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# From Classrooms to Courtrooms:

## **Zero Tolerance Unveiled**

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## EXECUTIVE SUMMARY

Zero tolerance policies mandate predetermined consequences or punishments for specific offenses. While enacted to address rising concerns about school safety, zero tolerance policies have many negative effects on children. Zero tolerance policies, by their mandatory nature, often impose severe punishments on students for relatively minor misbehavior. They even have the effect of pushing children into their local juvenile or criminal justice system. Policy-makers, educators, and parents should be concerned about depriving children of educational opportunities.

Zero tolerance policies in public schools became widespread with Congress' passing of the Gun Free Schools Act of 1994 (GFSA). The GFSA conditioned states' federal education funding on their willingness to pass laws requiring a one-year expulsion for any student caught in possession of a firearm. Compliance with the GFSA was universal because every state depends on federal funding to supplement its educational budget. However, many states went beyond the federal mandatory expulsion policy for firearms, allowing zero tolerance policies to reach violence, alcohol, drugs, and virtually any object that can be considered a weapon. States, to comply with the GFSA, must keep zero tolerance policies regarding possession of firearms but could legally abandon their zero tolerance extensions to other misbehavior.

The Georgia General Assembly has enacted zero tolerance laws in sections 20-2-751.1 and 20-2-751.6 of the Georgia Code. Section 20-2-751.1 mandates that each local school board establish a policy requiring at least the one-year expulsion of any student who brings a firearm to school. As also required under the GFSA, this law gives school authorities the discretion to modify the one-year expulsion on a case-by-case basis. Section 20-2-751.6 provides that students found by the school board's disciplinary tribunal to have committed an act of physical violence against a school employee will be subject to permanent expulsion from school. Under this section, the school board has limited discretion to permit the child's re-enrollment into the public school system.

Examples of the implementation of zero tolerance policies in Georgia show the lack of discretion being used. They include an 11-year old girl who was suspended from sixth grade for carrying a Tweety Bird key chain wallet to school, in alleged violation of the school's weapons policy, and a 14-year old high school student who was expelled for the remainder of the school year for writing a fictional story in her personal journal.

The application of zero tolerance policies raises constitutional concerns regarding the right to an education and the denial of a student's right to due process. The United States Supreme Court has acknowledged the importance of education to our children, but has not yet recognized a fundamental right to education under the United States Constitution. Many states, including Georgia, have recognized the fundamental right to education under their individual state

constitutions. Zero tolerance policies can be challenged on due process grounds under the Fifth and Fourteenth Amendments to the United States Constitution, which provides that neither the federal government nor states can deprive any person of life, liberty, or property without due process of law. Procedural due process requires fair and adequate procedures and zero tolerance policies may be challenged when schools fail to provide these required procedures. The United States Supreme Court has held that students are entitled to due process prior to suspension or expulsion, except when the student is an immediate danger to herself or others. Students must be given notice of the charges against them and be given an opportunity to respond to the charges. The procedures required for expulsions and long-term suspensions may be greater than those for shorter suspensions because the due process afforded should be commensurate with the potential penalty imposed. Many states, including Georgia, fail to explicitly provide for procedural due process in their zero tolerance statutes. Schools that fail to provide notice and the opportunity to be heard violate students' minimum due process rights. Due process also requires individualized consideration of circumstances when the zero tolerance policy allows for case-by-case determination or modification of the mandatory punishment.

Substantive due process challenges attack the mandatory nature of zero tolerance policies and their lack of connection to legitimate educational goals. When reviewing such statutes, the level of judicial scrutiny applied depends on whether the individual state recognizes the right to education as a fundamental one. Strict scrutiny is applied when the right to an education is fundamental and requires that the government show a compelling interest in order to limit that right. Where the right to education is not considered fundamental, low scrutiny is used and any rationally-related government interest will satisfy the burden. While several cases have held that zero tolerance policies do not violate substantive due process merely because they are mandatory, the blind application of these policies may be unconstitutional. Oftentimes, however, courts defer to the local school entity concerning disciplinary decisions, making substantive challenges very difficult.

In addition to constitutional considerations, the criminalization of youth is a prominent concern associated with zero tolerance policies. The application of zero tolerance policies has increased the number of criminal and delinquency charges filed against children for in-school behavior. A 2000 report indicated that 43 states required schools to report various conduct to law enforcement agencies. In 2002, Congress added another condition to the GFSAs in order for schools to receive their federal funding, requiring them to report to their respective criminal justice or juvenile delinquency system, students in violation of the GFSAs. The overall increase in criminal and delinquency charges raises questions about students' rights regarding arrest, notification, and student detainment. Although delinquency offenses are not technically considered criminal charges, students charged with delinquency offenses are entitled to many of the same constitutional protections as in a criminal proceeding, including

the right to notice, the right to counsel, and the privilege against self-incrimination. The Georgia Court of Appeals has also recognized that constitutional protections against double jeopardy also extend to juveniles involved in delinquency proceedings.

Several states have analyzed the statutes that students allegedly violated under the void for vagueness doctrine of the Fourteenth Amendment. Void for vagueness requires that a penal statute define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited and does so in a manner that does not encourage arbitrary and discriminatory enforcement. The void for vagueness doctrine was almost addressed by Georgia courts in a delinquency case; however, the Court of Appeals found that the argument was waived on appeal. The particular statute at issue was Georgia Code section 20-2-1181 which incriminates any person who “disrupt[s] or interfere[s] with the operation of any public school.” The statute makes it a high and aggravated misdemeanor to commit such an offense, yet fails to define “disrupt,” “interfere,” or “operation.” There is a strong argument that Georgia Code section 20-2-1181 should be held void for vagueness because it provides no guidelines on how to act in compliance with the statute and does not give clear notice of what behavior is prohibited.

A study by the National Center for Education found that after four years of implementation, zero tolerance policies had no appreciable effect on reducing school violence. It found that the schools where zero tolerance policies were enforced were less safe than those without such policies. Although school officials credit the overall decrease in school violence to the enforcement of zero tolerance policies, the reduction is more likely a manifestation of the overall decline in juvenile delinquency, beginning before the emergence of zero tolerance policies in 1993. Consistent with this trend, the Crime Index, as reported by the Federal Bureau of Investigation, indicates a 24.9% decrease since 1993 in the United States. Thus the decline in violence among youth is consistent with the overall decline in violence in the United States, and not due to the enactment and enforcement of zero tolerance policies.

A negative impact of zero tolerance policies is the denial of education. As students are removed from their educational settings, they typically fall behind in their school work, which increases the likelihood that they will drop out and engage in other delinquent behavior. Suspension has negative consequences on academic performance, and school performance is one of the strongest predictors of whether a youth will drink, smoke, use weapons, or attempt suicide. When students fall behind in their classes because of suspension or expulsion, it increases their likelihood of dropping out. In fact, suspension is a moderate to strong predictor of whether a student will drop out of school. Dropping out increases the difficulty in transferring to full-time work and the average earnings of drop-outs are significantly less than those of high school graduates. Additionally, dropping out is correlated to the likelihood of criminalization and

negative health factors. The denial of education, therefore, impacts the national economy.

The high rate of suspensions and expulsions creates a need for quality alternative education programs. Research on alternative schools is scarce and more information is needed to determine the quality and effectiveness of education provided. Because the United States Constitution does not recognize the right to an education as fundamental, and because states that do recognize education as a fundamental right do not always require that alternative education programs be available, many times the educational opportunities for suspended and expelled students are inadequate. Georgia has adopted a policy regarding alternative education programs. In addition to laying out certain structural and procedural requirements for the establishment of alternative schools, the policy states that it is preferable to reassign disruptive students to an alternative program rather than suspending or expelling them from school. Georgia authorizes school administrators to utilize alternative education opportunities but does not require that they do so.

