EDUCATING EXPELLED STUDENTS AFTER NO CHILD LEFT BEHIND: MENDING AN INCENTIVE STRUCTURE THAT DISCOURAGES ALTERNATIVE EDUCATION AND REINSTATEMENT

Maureen Carroll*

Expelled students have intense educational needs, yet few states protect their rights to alternative education during the period of expulsion or reinstatement to mainstream education following the period of expulsion. Instead of strengthening those rights, the No Child Left Behind Act (NCLB) creates an incentive structure that encourages the exclusion of expelled students from all access to educational opportunity.

The lack of educational access for expelled students is a serious concern. Students of color are expelled at rates that far exceed their representation in the school population. As a result, denying expelled students access to education exacerbates the equitable harms caused by racial disparities in the application of school discipline and widens the achievement gaps caused by discrimination and inequality in the school system. Moreover, the widespread adoption of zero tolerance policies has created a situation in which American public schools expel tens of thousands of students each year, often for minor, first-time offenses. Depriving these students of access to education has a devastating impact on their lives, and ultimately leads to public expenditures that far exceed the cost of public education.

This Comment examines legal strategies for counteracting NCLB's exclusionary incentives and expanding expelled students' access to education. Changes to the implementation of the NCLB accountability framework could change the incentive structure from the top, while litigation challenging exclusion at the school level could change the incentive structure from the bottom. In addition, strengthening the educational guarantees provided by the state constitutions could close the loopholes through which too many expelled students are deprived of educational opportunity.

---

* Articles Editor, UCLA Law Review, Volume 56. J.D. Candidate, UCLA School of Law, 2009; B.S., Princeton University, 1998. I owe many thanks to Professor Stuart Biegel for generously sharing his time and insight as my Comment advisor. I would also like to thank Shayla Myers, Professor Gary Rowe, and Paul Weitzel for their valuable encouragement, advice, and feedback.

INTRODUCTION

American public schools expelled more than one hundred thousand students during the 2004–2005 school year.[1] Research suggests that twenty-five thousand to fifty thousand of those students were completely deprived of access to public education.[2] Many will never return to school.[3]

1. According to projections by the Office for Civil Rights (OCR), a subdivision of the Department of Education (ED), 106,222 public school students were expelled during the 2004–2005 school year. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2004 CIVIL RIGHTS DATA COLLECTION, http://ocrdata.ed.gov/ocr2004rv30/xls/nation-projection.xls [hereinafter OCR 2004]. *But see* Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 283 (2006) ("The true number of students suspended and expelled is unknown because school districts and states do not adequately keep and report this data. . . . The actual numbers may be much greater than those reported.").

2. Based on school surveys, OCR estimated that 26,349 expelled students, about 25 percent, experienced "total cessation of educational services" in 2004–2005. OCR 2004, *supra* note 1. Other

While many scholars have criticized zero tolerance policies and other aspects of the expulsion process,[4] few have focused on what students experience following expulsion.[5] Calling attention to the overuse and unjust imposition of expulsion is valuable and necessary, but not sufficient to protect students' access to educational opportunity. The expulsion rate shows no sign of slowing, and ignoring the expelled will leave abuse of their rights unseen and unchecked.[6] Preventing such abuse requires attention to what

---

studies put the number much higher. For example, ED estimated that 44 percent of the students expelled in 1996–1997 were not referred to an alternative education program. *See* Joan M. Wasser, Note, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 761–62 (1999). Of students expelled under the Gun-Free Schools Act in 2003–2004, 54 percent were not referred to alternative education. *See* U.S. DEP'T OF EDUC., REPORT ON THE IMPLEMENTATION OF THE GUN-FREE SCHOOLS ACT IN THE STATES AND OUTLYING AREAS: SCHOOL YEAR 2003–04, at 6 (2007), *available at* http://www.ed.gov/about/reports/annual/gfsa/gfsa03–04rpt.pdf [hereinafter GFSA 2003]. The uncertainty in this area reflects the general lack of information regarding expelled students' educational placement and outcomes. *See* Rokeach & Denvir, *supra* note 1, at 283–84 ("Little or no research has been conducted to directly measure the effect of suspension and expulsion upon student behavior or to find out what happens to expelled students.").

3. Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 66–67 (2002) ("[S]tudies show that many [suspended or expelled students] will not return to school even when the sanction expires, and those who do return are more likely than other students to fail their courses.").

4. *See, e.g.*, Paul M. Bogos, *"Expelled. No Excuses. No Exceptions."—Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311*, 74 U. DET. MERCY L. REV. 357 (1997); Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J. 159; Anthony J. DeMarco, *Suspension/Expulsion—Punitive Sanctions From the Jail Yard to the School Yard*, 34 NEW ENG. L. REV. 565 (2000); William Haft, *More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795 (2000); Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in* Brown v. Board of Education, 9 U.C. DAVIS J. JUV. L. & POL'Y 289 (2005); Rokeach & Denvir, *supra* note 1; Alicia C. Insley, Comment, *Suspending and Expelling Children From Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2001).

5. For academic attention to student experiences following expulsion, see Joseph W. Goodman, Leandro v. State *and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina*, 83 N.C. L. REV. 1507 (2005); Amy E. Mulligan, *Alternative Education in Massachusetts: Giving Every Student a Chance to Succeed*, 6 B.U. PUB. INT. L.J. 629 (1997); O'Kelley H. Pearson, Note, *Education Law—Fundamentally Flawed: Wyoming's Failure to Protect a Student's Right to an Education,* RM v. Washakie County School District Number One, *102 P.3d 868 (Wyo. 2004)*, 6 WYO. L. REV. 587 (2006); Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582 (1996).

6. The OCR projected an increase of 17,091 more expulsions over a two-year period, from 89,131 expulsions during the 2002–2003 school year to 106,222 expulsions during the 2004–2005 school year. *See* OCR 2004, *supra* note 1; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2002 ELEMENTARY AND SECONDARY SCHOOL SURVEY, http://ocrdata.ed.gov/ocr2002rv30/wdsdata.html [hereinafter OCR 2002]; *see also* Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 86 (2003) ("Although the relatively sorry state of American public education has been near the top of the public agenda in recent years, the massive turn

happens to these students after expulsion, including the legal parameters that define expelled students' access to public education.[7]

Expelled students have a particularly strong need for education. Exclusion[8] magnifies the heightened risks students face after expulsion, such as an increased likelihood of becoming involved in the juvenile justice system or permanently dropping out of school.[9] The structure and supervision of the school environment can reduce students' involvement in high-risk or illegal behavior, while exclusion from that environment can make legal trouble more likely.[10] Similarly, ongoing access to education can counteract the risk of school alienation and permanent dropout, while denying alternative education and reinstatement can make dropping out the only available option.[11]

Despite expelled students' intense educational needs, the current legal structure provides few guarantees of alternative education during the period of expulsion or reinstatement to mainstream education following the period of expulsion.[12] State laws vary widely, often limiting or eliminating educational opportunities for expelled students; only thirteen states require school districts to provide expelled students with an alternative educational program.[13] Federal law enhances expelled students' educational rights under some circumstances.[14] The No Child Left Behind Act (NCLB), however,

---

toward expulsions and suspensions and the potentially dire consequences reported by researchers has generally eluded this focus." (footnote omitted)).

7. *Cf.* Rokeach & Denvir, *supra* note 1, at 300–01 ("[T]here is a need for more research on what happens to youths who have been suspended or expelled to find out how these punishments influence their future.").

8. Throughout this Comment, expulsion refers to a disciplinary removal that prohibits a student from attending a particular public school or educational program. Exclusion, in contrast, refers to postexpulsion decisions that prohibit a student from attending any public school or educational program.

9. Blumenson & Nilsen, *supra* note 6, at 81–83; Bogos, *supra* note 4, at 384.

10. Sasha Polakow-Suransky, *America's Least Wanted: Zero-Tolerance Policies and the Fate of Expelled Students*, *in* THE PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE, AND JUVENILE INJUSTICE 101, 122 (Valerie Polakow ed., 2000); Rokeach & Denvir, *supra* note 1, at 286 ("Time out of school and school alienation are associated with increased risk of juvenile delinquency and incarceration."); Reed, *supra* note 5, at 583 ("Failing to provide [expelled] students with an educational alternative . . . contributes to the growing problems of drug abuse, crime, and increased utilization of public assistance . . . .").

11. *See* Blumenson & Nilsen, *supra* note 6, at 82–83.

12. *See infra* Part I.

13. Wasser, *supra* note 2, at 761; *see also* GFSA 2003, *supra* note 2, at 18–129 (collecting survey data regarding alternative education from each state and U.S. territory).

14. Goodman, *supra* note 5, at 1519 (noting that the Individuals with Disabilities Education Act requires alternative education after expulsion for students with disabilities); Reed, *supra* note 5, at 586 (describing due process requirements in expulsion hearings); *see also* Goss v. Lopez, 419 U.S. 565, 572 (1975) (requiring procedural due process protections in school discipline proceedings).

harms expelled students by creating an accountability system that rewards schools for engaging in exclusionary practices.[15]

The lack of educational access for expelled students cannot be taken lightly, especially in light of the fact that schools expel students of color at rates that far exceed their representation in the school population.[16] Denying educational access after expulsion thus widens existing achievement gaps caused by discrimination and inequality in the public school system.[17] While research suggests that racial disparities in school discipline may result from unconscious bias,[18] the decision to adopt policies denying alternative education or reinstatement for expelled students occurs on a conscious level. Given this country's history of school segregation and other legally sanctioned discrimination against students of color, the conscious decision to deny educational opportunity to those expelled, a group disproportionately composed of nonwhite students, should not be accepted in the absence of a strong justification.

Such a justification does not exist. Despite claims to the contrary, the increasing use of expulsion and the high costs of exclusion show that denying educational opportunity to expelled students is inappropriate, unfair, and unwise.[19] Zero tolerance policies have been widely adopted, fundamentally

15. *See* William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 585 (2006) (noting that administrators in some schools might respond to NCLB and other accountability systems by excluding low-performing poor and minority students from mainstream education); Daniel J. Losen, *Graduation Rate Accountability Under the No Child Left Behind Act*, *in* NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD 105, 105 (Gail L. Sunderman, James S. Kim & Gary Orfield eds., 2005). *See generally* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) (describing the negative incentives created by the NCLB accountability structure).

16. Josie Foehrenbach Brown, *Escaping the Circle by Confronting Classroom Stereotyping: A Step Toward Equality in the Daily Educational Experience of Children of Color*, 11 ASIAN L.J. 216, 225 (2004) ("The overrepresentation of African-American students generally and African-American boys in particular among those disciplined, suspended, and expelled from public schools has been widely reported."). During the 2004–2005 school year, African American students comprised 17 percent of the school population but received 34 percent of all expulsions. OCR 2004, *supra* note 1. Latino students comprised less than 19 percent of enrollment but received more than 20 percent of the expulsions. OCR 2004, *supra* note 1.

17. *See* 20 U.S.C. § 6301 (Supp. 2005) (acknowledging "the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers"); OCR 2004, *supra* note 1 (indicating that schools disproportionately expel African American and Latino students); A. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 147 (2000) ("[S]tudents who are kicked out of school are typically the students who need education the most; many of them come from low-income families or are at risk."); *cf.* Bogos, *supra* note 4, at 380–81 (describing a National School Boards Association (NSBA) survey finding that "suspended students are usually the very students who most need direct instruction").

18. *See* Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 335–36 (2002).

19. *See infra* Part II.

changing the role of expulsion as a disciplinary tool.[20] Schools now expel large numbers of young students for minor, nonviolent, first-time offenses, undermining justifications for depriving expelled students of all access to educational opportunity.[21] Complete exclusion has devastating effects on students' lives. In the short term, it increases the likelihood that the student will engage in high-risk behavior and become involved with the juvenile justice system. In the long term, it limits students' ability to support themselves and contributes to the school-to-prison pipeline.[22] Even if these effects could be considered fair, denying expelled students access to education would still be financially unwise. Excluding a single student may ultimately require hundreds of thousands of dollars in public expenditures, resulting in an exponentially higher cost to society than the amount required for public education.[23]

This Comment proposes and analyzes legal strategies that should be used to counteract NCLB's exclusionary incentives and expand expelled students' access to education. These strategies derive from the text of NCLB, procedural due process rights recognized under the U.S. Constitution, and educational rights created by the state constitutions.[24]

This Comment proceeds in three parts. Part I provides an overview of the law governing expelled students' access to education, and finds that the existing legal structure does not sufficiently protect educational opportunity for these students. In particular, NCLB creates harmful exclusionary incentives. Part II explores the severe equitable and financial consequences of failing to educate expelled students. Part III proposes and analyzes legal

20. Blumenson & Nilsen, *supra* note 3, at 64 ("Public school zero tolerance rules represent a sea change in American educational policy. After years of campaigns aimed at keeping children at risk *in* school, the zero tolerance effort seeks instead to identify troublesome students and get them *out* of school." (emphasis in original)).

21. *See* Kim Fries & Todd A. DeMitchell, Comment, *Zero Tolerance and the Paradox of Fairness: Viewpoints From the Classroom*, 36 J.L. & EDUC. 211, 212–13 (2007) ("While the impetus for zero tolerance was weapons possession, zero tolerance policies in most states have expanded to include nonviolent behavior such as drug possession, defiance of authority, habitual profanity, defacing school property, and gang-related behavior on school campuses.").

22. *See, e.g.*, Hanson, *supra* note 4, at 338–40; Rokeach & Denvir, *supra* note 1, at 284–86; Reed, *supra* note 5, at 605–07. For an overview of the meaning and effects of the school-to-prison pipeline, see NAACP LEGAL DEFENSE FUND, DISMANTLING THE SCHOOL TO PRISON PIPELINE (2005).

23. Bogos, *supra* note 4, at 386 (noting that expelled students often get into legal trouble within one year of expulsion, and that incarceration costs more than $23,000 per person per year compared to $5000 per year for a public school student); Hanson, *supra* note 4, at 330, 338–39 (noting that expelled students are more likely to drop out, and that a student who drops out and becomes involved in drugs or crime creates a societal cost of $1.7 to $2.3 million in supportive services such as unemployment benefits and public support).

24. *See infra* Part III.

strategies to counteract exclusionary incentives and to promote alternative education and reinstatement to mainstream education. The Comment concludes that society cannot afford to continue its willful blindness to the consequences of exclusionary discipline.

I. LEGAL PROVISIONS GOVERNING THE EDUCATION OF EXPELLED STUDENTS

Expelled students have two distinct needs: alternative education during the period of expulsion and reinstatement to the mainstream setting following the period of expulsion. As this Part explains, an uneven patchwork of state laws and local policies provides few guarantees that either need will be met. Instead of addressing these needs by replacing that uneven patchwork with an across-the-board mandate for alternative education and reinstatement, the No Child Left Behind Act (NCLB) creates incentives for educational agencies to exclude expelled students from all educational opportunity.

A. Uneven Protections Offered By State Laws

Few states protect an expelled student's right to a public education; only thirteen states require school districts to provide students with an alternative placement after expulsion.[25] As the following examples indicate, an expelled student's right to educational services may derive from one of two sources: (1) state legislation or (2) the education clause of the state constitution. The exact contours of that right are often unclear, regardless of its source.

25. States requiring alternative education for all expelled students include California, Connecticut, Delaware, Hawaii, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, New York, Oregon, Pennsylvania, and West Virginia. GFSA 2003, *supra* note 2, at 18–129. As of 2000, twenty-six states required school districts to establish alternative educational programs for which expelled students are eligible. ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 14 (2000) [hereinafter OPPORTUNITIES SUSPENDED], *available at* http://www.civilrightsproject.ucla.edu/research/discipline/opport_suspended.php. In some states, however, school districts retain the discretion to deny any expelled student admission to the alternative programs they are required to establish. *See, e.g.*, C.S.C. v. Knox County Bd. of Educ., No. E2006-00087-COA-R3CV, 2006 WL 3731304, at *10 (Tenn. Ct. App. Dec. 19, 2006) (finding that while a Tennessee statute required the school board to establish an alternative school for suspended and expelled students in grades seven through twelve, the statute did not "mandate[ ] that all students suspended or expelled from their regular schools have the *right* to attend an alternative school").

1. State Statutes Determining Postexpulsion Educational Access

State statutes vary widely in the scope of educational rights afforded to expelled students. California has taken an exceptional approach, creating a clear statutory entitlement to both alternative education and reinstatement.[26] Following expulsion, a school district must refer the student to an alternative educational program.[27] School districts must maintain detailed information about the type of educational services provided both during and after the period of expulsion.[28] At the time of the expulsion, the student must be provided with a rehabilitation plan governing his or her reentry into mainstream education, and the district must set a date to review the student's eligibility for reinstatement.[29] During that review, there is a presumption of reinstatement that can be overcome only if the student either failed to comply with the rehabilitation plan or poses an ongoing threat to campus safety.[30]

Louisiana also provides for the education of expelled students, but unlike California, its statute contains several exceptions.[31] The clearest exception applies to students expelled for possessing a weapon or distributing drugs.[32] A district does not have to provide alternative education to these students,[33] who must complete "an appropriate rehabilitation or counseling program."[34] For students expelled for reasons other than weapon possession or drug distribution, a school district must provide an alternative educational

26. *See* Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 Amendments to the Individuals With Disabilities Education Act*, 47 AM. U. L. REV. 487, 553 (1998) ("California . . . requires the provision of educational services to all expelled students.").

27. *See* CAL. EDUC. CODE § 48915(d) (West 2006) (requiring alternative education for students expelled under the zero tolerance policy); *id.* § 48915(f) (requiring alternative education for students expelled under provisions other than the zero tolerance policy); *see also id.* § 48916.1 (describing the required features of alternative educational programs for expelled students).

28. *Id.* § 48916.1(e)(1). The state may withhold funds if a school district fails to maintain this data. *Id.* § 48916.1(e)(2).

29. *Id.* § 48916(b). The hearing date must be no later than either the last day of the semester after the expulsion or one year after the expulsion, depending on the grounds for the expulsion. *Id.* § 48916(a).

30. *Id.* § 48916(c).

31. *See* LA. REV. STAT. ANN. § 17:416 (Supp. 2008).

32. *Id.* § 17:416(B).

33. *Id.* § 17:416.2(A)(1).

34. *Id.* § 17:416(B)(3)(d)(i). The student must pay for the counseling program, but can obtain a waiver from the counseling requirement "upon a documented showing by the student that no appropriate program is available in the area or that the student cannot enroll or participate due to financial hardship." *Id.* § 17:416(B)(3)(d)(ii), (iii).

program unless it has obtained a waiver from the state.[35] An educational agency can request such a waiver based on "economically justifiable reasons."[36]

Even when a student is placed in an alternative education program, obstacles to educational opportunity remain. A student can be dismissed from the alternative program for "disorderly conduct."[37] Following the period of expulsion, the student cannot return to a mainstream school except by permission of the school board; the statute thus implies a presumption against reinstatement.[38]

One recent case shows the extent to which the Louisiana statute fails to protect expelled students' access to education.[39] On November 11, 2005, a Louisiana school expelled an eighth grader for attending a school function while under the influence of marijuana.[40] The school board refused to provide the student with alternative education, provoking multiple phases of litigation that extended from June 2006 through April 2007.[41] The student's parents provided the student with home schooling throughout the remainder of the 2005–2006 academic year, and the litigation led to the student's reinstatement to the mainstream school at the start of the 2006–2007 school year. The school board refused to recognize the student's home schooling as a basis for promotion to the ninth grade, however, and

35. *Id.* § 17:416(A)(2)(c) ("Unless otherwise defined as a permanent expulsion and except as otherwise provided by Subsections B and C of this Section [involving expulsion for weapons possession and drug distribution], an expulsion shall be defined as a removal from all regular school settings for a period of not less than one school semester, during which time the city, parish, or other local public school board shall place the pupil in an alternative school or in an alternative school setting unless the board is exempt as provided by law from providing such alternative school or alternative school setting.").

