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School Discipline “As Part of the Teaching Process”: Alternative and Compensatory Education Required by the State’s Interest in Keeping Children in School

Amy P. Meek*

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INTRODUCTION

In *Goss v. Lopez*, the leading case on due process requirements in school discipline, the Supreme Court emphasized that the purpose of suspending students is not just "a necessary tool to maintain order but a valuable educational device." Justice White's majority opinion recognized that the state's interest in school discipline proceedings is not merely to preserve school order but also to develop a dialogue with misbehaving students as part of the teaching process. Over the last three decades, however, the rise in "zero-tolerance" policies has hamstrung educators' flexibility to discipline students by requiring lengthy suspensions or expulsions for a variety of offenses.

Post-*Goss* lower court rulings often have neglected the state's interest in educating all children—even those who misbehave—while over-emphasizing schools' interests in excluding certain students to maintain an orderly learning environment. A closer look at *Goss*, as well as at subsequent Supreme Court case law on the constitutional rights of students, suggests that the state's legal interest is to ensure that every student gets an education rather than to exclude misbehaving students.

This Note argues that courts should consider expressly the state's interest in educating every child as a factor separate from the school's interest in removing a misbehaving student from the learning environment. Although courts may preserve much of their traditional deference to the judgment of teachers and school officials in deciding whether to discipline a student, this Note contends that courts should not conflate the state's interests with a particular school's interests. The state's interest in educating all children deserves more weight when a state constitution guarantees children a fundamental right to education or when a state has enacted a statute requiring that expelled students obtain alternative learning services. In such cases, due process, equal protection, and statutory interpretation arguments should emphasize the state's interest in educating children. Therefore, although courts need not scrutinize every aspect of every disciplinary decision, the state's interest in educating children does require courts to look more critically at the nature of disciplinary methods and the alternative education meted out to students.

Recognizing the state's interest as advanced in this Note would not require courts to award significant monetary damages nor make educators personally

2. The term "zero-tolerance" has been adopted to denote policies mandating "the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the seriousness of behavior, mitigating circumstances, or situational context." AM. PSYCHOL. ASS'N ZERO TOLERANCE Task Force, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations 2 (2006), available at http://www.apa.org/releases/ZTTFReportBODRevisions5-15.pdf [hereinafter APA, Zero Tolerance Policies].
liable for their disciplinary decisions. Instead, the approach suggested here in-
volves the courts' (1) requiring that students excluded from school receive an
adequate alternative education; and (2) awarding compensatory education\(^3\) to
students whose alternative programs fall short.

This Note focuses on Connecticut as an example of a state ripe for the kind
of analysis and policy changes proposed. Numerous students are excluded from
Connecticut schools for unnecessarily long periods without adequate alterna-
tive education—despite state statutes protecting students (including a manda-
tory alternative education law) and a well-established fundamental right to edu-
cation in Connecticut (requiring strict scrutiny).\(^4\)

Part I of this Note argues that zero-tolerance policies have counterproduc-
tive social effects because they push misbehaving students out of the classroom
instead of disciplining them on school grounds or through alternative educa-
tion programs. Part II outlines the current state of U.S. constitutional protec-
tions for public school students and argues that, although Supreme Court doc-
trine has acknowledged the state's interest in educating all students, lower
federal courts often have incorrectly ignored this interest. Part III discusses re-
cent opinions that examine whether various state constitutions require ade-
quate alternative education for students excluded under zero-tolerance policies.
These cases suggest that, rather than focusing on the individual's right to an
education, plaintiffs have experienced the most success when they can convince
the courts that the state's interest lies in educating all children, including those
who misbehave.

Therefore, Part IV proposes that child advocates should focus the attention
of courts on the state's interest in educating all children by specifically seeking
compensatory education as a remedy. The model for this strategy comes from
the Individuals with Disabilities Education Act (IDEA), which supplies a com-
pensatory education remedy for students who are denied a free and appropriate
public education.\(^5\) Under the IDEA paradigm, plaintiffs seek compensatory

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\(^3\) "Compensatory education" is a term often used to refer to educational and related
services provided as an equitable remedy to redress the denial of a free and appro-
priate public education for a child with disabilities. See generally Letter from Ken-
neth Warlick, Dir., Office of Special Educ. Programs, U.S. Dep't of Educ., to Dr.
Gordon Riffel, Deputy Superintendent, Ctr. for Special Educ., Ill. State Bd. of
Educ. 2 (Aug. 22, 2000) [hereinafter Letter from Kenneth Warlick], available at
(“Federal circuit courts of appeal have confirmed the independence of the right to
compensatory education as an equitable remedy to address the denial of FAPE [a
free and appropriate public education] from the right to FAPE generally, which
latter right terminates upon certain occurrences . . . .”).

\(^4\) See CONN. GEN. STAT. § 10-233d (2009); Horton v. Meskill, 376 A.2d 359, 373
(Conn. 1977) ("[I]n Connecticut the right to education is so basic and fundamen-
tal that any infringement of that right must be strictly scrutinized.").

While the IDEA does not use the term "compensatory education," courts have
used the term in awarding educational and other services to children with dis-
education for individual, nondisabled students harmed by exclusion from school without an adequate alternative education program. Finally, the Conclusion recommends an approach for child advocates in Connecticut, applying the lessons drawn from Parts I through IV.

I. Zero-Tolerance Policies and the Harm of Excluding Students from School

"Zero-tolerance" laws and policies in the United States require educators to mete out harsh and inflexible punishments for rule-breaking. Researchers have shown, however, that high suspension rates do not improve school climates and that students who are excluded from school without adequate alternative education are more likely to drop out or get arrested. In addition to harming the interests of students, zero-tolerance laws ignore the larger state interest in ensuring that all children are educated.

Zero-tolerance education policies gained prominence in the late 1980s and early 1990s after school districts in California, New York, and Kentucky enacted mandatory expulsion policies for drugs, fighting, and gang-related activity. By 1993, zero-tolerance policies were adopted across the country and often expanded to include mandatory expulsions for offenses such as smoking and school disruption. The federal government cemented this trend in 1994 by enacting the Gun-Free Schools Act, which requires local educational agencies to mandate a one-year expulsion for students who bring weapons to school. The federal law did not require that states provide an alternative education to students expelled under zero-tolerance policies. While thirty-six states provide some alternative education programs to students excluded from school, only thirteen states require school districts to provide an alternative education to expelled students. A significant proportion of expelled students are unable to ac-

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7. See id. at 48-49.
9. Id.
cess alternative education options. During the 1999-2000 school year, about one-third of districts offering alternative schooling for at-risk students were unable to enroll new students as a result of staffing or space limitations.

Even though the zero-tolerance federal requirement was designed to prevent weapons from entering schools, the vast majority of expulsions today result from fights or from alcohol, drug, or tobacco offenses. School suspensions and expulsions have skyrocketed as a result of zero-tolerance policies. Moreover, out-of-school suspension—in which a student is excluded from school for ten days or less—has become the most prevalent disciplinary method adopted by schools. For instance, during Connecticut’s 2007-08 school year, six percent of students were punished with out-of-school suspensions, and twelve of the state’s school districts suspended at least ten percent of their students out of school. The majority of these suspensions were issued for relatively minor offenses such as insubordination, truancy, or obscene language. As a result, some educators have questioned the merit of policies that require expelling or suspending students for relatively trivial infractions.

