AN ANALYSIS OF THE LEGAL AND ETHICAL DIMENSIONS OF
ZERO-TOLERANCE COURT DECISIONS IN K-12 PUBLIC EDUCATION

A Dissertation in
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by
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ABSTRACT

Zero-tolerance policies have a short yet prolific history in American schools. Originally developed by the U.S. Customs Agency, zero tolerance was intended to target a rapidly growing drug trade. Most schools began adopting these policies in response to The Gun Free Schools Act of 1994. This mandate requires all state education agencies to develop a policy towards weapons that results in an expulsion of no less than one year. Coupled with this requirement is the stipulation that these policies must allow for the senior most administrators within a local education agency to have the discretion to modify the punishment on a case by case basis.

Commentators have characterized zero tolerance as one of the most simplistic approaches to school discipline. However, school discipline data are notoriously challenging to analyze due to the many factors that contribute to school discipline in general. There is a lack of empirical evidence to support the claim the notion that zero-tolerance policies decrease violent incidents in schools or improve school safety. The message behind the policies clearly indicates that violence in schools is not tolerable under any circumstances; however there is no correlation between the message and the outcomes from policy implementation. Regardless of this, the American legal structure supports the application of these policies. This study examines the legal and ethical dimensions of zero-tolerance policies in an attempt to determine the degree to which U.S. courts have provided language suggesting discrepancies between the legal holding and the opinion following the decision.
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Chapter 1

Introduction

Concern about school safety is not new; however, academic interest in studying student aggression and school safety has grown dramatically in the past 20 years (Astor, Guerra, and Van Acker, 2010; Cornell & Mayer, 2010; Mayer & Furlong, 2010; Osher, Bear, Sprague, & Doyle, 2010; Swearer, Espelage, Vaillencourt, & Hymel, 2010). Cornell and Mayer (2010) conducted a PsycINFO search of peer-reviewed articles using the search term school violence and found more than four times the number of articles since 2000 (443) compared to the number of articles published in the 1990’s (84). This has been driven in part by widespread media attention to horrific acts of school violence in the recent past. The tragic shooting at Columbine High School in Littleton, Colorado, is one of the most publicized incidents of fatal violence in schools but statistics on school violence illustrate that it cannot be characterized as an isolated incident. There have been a number of fatal incidents in American schools both prior to and in the wake of Columbine (Chen, 2008; National Center for Educational Statistics, 1998; U.S. Department of Education, 2009).

implementing policies encouraging safe and drug-free schools (Doolittle & Sharkey, 1998). Increased media attention and public perception that schools were becoming more dangerous led to the Acts of 1994 and 1996 to include a provision mandating state educational agencies to develop zero-tolerance policies for weapons in schools in order to receive funding through No Child Left Behind (Casella, 2003; Chen, 2008; Martinez, 2009; Skiba & Peterson, 1999; Stader, 2004).

Do zero-tolerance policies decrease incidents of violence in schools and make schools safer? Commentators have characterized zero tolerance as one of the most simplistic approaches to school discipline (Cornell & Mayer, 2010) and there is a lack of empirical evidence to support their effectiveness (Chen, 2008). However, school discipline data are notoriously challenging to analyze due to the many factors that contribute to school discipline in general. Osher, Bear, Sprague, and Doyle (2010) include factors such as the developmental needs of students; teacher, student, and school culture; student socioeconomic status; school and classroom composition and structure; pedagogical demands, student and teacher role expectations and capacity to meet the institutionally established expectations for their roles; and school climate as factors contributing to school discipline data (p. 48). Administrators have little control over most of these yet face the challenge of making discipline decisions on a daily basis for infractions influenced by this myriad of factors. Zero-tolerance policies are intended to provide defined parameters that are applied equally to all students that send the clear message that violence is not permitted in schools under any circumstances (Casella, 2003; Martinez, 2009; Skiba & Peterson, 1999; Stader, 2004).
Overview

Zero-tolerance policies have a short yet prolific history in American schools. Originally developed by the U.S. Customs Agency, zero tolerance was intended to target a rapidly growing drug trade. Congress enacted the first Guns-Free School Zones Act in 1990. This version of zero tolerance made it a felony to possess a firearm on or near school property. The U.S. Supreme Court found this early Act to be illegal in *U.S. v. Lopez* (1995) because it “exceeded Congress’ power to legislate under the Commerce Clause” (p. 3). Most schools began adopting these policies in response to The Gun Free Schools Act of 1994 (20 U.S.C. Chapter 70 Sect. 8921; American Psychological Association, 2006; Martinez, 2009; Skiba & Rauch, 2006). This mandate requires all state education agencies to develop a policy towards weapons that results in an expulsion of no less than one year. Coupled with this requirement is the stipulation that these policies must allow for the senior most administrators within a local education agency to have the discretion to modify the punishment on a case by case basis (Casella, 2003; Martinez, 2009; American Psychological Association, 2006, Stader, 2004). The original policy dictated that schools adopt zero-tolerance towards firearms or risk losing federal funding from the Elementary and Secondary Education Act (now referred to as No Child Left Behind) (Casella, 2003, Martinez, 2009; Skiba & Peterson, 1999; Stader, 2004). Within the first year the law was amended to read *weapon* rather than *firearm* in order to allow for the inclusion of other firearm type weapons that pose a threat in schools (Casella, 2003; Martinez, 2009). Initial examination of the policy reveals defined
parameters while providing administrators the opportunity to exercise discretion based on the context of each infraction.

These policies were widely adopted in schools as a philosophy or policy that mandates the application of predetermined consequences. Most often severe and punitive in nature, these consequences are applied regardless of the gravity of behavior, mitigating circumstances, or situational context. Zero-tolerance policies assume that removing students who engage in disruptive behavior will deter others from disruption and create improved climate for those students who remain (Casella, 2003; Martinez, 2009; Skiba & Peterson, 1999; American Psychological Association, 2006, Ewing, 2000) As these policies have continued to evolve school leaders have taken full advantage of the leeway afforded to them under the law to keep students safe. Zero tolerance is not applied to a host of infractions including insubordination, tardiness, threatening or profane language, drugs and alcohol, and dress code.

There is a lack of empirical evidence to support the claim the notion that zero-tolerance policies decrease violent incidents in schools or improve school safety. Any claim that supports zero-tolerance policies have had these intended effects are negligible (Chen, 2008). The message behind the policies clearly indicates that violence in schools is not tolerable under any circumstances; however there is no correlation between the message and the outcomes from policy implementation (American Psychological Association, 2006). Further clouding the effort to analyze the effects of zero-tolerance policies is the fact that while many infractions are covered from state to state, it is only weapons as defined by The Gun-Free Schools Act that are reported to the Federal government.
A number of scholars have found that the unintended consequences of zero tolerance outweigh the rationality of these policies (Chen, 2008; The Civil Rights Project, 2000; Verdugo, 2002). These include the overuse of suspension as a teaching tool and the misuse of the policies by administrators (Martinez, 2009). Zero-tolerance policies provide administrators the ability to use discretion and modify suspensions, however; many disregard this option (Osher, et. al., 2010). Another unintended consequence stems from the disproportionate representations of racially or ethnically diverse students and those with special needs (The Civil Rights Project, 2000). Suspension is also linked to higher drop-out rates, repeated suspensions, and poor academic achievement (Martinez, 2009).

Given what is known about the effects of zero tolerance it is fair to question why school administrators are not held legally responsible for the unintended consequences of their decisions. This is especially true when the decisions have the potential to significantly impact a student’s life in a negative way. The answer to that question lies in the fact that schools are afforded legal protection through the recognition of special leeway in matters of school safety. The United States Constitution provides an outline for both the rights and obligations of U.S. citizens. Among these rights are the First Amendment’s freedom of speech, the Fourth Amendment’s protection from unreasonable search and seizure, and the Fourteenth Amendment in respect to Due Process and the Equal Protection Clause. Zero-tolerance policy opponents make the claim that the application of zero-tolerance policies violates these amendments either individually or in combination depending upon the facts of the claim. The United States Supreme Court
has made it clear that while students are not stripped of their constitutional rights at school there are special rules for certain constitutional challenges that arise in schools.

**First Amendment (Free Speech Clause)**

The first time the Supreme Court addressed the rights of students pursuant to the First Amendment’s Free Speech Clause was in *Tinker v. Des Moines Independent Community School District* (1969). In this case, students were suspended for wearing black armbands to protest the Vietnam War. The U.S. Constitution states, in part, that “Congress shall make no law…abridging the freedom of speech” (United States Constitution, Amendment I). The court found that the suspensions violated the Free Speech Clause and famously stated, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” (p. 6). The Court further discussed freedom of speech in *Bethel School District No. 403 v. Fraser* (1986) where a student used a sexual metaphor to describe an opponent during a school sponsored assembly for student government elections. The Supreme Court made the distinction that allowed school districts to discipline students for lewd and indecent speech because it is the responsibility of schools to “inculcate the habits and manners of civility” (p. 6).

Student expression was further addressed in *Hazelwood v. Kuhlmeier* (1988) when a high school principal removed certain articles from the school newspaper before it was distributed. The Supreme Court found that schools had the authority to limit speech that was in connection to a curricular activity. The Court determined that
students’ rights are not “automatically coextensive with the rights of adults in other settings” and “must be applied in light of the special characteristics of the school environment,” (p. 6).

Fourth Amendment

The Fourth Amendment is a constitutional provision which guarantees the right of citizen to be “secure…against unreasonable searches and seizures” by government agents (United States Constitution, Amendment IV). The Supreme Court addressed this right in New Jersey v. T.L.O. (1986). In this case a principal searched a 14 year old girl’s purse after she was caught smoking with a friend in the school bathroom. The principal found the cigarettes he was looking for along with marijuana and other items that suggested she was involved in selling marijuana. The student claimed her rights under the Fourth Amendment were violated. The Supreme Court concluded that a special standard was necessary to recognize the interests of the school environment. The Court held, “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures” (p. 10). The Court concluded that schools must demonstrate that the search was “justified at its inception” and that it was “reasonably related in scope” to the initial reason for the search (p. 5)

The Supreme Court expanded school officials’ authority to conduct searches in Vernonia School District 47J v. Acton (1995) by deciding officials could conduct searches for issues outside the normal need for law enforcement. Vernonia School District had implemented random drug tests for athletes in response to students’
increasing drug use. Acton, a 7th grade boy, and his parents refused to sign the consent to search when he was signing up to play football. The Court found that governmental interest in keeping all students safe outweighed the privacy interests of individual students. In Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls (2002) students filed a claim that random drug testing as a requirement of participation for any extra-curricular activity was a violation of their Fourth Amendment rights. The Court cited Vernonia and indicated that students who chose to participate in any extra-curricular activity, not just athletics, were subject to the same limitations on their expectation of privacy because participation is voluntary.

Most recently the Supreme Court handed down its ruling in Safford Unified School District v. Redding (2009) concluding that the strip search of a middle school student for ibuprofen was not reasonable in scope. While the T.L.O. standard was preserved, Redding establishes that searches by school officials are not without limitation.

Fourteenth Amendment

The Fourteenth Amendment states in part that no state can “deprive any person of life, liberty, or property without due process of law” (United States Constitution, Amendment XIV). This issue came before the U.S. Supreme Court in Goss v. Lopez, a class action lawsuit filed in Ohio after students had been suspended with no notice or hearing “either prior to or within a reasonable time thereafter” (p. 1). The Court determined that students had a legitimate property interest to a public education. Because
of this, the Court held that students must given notice and some kind of hearing for suspensions lasting up to ten days.

The Fourteenth Amendment also guarantees that states cannot “deny to any person within its jurisdiction the equal protection of the laws” (United States Constitution, Amendment XIV). Claims that zero-tolerance policies violate Equal Protection based on the fact that a disproportionate numbers of male minority students are the recipients of such punishment have typically been denied. This is because Equal Protection hinges on intentionality, not disparate impact.

**Statement of the Problem**

Disputes regarding the application of zero-tolerance policies are not limited to academic discourse. School administrators are increasingly involved in litigation in response to student suspension and expulsion. Many parents have filed claims against what they view as unfair and unnecessary administrative decisions regarding the futures of their children. Harsh, long term punishment for the wide array of infractions under the zero-tolerance umbrella can result in equally long-term effects for students. Exclusion from school can result in poor student achievement, an increased likelihood for future discipline problems, early drop out, and/or entry into the school to prison pipeline (The Civil Rights Project, 2000; Martinez, 2009; Skiba & Peterson, 1999). Whether or not educational services or placement is offered to offenders varies from state to state, and when services are offered they are typically of lower academic quality than those provided at school.
Adding to this problem is the special leeway granted to school officials when it comes to making decisions regarding the safety of schools. The courts have been reluctant to interfere in zero-tolerance issues as long as the students’ constitutional rights are not violated. These include the First Amendment right to freedom of speech, Fourth Amendment right to freedom from unnecessary search and seizure, and Fourteenth Amendment right to due process of law. Alexander and Alexander (2010) state:

The court pointed out that its role was not to judge the wisdom of the zero tolerance policy, but rather to determine whether proper due process procedures had been adhered to….In the final analysis, the courts will not substitute their judgment as to the wisdom of zero tolerance policies so long as student due process rights are not denied (pp. 460-461).

Research has shown that school violence has not increased and schools are not more dangerous today than they have been in the past. Complementary research has explored and identified the ways in which school safety is more complex and multi-faceted than most school discipline approaches take into account. Additionally, scholars have stressed the importance of increasing the body of evidence-based practices that have the intended effect of decreasing school violence and increasing school order. Public perception paints another picture. Zero-tolerance policies reflect the erroneous idea that schools have become increasingly unsafe and that swift, tough discipline procedures are the answer to the problem. Cornell and Mayer (2010) found that school administrators are more likely to rely upon anecdotal reviews and the advice of other administrators (presumably based on equally anecdotal reviews). A systematic review of zero-tolerance policy application provides insight into the factors school leaders consider when making school discipline decisions for infractions of this sort.
This type of review is challenging due to the inconsistencies found in school safety and discipline data. School violence is a critical issue that needs to be addressed to determine the appropriate steps necessary to improve school order and safety. Legal claims brought before the courts provide clear detail of the application of zero-tolerance policies. This study seeks to provide guidance based on empirical fact rather than anecdotal reviews.

**Research Questions**

To date, there has been a lack of rigorous studies that adequately represent observable changes to the cultures of schools and school districts that have implemented zero-tolerance policies (e.g., Chen, 2008). In fact, there has been no noticeable decrease in the number of incidents of school violence since these policies were implemented (Martinez, 2009). Research also indicates that multiple suspensions have a negative effect on school climate rather than improving it by removing disruptive students (Martinez, 2009).

This study seeks to answer the following questions:

1. What are the common reasons school districts typically prevail in zero-tolerance litigation?
2. What is the degree to which holdings for the student have addressed ethical concerns?
3. What do the discrepancies between the holding of the court and the dicta tell us about the ethical conflicts between educating and protecting students.

Statement of Potential Significance

School safety is not an issue that is limited to the field of education. Mayer and Cornell (2010) recommend a transdisciplinary approach to studying school safety noting that the issue has “inherent links beyond education to juvenile justice; mental health and social welfare; school, clinical, and community psychology; sociology; and related disciplines (p. 5). Social science scholars have explored multiple facets of zero-tolerance policies ranging from psychosocial development to academic learning. There is a distinct lack of literature exploring zero tolerance from an educational leadership perspective.

This study contributes to the field by providing an in-depth analysis of the legal and ethical dimensions of zero-tolerance policies as they relate to previously identified themes that cross law, ethics, and educational administration. There is only one scholar to date that has applied both legal and ethical frameworks to decision-making in educational administration. Stefkovich (2006) provides the model for future research on the intersection of students’ rights, education law, and the multiple ethical paradigm approach. It is from that research that this study originated. This study provides an examination of zero-tolerance policies from this perspective and provides recommendations for administrative decision-making for school safety and order.
**Conceptual Framework**

American schools have consistently demonstrated a tension between the obligation of preparing students to participate as contributing members of a republic and maintaining a safe school environment (Skiba, 2000). From Colonial America, through the 19th and 20th centuries to today, administrators have had to make choices that have significant effects on the lives of others (Mayer & Furlong, 2010; Shapiro & Stefkovich, 2005; Skiba, 2000; Stefkovich, 2006). These decisions require examining the purpose of the school against the rights of the individual to determine the best course of action (Eisner, 2001; Shapiro & Stefkovich, 2005; Stefkovich, 2006).

The *purpose of school* as a concept has evolved over time, however Eisner (2001) points out that America’s continuous evolution towards defining *purpose of school* has been based upon the concept of rationality (p. 368). Rationality is not a poor choice when making decisions, but Eisner (2001) points out that the decentralized nature of the U.S. public education “system” does not lend itself to rationality. He states:

Rationalization as a concept has a number of features. First, it depends on a clear specification of intended outcomes. That is what standards and rubrics are supposed to do….Second, rationalization typically uses measurement as a means through which the quality of a product or performance is assessed and represented. Measurement, of course, is *one* way to describe the world….Third, the rationality of practice is predicated on the ability to control and predict….Fourth, rationalization downplays interactions…[which] are not simply the conditions that are to be introduced in classrooms…but also the kinds of personal qualities, expectations, orientations, ideas, and temperaments that interact with those conditions….Fifth, rationalization promotes comparison….Sixth, rationalization relies upon extrinsic incentives to motivate action (p. 368).
This suggests that American school reform in regard to the *purpose of school* is based more on adherence to the *principles* of rationality than to addressing a collective purpose inclusive of complex nature of the school setting or the participants of those settings.

Zero-tolerance policies are a good example of a *rational* approach to school discipline. These policies are one-size fits all rules that have the clear intended outcome of making schools safer. School districts measure and report zero-tolerance infractions to their respective state departments of education who in turn report compiled state data to the federal government. The philosophy behind zero tolerance presumes that controlling for infractions will allow us to make an accurate prediction to the state of school safety. Attention to interactions and context are written in as a caveat to the overarching policy that gives administrators discretion based on the facts of a particular incident. Reported data allows for comparison across districts and states providing justification for labeling a school either “dangerous” or “not dangerous”. And finally, zero-tolerance policies are tightly connected to funding, a powerful extrinsic motivator (Casella, 2003; American Psychological Association, 2006; Skiba, 2000).

The mechanism in place to handle disputes of policy is the judicial system. In the case of school discipline this would be the claim of the student against the application of the policy at the school district level. The U.S. Supreme Court has handed down multiple decisions that affect how these disputes are handled. The Court has looked at both the interests of schools and the interests of students. They have determined the extent to which schools have been afforded leeway when it comes to school safety and the parameters of students’ constitutional rights. Legal analysis is the appropriate method for
answering this study’s first question, “what are the common reasons school districts typically prevail in zero-tolerance litigation”?

