

THREE

MICHIGAN'S BRAND OF ZERO TOLERANCE: IS THERE ANOTHER WAY?

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This paper explores the evolution of zero tolerance policies in Michigan public schools and assesses their current effectiveness. Drawing on research that compares state approaches to school discipline, the author contextualizes Michigan's policy choices and explores viable options to better protect all Michigan students.

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I. INTRODUCTION

His words were probably flip, sarcastic – said on an impulse to silence a taunting classmate. It was November 2001 and that classmate wanted to know what “John” was carrying in his duffel bag.¹ “What do you think I have, a bomb?” he shot back. Administrators never sounded an alarm or evacuated the building. They didn’t call in a trained police expert to search John’s bag, which contained no bomb. But they did expel the Michigan eighth grader without a hearing. He spent a year at home, receiving his education through a correspondence program on his parents’ nickel.

The incident brings to life a host of concerns about Michigan’s zero tolerance policies, both in the way the state defines mandatory expulsion and the way schools process these discipline decisions. Other states have enacted numerous protections for children facing suspension or expulsion – everything from requiring written notice of the charges to allowing case-by-case discretion in meting out mandatory expulsions.² Dan Rubin, a law intern at the Ann Arbor-based Student Advocacy Center of Michigan (SAC), found in a 2003 preliminary study of state school codes that Michigan lags behind every other state in the country in terms of the statutory protections it offers students facing suspension or expulsion³. As a result, punishments in Michigan schools often mismatch the alleged misdeed and disregard motive, intent, context, and common sense. During the expulsion process, some Michigan students are not afforded due process protections. Moreover, after the expulsion, an alarming number of students do not receive a referral to an educational service.

This paper will explore and evaluate Michigan’s school code provisions that pertain to the expulsion of students. After tracking the rise of zero tolerance policies in both the U.S. and Michigan, the paper will compare Michigan’s school code with other states, and discuss the inclusion and exclusion of various provisions. Bill analyses and official minutes from Michigan House and Senate deliberations are employed to understand how and why Michigan’s discipline code evolved the way it did. Rubin’s research, analyzing school codes for every state, provides the necessary context to judge and understand Michigan’s discipline code, and allows an

¹ Ruth Zweifler and Julia De Beers, “The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth,” *Michigan Journal of Race & Law* 1, no. 8 (2000), 216.

² Dan Rubin, “Statutory Protections in State School Codes,” (Student Advocacy Center of Michigan, Ann Arbor, 2003, unpublished).

exploration of other approaches. The paper ends by evaluating the effectiveness of zero tolerance policies, and by weighing possible benefits to safety and costs to justice and liberty.

II. THE NATIONAL RISE OF ZERO TOLERANCE

School violence surfaced as a national policy concern in 1978 when Congress was presented with the Safe School Study Report, which explored the frequency and seriousness of crime in elementary and secondary schools and reported the number and location of schools affected by crime.⁴ However, it wasn't until 1989 that school districts in California, New York, and Kentucky began to mandate expulsion for certain offenses: possession of drugs, fighting, and gang-related activity.⁵ In 1990, Congress enacted the Gun-Free School Zones Act. That law was later found by the Supreme Court to exceed Congress' constitutional authority and thus declared, in part, unconstitutional.⁶ Despite the Supreme Court's ruling, many states enacted their own legislation requiring expulsion for serious offenses.

Youth violence was on the rise during the early 1990s as was fear in schools. Arrest rates for homicides committed by offenders ages 13 through 17 spiked, peaking in 1993.⁷ In the early 1990s, a startling 90 percent of high school seniors reported being worried about crime and violence.⁸ Eager for a "no-nonsense approach,"⁹ educators turned to "zero tolerance," a term that crept into the national lexicon in 1986 as the title of a program to impound seagoing vessels carrying any amount of drugs.¹⁰

The concept became a national school discipline policy in 1994 when, at the urging of the American Federation of Teachers,¹¹ Congress passed the Gun Free Schools Act (GFSA), tying the act to its spending power instead of its commerce clause power as the Gun Free School

³ The Student Advocacy Center of Michigan is a nonprofit based in Ann Arbor that works directly with expelled students and those in danger of expulsion, helping to secure appropriate educational services.

⁴ Joan M. Wasser, "Zeroing In On Zero Tolerance," *Journal of Law & Politics* (Fall 1999), 748.

⁵ 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 (Feb. 9, 2000), 2.

⁶ *United States v. Lopez*, 514 U.S. 549.

⁷ U.S. Department of Justice, Federal Bureau of Investigation, "Trends in Arrest Rates for Homicide, 1976-1996," as cited in Franklin E. Zimring, *American Youth Violence*, (New York: Oxford University Press, 1998).

⁸ U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 2002, "Section 2: Public attitudes toward crime and criminal justice-related topics, High School seniors reporting that they worry about selected social problems, United States, 1990-2002," at <albany.edu/sourcebook/1995/tost_2.html#2_x>.

⁹ Skiba, 2.

¹⁰ *Ibid*, 2.

¹¹ Wasser, 748-749.