36. *Id.* § 17:416.2(B)(1) ("Any city, parish, or other local school system unable to comply with the provisions of Subsection A of this Section for economically justifiable reasons as defined by the State Board of Elementary and Secondary Education may apply to the board on a school year to school year basis for a waiver from the requirements of these provisions.").

37. *Id.* § 17:416.2(F) ("Any expelled student attending an alternative education program and exhibiting disorderly conduct shall be dismissed from the alternative education program and shall not be permitted to return to the alternative education program until his period of expulsion has ended.").

38. *Id.* § 17:416(B)(3)(a)(i) ("No student who has been expelled pursuant to the provisions of this Section shall be admitted to any public school in any other parish or city school system in the state except upon the review and approval of the school board of the school system to which he seeks admittance.").

39. *See* B.W.S., Jr. v. Livingston Parish Sch. Bd., 960 So. 2d 997 (La. Ct. App. 2007).

40. *Id.* at 998.

41. *Id.* Prior to the expulsion, the state had not waived the requirement that the district provide an alternative placement; the board allegedly filed a retroactive application for a waiver while the litigation was pending. *Id.* at 1000 n.2 ("[P]laintiffs filed suit in federal court on October 30, 2006, seeking damages due to the School Board's excessive punishment for a serious offense, its failure to provide the child with an alternative education, its retroactive application for a waiver from providing alternative education to allegedly prevent this child from receiving an education, its refusal to administer the LEAP test [required for promotion to the ninth grade], and its refusal to evaluate the child's home schooling to determine her grade placement.").

forced her to repeat the eighth grade even though her standardized test scores indicated that she was ready for ninth-grade work.[42] In the final stage of the litigation, the appellate court "reluctantly" concluded that it could grant no further relief, despite its finding that "the institutional delays in the judicial system and in the School Board's actions fighting every attempt by the parents to have their child maintain her education have cost this child one year of her academic life."[43] The court implied that the school had no valid reason for denying alternative education, noting that the student "might have a damages claim" resulting from that failure.[44] A concurrence called it "a sad day for education and justice . . . when administrators . . . so miserably fail to do justice and hurt a child."[45]

A Tennessee statute governing alternative education provides even fewer educational opportunities than the Louisiana statute, and less clarity. It does not require school districts to establish alternative schools for expelled students in grades one through six.[46] For expelled students in grades seven through twelve, each school district must establish at least one alternative school.[47] However, the Tennessee Court of Appeals has found that the statute does not create a right to alternative education for expelled students, even in grades seven through twelve.[48] While the statute requires that the district establish an alternative program serving those grades, admission to or exclusion from the program remains a matter of local discretion.[49] Similarly, while local educational agencies operating alternative schools are required to establish "formal transition plans" for returning alternative school students to mainstream education,[50] that requirement may not create any corresponding right to reinstatement since the statute also explicitly permits school districts to exclude a student who "is under suspension and/or expelled."[51]

42. *Id.* at 998. The school board allowed the student to take the standardized test required for promotion to the ninth grade only as a result of the litigation. *Id.*

43. *Id.* at 1001; *see also B.W.S., Jr.*, 936 So. 2d at 183 (Johnson, J., dissenting) ("In the event of expulsion, LA. REV. STAT. § 17:416(A)(2)(c) mandates that the local school district provide an alternative education to the expelled student. The Livingston Parish School District has not only ignored the statutory mandates, the system has refused to cooperate with the family's effort at home schooling.").

44. 960 So. 2d at 1002.

45. *Id.* at 1002 (Welch, J., concurring).

46. *See* TENN. CODE ANN. § 49-6-3402(a) (Supp. 2007).

47. *Id.*

48. *See* C.S.C. v. Knox County Bd. of Educ., No. E2006-00087-COA-R3CV, 2006 WL 3731304, at *10 (Tenn. Ct. App. Dec. 19, 2006).

49. *Id.*

50. TENN. CODE ANN. § 49-6-3402(i)(1).

51. *Id.* § 49-6-3401(f) ("Nothing in this title shall require an LEA to enroll a student who is under suspension and/or expelled in an LEA either in Tennessee or another state.").

Nonetheless, the statute does appear to contemplate reinstatement. A student attending an alternative school accrues credits towards graduation as though he or she were still enrolled in the mainstream school,[52] yet "[n]o student may graduate based solely on attendance in alternative schools."[53]

Of all the state statutes restricting the educational rights of expelled students, Michigan's may be the harshest.[54] The Michigan statute allows permanent expulsion without alternative education. Under this zero tolerance statute, a school district must completely exclude students expelled for weapons offenses unless it has established certain narrowly defined alternative programs. Where a district has established an alternative program, it retains discretion to determine who may attend.[55] An expelled student who seeks to return to mainstream education must allow a minimum time period to elapse, then follow the reinstatement procedures specified in the statute. These procedures include a formal petition by the student before a maximum of two separate school boards,[56] and must be followed no matter how much time has elapsed since the expulsion.[57]

2. Expelled Students' Educational Rights Under State Constitutions

Where state legislation does not provide a clear right to education after expulsion, students have asked courts to recognize a right to alternative

52. *Id.* § 49-6-3402(b).

53. *Id.* § 49-6-3402(a).

54. *See* MICH. COMP. LAWS. ANN. § 380.1311 (West Supp. 2008). Commentators have called the Michigan law the harshest zero tolerance statute in the country. *See, e.g.*, Bogos, *supra* note 4, at 379 ("Among the state legislatures which have enacted a zero-tolerance policy on weapons, Michigan's may be the harshest. . . . [E]xpelled students get no second chance nor a guarantee of attending an alternative education program." (footnote omitted)).

55. MICH. COMP. LAWS. ANN. § 380.1311(3) ("Except if a school district operates or participates cooperatively in an alternative education program appropriate for individuals expelled pursuant to subsection (2) and in its discretion admits the individual to that program, and except for a strict discipline academy established under sections 1311b to 1311*l*, an individual expelled pursuant to subsection (2) is expelled from all public schools in this state and the officials of a school district shall not allow the individual to enroll in the school district unless the individual has been reinstated under subsection (5)." (footnote omitted)). A 1997 study by the Michigan Department of Education illustrates the impact of these restrictions: Only 8.7 percent of expelled students were placed in an alternative school. Polakow-Suransky, *supra* note 10, at 109.

56. The student and/or parent initiate these procedures by completing a petition for reinstatement, without assistance from the district. The school board then appoints a committee to review the petition, with optional input from the superintendent of schools. The review results in a recommendation to the school board that must then reach a final decision at its next regularly scheduled meeting. MICH. COMP. LAWS ANN. § 380.1311(5). The statute also specifies which factors the school district must consider when determining whether reinstatement is appropriate. *Id.* § 380.1311(5)(e).

57. *Id.* § 380.1311(3).

education under the state constitution's education clause.[58] Every state constitution contains a provision establishing a system of public education.[59] Many of those provisions create an individually enforceable right to education, though the nature and extent of that right varies.[60] Among the states that have addressed the issue, many have found that the state education clause does not create a fundamental right, especially within the context of student discipline.[61] As described below, however, courts in some states have interpreted education clauses to require alternative education for expelled students.

The West Virginia Supreme Court of Appeals has held that the education clause of the state constitution requires the state to provide expelled students with alternative education during the period of expulsion "in all but the most extreme cases."[62] In *Cathe A. v. Doddridge Board of Education*,[63] the Doddridge County Board of Education imposed a twelve-month expulsion after a student brought two knives onto a school bus.[64] The Board refused to provide the student with a free alternative education program, consistent with a policy issued by the state superintendent of schools.[65] The policy provided that expelled students were not entitled to state-funded education during the period of expulsion.[66]

58. *See generally* Reed, *supra* note 5, at 593–600.

59. For a complete list of state constitutional education clauses, see Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 134–40 (1989).

60. *See* Reed, *supra* note 5, at 593–602; Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 527–32 (2007); *see also* John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence From the Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1.

61. *See* Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095 n.4 (Mass. 1995) (collecting cases); Blumenson & Nilsen, *supra* note 6, at 104–05 ("At this point, many state courts have held education to be a fundamental right, and many have held to the contrary." (footnote omitted)); Goodman, *supra* note 5, at 1516 n.51 (collecting cases).

62. Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 351 (W. Va. 1997); *see also* Blumenson & Nilsen, *supra* note 6, at 109–10 ("[T]he West Virginia Supreme Court first found the failure to provide alternative education to expelled students unconstitutional per se, later modifying its ruling to allow a case-by-case determination in which the state could attempt to meet its burden by a strong showing that particular, extreme circumstances made no alternative setting feasible." (citing Philip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 916 (W. Va. 1996), *overruled by Cathe A.*, 490 S.E.2d 340)).

63. 490 S.E.2d 340.

64. *Id.* at 344–45.

65. *Id.* at 345.

66. *Id.* at 350.

The court found the per se exclusionary policy "incompatible with the place of education as a fundamental, constitutional right in this State."[67] Applying strict scrutiny analysis, the court found that the state was required to provide expelled students with alternative educational services unless it could make a "strong showing of necessity."[68] The court indicated that the state could meet that burden only under "extreme circumstances," where "a student's actions are so egregious, that in order to protect teachers and other school personnel . . . the State may determine that there is a compelling state interest not to provide an alternative to that particular expelled student."[69] By allowing for this exception, the decision modified the ruling below, which had stated that "[f]orced ignorance, by failing for 12 months to provide a student with a publicly funded education, is not a rational or appropriate remedy for student misconduct regardless of the severity of such misconduct."[70]

While the majority took great pains to characterize the exception as a narrow one, one dissenter expressed concern for the students who could be legally excluded as a result of the decision.[71] The dissenter worried that those students would become "orphans, abandoned by the educational system, without anyone to educate them and give them the opportunities inherent in being an educated person."[72] The dissenter also noted that the justice system provided educational services to incarcerated students, indicating that the majority's exception was unnecessary and counterproductive:

> If more violent juveniles residing in correctional facilities are not perceived as too dangerous to educate, then students committing far lesser transgressions resulting solely in expulsion should not be denied their constitutional right to learn. In fact, it is precisely these students, who have not yet deviated from lawful behavior, to whom we should turn our greatest attention in assuring their constitutional right to education in hopes of preventing their criminal demise.[73]

---

67. *Id.*

68. *Id.* at 350–51.

69. *Id.* at 350, 351 (quoting *Phillip Leon* M., 484 S.E.2d at 919 (McHugh, J., concurring in part and dissenting in part)).

70. *Id.* at 345.

71. *See id.* at 352 (Davis, J., concurring in part and dissenting in part).

72. *Id.* at 345.

73. *Id.* at 354 (citing *Phillip Leon* M., 484 S.E.2d at 916); *accord* Blumenson & Nilsen, *supra* note 6, at 109 ("[E]ven juvenile institutions housing the most dangerous delinquents are able to provide them with educational services. Those states that fail to provide alternative education to those expelled for less hazardous behavior shoulder a difficult burden in showing that there were no more precisely tailored means than expulsion available.").

Like the West Virginia Supreme Court of Appeals, the New Jersey Superior Court found that a student's right to education survived expulsion.[74] However, unlike the West Virginia court, the New Jersey court appeared to leave no exceptions. In *State ex rel. G.S.*,[75] a fifteen-year-old high school student was expelled for acting as a lookout while other students made a false bomb threat.[76] The student was adjudicated delinquent by a juvenile court, but because he had no prior offenses he was not incarcerated.[77] The juvenile court ordered the student to attend school regularly and to obtain a high school diploma as conditions of his probation.[78] The order conflicted with the school district's policy of terminating all educational services to students expelled in bomb threat cases.[79] The student thus sought relief from the chancery division of the New Jersey Superior Court.[80]

The court held that the state constitution guaranteed the expelled student the right to attend an alternative educational program.[81] The court emphasized the broad reach of the education clause of the state constitution, which required the legislature to provide a public education to "*all the children in the State*."[82] The court also noted that "the Legislature has implemented this constitutional demand by providing for the public education of every child within the state."[83] In the court's view, the state legislature recognized that the right to education survived expulsion when it mandated alternative education for students adjudicated delinquent for possessing weapons on school property.[84] As a result, the court held that "the State has the constitutional obligation to provide an education to a juvenile who has been adjudicated delinquent and placed on probation, even though his local school district has expelled him."[85]

74. *See* State *ex rel.* G.S., 749 A.2d 902 (N.J. Super. Ct. Ch. Div. 2000).
75. 749 A.2d 902.
76. *Id.* at 904.
77. In deciding against incarceration, the court also considered that the student regularly attended school, and that "[h]is academic record clearly demonstrated an aptitude for college." *Id.* at 903.
78. *Id.* at 904.
79. *See id.* at 904.
80. *Id.* at 907.
81. *Id.* at 908.
82. *Id.* at 906 (citing N.J. CONST. art. 8, § 4, para.1).
83. *Id.* at 907.
84. *Id.* at 907 (citing N.J. STAT. ANN. § 18A:37-7 to -12). The court also found that "the dispositional provisions of the New Jersey Code of Juvenile Justice contemplate that adjudicated delinquents will continue to receive public education up until their 19th birthday." *Id.*
85. *Id.*

In contrast, the Wyoming Supreme Court reached the opposite result in a case arising under a similar procedural posture.[86] In *RM v. Washakie County School District No. One*,[87] two students were expelled for selling marijuana on school grounds. The juvenile court ordered the school district to provide the students with alternative educational services during their one-year expulsion, basing its decision on the education clause of the Wyoming constitution.[88] The Supreme Court of Wyoming disagreed, finding that the district had no constitutional obligation to provide an alternative education to the expelled students.[89]

While the court affirmed that the education clause of the Wyoming Constitution created a fundamental right, it characterized that right as the opportunity for an education, rather than as a right to education itself.[90] Drawing on that distinction, the court found that "the fundamental right to an opportunity for an education does not guarantee that a student cannot temporarily forfeit educational services through his own conduct."[91] The court found a compelling state interest in "providing for the safety and welfare of its students."[92] The court accepted expulsion without alternative educational services as a narrowly tailored means of achieving that interest, based on two factors. First, a Wyoming statute limited expulsion to a maximum of one year.[93] Second, the school district had the discretion to tailor

86. *See In re* RM v. Washakie County Sch. Dist. No. One, 102 P.3d 868 (Wyo. 2004); *see also* Pearson, *supra* note 5 (criticizing the *RM* decision).

87. *See In re RM*, 102 P.3d at 870.

88. *Id.* at 870–71 ("In addition to the terms of probation for each child, the juvenile court ordered the School District to provide RM and BD with a free and appropriate education during the period of the student's expulsion. In doing so, the juvenile court specifically concluded that the School District had an obligation under the Wyoming constitution to provide such an education to these students.").

89. *See id.* at 877 ("We hold that the Wyoming constitution does not require that an alternate education be provided to students who have been lawfully expelled.").

90. *See id.* at 873, 874 n.14 (concluding that "strict scrutiny is the appropriate test" but finding that "the fundamental right provided is an *opportunity* for an education").

91. *Id.* at 874.

92. *Id.* at 876.

93. *Id.* at 875 ("The 'fact that the forfeiture is temporary is important' because 'temporary deprivation of constitutional rights does not require the protection that a permanent deprivation would.' . . . The temporary suspension of educational services is not the denial of all educational opportunities. . . . Following the expiration of the expulsion term students can return to school and once again receive educational services." (quoting Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 355 (W. Va. 1997) (Workman, C.J., concurring in part and dissenting in part), and citing WYO. STAT. ANN. § 21-4-305(e) (2007) ("No suspension or expulsion shall be for longer than one (1) year."))). While the court emphasized the temporary nature of the deprivation, in the end the students never returned to school. Pearson, *supra* note 5, at 617 (citing an interview with Honorable Gary P. Hartman).

the length of the expulsion to the student's particular circumstances.[94] The court emphasized its limited role in evaluating the constitutionality of the state action, and noted that while providing alternative education may indeed be the wisest approach, only the legislature could mandate that approach.[95]

B. Limited Guarantees Provided Under Federal Law

While matters of education are typically left to state law, federal law is capable of providing significant protections for the rights of expelled students. As this Subpart explains, those protections currently come into play only under a relatively narrow set of circumstances.

Prior to an expulsion, federal law protects students by requiring notice and a hearing. In *Goss v. Lopez*,[96] the U.S. Supreme Court held that procedural due process must be provided to a student facing exclusionary discipline. The Court found that exclusionary discipline threatened interests protected by the Due Process Clause of the Fourteenth Amendment, which prohibits arbitrary deprivations of liberty or property. The Court determined that the disciplinary action implicated a liberty interest—the student's reputation and "later opportunities for higher education and employment"—and a property interest—the student's entitlement to a public education.[97] While acknowledging that the Constitution did not create a right to public education, the Court noted that the state had chosen to extend that right to the children residing within its borders. Having created that entitlement, the state could not withdraw it except through "fundamentally fair procedures."[98] The Court thus concluded that, "[a]t the very minimum, . . . students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."[99]

---

94. *In re RM*, 102 P.3d at 876 ("Because school districts must tailor their decisions to deny educational services to fit the circumstances of each case, the temporary expulsion of students is narrowly tailored to fit the state's compelling interest in protecting the safety and welfare of its students."). The court used this provision to distinguish the West Virginia court's decision in *Cathe A.* The policy at issue in the West Virginia case asserted that the state had no responsibility to provide alternative educational services to any expelled student under any circumstances. Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 350 (W. Va. 1997).

95. *Id.* at 876–77 ("[W]e are judges, not legislators . . . . Thus, the only proper inquiry for this Court is whether our state constitution *requires* the provision of [alternative] educational services." (quoting *Cathe A.*, 490 S.E.2d at 354–55 (Workman, C.J., concurring in part and dissenting in part))).

96. 419 U.S. 565 (1975).

97. *Id.* at 573.

98. *Id.* at 574.

99. *Id.* at 579 (emphasis omitted). The Court noted that a deprivation longer than the ten-day suspension at issue "may require more formal procedures." *Id.* at 584. Federal and state courts have

While the *Goss* court found that the Constitution protects students prior to expulsion, no subsequent case has extended that protection past the point of expulsion.[100] For students with disabilities, however, federal law continues to protect educational access after expulsion through the Individuals with Disabilities Education Act (IDEA).[101] In any state receiving funds through IDEA, all students with disabilities must receive a free appropriate public education.[102] As of 1997, this mandate explicitly extends past a student's expulsion, even if the behavior leading to the expulsion was unrelated to the student's disability.[103] Before 1997, the statute did not explicitly require that students continue to receive educational services after expulsion. However, the Department of Education interpreted IDEA to require postexpulsion educational services.[104] The State of Virginia fought that interpretation, winning a case in federal court on the basis that the requirement to provide educational services after expulsion did not unambiguously appear in the statute.[105] In the face of this resistance, the U.S. Congress amended the statute to make the requirement plainly clear.[106]

---

interpreted the "more formal" procedures requirement for expulsion by mandating a prior hearing and substantial evidentiary support for the alleged misconduct. Reed, *supra* note 5, at 586. Most states also recognize students' rights to an attorney, to testify, and to produce witnesses on their behalf. *Id.* at 586 n.33.