Perhaps more troublingly, research suggests that zero-tolerance policies have counterproductive effects both on the disciplined students and on the schools that exclude them. First, out-of-school suspensions and expulsions

13. See id. at 761-72. Wasser estimates, based on data from 1996-1997, that about forty-four percent of students expelled are not offered any form of alternative education.


15. Anderson, supra note 11, at 1185.

16. See RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 11 (2000); Anderson, supra note 11, at 1186.


19. Id.

20. See, e.g., SKIBA, supra note 16, at 10 (citing education studies from the 1990s finding that school suspension commonly is used for relatively minor offenses such as disobedience and disrespect, attendance problems, and general classroom disruption); Christine Bowditch, Getting Rid of Troublemakers: High School Disciplinary Procedures and the Production of Dropouts, 40 SOC. PROBS. 493, 498-99 (1993) (showing that, in the inner-city high school studied, staff often relied on suspensions to punish students who questioned authority, rather than to increase safety).
“push” students out of school in ways that contribute to increased dropout rates and delinquency; excluding students from school actually can reinforce their negative behaviors.\textsuperscript{21} Being excluded from school is associated with future discipline problems, lower grades, higher drop-out risk, and an increased risk of delinquency and incarceration.\textsuperscript{22} Several longitudinal studies of student behavior have found that, even controlling for variations in demographics and school structure, students suspended for misbehavior are more likely to have discipline problems in future semesters and are more likely to drop out of school in the long term.\textsuperscript{23} In 2007, Connecticut’s Court Support Services Division found that eighty-nine percent of sixteen- and seventeen-year olds involved in the juvenile justice system had been suspended or expelled from school.\textsuperscript{24}

One study attempted to measure the effectiveness of suspensions as an intervention for sixth grade students who were referred to the principal’s office early in the year.\textsuperscript{25} The authors hypothesized that students who were referred to the principal’s office but not suspended would be more likely to appear before the principal later in the year, while students who were suspended after being referred to the principal would be more likely to reform their behavior in future terms.\textsuperscript{26} Instead, a multivariate regression of the data showed the opposite: Students who were not suspended after referral to the principal’s office were significantly less likely to be disciplined in later semesters, while students who were suspended after their referrals were significantly more likely to have ongoing discipline problems.\textsuperscript{27} After examining the individual patterns of disciplinary referral, the authors concluded that suspension tends to reinforce problematic behaviors rather than discourage them.\textsuperscript{28}

Moreover, other research suggests that zero-tolerance policies fail to improve the learning environment even for students who remain in school. Schools that suspend and expel students at higher rates actually perform worse

\begin{itemize}
\item \textsuperscript{21} See id. at 14-15.
\item \textsuperscript{23} See, e.g., APA, ZERO TOLERANCE POLICIES, supra note 2, at 48-49 (summarizing short-term and long-term longitudinal studies of student discipline).
\item \textsuperscript{24} IMPROVE DISCIPLINE AND ACADEMIC PERFORMANCE, supra note 18, at 1.
\item \textsuperscript{25} Tary Tobin & George Sugai, Patterns in Middle School Discipline Records, 4 J. EMOTIONAL & BEHAV. DISORDERS 82 (1996).
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 91.
\item \textsuperscript{28} Id.
\end{itemize}
SCHOOL DISCIPLINE "AS PART OF THE TEACHING PROCESS"

on standardized tests, regardless of student demographics or socioeconomic status.\textsuperscript{29} Even after controlling for poverty rates, racial composition, and type (elementary or secondary) of school, one 2005 study found that schools with more out-of-school suspension exhibited lower passing rates on state accountability tests.\textsuperscript{30}

In response to criticism of zero-tolerance policies, some school districts have begun experimenting with requiring in-school suspensions or alternative education programs for students who otherwise would be excluded from school altogether.\textsuperscript{31} Researchers have found that these programs can significantly improve student behavior and outcomes, as well as overall school safety, as long as they are properly implemented with measures such as counseling and continued schoolwork.\textsuperscript{32}

A handful of states have begun to shift away from zero-tolerance policies by enacting laws to require that school districts develop or improve alternative education programs for students excluded from school.\textsuperscript{33} North Carolina, for example, rewrote its alternative learning statute in 1999 to require local school boards to establish alternative learning programs and to adopt guidelines for assigning students to such programs, including strategies for providing alternative learning programs to students subject to long-term suspension or expulsion.\textsuperscript{34} Although the law does not place any requirements on the quality of the alternative learning program, it urges local boards "to adopt policies that prohibit superintendents from assigning to alternative learning programs any pro-


fessional public school employee who has received" substandard evaluations.\textsuperscript{35} In 2000, Georgia enacted the A Plus Education Reform Act,\textsuperscript{36} which established an official alternative education system, required local school boards to adopt discipline processes that would help support students and provide services to address behavioral problems, and expressed the state's policy preference to "re-assign disruptive students to alternative educational settings rather than to suspend or expel such students from school."\textsuperscript{37}

In 2007, Connecticut enacted an even more ambitious law requiring that all suspensions be served in-school, unless the school's administration determines that the student poses such a significant danger to persons or property, or such a disruption to the educational process, that the student must be excluded from school during the period of suspension.\textsuperscript{38} Before the law was enacted in 2008, however, the state legislature passed another law extending the start date of the in-school suspension requirement to July 1, 2009, due to implementation concerns about overcrowding.\textsuperscript{39} Some educators and municipalities have opposed the law on the grounds that it creates an unfunded mandate to babysit troubled children, but attempts to delay further the law's implementation have not succeed.\textsuperscript{40}

The recent movement by states towards requiring alternative education and in-school suspension programs recognizes society's interest in educating all children and keeping them physically in school, even if doing so increases costs for local school districts. The progress achieved by these policies, however, is undermined in the many states that fail to provide an appropriate education to students who are suspended or expelled from school. For example, Connecticut requires that school boards offer an alternative educational opportunity to ex-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Ga. Code Ann. § 20-2-735(f) (2009); see also id. §§ 20-2-735(c)-(e), -768 (2009); Avarita L. Hanson, Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education, 9 U.C. Davis J. juv. L. & Pol'y 289, 372-73 (2005) (applauding the Act's improvements to Georgia's school disciplinary policies but noting that "a wide net has been cast by statute to capture many other types of specified and non-specific student behaviors that could spark student discipline, such as 'disruptive behavior.'").
\item An Act Concerning School Learning Environment, Pub. Act No. 08-160, sec. 2, § 10-233c(g), 2008 Conn. Acts 588 (Reg. Sess.).
\end{enumerate}
\end{footnotesize}
pelled students under sixteen, but it does not include any requirements about the number of hours or the quality of alternative education to be provided. Alternative schools often do not receive the financial resources needed to provide an appropriate education to expelled and suspended students.

Most states still fail to provide any alternative education to expelled or suspended students. Some states' zero-tolerance laws require students to be expelled permanently for certain violations, without providing for adequate alternative education. Nevada's law, for instance, requires that a student be expelled permanently after a second occurrence of certain incidents involving battery, drugs, or firearms. The law does require that a permanently expelled student receive some alternative education but only in the form of private school, homeschooling, independent study, or distance education. In-school alternative education within the public system is not required. It certainly seems unlikely that a permanently expelled student whose parents are unable or unwilling to fund private school or homeschooling would receive adequate instruction from an independent study or distance education program.

