/alterse.html>>.
- ³⁸ Skiba, R.J., Michael, Robert S., Nardo, Abra. (2002). *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*. Bloomington, IN: Indiana Education Policy Center.
- ³⁹ National Research Council & Institute of Medicine, supra, p. 87.
- ⁴⁰ Gottfredson, Denise, C., (2001). *Schools and Delinquency*. New York: Cambridge University Press, p. 86.
- ⁴¹ Blum, R.W., McNeely, C.A., Rinehart, P.M. (2002). *Improving the Odds: The Untapped Power of Schools to Improve the Health of Teens*. Minneapolis, MN: Center for Adolescent Health and Development, University of Minnesota.
- ⁴² National Center on Violence Research. (1998). *Violence in the Schools*. Pittsburgh, PA: Carnegie Mellon University; National School Safety Center; *What Works: Promising Violence Prevention Programs*. School Safety Workbook. Malibu, CA: Pepperdine,

University Press; Gottfredson, D. (1997). *School Based Crime Prevention*, in *Preventing Crime: What Works, What Doesn't, What's Promising. A Report to the United States Congress*, edited by L. Sherman, et al. Washington, DC: US Department of Justice Programs, National Institute of Justice.

⁴³ Kingery, Paul M., *supra*.

⁴⁴ Centers for Disease Control. (2001). *Youth Risk Behavior Survey*.

⁴⁵ DeVoe, J.F., et al., *supra*.

⁴⁶ National Research Council Institute of Medicine, *supra*, pp. 122 – 132; Gottfredson, G.D., Gottfredson, C.C., Czeh, E.R., Cantor, D., Crosse, S.B. & Hantman, I. (2000). *National Study of Delinquency Prevention in Schools*. Ellicott City, MD: Gottfredson Associates, Inc.

⁴⁷ Hamilton Fish Institute. (2001). *A Comprehensive Framework for School Violence Prevention*. www.hamfish.org/framework/start/html.

⁴⁸ Further information about the comprehensive approach and research-based practices may be found on the Hamilton Fish Institute website, www.hamfish.org.

⁴⁹ Ewing, Charles Patrick. (2000). *Sensible Zero Tolerance Protects Students*. Harvard Education Letter. Jan./Feb. 2000.

⁵⁰ Skiba, R.J., *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, *supra*.

⁵¹ Heaviside, S, et al., *supra*.

⁵² McAndrews, Tobin. (2001). *Zero Tolerance Policies*. ERIC Digest No. 146. ERIC Clearinghouse on Educational Management, College of Education, University of Oregon (recommends zero tolerance policies that “allow flexibility”); Education Law Center. (2002). *Survey of Key Education Stakeholders on Zero Tolerance Student Discipline Policies* (finding that school administration organizations support zero tolerance, but believe administrators should be allowed discretion in student discipline matters).

⁵³ S. Heaviside, et al., *supra*.

⁵⁴ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

⁵⁵ *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

⁵⁶ *Ratner v. Loudoun County Public Schools*, 16 Fed. Appx. 140, 2001 WL 855606 (4th Cir. 2001) (finding that “... the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy ...”).

⁵⁷ *Worthington v. Fauver*, 88 N.J. 183, 204 (1982).

⁵⁸ *Levine v. Institutions and Agencies Dept. of New Jersey*, 84 N.J. 234, 258 (1980) (“the right to a free public education is ... expressly guaranteed [in our Constitution] and, thus, as defined by this Court ... does constitute a fundamental right”); *Robinson v. Cahill*, 69 N.J. 133, 147 (1975) (*Robinson IV*) (“...the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution”).

⁵⁹ A full discussion of the case law in which other state courts have determined that education is a fundamental right is beyond the scope of this article. However, a state-by-state summary of school finance court rulings, in which the courts discuss the right to a public education under the state constitution, can be found on the web site for the Advocacy Center for Children’s Educational Success (ACCESS): www.accessednetwork.org/litigationmain.html.

⁶⁰ *Doe v. Poritz*, 142 N.J. 1, 90 (1995) (applying balancing test to statute which infringed on the right to privacy).

⁶¹ Cathe A. v. Doddridge County Board of Educ., 200 W.Va. 521 (1997).

⁶² Skiba, R.J. & Peterson, R., supra.