It is important that school teachers and administrators retain the authority to remove dangerous students from school in order to ensure the safety of that student and others. However, the application of needlessly harsh one-size-fits-all punishments through zero tolerance policies is reaching students who pose little or no threat. The tendency of these policies to remove students from their school settings creates many detrimental effects to the students. Steps can be taken to minimize the negative impact of zero tolerance laws on children and society. Those include using discretion when at all possible, honoring students' procedural and substantive due process rights, and improving the quality and availability of alternative education programs. Georgia should eliminate its zero tolerance policy that is not required by the GFSA, make statutory language clear regarding what behavior is prohibited and the potential consequences of that behavior, amend statutes to explicitly comply with required due process procedures, require that suspended and expelled students have the opportunity to attend an alternative school, and create effective alternative education programs that focus on academic and behavioral development.

## INTRODUCTION

Zero tolerance policies are pushing children out of their schools. These policies require that students receive uniform, harsh punishments for infractions, many of them minor. The tendency of *zero tolerance* policies to push students into the juvenile justice system for minor school misbehavior is disturbing. Policy-makers, educators, and parents should be concerned about depriving children of educational opportunities.

School safety is an important issue today. Undoubtedly, recent school tragedies have heightened the public's concern for implementation of effective policies ensuring our children's safety. However it has become clear that efforts to keep schools safe have spun out of control. In response to safety concerns, Congress and state legislatures have passed zero tolerance laws regarding school discipline. While these laws were intended to focus on truly dangerous behavior of children, today students who pose little or no threat to school safety are being expelled and often referred to the criminal or juvenile justice system.

There is no standard definition for *zero tolerance*. The U.S. Department of Education has defined *zero tolerance* as a school or district policy that mandates predetermined consequences or punishment for specific offenses. The common theme of zero tolerance policies is prescribed consequences for specified behaviors, regardless of the intensity or repetition of the behavior and without regard to the circumstances of that behavior. In other words, zero tolerance policies mandate a one-size-fits-all punishment for certain behavior, regardless of the situation surrounding the offense.

The specific definitions for *suspension* and *expulsion* vary according to each state. In general *suspension* refers to the short-term exclusion of a student from the traditional school setting, usually for less than ten days, and *expulsion* refers to the long-term exclusion of a student, up to the permanent removal from a traditional school setting. In Georgia, *expulsion* means the exclusion of a student from a public school "beyond the current school quarter or semester," and *suspension* means "the short-term suspension of a student from a public school for not more than ten days or long-term suspension for more than ten days [but not beyond the current school quarter or semester]..."<sup>1</sup>

## BACKGROUND

### History of Zero Tolerance

It was not until 1994, when Congress passed the Gun-Free Schools Act<sup>2</sup> (GFSA or "the Act"), that zero tolerance laws became widespread. The Gun-Free

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<sup>1</sup> GA. CODE ANN. § 20-2-767 (2001).

<sup>2</sup> 20 U.S.C. § 8921 (repealed 2002). In January 8, 2002 this statute was repealed and was simultaneously replaced by 20 U.S.C § 7151, which includes substantially the same provisions. Most changes were on account of housekeeping, such as removal of the time specifications in

Schools Act was a part of the Improving America's Schools Act of 1994, which was a part of the reauthorization of the Elementary and Secondary Education Act in 1994, providing \$12 billion in federal funding for public schools over five years. The GFSA requires schools receiving federal education funding to expel students for one year who were caught carrying a firearm or explosive. Congress conditioned the federal funding provided to states on each state's willingness to pass such a law within one year.

The Gun-Free Schools Act also provides that each state allow for the modification of the expulsion requirement on a case-by-case basis. In addition, the Act specifically states that it should not be construed to prevent states from providing an expelled student with an alternative educational setting.

### Have States Gone Too Far?

Compliance with the GFSA was universal because every state relies on federal funding to supplement its education budget. Almost every state enacted zero tolerance laws by October 1995, with the remaining states complying shortly thereafter.

Many states went beyond the mandatory one-year expulsion for firearms, as defined in 18 U.S.C. § 921(a), required by the Gun-Free Schools Act. Under 18 U.S.C. § 921(a), a "firearm" is defined as a "weapon...which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device."<sup>3</sup> Although the GFSA only addressed zero tolerance policies related to possession of a firearm or explosive device, zero tolerance statutes now reach virtually any object that could be considered a weapon, as well as violence, alcohol and drugs, including some prescription and over-the-counter drugs.<sup>4</sup>

States, to comply with the GFSA, must keep zero tolerance policies regarding possession of firearms and explosives, but could legally abandon their zero tolerance extensions to other misbehavior (such as drugs, alcohol, and violence), which are not required under the Act. While the GFSA specifies the minimum punishment that states must evoke for firearm possession, not the maximum, the

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relation to its passing, laid out in sections 8921(b)(3) & (f). *Compare* 20 U.S.C. § 8921 (repealed 2002) *with* 20 U.S.C. § 7151 (2002) (the language in § 8921 regarding states' one year compliance with the law and requiring the Secretary to report to Congress the states in non-compliance after two years, was removed in § 7151). § 7151 provides that the Act be construed consistent with the new Individuals with Disabilities Education Act (20 U.S.C.S. § 6301), passed at the same time as GFSA. Another difference is an exemption from the one-year expulsion if the firearm is "lawfully stored inside of a locked vehicle on school property" or if it is authorized by the educational agency. Also § 7151 adds another condition to states' receipt of funds: that states pass a law requiring the educational agency to report all students who bring a firearm or weapon to school to the criminal/juvenile justice system. See U.S.C.S. § 7151(g), (h) (2002). The Gun Free Schools Act will be herein cited as 20 U.S.C. § 7151.

<sup>3</sup> 18 U.S.C. § 921(a)(3) (2000).

<sup>4</sup> U.S. DEP'T OF EDUCATION, U.S. DEP'T OF JUSTICE, ANNUAL REPORT ON SCHOOL SAFETY, 6-7 (1998).

Act does provide educational officials the authority to modify the one-year expulsion requirement when evaluating individual cases. Under the GFSA, a “chief administrating officer” of a local educational agency may use discretion in individual cases to modify the automatic expulsion requirement.<sup>5</sup> Consequently, challenging zero tolerance by challenging the GFSA forces an examination of states’ interpretations of the Act.

Sadly, case after case shows that administrators often fail to use this discretionary authority to limit mandatory expulsion.<sup>6</sup> In fact, administrators are using their discretion to expand zero tolerance policies to punish infractions too minor to be addressed in the GFSA.

Every state had expulsion guidelines for school districts before the passage of the Gun Free Schools Act, but there was no consistent policy among the states.<sup>7</sup> Policies ranged from one-year expulsions for students with guns to no wording whatsoever for weapons on school grounds.<sup>8</sup> As a result of the GFSA, now every state’s law provides that every student caught carrying a gun on campus must be expelled for at least one year, with an exception for schools to modify the expulsion policy on a case-by case basis.

## ZERO TOLERANCE IN GEORGIA

### Zero Tolerance Laws

In response to the GFSA passed in 1994, the Georgia General Assembly took legislative action by amending the Public School Disciplinary Tribunal Act.<sup>9</sup>

#### *Definitions*

As defined in Georgia, under Code section 20-2-751, “expulsion” means the removal of a student beyond the current school term (quarter or semester).<sup>10</sup> “Long term suspension” refers to removal for more than ten days but less than the current school term. “Short-term suspension” means removal of a student for

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<sup>5</sup> 18 U.S.C. § 7151(b)(1).

<sup>6</sup> Advancement Project & The Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* v (2000).

<sup>7</sup> See Congr. Research Serv. & U.S. Senate, *The Gun Free Schools Act of 1994*, 10-14, available at <http://feinstein.senate.gov/booklets/gunfree.pdf> (last visited Feb. 20, 1994).

<sup>8</sup> See ALA. CODE § 16-1-14 (1995) (provided that local school boards may prescribe rules which remove students from class who may be detrimental to the best interest and welfare of the whole student body); ARIZ. REV. STAT. §§ 15-840, 841 (1991) (provided that a student may be expelled for habitual profanity, vulgarity, or excessive absenteeism); GA. CODE ANN. § 20-2-751 (2001) (provided that local boards of education may establish policies or rules to impose expulsion); LA. REV. STAT. ANN. § 17.416 (1982) (provided that students may be expelled for any one of certain specified reasons including carrying firearms, knives, or other implements which can be used as weapons). For a complete summary of the states’ expulsion guidelines before the passage of the GFSA, see Congr. Research Serv. & U.S. Senate, *supra* note 7, at 10-14.