Michigan's permanent expulsion law is unusually harsh even by the ordinary standards of state zero-tolerance policies. The current version of the law, enacted in 1994, requires permanent expulsion for any student who possesses a dangerous weapon or who commits arson or rape on school grounds, and it provides for no alternative education program at all. Although permanently expelled students can eventually petition for reinstatement, there is no guarantee that they ever will be welcomed back into the school system. Moreover, Michigan's Attorney General has opined that, as long as a permanent expulsion accords with due process requirements, i.e., follows adequate notice and a hearing, the board of education is not required to provide an alternative education.

41. CONN. GEN. STAT. § 10-233d(d) (2009).
42. Wasser, supra note 12, at 762-63.
43. See Carroll, supra note 22, at 1912.
44. NEV. REV. STAT. § 392.466 (2008).
45. See id.
46. See Paul Bogos, Note, "Expelled. No Excuses. No Exceptions."—Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311, 74 U. Det. Mercy L. Rev. 357, 380 (1997) ("Among the state legislatures which have enacted a zero-tolerance policy on weapons, Michigan's may be the harshest."); Carroll, supra note 22, at 1919 ("Of all the state statutes restricting the educational rights of expelled students, Michigan's may be the harshest.").
47. MICH. COMP. LAWS ANN. § 380.1311 (West 2005). See generally Bogos, supra note 46 (discussing the passing of and reaction to Michigan's permanent expulsion law).
48. MICH. COMP. LAWS ANN. § 380.1311 (West 2005); see also Carroll, supra note 22, at 1919 (describing the requirements for a petition for reinstatement).
program for nonhandicapped, expelled students. The Attorney General reasoned that, while Michigan state law legitimately entitles school-age children to attend public schools, "public education is not a fundamental right under either the United States or Michigan Constitutions. . . . A student, by his own misconduct, may forfeit his legitimate entitlement to attend the public school in the school district in which he resides." 

Although it does not appear that any individual or organization has challenged directly the constitutionality of Michigan's permanent expulsion law, one Michigan court of appeals upheld a school's discretion to expel students permanently for conduct falling outside the plain meaning of the statute. The court held that, even though BB guns were not included in the "dangerous weapon" definition of the Michigan law, the statute nonetheless empowered the school district to establish a policy mandating the permanent expulsion of a student for possessing a BB gun on school property.

Although most states' zero-tolerance policies do not mandate a permanent expulsion for students who misbehave, these policies nonetheless deny substantial numbers of students the opportunity to obtain an adequate education. Zero-tolerance policies also have demonstrably failed to improve schools' test scores or learning environment. Therefore, although teachers and local school boards may find it easier to address disciplinary issues by suspending or expelling problem students, courts should consider that the use of zero-tolerance policies harms the state's interests in the long term.

II. LIMITS ON SCHOOL DISCIPLINE UNDER THE FEDERAL CONSTITUTION

Although the Supreme Court has held that individuals do not have a fundamental right to education under the U.S. Constitution, the Court often has emphasized the importance of the state's interest in educating all children. This Part provides an overview of the constitutional contexts in which the Court has


50. Id.


52. Id.

53. See Wasser, supra note 12, at 762.

54. See APA, ZERO TOLERANCE POLICIES, supra note 2, at 46-49.

acknowledged this interest: due process, in both its procedural and substantive forms; equal protection; and the First and Fourth Amendments. Despite the Court's recognition of the state's interest in ensuring an education to all students, lower federal courts often have overlooked this consideration in school discipline cases.

A. Procedural Due Process Protections for Students

Students facing expulsion can find some protection in the Fourteenth Amendment to the U.S. Constitution, which forbids the state from depriving any person of life, liberty, or property without due process of law. When a statute entitles individuals to a particular benefit, the state cannot revoke that statutory entitlement without first providing certain procedural protections. In Goss v. Lopez, the Supreme Court held that Ohio had established a property interest in education by providing free public education to residents and requiring school attendance through compulsory education laws. Therefore, Ohio could not take away a student's legitimate entitlement to a public education—even for misconduct—without adhering to minimum due process requirements. The Court concluded that students have a due process right to notice and a hearing of the charges against them before they can be suspended or expelled; the timing and content of notice depends on "appropriate accommodation of the competing interests involved." For suspensions of ten days or fewer, the Court held that either oral or written notice could suffice to maintain procedural due process and that, in rare emergency situations, providing notice and hearing after the fact might be sufficient. The Court expressly declined to provide guidelines for longer suspensions or expulsions, however, stating without further elaboration that such circumstances "may require more formal procedures."

For long-term suspensions and expulsions, courts have generally referred to the three-factor test from Mathews v. Eldridge to assess what procedural pro-

56. U.S. Const. amend. XIV, § 1.
58. Id. at 574.
59. Id.
60. Id. at 579.
61. Id. at 581-83.
62. Id. at 584.
tions are due in disciplinary proceedings. In *Mathews*, the Supreme Court concluded that, although the plaintiff had a property interest in retaining his disability benefits, the cost of providing an evidentiary hearing before terminating those benefits would outweigh its potential value. Under the *Mathews* balancing test, the court must consider: (1) the private interest affected by the official action; (2) the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens of meeting additional procedural requirements.

*Goss* predates *Mathews*; its discussion of the interests under consideration therefore does not map perfectly onto the three-factor *Mathews* framework. Although *Goss* did not substantially discuss the nature of the government interest involved in disciplinary proceedings, it emphasized the importance of the state's interest in educating all students. The first part of the opinion is devoted to discussing the importance of the private interests that the state's public education system and compulsory education laws create. These interests include both the student's property interest in continuing to receive educational benefits and the student's liberty interest in preserving reputation. The Court then weighed the merits of additional safeguards against the length of suspension, administrative burdens, and educational needs. Rather than suggesting that the state's interest is keeping certain students off school grounds, however, the Court emphasized that the state's interests are served by educating all students effectively and efficiently, as well as by maintaining order. The Court noted that the state's (as well as the student's) interest is disserved by unwarranted suspensions. Although a student whose presence poses an ongoing physical danger or threat of disruption might be removed immediately from school, the Court emphasized that notice and a hearing should follow as soon as possible after removal. The Court further stressed the state's interest in structuring the suspension process in a way that helps educate misbehaving children: "[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."

In assessing longer-term suspensions and expulsions under the three-factor *Mathews* framework, courts have quoted *Goss* in discussing the nature of the student's interest in avoiding unfair exclusion from the educational process and

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64. See, e.g., Coronado v. Valleyview Pub. Sch. Dist. 365-U, 537 F.3d 791, 796 (7th Cir. 2008); Watson *ex rel.* Watson v. Beckel, 242 F.3d 1237, 1240 (10th Cir. 2001); Palmer *ex rel.* Palmer v. Merluzzi, 868 F.2d 90, 95 (3d Cir. 1989); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 923-24 (6th Cir. 1988).


66. *Id.* at 334-35.


68. *Id.* at 582-83.

69. *Id.* at 583.
loss of future opportunities. The state’s interest often is conflated with the school’s interest in maintaining order and discipline. As a result, courts assume that the student’s interest in staying in school inevitably must conflict with the state’s interest in keeping misbehaving students out.

Even when a student can demonstrate the inadequacy of the disciplinary process, courts generally dismiss claims unless the student can prove that the suboptimal procedures substantially prejudiced the hearing’s outcome. In one such case, the Fifth Circuit dismissed the due process claims of a student expelled for the remainder of the school year after a December hearing on the grounds that: (1) the student admitted to two of the charges, cursing at the principal and leaving school without permission; and (2) the student admitted to breaking school rules by fighting with other students on two occasions. The court reasoned that, since the student admitted to participating in the fights, no prejudice resulted from the school’s failure to list fighting among the charges in the hearing notice.

