

## **Zero-Tolerance Discipline in Illinois Public Schools, Illinois Bar Journal**

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Given the increased scrutiny of discipline policies and procedures, school authorities should be aware of the legal concerns raised by "one size fits all" zero-tolerance discipline policies. This article examines the issue and offers guidelines for school boards, administrators, and lawyers.

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### **I. Introduction**

In response to the tragic school shootings nationwide and to governmental initiatives designed to get tough on serious student misconduct; particularly when it involves weapons, alcohol, and drugs; more and more public schools are considering "zero tolerance" policies that impose severe, predetermined penalties for student misconduct. The federal government has entered the fray with legislative enactments that purport to strengthen schools' authority to temporarily exclude or expel students for drug and weapons offenses.

But the use of zero-tolerance disciplinary policies has come under fire from media and interest groups and become an increasingly common subject of federal and state litigation. The term "zero tolerance" is cavalierly used to describe any decision to expel a student, as if there were a generally accepted definition of the term.

This lack of a common definition is a problem for school officials as they examine their disciplinary policies and procedures. Governor George Ryan has acknowledged the problem, saying that "zero tolerance has to be defined on a statewide basis...it can't mean one thing in one school and one thing in another."<sup>1</sup> Critics of "zero-tolerance" policies cite as examples students who were suspended or expelled for conduct that, they contend, did not warrant such serious punishment. For instance, on March 3, 1998, Boston University's Daily Free Press had an editorial entitled "Excessive Punishment," which read in part:

A middle-schooler in Oregon takes a swig of Scope after lunch. An eighth-grader tries to make his classmates laugh by sucking on an Alka Seltzer tablet. A 13-year-old has Advil in her backpack rooted out by a drug-sniffing dog. And a high school student brings an African tribal knife to her world history class. What do these students have in common? They were each suspended for their transgressions under zero tolerance policies at their schools.

The real concern in these instances is not so much the propriety of "zero-tolerance" policies but whether the punishment has some reasonable connection to the misconduct in question or school officials have reasonably determined that intentional misconduct occurred.

It is misguided, though, to suggest that zero-tolerance school policies are inherently bad; obviously no school "tolerates" drugs, weapons, or serious misconduct. The real question is whether the district should impose a predetermined, uniform consequence, usually an extended expulsion, for specified misconduct; for example, any possession of a weapon or

drugs on school grounds, regardless of the individual circumstances of the offense (this is the definition of "zero-tolerance policy" for purposes of this article). The debate, then, is over the automatic nature and severity of such punishments. Is a singular, preordained punishment for any category offense fair and lawful?

## II. The Decatur Incident

Much of the current debate over zero-tolerance policies in Illinois arises not so much from thoughtful analysis as from the national media frenzy over the Decatur School Board's expulsions of several students for their roles in a fight at a football game. The melee was captured on home video and showed one group of students attacking two other students. The tape was subsequently broadcast to a national audience.

The principal issues ultimately were more political than legal, with the Decatur incident receiving national scrutiny when the Rev. Jesse Jackson intervened on behalf of the students. In the litigation that followed in *Fuller v Decatur Public School Board of Education*,<sup>2</sup> the students contended that the board had violated their constitutional rights by relying on a zero-tolerance policy, allegedly punishing them as a group, denying them due process, and improperly basing the decision on race.

The students argued that they were stereotyped as gang members and "racially profiled" by the board. They also claimed that because the fight was short and no guns, knives, or drugs were involved, expulsion was too severe a penalty. This contention in particular; i.e., that misconduct is not truly serious unless it involves drugs, guns or knives; suggested a fundamental misunderstanding of public schools' authority to preserve order and safety by imposing discipline that the local board deems appropriate and that the Illinois legislature has authorized.

The Fuller court found that the students failed to show that the board had adopted or practiced a "zero-tolerance policy." While the board had adopted a resolution declaring a "no-tolerance position on school violence," the court determined that the resolution had no impact on the students being disciplined. The court found the "no-tolerance" resolution to be more of a political or philosophical statement against criminal activity in schools than a formal policy on student discipline.<sup>3</sup> The court determined that the board based its decision to expel on sufficient evidence of serious misconduct and that local school board disciplinary decisions are entitled to substantial deference by the courts.