<sup>9</sup> See GA. CODE ANN. § 20-2-750 (2001); *Id.* § 20-2-751.1.

<sup>10</sup> *Id.* § 20-2-751.

ten days or less. “Weapons” as defined by the Georgia legislature, carries the same definition as “firearm” under the GFSA.<sup>11</sup>

### *Expulsion Policy For Students Bringing Weapons to School*

On July 1, 1995, Georgia Code section 20-2-751.1<sup>12</sup> became effective. This law mandates that each local school board establish a policy requiring at least a one year expulsion of any student who brings a weapon to school. Similar to the GFSA, the statute provides that each local board of education shall have the authority to modify the expulsion on a case-by-case basis. Under section 20-2-751.1 school officials are also authorized to place a student who brings a weapon to school in an alternative educational setting.

### *Disciplinary Policy for Students Committing Physical Acts of Violence Against School Official or Employee*

Georgia also has a zero tolerance policy regarding students who commit an act of physical violence against a school official, school employee, or school bus driver.<sup>13</sup> “Physical violence” is defined as “intentionally making physical contact of an insulting or provoking nature,” or “intentionally making physical contact which causes physical harm to another unless...in defense of himself or herself....” Under this section, upon an occurrence of alleged physical violence, a tribunal determines all issues of fact and intent.<sup>14</sup> The tribunal then makes recommendations to the school board regarding whether and when the student may return to public school. Section 20-2-751.6(c)(1) mandates that a student be expelled from the public school system if he or she was found by the tribunal to have committed an act of physical violence against a school official or employee, as described above. Expulsion under this section is permanent, lasting for the remainder of the student’s eligibility to attend public school pursuant to section 20-2-150.<sup>15</sup>

The school board’s discretion is specifically limited under this section. The school board has discretion to permit a student to attend an alternative school program during the period of expulsion. If no alternative program is available for students found guilty of committing violence against a school official while in kindergarten through sixth grade, the school board may, at its discretion, re-enroll the student in the regular public school program. Similarly, if the student found to

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<sup>11</sup> Compare *Id.* § 20-2-751 with 20 U.S.C. § 7151(b)(3) (2002) (both referring to the definition of *firearm* under 18 U.S.C. § 921(a)(3)). *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 an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device.” 18 U.S.C. § 921(a)(3).

<sup>12</sup> GA. CODE ANN. § 20-2-751.1.

<sup>13</sup> *Id.* § 20-2-751.6.

<sup>14</sup> The tribunal consists of three teachers or certificated education personnel who are appointed by the local school board. *Id.*

<sup>15</sup> *Id.* § 20-2-150 (outlines eligibility for enrollment in the public school system).

have committed the act of physical violence is in kindergarten through eighth grade at the time of the offense, then the local school board may, at its discretion, allow the student to reenroll in the public school system for grades nine through twelve. This discretion does not explicitly extend to students in grades nine through twelve found to have committed an act of physical violence against a school employee.

## Other Pertinent Laws

### *Disrupting Public Schools*

Georgia Code section 20-2-1181<sup>16</sup> makes it “unlawful for any person to disrupt or interfere with the operation of any public school.” The statute proscribes that it is a high and aggravated misdemeanor to commit such an offense.

Although this statute does not fall into the common definition of a zero tolerance law, one mandating predetermined *punishment* for certain acts, it induces many of the same concerns. The statute directly contributes to the criminalization of students because it requires that those found to have disrupted the operation of a public school, be charged with a high and aggravated misdemeanor. Rather than giving school administrators the authority to discipline the disrupting students within the school setting, section 20-2-1181 facilitates the removal of misbehaving students from the schools and leaves them in the hands of law enforcement agencies. Additionally, this statute is very broad and does not define “disrupt,” “interfere,” or “operation,” as used in the statute, so as to limit its scope. As worded, this section may act as a fall-back provision or a tack-on charge for school administrators to use loosely.

The statistics regarding the implementation of this statute confirms the excessive use of this law. The Georgia Department of Juvenile Justice’s data<sup>17</sup> reflects that in 2001, over 1300 charges against students were made for disrupting public schools, and since then each year, over 1400 charges were made. In 2003 only 311 of the 1,470 charges were dismissed, and of those remaining disruption of school charges, about one out of every four resulted in the commitment of a student to either a long-term or short-term program. Of those students not committed to a program, about half were put on probation as a result of the charge.

### *Students Subject to Disciplinary Order of Other School Systems*

Georgia Code section 20-2-751.2 allows a local board of education to deny a student enrollment if that student has a disciplinary order from any other school system. The statute also authorizes the local board to suspend or expel the

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<sup>16</sup> *Id.* § 20-2-1181. See *infra* notes 86-89 and accompanying text (discussion of the constitutionality of section 20-2-1181).

<sup>17</sup> Data is on kept file with the Georgia Department of Juvenile Justice.

student for any time remaining in order to fulfill the other school system's disciplinary order, in lieu of refusing enrollment.

### Examples of Implementation of Zero Tolerance Policies

News of severe zero tolerance applications have swept the nation, unveiling a troublesome picture. Innocent children are being suspended and expelled for frivolous acts at school. Two telling examples of actions taken pursuant to zero tolerance policies in Georgia are described below.

On October 27, 2000, Cobb County made national news when an 11-year old girl, Ashley Smith, was suspended from the sixth grade for carrying a Tweety Bird key chain wallet to school.<sup>18</sup> Smith received the maximum penalty, a two-week suspension. The novelty chain attached to the wallet was considered a weapon in the eyes of school officials and was, therefore, in violation of its zero tolerance weapons policy. Stressing the importance that students be aware of what behavior is prohibited, the American Civil Liberties Union of Georgia filed a lawsuit on behalf of Smith's parents challenging the Cobb County School District's reluctance to provide details regarding its weapon policy.

Just recently in October of 2003, a 14 year old student at Roswell High School was expelled for the remainder of the year for writing a fictional story in her personal journal.<sup>19</sup> The journal was taken from Rachel Boim in class because she was passing it to another student. The journal entry described a student who dreams of killing a teacher. Boim stated that the story was not intended as a threat, but was a fictional story. Regardless, the school system spokesperson said the expulsion was justified for "inappropriate writings that describe the threat of bodily harm toward a school employee." The school board temporarily rescinded the expulsion until Boim's formal hearing.

Exclusion from school carries serious consequences, and can affect the child in many ways.<sup>20</sup> Innocent children should not be subjected to sweeping policies that threaten to deprive them of their educational opportunities for unsuspected behavior. It is important that students have a clear understanding of the behavior that is prohibited in schools and a clear understanding of the potential consequences of that behavior. Also, school administrators need to use discretion in enforcing zero tolerance policies to ensure fairness to all students.

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<sup>18</sup> Mischa Gaus, *ACLU sues Cobb Schools Over 'Zero Tolerance Policy': Tweety Bird Flap: Group Claims Education Officials Illegally Withheld Needed Information*, ATLANTA J. CONST., Oct. 28, 2000, at G4; American Civil Liberties Union, *Girl Suspended for Tweety Bird Chain*, September 28, 2000, available at <http://archive.aclu.org/news/2000/w092800a.html> (last visited on Feb. 12, 2004); CNN, *Georgia Girl's Tweety Bird Chain Runs Afoul of Weapons Policy*, Sept. 28, 2000, available at <http://www.cnn.com/2000/US/09/28/wallet.suspension.02/#2> (last visited Feb. 12, 2004).

<sup>19</sup> Mia Taylor, *Student Expelled Over Diary*, ATLANTA J. CONST., Oct. 23, 2003, at A-1.

<sup>20</sup> See *infra* notes 63-89, 97-114 and accompanying text (discussing the potential consequences of zero tolerance policies, including the denial of education, the increased likelihood of dropping out, and the increased likelihood of criminalization).