Although a student arguably does not need notice of misbehavior he knows he committed, this strict interpretation of the “substantial prejudice” standard seriously undermines the notice element of procedural due process requirements. Students and parents might think that they can prepare for a disciplinary hearing based on the information of which they have been notified. But the history of such rulings paradoxically suggests students and their parents ought to ignore the official notice and instead prepare to discuss all possible misbehavior in which the student engaged. By conflating the state’s interest in educating all children with the school’s interest in maintaining order, courts have tipped the scales against students facing expulsion. This incomplete protection exacerbates the negative effects of zero-tolerance laws and policies.

B. Support for the State’s Interest in Educating All Students in Other Supreme Court Opinions

Although lower courts often ignore the state’s interest in keeping children on school premises, Supreme Court opinions after Goss have emphasized the distinction between disciplinary measures that remove children from school, particularly for an extended length of time, and those that keep children within

70. See, e.g., Watson ex rel. Watson v. Beckel, 242 F.3d 1237, 1240 (10th Cir. 2001); Palmer ex rel. Palmer v. Merluzzi, 868 F.2d 90, 95 (3d Cir. 1989).

71. See generally Watson, 242 F.3d at 1240 (“The students’ interest in ‘unfair or mistaken exclusion from the educational process’ must be balanced against the school’s interest in ‘discipline and order.’” (quoting Goss, 419 U.S. at 579)).

72. See, e.g., id. at 1242.

73. Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1083 (5th Cir. 1984).

74. Id.

75. See Watson, 242 F.3d at 1240; Palmer, 868 F.2d at 95; Keough, 748 F.2d at 1083.
their original educational environments. This Section discusses several cases where the Supreme Court acknowledged the constitutional importance of educating all children in its analysis of individual students' rights.

In one such case, \textit{Ingraham v. Wright}, the Supreme Court carefully distinguished the "state-created property interest in public education," involving greater due process considerations, from the liberty interest in avoiding corporal punishment.\footnote{430 U.S. 651, 674 n.43 (1977).} The Court emphasized that corporal punishment rarely and only temporarily removes a child from school and that "[t]he purpose of corporal punishment is to correct a child's behavior without interrupting his education."\footnote{Id.}

In cases addressing the Fourth Amendment rights of schoolchildren, the Court has emphasized the state's interest in educating all students and the distinction between exclusions from school and other forms of discipline. The Court has justified drug-testing requirements for athletic teams and extracurricular activities, for example, on the grounds that suspensions from these activities are less serious than suspensions from school. In \textit{Board of Education v. Earls}\footnote{536 U.S. 822 (2002).} and \textit{Vernonia School District 471 v. Acton},\footnote{515 U.S. 646 (1995).} the Court relied on the premise that only limited consequences would result from a student failing a drug test, because a positive drug test result would lead only to suspension from the athletic or extracurricular program, rather than to criminal penalties or suspension from school.\footnote{See \textit{Earls}, 536 U.S. at 833-34; \textit{Acton}, 515 U.S. at 658.} The Court therefore concluded that the intrusion of testing students' urine for drugs could be justified by the "schools' custodial and tutelary responsibility for children."\footnote{\textit{Acton}, 515 U.S. at 656.}

The Supreme Court also has highlighted due process concerns and the state's educational responsibilities in its First Amendment case law. In \textit{Tinker v. Des Moines Independent Community School District},\footnote{393 U.S. 503 (1969).} the Court held that school officials had acted unconstitutionally by suspending students who wore black armbands to protest the Vietnam War, stating that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."\footnote{Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).} As justification, the Court quoted portions of its own opinions, dating back to the 1920s, that emphasized the importance of the state's role in educating students as well as
teaching respect for rights and liberties as part of education. Although the Court upheld additional restrictions on vulgar student speech in *Bethel School District No. 403 v. Fraser*, it did so by reference to the important state role of inculcating “the habits and manners of civility” through public education. Similarly, the Court justified the suspension of a student who had held up a banner with the words “BONG HiTS 4 JESUS” at a school-authorized off-campus activity based on Congress’s declarations that “part of a school’s job is educating students about the dangers of illegal drug use.” While these cases do not directly address the balancing factors in due process analysis, they demonstrate that recognition of the state’s interest in education is not without precedent in Supreme Court school discipline cases.

C. Equal Protection Analysis and the State’s Interest in Educating Students

Despite its emphasis on the importance of education, the Supreme Court has held that education is not a fundamental right under the U.S. Constitution. Thus, no heightened scrutiny is accorded at the federal level for legislation or policies that interfere with an individual’s access to education. Instead, government interference will be upheld as long as it is rationally related to a legitimate government purpose. Because individuals do not have a fundamental constitutional right to an education, it is tempting to conclude that the state’s interest in educating individuals should be accorded less weight in due process balancing tests and thus be regularly overridden.

Such a conclusion would be misguided, however. Even in its opinions denying that education is a fundamental right, the Court strongly emphasizes the importance of the state’s interest in educating all children. *San Antonio Independent School District v. Rodriguez*, the Court’s first ruling that education does not rise to the level of a fundamental right, quoted *Brown v. Board of Education*’s statement that “education is perhaps the most important function of state and local governments.” Because the question presented was whether the Texas school-financing system violated the Equal Protection Clause by providing

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84. *See id.* at 506-08.
86. *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS’ NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
87. *Morse v. Frederick*, 551 U.S. 393, 408 (2007). The principal had originally suspended the student for ten days; the superintendent limited the term of the student’s suspension to time served (eight days) after upholding the decision upon the student’s administrative appeal. *Id.* at 398-99.
children from wealthy families a superior education, the Court’s ruling focused on the level of scrutiny necessary when reviewing such a policy. The Court emphasized that “the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.” Despite the importance of the state’s interest in education, then, the Court concluded that the right to education did not warrant a higher level of scrutiny under equal protection analysis.

In Plyler v. Doe, the Court emphasized the state’s critical interest in education, stating that even though public education might not be a fundamental right, “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” The Court noted that, compared to other benefits granted by the state, education plays an important role in “maintaining our basic institutions” and, furthermore, that depriving a child of education has a lasting negative impact on an individual’s life. The Plyler opinion acknowledged that education systems prepare citizens to participate effectively in the nation’s democratic system and serve as the primary vehicle for transferring social values: “In sum, education has a fundamental role in maintaining the fabric of our society.” Therefore, the Court struck down a law denying public education to the children of undocumented immigrants on the grounds that no rational basis could justify denying these educational benefits “in light of the costs involved to these children, the State, and the Nation.” The Court later acknowledged that it had “not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review” but declined to resolve these issues.

Given the Supreme Court’s emphasis on the importance of education in its equal protection analysis, and the fact that the law in these cases is far from settled, these rulings support, rather than detract from, the central argument in this Note. The Court’s adoption of the rational basis test in equal protection cases does not necessarily conflict with an approach to due process analysis that emphasizes the state’s interest in providing an education to all.

