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# MAKING KIDS TOE THE LINE IN THE OLD LINE STATE:

## THE DISPARATE APPLICATION OF PUBLIC SCHOOL DISCIPLINE POLICIES IN MARYLAND

ALLISON I. FULTZ\*

### INTRODUCTION

Public school students step into unforgiving territory when they face school conduct and discipline issues. Across the country, students of all grade levels are subject to mandatory suspensions or expulsions for behavior ranging from “habitual indolence” to the commission of a crime on school grounds.<sup>1</sup> While mandatory punishments apply to certain offenses that threaten the general safety of a school’s population, enforcement of policies established by individual schools or school districts for other types of behavior depends on the discretion of individual administrators and may carry equally punitive sanctions.<sup>2</sup>

In 1994, Congress enacted the Gun Free Schools Act<sup>3</sup> in response

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1. See ADVANCEMENT PROJECT AND CIVIL RIGHTS PROJECT AT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES app. III (June 2000) [hereinafter OPPORTUNITIES SUSPENDED] (summarizing mandatory punishments in all states), available at [http://www.law.harvard.edu/groups/civilrights/conferences/zero/zt\\_report2.html](http://www.law.harvard.edu/groups/civilrights/conferences/zero/zt_report2.html).

2. See *id.* at app. III (noting that infractions such as carrying a pager or loitering, which are not likely to put the school population at risk, may carry equally punitive sanctions such as those involving weapons or drugs).

3. Pub. L. No. 277, 108 Stat. 270 (1994) (codified at scattered sections of 20 U.S.C.)

to public apprehension about violent incidents in schools.<sup>4</sup> The Gun Free Schools Act requires states receiving federal education funding to pass legislation requiring mandatory one-year expulsion for students who carry a gun to school, with an allowance for school officials to adjust the punishment at their discretion.<sup>5</sup> Although the Gun Free Schools Act only addressed the serious threat posed by the presence of firearms in schools, states soon followed with similarly structured legislation, listing various offenses or violations of school policies and corresponding mandatory punishments.<sup>6</sup> The seeming clarity of linking school rule violations to predetermined sanctions under “zero tolerance” policies<sup>7</sup> appealed to school administrators who were searching for a consistent means by which to address disruptive or violent student behavior.<sup>8</sup> However, the American Bar

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4. See generally Chris Pipho, *Living With Zero Tolerance*, 79 PHI DELTA KAPPAN 725, June 1, 1998, available at 1998 WL 13658413 (explaining that, prior to passage of the Gun Free Schools Act, state legislation generally considered student discipline and control to be a local issue, simply requiring local boards to have a policy on discipline, suspensions, and expulsions). Following passage of the Act, state legislatures began to implement specific statewide student discipline measures relating to weapons in schools. *Id.*

5. See 20 U.S.C. § 7151 (2001). The Act provides that:

Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing.

*Id.*

6. See OPPORTUNITIES SUSPENDED, *supra* note 1, at app. III (noting that some of the infractions for which suspension is the automatic punishment are defiance of authority, disruptive behavior, and disobedience). Eight states mandate expulsion for persistent disobedience or defiance of authority. *Id.* Individual school districts typically have discretion to institute more detailed policies. *Id.*

7. See U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS (“NCES”), INDICATORS OF SCHOOL CRIME AND SAFETY 2000, app. A at 133 (2001) (comparing rates of crime in schools based on several factors, including the type of discipline policy employed), available at <http://nces.ed.gov/pubs2001/crime2000>. The Navy was the first government body to articulate a “zero tolerance” disciplinary policy with regard to proscribed activity. See *Williams v. Sec'y of the Navy*, 787 F.2d 552, 555 (Fed. Cir. 1986) (describing “zero tolerance” Navy policy OPNAVINST 5350.4, which established guidelines for a unified Navy Alcohol and Drug Abuse Program and required urinalysis obtained from random sampling or sweeps of military units to be used as the basis for ascertaining drug or alcohol abuse among troops). By the late 1980s, several school districts across the country had adopted zero tolerance expulsion policies for drug possession, and by the early 1990s zero tolerance included such rule violations as wearing hats or disruptive behavior, and had expanded the role of law enforcement in the schools. See Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 373 (1999).

8. See generally Vito A. Gagliardi, Jr., *In Defense of Zero Tolerance*, 164 N.J. L.J. 667,

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Association likens zero tolerance policies to theories of punishment formerly reserved for adult offenders<sup>9</sup> and joins other critics of zero tolerance in questioning its efficacy in furthering the education of students.<sup>10</sup> Zero tolerance policies punish students primarily through suspensions and expulsions in order to rid schools of disruptive students, whereas prevention efforts aim at eliminating undesirable behaviors.<sup>11</sup> Students who are excluded from seeking an education are more likely to do poorly in school and therefore suffer academically as a collateral effect of making amends for their behavior.<sup>12</sup>

Although Maryland does not depend exclusively on a zero tolerance model of discipline and has taken significant steps at the state level to implement a comprehensive policy that involves

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667 (2001) (arguing that zero tolerance discipline policies in the New Jersey public schools are not “one-size-fits-all” schemes, but allow administrators to exercise their discretion). Any problems arising from “occasional overreaction” by administrators would therefore be remedied in the courts on a case-by-case basis. *Id.*

9. The American Bar Association states:

Mandatory expulsion rules rest on theories of punishments developed in the adult criminal justice system. Thus, students are expected to be deterred – either in general, or in individual cases – because of a school’s rules. Students are “incapacitated” by being segregated from the school community through expulsion, referral to juvenile court and to disciplinary schools. And there is a notion of retribution as well, since modern school discipline policies care little for the well being of the student (which might be considered “rehabilitation”) and operate much more along the “let the punishment fit the crime” model of the adult criminal justice system.

A.B.A. CRIMINAL JUSTICE SECTION, REPORT ON ZERO TOLERANCE (2001), available at <http://www.abanet.org/crimjust/juvjus/zerotolreport.html>.

10. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 11 (discussing the direct loss of educational opportunity each time a student is suspended or expelled, and the cumulative erosion of academic performance resulting from repeated exclusion from school).

11. See generally, *e.g.*, *id.* at 2 (discussing a nascent effort among school districts to support and engage disruptive students by including them in the larger community, instead of simply shutting them out of the classroom).

12. See Skiba & Peterson, *supra* note 7, at 372, 376 (describing the correlation between suspensions and school performance, and noting that suspension is a “moderate to strong” predictor of whether a student is likely to drop out of school); see also *id.* at n.15 (citing Ruth B. Eckstrom et al., *Who Drops Out of High School and Why? Findings from a National Study*, TEACHERS C. REC., Spring 1986, at 356-73) (describing a study performed in the 1980s, before zero tolerance policies were widespread, which demonstrated that more than 30% of sophomores who dropped out had been suspended, a rate three times that of their classmates who had stayed in school). Although a direct cause and effect relationship is difficult to establish, it is nevertheless apparent that these at-risk students require support and encouragement in order to complete their education. See *id.* at 382. School administrators acknowledge that suspension is sometimes used as a tool to exclude troublemakers for the purpose of encouraging them to leave school. See *id.* at 376. Studies have also shown that expulsions, which also do not provide children the opportunity to continue their education, undermine students’ efforts to complete high school. See *id.*

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prevention, intervention,<sup>13</sup> character development and community support, in addition to punishment,<sup>14</sup> problems of uniform application persist.<sup>15</sup> Some school districts continue to enforce rules through suspension and expulsion.<sup>16</sup> The most subjective categories of punishment, which address infractions such as insubordination, tardiness and disruptive behavior, are left for local determination and enforcement.<sup>17</sup> These categories are most susceptible to discriminatory application.<sup>18</sup> Whereas offenses involving serious threats to safety, such as possession of a firearm<sup>19</sup> or possession of

13. See An Act Concerning Education – School Order and Discipline, 1996 Md. Laws ch. 4, (S.B. No. 221), ch. 5, (H.B. No. 298) (codified at MD. CODE ANN., EDUC. §§ 7-304 to 7-308 (2001)) (“requiring the State Board of Education to establish guidelines that define a State Code of student discipline” which provides for preventing undesirable or dangerous behavior and which sets out procedures for engaging students in order to prevent further incidents (“intervening”) when they violate school policies).