100. Courts have not recognized education as a federal fundamental right, limiting the circumstances in which constitutional protections apply. Many scholars have argued that recent legislative actions and judicial decisions could change that result. *See, e.g.*, Salerno, *supra* note 60, at 539–40 (arguing that the No Child Left Behind Act (NCLB) represents an "extension of the federal government's reach into the realm of education" and a "reaffirmation of society's regard for education," both of which support recognizing education as a federal fundamental right); Brooke Wilkins, Note, *Should Public Education Be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 288 (2005) ("Using the analytical approach of [Lawrence v. Texas, 539 U.S. 558, 578–79 (2003)], it is possible to argue for a federal fundamental right to education."); *see also* Blumenson & Nilsen, *supra* note 6, at 91 (noting that the existence of a "limited educational guarantee" under the Constitution is an open question, and that "an expelled student's challenge to the complete denial of public education could provide the Court with an opportunity to answer that question").

101. 20 U.S.C. §§ 1400–1482 (Supp. 2005).

102. *Id.* § 1412(a)(1)(A).

103. *Id.* (requiring that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school").

104. *See* Reed, *supra* note 5, at 620 ("[I]n 1993, the Office of Special Education Programs . . . [stated that the Individuals with Disabilities Education Act] requires that when misconduct is determined not to be a manifestation of the student's disability, the student may be removed from school, but educational services may not be stopped even if the disciplinary removal is to exceed ten school days.").

105. Va. Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997).

106. Individuals With Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60 (1997) (codified at 20 U.S.C. § 1412(a)(1)(A) (2000)). The requirement has remained controversial. *See, e.g.*, Lauren Zykorie, *Reauthorizing Discipline for the Disabled Student: Will Congress Create a Better Balance in the Individuals With Disabilities Education Act (IDEA)?*, 3 CONN. PUB. INT. L.J. 101 (2003).

NCLB could have followed an approach similar to IDEA and explicitly required states to continue educating nondisabled students after expulsion. That approach would have been consistent not only with the title of the act, but also with its stated goal of "holding schools, local educational agencies, and States accountable for improving the academic achievement of *all* students."[107] Unlike IDEA, however, NCLB does not require states to educate students who have been expelled.[108]

In fact, NCLB includes few references to educational access after expulsion. NCLB incorporates the Gun-Free Schools Act,[109] which requires states to impose a minimum one-year expulsion for students who bring firearms to school,[110] and permits but does not require that states provide alternative education for expelled students.[111] Another reference, in the Safe and Drug Free Schools section of the statute, lists expelled students among "populations not normally served by the state educational agencies and populations that need special services."[112] This reference appears to reflect an assumption that alternative education will be the exception rather than the rule.

---

107. 20 U.S.C. § 6301 (Supp. 2005) (emphasis added).

108. This difference is only one of many between the two laws. A side-by-side comparison of the two statutes reveals a policy schizophrenia: a tension between individualization and standardization. For example, the most fundamental building block of the Individuals with Disabilities Education Act (IDEA) is an individualized education plan specifically created for each student with a disability, while the base element of NCLB is standardized testing and reporting at the group and subgroup level. *See* Cory L. Shindel, Note, *One Standard Fits All? Defining Achievement Standards for Students With Cognitive Disabilities Within the No Child Left Behind Act's Standardized Framework*, 12 J.L. & POL'Y 1025, 1033 (2004) ("[C]ongressional efforts to reconcile the IDEA, which emphasizes individualized achievement, and the NCLB, which prioritizes group progress, must preserve the individualized nature of special education."). IDEA enforcement depends on individual action through state procedures, mediation, or lawsuits, while NCLB cannot be enforced through individual action. *See* Michael Metz-Topodas, Comment, *Testing—The Tension Between the No Child Left Behind Act and the Individuals With Disabilities Education Act*, 79 TEMP. L. REV. 1387, 1401–03 (2006). *Compare* GAO, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO AVOID CONFLICTS 7 tbl.1 (2003), *available at* http://www.gao.gov/new.items/d03897.pdf (describing various means available for individual IDEA enforcement), *with* Ass'n of Cmty. Orgs. for Reform Now v. N.Y. City Dep't of Educ., 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003) (finding that the NCLB does not create individually enforceable rights "because it is focused on the regulation of states and local educational agencies, and focuses on improving the condition of children collectively, and therefore lacks . . . individual focus").

109. 20 U.S.C. § 7151.

110. Hanson, *supra* note 4, at 305 (describing the changes to the Gun-Free Schools Act in the NCLB reenactment).

111. *See* 20 U.S.C. § 7151(b)(2) ("Nothing in this subpart shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting.").

112. *See id.* § 7113(a)(5) (referring to "populations not normally served by the State educational agencies and local educational agencies and populations that need special services, such as school dropouts, suspended and expelled students, youth in detention centers, runaway or homeless children and youth, and pregnant and parenting youth").

C. Negative Incentives Created By the No Child Left Behind Act

NCLB shapes expelled students' access to education not only passively, by failing to guarantee educational opportunity after expulsion, but also actively, by creating incentives that reward schools for excluding students after expulsion.[113] As this Subpart explains, those incentives result from interactions between the NCLB accountability structure and state laws, and thus vary across different states.

Congress enacted NCLB in 2001 as a reauthorization of the Elementary and Secondary Education Act (ESEA), which was first enacted in 1965.[114] NCLB expanded upon the ESEA accountability scheme by requiring that 100 percent of students demonstrate proficiency in reading and math by the year 2014.[115] Each state receiving NCLB funds must define its own standards for proficiency and create a plan for reaching the 100 percent benchmark.[116] As part of that plan, the state must then require each school to show adequate yearly progress (AYP) towards full proficiency by reaching a fixed target each year.[117] Proficiency and AYP are determined primarily through scores on standardized tests that schools must administer every year during grades three through eight, and once during grades nine through twelve.[118] For the test results to be valid, 95 percent of enrolled students must participate.[119] The test scores must be disaggregated by race, socioeconomic status, disability, and limited English proficiency status.[120] If any subgroup fails to show AYP, the entire school fails to make AYP.[121]

In addition to test scores, states must use graduation rates and other academic indicators to determine AYP. Unlike test scores, however, these additional indicators do not need to show annual progress towards a fixed proficiency target.[122] While falling short of a benchmark on the other academic indicators can cause a school not to make AYP, the opposite is generally

113. *See* Ryan, *supra* note 15, at 969–70.

114. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 244 n.8 (2004).

115. *See* 20 U.S.C. § 6311(b)(2)(F).

116. *See id.*; *see also* Ryan, *supra* note 15, at 941–42 ("States are free to determine their own standards, to create their own tests, and to determine for themselves the scores that individual students must receive in order to be deemed 'proficient.'").

117. 20 U.S.C. § 6311(b)(2)(C); *see also* Ryan, *supra* note 15, at 941 ("Adequate yearly progress is . . . less about yearly achievement gains than it is about hitting uniform benchmarks.").

118. 20 U.S.C. § 6311(b)(3)(C)(v)(I), (vii).

119. *Id.* § 6311(b)(2)(I)(ii).

120. *Id.* § 6311(b)(3)(C)(xiii).

121. *Id.* § 6311(b)(2)(I)(i).

122. *Id.* § 6311(b)(2)(I); Ryan, *supra* note 15, at 940 n.36 ("[A]dditional indicators need not be set at any particular level, nor need they increase over time.").

not true; a school with inadequate test scores cannot reach AYP based on other indicators unless the safe harbor provision applies.[123] Under this provision, a high school in which one subgroup does not reach the required testing proficiency level can still make AYP if that subgroup improved its testing proficiency rate by 10 percent and met the graduation rate requirements.[124] Graduation rates and other academic indicators do not have to be disaggregated into subgroups, except for purposes of the safe harbor provision.[125]

Schools receiving NCLB funds and failing to reach the AYP benchmarks face increasingly harsh sanctions.[126] After two consecutive years without making AYP, a district must place the school in "school improvement status," providing students with tutoring services and the option to transfer to a different school within the district.[127] If a school continues to miss its AYP targets after two years in school improvement status, the district must take "corrective action."[128] This action may include termination or replacement of the school staff, a transfer of school management authority from the school to the district, or organizational restructuring.[129] If the school has still not reached AYP after an additional year, making five consecutive years in total, it could face closure or takeover by the state.[130] A similar structure applies at the district level; local educational agencies that consistently fail to reach AYP face sanctions that include removing schools to another jurisdiction, ceding administrative control to the state, or abolishing the district entirely.[131]

NCLB holds each school accountable for the test scores of all students attending the school, but does not require any school to allow any particular student to attend. The threat of serious sanctions for failing to meet testing goals may tempt schools to exclude the students who perform poorly on the

123. *See* 20 U.S.C. § 6311(b)(2)(I)(i) (describing the safe harbor provision); Ryan, *supra* note 15, at 940 n.36 ("[T]he additional indicators can only be used *against* schools; failure to post certain test scores, for example, cannot be excused by a high graduation rate.").

124. Losen, *supra* note 15, at 113–14 (citing 20 U.S.C. § 6311(b)(2)(I) (2000)).

125. *Id.* at 114 ("In other words, schools must be responsible for subgroups only as far as test scores; they need not be responsible for whether particular subgroups of students, including Black and Latino students, actually graduate.").

126. *See* 20 U.S.C. § 6316.

127. *Id.* § 6316(b), (e); *see also* Ryan, *supra* note 15, at 945–46 ("[T]he media have translated 'in need of improvement' to mean 'failing,' fueling the popular perception that any school that does not make AYP—regardless of whether it receives Title I funding—is a failing school.").

128. 20 U.S.C. § 6316(b)(7)(A), (C).

129. *Id.* § 6316(b)(7)(C)(iv). Imposing some of the harsher sanctions may expose districts to legal liability. *See, e.g.*, Andrew Spitser, Comment, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice*, 54 UCLA L. REV. 1339 (2007).

130. 20 U.S.C. § 6316(b)(8)(B).

131. *Id.* § 6316(c)(10)(C).

test.[132] By excluding low-scoring students, a school can improve its test scores without expending any additional resources.[133] As one scholar explains, "[o]ne less student performing below the proficiency level increases the overall percentage of students who have hit that benchmark."[134] As a result, NCLB unintentionally creates exclusionary incentives.[135]

By seeking improvement through competition, NCLB asks schools and districts to behave like market participants. The school choice provision, in particular, encourages schools to compete for desirable students. NCLB creates the risk that schools will follow its prescription too well, competing to educate high-performing students while simultaneously trying to push out low-performing students, who would otherwise drag down schools' reported performance.[136]

This push-out phenomenon has been observed across the country, in locations implementing NCLB-mandated plans as well as those that had already implemented high-stakes accountability systems prior to NCLB.[137] New York City administrators, faced with the risk of poor results on the high-stakes Regents examination, told thousands of low-performing students not to return to school, despite the fact that state law clearly gave the students the right to attend school until they turned twenty-one.[138] The Chancellor

132. In addition to the explicit sanctions provided under NCLB, schools that fail to make adequate yearly progress suffer reputational damage. While it is not clear that this damage lowers property values or affects the relocation decisions of individuals and businesses, "state and local officials seem to believe that the perceived quality of public schools matters" in those respects. Ryan, *supra* note 15, at 950–51.

133. Losen, *supra* note 15, at 105–06 ("Artificially improving test results in this manner requires no additional resources. Therefore administrators in inadequately funded schools and districts that lack the capacity to pursue true reforms, and who are faced with the threat of school closings or district takeovers, may be especially vulnerable to such negative incentives."). One study found that a majority of teachers believed that conditions outside the school created significant barriers to students' academic progress. *See* LAURA S. HAMILTON ET AL., STANDARDS-BASED ACCOUNTABILITY UNDER NO CHILD LEFT BEHIND: EXPERIENCES OF TEACHERS AND ADMINISTRATORS IN THREE STATES 119–20 (2007). The teachers thus felt that test-based accountability systems held them responsible for factors beyond their control. *Id.* at 120. The temptation to exclude low-performing students may be especially strong where school personnel believe that exclusion is the only way to avoid blame for their students' poor performance because they feel unable to help their students improve.

134. Ryan, *supra* note 15, at 969.

135. *See generally* Losen, *supra* note 15, at 105 ("Rather than stimulating schools to improve their instruction as intended, the pressure to raise scores can lead to practices that effectively push out low achievers in order to boost school achievement profiles."); Koski & Reich, *supra* note 15, at 585; Ryan, *supra* note 15.

136. Ryan, *supra* note 15, at 969 ("[S]chools, to the extent they can, will work to avoid enrolling those students who are at risk of failing the exams.").

137. Philip T.K. Daniel, *No Child Left Behind: The Balm of Gilead Has Arrived in American Education*, 206 EDUC. L. REP. 791, 808 (2006) (describing reports of push-out in New York and Texas).

138. Elisa Hyman, *School Push-Outs: An Urban Case Study*, 38 CLEARINGHOUSE REV. 684, 684–85 (2005).

of the New York City Schools described the problem as a city-wide issue, rather than "just a few instances," and called what was happening to the students "a tragedy."[139] Similar exclusionary responses to accountability systems have been documented in Texas,[140] Florida,[141] and Alabama.[142] Often, these practices exclude low-income or minority students, two of the groups explicitly targeted for assistance in the NCLB statement of purpose.[143]

Expelled students present tempting targets for administrators acting upon exclusionary incentives. Schools disproportionately expel students of color and low-income students;[144] because of discrimination and inequality throughout the school system, those groups tend to score lower on standardized tests relative to white and higher-income students.[145] Expulsion

139. GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 60 (2004); *see also* Losen, *supra* note 114, at 292 ("[E]xperts who have examined the statistics and administrators of high school equivalency programs say that the number of 'pushouts' seems to be growing, with students shunted out at ever-younger ages." (quoting Tamar Lewin & Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES, July 31, 2003, at A1)).

140. Lupe S. Salinas & Robert H. Kimball, *The Equal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools*, 14 GEO. J. ON POVERTY L. & POL'Y 215, 228–29 (2007) ("Poor children are viewed as a liability because they impact attendance rates and test scores that are used to rate schools. . . . In many schools, teachers and administrators target students for elimination from the public school system since the students are not likely to pass the state examinations that are used to rate schools and provide financial incentives to all employees.").

141. Losen, *supra* note 15, at 107 ("According to a report by *The News Hour With Jim Lehrer*, poorly performing students in Orlando, Florida were actively counseled into GED programs. Once these students left school, their low test scores did not count against their school's overall performance." (citation omitted)).

142. *Id.* at 108 ("[I]n Birmingham, Alabama, in the course of a lawsuit, the school board admitted that 522 students (predominantly Black) were involuntarily administratively withdrawn in the spring of 2000." (internal citations omitted)).

143. *See* 20 U.S.C. § 6301(3) (Supp. 2005) (stating a purpose of "closing the achievement gap between high and low-performing children, especially the achievement gaps between minority and non-minority students, and between disadvantaged children and their more advantaged peers"); *see also* Losen, *supra* note 15, at 110 ("Whatever benefits . . . could accrue from a sound system of subgroup accountability for academic achievement, students in the groups with the lowest scores are more likely to be pressured to leave when test scores alone determine whether schools and districts are sanctioned.").

144. *See* Blumenson & Nilsen, *supra* note 6, at 68 ("[S]chool administrators benefit [from zero tolerance policies] because expelled students are often poor students who score poorly on the standardized tests that are increasingly used to evaluate their schools.").

145. *See, e.g.*, Thomas J. Kane & Douglas O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, *in* NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 152, 154 (Paul E. Peterson & Martin R. West eds., 2003) (describing the differences between African American and white performance on the National Assessment of Educational Progress); Koski & Reich, *supra* note 15, at 584 (noting the "well-known fact that poor and minority students tend to perform worse on standardized assessments than their wealthier and white peers"); Ryan, *supra* note 15, at 934 ("Disadvantaged students tend to do worse on standardized tests than do their more affluent counterparts.").

magnifies any existing disadvantage; high-quality alternative programs are rarely available, and time out of school harms academic progress.[146] By drawing disproportionately from groups with low test scores, then adding barriers to academic improvement, expulsion creates an underperforming and stigmatized subgroup highly vulnerable to exclusion.

If the desire to improve test scores can lead schools to exclude low-income and minority students who possess a clear right to attend school, it will have an even more detrimental impact on expelled students, who possess few clearly defined educational rights. Only thirteen states recognize expelled students' right to alternative education.[147] In the remaining thirty-seven states, enrollment in alternative programs (where such programs exist) is often subject to administrative discretion.[148] Those exercising discretion may be influenced, whether consciously or unconsciously, by NCLB's exclusionary incentives. Because they often lack a clear right to return to mainstream education, it is easy for administrators not only to push out expelled students by denying alternative education, but also to keep them out by denying reinstatement. Reinstatement decisions are usually a matter of great discretion by school administrators, making the decisions vulnerable to exclusionary incentives and difficult to challenge.[149] The decision to deny expelled students reinstatement may be affected by the perceived impact on test scores, even where the stated reasons involve school safety or failed rehabilitation.

In one narrow instance, NCLB's accountability structure has the potential to help expelled students if they are schooled in jurisdictions that create a clear right to alternative education. Because NCLB mandates that all schools in a state be subject to the same benchmarks,[150] the statute requires

146. Rokeach & Denvir, *supra* note 1, at 285 ("[S]tudents who have been suspended or expelled become further behind in their schoolwork, lose academic credits, and are more likely to become alienated or discouraged, thus accelerating their path toward dropping out."); James A. Maloney, Comment, *Constitutional Problems Surrounding the Implementation of "Anti-Gang" Regulations in the Public Schools*, 75 MARQ. L. REV. 179, 200 (1991) ("[S]tudents who are disciplined by suspension or expulsion are, statistically, already behind in school; suspension or expulsion causes these students to fall further behind.").

147. GFSA 2003, *supra* note 2, at 18–129.

148. *See, e.g.*, C.S.C. v. Knox County Bd. of Educ., No. E2006-00087-COA-R3CV, 2006 WL 3731304, at *10 (Tenn. Ct. App. Dec. 19, 2006).

149. *See infra* Part III.B.2.

150. *See* 20 U.S.C. § 6311(b)(1)(B) (Supp. 2005) ("The academic standards required by subparagraph (A) shall be the same academic standards that the State applies to all schools and children in the State."). NCLB may have another benefit for students attending alternative schools, as "courts have been cautiously looking to the achievement of state content standards as guidelines for what is a constitutionally adequate education." Koski & Reich, *supra* note 15, at 564. By compelling testing in alternative educa-

alternative schools to meet the same standards as mainstream schools. By extending accountability to alternative schools, NCLB offers the promise of improvement and implicitly condemns the practice of treating alternative schools more like correctional institutions than educational institutions.[151]

Another NCLB provision, however, weakens the law's ability to improve alternative schools through increased accountability. The provision allows states to exclude, for accountability purposes, the test scores of students who attend a school for less than a full academic year.[152] Each state must create its own definition of what constitutes a full academic year. Depending on that definition and the timing of the expulsion, the full-year provision can remove expelled students from the accountability structure for up to two years.[153] After that length of time, expelled students may have dropped out of the public school system altogether. In addition, some alternative schools are designed as temporary placements intended to last less than a full academic year.[154] The full-year provision can result in excluding the test scores of all students attending such schools. The schools can be entirely separated from the accountability structure, turning them into what one commentator has described as "accountability safe-houses."[155] In more than one way, the

tional settings, NCLB produces data that can be used to challenge the constitutional adequacy of the education provided by alternative schools.