Zones Act. By this time, homicides committed by youth had started to decline – as had school crimes and reports of physical fights by students, injuries in fights, and the number of students carrying a weapon.¹² The number of students threatened or injured with a weapon on school property had remained constant from 1993-1999,¹³ but the public's perception was different. Early stories documenting zero tolerance's success in reducing school fights fueled its acceptance.¹⁴ A national movement urged the passage of a zero tolerance policy.¹⁵

The GFSA requires states that receive federal funds under the Elementary and Secondary School Act to pass a law directing local districts to expel students for at least a year when it has been determined they have brought a weapon to school.¹⁶ Each state law is to allow the chief administering officer of a district to modify the expulsion requirement for a student on a case-by-case basis. A firearm is defined as 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 any explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer.”¹⁷ It also refers to any destructive device, including any explosive, incendiary or poison gas; bomb; grenade; rocket having a propellant charge of more than four ounces; missile having an explosive or incendiary charge of more than one-quarter ounce; and land mine. Knives and common fireworks were not included, but states were allowed to broaden the definition of weapon – and many have.¹⁸

III. ZERO TOLERANCE IN MICHIGAN

Although suspension and expulsion procedures were detailed in the Michigan School Code of 1976, nothing was mandated. In fact, as late as 1993, the school code said a school board “may authorize or order” the suspension or expulsion of a student guilty of “gross misdemeanor or persistent disobedience” if it best served the interest of the school.¹⁹

¹² Justice Policy Institute, *School House Hype: Two Years Later*, (San Francisco: Center on Juvenile and Criminal Justice, 2000).

¹³ Philip Kaufman, et al., *Indicators of School Crime and Safety*, U.S. Department of Education and Justice, NCJ No. 190075 (2001), at <<http://nces.ed.gov/pubs2002/crime2001>>.

¹⁴ Paul M. Kingery, *Zero Tolerance: The Alternative is Education*, (Washington, D.C., The Hamilton Fish Institute, 2000), at <<http://hamfish.org/pv/pub/susexp.html>>.

¹⁵ Wasser, 748.

¹⁶ Gun-Free Schools Act, 1994, *U.S. Code*, Vol. 20, sec. 70.

¹⁷ *U.S. Code*, Title 18, Part I, Chapter 44, Section 921 (3)-(4).

¹⁸ Wasser, 750.

¹⁹ Michigan Public Act 335 of 1993, Section 380.1311 of the Michigan Compiled Laws.

Eight days before the GFSA was passed by Congress, the Michigan Legislature adopted amendments to the school code provision relating to suspensions and expulsion. With a few exceptions,²⁰ the amendments required a district to permanently expel a student in possession of a dangerous weapon or one who has committed arson or rape on school grounds.²¹

Incidents involving the use or presence of weapons in schools appeared to fuel the changes. Both the Senate and House bill analyses described how weapons possession had recently disrupted the educational environment.²² A Lansing Eastern High School senior brandished a loaded gun during a lunchtime fight. A high school student in Tawas pulled a gun in a classroom, threatening to harm the teacher. A middle school honors student in Ironwood brought a gun to school and threatened to shoot his ex-girlfriend's new boyfriend.

The changes took effect Jan. 1, 1995, and within the year, some 240 students were expelled for offenses ranging from threatening other students with weapons to possession of pocketknives.²³ According to the Michigan House bill analysis, there was "considerable sentiment that schools should not have to treat all such cases alike and that some flexibility needs to be added to the law, particularly for younger children."²⁴ With this in mind, several provisions were added. Students enrolled in fifth grade or below and expelled for reasons other than a firearm's possession would no longer have to wait 60 days but could initiate a reinstatement petition at any time.²⁵ But those same students could not be reinstated before the expiration of 10 school days. Students enrolled in fifth grade or below and expelled for firearm possession or threatening another person with a dangerous weapon were required to wait 60 days before starting a petition and could not be reinstated before 90 days. The bill also mandated expulsion

²⁰ According to the Michigan Compiled Laws Section 380.1311 (2) (a)-(d), school boards were not required to expel a pupil for possessing a weapon if the pupil established in a clear and convincing manner at least one of the following:

- The object possessed was not possessed for use as a weapon.
- The object wasn't knowingly possessed.
- The pupil didn't know the object constituted a dangerous weapon.
- Or, the weapon was possessed by the pupil at the suggestion of school or police.

²¹ Michigan Public Act 328 of 1994, Section 380.1311 of the Michigan Compiled Laws.

²² Michigan Senate Fiscal Agency, "Student Expulsion for Weapons," SFA Bill Analysis of SB 966 and SB 1099, (Lansing: Michigan Senate Fiscal Agency, 1994), 1.

²³ Michigan Senate Fiscal Agency, "Expelled Students," SFA Bill Analysis of SB 527, (Lansing: Michigan Senate Fiscal Agency, 1995), 1.

²⁴ Michigan House Legislative Analysis Section, "Weapon-Based Expulsions," HLAS Bill Analysis of SB 527 with House Committee Amendments, (Lansing: Michigan House Legislative Analysis Section, 1995), 1.

²⁵ Michigan Public Act 250 of 1995, Section 380.1311 of the Michigan Compiled Laws.

for all criminal sexual conduct in a school building or on school grounds. The changes, approved December 25, 1995, took effect immediately.

Michigan's school code provisions pertaining to expulsion remained the same until 1999. Although school crime and general youth homicide arrest rates had dropped nationally over the past several years, various academics were predicting increases in school violence. In 1995, John DiIulio of Princeton University warned of the coming of tens of thousands of "severely morally impoverished juvenile superpredators" who will do what comes naturally: murder, rape, rob, assault, burglarize, deal deadly drugs and get high.²⁶ High-profile school shootings, including the 1999 Columbine High School shootings in Littleton, Colorado, also incited a tougher response.²⁷

New provisions allow teachers to suspend a student for up to one full day for good reason, require suspensions of up to 180 school days for a physical assault against another pupil, and require permanent expulsions for any physical assault against a school employee or volunteer.²⁸ The revised code also permits suspensions or expulsions for cases of "verbal assault" against a school employee or volunteer, although in a September 2003 ruling, U.S. District Judge David M. Lawson wrote that the state law was unenforceable because it was "unconstitutionally vague and overbroad."²⁹

As Michigan's school discipline code has grown more stringent, increasing numbers of students have been impacted. While only a few hundred were expelled in the mid-1990s, in the 2001-2002 school, expulsions numbered 1,588, likely a low estimate because only 82 percent of schools reported data.³⁰

²⁶ John R. DiIulio, "The Coming of the Superpredators," *The Weekly Standard*, 27 November 1995.