14. See MD. CODE ANN., EDUC. § 7-304(e) (4) (2001) (requiring school districts to establish procedures that involve school personnel and community members to address the needs of disruptive students as part of their application for state funds).

15. See discussion *infra* Part III.D.

16. See MD. STATE DEP’T OF EDUC. DIV. OF PLANNING, RESULTS AND INFO. MGMT., SUSPENSIONS, EXPULSIONS AND HEALTH-RELATED EXCLUSIONS: MARYLAND PUBLIC SCHOOLS 2000-2001 1 tbl.1 (2002) [hereinafter SUSPENSIONS AND EXPULSIONS REPORT] (showing that, while an average of 8.4% of Maryland students were suspended from Maryland public schools in the 2000-2001 academic year, Dorchester and Somerset Counties suspended 15.8 and 18.8% of their students, respectively), available at <http://www.msde.state.md.us/AboutMSDE/Divisions/prim2000/susp01>; see also DORCHESTER COUNTY PUB. SCH., DISCIPLINE PHILOSOPHY (last visited Sept. 16, 2002) (stating that “any conduct which causes a disruption of or interference with the academic process, or places in danger any person or property, or which creates a reasonable likelihood of such disruption, interference, or danger shall be cause for suspension or expulsion”) (emphasis added), available at <http://www.dcps.k12.md.us/pdfs/discipline-2001-2002.pdf>.

17. See, e.g., MONTGOMERY COUNTY PUB. SCH., A STUDENT’S GUIDE TO RIGHTS AND RESPONSIBILITIES IN MONTGOMERY COUNTY PUBLIC SCHOOLS, 2000-2001 SCHOOL YEAR 9 (2000) [hereinafter STUDENT’S GUIDE] (referring students to individual schools for policies directed at such infractions as fighting, cutting class, tardiness and insubordination).

18. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 6-7 (summarizing state data and anecdotal evidence from attorneys representing students in disciplinary cases to illustrate that African American and Latino students are more likely than white students to be punished for minor misconduct and discretionary offenses); see also Skiba & Peterson, *supra* note 7, at 374-75 (discussing studies which conclude that African American male students are disproportionately disciplined for such behavior-based infractions as fighting or defiance, even when the studies correct for factors such as socio-economic status).

19. See, e.g., MD. CODE ANN., EDUC. § 7-305(e) (1) (2001) (adopting the definition of a firearm contained in 18 U.S.C. § 921 as the basis for Maryland schools’ firearms prohibition). “[F]irearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.” 18 U.S.C. § 921(a) (3) (2000).

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intoxicants on school property, are likely to depend on objective definitions,<sup>20</sup> offenses described as “disruptive” employ subjective definitions based on the effect of the offending student’s behavior.<sup>21</sup> Statistics for Maryland schools mirror national patterns in that African American students and disabled students are punished in numbers out of proportion to their representation in the general student population.<sup>22</sup>

Part I of this Comment will discuss Maryland’s school discipline policies and analyze them within the context of national trends.<sup>23</sup> Part I will also discuss the latitude that all educational entities enjoy when defining and implementing school discipline policies.<sup>24</sup> Part II will examine Maryland’s policies on school suspension and expulsion in detail, and will analyze patterns of application of those policies in two school districts<sup>25</sup> and across the state generally.<sup>26</sup> Part II will then review Maryland’s strategies for preventing proscribed behavior.<sup>27</sup> Finally, Part III will provide recommendations for ensuring fairness in the application of Maryland school districts’ disciplinary schemes.<sup>28</sup>

## I. BACKGROUND

### A. *Maryland Law and Policy*

In 1996, Maryland enacted legislation requiring the State Board of Education (“State Board”) to establish a state code of student

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20. See, e.g., MONTGOMERY COUNTY PUB. SCH., REG. COF-RA: INTOXICANTS ON MCPS PROPERTY 1 (1998) (defining an intoxicant as “alcohol or controlled substances not authorized by a physician’s prescription”), available at [www.mcps.k12.md.us/departments/policy/pdf/cofra.pdf](http://www.mcps.k12.md.us/departments/policy/pdf/cofra.pdf).

21. See, e.g., MD. CODE ANN., EDUC. § 7-304 (2001) (stating that the purpose of the statute is to require county boards to adopt programs that “reduce disruption,” but failing to define either disruptive behavior or the magnitude of the effect that behavior must have in order to be considered disruptive).

22. See *infra* app. tbls.1-2 (illustrating that, in 2000-2001, African American students constituted 37.1% of Maryland’s public school population, but 55.4% of all students suspended from school); see also SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 18 tbl.15 (showing that students with disabilities represent 13% of the student body, but 24.5% of all students suspended, and 22.9% of students receiving extended suspensions). The data published by the Maryland State Department of Education (“MSDE”) only reflects the raw numbers underlying the comparison of suspension rates between students with disabilities and all students. See *id.*

23. See discussion *infra* Part I.A.

24. See discussion *infra* Part I.A.

25. See discussion *infra* Parts II.A-D; see also discussion *infra* Part II.E (comparing Montgomery and Dorchester Counties).

26. See discussion *infra* Parts II.A-E.

27. See discussion *infra* Part II.F.

28. See discussion *infra* Parts III.A-E.

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conduct to guide local school districts.<sup>29</sup> In order to be eligible for state funding, local school districts must demonstrate that their programs adhere to state guidelines.<sup>30</sup> In accordance with the Gun Free Schools Act, Maryland requires a one-year expulsion for students who carry firearms onto school property, with discretion for county superintendents to grant shorter expulsions or alternative education placements on a case-by-case basis.<sup>31</sup>

In contrast to requiring specific sanctions for firearms, the State Board grants individual school districts the authority to enact policies “not inconsistent” with state guidelines for other categories of infractions.<sup>32</sup> To aid school districts in enacting policies, the Maryland State Department of Education (“MSDE”) issued the Maryland Guidelines for a State Code of Discipline (“State Code of Discipline”).<sup>33</sup> The State Code of Discipline provides a framework for local school systems to use in implementing “appropriate and progressive discipline and incentive measures” aimed at creating “an improved school environment” in which individuals “relate to one another in a positive, rewarding, participatory and welcoming fashion.”<sup>34</sup> The guidelines aim to eliminate disruptive behavior by defining standards of conduct and clear consequences for violating those standards.<sup>35</sup> The State Code of Discipline defines two categories of conduct: (1) Classification I, behaviors which disrupt the learning environment, such as class cutting, disrespect, fighting

29. See An Act Concerning Education – School Order and Discipline, 1996 Md. Laws ch. 4, (S.B. No. 221), ch. 5, (H.B. No. 298) (codified at MD. CODE ANN., EDUC. §§ 7-304 to 7-308 (2001)) (requiring the State Board of Education to establish guidelines that define a State Code of student discipline).

30. See MD. CODE ANN., EDUC. § 7-304(e)(3) (2001) (“Each local education agency that is applying for State support . . . shall submit proposals for funding of programs to the State Department of Education that include: . . . (3) Adherence to the State Board regulations on disciplinary policies and programs and other guidelines established by the State Department of Education . . .”).

31. See *id.* § 7-305(e)(2)-(3) providing:

(e) Bringing a firearm onto school property . . . (2) Except as provided in paragraph (3) of this subsection, if the county superintendent or the superintendent’s designated representative finds that a student has brought a firearm onto school property, the student shall be expelled for a minimum of 1 year. (3) The county superintendent may specify, on a case by case basis, a shorter period of expulsion or an alternative educational setting, if alternative educational settings have been approved by the county board, for a student who has brought a firearm onto school property.

32. See MD. CODE ANN., EDUC. § 4-108(4) (2001).

33. DIV. OF COMPENSATORY AND SUPPORT SERV., MD. STATE DEP’T OF EDUC., MARYLAND GUIDELINES FOR A STATE CODE OF DISCIPLINE (1997) [hereinafter MD. GUIDELINES FOR A STATE CODE OF DISCIPLINE].

