

THE CHILDREN LEFT BEHIND:
HOW ZERO TOLERANCE IMPACTS
OUR MOST VULNERABLE YOUTH

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INTRODUCTION

The *Michigan Journal of Race & Law* Symposium, February 8th and 9th, 2002, at the University of Michigan examined the issue: Separate but

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Unequal: The Status of America's Public Schools. In the past, children of color were expressly denied an equal education on the basis of their race. Today's policies deny many children of color access to educational programs and supports, for reasons that are neutral on their face, with devastating consequences to the students, their families and their communities. The following article explores the concerns and experiences of a public service agency with the growing application of "Zero Tolerance" policies and practices to schools and school children. The purpose of this article is to increase awareness of the nature and effects of zero tolerance policies and to explore the resultant issues that must be addressed. In the end, the persons most disproportionately affected include children of color but when zero tolerance policies result in a failure to educate some children, the consequences impact not only those children, but all of us.

The Student Advocacy Center of Michigan (the Center), a statewide, private, not-for-profit organization, was established in 1975 and continues today as the only Michigan organization advocating on behalf of public school students in both general and special education. The Center serves children who experience difficulty accessing needed educational and support services, explores the effects of their circumstances, and offers information to policy makers, educators and the public about possible remedies. The Center is unique in its focus on the *in-school* experiences of students, working in partnership with parents, schools, community leaders and organizations to encourage and promote school policies and practices that work for children, and to challenge those that, however well-intentioned, have a harmful impact.

A primary goal of the Center is to assure that students receive effective and appropriate educational services *the first time around*, in their home school, rather than be referred for remedial or alternative services after they have experienced failure. The Center works to ensure that families have the information they need to advocate successfully for their children, and that policy makers and the general public understand the consequences of unfair, exclusionary or poorly implemented educational policies and systems.

I. AN OVERVIEW OF ZERO TOLERANCE

In 1954, *Brown v. Board of Education*¹ heralded equal educational opportunities for children of color.² In the mid-seventies, state and federal laws mandated educational services for children with disabilities.³ At last,

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. The *Brown* Court expressly overruled the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896); it ringingly declared that "in the field of public education . . . [s]eparate educational facilities are inherently unequal." *Id.* at 495.

3. See Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (requiring that any program or facility receiving federal funds *not* discriminate against an otherwise qualified individual solely because of the individual's disability. This applies to

it appeared that the commitment to universal public education was assured. However, with the passage of the federal 1994 Gun-Free Schools Act (GFSA)⁴ the dream for equality began to wither. As a consequence of GFSA, zero tolerance school laws, policies and informal practices have swept the nation. In the process, these laws have swept uncounted numbers of our most vulnerable and needy children into the streets where they remain uneducated, unserved, and unsupervised. These zero tolerance laws and policies have proliferated, in part, due to a number of horrifying high profile stories.⁵ However, despite these incidents, school associated deaths are rare occurrences. Of the 2,752 children nationwide who were murdered in 1997–1998, just over 1% were school-associated.⁶ Furthermore, most crimes that occur in school are not violent. For example, as of 1998, theft made up 58% of all crime at school.⁷ In addition, violent crimes against students have declined since 1992.⁸

Although 90% of our schools are free from serious crime,⁹ the public's perception of school violence and, thus, the field of public opinion has changed. While a few decades ago academics and politicians would

virtually all public schools and requires them to accommodate students' disabilities.); see also Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (1994) (amended 1997); 34 C.F.R. 300 (1999) (regulations for due process and other provisions).

4. Gun-Free Schools Act, 20 U.S.C.A. § 7151 (West Supp. 2000).

5. Today a series of widely publicized school shootings have left the nation wondering why some students resort to violence to express their frustrations and anger. In most cases, the assailant-to-be had exhibited clear signals of the impending aggression. For instance, Kip Kinkel, the fifteen-year-old high school student whose shooting rampage left his parents and two of his classmates dead and another 22 students injured, had read a passage of his journal about killing other students out loud in school. He was caught with a gun the day before the shooting and was subsequently expelled from school. No one intervened either before or after the expulsion, thereby further marginalizing an already angry and frustrated young man. THE STUDENT ADVOCACY CENTER OF MICHIGAN, ACCESS DENIED 1 (1999) (on file with the Michigan Journal of Race & Law) [hereinafter ACCESS DENIED].

6. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY 2 (Oct. 2000), available at <http://nces.ed.gov/pubs2001/2001017.pdf>.

7. *Id.* at 4.

8. *Id.* at 4.

9. Office for Victims of Crime, U.S. Department of Justice, Legal Series Bulletin No. 2: Reporting School Violence (Jan. 2002), <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/ncj189191.pdf>.

A "serious crime" has been variously defined and a single, standard definition remains elusive. Attorneys for the National School Boards Association refer to crimes that should be the target for school zero-tolerance policies as "behavior that would be punished as illegal off campus" and behavior that "present[s] a danger to others." Julie Underwood, Statement to U.S. Commission on Civil Rights 6–7 (Feb. 18, 2000) (on file with the Michigan Journal of Race & Law). The Michigan School Code requires school boards to permanently expel students, subject to possible reinstatement, for crimes such as physical assault, possession of a dangerous weapon, criminal sexual conduct, and arson. MICH. COMP. LAWS §§ 380.1310–1311 (West 2001).

have struggled to understand where violent children went wrong, today legislators are proposing an extension of the death penalty to offenders as young as eleven years old. The most widespread manifestation of the policy shift from rehabilitation to harsh punishment has been the almost universal use of “zero-tolerance” laws to punish and expel students who bring weapons to school.

“Zero tolerance (ZT) education policies are a variety of school disciplinary practices that mandate automatic suspension and/or expulsion from school for offenses perceived to be a threat to the safety of other children, school employees, or the school community itself.”¹⁰ While these laws originally focused on truly dangerous and criminal behaviors, such as gun possession,¹¹ some states extended these laws to include possession of other types of weapons,¹² as well as the possession or use of drugs. School districts also quickly expanded the policies even further to include infractions that pose no safety concern, such as “disobeying [school] rules,” “insubordination,” and “disruption.”¹³ The list of offenses that trigger zero tolerance responses continues to grow. Additionally, many school districts invoke the language of zero tolerance and expel children for violating school rules when the zero tolerance policies do not extend to the behavior punished. Actions that were once considered relatively harmless childhood pranks now result in expulsion and often criminal or juvenile delinquency charges. For example, “Aspirin, Midol, and even Certs have been treated as drugs, and paper clips, nail files, and scissors have been considered weapons.”¹⁴ Once snared, regardless of the offense, the student is likely to be treated as if he or she has violated the weapons law and will receive all the harsh penalties that accompany a charge of possessing a gun, including permanent expulsion and referral to the courts.

While these policies do not explicitly target racial minorities, studies of multiple school districts uniformly indicate a disparate impact upon racial minorities.¹⁵ These policies can be applied in extremely subjective

10. R. J. Skiba & R. L. Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 PHI DELTA KAPPAN 372 (1999).

11. Russell J. Skiba, *Zero Tolerance, Zero Evidence: A Critical Analysis of School Disciplinary Practice*, Research Review Submitted to the U.S. Commission on Civil Rights 4 (Feb. 9, 2000).

12. *Id.* at 4–5.

13. ADVANCEMENT PROJECT, THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 1 (2000) [hereinafter OPPORTUNITIES SUSPENDED].

14. *Id.*

15. See *id.* at 6; RUSSELL J. SKIBA ET AL., UNIVERSITY OF NEBRASKA—LINCOLN, INDIANA EDUCATION POLICY CENTER, Policy Research Report #SRS1, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (2000), available at <http://www.indiana.edu/~iepc/>; Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILDREN 381–91 (2000), available at <http://www.ideapractices.org/ideadepot/dispropotionate.htm>.

ways that are often influenced by racial prejudice.¹⁶ For example, “an African-American high school student in . . . Rhode Island offered to help his teacher dislodge a stuck diskette from his classroom’s computer. But when he pulled out his keychain knife to help release the disk, he fell afoul of . . . ‘zero tolerance’ rules, which mandate automatic exclusion for any student who brings a ‘weapon’ to school . . . On the other hand, a white student in . . . Vermont was neither suspended nor expelled when he explained that he’d brought a loaded shotgun to school because it was hunting season.”¹⁷ With the increased focus on zero tolerance policies in the past several years, cases that involve a reemergence of barriers to education rather than efforts to assure an appropriate quality of services and supports have also increased.