Complicating this rational approach to the purpose of education are the unique situational contexts in which decisions are made and the emotionally charged conflicting ideas surrounding school discipline (Martinez, 2003, Mayer & Furlong, 2010; Osher & Quinn, 2003; Skiba, 2000). A uni-dimensional approach to school discipline assumes stakeholders recognize a singular context and have non-conflicting ethical perspectives. This is not the case. Understanding the complex and value-laden nature of school discipline cannot be done with the tools of legal analysis alone.

This study explores the ethical conflicts within court cases, however; there is also useful information in the holdings that were for the student. These cases may provide data that would answer the second research question in this study, “What is the degree to which holdings for the student have addressed ethical concerns”? Discrepancies between the legal determination of a court’s ruling and the court’s discussion within the case indicate potential ethical conflicts worth examining for two reasons. First, legal cases provide a detailed portrait of the facts surrounding a case. School discipline data is known for being difficult to work with specifically due to a lack of consensus across school districts and states in terms of defining infractions (Astor, et. al., 2010; Mayer & Cornell, 2010; Mayer & Furlong, 2010). Additionally, available data is not always accurate due to under-reporting of incidents of school violence (National Center for Educational Statistics, 1998; Stader, 2004; Verdugo, 2002). Second, the U.S. system of justice relies on the courts to determine precedent by clarifying ambiguity in statutes. As was noted above, school discipline is not free from ethical conflicts. The discussion
provided by the respective courts in zero-tolerance litigation provides details of conflict that are on an official record. This does not persuade a change of decision but provides a window into the ethical perspective of the court.

Conflicting ethical codes are equally complex. Scholars of educational leadership have recommended addressing these conflicts through the study of ethics (Begley & Johansson, 1998; Shapiro & Stefkovich, 2005; Starratt, 1991; Stefkovich, 2006; Strike, Holler, & Soltis, 1998). School administrators are faced with making decisions on a daily basis that force them to grapple “with the complexities, uncertainty, and diversity in public schools” (Shapiro & Stefkovich, 2006, p. 3). Shapiro and Stefkovich state:

In the 21st century, as society becomes even more demographically diverse, educational administrators will, more than ever, need to be able to develop, foster and lead tolerant and democratic schools…through the study of ethics, educational leaders of tomorrow will be better prepared to recognize, reflect on, and appreciate differences (p. 4).

Many contemporary scholars such as Starratt, Strike, Noddings, Kohlberg and Gilligan have provided guidance on incorporating ethics into leadership programs (Shapiro & Stefkovich, 2005). Shapiro and Stefkovich have built upon these scholars’ work in two important ways. First, they utilize the case study approach in a similar manner to Strike but have embedded examination of both personal and professional ethical codes and encourage future leaders to become comfortable with reflecting on practice. Second, they acknowledge Starratt’s work by advocating for a multiple paradigm approach to applying theoretical perspectives to educational dilemmas as opposed to one traditional justice perspective (Shapiro & Stefkovich). These paradigms, including the ethic of justice, the ethic of care, and the ethic of critique, are based on the work of the other authors above.
However, Shapiro and Stefkovich propose a fourth ethical paradigm, the ethic of the profession. This paradigm contains elements of the previous three but incorporates professional judgment and professional decision making, defining it as a separate paradigm in and of itself.

As Stefkovich (2006) points out, what is legal is not necessarily ethical, nor is what is ethical always legal. Shapiro and Stefkovich’s multiple paradigm framework addresses the ethical dimensions of court decisions on educational issues. Truly understanding the interplay between the legal and ethical dimensions required the application of a second model derived from Shapiro and Stefkovich’s earlier work. In the original work, the authors quote Foster who said, “[e]ach administrative decision carries with it a restructuring of human life: that is why administration at its heart is the resolution of moral dilemmas” (p. 3). Understanding the ways in which law and ethics cross traditional educational leadership themes, Stefkovich (2006) further teased out the nuances of ethics in educational leadership and decision making through her “Best Interests of the Student” model. This work illustrates the balance between respect, responsibility and rights in terms of the best interest of the student. She stresses that decisions should be made that balance both the rights and responsibilities of students as well as meets the need for mutual respect in the school setting (Stefkovich, 2006). The Best Interest of the Student model provides both a legal and an ethical framework from which administrators can glean insight into making more informed decisions.

Stefkovich (2006) writes:

In discussing case law related to what is legal and what is ethical, a number of important themes emerge. These themes are also apparent in educational literature that focuses on what constitutes good administrative
practice. They include issues related to (a) the importance of access to education for all students; (b) the tension between equality (treating all students the same) and equity (recognizing that students do not all start out as equal and some need more or different attention than others in acquiring education); (c) the extent that schools inculcate values; (d) cultural differences in our ever-changing society; and (e) the rights of parents related to the school’s responsibility to act *in loco parentis* (in the place of parents) (p. 5).

Content analysis of the discussion in selected court cases will answer the third research question in this study; “what do the discrepancies between the holding of the court and the dicta tell us about the ethical conflicts between educating and protecting students”? It is this conceptual framework and model that best inform the approach and analysis to this study. This mixed methodology study included both traditional legal research and content analysis as discussed in the next section.

**Overview of Methodology**

Federal and state statutes and regulations regarding zero tolerance policies were retrieved electronically to provide data regarding policy development guidance. Primary data in the form of published legal cases were collected via secure Penn State access to Westlaw, an electronic legal research database. These cases were analyzed using guidance from Supreme Court decisions that have bearing on the selected cases. The findings in each of the selected cases were coded to determine the degree to which discrepancies were found between the ruling and the discussion in the court’s findings. The cases were then further coded to identify themes across both the legal and ethical dimensions of selected cases. These themes were then compared against the
themes that Stefkovich (2006) developed that cross law, ethics, and what “constitutes good administrative practice” (p. 5).

Limitations

Limitations of this study include the following: The challenge in finding a range of cases that represent zero-tolerance policies nationally lies in the fact that zero-tolerance suspensions are rarely litigated in the courts. Many of the cases include disputes of suspensions claiming violations of the Individuals with Disabilities in Education Act (IDEA), the federal law guaranteeing a free and appropriate education to special needs students. The specifics of these claims are not explored in depth due to the narrowed scope of this study. Additional concerns include the discrepancies in and misreporting of school discipline data. The complex relationship between school discipline and IDEA is not within the scope of this study but warrants further study at another time. Additionally, this study is limited to analysis of rights granted by the U.S. Constitution and does not analyze state level claims.

The delimitation of this study is that cases represent all available zero tolerance litigation between 1996 and 2009. The researcher was unable to locate any cases prior to 1996 through Westlaw or Lexus-Nexus. There are multiple claims in the courts at the present time that are not included.
Summary

The clear discrepancies between the intent of zero-tolerance policies and the literature that discredits the effectiveness of zero-tolerance practices to achieve greater school safety lies as the foundation of this study. Many scholars (Astor, et. al., 2010; Chen, 2008; Gregory, Skiba, & Noguera, 2010) have approached this issue from the perspectives of intended and unintended consequences on student achievement. This study seeks to enrich those discussions by exploring the legal and ethical dimensions of zero-tolerance policies. The following chapter will provide an historical perspective on school safety, explore the development of zero-tolerance policies in schools, outline the legal framework that supports the use of zero tolerance as a means of discipline, and discusses the unintended consequences of these policies.
Chapter 2

Literature Review

Zero-tolerance policies were implemented in response to the growing perception that violence in schools was increasing (Casella, 2003; Chen, 2008, Cornell, 2009, Cornell & Mayer, 2010; Martinez, 2009; Skiba & Peterson, 1999; Stader, 2004). For example, scholars have used statistics from the National Center for Educational Statistics (NCES) and the Bureau of Justice to support the claim that violent incidents were at an all time high after school violence statistics were released by agencies such as these in annual reports starting in 1998 (Bennet-Johnson, 2004; Cornell, 2009; Mayer & Furlong, 2010). Mayer and Furlong (2010) explain that while incidents peaked in 1993, school violence was still considered an epidemic throughout the 1990s (p. 16). This perception has been linked to increased news coverage of school shootings, the release of national reports from agencies such as the NCES (Mayer & Furlong, 2010) and increased attention by scholars (Cornell & Mayer, 2010). Mayer and Furlong (2010) suggest that the problem does not lie in an increase in violence but rather a problem in defining the parameters of school behaviors that would fall under the relatively small category of school violence (p. 16). They explain:

There are no extant data that map precisely to all of these categories—this limitation leads us to a key consideration. Having neither a quantitative referent base of a broader array of student behavior associated with school violence nor definitive means of quantifying unacceptable, marginal, and acceptable behaviors at school, highly variable interpretations of the seriousness of school violence incidents are possible (p. 16).
Evidence showing school violence is no longer an epidemic and that schools are safer than the public assumes does not negate the attention violence in schools should receive.

Ensuring the safety of students should be a primary goal of every school leader. Zero tolerance is one approach to school discipline that educators have turned to as a means of improving school safety. The philosophical roots of zero tolerance lay within the justice-based concepts of equality (treating everyone the same) and utilitarianism, that the greater good for the majority is the primary goal, even at the expense of the individual. Matters of school safety warrant critical attention, and if need be, swift consequences, however, there is little evidence to support the claim that zero tolerance provides the framework for increased school safety. Moreover, there is an abundance of evidence linking long-term systemic problems with zero-tolerance practices. The literature on school order and safety suggest that zero tolerance is the simplest and least effective approach with a myriad of unintentional consequences that have a negative impact on education, not just for an individual student but for the system as a whole (American Psychological Association, 2006; Casella, 2003).

This chapter will explore the historical background of school safety, discuss the legislative events that led to the development of zero-tolerance policies, and establish the legal framework in which these policies are supported by the U.S. Constitution. It will then outline the unintended consequences of zero-tolerance policies.
Historical Background of School Safety

Concern for school safety and order is not a modern phenomenon brought on by a sudden surge of violent incidents or extensive media attention (Cornell & Mayer, 2010; Mayer & Furlong, 2010). School violence spans more than 200 years in the United States. The jolting effect of an incident of school violence as portrayed by modern media contributes to the feeling that school violence is a modern concern, but Mayer and Cornell (2010) explain, “[p]eriodic high-profile events such as school shootings temporarily raise public awareness and concern, but memories fade, and investments in addressing school safety have typically been short lived and more rhetorical than purposeful” (p. 5). Modern incidents of school violence are thrust into the public attention after highly publicized events occur. Each event reinforces the perception that schools are becoming more dangerous (Cornell & Mayer, 2010).

School violence would be better characterized as a persistent problem that has been pervasive throughout the history of education. Cornell and Mayer (2010) provide multiple examples of school violence including “clay tablets of Mesopotamia dating back to 2000 BC” and references to Aries’ book, Centuries of Childhood (1962) that “cited numerous accounts of assaults, riots, and shootings in European schools from the Middle Ages to the 19th century” (p. 7). American schools have not been exempt from disruptive student behavior and acts of violence. There has been no extended period in the history of American schools that is free from concern about disruptive student behavior. In fact, throughout the 19th century teachers in Colonial America often dealt with violent student mutinies and public concern for school safety (Cornell & Mayer, 2010; Crews & Counts,
1997. Horace Mann addressed the issue of flogging for student misbehavior and reported on the dissolution of approximately 400 schools in Massachusetts due to discipline problems (Cornell & Mayer, 2010).

The shootings at Columbine High School in 1999 stand out as the most horrific murders in the history of American schools due to the number of students who lost their lives. Few people are aware that the worst incident in U.S. history actually occurred in 1958 when a student intentionally set fire to his school killing 92 students and their teachers (Brendtro, 2005; Mayer & Furlong, 2010). Cornell and Mayer (2010) inform us that “[i]n each of the past five decades, congressional hearings and government studies have periodically raised concerns about newly perceived upsurges in student violence” (p. 7).

Issues of school violence came to the forefront with the release of the 1978 report Violent Schools—Safe Schools: The Safe School Study Report to Congress (U.S. National Institute of Education, 1978). This report was mandated by Congress to determine the frequency and seriousness of crime in schools across the United States. It also identified the ways in which schools were using crime prevention techniques and explored new ideas that would aid in crime prevention in schools. The 1984 report, Disorder in Our Public Schools (U.S. Department of Education, 1984) linked ongoing issues of school disorder with increases in juvenile crime (Mayer & Furlong, 2010). In response to these reports, Congress enacted a sequence of legislation intended to decrease school violence. These include The Safe and Drug Free Schools Act of 1986 and The Gun-Free School Zones Act of 1990 (Mayer & Furlong, 2010). Embedded within these
Acts were financial incentives for schools to implement measures of school safety (Doolittle & Sharkey, 1998).

Regardless of the erroneous presumption that school violence is on the rise or that it is a modern phenomenon, it remains a serious concern that schools must address. Mayer and Furlong (2010) illustrate the ambiguity of meaning and definition of safety by stating:

For example, how is meaning attached to the observation that 909,500 secondary students (3.4%) experienced theft at school in 2006 or that 43% of middle schools reported weekly incidents of school bullying during the 2005-2006 year (Dinkes, Kemp, & Baum, 2009)? Considering the 767,000 violent crimes at school reported in 2006 spread across 26.4 million students ages 12 to 18, each attending school for about 165 days (assuming absences), does the resultant rate of 1.76 victimization experiences per 10,000 student—school days represent a major problem? These data suggest that a child has about a 1 in 5,700 (5,681) chance of being a violent crime victim on a given day during the school year, or about 1 violent incident at a large comprehensive high school every other day (p. 16).

In a continuing effort to decrease incidents of school violence, legislators turned to solutions offered up for another pervasive societal problem, the “war on drugs” (Casella, 2003; Martinez, 2009; Stader, 2004). Concerns about school discipline and order are similar to the concerns of societal discipline and order Casella, 2003). Schools began to look at and align with national crime policies in order to improve school safety.

**The Development of Zero-Tolerance Policies**

Finding a written definition of the term zero tolerance is difficult. The use and meaning of the term has evolved over time, however from its initial use in the 1980s in
connection to federal drug policy the intent has been clear (Skiba, 2000). Zero tolerance is intended to send the message that certain behaviors will not be tolerated and all offenses will be punished severely no matter how minor (Martinez, 2009; Skiba, 2000; Skiba & Peterson, 1999, Stader, 2004). Zero tolerance first received national attention when U.S. Attorney General Edwin Meese hailed a program developed by a U.S. Attorney in San Diego that impounded seagoing vessels carrying any amount of drugs (Skiba, 2000).

This no nonsense approach to crime appealed to the senses of the American public. Instances of an increase in school violence related to drugs, gangs, and weapons caused educators to turn to zero-tolerance policies as a solution to the problem. As early as 1989, a handful of schools began adopting these policies (Skiba, 2000). Casella (2003) puts zero tolerance in perspective by stating that the concept “is one part of a larger package of federal school violence prevention initiatives that were developed in the 1990s” (p. 874). These include The Safe and Drug-Free Schools and Communities Act of 1986 (Pub. L. No. 100-197, tit. I, § 5134, 102 Stat. 252, 261 (1988)) The Gun-Free School Zones Act of 1990 (18 U.S.C. §922(q), 2009), and The Gun-Free School Zones Act of 1994 (20 U.S.C. §8921 (repealed, 2002)) amended to The Gun-Free School Zones Act of 1996. The Acts of 1986 and 1990 included incentive money to aid states and districts in developing and implementing policies encouraging safe and drug-free schools (Doolittle & Sharkey, 1998). The Acts of 1994 and 1996 included a provision mandating state educational agencies to develop zero-tolerance policies for weapons in schools. Schools could not be forced to comply but because these Acts were amendments to the Elementary and Secondary Education Act of 1965, compliance was directly linked to
federal funding (Casella, 2003; Chen, 2008; Martinez, 2009; Skiba & Peterson, 1999; Stader, 2004).

Consequently, most schools began adopting zero-tolerance policies in response to The Gun Free Schools Act of 1994 (American Psychological Association, 2008; Martinez, 2009; Skiba & Rauch, 2006), a mandate that required all state education agencies to develop a policy towards weapons that results in an expulsion of no less than one year. These policies were required to allow for the senior-most administrator within a local education agency to have the discretion to modify the punishment on a case-by-case basis (Casella, 2003; Martinez, 2009; Mayer & Furlong, 2010; Skiba, 2000; Skiba & Peterson, 1999).

The original policy dictated that schools adopt zero-tolerance towards firearms (Casella, 2003; Martinez, 2009; Skiba & Peterson, 1999; Stader, 2004). Within the first year the law was amended to read weapon rather than firearm in order to allow for the inclusion of other firearm-type weapons that pose a threat in schools (Casella, 2003; Martinez, 2009). However, even under the broader definition the federal government only included the addition of grenades and rockets in its clarification of the law. Initial examination of the policy reveals clear parameters while providing administrators the opportunity to exercise discretion based on the context of each infraction.

These policies were widely adopted in schools as a philosophy or policy that mandates the application of predetermined consequences. Most often severe and punitive in nature, these consequences are applied regardless of the gravity of behavior, mitigating circumstances, or situational context. Zero-tolerance policies assume that removing
students who engage in disruptive behavior will deter others from disruption and create improved climate for those students who remain (Ewing, 2000).

This policy move was in alignment with other national crime policies that focused on preventative rather than reactive measures to events that have already occurred (Casella, 2003). Described as “punishing dangerousness” (Robinson, 2001), zero-tolerance policies attempt “to prevent violence by punishing young people because of their potential for violence and their displayed dangerousness” (Casella, 2003). The rationale for zero tolerance rests upon the presupposition that school violence has become drastic and lethal (Ashford, 2000; Litke, 1996) coupled with the intent that these policies would be coupled with other school safety initiatives as a whole package for preventing school violence inclusive of mediation, counseling, and conflict resolution programs (Casella, 2003).

Proponents of zero tolerance draw on studies that link violence prevention programs coupled with zero-tolerance policies to effectively reducing violence in schools. Casella (2003) informs us that “according to survey data, the four most effective violence prevention strategies entailed a mix of policing and conflict resolution efforts” (p. 876). There is evidence from social and behavioral psychology which suggests that people become conditioned to rules and learn to accept new expectations (Casella, 2003). Zero tolerance heightens the consequence side of crime and punishment, attempting to convince people that the consequences are not worth the risk. Casella (2003) explains:

The underlying theory is rational choice theory. A driving force in the economics of crime, rational choice theory states that individuals choose among a number of options of behavior and that their final choice can be understood as rational if examined in the context of the individuals goals, the prohibitions and laws of society, and the circumstances of the
Supporters of zero-tolerance policies do not see these rules as being overly punitive or unfair. Rather, they view them as a way of bringing uniformity to ineffective school discipline practices that are often disparate and racist. They claim that zero-tolerance may lead to fewer suspensions once students become accustomed to the rules; however, the bulk of evidence is anecdotal in nature (American Psychological Association, 2006; Casella, 2003).