# PROBLEMS WITH ZERO TOLERANCE POLICIES

## Constitutionality Concerns

### *Right to An Education*

In *Brown v. Board of Education*, the United States Supreme Court acknowledged the importance of education to our children, stating that, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>21</sup> The Supreme Court recognized education as the most important function of state and local governments.<sup>22</sup> However, the Court has not yet recognized a fundamental right to an education under the U.S. Constitution.<sup>23</sup> Regardless, several states have recognized the fundamental right to education in their individual state constitution.<sup>24</sup>

Article VIII, Section I, Paragraph I of the Constitution of the State of Georgia reads that "the provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation..." The Georgia Supreme Court held that this provision guaranteed the right to a free education.<sup>25</sup> However, the Georgia Court of Appeals has held that a permanent expulsion does not violate the guarantee to a free education because the right may be limited by statute.<sup>26</sup>

### *Due Process Issues*

Zero tolerance policies can be challenged on due process grounds under the Fifth and Fourteenth Amendments to the United States Constitution, which provide that neither the federal government nor states can deprive any person of life, liberty, or property without due process of law.<sup>27</sup> Due process can be divided into two sub-parts: procedural and substantive due process. Procedural due process requires fair and adequate procedures, whereas substantive due process concentrates on rights and impairment of those rights, regardless of the fairness of the procedure.

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<sup>21</sup> *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954).

<sup>22</sup> *Id.*

<sup>23</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 (1973).

<sup>24</sup> *See, e.g., Crim v. McWhorter*, 242 Ga. 863 (1979). (finding that Georgia's state constitution guaranteed a right to free education); *Cathe A. v. Doddridge Bd. Of Educ.*, 490 S.E.2d 340, 346 (W. Va. 1997) (stating that West Virginia recognizes a fundamental, constitutional right to education under its state constitution); *State ex rel. G.S.*, 749 A.2d 902, 907-08 (N.J. Super. Ct. Ch. Div. 2000) (finding that the New Jersey Constitution guarantees children the right to free school instruction and that the state has a constitutional obligation to provide an education to an expelled juvenile).

<sup>25</sup> *Crim v. McWhorter*, 242 Ga. 863 (1979).

<sup>26</sup> GA. CODE ANN. § 20-2-750 et. seq. (2002); *D.B. v. Clarke County Bd. of Educ.*, 220 Ga. App. 330 (1996). Georgia recognizes the right to a free education in GA. CONST. art. VIII, § I.

<sup>27</sup> *See* U.S. CONST. amends. V, XIV.

## Procedural Due Process

Procedural due process covers issues such as the type of hearing that is required, right to counsel, and evidence eligible for consideration. In 1975, the United State Supreme Court established that students were entitled to due process prior to suspension or expulsion.<sup>28</sup> Due process proceedings should occur before suspension or expulsion, except when a student is an immediate danger to himself or others. At the very least, students must be told of charges against them and be given an opportunity to respond to the charges.<sup>29</sup> While the procedures required for expulsions and long-term suspensions may be greater than those for short-term suspensions, due process afforded should be commensurate with the potential penalty imposed.<sup>30</sup> *Goss v. Lopez* established the right of public school students not to be expelled arbitrarily or irrationally.<sup>31</sup>

Procedural due process challenges to expulsions and suspensions under zero tolerance policies are valid when a school fails to provide the minimum procedures, as described above.<sup>32</sup> Many states have adopted zero tolerance policies requiring one-year expulsion under GFSA but have no explicit statutory requirements regarding procedural due process. Georgia, for example, passed a mandatory expulsion law conforming to the GFSA but failed to explicitly include procedural due process requirements within the statute.<sup>33</sup> In fact, the only time a disciplinary hearing is required under Georgia statute is in the case of an alleged assault or battery by a student or intentional damage to the school premises or another's personal property, if the damage could justify expulsion or long-term suspension of the student.<sup>34</sup> Georgia does, however, authorize local boards of education to establish disciplinary tribunals to impose suspension or expulsion.<sup>35</sup> In practice, the public schools in Georgia hold disciplinary tribunal hearings when a student is subject to long-term suspension or expulsion in order to honor students' procedural due process rights. Schools that fail to provide notice and opportunity to be heard violate the students' minimum due process rights. Most schools provide informal notice and hearings to students for expulsions. Those that do not or that deny students of their rights are rarely challenged. The impairment of a student's right to a hearing can be a valuable opportunity to challenge zero tolerance disciplinary actions.

Procedural due process may also require that the hearing and disciplinary actions include individualized consideration regarding the circumstances of the

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<sup>28</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The Fifth Circuit also suggested that the school board should provide a higher degree of due process when the student is facing serious penalties, like expulsion. See *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458, 460 (5th Cir. 1974).

<sup>31</sup> *Goss*, 419 U.S. 565.

<sup>32</sup> Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 133 (1999) (stating that many states have implemented zero tolerance expulsion policies without providing for procedural requirements).

<sup>33</sup> GA. CODE ANN. § 20-2-751.1 (2001).

<sup>34</sup> *Id.* § 20-2-753.

<sup>35</sup> *Id.* § 20-2-752.

behavior and the appropriate punishment. The Due Process Clause does not prevent the application of zero tolerance mandatory punishment policies; however it does require individualized consideration when the policy allows for case-by-case determinations or modification of the mandatory punishments.<sup>36</sup> Appropriate considerations include taking into account the student's age, past behavior, and mitigating factors regarding the specific incident. The Fifth Circuit commented that formalistic acceptance of the full scope of the required punishment, "without independent Board consideration of what under all of the circumstances, the penalty should be, is less than full due process."<sup>37</sup>

### Substantive Due Process

Substantive due process challenges have attacked the mandatory nature of zero tolerance policies as excessive and lacking a sufficient connection to legitimate educational goals.<sup>38</sup> The level of scrutiny used to review such policies and their application depends on whether the right to education is a fundamental one. When the right to education is considered fundamental, as some states recognize, *strict scrutiny* is used to analyze alleged violations of this right.<sup>39</sup> *Strict scrutiny* requires the government's showing of a compelling interest to limit that right; in other words, the government's interest must be necessary to achieve its goal.<sup>40</sup> However, if the right to education is not considered fundamental, the right may be limited as long as it is rationally or conceivably related to the government interest, a much lower standard.<sup>41</sup>

In the many states where education is not considered a fundamental right, to make a successful substantive due process challenge the plaintiff must show an extreme departure from established norms. Since the level of judicial scrutiny is very low, if the school entity defendant provides any reasonable justification for its policy, it will likely withstand the scrutiny.<sup>42</sup> Courts generally defer to local school entities concerning disciplinary decisions, making substantive challenges very difficult.<sup>43</sup>

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<sup>36</sup> See *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000); *Lee*, 490 F.2d 458; See also *Advancement Project & The Civil Rights Project*, *supra* note 6, at 46.

<sup>37</sup> *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458, 460 (5th Cir. 1974).

<sup>38</sup> *Mitchell v. Bd. of Tr. of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660 (5th Cir. 1980) (finding that mandatory punishments do not violate substantive due process); *Caldwell v. Cannady*, 340 F. Supp. 835, 838 (N.D. Tex. 1972) (upholding a zero tolerance mandatory expulsion rule, finding therefore that it was not a violation of substantive due process).

<sup>39</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>40</sup> *Burson v. Freeman*, 504 U.S. 191, 199-200 (1992).

<sup>41</sup> See *Romer*, 517 U.S. at 631.

<sup>42</sup> *Id.* at 631.