²⁷ Michigan Senate Fiscal Agency, "School Violence," SFA Bill Analysis of SB 183, SB 206, HB 4240, HB 4241, (Lansing: Senate Fiscal Agency, 1999).

²⁸ Michigan Public Act 23 of 1999, Section 380.1311a of the Michigan Compiled Laws.

²⁹ *Smith v. Mount Pleasant Public Schools*, No. 01-10312 (E.D. Mich., 30 September 2003). The case started in 2000 when a junior at Mt. Pleasant High School was suspended for 10 days after writing a parody of the school's tardy policy, using derogatory language to describe the principal. The ACLU of Michigan and Smith filed suit in September of 2001, alleging that the district violated Smith's First Amendment rights. While the Court found the state and district policy vague, it also found that the discipline did not violate Smith's First Amendment rights, so a request to change his school records was denied. In December of 2003, the plaintiff's motion for reconsideration was denied.

IV. AN OVERVIEW AND COMPARATIVE ANALYSIS

Because of these changes over the past 10 years, Michigan now has one of the most punitive school discipline codes in the nation.³¹ The following section analyzes how Michigan's state code differs from other states in several areas related to the definition and processing of expulsion.

A. Specificity

Twenty-seven states, Michigan included, expanded the federal mandatory expulsion provision to include any weapon and, in some cases, look-alike weapons.³² As of 2000, 17 states have mandated expulsion for drug and alcohol possession. Other states expel students for disobedience (12 states), assaults against other students (10 states), vandalism (eight states), and verbal assaults (six states).³³ Michigan expels students for offenses in all of these categories.

The broader scope of Michigan's laws was a deliberate decision. Senate Bill 966 of 1994, as reported from the Senate Education Committee, would have required expulsion only for those students unlawfully possessing a firearm, but the Senate passed a bill that expanded this to include dangerous weapons as well.³⁴ Those opposing this broader definition argued that a "sanction other than expulsion could be more appropriate for students found to be in unauthorized possession of a dangerous weapon."³⁵ The broader "dangerous weapon" concept would net a huge number of children and, as a result, the juvenile court system would likely be overburdened. On the other hand, some argued that incidents involving knives or other dangerous weapon were just as serious and "should be treated as such."³⁶ These proponents agree that students in possession of any dangerous weapon pose a threat and must be removed to ensure a safe school environment.³⁷

³⁰ Michigan Center for Educational Performance and Information, *School Safety Practices Report, 2001-2002 School Year*, (Lansing: CEPI, 2003).

³¹ Zweifler and De Beers, 200.

³² The Civil Rights Project at Harvard University and the Advancement Project, *Opportunities Suspended: The devastating consequences of zero tolerance and school discipline policies*, (Cambridge: Harvard University, 2000).

³³ Michigan Nonprofit Association, *Zero Tolerance Policies and Their Impact On Michigan Students*, Spotlight Series on Applied Research, Michigan Public Policy Initiative Series on Research. (Michigan Nonprofit Association, January 2003), at <http://www.mnaonline.org/pdf/spotlight%202002_12.pdf>, 5.

³⁴ Michigan Senate Fiscal Agency, "Student Expulsion for Weapons," 6.

³⁵ *Ibid*, 6.

³⁶ *Ibid*, 6.

³⁷ *Ibid*, 3-4.

A similar argument was made in 1999 when the state further expanded the scope of its discipline code, requiring suspensions of up to 180 days for assaulting a student and expulsions for assaulting a school employee or volunteer. Verbal assaults against a school employee or volunteer could also result in expulsion now. The broader definition was needed to “create and maintain a safe educational environment.”³⁸ Students who verbally assault a school official could be inclined to carry out their threat.³⁹ Physical attacks against another student couldn’t be overlooked in light of the “Littleton tragedy.”⁴⁰ In sum, just “one miscreant can disrupt an entire classroom, and a handful can ruin the atmosphere of a school,” meaning the broader discipline measures would “promote efforts to educate and to learn, as well as protect the physical safety of school personnel and students.”⁴¹

However, Michigan’s broad law can mean severe punishments for incidents involving such items as paper clips and over-the-counter drugs like Tylenol and Sudafed.⁴² Proportional responses are difficult. Consider the case of an African-American student permanently expelled from a primarily rural, white high school for showing the butt of a BB gun to a student who had exposed a T-shirt emblazoned with the Confederate flag.⁴³ A Michigan Court of Appeals ruled that although the state school code did not define BB guns as dangerous weapons, the statute did not expressly prohibit expulsion for possession of a BB gun on school property.⁴⁴

While the majority of states do not distinguish between firearms and deadly weapons, a few do, including Hawaii and Indiana.⁴⁵ These states specify that districts may choose – but aren’t required – to expel for possession of a dangerous weapon. This less punitive approach gives school administrators more discretionary power and enhances proportionality. In other words, it allows an administrator to mete out different and more appropriate punishments to the student with a loaded gun, on the one hand, and the student with a BB gun on the other.

³⁸ Michigan Senate Fiscal Agency, “School Violence,” 10.

³⁹ *Ibid*, 10.

⁴⁰ *Ibid*, 10.

⁴¹ *Ibid*, 11.

⁴² Zweifel and De Beers, 194, 200.

⁴³ Rubin.

⁴⁴ *Davis v. Hillsdale Community School District*, 226 Mich. App. 273, 573 NW.2d 77, 80, as cited by Rubin.

⁴⁵ Hawaii Revised Statutes 302A-1134.6; Indiana Code 20-8.1-5.1-10, as cited by Rubin.