Opponents to zero tolerance provide evidence for their positions on these policies. The American Psychological Association (2006) commissioned a report on the effectiveness of zero-tolerance policies that acknowledged the intent of zero tolerance policies. The author’s state:

There can be no doubt that schools have a duty to use all effective means needed to maintain a safe and disciplined learning environment. Beyond the simple responsibility to keep children safe, teachers cannot teach and students cannot learn in a climate marked by chaos and disruption. About this there is no controversy (p. 2).

The task force identified five key assumptions about zero tolerance and examined data that would inform the accuracy of those assumptions. The accuracy of the findings of the task force has been reinforced by several scholars who have cited and built upon the task force’s work.

The first assumption is that school violence is at a serious level and increasing, requiring decisive and forceful strategies for violence prevention (American
Psychological Association, 2006; Mayer & Furlong, 2010; Skiba & Peterson, 2000, Stader, 2004). Zero tolerance opponents point out that evidence does not support that violence is out of control (American Psychological Association, 2006; Mayer & Furlong, 2010; Stader, 2004), that serious and deadly violence peaked in the early 1990s (Mayer & Furlong, 2010), and that school violence has remained stable or decreased since that time (American Psychological Association, 2006; Cornell & Mayer, 2010). Even if acts of school violence were increasing, the unintended consequences indicate that zero tolerance is not an effective strategy. Under zero tolerance, an increase in school violence would lead to an inevitable increase in suspensions. It has already been established (American Psychological Association, 2006) that suspension is linked to decreased academic achievement and an increased likelihood suspended students will have future behavior problems once they return to school. Given these facts, zero tolerance would be counterproductive to its own intent.

The second assumption of zero tolerance is that it improves consistency in the application of school discipline procedures and sends a clear message to students (American Psychological Association, 2006). The evidence strongly suggests that this is not true. In fact, suspension and expulsion rates continue to vary widely across schools and districts and are as closely connected to characteristics of the schools and school personnel as it is to student behavior (American Psychological Association, 2006). Zero-tolerance policies provide for a consistent framework for the application of pre-determined consequences for specific offenses but they also provide administrators the ability to use discretion and modify the punishment in each instance. The consistency of zero tolerance comes from educators’ moral commitments to keep children safe. Both
Congress and the Courts have recognized the need to provide educators flexibility and discretion, therefore zero tolerance is more of a political catchphrase describing the degree to which educators will work to provide safe learning environments. Zero tolerance sends a clear message to students, but perhaps not the intended message. Zero tolerance policies send multiple messages. Two of these are that a student is not welcome in the school and that school personnel are “not fair” (Martinez, 2009). Student alienation and disengagement reinforce in students the notion that they are not a part of or do not belong to the school community (Stader, 2004) which has been linked to increased behavior problems.

The third assumption is that removing disruptive students will create a school climate that is more conductive to learning for the remaining students (American Psychological Association, 2006; Casella, 2003; Martinez, 2009). The Zero Tolerance Task force found:

[D]ata on a number of indicators of school climate have shown the opposite effect, that is, that schools with higher rates of school suspension and expulsion appear to have less satisfactory ratings of school climate, less satisfactory school governance structures, and spend a disproportionate amount of time on disciplinary matters. Perhaps more importantly, recent research indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement, even when controlling for demographics such as socioeconomic status (p. 5).

The argument that zero tolerance improves school climate is hard to make in light of its association with negative achievement outcomes.

The fourth assumption is that overall student behavior will improve due to the deterrent effect of swift and certain punishments. Evidence shows that school suspension
in general predicts higher future rates of suspension among students who are suspended (Skiba, et al., 2006) and is associated with a higher likelihood of dropout or delayed graduation (American Psychological Association, 2006; Casella, 2003; Martinez, 2009).

The fifth assumption includes both parental support of zero-tolerance policies to ensure safety in schools and that students feel safer knowing that zero-tolerance infractions will be dealt with in no uncertain terms. The American Psychological Association (2006) found both mixed and inconclusive evidence for this assumption. They found that media accounts and some survey data show that parents support zero tolerance if they feel their children’s safety is at stake; however there are also strong negative reactions if they feel the student’s right to an education is threatened (p. 6).

Whether the evidence supports or refutes the claims that zero-tolerance policies are effective, the fact remains that schools are responsible for keeping children safe. The unique context of schools and the fact that attendance is compulsory has presented the U.S. legal system with multiple challenges to clarify the school’s authority in light of this responsibility. The following section will identify the legal framework that grants special leeway to schools and defines the rights of students within schools.

**Legal Framework Supporting Zero-Tolerance Policies**

Administrators’ decisions have the potential to significantly impact a student’s life both short and long term. When making decisions, educators must consider the needs and expectations of the school and the individual needs of the students they serve. This is especially true in matters of school safety and order. The United States Constitution
provides an outline for both the rights and obligations of U.S. citizens. Among these
rights are the First Amendment’s freedom of speech, the Fourth Amendment’s protection
from unreasonable search and seizure, and the Fourteenth Amendment in respect to the
Due Process Clause. Legal disputes of zero-tolerance policies typically challenge the
application of the policy in a particular instance as violating one or more of a student’s
constitutional rights. The U.S. Supreme Court has recognized the unique characteristics
of schools, that is, the responsibility to provide a safe learning environment to a
population of citizens that have compulsory attendance requirements, and has identified
the parameters of the leeway afforded in light of these special characteristics. The Court
has made it clear that while students are not stripped of their constitutional rights at
school there are special rules for certain constitutional challenges that arise in schools.
There are three instances in which the Court has created special constitutional rules for
public schools. Special rules guiding the application of the First, Fourth, and Fourteenth
Amendments in schools will be discussed in the following sections.

First Amendment (Free Speech Clause)

The Supreme Court addressed the rights of students pursuant to the First
Amendment’s Free Speech Clause in *Tinker v. Des Moines Independent Community
School District* (1969). In this case, students were suspended for wearing black
armbands to protest the Vietnam War. The court found that the suspensions violated the
Free Speech Clause because schools were public places and students had the right to
express their opinions within these institutions. The Court famously stated, “It can hardly
be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” (p. 6). However the court cautioned that this right must be balanced with the legitimate interests of school officials to maintain the order and safety of the school environment. Writing for the majority in *Tinker*, Justice Fortas explained:

[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with the fundamental constitutional safeguards, to prescribe and control conduct in the schools (p. 6).

The Court observed that there was no evidence of “interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone” (p. 7). If there was in fact an interference then student conduct “in class or out, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech” (p. 9).

The Court has, on three occasions since the *Tinker* decision, found that students’ First Amendment rights are limited due to consideration of legitimate interests on the part of the school district. In *Bethel School District No. 403 v. Fraser* (1986) the Supreme Court made the distinction that allowed school districts to discipline students for lewd and indecent speech. The Court acknowledged the “wide freedom in matters of public discourse” it did not require “the same latitude must be permitted to children in school” (p. 1). This statement was based on the responsibility of schools to act *in loco parentis*
and “inculcate the habits and manners of civility,” (p. 6). The Court further explained the importance of teaching civility and manners thusly:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics classes; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers…demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct (p. 7).

Student expression was further addressed in *Hazelwood v. Kuhlmeier* (1988) when a high school principal removed an article from the school newspaper. This case pointed out that while recognizing that students did maintain their First Amendment constitutional right to freedom of speech or expression, those rights were not “automatically coextensive with the rights of adults in other settings” and “must be applied in light of the special characteristics of the school environment,” (p. 4). The difference between *Hazelwood* and *Tinker* lies in the fact that *Tinker* deals with personal expression while *Hazelwood* was a matter of an educator’s authority over a school sponsored publication. This, along with other expressive activities might be reasonably perceived to “bear the imprimatur of the school” (p. 8). Educators were given the authority to exercise greater control over curricular-related speech “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and the views of the individual speaker are not erroneously attributed to the school” (p. 9). This provided schools a way to disassociate itself from “speech that is, ungrammatical, poorly written, inadequately
researched, biased, or prejudiced, vulgar or profane, or unsuitable for immature
audiences” (p. 9).

In *Morse v. Frederick* (2009), a student challenged that his First Amendment
rights were violated when he was suspended for speech that appeared to promote drug
use at an off campus school sponsored event. The Court once again recognized the
“special characteristics of the school setting” which enabled a school district to suspend
the student for hoisting a banner that read “BONG HiTS 4 JESUS”. The Court
emphasized school officials’ legitimate authority to restrict such speech that “is
reasonably viewed as promoting illegal drug use” at school sponsored events.

The Court indicated that there were two basic principles at hand. First, “the
constitutional rights of students in public school are not automatically coextensive with
the rights of adults in other settings” (p. 8). Second, schools have special characteristics
but *Tinker*’s substantial disruption test was not absolute in all situations. The Court
observed that it had already been determined that deterring student drug use “is an
important—indeed, perhaps compelling ‘interest’” (p. 9). The Court found additional
support of the importance of educating students about the dangers of drug use through
Congress’ actions. Congress had spent billions of dollars supporting drug prevention
programs and had required schools receiving federal funding under the Safe and Drug-
Free Schools Community Act to affirm that their drug prevention programs “convey a
clear and consistent message that…illegal use of drugs [is] wrong and harmful” (p. 9). In
distinguishing this case from *Tinker*’s material disruption standard, the Court explained,
“[t]he danger here is far more serious and palpable. The particular concern to prevent
student drug abuse at issue here, embodied in the established school policy…extends well beyond an abstract desire to avoid controversy” (p. 9).

Fourth Amendment

The Fourth Amendment is a constitutional provision which prohibits unreasonable searches and seizures by government agents. A search by police officials generally requires probable cause and a warrant before a search can be conducted. The Supreme Court was tasked with determining whether or not the Fourth Amendment applied to searches conducted by school officials and the appropriate standard for conducting such a search if in fact the Amendment did apply. In New Jersey v. T.L.O. (1985), the Supreme Court concluded that the Fourth Amendment did apply to searches conducted by school officials however, a special standard was necessary to recognize the interests of the school environment.

The Court stated that it had to strike a balance between the student and school concerns and determined that students had a legitimate expectation of privacy that included the right to “carry with them a variety of legitimate, noncontraband items, and there was no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them on to school grounds” (p. 10). The Court recognized that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures,” (p. 10). The Court determined that requiring a warrant did not suit the school environment because it “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools” (p.
11). The Court concluded that the correct standard for determining the constitutionality of conducting a search of a student in the public school setting was reasonableness. School district personnel must prove that the search was justified in its inception and that it “was reasonably related in scope to the circumstances which justified the interference in the first place,” (p. 5). The Court wanted to protect students by making sure their interests were invaded “no more than is necessary to achieve the legitimate end of preserving order in the schools,” (p. 12).

The Court expanded school officials’ authority through its decision in Vernonia School District 47J v. Acton (1995). This case involved the family of a 6th grade boy who claimed that consent to random urinalysis testing as a requirement to participate in extra-curricular sports violated his Fourth amendment rights. The district argued that a growing number of students were getting involved with drug use in the community therefore the rule was legitimately addressing issues of school safety. This decision set the precedent for allowing searches for issues outside the normal need for law enforcement where probably cause requirements were not practical. The Court also decided that students who participate in extra-curricular activities do not have the same privacy rights while involved in the activity that other students have because participation is voluntary. The Vernonia Court found that the governmental interest in keeping all students safe outweighed the privacy interests of individual students therefore the ‘reasonableness’ standard was appropriate for searches in schools.

‘The ultimate measure of the constitutionality of a governmental search is “reasonableness”…[W]hether a particular search meets the reasonableness standard “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”’ Where a search is undertaken by law
enforcement officials…reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued…without showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required…probable cause is not invariably required either (p. 5)

The Court applied the decision in Vernonia to another mandatory random drug testing case, Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls (2002). Whereas in Vernonia the school district had the mandatory consent rule for student athletes, the school district in Earls extended that mandate to include participation in all extra-curricular activities such as choir, cheerleading, band, and school sponsored student club organizations. The students who filed the claim argued that it violated their Fourth Amendment rights because “the School District failed to identify a special need for testing students who participate in extracurricular activities, and that the ‘Drug Testing Policy neither addresses a proven problem nor promises to bring any benefit to students or the school.’” (p. 4). Again, the Court found that the district had a legitimate interest in students’ safety with the same measures “a reasonable guardian or tutor might undertake” (p. 6).

In 2009, the Supreme Court handed down its decision in Safford Unified School District v. Redding where a female student was strip searched when the school suspected that she was in possession of prescription strength ibuprofen. A student informant who was found to have four pills in her possession reported that she had received them from Redding and indicated that Redding was distributing these pills to other students as well. Redding’s belongings were searched, and when nothing was found she was asked to
remove her outer clothing and pull her bra and underwear away from her body so any pills she might be hiding would fall out. The Court concluded that the search was not reasonable in scope. While the standard in *T.L.O.* was preserved, *Redding* establishes that the deference afforded school officials was not unfettered or without limitation.

In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students...[T]he Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator’s professional judgment.

We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions (p. 9)

**Fourteenth Amendment (Due Process and Equal Protection Clauses)**

The third area in which schools are granted special rules is with respect to the Due Process Clause of the Fourteenth Amendment. In *Goss v. Lopez*, nine students filed claim that they had been suspended from school for up to ten days. They claimed that they were not provided “a hearing of any kind” (p. 6). The Court determined that students have a legitimate property interest to a public education therefore students facing a suspension of up to ten days should be given notice and some kind of hearing. The school district justified its actions by pointing out that the suspensions occurred during “a period of widespread student unrest” (p. 6). The Court recognized the school’s need to maintain order and discipline but noted that this must be balanced with the student’s need
to tell his or her version of events. The Due Process Clause “requires at least these
rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary
exclusion from school,” (p. 12). Due Process afforded in schools does not require
providing counsel, cross-examining witnesses, or providing supporting witnesses.

To impose in each such case even truncated trial-type procedures might
well overwhelm administrative facilities in many places and, by diverting
resources, cost more that it would save in educational effectiveness.
Moreover, further formalizing the suspension process and escalating its
formality and adversary nature may not only make it too costly as a
regular disciplinary tool but also destroy its effectiveness as part of the
teaching process (p. 13)

The Equal Protection Clause of the Fourteenth Amendment is intended to protect
students from governmental discrimination for race, gender, age, socioeconomic status,
or sexual orientation (Green, 2008). Claims that zero-tolerance policies violate Equal
Protection based on the disproportionate numbers of male minority students being the
recipients of such punishment have typically been denied. This is because Equal
Protection hinges on intentionality. Thus far, there have been no valid claims that zero
tolerance was applied because of gender or race therefore an Equal Protection violation
has not been established. Intentional discrimination is difficult to establish in schools
(Green, 2008).

**Unintended Consequences**

There is a lack of empirical evidence to support the claim that zero-tolerance
policies decrease violent incidents in schools or improve school safety. Any research that
supports the claim that zero-tolerance policies have had these intended effects is negligible (American Psychological Association, 2006; Chen, 2008; Stader, 2004). The message behind the policies clearly indicates that violence in schools is not tolerable under any circumstances; however there is no correlation between the message and the outcomes from policy implementation (Chen, 2008; Mayer & Furlong, 2010).

One challenge clouding the effort to analyze the effects of zero-tolerance policies is that while various states include a variety of infractions under the definition of zero tolerance, it is only weapons as defined by The Gun-Free Schools Act that are reported to the Federal government. According to a 1998 National Center for Educational Statistics report, there were 203,010 incidents reported that would fall under zero-tolerance with only a fraction reported as weapons related. The sample schools reported 10,950 incidents of physical attacks or fights with weapons but in that same school year, the Federal government reported slightly fewer than 5000 total incidences reported by every state combined (National Center for Educational Statistics, 1998; U.S. Department of Education, 1998). School administrators are then, in effect, using the federal mandate as a justification for their policies while being held accountable for only a fraction of that which now falls under the zero-tolerance umbrella within school districts.

What these policies’ effects lack in intended consequences is more than made up for with unintended consequences. Martinez (2009) reports two major negative issues that arise from zero-tolerance policies, misuse and abuse by school administrators and the overuse of suspension as a disciplinary measure (pp 154-155). Provisions of The Gun-Free Schools Act allow administrators to take a host of variables into account when deciding whether or not to enforce a violation under zero-tolerance. Many administrators
have chosen to disregard their ability use discretion and adjust the punishment based on the facts of the situation (Martinez, 2009). Rather, the policies are strictly enforced by what Osher & Quinn (2003) call ‘street level bureaucrats’ that decide when and how to interpret rules without taking environmental factors into account. Many administrators find justification for student suspension within these policies, however, the literature supporting the claim that certain subgroups (e.g. racial and ethnic minorities, those served by special education, and those who are not performing well academically) are disproportionately represented indicates an ethical, and perhaps legal, problem within this unintended consequence (American Psychological Association, 2006; Casella, 2003; Stader, 2004; Verdugo, 2002). Moreover, research findings have demonstrated that suspension is not effective for modifying students’ behavior, leading to repeated suspensions, poor academic performance, and higher drop-out rates (American Psychological Association, 2006; Martinez, 2009; Skiba & Peterson, 1999).

Studies on zero tolerance have found that zero-tolerance policies do not make schools safer (American Psychological Association, 2006, Mayer & Furlong, 2010; National Center for Educational Statistics, 1998), do not reduce school violence (American Psychological Association, 2006; Casella, 2003; Chen, 2008), do not make school discipline practices consistent (American Psychological Association, 2006; Stader, Psychological Association, 2006; Martinez, 2009), negatively affect student academic achievement (American Psychological Association, 2006; Chen, 2008; Martinez, 2009), and increase the chances for students who are punished under the zero-tolerance umbrella to end up in prison (Chen, 2008; Martinez, 2009; Stader, 2004). It was also found that the use of zero-tolerance policies “accelerate negative mental health outcomes”, increase
student alienation and disengagement, and increase future prison costs due to the lack of prevention and treatment of delinquency in an effective manner (American Psychological Association, 2006).

