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Comment

The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process

I. Introduction

> It was a phone call that will stay with Denver Police Officer John Lietz for the rest of his life. Shortly after 11:00 am [on the morning of April 27, 1999,] he picked up the line to hear the voice of Matthew Depew, the son of a fellow cop: Depew and 17 other Columbine High School students were trapped in a storage room off the school cafeteria, hiding from kids with guns . . . . He could hear bursts of gunfire in the background. Lietz told the kids to barricade the door with chairs and sacks of food, and to be ready to attack the gunmen if they got in.[1]

Could a news account such as this[2] possibly have been imagined when America envisioned its schools in the Year 2000? New computers, less illiteracy, more support for children with learning disabilities, and better teacher recruitment may all come to mind when one thinks of schools in the new millenium. However, those working to improve our schools have these and a list of others on their agenda for the Year 2000: "monitored security cameras and armed law-enforcement of-

1. Matt Bai et al., *Anatomy of a Massacre*, NEWSWEEK, May 3, 1999, at 24.

2. *See, e.g.*, Steve Schmidt, *Small Town's Horror Hard to Forget: 1996 School Shooting in Washington First of Deadly Series of Attacks*, SAN DIEGO UNION-TRIBUNE, May 23, 1999, at A1; *Anatomy of a Massacre, supra* note 1, at 24; THE WHITE HOUSE OFFICE OF COMMUNICATIONS, *Radio Address of the President to the Nation* 5/23/98 (May 26, 1998) *available in* 1998 WL 261790 (White House) (commenting upon the tragic incidents of school violence in Paducah, Kentucky; Jonesboro, Arkansas; Pearl, Mississippi; and Edinboro, Pennsylvania all within a year).

ficers, . . . increased awareness of violent characteristics and drills aimed at guiding students through hostage situations."[3]

As the new millenium has approached, the public has grown both in its awareness of school violence, and in its outrage that the schools in America could be the settings of weapons violence. In 1994, Congress took action by introducing the Gun-Free Schools Act of 1994,[4] which encouraged each state receiving federal funds for education to follow suit and introduce their own laws, now known as "zero tolerance" laws.[5] As a result of the introduction of "zero tolerance" laws, the nation is also seeing news accounts such as these:

> Expelled fifth-grader Shanon Borchardt Coslett is waiting to see whether the school board will let her back into classes this week. The honor roll student was expelled after she picked up her mother's lunch box by mistake and brought a paring knife to school. Shanon, 10, reported her find to a teacher at Twin Peaks Charter Academy [in Longmont, Colorado]. Administrators said they had no choice, the law required them to expel the girl.[6]

> By all accounts, 17-year-old Brian Wood was a model student at Bassett High School in southwestern Virginia . . . . But during a class field trip . . . students were asked to empty their pockets and Brian pulled from his a two-and-a-half inch knife, one that he said he accidentally left in his jeans the night before. School administrators, citing their zero tolerance policy for weapons, expelled him from school for a year.[7]

> In Muskego, [Wisconsin], two fifth-graders were suspended for bringing an orange fluorescent toy gun on the school bus . . . .[8]

This comment argues that the Gun-Free Schools Act of 1994[9] and the state laws passed in pursuance thereof, "zero tol-

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3. Kathleen Mortensen, *Schools Look at Myriad of Security Approaches to Prevent Violence,* ASSOCIATED PRESS NEWSWIRES, Sept. 29, 1999, at 1, *available in* 9/29/99 APWIRES 13:35:00.

4. 20 U.S.C. §§ 8921-23 (1994).

5. *See, e.g.,* ARIZ. REV. STAT. ANN. § 15-841(G) (West 1998); ALASKA STAT. § 1403.160 (Michie 1998); IDAHO CODE § 33-205 (1997).

6. *Knife Gets Honor Student Expelled from Her School,* ORLANDO SENTINEL, Feb. 8, 1998, at A18.

7. Adam Hochberg, *Weekend All Things Considered,* ASSOCIATED PRESS POL. SERV., November 22, 1997, at 1, *available in* 1997 WL 2564507.

8. *Waupun Student Caught With Pistol,* MILWAUKEE J. SENTINEL, May 30, 1998, at 2.

9. 20 U.S.C. §§ 8921-23 (1994).

erance" laws,[10] must afford the maximum amount of procedural due process to the students who are expelled for bringing a weapon to school. Specifically, these laws have the potential of imposing strict and harsh punishment upon school children who are not dangerous and who will only suffer detrimental results from a full year expulsion. In addition, and perhaps more irksome, is that these laws do not prevent school violence.

Part II of this comment first examines the nature of every student's property interest in attending school, which is protected by the United States Constitution. Second, Part II describes procedural due process, what it requires at a minimum, which procedures students are entitled to before expulsion, and which procedures provide the maximum amount of due process. Third, this part provides a background of weapons violence in schools. Fourth is a description of various reactions to school violence, from schools, parents, and the federal and state governments. Fifth, Part II describes the Federal Gun-Free Schools Act of 1994[11] and the various state laws that have been passed in compliance thereof, giving a detailed description of each state law in chart form.

Part III describes the deficiencies inherent in these laws, in that the federal law fails to direct the states to provide procedural due process, and many states impose expulsion without any procedural due process. This part illuminates two evils caused by the lack of procedural due process: (1) the danger that these laws will completely fail to protect students' property interest in attending school; and (2) the danger that these laws will completely fail to prevent dangerous behavior.

Parts IV and V present a solution: All states must provide formal due process procedures when expelling a student for a year or more, pursuant to the Gun-Free Schools Act of 1994.[12]

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10. *See, e.g.*, ILL. COMP. STAT. 5/10-22.6 (West 1998); IND. CODE ANN. § 20-8.1-5.1-10(C), (E), (F) (Michie 1998); IOWA CODE § 280.21B (West 1998).

11. 20 U.S.C. §§ 8921-23 (1994).

12. *Id.*

II. Background

A. *Students' Property Interest in Attending School*

The right to attend school is not a fundamental right.[13] In its discussions about school attendance, the United States Supreme Court has taken an antithetical view. While recognizing the historical importance of public education, even recognizing it as central to a person's function in society and exercise of other rights,[14] the Court has simultaneously stated that public education is not a right originating in the Constitution.[15]

Historically, courts unanimously recognized the obligation placed upon the states by the United States Constitution to provide public education equally.[16] Equality in education was a concept construed in "judge-made law" from the Equal Protection Clause of the Fourteenth Amendment.[17] The right to equal access seemed to border upon a "fundamental right" to free public education in the 1950's, during the time that the famous case of *Brown v. Board of Education*[18] was decided. The *Brown* Court described education as central to the public interest, and almost stated outright that education was a constitutional right:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate [society's]

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13. *See* SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW, 132-33 (1987).

14. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

15. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982). In *Plyler*, the Supreme Court stated:

> Public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Id. at 221.

16. "Equality has been the central theme of school law since at least 1954." DAVIS & SCHWARTZ, *supra* note 13, at 131 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)); *see* U.S. CONST. amend. XIV, § 1.

17. DAVIS & SCHWARTZ, *supra* note 13, at 132 (citing Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982); Greenawalt, *How Empty is the Idea of Equality?,* 83 COLUM. L. REV. 1167 (1983); Westen, *To Lure the Tarantula from Its Hole,* 83 COLUM. L. REV. 1187 (1983)).

18. 347 U.S. 483 (1954).

> recognition of the importance of education to our democratic society.[19]

Other courts followed the reasoning of *Brown* and, in turn, upheld education as a near-right.[20] In the 1970's, education reached its pinnacle of Constitutional importance, during which time courts began to formally recognize education as a fundamental interest.[21] For example, in *Serrano v. Priest*,[22] the Supreme Court of California stated: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed, compels our treatment of it as a 'fundamental interest.'"[23]

This treatment of education as a fundamental interest changed in the United States Supreme Court decision of *San Antonio Independent School District v. Rodriguez*,[24] which held that education is not conferred as a fundamental right in the United States Constitution, either explicitly or implicitly.[25] Without detracting from the importance of education in American society, the Court held 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."[26]

Instead of a fundamental right or interest proceeding from the United States Constitution, the *Rodriguez* Court held that education is a benefit, or property interest, conferred by the states.[27] The states, at the time the Constitution was adopted, took on the responsibility of ensuring that "each child [receives]

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19. *Id.* at 493.

20. *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961) (recognizing education as "vital and, indeed, basic to civilized society.")

21. *See* Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971) (stating that "it would seem beyond argument that the right to receive a public school education is a basic personal right or liberty."). *Id.* at 1158.

22. 5 Cal. 3d 584 (1971).

23. *Id.* at 608-09.

24. 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).

25. *See* 411 U.S. at 35. The plaintiffs attacked the "Texas system of financing public education," and argued that the poor students living in areas with low property tax bases were being denied equal protection. *Id.* In turn, the plaintiffs argued that education should be recognized as a fundamental right, due to its intricate relationship with the fundamental right to free speech. *See id.* at 5, 35-36.

26. *Id.* at 30.

27. *See id.* at 35.

an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[28] Thus, the states assume this responsibility by imposing an obligation to attend school, and thereby grant to those students living within their borders a property interest in receiving a public school education equal to others in the same state.[29]

B. *Procedural Due Process*

1. *Procedural Due Process: the Minimum Required*

Procedural due process has been defined by the United States Supreme Court as "the [central concept in the] implementation of a regularized, orderly process of dispute settlement."[30] The requirements of procedural due process apply when liberty or property interests protected by the Fourteenth Amendment are deprived by the state in some way.[31] The precise procedures required in these cases depend upon a set of considerations, which have been defined by the United States Supreme Court in a number of cases.[32]

In the majority of cases, the United States Supreme Court has held that "the right to some kind of prior hearing is paramount."[33] As described by the Court in *Boddie v. Connecticut,*[34]

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28. *Rodriguez*, 411 U.S. at 37.

29. *See id.*; *See* LEGAL RIGHTS OF CHILDREN § 24.04 (Donald T. Kramer ed., Shepard's/McGraw-Hill 2d ed. 1994) (citing Ingraham v. Wright, 430 U.S. 651 (1977)). State laws requiring compulsory school attendance were first passed in the 1900s. *See id.* § 24.04. By 1918, every state had a compulsory school attendance law in effect. *See id.* "In most states, it is a misdemeanor for a parent or guardian of a child between the ages of six . . . and usually eighteen . . . to fail to see that the child regularly attends school." *Id.* In some states, parents are subject to charge for contributing to the delinquency of a minor if they fail to ensure that their children attend school on a regular basis. *See id.* (citations omitted). All states also have laws requiring school attendance for a minimum number of years. *See id.*

30. Boddie v. Connecticut, 401 U.S. 371, 373 (1971).

31. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 567 (1972).

32. *See id.* at 569 (citing Boddie v. Connecticut, 401 U.S. 371 (1971); Bell v. Burson, 402 U.S. 535 (1971); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950)).

33. *Roth*, 408 U.S. at 569-70; *see also Boddie*, 401 U.S. at 379; *Bell*, 402 U.S. at 542.

34. 401 U.S. 371 (1971).

"the theme that 'due process of law signifies a right to be heard in one's defense' has continually recurred" in the Court's decisions.[35] The *Boddie* Court traced this concept back to the nineteenth century, in cases such as *Windsor v. McVeigh*[36] and *Hovey v. Elliott*,[37] in which the Court rooted concepts such as "wherever one is assailed in his person or his property, there he may defend,"[38] and "due process of law signifies a right to be heard in one's defense."[39]

In addition to some type of hearing, a line of fundamental cases also holds that notice is an essential element to procedural due process.[40] For example, *Mullane v. Hanover Trust Co.*[41] established the standard that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require notice and opportunity for a hearing appropriate to the nature of the case."[42] This standard has been utilized in a number of cases to mean that a person is entitled to notice before any hearing takes place, giving the person the opportunity to contest the state action.[43]

"Minimum due process," therefore, has evolved to mean that notice and an opportunity to be heard should be provided whenever a property interest is deprived.[44] The Supreme Court, when determining what procedures will satisfy due process, has applied varying procedures to different cases depending upon the interest involved in the particular case.[45] As

35. *Id.* at 377.

36. 93 U.S. 274 (1876).

37. 167 U.S. 409 (1897).

38. *Windsor*, 93 U.S. at 277.

39. *Hovey*, 167 U.S. at 417.

40. *See, e.g.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Armstrong v. Manzo, 380 U.S. 545 (1965).

41. 339 U.S. 306 (1950).

42. *Id.* at 313.

43. *See* Goss v. Lopez, 419 U.S. 565, 579 (1950) (citing Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) (The right to a hearing "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane*, 339 U.S. at 314)); *see also* Armstrong v. Manzo, 380 U.S. 545 (1965); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

44. *See Goss*, 419 U.S. at 578.

45. *See* Bell v. Burson, 402 U.S. 535, 540 (1971).

stated by the Court in *Bell v. Burson*,[46] "[a] procedural rule that may satisfy procedural due process in one context may not necessarily satisfy procedural due process in every case."[47] Therefore, this Comment will examine the due process procedures that have been required by the Supreme Court when school attendance has been prohibited by the state through suspension or expulsion.