34. *Id.*

35. See *id.*

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and local dress code violations; and (2) Classification II, behaviors which may seriously jeopardize school order and security, including arson, possession of a weapon of any kind and possession of drugs.<sup>36</sup> The guidelines offer a range of consequences (which include non-punitive intervention programs as well as punishments) as recommendations rather than requirements, and remind school officials that the recommendations are not intended “to restrict them from exercising professional judgment and sound discretion that is consistent with local policy.”<sup>37</sup>

Maryland pursues a comprehensive approach to school discipline and employs the prevention of disruptive behavior as its first line of defense.<sup>38</sup> MSDE has taken the approach that school violence is as much a public health problem as an administrative one and has established a School Safety Speaker’s Bureau in collaboration with Sheppard Pratt Hospital and other community groups.<sup>39</sup> Professionals experienced in “building a rapport with students . . . [and helping] kids solve problems that, unchecked, often lead to acts of school disruption or even violence” are available to speak to school and community groups.<sup>40</sup>

In the national context, Maryland is one of a minority of states that has chosen not to define a number of student offenses and punishments by statute.<sup>41</sup> Instead, the statute sets out principles from

36. See *id.* at 8-10 (listing Classifications I and II and their respective “possible range(s) of interventions and consequences”).

37. *Id.* at 8.

38. See MD. CODE ANN., EDUC. § 7-304(a) (2001) (“The purpose of this section is to require each county board of education to provide a continuum model of prevention and intervention activities and programs that encourage and promote positive behavior and reduce disruption.”). The code further requires that:

(b) Standards of conduct; implementation. The State Board of Education shall: (1) Establish guidelines that define a State Code of discipline for all public schools with standards of conduct and consequences for violations of the standards; and . . . each county board shall adopt regulations designed to create and maintain within the schools under its jurisdiction the atmosphere of order and discipline necessary for effective learning . . . (2) The regulations adopted by a county board under this subsection: (i) Shall provide for educational and behavioral interventions, counseling, and student and parent conferencing; and (ii) Shall provide alternative programs, which may include in-school suspension, suspension, expulsion or other disciplinary measures that are deemed appropriate.

*Id.* § 7-306(b) (1)-(2).

39. See MD. STATE DEP’T OF EDUC. SPEAKER’S BUREAU (last visited Sept. 16, 2002) (advocating the need to prevent violence in schools and listing persons available to speak or consult with school and community groups to improve their violence prevention programs), at <http://www.msde.state.md.us/SchoolSafety/Speaker'sBureau.html>.

40. *Id.*

41. See OPPORTUNITIES SUSPENDED, *supra* note 1, at app. III (noting that Maryland



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the “continuum model”<sup>42</sup> that are then amplified in the State Code of Discipline.<sup>43</sup>

## II. ANALYSIS

### A. Maryland Generally

MSDE policies embody a comprehensive approach to creating safer schools, but create disparities in policies by leaving some categories of sanctions entirely to the local boards’ discretion.<sup>44</sup> Maryland has, for the most part, eschewed the mandatory-minimum-sentencing approach to punishing students.<sup>45</sup> In conformance with the Gun Free Schools Act,<sup>46</sup> Maryland statutes require a one-year expulsion, subject

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mandates expulsion for possession of a firearm and defines no other suspension or expulsion offenses by statute). In contrast, Nebraska *requires* either suspension or expulsion for any of the following offenses, some of which are serious threats to general safety (possession of a firearm) and some of which are better characterized as pranks (possession of an imitation of alcoholic liquor):

Violence, force, coercion, threat, intimidation; willfully causing or attempting to cause substantial damage to property, stealing or attempting to steal property of substantial value, or repeated damage or theft involving property; causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student; threatening or intimidating any student for the purpose of or with the intent of obtaining money or anything of value from such student; possession of a firearm; engaging in the unlawful possession, selling, dispensing, or use of a controlled substance or an imitation controlled substance or alcoholic liquor; being under the influence of a controlled substance or alcoholic liquor; public indecency; sexually assaulting or attempting to sexually assault any person.

*Id.*

42. See MD. CODE ANN., EDUC. § 7-304(a) (2001) (articulating prevention of disruptive behavior, engagement with the student and promotion of positive behavior as the basis for dealing with disruptive students according to “continuum model” principles).

43. See generally MD. GUIDELINES FOR A STATE CODE OF DISCIPLINE, *supra* note 33, at 1-14 (omitting an explicit definition of the “continuum model” of discipline, but providing two classifications of punishable behavior, each with an accompanying range of punishments). Furthermore, the State Code of Discipline encourages districts to update existing policies and develop new policies that incorporate “appropriate and progressive discipline and incentive measures.” *Id.* at 1.

44. See *id.* (offering the guidelines for use by local school boards in developing disciplinary policies tailored to the needs of local communities); see also STUDENT’S GUIDE, *supra* note 17, at 9 (referring students to individual schools for policies directed at such infractions as fighting, cutting class, tardiness and insubordination).

45. See OPPORTUNITIES SUSPENDED, *supra* note 1, at app. III (describing that, in applying a zero tolerance approach to a broad range of student behaviors, twenty-three states statutorily define such nonviolent activities as willful disobedience, insubordination, violation of school rules and defiance of authority as offenses requiring suspension, in addition to such violent activities as possession of a weapon).

46. 20 U.S.C. § 7151 (2001).

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to case-by-case review by local administration, for students carrying a firearm onto school property.<sup>47</sup> Somewhat incongruously, until October 1, 2001, more than one instance of possession of a portable communication device, such as a cellular phone or pager, resulted in mandatory referral to the police, who had discretion to arrest.<sup>48</sup> Possessing or consuming intoxicating beverages on school property<sup>49</sup> and possession of a deadly weapon, including a firearm,<sup>50</sup> are subject to civil or criminal sanctions, with no mandatory punishment imposed by the State Board except as required by the federal Gun Free Schools Act.<sup>51</sup> At the state level, therefore, Maryland mandates

47. MD. CODE ANN., EDUC. § 7-305(e) (2001).

48. *See id.* § 26-104(e) (giving a police officer discretion to arrest a student for carrying a cellular phone if the officer had been contacted by the school administration). School authorities may contact the police for a first offense and are *required* to contact the police for a second or subsequent offense. *Id.* § 26-104(d); *see also* § 26-104(f) (defining a violation of the rule as a misdemeanor punishable by a fine of \$2,500, six months' imprisonment, or both). Legislation prohibiting Maryland public school students from carrying pagers was first passed in 1989 after a finding that pagers contributed to drug trafficking on public school grounds, and that limiting pager use would inhibit the drug trade within schools and thwart, to some degree, students' access to drugs. Act of May 25, 1989, 1989 Md. Laws ch. 592 (prohibiting public school students from carrying portable pagers on school grounds) (codified as amended at MD. CODE ANN., EDUC. § 26-104 (2000)). *But see* Act of May 18, 2001, 2001 Md. Laws ch. 637 (H.B. 67) (codified as amended at MD. CODE ANN., EDUC. § 26-104 (2001)) (repealing the statute effective Oct. 1, 2001, except in Baltimore City and the counties of Baltimore, Caroline, Dorchester, Somerset, Talbot, Wicomico and Worcester); Act of May 6, 2002, 2002 Md. Laws ch. 402 (H.B. 1010) (codified as amended at MD. CODE ANN., EDUC. § 26-104 (2002) (repealing the statute as it applied to Baltimore County effective July 1, 2002)). Since cellular phones have become a fact of daily life for many people, previous concerns about the use of portable communication devices in the drug trade have been eclipsed. *Id.*; *see also* Bernadine Dohrn, "Look out, Kid, It's Something You Did:" *The Criminalization of Children*, in *THE PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE AND JUVENILE INJUSTICE* 157 (Valerie Polakow ed., 2000) (criticizing zero tolerance policies for possession of pagers). Dohrn criticizes zero tolerance measures in this context because:

Possession of pagers appears to be an offense that is both a status offense (for which adults would not be arrested) and an expansion of drug laws by labeling pagers as 'drug paraphernalia' or contraband: transforming a technological convenience into a crime. School-based arrests for possession of pagers is a classic example of the criminalization of youth.)