The evidence supporting the negative effect zero-tolerance policies have on students’ lives compels scholars to explore alternative approaches to address school violence. Understanding the legal and ethical dimensions of zero tolerance informs this work.
Chapter 3

Methodology

This study employs mixed methodologies which includes traditional legal research and content analysis. It entails a methodological inquiry into the legal and social sciences sources that deepen understanding and inform interpretation of the law on zero-tolerance policies. It also sought to determine the extent to which discrepancies are found between the legal and ethical dimensions of zero-tolerance policy applications found in each of the court decision in this study. This study included all published court cases involving the application of zero-tolerance policies in schools. Combining legal research with content analysis provided a richer understanding of both the legal and ethical dimensions of zero-tolerance court decisions in K-12 public education.

Legal Research

Historically, legal research has taken the form of document analysis of hard copies of legal data. Current legal research practices have been greatly aided by the availability of legal data and documents available electronically. This study sought to identify the reasons why school districts typically prevail in zero-tolerance litigation. The researcher first identified key Supreme Court decisions that have informed state and circuit courts in matters of zero tolerance. Next, the researcher located authorities at the federal and state levels that authorize the use of zero-tolerance policies through statutes,
regulations, and case law. After all authorities had been located, the researcher conducted a content analysis of data from primary source zero tolerance cases that have come before the courts in the United States. Each case provided a discussion of facts that detail the extent to which the judge found discrepancies or alignment between the facts of the cases and the action taken by the respective school board. These discussions informed us that judges often believe that zero-tolerance policies, while legal, do not necessarily address the ethical concerns inherent to student discipline procedures.

Through this study, the researcher also sought to find common themes within the court opinions when conflicts arose between the application of zero-tolerance policies and the best interests of the student. Answering this question required an additional method of inquiry. Content analysis is used across almost all fields to address questions of conceptual and relational themes. Content analysis is an appropriate methodology in this study because it can be applied to any piece of writing or recorded communication.

Russo (2006) stated that legal research methodology is an approach to historical-legal research that systematically investigates the interpretation and investigation of the law. He continued by noting that “[a]s it attempts to make sense of the evolving reality known as the law, legal research employs a timeline that looks to the past, present, and future for a variety of purposes” (p. 6). The cornerstone of legal research requires scholars to look to the past to locate authority that will provide answers to questions of law. The Anglo-American legal system is deeply rooted in the principle of precedent, or *stare decisis*. Black’s Law Dictionary defines this important concept as “The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation” (8th ed. 2004). This doctrine promotes stability
and reliability in the law and holds legal matters settled unless some form of extraordinary circumstances or facts compels the court or a higher court in its jurisdiction to reexamine the question of law. Because legal decisions are most commonly based on past precedent, legal research demands systematic investigation into past legal data (Russo, 2006).

Law itself is a “reactive, rather than proactive force that is shaped by past events that can help lead to stability in its application” (Russo, 2006). Because of this nature of the law, factual circumstances guide its development. When a case is presented that has facts similar to a case already decided on in the same jurisdiction, the precedent set in the previous case dictates the decision in the later case. Courts have the opportunity to develop or clarify law when faced with different factual circumstances and previous undecided questions of law. A claim must have an actual dispute or controversy to be heard in a court of law. Because of this, researchers must look to see how past authoritative decisions from the courts have dealt with the same issue as they move forward with their research questions.

A legal researcher can turn to past decisions to support a claim that is similar in fact to an already determined case and make the argument that the precedent should be upheld. However, if the precedent does not support the research claim it is the burden of the researcher to prove that their case is sufficiently different and inapplicable to the precedent at hand. In this dissertation, the author looks to past precedent in analyzing the application of zero-tolerance school discipline policies in K-12 public schools as well as several sources of law for legal research as discussed below.
Russo (2006) informs us of three broad sources of law for legal research: (a) primary sources; (b) secondary sources; and (c) research (or finding tools). All three sources are available through hard copies of pertinent publications. They are also available electronically through subscriptions to databases such as Westlaw or Lexis-Nexis or other electronic databases that are free to the public. Utilizing electronic databases can be less time intensive than manual searches but requires an additional set of skills. Electronic searches typically involve descriptive word or phrase searches similar to a Google or Yahoo internet search.

**Primary Sources**

Primary sources of law for legal research include constitutions, statutes, administrative regulations, and case law (Russo, 2006). This study employed the guidance and parameters from these four areas to analyze the legal dimensions of zero-tolerance court decisions in K-12 public education.

**Constitutions**

Constitutions are the most basic form of law and define the governmental framework in a jurisdiction by outlining the rights and obligations of both a government and its citizens. These are published in hard copy and electronically either as a singular unit or as part of a jurisdiction’s statutory compilations (Russo, 2006). Constitutions are the highest source of law within their respective jurisdictions. Each state and federally
recognized American Indian reservation has its own constitution that is applicable within its borders. The federal constitution, which delineates the rights and responsibilities of American citizens, is the supreme law of this country. “As the primary source of American law, the [United States] constitution provides the framework within which the entire legal system operates” (Russo, 2006, p. 8). State and Tribal constitutions, statutes, regulations, case law, or executive orders may not contradict or limit rights protected by the U.S. Constitution. In the event that this should happen, the U.S. Constitution would override the state or tribal authority as the supreme law of the land. “[T]he [United States] Constitution establishes the three co-equal branches of government that exist on both the federal and state level. The legislative, executive, and judicial branches of government, in turn, give rise to the three other sources of law” (Russo, 2006, p. 9).

**Statutes**

The legislative branch is responsible for making the law. The legislature presents a bill that has completed the legislative process to the Chief Executive who has the authority to enforce the new statute with his or her signature. After a governor or the president signs a bill into law, the statute is first published as an individual copy (Davies, 1986; Russo, 2006). The statute then appears as a session law, which is a compilation of laws enacted in a given legislative session arranged chronologically. An example of this would be Public Law 104-208 (the Gun-Free School Zones Act of 1996) indicates that in 1996, this Act was the 208th piece of legislation passed in the 104th Congress. After a
statute has been enacted it is published in the official reporter for that jurisdiction’s statutes.

The official reporter for federal statutes is United States Code (U.S.C.). The names of the state reporters vary but typically have the state name in it. Researchers may find non-official versions helpful when trying to construe meaning of a statute. The United States Code Annotated (U.S.C.A.), for example, includes the statute as well as annotations and summaries of cases which have interpreted or applied the statute (Russo, 2006).

**Regulations**

Once a statute is signed into law, the executive branch is responsible for enforcing those statutes and creating regulations that clarify and provide guidance for the interpretation and implementation of the statute. “Keeping in mind that a statute provides broad directives, the executive branch fleshes a law out by providing details in the form of regulations” (Russo, 2006, p. 9). To fully understand a statute, a researcher must turn to regulations which are developed by state and federal agencies responsible for enforcing the statute. Regulations are intended to clarify and provide for greater understanding of a statute (Russo, 2006). For example, when Tennessee designed the state’s regulations for zero-tolerance policies in schools they provided the following clarification: intent of the law was for a safe and secure leaning environment; disciplinary action was to be “swift, certain, and severe”; infractions included for consideration for zero-tolerance sanctions include drugs, drug paraphernalia, or dangerous weapons;
“school” is defined as while on a school bus, on school property, or while attending any school event or activity; and grounds for punishment included being under the influence of a drug, possessing a drug, drug paraphernalia, or dangerous weapon, or assaulting or threatening to assault a teacher, student, or other person (Tennessee, 49-6-4216).

Regulations are published daily in the Federal Register. This is the most current version of regulations. Regulations are permanently compiled into the Code of Federal Regulations. Librarians are most skilled at finding regulations and can be extremely helpful to legal researchers.

**Case Law**

The judiciary is responsible for interpreting the law and developing case law, known as judge-made or common law (Davies, 1986). Common law is the name given to judicial interpretations of issues that may have been overlooked in the legislative or regulatory process. These issues may have been unanticipated or arose due to the unclear application of the law (Altman, 2001). Case law is binding precedent. In describing binding precedent, Russo (2006) notes, “[c]ommon law is rooted in the concept of precedent, the proposition that a majority ruling of the highest court in a given jurisdiction, or geographic area over which a court has authority, is binding on all lower courts within its jurisdiction” (p. 10). When there is no case on point in a particular jurisdiction, that jurisdiction may look to another jurisdiction for guidance on a similar matter. Cross-jurisdictional precedent is not binding. Conducting legal research starts with examination of case law. This does not mean that case law is more important than
constitutions, statutes, or regulations, but because case law applies in situations where the law was unclear it is a good starting point.

**Secondary Sources**

Secondary sources for legal research include periodicals, encyclopedias and dictionaries, restatements of law, and books and treatises. These sources are writings about the law, both looking to past application and future implications. This study will use periodicals and dictionaries to provide clarification on legal thought and definition. The periodicals, in the form of law review articles are available in hard copy and electronic form. These reviews synthesize zero-tolerance policy claims as a collective either conceptually or factually. They also provide a context for understanding the legal claims and the subsequent holdings in the selected cases.

**Research (or Finding) Tools**

There are a number of ways in which a researcher can access legal data. This study will procure all decisions and cases used in the legal analysis through the electronic database, Westlaw. The researcher will employ both topic and descriptive word searches. Additionally, each retrieved case will be reviewed for legal reference to other zero-tolerance policy cases that may not have been picked up through the first two types of searches.
Content Analysis

Content analysis is the second methodology used in this study. In order to answer the research questions it was necessary to understand both the legal and the ethical dimensions of the zero-tolerance K-12 court decisions. Legal analysis provided the tools for analyzing the legal aspects of each case; however it did not provide the tools for analyzing the court’s discussion in the finding of the case. Content analysis is the “name of a variety of means of textual analysis that involve comparing, contrasting, and categorizing a corpus of data to test hypotheses” (Schwandt, 2001). It involves selecting documents to be analyzed, developing a category-coding procedure, coding of data (open or axial), and finally interpretation of the coded data (Corbin & Strauss, 2008; Gall, Gall & Borg; Maxwell, 2005).

This method is particularly useful for the analysis of text found in legal holdings due to the efficiency of language employed by the courts in most cases. The researcher first decided on the level of analysis and then selected word combinations that provide data that can be analyzed qualitatively for conceptual or thematic elements (Corbin & Strauss, 2008). It was critical to develop a distinct method for distinguishing between concepts as well as to develop rules for coding the texts selected (Corbin & Strauss, 2008; Maxwell, 2005).

The phenomena of interest in this study are the discrepancies found between the rationale supporting the decisions of the court and the inferences made in the discussion that question, support, or criticize the decision on an ethical level. Factors included in the rationale of the decision are the statute or regulation under which the claim was made, case law decisions that have established precedents, and the relationship between the
claim and the decision. The discussion contains the judge’s opinion on his or her viewpoint in regard to the case. These discussions provide rich descriptive information either in support of the decision or commentary on why the judge does not agree with the decision from an ethical standpoint.

**Data Collection Procedures**

Federal and state statutes and regulations regarding zero-tolerance policies were retrieved electronically to provide data regarding policy development. Primary data in the form of published legal cases were collected via secure Penn State access to Westlaw, a computerized legal research database. Secondary source data from law review articles and legal dictionaries were used to provide a more detailed picture of each case and issues surrounding zero-tolerance policies. These were retrieved in hard copy or electronically through computerized databases including Westlaw, Lexis-Nexis, and the Educational Resources Information Center (ERIC). Each of the cases were then uploaded into NVivo 8, a computer based qualitative data analysis tool.

**Analytical Methods**

Court opinions were identified by an electronic search through secure electronic access to Westlaw. Search terms included “zero tolerance” and “zero-tolerance policies” in connection to the search terms “schools”, “public schools” “school violence” and “school safety”. This search produced 30 cases. A secondary electronic search of
Lexis-Nexis produced the same results. The researcher then began by open coding the 30 legal holdings for descriptive statistics including the students’ age, gender, and regional location. Additional open coding was employed to determine the following: prevailing party (student of school district); whether there was language within the holding that indicated a possible discrepancy between the legal ruling and the court’s opinion.

Language indicating possible discrepancies between the notion of justice as defined by the letter of the law versus the spirit of the law, include phrases such as: “best interest”; “there is no doubt these[zero-tolerance or school discipline] policies were intended”; “[jettison, disrupt, or betray] common sense”; “law must be flexible”; “intrude upon the right [to…] education”; “punishments fit the crime”; and “judge the wisdom”. Also included in the open coding were colloquialisms indicating the attitude of the court including: “not every speeder gets a ticket”; “there is no justice without mercy”; and “choose between good and evil”. Last, sentence structure was analyzed for both the coordinating conjunction “but” to determine major discrepancies within rationale statements as well as for subordinating conjunctions such as “although” or “even if”.

Sentence structure was also analyzed to determine discrepancies in thoughts as indicated by connecting adverbs such as “however”; “nevertheless”; or “moreover”. Last, text was analyzed for the indication of emotion, specifically in phrases with opposing thoughts closely connected, by isolating adverb intensifiers such as “really” (as in ‘really well’); “extremely” (as in ‘extremely disappointed’) or by identifying negative adverbs and adverbs of manner such as “carefully”; “scarcely”; “seldom”; or “patiently”.

The text in each of the cases was concurrently analyzed for the non-presence of language indicating discrepancies. The individual cases were assigned as primary (tree
node) headings in NVivo8 with sub-headings for categorizing demographic information. Discrepancies were then itemized to determine a ratio of occurrences within each case that indicate the number of displayed discrepancies.

The researcher constructed a three-point continuum scale describing the extent to which the holding aligned with the dicta, that is, supporting discussion, for each of the cases. Cases were scored as follows: 1 = the holding and dicta were in alignment, 2 = there were minor discrepancies between the holding and the dicta, and 3 = there were significant discrepancies between the holding and the dicta. Cases that score a 3 along the continuum were further coded to determine the reasons behind the discrepancies.

Cases that ruled for the students and had no discussion suggesting discrepancies within the rationale for the holding were grouped together for later use in the analysis. These cases provide demographic information that can be used to identify trends\(^1\). Cases from that group were scored a “1” on the discrepancy scale. Cases that ruled for the school district were then divided into two categories. The first group revealed little to no discrepancies between the holding and the dicta presented in the final documents. These cases scored either a “1” or a “2” on the discrepancy continuum. That step eliminated 25 court cases from the final analysis. Holdings in the second group revealed significant discrepancies within the final documents. Axial coding was then used to determine themes across 5 cases that scored a “3”, including the basis of the claim against the school district; infraction of the student; perceived intent of the student; history of the student’s behavior; and the degree to which each case demonstrated ethical conflicts.

\(^1\) One case that held for the student was placed into Category III. \textit{Seal v. Morgan} was highly disputed and indicated numerous discrepancies worth exploring in this category.
The coding process was completed by using selective coding informed by the elements included in the axial coding to determine thematic patterns of “rights”, “respect”, and “responsibility” as they are defined by Stefkovich’s (2006) “Best Interests of the Student” model.

The constant comparative method was used to determine the consistency among the rationales in the holdings for similar offenses. The Supreme Court decisions used as the basis for legal claims were triangulated across the zero-tolerance claims. To ensure consistency in the arguments, themes identified within the zero-tolerance cases were triangulated across jurisdictions. The following chapter will provide the results of the application of the above methodology to the selected court cases.
Chapter 4

Results

Results of this mixed methods study are presented below. The study included 30 court decisions handed down between 1996 and 2009. These were identified from an electronic search of Westlaw and Lexis-Nexus. The holdings originate from 15 states; six were heard in Circuit Court. All of the cases were included in the study due to the limited number of cases that have gone to court. To date, none of the cases have been granted certiorari, that is, grounds to appear, before the U.S. Supreme Court.

Table 4-1: Holding Titles, Years, Circuits, and Location.

<table>
<thead>
<tr>
<th>Name and Citation</th>
<th>Year</th>
<th>Circuit</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>In Interest of T.H., III</td>
<td>1996</td>
<td>Fifth</td>
<td>Mississippi</td>
</tr>
<tr>
<td>681 So. 2d 110</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.M through S.M. v. Briggs</td>
<td>1996</td>
<td>Tenth</td>
<td>Utah</td>
</tr>
<tr>
<td>922 P. 2d 754</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>J.M .v. Webster County Bd. of Educ. 207 W. Va. 496, 534 S.E.2d 50</td>
<td>1997</td>
<td>Fourth</td>
<td>West Virginia</td>
</tr>
<tr>
<td>Wood by and through Wood v. Henry County Public Schools 255 Va. 85, 495 S.E.2d 255</td>
<td>1998</td>
<td>Fourth</td>
<td>Virginia</td>
</tr>
<tr>
<td>Crawley v. School Bd. of Pinellas County 721 So. 2d 396 (1998)</td>
<td>1998</td>
<td>Eleventh</td>
<td>Florida</td>
</tr>
<tr>
<td>Colvin ex rel. Colvin v. Lowndes County Mississippi School District</td>
<td>1999</td>
<td>Fifth</td>
<td>Mississippi</td>
</tr>
<tr>
<td>Case Name</td>
<td>Citation</td>
<td>Year</td>
<td>Circuit</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>------</td>
<td>--------------</td>
</tr>
<tr>
<td>James P. v. Lemahieu</td>
<td>84 F. Supp. 2d 1113</td>
<td>2000</td>
<td>Ninth</td>
</tr>
<tr>
<td>M.M. v. Chesapeake City Schools</td>
<td>52 Va. Cir. 356</td>
<td>2000</td>
<td>Fourth</td>
</tr>
<tr>
<td>Seal v. Morgan</td>
<td>229 F. 3d 567</td>
<td>2000</td>
<td>Sixth</td>
</tr>
<tr>
<td>Ratner v. Loudoun County Public Schools</td>
<td>16 Fed appx. 140</td>
<td>2001</td>
<td>Fourth</td>
</tr>
<tr>
<td>Bundick v. Bay City Independent School Dist.</td>
<td>140 F. Supp. 2d 735</td>
<td>2001</td>
<td>Fifth</td>
</tr>
<tr>
<td>South Gibson School Bd. v. Sollman</td>
<td>768 N.E.2d 437</td>
<td>2002</td>
<td>Seventh</td>
</tr>
<tr>
<td>Cuesta v. School Bd. of Miami-Dade County FL.</td>
<td>285 F.3d 962</td>
<td>2002</td>
<td>Eleventh</td>
</tr>
<tr>
<td>D.T. v. Harter</td>
<td>844 So. 2d 717</td>
<td>2003</td>
<td>Eleventh</td>
</tr>
<tr>
<td>In re Hinterlong</td>
<td>109 S.W. 3d 611</td>
<td>2003</td>
<td>Fifth</td>
</tr>
<tr>
<td>T.B. ex rel. C.B. v. Board of Trustees of Vicksburg Warren School Dist.</td>
<td>931 S.o. 2d 634</td>
<td>2006</td>
<td>Fifth</td>
</tr>
<tr>
<td>Rigau ex rel. Rigau v. District School Bd. of Pasco County</td>
<td>961 So.2d 382</td>
<td>2007</td>
<td>Eleventh</td>
</tr>
</tbody>
</table>
Demographics

The court decisions in this study primarily involved zero-tolerance infractions committed by male students. Of the 30 holdings, five directly involved female students. One of the cases involved a group of students. One of the cases was an elementary school student, four were middle school, and 25 were high school students. The student prevailed in eight cases and the school district prevailed in 22.