151. This practice is disconcertingly common. *See, e.g.*, Blumenson & Nilsen, *supra* note 6, at 115–16 ("Although some [alternative] schools are innovative and permit students to keep up with their grade level, many are little more than holding facilities where students complete rote exercises that are a far cry from their regular curriculum, and some are more like jails than schools."). Some alternative programs have also been called "dumping grounds" and "soft jails." Joseph Lintott, Note, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 572 (2004).

152. 20 U.S.C. § 6311(b)(3)(C)(xi) (providing that assessments shall "include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, except that the performance of students who have attended more than 1 school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency").

153. Consider this hypothetical: A state defines a full academic year as October 1 through March 1. On February 2, 2008, a mainstream high school within the state expels a student for a period of one year, and the student enters an alternative school the next day. Because she changed schools between October and March, the student was not enrolled in either school for the full 2007–2008 academic year. If the student returns to the mainstream high school on February 3, 2009, the student was also not enrolled in either school for the full 2008–2009 academic year.

154. *See* S.B. 219 2007–2008 Leg., Reg. Sess. (Cal. 2007), *available at* http://info.sen.ca.gov/pub/07-08/bill/sen/sb_02010250/sb_219_bill_20070426_amended_sen_v97.pdf (proposing to amend California's accountability structure to include "[t]he test scores of enrolled pupils who were referred to an alternative program . . . that is designed to enroll pupils for less than one school year").

155. *See* Losen, *supra* note 114, at 291 ("Schools that send chronic 'low achievers' to alternative schools, could circumvent test-score accountability . . . . In some districts, alternative schools designed for students with behavioral needs could become accountability safe-houses . . . ."); *see also* Hyman, *supra* note 138, at 685 (noting that "a lack of standards of accountability for most alternative

full-year provision can cause expelled students to disappear from the accountability structure, so that no school need account for their performance.

A serious but opposite risk exists in states where the definition of a full year places an alternative school within the accountability structure, but the right to alternative education is not clearly established. Because expelled students are more likely to demonstrate poor performance on standardized tests,[156] a school designed for expelled students may experience more difficulty meeting AYP than a mainstream school. Where a district is not required to maintain an alternative school that fails to demonstrate AYP, the threat of sanctions could lead the district to close the school rather than devote scarce resources[157] towards improving it.[158] In this way, an accountability structure designed to improve educational access could result in the complete denial of educational access for the students who had attended an alternative school.[159]

---

school programs" has contributed to exclusionary practices in New York, where mainstream schools are required to publish report cards but alternative schools are not).

156. *See supra* notes 144–146 and accompanying text.

157. For an overview of cutbacks in educational services caused by funding deficits at the state and local level, see Nat'l Educ. Ass'n, Cuts Leave More and More Public School Children Behind (Dec. 2003/Jan. 2004), http://www.nea.org/esea/storiesfromthefield.html.

158. By placing demands on scant resources while focusing on successes at the school level, NCLB also reduces incentives for school districts to open new schools devoted to reconnecting out-of-school youth. For example, over the past few years the School District of Philadelphia has opened several such schools using a mixture of subcontracting and funding from foundations, private donations, and government grants. Nancy Martin & Samuel Halperin, *Whatever It Takes: How Philadelphia Is Reconnecting Out-of-School Youth*, PROSECUTOR, Jan./Feb. 2007, at 18, 19, 38–39. Because the reconnected students do not improve the graduation rate or the test scores of an existing school, the NCLB accountability structure fails to reward the district for opening these schools, despite their success. Designing programs so that they are part of an existing high school, either physically or through an accounting fiction, offers one way around this issue; in New York state, the Syracuse and Liverpool school districts have taken this approach. Maureen Nolan & Paul Riede, *School Slams Door on Dropouts: Students Say Syracuse School Pushed Them Out; Fowler Botches Records of Those Not Graduating*, POST-STANDARD, May 23, 2004, at A1.

159. *See* Gary Cartwright, *One School Left Behind*, TEX. MONTHLY, July 2004, at 56, 56 (describing an alternative school at risk of closure, and arguing that "[t]he possibility that a school whose purpose is to ensure that no child is left behind could be permanently closed by the No Child Left Behind Act goes against everything the law ought to stand for"). In provisions outside of NCLB's Title I accountability framework, NCLB provides funding for school districts that aim to help expelled students. 20 U.S.C. §§ 7115(b)(2)(E)(ix), 7175(a)(11), 7215(a)(15) (2000 & Supp. 2005). These programs are funded orders of magnitude below Title I, do not require recipients to meet strict performance benchmarks, and do not impose sanctions for failure to show results. *Compare id.* § 7103 (Supp. 2005), *with id.* § 6302 (Supp. 2005). As a result, the funding provisions are unlikely to alter the exclusionary incentives created by the accountability framework.

II. THE HIGH COSTS OF EXCLUSION

A number of unspoken assumptions lie beneath the surface of the public debate about expulsion. One is that expulsion is applied fairly and evenly, based entirely on the student's decision to engage in misbehavior, and therefore forms an appropriate basis for terminating educational opportunity.[160] A second is that schools use expulsion rarely and as a last resort, expelling only "bad kids" with behavioral issues so serious that the classroom cannot accommodate them.[161] A third is that the value of exclusion should be measured solely in terms of the effect on those who remain in the mainstream classroom, rather than considering the cost to the expelled students or to society as a whole.[162] This Part analyzes the flaws in those assumptions, finding that they do not form an appropriate basis for legislative or judicial decisionmaking about educational access after expulsion.

A. Racial Disparities in the Application of Exclusionary Discipline

Rates of suspension and expulsion show significant racial disparities, challenging the assumption that exclusion results from a fair and appropriate process.[163] Across the country, African American students are subject to exclusionary discipline at rates far exceeding their representation in the school population.[164] Nationally, during the 2004–2005 school year African

160. *See, e.g.*, Keith D. v. Ball, 350 S.E.2d 720, 722–23 (W. Va. 1986) ("If an individual chooses to exercise his right to education in such a fashion as to disrupt schools and deny that right to others, then he may forfeit the right to attend.").

161. *See, e.g.*, Letters to the Editor, CAPITAL (Annapolis, Md.), June 1, 2006 (objecting to a front-page newspaper article because of its headline, "Bad kids facing longer expulsions"); Dave Winans, *Improving Struggling Schools—In Spite of the Law*, NEA TODAY, Jan. 2003, at 16, 16 (quoting a school district official who contrasted disciplined students with "students who want to learn"); Phoebe Zerwick, *Snubbed: Closing of School Hard on Students*, WINSTON-SALEM J., Apr. 8, 2003, at B1 (quoting a school board member who referred to alternative school students as "bad kids" and stating that "[s]ome board members don't like the idea of keeping disruptive students at their home school").

162. *See, e.g.*, Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 357 (W. Va. 1997) (Workman, C.J., concurring in part and dissenting in part) ("Now it appears that the majority would siphon more money away from the general student population by their requirement of an alternative education to kids who won't follow the rules.").

163. There is also disproportionality in gender, with male students suspended and expelled far more frequently than female students. Skiba et al., *supra* note 18, at 320 ("At both the junior and senior high school levels, [a 1986 study] reported a consistent ordering in the likelihood of suspension from most to least: black males, white males, black females, white females.").

164. Brown, *supra* note 16, at 225 ("The overrepresentation of African-American students generally and African-American boys in particular among those disciplined, suspended, and expelled from public schools has been widely reported.") (collecting studies). Some studies have also found that schools disproportionately suspend and expel Latino students, although "the finding is not universal across locations or studies." Skiba et al., *supra* note 18, at 320.

American students made up less than 17 percent of the student body but received more than 34 percent of the expulsions.[165] In contrast, white non-Hispanic students made up more than 58 percent of the student body but received less than 41 percent of the expulsions.[166] This finding of racial disproportionality in school discipline has remained consistent for over twenty-five years.[167]

A growing body of research suggests that schools disproportionately suspend and expel African American students because of racial bias, rather than differences in behavior[168] or socioeconomic status.[169] One study found that the disparities began at the classroom level.[170] Teachers were more likely to refer African American students to the principal's office for misconduct with a strong subjective component, such as disrespect or loitering.[171] In contrast, white students were more likely to be referred for behavior with an objective basis, such as smoking or vandalism.[172] Another study found that "teachers in middle-class, predominately white schools viewed student

165. OCR 2004, *supra* note 1. Latino students comprised less than 19 percent of enrollment numbers but received more than 20 percent of the expulsions. *Id.*

166. *Id.*

167. Skiba et al., *supra* note 18, at 318 ("Investigations of a variety of school punishments over the past 25 years have consistently found evidence of socio economic and racial disproportionality in the administration of school discipline."). The NCLB incentive structure may contribute to this problem, if the experience of the Texas accountability system has any predictive power. As one commentator notes, "[t]he only state that has had a race-based test driven accountability system in place, Texas, also has a disproportionately high level of Latino and Black children who are sent to disciplinary alternative programs." Losen, *supra* note 114, at 292.

168. Skiba et al., *supra* note 18, at 335 ("What is especially clear is that neither this nor any previously published research studying differential discipline and rates of behavior by race . . . has found any evidence that the higher rates of discipline received by African-American students are due to more serious or more disruptive behavior.").

169. *See, e.g.*, Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1566 n.29 (2004) (describing a Seattle study finding that controlling for other factors, such as "poverty and living in a single-parent family," did not eliminate disparities in the suspension and expulsion of African American students); Skiba et al., *supra* note 18, at 333 (noting that both the current study and a prior study found that "significant racial disparities in school discipline remain even after controlling for socioeconomic status"). For students of color in poor schools, socioeconomic status may represent an additional disadvantage rather than a cause of racial disparities, as students excluded from those schools are less likely to receive alternative educational services during the suspension or expulsion. *See* Adams, *supra* note 17, at 149 ("[L]ower economic schools with large numbers of minority students are more likely to exclude students from school rather than to place them in [in-school suspension] or provide alternative education programs. . . . One explanation is that urban schools lack the money to implement programs and services.").

170. Skiba et al., *supra* note 18, at 330 ("[F]or this sample, disproportionality in school suspension for African-American students can be accounted for in large measure by prior disproportionate referral of African-American students to the office.").

171. *Id.* at 334.

172. *Id.*

inattention as an indication that the teacher needed to do more to gain the student's interest. On the other hand, this same behavior in predominately black, lower-class schools was interpreted as resulting from the students' putative low attention spans."[173] These studies suggest that racial disparities in school discipline result where negative stereotypes of African American youth (as dangerous or unintelligent) affect teachers' subjective interpretations of student behavior.[174]

Denying educational opportunity based on a process tainted with racial bias clearly conflicts with constitutional ideals, as expressed in Supreme Court cases addressing educational issues. Those ideals give rise to equitable arguments, though the corresponding legal arguments have no force under current jurisprudence. In *Goss v. Lopez*,[175] for example, the Court found that access to education should not be restricted except through "fundamentally fair procedures."[176] As an equitable matter, expulsion procedures that produce significant racial disparities cannot be considered fundamentally fair.[177] Similarly, in *Parents Involved in Community Schools v. Seattle School District No. One*,[178] the Court declared that a student seeking enrollment at a particular school should not be "forced to compete in a race-based system that may prejudice the [student]."[179] In an education system affected by exclusionary incentives, all students compete for educational access; the disproportionate exclusion of students of color indicates that the system is indeed race based. If exclusion from a particular school cannot be supported under a race-based system, complete exclusion from the educational system must also be insupportable on these grounds.[180]

---

173. Reed, *supra* note 5, at 608 (internal citations omitted).

174. *See* Brown, *supra* note 16, at 225 ("The racial disproportionality in the imposition of school discipline represents [a] dramatic example of the damaging effects of stereotyping on daily school practices."); *see also* Skiba et al., *supra* note 18, at 336 ("Fear may also contribute to overreferral. Teachers who are prone to accepting stereotypes of adolescent African-American males as threatening or dangerous may overreact to relatively minor threats to authority . . . ."). The uneven adoption of zero tolerance regulations also contributes to racial disparities. *See* Blumenson & Nilsen, *supra* note 6, at 85 ("[Z]ero tolerance regulations exacerbate the disparity because they are more prevalent in predominantly black and Latino school districts than in others.").

175. 419 U.S. 565 (1975).

176. *Id.* at 574.

177. This assertion fails as a legal argument because *Goss* establishes procedural requirements rather than outcome-based restrictions on the expulsion process. *Id.* at 577–83. So long as an appropriate hearing is provided, racial disparities do not violate the standards announced in *Goss*.

178. 127 S. Ct. 2738 (2007).

179. *Id.* at 2751.

180. This assertion also fails as a legal argument because the *Parents Involved in Community Schools* decision addressed facially race-based classifications, rather than systems producing racial disparities. *Id.* at 2759. So long as exclusion is not explicitly based on racial criteria, racial disparities do not violate the standard announced in *Parents Involved in Community Schools*.

Courts have been reluctant to accept racial disparities in school discipline as a basis for overturning individual disciplinary decisions, often denying relief on the basis of deference to school officials or the difficulty of determining that racial bias was behind the expulsion of a particular student.[181] A challenge brought by a large group of expelled students of color seeking access to alternative education, however, does not implicate the same concerns as a request to overturn an individual expulsion decision. Courts should be less reluctant to intervene where systemic bias results in the complete loss of educational opportunity for large numbers of students. At a minimum, the decision to deny alternative education or reinstatement to a group disproportionately composed of students of color should create deep skepticism about the stated reasons for terminating educational access.

B. Effects of Zero Tolerance Policies on Traditional Justifications for Exclusion

Zero tolerance policies have fundamentally changed the role of expulsion in the American public school system.[182] Justifications for denying educational access after expulsion would be more persuasive under a disciplinary system in which schools expelled only a few older students, for violent offenses, as a last resort. As this Subpart explains, because of the widespread adoption of zero tolerance policies, that system does not exist.[183]

Congress encouraged the adoption of zero tolerance policies in 1994 by passing the Gun-Free Schools Act (GFSA), which required states receiving federal funds to adopt a policy mandating a one-year expulsion for any student bringing a firearm to school.[184] Every state passed a law that met the requirements of GFSA, and most went further, implementing zero tolerance

181. *See, e.g.*, Fuller v. Decatur Pub. Sch. Bd., 78 F. Supp. 2d 812, 824 (C.D. Ill. 2000) ("This court notes that the statistics produced during trial could lead a reasonable person to speculate that the School Board's expulsion action was based upon the race of the students. However, this court cannot make its decision solely upon statistical speculation. The court's finding must be based upon the solid foundation of evidence and the law that applies to this case.").

182. Blumenson & Nilsen, *supra* note 3, at 64 ("Public school zero tolerance rules represent a sea change in American educational policy. After years of campaigns aimed at keeping children at risk *in* school, the zero tolerance effort seeks instead to identify troublesome students and get them *out* of school." (emphasis in original)).

183. *Id.*; Wasser, *supra* note 2, at 752 ("Because of the importance of education, the suspension or expulsion of a student—the most severe punishment a school can impose—was historically used sparingly and often in only the most extreme circumstances. But zero tolerance policies change this calculus."). *See generally* Hanson, *supra* note 4, at 297–315 (tracing the evolution of school discipline policies from the 1950s through the present).

184. 20 U.S.C. § 7151(b)(1) (Supp. 2005); Blumenson & Nilsen, *supra* note 6, at 69–70.

regulations that mandated expulsion for a far greater range of behavior.[185] As a result, the number of expelled students increased dramatically during the 1990s, especially in large school districts. In Chicago, for example, the public school system expelled 14 students during the 1992–1993 school year, as compared to 737 students during the 1998–1999 school year.[186] Massachusetts expelled 90 students during the 1992–1993 school year; just one year later, the state expelled 900 students.[187]

With an estimated 106,222 students expelled from American public schools during the 2004–2005 school year, this trend shows no sign of slowing.[188] Few of these expelled students fit the outdated stereotype of a jaded older student who can no longer benefit from educational opportunity. For example, a Michigan study revealed that most expelled students were between twelve and fifteen years old at the time of the expulsion.[189] Even if there exists a point at which an educable child becomes an uneducable adult, surely that point occurs after the age of twelve. As this study demonstrates, zero tolerance policies remove large numbers of students from the educational system while they are still capable of rehabilitation.

By their very definition, zero tolerance policies involve expelling students for first offenses rather than reserving the most serious disciplinary option for cases of last resort.[190] Thus, under zero tolerance policies schools expel students who have had no other disciplinary problems. Opponents of ongoing access to education for students expelled under zero tolerance policies invoke images of students who consistently exhibit an unwillingness or inability to obey the rules of the classroom.[191] These images conflict with the reality that schools now expel students who have obeyed the rules on all but one occasion. Denying alternative education to expelled students thus requires justifying total exclusion from educational opportunity based on a single mistake.

---

185. Blumenson & Nilsen, *supra* note 6, at 70.

186. Brady, *supra* note 4, at 180; *see also* Blumenson & Nilsen, *supra* note 3, at 66 ("In Chicago, expulsions rose from 81 to 1000 during the first three years of zero tolerance.").

187. DeMarco, *supra* note 4, at 566.

188. OCR 2004, *supra* note 1. In comparison, fewer than 90,000 students were expelled during the 2002–2003 academic year. OCR 2002, *supra* note 6.

189. Polakow-Suransky, *supra* note 10, at 106 ("Although the stereotypical perpetrator of school violence is an 18-year-old 'thug with a gun,' data show that the majority of students caught by the expulsion law are in fact between the ages of 12 and 15." (citation omitted)).

190. Marsha L. Levick, *Zero Tolerance: Mandatory Sentencing Meets the One-Room Schoolhouse*, 8 KY. CHILD. RTS. J. 2, 4 (2000) ("Rather than have an array of mandatory sentences available to address different levels of behavior and the different characteristics of the children charged, mandatory expulsion policies treat alike the six-year-old and the seventeen-year-old, the gun-toting student and the student carrying a butter spreader in his lunchbox, the first-time offender and the chronic trouble-maker, and the regular and special education student.").

191. *See supra* note 161.

Expulsion through zero tolerance policies has increased because of a wave of fear about school violence, fueled by events like the Columbine shooting.[192] However, school violence has been declining for more than a decade,[193] suggesting that graphic images of a few serious events have led the public to overstate the magnitude of the risk.[194] Moreover, the wide range of behavior addressed by current zero tolerance policies weakens the link between expulsion and violence.[195] As of 1998, 88 percent of schools had zero tolerance policies for drugs, and 87 percent had zero tolerance policies for alcohol.[196] Many schools also use zero tolerance expulsions to address more subjective nonviolent offenses such as "defiance of authority" or "habitual profanity."[197]

Some schools implementing zero tolerance policies also expel students for mild and innocuous behavior.[198] For example, an antidrug zero tolerance

192. *See* Insley, *supra* note 4, at 1 (recounting the story of a student who was suspended for acknowledging that a shooting could happen at his school, during a teens-only Internet chat).

193. Jennie Rabinowitz, Note, *Leaving Homeroom in Handcuffs: Why an Over-Reliance on Law Enforcement to Ensure School Safety is Detrimental to Children*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 153, 153 (2006) ("[C]rime in schools—and violent crime in particular—decreased significantly between 1992 and 2002, the most recent year for which statistics on school crime are available."); Hanson, *supra* note 4, at 342 n.158 ("The combined rates for all serious violent offenses (murder, rape, robbery, and aggravated assault) declined 32 percent for youth ages 15–17 from 1994–1998 and 27 percent for children 14 and under . . . .").