D. Substantive Due Process Protections for Students

Although the Supreme Court does not appear to have addressed explicitly the question of substantive due process protections for students, some federal

91. Id. at 30.
93. Id.
94. Id.
95. Id. at 230.
97. Id. at 286.
courts have concluded (based on the Court's level of scrutiny in equal protection cases) that substantive due process protections for public school students are fairly minimal. These courts have stated that substantive due process only warrants revising a suspension or expulsion decision in the rare case that a decision is "arbitrary or irrational or motivated by bad faith." The Seventh Circuit concluded in *Dunn v. Fairfield Community High School District No. 225*, for instance, that it could not interfere with a teacher's actions in disciplining a student on substantive due process grounds unless those actions were shown to be "wholly arbitrary." Because the "wholly arbitrary" standard requires "an extraordinary departure from established norms," it is far more difficult to meet than the ordinary standard of review for an administrative agency (under which courts may overturn decisions shown to be "arbitrary, capricious, or otherwise not in accordance with the law"). To gain substantive due process protection, a student must show that the teacher or school official acted in a way unjustified by any government interest. In one such case, the Seventh Circuit upheld the nearly four-and-a-half-year expulsion of a student who had participated in planning a high school shooting conspiracy, even though the student had withdrawn from the conspiracy before school officials learned of the plan.

Even under the exacting "wholly arbitrary" standard enforced by most courts in substantive due process analysis, expulsions sometimes are found to be so egregiously unjustified as to warrant reversal. In *Seal v. Morgan*, the Sixth Circuit ruled that the district court had correctly denied the Knox County Board of Education's motion for summary judgment in a case where a student was expelled after a friend's knife was found in his car. The court noted that the Board's decision would be upheld as long as it was rationally related to a legitimate state interest, cautioning that judges should exercise restraint when cases implicate substantive due process in order to avoid imposing their policy judgments on decisions made by school administrators. Nonetheless, the court ruled that no legitimate state interest could have justified the Board's decision to expel a student for possessing a knife without even asking whether he possessed it knowingly. The Third Circuit, however, declined to apply *Seal* to the due process claims of a five-year-old kindergarten student who was suspended.

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98. See Rosa R. v. Connolly, 889 F.2d 435, 439 (2d Cir. 1989) (citing Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 264 (5th Cir. 1985)).
99. 158 F.3d 962 (7th Cir. 1998).
100. Id. at 966.
101. Id.
102. Id. (quoting 5 U.S.C. § 706(2)(A) (1994)).
103. Remer v. Burlington Area Sch. Dist., 286 F.3d 1007, 1013 (7th Cir. 2002).
104. Id.
105. 229 F.3d 567 (6th Cir. 2000).
106. Id. at 575-76.
for saying, "I'm going to shoot you," to his friends while playing at recess.\textsuperscript{107} The court found that sufficient notice had been given regarding the school's new zero-tolerance policy for statements threatening harm with a weapon, even though the student was absent when the principal told his class about it and his parents did not receive the principal's letter explaining the policy.\textsuperscript{108} Because the principal had met with the kindergarten student and asked him to explain what he had said and done, the school's procedures were deemed sufficient even though the principal had not talked to the student's parents before imposing the suspension.\textsuperscript{109} Furthermore, the court held that the student's substantive due process rights were not violated because he had admitted to "playing guns," therefore showing that "[u]nlike the situation in \textit{Seal}, A.G. had knowledge of the underlying conduct for which he was sanctioned."\textsuperscript{110}

In cases like \textit{Seal} and \textit{Dunn}, federal courts again have conflated the school's interest in disciplining a child with the state's interest in providing an education. As the next part of this Note will argue, however, some state court rulings successfully distinguish the state's interest from the school's interest in these situations. These state rulings can serve as a model for advocates seeking to mitigate the effects of zero-tolerance policies.

III. ALTERNATIVE EDUCATION PROGRAMS MANDATED BY STATE INTERESTS IN EDUCATION

Children's advocates have challenged zero-tolerance policies in state courts where the state constitution recognizes a fundamental right to education, with mixed results. Massachusetts and Nebraska courts, for example, rejected the notion that their jurisdictions' constitutionally recognized duties to provide adequate educational opportunities grants students a fundamental right to an education in the disciplinary context.\textsuperscript{111} On the other hand, decisions in three states (Mississippi, West Virginia, and New Jersey) have recognized the necessity of providing alternative education opportunities to expelled or suspended students based on societal interests expressed in state constitutions and statutes.\textsuperscript{112} Most recently, the Supreme Court of Wyoming acknowledged the existence of a student's fundamental right to an adequate education but ruled that the state's

\textsuperscript{108} \textit{Id.} at 423-24.
\textsuperscript{109} \textit{Id.} at 424.
\textsuperscript{110} \textit{Id.} at 424-25.
compelling interest allows it to expel students without providing an alternative education.\textsuperscript{13} This Part argues that, although advocates often focus on the importance of the individual’s right to education, they should focus on the interests of the state, too. Plaintiffs have had the most success in cases where courts are convinced that the state’s interest lies in educating all children, including those who misbehave.

A. Massachusetts and Nebraska: No Fundamental Individual Right to Education

Although the Massachusetts Constitution recognizes the Commonwealth’s duty to provide all children with an adequate education, its courts have rejected the idea that this duty requires the Commonwealth to provide alternative education to students expelled or suspended from school. In 1993, the Supreme Judicial Court of Massachusetts invalidated the school-financing system on the ground that the Massachusetts Constitution imposes a “duty on the Commonwealth to ensure the education of its children in the public schools.”\textsuperscript{14} In McDuffy v. Secretary of the Executive Office of Education, the court not only acknowledged the existence of this duty but also held that it necessarily required the Commonwealth (particularly the executive and legislative branches) to provide an appropriate education to students. The court concluded:

What emerges also [from the text and history of the Constitution] is that the Commonwealth has a duty to provide an education for all its children, rich and poor, in every city and town of the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.\textsuperscript{15}

Only two years later, however, in Doe v. Superintendent of Schools the Supreme Judicial Court seemed to retreat from this language, declining to find that individual students have a fundamental right to an education.\textsuperscript{16} There, the court narrowly interpreted its ruling in McDuffy to mean only that the Commonwealth must provide all children with an opportunity for an adequate public education. The court noted that several other jurisdictions had declined to recognize education as a fundamental right, although it did acknowledge\textsuperscript{17} that North Dakota’s highest court had ruled that “[t]he North Dakota constitutional

\begin{footnotes}
\item[15] Id. at 548.
\item[16] 653 N.E.2d 1088, 1095 (Mass. 1995).
\item[17] Id. at 1095 n.4, 1101.
\end{footnotes}
provisions relating to education have at least equal standing with Article I, § 3 and § 4 of the North Dakota Constitution guaranteeing freedom of religion and freedom of speech and press. 118 Although the government need only grant students the opportunity for adequate schooling, that opportunity depends on individual behavior: Students may forfeit their interest in a public education if they violate school rules. 119 Because a student's right to an education is not fundamental, courts also must apply the rational basis test rather than a higher level of scrutiny when examining a school's disciplinary decision. 120 Doe therefore rejected the substantive due process claims of the plaintiff, a ninth-grade girl—expelled for bringing a lipstick case knife with a dull one-and-one-quarter-inch blade to school—who received no alternative education during the year-long expulsion period. 121

The ruling in Doe relied principally on a decision that had preceded McDuffy by just a few months, interpreting Massachusetts's compulsory education statute to deny the board of education the power to require school committees to provide alternative education to expelled students. 122 In Board of Education v. School Committee of Quincy, a student who had been expelled permanently from Quincy High School for a firearms possession charge (despite having no prior juvenile record) challenged the school committee's refusal to provide any alternative education. The court noted that the student had attempted unsuccessfully to gain admittance to both a private school and a public high school in another city, and that a number of other school systems in the Commonwealth offered home tutoring or other alternative education programs. 123 Despite the hardship suffered by the student (who had hoped to finish high school and attend college) 124 and the deference to which the Board's interpretation of the statute was entitled, the court ruled that the Board's interpretation "intrudes on school committees' right to discipline students." 125 The Doe ruling cited Board of Education v. School Committee in finding that "it is for the Legislature, not the courts, to decide when, if ever, alternative education must

118. State v. Rivinius, 328 N.W.2d 220, 228 (N.D. 1982). Rivinius held that the state's certification requirements for teachers did not unreasonably interfere with the religious liberties of parents who wished to send their children to an unapproved Christian day school. Id. at 231.

119. Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995) ("Our prior decisions support the view that a student's interest in a public education can be forfeited by violating school rules.").

120. Id. at 1097.

121. Id. at 1091-92, 1097.


123. Id. at 668.

124. Id.

125. Id. at 670.
be provided to students expelled for disciplinary reasons, and the form such education must take.\textsuperscript{126}

The Supreme Court of Nebraska followed the reasoning in \textit{Doe}, holding that although the Nebraska Constitution provides a right to education in school financing contexts, it does not create a fundamental right to education for individuals.\textsuperscript{127} As in \textit{Doe}, the Nebraska court applied rational basis review to the expulsion of a student for knowingly possessing a knife on school property, upholding the punishment because “[e]xpulsion is a rationally related means of protecting students and staff from violence.”\textsuperscript{128} The court based its decision on substantive due process grounds, finding that there was no “shocking disparity between the punishment and the offense.”\textsuperscript{129} Similarly, the sanction was neither arbitrary nor capricious and did not reach beyond the bounds of the law.\textsuperscript{130}

In both Massachusetts and Nebraska, the respective judicial decisions were based on the reasoning that the jurisdictions’ constitutional duties to provide the opportunity for universal adequate education do not create a fundamental right to education for individual students. Neither high court, however, considered the question of whether the constitutional duty to offer educational opportunity to all children might conflict with a particular school’s interest in excluding children. Instead, the courts equated the government’s interests with these particular schools’ interests in these cases.

B. \textit{Mississippi, West Virginia, and New Jersey: State Interests in Educating All Students}

Courts in three states have rejected the notion that a state’s duty to offer an adequate education to children may be circumscribed on account of misbehavior. These rulings have been based on statutory, equal protection, and substantive due process analysis. The common thread in these decisions is that each recognizes that the state’s interest in keeping all students in school may not be aligned with the school’s interest in keeping out misbehaving students. These states’ laws and constitutions suggest that governments have a parallel duty to provide alternative education even to misbehaving children.

In 1996, the Supreme Court of Mississippi struck down a school district’s policy of treating suspension days as unexcused absences on the basis that such a policy was statutorily arbitrary and capricious.\textsuperscript{131} Because students automatically failed any class in which they tallied more than six unexcused absences, the district’s policy implied that an individual student would fail automatically all

\textsuperscript{126} \textit{Doe}, 653 N.E.2d at 1097.

\textsuperscript{127} \textit{Kolesnick ex rel. Shaw v. Omaha Pub. Sch. Dist.}, 558 N.W.2d 807, 813 (Neb. 1997).

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.} at 814.

\textsuperscript{131} \textit{Bd. of Trs. v. T.H., III ex rel. T.H., Jr.}, 681 So. 2d 110, 117 (Miss. 1996).
of his classes as a result of a ten-day suspension despite having earned all Bs. The court ruled that this policy was an arbitrary and capricious interpretation of state law on three grounds. First, the compulsory attendance law "sets forth the public policy of this state as to the attendance of students in schools" and limits the power of boards of trustees to exclude students in disciplinary proceedings. Second, the law places the power of expelling students in the youth court. Finally, the law "demands that the students continue to receive an education after disciplinary problems." The court noted that the Board of Trustees created an alternate education program for suspended students but refused to allow the plaintiff to attend. Therefore, the Board could not fail the plaintiff for school absences it had forced him to take. Most importantly, the court concluded that the Board acted contrary to the main purpose of the compulsory education laws: "The Legislature has made public policy crystal clear that a suspended or expelled student should stay in school."

Although the plaintiff in T.H., III also argued that his substantive due process rights had been denied, the Supreme Court of Mississippi did not reach these constitutional claims because its ruling was based on statutory interpretation. The court agreed, however, that the plaintiff had a fundamental right to education guaranteed by the Mississippi Constitution and that the proper test for determining whether the school policy had violated his substantive due process rights was whether "it furthers a substantial legitimate interest of the school district." The court noted that, under this formulation of the rational-basis test, substantial discretion still would be granted to school boards' disciplinary schemes.

West Virginia's highest court ruled in 1996 that an even higher standard than Mississippi's "substantial legitimate interest" would be necessary to justify depriving an expelled student of educational services. In Phillip Leon M. v. Greenbrier County Board of Education, the Supreme Court of Appeals of West Virginia held that, because the West Virginia Constitution guarantees children a fundamental right to education, any state infringement of that right must be narrowly tailored to a compelling state interest. Based on equal protection doctrine, the court applied strict scrutiny to the board of education's decision to...

132. Id. at 112-13.
133. Id. at 115.
134. Id. at 117.
135. Id.
136. Id. at 115.
138. Id.
139. 484 S.E.2d 909, 914, 916 n.12 (W. Va. 1996).
expel the plaintiff without providing alternative education resources.\textsuperscript{140} According to the court, the state’s compelling interest in maintaining a safe school environment warranted removing a student from school after he brought a firearm on campus.\textsuperscript{141} No such compelling interest, however, could justify the Board’s failure to provide the plaintiff with an alternative form of education.\textsuperscript{142} The court expressly limited its 1986 opinion, \textit{Keith D. v. Ball}, in which it had stated that students who made false bomb threats to their school had “temporarily forfeited their right to education.”\textsuperscript{143} \textit{Phillip Leon M.} stated that \textit{Keith D.’s} holding was limited only to cases in which students appeal their removal from a particular school environment: While the plaintiff in \textit{Phillip Leon M.} might have forfeited his right to attend a particular school due to misbehavior, he did not completely forfeit his right to public education.\textsuperscript{144}

In 1997, the Supreme Court of West Virginia extended \textit{Phillip Leon M.} to hold that a school board cannot require parents of expelled students to pay for alternative education, because the state’s constitution includes a fundamental right to an education.\textsuperscript{145} In \textit{Cathe A. v. Doddridge County Board of Education}, the court did find that a compelling state interest was served by the state’s Safe Schools Act (enacted to conform to the federal Gun-Free Schools Act).\textsuperscript{146} The court held that the law, which requires a twelve-month expulsion period for violations of the “no weapons” policy, furthered the compelling state interest of providing a safe and secure school environment.\textsuperscript{147} The court also found, however, that the school board’s proposal to provide four hours of instruction per week, with the parents reimbursing all costs, was insufficiently narrowly tailored to further that interest.\textsuperscript{148} In all but the most extreme cases, the state constitution requires that an alternative education be provided to students.\textsuperscript{149}