Table 4-2: Number of Offenses by Gender.

<table>
<thead>
<tr>
<th>Gender</th>
<th>Number of Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>28</td>
</tr>
<tr>
<td>Female</td>
<td>2</td>
</tr>
<tr>
<td>Large group</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 4-3: Number of Offenses by School Level Age Group.

<table>
<thead>
<tr>
<th>School Level Age Group</th>
<th>Number of Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elementary School</td>
<td>1</td>
</tr>
<tr>
<td>Middle School</td>
<td>4</td>
</tr>
<tr>
<td>High School</td>
<td>25</td>
</tr>
</tbody>
</table>

Table 4-4: Number of Holdings by Prevailing Party.

<table>
<thead>
<tr>
<th>Prevailing Party</th>
<th>Number of Holdings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Student</td>
<td>8</td>
</tr>
<tr>
<td>School District</td>
<td>22</td>
</tr>
</tbody>
</table>

Zero-tolerance infractions in these holdings included: one for possession of a firearm, eight for possession knives, five incidents of threatening or profane speech, six for possession of illegal substances, seven for possession of alcohol, and three for repeated fighting.
Three of the holdings claimed a First Amendment violation. Six students claimed equal protection violations. Four holdings addressed the Fourth Amendment, and 24 included either procedural (right to hearing) or substantive (property interest) due process claims.

Table 4-5: Type of Offense by Number of Occurrences.

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>Number of Occurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Threatening or profane speech</td>
<td>5</td>
</tr>
<tr>
<td>Repeated fighting</td>
<td>3</td>
</tr>
<tr>
<td>Alcohol</td>
<td>7</td>
</tr>
<tr>
<td>Illegal Substances</td>
<td>6</td>
</tr>
<tr>
<td>Knives</td>
<td>8</td>
</tr>
<tr>
<td>Firearms</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 4-6: Claims in Zero-Tolerance Litigation.

<table>
<thead>
<tr>
<th>Cases</th>
<th>First Amendment</th>
<th>Fourth Amendment</th>
<th>Due Process</th>
<th>Equal Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>In Interest of T.H., III</strong></td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>681 So. 2d 110</td>
<td></td>
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<tr>
<td><strong>E.M through S.M. v. Briggs</strong></td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>922 P. 2d 754</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>In Matter of Expulsion of Daniel Polonia from Independent School District No. 709</strong></td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>1996 WL 45169</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Doe v. Board of Educ. of Oak Park &amp; River Forest High School Dist. 200</strong></td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>115 F. 3d 1273</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Cathe A. v. Doddridge County Bd. of Educ.</strong></td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>200 W. Va. 521, 490 S.E.2d 340</td>
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<td></td>
</tr>
<tr>
<td><strong>J.M. v. Webster County Bd. of Educ.</strong></td>
<td>O</td>
<td>O</td>
<td>O</td>
<td>O</td>
</tr>
<tr>
<td>207 W. Va. 496, 534 S.E.2d 50</td>
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Legal analysis was used to determine the prevailing party and the extent to which discrepancies were found between the holding and dicta in each of the cases. The cases were divided into two groups, holding for the student and holding for the district. The cases in which the student prevailed were removed from the initial grouping and placed into the first category level. Seven cases were determined to be Category I indicating alignment between the holding and the dicta of the case. The remaining legal holdings were then coded to determine which of them had language indicating discrepancies between the holding and the dicta in the court documents. These were then separated into two categories. Holdings that suggested minor discrepancies were placed into

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<td><strong>Rigau ex rel. Rigau v. District School Bd. of Pasco County</strong></td>
<td>961 So.2d 382</td>
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“X” indicates the court affirmed a constitutional violation
“O” indicates the court denied a constitutional violation

### Holdings

Legal analysis was used to determine the prevailing party and the extent to which discrepancies were found between the holding and dicta in each of the cases. The cases were divided into two groups, holding for the student and holding for the district. The cases in which the student prevailed were removed from the initial grouping and placed into the first category level. Seven cases were determined to be Category I indicating alignment between the holding and the dicta of the case. The remaining legal holdings were then coded to determine which of them had language indicating discrepancies between the holding and the dicta in the court documents. These were then separated into two categories. Holdings that suggested minor discrepancies were placed into
Category II. There were 18 cases in this category. The remaining five cases were placed into Category III, indicating significant discrepancies between the holding and the dicta. The legal dimensions of each of the three categories of holdings will be discussed in the following sections.

Holding Category I

*In re Hinterlong*

109 S.W.3d 611

*Texas* (2003)

Hinterlong, a high school student filed action against the school district, a teacher, and an unnamed student informant when he was suspended for a “thimble-full” of “cola colored” liquid assumed to be alcohol in a water bottle in his car. Hinterlong claimed the bottle was not his and he did not know where it came from. He then claimed he was being “set up” as retribution for an incident earlier in the year where some students were punished for trespassing and partying in Hinterlong’s parents’ home while the family was out of town. Hinterlong was placed in alternative education. He sought mandamus relief because he claimed that the school level “crime stoppers” program did not allow him to know his accuser. The school level crime stoppers program did not qualify as a “crime stoppers organization” as defined by the crime stopper statute. He also claimed improper channels for reporting invalidated the privileged “crime stoppers” tip, and that his due process rights were violated because he had no recourse in the charges against him based on the privilege of the tip. The court found no merit in these claims aside from holding that “mandamus was not barred for lack of due diligence” (p. 1).
Mandamus is “an extraordinary remedy and will issue only if the trial court has committed a clear abuse of discretion and the relator has no adequate remedy at law” (p. 2). In this case, Hinterlong’s claim that he could not confront his accuser left him no adequate remedy at law. Hinterlong was acquitted of the charge that he was minor in possession based on the fact that it was never determined that the liquid in the water bottle was alcohol. Because the Crime Stoppers program was in place prior to the implementation of the zero-tolerance policy, the court held “Hinterlong has no adequate remedy at law, mandamus relief is appropriate” the court stated:

We hold that the purpose of the crime stoppers privilege does not justify, in the limited public school zero tolerance setting, the resultant almost total abrogation of Hinterlong’s common law causes of action against the tipster and the person or persons who planted the Ozarka water bottle or the partial abrogation of Hinterlong’s common law causes of action against Clements (p. 24)

There were no discrepancies found within the case that indicated a conflict of ethics with the application of the zero-tolerance policy. However; the court made it clear that given the gravity of punishment under zero tolerance, unsubstantiated tips from a Crime stoppers program required special consideration due to the lack of legal recourse for the accused.

Colvin ex rel. Colvin v. Lowndes County Mississippi School Board
114 F.Supp.2d 504
Mississippi (1999)

In Colvin ex rel. Colvin v. Lowndes County Mississippi School Board, a sixth grade student was suspended for being in possession of a knife. The knife in question
was a miniature Swiss army knife key chain with a two inch blade, fingernail file, small pair of scissors, and closed-end cuticle knife. Colvin claimed that his due process rights under the Individuals with Disabilities in Education Act (IDEA). The court found that due process was violated and remanded the case back to the school board.

Colvin was caught with the knife when it fell out of his book bag in class. He picked it up and put it back in so as not to lose it. He had no prior discipline problems. When he was suspended his parents claimed that they had tried multiple times to have their son’s disability verified and the school should have recognized a disability due to their repeated requests and Colvin’s academic achievement. The school official in charge of the suspension recommended to the board that they reduce Colvin’s suspension from one academic year to one day based on his record of good behavior and the minimal threat the “knife” posed. The board disregarded the recommendation stating duty to uphold zero tolerance and applied the full punishment. The court determined:

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. (p. 10)

The court ruled that Colvin’s substantive due process rights under IDEA were violated. The court addressed the abuse of discretion in cases of zero tolerance.

*D.T. v. Harter*

844 So.2d 717

Florida (2003)
In *D.T. v. Harter* a student was suspended for possession of marijuana. The student filed suit to overturn the school board’s ruling. Drug sniffing dogs indicated potential drugs in D.T.’s car on a routine parking lot sweep. Upon inspection a small amount of marijuana was found on the floorboard of the car. It was described as enough to fit in the center of the officer’s hand. D.T. was driving a car that had belonged to his mother for the previous nine years. She indicated that multiple family members had driven in the car over the past couple years. D.T. maintained that he had no knowledge of the marijuana. The court required the district:

To find that the student must, *at the very least*, have knowledge that the contraband exists or have reasonable belief that it could exist within his or her dominion and control is very reasonable. To find otherwise would apply such a strict standard that no student would ever have a fair hearing because the student would automatically be guilty without hearing the other side (p. 2).

*Lyons v. Penn Hills School District*
723 A.2d 1073
Pennsylvania (1999)

A seventh grade boy was suspended for violating his school’s zero-tolerance policy by being in possession of a pocketknife. The policy did not allow for any type of weapon on campus. The school district produced a document signed by Lyons earlier in the year that acknowledged understanding the policy and the one year suspension that would occur if the policy was violated. The court held that the district violated Lyons due process rights in two ways. First, the policy was approved by vote but had not yet been put into writing. The court found that because the rule was unwritten, there was no section to provide administrative discretion on a case-by-case basis as was required under
the Pennsylvania School Code. Second, Lyons signature of acknowledgement was not valid because his parents had not been notified of the policy in writing. The court determined that the school district acted beyond the scope of their authority.

_Rigau ex rel. Rigau v. District School Board of Pasco County_
961 So.2d 382
_Florida (2002)_

Rigau, a senior in high school, was suspended for ten day after being charged with being under the influence of alcohol as a ‘senior grad bash’. This district claimed that Rigau was with 2-3 other students who had been drinking. Rigau denied the charge and cited his passing of a field sobriety test before entering the bash and passing a polygraph test that he was not drinking that night as proof. The district disregarded his evidence and suspended him anyway. Judge Whatley noted, “In the face of the negative impact of such a suspension the Board failed to appear in this appeal and respond in any manner to Rigau’s assertions” (p. 1).

_James P. v. Lemahieu_
84 F. Supp. 2d 1113
_Hawaii (2000)_

In James P. v. Lemahieu, a high school student was suspended for possession of alcohol at school. The facts of the case indicate that James and two of his friends were at his house prior to a school sponsored luau. His two friends were drinking at his house. One of them got sick and the other was visibly drunk at the luau so all three were questioned. James denies that he had been drinking. The following Monday James was informed of his suspension. He tried talking to two separate administrators who told him
the final decision had been made. The district recommended a full 92 day suspension unless James would agree to a five-day suspension and attend drug and alcohol counseling. The family filed a claim that the suspension violated James’ substantive due process rights and the equal protection clause. The court held that there was a due process violation because the district did not have proof that James had been drinking.

_Crawley v. School Board of Pinellas County_

721 So.2d 396

Florida (1998)

Two students, Moser and Crawley, were suspended for being under the influence of an illegal substance while on school property. The students denied the charge. The court stated that in order to sustain a suspension order the district must provide proof that the students were in fact under the influence. The district failed to do so. The court concluded that the record did not show “a scintilla of evidence” (p. 1) and overturned the suspension.

_Holding Category II_

_In Matter of Expulsion of Daniel Polonia_2

1996 WL 45169 (Minn.App.)

Minnesota (1996)

A middle school boy held a gun-like weapon to the head of a girl at the bus stop and saying, “give me all your money or I’ll blow your head off”. The girl reported the

2 This case was not selected for publication in the Federal Reporter. It cannot be used as precedent but can be used for research.
incident to the principal. She said she did not believe he was teasing and she was having trouble concentrating. Polonia was suspended. Polonia claimed that his due process rights were violated because he had inadequate notice of the district’s zero-tolerance policy against dangerous weapons. He also claimed procedural irregularities deprived him of due process. The court found that Polonia’s due process rights were not violated because the policy for dangerous weapons was explicitly stated in the handbook.

*In Interest of T.H.*
681 So.2d 110
Mississippi (1996)

In this case, a student filed claim that a district’s zero-tolerance policy was unconstitutionally broad because it did not contain a geographic limitation on where or when a child might drink alcohol without being suspended. The student had been suspended for drinking beer at a friend’s house then attended a high school football game. The court found that the policy was not over broad because the student had been drinking within the boundaries of the district’s authority.

*E.M. through S.M. v. Briggs*
922 P.2d 754
Utah (1996)

E.M., a 14 year old middle school student and two of his friends were suspended for possession of marijuana on school grounds. The boys do not dispute the facts of the case. They were suspended for the remainder of the school year (approximately one month) and were provided homebound services. Their students claimed that the policy under which they were suspended did not include their length of suspension; with the
inclusion of homebound services therefore it was invalid. The district then cited the previous discipline policy and went forward with the suspension. The court held that the school district did not violate its own procedures and rules because the district’s policy included various types of suspensions, from in-school suspensions to full expulsion.

Cathe A. v. Doddridge County Board of Education
200 W.Va. 521, 490 S.E.2d 340
West Virginia (1997)

In Cathe A. v. Doddridge County Board of Education a high school student claimed that the application of the school district’s zero-tolerance policy that removed a student for up to 12 months for bringing dangerous weapons to school violated the state’s constitutional guarantee of a fundamental right to education. The court determined that maintaining school safety was a compelling state interest and there was no violation.

After multiple behavior problems the student was found with a heavy lock blade knife on school property. The district determined that is was a deadly weapon. The court stated:

If West Virginians cannot have a reasonable degree of confidence that the schools that their children, grandchildren, nieces, nephews, friends and neighbors attend and work in are safe and secure, the survival of the “thorough and efficient” public school system which our Constitution itself mandates is in question. Indeed, a school system that did not take rigorous steps to eliminate violence and weapons could find itself in serious liability problems if a child or teacher were injured by the presence of conditions that the school could have detected and prevented. We conclude that the Safe Schools Act's 12-month expulsion period sends a strong message that we think the Legislature was entitled to believe needs to be sent to further a compelling state interest (p. 11).
In *Doe v. Board of Education of Oak Park & River Forest High School District 200*, a learning disabled student brought forth claim against the school district when he was suspended for possession of a pipe and marijuana at a school dance. He claimed his due process rights under IDEA were violated when alternative educational placement was not provided. The court found that due process was not violated because the offense was not a manifestation of his disability (see *Hill v. Sharber*, this study, p. 28). Additionally, the district was not required to provide alternative educational services because the *right* to an education is one that can be forfeited and the court agreed.

In *Wood by and through Wood v. Henry County Public Schools*, a sophomore in high school was suspended for ten days for having a pocketknife at a school sponsored event. Wood was on a school sponsored field trip to the local county jail. Before allowing students to enter, one of the officers asked if any of them had any weapons. Wood had a pocketknife in his pocket from the day before and gave it to the officer along with his explanation. The officer gave it to the chaperone that turned it over to school officials. After the ten-day suspension, Wood and his family were notified that his suspension was being extended to 365 days with homebound services as per their zero-tolerance policy. The family filed the claim that Wood’s due process rights were violated with the longer suspension. The court held that there was no violation because Wood was provided multiple hearings.
In this case, Jordan, a high school student filed suit that his suspension from interscholastic activities violated his due process rights because the district does not require any sort of hearing in matters of extra-curricular activities. Jordan was a promising young football player that showed promise for receiving college scholarships for football. He started his senior year as team captain and received several letters from universities that indicated he might be awarded a scholarship if his level of performance remained consistent. Police responded to a 911 call made by Jordan from the parking lot of a convenience store at 3am. Officers believed him to be clearly inebriated. The reported it to the school and the district found that this violated the drug and alcohol free contract Jordan has signed. Jordan said he had been attacked in the lot and that his attackers threw beer bottles at him. He maintained he did not violate the zero-tolerance policy. Jordan’s story had changed many times and he was sidelined for the rest of the season.

The school district received repeated requests for some sort of hearing to determine Jordan’s guilt. They denied these requests. The court found that Jordan’s due process rights were not violated because extra-curricular activities are not a protectable property nor liberty interest.
A group of high school students filed suit that their due process rights were violated by the application of a vague zero-tolerance policy. The students were involved in a gang related fight that started in the bleachers of a high school football game. The students were originally suspended for two years but that suspension was modified to eight months. The court ruled that there was no violation because the district had no zero-tolerance policy. Rather, a joint consortium of schools including Decatur had adopted a “no-tolerance position toward violence in schools [that was] a political statement rather than binding policy” (p. 16).

*M.M. v. Chesapeake Public Schools*
2000 WL 33261105 (Va. Cir. Ct.)
Virginia (2000)

In *M.M. v. Chesapeake Public Schools* a student was suspended for making multiple threats of violence including bomb threats and claims of making actual bombs. The student claims he did not make the threats and that the zero-tolerance policy violated his due process rights. The court found that the district’s policy was not arbitrary or capricious and recognized that the Commonwealth of Virginia also used mandatory sentences for certain offenses.

*Bundick v. Bay City Independent School District*
140 F.Supp.2d 735
Texas (2001)

In *Bundick v. Bay City Independent School District*, a high school filed a claim against the school district when he was suspended for having a machete in the toolbox of his truck. He claimed both 4th and 14th amendment violations inclusive of due process
and illegal search and seizure. The machete was found when a trained dog detected something indicating that Bundick’s truck should be searched. This search revealed the machete but no illegal substance. Bundick claims the search violates his 4th Amendment rights because the search did not reveal any substance intended by such a search originating from a dog search. The citing T.L.O. the court disagreed. It stated:

[Bundick] claims that the warrantless searches of the truck and the toolbox were conducted without…justification and without his consent. However, given the relaxed standard applicable to searches and seizures on school properties, Bundick’s claim fails...The fact that a machete was found and seized instead of any suspected substance, is of no consequence. The official was legally in a position to view the contents of the toolbox when he discovered the machete, and it was “immediately apparent” that the machete was an illegal knife under the school district rules; therefore, taking possession of the machete constituted a valid “plain view seizure” (pp. 5-6).

Bundick complained of due process violations when he claims he was denied educational services. The court found this claim invalid because he was provided continuing educational services and received enough credit to graduate by the end of the year on time. Bundick claimed that the violation stemmed from his exclusion from extra-curricular activities. The court found that while a student has a protected interest in educational services, the U.S. Constitution excludes extra-curricular activities under this protection.