2. *Students' Procedural Due Process Rights in the Context of Suspension and Expulsion*

Although not characterized as a fundamental right, there are some ramifications for labeling public school education, provided by the state, as a property interest. As described, property interests in general allow access to procedural due process before deprivation of those interests.[48]

Of course, students are not entitled to attend school if they are in violation of the order and discipline required in the public school system.[49] Bringing a weapon to school, which is conduct in direct contravention with order and safety in school, has been viewed by courts as an appropriate time for school authorities to discipline children and withhold attendance privileges through suspension and expulsion.[50] The rule of law is that school officials have broad authority to "'withdraw' an individual's right to receive a free public education based upon that individual's misconduct," when necessary to maintain order and discipline and "where there exists fundamentally fair procedures to determine whether the misconduct has occurred."[51]

A school board's decision to suspend or expel a student will not generally be overruled unless it is shown that the school

46. 402 U.S. 535 (1971).

47. *Id.* at 40.

48. *See supra* text accompanying notes 30-47.

49. *See* LEGAL RIGHTS OF CHILDREN, *supra* note 29, § 24.04 (citing Ingraham v. Wright, 430 U.S. 651 (1977)).

50. *See id.* at § 24.10 (citing Mitchell v. Board of Trustees of Oxford Mun. Separate Sch. Dist., 625 F.2d 660 (5th Cir. 1980)); *but see* Washington v. Smith, 618 N.E.2d 561 (Ill. App. 1993) (expelling a student for bringing an ice pick to school to return the pick to another student who had left it at her house the previous night, under circumstances where the student did not exhibit, brandish, or otherwise threaten anyone with it, was an abuse of discretion).

51. Rucker v. Colonial Sch. Dist., 517 A.2d 703, 704 (Del. Super. 1986), *cited in* LEGAL RIGHTS OF CHILDREN, *supra* note 29, § 24.11 n.194.

board acted in an "unconstitutional, illegal, arbitrary, capricious, [or] unreasonable" manner, or in a manner "unsupported by a preponderance of the evidence."[52] Additionally, the United States Supreme Court held in *Goss v. Lopez*[53] that students must receive minimum due process before short-term suspension.[54]

In Goss, it was held that suspension or expulsion deprives a student so completely of his or her property interest to attend school, and has such great potential for negative impact upon the child both when receiving the punishment and later in life, that such punishment can only be imposed if accompanied by the procedural safeguards guaranteed by minimum due process.[55]

In the 1970's, nine students instituted a 42 U.S.C. § 1983[56] action against the Columbus Board of Education and various administrators of the Columbus, Ohio, Public School System, claiming that "he or she had been suspended from public school for up to ten days without a hearing," pursuant to a state statute.[57] The claim centered around the argument that the state statute was unconstitutional because it allowed school officials to deprive the plaintiffs of equal access to education without a hearing in violation of the Fourteenth Amendment.[58] All of the plaintiffs had been suspended as a result of "widespread student unrest" in the spring of 1971, presumably surrounding the

52. LEGAL RIGHTS OF CHILDREN, *supra* note 29, § 24.11 (citing Board of Ed. of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982), *reh'g denied* 458 U.S. 1132 (1982)).

53. 419 U.S. 565 (1975).

54. *See id.* at 583 (holding that students facing temporary suspension from public school were entitled to due process, including notice and an opportunity to present his or her version of the incident to authorities prior to the suspension).

55. *See id.*; *see also* LEGAL RIGHTS OF CHILDREN, *supra* note 29, at § 24.11 (citations omitted).

56. A § 1983 action is a claim that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983 (West 1994).

57. *Goss*, 419 U.S. at 568; *see* OHIO REV. CODE ANN. § 3313.66 (Anderson 1996).

58. *See Goss*, 419 U.S. at 568-69; *see* U.S. CONST. amend. XIV.

Vietnam War.[59] Each plaintiff had been suspended with some informal notice, but without a hearing.[60]

The Court first stated the proposition that had by then become the law, that access to education is a property interest protected by the Fourteenth Amendment, even though a "right to education" was not specifically mentioned in the Constitution.[61] The Court reasoned that, because Ohio had provided for public, compulsory education through state statute, the state had created a property interest, which vested to those students attending public school.[62] As a result, their property interest in attending school could not be deprived without adherence to procedural due process.[63]

The Court then considered what procedural due process was due to a student when a school imposed suspension from school.[64] When examining which procedures were required when suspending a student, the Court considered the following: (1) the nature of the deprivation[65] and the interest of the student in equal access to education;[66] (2) the interest of the school district in avoiding pre-suspension procedures[67] as well as the value of any possible additional procedures;[68] and (3) the risk involved for the child in being erroneously suspended.[69] In considering the nature of the deprivation, the Court recognized that, although the ten day suspensions involved in these cases were for relatively short periods of time, each suspension represented "a serious event in the life of the suspended child."[70] The Court stated that "[t]he student's interest is to avoid unfair or mistaken exclusion from the educational process . . . . The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of

59. *See Goss*, 419 U.S. at 569.
60. *See id.* at 569 n.3, 570-71.
61. *See id.* at 572-73; *see also* DAVIS & SCHWARTZ, *supra* note 13, at 63.
62. *See Goss*, 419 U.S. at 572-73.
63. *See Goss*, 419 U.S. at 573-74 (citing OHIO REV. CODE §§ 3313.04, 3313.48, 3313.64 (1972, Supp. 1973)).
64. *See Goss*, 419 U.S. at 576.
65. *See id.*
66. *See id.* at 579.
67. *See id.*
68. *See id.* at 583.
69. *See Goss*, 419 U.S. at 580.
70. *Id.* at 576.

the State if his suspension is in fact unwarranted."[71] The court also recognized the competing interest of a school district in making its own rules, which could be adjusted for the particular cases of which only the school officials and students themselves could have first-hand knowledge.[72]

The risk of erroneous deprivation was high due to the fact that "[d]isciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed."[73] However, the "prospect of imposing elaborate hearing requirements in every suspension case [was] viewed with great concern," because the Court viewed school systems as "vast and complex," and recognized that suspension, unfortunately, was a frequent occasion, sometimes calling for immediate, strict action.[74] To impose more formal hearings for the "countless" short-term suspensions may "overwhelm administrative facilities" and "cost more than it would save in educational effectiveness."[75]

The Court, therefore, turned to the minimum standards of due process, which traditionally afforded notice and an opportunity to be heard, as deemed appropriate by the facts of each case.[76] These minimum standards struck a balance between the need of the student to avoid arbitrary deprivation and the school district's need to retain flexibility over the process.[77] For example, the opportunity to be heard could be an "informal give and take" with the student if the school officials deemed that to be sufficient to hear the student's point of view.[78] The Court did not foresee difficulties in simple notice and hearing requirements, but found that the requirements were "if anything, less

71. *Id.* at 579.

72. *See id.* at 577-78.

73. *Id.* at 580.

74. *Goss*, 419 U.S. at 580.

75. *Id.* at 583.

76. *See id.* at 578-79 (quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950), "deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case."); *see also* Grannis v. Ordean, 234 U.S. 385 (1914) ("fundamental requisite of due process of law is the opportunity to be heard").

77. *See Goss,* 419 U.S. at 578-79.

78. *See id.* at 579.

than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[79]

The Court then very clearly limited its holding:

> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.[80]

In sum, as demonstrated by *San Antonio Independent School District v. Rodriguez*[81] and *Goss v. Lopez,*[82] a student's interest in attending school is a cognizable property interest which must be protected by procedural process before being limited or denied. No procedures have been specifically outlined for cases of long-term suspension or expulsion. However, minimum due process, consisting of notice and an opportunity to be heard, is required before suspension of a student for 10 days or less.[83] In *Goss,* the United States Supreme Court indicated that longer suspensions and expulsions "may require more formal procedures."[84]

3. Goldberg v. Kelly*: Formal Due Process Procedures*

Although the Supreme Court has not decided what "more formal" procedures should be utilized when expelling or suspending a student for a period of longer than 10 days, some guidance is present in the Supreme Court decision of *Goldberg v. Kelly*.[85] In *Goldberg*, the Supreme Court clarified the context in which the maximum amount of procedural due process was owed, and what protections constituted this level of procedural due process.[86]

In *Goldberg*, recipients of public assistance challenged the termination of their welfare benefits without pre-termination hearings.[87] The Court found that the property interest in wel-

79. *Id.* at 583.
80. *Id.* at 584.
81. 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).
82. 419 U.S. 565 (1975).
83. *See id.* at 584.
84. *Id.*
85. 397 U.S. 254 (1970).
86. *See* RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW, CASES AND NOTES, 380 (3d ed. West Publishing Co., 1997).
87. *See Goldberg,* 397 U.S. at 255.

fare benefits inured from the federal program of Aid to Families with Dependent Children, and the state-enacted New York State Home Relief program.[88] The Court considered the competing interests of the recipients in continued benefits, and the state in retaining flexibility in termination without extensive procedures.[89] The imperative interest of the recipient was the dependence upon the benefits in question for "the very means by which to live while he [or she] waits."[90]

The competing governmental interests, "conserving fiscal and administrative resources," were found to fall short of overriding the interests of the welfare recipient.[91] The Court quoted the district court, stating: "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance . . . to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal."[92]

Therefore, the *Goldberg* Court held that, where the recipient of a property interest can show an overriding interest in retaining the benefit of that property interest, and the risk involved in depriving this property interest is great, a pre-termination hearing, as opposed to a hearing provided only after termination of welfare benefits, was found to be required.[93] The welfare recipients were entitled to the following procedures: (1) a "fair hearing," designed "to produce an initial determination of the validity of the . . . grounds for discontinuance . . . in order to protect a recipient against an erroneous termination of his benefits;"[94] and (2) "the opportunity to be heard,"[95] which was held to include a hearing "at a meaningful time and in a meaningful manner,"[96] "timely and adequate notice detailing the rea-

88. *See id.* at 261; *see* 42 U.S.C. §§ 601-610 (1964 ed. and Supp. IV); N.Y. SOCIAL WELFARE LAW §§ 343-362 (McKinney 1966).

89. *See Goldberg*, 397 U.S. at 264-66.

90. *Id.* at 264 (citations omitted).

91. *Id.* at 265.

92. *Id.* at 266 (quoting Kelly v. Wyman, 294 F. Supp. 893, 904-05 (S.D.N.Y. 1968)).

93. *See id.* at 266.

94. *Goldberg*, 397 U.S. at 266 (citing Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring)).

95. *Id.* at 267 (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

96. *Id.* at 267 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

sons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[97]

4. *The Interpretation of* Goss v. Lopez *and the Use of Formal Due Process Procedures in the Education Context*

Cases subsequent to *Goss*[98] have not been consistent in the standard applicable to long-term suspensions and expulsions.[99] Some cases have required formal procedures, akin to those imposed by *Goldberg v. Kelly*,[100] for long-term suspensions and expulsions.[101] Other cases have only applied minimum due process, despite the Supreme Court's dicta in *Goss* stating that more formal procedures may apply to suspensions for more than ten days and expulsions.[102]

Yarber v. McHenry[103] involved a high school student who was denied a semester of credits for violation of the attendance policy.[104] The Missouri Supreme Court found that Yarber had a property interest in his education under *Goss,* which attached because Missouri statutes mandated "the establishment of schools," and provided for compulsory education.[105] When applying *Goss,* the Missouri Supreme Court considered that when, as in *Goss*, a short-term, or *de minimis,* deprivation was involved, the student had the right to "notice and the opportunity

97. *Id.* at 267-68.

98. 419 U.S. 565 (1975) (holding that a student's property interest in attending school could not be deprived without adherence to procedural due process).

99. *Compare* State *ex rel.* Yarber v. McHenry, 915 S.W.2d 325 (Mo. 1995) (holding that a high school student denied a semester of credits for violation of the attendance policy was entitled to a hearing), *with* Newsome v. Batavia Local Sch. Dist., 842 F.2d 920 (6th Cir. 1988) (holding that a student did not have right to confront the two witnesses who implicated him in a drug violation because he was only entitled to minimum due process).

100. 397 U.S. 254 (1970).

101. *See, e.g.,* Wood v. Henry Co. Public Sch., 495 S.E.2d 255 (Va. 1998); *Yarber*, 915 S.W.2d at 325; United Indep. Sch. Dist. v. Gonzalez, 911 S.W.2d 118 (Ct. App. Tx. 1995).

102. *See, e.g.,* Doe v. Superintendent of Sch. of Worcester, 856 F. Supp. 438 (Mass. 1995); *Newsome*, 842 F.2d 920.

103. 915 S.W.2d 325 (Mo. 1995).

104. *See id.* at 326.