*Id.*

49. *See* MD. CODE ANN., EDUC. § 26-103 (2002) (providing that persons found possessing or consuming intoxicants, including alcohol or drugs, on school property may be cited for a civil violation if they do not comply with a police officer's request to stop). Possession alone is, therefore, not the basis for the offense. *Id.*

50. *See* MD. ANN. CODE art. 27, § 36A (2002) (providing that persons found guilty of possessing an unauthorized deadly weapon on school property will be charged with a misdemeanor and may be subject to a fine of up to \$1000 or three years' imprisonment).

51. *See* 20 U.S.C. § 8921 (2000) (requiring one-year expulsion, subject to the discretion of the superintendent on a case-by-case basis, when a student is found carrying a gun on school property).

punishments for a limited number of specific offenses that are deemed to threaten a school's general safety.<sup>52</sup> In contrast to states that mandate a wide range of punishments to be applied at the local level,<sup>53</sup> Maryland allows local districts to tailor most discipline policies to their needs.<sup>54</sup>

This approach provides clarity and flexibility to school districts, enumerates a statewide standard through the State Code of Discipline and incorporates a mechanism for policing the application of policies.<sup>55</sup> However, problems in applying policies may not become apparent because annual reports, submitted to MSDE by school districts, on local policies are not required to evaluate progress according to a consistent statewide benchmark.<sup>56</sup>

### B. The State Board of Education's Authority

The State Board of Education's statutorily conferred authority over school administration questions effectively renders it a law unto itself.<sup>57</sup> MSDE is empowered by statute "to adopt bylaws, rules, and regulations for the administration of the public schools," which "have the force of law when adopted and published."<sup>58</sup> The statute charges the State Board with enforcing and interpreting both the statutory provisions within its jurisdiction and MSDE-formulated bylaws, rules and regulations.<sup>59</sup> The State Board has sole jurisdiction over controversies and disputes arising out of school education

52. See *supra* notes 47-51 and accompanying text.

53. See, e.g., *supra* note 41 (delineating Nebraska's extensive list of infractions requiring suspension and/or expulsion).

54. See MD. CODE ANN., EDUC. § 4-108(4) (2001) (charging each county board with adopting policies for the conduct and management of the county public schools "not inconsistent with State law . . .").

55. See *id.* § 7-304(f) (2001) (requiring those districts who receive state funding for their programs for disruptive students to submit an annual report summarizing the districts' success in meeting the goals set out in its program).

56. See *id.* § 7-304(e)-(f) (requiring participating districts to assemble and evaluate their own programs, but not providing benchmark criteria for statewide use).

57. See discussion *infra* Part II.B.

58. MD. CODE ANN., EDUC. § 2-205(c)(1)-(2) (2001).

59. *Id.* § 2-205(c)(1)-(2); see also *Mayberry v. Bd. of Educ.*, 750 A.2d 677, 684 (Md. 2000). The court in *Mayberry* stated:

While administrative agencies generally may interpret statutes, as well as rule upon other legal issues, and while an agency's interpretation of a statute which it administers is entitled to weight, the paramount role of the State Board of Education in interpreting the public education law sets it apart from most administrative agencies.

750 A.2d at 684.

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policies.<sup>60</sup> Furthermore, the statute empowers the State Board to author its own laws by directing it to recommend legislation which: “(1) consider[s] the educational needs of this State; and (2) [w]ith the advice of the State Superintendent, recommend to the Governor and the General Assembly any legislation that it considers necessary.”<sup>61</sup> In addition, county School Boards may “[a]dopt, codify, and make available to the public bylaws, rules, and regulations not inconsistent with State law, for the conduct and management of the county public schools.”<sup>62</sup>

At the local level, the county Superintendent has the authority to interpret local policy and applicable State Board bylaws.<sup>63</sup> The county Superintendent decides “all controversies and disputes that involve: (i) the rules and regulations of the county board; and (ii) the proper administration of the county public school system.”<sup>64</sup> Decisions of the Superintendent may be appealed to the county board, and decisions of the county board may be appealed to the State Board.<sup>65</sup> At each step in the appeals process, the body hearing the appeal grants the highest degree of deference to the decision-maker below.<sup>66</sup> Since the assumption is that prior decisions will be allowed to stand, very few disputes percolate up to a level where patterns of policy application can be discerned on a statewide basis.<sup>67</sup>

Although the Maryland appellate courts hear appeals of State Board decisions, the courts typically accord the State Board great deference.<sup>68</sup> In *Hurl v. Board of Education*<sup>69</sup> the Maryland Court of

60. See MD. CODE ANN., EDUC. § 2-205(d)(1)-(e)(3) (2001) (giving the State Board the authority to bring legal action to enforce its policies, and to decide controversies within its jurisdiction).

61. *Id.* § 2-205(k)(1)-(2).

62. MD. CODE ANN. EDUC. § 4-108(4) (2001).

63. See *id.* § 4-205(c)(1) (providing that the Superintendent’s interpretation of State Board bylaws is intended to provide a bridge between local policies and State policies).

64. MD. CODE ANN. EDUC. § 4-205(c)(2) (2001).

65. See *id.* § 4-205(c)(3) (requiring that appeals of a superintendent’s decision to the county board occur within thirty days of the decision in question, and that appeals from the county board’s decision to the state board occur within thirty days).

66. See MD. REGS. CODE tit. 13A, § 13A.01.01.03(E)(1)(a) (2001) (presuming decisions of a county board to be *prima facie* correct, and permitting the State Board to overrule a county board only where the local body has been found to have acted arbitrarily, unreasonably or unlawfully).

67. See *Hurl v. Bd. of Educ.*, 667 A.2d 970, 976 (Md. Ct. Spec. App. 1995) (discussing the combined weight of legislation and case law in establishing that “the State Board has the ‘last word’ on controversies or disputes involving the proper administration of the public school system, thereby leaving the courts of this State with limited power to interfere.”).

68. *Id.*

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Appeals confirmed that the State Board's decisions regarding the administration of Maryland's public schools are final and beyond judicial interference, with four exceptions: (1) where a purely legal matter is at issue; (2) where the State Board has acted in violation of state statute; (3) where the State Board exercised its power in bad faith, fraudulently or in breach of trust; and (4) where the State Board has acted arbitrarily or capriciously.<sup>70</sup> As a result, it is incumbent on the State Board to observe the utmost fairness in adjudicating disputes arising out of school policies, because it is essentially a self-policing body.<sup>71</sup>

A decision by the State Board is, therefore, binding on county boards, whether it affirms or overrides the local boards' actions.<sup>72</sup> State Board decisions prevail even in areas where some authority has been delegated to county superintendents and boards.<sup>73</sup> The standard of review governing appeals to the State Board, including those pursued in response to policies enacted by local school boards, is similar in structure to the review that state courts have over the State Board's actions.<sup>74</sup> Because each entity hearing an appeal in an

69. 667 A.2d 970 (Md. 1995) (holding that State Board's affirmance of the county board's involuntary transfer of a teacher was final and subject to judicial review only in the four instances cited).

70. *Id.* at 977; *see also* *Resetar v. State Bd. of Educ.*, 399 A.2d 225, 238 (Md. 1979), *cert. denied*, 444 U.S. 838 (1979) (holding that the State Board had final authority to impose sanctions on teachers, and that the court was limited to reviewing whether the Board's actions in imposing the sanctions were arbitrary or capricious); *McIntyre v. Bd. of Educ.*, 461 A.2d 63, 66-67 (Md. Ct. Spec. App. 1983) (holding that the State Board has authority to interpret contracts entered into by county boards where the contract is based on a State Board-issued standard document); *Bd. of Educ. v. McCrumb*, 450 A.2d 919, 923 (Md. Ct. Spec. App. 1982) (finding that the State Board's interpretation of school system policies is final and binding on county boards and that courts are limited to finding whether the State Board's action was arbitrary, capricious or unreasonable).

71. *See* MD. REGS. CODE tit. 13A, § 13A.01.01.03(E)(2) (2001) (requiring the State Board to "exercise its independent judgment . . . in the *explanation and interpretation* of public school laws and State Board regulations") (emphasis added).

72. *See, e.g., McCrumb*, 450 A.2d at 922 (holding that the State Board's reversal of a principal's suspension by county superintendent and board was within the State Board's authority).

73. *See id.* at 923 (finding that the State Board of Education is "vested with the last word on matters of educational policy or the administration of the system of public education," even where superintendents or school districts may have discretion to act).