194. Blumenson & Nilsen, *supra* note 6, at 67 ("With hindsight, we know that the sensational school shootings were in fact unconnected events, aberrant in the affected schools and unreflective of the substantial downward trend of juvenile crime."); Insley, *supra* note 4, at 1059–60 (comparing the amount of news coverage focusing on the Columbine incident to other news topics and concluding that media outlets devoted an "exorbitant amount of time" to covering Columbine). Much of the public's fear may be not only exaggerated but misplaced. For example, "although ninety-six percent of all juvenile homicide arrests occur in suburbs and cities, parents in rural areas expressed more fear than suburban and urban parents regarding school safety." *Id.*

195. Blumenson & Nilsen, *supra* note 6, at 72 ("It is estimated that the vast majority of expulsions and suspensions are imposed for noncriminal, nonviolent minor offenses, such as smoking cigarettes and truancy.").

196. Insley, *supra* note 4, at 1049 (contrasting current school policies with the original language of the federal Gun-Free Schools Act of 1994, which required expulsion only for weapons incidents).

197. Fries & DeMitchell, *supra* note 21, at 212–13 ("While the impetus for zero tolerance was weapons possession, zero tolerance policies in most states have expanded to include nonviolent behavior such as drug possession, defiance of authority, habitual profanity, defacing school property, and gang-related behavior on school campuses.").

198. Blumenson & Nilsen, *supra* note 6, at 66 ("Zero tolerance imposes expulsion or suspension for a wide range of misconduct that previously would have been dealt with through lesser sanctions such as detention, or through remedial efforts such as counseling."); Insley, *supra* note 4, at 1040 ("[M]andatory punishments issued under zero tolerance policies often exclude innocent children from school for non-violent behavior that poses little or no threat to school safety."); *see also* ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, *supra* note 25, at 7 ("The stories about suspension and expulsions for sharing Midol, asthma medication (in an emergency), and cough drops with classmates, and bringing toy guns, nail clippers, and scissors to school are not anomalies; these incidents happen every day.").

policy led a high school to expel a student for possession of Advil, an over-the-counter pain reliever.[199] At another school, a boy was expelled for lending his inhaler to his girlfriend when she had an asthma attack.[200] Even an offense like weapons possession may be benign in practice, as when a fifth grader was expelled after telling a teacher about the paring knife that her mother accidentally put in her lunch box.[201] In light of zero tolerance policies that impose expulsion for a great deal of nonviolent and mild behavior, the need to prevent school violence is not sufficient justification for denying alternative education and reinstatement to expelled students.

C. Harm to Excluded Students and Society

Justifications for expulsion and the subsequent termination of educational opportunity often focus solely on those who remain in the mainstream classroom.[202] That narrow view ignores the harm to those excluded and the costs to society as a whole, inadequately accounting for the inequitable and financial consequences of exclusion. All students, including those who have been expelled, need a safe and effective learning environment in order to become productive members of society.[203]

In the short term, denying access to alternative education exacerbates expelled students' intense educational needs. Expulsion disproportionately targets low-income and minority students, widening achievement gaps caused by discrimination and inequality in the public school system.[204] In

199. Hanson, *supra* note 4, at 311 n.65.

200. *Id.* at 316 n.78.

201. *Id.* at 318 n.83.

202. *See, e.g.*, RM v. Washakie County Sch. Dist. No. One, 102 P.3d 868, 876 (Wyo. 2004) (holding that expulsion without alternative educational services was "narrowly tailored to fit the state's compelling interest in protecting the safety and welfare of its students"); Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1097 (Mass. 1995) (holding that expulsion without alternative educational services was "rationally related to the school officials' interest in protecting other students and staff from potential violence"); *cf.* Blumenson & Nilsen, *supra* note 6, at 75 ("Zero tolerance in public education constitutes a form of triage: it attempts to protect and better educate one group of children by identifying and excising another."); Haft, *supra* note 4, at 796 ("There is a trend in public education of . . . fail[ing] to recognize the cost of exclusion as a sanction.").

203. *See* Haft, *supra* note 4, at 797 ("[T]he decision to exclude or ostracize individuals from an institution specifically designed to prepare them to be productive members of our society is a grave one.").

204. 20 U.S.C. § 6301 (Supp. 2005) (noting "the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers"); OCR 2004, *supra* note 1 (finding that schools disproportionately expel African American and Latino students); Adams, *supra* note 17, at 147 ("[S]tudents who are kicked out of school are typically the students who need education the most; many of them come from low-income families or are at risk."); *cf.* Bogos, *supra* note 4, at 381 (describing a National School Boards Association survey finding that "suspended students are usually the very students who most need direct instruction").

addition to harming academic progress, denying alternative education removes expelled students from a supervised school environment to the street, where they are more likely to engage in high-risk sexual behavior, alcohol and drug abuse, and criminal activity.[205] Recognizing the potential of alternative programs to reduce the risk that expelled students will become involved with the juvenile justice system, some law enforcement groups have actively lobbied for alternative education.[206]

In the long term, denying alternative education harms a student's ability to earn a high school diploma. Students who do not receive educational services have more difficulty progressing academically and cannot accumulate credits towards graduation.[207] Even if students manage to get reinstated after a period of exclusion, they cannot advance to the next grade along with their peers, and students who are held back a grade are more likely to drop out.[208] Time out of school also makes it more difficult for students to readjust to the classroom environment and causes students to become cynical, discouraged, and alienated from their schools, all of which lowers the likelihood of graduation.[209] Without education or counseling during expulsion,

---

205. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PROMOTE SEXUAL HEALTH AND RESPONSIBLE SEXUAL BEHAVIOR 7 (2001), *available at* http://www.surgeongeneral.gov/library/sexualhealth/call.pdf ("Evidence suggests that school attendance reduces adolescent sexual risk-taking behavior."); LAURA DUBERSTEIN LINDBERG ET AL., TEEN RISK-TAKING: A STATISTICAL PORTRAIT 26 (2000) (finding that even after controlling for age differences, out-of-school male teens were more likely than in-school male teens to engage in high-risk behaviors, including binge drinking and illegal drug use); Bogos, *supra* note 4, at 384 & n.181 (citing a study finding that 8 percent of students expelled from Colorado public schools in 1993–1994 experienced legal trouble within one year); *see also* Blumenson & Nilsen, *supra* note 6, at 83 ("One study concludes that, absent alternative education for removed students, 'school personnel may simply be dumping problem students out on the streets, only to find them later causing increased violence and disruption in the community.'").

206. Polakow-Suransky, *supra* note 10, at 122 ("The Michigan Police Legislative Coalition (1998), the Michigan Association of Chiefs of Police (1998), the Police Officers Association of Michigan (1998), and the Fraternal Order of Police (1998) all submitted statements in support of alternative education amendments to the House subcommittee."). A juvenile court judge in Texas, also recognizing "the causal link between lack of education and juvenile crime," helped to found an alternative school for expelled students. Sharon Hemphill, *Making a Difference for Juveniles*, HOUS. LAW., May–June 2002, at 56. The judge explained that he helped to implement the program because "[w]e cannot expel these young people to the street. . . ." *Id.* at 56–57.

207. Rokeach & Denvir, *supra* note 1, at 285 ("[S]tudents who have been suspended or expelled become further behind in their schoolwork, lose academic credits, and are more likely to become alienated or discouraged, thus accelerating their path toward dropping out.").

208. Salinas & Kimball, *supra* note 140, at 230 ("Students become disillusioned at being retained and often quit. Statistically, students have a 50% chance of dropping out if they are retained for one year and 90% if they are retained for two years.").

209. The National School Boards Association surveyed the available research on exclusionary discipline and concluded that "traditional approaches—such as punishment, removing troublemakers, and similar measures—often harden delinquent behavior patterns, alienate troubled youths from the

the underlying cause of the misbehavior cannot be addressed. As a consequence, the student risks future disciplinary action, which pushes graduation even further out of reach.[210]

In contrast, access to high-quality alternative education allows students to continue making academic progress, earn the credits necessary to advance to the next grade, and continue on the path to graduation. When both alternative education and reinstatement are denied, even those students who manage to maintain the motivation and discipline needed to complete school have no choice but to drop out.

Depriving students of the opportunity to earn a high school diploma limits their ability to support themselves, creating long-term repercussions for excluded students and for society. Those without a high school diploma have access to fewer jobs, a greater likelihood of unemployment, and lower earning potential relative to high school graduates.[211] Expelled students who do not complete high school also face an increased likelihood of incarceration, even when compared with students who drop out of school for other reasons, such as employment, marriage, or pregnancy.[212] Exclusion thus

---

schools, and foster distrust." Bogos, *supra* note 4, at 381; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: EDUCATION COULD DO MORE TO HELP STATES BETTER DEFINE GRADUATION RATES AND IMPROVE KNOWLEDGE ABOUT INTERVENTION STRATEGIES 31 (2005) [hereinafter GAO REPORT] ("[P]oor grades and attendance, school disciplinary problems, and failure to advance to the next grade can all gradually lead to disengagement from school and result in a student not finishing high school."); Hanson, *supra* note 4, at 330–31 ("Getting any student back on track is not easy—particularly if that student was psychologically damaged, entered a growth spurt period and did not feel comfortable in classes with younger students, or the student did not productively spend his time away from school while on expulsion (particularly where no meaningful alternative education was provided).").

210. *See* U.S. DEP'T OF EDUC., ALTERNATIVE EDUCATION PROGRAMS FOR EXPELLED STUDENTS (1996), http://www.ed.gov/offices/OSDFS/actguid/altersc.html ("The consensus among educators and others concerned with at-risk youth is that it is vital for expelled students to receive educational counseling or other services to help modify their behavior and possibly other support services while they are away from their regular school. Without such services, students generally return to school no better disciplined and no better able to manage their anger or peaceably resolve disputes. They will also have fallen behind in their education, and any underlying causes of their violent behavior may be unresolved.").

211. Reed, *supra* note 5, at 606 ("Compared to high school graduates, dropouts are much more likely to be unemployed. Even those dropouts who are able to find work are at a distinct disadvantage in terms of earning capacity when compared to those students who graduated from high school and college.").

212. Florence Moise Stone & Kathleen B. Boundy, *School Violence: The Need for a Meaningful Response*, 28 CLEARINGHOUSE REV. 453, 464 (1994) ("Students who drop out of school because they are expelled have the highest probability of becoming involved in illicit activities (theft and selling drugs) among students who drop out of school for other reasons (employment, marriage, or pregnancy)."); *see also* Rokeach & Denvir, *supra* note 1, at 286 ("Time out of school and school alienation are associated with increased risk of juvenile delinquency and incarceration."); Reed, *supra* note 5, at 606 (reporting on a study finding that for males in Philadelphia, dropping out correlated

contributes to what has been termed the school-to-prison pipeline, which moves predominantly minority students "from mainstream educational environments . . . onto a one-way path toward prison."[213]

As the Supreme Court noted more than half a century ago, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[214] Taking away the chance to be a productive member of society is inconsistent with fundamental principles of equality and fairness.[215] As another court stated more recently, "[f]orced ignorance . . . is not a rational or appropriate remedy for student misconduct[,] regardless of the severity of such conduct."[216]

Even if exclusion could be considered fair to the expelled student, the effect on government spending would still make it an unwise choice. When a single student becomes involved with drugs and crime instead of finishing school, the cost to taxpayers has been estimated at $1.7 million to $2.3 million.[217] In contrast, returning an expelled student to mainstream education costs about $5000, the same amount required to educate any other student. Effective alternative education costs slightly more, about $7000, but one study found that it provides $20,650 per student per year in social benefits.[218] Multiplying the net financial benefit of providing alternative

---

with later involvement in illegal activity even after controlling for "social status of origin, race, marital and employment status"); *cf.* Losen, *supra* note 114, at 257 ("Approximately 69% of adult prison inmates are high school dropouts. Seventy-five percent of youths under the age of eighteen who have been sentenced to adult prisons have not completed the tenth grade.").

213. NAACP LEGAL DEFENSE & EDUC. FUND, DISMANTLING THE SCHOOL TO PRISON PIPELINE 1 (2005).

214. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

215. The requirement of educational services for those students whose offenses were judged serious enough to warrant incarceration supports this view; however, that requirement is poorly enforced. *See generally* Robin Johnson, *Destiny's Child: Recognizing the Correlation Between Urban Education and Juvenile Delinquency*, 28 J.L. & EDUC. 313 (1999) (discussing how the educational needs of students in juvenile detention are largely ignored).

216. Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 345 (W. Va. 1997) (quoting an unpublished lower court decision).

217. Hanson, *supra* note 4, at 338 ("In 1998, a Vanderbilt University economist, Prof. Mark A. Cohen, calculated the cost to American taxpayers of a young person who drops out of high school and enters a life of crime and drugs. Those costs amounted at present value to between $1.7 million and $2.3 million."). This amount includes "costs for crime victims, criminal justice, resources devoted to the drug market, and lost wage productivity." *Id.* at 339 n.148; *see also* Bogos, *supra* note 4, at 386 (noting that expelled students entering Michigan's juvenile justice system require $23,000 per year in taxpayer support, while educating a public school student costs only about $5000 per year).

218. Polakow-Suransky, *supra* note 10, at 121. The social benefits included "learning time that would have been lost, reduced grade repetition, added tax revenue, reduced welfare costs, and reduced prison costs." *Id.*

education for a single student (more than $10,000)[219] by the estimated number of students denied alternative education during the 2004–2005 school year (more than 25,000)[220] reveals that a nationwide mandate for alternative education would have saved a staggering $250 million in one year alone. Clearly, educating expelled students costs a great deal less than excluding them.

III. EDUCATING EXPELLED STUDENTS BY CHANGING THE INCENTIVES AND CLOSING THE LOOPHOLES

This Part proposes a three-step approach to mending the legal structures that allow and sometimes encourage the termination of expelled students' educational opportunity. First, the No Child Left Behind Act's (NCLB) accountability structure can be reframed in order to hold states responsible for the academic progress of all students, including those who have been expelled. Next, litigation can alter the incentive structure by pushing back against exclusionary practices. Finally, the education clauses of state constitutions provide a means to close the loopholes through which expelled students can be denied access to education.[221]

A. Changing the Incentives From the Top: Reframing Accountability

This Subpart proposes alterations in the implementation of NCLB's accountability structure, so as to counteract its exclusionary incentives and reduce the pressure to deny educational opportunity to expelled students. The proposed changes fall within the constraints of the law as written; changes to the statute are beyond the scope of this Comment.[222]

---

219. This number has been rounded down for clarity and was derived by subtracting the cost of alternative education from the social benefits as calculated by the Michigan Federation of Teachers study: $20,650–$7000 = $13,650. *Id.*

220. This number has been rounded down for clarity. *See* OCR 2004, *supra* note 1 (estimating that 26,349 expelled students experienced a "total cessation of educational services" in 2004–2005).

221. Alternatively, states could adopt legislation guaranteeing access to high-quality alternative educational services for expelled students. Because of limited state education budgets and the political unpopularity of devoting resources to students who have been expelled, this alternative appears less feasible. While this Comment does not explore the possibility of state legislative action in detail, the policy arguments in Part II could be deployed in support of such legislation.

222. This limitation results from pragmatic considerations, rather than from satisfaction with the No Child Left Behind Act (NCLB) as written. Congress does not appear likely to implement significant statutory changes or to repeal the law in the near future. *See* David J. Hoff, *Bush Presses NCLB Renewal on His Terms*, EDUC. WK., Jan. 16, 2008, at 16 (describing resistance and disagreement over possible changes to NCLB).

1. Enforcing Meaningful Graduation Rate Requirements

The possibility that schools could seek to improve test results by excluding low-performing students is implicitly recognized in the text of NCLB, which requires that graduation rates be considered as part of the adequate yearly progress (AYP) determination.[223] Secretary of Education Rod Paige acknowledged the risk of exclusion more explicitly, stating that "[w]ith the passage of NCLB, the expectations for schools to make AYP have increased; it is critically important that schools do not make AYP simply because students have dropped out of school."[224] Holding schools accountable for graduation rates, in theory, provides a check on the law's exclusionary incentives by punishing schools that fail to keep students enrolled until they graduate.[225]

However, regulations issued by the Department of Education (ED) have substantially weakened the graduation rate requirements imposed by the statute.[226] The regulations require states to set a graduation rate target, but do not impose any restrictions on how low that rate can be set. In addition, the regulations do not require states to set benchmarks for yearly progress

223. ORFIELD ET AL., *supra* note 139, at 11 ("Graduation rate accountability provisions were inserted into the Act's definition of 'Adequate Yearly Progress,' in part, to create a counter incentive for school officials to hold onto, rather than push out, struggling and disadvantaged students."); Losen, *supra* note 114, at 293 ("NCLB did require that graduation rates be factored in to determine whether high schools were making adequate yearly progress . . . . The concern was that schools that gamed the system to raise their test scores would be prevented by clearly forbidding practices such as counting dropouts as transfers.").

224. Losen, *supra* note 15, at 128 n.4.

225. *See* Koski & Reich, *supra* note 15, at 585 n.145 ("The NCLB provides modest protection against . . . push-out behavior by requiring both the publication of data on graduation rates and the inclusion of graduation rates in the AYP calculation." (citing 20 U.S.C. § 6311(b)(2)(C)(vi) (Supp. 2003)); Ryan, *supra* note 15, at 970 ("[NCLB] provides weak protection against [the] temptation [to exclude low-performing students]. It requires that graduation rates be included as part of a school's determination of AYP, but it does not say what the rate must be, nor does it demand that the rate increase over a certain period of time.").

226. *See* Losen, *supra* note 15, at 112–14. One commentator has argued that the manner in which the Department of Education (ED) adopted these regulations violated the statute, but that courts are not likely to grant relief. *See* Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1053, 1055 (2007) (noting that the ED's refusal to include legitimate representatives of parents and students on the negotiated rulemaking committee, as clearly required under NCLB, appears to be a relatively novel procedural defect in the agency's actions, and that "the Act, as currently written, will likely be interpreted by courts to provide no remedy for interested parties excluded from the negotiated rulemaking process"). When one group of excluded parties challenged the rulemaking process, their suit was first dismissed for lack of ripeness, and subsequently for lack of standing. Ctr. for Law & Educ. v. U.S. Dep't of Educ., 315 F. Supp. 2d 15, 17 (D.D.C. 2004).

towards the graduation rate goal.[227] As a result, the regulations allow AYP definitions that require a fixed amount of progress towards testing proficiency but not towards adequate graduation rates. The regulations also weaken race-based accountability in this area by not requiring that schools disaggregate graduation rates into racial and ethnic subgroups as part of the AYP determination, as they must do for test results, unless a school invokes the safe harbor provision.[228] As a result, the regulations fail to discourage exclusion of students of color, a subgroup vulnerable to being pushed out because of disproportionately low test scores.[229] Both of these regulations structurally prioritize graduation rates below test scores,[230] thus increasing the incentive for schools to exclude low-performing students.

The state plans approved pursuant to the ED regulations preserve little of the statute's intended check on exclusionary practices through graduation rate accountability.[231] As of February 2004, only ten states required schools to meet a minimum graduation rate in order to make AYP.[232] Thirty-nine states allowed schools to make AYP based on a graduation rate increase, rather than a fixed target; in some states, a school could make AYP based

227. Losen, *supra* note 15, at 113; Losen, *supra* note 114, at 293 ("Unfortunately, the Department of Education has watered down the new statutory requirements and in regulations, instructed educational agencies that they need not show annual progress on graduation rates, nor must they apply race-conscious accountability for graduation rates.").