Section 10-22.6 of the Illinois School Code<sup>4</sup> authorizes boards to suspend and expel students pursuant to prescribed procedures. Merely expelling students for serious student misconduct does not equate to a zero-tolerance policy. Even a law or a policy that mandates expulsion for serious misconduct would be lawful if properly drafted.

Section 10-22.6 authorizes a board to expel students guilty of gross disobedience and misconduct for up to two years. For certain weapons offenses, Illinois law provides for a mandatory one-year expulsion, giving the board and superintendent authority to alter that penalty as appropriate. Whatever the disciplinary measure, the process by which it is imposed must be consistent with students' constitutional rights. Boards that impose mandatory penalties might be unlawfully overstepping their authority to discipline if the policy supporting the penalty is not carefully drafted and implemented.

### III. Judicial Review of Zero-Tolerance Policies/Procedures

While there is no clear judicial guidance about how public schools can adopt and implement zero-tolerance policies yet in Illinois, a number of courts in other jurisdictions have considered them, with varying results.

For instance, in *Lyons v Penn Hills School District*,<sup>5</sup> a Pennsylvania appellate court examined the expulsion of a seventh grade "A" student and chorus member for one year for violating a school district's zero-tolerance weapons policy after an instructor observed him filing his fingernail with a miniature Swiss army knife he had found in a school hallway. The court held that the school board exceeded its authority in adopting its zero-tolerance policy for weapons. According to the court, the policy denied the exercise of discretion specifically required by statute; i.e., it did not allow the superintendent to modify on a case-by-case basis expulsion sanctions for students who possessed weapons.

Similarly, a federal district court in *Colvin v Lowndes County Sch. Dist.*<sup>6</sup> held that a district violated a student's due process rights by expelling him under a zero-tolerance-for-weapons policy without properly considering the circumstances of his case.

In *Colvin*, a sixth grader was suspended for bringing a miniature Swiss army knife key chain with a fingernail file, small pair of scissors, and closed-end cuticle knife to school. The "weapon" carried the insignia of a pharmaceutical company and was given to the student by his mother, a registered nurse. It was found after it accidentally fell out of a hole in the student's book bag. When confronted about the knife, the student handed it to his teacher without incident and cooperated with school officials after its discovery. He was expelled for one year.

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#### Side Bar

##### \* ABA Opposes Unyielding Zero-Tolerance Policies

The *Colvin* court reversed the expulsion, in part because the school deferred to an "unwritten blanket policy of expulsion, absent reference to the circumstances of the infraction."<sup>7</sup> The president of the school board had testified that the zero-tolerance policy required the board to impose the same one-year expulsion penalty regardless of the circumstances of the offense. In criticizing the school's decision, the court wrote as follows:

Employing a blanket policy of expulsion, clearly a serious penalty, precludes the use of independent consideration of relevant facts and circumstances. Certainly, an offense may warrant expulsion, but such punishment should only be handed down upon the Board's independent determination that the facts and circumstances meet the requirements for instituting such judgment. By casting too wide a net, school boards will effectively snare the unwary student. The school board may choose not to exercise its power of leniency. In doing so, however, it may not hide behind the notion that the law prohibits leniency for there is no such law. Individualized punishment by reference to all relevant facts and

circumstances regarding the offense and the offender is a hallmark of our criminal justice system.<sup>8</sup>

But an Indiana appellate court reached a different result in *Board of School Trustees v Barnell*.<sup>9</sup> The Barnell court reviewed the expulsion of yet another student who brought a Swiss army knife to school. The student-conduct guidelines imposed automatic expulsion for bringing a knife to school.