105. *Id.* at 328 (quoting MO. REV. STAT. §§ 160.051, 167.031 (1986)).

to be heard."[106] However, in accordance with the wording of *Goss,* "where the discipline is more than *de minimis,* a hearing affording more than the informal proceeding in *Goss* may be required."[107] The court found that the penalty of a denial of a semester's worth of credits, was "in no way *de minimis.*"[108] Therefore, the court held that a hearing, instead of mere notice and an "informal give-and-take between student and disciplinarian," were due to the plaintiff Yarber.[109] This case did not elaborate on the additional procedures that were due, since the limited issue concerned whether this was a "contested case," requiring a hearing for venue purposes.[110]

Yarber also considered the denial of credits in light of another U.S. Supreme Court case, *Board of Curators of the University of Missouri v. Horowitz,*[111] which supported its decision to provide a hearing to the high school student. *Horowitz* was decided after *Goss,* and added a qualification to the procedural due process analysis.[112] In *Horowitz,* a former medical student challenged her expulsion, which was based upon poor clinical performance.[113] She brought a 42 U.S.C. § 1983 action,[114] claiming that her constitutional right to procedural due process had been infringed, because she had not received a hearing.[115] She had received notice that her performance was below par, but was not given the opportunity to be heard before she was expelled.[116] The Court upheld the administration's actions as constitutional, due to the extensive nature of the evaluation process that the school performed before expulsion.[117]

In considering *Goss,* the *Horowitz* Court emphasized that the *Goss* decision had valued the state's interest in allowing the school administration to remain flexible in its handling of indi-

106. *Yarber,* 915 S.W.2d at 328.
107. *Id.* (citing Goss v. Lopez, 419 U.S. 565, 581-84 (1975)).
108. *Id.* at 328.
109. *Id.* (citing Goss v. Lopez, 419 U.S. 565, 581-84 (1975)).
110. *See id.* at 327.
111. 435 U.S. 78 (1978).
112. *See* DAVIS & SCHWARTZ, *supra* note 13, at 121-22.
113. *See Horowitz,* 435 U.S. at 79.
114. *See supra* note 56.
115. *See Horowitz,* 435 U.S. at 80.
116. *See id.*
117. *See id.* at 85.

vidual disciplinary matters.[118] The Court, therefore, held in *Horowitz* that the need for flexibility justified "far less stringent procedural requirements in the case of an academic dismissal," as opposed to a disciplinary dismissal.[119]

In light of *Horowitz,* the Missouri Supreme Court in *Yarber* analyzed whether the absenteeism by Yarber constituted academic or disciplinary action when determining the level of procedural due process.[120] As the *Yarber* court recognized, "if [the punishment is] disciplinary in nature, then a hearing is required . . . . On the other hand, if the nature of the attendance policy is academic, then a hearing is not required . . . ."[121] The Missouri Supreme Court found that, although the attendance policy had some academic aspects, it was essentially designed to punish poor attendance, and was therefore a disciplinary action, requiring a hearing.[122]

Some cases, unlike *Yarber,* have applied the *Goss* "minimum due process" standard for procedural due process to long-term suspensions and expulsions, ignoring the fact that *Goss'* holding is limited to short-term suspensions only.[123] For example, in *Newsome v. Batavia Local School District*,[124] a high school student was expelled for "possessing and offering a marijuana cigarette for sale on high school property."[125] Newsome was originally suspended pursuant to a preliminary suspension hearing, at which school officials refused to disclose the identity of two individuals who had originally made the charges.[126] The hearing was discontinued, but before it could be resumed, school officials informed Newsome that he was expelled for the rest of the semester.[127]

When Newsome appealed the decision to the Batavia School Board, he was given a hearing and had the opportunity

118. *See id.* at 86.
119. *Id.*
120. *See Yarber*, 915 S.W.2d at 328.
121. *Id.* at 329.
122. *See id.*
123. *See* cases cited *supra* note 102.
124. 842 F.2d 920 (6th Cir. 1988).
125. *Id.* at 921.
126. *See id.*
127. *See id.*

to be represented by counsel.[128] Again, the school officials, stating that they rested their decision to expel Newsome solely upon the statements of two witnesses, refused to produce the witnesses against Newsome or to identify them.[129] The school board affirmed the expulsion in closed deliberations, which the school principal and superintendent attended but which Newsome and his attorney were forbidden to attend.[130]

The Sixth Circuit held that Newsome's procedural due process rights had not been denied by the refusal to allow the cross-examination of the witnesses against him, or by the closed deliberations.[131] In so holding, the court reasoned, "[w]hile *Goss* specifically limited itself to 'the short suspension, not exceeding ten days, it nevertheless establishes the minimum requirements for long-term expulsions as well.'"[132]

Thus, the only direction from the Supreme Court regarding disciplinary expulsions follows from dicta contained in *Goss v. Lopez*,[133] that procedures more formal than minimum due process may be required, and a possible interpretation of *Board of Curators of the University of Missouri v. Horowitz*,[134] that although academic dismissals do not warrant a hearing, disciplinary expulsions probably do.[135] The lack of a Supreme Court decision on point has led to varying results regarding the level of due process necessary before long-term suspensions and expulsions, either providing "barebones" minimum due process, or requiring formal procedures such as a hearing and the presentation of witnesses.

C. *Weapons Violence in Schools*

Since 1996, at least 27 people have died and dozens have been wounded in school shootings nationwide.[136] The Violence

128. *See id.*
129. *See* 842 F.2d at 922.
130. *See id.* at 922-24.
131. *See id.* at 925.
132. *Id.* at 926 (citing *Goss*, 419 U.S. at 584).
133. 419 U.S. 565 (1975).
134. 435 U.S. 78 (1978).
135. *See* Yarber v. McHenry, 915 S.W.2d 325, 329 (Mo. 1995).
136. *See* Schmidt, *supra* note 2, at A1; *see also* Victoria Benning, *Note, Seen as Threat, Has Student in Trouble*, WASH. POST, June 2, 1998, at B01.

Institute of New Jersey at the University of Medicine and Dentistry released a 1996 study, which reported that:

> [Approximately eight] percent of New Jersey high school pupils said they had taken a weapon to school in the last 30 days. About four percent of high school students reported they stayed out of school at least one day in the past 30 days because they felt threatened, and 6.6 percent said they had been threatened or injured with a weapon on school property at least once during the year.[137]

The most unsettling incidents of school gun violence have been chillingly similar. Their description is crucial to developing an understanding of the type of behavior that should be targeted by the law and eliminated altogether. The profile has been described as follows: "A deeply troubled student. An unresolved grievance, real or imagined. No clue how to handle the anger or pain. A breakdown or rejection of parental supervision. Access to guns."[138] Most of the recent incidents of weapons violence in schools have involved multiple-victim school shootings by white teenagers in rural communities or small towns.[139] The most dangerous and destructive students have fit this profile: they have been "depressed boy[s] of above–average intelligence, who suffered an inferiority complex and [were] enthralled by violent images from film or television."[140]

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137. Jean Rimbach & John Mooney, *Whitman Unveils Plan to Cut School Violence*, THE RECORD, N. N. J., Sept. 4, 1998, at A3.

138. Matthew Hay Brown et al., *Why Do Kids Kill? Contrary to Perceptions, School Violence is Not Rising. But Amid a Shocking Spate of Multiple Schoolyard Killings, a Profile of Child Killers is Emerging*, HARTFORD COURANT, March 26, 1998, at A1.

139. *See id.*

140. Randall Sullivan, *A Boy's Life, Part 2,* ROLLING STONE, Oct. 1, 1998, at 46, 49; *see also Anatomy of a Massacre (Columbine High School Shootings), supra* note 1 (before the alleged rampage at Columbine High School, the two accused gunmen, Eric Harris and Dylan Klebold "became 'obsessed' with the violent game Doom—an interactive game in which the players try to rack up the most kills—and played it every afternoon."); Lynne Lamberg, *Preventing School Violence: No Easy Answers,* Aug. 5, 1998, 1998 JAMA 404 (noting troubled students are isolated when other children fail to relate to their fascination with violence; the typical offender is a male without many friends to challenge his behavior, who act out to make people pay attention to him). Recognizing the unorthodox nature of citing ROLLING STONE in a law review article, I must state that the investigative reporting of ROLLING STONE's two-part analysis of teenage weapons violence was almost unparalleled by other sources.

While the demographics of multiple-victim school shootings have common threads, no solitary factor can explain this complex and multi-faceted phenomenon.[141] Rural settings, such as Springfield, Oregon, where 17-year-old Kip Kinkle recently pled guilty to shooting two of his classmates dead and injuring dozens of others and stands charged of killing his parents,[142] are common settings for multiple-victim gun violence.[143] A 1993

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141. *See generally* Trina Menden Anglin, *Violent and Aggressive Behavior, in* PRIMARY PEDIATRIC CARE 839 (3d ed., Mosby-Year Book, Inc., 1997).

142. *See* The Associated Press, *School Shootings List,* ASSOCIATED PRESS NEWSWIRES, Sept. 24, 1999, at 1, *available in* 9/24/99 APWIRES 16:55:00; Randall Sullivan, *A Boy's Life, Part 1,* ROLLING STONE, Oct. 1, 1998, at 46, 50.

143. Barry Loukaitis, who was 14 when committing multiple shootings in school, was recently sentenced to life in prison for the deaths of two students and a teacher on February 2, 1996 during an algebra class in the small farm town of Moses Lake, Washington. *See Family of Moses Lake Victim Refiles Suit Against Killer's Family,* PORTLAND OREGONIAN, Feb. 11, 1999, at B2. Evan Ramsey, now 18, was sentenced to 210 years in prison for his shooting rampage on February 19, 1997, when he was only 16, in Bethel, Alaska. He received 99 years each for the deaths of a student and principal, and 12 years for attempted murder and assault. *See News Highlights,* CINCINNATI POST, Dec. 4, 1998, at 2A. Eighteen-year-old Luke Woodham is currently serving three life sentences for stabbing his mother to death and killing two students in a shooting spree on October 1, 1997, in Pearl, Mississippi, when he was only 16, during which eight others were injured. *See* The Associated Press, *Boyette Trial Delayed Again,* ASSOCIATED PRESS NEWSWIRES, Sept. 21, 1999, at 1, *available in* 9/21/99 APWIRES 12:40:00; Gina Holland, *Violence Solutions Sought,* ASSOCIATED PRESS NEWSWIRES, Aug. 24, 1999, at 1, *available in* 8/24/99 APWIRES 02:12:00; *Peal High Defendant Wants New Trial Judge,* THE COMMERICAL APPEAL, Feb. 3, 1999, at A9. Michael Carneal recently plead guilty but mentally ill to murder and is serving a life sentence for opening fire on a prayer group at Heath High School in West Paducah, Kentucy, on December 1, 1997, killing three and wounding five students, in 1997, when he was only 14 years old. *See* The Associated Press, *School Shootings List, supra* note 142, at 1; *see also* The Associated Press, *Carneal Thought it Would be 'Neat' to Act Out Part of Movie, Friend Says,* ASSOCIATED PRESS, Sept. 5, 1999, *available in* 9/5/99 APWIRES 22:02:00; *see also* Stacey Burns, *Legislature 1999: Bill Would Have State Study Tie Between Games, Violence,* THE NEWS TRIBUNE, Feb. 11, 1999, at A11. In 1997, in the small town of Stamps, Arkansas, a 14-year-old boy was arrested for allegedly instituting a sniper attack that wounded two students. *See* Ellen O'Brien & Kevin Wishard, *Growing Up With Guns: Everyone Has Answers but Few Solutions for Teen Violence,* AUSTIN AMERICAN-STATESMAN, May 31, 1998, at H1. On March 24, 1998, another grisly episode occurred in Jonesboro, Arkansas. Two boys, Mitchell Johnson, 13, and Andrew Golden, 11, pulled a fire alarm in a middle school and shot those who filed out onto the playground. *See id.* The boys were convicted of murdering four students and wounding ten others. *See id.*; *see also* The Associated Press, *School Shootings List, supra* note 142, at 1; Randall Sullivan, *supra* note 140, at 46, 49. "The day after the Jonesboro killings, a four-year-old boy arrived at his Cleveland childcare center with a loaded gun hidden in his clothing. On the same day, a 13-year-old [attempted] to murder his principal with a semiautomatic

study revealed that more than half of the seventh to twelfth grade boys questioned in 38 rural Texas school districts reported carrying a knife to school.[144] This number is twice the national average.[145] This same study revealed that "eighteen percent of 15 to 17-year-old boys reported carrying a handgun to school," which is a number seven times the national average.[146] In the 12 months preceding the survey, 16% of the students who admitted that they carried a weapon to school had been robbed, 37% had been threatened, and 15% had been physically attacked while at school.[147] "Most [of these students] reported [that] carrying a gun to school [was] for protection or with the intent to shoot an aggressor."[148] Children in rural areas have a "far readier access to guns,"[149] even more access than "black urban youths, according to a 1996 poll by Louis Harris & Associates."[150]

Another common thread that emerges is that the boys accused of committing the highly publicized rural multi-victim school shootings were proclaimed to be clinically depressed.[151]

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weapon in Daly City, California. A few days later, [two groups of] teenagers in two automobiles opened fire on each other in front of a high school in Nashville." Michael Fickes, *Guns, Knives and Schools*, 37 SCH. PLAN. AND MGMT., 5, 20 (1998). Fortunately, no one was hurt in the Nashville drive-by. *See id.* On the last day of March 1998, two 14-year-olds were arrested in Baltimore for arranging a murder-for-hire plot, in which one offered the other $100 to kill a 16-year-old. *See id.* On April 24, 1998, a science teacher was shot and died at an eighth-grade dance in Edinboro, Pennsylvania. Andrew Hurst, 14, awaits trial. *See School Shootings List, supra* note 142, at 1. On May 19, 1998, 18-year-old Jacob Davis allegedly shot and killed a classmate in a parking lot at his high school in Fayetteville, Tennessee. *See id.* On May 21, 1998, 25 people were hurt and two teens were killed in a high school in Springfield, Oregon, at the hands of 15-year-old Kip Kinkel. Kinkel pled guilty to murder and attempted murder, and is accused of killing his parents the day before the shooting. *See id.* On April 10, 1999, 15 lives ended and 23 students were wounded at Columbine High School in Littleton, Colorado, at the hands of two student gunmen, Eric Harris, 18, and Dylan Klebold, 17, who went on a vicious shooting spree and then killed themselves. *See Anatomy of a Massacre (Columbine High School Shootings), supra* note 1, at 1.