228. Losen, *supra* note 15, at 113–14. The Secretary of Education, defending this interpretation, expressed confidence "that publicly reporting disaggregated data on the other academic indicators will ensure that schools, LEAs, and the State are held accountable for subgroup performance." *Id.* at 114. For a description of the safe harbor provision, see *supra* notes 123 through 125 and accompanying text.

229. *See* Ryan, *supra* note 15, at 969 ("Given the connection between performance on tests, socioeconomic status, and race, the students most likely to be targeted for exclusion will be the poor and/or racial minorities.").

230. Funding decisions have mirrored these priorities as well. For example, in 2001 the federal government spent more than forty times as much on the national assessment of educational progress as it did on dropout statistics. *See* ORFIELD ET AL., *supra* note 139, at 7.

231. Losen, *supra* note 15, at 111 ("In contrast to the rigid adherence to test-driven accountability requirements in NCLB, the federal administration introduced a great deal of flexibility when it came to graduation rates. Rather than use this flexibility to strengthen graduation rate accountability, ED approved state accountability measures in state after state that effectively undermined accurate reporting and diluted any protection against pushing students out that graduation rate accountability might have provided."); ORFIELD ET AL., *supra* note 139, at 13 ("In essence, by approving these permissive plans, while holding firm on test-driven accountability, the Department has effectively allowed the incentives to push out low achieving minority students to continue unchecked."); GAIL L. SUNDERMAN, THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW 44 (2006) (describing ED approval of amendments to state plans that "further weaken graduation rate accountability").

232. Losen, *supra* note 15, at 116.

on a graduation rate increase of only .1 percent.[233] In addition, only forty states require schools to make AYP based on graduation rates disaggregated across racial subgroups.[234] The end result, as one commentator has explained, is that "under current accountability systems, schools can be deemed 'highly performing' even if half of their minority freshmen never graduate."[235]

In order to counteract exclusionary incentives created by weak accountability systems, NCLB should mandate strong graduation rate requirements. The experience of one Alabama school district illustrates how a fixed graduation rate target, set at a high level and coupled with rigorous accounting, can succeed.[236] When the district failed to meet its 90 percent graduation rate requirement, it took steps to track down every student in the district who had missed school. When administrators reached students, they offered supplemental programs to help students make up for lost credits, allowing students to return to school who otherwise would have dropped out.[237] If rigorous and well-enforced graduation rate accountability can encourage a district to take affirmative steps towards inclusion, it stands to reason that it can also discourage actions that exclude students from educational opportunity.[238] In a well-designed system, every excluded student would lower the graduation rate and make goal attainment less

233. *Id.* at 116–17 (reporting that Texas and California allow schools to make AYP for graduation rates based on an increase of .1 percent); *see also* GAO REPORT, *supra* note 209, at 22 tbl.1 (finding that twenty-eight states allowed schools to count any increase as progress, three states required .1 percent progress, four states required 1 percent progress, one state required schools to reduce the difference between the actual and target rate by 10 percent over a two-year period, and two states allowed schools to make adequate yearly progress with no increase in graduation rate, just by maintaining the previous year's rate). A researcher speaking with a California state official noted that, given current graduation rates, California would not reach its 100 percent graduation rate goal for five hundred years. *See* Losen, *supra* note 15, at 117. The official replied, "In California, we're patient." *Id.*

234. Losen, *supra* note 15, at 117.

235. *See id.*; *see also* GAO REPORT, *supra* note 209, at 22–23 ("[A]llowing schools to use progress as the [NCLB] graduation rate indicator could result in schools making AYP annually, while not meeting state graduation rate targets for decades, if at all.").

236. *See* William C. Singleton III, *Two of Three System Schools Meet Goals*, BIRMINGHAM NEWS, Aug. 23, 2006, at 1N (describing school district efforts in Tarrant, Alabama).

237. *Id.* (quoting the school superintendent as stating, "If we can track them down, we're going to meet with them and see what we need to do to help them with credit recovery or see whatever we need to do to get them back in school.").

238. A strong graduation rate, however, cannot make up for a school's failure to make AYP based on test scores. For example, a school that graduates all of its students but misses its testing proficiency goal because of one student's test score will still not make AYP. *Cf.* Ryan, *supra* note 15, at 970. The incentive to exclude that student can be weakened by graduation rate accountability, but some exclusionary incentive will remain unless the state sets a hard target of a 100 percent graduation rate—an unlikely circumstance. Thus, even if the federal regulations and state plans preserve the role of the accountability provision as a check on exclusion, other counterexclusionary strategies would still be necessary.

likely, while every reinstated student would raise the graduation rate and make goal attainment more likely.

However, graduation rate accountability cannot counteract exclusionary incentives unless there is accurate data collection and analysis.[239] A 2005 GAO report found accuracy problems in states' graduation rate calculations, and noted that fewer than half of the states conducted audits to verify graduation rate data.[240] Another study revealed systemic and severe underreporting of dropouts, resulting from both the methods and the data used to calculate graduation rates. For example, some states reported a 5 percent dropout rate for African American students when the true rate was close to 50 percent.[241] If coupled with lax verification, strict graduation rate requirements can lead to exclusion rather than inclusion, since it may be cheaper and easier to push a student out and create an inaccurate record than it is to provide educational services.[242]

Strict and verified graduation rate accountability would promote inclusion of students generally, but would not reach the needs of expelled students without careful tailoring. A graduation rate calculation that compares the number of twelfth-grade graduates to the number of entering ninth-grade students does not count students who were expelled before they entered the ninth grade.[243] Reinstating such students would raise the graduation rate,

239. For example, while an Alabama school district reached out to students to improve its graduation rate statistics, a New York school district excluded students without harming its official graduation rate by incorrectly classifying the students as transfers. *Compare* Singleton, *supra* note 236 (describing the supplemental programs offered to a student in Tarrant, Alabama, even though he "thought there was no way for him to do his regular schedule and make up two credits"), *with* Tamar Lewin & Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES, July 31, 2003, at A1 (describing a credit-deficient student in New York City who was told that "no matter how hard you work, you're not going to make it, so there's no point in your trying anymore").

240. GAO REPORT, *supra* note 209, at 4; *see also id.* at 5 ("[D]ata problems exist, and it is unclear whether the department's monitoring efforts are sufficient for states to provide accurate data for Education's estimates."); *cf.* Salinas & Kimball, *supra* note 140, at 232 ("The Editorial Projects in Education Research Center reported that, on average, states overestimated graduation rates by 12% in 2003, while some states, like Texas, overestimated Black and Hispanic graduation rates by 20%.").

241. ORFIELD ET AL., *supra* note 139, at 7–9. The report suggests assigning an individual identification number to each student in order to accurately track graduation rates. *Id.* at 9.

242. Hyman, *supra* note 138, at 685 ("Exclusionary practices have also flourished in many areas due to faulty and nonuniform pupil-accounting measures . . . . In New York City, for example, student-outcome accounting is not transparent, and students who leave school without a diploma are not necessarily counted as dropouts."); *see also* Ryan, *supra* note 15, at 970 n.170 ("Although the [NCLB] regulations indicate that a student who receives a GED does not count as a high school graduate, and they warn that states 'must avoid counting a dropout as a transfer,' 34 C.F.R. § 200.19(a), it remains to be seen how vigorously these regulations will be enforced.").

243. *See* GAO REPORT, *supra* note 209, at 3 (noting that twelve states used the "cohort" definition, which "compares the number of 12th grade graduates with the number of students enrolled as 9th graders 4 years earlier, while also taking into account the number of students who left the school, such as those

but continuing to exclude them would not lower it. Because research suggests that a significant percentage of expulsions occur between the ages of twelve and fifteen,[244] the failure to include students expelled prior to ninth grade in the graduation rate calculation could create a large accountability gap.

Graduation rate accountability presents a potentially greater problem, in that the statutory language measures on-time graduation by "the standard number of years."[245] ED has not clarified how a school should determine "the standard number of years," creating a dilemma for alternative schools that follow self-paced models. In those schools, some students complete the curriculum in fewer than four years, but some take longer.[246] More generally, when expelled students enter alternative schools they often have fewer than the standard number of credits because of the expulsion, prior suspensions, or truancy; those students require more time to graduate.[247] As a result, a strict four-year definition could cause some alternative schools to miss the graduation rate goal even if a high percentage of entering students eventually graduate. One alternative high school in Texas faced this very issue: Despite receiving numerous awards for its innovative curriculum and high college acceptance rate,[248] the school risked closure because of its low on-time

---

who transferred in and out. Thirty-two states used a definition of high school graduation rate based primarily on the number of dropouts over a 4-year period and graduates, referred to as the 'departure classification definition.'").

244. *See, e.g.*, Polakow-Suransky, *supra* note 10, at 106 ("[D]ata show that the majority of students caught by the [Michigan] expulsion law are in fact between the ages of 12 and 15.").

245. 20 U.S.C. § 6311(b)(2)(C)(vi) (Supp. 2005) (stating that the graduation rate is "defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years").

246. Several states have experienced difficulty counting students enrolled in five-year programs; due to lack of guidance from ED, the states have varied in how they included those students in graduation rate calculations. GAO REPORT, *supra* note 209, at 23. For example, one state counted the students as dropouts even if they graduated in five years, "until it received approval to count them as graduates. Another state planned to count such students as graduates without requesting approval to do so." *Id.* States face a similar problem in calculating graduation rates for students with disabilities who graduate in a nonstandard number of years based on their Individualized Education Plans (IEPs). *See id.* at 4 (noting that the "[Department of] Education has not provided guidance to all states on how to account for students in such programs . . . . [and that] [a]s a result, some states were not aware of the modifications available to count such students in their graduation calculation").

247. Rokeach & Denvir, *supra* note 1, at 285 ("[S]tudents who have been suspended or expelled become further behind in their schoolwork [and] lose academic credits . . . ."); Lorenzo A. Trujillo, *School Truancy: A Case Study of a Successful Truancy Reduction Model in the Public Schools*, 10 U.C. DAVIS J. JUV. L. & POL'Y 69, 74 (2006) ("Nearly half of expelled students had been chronically truant in the previous year.").

248. Nancy Neff, *Social Work Professor Helps Develop Innovative Drop-out Prevention Program at Local High School*, INSIDE ON CAMPUS, Feb. 25, 2005, http://www.utexas.edu/opa/ic/oncampus/2005/february/franklin.html (reporting that an Austin newspaper voted Garza "Best Public High School in Texas" and that 75 to 80 percent of the 2003 graduating class continued to college).

graduation rate.[249] Since the appropriate number of years over which to measure graduation rates is a school-specific issue, it requires a school-specific solution: Graduation rate waivers could be narrowly drawn and liberally granted based on the structure of the particular school,[250] or the standard number of years required for graduation could be defined on a school-by-school basis.[251]

2. Reducing Exclusionary Incentives Through Growth Models

Growth models offer another possible means to reduce exclusionary incentives within NCLB. These models hold schools responsible for gains in proficiency made by a particular group of students, rather than for an absolute percentage of students at proficiency in a particular grade each year.[252] In theory, growth models present another potential method of reducing exclusionary incentives.[253] Such models recognize that some students start at a lower proficiency level,[254] and then reward schools for

249. Cartwright, *supra* note 159, at 56, 58 ("Because of Garza's unique role as a rescuer of lost souls, its graduation rate is nowhere near the benchmark set by Texas's education officials of 75 percent of each entering class. The law makes no allowance for alternative schools. . . . The clock starts ticking when students enter the ninth grade. But by the time Garza gets them, many are already hopelessly behind their graduating class."); Raven L. Hill, *3 Schools Off Low-Performing List*, AUSTIN AM.-STATESMAN, Dec. 14, 2006, at B01 (noting that Garza was removed from the list of schools not making AYP because "Garza, a nontraditional, self-paced high school that targets students at risk of dropping out, was allowed to be judged on alternative education standards for graduation").

250. While the Department of Education (ED) granted only five waivers between 2003 and early 2005, Brandi M. Powell, Comment, *Take the Money or Run?: The Dilemma of the No Child Left Behind Act for State and Local Governments*, 6 LOY. J. PUB. INT. L. 153, 179 (2005), it has recently shown more flexibility. *See* Rosalind S. Helderman & Nick Anderson, *Va., Md. Schools Win "No Child" Exemptions*, WASH. POST, June 16, 2005, at B8 (reporting the ED's decision to grant waivers to Virginia and Maryland). The ED has also approved amendments to state plans allowing limited English proficiency (LEP) students and students with disabilities (SWD) extra time to graduate. SUNDERMAN, *supra* note 231, at 45. These amendments may reduce push-out incentives, but are controversial because they hold LEP students and SWD to a different standard. *Id.*

251. The standard number of years required for graduation already varies depending on which grades are included within a school, minimizing infrastructure problems that would be created by a variable definition. GAO REPORT, *supra* note 209, at 7 ("[Department of] Education officials told us that standard number of years is determined by a state and is generally based on the structure of the school. For example, a high school with grades 9 through 12 would have 4 as its standard number of years while a school with grades 10 through 12 would have 3 as its standard number of years.").

252. Ryan, *supra* note 15, at 981 ("Although this method is fairly complex in its details, its basic approach is to focus on achievement gains over time for the same individual or groups of students.").

253. *Id.* at 982 ("To the extent that value-added assessments help isolate school quality, they also help level the playing field for all schools by taking away the advantage of having an affluent student body or the disadvantage of having a poor one. This, in turn, would lessen or eliminate the incentive to shape the student body . . . .").

254. By recognizing that students have different starting point, growth models partially address one major criticism of the statute. *See* Emily Suski, *Actually, We Are Leaving Children Behind: How*

helping them to improve rather than punishing schools for taking them in.[255] In response to state complaints, the ED is currently conducting a pilot project in which ten states may use growth models, rather than absolute targets, to measure the standardized testing component of AYP.[256]

Growth models, however, offer only limited potential for reducing the exclusion of low-performing students.[257] Studies show that those students who start at a lower performance level also make slower gains in performance over time; the structural inequalities that cause the lower starting point may also harm the ability to improve.[258] As a result, disadvantaged students will harm a school's ability to make AYP even under growth models, and the incentive to exclude them will remain. Political feasibility presents another obstacle to the adoption and the success of growth models. Such models accept different absolute levels of achievement for different groups of students, undermining the stated goals of NCLB by tolerating the achievement gaps the law was designed to address.[259]

Changes to Title I Under the No Child Left Behind Act Have Helped Relieve Public Schools of the Responsibility for Taking Care of Disadvantaged Students' Needs, 14 GEO. J. ON POVERTY L. & POL'Y 255, 258 (2007) (criticizing NCLB for failing to "recognize[ ] that serving concentrations of low-income families can negatively impact a school's ability to educate its students," making the statute less effective than its predecessor in serving these students).

255. SUNDERMAN, *supra* note 231, at 53 ("[T]he tentative move towards a growth model to calculate AYP [has] potential to address some of the flaws in the law and the negative incentives created by NCLB.").

256. U.S. GOV'T ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: STATES FACE CHALLENGES MEASURING ACADEMIC GROWTH THAT EDUCATION'S INITIATIVES MAY HELP ADDRESS 2 (2006), *available at* http://www.gao.gov/new.items/d06661.pdf (describing a pilot program).

257. For an overview of the limitations of growth models in accountability systems with racial subgroup requirements, see Kane & Staiger, *supra* note 145, at 164–68; *see also* SUNDERMAN, *supra* note 231, at 53 (arguing that growth models will meet with limited success in reducing negative incentives "as long as the timeline for reaching 100% proficiency and a reliance on a test-based accountability remain in place").

258. Ryan, *supra* note 15, at 981 ("The complicating factor is that exogenous factors, like socioeconomic status, appear to affect not only overall achievement, but also rates of progress."). Scholars have suggested various methodological solutions to this problem. *See, e.g.*, HAMILTON ET AL., *supra* note 133, at 136 ("A growth-based measure that provided credit for movement all along the achievement scale could be devised to reflect state or national priorities without ignoring certain types of achievement gains—for example, by incorporating weights that create extra incentives for movement at the lower end of the scale."); Ryan, *supra* note 15, at 981–82 (proposing two methods of controlling for "exogenous factors").

259. Koski & Reich, *supra* note 15, at 584 (cautioning that a "value-added approach" would "tolerate a wide (and possibly growing) gap in absolute levels of performance" between "wealthier and whiter schools" and "poor and minority schools"); Ryan, *supra* note 15, at 983 ("Creating a 'fair' system of accountability, which isolates a school's performance, may . . . . be politically unacceptable insofar as it tolerates different absolute rates of achievement and is therefore in tension with any rhetorical commitment to leave no child behind.").

As for expelled students, growth models show even less promise for reducing exclusionary incentives, because continuing academic growth depends on the availability and quality of educational services. Expelled students who are not provided with alternative education will have little or no opportunity to improve their academic performance during the period of expulsion. Because of the poor quality of many alternative programs, even those expelled students who continue to receive educational services are likely to show less improvement than other disadvantaged students educated in the mainstream setting.[260] Thus, the use of growth models will not change the incentive to exclude expelled students who lack access to high-quality alternative education.

3. Counteracting the Exclusionary Effect of "Full Academic Year" Definitions

The NCLB allows schools to exclude the scores of students who have not attended a school for a full academic year.[261] This provision seems to make sense, since schools should not be held accountable for the performance of those students they did not have the opportunity to educate. However, the provision also fails to hold schools accountable for those expelled students they have chosen not to educate.[262]

An inclusive full academic year definition—one that counts students enrolled for a few weeks, for example—could solve the accountability problem with respect to expelled students. However, states are unlikely to adopt a definition that prioritizes inclusion of expelled students at the expense of holding schools accountable for newly arrived students. A more feasible solution is for states to adopt an inclusive definition of enrollment, one that counts students as attending the school from which they were expelled. Such a definition would keep expelled students within the accountability structure without unfairly holding schools responsible for the performance of recently transferred students.

---

260. *See generally* Blumenson & Nilsen, *supra* note 6, at 115–16 (explaining that many alternative schools are "a far cry from their regular curriculum").

261. 20 U.S.C. § 6311(b)(3)(C)(xi) (Supp. 2005).

262. *See* Daniel, *supra* note 137, at 809 ("[The full academic year provision] means non-reporting occurs for 'push out students' as well as those sent to alternative schools because of suspension or expulsion or other disciplinary punishments."); *see also* Shindel, *supra* note 108, at 1077 ("[A] school could avoid accountability for students with disabilities by invoking disciplinary procedures against them and placing them in interim alternative settings to preclude their full-year enrollment.").

B. Changing the Incentives From the Bottom: Litigating Against Exclusion

Because the accountability structure of NCLB creates pressure to exclude expelled students, promoting inclusion requires the application of pressure in the opposite direction. Reports of students being pushed out in school districts across the country indicate that administrators face few consequences for engaging in exclusionary practices.[263] Expelled students and their advocates must take steps to assert and to enforce their educational rights in order to change this dynamic.[264] Similar efforts in school funding reform and dropout prevention have shown that achieving and enforcing change requires a broad-based strategy that includes substantial community support.[265] This Subpart analyzes litigation tactics that may be used as a component of such a strategy. Litigation forces educational agencies to defend themselves publicly, acknowledging their practices and justifying their actions before a neutral decisionmaker.[266] Litigation also provides a means of drawing attention to exclusion and its consequences.[267]

1. Challenging Exclusion From Alternative Education During the Period of Expulsion

A recent lawsuit challenging exclusionary practices in New York City provides a model that could be adapted to promote alternative education for

---

263. *See supra* notes 137–143.