74. Maryland's administrative regulations governing the State Board provide that:

(1) Decisions.

(a) Decisions of a county board involving a local policy or a controversy and dispute regarding the rules and regulations of the county board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the county board unless the decision is arbitrary, unreasonable, or illegal.

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education-related matter grants significant deference to the body which rendered the initial decision, challenges to local policies and the manner in which those policies are enforced are difficult to maintain.<sup>75</sup>

Given the individualized nature of appeals brought before the State Board, appeals proceedings present a very limited forum in which to promote or solidify state policies.<sup>76</sup> The primary effect of the appeals process is to establish limits on challenges to policies or to correct poor application of policies.<sup>77</sup> Therefore, reliance on the appeals process does not advance a consistent application of school discipline measures.<sup>78</sup> In order to be effective, guidelines must be applicable throughout the state, and must, at a minimum, adhere to a framework that allows the State Board to provide general support to individual districts as they implement new or revised policies.<sup>79</sup> Maryland has already taken the first step toward being able to evaluate the efficacy of discipline policies on a district-by-district basis by tracking offenses and their suspensions or expulsions.<sup>80</sup>

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(b) A decision may be arbitrary or unreasonable if it is one or more of the following: (i) It is contrary to sound educational policy; (ii) A reasoning mind could not have reasonably reached the conclusion the county board reached;

(c) A decision may be illegal if it is one or more of the following:

(i) Unconstitutional; (ii) Exceeds the statutory authority or jurisdiction of the county board; (iii) Misconstrues the law; (iv) Results from an unlawful procedure; (v) Is an abuse of discretionary powers; or (vi) Is affected by any other error of law.

(d) The appellant shall have the burden of proof.

(2) State School Laws and Regulations. The State Board shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations.

MD. REGS. CODE tit. 13A, § 13A.01.01.03(E) (2001).

75. See, e.g., *id.* § 13A.01.01.03(E)(1)(a) (stating that decisions of the county board are *prima facie* correct).

76. See *supra* notes 59-67 and accompanying text.

77. See generally Gagliardi, *supra* note 8, at 667 (asserting that zero tolerance policies allow school administrators a sufficient degree of discretion and advocating the use of appeals as the best means to address those instances where an administrator acts inappropriately).

78. See MD. REGS. CODE tit. 13A, § 13A.01.01.03(E)(4)(b) (2001) (stating that “[t]he State Board may not review the merits of a student suspension or expulsion,” but is authorized to review whether the county board (1) failed to follow State or local law, policies or procedures, (2) violated a student’s due process rights, or (3) acted unconstitutionally). Any examination of local policy in this context will therefore tend to be circular and will typically not reach issues of fair application. *Id.* § 13A.01.01.03(E)(4)(b)(i).

79. See *supra* notes 55-56 and accompanying text.

80. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 4-5 tbls.4-5 (tracking the number of suspensions from Maryland public schools by grade and school district); see also *id.* at 6 tbl.6 (illustrating the number of suspensions by

### C. Suspensions and Expulsions

Local school districts have the latitude to institute more detailed conduct and discipline policies than those described in the State Code of Discipline, as long as the policies conform to state guidelines.<sup>81</sup> MSDE releases statistics annually, summarizing suspensions and expulsions that result from both state-recommended and locally instituted policies.<sup>82</sup> MSDE tracks suspensions and expulsions arising out of the following broad categories of offenses: (1) Attendance; (2) Dangerous Substance; (3) Weapons; (4) Attack/Threats/ Fighting; (5) Arson/ Fire/Explosives; (6) Sex Offenses; (7) Disrespect/ Insubordination/ Disruption; and (8) Other.<sup>83</sup>

Suspensions and expulsions are widely employed across the country, and states have increased their use with the adoption of zero tolerance discipline policies.<sup>84</sup> Although infractions that threaten the safety of the school population are often expellable offenses,<sup>85</sup> many

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“school level”); *id.* at 7 tbl.7 (tracking the number of suspensions by grade levels and type of offense); *id.* at 13 tbl.10 (illustrating the percentage change of suspensions by type of offense); *id.* at 14 tbl.11 (comparing the four most frequent suspension offenses over a five year period); *id.* at 15 tbl.12 (tabulating expulsions as a percentage of suspensions, categorized by offense); *id.* at 16 tbl.13 (showing percent change in expulsions by offense from the previous school year).

81. See MD. CODE ANN., EDUC. § 4-108(4) (2001) (requiring county school boards to ensure their policies relating to “conduct and management” of public schools are “not inconsistent” with state law).

82. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 4-7 tbs.4-7, 13 tbl.10, 15-16 tbs.12-13. (including suspension and expulsion data from offenses ranging from arson to a refusal to obey school policies or regulations).

83. See *id.* at 15 tbl.12. Categories are further subdivided as follows:

Attendance: Class cutting, tardiness, truancy

Dangerous Substance: Alcohol, inhalants, drugs, tobacco

Weapons: Firearms, other guns, other weapons

Attack/Threat/Fighting: Physical attack - teacher/staff, physical attack - student, verbal or physical threat to teacher or staff, verbal or physical threat to student, fighting, extortion

Arson/Fire/Explosives: Arson/fire, false alarm/bomb threat, explosives

Sex offenses: Sexual assault, sexual harassment, sexual activity

Disrespect/Insubordination/Disruption: Disrespect, insubordination, harassment, classroom disruption, inciting/participating in disturbance

Other: Academic dishonesty/cheating, portable communication devices, theft, trespassing, unauthorized sale or distribution, vandalism/destruction of property, refusal to obey school policies or regulations.

*Id.*

84. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 3 (summarizing the increasing use of suspensions resulting from zero tolerance policies in several states from 1991-99).

85. See *id.* at app. III (indicating, e.g., that possession of a weapon, other than as defined in the Gun Free Schools Act, is an expellable offense defined by statute in thirty-three states).

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behaviors that are disruptive, but not dangerous, also serve as a basis for removing students from school.<sup>86</sup> Expelling students who exhibit dangerous behavior protects the school population while simultaneously punishing the offending students, but the rationale for removing students who do not pose an overt threat is less clear.<sup>87</sup> While disruptive behavior can derail a school's educational mission if left unchecked,<sup>88</sup> simply excluding students also forecloses an opportunity for the school to redirect the students' behavior.<sup>89</sup> Furthermore, barring children from class without any access to education puts them at risk academically.<sup>90</sup>

The use of suspension and expulsion in Maryland varies widely: in Montgomery County, the school district with the lowest suspension rate, 3.7% of students in the school system were suspended during the 2000-2001 school year, a figure that had risen approximately half a percentage point over seven years,<sup>91</sup> while enrollment in the county increased almost 19% during the same period.<sup>92</sup> At the opposite extreme, Dorchester County suspended 15.8% of its students during the 2000-2001 school year.<sup>93</sup> The state average was 8.4%.<sup>94</sup> This

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86. See *id.* (listing disobedience of an order of a school official's order as an expellable offense in Kansas).

87. See *id.* at 9-10 (criticizing suspensions as often fostering the very types of behavior they aim to punish, such as truancy).

88. See Linda Perlestein, *Schools Awash in Bad Behavior*, WASH. POST, July 11, 2001, at B1 (describing the lack of training for teachers in Howard County, Maryland, for dealing with disruptive or violent behavior among elementary school students). Teachers and school administrators report that disruptive behavior among students has increased markedly in the past twenty years, and that it is currently "accelerating way beyond our ability to get effective interventions in place." *Id.* Without options for teachers or students to address the situation, suspensions in Howard County increased fivefold from 1994 to 1999. See *id.*

89. See Skiba & Peterson, *supra* note 7, at 376 (citing behavioral studies and anecdotal evidence showing that suspension, lack of supervision at home, and opportunities for anti-social activity on the street all reinforce one another as factors that accelerate a troubled student's dissociation from school).

90. See *supra* note 12 and accompanying text.

91. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 1 tbl.1 (showing statistics for expulsions and suspensions in all Maryland school districts from 1992-2001).