144. *See* Kathleen J. Cirillo et al., *School Violence: Prevalence and Intervention Strategies for At-Risk Adolescents,* ADOLESCENCE, July 1, 1998, at 1, *available in* 1998 WL 22004851.

145. *See id.*

146. *See id.*

147. *See id.*

148. Kathleen J. Cirillo et al., *supra* note 144.

149. Matthew Hay Brown et al., *supra* note 138, at A1.

150. *Id.*

151. *See* Sullivan, *supra* note 140, at 46, 49.

The incidence of depression and suicide has greatly risen among young people. Reliable studies have shown that 30-35% of male adolescents and 50% of female adolescents report symptoms of depression, including suicidal ideation.[152]

The psychiatrist who examined 14-year-old Barry Loukaitis, who allegedly shot his math teacher and two classmates in February 1996,[153] stated: "one of the things that we're seeing in the population at large is that all the mood disorders are happening earlier and earlier."[154] Kip Kinkle, the 17-year-old boy who recently pled guilty to murder in the Springfield, Oregon shootings,[155] was treated with Prozac before the time of his alleged rampage.[156] "Studies have shown that people taking Prozac tend to be less aggressive and irritable . . . [b]ut the issue [which would have been a central one] at Kip Kinkel's criminal trial [would have been] whether people who go off Prozac become even more irritable and aggressive than they were prior to taking the drug."[157]

The American Psychological Association has identified four factors in its "Violence and Youth" report that contribute to juvenile violence: (1) early involvement with drugs and alcohol; (2) easy access to weapons, especially handguns; (3) association with anti-social, deviant peer groups;[158] and (4) pervasive exposure to violence in the media.[159] In turn, other common reasons

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152. *See* L. MUFSON ET AL., INTERPERSONAL PSYCHOTHERAPY FOR DEPRESSED ADOLESCENTS (1993), *cited in* Ake Mattsson & John M. Diamond, *Mood Disorders in Children and Adolescents, in* PRIMARY PEDIATRIC CARE, 819 (3d ed. Mosby-Year Book, Inc. 1997).

153. *See* Sullivan, *supra* note 140, at 49.

154. *Id.* at 50.

155. *See School Shootings List, supra* note 142, at 1; *see generally* Sullivan, *supra* note 142, at 76.

156. *See* Sullivan, *supra* note 140, at 46, 50.

157. *Id.*

158. For example, adult charges were brought against a number of students for allegedly master-minding the school shooting in Jackson, Mississippi by gunman Michael Woodham, which left his mother and two students dead. The other students charged were part of "a cult-like group linked to the killings." *See Boyette Trial Delayed Again, supra* note 143.

159. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION COMM. ON VIOLENCE AND YOUTH, REPORT ON VIOLENCE AND YOUTH (1993); *see also Carneal Thought it Would be 'Neat' to Act Out Part of Movie, Friend Says, supra* note 143 ("About a year before opening fire on a high school prayer group, Michael Carneal told a friend it 'would be neat' to act out part of a movie in which a youngster dreams about shooting fellow students . . . ."). The families of the three girls killed when Michael

attributed to teenage weapons violence are: (1) the breakdown of the family unit;[160] and (2) the exposure of children to violence and mature subject matter at increasingly earlier ages.[161]

The ease and extent of access to weapons that children enjoy is definitely a common phenomenon in the highly publicized accounts of student weapons violence.[162] This may be attributable to a lax or misguided parental attitude towards guns. For example, as Kip Kinkle became fixated on guns by perusing them on the Internet and in gun magazines, his father, who had never been a gun owner and had in fact despised them, nevertheless "agreed to buy Kip a .22 rifle . . . for Christmas."[163] Kip's father, Bill Kinkle, "had become convinced [that] Kip would find some other way to get a gun . . . and was concerned that his refusal to be involved might add the allure of forbidden fruit to Kip's desire for a weapon."[164]

Bill Kinkle's fear that his son would find some way to own a gun demonstrates the other reality of weapons access to children: the teenage generation's sophistication in trafficking

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Carneal, 14, aimed a shooting spree at a prayer group in Paducah, Kentucky, have brought suit against 25 companies alleging that the entertainment industry motivated the attack. *See* THE ASSOCIATED PRESS, *Digest Briefs,* ASSOCIATED PRESS NEWSWIRES, July 20, 1999, *available in* 7/20/99 APWIRES 18:16:00.

160. A study done in September, 1997 revealed that "parent-family connectedness" had an impact upon "emotional distress for both younger and older adolescents;" for example, "[t]he presence of parents at key times during the day (at waking, after school, at dinner, and at bedtime), shared activities with parents, and high parental expectations for their child's school achievement were . . . moderately protective against emotional distress for both younger and older adolescents." Michael D. Resnick et al., *Protecting Adolescents from Harm: Findings from the National Longitudinal Study on Adolescent Health*, 278 JAMA 823, Sept. 10, 1997, at 1, *available in* 1997 WL 13337915.

161. *See* Holland, *supra* note 143, at 1. (School counselor Donna Barefoot commented on the great number of students she treats on the elementary school level who come to her with complex issues such as divorce and domestic violence. "I tell them[:] 'you have big people problems and you're only five years old.'"); *see generally* Paul M. Bogos, *"Expelled, No Excuses, No Exceptions."—Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.I.A. Section 380.1311,* 74 U. DET. MERCY L. REV. 357 (1997) (citing CARL S. TAYLOR, DANGEROUS SOCIETY (1990)); Matthew Robinson, *When Children Commit Crimes, Jump in Violence Worries Police, Policy-Makers*, INVESTOR'S BUSINESS DAILY, Dec. 4, 1995, at A1; Michael Casserly, *Discipline and Demographics, The Problem is Not Just the Kids*, EDUC. WK., Jan. 24, 1996, at 40.

162. *See* Brown et al., *supra* note 138, at A1.

163. *See* Sullivan, *supra* note 142, at 84-85.

164. *Id.* at 85.

weapons.[165] Incredibly, children are buying guns from each other in school.[166] On the day that Kip Kinkle allegedly committed his murders, he had been on suspension along with another boy for alleged possession and sale of a stolen handgun.[167] The other boy had allegedly telephoned Kip, telling him to bring money to school for a "surprise," which turned out to be "a .32-caliber pistol, . . . loaded with a nine-round clip," which had allegedly been stolen from another friend's father.[168]

This sort of access is characteristic of the weapons violence occurring nationwide. For example, the children who were convicted of committing the Jonesboro, Arkansas shootings, at the incredibly young ages of 11 and 13, had access and possession of: "three high-powered hunting rifles, seven handguns, two crossbows, a machete, eight knives and a huge cache of ammunition" at the time of the alleged incident.[169] This sort of access, coupled with "the fact that youths have trouble resolving disputes maturely" can easily result in deadly confrontations.[170]

The alternative to analyzing each component of school violence is to see the problem as one, complex, multi-faceted whole. Dr. Carl Bell, president and CEO of the Community Mental Health Council in Chicago, recently stated: "you can't blame it on the school, you can't blame it on the family, the breakdown of religion or the availability of guns. It is not that simple. It is usually a combination of things. Behavior is multidetermined."[171] Inherent in this gestalt analysis is the most frightening aspect of studying the cause of school violence: "some children are very, very psychopathic . . . . Some kids are young predators."[172] As social scientist Charles Patrick Ewing described, "these 'crazy murders' . . . have no obvious motive."[173]

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165. *See, e.g.*, R. Michael Anderson, *Janitor Charged in Sale of Gun to Student*, THE FLORIDA TIMES-UNION, March 18, 1998, at 1.

166. *See, e.g.*, Kathy Ostrander, *Milton Teen Charged on Gun, Drug Counts*, WISCONSIN STATE J., Dec. 22, 1998, at 1B.

167. Sullivan, *supra* note 142, at 78.

168. *Id.*

169. Sullivan, *supra* note 140, at 50; *see also* Fickes, *supra* note 143, at 20.

170. Robinson, *supra* note 161, at A1.

171. Clarence Waldron, *Why Are So Many Children Committing Murders?*, JET MAG., June 8, 1998, at 14.

172. *Id.*

173. Sullivan, *supra* note 140, at 50.

Children likely to kill can be criminally psychotic, which, in part, means that they either have no way to comprehend consequences, or on some psychological level are so self-destructive that punishment will not deter them.[174] For example, Barry Loukaitis, the 14-year-old honor student convicted of shooting his math teacher and two classmates, made a disturbing comment demonstrating a high level of psychotic behavior.[175] Standing over one of his victims who had been sitting in math class he asked, "Sure beats algebra, doesn't it?"[176]

This sort of attitude is disturbing because it is callous and reckless about causing other people's suffering. These traits are textbook indications of psychopathy, which is characterized as "prominent guiltlessness (defective conscience) and lovelessness, [the] (incapacity for loyalty to others)."[177] A psychopathic child operates with a "disregard for the feelings and rights of others and an inability or unwillingness to control their own behavior . . . [F]uture psychopaths grow from childhood into adolescence loving no one and guided by an external morality in which acceptable behavior is whatever they can get away with."[178]

D. *School Responses to Weapons Violence*

In recent years, schools have taken action, devising tactics against school violence beyond the traditional reprimand in the principal's office, or home suspension. New Jersey Passaic High School officials are focusing on prevention by instituting their own anti-violence programs.[179] For example, the district has instituted peer-mediation and leadership programs and it plans to create a new group to present anti-violence assemblies.[180]

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174. *See* Irving B. Weiner, *Juvenile Delinquency, in* PRIMARY PEDIATRIC CARE, 815-16 (3d ed. Mosby-Year Book, Inc., 1997) ("The illegal behavior of characterological delinquents reflects a basically asocial personality orientation. These young people manifest many features of what is commonly termed psychopathy."). *Id.*

175. *See* Sullivan, *supra* note 140, at 49.

176. *Id.*

177. Weiner, *supra* note 174, at 815-16.

178. Weiner, *supra* note 174, at 816 (citing L.J. Deutsch and M.T. Erickson, *Early Life Events as Discriminators of Socialized and Undersocialized Delinquents*, 17 J. ABNORMAL CHILD PSYCHOL. 541 (1989)).

179. *See* Rimbach & Mooney, *supra* note 137, at A3.

180. *See id.*

Some school administrators have been receptive to preventative measures such as state action instituting police presence in schools. Officials from Paterson High School in New Jersey, for example, have reported beneficial effects of police presence in school.[181] The police officers assigned to Paterson High School have provided "training in school violence prevention, conflict mediation, counseling, sexual harassment, and how to handle secret tips from students."[182]

Other school officials hesitate to institute the presence of police and metal detectors, and instead choose to focus on demanding accountability from the students.[183] These school districts have depended solely upon their strict expulsion policies.[184] For example, the Superintendent in the Bethlehem Area School District in Pennsylvania recently expressed his view that he sees metal detectors as a last resort.[185] Instead, the superintendent wants to use state grants to bolster the district's Second Chance Academy, an alternative program for troubled youths who have been suspended or expelled for bad behavior.[186] This district has also "expelled two eighth-graders for making death threats against their teachers on the Internet."[187] In 1997, a student in New Milford, New Jersey, was reported to the police for threatening a teacher.[188] The New Milford superintendent stated: "the student's mother was upset, but we told her we had no choice, period . . . . Any threat is taken seriously. We can't let anything go by."[189]

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181. *See id.*

182. *Id.*

183. *See* Kathleen Parrish & Christian D. Berg, *Pennsylvania Bill Seeks Millions to Fight School Violence: State Representative Julie Harhart will Introduce the Law With Attorney General's Backing*, ALLENTOWN MORNING CALL, SEPT. 15, 1998, at A1.

184. *See id.*

185. *See id.*

186. *See id.* The Second Chance Academy is a proposed alternate program for troubled students between the ages of 10 and 17. If successful, this academy will provide counseling and academic programs for a selected 100 troubled students, while suspended or expelled. *See* Gail Scudder, *School Symposium Coordinates the Taming of Unruly Students: Lehigh Valley Leaders Want Help to Protect Good Students from Disrupters*, ALLENTOWN MORNING CALL, May 29, 1998, at B1.

187. Parrish & Berg, *supra* note 183, at A1.

188. *See* Rimbach & Mooney, *supra* note 137, at A3.

189. *Id.*

In New Mexico, the Belen Board of Education "tightened restrictions against bringing guns or other weapons on campus and expanded conditions allowing searches and seizures on campus."[190] The policy, which already banned guns, was expanded to prohibit knives, or any other item that could be used as a weapon.[191] It also banned toy guns, toy knives, and any explosive, including bombs, grenades and rockets.[192] The punishment for possession of any of these items is expulsion for up to a year and automatic referral to law enforcement.[193]

E. *Parental Responses to Weapons Violence*

In June 1998, a couple in Waukesha County, Wisconsin, pressed charges against their 17-year-old son after he made threats to imitate the acts that have been attributed to Kip Kinkle, i.e., to kill his parents and classmates.[194] The frightening threat came after a series of behavior problems, including temper displays in which he threatened on other occasions to harm his family and classmates.[195] Other behavior representing a cause for concern included an incident where he brought a toy gun to school, and threatened to kill fellow football players who had criticized his athletic ability.[196]

Reluctantly, his parents decided to have him jailed while they sought treatment options.[197] The charge was disorderly conduct and bail jumping related to a previous charge.[198] "A court commissioner set bail at $5,000, after the parents said they refused to take him back home until he entered inpatient treatment."[199] The broken-hearted mother stated, "He's our son

190. Arley Sanchez, *School Board Tightens Weapons, Search Policies*, ALBUQUERQUE J., June 25, 1998, at 2. The student rights implicated by school search and seizure policies present distinct legal issues. Such a discussion is beyond the scope of this paper. However, it is important to recognize that tough laws may diminish a number of students' rights.