264. *See* Hyman, *supra* note 138, at 684, 689 ("[T]he school push-out problem . . . has been brewing in many cities and rural areas and has been fueled by [NCLB] . . . . While the specter of [NCLB] continues to loom over our nations' schools, grassroots organizations, parent groups, attorneys, educators and policy-makers must monitor their local school systems and take action if schools are engaging in exclusionary practices.").

265. Nicole Liguori, Note, *Leaving No Child Behind (Except in States That Don't Do as We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033, 1042 (2006) ("[P]laintiffs' victories in the state courts have not led to widespread—or even limited—changes in educational inequities. Mere declarations that school funding systems are unconstitutional have not substantially furthered education reform; instead, such declarations have been followed by little progress."). *See generally* Amy M. Reichbach, *Lawyer, Client, Community: To Whom Does the Education Reform Lawsuit Belong?*, 27 B.C. THIRD WORLD L.J. 131 (2007) (urging lawyers to devise litigation strategies that reach beyond their clients' immediate needs to address long term changes); *cf.* Martin & Halperin, *supra* note 158, at 18 (noting that Philadelphia's successful "planning, consensus-building and partnership mechanisms for recovering out-of-school youth . . . enjoy the strong support of city government, employers, foundations, youth-serving intermediaries, and community-based nonprofit organizations").

266. *See generally* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004) (suggesting that lawsuits can be used as platforms for social movements).

267. *See* Hyman, *supra* note 138, at 689 (describing how litigation targeting exclusionary practices in New York City "generated local and national awareness of the phenomenon of school push-outs").

expelled students.[268] The suit identified the source of the illegal actions as the exclusionary incentive structure, rather than misconduct by individual school administrators, and sought a forward-looking remedy that enabled ongoing enforcement by students and their families. In *RV v. New York City Department of Education*,[269] a high-stakes testing regime adopted by the state school system created pressure for administrators to exclude low-performing students.[270] Students who had too few credits to graduate on time, or who appeared likely to fail the standardized test required for graduation, posed a threat to New York City high schools' graduation statistics.[271] As a result, although state law guaranteed the students the right to attend school until graduating or reaching age twenty-one, thousands of predominantly minority students were told that they could not return to their schools.[272] A complicated and poorly verified discharge system allowed administrators to avoid counting the students as dropouts.[273] Students excluded from three schools brought suit, alleging violations of state and federal law.[274]

The schools settled the case, conferring a number of rights on formerly excluded students and requiring procedures to protect against future exclusionary practices.[275] Students who had been discharged or transferred gained the right to reenroll, conditioned only on attending a guidance

268. *See* RV v. N.Y. City Dep't of Educ., 321 F. Supp. 2d 538 (E.D.N.Y. 2004).

269. 321 F. Supp. 2d 538 (E.D.N.Y. 2004).

270. Hyman, *supra* note 138, at 685 ("In New York the [push-out] problem started earlier than the [NCLB] Act: in 1996 the New York State Board of Regents revised the state's graduation requirements, phasing in the required passing of five different regents examinations to obtain a diploma."); Jack B. Weinstein, Brown v. Board of Education *After Fifty Years*, 26 CARDOZO L. REV. 289, 293 (2004) ("A few weeks ago, the New York City Board of Education settled a case [*RV*] in my court involving the alleged 'pushing-out' of high school students, predominantly African-American and Hispanic. Public schools, under increased pressure to improve reported performance on standardized tests and other so-called objective measures, summarily dropped underperforming students from the rolls.").

271. Lewin & Medina, *supra* note 239 ("As students are being spurred to new levels of academic achievement and required to pass stringent Regents exams to get their high school diplomas, many schools are trying to get rid of those who may tarnish the schools' statistics by failing to graduate on time.").

272. Tamar Lewin, *City to Track Why Students Leave School*, N.Y. TIMES, Sept. 15, 2003, at B1 ("Although students have the legal right to remain in school until they are 21, many New York students who are unlikely to graduate on time have been told by school administrators to leave school and enroll in an equivalency program, or into a program that will not lead to a diploma.").

273. Lewin & Medina, *supra* note 239.

274. The students based their claims on the Due Process Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 (2000), New York Education Law §§ 3202 and 3214 (2007), and the New York City Chancellor's Education Regulations. *RV*, 321 F. Supp. 2d at 538–39, 541. The three cases, alleging violations at Franklin K. Lane High School, Martin Luther King, Jr., High School, and Bushwick High School, were combined into the *RV* decision. *Id.* at 538–39.

275. The court dismissed the case involving Martin Luther King, Jr. High School as moot. The terms of the settlements for Franklin K. Lane High School and Bushwick High School differed slightly; the description here includes the features common to both. *Id.* at 543–59.

conference. Students who had been absent for more than twenty consecutive school days gained an unconditional right to reenroll within two days of providing notice to the school. In addition, the settlement contained several forward-looking remedies meant to prevent future exclusion. One such remedy required schools to conduct an individual planning interview before discharging any student. The student and a parent attend the interview, at which school personnel conduct a review of the student's record and make a recommendation as to the best educational option. The minimum requirements for the interview include a review of the student's credits and progress towards a diploma, an explanation of the student's educational rights, and consideration of whether additional services could be used to help the student complete his or her education.[276] The New York Department of Education also agreed to provide data regarding discharges and transfers from the schools each quarter.[277]

Several features of the *RV* litigation make it a useful model for challenging the exclusion of expelled students from alternative education. The forward-looking nature of the remedy gave students and their families tools for keeping inclusive practices in place. Support for ongoing enforcement can help to assure that the pressure against exclusion will not be short lived. Moreover, the suit was only a small piece of a larger effort with broad-based community support. The schools provided relief beyond the scope of the original complaint, suggesting a positive response to the public visibility and awareness raised by the advocacy.[278]

In addition, *RV* challenged the systemic nature of the problem, both through its class action format and by positing the issue as the incentive structure itself, rather than the actions of a few misguided administrators. This broad framing created space for a systemic solution capable of addressing all students' needs and avoided the problems of delay and mootness that

276. *Id.* at 541–42.

277. *See id.* at 542; *see also* Hyman, *supra* note 138, at 688 (describing the terms of the settlement and the corresponding changes in state department of education policies).

278. Advocates for Children, which served as plaintiffs' counsel, noted that the effort "combined direct service, public education, community outreach, public policy, media campaigns, and impact litigation." Hyman, *supra* note 138, at 684; *see also id.* at 688 ("On June 16, 2004, the Department of Education sent to plaintiffs' counsel a letter setting forth the steps that the department had taken to date to address the citywide problems and agreeing to undertake voluntary information sharing with counsel (outside the scope of the three lawsuits) concerning discharges and transfers on a citywide basis during the 2004–2005 and 2005–2006 school years. The department indicated that it invested $8 million to develop new programs for overaged and undercredited students. The department indicated that it was restructuring its alternative schools division to serve the needs of overaged and undercredited students better.").

can arise in individual case litigation.[279] At the same time, the suit sought to change actions taken by the schools as a reaction to the accountability model, rather than challenging the accountability regime itself. This indirect approach is necessary for any suit challenging negative consequences arising from NCLB, as courts have found that NCLB does not create a private right of action.[280]

The *RV* approach and remedy could be tailored to address the particular rights to alternative education available in a given state. Because *RV* targeted illegal actions, this tailoring would first require identifying which actions are illegal in light of these educational rights. In California, for example, expelled students possess a clear statutory right to attend an alternative program.[281] Of the more than nineteen thousand students expelled from California schools during the 2004–2005 academic year, however, an estimated 2817 were not provided with educational services after the expulsion.[282] Those excluded could bring a challenge based on their statutory entitlement to alternative education. In West Virginia, where alternative education can be denied only in cases of strict necessity,[283] excluded students could bring suit demanding a particularized showing. In Tennessee, where districts are required to make alternative programs available but not to admit any particular student,[284] students could challenge the unavailability of an alternative school setting.[285]

279. *See, e.g.*, B.W.S., Jr. v. Livingston Parish Sch. Bd., 960 So. 2d 997, 1001 (La. Ct. App. 2007) ("[T]he institutional delays in the judicial system and in the School Board's actions fighting every attempt by the parents to have their child maintain her education have cost this child one year of her academic life.").

280. *See* Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779 (2006) (surveying cases brought to enforce NLCB, noting the problems plaintiffs have faced in those cases, and suggesting a new approach for using the courts to influence implementation of the statute).

281. *See* CAL. EDUC. CODE § 48915 (West 2006) (requiring alternative education for expelled students).

282. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2004 CIVIL RIGHTS DATA COLLECTION: PROJECTED DATA FOR THE STATE OF CALIFORNIA, *available at* http://ocrdata.ed.gov/ocr2004rv30/xls/california-projection.xls; *see also* GFSA 2003, *supra* note 2, at 15 tbl.8 (reporting that 10 percent of students expelled under California's Gun-Free Schools Act policy were not provided with an alternative placement); Editorial, *President of Board Gets Off to Strong Start*, SAN JOSE MERCURY NEWS, Jan. 29, 2007, at A-OP1 (reporting that one school district had no community day school "for the most difficult students," that "[t]he need is dire," and that the district planned to open a community day school in a year).

283. Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 351 (W. Va. 1997).

284. C.S.C. v. Knox County Bd. of Educ., No. E2006-00087-COA-R3CV, 2006 WL 3731304, at *10 (Tenn. Ct. App. Dec. 19, 2006) (interpreting TENN. CODE. ANN. § 49-6-3402(a) (2002)).

285. This type of challenge can be more successful that it would seem. For example, a Tennessee school district agreed to establish an alternative program and to admit the expelled students who had brought the challenge, despite the court's explicit finding that Tennessee law did not guarantee the students the right to attend the program. *See id.*

For any targeted exclusionary practices, expelled students could seek forward-looking remedies. Where a school has been found to violate expelled students' rights with respect to alternative education and reinstatement, relief obtained through litigation could require that the school hold a planning conference shortly after each expulsion to explain those rights to expelled students and their parents. A written record of each conference and the information provided could help to track and ensure compliance. Requiring schools to make information on alternative education and reinstatement public would enable students, parents, and community groups to advocate for expelled students' educational rights on an ongoing basis. Such information should thus be provided to state agencies and made available to students and families.

Where alternative education challenges fail, they may still produce benefits. A school or district engaging in exclusionary practices disclaims responsibility for the education of expelled students, implicitly denying that expelled students continue to have educational needs. A lawsuit demanding alternative education challenges that denial, explicitly asserting the educational needs of the expelled students. Such a lawsuit thus enhances visibility both for expelled students and for district practices. Moreover, forcing a district to admit its refusal to provide alternative education may strengthen an expelled student's claim for reinstatement to mainstream education. Denying reinstatement works a more serious deprivation when it results in complete exclusion from the educational system, implicating greater due process protections than situations where alternative education is provided.[286]

2. Challenging Exclusion From Mainstream Education After the Period of Expulsion

Most expulsions are imposed for a fixed length of time, rather than on a permanent basis.[287] Many students, however, meet obstacles when seeking

---

286. *Cf.* McCall v. Bossier Parish Sch. Bd., 785 So. 2d 57, 67 (La. Ct. App. 2001) ("[D]ue process considerations [are] at a minimum in this expulsion setting where assignment to an alternative school is the punishment . . . .").

287. *See* Erica Bell, Note, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education for All Handicapped Children Act of 1975*, 51 FORDHAM L. REV. 168, 172 n.30 (1982) (collecting statutes setting maximum expulsion periods in several states). In Michigan, however, schools may impose permanent expulsions. *See generally* Bogos, *supra* note 4 (discussing Michigan schools' zero tolerance policy). A permanently expelled student can file a petition for reinstatement, but the state provides no assistance in preparing or explaining the form. Polakow-Suransky, *supra* note 10, at 109. A survey of three Michigan school districts covering the 1995–1996 and 1996–1997 school years showed that only 40 to 64 percent of expelled students petitioned for reinstatement. Of those who petitioned, 46 to 60 percent never returned to school. *Id.* Low reinstatement rates are especially

reinstatement to mainstream education after a period of expulsion.[288] In *RM v. Washakie County School District No. One*,[289] the temporary nature of the expulsion provided an important basis for the Wyoming Supreme Court's conclusion that the school district could deny alternative educational services without violating the state constitution. The court found the exclusion to be narrowly tailored because it marked only a temporary deprivation of the student's educational rights.[290] In contrast, courts have long recognized that permanent expulsion represents a more serious deprivation that may violate the student's federal constitutional rights.[291]

If a fixed-length expulsion deprives a student of educational rights only temporarily, it follows that those rights must be restored after the period of expulsion is complete. Under *Goss v. Lopez*,[292] schools must comply with procedural due process requirements before depriving a student of his or her liberty and property interests by imposing the original expulsion. Where a school seeks to exclude a student for a second time by denying reinstatement, the action marks a separate infringement that should not be allowed absent the same "fundamentally fair procedures"[293] to prove that exclusion is justified. Litigation could help expelled students break down barriers to reinstatement by forcing schools to provide procedural safeguards during reinstatement decisions.

---

disturbing in Michigan, where expelled students have no right to alternative education and evidence suggests that most are expelled between the ages of twelve and fifteen. *See id.* at 106, 109.

288. *See, e.g.*, Rokeach & Denvir, *supra* note 1, at 285 ("[I]nterviews with students revealed that school officials are sometimes uncooperative, dragging their feet and creating obstacles, when responding to reinstatement requests after completion of the expulsion period."); *Alternative School Enrollment Grew by 1,000 in 15 Months*, PHILA. PUB. SCH. NOTEBOOK, February 2004, http://www.thenotebook.org/newsflash/2004/february/alternative.htm (reporting that of the 2700 students attending alternative schools in Philadelphia, only 200 were readmitted to regular school placements at the start of the school year).

289. 102 P.3d 868, 875 (Wyo. 2004) (Workman, C.J., concurring in part and dissenting in part) ("The 'fact that the forfeiture is temporary is important' because 'temporary deprivation of constitutional rights does not require the protection that a permanent deprivation would.'" (citing Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 355 (W. Va. 1997))).

290. *Id.* at 876.

291. *See, e.g.*, Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974) (overturning an expulsion decision in part due to the permanent nature of the punishment, and noting that "a sentence of banishment from the local educational system is, insofar as the institution has power to act, the extreme penalty, the ultimate punishment" and that "[s]tripping a child of access to educational opportunity is a life sentence to second-rate citizenship, unless the child has the financial ability to migrate to another school system or enter private school"); Cook v. Edwards, 341 F. Supp. 307, 311 (D.N.H. 1972) ("[T]he punishment of indefinite expulsion raises a serious question as to substantive due process.").

292. 419 U.S. 565 (1975).

293. *Id.* at 574.

An expelled student who has completed the period of expulsion, but has been denied reinstatement without a fair hearing, may bring a claim for violation of the Due Process Clause of the Fourteenth Amendment. This claim has been implicitly though not widely recognized, and finds additional support in analogous decisions involving civil commitment.[294] Courts have long required additional procedural safeguards when a student's punishment is extended beyond the original time frame. In *Williams v. Dade County School Board*,[295] for example, the court found that a student's procedural due process rights were violated when the district unilaterally extended a ten-day suspension for an additional thirty days without first providing the "rudiments of an adversary hearing."[296]

More recently, in *Johnson v. Collins*,[297] the court issued a preliminary injunction against a New Hampshire school board that unilaterally renewed a student's expulsion without a hearing. The school board issued the original expulsion on June 4, 2002, based on a finding that the student wrote a bomb threat on the chalkboard of a school classroom. Prior to the original expulsion hearing, the school board sent the student's parents a notice indicating that the proposed expulsion would last "for the remainder of the school year."[298] The following August, after the student passed a psychological examination and signed a reinstatement agreement, the school board readmitted him to the mainstream school. The agreement provided that "[i]f the student commits any offense for which suspension from school is the punishment, reinstatement of the expulsion will occur."[299] When the student violated the agreement two months later, the school board summarily expelled him.[300]

The court held that "[t]he School Board's decision to summarily expel [the student] on October 4, 2002 likely violated his constitutional right to due process in that he was not afforded any hearing prior to the expulsion."[301] The court found that the reinstatement agreement did not provide grounds

294. In addition, some scholars have argued that "[l]aws limiting the employment opportunities of offenders raise somewhat analogous constitutional concerns" to "statutes or official actions affecting educational access." Blumenson & Nilsen, *supra* note 6, at 111 n.181 (collecting cases).

295. 441 F.2d 299 (5th Cir. 1971). While the principal did meet with the student's parents prior to officially extending the suspension, the court found that "this informal meeting was called not to weigh objectively the facts and reach a fair decision, but to explain to the parents the decision that had already been reached." *Id.* at 300.

296. *Id.* at 299–300 (5th Cir. 1971) (quoting Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961)).

297. 233 F. Supp. 2d 241 (D.N.H. 2002).

298. *Id.* at 245.

299. *Id.* at 246.

300. *Id.*

301. *Id.* at 250.

for expulsion without a hearing, as it did not expressly waive the student's constitutional rights. The court rejected the school board's attempt to characterize the second expulsion as an extension of the original expulsion, finding that "by the express terms of the School Board's written decision the June 4th expulsion was for the remainder of the previous school year, which ended in June 2002. The School Board could not reinstate an expulsion that already expired."[302]

As recognized in *Johnson*, a school board that seeks to exclude a student after a fixed period of expulsion imposes a second punishment, independent of the original expulsion.[303] Because the second punishment implicates the same educational interests as the original expulsion, the same procedural protections must be provided.[304] Failure to provide a fair hearing prior to the second exclusion violates the student's right to due process.

The due process claim of an expelled student who is denied reinstatement without a hearing is analogous to the well-recognized due process claim of an incarcerated person who has been subjected to involuntary commitment without a hearing.[305] Although he is currently incarcerated, a prisoner has a protected liberty interest in being released when his sentence expires.[306] If the prisoner poses a continuing danger to himself or the community, however, the state may seek civil commitment because of its valid interest in preventing future harm.[307] Balancing these interests requires, at

302. *Id.* at 251.

303. While *Johnson* involved an exclusion subsequent to reinstatement, rather than a continuous exclusion, the court based its decision on the fact that the original expulsion had expired rather than the fact that the student had been reinstated to the mainstream setting. *Id.*

304. *Cf.* Tate v. Racine Unified Sch. Dist., No. 96-CV-524, 1996 WL 33322066 (E.D. Wis. Aug. 15, 1996) (finding that a reinstatement hearing provided insufficient procedural protections, violating the student's right to due process, and requiring the district to provide a new hearing focused on whether the student posed a continuing threat to school safety).

305. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 357 (1997) (upholding a Kansas commitment statute on the basis that it "unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement"); Foucha v. Louisiana, 504 U.S. 71, 81–82 (1992) (invalidating a Louisiana commitment statute under which "the State need prove nothing to justify continued detention" of an insanity acquittee on the basis that "the statute places the burden on the detainee to prove that he is not dangerous"); U.S. v. Salerno, 481 U.S. 739, 751 (1987) (upholding a pretrial detention procedure under which "the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"); *see also* Demore v. Kim, 538 U.S. 510, 551 (2003) (Souter, J., dissenting) (noting that *Hendricks*, *Foucha*, and *Salerno* "insist at the least on an opportunity for a detainee to challenge the reason claimed for committing him").

306. *Cf. Hendricks*, 521 U.S. at 350, 356.