92. See DIV. OF PLANNING, RESULTS AND INFO. MGMT., MD. STATE DEPARTMENT OF EDUCATION, MARYLAND PUBLIC SCHOOL ENROLLMENT BY RACE/ETHNICITY AND GENDER AND NUMBER OF SCHOOLS, SEPTEMBER 30, 2001, 18 tbl.10 (2002) [hereinafter ENROLLMENT REPORT] (tabulating total enrollment in Maryland public schools from 1991 to 2001), available at <http://www.msde.state.md.us/AboutMSDE/Divisions/sprim2000/enroll101.pdf>. These statistics suggest that Montgomery County public schools maintained a consistent discipline policy in the face of rapidly rising enrollment. *Id.*

93. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 1 tbl.1 (showing an increase in Dorchester County's public school population of less than 1% from 1992 to 2000); see also ENROLLMENT REPORT, *supra* note 92, at 18 tbl.10 (reflecting a 1% drop in the number of students suspended in Dorchester County from 1992-2000).



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disparity in application can most readily be explained by policy differences, both in conception and execution, and disparities in available resources across districts.<sup>95</sup> Suspensions for nonviolent Disrespect/Insubordination/Disruption infractions constituted 60% of the suspensions in Baltimore County<sup>96</sup> and 38% for the state overall.<sup>97</sup> Therefore, in a significant proportion of instances, school districts equally punish for non-violent conduct as for offenses such as carrying a weapon to school.<sup>98</sup>

Suspensions are more liberally used than expulsions, especially with regard to subjective infractions.<sup>99</sup> Expulsions, however, track more closely the seriousness of the offense being punished. For example, expulsion follows suspension in an average of 24.3% of cases for offenses involving firearms and weapons, drugs, physical attacks on faculty and staff, arson/fire, extortion and bomb threats.<sup>100</sup> These serious Category II offenses account for 55.2% of all expulsions.<sup>101</sup> Conversely, only 0.7% of suspensions for disrespect/insubordination, refusal to obey school policies, and classroom disruption resulted in expulsion,<sup>102</sup> although they represented 42.9%

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Taken together, these statistics reflect that Dorchester County maintained the status quo with regard to its application of suspension policies.

94. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 1 tbl.1.

95. See discussion *infra* Part II.E.

96. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 8 tbl.8 (showing the number of suspensions from Maryland public schools in a variety of categories for the 1999-2000 school year).

97. See *id.* at 9-12 tbl.9 (showing that, typically, non-violent behavior was the basis for over 54% of suspensions in any given district). Attendance infractions accounted for an additional 7.3% of suspensions on a statewide basis. *Id.*

98. See *id.*; see also Marc Fischer, *Going Too Far: The Case of the Nail Clipper*, WASH. POST, Jan. 15, 2002, at B1 (describing an incident in which an elementary school principal recommended expulsion for an eight year-old boy who had brought to school a keychain with a nail clipper attached, noting that the clipper's fold-out nail file was a "most dangerous object").

99. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 14 tbl.11 (summarizing the four most frequent categories of offenses resulting in suspension as: (1) physical attack on students (most frequent); (2) disrespect/insubordination; (3) refusal to obey school policies and regulations; and (4) classroom disruption). Three of the four categories depend on subjective determinations of a given behavior's effect and fall into the State Code of Discipline's Classification I. See MD. GUIDELINES FOR A STATE CODE OF DISCIPLINE, *supra* note 33, at 8 (listing disrespect, refusal to obey school policies and classroom disruption among behaviors which disrupt the learning environment).

100. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 16 tbl.13 (listing raw numbers of suspensions and expulsions by category, from which percentages were derived).

101. See *id.*

102. See *id.*

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of all suspensions.<sup>103</sup> Maryland school districts, therefore, use expulsions more sparingly than suspensions and reserve the more severe consequences of expulsion for more serious infractions.<sup>104</sup> Both suspensions and expulsions, however, remove students from their classrooms; the aggregate effect of repeated suspensions can approach that of expulsion in accounting for lost time in class.<sup>105</sup>

Because this disruption of a student's education has a potentially serious impact, removing a student from school for extended periods carries legal consequences, as established in *Goss v. Lopez*.<sup>106</sup> *Goss* was a class action in which a group of public high school students suspended for misconduct without a pre-suspension hearing sued for protection under the Due Process Clause.<sup>107</sup> The U.S. Supreme Court held that students have a property interest in obtaining an education.<sup>108</sup> The Court stated in *Goss* that a deprivation of one's property rights that is *de minimis* does not trigger application of due process guarantees, but that a school suspension of up to ten days is *not de minimis* and therefore requires minimum due process requirements of notice and an opportunity for the student to present his or her side of the story.<sup>109</sup> Given the potential future impact of a suspension, the decision to impose one therefore cannot be arbitrary.<sup>110</sup> The Court weighed the requirement of fairness toward students against the school district's interest in administrative efficiency,<sup>111</sup> but did not set out requirements for longer suspensions

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103. *See id.*

104. *See supra* notes 84–87.

105. *See supra* note 12 and accompanying text.

106. 419 U.S. 565 (1975).

107. *Id.* at 567-69 (explaining the purpose of the lawsuit).

108. *See id.* at 574 (holding that a “student’s legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause,” and which cannot be curtailed as the result of a student’s misconduct “without adherence to the minimum procedures of that Clause”). A student’s Due Process liberty interest in personal reputation is also implicated. *See id.* (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)) (requiring the minimum requirements of the Due Process Clause be satisfied “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him”). Because disciplinary actions may become part of a student’s permanent record, the student’s “standing” within the school community, and opportunities for further education or employment, may be affected. *Id.* at 575.

109. *See id.* at 576, 579-81 (indicating that, for suspensions of ten days or less, the Due Process Clause requires students to receive oral or written notice of the matter and an opportunity to be heard).

110. *See id.* at 574 (arguing that because public education is a property interest, it cannot be arbitrarily taken away under the Due Process Clause).

111. *See id.* at 583 (recognizing the burden that more formal procedures would

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or expulsions, noting only that longer periods of exclusion from school might require more formal procedures.<sup>112</sup>

Until *Goss*, states differed in their definitions of long- or short-term suspensions, with the possibility that a fifteen-day suspension might be considered short-term in one place and long-term in another.<sup>113</sup> *Goss* established a standard short-term suspension of ten days or less,<sup>114</sup> and its accompanying due process requirements.<sup>115</sup>

Maryland courts have adopted the *Goss* minimum due process requirements as a general standard<sup>116</sup> and have applied them as recently as 2000.<sup>117</sup> Because *Goss* established a floor for ensuring due process protection in the case of short-term suspensions, but left open the question of additional requirements for expulsions,<sup>118</sup> states may choose to adopt the *Goss* minimum requirements for general use in discipline proceedings.<sup>119</sup> *Goss*, therefore, represents only the first step in establishing protections for students who are barred from school.<sup>120</sup>

Students may successfully challenge suspensions and expulsions on substantive due process grounds, even if officials have given a student all necessary procedural protections, if the punishment can be

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impose on schools in terms of cost and staff time). To make the suspension process more formal would "make it too costly as a regular disciplinary tool" and "destroy its effectiveness as part of the teaching process." *Id.*

112. See *id.* at 584 (noting that the holding applies only to "short suspension(s)" of less than ten days, and that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures").

113. See LAWRENCE F. ROSSOW & JERRY R. PARKINSON, THE LAW OF STUDENT EXPULSIONS AND SUSPENSIONS 2 (Educ. Law Ass'n Monograph No. 62, 2d ed. 1999) (discussing the lack of standard interpretation among states about the length of a short-term suspension and the resulting disparity in effect on student records).

114. See *supra* note 112 and accompanying text.

115. See *supra* note 109 and accompanying text.

116. See *Miller v. Bd. of Educ.*, 690 A.2d 557, 560-61 (Md. Ct. Spec. App. 1997) (holding that procedural due process, "[i]n the school discipline context," required only that the school board provide the student with notice of the charges against her and a chance to explain her side of the story). Since the student in *Miller* was expelled, the Maryland Court of Special Appeals applied the *Goss* floor for short-term suspensions in its reasoning, but did not recognize *Goss*' additional acknowledgement that expulsion might warrant more formal procedures. *Id.*

117. See *Mayberry v. Bd. of Educ.*, 750 A.2d 677, 691 (Md. Ct. Spec. App. 2000) (applying the holding in *Miller*).

118. See *Goss*, 419 U.S. at 584 (declining to address the issue of what formal procedures may be required for expulsions).