B. Case-by-Case Discretion

The most common protection found in Rubin's study was a provision permitting case-by-case modification in mandatory one-year expulsions.⁴⁶ According to the Gun-Free School Act state laws "shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis."⁴⁷ More than 35 states include such a protection in their school code – but not Michigan.⁴⁸

Instead, Michigan's school code allows exceptions in its expulsion policy only if the pupil establishes in a clear and convincing manner at least one of the following:

- The object possessed was not possessed for use as a weapon.
- The object was not knowingly possessed.
- The pupil didn't know the object constituted a dangerous weapon.
- The weapon was possessed by the pupil at the suggestion of school or police.⁴⁹

From the beginning, the lack of discretion given to school administrators was debated. An opposing argument described in the 1994 Senate Fiscal Analysis of SB 966 said a school board may want to keep the child in school and obtain counseling for the student or take other steps more appropriate than expulsion.⁵⁰ Subsequent bill analyses noted that some school officials were concerned that zero tolerance "unnecessarily punishes some children who had no intent to harm"⁵¹ and "deprives schools of the flexibility they need to examine mitigating circumstances"⁵² There was even some concern that the state could lose federal funds because of the omission of a case-by-case provision.⁵³ Such concerns were countered by an assertion that administrators already had discretion through the four exceptions and that Congress was considering repealing the case-by-case provision.⁵⁴

According to the Student Advocacy Center of Michigan, which works to secure appropriate educational services for expelled and other at-risk students, a number of school

⁴⁶ Rubin.

⁴⁷ Gun-Free Schools Act.

⁴⁸ Rubin.

⁴⁹ Michigan Compiled Laws Section 380.1311 (2) (a)-(d).

⁵⁰ Michigan Senate Fiscal Agency, "Student Expulsion for Weapons," 5.

⁵¹ Michigan Senate Fiscal Agency, "Expelled Students," 3.

⁵² Michigan Senate Fiscal Agency, "School Violence," 12.

⁵³ Michigan Senate Fiscal Agency, "Expelled Students," 4.

⁵⁴ *Ibid*, 4.

officials have said they would consider modifying their response to discipline problems but cannot – their hands are tied and they must expel permanently.⁵⁵ Research indicates that even administrators who fully understand when they can use discretion may be reluctant to do so.⁵⁶

One reason for this reluctance is a fear of litigation.⁵⁷ Nationally, parents have attempted to sue schools for negligence in failing to prevent school violence, including an unsuccessful attempt in Littleton, where school officials were protected by state governmental immunity laws.⁵⁸ In Michigan, parents can sue individual employees (not schools) – but it's a difficult proposition, according to Norman Tucker, former president of the Michigan Trial Lawyers Association and senior shareholder at Sommers, Schwartz, Silver and Schwartz in Southfield.⁵⁹ Parents who threaten to sue typically never pursue the case after talking to an attorney, he said. The standard is quite high: "You have to prove gross negligence, willful and wanton misconduct," he said.⁶⁰ A Justice Policy Institute report noted that a legal analysis found no discernible trend by either state or federal courts in holding school officials liable for injuries students suffered by a third party while at school.⁶¹

Some administrators assume a uniform approach ensures fairness. For this reason, many do not support increased discretion in expulsion policy.⁶² A 1995 bill analysis said that reportedly school officials had been advised by legal counsel to ignore intent-based exceptions and treat students uniformly.⁶³ Discretion that results in discrimination is a legitimate concern, particularly if that discretion benefits affluent students over disadvantaged ones. But supposed concern about discrimination and fairness is disingenuous in face of the facts. Michigan's "uniform approach" – to treat students equally harshly – hardly ensures fairness. Students can receive very different punishments for the same offense depending on what school they attend

⁵⁵ Rubin.

⁵⁶ Wasser, 769.

⁵⁷ Wasser, 771.

⁵⁸ Karen Abbott, "Details unlikely to fuel more suits," *Rocky Mountain News* (Denver), 26 February 2004.

⁵⁹ Norman Tucker, Email to the author, 15 March 2004.

⁶⁰ Alan Fisk, "Suits Against Schools Explore New Turf," *National Law Journal*, 11 June 2002, at <www.law.com/jsp/article.jsp?id=1022954303348>.

⁶¹ Justice Policy Institute.

⁶² Wasser, 771.

⁶³ Michigan House Legislative Analysis Section, "Weapon-Based Expulsions," 3.

and, some would argue, what color their skin is. Black students represented 20 percent of all Michigan students in 2001-2002, but made up 38 percent of the expulsions.⁶⁴

In addition, students of all races are subject to punishments disproportionate to their alleged wrongdoing. Consider the case of an eighth-grader expelled for carrying a knife at a school football game, despite his explanation that he feared for safety and needed the knife for self-protection.⁶⁵ Similarly, a 12-year-old girl was expelled for carrying her father's hunting knife to protect herself against a man she believed was following her.⁶⁶ Two grade-school students were expelled after a janitor saw whittling knives fall out of their pockets on the playground after school.⁶⁷ The pair had reportedly just come from a friend's house, where they were whittling wood.

However, in Tennessee, an expulsion was overturned because a school district failed to consider a student's claim that he did not know about a knife he possessed. The ruling, which affects districts in Michigan, noted that a student could not injure another person or disrupt school if totally unaware of a weapon's presence.⁶⁸

While the 4th Circuit Court of Appeals seemed to encourage the use of some discretion in this case, some courts have been unwilling to second-guess school discipline decisions. In the suspension case of a middle school student in possession of the knife, it was found that he had taken the weapon from a suicidal friend.⁶⁹ Despite the seemingly mixed message from the courts, numerous states have adopted language in their school codes that encourages some discretion, sometimes with language that goes beyond the "case-by-case" concept. In Virginia, for instance, school officials "may... determine, based on the facts of a particular situation, that special circumstances exist and no disciplinary action or another term of expulsion is appropriate."⁷⁰ In West Virginia, school officials are directed to consider "the extent of the pupil's malicious intent," "the outcome of the pupil's misconduct," "the pupil's past behavior history," and the "likelihood of the pupil's repeated misconduct."⁷¹ An important consideration for future research

⁶⁴ According to the CEPI's "School Safety Practices Report," white students, 73 percent of students in the state, represented only 54 percent of expelled students.