This article begins by discussing the history and evolution of zero tolerance policies, and takes a closer look into the Federal Gun Free Schools Act (GFSA). Part II looks at the rapidly expanding network of laws that Michigan has enacted as a consequence of the GFSA. Part III identifies the problems that have arisen with zero tolerance policies. These problems include racial and special education disparities, due process issues, a heavy reliance on punishment rather than prevention, a lack of available data to analyze the true effects of zero tolerance policies, and the lack of alternative education opportunities for children who have been targeted by these policies. Part IV discusses how zero tolerance laws lead to excessive punishment. Part V focuses on Michigan zero tolerance laws and the impact on students who lack legal protection from their overenforcement. Part VI of this article presents representative narratives of children who have been harmed by zero tolerance expulsions; and part VII discusses possible solutions to these problems, from amending current policies to changing the implementation of these policies.

A. *The History of Zero Tolerance*

“Zero tolerance” as a term received national attention as the title of a 1986 program developed by U.S. Attorney Peter Nunez, which impounded seagoing vessels that carried *any* amount of illicit drugs.¹⁸ In 1988 the program became a national policy when U.S. Attorney General Edwin Meese III “ordered customs officials to seize the vehicles and property of anyone crossing the border with even trace amounts of drugs, and charge those individuals in federal court.”¹⁹ The impoundment

16. Terry Keleher, Program Director, Applied Research Center, Racial Disparities Related to School Zero Tolerance Policies, Testimony before the U.S. Commission on Civil Rights (Feb 18, 2000) (on file with the Michigan Journal of Race & Law).

17. *Id.* at 2.

18. Skiba, *supra* note 11, at 4.

19. *Id.* at 4.

program was phased out in 1990 after an Oceanographic Institute research vessel was seized when a single marijuana cigarette was found in a sailor's cabin.²⁰ Nevertheless, the idea of zero tolerance captured the nation's imagination and was applied to an expansive range of topics, "ranging from environmental pollution and trespassing to skateboarding, homelessness, and boom boxes."²¹ In 1989, the first school districts began to implement zero tolerance policies in response to perceived violence in schools. California, Kentucky, and New York made expulsion mandatory for offenses such as fighting, drugs and gang-related activity.²² In 1990, Congress enacted the Gun-Free School Zones Act.²³ This act prohibited, with few exceptions, the possession or discharge of a firearm in a school zone.²⁴ However, in *United States v. Lopez*,²⁵ the Supreme Court held that the Gun-Free School Zones Act exceeded Congress' commerce clause powers, and was therefore unconstitutional.²⁶ After the Supreme Court ruled that the Gun-Free School Zones Act was unconstitutional, many states enacted their own legislation requiring expulsion for serious offenses, including the possession or discharge of a firearm. By 1993, local policies were adopted throughout the country, often expanded to include smoking on school grounds, physical fighting, making verbal threats, failure to disclose knowledge of another student's verbal threat, and "school disruption."²⁷

Not until 1994 did zero tolerance truly become a national policy. In order to avoid the constitutional issues that arose in *Lopez*,²⁸ Congress tied the Gun-Free Schools Act (GFSA) to its spending power instead of its commerce clause power.²⁹

B. *The Federal Gun Free Schools Act*

The Federal Gun Free Schools Act³⁰ (GFSA) requires that any state that receives Elementary and Secondary Education Act³¹ funds must have a law that requires an expulsion of one calendar year for possession of a

20. *Id.* at 6.

21. *Id.* at 4.

22. *Id.* at 4.

23. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844 (codified in scattered sections of 12, 18, 20, 21, 28, 31, 42, 46, U.S.C.).

24. *Id.*

25. 514 U.S. 549 (1995).

26. *Id.*

27. Skiba, *supra* note 11, at 4.

28. Gun-Free Schools Act, 20 U.S.C.A. § 7151 (West Supp. 2002).

29. *Id.*

30. *Id.*

31. Elementary and Secondary Education Act, 42 U.S.C. §§ 6301-6392 (2000).

firearm.³² Although this policy seems rigid, there are significant exceptions. For example, the law states “such State law *shall* allow the chief administering officer of a local educational agency to modify the expulsion . . . on a case-by-case basis”³³ Although this language implies that the State is required to give the school district the power to alter the mandatory expulsion, many states, including Michigan, do not provide for this case-by-case consideration.³⁴ In addition, the law explicitly provides an exception for firearms that are “lawfully stored inside a locked vehicle on school property”³⁵ and are used in “activities approved and authorized by the local educational agency . . . [when the] agency adopts appropriate safeguards to ensure student safety.”³⁶

When a violation requiring expulsion takes place, the State must comply with certain other requirements. Each state is required to provide a “description of the circumstances surrounding any expulsion,”³⁷ including the name of the school, the number of students expelled and the type of firearms concerned.

The GFSA also requires an educational agency to have a policy requiring the referral of any student who has brought a firearm or weapon to school to the criminal justice or juvenile delinquency system.³⁸ The ambiguity of the statute compounds the negative effects. While the term “firearm” is explicitly and carefully defined, the term “weapon” is not defined anywhere in the statute. Furthermore, even though the GFSA explicitly mentions firearms, *not weapons*, when mandating a student’s expulsion, the inclusion of the term “weapon” in the referral requirement has led many states to enact laws, and many school boards to enact rules that similarly apply the one-year expulsion to any “weapon,” thereby increasing the reach of the GFSA.³⁹

States and local school districts have broadened zero tolerance even further beyond weapons, including drugs and alcohol, and in some instances, fighting or homework completion in their policies. In Michigan, *permanent* expulsions are mandated for the possession of a

32. The statute defines a firearm as:

A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an *explosive*; B) the frame or receiver of any such weapon; C) any firearm muffler or firearm silencer; or D) any destructive device. 18 U.S.C. § 921(a)(3) (2000).

33. 20 U.S.C.A. § 7151(b)(1) (emphasis added).

34. See *infra* note 42.

35. 20 U.S.C.A. § 7151(g).

36. *Id.*

37. *Id.* § 7151(d)(2).

38. *Id.* § 7151(h)(1) (emphasis added).

39. New York and Texas are among the states that require mandatory expulsions for weapons. See OPPORTUNITIES SUSPENDED, *supra* note 13, app. III; see also Modzeleski, *supra* note 42.

dangerous weapon, arson, and criminal sexual conduct, instead of the one-year expulsion required only for possession of a firearm.⁴⁰ Some districts now apply these policies to behaviors that occur outside of school.⁴¹ Although the policies vary from district to district, as of 1999, 94% of schools across the nation reported zero tolerance policies for firearms and 91% reported policies for weapons other than firearms.⁴² Zero tolerance policies have extended to situations not involving weapons: 87% of schools had policies that required expulsion for alcohol and 88% had such policies for drugs.⁴³ Overall, what was once zero tolerance for firearm possession under the GFSA has been expanded to situations which, in effect, harm rather than help children.

II. MICHIGAN'S ZERO TOLERANCE LAWS

Before the advent of the Gun-Free Schools Act, Michigan's school suspension and expulsion procedures were encoded in the Michigan School Code of 1976.⁴⁴ The 1976 Code did not mandate suspension or expulsion for weapons, drugs, or other offenses; rather, incidents were reviewed on a case-by-case basis and discipline was meted out according to the circumstances of the case.⁴⁵ According to section 380.1311(1) of the School Code, a school board could expel a "pupil guilty of [a] gross misdemeanor or persistent disobedience when in the board's judgment the interest of the school may demand the authorization or order."⁴⁶ In the

40. MICH. COMP. LAWS ANN. § 380.1311(2) (West 1997) ("If a pupil possesses in a weapon free school zone a weapon that constitutes a dangerous weapon, commits arson in a school building or on school grounds, or commits criminal sexual conduct in a school building or on school grounds, the school board . . . shall expel the pupil from the school district permanently . . .").