South Gibson School Board v. Sollman
768 N.E.2d 437
Indiana (2002)

Three days before the end of the semester, drug dogs detected marijuana in a
student’s truck. The truck belonged to Sollman. A small amount of marijuana was found and Sollman was suspended for the rest of the semester. Sollman was also denied credit for the coursework he had completed prior to the suspension. Sollman claimed that his Fourteenth Amendment rights were violated and that he should not lose credit for work already completed. The court held that is was not its job to judge the wisdom of the district’s actions and upheld the suspension.

Cuesta v. School Board of Miami-Dade County, Florida
285 F.3d 962
Florida (2002)

In Cuesta v. School Board of Miami-Dade County, Florida, A student filed claim against a school district and the county when she was expelled and placed in a holding cell upon arrest for handing out pamphlets that said I “wonder what would happen” if the student shot the principal, teachers, or other students. The pamphlet, which had a picture of the principal, Mr. Dawson, with a dart through his head was entitled “First Amendment” and a portion of it read:

I have often wondered what would happen if I shot Dawson in the head and other teachers who have pissed me off or shot the fucking bastard who thought I looked at him wrong or the airheaded cheerleader who is more concerned about what added layer of Revlon she's putting on instead of the fact that she's blocking my path or, I would shoot (twice) the fucking freshmen who think they're cool cuz they're in high school (p. 4).

The pamphlet also contained other racial slurs, derogatory comments about immigrants, and both violent and sexual cartoons. The student claimed her First Amendment rights were violated by the school district. The court held that there was no violation for two
reasons. First, in balancing school safety with individual rights, the hate speech contained in the pamphlet was not protected under the special context of school rules. Second, speech of that type was not protected in public spaces either. Florida statutes assign felony status to speech that falls into the description below:

It shall be unlawful to print, publish, distribute or cause to be printed, published or distributed by any means, or in any manner whatsoever, any publication, handbill, dodger, circular, booklet, pamphlet, leaflet, card, sticker, periodical, literature, paper or other printed material which tends to expose any individual or any religious group to hatred, contempt, ridicule or obloquy unless [the name and address of those responsible for the publication] is clearly printed or written thereon (p. 5).

The principal called the students into his office regarding the pamphlets. He had asked law enforcement to be present due to the personal threats contained within the pamphlet. Cuesta was arrested and taken to a county detention center where she was strip searched before being placed holding cell. The student claimed a Fourth Amendment violation for the strip search. The court found that there was no violation because the search was reasonable in light of the threatening speech contained in the pamphlet.

*S.G. ex rel. A.G. v. Sayreville Board of Education*
333 F.3d 417
Mississippi (2003)

In *S.G. ex rel. A.G. v. Sayreville Board of Education*, the family of a kindergarten student claimed that his three-day suspension for saying “I’m going to shoot you” at school while playing with friends violated his First Amendment and Fourteenth Amendment due process and equal protection rights. The court found that there were no violations on any of the claims.
This ruling became case law that recognized that language threatening violence
and the use of a firearm was a legitimate decision related to reasonable pedagogical
concerns and undermined the school’s basic educational mission. The court did not feel
that the suspension was excessive due to recent history in the area. There had been
multiple occurrences of this type of behavior in the days preceding the incident. The
principal had gone into each of the classrooms to discuss with the children that this type
of play was not allowed at school and had sent letters home to the parents. A.G. had been
absent that day and his parents never received a letter. The court held that due process
was not violated because the principal met with A.G. and the two other boys to inform
them before their suspension. The court also ruled there was no evidence of an equal
protection violation.

_T.H. v. San Diego Unified School District_
122 Cal.App.4th 1267, 19 Cal.Rptr.3d 532
California (2004)

In _T.H. v. San Diego Unified School District_ the court ruled that the suspension
and alternative education placement of a middle school girl, T.H., did not violate her
constitutional right to due process. T.H. was suspended for initiating a fight on school
grounds. This was her third offense of this nature and district policy recognizes the third
offense as an infraction that falls under zero tolerance. The district determined:

T.H. willfully used force in attempting to cause physical injury to another
student, and this was T.H.’s third fighting incident in the past school year.
The panel found expulsion was a proper remedy because “[o]ther means
of correction are not feasible” and T.H.’s continued presence at the school
“causes a continuing danger to the physical safety of herself and others.”
The panel found that “[o]ther means of correction have repeatedly failed
to bring about proper conduct (p. 4).
T.H. was placed in an alternative educational setting. Several days after being placed in an alternative setting she engaged in a physical confrontation of a staff member. One of the conditions of her alternative education placement was that she not break any school rules in order to stay. Because of her physical confrontation, T.H. was suspended and placed in a community school. While in the community school, T.H. alleges she was sexually assaulted and physically harassed by older male students. It is for this reason T.H. filed suit against the school district.

T.H. claimed that the school district’s zero-tolerance policy violated California state law in two ways, first, that it included infractions (i.e. fighting) that state law did not, and that it removed the option for a principal to use discretion based on the context of the case. The court found that while the district policy did in fact include infractions beyond those specifically stated in California law, it did not violate the law because fighting was not specifically excluded from inclusion as a zero-tolerance infraction. Second, the district policy mandated principals to refer zero-tolerance infractions to a governing board and T.H. argued that removing principal discretion prior to referral violated state law proving administrative discretion it matters of suspension and expulsion. The court found that this was not the case. The court determined that the district policy provided students with a wide range of protections therefore eliminating the option for administrators to use discretion on the outset of a referral did not violate state law.
**Vann ex rel. Vann v. Stewart**  
*445 F.Supp.2d 882*  
**Tennessee (2006)**

A high school student was suspended for possession of a small pocket knife on school property. He showed it to several students but did not report it to the teacher. It was noted on record that he did not brandish the knife at any time. He claimed that the one year suspension as per the district’s zero-tolerance policy violated his substantive due process rights because the district did not modify the punishment based on the facts. He also claimed an equal protection violation. The court held that there were no violations. There was no due process violation because the district was under no obligation to modify the suspension. The court recognized a legitimate governmental interest of ensuring a safe and secure learning environment and denied the equal protection claim.

**Bogle-Assegai v. Bloomfield Board of Education**  
*467 F. Supp, 2d 236*  
**Connecticut (2006)**

A high school student claimed her Fourteenth Amendment substantive due process and equal protection rights were violated when she was suspended for assaulting another student. The facts of the case revealed that her instigation of the fight and continued aggression throughout the hearing process compelled the court to deny both claims. The student felt the other student in the fight should have been suspended as well, and because only one of them was it was applying the rule unfairly. Multiple witnesses attest that the other student did not start the fight or even fight back once the fight had started. The court ruled that this was evidence to refute an equal protection claim.
T.B. ex rel. C.B v. Board of Trustees of the Vicksburg Warren School District
931 So.2d 634
Mississippi (2006)

T.B., a ninth grade student, was suspended for possession and sale of a controlled substance. A fellow student approached T.B. and asked him if he had anything for a headache. T.B. said he didn’t but he knew someone who did. He told the student it would cost him $5.00 for a pill. The student didn’t have enough so T.B. gave him $3.00 so he could get the pill. T.B. took the money to another student brought a prescription painkiller to the student with a headache. When charged with the offense, T.B. denied he had engaged in possessing or selling drugs.

T.B. claims his due process rights were violated because he was not allowed access to the witness list, nor was he notified when a key witness changed his testimony. The court noted that T.B did not actually ask for the witness list. He also claims that he was not allowed to cross examine witnesses, and additional claim of due process violation. The court held that T.B.’s rights were not violated because his lawyer was allowed to cross examine witnesses at trial. The court declared that there was enough evidence uncovered throughout the investigation that justified the suspension.

Hill v. Sharber
544 F.Supp.2d 670
Tennessee (2008)

In Hill v. Sharber a high school boy was suspended for having alcohol in his vehicle on school grounds. Police drug dogs detected the drugs in a random parking lot search. Hill was removed from class, read his Miranda rights, and asked if he had drugs
in his car. In the lot he was asked to open his car where ten twelve-ounce bottles of beer were found in a duffel bag. The student filed suit claiming the search of his vehicle after a positive alert from a drug dog and his handcuffing during the search violated his rights. He also claimed violation of the Individuals with Disabilities in Education Act (IDEA). The court found that a “sweep” of the parking lot by drug dogs was not considered a “search”, and the search of the vehicle was not a violation of the student’s rights because there was probable cause. As previously noted in this study, the special context of schools does not require probable cause for a search. The standard for searches in the school context is “reasonableness”. The court found that the handcuffing did not violate Hill’s rights because he was informed that it was for his safety and the safety of the officers and the duration was only ten minutes.

The school held a “manifestation hearing” to determine if Hill’s rights were violated under IDEA. It was determined that his rights were not violated because the offense was not a manifestation of his disability nor was it a result of the school district implementing his Individualized Education Plan improperly. Hill was placed in alternative education and was suspended from the school’s hockey team as was required under the district’s zero-tolerance policy.

Holding Category III

*J.M. v. Webster County Board of Education*

207 W.Va. 496, 534 S.E.2d 50

West Virginia (1997)
In *J.M. v. Webster County Bd. of Education*, a high school student sought review of the decision the school board made to expel him for possession of a firearm on school property. He claimed his procedural and substantive due process rights were violated and that he should not have been suspended given the facts of the case. The court found that there was no violation because the mandatory suspension period under The Safe and Guns-Free Schools Act is not facially unconstitutional, nor procedurally deficient, the principal adequately addressed suspension notification, and the ten day suspension for bringing a loaded handgun on school grounds was not inadequate.

This court immediately noted the “unfortunate” (p. 1) nature of this case in its decision. J.M. was 15 years old and was suspended for two days from school. J.M.’s mom picked him up from school and on the drive home J.M.’s father passed them in his vehicle. He then followed them to the elementary school where J.M.’s mom worked. The father was very upset and decided he was going to remove J.M. from school because he had been suspended at least ten times that year already. J.M.’s father decided he was going to get his son a job at the lumber yard and he made J.M. get in the truck with him to go there. J.M. did not want to go. They could not find anyone at the lumber yard so they drove to their home. J.M. hit the lawnmower when he opened the truck door and his father got angry. He made a comment about what would happen if the door was scratched (he would “pole-ax” him) then threatened that he might end up like “the Linkous boy”, a reference to the fact that Mr. Linkous had recently been linked to the shooting death of his own son.

The father went around to the back of the house and J.M. ran upstairs to remove the guns from his father’s gun safe, fearing for his life. He heard his father coming so he
shoved a loaded handgun into the waistband of his pants. His father did not see this and ordered him back to the truck to try the lumberyard again. Once there they discovered that J.M. needed a work release from the school because he was too young. J.M.’s father then drove them back to the school to get a release. As soon as J.M. got the chance (when his father was not around) he turned over the gun because he knew he was not supposed to have it on school grounds and explained why he had it. He also explained that he thought his father was going to kill him. J.M. was suspended under the district’s zero-tolerance policy. Justice Starcher gave the following dissenting opinion:

The majority opinion sets forth equitably compelling facts, and does a good job in crafting excellent syllabus points. Then it applies the good facts to the good law, and ends up with a bad result. There is only one explanation for such a result—the wish of the majority not to “undermine” a local school board that is bent on “zero-tolerance,” regardless of the equities and the law (p. 14).

*Anderson v. Milbank School District 25-4*
197 F.R.D. 682
South Dakota (2000)

A father filed suit on behalf of his daughter claiming a freedom of speech violation when she was suspended under the school district’s zero tolerance provision for profane language. The student went to the school’s office after school when her mother, a cook in the school district, was not there to give her a ride home as she usually does. The student’s mother had left a note in the office that her daughter was to ride the bus home. Upon realizing that she had received the note after the bus had already left, the student uttered the expletive “shit” to herself. The school secretary said she was going to report it to the principal the next day. The infraction was punishable by a 2½ day in-
school suspension and the student would have her quarterly grades lowered 2% for each day she was out. The father claims the daughter’s First Amendment right to free speech was violated.

The court ruled that there was no First Amendment violation because both the offense and the punishment were explicitly stated in the student handbook. The student did not contest that fact. The student could have appealed to the superintendent or school board of the district but did not. The court ruled in favor of the district but noted:

The speech here had no political or social message of any kind. It is, however, somewhat understandable why...plaintiff’s ward may have experienced some frustration...The student was “talking to herself” in an office setting with only one other person present. The better course of valor may well have been for the secretary to have strongly reminded the student of the rule and to have told the student, a very good student, to not repeat the conduct. After all, not every speeder on the highway receives a citation. Law enforcement officials, even in the face of a clear violation of the law, do not arrest every person or issue a ticket every time...The conduct was certainly not disruptive to the educational environment or to other students or faculty. The violation was perhaps too much to do about relatively little...This rule was a “zero tolerance” rule. Without addressing serious questions as to the mindlessness of some zero tolerance rules, the office secretary may, of course, have perceived it to be her duty to report every rule violation, regardless of how minor (p. 6).

*Seal v. Morgan*

*229 F. 3d 567*

*Tennessee (2000)*

A high school boy brought suit against the superintendent and board of education seeking compensation for an expulsion that resulted from his friend’s knife being found in the glove compartment of his car while it was parked in a school parking lot. Seal denied any knowledge of the knife being in his car while the car was on school property. His car had been searched because four students had reported that they had seen Seal and
one of his friends drinking. The band teacher asked Seal’s friend if he and Seal had been drinking. He said no and the teacher allowed them to enter the band room because he did not smell alcohol. A short while later they were summoned to the teacher’s office where the vice principal joined them. He searched their coats and instrument cases for a flask then announced that he needed to search Seal’s car. There was never any alcohol found but during the search it was revealed that Seal’s friend’s knife was in the glove compartment from when they had been driving around the night before. He claimed that the district’s actions violated his due process rights.

The court agreed and held that in order to suspend a student under zero tolerance the student must have knowledge of the weapon with which he or she is being charged possessing. The court stated:

[S]uspending or expelling a student for weapon possession, pursuant to a zero tolerance policy, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest, so as to survive due process challenge…[and] absence of any evidence about what the board of education concluded regarding student’s knowledge precluded summary judgment (p. 1).

Ratner v. Loudoun County Public Schools
16 Fed.Appx. 140
Virginia (2001)

In Ratner v. Loudoun a student filed claim that his four month suspension violated

3 This case was not selected for publication in the Federal Reporter. It cannot be used as precedent but can be used for research.
his due process rights. Ratner had taken a binder that contained a knife from a suicidal fellow student in effort to save her life. He had spoken to the girl the night before and knew she had a history of suicide attempts. She told him she had inadvertently brought the knife to school. He took the binder with the knife in it so she would not have access to it while she was feeling suicidal. He put the binder in his locker and did not take it out all day. Ratner did not actually look at the knife and there was no suggestion that he ever intended to personally possess the knife. The school dean stated that she believed Ratner acted in what he felt was the best interest of the fellow student and at no time posed a threat.

The court ruled that due process extended only to giving the student “constitutionally sufficient process in the various notices and hearings” that led to suspicion (p. 1) and denied Ratner’s claims. The court noted that it was the place of the court to determine the constitutionality of a claim, not the wisdom of the zero-tolerance policy. The court stated:

However harsh the result in this case, the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy of the sort alleged to be in place at Blue Ridge Middle School or of its application to Ratner (p. 3).

In a concurring opinion, Justice Hamilton included his thoughts on zero tolerance as applied to this case:

I write separately to express my compassion for Ratner, his family, and common sense. Each is the victim of good intentions run amuck….There is no doubt that this zero-tolerance…policy, and others like it….were adopted in large response to the tragic school shootings that have plagued our nation's schools over the past several years. Also, no doubt exists that in adopting these zero-tolerance/automatic suspension policies, school
officials had the noble intention of protecting the health and safety of our nation's school children and those adults charged with the profound responsibility of educating them. However, as the oft repeated old English maxim recognizes, “the road to hell is paved with good intentions.” (p. 3).

*Langley v. Monroe County School Board*

4 264 Fed.Appx. 366, 2008 WL 276084 (C.A.5 (Miss.))

*Mississippi (2008)*

In *Langley v. Monroe County School Board*, a student was suspended for having a partially full can of beer in the vehicle she drove to school. Langley was suspended and was to be placed in an alternative educational setting for 30 days. She appealed and attended the alternative educational setting while she awaited her appeal. The district upheld the suspension. Langley filed suit claiming a due process violation.

Langley was a good student who was in many student organization leadership positions. Langley’s parents had been at a cookout the day before the incident and the mother drank part of the beer. She did not finish it and left it in the car. Her daughter took the car to school the next day when her own car wouldn’t start. The assistant principal noticed the car had no parking decal and upon further inspection found the partially full can of beer. The assistant principal said on record that he was sure Langley had no knowledge of the beer but this fact was “not the issue” (p. 2). Her suit brought forth details of the case that the court found distressing, but because she was provided alternative educational placement it ruled that there was no due process violation.

*This case was not selected for publication in the Federal Reporter. It cannot be used as precedent but can be used for research.*
Conclusion of Results

The data within the cases discussed in this section answered the question, “What are the common reasons school districts typically prevail in zero-tolerance litigation? This study intends to address ethical concerns and conflicts as well. The next chapter will explore the degree to which ethical concerns are addressed in cases where the student prevailed. It will also identify ethical conflicts found in the Category III holdings and discuss how these inform thematic patterns of “rights”, “respect”, and “responsibility”. It will conclude with a thematic critical analysis of the meta-analysis of the cases’ content.
Chapter 5
Analysis

This chapter will report the analysis of the legal holdings and dicta from the 30 cases included in this study on two levels. The results of this study indicated that the cases were divided into three categories based upon shared characteristics. Each of these categories will be analyzed individually to determine common themes that emerge from the three possible holdings in this study: for the student, for the district; or for the district with clear discrepancies between the holding and the dicta. These analyses will answer the questions; “what is the degree to which holdings for the student have addressed ethical issues concerns” and “what do the discrepancies between the holding of the court and the dicta tell us about the ethical conflicts between educating and protecting students”?

Category I Analysis

The evidence in this study indicates that school districts are more likely to prevail in zero-tolerance litigation than students. Worth noting are the ethical dimensions addressed in the holdings and dicta in cases where students have prevailed that address issues of fairness, care for students, social class, and professional discretion. Students

5 Except in the case of Seal v. Morgan, where the holding was for the student but the dicta provided considerable evidence of discrepancy.
successfully claimed due process violations based on the source of the accusation, knowledge of offense, lack of evidence and/or the construction of the zero-tolerance policy in terms of overbreadth or vagueness.