191. *See id.*

192. *See id.*

193. *See id.*

194. *See* Lisa Sink, *Waukesha County Couple Press Charges Against Their Son Over Threats: 17-year-old's Reference to Oregon School Killings Was Last Straw, Mom Says*, MILWAUKEE J. SENTINEL, June 3, 1998, at 1.

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

199. Sink, *supra* note 194, at 1.

and we love him, . . . [but] [w]e just feel like [he is] at a turning point here. I see it as a cry for help."[200]

Other parents describe similar despair and torment over children who exhibit bizarre and dangerous behavior, but luckily are able to identify and treat an underlying mental disorder before tragedy strikes. One father described for the Pittsburgh Post-Gazette a son difficult even from birth.[201] "As an infant, [the father described,] he'd hold his breath until he turned blue. We had to blow on his face to get him to breathe."[202] As an older child, he became highly aggressive, threatening to kill his mother, and often harming himself, his sister, and his mother.[203] The family, early on, accepted the fact that a mental illness was to blame, and began a search for the proper medical treatment.[204] After treatment for attention deficit disorder failed, and after many harrowing violent outbursts from the child, a psychiatrist pinpointed the correct mental disorder, and prescribed a regimen of "medication, close supervision, a strict schedule and rules with clear rewards and consequences."[205]

Parents of troubled children, although becoming more adept at recognizing mental illness and seeking treatment, are discouraged. At a meeting arranged by United States Representative Ronnie Shows, D-Miss., in response to the shooting aimed at a student prayer group in Jackson, Mississippi, parents concerned about their troubled teens spoke out.[206] Many expressed frustration over the state's "expensive medicines, inadequate treatment options and untrained educators."[207] One mother of a mentally ill teen-age boy confessed that she was at a breaking point.[208] In an effort to supervise her son full time to avoid any sort of violent behavior, she "turned down a promo-

200. *Id.*

201. *See* Sally Kalson, *Beyond Control*, PITTSBURGH POST-GAZETTE, June 10, 1998, at A1. The names of the family members were kept confidential for anonymity purposes. *See id.*

202. *Id.*

203. *See id.*

204. *See* Kalson, *supra* note 201, at A1.

205. *Id.*

206. *See* Holland, *supra* note 143.

207. *Id.*

208. *See id.*

tion and works nights so she can be available [to her son] in the daytime."[209]

One can only imagine the experiences that families are forced to endure living with a troubled child. According to Elizabeth Kelly Scanlon, the director of the Western Pennsylvania Coalition for Children's Advocacy, "'[s]ome of these families are diagnosed with post-traumatic stress disorder,' . . . referring to the same condition ascribed to soldiers returning from war."[210]

F. *Government Responses to Weapons Violence and Zero Tolerance Laws*

Prior to 1994, federal and state legislation was not specific with regard to student discipline, and "generally decreed it to be a local issue. The most common law on the books was a general requirement that local boards have in place a policy on discipline, suspensions, and expulsions."[211]

With increasing reports and public attention regarding weapons violence in schools, both the state and federal governments have reacted. The school officials, in tandem with law enforcement, were the first to react. During the month of June, 1996,

> a panic-driven wave of juvenile arrests and school suspensions spread across Oregon and into adjacent states . . . . In Grants Pass, [Oregon,] a 15-year-old boy was arrested for threatening to kill two classmates . . . . In the town of Lebanon, [Oregon,] a 12-year-old was suspended from school while police investigators tried to determine what charges were appropriate for 'allegedly making threatening remarks and machine-gun-like sounds.' In Vancouver, Washington, a six-year-old boy was suspended from school after another kid reported that he had bragged he was going to bring a gun to school . . . . At Exeter High School, in Exeter, New Hampshire, fifty-two senior boys were disciplined for squirting underclassmen with Super Soakers during lunch.[212]

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209. *Id.*

210. Kalson, *supra* note 201, at A1.

211. Chris Pipho, *Living With Zero Tolerance*, PHI DELTA KAPPAN, June 1, 1998, at 1, *available in* 1998 WL 13658413.

212. Sullivan, *supra* note 140, at 48, 49.

1. *Federal, State, and Local Programs*

As far back as 1978, the Safe School Study Report was prepared for Congress, presenting the disturbing incidents of serious violent crime in American schools.[213] According to this report, over a third of robberies and assaults on youth in urban areas occurred in school and over 5,000 teachers per month were physically assaulted in school.[214]

In the 1980's the problem was still an issue of concern. For example, in *New Jersey v. T.L.O.*,[215] a 1985 decision of the United States Supreme Court, the Court stated that "drug use and violent crime in the schools have become major social problems."[216]

In the past five years, radio addresses and memoranda from President Clinton have revealed that the problem is still a serious issue today.[217] In his radio address to the nation on May 23, 1998, President Clinton spoke about the rash of rural multiple-victim school shootings in Kentucky, Arkansas, Mississippi and Pennsylvania.[218] He described these events as "symptoms of a changing culture that desensitizes our children to violence; . . . where too many young people seem unable or unwilling to take responsibility for their actions; and where all too often, everyday conflicts are resolved not with words, but with weapons, which, even when illegal to possess by children, are all too easy to get."[219]

In response to these events and the more prevalent problems he spoke of, President Clinton sponsored several campaigns against school weapons violence. He initiated the Youth

213. *See generally* NATIONAL INSTITUTE OF EDUCATION, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, VIOLENT SCHOOLS-SAFE SCHOOLS: THE SAFE SCHOOL STUDY REP. TO THE CONGRESS (1978), *cited in* Julius Menacker & Richard Mertz, *State Legislative Responses to School Crime,* 85 ED. LAW REP. 1 (1993).

214. *See id.*

215. 469 U.S. 325 (1985).

216. *Id.* at 339.

217. *See, e.g.*, THE WHITE HOUSE OFFICE OF COMMUNICATIONS, *Radio Address Paper on New Resources to Keep Schools Safe,* (Sept. 11, 1999), *available in* 1999 WL 706603; *Radio Address of the President to the Nation, supra* note 2; President Clinton's Memorandum on Implementation of Safe School Legislation, 30 WEEKLY COMP. PRES. DOC. 2150-51 (Oct. 22, 1994).

218. *See Radio Address of the President to the Nation, supra* note 2.

219. *Id.*

Crime Gun Interdiction Initiative (YCGII),[220] designed to eliminate the illegal gun markets that target some of their sales to school children by providing information and funding for the Bureau of Alcohol, Tobacco, and Firearms and local police departments.[221] As of May 1998, the YCGII had traced over 93,000 guns in the illegal gun trafficking market.[222]

A directive from the President, signed in March 1997, required every federal agency to enforce a requirement that each gun issued to federal law enforcement officers have child safety locks.[223] In a "historic agreement, eight major gun manufacturers followed the President's lead and . . . voluntarily agreed to provide child safety locking devices with all their handguns."[224]

In a September 1998 proclamation, President Clinton announced that in August of that year his administration had released a guide as part of the Administration's Safe and Drug-Free Schools program, entitled "Early Warning, Timely Response: A Guide to Safe Schools." The guide, developed by the Secretary of Education and the Attorney General, sets out to help schools and teachers identify dangerous students and prevent violence.[225] At the same time, President Clinton also created the School-Based Partnership grant program, which will be used by police to work with schools and community-based organizations to address crime in schools.[226]

In the wake of the Columbine High School shootings, President Clinton has "called on Congress to do its part by passing common sense gun legislation . . . [and] announced over $100 million in grants from the new Safe Schools/Healthy Students Initiative for 54 communities to prevent and combat youth violence. An additional $17 million in COPS grants for 46 commu-

220. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-484 (1998).

221. *See* THE WHITE HOUSE OFFICE OF COMMUNICATIONS, OFFICE OF THE PRESS SECRETARY 5/29/98, *Fact Sheet on Building Safer Communities*, May 29, 1998, at 3, *available in* 1998 WL 274842.

222. *See id.*

223. *See id.*

224. *Id.*

225. *See* Proclamation No. 7118, 64 Fed. Reg. 49, 261 (1998); *see also The White House: Promoting School Safety, Preventing Youth Violence and Encouraging Learning*, M2 PRESSWIRE, Oct. 20, 1998, *available in* 1998 WL 16528797 [hereinafter *Preventing Youth Violence*].

226. *See Preventing Youth Violence, supra* note 225.

nities to hire 147 new police officers for schools was also released."[227]

Recent state government responses have included a call to prevention, including training teachers to recognize potentially dangerous students, and to handle those students once identified.[228] As Mike Fisher, Attorney General of the Commonwealth of Pennsylvania observed, "most school officials are ill-equipped to deal with violence."[229]

In the State of New Jersey, Governor Christine Todd Whitman proposed a plan in September 1998 with the goal of "identify[ing] and treat[ing] troubled students before violence occurs."[230] The plan proposes to: (1) assign police officers to some New Jersey schools; (2) distribute guidelines to teachers about the common characteristics of troubled students, including a "tip sheet of behavior problems" and a video series; (3) provide $5 rebates to gun buyers who install trigger locks; (4) create a program to help victims of youth violence; and (5) launch a peer-based anti-violence campaign.[231]

In Pennsylvania in September 1998, state Representative Julie Harhart and Attorney General Mike Fisher announced plans to make $80 million available for Pennsylvania schools to buy security devices and provide training to stop crime in the classroom.[232] "Under the plan, schools could use the funds to buy metal detectors, hire security guards, develop violence response plans, provide staff training, purchase instructional materials and institute school identification programs . . . . "[233]

Bibb County in Macon, Georgia boasts a detailed program designed to prevent teenage weapons violence and crime.[234] The Chief of Police for the Bibb County Board of Education Campus Police Department, Michael Dorn, is an expert in the

227. OFFICE OF THE PRESS SECRETARY, *Radio Address Paper on New Resources to Keep Schools Safe 9/11/99*, (Sept. 13, 1999), *available in* 1999 WL 706603, at 1.

228. *See* Parrish & Berg, *supra* note 183, at A1.

229. *Id.*

230. Rimbach & Mooney, *supra* note 137, at A3.

231. *See id.*

232. *See* Parrish & Berg, *supra* note 183, at A1.

233. *Id.*

234. *See* Fickes, *supra* note 143, at 20 (1998).

practical techniques of preventing weapons violence in schools.[235]

Dorn first practices "honest assessments of the potential for violent incidents in . . . schools . . . . 'Begin by studying crime in your community, in cooperation with the local police, . . . If young people in your community are committing crimes with weapons, that's an important indicator. Young people won't say, oh, this is a school, no weapons there.'"[236] Dorn does point out, however, that studying community crime is not a fool-proof indicator.[237] Many of the highly publicized school shootings were such a shock because they occurred in communities with very low incidents of weapons crime.[238] Regardless of the type of community, all schools need weapon reduction strategies; the incidence of violent crime outside the school merely measures the urgency.[239]

> The strategy implemented in Bibb County consists of five factors:
> (1) a policy that defines what weapons are, prohibits students from carrying those weapons to school, and lays out the consequences for being caught with a weapon in school;
> (2) constant education about these policies so that all students know exactly what will happen if they are caught with a weapon;
> (3) policies designed to make it difficult to bring a weapon to school;
> (4) weapons screening programs;
> (5) consistent sanctions for students caught violating the weapons policy.[240]

2. *Zero-Tolerance Laws*

In 1994, President Clinton expanded the Drug-Free Schools Act[241] into the Safe and Drug-Free Schools and Communities Act of 1994,[242] placing emphasis on violence prevention by providing fiscal support for violence and drug prevention pro-

235. *See id.*
236. *Id.*
237. *See id.*
238. *See id.*
239. *See* Fickes, *supra* note 143, at 20.
240. *Id.*
241. 20 U.S.C. § 7201 et seq. (1989).
242. 20 U.S.C. § 7101 et seq. (1994).

grams.[243] Accompanying these Acts, President Clinton signed into law the Gun-Free Schools Act of 1994.[244]

The Gun-Free Schools Act of 1994 requires each state receiving federal funds to have in effect a state law requiring local educational agencies to expel, for at least one year, any student "who is determined to have brought a weapon to school."[245] In addition, in order to receive federal funds, schools are directed to develop policies "requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to . . . school."[246] The one-year expulsion is mandatory, except that the chief administering officer of such local education agency may modify it on a case-by-case basis.[247] The Gun-Free Schools Act of 1994[248] makes no mention or provision for procedural due process, except to make a provision for adherence to the Individuals with Disabilities Education Act.[249]

Nationwide, "student discipline and control entered a new era in 1994 when the federal government passed . . . the Gun-Free Schools Act.[250] Beginning in 1994 and carrying on into 1995, [most] states came into compliance with the federal mandate."[251] These laws accurately track the federal law regarding the punishment of immediate expulsion if found to be in posses-

243. *See Preventing Youth Violence, supra* note 225.

244. 20 U.S.C. §§ 8921-23 (1994).

245. 20 U.S.C. § 8921(b)(1).