41. See Student Advocacy Center of Michigan, Case Files (on file with the Michigan Journal of Race & Law); see also *Burns v. Fowlerville*, No. 95-cv-40001 (E.D. Mich. 1995) (involving a student who faced expulsion and was accused of being with another student who may have been carrying a gun, after school hours and off school grounds).

42. William Modzeleski, Briefing on the Civil Rights Implications of Zero Tolerance Policies in Schools, Address Before the U.S. Commission on Civil Rights (Feb. 18, 2000) (on file with the Michigan Journal of Race & Law).

43. *Id.*

44. Michigan School Code of 1976, 1976 Mich. Pub. Acts 451, reprinted in Mich. Comp. Laws § 1311(1).

45. MICH. COMP. LAWS 380.1311(1).

46. *Id.* In 1985, the Attorney General of Michigan stated, in an opinion, that a board of education "may not . . . suspend or expel a pupil for negligent conduct or petty or trivial offenses . . . [but a student may be expelled for] willful misconduct detrimental to the school or persistent disobedience of reasonable rules and regulations of the school." Schools and School Districts, Op. Att'y Gen. of Michigan No. 6271, at 14 (1985). Neither the legislation nor the opinion by the Attorney General of Michigan contains a definition of "gross misdemeanor," "persistent disobedience," "willful misconduct" or "reasonable rules and regulations."

experience of the Student Advocacy Center,⁴⁷ the use of draconian or long-term expulsion was not a prevailing trend before the GFSA, and these generic reasons for expulsion did not present a problem.⁴⁸

In response to the GFSA, substantial amendments were enacted to the school code in 1995 and then again in 1999. In 1995, section 380.1311 (2) was added to the school code, requiring permanent expulsion for “possession of a dangerous weapon,” “arson,” and “criminal sexual conduct,” unless the situation meets one of the exceptions identified in the law.⁴⁹ In order to fall under an exception, the student must establish:

in a clear and convincing manner at least [one] of the following:

- a) The object or instrument possessed by the pupil was not possessed by the pupil for use as a weapon, or for direct or indirect delivery to another person for use as a weapon.
- b) The weapon was not knowingly possessed by the pupil.
- c) The pupil did not know or have reason to know that the object or instrument possessed by the pupil constituted a dangerous weapon.
- d) The weapon was possessed by the pupil at the suggestion, request, or direction of, or with the express permission of, school or police authorities.⁵⁰

Furthermore, under Michigan law, if the student is in fifth grade or below and has been expelled for possession of a firearm or for threatening someone with a dangerous weapon, the student may petition for reinstatement after 60 days, but may not be reinstated until 90 days have passed.⁵¹ If a young student has been expelled for other reasons, he or she may petition for reinstatement at any time, but may not be reinstated until 10 days have passed.⁵² If the student is in sixth grade or above, he or she may petition for reinstatement after 150 days have passed, and may be

47. Since this type of data has not been tracked by the Michigan Department of Education, this trend is based on the anecdotal experience of the Student Advocacy Center.

48. The laws regarding expulsion that were enacted before the GFSA remain in full force today, and are currently used with increasing frequency in conjunction with the newer laws in order to justify outlandish expulsions. Today these undefined grounds for expulsion are increasingly problematic.

49. MICH. COMP. LAWS ANN. § 380.1311(2) (West 1997 & Supp. 2002) (possession of a dangerous weapon, criminal sexual conduct and arson).

50. *Id.* § 380.1311(2)(a)–(d).

51. *See id.*, § 380.1311(5)(a)–(b). Even though a student can petition for reinstatement, there is no guarantee that the school will accept the petition and reinstate the student. In the experience of the Center, the student generally remains out of school.

52. *Id.*

reinstated only after 180 days have passed.⁵³ The law explicitly excuses school districts from any obligation to assist the family in preparing the petition.⁵⁴ Similarly, once the petition is submitted, the district is under no obligation to approve the petition. Nor is any other public school district in the state obliged to admit the student although admission is not prohibited.

In 1999, additional sections governing zero tolerance suspensions and expulsions were added to the school code. These sections:

- 1) allow a teacher to suspend a student for up to one full day for good reason,⁵⁵
- 2) require a suspension of up to 180 school days for a physical assault against another pupil,⁵⁶
- 3) require a permanent expulsion for any “physical assault” against a school employee or volunteer,⁵⁷ and
- 4) require a suspension or expulsion at the discretion of the school board for instances of “verbal assault” against a school employee or volunteer.⁵⁸

Michigan laws place the responsibility of finding a suitable alternative educational program for the expelled individual upon the student and his or her parents.⁵⁹ They also require the schools to report all school “crimes” to the police and reciprocally for the police to report any crimes committed in the community to the schools.⁶⁰ Finally, schools are required to report the number of pupils expelled with a brief description of the incident that caused each expulsion.⁶¹

The State of Michigan has one of the most punitive school discipline codes in the nation. Local school district policies in Michigan generally expel students for drug or alcohol possession; disobedience; the possession of any controlled substances (including prescriptions and antibiotics); and even the possession of over-the-counter drugs such as Tylenol and Sudafed.⁶² Furthermore, if a child is expelled for a mandatory offense, as

53. *Id.*

54. *See id.* § 380.1311(5)(c).

55. *See id.* § 380.1309.

56. *See id.* § 380.1310(1).

57. *See id.* § 380.1311a(1).

58. *See id.* § 380.1311a(2).

59. *See id.* § 380.1310(2), 1311(10), 1311a(11).

60. *See id.* § 380.1308(3)–(4). This assures the involvement of the juvenile justice system for an increasing number of students.

61. *See id.* § 380.1310a.

62. Nancy E. Walker et al., *Should Michigan's Zero Tolerance Policies be Tolerated?* (unpublished manuscript, on file with the Michigan Journal of Race & Law).

defined in section 1311(2),⁶³ the student is excluded from any school in the state unless he or she is sight-and-sound separated from any other educational program. Not only does Michigan expel students for offenses that many other states do not regard as serious,⁶⁴ but Michigan also places extra burdens on the families of expelled students. These families bear the responsibility for providing alternative education and petitioning for reinstatement. These severe burdens ultimately result in disproportionate effects upon children of color, especially children of lower economic classes.

III. ZERO TOLERANCE UNDERMINES THE VISION OF UNIVERSAL EDUCATION: WHO IS EXCLUDED?

Although both the federal and state zero tolerance laws require school districts to report their expulsion data, this requirement is often ignored. Accurate and comprehensive data to analyze the true effects of these zero tolerance or expulsion policies is currently impossible to acquire; and therefore, no study can accurately estimate the impact upon society. However, every study that has been completed has determined that these policies have radically increased the number of expulsions.⁶⁵ Multiple studies have determined that zero tolerance policies primarily affect young children in sixth through ninth grades,⁶⁶ and all studies show that zero tolerance policies disproportionately affect

63. Offenses requiring mandatory expulsion are: possessing a dangerous weapon in a weapon free school zone, arson and criminal sexual conduct. See § 380.1311(2).

64. Walker et al., *supra* note 62, at 9.

# OF STATES USING EXPULSION	OFFENSE
17	Drug and alcohol possession
12	Disobedience
10	Assault against another student
8	Vandalism
6	Verbal threats

Michigan expels students for *all* of these offenses.

65. Joan M. First, Executive Director, The National Coalition of Advocates for Students (NCAS), Testimony before the U.S. Commission on Civil Rights (Feb. 18, 2000), at 1 (referencing the newsletter, *Catalyst: Voices of Chicago School Reform*, indicating that expulsions in Chicago rose from 21 in 1994–1995 to 668 in 1997–1998).