<sup>43</sup> In 1975, the United States Supreme Court commented that "it is not the role of the federal court to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion...." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). This rationale has been reflected in subsequent cases. See *Ratner v. Loudoun County Pub. Sch.*, 16 Fed. Appx. 140 (4th Cir. 2001) ("the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy"); *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237, 242 (Miss. 1985) ("the law commits [the suspension decision] to the authority and discretion of the school board);

While several cases have held that zero tolerance policies do not violate substantive due process merely because they are mandatory,<sup>44</sup> the blind application of these policies may be found unconstitutional.<sup>45</sup>

*Seal v. Morgan*<sup>46</sup> involved the expulsion of Seal, a high school junior, after his friend's knife was found in the glove compartment of his mother's car, which Seal drove on campus. Seal denied any knowledge of the knife's presence in his car on the school campus, although he knew that his friend was in possession of the knife the day before.<sup>47</sup> The Sixth Circuit acknowledged the school board's interest in maintaining the safety of school campuses and noted that a decision not to expel a potentially dangerous student also carried very serious potential consequences.<sup>48</sup> Nevertheless, the court found that expelling a student without a proper showing of scienter, or intent, would not rationally be related to any legitimate state interest.<sup>49</sup> The court stated that the school board could not relieve itself of its obligation to determine a student's intention to commit the acts for which the student was expelled.<sup>50</sup> The court also criticized the school board's argument that it needed to apply its zero tolerance policy ruthlessly, and without regard to the student's intention, because otherwise it would send an inconsistent message to students.<sup>51</sup> The court reiterated that consistency is not a substitute for rationality.<sup>52</sup> In continuing to criticize the school board's policies, the 6th Circuit compared zero tolerance rationale to that of suspending students chosen at random from the school's directory.<sup>53</sup> The 6th Circuit consciously set precedent by stating, "we expect that our opinion today will clarify the contours of a student's right not to be expelled for truly unknowing or unconscious

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*Colvin v. Lowndes County*, 114 F. Supp. 2d 504, 513 (N.D. Miss. 2000) (court acknowledges that "school disciplinary matters are best resolved in the local community and within the institutional framework of the school system"); *But see Seal v. Morgan* 229 F.3d 567, 579 (6th Cir. 2000) ("The fact that we must defer to the Board's rational decisions in school discipline cases does not mean that we must, or should, rationalize away its irrational decisions.").

<sup>44</sup> See *Mitchell v. Bd. of Tr. of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660 (5th Cir. 1980) (court recognized that a mandatory disciplinary rule adopted by a school board can be unconstitutional if there is no rational relationship between the punishment and the offense; however, the rule is not unconstitutional simply because it is mandatory); *Bd. of Sch. Tr. v. Barnell*, 678 N.E.2d 799 (Ind. App. 1997) (held that a school rule providing for automatic expulsion for knives was not arbitrary); *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So.2d 237 (Miss. 1985) (held that the exercise of a board's authority would not be disturbed unless it infringed upon some state or federal constitutional right, and that the policy, although mandatory, was constitutional because it furthered substantial legitimate interests of the school district).

<sup>45</sup> See *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458, 460 (5th Cir. 1974); *Lyons v. Penn Hills Sch. Dist.*, 723 A.2d 1073 (Pa. Commw. Ct. 1998).

<sup>46</sup> *Seal*, 229 F.3d 567.

<sup>47</sup> *Id.* at 572.

<sup>48</sup> *Id.* at 582.

<sup>49</sup> *Id.* at 575-76.

<sup>50</sup> *Id.* at 581.

<sup>51</sup> *Id.* at 581.

<sup>52</sup> *Id.* at 579.

<sup>53</sup> *Id.* at 578.

possession of a forbidden object.”<sup>54</sup> The court reversed summary judgment for the plaintiff school entity and remanded the case back for determination regarding the student’s intent.<sup>55</sup>

In *Lyons v. Penn Hills School District*, a teacher found a student with a miniature Swiss army knife that the child had found in a school hallway.<sup>56</sup> The student, Lyons, told the principal that he intended to turn the knife into his instructor, however, Lyons was still suspended for a year under the school district’s unwritten zero tolerance policy on weapons.<sup>57</sup> The Pennsylvania Commonwealth Court found that the appellant school district failed to provide its superintendents of each school with the discretion to modify discipline. The court noted that the Pennsylvania legislature expressly authorized the superintendent of each school district to recommend a modification of the mandatory expulsion requirement on a case-by-case basis.<sup>58</sup> The court strongly stated that the appellant school district exceeded its authority in adopting a zero tolerance policy that denied the superintendents discretion that was statutorily provided for, and “frustrate[d] the clear legislative intent that this statute not be blindly applied.”<sup>59</sup>

In *Lee v. Macon County Board of Education*,<sup>60</sup> the Fifth Circuit reviewed a board of education’s decision to order the permanent expulsion of two students, as recommended by their school principal. The court noted a pattern of the board of conforming to the principal’s judgment rather than undertaking independent consideration of the circumstances. The court stressed the seriousness of the penalty at stake and stated that, “[f]ormalistic acceptance or ratification of the principal’s request or recommendation as to the scope of punishment, without independent Board consideration of what, under all the circumstances, the penalty should be, is less than full due process.”<sup>61</sup> The court proceeded to remand the case for Board reconsideration.<sup>62</sup>

These cases reiterate the importance of using discretion when applying zero tolerance policies. The blind application of zero tolerance policies, without consideration of the student’s intent and individual circumstances can be a violation of their constitutionally required substantive due process rights.

## Criminalization of Youth

Zero tolerance policies have increased the number of criminal and delinquency charges filed against children for in-school behavior.<sup>63</sup> Even when the behavior

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<sup>54</sup> *Id.* at 581.

<sup>55</sup> *Id.* at 582.

<sup>56</sup> *Lyons v. Penn Hills Sch. Dist.*, 723 A.2d 1073 (Pa. Commw. Ct. 1998).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1075.

<sup>59</sup> *Id.* at 1076.

<sup>60</sup> *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458 (5th Cir. 1974).

<sup>61</sup> *Id.* at 460.

<sup>62</sup> *Id.* at 461.

<sup>63</sup> Advancement Project & The Civil Rights Project, *supra* note 6, at 15.

poses no serious danger to the safety of others, students often face charges. Many times school districts transfer their disciplinary authority to law enforcement and charges are brought without respect to the age of the student, her intent, circumstances, or the severity of the harm caused.<sup>64</sup>

In the 2002 revision of the Gun Free Schools Act, 20 U.S.C. § 7151, Congress mandated that local educational agencies report to their respective criminal justice or juvenile delinquency systems, students who bring “firearms or weapons” to school.<sup>65</sup> Congress also conditioned the states’ educational funding on this additional requirement. With this change, the number of students criminalized for their school-related behavior will undoubtedly increase.

Even before the mandatory Congressional provision, many states required that schools report certain students to law enforcement. During the 1998-1999 school year, more than 3,000 students were referred to law enforcement for “disturbing schools.”<sup>66</sup> A report from the National Summit on Zero Tolerance in 2000 indicated that 43 states required schools to report to law enforcement agencies various student conduct. Often these referrals occur when the offense does not include violence. The American Bar Association (ABA), in its 2000 report recognized the trend of zero tolerance policies to refer children to juvenile court.<sup>67</sup> The report describes several examples in various states where children were formally processed through the juvenile justice system for relatively minor school infractions.

The overall increase in criminal and delinquency charges also raises questions about students’ rights regarding the arrest, notice of the charges against them, and detainment of the student. Although delinquency charges are not technically considered criminal charges, students receiving delinquency charges are entitled to the many of the same constitutional protections granted in a criminal proceeding.<sup>68</sup> Students are entitled to due process protections, including the right to notice, the right to counsel, and the privilege against self-incrimination. In *In re Gault*, the United States Supreme Court stressed the similarities between a delinquency adjudication and an adult criminal proceeding.<sup>69</sup> The Supreme Court held that notice in a juvenile court proceeding must comply with due process requirements, including that the notice be given “sufficiently in advance of scheduled court proceedings,” that it be given to the child and the child’s guardian, that it “set forth the alleged misconduct with particularity,” and that it

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<sup>64</sup> *Id.* at 15. For examples of school districts transferring disciplinary problems to law enforcement, *see id.*

<sup>65</sup> 20 U.S.C. § 7151(h) (2002).

<sup>66</sup> Advancement Project & The Civil Rights Project, *supra* note 6, at 16.

<sup>67</sup> American Bar Association, *Zero Tolerance Report* (2001), available at [www.abanet.org/crimjust/juvjus/zerotolreport.html](http://www.abanet.org/crimjust/juvjus/zerotolreport.html) (last visited on Feb. 12, 2002).

<sup>68</sup> *See In re Gault*, 387 U.S. 1, 30-31 (1967).