246. 20 U.S.C. § 8922(a). The implications of this subsection of the law is beyond the scope of this article, which is focusing only on the issue of the one-year expulsion. However, the solution suggested herein, to require maximum due process in the Gun Free Schools Act, would presumably cure any deficiencies in due process that this subsection may present.

247. *See* 20 U.S.C. § 8921(b)(1); *see also Preventing Youth Violence, supra* note 225.

248. 20 U.S.C. §§ 8921-23 (1994).

249. 20 U.S.C.A. § 1400 et seq.; *see* 20 U.S.C. § 8923 (1994). Courts have consistently held that the Gun-Free Schools Act does not permit the expulsion of handicapped students without adherence to the procedural safeguards of the Individuals with Disabilities Education Act. *See* 20 U.S.C.A. § 1400 et seq. (1994); *see e.g.*, Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423 (D. Ariz. 1997). This unequal treatment poses an interesting equal protection issue, which is beyond the scope of this paper. What is relevant to the present inquiry is that procedural due process was additionally provided for through the Individuals with Disabilities Education Act, but no additional provisions were made for the procedural due process of other students.

250. 20 U.S.C. §§ 8921-23 (1994).

251. Pipho, *supra* note 211, at 1.

sion of a weapon in school. The most marked difference between them is the amount of procedural due process afforded. Some provide formal due process, such as a hearing with the right to cross-examine witnesses. Others provide for no due process at all. The state laws enacted to comply with the Gun-Free Schools Act[252] can be characterized as follows:

252. 20 U.S.C. §§ 8921-23 (1994).

STATE LAWS IN COMPLIANCE WITH 20 U.S.C. § 8921(b)(1), THE GUN-FREE SCHOOLS ACT OF 1994[253]

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Alabama ALA. CODE § 16-1-24.3 (1995)	A student who is determined to have brought a weapon to a school or its jurisdiction must be expelled from school for a period of not less than one year, unless the school district modifies the expulsion on a case-by-case basis. The student must be referred to the criminal justice or juvenile delinquency system.[254] NOTE: THIS LANGUAGE TRACKS THE FEDERAL LAW, AND HEREINAFTER WILL BE IDENTIFIED AS SUCH.	**NOTICE** to parents upon violation.	N/A

253. This table does not include those laws that provide for expulsion for weapons possession but fail to follow the terms provided by the Gun-Free Schools Act. In California, expulsion of students determined to have possessed a firearm is not mandatory. They may be expelled by the governing board only if there is a recommendation by the principal, superintendent of schools, hearing officer or administrative panel, and only if "other means of correction are not feasible or have repeatedly failed to bring about proper conduct," or "due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." CAL. EDUC. CODE § 48915(b)(1)—(b)(2) (West 1999). Delaware, Florida, and Oklahoma's codes contain general provisions regarding expulsion, but no specific sections for expulsion for possession of a firearm. *See generally* DEL. CODE ANN. tit. 14, § 4130 (1998); FLA. STAT. ch. 230.23 (1999), *amended by* 1999 Fla. Sess. Law Serv. 284 (West); OKLA. STAT. tit. 70, § 5-118 (1999). In Massachusetts, a student found in possession of a gun may be expelled, but the time period is not mandated, and "a principal may, in his discretion [after a hearing] decide to suspend rather than expel [the] student." MASS. GEN. LAWS ch. 71, § 37H (1999). Under the law of Wisconsin, if a student possesses a firearm at school, the student is automatically suspended, not expelled, and a due process rule requires that the suspension cannot exceed five days without notice of a hearing. *See* WIS. STAT. § 120.13(1)(b)—(b)(m) (1999).

254. A majority of states have imposed harsh sanctions for the possession of guns at or near schools, including imprisonment. *See, e.g.*, GA. CODE ANN. § 16-11-127.1 (Harrison 1994); MASS. GEN. LAWS ch. 269, § 10(j) (1992); MD. CODE ANN., Crim. § 36a (1994); MICH. COMP. LAWS ANN. § 750.237(a)(4) (West 1994); MINN. STAT. ANN. § 609.66 (West 1994); N.J. STAT. ANN. § 2c:39-5(e) (West Supp. 1994); N.Y. PENAL LAW § 265.06 (McKinney 1994); WASH. REV. CODE ANN. § 9.41.280 (West 1995). Some statutes make weapons possession on school property a felony. *See* ARK. CODE ANN. § 5-73-119 (2)(a)-(b) (Michie 1994).

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Alaska ALASKA STAT. § 14.03.160 (Michie 1998)	Tracks the federal law.	**HEARING**, only if the student is referred to law enforcement.	**READMISSION**, only upon conditions prescribed by the local board of education, which may include, but are not limited to, psychiatric evaluation.
Arizona ARIZ. REV. STAT. § 15-841(G) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	N/A
Arkansas ARK. CODE ANN. § 6-18-503(B)(II) (Michie 1998)	Tracks the federal law, except there is no provision for referral to law enforcement.	**HEARING, NOTICE**, and **OTHER DUE PROCESS PROCEEDINGS** as prescribed by the school administration.	**ALTERNATIVE SCHOOL** only for students with disciplinary, socially dysfunctional, or behavioral problems.
Colorado COLO. REV. STAT. § 22-33-106(d)(I) (1996)	Tracks the federal law, except that there is no provision for referral to law enforcement, and if a student discovers that he is in possession of a dangerous weapon, and notifies a teacher, administrator, or other authorized person as soon as he or she discovers it, the expulsion is not mandatory.	None.	N/A
Connecticut CONN. GEN. STAT. § 10-233d(2) (1996)	Tracks the federal law, and the expulsion is subject to an application for early readmission. There is no provision for referral to law enforcement.	Meeting of impartial school board members, and a **HEARING** conducted by the board of education.	**MANDATORY ALTERNATIVE SCHOOLING** for students under 16; **OPTIONAL ALTERNATIVE SCHOOLING** for students between 16 and 19.
District of Columbia D.C. CODE ANN. §§ 31-451, 31-452, 31-453 (1997)	Tracks the federal law.	None.	N/A
Georgia GA. CODE ANN. § 20-2-751.1(a), (c) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	N/A

Idaho IDAHO CODE § 33-205 (1997)	Tracks the federal law.	**NOTICE, HEARING, RIGHT TO COUNSEL, RIGHT TO PRESENT WITNESSES, RIGHT TO CROSS-EXAMINE WITNESSES.**	N/A
Illinois 105 ILL. COMP. STAT. § 5/10-22.6 (West 1993)	Tracks the federal law, except there is no provision for referral to law enforcement.	Expulsion meeting with the school board, including notice. The board or hearing officer shall state the grounds for the expulsion at the meeting.	The Department of Human Services can send a representative to consult with the board at such meeting whenever there is evidence that mental illness may be the cause for expulsion or suspension.
Indiana IND. CODE § 20-8.1-5.1-10(C), (E), (F) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	Expulsion meeting, only upon request. **NOTICE** of the right to an expulsion meeting and the reasons for the expulsion. Written notice of the action taken by the school board after the meeting, including a written summary of the evidence. **APPEAL**, unless the school board has voted not to hear appeals.	The person presiding over the expulsion meeting has the power to issue subpoenas, compel the attendance of witnesses, and administer oaths.
Iowa IOWA CODE § 280.21B (1996)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	N/A

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Kansas KAN. STAT. ANN. §§ 72-89a02; § 72-8903 (1995)	Tracks the federal law.	**MAXIMUM DUE PROCESS**: notice, a hearing, the right to be represented by counsel, the right to present witnesses, the right to cross-examine witnesses, the right to a record of the proceedings, and the right to appeal.	Upon expulsion, the student shall be informed of public services available to treat the behaviors that caused the incident. The official overseeing the hearing has the power to issue subpoenas. The section does not apply to the possession by pupils of weapons at school, on school property, or at a school supervised activity if the possession is connected with a weapons safety course of instruction or a weapons education course approved by the school, or if the possession is specifically authorized by the chief administrative officer of the school.
Kentucky KY. REV. STAT. ANN. § 158.150(2) (Banks-Baldwin 1996)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	In determining whether a student has brought a gun to school, the local board of education shall use the definition of "unlawful possession of a weapon on school property" stated in Kentucky Revised Statutes (KRS) § 527.070—he or she must have acted knowingly, for reasons other than a school-sanctioned event.

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Louisiana LA. REV. STAT. ANN. § 17:416(C)(2)(A)(I), (B)(I), (C)(I) (West 1995)	Tracks the federal law.	Conference with principle, with notice. **HEARING, NOTICE, REPRESENTATION BY COUNSEL, APPEAL.**	The student may be readmitted during the expulsion period on a probationary basis.
Maine ME. REV. STAT. ANN. tit. 20-A, § 1001 (West 1995)	Tracks the federal law.	The statute provides for "proper investigation and due process proceedings."	**READMISSION** based upon satisfactory evidence that the behavior will not recur. Allows the school board to offer instructional activities related to firearms, and to allow a student to bring a gun to school for instructional activities sanctioned by the district.
Maryland MD. CODE ANN., EDUC. § 7-305(E)(2) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	Investigation by the superintendent. Conference between the superintendent and the student. Opportunity to appeal to the school board, **HEARING, COUNSEL, RIGHT TO PRESENT WITNESSES, RIGHT TO CROSS-EXAMINE WITNESSES.** No appeal from the school board's decision.	N/A

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Michigan Mich. Comp. Laws § 380.1311(2) (1995)	Tracks the federal law, except that the expulsion is permanent, subject to a petition for reinstatement, and there is no provision for referral to law enforcement. In addition, a school board is not required to expel a pupil for possessing a weapon if the pupil establishes by clear and convincing evidence at least one of the following: the object was not possessed by the pupil for use as a weapon, or for direct or indirect delivery to another person for use as a weapon; or the weapon was not knowingly possessed by the pupil; or the pupil did not know or have reason to know that the object possessed by the pupil constituted a dangerous weapon; or the weapon was possessed by the pupil at the suggestion, request, or direction of school or police authorities.[255]	None.	**REFERRAL TO THE LOCAL DEPARTMENT OF SOCIAL SERVICES OR COUNTY COMMUNITY MENTAL HEALTH AGENCY** after expulsion. **PETITION REINSTATEMENT** after the expulsion.
Minnesota MINN. STAT. § 127.282(A) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	N/A

255. Allowing the student to establish these facts does not automatically afford the student a hearing. Many fact-finding sessions are informal discussions around the student's locker. *See, e.g.*, James v. Unified Sch. Dist. No. 512, 959 F. Supp. 1407 (D. Kansas 1997) (student's Fourteenth Amendment rights were not violated when he was given an opportunity to be heard at an informal gathering with school administrators in the classroom building hallway and in the school parking lot).

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Mississippi MISS. CODE ANN. § 37-11-18 (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	The expulsion shall only take effect subject to the constitutional rights of due process, which shall include the student's right to **APPEAL** to the local school board.	N/A
Missouri MO. REV. STAT. § 160.261(3) (1995)	Tracks the federal law, except it requires either one full year "suspension," or permanent expulsion, and there is no provision for referral to law enforcement.	*None.*	Exception for "Civil War reenactments."
Montana MONT. CODE ANN. § 160.261(3) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	The trustees of the district shall define the procedures by which the trustees may expel a pupil.	The school district may offer instructional activities related to firearms, or allow a firearm to be brought to school for instructional activities.
Nebraska NEB. REV. STAT. § 79-2631(1) (1995)	Imposes the one-year expulsion only if the student is found to have knowingly and intentionally possessed a weapon on school grounds, and there is no provision for referral to law enforcement.	None.	N/A
Nevada NEV. REV. STAT. § 392.466(2) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	A student may possess a firearm with the permission of the principal.
New Jersey N.J. STAT. ANN. § 18A:37-7 (West 1995)	Imposes the one-year expulsion only if the student has been found to have knowingly possessed a firearm or has been convicted or adjudicated delinquent for possession of a firearm. There is no provision for referral to law enforcement.	**HEARING.**	Before returning to the regular education program, the student must undergo a child study team evaluation, and the principal must determine whether the pupil is prepared to return to the school's regular education program.
New Hampshire N.H. REV. STAT. ANN. § 193:13(III) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	Allows a student to possess a firearm with written authorization from the superintendent.

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
New Mexico N.M. STAT. ANN. § 22-5-4.7(A) (Michie 1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	**ALTERNATIVE SCHOOL** only if the student is handicapped.
New York N.Y. EDUC. LAW § 3214(3)(d) (McKinney 1995)	Tracks the federal law, except it requires "suspension" for one year.	**MAXIMUM DUE PROCESS**: notice, a hearing, the right to be represented by counsel, the right to present witnesses, the right to cross-examine witnesses, the right to a record of the proceedings, and the right to appeal. The determination of the superintendent to expel shall be subject to review by the board of education, and the commissioner.	N/A
North Dakota N.D. CENT. CODE § 15-49-13(2) (1995)	Tracks the federal law, except it requires immediate suspension and one-year expulsion, and there is no provision for referral to law enforcement.	**HEARING.**	The law does not apply to any student participating in a school-sponsored shooting sport, if the student has informed the school principal of his or her participation.
Ohio OHIO REV. CODE ANN. § 3313.66(2) (Anderson 1996)	Tracks the federal law, except there is no provision for referral to law enforcement.	Meeting with the superintendent, with notice. **MAXIMUM DUE PROCESS**: notice, a hearing, the right to be represented by counsel, the right to present witnesses, the right to cross-examine witnesses, the right to a record of the proceedings, and the right to appeal.	The superintendent shall provide the pupil and his parent, guardian, or custodian with information about services or programs offered by public and private agencies that work toward improving those aspects of the pupil's attitudes and behavior that contributed to the incident.
Oregon OR. REV. STAT. § 339.250(6) (1995)	Tracks the federal law.	None.	Provides an exception for students who bring a gun to school with the permission of the school district, and the State Board of Education may adopt additional exceptions.