66. ACCESS DENIED *supra* note 5, at 12; THE STUDENT ADVOCACY CENTER OF MICHIGAN, CHILDREN LEFT BEHIND 5 (1999) (unpublished manuscript, on file with the Michigan Journal of Race & Law) (analyzing child risk factors as antecedents to expulsions from within the 1999–2000 school year expulsion cases of the Student Advocacy Center of Michigan) [hereinafter CHILDREN LEFT BEHIND].

minorities.⁶⁷ According to the experience of the Student Advocacy Center, these policies also target children with special education needs.⁶⁸

A. *Incomplete and Unreliable Data*

Despite the disastrous impact of these policies and informal practices, accurate and comprehensive documentation of the effects of zero tolerance policies is virtually non-existent. Although both federal and state laws require school districts to provide expulsion data, there are no enforcement mechanisms that force the schools to accurately track and report data. Thus, in most states, including Michigan, the requirement to report is unenforced; consequently, the number of children and, more specifically, the extent of the impact on poor children and children of color are unknown.

In 1998, in response to Freedom of Information Act (FOIA) requests to 100 Michigan school districts, the Student Advocacy Center received only seventeen responses with sufficiently analyzable data.⁶⁹ Those seventeen districts self-reported 581 total expulsions for school years 1995–1996 and 1996–1997.⁷⁰

In September 2000, in response to a Freedom of Information Act (FOIA) request,⁷¹ the Michigan Department of Education (MDOE) stated that due to an “encryption” problem no suspension or expulsion data for the 1999–2000 school year existed for the state, even though the law requires the compilation of this data.⁷² Although some data was ultimately obtained, an analysis of this data from the MDOE found that only 4% of

67. First, *supra* note 65.

[A] recent study . . . found that since Zero Tolerance policies have been popularized, African American students at the schools surveyed have been expelled or suspended at a rate that is disproportionate to their numbers. In some of the school districts surveyed, African American students were removed from school three to five times more frequently than [W]hite students . . . [D]ata reveal[s] that school exclusion is consistently about race. Federal civil rights data show that during the 1976–77 school year, 15 percent of all U.S. public school students were Black and 75% were [W]hite. Yet Blacks received 30 percent of suspensions and expulsions, while [W]hites received just 64%. By 1997–98, 17 percent of the public school students were black and 64 percent were white, but Blacks received 32% of suspensions, [W]hites just 51 percent. During the past 25 years there has NEVER been a year when suspension and expulsion rates were higher for [W]hite students than for African American students.

Id.

68. CHILDREN LEFT BEHIND, *supra* note 66, at 69 (1999).

69. ACCESS DENIED, *supra* note 5, at 11 (1999).

70. *Id.*

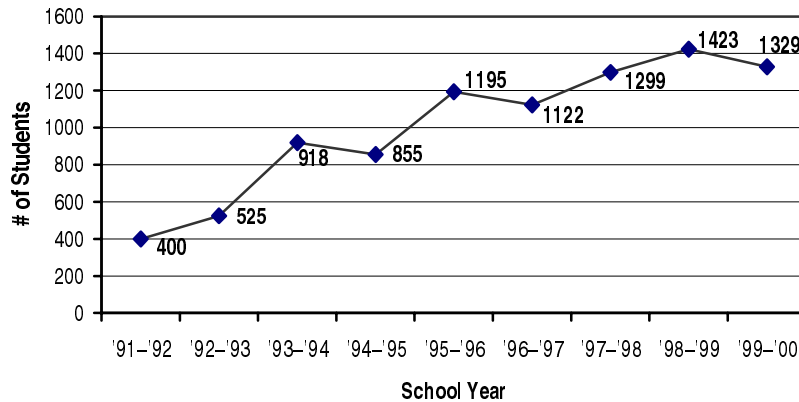
71. MICH. COMP. LAWS § 15.231 *et seq.* (2000).

72. MICH. COMP. LAWS Ann. § 380.1311a (West 2000).

the state's 555 districts reported.⁷³ From that small percentage of districts, a total of 589 students was reported expelled in that one year.⁷⁴ In the 2000–2001 school year, approximately 20% of all school districts reported expulsion data to MDOE. The data that was reported was so poor that the state did not even attempt to analyze or report the data.

Since 1995, the Center's experience strongly suggests that Michigan's expulsions are skyrocketing. While there are no reliable records from Michigan, the following charts from the State of Wisconsin and the Chicago Public Schools provide a general indication of the growing overuse of zero tolerance policies nationwide.

FIGURE I
WISCONSIN PUBLIC SCHOOL EXPULSION TREND⁷⁵

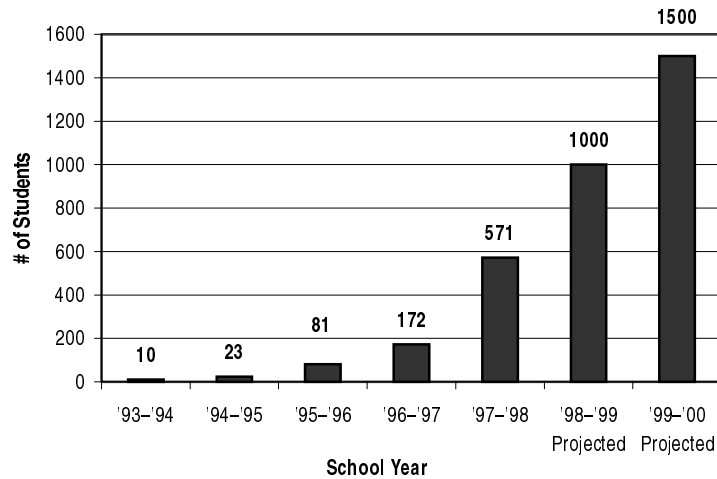


73. STUDENT ADVOCACY CENTER OF MICHIGAN, Michigan Public Schools Expulsion Data1 [hereinafter *Michigan Public Schools Expulsion Data*] (on file with the Michigan Journal of Race & Law).

74. *Id.* at 2.

75. WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, BULLETIN NO. 02030, OFFERING EDUCATIONAL OPPORTUNITIES TO EXPELLED STUDENTS IN WISCONSIN 2 (2001), available at <http://www.dpi.state.wi.us/dpi/dlsea/sspw/postexpul.html> (on file with the Michigan Journal of Race & Law).

FIGURE 2
STUDENT EXPULSIONS PER YEAR, CHICAGO PUBLIC SCHOOLS⁷⁶



Studies in Michigan also lack information on the relationship between poverty and the likelihood of student expulsions. Repeated FOIA requests made by the Center to the state and to the local districts for data regarding the relationship of free/reduced lunch eligibility and zero tolerance expulsions have gone unanswered.

B. The Extent of the Impact on Children of Color

In every school district examined, scholars and policy makers have found significant racial disparities in student suspensions and expulsions.⁷⁷ African-American and Latino students are more likely to be suspended or expelled than their White counterparts. In some areas, African Americans are suspended or expelled at twice their proportion of the school population.⁷⁸ In other areas, Latinos are expelled up to four times their proportion of the school population.⁷⁹ For decades, surveys have consistently reported such disparate impact on state and national levels.⁸⁰

Additionally, the Michigan data for the 1999–2000 school year collected by the Student Advocacy Center of Michigan illustrates that out of a reported 589 expulsions, African-American students constituted the

76. Keleher, *supra* note 16, attachment 2.

77. *Id.* at 1.