⁶³ Kingery, Paul M., supra.

⁶⁴ IMO the Grant of the Charter School Application of Englewood on the Palisades Charter School et al., 164 N.J. 316, 322 (2000); Robinson v. Cahill, 62 N.J. 473, 508-509 (1973), cert. denied, 414 U.S. 976 (1973) (Robinson I).

⁶⁵ First, although the Commissioner and State Board claimed they were applying an arbitrary and capricious standard of review, they carefully considered and discussed all of the facts in K.A.'s case and applied a level of scrutiny to the school board's decision that is not typical of this standard. Second, before issuing a final decision reversing K.A.'s expulsion, the Commissioner had denied K.A.'s application for emergent relief, which predated ELC's representation and did not include state constitutional claims, and specifically found that it was unlikely K.A. would succeed on the merits of the appeal. In other words, prior to the time a fundamental rights argument had been raised, the Commissioner indicated that he would not reverse the expulsion. Third, on the date the Commissioner issued the decision reversing K.A.'s expulsion, he applied an arbitrary and capricious standard in another discipline case and summarily upheld the permanent expulsion and termination of educational rights for a high school sophomore who admitted to calling a false bomb threat into his school. These factors indicate that K.A. prevailed in his appeal because he raised state constitutional challenges to the school board's zero tolerance policy. Even though neither the Commissioner nor State Board explicitly based their decision on a fundamental rights analysis, both applied a heightened level of scrutiny to reverse the expulsion.

⁶⁶ In another case from New Jersey, State ex rel. G.S. 330 N.J. Super. 383 (Ch. Div. 1999), the court in a juvenile proceeding ruled that the state has a constitutional obligation to provide an alternative education program to a juvenile expelled from school for conduct for which he was also adjudicated delinquent. The court did not address the constitutionality or soundness of zero tolerance or the school board's decision to terminate all educational services for G.S. for acting as a "lookout" during a false bomb threat. Rather, the court rested its decision on its statutory mandate to consider the academic needs of an adjudicated child and the state's constitutional duty to ensure a public education for all children residing within the state. G.S. is a trial court decision made in the context of a juvenile proceeding, yet it provides an additional precedent for a constitutional analysis in a student discipline case.

⁶⁷ For a more detailed discussion of the limits of federal claims relative to zero tolerance, see, Browne, J., Losen, D., & Wald, J. (2001). *Zero Tolerance: Unfair, with Little Recourse*, In Skiba, Russel J., and Noam, Gil, G. (Eds), *New Directions for Youth Development, Zero Tolerance: Can Suspension and Expulsion Keep Schools Safe*. No. 92, Winter 2001, p. 73.

⁶⁸ Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000).

⁶⁹ Ratner v. Loudoun County Public Schools, 16 Fed. Appx. 140, 2001 WL 855606 (4th Cir. 2001).

⁷⁰ Id.

⁷¹ Dixon v. Alabama State Board of Education, 294 F.2d 105 (5th Cir. 1961).

⁷² See, Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

⁷³ Colvin v. Lowndes, 114 F.Supp.2d 504 (N.D. Miss 1999), modified 32 IDELR 32 (No. Dist. Miss. 2000); see also, Lee v. Macon County Board of Educ., 490 F.2d 458 (5th Cir. 1974) (holding that when statute vests board of education with authority to consider individual facts in imposing expulsion, due process requires a school board to fully consider the circumstances surrounding the misdeed as well as the penalty to be prescribed, without simply confirming the principal's recommendation); Lyons v. Commonwealth of Pennsylvania, 723 A.2d 1073 (Commonwealth Ct. Pa. 1999) (invalidating expulsion under zero tolerance policy because district superintendent failed to exercise discretion to modify discipline, as required by state statute); compare, Mitchell v. Board of Trustees, 625 F.2d 660 (5th Cir. 1980) (holding that where district's discipline code called for mandatory punishment and did not require the consideration of individual circumstances, the due process clause does not guarantee the exercise of discretion by the school board in determining the punishment).

⁷⁴ 20 U.S.C. § 1400 et seq.

⁷⁵ 42 U.S.C. § 2000d; 34 C.F.R. § 100.7(b).

⁷⁶ 20 U.S.C. § 7115.

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