⁶⁵ Michigan Senate Fiscal Agency, "Expelled Students," 3.

⁶⁶ *Ibid.*, 3.

⁶⁷ Michigan Senate Fiscal Agency, "Expelled Students," 3.

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

⁶⁹ *Ratner v. Loudoun County Public Schools*, 2001 U.S. App. LEXIS 16941 (4th Cir. 2001).

⁷⁰ Va. Code Ann. § 22.1-277.07 (A) as cited by Rubin.

⁷¹ W. Va. Code § 18A-5-1a(i) as cited by Rubin.

is how well such language translates into practice and prevents unjust suspensions and expulsions. But certainly, the existing language in Michigan's school code – not to mention the state's legal counsel – has done little to encourage discretion in practice.

C. Due Process

Due process rights are mentioned nowhere in Michigan's expulsion statute other than in reference to special education students. General education students have no statutory due process protections. Twenty-five states, on the other hand, require sufficient notice, an explanation of the evidence, and the opportunity to be heard⁷² – protections set out in the 1975 U.S. Supreme Court decision *Goss v. Lopez*.⁷³ This ruling applies to all states but does not require that they legislate such provisions.

Again, concerns were raised early on in Michigan as legislators amended the expulsion statute. A 1994 bill analysis noted that it was unclear in the bill “how or by whom a determination of the alleged [weapon] possession would be made.”⁷⁴ While the bill specified protections for special education students, “the courts have made it clear that *all* students are entitled to rudimentary due process protections when they are suspended even for short periods, and additional protections when they are permanently expelled.”⁷⁵

Michigan politicians have a history of protecting local control, and legislators may have worried that overt due process protections would inhibit administrators' ability to swiftly remove a dangerous student from school. Or maybe legislators saw such provisions as unnecessary, figuring that the *Goss v. Lopez* decision applies to the state and some districts already followed those provisions. But without legislative protections, the onus for appeal falls on the federal courts, which tend to defer to state administrative decisions. In the absence of legislation, schools also may not be aware of their obligations, and thus, students like “John,” described in the beginning of the paper, are handed severe punishments without a chance to tell their side of the story.

⁷² Rubin.

⁷³ *Goss v. Lopez*, 419 U.S. 565 (1975). The Supreme Court found that that two Columbus, Ohio school principals violated the rights of nine students given 10-days suspensions without any hearings. The Court held that Ohio must recognize students' entitlements to education as property interests protected by the Due Process Clause in the Fourteenth Amendment. The Court found that students facing suspension should, at a minimum, be given notice and some kind of hearing.

⁷⁴ Michigan Senate Fiscal Agency, “Student Expulsion for Weapons,” 5.

⁷⁵ *Ibid*, 6.

The option of legal recourse is another possible reason legislators did not enact specific due process protections. According to a 1985 Michigan Attorney General's opinion, the judicial branch has the authority to review school boards' decisions.⁷⁶ Indeed, a Michigan student alleging that a district violated his due process rights by not allowing him to cross-examine witnesses found success in the courts in 2002.⁷⁷ But not all families know their legal options and even those who do may not have the money or time to fight a discipline decision.⁷⁸ Families who do challenge schools' discipline decisions face an uncertain ruling, as courts generally defer to the school board, unlike the case previously described.⁷⁹ Or, a decision could be so long in the making, that it is unlikely to truly help the affected student.⁸⁰

Rather than leave due process protections ambiguous in these life-changing decisions, other states are quite specific in their school codes. New Hampshire, for instance, requires a meeting, oral or written notice of both the charges and an explanation of the evidence, written explanation to parents, and an opportunity for the student to present their side of the story in all short-term suspensions.⁸¹ Long-term suspensions require written communication of the charges and decision, a hearing, and notice of the right to appeal.⁸² And expulsions require a formal hearing, "dispassionate and fair consideration of substantial evidence," and notice of the right to appeal.⁸³

Some states go even beyond these protections. Eleven states preserve the rudiments of an adversarial proceeding in disciplinary hearings and allow students the right to counsel, the right to cross-examine witnesses, and the right to know the evidence against them.⁸⁴ Eighteen state school codes give a time frame within which the discipline hearings or parental contact must

⁷⁶ *Schools and School Districts*, Op. Attorney General of Michigan 6271, 13-14 (1985).

⁷⁷ *Mahaffey v. Aldrich, et al.*, No. 02-CV-790829 (E.D. Mich. 25 October 2002). The student's parents sued the district and related officials, alleging their son's free speech and due process rights had been violated. The student was suspended after he admitted his contribution in creating "Satan's Web Page," a site that said "Satan's mission for you this week," is to "stab someone for no reason then set them on fire throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face." The Court ruled that the Web site content did not constitute a "threat" and was thus protected by the First Amendment. The court also found a violation of the student's due process rights but did not find sufficient proof to support the student's disability discrimination claim.

⁷⁸ Zweifel and De Beers, 212.

⁷⁹ *Ibid*, 212.

⁸⁰ *Ibid*, 212.

⁸¹ New Hampshire Code Admin. R. Ed. 317.04 (d) (1) as cited by Rubin.

⁸² N.H. Code Admin R. Ed. 317.04 (d) (2) as cited by Rubin.

⁸³ N.H. Code Admin R. Ed. 317.04 (d) (3) and (e) as cited by Rubin.