78. *Id.*

79. *Id.*

80. See OPPORTUNITIES SUSPENDED, *supra* note 13.

largest racial group. “Though demographic information is not complete even among the few schools that did report on expulsions, we can glean some trends from the data . . . African American students constituted the largest number of students expelled (265 out of 404 students for whom ethnicity information was provided.)”⁸¹ For example, in the Lansing School District, 51% of the expulsions were of African-American students, even though they comprised only 33% of the school district’s population. This disproportionate representation by African Americans in the expulsion rates is not due to socioeconomic status. Studies that have accounted for this possibility by controlling the poverty level have still found that race “makes a significant contribution to rates of school suspension.”⁸²

According to Dr. Russell Skiba, the source of the racial disproportionality is largely due to the differences in the number of office referrals made by classroom teachers. Once the student is referred to the main office, there are no significant “differences between [W]hite and [B]lack students in mean number of days per suspension . . . [but] African American students [are] almost twice as likely to be referred to the office as [W]hite students.”⁸³ There are also differences in the types of incidents that result in a referral. African-American students are referred for behavior such as “Loitering, Disrespect, Excessive Noise, Threat, and a catch-all category called Conduct Interference.”⁸⁴ White students are typically referred for more explicit behavior, such as “Smoking, Endangering, Obscene Language, Vandalism, and Drugs/Alcohol.”⁸⁵ The categories that result in suspensions for African-American students are typically more subjective, and it has been hypothesized that the “disproportionate discipline of African-American students may be due in part to a misrepresentation of differences in the behavior of [B]lack and [W]hite students that are essentially culturally biased.”⁸⁶

81. *Michigan Public Schools Expulsion Data*, *supra* note 73, at 3.

82. Dr. Russell Skiba, *Zero Tolerance: Issues of Equity and Effectiveness*, Briefing to the U.S. Commission on Civil Rights 2 (Feb. 18, 2000) (on file with Michigan Journal of Race & Law). However, the Urban Institute Program found: “Low-income adolescents were also two-and-a-half times as likely as higher-income adolescents to have been expelled or suspended from school in the previous year . . . Nationwide, these indicators remained the same in 1997 and 1999 for both income groups of 12- to 17-year-olds.” URBAN INSTITUTE PROGRAM, 1999 SNAPSHOTS OF AMERICA’S FAMILIES II: CHILDREN’S BEHAVIOR AND WELL-BEING 3, available at <http://www.urban.org/content/Research/SAF/Snapshots/1999Results/ChildrensBehaviorandWellBeing/Behavior.htm> (on file with the Michigan Journal of Race & Law). The combination of minority status and low socio-economic status presents almost insuperable barriers to academic success for many of these children.

83. Skiba, *supra* note 82, at 2.

84. *Id.*

85. *Id.*

86. *Id.* at 2.

C. The Extent of the Impact on Children with Special Education Needs

An analysis of the Center's expulsion case records⁸⁷ for the 1999–2000 school year found evidence that many of the students who were expelled should have been screened for special education services eligibility long before the triggering incident. The most common risk factors were indications of emotional problems (17%), previous trauma (15%), diagnosis of ADHD (15%), participation in private counseling or therapy treatment (13%), and depression (11%).⁸⁸

While Michigan does not explicitly track how many expelled students had been certified as needing special education services, a Center study found that 71% of the students in the study were either special education certified, receiving Section 504 protections,⁸⁹ or had identifiable risk factors prior to the expulsion incident.

Some school boards refuse to diagnose or test students for disabilities, even when the symptoms that should have alerted school officials are present. Fifty-two percent of the children in the Center's study had exhibited one or more risk factors but had never been referred for evaluation. The failure to properly identify students with special needs, or the failure to provide the necessary academic support for eligible students, results in students being penalized academically and punished for behaviors that could and should have been averted by positive, supportive behavior plans.

The students in the Center study were not expelled for violent acts. Rather, they were expelled for writing, verbalizing, exhibiting signs of fear and anger or just poor judgments. That fear and anger may have been directly linked to the lack of accommodations and support provided to them.⁹⁰

D. The Extent of the Impact Upon Young Children

Every expulsion study of students by age and grade identifies early adolescence as the age group most likely to receive school exclusion penalties. This is confirmed by studies by the Michigan Family Independence

87. The sample size is 91 case records.

88. CHILDREN LEFT BEHIND, *supra* note 66, at 5.

89. See *supra* note 3; Section 504 of the Rehabilitation Act of 1976, 29 U.S.C. 794 (1976) is an anti-discrimination measure that applies to any facility that receives federal funds, including public schools. A school must reasonably accommodate a student's disability. Such accommodation includes adjustments in course content, teaching techniques, and the student's environment. A student under section 504 protection cannot be suspended or expelled unless the school observes certain due process procedures.

90. CHILDREN LEFT BEHIND, *supra* note 66, at 14.

Agency,⁹¹ by independent studies by research organizations such as the Michigan State University Institute for Children and Families and by advocacy agencies such as the Center:

Early adolescence is a period of fast-paced and varied physical, emotional, social, and intellectual change and development. During these years, young people explore who they are and think about who they will be. This exploration manifests itself in risk-taking and experimentation with new attitudes and behaviors. Healthy risks within safe, secure limits are valuable to character development; however, risks taken in an atmosphere lacking adult guidance and positive alternatives may put adolescents in harm's way.⁹²

Redirection of unwanted or unacceptable behaviors would be more beneficial than expulsion, which may lead to dire consequences, especially to minority children who may have no other resources for education.

IV. ZERO TOLERANCE LEADS TO EXCESSIVE PUNISHMENT

Zero tolerance policies are used to justify major punishments for minor infractions. Many school districts loosely interpret "weapon," resulting in widely publicized expulsions for "key chains, butter knives, . . . and even chicken 'fingers'⁹³ and textbooks. Zero tolerance policies are also invoked for "verbal assault"⁹⁴ or even accidental acts construed as assault.⁹⁵

Zero tolerance impact is amplified when children are denied the opportunity to be heard or to explain themselves. Rather than encouraging

91. Michigan Family Independence Agency Children's Services, Report of Expulsion Results, Grade Code Count, Aug. 1999–Aug. 2000 (on file with the Michigan Journal of Race & Law).

92. THE MIDDLE START INITIATIVE, LEAGUE FOR HUMAN SERVICES, STARTING AGAIN IN THE MIDDLE (2001) (on file with the Michigan Journal of Race & Law).

93. WALKER, *supra* note 62, at 9 (citations omitted).

94. MICH. COMP. LAWS ANN. 380.1311a(2) (West Supp. 2002). "Verbal assault" has never been defined.

95. In one egregious example,

Students on a school bus were playfully throwing peanuts at one another. A peanut accidentally hit the white female bus driver, who immediately pulled over to call the police. After the police arrived, the bus was diverted to the courthouse, where the children were questioned. Five African American males, ages 17 and 18, were then arrested for felony assault, which carries a maximum penalty of five years in prison . . . The young men lost their bus privileges and suspension was recommended . . . all five young men, who were juniors and seniors, dropped out of school because they lacked transportation to travel the 30 miles to their school

students to trust and rely on adults when faced with a troubling situation, the current reliance on punitive consequences also silences students who may be most concerned about the well-being of their classmates. Zero tolerance policies have been used to punish children who help others or turn in weapons, thus discouraging behavior that society wants to promote. Examples of such situations include:

- A male high school student learns that a suicidal friend has a weapon. He persuades her to give it to him. When he hands it to school authorities, he is expelled.⁹⁶
- A troubled girl speaks with a teacher after school. She gives the teacher the knife she was carrying because she does not want to get into trouble. She is expelled.⁹⁷

Once a student has been targeted with a zero tolerance policy, many school administrators ignore the exceptions allowed in the law, and insist that they have no choice but to expel the student. Often, the administrators fail to investigate the incident, and expel the child based upon accusations or dubious evidence.⁹⁸ This mindset allows for any kind of allegation to be considered for punishment.

These unfair applications of zero tolerance policies are particularly damaging to the students, because “[m]ost suspensions and expulsions take place at the middle and high school level, when many adolescents are acutely tuned into issues related to fairness and justice.”⁹⁹ Adolescents display “a heightened sensitivity to situations where they believe the punishment may not be warranted and seem to crave individualized discipline.”¹⁰⁰

Why do schools apply zero tolerance policies in these damaging ways? Some school administrations lack accurate information, and have, in some situations, been provided with incorrect interpretations of the law. Other administrators may use zero tolerance policies in order to rid themselves of undesirable students. Many administrators are either unaware of the statutory exceptions, or choose to ignore their existence.