The student argued that because he did not threaten anyone with his "relatively innocuous" knife, his expulsion was not necessary to maintain order and was therefore arbitrary. He also argued that the decision to expel was an arbitrary and capricious administrative act and that the district failed to provide clear notice that students could be expelled for a first offense. The court upheld the school board's rule as clearly spelling out the consequences for such an offense and found that relying on the automatic expulsion rule was not arbitrary or a violation of any rights of the student.<sup>10</sup>

Similarly, in *Clinton Municipal Separate School District v Byrd*,<sup>11</sup> two high school students that defaced school property were suspended for a semester. The board had adopted a policy providing that if a student defaced school property, he or she "shall" be suspended or expelled.

The Mississippi Supreme Court held that a mandatory school disciplinary rule is not unconstitutional simply because it is mandatory. The court pointed out that a school rule couched in mandatory terms does not necessarily withdraw discretion from a school board. Although affirming the discipline, the court wrote as follows:

[t]hat a school rule may be worded in mandatory language does not deprive school boards and their subordinates of the authority to administer the rule with flexibility and leniency. The school board may choose not to exercise its power of leniency. In doing so, however, it may not hide behind the notion that the law prohibits leniency for there is no such law.<sup>12</sup>

In reaching its conclusion, the court relied upon several older federal court decisions upholding school board decisions based on mandatory expulsion policies for weapon or drug possession. As pointed out above in *Colvin*, at least one other court has relied upon this same principle to overturn a school's mandatory policy.

Finally, in *Seal v Morgan*,<sup>13</sup> a high school student brought a federal section 1983 action against his school for expelling him after a friend's knife was found in his car. The student claimed that he did not know about the knife. The school filed a motion for summary judgment, but the trial judge essentially entered summary judgment against the school on the issue of liability on the due process claim.

The appellate court held that suspending or expelling a student for weapons possession under a zero-tolerance policy when the student did not knowingly possess a weapon was not rationally related to a legitimate state interest, reasoning that "[n]o student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its presence."<sup>14</sup>

The appellate court reversed summary judgment in favor of the student to allow for further discovery, but held that "[f]or the future...we expect that our opinion today will clarify the

contours of a student's right not to be expelled for truly unknowing or unconscious possession of a forbidden object."15

Illinois state law imposes a mandatory one-year expulsion for possession of a weapon (as defined at 105 ILCS 5/10-22.6) at school, a school activity, or an event "reasonably related" to school. However, the law specifically provides the school board or superintendent with authority to alter that penalty if warranted, building in the important element of discretionary decision-making in school expulsion matters.

#### IV. Recommendations

In considering whether to adopt a zero-tolerance policy for misconduct, schools should specify what they mean by "zero tolerance." Zero tolerance of drugs and weapons is, and always has been, the policy of all public schools. "Zero tolerance" could thus mean that all drug offenses will result in some discipline and/or required drug treatment, clearly an acceptable approach. On the other hand, it could mean that all drug offenses, regardless of type, will result in a one-year expulsion.

Schools step onto thin ice when they diverge too dramatically from the principle of making the punishment fit the crime. Fortunately, boards rarely adopt policies that provide automatic penalties for specified offenses with no exceptions for the circumstances of the case or the record or intent of the student.

Given the increased scrutiny now being devoted to discipline policies and procedures, schools should be wary of "one size fits all" discipline policies. While a zero-tolerance policy for serious misconduct remains fully within the district's authority, schools may want to ask the following questions before adopting or enforcing any policy that mandates a preordained penalty, particularly expulsion.

- \* Do they really need a written zero-tolerance policy that allows no exceptions? Remember, schools can impose consistent, stiff penalties for serious misconduct with clear notice to students without creating a zero-tolerance policy that preordains a uniform penalty.
- \* Have they carefully determined whether the offense was actually committed? Just because an offense is serious does not mean school authorities have a lesser duty to demand sufficient and reliable evidence that it occurred. School boards should try not to rely exclusively on hearsay information if possible.
- \* Was the offense knowing and intentional? If the conduct is unintentional, think about what the penalty is really designed to address, though schools need not minimize safety issues or the need to make the seriousness of such conduct clear to other students.
- \* Is the offense covered by the policy adequately defined; e.g., would "weapon or look-alike" as defined in the school policy cover a bright-orange squirt gun? Does the policy provide adequate notice of the penalty for the offense, particularly if it is an automatic, fixed-term expulsion?