The attention the courts have given the seriousness of maintaining school safety can best be summed up by Justice Davidson who in Colvin by and through Colvin v. Lowndes County Mississippi School District acknowledged:

While this court is cognizant of the unenviable position of the school boards of this and other states and of their aim to create a school environment conducive to learning, by eliminating the fear of crime and violence, such efforts must be balanced with the constitutional guarantees afforded to the children who enter the school house door (p. 4).

It is not without serious deliberation that the courts have made the decision to intervene in the broad discretion afforded school officials in maintaining school safety and order. Each of the holdings have made it clear that the responsibility placed on administrators is great while reminding us that administrative decisions are not infallible.

The courts’ holdings took issue with accusations that came from anonymous or unnamed accusers. The severe punishment associated with zero tolerance and the degree to which that punishment can negatively affect a student’s life has caused two courts concern. The issue in In re Hinterlong was the anonymous crime stoppers tip. The court discussed that in traditional crime stoppers programs (non-school based), all tips are followed up on and verified prior to charges being filed. Zero tolerance in terms of the “special context of schools” does not provide this safeguard from false accusations. The Hinterlong court stated:
A statute or ordinance that unreasonably abridges a justiciable right to obtain redress for the injuries caused by the wrongful acts of another is void as amounting to a denial of due process (p. 5).

In a similar case, the court determined that unnamed accusers were not credible as the only source of determining evidence of guilt. In *Rigau ex rel. Rigau v. District School Board of Pasco County*, the court found that, “…student’s due process rights were violated [when] only evidence of student’s alcohol consumption came from unnamed accusers” (p. 2).

Another matter of substantial concern in the holdings was the issue of evidence. The most notable case for this is *Seal v. Morgan* in which a boy was suspended for unknowingly having a knife in his glove compartment. The court did not agree with the school district that the fact Seal did not know he was in “possession” was irrelevant. The court stated:

In absence of findings of fact by the board of education, it could be concluded…that the board failed to consider student’s knowledge of the presence of friend’s knife in his car…where the board’s attorney insisted on appeal that the student’s knowledge was completely irrelevant and the board’s policy required student’s expulsion regardless of whether he knew the knife was in his car (p. 5).

In this instance, the court went so far as to challenge the Board in *Seal* with two separate scenarios in which the student would not be aware of their guilt. These scenarios included someone dropping a pocketknife into the backpack of the valedictorian and someone spiking the punchbowl at a school dance. The court asked if the Board would have applied the same standards in these situations and suspended the valedictorian for
possession of a knife or the students who drank from the punchbowl not knowing it contained liquor for possession of alcohol. The Board acknowledged that it would not have applied the same standard.

The court also addressed the matter of evidence in *Crawley v. School Board of Pinellas County* where two students were accused of being under the influence of an illegal substance. They were suspended and upon appeal the court found that the Board acted erroneously by suspending the students without “a scintilla of evidence” (p. 1). They continued by stating, “We understand the School Board's concern and the basis for its…policy. However, that policy does not override the need for proof of a necessary element of the charged violation as set out in the rule itself” (p.2).

The third area in which the courts took issue was within the construction and authority contained within the language of the policy itself. The facts of *D.T v. Harter* led the court to question what it meant to be in “possession” of alcohol. The student was accused of possession of alcohol for being intoxicated at a school function. The court determined that the school board overstepped its authority by claiming it could consider substances *within* a student’s body to fall under the purview of their policy.

The dicta provide more insight into the ethical considerations of these cases. The *Colvin* court questioned the school district’s attention to the unique facts of the student’s case and noted, “Although Jonathan was failing one subject and passing another subject by a mere one point, some teachers professed this a success and did not consider such standing to warrant consideration. The court finds such an attitude repugnant” (p. 8). The court continued to express its feelings regarding the school district’s callous approach towards the individual needs of students by informing the district that the court was
“offended by the manner in which it blindly meted out the student’s punishment” (p. 11) in consideration of the duration and seriousness of the suspension. The court determined in *James P. v. Lemahieu* that there was irreparable harm that could come from a long suspension including his grades being lowered, his loss of privilege to participate in extra-curricular activities, and potential academic or sport scholarships to university.

In two of the cases, *Lyons v. Penn Hills School District* and *Rigau ex rel. Rigau v. District School Board of Pasco County*, the courts made comment regarding the social standing of the families as they applied in these two instances. In *Lyons*, the court explained that, in part, the school district should have taken into account that Lyons came from a good family and that “both parents were college graduates and gainfully employed, that Lyon’s sister [was] enrolled in college, and that all members of the family regularly attend church” (p. 4). The court believed that these facts suggested that Lyon’s family would not condone criminal behavior, therefore the district should have taken the family situation into account. The *Rigau* court made note that it was beneficial to the student that his father was an attorney because the average parent might not have known to challenge the district’s suspension.

The dicta offered substantial insight from the ethical standpoint of fairness and justice. The *Hinterlong* court felt justice was not served by his suspension for multiple reasons. First, the court noted that in the case of a privileged crime stoppers tip, had Hinterlong not been acquitted of the minor possession charge they would have upheld the suspension. It was the finding of fact in one case that informed the other. The court also felt the ‘evidence’ was lacking. The court commented that the tipster accused Hinterlong of hoarding alcohol in his trunk but his vehicle “did not have a trunk and only a thimble
full of a substance never proved to be alcohol which is hardly stockpiling or hoarding” (p. 21). The court maintained that the need for the zero-tolerance policy was unfortunate but the anonymous nature of the crime stopper trip did not provide Hinterlong any redress.

The Colvin court questioned the district’s attention to the actual facts of the case because the school resource officer had testified that he felt that reducing the suspension from 365 days to just one day would be appropriate. The school board disregarded and applied the full year-long suspension. The court instructed:

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 (p. 10).

The dicta in Seal v. Morgan made it clear that there was no justice if a student could be punished for something he or she was completely unaware they had done. They further noted that they “could take no comfort” in the fact that Seal was provided multiple hearings because since the district did not take into account the difference between knowing and unknowing possession it “would not have made a difference” what Seal had said in those hearings (p. 15). Final remarks of the court included:

[T]he Board may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a…policy that purports to make the students’ knowledge a non-issue. [The court was] also not impressed by the Board’s argument that if it did not apply its…policy ruthlessly, and without regard for whether students accused of possessing a forbidden object knowingly possessed the object, this would send an inconsistent message to its students. Consistency is not a substitute for rationality (p. 18).
This discussion illuminates some of the ethical concerns that have caused the courts to find for students in some instances. As was noted previously, this is not the norm by any means when it comes to zero-tolerance litigation. The next section will explore the ethical dimensions of the holdings that contained discrepancies and discuss how these discrepancies inform our understanding of the tension between educating and protecting students.

**Category III Analysis**

The cases in Category III are important in the respect that they each have strong language questioning the justice served by applying zero-tolerance policies in certain situations. In *Ratner v. Loudoun County Public Schools*, *Seal v. Morgan*, and *J.M. v. Webster County* the offense was weapon-related. The charge in *Langley v. Monroe County* was possession of alcohol. Profane language was the issue in *Anderson v. Milbank*. The school district prevailed in four of the five cases. *Seal* is the only holding in this category in which the student prevailed, but Seal later committed suicide.

The courts have maintained throughout every case in this study that it was not its job to judge the wisdom of the application of zero-tolerance policies. The courts have also maintained that it is not its place to interfere in school matters or disrupt the trust given to school officials to use their best judgment in light of the unique context each situation presents. Presented with a case in which a middle school student took the knife belonging to a suicidal friend (*Ratner v. Loudoun*), the court noted that even the administrator “believed Ratner acted in what he saw as the girl’s best interest and that at
The court continually precluded its holding statements with descriptors indicating an ethical stance towards the case. The court acknowledging that “no matter how harsh the result in this case… school officials gave Ratner constitutionally sufficient, even if imperfect, process in the various notices and hearings it accorded him” (p. 3). On official record, Justice Hamilton wrote separately to “offer [his] compassion to Ratner, his family, and common sense” (p. 3).

The Anderson court also found little common sense in the application of a zero-tolerance policy when a student uttered “shit” under her breath in an empty school office. However; this court explained that the rules were known in advance and the student acknowledged understanding the punishment for profane language. It determined that while there is a question as to the degree of profanity was really introduced into the school setting; the punishment was fairly applied in this situation. The court also held that Anderson had alternative ways in which she could appeal her suspension but she chose to go directly to Circuit court. The court stated:

Due process requirements were met. The student could have not only appealed to the Milbank board but to the state circuit court from any adverse decision by the Milbank board and then to the South Dakota Supreme Court from any adverse decision by the circuit court (p. 6).

The court in Langley v. Monroe did not see the legal course of action as just in the instance where a girl was suspended from school when a partially-open beer (admittedly left in the car by her mother the night before) was found on school property. Beginning by informing us that “the facts underlying this appeal are as straight forward as the y are
unfortunate” (p. 2), the court took issue with the fact the district did not think that the student’s unknowing possession was an issue. The court discussed the uncontroverted evidence that the student was unaware of the partially full beer and found:

However misguided the school district’s actions may have been, the Langleys’ appeal must fail. As the Supreme Court observed more than three decades ago, ‘'[t]he system of public education that has evolved in this Nations relies necessarily upon the discretion and judgment of school administrators...and was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion’” (p. 2).

The *J.M. v. Webster* court also determined that while the application of the policy was fair, the outcome was not just when a boy was suspended for possession of a weapon. The court observed the responsibility school officials had once the zero-tolerance process was put into motion. The court expressed concern that the board did not take into account that the student felt his father was going to shoot him with the confiscated gun.

The *Seal* court viewed justice differently than the *Langley* court in terms of knowingly being in possession of a forbidden object or substance. Details of this are noted above with the Category I analysis but it bears repeating that the court determined that “suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate governmental interest” (p. 12). The court found it unbelievable and irrational that the board would claim to impartially assign suspension and justify those suspensions with hearings that did not take into account the knowledge of possession. The court questioned:
Did the Board expel him because it disbelieved Seal’s explanation, did it expel him despite believing his explanation completely, or did it expel him without deciding the issue, in the belief that Seal’s knowledge was simply irrelevant to the decision? Of these possibilities, the first one would have been permissible if rationally supported by the record, but the other two would not have been (p. 18).

The courts in the five holdings indicating discrepancies similarly summed up the application of zero-tolerance policies in these instances. The courts stated, “without addressing the questions as to the mindlessness of some zero tolerance rules” (Anderson v. Milbank, 2000, p. 7) and the detrimental effect they can have on students’ lives, “we would have thought this principle so obvious that it would go without saying” (Seal v. Morgan, 2000, p. 12). However, “[t]he fact that we must defer to the Board’s rational decisions in school discipline does not mean that we must, or should rationalize away its irrational decisions” (Seal v. Morgan, 2000, p. 16). The Ratner court concluded, “Certainly, the oft repeated maxim, ‘there is not justice without mercy’ has been defiled by the results obtained here” (p. 4).

How might these cases looked different if an alternative ethical approach had been applied to the case? The four cases above in which the district prevailed strongly suggest the courts would have preferred a different outcome. For the purpose of contrasting analysis, the four cases are presented through multiple lenses below. Each begins by reviewing the details of how the ethic of justice was applied.
J.M. v. Webster County Board of Education

This case involved the suspension of a 15 year-old boy for possession of a firearm on school property. This was a violation of the Safe Schools Act and the district’s zero-tolerance policy. Facts of the case revealed that the boy was in possession of the gun because he feared his father was going to shoot him with it. The boy had been suspended and his father had made threatening statements and decided to remove J.M. from school to work in the local lumberyard. He had been in the process of hiding the weapon when his father ordered him to get in the car to go to the school to the lumberyard where they found out that the boy had to have a work release because of his age. They then went to the school where the boy immediately turned in the gun to a football coach when his father was not in the office. The boy explained to the coach why he had the weapon. The coach locked the gun and ammunition in a filing cabinet then took J.M. to the state police barracks and turned him in to the troopers. Afterward he reported it to the principal and superintendent.

Ethic of Justice

Zero-tolerance policies are by design intended to be fair because they are clearly stated, apply consequences equally to all offenders, and have flexibility that provides administrators the authority to modify punishment on a case by case basis. If justice is a moral principal then the zero-tolerance policy that was applied in J.M.’s case is appropriate in the fact that as a society we want all incidents of firearms in schools handled in a swift and certain manner. This not only ensures the safety of students but
sends the message to all students that there are certain activities or acts that are simply not permissible at school.

There is no doubt that the football coach, who had coached J.M., was faced with a moral dilemma as the boy handed him the gun and ammunition. Compounding that dilemma were the facts surrounding it and the behavior J.M.’s father was exhibiting that reinforced the authenticity of J.M.’s version of events. Given the situation, it would not be just for the coach to do anything but turn J.M. in to the principal, superintendent, or local authorities. The only reason the coach was in the situation to begin with was because there were no administrators on campus at the time J.M.’s father brought his son back to school and the coach was the acting administrator that day. Firearms, especially coupled with the immediate availability of ammunition, do not present a situation where discretion is necessarily a way in which fairness can be ensured. What if it was a student the coach did not know who had the same story? Would it be fair to use discretion in once instance but not the other? Would it be possible to justify why a person would take different actions given the same situation with another student?

The effects of school shootings are devastating. Zero-tolerance policies are intended to protect the community of school by punishing dangerousness (Robinson, 2001) before acts of violence are actually committed. The discretion written in to zero-tolerance policies indicates that they are not absolute. However; the intent of zero tolerance is to target firearms specifically, making modification in this instance less feasible. J.M.’s rights deserved to be recognized but administrators must consider the greater safety of all students.
The question in J.M.’s case is whether or not zero-tolerance policies adequately address school shootings and school violence. In making his decision, the coach relied on the district’s policy. Although the facts of the case do not discuss the reporting requirements between the school and law enforcement, it is clear that the coach would have had to make the choice to do nothing or report it to the principal at the very least. As “acting” administrator the coach did not have the authority to make any decisions regarding the modification of J.M.’s suspension.

**Ethic of Care**

The ethic of justice as applied to zero tolerance provides an efficient means of making progress, even if only facially, towards reducing school violence. This approach does nothing to encourage and nurture students in their own personal growth. The football coach had the opportunity to address his moral dilemma from the ethic of care at several points during the incident.

The application of the ethic of care requires us to back up to the point that the principal imposed the initial suspension that was the catalyst for the event. When reading the case it is difficult to put aside questions regarding the fact that J.M. had been suspended so many times with no indication that the school did anything other than push him out. The facts indicate that there was a close and trusting relationship between J.M. and the football coach, it seems unreasonable to believe that the coach was completely unaware of J.M.’s repeated behavior problems. Further, if there were consistent
problems at home, it also seems unreasonable that personnel in the high school would not be in some way aware of it considering J.M.’s mom was an employee of the district.

The ethic of care is based on nurturing, trust, and relationships (Shapiro & Stefkovich, 2005). When J.M.’s father was acting in a manner that the coach found excessively angry while using language the coach found offensive, he had the opportunity to view the situation from J.M.’s perspective. It is a testament to the coach’s character that J.M. trusted him enough to tell him personal information and hand over the gun and ammunition. There is no reason why J.M. could not have kept the gun and ammunition where it was when he entered the office. J.M.’s words were, “take care of them” because he thought his father “was going to kill him” (p. 6). This was a child reaching out for help and protection.

The record shows that the coach sought external support with the situation by taking J.M. to the state police barracks. It appears that the football coach was aware of the hierarchal structure found in traditional school settings and he reported accordingly. There is no mention of a family services referral or any support for the family at all for that matter. J.M. was placed in alternative education with no mention of counseling or any sort of rehabilitative services. Even if J.M.’s actions had been intentional, which of course they were not, there were no safeguards mentioned to help J.M. and his family after the event.
Ethic of the Profession

This case, much like the others to follow, is a serious moral dilemma that any administrator would find challenging. We can understand J.M.’s fear and although it is difficult to condone, we can understand J.M.’s father’s frustration. The emotions and challenging circumstances are intentionally written in a way that makes the reader understand that there was no true right or wrong answer. This case is unique in the fact that it is the nature of the offense, a potentially-loaded firearm, heightens the immediacy of action. The question at the heart of this paradigm’s analysis is one that cannot be answered by this study. The ethic of the profession is based on understanding where competing ethical codes clash. For the purpose of this analysis it will be necessary to make two assumptions about the football coach. First, we must assume that there are differences between his personal and professional codes of ethics as well as assume that there is a difference between his personal code of ethics and the community expectations.

Shapiro & Stefkovich (2005) indicate four types of clashes between ethical codes (p. 24). These are discussed starting on page 16 of this study. In this event, the coach was most likely torn between how he would choose to react to the situation as if it were personal and the responsibility he felt as the staff member with the most authority in the building. Further complicating the clash between his potential personal and professional codes is the fact that he most likely did not have formal administrative or leadership training. He was then forced to make a decision from a professional code of ethics that he may not completely understand. Second, the coach may have felt a clash of codes between his role as a coach and his before mentioned role as an “acting” administrator.
Coaches are mentors and motivators who are committed to developing student athletes physically, mentally, and emotionally. This is different than the role of an administrator, who is certainly committed to student development but in a more academic way.

Next is the potential clash of codes between the football coach’s perspective and the principal or superintendent’s perspective regarding the most ethical manner in which the situation should be handled. The courts state that the background is detailed specifically because it is important to this case. This indicates that the coach was providing much of the detail that illustrated the cause of J.M.’s fear. The record showed he testified at two separate hearings but was not a member of the decision-making team. His initial referral led to a set of consequences he had no control over. Last, whether or not the community expected a full 365-day suspension or not, the facts of the case do not indicate any participants objecting to the long suspension aside from J.M. and his mother. Considering the detail in the case, if the coach had been in full support it could be assumed that it would have been noted.

**Anderson v. Milbank School District 25-4**

The facts of this state that a female high school student was suspended for 2½ days for profane and inappropriate language on school property. Her mother was a cook in the school and typically gave her a ride home from school. On the day of the incident the mother left a note for Anderson to ride the bus. She received the note after the bus had left and said, “shit” to herself. The secretary informed her she would report her to the principal, which she did, and Anderson was subsequently suspended.
Ethic of Justice

The ethic of justice analysis in this case is relatively concise. The school rule prohibited profane language and Anderson broke the rule. The analytic approach rests on the question of whether or not it is a good rule. Unlike zero-tolerance policies for weapons, the district’s zero-tolerance policy for language did not have the element of discretion embedded within it. The argument for the fairness of this rule is weak without the ability to modify the suspension based on the context in which the incident occurred.