<sup>69</sup> 387 U.S. 1.

be in writing.<sup>70</sup> The Supreme Court stated that due process requires this type of notice and that it does not allow any less.<sup>71</sup>

In *Gault*, the Supreme Court also addressed the right of a juvenile to retain counsel and the child's Fifth Amendment right against self-incrimination.<sup>72</sup> The Court concluded that, "the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency that may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel..."<sup>73</sup> The Supreme Court went on to state that if the child is unable to afford counsel, counsel will be appointed to represent the child.<sup>74</sup> The Court also concluded that the constitutional privilege against self-incrimination is applicable in delinquency proceedings.<sup>75</sup>

Relying heavily on the Supreme Court's decision in *Gault* two years before, the Georgia Court of Appeals recognized the applicability of the Fourteenth Amendment to states and reversed a lower court decision on appeal because a 14-year old was not informed of his right to counsel relating to his delinquency proceeding.<sup>76</sup> The Court of Appeals stated that, "the same rights now afforded ordinary citizens through all 'critical' stages of the criminal process must be afforded to children in any particular stage of a juvenile delinquency process if the results...can have a direct effect...and the final determination may result in a restraint on a child's freedom."<sup>77</sup> After the United States Supreme Court held that jeopardy does attach within the meaning of the Fifth Amendment in delinquency proceedings in juvenile court,<sup>78</sup> the Georgia Court of Appeals has also recognized that constitutional protections against double jeopardy (preventing the State from retrying a defendant for the same act) extend to juveniles involved in delinquency proceedings.<sup>79</sup> In 2002, when reversing the adjudication of a delinquency charge because the child did not have an opportunity to cross-examine witnesses and was not told that anything said by her could be used against her in court, the Georgia Court of Appeals reiterated its position that "[t]he adjudicatory phase of a delinquency proceeding should track (or parallel) an adult criminal trial."<sup>80</sup> Georgia has even codified a child's right to counsel,

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<sup>70</sup> *Id.* at 33.

<sup>71</sup> *Id.* at 33-34.

<sup>72</sup> See *Gault*, 387 U.S. 1.

<sup>73</sup> *Id.* at 41.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 50-51, 55.

<sup>76</sup> *Freeman v. Wilcox*, 119 Ga. App. 325 (1969).

<sup>77</sup> *Id.* at 328.

<sup>78</sup> *Breed v. Jones*, 421 U.S. 519 (1975).

<sup>79</sup> *In the Interest of J.B.W.*, 230 Ga. App. 673, 675 (1998); See also *In the Interest of J.C.*, 257 Ga. App. 657 (2002).

<sup>80</sup> *In the Interest of J.C.*, 257 Ga. App. 657.

right against self-incrimination, and right to cross examine adverse witnesses in juvenile court proceedings.<sup>81</sup>

Another due process protection under the Fourteenth Amendment of the United States Constitution is the void for vagueness doctrine. The void for vagueness doctrine requires that “a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>82</sup> Due process requires that persons of ordinary intelligence reasonably be informed as to what activities are prohibited, such that they are not required to speculate as to the meaning of the law.<sup>83</sup> Vagueness may invalidate a criminal law for either of two independent reasons: it may fail to provide the kind of notice that will enable ordinary people to understand what conduct is prohibited or it may authorize and even encourage arbitrary and discriminatory enforcement.<sup>84</sup>

While Georgia has not yet addressed the void for vagueness doctrine with regards to a statute in a delinquency proceeding, it seems that children should also be able to invoke this due process protection along with their right to notice, right to counsel, right against self-incrimination, and double jeopardy protections. In fact, other states have analyzed statutes in delinquency proceedings under the void for vagueness doctrine and have held such statutes vague.<sup>85</sup> The void for vagueness doctrine was almost addressed by Georgia courts in a delinquency proceeding in *Pitts v. State*; however the Court of Appeals found that the argument was waived on appeal because it was not both “raised” and “passed on.”<sup>86</sup> The statute in question was section 20-2-1181 of the Georgia Code, the *disrupting public schools* law, which makes it a high and aggravated misdemeanor “for any person to disrupt or interfere with the operation of any public school.”<sup>87</sup>

Given the established law, it is clear that a statute needs to be sufficiently definite in order to give an ordinary person fair notice of the proscribed behavior. A strong argument can be made that Georgia Code section 20-2-1181 should be held void for vagueness. The statute has no definitional component; the words “disrupt,” “interfere,” and “operation” are never defined.<sup>88</sup> Section 20-2-1181

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<sup>81</sup> GA. CODE. ANN. § 15-11-6 (2001) (children’s right to counsel in juvenile proceedings); *Id.* § 15-11-7 (children shall have the opportunity to cross-examine adverse witnesses and need not be a witness against or incriminate herself in juvenile proceedings).

<sup>82</sup> *Kolender v. Lawson*, 461 U.S. 352 (1983); *Bohannon v. State*, 497 S.E.2d 522 (Ga. 1998); *Brinkley v. State*, 322 S.E.2d 49 (Ga. 1984).

<sup>83</sup> *Bilbrey v. State*, 254 Ga. 629, 631 (1985); *State v. Johnson*, 507 S.E.2d 443 (Ga. 1998).

<sup>84</sup> *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

<sup>85</sup> *People in the Interest of M.*, 630 P.2d 593 (Colo. 1981) (held that statute for loitering was unconstitutionally vague in a juvenile delinquency proceeding); *T.R. v. State*, 80 P.3d 1276 (Nev. 2003) (Nevada Supreme Court found that a statute was void for vagueness in a delinquency adjudication); *In re P.*, 446 N.Y.S.2d 1009 (N.Y. Fam. Ct.) (found statute vague in a delinquency proceeding because it failed to define what constituted a *dangerous knife*).

<sup>86</sup> *Pitts v. State*, 260 Ga. App. 274, 274 n.1 (2003).

<sup>87</sup> GA. CODE. ANN. § 20-2-1181 (2001).

<sup>88</sup> *Id.*

does not give clear notice of what behavior is prohibited and it provides no guidelines for how to act in compliance with the statute. In addition, there is not a sufficient body of judicial interpretation on the subject. In fact, the only case citing the statute is *Pitts*, which dealt with a school fight attracting a large crowd.<sup>89</sup> Since the court found that *Pitts* had abandoned the void for vagueness argument on appeal, the court could only affirm that there was sufficient evidence to uphold the jury's verdict. Also, section 20-2-1181 may authorize arbitrary and discriminatory enforcement. Without sufficient definiteness of what the statute prohibits, it can be used to target specific groups or may be used to go after people who do something as innocent as playing music outside of a school.

### Lack of Effectiveness

A study by the National Center for Education found that after four years of implementation, zero tolerance policies had no appreciable effect on reducing school violence.<sup>90</sup> Strikingly, those schools in which zero tolerance policies were enforced were less safe than those without harsh policies.<sup>91</sup> This suggests that certainty of punishment provides no assurance that safer schools will be created.

A 1999 report by the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention reported that violence by juveniles dropped 33% percent between 1993 and 1997.<sup>92</sup> Although school officials may credit this decrease in violence to enforcement of zero tolerance policies, the reduction is more likely the result of the overall decline in juvenile delinquency that began before the emergence of zero tolerance policies.<sup>93</sup> Serious violent crimes committed by juveniles peaked in 1993 and have been declining ever since.<sup>94</sup> Additionally, the Federal Bureau of Investigation's 2002 Uniform Crime Report reveals an overall 24.9% decrease in Crime Index since 1993 in the United States.<sup>95</sup> Thus, the decline in violence among youth is consistent with the overall decline in violence in the United States, and not due to the enactment and enforcement of zero tolerance policies.<sup>96</sup>

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<sup>89</sup> *Pitts*, 260 Ga. App. 274.

<sup>90</sup> Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 148 (2000); Advancement Project & The Civil Rights Project, *supra* note 6, at 17.

<sup>91</sup> Adams, *supra* note 90, at 148; Advancement Project & The Civil Rights Project, *supra* note 6, at 17.

<sup>92</sup> HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS & VICTIMS 62 (1999) (the drop in serious violence was led by reductions in victimizations by juveniles). The report also indicates that violence by adults dropped 25%. *Id.* at 62-63.