119. See *supra* note 116 and accompanying text (noting that the Maryland Court of Special Appeals in *Miller* applied the *Goss* requirements to an expulsion, but not to a short-term suspension).

120. See *Goss*, 419 U.S. at 574, 584 (recognizing that minimum due process attaches when a student's property interest in an education is abridged in a manner that is not merely *de minimis*).

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demonstrated to be out of proportion to the offense.<sup>121</sup> However, states vary in their approach to interpreting substantive due process. For example, some states require a “shocking disparity between the punishment and the offense,”<sup>122</sup> while others require that that “no rational relationship” exist between the punishment and the offense.<sup>123</sup> Other states dismiss substantive due process claims altogether on the grounds that only an infringement of “fundamental rights” would support such claims and that education is not a fundamental right.<sup>124</sup> Without a consistent legal standard to guide the examination of rationales behind suspensions and expulsions, students are subject to criteria that vary from state to state.<sup>125</sup>

#### D. Disparities in Application

In order for discipline policies to be effective, school administrators must apply them fairly.<sup>126</sup> Many districts throughout the United States confuse undifferentiated application with fairness, and fall into the zero tolerance trap.<sup>127</sup> Although Maryland avoids the pitfalls inherent in a wholesale adoption of wide-reaching offenses, data released by MSDE reflect a pattern of disparate application of suspensions and expulsions when African American students and students with disabilities are involved.<sup>128</sup>

121. See ROSSOW & PARKINSON, *supra* note 113, at 56-57 (discussing case law establishing a “fundamental fairness” basis for challenging suspensions and expulsions).

122. See *id.* at 57 (citing *Kolesnick v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807, 813-14 (Neb. 1997), which held that a two-semester expulsion did not demonstrate a shocking disparity as punishment for possession of a knife).

123. See *id.* (citing *James v. Unified Sch. Dist. No. 512*, 899 F. Supp. 530, 534 (D. Kan. 1995) (holding that weapon possession rationally resulted in expulsion from a Kansas public school)).

124. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-39 (1973) (holding that education is not a fundamental right protected explicitly or implicitly by the U.S. Constitution); see also ROSSOW & PARKINSON, *supra* note 113, at 57 (discussing the range of approaches employed by states and concluding that, in all cases, the student bringing the substantive due process claim bears a *heavy* burden of persuasion).

125. See *supra* note 120 and accompanying text.

126. See discussion *infra* Part II.D.

127. See Joan M. Wasser, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 774-75 (1999) (asserting that adopting penal code definitions of zero tolerance offenses involving guns, knives and drugs establishes clear definitions of offenses). Providing specific standards for offenses allows administrators to distinguish between the student who inadvertently carries aspirin to school from the one who distributes cocaine. *Id.* at 775. Such distinctions enable school staff to administer punishments meaningfully and, therefore, avoid the disproportionate punishment of students who commit minor infractions such as carrying pain relievers or pocketknives. *Id.*

128. See discussion *infra* Part III.D.2.

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1. *Effects on African American Students*

MSDE's data reveal that, on a statewide basis, African American students are the only ethnic group whose representation among the percentage of students suspended exceeds that of their percentage among the student body as a whole.<sup>129</sup> The pattern for African American students throughout Maryland is in fact the inverse of that for all other ethnic groups: suspensions among Native American, Asian American, Hispanic and White students represent a smaller proportion of total suspensions than each ethnic group, respectively, represents in the general student population.<sup>130</sup> Although it would not be expected that the proportion of suspensions correspond exactly to the proportion of students of a given ethnic group within the larger student body, the lack of correlation in the case of African American students is striking: in Montgomery County, African American students make up 21% of the student population, but receive 41.7% of the suspensions.<sup>131</sup> Montgomery County's numbers are dramatic because the proportion of African American student suspensions is double the proportion of African American students in that district, but the 20% spread between representation in the general population and representation among suspensions is consistent with the state average.<sup>132</sup> Even though a detailed statistical analysis is beyond the scope of this Comment, the data available illustrate that African American students receive a disproportionate share of suspensions in Maryland Public Schools.<sup>133</sup>

MSDE does not publish data on offenses tabulated according to ethnic group, so it cannot be determined whether African American students in Maryland receive a disproportionate number of punishments for subjectively determined infractions.<sup>134</sup> However,

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129. See *infra* app. tbls.1-2; see also ENROLLMENT REPORT, *supra* note 92, at 1 tbl.1 (reflecting enrollment in Maryland public schools according to race and gender); SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 3 tbl.3 (displaying statistics for suspensions and expulsions according to various classifications of race and ethnicity).

130. See ENROLLMENT REPORT, *supra* note 92, at 1 tbl.1 (tracking the percentage of the student population represented by each identified ethnic group); SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 3 tbl.3 (reflecting numbers of students suspended or expelled categorized by race).

131. See *infra* app. tbls.1-2; see also ENROLLMENT REPORT, *supra* note 92, at 1 tbl.1; SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 3 tbl.3.

132. ENROLLMENT REPORT, *supra* note 92, at 1 tbl.1; SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 3 tbl.3.

133. See discussion *infra* Part II.D.1.

134. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16 (failing to provide tabulations that would enable an analysis of offenses by type and ethnic group for those students who have been suspended or expelled); see also OPPORTUNITIES SUSPENDED, *supra* note 1, at app. V (showing that approximately 20% of states collect

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nationwide statistics consistently reveal that African American students are disproportionately represented among those who are punished for perceived challenges to authority.<sup>135</sup> Although students' due process rights may be observed in the procedures leading to their suspensions and expulsions, a resulting deprivation of their property right in an education<sup>136</sup> may manifest itself nonetheless.<sup>137</sup> Because of the damaging academic impact that exclusion from school may have on students, such disparate treatment has the potential to place African American students at a disadvantage in the classroom.<sup>138</sup> Without further examination, it cannot be stated conclusively that school officials' response to African American students' behavior is undeniably biased, but the effect is clear: African American students are losing out on their education because they are being excluded from school at higher rates than their peers.<sup>139</sup>

## 2. *Effects on students with disabilities*

Suspensions and expulsions also appear to be meted out disproportionately to students with disabilities.<sup>140</sup> Under the federal Individuals with Disabilities in Education Act<sup>141</sup> ("IDEA"), passed in 1975 as the Education for All Handicapped Children Act,<sup>142</sup> states are

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data for suspensions and expulsions by race).

135. See KIM BROOKS ET AL., JUST. POL'Y INST. & CHILD. L. CENTER, INC., SCHOOLHOUSE HYPE: TWO YEARS LATER 21 (2000) (compiling data which demonstrate that African American students generally are suspended or expelled at markedly higher rates than White students). Examples of such disparate treatment include Phoenix (African American students were suspended or expelled at twenty-two times the rate of White students), Austin, Texas (four times) and San Francisco (3.7 times). *Id.* at 20-21. Corresponding figures for Maryland are: Maryland statewide (two times), Dorchester County (2.3 times) and Montgomery County (2.8 times). See *infra* app. tbls.1-2. Although Maryland's statistics reflect a smaller disparity than those from other states, African American students are suspended or expelled from public school roughly *two to three times as often* as their White counterparts. *Id.*

136. See discussion *supra* Part II.C.

137. See *supra* note 121 and accompanying text.

138. See *supra* note 12 and accompanying text.

139. See *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (discussing the importance of education as a property interest and the potential deleterious effects of a suspension in a student's record).

140. See *infra* app. tbl.4 (summarizing MSDE suspension data for Maryland as a whole and for Montgomery, Dorchester and Somerset Counties, demonstrating that, as for African American students, suspension rates for students with disabilities are significantly higher than those for other students).

141. 20 U.S.C. § 1401-1487 (2000).

142. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1401-1487 (2000)); see also ALLAN G. OSBORNE, JR., DISCIPLINARY OPTIONS FOR STUDENTS WITH DISABILITIES 2 (Educ. L. Ass'n Monograph No. 60, 1997) (detailing the history of legislation aimed at students with disabilities).