⁸⁴ Rubin.

occur.⁸⁵ Four states require that school officials at least try to accommodate the schedule of parents or guardians when setting conference dates.⁸⁶

Again, academic research is needed to understand if such provisions translate into improved protection and more fair discipline decisions. Still, the lack of clarity in Michigan's school code gives reason for concern. Some students receive no hearings or have to wait for months before getting one.⁸⁷ Schools sometimes do not contact parents for weeks or months regarding upcoming hearings, or officials schedule the meetings during times that parents or guardians cannot attend.⁸⁸ Approaches in other states provide useful models in avoiding such pitfalls.

D. Referrals

In Michigan, school officials must refer expelled students to the appropriate county department of social services or county community mental health agency within three days of an expulsion.⁸⁹ But there is no similar requirement to provide for the student's educational needs, be it a referral to an alternative school, instruction at home, or a discipline academy. Rather, the state explicitly places the onus on parents or legal guardians to "locate a suitable alternative educational program."⁹⁰ Michigan is one of only a few states that statutorily place the entire burden of finding a suitable alternative education entirely on the student and family.⁹¹ In comparison, 16 states require a referral to an alternative educational program during the suspension or expulsion.⁹²

Although public school attendance is compulsory for children ages six to 16,⁹³ the Michigan Attorney General ruled in 1985 that school boards were not required to provide an alternative education program for students.⁹⁴ Despite this, Michigan senators proposed a bill in 1994 to amend the juvenile code and require that an alternative education program intended for

⁸⁵ Ibid.

⁸⁶ The four states include Colorado (C.R.S.A. § 22-33-105(d)); Delaware (14 Del. C. § 4122 (c)); Minnesota (M.S.A. § 121A.47, Subd. 4); and Missouri (V.A.M.S. 167.161(3)) as cited by Rubin.

⁸⁷ Rubin.

⁸⁸ Rubin.

⁸⁹ Michigan Compiled Laws Section 380.1311(4).

⁹⁰ Michigan Compiled Laws Section 380.1311(10). School officials are to notify the state when alternative programs are established, and the Office of Safe Schools is required to compile information on existing alternative education programs, but schools are not required to pass along this information to students or parents.

⁹¹ Rubin.

⁹² Ibid.

⁹³ Michigan Compiled Laws Section 380.1561.

⁹⁴ *Schools and School Districts*, Op. Attorney General of Michigan 6271, 13, 17 (1985).

juvenile delinquents be offered to students expelled for unlawful possession of a firearm or other dangerous weapon.⁹⁵ There was uncertainty about who would establish, operate, and fund these programs, however, and the bill failed.⁹⁶ Still, the issue surfaced repeatedly during the second reading of the 1994 senate bill amending the discipline code.⁹⁷ Two state representatives moved to require that the school board develop an individualized plan of alternative education to ensure progress similar to the expelled student's peers. Four representatives moved to require that intermediate school districts provide alternative education programs and one of the four offered a similar amendment later, but all failed. When the bill passed on its third reading without alternative education provisions, four representatives mentioned this shortcoming. Representative Lynne Martinez (D-Lansing) said she supported expelling students for weapons possession at school, but she voted against the bill because it did "half the job."⁹⁸ She explained: "I do not support leaving them with no school to attend, no activity, no guidance other than roaming our communities with the weapon."

When the state amended the expulsion statute in 1995, legislators did add provisions allowing but not mandating district-provided homebound services to students not placed in alternative education programs.⁹⁹ In addition, an amendment required that a prorated per-pupil state grant follow the expelled student to a public school sponsored alternative education program or public school academy.¹⁰⁰

In 1999, during the third reading of a bill amending the discipline code, a senator offered an amendment to require the school board to place expelled students in a suitable program to continue his or her education during expulsion.¹⁰¹ While that particular initiative failed to pass, the bill empowered authorizing bodies such as school boards and intermediate school district boards to create strict discipline academies to serve at-risk students.¹⁰² But the most recent listing of strict discipline academies in Michigan includes only three such academies.¹⁰³

The result is that only 38 percent of students expelled from districts reporting their data

⁹⁵ Michigan Senate Bill 1099 of 1994.

⁹⁶ Michigan Senate Fiscal Agency, "Student Expulsion for Weapons," 6.

⁹⁷ State of Michigan, Journal of the House, 21 September 1994, 2466-2486.

⁹⁸ Ibid.

⁹⁹ Michigan Senate Fiscal Agency, "Student Expulsion for Weapons," 6.

¹⁰⁰ Michigan Public Act 250 of 1995, Section 380.1311 of the Michigan Compiled Laws.

¹⁰¹ State of Michigan, Journal of the Senate, 12 May 1999, 647.

¹⁰² Michigan Compiled Laws Section 380.1311.

¹⁰³ Michigan Department of Education, *Directory of Public School Academies*, (Lansing: MDE, 2003), at <www.michigan.gov/mde/0,1607,7-140-5233_6003-23300--,00.html>.

were provided a referral to an educational service in the 2001-2002 school year.¹⁰⁴ This means at least 941 cases did not receive such a referral – be it for alternative education, instruction at home, or a discipline academy. What's more, the state does not know how many expelled students actually received such services.

A bill analysis noted that putting the burden on parents did little to ensure expelled students receive instruction.¹⁰⁵ Some expelled students may have irresponsible or particularly overburdened and resource-poor parents. These factors could be tied to the misconduct that caused the expulsion, and most likely reduce the chances of the student securing services post-exclusion. Yet even responsible and determined parents seeking services for their children face prohibitive fees, transportation challenges, full programs, and age and restrictive admission requirements.¹⁰⁶ Permanent expulsion means the student is expelled from all public schools in the state, but private schools, a costly alternative, are unlikely to admit such students. Online educational options can also cost money and may not engage the student in meaningful ways. In the end, the state's hands-off approach in an environment with a lack of alternative options merely moves "students from the classroom to the street."¹⁰⁷

However, states such as California, Hawaii, Kentucky and Louisiana mandate that alternative services are provided for expelled students.¹⁰⁸ Other states, such as Colorado and Ohio, require that parents be given notice of alternative education options.¹⁰⁹ These approaches are a step to ensure a safety net for expelled students. Still, they should be taken carefully. Liberal referral policies can create a potential for overusing alternative education and creating "dumping grounds" for certain groups of students.¹¹⁰

In addition, not enough is known about the quality and effectiveness of the programming, particularly long-term.¹¹¹ The National Center for Education Statistics and the Department of Justice have suggested numerous characteristics for model programs, including low student-staff

¹⁰⁴ Michigan Center for Educational Performance and Information, 19.