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 913-16.
\item \textsuperscript{141} \textit{Id.} at 914.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} Keith D. v. Ball, 350 S.E.2d 720, 723 (W. Va. 1986).
\item \textsuperscript{144} \textit{Phillip Leon M.}, 484 S.E.2d at 914-16.
\item \textsuperscript{145} \textit{Cathe A. v. Doddridge County Bd. of Educ.}, 490 S.E.2d 340, 349-50 (W. Va. 1997).
\item \textsuperscript{146} \textit{Id.} at 348.
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.} at 349.
\item \textsuperscript{149} \textit{Id.} at 351. The court noted that its ruling addressed only the question of whether the school board could condition the availability of alternative education on the parents’ ability or willingness to pay for it. The \textit{Cathe A.} decision did not include other questions because the plaintiff had not challenged the circuit court’s holding that the board was obliged only to provide four hours per week of educational services and no transportation. \textit{Id.} at 349.
\end{itemize}
New Jersey law also recognizes a well-established constitutional right to an education.\textsuperscript{150} As a result of litigation challenging funding deficiencies for schools in poor urban districts through the 1980s and 1990s, wide-ranging reforms were enacted, including alternative education programs for students excluded from school.\textsuperscript{151} While New Jersey's highest court has not addressed the question of whether the state is required to provide an alternative education to expelled students, the state board of education and at least one lower court have found that the state has a constitutional obligation to do so. In 2000, a New Jersey court held in a case of first impression that a student expelled for making a bomb threat (conduct for which he also was adjudicated delinquent) did not forfeit his right to an education under the state constitution; the court directed that the state therefore place him in an alternative school appropriate for his needs.\textsuperscript{152} The state board of education required local boards of education to provide alternative education programs to expelled students in two separate recent decisions, stressing that "the New Jersey State Constitution requires that a child excluded from the regular classroom for disciplinary reasons be provided with an alternative education program until he either graduates from high school or reaches his nineteenth birthday, whichever comes first."\textsuperscript{153} This ruling, when considered in concert with the state court decisions in Mississippi and West Virginia, provides additional support for the argument that courts should accord more weight to the state's interest in educating all students.

C. Wyoming: Strict Scrutiny but No Alternative Education

In 2004, the Supreme Court of Wyoming considered the question of whether the state's constitution required alternative education for students expelled after selling marijuana to other students on school grounds.\textsuperscript{154} The court followed its decision in Washakie County School District Number One v. Her-
SCHOOL DISCIPLINE "AS PART OF THE TEACHING PROCESS"

which held that education is a fundamental right under the state constitution. In its previous education decisions, the court had “concluded that the founders of our state placed fundamental importance on education and, therefore, strict scrutiny must apply.” Under strict scrutiny, state actions only will be upheld if they are justified by a compelling state interest and accomplish their goal in the least onerous way.

Nonetheless, the Supreme Court of Wyoming found that expelling students without providing an alternative education satisfied this standard, because it was the least restrictive method of accomplishing the school district’s compelling interest in protecting the safety and welfare of its students. Although the plaintiffs argued that providing an alternative education program during the period of their expulsion would be less onerous than eliminating their educational services altogether, the court rejected this argument on several grounds. First, the state’s system provided every citizen with a uniform opportunity for education, and students may forfeit this opportunity if their conduct threatens the safety of other students or employees. Second, the students’ expulsions would last only one year, after which they could return to school. Third, state laws neither required expulsion for drug offenses nor prohibited the provision of alternative education, so school districts could tailor their responses to each child’s circumstances. The court concluded that, although alternative education policies might be a “good idea,” they are not required by Wyoming’s constitution.

One of the major flaws with the Supreme Court of Wyoming’s reasoning is that it conflates the school’s interests in protecting other students and faculty members with the state’s interests in keeping children in the education system. The opinion contends that the state has discharged its constitutional duty by setting up an education system with appropriate opportunities, but it fails to consider the potentially less onerous alternative of providing schooling even for children who misbehave. Since most states have found that even incarcerated children maintain a right to be educated in detention facilities, Wyoming’s system seemingly falls short of the “least onerous method.”

Another flaw in the Washakie opinion is that it purports to address the general question of whether alternative education is required for expelled students,

155. 606 P.2d 310 (Wyo. 1980).
156. In re R.M., 102 P.3d at 873.
157. Id. at 874.
158. Id. at 876.
159. Id. at 874-76.
160. Id. at 877.
Despite relying largely on the fact that drug offenses are not cause for mandatory expulsion under Wyoming statute.\textsuperscript{163} The court acknowledged in a footnote that Wyoming's statute requires expulsion for weapons violations, but "[b]ecause that statute was not the basis for RM's and BC's expulsions," the court did not consider it.\textsuperscript{163} The court's reasoning, however, seems to suggest that alternative education might be required in cases where educators could not modify the length of expulsions on a case-by-case basis. This would imply either that mandatory expulsion statutes are unconstitutional in Wyoming, or that the state has a constitutional duty to provide alternative education to students expelled on weapons charges but not those expelled for drug offenses. If this is the case, however, it seems hard to believe that a distinction between weapons charges and drug offenses could pass the strict scrutiny test. Given the court's emphasis on the notion that the state has no duty to provide an alternative education to students who pose a danger to other students, it seems unreasonable to suggest that schools provide an alternative education to students caught with weapons but not those caught with drugs.

Finally, the Supreme Court of Wyoming errs in suggesting that an expulsion of one year is narrowly tailored simply because it does not permanently exclude students from schools. Given the numerous studies finding that year-long expulsions lead to lower grades and increase the chances of dropping out or arrest,\textsuperscript{164} an expulsion of a full year without alternative education is likely to cause significant harm to students.

The flaws in the Wyoming decision, taken in the context of the decisions in states like Mississippi and West Virginia, provide support for the argument that zero-tolerance policies infringe on constitutional guarantees to education. The reasoning in these decisions suggests that advocates succeed when they emphasize the state's interest in educating all children as well as the individual plaintiff's interest in obtaining an education.

IV. COMPENSATORY EDUCATION AS A REMEDY

Given that states have an important interest in educating all children, compensatory education might seem a natural remedy for any student who is wrongfully excluded from school. As noted in the previous Part, however, the difficulty in challenging expulsion or long-term suspension decisions stems from courts assuming that no harm results to students from temporary suspension or reassignment to an alternative school. Although federal courts have awarded compensatory education to disabled children—even those over the age of twenty-one—as a remedy for denial of a free and appropriate education,\textsuperscript{165} the remedy of compensatory education seldom is sought or awarded for non-

\textsuperscript{163} In re R.M., 102 P.3d at 876 n.2.
\textsuperscript{164} See supra Part I.
disabled students excluded from school. This Part contends that advocates ought to seek compensatory education as a specific remedy for individual non-disabled students harmed by exclusion from school without an adequate alternative education program.

Courts frequently suggest that students are not harmed when they are allowed to return to school after a period of exclusion. For example, the Court of Appeals of Mississippi recently dismissed the claims of a student who had brought a due process and placement challenge to his expulsion and transfer to an alternative school. The court reasoned that the placement issue was moot because the student already was attending the alternative school at the time he filed the motion seeking placement in a different school. The court did not address the adequacy of the alternative school placement, even though Mississippi's constitution includes a fundamental right to an education, and Mississippi's alternative schools have been criticized widely as inadequate. Of course, courts do not always ignore the question of compensatory education: In Doe, the Supreme Judicial Court of Massachusetts found that the plaintiff's claims were not moot even though she had returned to school before the case was decided, on the grounds that compensatory education would be required as a remedy for the year she spent out of school.

The Supreme Court considered the issue of damages awards for denials of procedural due process in Carey v. Piphus, where a group of elementary and secondary students claimed they had been suspended without a proper hearing. The Court held that substantial nonpunitive damages were unwarranted for denials of procedural due process unless the students could show that their suspensions were unjustified or that the denial of procedural due process actually caused them some real, tangible injury. Regarding the kinds of injury the students would have to demonstrate to recover damages, the Court discussed only the issue of mental and emotional distress; it did not examine, however, whether the students might need compensatory education to make up for the twenty days of school they had lost.