<sup>93</sup> See Office of Juvenile Justice and Delinquency Prevention, *Trends in Rates of Juveniles Committing Serious Violent Crimes*, available at <http://ojjdp.ncjrs.org/ojstatbb/html/qa135.html>; See also SNYDER & SICKMUND, *supra* note 92, at 62.

<sup>94</sup> Office of Juvenile Justice and Delinquency Prevention, *supra* note 93.

<sup>95</sup> FEDERAL BUREAU OF INVESTIGATION & U.S. DEP'T OF JUSTICE, 2002 UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 3 (2002). *Crime Index* is "composed of selected offenses used to gauge fluctuations in volume and rate of crime reported to law enforcement." For more information, see *id.* at 3.

<sup>96</sup> SNYDER & SICKMUND, *supra* note 92, at 62-63; See Schwartz et. al., *School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV 1, 6 (2000) (noting that declines in

## Denial of Education

One negative impact of zero tolerance policies is the denial of education. As students are removed from their educational settings through suspensions and expulsions, they typically fall behind in their schoolwork, which increases the likelihood they will drop out and engage in other delinquent behavior.

### *Decrease in Academic Performance Leading to Further Delinquency*

Suspension usually has negative consequences on academic performance. Suspended children may receive failing grades in missed classes and often complain that teachers do not provide assignments to allow the students to keep up with their school work for days missed. Suspended students may also be retained in their grade level. Studies confirm that poor school performance is one of the strongest predictors of whether youth will drink, smoke, use weapons or attempt suicide.<sup>97</sup> If poor school performance leads to further delinquency, denying our children educational opportunity will likely promote what we are trying to prevent: misbehavior in schools. Some experts have concluded that, "suspension may simply accelerate the course of delinquency by providing a troubled youth with little parental supervision and more opportunities to socialize with deviant peers."<sup>98</sup>

### *Rise in Dropout Rates*

The increase in suspension and expulsion rate easily leads to higher rates of dropping out and delinquency among youth. Suspension is a moderate to strong predictor of a student dropping out of school.<sup>99</sup> One study estimated that suspended sophomores are three times as likely to drop out than other students their age.<sup>100</sup> Also according to the study, ten percent of students cited expulsion or suspension as their primary reason for dropping out of school.<sup>101</sup> More than 30% of sophomores who drop out have been suspended.<sup>102</sup> When students are out of the classroom because the school has suspended or expelled them, many youth fall behind, which increases the students' risk of dropping out. According

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serious violence committed by youth, both inside and outside of school, contradict public perceptions and current disciplinary policies).

<sup>97</sup> See Coalition for Juvenile Justice, *2001 Annual Report: Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention, Overview*, at <http://www.juvjustice.org/publications/overview2001.pdf> (last visited Feb. 12, 2004).

<sup>98</sup> Advancement Project & The Civil Rights Project, *supra* note 6, at 11 citing Russ Skiba and Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* PHI DELTA KAPPAN (January 1999).

<sup>99</sup> Advancement Project & The Civil Rights Project, *supra* note 6, at 13.

<sup>100</sup> Ruth B. Ekstrom et. al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356 (1986).

<sup>101</sup> *Id.* at 364.

<sup>102</sup> *Id.* at 360.

to the National Center for Education Statistics, eleven percent of the population between ages 16 and 24 are high school dropouts.<sup>103</sup>

Education is essentially an investment, and the returns are social, cultural, and economic. The benefits of higher education include “better employment opportunities, jobs that are less sensitive to general economic conditions, better opportunities to participate in employer-provided training, and higher earnings.”<sup>104</sup> Not graduating from high school increases the difficulty in transitioning to full-time work.<sup>105</sup> Also, earnings are, on average, over thirty percent lower for those with less education.<sup>106</sup> “Bureau of Labor Statistics data show that within months of graduation, students who finished high school are about twice as likely to be working or enrolled in college as those who drop out.”<sup>107</sup>

The Coalition for Juvenile Justice’s (“CJJ”) 2001 Annual Report reveals that youth who drop out of school are three and a half times more likely than high school graduates to be arrested.<sup>108</sup> The CJJ also reported that 82% of adult prisons inmates have dropped out of high school.<sup>109</sup> There is no doubt that there is a relationship between drop out rates and criminalization.

Dropping out also has additional unexpected consequences such as health problems: “[t]here is a strong positive relationship between indicators of a person’s health and educational attainment.”<sup>110</sup> Persons with more education are found to have better health knowledge, were less likely to smoke cigarettes, were more likely to exercise regularly, and less likely to be exposed to a health hazard at work.<sup>111</sup> In one study, the percentage of 25 to 64 year-olds who had either Medicare or private health insurance increased with the level of education they had attained.<sup>112</sup> Access to preventative care and treatment affects not only individuals, but the economy as a whole: “[g]ood health not only has social and

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<sup>103</sup> National Center for Education Statistics, *Fast Facts: Dropout Rates*, available at <http://nces.ed.gov/fastfacts/display.asp?id=16> (last visited Feb. 12, 2004).

<sup>104</sup> NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF EDUCATION, *THE CONDITION OF EDUCATION 80* (1993), available at <http://nces.ed.gov/pubs93/93290.pdf> (last visited Feb. 12, 2004).

<sup>105</sup> *Id.* at 82-85 (explaining results of study finding that only 37% of young people who left school the previous year without finishing were employed, whereas 60% of those who did finish high school, but did not go on to college, were employed).

<sup>106</sup> *Id.* at 86-87 (finding that males who did not finish high school earned about 30% less than those that did finish high school and did not go on to college, also finding that same earning penalty for females was between 37% and 47%).

<sup>107</sup> *OOChart: High School Graduates About Twice as Likely as Dropouts to Work or Go to School*, 44 OCCUPATIONAL OUTLOOK Q. No. 2 (Summer 2000), at <http://www.bls.gov/opub/ooq/2000/summer/oochart.htm> (last visited on Feb. 12, 2004).

<sup>108</sup> Coalition for Juvenile Justice, *supra* note 97, at 2.

<sup>109</sup> *Id.*

<sup>110</sup> NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF EDUCATION, *supra* note 104, at 81.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 92-93.

financial consequences for the individual but also for society, which bears some of the economic burden of providing care and of lost productivity.”<sup>113</sup>

A culmination of the effects of dropout rates no doubt affect the national economy: “[e]ach year the nation is drained of more than \$200 billion in lost earnings and taxes because of the rate of youth dropping out of school.”<sup>114</sup>

### Deficient Alternative Education

The high rate of suspensions and expulsions creates a need for quality alternative education programs. Some alternative schools provide adequate education and services to the at-risk population. While such alternative education programs ensure that excluded students are not denied educational opportunities, they are not widespread. “Unfortunately, many alternative education programs are no more than holding pens for children considered to be troublemakers. Students attending those schools are mistreated and denied adequate instruction, thus exacerbating issues of alienation, hostility, and low academic performance.”<sup>115</sup>

The United States Constitution does not recognize the right to education as a *fundamental* right; therefore under it there is no requirement for schools to provide alternative education to suspended or expelled children. Only a limited number of states guarantee the right to public education,<sup>116</sup> and their commitment to alternative educational programs for suspended and expelled students differ.<sup>117</sup> The alternatives to educational opportunities for suspended or expelled students are many times inadequate. Interestingly, however, the GFSA

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<sup>113</sup> *Id.* at 92.

<sup>114</sup> Coalition for Juvenile Justice, *supra* note 97, at 2.