307. *Id.* at 363.

a minimum, that the state provide notice and a hearing before continuing to deprive the prisoner of his liberty.[308]

Similarly, after the end of a fixed period of expulsion, a student seeking to return to mainstream education has a property interest in his education and a liberty interest in his reputation and future opportunities.[309] As the Supreme Court recognized in *Goss*, exclusion from mainstream education infringes on both of those interests.[310] If the student poses an ongoing danger to the school community, however, the state may seek to deny his request for reinstatement because of its valid interest in school safety. Balancing these interests requires the state to provide notice and a hearing before continuing to deprive the student of his educational rights.

While a prisoner has a greater interest in securing his physical liberty than an expelled student has in seeking reinstatement to mainstream education, the distinction merely indicates that less process, rather than no process, is due.[311] The procedural protections for a student seeking reinstatement need not reach the level of a civil commitment hearing, but should at least be equivalent to the protections required at the original expulsion hearing, where the same property and liberty interests were at stake. Expulsion hearing requirements vary among the states, but all include notice, a formal hearing before an impartial trier of fact, and an opportunity for the student to be heard.[312] Most states also allow students to bring legal representation, present witnesses, and record the hearing.[313] California's statute governing reinstatement to mainstream education already contains such procedural safeguards.[314] At the time of the original expulsion, the state requires the school district to create a rehabilitation plan and to set a date to review the student's eligibility for reinstatement at the end of the expulsion period.[315] The school district must establish clear procedures for reviewing a student for reinstatement, and must make those rules available to the student at the time of the original expulsion.[316] The statute requires that, "[u]pon completion of

308. *Id.* at 364.

309. *Cf.* Goss v. Lopez, 419 U.S. 565, 574 (1975) (noting the liberty and property interests implicated by school discipline decisions).

310. *Id.*

311. *See generally* Gorman v. Univ. of R.I., 837 F.2d 7, 14 (1st Cir. 1988) (noting that an expulsion hearing need not "mirror[ ] a common law criminal trial" but must consider "[t]he interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma").

312. Reed, *supra* note 5, at 586.

313. *Id.* at 586 n.36.

314. *See* CAL. EDUC. CODE § 48916 (West 2006).

315. *Id.* § 48916(a)–(b).

316. *Id.* § 48916(c).

the readmission process, the governing board shall readmit the pupil, unless the governing board makes a finding that the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district."[317] By providing notice of the reinstatement review, establishing a presumption in favor of the student, and limiting the circumstances under which the district may renew the expulsion, the law treats the formerly expelled student as possessing educational rights similar to those he or she possessed prior to the expulsion.[318]

Many states, however, do not impose procedural safeguards or even create clear standards governing reinstatement after a period of expulsion.[319] A Louisiana statute, for example, states that reinstatement requires "the review and approval of the school board of the school system to which [the expelled student] seeks admittance."[320] The statute does not indicate the form of that review, or the conditions under which approval must be granted.

As a result of the lack of procedural safeguards or guidance regarding reinstatement under state law, students seeking reinstatement after a period of expulsion currently have few legal tools at their disposal. Even if the school can assert no basis for continuing exclusion, students may have little recourse. The availability of a procedural due process challenge could cure that defect, providing formerly expelled students with a path back to mainstream education. Strengthening procedural due process protections would not require schools to reinstate students who pose an ongoing danger to school safety, or who have failed to complete a rehabilitation plan imposed at the time of the original expulsion. Rather, schools would be required to assert a valid basis for exclusion, provide some form of support for their conclusion, and give the student notice and an opportunity to challenge that conclusion at a hearing.

Placing the burden on the school to show why the student must be excluded creates a path to reinstatement in those cases where exclusion cannot be justified. Even in cases where the student is not immediately readmitted, requiring the school to provide reasons for the exclusion allows the student to take concrete steps to address the school's concerns, perhaps

317. *Id.*

318. The statute does not specifically require, however, that the district provide the student with a hearing as part of the review process.

319. *See, e.g.*, TENN. CODE ANN. § 49-6-3402 (2002 & Supp. 2007) (requiring school districts operating alternative schools to create transition plans for expelled students' return to mainstream education, but creating no other procedural or substantive rights regarding reinstatement); LA. REV. STAT. ANN. § 17:416 (2007) (stating only that reinstatement requires school board review and approval).

320. LA. REV. STAT. ANN. § 17:416.B.(3)(a)(i) (2001).

leading to reinstatement at a later date. As a structural matter, a hearing requirement would alter the incentive structure by creating visible consequences for exclusionary practices. A school would have to admit and to defend publicly its decision to exclude, subjecting it to possible criticism and embarrassment.

C. Closing the Loopholes: Strengthening Educational Rights

The counterexclusionary litigation strategies in the previous Subpart depend to a large degree on the existence of established state-level guarantees. A lack of clearly defined educational rights at the state level creates a loophole through which schools can exclude expelled students with impunity. This Subpart proposes approaches for closing such loopholes by strengthening the rights of expelled students under the state constitutions.[321]

As noted, each state constitution contains an education clause; many create an individually enforceable right, though the nature of that right varies from state to state.[322] In states where the constitution has been found to create an individually enforceable right to education, courts hearing constitutional challenges must analyze whether denial of postexpulsion services impermissibly infringes upon that right. Courts that hold there was no infringement on students' constitutional rights consistently rely on several justifications: that expulsion marks only a temporary denial of educational opportunity,[323] that exclusion advances school safety,[324] and that denying alternative education may have a deterrent effect.[325]

---

321. Several states may prove amenable to such a challenge. For example, the North Carolina Court of Appeals held in 1987 that the state constitution did not require alternative education for expelled students. Goodman, *supra* note 5, at 1511. However, that holding was called into doubt ten years later, when the state supreme court found education to be a fundamental right implicating strict scrutiny analysis. *Id.* at 1511–12.

322. *See supra* Part I.A.2.

323. RM v. Washakie County Sch. Dist. No. One, 102 P.3d 868, 875 (Wyo. 2004) ("The 'fact that the forfeiture is temporary is important' because 'temporary deprivation of constitutional rights does not require the protection that a permanent deprivation would.'") (quoting Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 355 (W. Va. 1997) (Workman, C.J., concurring in part and dissenting in part)).

324. *See, e.g.*, *Cathe A.*, 490 S.E.2d at 355 (Workman, C.J., concurring in part and dissenting in part) (justifying exclusion on the basis of "the valid legislative recognition that our schools must be made safe for both the students and the teachers").

325. *See, e.g.*, Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1097 (Mass. 1995) ("It reasonably may be argued that a requirement that a student who is expelled for misconduct, no matter how egregious, be provided with alternate education by a public school system, would be likely to have a serious detrimental effect on the ability of school officials to deter dangerous behavior within a school by imposing expulsion as a sanction.").

Such arguments are fact based in nature. Although research could easily refute or undermine these arguments, few studies have addressed the effects of exclusion.[326] The absence of research in this area harms but does not defeat students' ability to challenge the constitutionality of denying postexpulsion educational services at the state level. While more research is needed, available data can be deployed in support of a mandate for alternative education and reinstatement.

The justification that denying alternative education promotes school safety may be the most problematic, in part because it depends on the assumption that expelled students are dangerous. The fact that expulsion disproportionately targets students of color,[327] combined with the pervasive stereotype that labels youth of color as dangerous, indicates that this assertion may have a racial basis.[328] The ability of the justice system to provide educational services to incarcerated students, who presumably are more dangerous than students who have simply been expelled, also undermines this justification.[329] Moreover, courts should recognize that exclusion from education does not have the same effect as incarceration or exclusion from the community, since it does not remove students from society.[330] If a student is truly dangerous, moving the student from the school to the street hardly seems like an appropriate or rational response. The expelled student will have additional opportunities to engage in high-risk or illegal activity during the day, and exclusion from school will not separate her from other students after the school day ends.[331] Studies show that there is an increased likelihood

326. *See* Rokeach & Denvir, *supra* note 1, at 283–84 ("Little or no research has been conducted to directly measure the effect of suspension and expulsion upon student behavior or to find out what happens to expelled students.").

327. Skiba et al., *supra* note 18, at 320 (describing multiple studies documenting the overrepresentation of African American students in exclusionary discipline).

328. This assertion is not meant to suggest that the school safety justification results from bad faith or intentional racism. Racial bias more likely acts on an unconscious level, predisposing decisionmakers to accept the school safety justification because of the negative stereotypes operating in the background. For an overview of the pervasive and unconscious nature of implicit racial bias and its effects on behavior, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

329. *See Cathe A.*, 490 S.E.2d at 354 (Davis, J., concurring, in part, and dissenting, in part) (arguing that the provision of educational services to incarcerated students supports educational access for expelled students); Blumenson & Nilsen, *supra* note 6, at 109.

330. Adams, *supra* note 17, at 145 ("[U]nlike the incapacitation of offenders in prison, exclusion simply displaces the offending student from the school to the streets.").

331. *See* Bogos, *supra* note 4, at 380 ("Without requiring expelled students to enroll in an alternative education program, one Department of Education official commented, '[y]ou're turning these students out [onto the streets] to get into more mischief. It does a disservice to society.'" (alterations in original)).

of juvenile justice involvement during the period of expulsion, which illustrates that exclusion may displace, but does not reduce, safety concerns.[332]

The assertion that schools are justified in denying alternative education because expulsion marks only a temporary deprivation of educational opportunity ignores the difficulties that expelled students face in returning to school after a period of exclusion. For example, in the case where the Wyoming Supreme Court relied on the temporary nature of the expulsion to justify denying alternative education,[333] the expelled students never returned to school.[334] Their experience is not unique; expulsion marks the end of many students' public school careers.[335] Whether students' inability to return arises from denial of reinstatement, or because they become alienated and discouraged from rejoining the school community, the end result remains the same.[336] The numerous administrative and social obstacles to reinstatement challenge courts' assumptions that expulsion represents only a temporary deprivation of educational rights.

The justification that denying alternative education may have a deterrent effect on student misconduct appears to be the weakest, as it requires several tenuous inferences: Prior to any disciplinary action, a student must be aware that certain conduct creates a risk of expulsion. The student must also be aware that expulsion will result in the denial of alternative education, and that awareness must be a factor affecting his decision whether to engage in the misconduct. Research has failed to show that expulsion has any deterrent effect, or that denying alternative education has an additional deterrent effect.[337] In fact, one study found that schools imposing expulsion under zero tolerance policies were actually less safe than schools without such policies.[338]

---

332. *See id.* at 384; Polakow-Suransky, *supra* note 10, at 122.

333. RM v. Washakie County Sch. Dist. No. One, 102 P.3d 868, 874 (Wyo. 2004) ("[T]he fundamental right to an opportunity for an education does not guarantee that a student cannot temporarily forfeit educational services through his own conduct.").

334. Pearson, *supra* note 5, at 617 (citing an interview with Judge Gary P. Hartman).

335. *See* Blumenson & Nilsen, *supra* note 3, at 66–67 ("[S]tudies show that many [suspended or expelled students] will not return to school even when the sanction expires, and those who do return are more likely than other students to fail their courses.").

336. *See, e.g.*, Rokeach & Denvir, *supra* note 1, at 285 ("[S]tudents who have been suspended or expelled become further behind in their schoolwork, lose academic credits, and are more likely to become alienated or discouraged, thus accelerating their path toward dropping out.").

337. *See* Goodman, *supra* note 5, at 1522–23; *cf.* Blumenson & Nilsen, *supra* note 6, at 76 ("Those experts who have attempted to isolate the impact of zero tolerance discipline have found little evidence that these sanctions are substantially influencing student behavior.").

338. Adams, *supra* note 17, at 148 (citing a National Center for Education Statistics study); *see also* Blumenson & Nilsen, *supra* note 6, at 76 ("[S]chools substantially relying on zero tolerance policies 'continue to be less safe than schools that implement fewer components of zero tolerance.'" (quoting Russ Skilen & Reese Peterson, *School Discipline at the Crossroads*, 66 EXCEPTIONAL CHILD 335, 340 (2000))).

In addition to finding a valid purpose for exclusion, a court analyzing a challenge under the state constitution must ask, at a minimum, whether the state action bears a rational relationship to that purpose.[339] This requirement provokes the question: rational from whose point of view? For an individual school taking an extremely narrow point of view, expulsion without ongoing services may appear rational. Excluding a low-performing student allows the school to avoid sanctions without expending additional resources, and removing one misbehaving student increases the resources available for the other students.[340] This narrow view, however, assumes that exclusion for such purposes can be justified. It fails to consider the educational needs of the expelled student, and ignores the serious equitable and financial costs of exclusion to society as a whole. Showing that total exclusion creates society-wide harm can remind courts and other decisionmakers of their duty to take the broader view; the policy arguments outlined in Part II can be put to that use.[341]

CONCLUSION

> A farmer went out to sow his seed. As he was scattering the seed, some fell along the path, and the birds came and ate it up. Some fell on rocky places, where it did not have much soil. It sprang up quickly, because the soil was shallow. But when the sun came up, the plants were scorched, and they withered because they had no root. Other seed fell among thorns, which grew up and choked the plants, so that they did not bear grain. Still other seed fell on good soil. It came up, grew and produced a crop, multiplying thirty, sixty, or even a hundred times.[342]

To promote the effective education of expelled students, NCLB must fall on the "good soil" of state laws that guarantee access to alternative education during the period of expulsion, as well as reinstatement following the period of expulsion. In a location that recognizes a right to alternative education, the No Child Left Behind Act (NCLB) offers the promise of extending accountability to alternative schools. In a state where students do not have access to alternative education or reinstatement, however, that promise cannot take root.

---

339. *See, e.g.*, Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1097 (Mass. 1995) (applying the rational basis test to an expelled student's claim for alternative education).

340. Losen, *supra* note 15, at 105–06.

341. *See supra* Part II.

342. *Mark* 4:3–8 (NIV).

Just as the labor of scattering seed implies a desire to produce a crop, the effort of implementing education reform implies a desire to improve student outcomes. NCLB, however creates incentives for schools to exclude low-performing students. This scenario raises the question: Why does NCLB sow its own thorns?

Some scholars suggest that the contradiction is due to an ulterior motive: NCLB gained support from politicians seeking to discredit public education in order to promote private education.[343] These scholars suggest that some NCLB supporters never expected schools to achieve the high goals set by the statute, believing instead that "an accountability system that would label thousands of public schools as failing while generating no such data on private schools" would increase support for school voucher programs.[344] Arguably, the high rates of schools failing to make adequate yearly progress (AYP) support the conclusion that NCLB was designed to discredit public education. More than a quarter of schools missed their targets in the first year of the act, and research suggests that more than 90 percent could fail to make AYP by 2014.[345] Other scholars reject the possibility of "NCLB as a shill for privatization," finding instead that states unwilling to suffer the political consequences of failing schools will lower academic standards "so that widespread failure, and the privatization to follow, does not occur."[346]

The Gun-Free Schools Act (GFSA) suggests another possible answer as to why NCLB is counterproductive, at least with respect to expelled students. By incorporating GFSA, which requires states to expel students for weapons violations, NCLB affirms expulsion as a disciplinary tool.[347] NCLB does not require states to report any information on student outcomes after an expulsion required by GFSA; instead, states must report only "the name of the school concerned," "the number of students expelled from such school," and

343. *See* Losen, *supra* note 114, at 276; Salinas & Kimball, *supra* note 140, at 230.

344. Losen, *supra* note 114, at 276; *see also* Salinas & Kimball, *supra* note 140, at 230 ("[One] possibility is that political players who might have opposed racial accountability were more interested in undermining public education by creating an accountability system that would label thousands of public schools as failing while generating no such data on private schools."); *see also* Ivan Chavez, *Paving the Way for Equality and Justice in Education*, HISPANIC J., May–June 2003 ("When you attach standards that can't possibly be met, the public school system gets discredited and the path to vouchers gets paved. For certain powerful business and economic interests, I think that's the ultimate goal.").

345. Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 BYU EDUC. & L.J. 157, 177 (2006).

346. James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1727–28 (2003).

347. *See* 20 U.S.C. § 7151 (Supp. 2005); *see also* Hanson, *supra* note 4, at 303–06 (tracing the history of the Gun-Free Schools Act (GFSA) from the original 1994 statute to the version incorporated into the No Child Left Behind Act (NCLB)).

"the type of firearms concerned."[348] This minimal reporting required under GFSA stands in stark contrast to the vast amounts of data collection NCLB requires in other areas.[349] Through GFSA, NCLB allows schools to expel students without asking where they will go or how their academic development will continue. In effect, it stops treating expelled students as students—young people in need of an education. If they are no longer students, they are no longer within the scope of NCLB, and their exclusion does not conflict with the goals of the statute.

Alternative education challenges that conclusion. It is not possible to discuss alternative education or reinstatement without acknowledging that expelled students do not disappear or cease to have educational needs upon the loss of the privilege to attend the mainstream school. A system that adopts an alternative education or reinstatement policy admits, at least implicitly, that exclusionary discipline policies have consequences.

The Department of Education (ED) has taken a positive step towards that recognition. As part of its implementation of GFSA, the ED requires schools to report whether students expelled pursuant to GFSA were referred to an alternative educational program.[350] That reporting has produced valuable data. For example, it is now known that only 46 percent of students expelled under GFSA were referred to an alternative program.[351]

While GFSA inspired a broad range of zero tolerance policies at the state and local level, it accounts for less than 3 percent of all expulsions.[352] Almost no data is available regarding the educational placement of students expelled for non-GFSA offenses.[353] Educational agencies have shown a growing willingness to test, measure, collect, and report vast amounts of data on currently enrolled students, but that willingness has not extended to expelled

348. 20 U.S.C. § 7151(d)(2).

349. *See, e.g.*, *id.* § 6311(h) (listing data collection and reporting requirements for accountability data).

350. GFSA 2003, *supra* note 2, at 1, 6.

351. *Id.* at 6.

352. Blumenson & Nilsen, *supra* note 6, at 70 (describing the broad range of zero tolerance policies inspired, but not mandated, by GFSA); U.S. DEP'T OF EDUC., REPORT ON THE IMPLEMENTATION OF THE GUN-FREE SCHOOLS ACT OF 1994 IN THE STATES AND OUTLYING AREAS, SCHOOL YEAR 2002–03, at 3 (2006) (indicating that 2143 students were expelled under GFSA-mandated policies during the 2002–2003 school year); OCR 2002, *supra* note 6 (indicating that a total of 89,131 students were expelled during the 2002–2003 school year).

353. *See, e.g.*, Polakow-Suransky, *supra* note 10, at 109 (noting that in a Michigan study, most districts "chose not to provide data or claimed that they did not have any records" on reinstatement rates and alternative education placement, and finding that "[t]he paucity of information on this vitally important stage of the expulsion process is telling").

students. This lack of information demonstrates a desire not to know—a failure to acknowledge the consequences of expulsion as a disciplinary tool.

Because expelled students continue to be part of society and have educational needs, expulsion does have consequences. Ignoring those consequences will not make them go away. Terminating educational opportunity after expulsion will only exacerbate the harm suffered by excluded students and society as a whole.[354] This Comment has proposed legal strategies that could counteract those harms and draw attention to the educational needs of expelled students. By ignoring those needs, society has indulged in willful blindness; each year, tens of thousands of expelled students give us new reasons to open our eyes.

354. *See* Blumenson & Nilsen, *supra* note 6, at 116 ("In order for our young people to fully realize their potential, society will have to overcome its propensity for branding and banishing troublesome students and instead see them as children with whom we share an intertwined and interdependent future.").