On at least one occasion, an individual nondisabled student has sought—and been awarded—compensatory education for a violation of due process.

166. See, e.g., Watson ex rel. Watson v. Beckel, 242 F.3d 1237, 1240 (10th Cir. 2001); Palmer ex rel. Palmer v. Merluzzi, 868 F.2d 90, 95 (3d Cir. 1989); Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1083 (5th Cir. 1984).
172. Id. at 263.
The Sixth Circuit ruled that a student’s procedural due process rights had been violated when the school board had expelled him after considering evidence submitted in private and unavailable during the student’s open hearing. The plaintiff had sought injunctions prohibiting school officials from enforcing his expulsion and requiring the school district to provide tutorial assistance to help make up the work he missed during his exclusion. He also claimed $10,000 in compensatory damages and attorneys’ fees and an injunction requiring the school district to implement a disciplinary process that comports with procedural due process requirements. The court held that the plaintiff was presumptively entitled to restitution for the education he would have received but for the due process violation and that the burden fell on the school district to show, by a preponderance of the evidence, that it would have rightfully expelled the student even if the hearing had met due process requirements. To receive money damages, however, the burden fell on the plaintiff to show that he suffered actual injury caused by the violation.

Courts also occasionally award compensatory education in class actions where large numbers of children have been denied adequate schooling. Most notably, compensatory education has been used as a partial remedy for racial segregation. Compensatory education also was provided as part of a class-wide remedy when children were denied due process because they were labeled as having behavioral problems or being mentally retarded, emotionally disturbed, or hyperactive by the Board of Education of the District of Columbia.

For individual plaintiffs, however, compensatory education generally is awarded only for violations of the Individuals with Disabilities Education Act (IDEA). This is not because the statute provides for the remedy of compensatory education; in fact, compensatory education is a judicially created exception not limited by statutory provisions. Most circuit courts have concluded, however, that an award of compensatory education may be appropriate relief under the IDEA. Courts have employed compensatory education to remedy IDEA

174. Id. at 922.
175. Id. at 928.
179. Id.
180. See G. ex rel. R.G. v. Fort Bragg Dependent Sch., 343 F.3d 295, 308-09 (4th Cir. 2003) (citing Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 249 (3d Cir. 1999); Ill. State Bd. of Educ., 79 F.3d at 660; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1496 (9th Cir. 1994); Pihl v. Mass. Dep’t of Educ., 9 F.3d 184, 188 (1st Cir. 1993)).
violations even where students are over twenty-one years old, the age at which the IDEA’s statutory protections end. In one such case, the court noted that the school’s obligation to provide compensatory education extends beyond simply writing a check.

The case law, then, suggests that courts may award compensatory education to remedy wrongful exclusions from school. Child advocates should challenge judges’ assumptions that short suspensions or temporary expulsions do not harm children by seeking compensatory education in all challenges to exclusions from school. By using this strategy, advocates can emphasize the state’s interest in educating all children rather than the school’s interests in avoiding liability for damages. Seeking compensatory education emphasizes the importance to students—as well as to the state—of providing alternative education programs even to those students disciplined for good cause. Compensatory education also can provide a remedy when students are placed in inadequately funded or improperly operated alternative education programs. Given that students who are excluded from school are disproportionately likely to earn low grades or drop out, it is particularly important for advocates to use IDEA case law in seeking compensatory education past the age ordinarily provided by state compulsory education laws.

**Conclusion**

While the approach suggested in this Note could help remedy the effects of zero-tolerance policies in virtually any jurisdiction, it is more likely to succeed in states that already recognize statutory and constitutional interests in educating all children. For example, Connecticut’s courts have not yet considered the question of whether the state must guarantee an adequate alternative education to students expelled from school. Although Connecticut law does require that expelled students are provided with an alternative education program, many of these programs are ineffective, are underfunded, and provide a suboptimal

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181. See Lester H. ex rel. Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990) (holding, based on Congress’s intent, that the district court did not abuse its discretion by awarding a profoundly retarded student two and a half years of compensatory education beyond age twenty-one to remedy an identical period of inappropriate placement).


learning experience.\footnote{Cf. Rick Green, Program To Offer Lifeline to Troubled City Students, Hartford Courant, Jan. 8, 1996, at A1; Cynde Rodriguez, Report Slams Adult Ed Program: Former Schools Chief Spells out Waste, Carelessness, Hartford Courant, Aug. 5, 1999, at A3.} Alternative education programs for expelled students in Connecticut may offer only a few hours of tutoring per day.\footnote{See, e.g., Jesse Leavenworth, Tutoring for Expelled Students To Be Combined, Cutting Costs, Hartford Courant, Dec. 13, 1995, at B1 ("The two students are to arrive at a small office building separate from the main school at 2 p.m. each day and be tutored for about two hours . . . .").} As the number of expulsions has risen, the quality of alternative education in Connecticut has declined.\footnote{See Don Stacom, Bullies Being Put on Notice, Hartford Courant, Nov. 29, 2004, at B3 ("If the number of expulsions rises as predicted this year, the school board will have to pay for that alternative education for more students than ever. In the past, Bristol has given private tutoring to each expelled student for two hours a day . . . . But starting today, all expelled students will attend classes operated by the Capitol Region Education Council at the city's alternative high school.").} Moreover, students serving out-of-school suspensions of up to ten days (as well as students suspended while they await expulsion hearings) are not provided with any alternative education.

As a policy matter, advocates should encourage Connecticut school districts to improve alternative education and to adopt effective in-school suspension programs. Research indicates that counseling that helps students take responsibility for their actions and boosts their self-esteem significantly improves these in-school suspension programs' effectiveness.\footnote{See Morris & Howard, supra note 32, at 157-58.} One study found that student behavior could improve with a simple five-minute conference, conducted weekly to monitor behavior, grades, assignments, and other potentially problematic areas.\footnote{See id.} Because such programs emphasize accountability and the need for students to take responsibility for their actions, they also can help advocates to counter the potential objection that in-school suspensions are insufficient deterrents for disruptive student behavior.

Connecticut's laws and constitution recognize that the state has an interest in providing an adequate education to all children and in keeping all children in school. The Supreme Court of Connecticut has long recognized that education is a fundamental right under the state constitution, triggering strict scrutiny for any state infringement of that right.\footnote{See Horton v. Meskill, 376 A.2d 359, 373 (1977) ("[I]n Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.").} Although that court has stated that the fundamental right to education applies mainly to school funding cases in the context of "substantially equal educational opportunity," it also has suggested
that the fundamental right to education applies to school's disciplinary policies as well.  

This legal background suggests a potential avenue for litigation challenging zero-tolerance policies in Connecticut. Advocates should seek compensatory education using equal protection as well as substantive due process arguments on behalf of students who have been suspended or expelled without adequate alternative education. More generally, advocates should emphasize the state's interest in educating all children and explicitly factor this interest into due process arguments. Instead of simply weighing the school's interest in excluding a student against the student's interest in an education, courts should consider the state's interest in keeping children in school separately from, and aligned with, the individual's interest in an education. Courts can preserve their traditional deference to educators' judgment by focusing on alternative and compensatory education as a proper remedy for students who are considered a risk to others in their particular school.

\[190. \text{ See Campbell v. Bd. of Educ., } 475 \text{ A.2d 289, 296 (1984) (dismissing the plaintiff's claims regarding the school's academic policy in part because, unlike disciplinary sanctions or questions of equal educational opportunity, academic sanctions do not involve the fundamental right to an education).} \]