<sup>115</sup> Advancement Project & The Civil Rights Project, *supra* note 6, at 14. The report describes a Mississippi alternative school that uses police officers to discipline, holds classes with very diverse grade levels, and has teachers merely acting as monitors rather than giving instruction. In another alternative school described, students watch videos all day and learn nothing. *Id.*

<sup>116</sup> See *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (finding that the right to education is a fundamental right in Ohio); *State ex rel. G.S.*, 749 A.2d 907-08 (N.J. Super. Ct. Ch. Div. 2000) (finding that the right to education is a fundamental right in New Jersey and that it requires schools to provide alternative education to expelled students); See also *Cathe A. v. Doddridge Bd. Of Educ.*, 490 S.E.2d 340, 349, 351 (W. Va. 1997) (requiring school districts in West Virginia to provide free alternative education to student expelled for one year and recognizing that in almost all cases, the State will be able to provide reasonable educational opportunities to children removed from the classroom). *But also see* *Walter v. Sch. Bd. Of Indian River County*, 518 So. 2d 1331, 1335-36 (Fla. Dist. Ct. App. 1987) (holding that there was no requirement in Florida to provide expelled students with an alternative educational program); Kim Brooks et. al, *School House Hype: Two Years Later*, at 20 (2000), available at [http://www.campbell.edu/faculty/gay/school\\_violence/sch\\_viol\\_JPI\\_hype.pdf](http://www.campbell.edu/faculty/gay/school_violence/sch_viol_JPI_hype.pdf) (last visited Feb. 20, 2004) (stating that Massachusetts Public schools are not required to provide alternative education).

<sup>117</sup> See, e.g., *D.B. v. Clarke County Bd. of Educ.*, 220 Ga. App. 330 (1996) (Georgia recognizes that the fundamental right to education may be limited by statute).

explicitly notes that nothing in the Act prevents states from providing alternative education for expelled students.<sup>118</sup>

The Georgia legislature has adopted a policy regarding alternative education programs.<sup>119</sup> This policy lays certain structural and procedural requirements for the establishment of alternative schools; for example, that the alternative program is provided in a setting “other than the student’s regular classroom...located on or off regular school campus.”<sup>120</sup> The policy also states that it is preferable to reassign disruptive students to an alternative education program rather than suspending or expelling students from school. The successful application of this policy is hard to determine. While Georgia *authorizes* school administrators to utilize alternative education opportunities, school administrators are never *required* to do so.<sup>121</sup>

Research on alternative schools is scarce and more information is necessary to determine the quality and effectiveness of education provided. Standards in alternative schools should mirror those of regular schools and resources should be equally allocated to these schools. Under-educating this group will have the same treacherous effects discussed under the *Denial of Education* section of this paper.

## RECOMMENDATIONS FOR CHANGE

Reasonable steps should be taken to keep schools safe and to discipline misbehaving students. However, discipline policies should not result in a mass denial of education to children. Zero tolerance policies were established in an attempt to quickly address rising concerns about school safety and discipline, but have created negative consequences affecting children, their families, and communities. The need for change is evident.

The American Bar Association (ABA) stated that *zero tolerance* is public education’s effort to import to education the concept of adult mandatory sentencing.<sup>122</sup> The ABA created a report with a formal recommendation regarding school discipline, which was adopted by the ABA’s policy-making House of Delegates.<sup>123</sup> The report describes zero tolerance as a “one-size-fits-all solution” to problems confronted by schools. The recommendation lists three basic principles. First, the report acknowledges and supports that schools should be a safe and gun-free environment for students. Next, the ABA recommends that school officials, in cases of alleged student misbehavior, exercise discretion in accordance with due process and in such a way that each student and the

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<sup>118</sup> 20 U.S.C. § 7151 (2002).

<sup>119</sup> GA. CODE. ANN. § 20-2-154.1 (2001).

<sup>120</sup> *Id.* § 20-2-154.1(d)(1)&(2).

<sup>121</sup> *See Id.*; *Id.* § 20-2-768.

<sup>122</sup> American Bar Association, *Recommendation, Report to House of Delegates*, 106th Congress, 103B (Feb. 2000), available at <http://www.abanet.org/crimjust/juvjus/zerotolres.html> (last visited Feb. 12, 2004).

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

surrounding circumstances of the misconduct are considered. The final ABA principle in the report asserts that alternatives to expulsion or prosecution should be in place to improve student conduct and school atmosphere while keeping schools safe.

### Discretion Employed

Because of the negative effects of zero tolerance, school districts should avoid automatic penalties beyond those mandated by the GFSA. For any specifically prohibited conduct, a range of consequences should be available, and allow room for individualized discretion. The GFSA permits discretion on behalf of school district administrators and states should employ that discretion, both explicitly in their laws and in practice. States should mandate the consideration of the individual's circumstances before prescribing punishment, not merely permit discretion.

Discretion should also be used, when possible, regarding referrals to the criminal justice or juvenile delinquency system. States that mandate referral to law enforcement agencies should allow room for consideration of the individual circumstances of the situation.

### Focus on Prevention

The ABA's report on school discipline focuses on prevention as an alternative to zero tolerance.<sup>124</sup> The report highlights the risk factors associated with suspension and expulsion, and encourages targeting the most potent risk factors early in a child's life to diminish misbehavior.

Another report on zero tolerance suggests pursuing an alternative route to school safety focused on preventing and eliminating the behavior that warrants exclusion, not focused on eliminating the student.<sup>125</sup> "Most behaviors that might warrant exclusion from school can be prevented if students perceive themselves as valued and respected members of a larger community that nurtures strong relationships between school adults and students, sets behavioral and academic standards, and values fairness and consistency."<sup>126</sup>

### Explicitly Guarantee Due Process

Special precautions should be taken to guarantee students' due process rights. The mandatory procedures for suspension and expulsion should be clearly laid out and codified, including the right to notice and a hearing. When permitted, as is under the GFSA, school officials should use their discretion in considering

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

<sup>125</sup> Advancement Project & The Civil Rights Project, *supra* note 6, at 2-3.

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

whether to prescribe the mandatory punishment for actions. The individual circumstances regarding the student and the incident should be taken into account so as to honor the student's substantive due process rights.

## Improve Alternative Education

The denial of education creates too many risks for children and society. Alternative education opportunities need to be available to suspended and expelled students. A few states have recognized its importance, and have mandated alternative education programs for suspended and expelled students. Without the availability of alternative education, many suspended and expelled students will miss the opportunity to receive educational guidance and instruction. Many expelled students, coming from low-income families, do not have the means to attend private schools or schools in other districts.

## GEORGIA'S NEED FOR CHANGE

The general applications of Georgia's zero tolerance policies are hard to determine. Granting administrators the authority to use discretion in applying zero tolerance policies and granting the authority to send excluded children to alternative schools does not mean that school administrators necessarily do so at any time. Listed below are suggestions that Georgia Legislature should consider in order to lessen the negative impact of zero tolerance policies.

- Eliminate the zero tolerance policy for mandatory expulsion under Georgia Code section 20-2-751.6 (act of physical violence against school employee), which is *not* required under the GFSA
- Explicitly require that school administrators use discretion when considering each alleged misbehavior
  - Allow flexibility
  - Consider expulsion alternatives
- Clearly define what "disrupt or interfere with the operation of any public school" means under Georgia Code Section 20-2-1181
  - Explicitly codify that administrators use discretion in applying this statute
- Amend statutes so as to explicitly comply with due process, including provisions related to:
  - Notice
    - Minimum time requirement before hearing;
    - State alleged misbehavior with particularity;
    - State possible sanctions;
    - Date and time of hearing.
  - Hearing
- Explicitly require that alternative education opportunities be offered for all or most suspended and expelled students
- Create effective alternative education programs that should entail:

- Clear focus on academic learning
  - High standards of expectation;
  - More flexible than traditional schools;
  - Use of creative instruction to benefit more students (every student can learn, but not in the same way).
- Focus on behavioral development
  - Counseling programs;
  - Conflict resolution skills;
  - Anger management training.
- Professional/Vocational development
  - Develop job-related skills;
  - Focus on healthy decision-making.
- Sense of community
  - Relatively small class size;
  - Caring relationships between teachers and students;
  - School linked support services with parents and communities.

It is important that school teachers and administrators retain the authority to remove dangerous students from school in order to ensure the safety of that student and others. However, the application of needlessly harsh one-size-fits-all punishments through zero tolerance policies are reaching students who pose little or no threat. The tendency of these policies to remove students from their school settings creates many detrimental effects to the students. Zero tolerance for firearms cannot be avoided under the GFSA, however Georgia can legislatively abandon section 20-2-751.6 and take other actions to reduce the negative impact of zero tolerance policies on our children and our society.