Aggravating the situation, the MDOE distributes inaccurate information. The MDOE publishes a sample policy for school administrators, but in discussing suspensions and expulsions makes no mention of the Michigan statute, section 1311(2) exceptions, which are

OPPORTUNITIES SUSPENDED, *supra* note 13, at 2–3.

96. First, *supra* note 65.

97. Student Advocacy Center Case Files (on file with the Michigan Journal of Race & Law).

98. See, e.g., *Newsom v. Batania*, 842 F.2d 920 (6th Cir. 1988) (upholding student’s expulsion based solely on anonymous testimony of two other students and where accused student was not allowed to learn the identity, or cross-examine, either accuser).

99. OPPORTUNITIES SUSPENDED, *supra* note 13, at 10.

100. *Id.*

explicitly provided. The MDOE's policy regarding suspensions and expulsions states:

Michigan Law requires a school district to permanently expel a student who possesses a dangerous weapon, commits arson or criminal sexual conduct. Subsequent laws were enacted that allow a one-day snap suspension by a teacher for a student who creates a safety threat; requires school districts to suspend or expel a student for *up to 180 school days* who commits a physical assault against another student; requires that a student be suspended or expelled for a verbal assault or a bomb threat; and requires a student who commits a physical assault against a school employee or volunteer to be permanently expelled.¹⁰¹

With no readily accessible information regarding applicable exceptions, administrators insist that they have no choice but to expel a student, blaming the expulsion entirely upon the statutory requirements.

Another reason for increased resort to zero tolerance policies is that the fear of student violence is so pervasive that many school officials worry about being sued by the families of potential victims of violence, despite the fact that it is not a common occurrence. A school administrator may thus choose to expel a student in a situation that does not call for expulsion, assuming that it is better to expel many students rather than to miss a case that may result in violence.

The fact that standardized test scores are tied to merit-based funding (MEAP)¹⁰² creates another incentive for a school's stringent application of zero tolerance policies. "[T]here are two ways to change standardized test scores at a school. Either children learn more, or the composition of the test pool changes."¹⁰³ Zero tolerance policies provide administrators with an easy way to remove low-scoring students. A Chicago high school administrator spoke of approximately 700 students who had been dropped from the rolls because they missed 20 or more days of school. He said, "What we have found is that those kids who are missing 20 days are the ones that drag your test scores down . . . We want quality more than quantity. If that means removing dead weight, then we will remove dead weight."¹⁰⁴

101. MICHIGAN DEPARTMENT OF EDUCATION, *MDE Recommendations: Suspensions and Expulsions*, available at http://www.michigan.gov/documents/MDE-P2_suspensions8-00_13805_7.pdf (providing advice to school administrators regarding the state of Michigan Laws) (emphasis in original).

102. Under the Michigan Educational Achievement Program (MEAP), a portion of the state funding to a school is tied to that school's MEAP scores. Students are tested in various subjects in grades 4–12.

103. First, *supra* note 65.

104. *Id.*

In other situations, students who have additional needs are often expelled because administrators do not want to deal with the additional accommodations that caring for such students requires.¹⁰⁵ This can include students with physical and learning disabilities, and even students whom administrators find troublesome or irritating such situations include:

- A school board failing to make any accommodations for a fourth grade student with documented hearing problems. The child is suspended over four times for “disrespectfulness.”¹⁰⁶
- A school board refusing to test a student for learning disabilities. The child is subsequently expelled for misbehaving.
- A student being dropped from school enrollment for missing more than 10 days of school.
- A student’s expulsion for failure to progress academically.

A number of improper motivations perpetuate the use of zero tolerance policies. Unfortunately, as a consequence of these improper motivations, minority students are disproportionately affected.

V. THE LACK OF LEGAL PROTECTIONS

A. *No Fundamental Right to Education*

The Michigan Constitution requires the establishment of public elementary and secondary schools;¹⁰⁷ however, it does not provide children with the fundamental right to an education. The Michigan Legislature has made public school attendance compulsory for children

105. Memorandum from Special Education Supervisor, Oceana Intermediate School District, to Special Education Staff (Oct. 16, 2000) (on file with the Michigan Journal of Race & Law).

We have gotten a lot of referrals for EI [emotionally impaired] evaluations. I have some concerns with this. If a child is already receiving services, what will change by labeling him or her EI? . . . The thing you need to be aware of is that if the child gets suspended and you have to do a Manifestation Determination Review, you will probably have to say that the behavior IS a manifestation of his/her disability, and you will not be able to suspend the student . . . Just be aware that labeling a child EI ties our hands in certain situation[s].

Id.

106. Based on Student Advocacy Center case records.

107. Mich. Const. 1963, art VIII § 2.

between the ages of six and sixteen.¹⁰⁸ However, as concluded by the Michigan Attorney General in 1985,

It is my opinion . . . that the board of education of a school district which, in accordance with due process requirements, suspends, for a lengthy period of time, or permanently expels, a non-handicapped student who is subject to the compulsory education requirements, is not required to provide an alternative education program for such student.¹⁰⁹

These provisions, taken together, lead to the most egregious abuses of zero tolerance. The failure to guarantee education to all students means that an expulsion could result in no education at all, regardless of the child's age.

B. *Due Process Concerns*

The severity of penalties and consequent effects of permanent expulsion from school services call for stringent due process protections to ensure proper use of zero tolerance laws. Unfortunately, due process protections that correspond to the gravity of the penalties are lacking.

It is interesting to note that clear federal and state protections exist for many classes of individuals. For example, the Civil Rights of Institutionalized Persons Act (C.R.I.P.A) protects incarcerated adults and juveniles. Teachers and school administrators have specific due process avenues.¹¹⁰ Yet students in general public education programs are

108. The Michigan Compiled Laws state:

(1) Except as provided in subsections (2) and (3), every parent, guardian, or other person in this state having control and charge of a child from the age of 6 to the child's sixteenth birthday, shall send that child to the public schools during the entire school year. The child's attendance shall be continuous and consecutive for the school year fixed by the school district in which the child is enrolled. . . .

MICH. COMP. LAWS § 380.1561.

109. *Schools and School Districts*, Op. Att'y Gen. of Michigan No. 6271, 13, 17 (1985).

110. A tenured teacher, for example, has a property interest in continued employment and is entitled to due process before that property interest can be taken away. A probationary teacher, on the other hand, has only a limited interest co-terminus with his or her current contract, and when that has elapsed, there is no further interest. Even so, the probationary teacher is entitled to due process and fundamental fairness. Moreover, general administrative rules include the following: dismissal only for specified reasons that are based on objective and documentable evidence; due process procedural safeguards, as established by state statutes. Similarly, principals and other school administrators enjoy due process protections against arbitrary dismissal. States also have statutory due process provisions regarding notice, opportunity for refutation, and appeal for teachers, principals, and school administrators, in addition to whatever union protections might exist in a given

protected only by the general right to due process contained in the 1975 U.S. Supreme Court decision, *Goss v. Lopez*,¹¹¹ in which “the Court made it clear that ‘[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.’”¹¹² However, neither the judicial opinion nor Michigan legislation specifies what these “formal procedures” might be.

This lack of clear due process protections leads to casual and capricious decisions to expel. There is no requirement for vigorous scrutiny of evidence before making the life-affecting decision to expel a student. School administrators fail to assess individual acts for intent or potential danger. District personnel act as investigator, prosecutor, judge and jury.

According to the Michigan Attorney General opinion, the judicial branch does have the authority to review the decisions that school boards make, and thus, school boards should be hesitant to violate students rights. However, this broad statement overlooks several considerations. First, many families have no access to legal advice or representation and, thus, are not even aware of their options. Second, the families of most expelled students cannot afford to bring suit against the school board. Third, even if the student manages to bring suit against the school board, the court generally defers to the judgment made by the school board without examining the merits of the case.¹¹³ Additionally, even if families have access to courts and receive a favorable judgment, by the time a decision is rendered, the child has already been out of school for a long time, and damage to the child’s future has already occurred.