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Pennsylvania 24 PA. CONS. STAT. § 13-1317.2(a) (1995)	Tracks the federal law.	**MAXIMUM DUE PROCESS**: notice, a hearing, the right to be represented by counsel, the right to present witnesses, the right to cross-examine witnesses, the right to a record of the proceedings, and the right to appeal.	Students who are less than 17 are still subject to the compulsory school attendance law even though expelled, and they must be provided an education, through the parents, and if the parents cannot provide it, through the school district. Does not apply to a weapon being used as part of a program approved by the school; a weapon that is unloaded and used by a student traversing school property while lawfully hunting, if the entry is authorized by school authorities.
South Carolina S.C. CODE ANN. § 59-63-235 (Law. Co-op. 1995)	Tracks the federal law.	**NOTICE, HEARING, RIGHT OF PARENTS OR GUARDIAN TO BE REPRESENTED BY COUNSEL, WHO MAY PRESENT WITNESSES AND CROSS-EXAMINE WITNESSES.** If an authority delegated by the board holds the hearing, either party may **APPEAL**. The action of the board may be appealed to the proper court.	N/A
South Dakota S.D. CODIFIED LAWS § 13-32-4 (Michie 1999)	Tracks the federal law, except there is no provision for referral to law enforcement.	**NOTICE, HEARING.**	N/A
Tennessee TENN. CODE ANN. § 49-6-3401(g) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	N/A

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
Texas TEX. EDUC. CODE ANN. § 37.007(e) (West 1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	**MANDATORY ALTERNATIVE SCHOOLING** if the student is under 10. If the student is over 10, OPTIONAL ALTERNATIVE SCHOOLING.
Utah UTAH CODE ANN. § 53A-11-904(2)(b) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	N/A
Vermont VT. STAT. ANN. tit. 16, § 1166(b) (1995)	Tracks the federal law.	**HEARING.**	N/A
Virginia VA. CODE ANN. § 22.1-277.01 (Michie 1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	**HEARING, NOTICE.** Right to an **APPEAL** before the full school board, if the decision to expel is made by a committee, unless the decision was unanimous.	Exempts persons who has been given permission to carry the weapon by school officials, and the law does not apply to unloaded firearms in a closed container in or upon a motor vehicle or an unloaded shotgun or rifle in a firearms rack in or upon a motor vehicle.
Washington WASH. REV. CODE § 28A.600.420 (1999)	Tracks the federal law, except there is no provision for referral to law enforcement.	None.	The law does not apply to students engaged in military education, any student involved in a convention, showing, demonstration, lecture or firearms safety course, or students participating in a rifle competition authorized by school authorities.

STATE / CITE	TERMS OF EXPULSION	PROVISIONS FOR PROCEDURAL DUE PROCESS	OTHER PROVISIONS
West Virginia W. VA. CODE § 18A-5-1a(a), (g) (1995)	Tracks the federal law, except there is no provision for referral to law enforcement.	The student first must be suspended, and within 24 hours the principal must make a request to the superintendent that the student be expelled. **MAXIMUM DUE PROCESS**: notice, a hearing, the right to be represented by counsel, the right to present witnesses, the right to cross-examine witnesses, the right to a record of the proceedings, and the right to appeal.	If the principal so determines, he or she shall report to the superintendent and to law enforcement that the student is criminally liable for weapons possession, within 72 hours of the incident.
Wyoming WYO. STAT. ANN. § 21-4-305 (Michie 1995)	Tracks the federal law.	**NOTICE; HEARING; APPEAL.**	N/A

This chart demonstrates that the Gun-Free Schools Act of 1994[256] has produced laws in almost every state, consistent only with regard to the punishment imposed. All laws require one-year expulsion of every student who is determined to have brought a gun to school. The lack of uniformity exists in the procedures offered before the one-year expulsion. Some states, such as West Virginia, offer formal procedural due process procedures, while others, such as Utah, offer no procedural due process at all.[257]

III. The Implications for Law and Society of Zero-Tolerance Laws

As described in Part I, the Gun-Free Schools Act of 1994[258] and zero tolerance laws have yielded results, that, even the school officials involved admit, border on the ridiculous, such as immediate suspension for playing with plastic toys.[259] The law enforcement and school administration hypersensitivity to students' horseplay with water pistols is a justified, but counterproductive, response to school weapons violence. The justification lies in the school's overall responsibility to ensure safety in schools, and the desire to best prevent any escalation of violence. The counterproductive nature of this crackdown is that it treats children who are prone to violence, and children who mean no harm by their behavior, exactly the same, with no provision for assessment or evaluation. The result is undue harshness upon children who bring toy guns to school, and the failure to assess a volatile student about to commit a grave act of violence.

A. *Danger that Zero-Tolerance Laws Will Completely Fail to Protect Students' Property Interest in Attending School*

It is well settled that a student possesses a property interest in a public school education that cannot be deprived without

256. 20 U.S.C. § 8921-23 (1994).

257. *Compare* W. VA. CODE § 18A-5-1a (a), (g) (1995) *with* UTAH CODE ANN. § 53A-11-904(2)(b) (1995).

258. 20 U.S.C. §§ 8921-23 (1994).

259. *See supra* text accompanying note 8.

some form of procedural due process.[260] However, as discussed, there is some confusion regarding the level of due process afforded to students before long-term suspension or expulsion; whether minimum due process is sufficient, or whether expulsions and long-term suspensions warrant more formal procedures.[261] The Supreme Court decision of *Goss v. Lopez*[262] indicated that more formal procedures than just notice and an opportunity to be heard may be required.[263] Thereafter, a slight qualification was added to this holding by *Board of Curators of the University of Missouri v. Horowitz*,[264] in which the Supreme Court held that less stringent procedural due process applied to academic dismissals than to disciplinary expulsions.[265] Thus, the state of the law is that short-term suspensions require minimum due process, but that long-term suspensions and expulsions may call for more formal procedures, except in the case of academic dismissals, which may be less formal. The confusion lies in that no direction has been provided as to long-term suspensions and expulsions for disciplinary violations, aside from the fact that procedures more formal than minimum due process may be required.

This confusion should be resolved quickly. Without clear guidelines as to what procedures are due a student facing expulsion, there exists a danger that some students will receive less procedural due process than is necessary to ensure against the erroneous deprivation of their property interest in attending public school. With increasing incidents of violence in school, and expulsion as the tactic taken by schools to try to control it, schools need clear direction as to how to protect students' property interests while controlling their behavior.[266]

The Gun-Free Schools Act of 1994[267] and the state laws passed in compliance with this federal law have been designed

260. *See* discussion *supra* Part II.B.2.

261. *See supra* text accompanying notes 98-135. *See discussion supra* Part II.B.1. for a discussion of minimum due process; *see discussion supra* Part II.B.3. for a discussion of formal due process procedures, or "maximum due process."

262. 419 U.S. 565 (1975).

263. *See* discussion *supra* Part II.B.2.

264. 435 U.S. 78 (1978).

265. *See supra* text accompanying notes 111-19, 134-35.

266. *See* discussion *supra* Part II.A.

267. 20 U.S.C. § § 8921-8923 (West 1994).

to address the problem of school violence.[268] However, this federal law, as well as some state laws passed in compliance, pose a danger to students' procedural due process rights, by suggesting that no procedure is due at all before expulsion.[269] For example, states such as Arizona, Colorado, Georgia and Iowa mandate immediate expulsion for no less than twelve months when a student is determined to have brought a gun to school, with no provisions at all as to how the determination should be made.[270] There are no provisions in these laws to allow the student any form of notice or opportunity to be heard before the expulsion.[271]

Other states have explicitly excluded students who have violated the firearm policy from any sort of procedural due process.[272] In Nevada, students in grades one through six who have committed violations of the disciplinary code, such as committing a battery on an employee or sale or distribution of a controlled substance,[273] are entitled to a review of their case by the board of trustees of the school district. However, students who have been found in possession of a firearm are specifically excluded from this due process procedure.[274] The statute reads:

> Any pupil in grades 1 to 6, inclusive, *except a pupil who has been found to have possessed a firearm in violation of subsection 2*, may be suspended from school or permanently expelled from school pursuant to this section only after the board of trustees of the school district has reviewed the circumstances and approved this action in accordance with the procedural policy adopted by the board for such issues.[275]

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268. *See* discussion *supra* Part II.F.2.

269. *See* Chart: State Laws in Compliance with 20 U.S.C. § 8921(b)(1), The Gun-Free Schools Act of 1994, *supra* Part II.F.2.

270. *See id.*; ARIZ. REV. STAT. § 15-841(G) (1995); COLO. REV. STAT. § 22-33-106(d)(I) (1996); GA. CODE ANN. § 20-2-751.1(a), (c) (1995); IOWA CODE § 280.21B (1996).

271. *See* Chart: State Laws in Compliance with 20 U.S.C. § 8921(b)(1), The Gun-Free Schools Act of 1994, *supra* Part II.F.2.; ARIZ. REV. STAT. § 15-841(G) (1995); COLO. REV. STAT. § 22-33-106(d)(I) (1996); GA. CODE ANN. § 20-2-751.1(a), (c) (1995); IOWA CODE § 280.21B (1996).

272. *See, e.g.*, NEV. REV. STAT. § 392.466(1) (1995); N.H. REV. STAT. ANN. § 193.13(III) (1969) (amended 1996).

273. *See* NEV. REV. STAT. § 392.466(1) (1995).

274. *See* NEV. REV. STAT. § 392.466(5) (1995).

275. NEV. REV. STAT. § 392.466(5) (1995) (Subsection two reads: "any pupil who is found in possession of a firearm while on the premises of any public school,

Through this Nevada statute, procedural due process is specifically provided to all students who have committed a violation placing them at risk for expulsion, at least in grades one through six, *except* those who have brought a gun to school.[276] In effect, a fifth grader who commits a battery upon his teacher is entitled to have his expulsion reviewed by the board of trustees of the school district. A fifth grader who is discovered to have a gun in his or her book bag will be automatically expelled, with no provision for review by the board of trustees, even if an investigation would have shown that a classmate had planted the gun without the student's knowledge.

The Gun-Free Schools Act of 1994[277] should direct the states to provide for procedural due process in conjunction with the expulsion of a student for weapons possession in school. In turn, the states that have not provided for procedural due process should follow those states that have directed the use of maximum due process before expelling a student for a year or more.

The students at risk of having their procedural due process rights violated are not necessarily students with evil intentions, and are even children who have stumbled into violating the very strict weapons policy without intending to do so. For example, fifth-grader Shanon Borchardt Coslett from Boulder, Colorado, was automatically expelled for accidentally bringing her mother's paring knife to school.[278] Under the zero tolerance law of Colorado, the school officials who expelled her were not required to give her an opportunity to explain.[279] Even having learned that she had accidentally possessed the paring knife, and even dutifully turned it in once she discovered it, the school officials stated they had no choice but to expel her, an honors student who had made a simple mistake and meant no harm.[280]

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at an activity sponsored by a public school or on any school bus must, for the first occurrence, be expelled from the school for a period of not less than one year." NEV. REV. STAT § 395.466(2) (1995)).

276. *See* NEV. REV. STAT. § 392.466(5) (1995).

277. 20 U.S.C. § § 8921-8923 (West 1994).

278. *See supra* note 6 & accompanying text.

279. *See* Chart: State Laws in Compliance with 20 U.S.C. § 8921(b)(1), The Gun-Free Schools Act of 1994, *see discussion supra* Part II.F.2.; COLO. REV. STAT. § 22-33-106(d)(I) (1996).

280. *See supra* note 6 & accompanying text.

It may be argued that expelling children like Shanon Borchardt Coslett is necessary to send a message that weapons in school will not be tolerated. However, a school system should, and is indeed required to, look at the individual circumstance of the child expelled.[281] Fifth-grader Shanon received a message of intolerance to her circumstances as a student. She learned that, no matter what circumstance might be easily explained to show that she was an honor student in good standing, who had made a simple mistake in taking her mother's lunch instead of her own, she would be treated exactly like those troubled, even psychotic students, who bring weapons to school entirely on purpose to harm others.[282]

This sort of direct punishment without provision for any sort of procedures to ensure fairness or accuracy is not only a violation of the procedures provided for by the Supreme Court in *Goss*, but is a callous disservice to the child and his or her family. Imposing the same harsh punishment upon a student who accidentally violates this rule, and a student who has ill, even evil, intentions in having possession of a gun, leads to fundamental unfairness. With no procedures required before expelling a child, there are no safeguards to ensure that the punishment rendered was fitting for the behavior.

A first grade teacher in the Pittsburgh public school system, Mary Potts, commented that zero tolerance laws are flawed because they fail to take into account how children at different age and grade levels respond to harsh punishment.[283] Under zero tolerance, every child is expelled for a year, regardless of age or circumstances. Mrs. Potts explained that students at different age and grade levels respond to punishment and view consequences differently. An older child can comprehend that he or she is a member of a larger school community, and that sometimes punishment is meant to send a message to others about certain types of behavior. In contrast, younger

281. Under *Goss v. Lopez*, 419 U.S. 565 (1975), every student possesses a property interest in public school attendance that entitles him or her to at least notice and an opportunity to be heard, and perhaps more formal procedures, when facing long-term suspension or expulsion. *See* discussion *supra* Part II.B.2.