¹⁰⁵ Michigan Senate Fiscal Agency, "School Violence," 12.

¹⁰⁶ Zweifel and De Beers 213.

¹⁰⁷ Michigan Senate Fiscal Agency, "School Violence," 12.

¹⁰⁸ Rubin.

¹⁰⁹ Ibid.

¹¹⁰ American Federation of Teachers, *Setting the Stage for High Standards: Elements of Effective School Discipline*, 11, at <<http://www.aft.org/edissues/downloads/settingthestage.pdf>>.

¹¹¹ Cheryl M. Lange and Sandra J. Sletten, *Alternative Education: A Brief History and Research Synthesis*, Project FORUM at the National Association of State Directors of Special Education, 2, at <http://www.nasdse.org/FORUM/PDF%20files/alternative_ed_history.pdf>.

ratio, highly trained staff, intensive counseling and mentoring, innovative curriculum, parental involvement, and collaboration with other agencies and schools.¹¹² The American Federation of Teachers also notes the need for a flexible continuum of placements and the need for built-in program accountability.¹¹³

Some states' legislation reflects concerns with quality. For instance, Tennessee established a system of competitive grants for pilot programs to measure the effectiveness of alternative schools.¹¹⁴ Mississippi's alternative education programs must have "clear and consistent goals for students and parents," "curricula addressing cultural and learning style differences," a "motivated and culturally diverse staff," and "counseling for parents and students."¹¹⁵ These states provide a few ideas for strengthening alternative education, but additional innovation is needed in ensuring both the availability and quality of such programs.

V. COSTS AND BENEFITS

As shown in the preceding comparative analysis, states have varying approaches to specificity, discretion, due process, and referrals in their discipline policies. When stacked up against other states, Michigan's brand of zero tolerance emerges as particularly harsh, resulting in serious consequences. Fairness and justice are compromised in practice when a discipline system inhibits the consideration of culpability. Liberty is eroded when students aren't provided due process protections or access to education. But some argue the benefits that increased school safety provides to the entire student body outweigh the costs to fairness, justice, and liberty for an individual.

Evidence, however, does not indicate that these benefits are as large as one might assume – despite early promise. Zero tolerance was shown to reduce fighting incidents at Henry Foss High School in Tacoma, Washington, where such incidents dropped from 195 the year before zero tolerance (1990-1991) to four the year after.¹¹⁶ But the policy in that instance, as in other schools with success stories, was communicated clearly, and removed students were placed in

¹¹² United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin*, February 1997, 5.

¹¹³ Steve Bickerstaff, Sarah Hardner Leon, and J. Greg Hudson, "Preserving the Opportunity for Education: Texas' Alternative Education Programs for Disruptive Youth," *Journal of Law and Education* 26, no. 4 (1997):16-19.

¹¹⁴ Tennessee Code Annotated § 49-6-3403(a) as cited by Rubin.

¹¹⁵ Mississippi Code Annotated § 37-13-92(7) as cited by Rubin.

¹¹⁶ Kingery,7.

other high schools or alternative education programs.¹¹⁷ As zero tolerance became a solution in and of itself, it has not lived up to that early reputation.

No evidence shows conclusively that zero tolerance works. Trend data on school safety provides no quick clues. Statistics from the National Crime Victimization Survey show that nonfatal crimes committed by students ages 12-18 – including thefts, violent and serious violent crimes – have fallen between 1993, before GFSA passed, and 1997.¹¹⁸ But this trend is generally true both in school, where students are directly impacted by zero tolerance, and out of school. Between 1997 and 1998, these drops start to flatten, and in the case of in-school violent crimes, start to rise slightly, even as out-of-school violent crimes fall and school discipline grows more punitive.

Data from the Centers for Disease Control and Prevention's Youth Risk Behavior Surveillance (YRBS) also shows a mixed picture.¹¹⁹ The percentage of students who reported being in a physical fight on school property at least once in the past 12 months has been falling since at least 1993. But this trend started before GFSA passed and before zero tolerance policies passed in many states, Michigan included. The percentage of students carrying a weapon on school property at least once in the 30 days preceding the survey fell two percentage points between 1993 and 1995. But in subsequent years, the trend line fell less than two percentage points, and remained virtually unchanged between 1999 and 2001, even as zero tolerance expanded. While fewer students report weapons possession in 2001 than in 1993, the percentage of students who say they were threatened or injured with a weapon on school property at least once during the 12 months preceding the survey remains virtually the same. In 1993, 7.3 percent of students reported this, while 8.9 percent did in 2001. The data also showed that while the number of students missing at least one day of school because they felt unsafe is small, increasingly more students feel this way. Between 1993 and 2001, this percentage rose from 4.4 to 6.6.

In Michigan, a dearth of information inhibits the analysis of long-term trends. Michigan data doesn't show up in the YRBS until 1995, just as the schools start enforcing stricter discipline policies. Since that time, Michigan has generally tracked national trends, showing a

¹¹⁷ Ibid, 7.

¹¹⁸ U.S. Department of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey*, 1992-1998.

¹¹⁹ Data was analyzed from CDC's Youth Risk Behavior Surveillance in 1993, 1995, 1997, 1999 and 2001, which included some 1991 data.

decline in fighting and weapon possession in schools. But the percentage of Michigan students who say they were threatened or injured with a weapon on school property has not changed, staying at 9 percent since 1995. Without earlier data, it is not possible to determine whether these trends started before or just as zero tolerance policies were enacted.