*C. The Consequences of Long Term Expulsion:
The Absence of Educational Alternatives
for All Expelled Students*

Data about student status, post expulsion, is rarely forthcoming. We know that alternative education programs are not readily available. A number of issues remain unclear: how long expelled students are out of school; when or whether expelled students are ever reinstated in their

school district. NATHAN L. ESSEX, *SCHOOL LAW AND THE FUTURE OF PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* 225–28 (2002). A school can dismiss for only a limited number of statutory grounds, and *the burden of proof resides on the board of education to show cause based on a preponderance of evidence. Id.* at 230 (emphasis added).

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

112. *Schools and School Districts*, Op. Att’y Gen. of Michigan 6271, 13, 14 (1985).

113. See, Mich. Const., Art. VI, § 28 (reviewing courts are bound to uphold an administrative agency’s findings of fact if there is rational and substantial evidence to support them); see also, *Newsome v. Batavia, Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1988) (holding that accused student facing expulsion, based solely on “tips” from other students, had no right to cross-examine tipsters or learn of their identities); accord *Paredes v. Curtis*, 864 F.2d 426 (6th Cir. 1988). But see *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000) (holding that expelling school board *must* consider exculpatory evidence offered by accused student).

home district; and whether they are able to enroll in a new district or in an alternative setting. Since Michigan does not assure a constitutional right to an education, local districts and the state are absolved of responsibility for educating expelled students. With a stunning disregard of reality, Michigan expulsion laws charge parents of expelled children with the obligation of providing an education for their children.¹¹⁴ Michigan law states that the legislature has fulfilled its responsibility by establishing a system of public schools, regardless of whether or not affected students and their families have any access to alternatives.

Home schooling is not realistic for a poor, ill-educated or over-worked parent. Access to private alternatives—or to another public school district—is highly questionable even if the school is willing to admit the expelled student. Children expelled under the weapons law are barred from all public schools in the state.¹¹⁵ When a child is expelled for a violation of local school rules and is therefore not barred from all public schools in the state, he or she is nevertheless rarely permitted to enroll in another district.¹¹⁶ Furthermore, prohibitive fees, transportation and age requirements usually present insurmountable barriers for even the most determined families.

In a January 2000 letter to the State Office of the Superintendent, a Wayne County school district superintendent recounted his sad personal experience with the parent of an expelled student:

Upon learning that her [14-year-old] son was expelled from all public schools, save those designed specifically for troubled youth . . . the parent ask [sic] about the educational alternatives for her son. . . . I shared that the office of safe schools compiled information on . . . existing alternative education programs . . . that may be open to enrollment of individuals expelled Upon requesting this information, I found that the vast majority of alternatives [listed] were not open to expelled students.¹¹⁷

Ironically, students who cannot find alternative educational facilities that will accept them or are geographically accessible and affordable, may then be denied readmission to their home schools because they have been

114. MICH. COMP. LAWS § 380.1310(2) (2000).

115. *Id.* § 380.1311(2),(3).

116. A school district other than the expelling school district may accept an application from an expelled student only after he or she has been denied reinstatement by the expelling district. The district receiving the application has the complete discretion to admit or deny the student. Its decision is final and not appealable. Mich. Comp. Laws Ann. § 380.1311 (5)(a)–(f) (West 2000); *see also* ACCESS DENIED, *supra* note 66, 35 (1999).

117. Letter from James F. Richendollar, Superintendent of Wayne County School District to the State Office of Superintendent (Jan. 2000) (on file with the Michigan Journal of Race & Law).

out of school. The reason given for denial is “the child has not continued his [or her] education.”¹¹⁸ Alternative education hurdles are frequently faced by children too young for alternative programs, or too poor to pay for transportation or tuition.

1. Additional Effects of Expulsion Upon Children of Color

While minority students are affected in the same way in which all expelled students are affected, the effects are often more significant due to socioeconomic differences between minority and majority students and families. Additionally, the large number of minority students who are excluded from the educational system results in a larger adverse impact upon the minority population as a group. Since more minorities are excluded from educational services, zero tolerance laws support a culture which perpetuates a system of undereducated members. A lack of education prevents entry into many avenues of employment. This, in turn, leads to behaviors that reflect anger and despair and may portend future encounters with the penal system. For example, in Michigan, there are more young African-American men in prison than there are in college.¹¹⁹ This appalling fact most severely impacts African Americans, and to a lesser degree, society as a whole.

2. Additional Effects of Expulsion Upon Special Education Students

A student who is eligible for special education services is guaranteed a free, appropriate public education (FAPE) regardless of disciplinary status. For those students who have been expelled under a zero tolerance policy, such services, when delivered at all, most often provide two to four hours a week in an isolated location. Even the casual observer would find this inadequate. While it sounds as if these children are better off than students expelled without these services, the services provided are nonetheless inadequate. Children in need of special education require, by definition, *more* services than the average student, not less. Yet, expelled students receive only a fraction of the services available to average in-school students. Also the home-schooled student misses the socialization that only a school or classroom can offer.

118. Student Advocacy Center Case Files (on file with the Michigan Journal of Race & Law).

119. See generally JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS? THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN (2002), available at <http://www.justicepolicy.org/coc.pdf> (on file with the Michigan Journal of Race & Law).

3. Additional Effects on the Entire School Community

The emphasis on punishment and repression impacts the whole school population, staff, and “good students,” as well as those unfortunate enough to be caught in the net of zero tolerance policies. In the summer of 2000, fifty high school students from fifty different school districts in Michigan attended a seminar on zero tolerance. Students spoke of the oppressive climate permeating their schools. They expressed deep concern for their fellow students as well as anxiety about the way youth in general are perceived. Punitive laws legitimize a poisonous climate of fear and suspicion on the part of both staff and students. With the proliferation of these stringent laws, the general public believes that there must be a problem and the fear of violence is reinforced. There is no forum for young people to examine concerns and identify strategies to make schools safe and nurturing places for all students, and no method of calculating the damages that zero tolerance policies inflict on other students and faculty.

VI. STORIES: GRIM TALES OF BOYS AND GIRLS

The following cases are from the most recent files of the Student Advocacy Center. The names are fictitious. They come from four different Michigan counties in different parts of the state and represent urban, rural and suburban districts.

A. “Mark”

In June, as school was drawing to a close, Mark, an African-American sixth grader with a history of behavioral problems, had a very bad day. He was involved in two fights, one during school and one immediately after. There were no weapons and no injuries.

The superintendent of his school district sent a letter to his parents informing them that Mark was expelled from the district and that there was no appeal of this decision. When a pro bono attorney recruited by the Center first called the school district, he was informed that this was a final decision and Mark could not be served in the district because of his pattern of unacceptable behaviors. The attorney persisted and, at a meeting with the family and the school, was able to point out that Mark’s mother had requested referrals for special help over the years.

As a resolution, Mark has been placed in a supportive program. The expulsion record has been expunged and the district is evaluating Mark to see if he qualifies for special education. Mark now attends school. This would be an unlikely outcome for students coming from lower

socioeconomic backgrounds and minorities who do not know their rights or have the means to obtain representation.

B. "John"

In November 2001, John, a Caucasian eighth grader, was taunted by a classmate who wanted to know what he was carrying in his duffle bag. John finally replied, "What do you think I have, a bomb?" John was sent to the office. No alarm was sounded nor was the building evacuated. A school administrator (not a trained police bomb expert) later searched his duffle bag and locker. No bomb was found. Nevertheless, John was expelled from school without a hearing. He spent the last year at home working on commercial correspondence programs at his parents' expense. He returned to school in the fall of 2002.

C. "Mary"

Mary is an African-American eighth grader who has been regularly threatened and harassed by a family in her neighborhood. After a particularly serious altercation in May 2002 her mother called the school to report her concerns about Mary's safety as well as her ability to respond appropriately.

Mary's principal questioned her and found that she was carrying a knife because she was feeling so unsafe. She readily gave the knife to the principal who then suspended her and requested an evaluation to see if Mary qualified for special education services. The Multidisciplinary Evaluation Team (MET) found a history of possible depression and/or school phobia. Mary's academic testing indicated a student with considerable ability and potential; however, her school work was inconsistent and did not rise to her potential.