282. *See* discussion *supra* Part II.B.2.

283. Telephone Interview with Mary Potts, Teacher, Pittsburgh Public School System (Nov. 1, 1998).

children in general are approval-seeking and perceive punishment as severe personal rejection.

Young children need more direct supervision to understand the consequences of being punished.[284] Mrs. Potts commented that automatic expulsion of a young child is a lost educational opportunity for the school officials and the child. The teacher explained that a child sent home merely feels rejected and rebuked. Some children may even become angry or despondent, exhibiting feelings of worthlessness, especially if the harsh punishment was not necessarily deserved and the child was not given an opportunity to provide an explanation. Mrs. Potts sees great possibility for some children if the school system could use the situation as a teaching opportunity. She suggests taking young children to the juvenile court system and the local jail for an explanation of what happens if a person is caught with an unlicensed weapon, or as a result of shooting incidents.

Even older children who are harshly punished experience lasting negative consequences. Melissa McDonald, 16, who was expelled from high school for three months, underwent a disturbing attitude change that her mother watched develop since the expulsion.[285] Melissa and a group of her friends had been expelled when alcohol was found in a car in the school parking lot.[286] Even after returning to school the fall after her expulsion, Melissa's mother commented, "She hates school now . . . I think she needed to be severely punished, but she should have been left in school. Now she can't wait until she's out."[287]

One must wonder what discipline is accomplished by forcing a child to stay home. The description in the Chicago Tribune of Melissa McDonald's expulsion stated: "During the three months that she was expelled from high school in 1996, Melissa McDonald, 16, sometimes slept until noon. She spent her days

284. *See* Peter A. Williamson, *Discipline: Holding the Line,* PARENTING, May 1990, at 89, *presented at* ALBERT EINSTEIN COLLEGE OF MEDICINE OF YESHIVA UNIVERSITY MONTEFIORE MEDICAL CENTER, DEPARTMENT OF PEDIATRICS CLINIC CONFERENCE, *Tantrums and Discipline,* Jan. 18-22, 1999.

285. *See* Julie Deardorff, *As School Expulsions Soar, Critics Worry Over Impact,* CHI. TRIB., April 23, 1998, at 1.

286. *See id.*

287. *Id.*

watching TV or listlessly bouncing on the trampoline in her back yard, waiting until her friends came home."[288]

Arnold Gallegos, an educator and chairman of the annual Joint National Conference on Alternatives to Expulsion, Suspension and Dropping Out of School, commented on the expulsion approach in this way: "Expulsion without any alternative programming is damaging . . . You just cannot expel students without supervision, guidance or education."[289]

The National School Boards Association (NSBA) has summarized the studies done on suspensions and expulsions, in part, as follows: "suspended students lose valuable instruction and are likely to distrust the authority that has rejected them."[290] If most stable students are vulnerable to this distrust and alienation, it is irresponsible to subject an unstable student to expulsion, and its attendant effects upon the student, without taking precautions. The NSBA has cautioned: "traditional approaches—such as punishment, removing troublemakers, and similar measures—often harden delinquent behavior patterns, alienate troubled youths from the schools, and foster distrust."[291]

B. *Danger that Zero Tolerance Laws Will Completely Fail to Prevent Dangerous Behavior*

As discussed, children likely to kill could be criminally psychotic.[292] Expelling the innocuous student who is horsing around with a water pistol, or who accidentally picked up their parent's lunch with a paring knife inside, will send messages to those students with in-tact senses of responsibility, but simply will not serve to deter students who are psychopathic. The students who act violently due to an internal psychopathy act with no regard for the consequences endured by others for the same behavior, and no desire to conform their behavior.[293]

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288. *Id.*

289. *Id.*

290. Bogos, *supra* note 161, at 380 (citing AMALIA E. CUERVO ET AL., TOWARD BETTER AND SAFER SCHOOLS (1984)).

291. *Id.* at 381 (citing AMALIA E. CUERVO ET AL., TOWARD BETTER AND SAFER SCHOOLS (1984)).

292. *See supra* notes 174-79 and accompanying text.

293. *See supra* notes 174-79 and accompanying text.

There must be some sophistication in assessing these students beyond expelling them and sending them home. In addition to risking damage to a child's self esteem, expulsion can present an even more grave danger by sending a dangerous student exhibiting acute signs of impending violence home, where he or she may not receive adequate supervision. As Peter M. Leavitt, a criminal court judge in Westchester County, observed, leaving these students unattended with no school supervision simply to wander on their own, with little or no parental direction is an exercise in futility which can result in more criminal mischief and "acting out" on the streets.[294] The very real possibility is that the potentially violent student is released to his parents, who may not be able to handle him, and thus becomes a threat to his neighborhood. Indeed, this "possibility" has already happened.

Kip Kinkle was home on suspension during the time that he allegedly committed the brutal murders of which he is accused.[295] School officials had determined that Kip Kinkle had possession of a gun at school, and was immediately removed from school on suspension to await likely expulsion.[296] The day following his suspension, he returned to Springfield, Oregon's Thurston High School with three guns hidden under his trench coat.[297] Some students commented for the press later that they were surprised to see Kip in school that day.[298] They knew that Kip had been suspended the day before for storing a loaded pistol in his locker, and was banned from campus for an indefinite period.[299]

What the Thurston High School officials should have been aware of, however, was that this sort of return to school should not have been unexpected. Some common sense principles, educated by advice from social science and psychology experts, could have predicted exactly what is alleged to have occurred next.[300] A student, who could be characterized as psychopathic

294. Interview with the Honorable Peter M. Leavitt, Criminal Division, Westchester County Court, in White Plains, N.Y. (Oct. 15, 1998).

295. *See* Sullivan, *supra* note 140, at 46, 47.

296. *See id.*

297. *See id.*

298. *See id.* at 47.

299. *See id.*

300. *See generally* Weiner, *supra* note 174.

is sent home, where, statistics state, he is likely to have unfettered access to weapons.[301] It is the most predictable of behaviors for this unstable youth, preoccupied with weapons violence, to return to the scene of the expulsion for retaliatory behavior.[302]

Schools must be equipped for a new era of school administration, and the law must be able to accommodate it. Local school districts are no longer dealing with students who can be shamed into good behavior by a day or two of suspension. The current era is one of sophisticated ingenuity, and sometimes mental disease, at a young age. Today's students have acquired knowledge of weapons and explosives and exhibit tendencies to act on it.[303] School administrators have to be more sophisticated in their approaches than to simply send students home. They must diagnose the particular student they are dealing with.

Imposing a blanket expulsion on every student will punish undeserving students, and create dangerous situations in other cases. Although the police department, which had been called when the gun was found in Kip's possession, claimed that no probable cause existed to take custody of Kip, they made this assessment without the aid of a psychologist.[304] The difficulty of the situation arose from the fact that Kip was only 15 at the time of his suspension, and he did not seem to be a dangerous person. Unfortunately, gone are the days when a child can be assessed from appearances, background, and makeup of the child's family. An underlying psychological disorder can exist even in seemingly harmless children from the most upstanding families. A 15-year-old has to be assessed as though he could be a psychotic killer; teenage "idiosyncrasies" must be taken seriously: threats, jokes about blowing up the school, gun possession, jokes about torturing animals.

The first step in devising personalized, effective responses to school gun violence is to put each incident of gun possession in school under the examination of every person involved: the student, parents, and school officials. Providing a forum for discussion about the incident and development of a plan of punish-

301. *See supra* notes 162-70 and accompanying text.
302. *See* Weiner, *supra* note 174, at 815; *see also* Anglin, *supra* note 141.
303. *See supra* notes 165-68 and accompanying text.
304. *See* Sullivan, *supra* note 140.

ment would allow the student to offer an explanation or to take responsibility for the incident. In the alternative, it would allow school authorities to identify those dangerous students who should be directed for mental evaluation and perhaps referred to law enforcement. This sort of sophisticated diagnosis and response would appropriately separate those students who misbehave out of rebelliousness or even misdirection from parents, from those who are most dangerous. Providing for maximum due process, allowing notice to the student and parents, a hearing with witnesses for both sides, and a formal determination of the facts of the incident as well as a detailed reason for the punishment, would build an assurance into the system that each student who is caught with a weapon is both adequately assessed and dealt with fairly.

IV. Providing Procedural Due Process: All States Must Provide Formal Procedural Due Process Procedures When Expelling a Student for a Year or More Pursuant to the Gun-Free Schools Act of 1994

To conform with the Supreme Court's guidance in *Goss v. Lopez,*[305] directing that expulsions call for more formal procedures than notice and an opportunity to be heard, and to build an assessment device into the discipline of children who possess a weapon at school, The Gun-Free Schools Act of 1994[306] should direct the states to apply formal procedural due process procedures. The case from the Supreme Court that provides guidance as to formal due process procedures, or "maximum due process," is *Goldberg v. Kelly.*[307] The procedures outlined in *Goldberg* should be incorporated into the Gun-Free Schools Act of 1994[308] and zero tolerance laws.

A student's property interest in a public education is similar to the property interest involved in *Goldberg.*[309] In *Goldberg,* the Supreme Court found that the plaintiffs possessed a property interest in welfare benefits which inured from

305. 419 U.S. 565 (1975).
306. 20 U.S.C. § § 8921-23 (West 1994).
307. 397 U.S. 254 (1970).
308. 20 U.S.C. § § 8921-23 (West 1994).
309. *See* discussion *supra* Part II.B.3.

federal and state legislation.[310] Similarly, in *Goss,* the Supreme Court found that students possess a property interest in access to public education, which inures from state compulsory education laws.[311] As with welfare benefits, the issue regarding procedural due process in the education context is whether the state should give up its flexibility in terminating the benefit, i.e. expulsion, to allow the person affected to contest the state action.[312]

In *Goldberg,* the state desired to conserve its fiscal and administrative resources by denying welfare benefits without having to conduct a pre-termination hearing in every case.[313] Similarly, the state has argued when challenged regarding its procedures for suspending and expelling students that holding hearings before every suspension or expulsion would "overwhelm administrative facilities . . . and cost more than it would save in educational effectiveness."[314] Despite these arguments in *Goldberg,* the Supreme Court held that the state, when terminating a property interest protected by the Fourteenth Amendment, had to provide notice, a hearing, an opportunity to present and cross-examine witnesses, and a written decision about the case before termination of welfare benefits.[315]

Welfare benefits were deemed by the *Goldberg* Court to be so essential to the welfare recipient that these procedures were necessary to ensure fairness.[316] Education, similarly, has been found by the Supreme Court to be "the most important function of state and local governments,"[317] and suspension or expulsion to be a "serious event in the life of the suspended [or expelled] child."[318] Under the guidance of the Supreme Court, therefore, formal procedural due process procedures are warranted and proper in the context of student expulsion. In the words of the

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310. *See supra* text accompanying note 88.

311. *See supra* text accompanying note 61.

312. *See supra* text accompanying note 89.

313. *See supra* text accompanying note 91.

314. Goss v. Lopez, 419 U.S. 565, 583 (1975); *see supra* text accompanying note 75.

315. *See supra* text accompanying notes 94-97.

316. *See supra* text accompanying note 92.

317. Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see supra* text accompanying note 20.

318. Goss v. Lopez, 419 U.S. 565, 576 (1975); *see supra* text accompanying note 70.

Goss Court, procedural due process is necessary because "it disserves both [the student's] interest and the interest of the state if [the student's] suspension [or expulsion] is in fact unwarranted."[319]

V. Conclusion

Providing for procedural due process will enhance the school's ability to determine which students should be removed from school for the safety of others. In turn, the procedures can identify the students who do not pose a threat, and whose expulsion would be unnecessary and counterproductive. In addition to these very important practical considerations, procedural due process will ensure that children expelled for weapons violations receive the Fourteenth Amendment protection that has been granted to all children through the decisions of the United States Supreme Court.

Therefore, the Gun-Free Schools Act of 1994,[320] as well as the zero tolerance laws that have failed to incorporate formal due process procedures, should be rewritten to incorporate procedural due process. This approach will provide a legally consistent and sophisticated response to weapons violence in schools.

Children will be impressed with the great importance of the violation, when served with notice and direction to attend a formal hearing. Those students who made honest mistakes will be given the opportunity to explain the situation, and can receive punishment appropriate to the circumstances. In this way, school officials can take opportunities to teach and provide guidance to misguided students who can correct inappropriate, and yet not dangerous, behavior.

As to those students on the edge of violent behavior, the procedural aspects of due process will especially serve the student and parents, as well as the school and surrounding community. Procedural due process provides the opportunity to evaluate and assess a troubled student's motivations and underlying problems. A child prone to criminal mischief, or on the brink of extreme violence, can be identified and addressed by

319. *Goss*, 419 U.S. at 579; *see supra* text accompanying note 79.
320. 20 U.S.C. §§ 8921-23 (West 1994).

law enforcement or psychological treatment if necessary. Parents unable to control their child will be given the opportunity to ask for help.

Procedural due process can perform many functions in the context of providing legally acceptable, efficient, and most importantly, effective school responses to weapons violence. The Gun-Free Schools Act of 1994 should incorporate the powerful rules of procedural due process into its policy against school weapons violence.

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