\* Is there a reasonable relationship between the punishment and the age of the student (e.g., weapon offense by a kindergartner) or nature of the offense (e.g., possession of a plastic knife)?

\* Does the policy allow any flexibility? Can the board or superintendent alter the penalty if appropriate? Building in flexibility can make policies less vulnerable to legal challenge.

\* Is the policy consistent with applicable statutes or regulations?

\* If the policy is deliberately designed to be zero tolerance, is it applied in a nondiscriminatory manner; i.e., to both "good" and "bad" kids?

Consider these questions and the issues they raise, and remember that imposing consistent penalties for similar offenses is generally the best practice.

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### ABA Opposes Unyielding Zero-Tolerance Policies

The American Bar Association voted at its midyear meeting last February to oppose zero-tolerance disciplinary policies that don't take into account the circumstances and the students in question. The resolution, approved by the ABA House of Delegates, reads as follows:

RESOLVED, that the American Bar Association supports the following principles concerning school discipline:

- 1) schools should have strong policies against gun possession and be safe places for students to learn and develop;
- 2) in cases involving alleged student misbehavior, school officials should exercise sound discretion that is consistent with principles of due process and considers the individual student and the particular circumstances of misconduct; and
- 3) alternatives to expulsion or referral for prosecution should be developed that will improve student behavior and school climate without making schools dangerous; and

FURTHER RESOLVED, that the ABA opposes, in principle, "zero tolerance" policies that have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student's history.

Here's an excerpt from the ABA's zero-tolerance report: "Although few could quarrel with a policy of zero tolerance towards children who misbehave ; adults who raise, teach or supervise children should react to misbehavior; their responses should be appropriate to the age, history and circumstances of the child as well as to the nature of the offense. Unfortunately, when it is examined closely, 'zero tolerance' turns out to have very little to

do with zero tolerance, and everything to do with one-size-fits-all mandatory punishment." The full report is online at <<http://www.abanet.org/crimjust/juvjus/zerotolreport.html>>. See also "Zero Tolerance, Zero Sense" in the April 2000 ABA Journal, on the Web at <<http://www.abanet.org/journal/apr00/04FZERO.html>>

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1. As reported in the January 25, 2000, Chicago Daily Southtown.
2. 78 F Supp 2d 812 (CD Ill 2000).
3. See also *West v Derby Unified School Dist. No. 260*, 206 F3d 1358, fn 3 (10th Cir 2000) (a student suspended for drawing a Confederate flag claimed that a school's policy against racial harassment or intimidation violated his First Amendment free-speech rights, but the court found that it was not a "zero-tolerance" policy because numerous factors aside from the plain language of the policy went into the administrator's decision to punish).
4. 105 ILCS 5/10-22.6.
5. 723 A2d 1073 (Pa Cmwlt 1999).
6. 114 F Supp 2d 504 (ND Miss 1999).
7. *Colvin*, 114 F Supp 2d at 512.
8. *Id.*
9. 678 NE2d 799 (Ind App 1997).
10. *Id.*, 678 NE2d at 805. See also *L.P.M. v School Bd. of Seminole Co.*, 753 So2d 130 (Fla App 2000) (upholding suspension from extracurricular activities pursuant to a zero-tolerance policy because participation is a privilege, not a right).
11. 477 So2d 237 (Miss 1985).
12. *Id.*, 477 So2d at 241; accord *Mitchell v Board of Trustees of Oxford Municipal Separate School District*, 625 F2d 660 (5th Cir 1980) (court recognized that a mandatory disciplinary rule adopted by a school board can be unconstitutional if there is no rational relationship between the punishment and the offense; however, the rule is not unconstitutional simply because it is mandatory).
13. 229 F3d 567 (6th Cir Tenn 2000).
14. *Id.*, 229 F3d at 575.
15. *Id.*, 229 F3d at 581.