Understanding the need for schools to maintain a safe and orderly learning environment, it is reasonable that there would be a limit to that which a student can say without repercussion. This rule would be in better alignment with the ethic of justice if it were not absolute. There is neither a rational reason to the length of the suspension nor any justification for connecting the suspension to a 2% decrease in quarterly grades. In this particular district quarterly grades are not even entered or accounted for, making the 2% decrease an empty scare tactic. It appears that the district’s rule is misguided by unnecessary bureaucracy if a student who enters the school office after hours, occupied by only one secretary can be suspended for muttering a mild expletive under her breath.

Ethic of Care

Restating from above, this is a case of a lack of common sense. The ethic of care would have the secretary offer Anderson a ride home from school rather than punish her for her frustration. If nothing else, the secretary could have simply affirmed the
frustration Anderson was feeling while gently reminding her of the rule about profane language.

**Ethic of the Profession**

Analyzing this case from the ethic of the profession requires the comparison of ethical codes. There is no indication that the school secretary or the principal faced any clashes between their respective personal and professional codes. This might be because the suspension was very short and the reduction of Anderson’s grades would not affect her by the end of the semester. Looking at that statement from another perspective could indicate that there should be a significant conflict between the personal and professional codes of ethics. The point of discipline is to teach appropriate behavior. The lack of discretion the administrator showed in this case suggests that it is not an effective punishment. There is not enough information to further analyze potential conflict between competing professional codes of ethics, conflicting codes of ethics among administrators, or conflicting codes between the administrator and the community.

**Langley v. Monroe County School District**

This is another example of a common sense dilemma that became a legal issue. Langley was suspended for having a partially full can of beer in her car. Facts of the case explain that she had borrowed her mother’s car that day because her car would not start. Her parents had been at a cookout the day before and her mom inadvertently left her beer
can in the car. Langley did not notice it when she drove to school. This case is written extremely concisely and provides little in terms of detailed facts that aid in the analysis.

**Ethic of Justice**

This ruling relied heavily on the precedent of relying on the discretion and judgment of administrators in matters of school discipline. The court stated, “[h]owever misguided the school district’s actions may have been, the Langley’s appeal must fail” (p. 2). The legal system in the U.S. is intended to protect citizens, however in this case the exact opposite happened. The reliance on past precedent, a hallmark of U.S. justice, resulted in an entirely unjust suspension for an innocent girl.

**Ethic of Care**

There are a few facts of this case that need to be considered under the ethic of care. First, Langley was placed in an alternative education setting that the family claims did not provide an adequate education. She was an honor student and held multiple leadership positions in the school. When her appeal to return to regular school was denied by the district she dropped out of school and got her GED. The long term ramifications of the district’s decision is worthy of criticism.

While the court cites maintaining the discretion administrators currently have in schools, there are instances where this is detrimental to students. In this situation, there was no immediate threat, nobody was at risk, and there was no foreseeable danger.
Moreover; the assistant principal acknowledges that he believed that Langley truly did not know the partially full beer was in the car but that “was not the issue” (p. 2). It seems that in this case, the administrator did not recognize that the well being of students should be a central element of decision-making. The lesson Langley learned from her experience is unlikely one of trust or compassion.

**Ethic of the Profession**

There is not enough information to indicate an accurate analysis of this case, but if we took the position that the principal did not believe this to be the best course of action, why might that be? It is possible that the principal was caught between his own common sense and the expectations of the community. The intent of zero-tolerance policies is explicit; certain behaviors are not tolerated under any circumstances. In this case, possession of alcohol on school grounds is considered one of these offenses. The principal, who undoubtedly has had a hand in developing the policy, is responsible for holding the entire building accountable to the policy. He must model that accountability. It is also possible his ethical code clashed with the assistant principal’s ethical code. This case, while legal, is overwhelmingly unethical and had a most unfortunate end.

**Ratner v. Loudoun County Public Schools**

*Ratner* is a case that provides a limited amount of information regarding the case yet contains powerful language indicating that this was a serious ethical dilemma for the
court. In this case, a 13 year old boy was suspended for having a knife in his locker that he had taken from a suicidal fellow student. He received a four month suspension for trying to do the right thing for his classmate.

**Ethic of Justice**

The *Ratner* court is clear that the decision of the school board was legal. Zero-tolerance policies are intended to target weapons specifically and there is no questioning that keeping weapons out of schools is necessary. This case lends itself to an analysis from the ethic of justice that discusses the greater good of the community. Shapiro and Stefkovich tell us that the ethic of justice comes from two schools of thought, that the individual gives up some rights for the good of all or that the greater good of the community requires a communal understanding that challenges individual rights in certain situations.

The administrator could make the argument that because fellow student informed the principal that the knife was in Ratner’s locker, the event was not a quiet event between two friends. This being the case, it is possible that many students knew of the knife. The facts of the case indicate that Ratner was aware of the zero-tolerance policy and was taking a chance. Allowing a student to “get away with” violating a zero-tolerance policy in a middle school when other students know about the incident and are familiar with the policy could pose a host of problems. Middle school students are not known for their acute understanding of contextual factors that make each school discipline situation unique. In this respect, the administrator must punish Ratner as he
did or risk his credibility with students in the future. The distinguishing factor in this is Ratner’s intent, but other student’s may not understand that.

Ethic of Care

Ratner was a situation where using increased principles of care would have been appropriate. This boy should have been thanked for taking the knife for his friend, not punished for saving a life.

Ethic of the Profession

This is truly a moral dilemma that would challenge any administrator. Not only would there be a conflict between personal and professional codes, there might well be an emotionally charged clash between different segments of the community. Zero-tolerance brings out strong feelings on both sides and in this instance it is easy to some people fully supporting this “no nonsense” approach and some outraged that this ever got to the point of suspension in this instance.

Meta-Analysis of Case Content

Analysis of the specific questions that answer the research questions provided above reveal thematic trends worth noting. This study also revealed a number of meta-themes across the full spectrum of cases presented in this study. These meta-themes include gender disproportionality, inconsistent application of zero-tolerance policies for
offenses for which they were originally designed, and the degree to which there is a conflict of the appropriateness in application based on type of offense. Similar to other studies (Casella, 2003; Robinson, 2001; Skiba, 2000; Skiba & Peterson, 1999; Stader, 2004; Verdugo, 2002), this study indicates that boys have been included in zero tolerance more often than girls.

The data in this study also suggest that there is a discrepancy between the intent and interpretation of the law in terms of the infractions covered under zero tolerance. The Guns-Free School Act is clear that a limited set of weapons are included as zero-tolerance infractions, but these data only include one instance of an offense that falls within the federal definition of ‘weapon’ as it pertains to zero tolerance. It is far more likely that these policies lead to long-term suspensions for drugs and alcohol or smaller weapon type articles such as pocketknives. Moreover; the claims have evolved over the course of time to where persistent fighting and verbal threats are more likely to be punishable by long term suspension than they had been previously.

Finally, the data suggest that there is less controversy over the application of zero-tolerance policies for drugs and alcohol use than for weapons related offenses. This is counterintuitive to the original intent of these policies.
Chapter 6

Conclusion

School responses to student discipline are becoming increasingly restrictive and punitive. Many schools have moved towards zero-tolerance or something akin to “three strikes and you’re out” policies intended to make schools safer (Haft, 2000). These retributive policies that often result in suspension (whether in school or out) and expulsion are being used as reactive, rather than proactive measures to maintain safety in schools. Proponents of authoritarian and coercive retributive policies fail to recognize that there are long-term costs associated with exclusion policies to both the school and the greater community (Cameron & Thorsborne, 2001; Haft, 2000; Morrison, 2002). Colvin (2000) argued, “Coercion produces alienated bonds, which, if reinforced by continual coercive relations, produce chronic involvement in serious delinquent behavior”. He continues:

While most students resign themselves to [coercive social control], a significant number of students actively (usually as individuals) resist. Such resistance leads to further coercive controls and ultimately to complete alienation from both the school and external authority in general. While the intended outcome of schools is to create compliant students, the latent outcome is the creation of a number of young people who become more marginalized with even greater social-psychological deficits (p. 16).

School discipline is intended to be a tool with which educators can address student behavior issues and guide students into making better choices. One cannot argue the need for discipline in schools, however, one could make a compelling argument that
the “punishment should fit the crime”. When a student engages in an activity on school
grounds that violates an action that falls under the zero-tolerance umbrella, there is no
doubt that some action must be taken. Unfortunately, these policies provide limited room
for administrators to look at the context in which the act was committed. Moreover,
administrators do not consistently use the discretion written in to the policies when
assigning a punishment (Haft, 2000).

The shift toward retributive school discipline policies coincides with high profile
occurrences of school violence; namely school shootings. The new policies have all but
eliminated the use of context-specific discretion and opportunity to assist offenders in
making better choices. American schools have two overarching and concomitant goals.
At the most basic level, these include the responsibility to prepare students both
academically and socially, with the expectation that an educated citizenry will ensure
societal stability (Kaestle, 1983; Sergiovanni, 1994). Secondly, the goal of social
preparation has been aided by the development of pro-social programs ranging from drug
awareness, character education, and citizenship education. School discipline as a
component of social preparation has not found a prominent role in the school reform
movement.

On the surface zero tolerance makes sense. Schools should certainly be able to
discipline students who are in possession of such items such as alcohol or a knife to
school. This is where zero tolerance gets tricky. What happens when the student in
possession of a knife only has it because he was holding it for another student who had
threatened to commit suicide but brought the knife to a trusted friend rather go through
with the act? What if the half empty beer can found in a student’s vehicle was
inadvertently left there by the student’s mother the night before? Cases like these create an ethical dilemma for school leaders who are required to adhere to zero-tolerance policies regardless of the circumstances. Judges across the country have recognized the limitation of zero-tolerance policies. While most decisions on these cases side with school districts, numerous judges have taken the opportunity to insert discussion that express concern about the nature of zero-tolerance policies and the restrictions they place on school administrators’ discretion in decision-making when it comes to some school incidents.

While school violence on the whole has declined the high profile cases have created a sense of paranoia. The results were school discipline policies and harsh consequences for student infractions that in previous years would not have resulted in suspension or expulsion. If one purpose of education is to create the conditions for students to learn to function in a democracy, then punitive and restrictive discipline policies make little sense because they are based on authoritarian and coercive principles and do not reflect democratic principles (Hart, 2000). Moreover, these policies isolate students, creating greater detachment from schools in the students who need the most attention. Costenbader and Markson (1998) concluded that retributive policies (e.g. the use of planned ignoring, time-out, and suspension) to alter students’ negative behavior was ineffective in changing students’ delinquent behavior. Furthermore, their study and others have indicated that the use of these discipline measures actually lead to increased maladaptive behaviors and avoidance of school staff (Costenbader & Markson, 1998; Latimer, Dowden & Muise, 2005).
When faced with dilemmas, school leaders often look towards the parameters of law to make final decisions. When examining zero-tolerance cases brought before the court it is clear that the law fully supports the decision to exclude students who engage in activity that falls under zero tolerance policy. These cases, however, are perfect examples of how law does not always support what is ethical or in the best interest of students.

Zero-tolerance policies have been studied from multiple perspectives; however there is a lack of research that addresses the intersection of law, ethics, and educational leadership. This study has illustrated instances where there do not seem to be many conflicts with the application of zero-tolerance policies, namely in matters of drugs and alcohol. It has also illustrated instances where the application of the policy is so unjust few people would believe that the situation was real, such as in *J.M. v. Webster County* when a boy was suspended for turning in a gun he thought his father might use to shoot him. The courts have stated in many ways that the wisdom of zero tolerance is questionable but they can only decide on the legality of application, not the appropriateness.

School officials take on the responsibility of maintaining safe school environments. If zero-tolerance policies worked as intended and ensured a safe leaning environment for students there would be no need for this study. However administrators would be wise to reconsider the mindless application of zero-tolerance policies given the volume of literature indicating the detrimental effects for students and the lack of evidence supporting their effectiveness. These policies are only one tool administrator have at hand to address the complex, and often challenging school discipline issues they
face daily. The courts have recognized that the discretion they have protected has not been used responsibly.

A Multi-Tiered Approach

Some scholars have suggested implementing a multi-tiered approach to discipline that actively includes stakeholders at the developmental stages (Astor, Benbenishty & Meyer, 2004). Others have recommended refining the school administrator’s ability to accurately assess threat levels (Cornell, Sheras, Gregory & Fan, 2009; Cornell, 2009). Still others call for providing greater mental health services in schools (Adelman & Taylor, 1998, 2000a, 2000b). One consistency among scholars is the expressed need to find innovative approaches to school order and safety. Scholars agree that school safety is dependent upon the school environment and recommend both school-wide and targeted interventions. There is a missing element in the basic premise of these suggestions, specifically, the needs of the offender are not valued or addressed.

Re-designed school discipline policies based on restorative justice principles could be implemented to fill the gaps left by school-wide and targeted interventions. This approach would help prevent school violence while responding to student discipline problems by focusing on the needs of both the victim and the offender. Principles of restorative justice have been used to resolve litigation involving juvenile offenders in the legal system. These principles have recently been explored for compatibility with public schools (Haft, 2000). Further study into the use of a restorative justice, both philosophy and practice, may assist educators in better preparing students to live as productive
citizens of the school community while simultaneously decreasing incidences of school violence.

The goals of restorative justice practices work toward building a stronger community both within and outside of the school. Additionally, the approach addresses students’ social development and provides opportunities for the offending student to intentionally make amends for those affected by the behavior. Restorative justice is defined as “a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future” (Haft, 2000; Latimer, Dowden & Muise, 2005). It holds the offender accountable for their conduct while seeking to repair and restore the integrity of the community after an offense has occurred.

Within the school context this would include teaching pro-social skills aligned with the restorative justice philosophy, pro-active classroom management, mediation between stakeholders, joint decision making of all stakeholders in both degree of severity of the infraction and the degree of reparation to be made by the offender, and follow up counseling (Cameron & Thorsborne, 2001; Costenbader & Markson, 1998; Morrison, 2002; Watchel, 2003). Research conducted in schools in Japan and Australia have reported that positioning their discipline practices within a restorative justice framework has resulted in a decrease in the number of student discipline infractions and created a greater sense of community within the schools (Cameron & Thorsborne, 2001; Latimer, Dowden & Muise, 2005). Restorative justice reinforces commitment to all students for the development of pro-social and community-building skills. Moving towards a
restorative justice model of school discipline would allow educators to better serve the needs of the community, school, and the students.

There have been many recommendations for alternative discipline practices to remedy the flaws of zero-tolerance policies. The most common includes the implementation of school discipline and school violence prevention programs that function on three levels; primary, secondary, and tertiary (American Psychological Association, 2006; Astor, et al., 2004). Primary prevention strategies are intended to target all students in schools. Secondary prevention strategies target those students who may be at risk for violence. Tertiary strategies target students who have already engaged in violent or disruptive behaviors.

It is at the tertiary level that policy makers and schools are employing practices that are counterintuitive to the work they are doing at the primary and secondary levels. As demonstrated by zero-tolerance policies, traditional modes of school discipline are typically comprised of a sequence of punitive consequences. These policies are intended to punish the offender but do not allow for critical examination of the underlying causes of school violence. They also lack rehabilitative components that have the potential to prevent incidents of school violence in the future. Having established that zero-tolerance policies are legal does not resolve the undeniable fact that the application of these policies is not always ethical. The American K-12 public education system has become adept at pushing kids out then reacting with disbelief when those same alienated children have little concern for others in the school setting. School leaders might turn to a restorative justice model of school discipline to alleviate some of the problems suspension and expulsion causes.
The key strengths of using restorative justice as a tertiary level of discipline are that the practices provide students with an avenue for making amends for misbehavior and offer services for both the victims and the offender to resolve and prevent future incidents. Restorative justice has the potential to alleviate the alienation and disengagement students feel in school and create a stronger school community. The research on student engagement and community building tells us that these two components have a positive effect on reducing violence in schools (Chen, 2008; Martinez, 2009; Skiba & Rausch, 2006).

**Multiple Approaches Working Together**

While preliminary studies of restorative justice at the school level show promise (Hart, 2000), there is little data showing the implementation and impact at the classroom level. Questions remain about the ways in which teachers’ use of restorative justice contributes to and influences behavior in the classroom. Research on school-wide approaches such as Ecological Classroom Management (ECM), Positive Behavior Support and Interventions (PBIS) and the newly legislated Response to Intervention (RTI) demonstrate positive school-level effects (Sugai & Horner; 2002). What is needed is an extensive study of how classroom teachers understand and implement principles and strategies such as ECM, PBIS, RTI, and how principles and strategies of restorative justice both complement and expand these to form a comprehensive approach to school discipline.
When speaking of school discipline, the phrase ‘school context’ is frequently used. Much like ‘best interest of the student’, the term is vague and defined in many ways. Researchers need to gain better understanding of what this term means. Astor, Guerra, and Van Acker (2010) suggest designing studies around social-organizational factors and exploring spatial-temporal research to meet this need. One element worth examining is how stakeholders within the ‘school context’ understand the law. One of the problems identified in this study was the fact that in many instances the administrator made decisions regarding the future of children as if zero tolerance were the only option. This is troubling given the extensive discretion administrators are provided within the policy. Students who engage in activities and behavior that would lead to suspension need communities and educators to provide them more support, not reinforce the feeling that they do not belong.

Determining systemic legal literacy is one way to begin the process of change. One element that every holding in this study had in common was the courts’ comments indicating that it was not their role to second guess or limit administrator discretion. It is easy to imagine zero tolerance from an alternative perspective; one in which administrators comply with the federal regulations and use the discretion written into the law to make decisions that are not mindless of the impact these decisions have on students’ lives.

Summary

Zero-tolerance policies were hastily constructed yet have become a mainstay of school discipline. There are few studies that look at the long-term effect large scale school safety and violence policies have had since the implementation of these policies.
There is a substantial amount of money going into schools to promote school safety measures. Rather than continue to fund projects that are loosely connected to the funding goal, scholars could look into cost-benefit studies of school safety initiatives. Using available funding more effectively might provide opportunities to make sustainable changes.

In summary, school discipline might be better understood through deliberate attempts to identify the relational elements that makes schools safe. This study is not suggesting that zero-tolerance should be eliminated entirely, but is does suggest that administrators would be wise to use the discretion provided them to make sound decisions for the good of all students.
Resources


*Crawley v. Sch. Bd. of Pinellas County, 721 So.2d 396 (1998).*


*D.T. v. Harter, 844 So.2d 717 (2003).*


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