Even with earlier data, conclusions are difficult to reach. Students are fighting less, committing fewer in-school crimes, and bringing weapons to school less often in 2001 than in 1993. But this trend started before the rise of zero tolerance, and in the case of weapons and total number of crimes, actually flattened as zero tolerance expanded. In addition, the percentage of students threatened or injured with a weapon has remained virtually unchanged in this time period.

Not surprisingly, experts who have tried to isolate the impact of zero tolerance policies have found little evidence that student behavior is influenced.¹²⁰ In fact, after four years of implementation, the National Center for Education Statistics found that schools that use zero tolerance policies are still less safe than those without such policies.¹²¹ One possible explanation for the lack of deterrent effect is the small percentage of students carrying firearms who are actually caught by school officials.¹²² In addition, some repeat offenders, which account for up to 40 percent of suspensions, may not get the message.¹²³

While researchers work to untangle the impact, if any, of zero tolerance on school safety, one fact is clear: most schools are safe, and in fact, safer than the wider community. A child is more likely to be a victim of a violent crime in his or her community or at home than at school.¹²⁴ Zero tolerance policies with no safety net interact with this dynamic in troubling ways by forcing students out of a structured school environment.

Excluded students not only face increased danger themselves, but also pose a greater threat to the community at large. Eric Blumenson, a Suffolk University Law School professor, and Eva S. Nilsen, a Boston University Law School associate clinical professor, note that

¹²⁰ Eric Blumenson and Eva S. Nilsen, "One strike and you're out? Constitutional constraints on zero tolerance in public education." *Washington University Law Quarterly* 81 (Spring 2003): 76.

¹²¹ Russ Skiba and Reece Peterson, "The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?," *Phi Delta Kappan* 80 (January 1999): 372-82.

¹²² Kingery, 6.

¹²³ T. Tobin, G. Sugai and G. Colvin, "Patterns in middle school discipline records," *Journal of Emotional and Behavioral Disorders* 4(2) 1996: 82-94.

¹²⁴ U.S. Department of Education and U.S. Department of Justice, *Annual Report on School Safety: 1998*, (Washington: GPO, 1998).

suspended and expelled students “embark on an inauspicious trajectory that is more likely to endanger themselves and others” when compared to students who stay in school.¹²⁵ This path leads to a greater likelihood of criminal behavior, school dropout, and future joblessness.¹²⁶

Out-of-school youth are also more likely than in-school youth to engage in risky behavior such as smoking, drinking, using drugs, and engaging in sexual intercourse with four or more partners.¹²⁷ In addition, anecdotal evidence suggests that some violent suspended and expelled students can be quite dangerous outside of school.¹²⁸ One expelled student in Oregon returned to school and shot several students. In another case, an expelled 17-year-old shot two Chicago teens walking home from school. As these incidents highlight, excluding students from school without a safety net (such as an alternative education program) is not “an effective solution to the youth violence problem, and literally ‘backfires’ at times.”¹²⁹

Rather than promote safety, zero tolerance can breed distrust and anger between schools and many of the same students who desperately need a positive connection. Students may view severe discipline as a message of rejection, which may explain the strong correlation between being suspended or expelled and dropping out of school.¹³⁰ Furthermore, some experts believe that zero tolerance may “accelerate the course of delinquency by providing a troubled youth with little parental supervision and more opportunities to socialize with deviant peers.”¹³¹

The key is to seek discipline solutions that truly do create safer schools, while minimizing the many costs associated with zero tolerance. Indiana University professor Russell Skiba suggests a long list of “what works in preventing school violence,” including violence prevention and conflict resolution curricula, peer mediation, bullying prevention, parental involvement, mentoring, anger management programs, teen courts, and using early warning signs.¹³²

There are numerous ways to reduce the costs associated with Michigan’s particularly harsh policies. Narrowing the number of offenses covered by mandatory expulsions and

¹²⁵ Blumenson, 82.

¹²⁶ Ibid, 82.

¹²⁷ Centers for Disease Control, “Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School: United States, 1992,” *Morbidity and Mortality Weekly Report* 43 (4 March 1994): 120-132.

¹²⁸ Kingery, 8.

¹²⁹ Ibid, 8.

¹³⁰ Skiba and Peterson.

¹³¹ The Civil Rights Project at Harvard University and Advancement Project, 11.

¹³² Indiana Education Policy Center, *Safe & Responsive Schools Project Publications Page*, at <www.indiana.edu/~safeschl/publication.html> (Accessed 27 March 2004).

empowering administrators to exercise case-by-case discretion would allow districts to mete out more proportional responses. Due process would be better protected by legislating that districts provide sufficient notice, an explanation of the evidence, and the opportunity to be heard. Students should be given the right to counsel and the ability to confront witnesses. Districts should establish a time frame for parent notification and hearings, and make a “good faith effort” in accommodating parents’ or guardians’ schedules for hearings. Lastly, safety both inside and outside the school could be improved by requiring school officials to provide referrals for educational services or by mandating that an alternative education be provided to expelled students.

VI. CONCLUSION

With no conclusive evidence that zero tolerance works – particularly when implemented too harshly and without a safety net – it is difficult to justify its continued use without modifications. When this lack of evidence is compared to the costs to fairness and liberty, action is urgently needed. The good news is that more effective models exist to promote school safety across the country while minimizing the costs documented in this paper. Change is possible – and essential for students like “John.” Under an improved discipline system, John’s careless words would be examined in context. He would have the opportunity to present his case to the school board with his parents nearby. He would have access to a free, public education no matter what happened. In the end, John – and so many other students – would be treated fairly and respectfully. And in the end, our schools truly would be safer, better places.