The MET found that they did not know Mary well enough to determine whether she was eligible for special education as she was relatively new to the district. It recommended a follow-up review in three to four months but found her ineligible for services at that time. The District immediately recommended permanent expulsion for violation of Section 1311(2).¹²⁰ The family contacted an advocate on the day of the hearing and the district then postponed the hearing.

Subsequently, Mary received private therapy and was diagnosed with a major depressive disorder. In early August, the family requested that the MET be reconvened to consider the new evidence. The district finally scheduled the reconvened MET three days after school had begun. The new MET quickly found Mary eligible for special services under IDEA

120. MICH. COMP. LAWS § 380.1311(2).

and found that her possession of the knife was a consequence of her feelings of extreme vulnerability. However, several placement possibilities must still be explored and Mary's entry into a ninth grade program is delayed.

D. "Ellen"

Ellen is a Caucasian third grader at an elementary school in a rural county. Ellen reported a bomb threat written on the bathroom wall and was interrogated by the police who demanded a handwriting sample. Subsequently another message appeared, 'There is a bomb in here.' Ellen told the police that she had written the second message but not the first. She alleges that the police told her that she could not go home unless she confessed to both incidents. Juvenile Court found Ellen 'not guilty' of the first incident and placed her on probation for the second. Ellen was expelled from school in March 2002. Her family has come to the Student Advocacy Center for assistance in finding an educational placement for Ellen.

VII. RECOMMENDATIONS

We believe that it is possible to assure safe, well disciplined schools while still guaranteeing that even our most troubled or troubling children will be provided with the intellectual and social skills to become active, productive members of our society. The following recommendations, either individually, but preferably as a package, hold the promise of achieving that goal:

1. **GUARANTEE ALL CHILDREN AN APPROPRIATE PUBLIC EDUCATION.** Either through legislation or constitutional amendment assure that all children, regardless of disciplinary or other status, be assured a free, appropriate public education.
2. **COLLECT AND ANALYZE ACCURATE DATA.** Although we know the general profile of children likely to be caught in the zero tolerance web, Michigan currently has no way to assess the magnitude and consequences of these policies. The Student Advocacy Center was asked by the State Superintendent of Instruction to submit its recommendations for data to be collected and reported in order to achieve a more detailed profile of the expelled student. The Center complied. Its request includes: a) demographic data including race/ethnicity, gender, free/reduced lunch status, special education eligibility, grade level, and MEAP scores; b) exclusions by length of time the student is out of

school; c) clearer and more specific definitions and reporting of violations; d) descriptive information about the status of the student (e.g., not in school, detention or juvenile court jurisdiction, alternative placement, special education plan).¹²¹ The expectation was that the State Board of Education would incorporate information about children out of school in its accreditation formula. Regrettably, though, it has not done so. Nevertheless, complete and accurate data is essential to assess the impact of zero tolerance policies and, though currently ignored, the law does require such collection and reporting.

3. **CODIFY DUE PROCESS PROTECTIONS IN THE MICHIGAN SCHOOL CODE.** At present, there are no statutory due process protections for Michigan children in general education, as opposed to those in special education. Perhaps protections modeled after New York requirements would be helpful. The New York requirements state that:

No pupil may be suspended for a period in excess of five school days unless such a pupil and the person in parental relation to such a pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right to representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf . . . A record of the hearing shall be maintained . . . A[n administrator] shall have the authority to modify this suspension on a case-by-case basis.¹²²

4. **IMPLEMENT CLEAR STANDARDS FOR ALTERNATIVE EDUCATION.** Once the need for an alternative educational program for a particular student is established, an accessible, appropriate program with needed supports should be provided. Elements of such a model program would include instructional hours at least equivalent to mainstream programs; transportation, when not located at the neighborhood building; opportunities to complete and receive credits; and an opportunity to transfer back to the home school after alternative conditions are met. With

121. Memorandum from Ruth Zweifler, Director of the Student Advocacy Center of Michigan, to Kathleen Straus, President, MI State Board of Education and Tom Watkins, State Superintendent of Instruction (Mar. 8, 2002) (on file with the Michigan Journal of Race & Law).

122. N.Y. EDUC. LAW § 3214 3(b)(2)(c)(1), 3(b)(2)(d) (2001).

support from the Charles Stewart Mott foundation, the National Youth Employment Coalition's Working Group on Effective Practices in Community Based and Alternative Education has developed a comprehensive Education Tool which can be used to identify effective practices and develop tools to improve educational practices for vulnerable youth.¹²³

5. ADDRESS THE OBVIOUS DISPARATE IMPACT ON CHILDREN OF COLOR. The continuing shame of racially disparate punishments must be challenged. In addition to establishing proactive, child-centered disciplinary programs, the State Board of Education should authorize the Department to monitor suspensions/expulsions for disparate impact on vulnerable populations and conduct an audit when necessary.
6. PROACTIVELY IDENTIFY CHILDREN WITH DISABILITIES AND CHILDREN EXHIBITING RISK INDICATORS. Disturbing behaviors and/or failure to make academic progress should signal the need to evaluate and determine eligibility for special education services. Nevertheless, these children are often ignored or dismissed as troublemakers or kids who just don't care. Federal regulations of the Individuals with Disabilities Education Act of 1997¹²⁴ require districts to implement Child Find, the process by which children are initially identified and evaluated for special education services. Michigan's rules do not contain any Child Find provisions. In a letter dated April 23, 2001, the Michigan Poverty Law Program submitted a Model Child Find Provision for Michigan Regulations. It included sections on Target Populations, Methods of Identifying Children, Public Awareness and Administration.¹²⁵ Implementation of such recommendations would go a long way to assure that children who need special supports will receive them.
7. PROVIDE TREATMENT FOR SUBSTANCE ABUSE. The current practice of expelling students for possession or use of

123. See National Youth Employment Coalition, *NYEC EDNet Tool* (2002), available at, www.nyec.org/EdStrategies.html (describing the Criteria and Self-Assessment Tool for Alternative Education) (on file with the Michigan Journal of Race & Law).

124. See *supra* note 3.

125. Letter from Suellen Scarnecchia, Associate Dean for Clinical Affairs, Michigan Poverty Law Program on behalf of Student Advocacy Center of Michigan, Michigan Council on Crime and Delinquency, and the Dyslexia Resource Center, to the Michigan Department of Education Office of Special Education and Early Intervention Services (Apr. 23, 2001) (on file with the Michigan Journal of Race & Law).

illegal substances is shortsighted at best. These young people need access to treatment and education or they will eventually join the growing number of prisoners incarcerated for substance abuse crimes, at great cost to society.¹²⁶

CONCLUSION

We believe that a vigorous public school system serving all children well is essential to a robust democracy. The long evolution from the earliest elite colonial academies to a public school system that has moved from asking “Who should be educated?” to “How shall we best educate all?” is regressing. The goal is no longer to assure that all young people will receive a free, individualized and equitable education and become full participating members of their communities. To identify a child as dangerous or to say that a child “scares me” is often enough to remove that child from all educational and support services. The recommendations listed above offer an alternative approach—one that will move to assure safe, appropriate learning environments for all of our children.

Eliminating zero tolerance laws—policies and practices that perpetuate suspicion and fear toward vulnerable children—would be the most effective means to achieve the goal of equal education. Laws to protect against violence are firmly in the criminal code and should be kept in that milieu. Removing these explicit statutes from the school code and concentrating on prevention and support are more hopeful means of achieving the safe, productive school environment that we wish for all of our children.

126. Michigan has the toughest zero tolerance drug penalties in the nation; for conviction of possession of 650 grams of certain narcotics and other controlled substances, the sentence is life imprisonment, MICH. COMP. LAWS. ANN. § 333.7403(2)(a)(i) (West 2001), which has been, unfortunately upheld in *Harmelin v. Michigan*, 501 U.S. 957 (1991).