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required to provide students with disabilities,<sup>143</sup> including those who have been suspended or expelled from school, a “free appropriate public education.”<sup>144</sup> Since IDEA requires school districts to educate students with disabilities in special education programs even following suspension or expulsion,<sup>145</sup> as a matter of policy these children do not face a wholesale deprivation of education if they are suspended or expelled.<sup>146</sup>

Maryland has adopted the federal definition of students with disabilities,<sup>147</sup> and requires that students with disabilities be punished in accordance with the requirements of IDEA.<sup>148</sup> Students with disabilities are subject to the same standards of conduct as other students, and, consonant with the holding in *Goss*,<sup>149</sup> may be suspended for up to ten days if such punishment would apply equally to a student without a disability.<sup>150</sup> However, if the conduct subject to punishment is found to be a manifestation of the student’s disability, the professional team overseeing the child’s education confers with the parents or guardians to determine an appropriate alternate educational placement for the duration of the suspension or

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143. The Individuals with Disabilities in Education Act (“IDEA”) defines a “child with a disability” as one:

- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A).

144. *See id.* § 1412(a)(1)(A) (requiring states eligible for federal assistance to provide a “free appropriate public education” to all children with disabilities between the ages of three and twenty-one, *including children with disabilities who have been suspended or expelled from school*). IDEA defines a free appropriate public education as one which meets state standards and which is provided in accordance with an education program, specific to each child, which is required by the statute. *See id.* § 1401(8).

145. *See id.* § 1412(a)(1)(A).

146. *See id.*

147. *See* MD. CODE ANN., EDUC. § 8-401 (2001) (defining “child with a disability” according to the same criteria as 20 U.S.C. § 1401(3)(A)).

148. *See id.* § 7-305(f) (requiring that “the discipline of a child with a disability, including the suspension, expulsion or interim alternative placement of the child for disciplinary reasons, shall be conducted in conformance with the requirements of the Individuals with Disabilities in Education Act of the United States Code”).

149. *See Goss v. Lopez*, 419 U.S. 565, 581, 584 (1975) (requiring that a student facing a suspension of up to ten days be provided with notice and an opportunity to be heard).

150. *See* 20 U.S.C. § 1415(k)(4) (2000) (requiring review of whether the student’s behavior was a manifestation of the disability only for a “change in placement” longer than ten days).

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expulsion.<sup>151</sup> Such measures are intended to ensure that students with disabilities receive an education equal to that of their non-disabled peers, and to prevent schools from excluding students on the basis of behavior that is attributable to a disability.<sup>152</sup> In Maryland, only 1.4% of public school suspensions in 2000-2001 were categorized as manifestations of disability.<sup>153</sup>

IDEA's requirement for a manifestation review represents the expansion of due process protections extended to students with disabilities.<sup>154</sup> Parents must be involved in determining the course of the student's educational program,<sup>155</sup> are accorded a hearing whenever school administrators recommend a change in a student's placement, either for disciplinary or educational reasons,<sup>156</sup> and may request an expedited hearing if they disagree with a determination.<sup>157</sup> Students with disabilities are therefore able to avail themselves of due process protection beyond that afforded by *Goss*.<sup>158</sup>

The safeguards of expanded due process rights and the recognition that disabilities may directly cause or influence disruptive and violent behavior provide a facially powerful mechanism for ensuring that students with disabilities receive a meaningful

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151. See *id.* (providing that if a team of professionals qualified to evaluate the student's disability finds that the disability impaired the student's capacity to understand the impact and consequences of the behavior that is subject to disciplinary action, or to control the behavior, then the behavior is considered a manifestation of the student's disability). Even students whose conduct is found not to be a manifestation of a disability, and who are consequently suspended for more than ten days, are required to be placed in an educational setting in which they may continue their education. *Id.* §§ 1412(a)(1), 1415(k)(5). States are required to provide services during the suspension to help the student prevent a recurrence of the behavior. See *id.* § 1415(j).

152. See *Honig v. Doe*, 484 U.S. 305, 323-24 (1988) (holding that a school district which unilaterally expels a student on the basis of behavior that is a manifestation of a disability violates IDEA's (then known as the Education of the Handicapped Act) requirement that students remain in their current educational placement while a review of their behavior is conducted). *Honig* solidified the manifestation doctrine, which had been developing at the circuit court level after passage of the Education of the Handicapped Act in 1975. OSBORNE, *supra* note 142, at 9. The intent and the result of the holding was to limit a school district's latitude in summarily excluding students whose disabilities fostered disruptive behavior. *Id.* Until it was amended in 1997, IDEA did not contain provisions to address discipline for students with disabilities, and school administrators relied on case law for guidance. See *generally id.* *add.*, at 1-8.

153. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 15 tbl.12 (illustrating that, of 123,364 suspensions, 1714 were manifestations of disability).

154. See 20 U.S.C. § 1415(a) (2000) (outlining requirements for states to ensure that students receive the free appropriate public education guaranteed by IDEA).

155. See *id.* § 1415(b)(1).

156. See *id.* § 1415(f).

157. See *id.* § 1415(k)(6)(A)(i).

158. See *supra* notes 153-56 and accompanying text.



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education.<sup>159</sup> In adopting the manifestation doctrine, IDEA accounts for disruptive behavior among students with disabilities.<sup>160</sup> Because of this recognition, it would therefore be expected that students with disabilities be disciplined at rates similar to those of the rest of the school population.<sup>161</sup> Indeed, Maryland publishes suspension data to suggest that this is the case.<sup>162</sup> However, students with disabilities in Maryland receive suspensions at a rate almost double that of their representation in the general school population.<sup>163</sup> The continuing disproportionate use of exclusionary measures to discipline students with disabilities calls into question whether the goals of IDEA and case law interpreting the statute<sup>164</sup> to keep such students in class are being fully achieved.<sup>165</sup>

#### E. State Policy and Local Application

Clearly defining offenses and consequences is essential in encouraging students to manage their behavior and in guiding school administrators toward just enforcement of discipline policies.<sup>166</sup> Maryland's State Code of Discipline was designed to allow

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159. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 36-38 (analyzing the protections provided by IDEA).

160. See *supra* note 152.

161. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 38 (indicating that since a student may, in effect, not be disciplined for behavior that is a manifestation of a disability, one might expect that the incidence of suspensions among students with disabilities would fall within the same range as the incidence of suspensions among non-disabled students). Nationwide figures show that students with disabilities are consistently removed from school at higher rates than their fellow students. *Id.*

162. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 18 tbl.15 (reflecting only extended suspensions of more than ten days and showing that, of students receiving suspensions, 5.5% of students in the general population and 5.1% of students with disabilities received extended suspensions, but only comparing statistics within, not between, groups).

163. See *infra* app. tbl.4.

164. See *Honig v. Doe*, 484 U.S. 305, 323 (1988) (interpreting Congress' intent in enacting IDEA as being to prevent schools from simply excluding disabled students for reasons of administrative convenience).

165. See generally OSBORNE, *supra* note 142, add. at 1 (discussing codification of the manifestation doctrine through the 1997 Amendments to IDEA contained in P.L. 105-17). Prior to 1997, case law dealing with the manifestation doctrine revealed disagreement among the circuit courts with respect to whether the relationship between the disability and the behavior need be direct and causal or indirect. *Id.* at 10-12. Because a coherent definition of manifestation is only four years old at time of writing, changes in school district policy may not yet have shown up in practice. See *supra* note 152. Nevertheless, the general principles of the manifestation doctrine have been in operation long enough for a corrective effect on the disciplinary treatment of students with disabilities to become apparent. *Id.*

166. See Wasser, *supra* note 127, at 774-75 (advocating the adoption of clear definitions of offenses, such as those contained in criminal codes, in order to facilitate fair and just applications of punishments).

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school districts latitude to construct policies appropriate to local demands.<sup>167</sup> Furthermore, MSDE recommends a range of consequences, rather than a uniform penalty, for disruptive behaviors so that principals and administrators will treat students fairly and effectively.<sup>168</sup>

To examine how the State Code of Discipline guidelines work at the local level, this section will compare and analyze the discipline policies of Montgomery County, Maryland's largest school system,<sup>169</sup> and Dorchester County, its fifth smallest.<sup>170</sup> These districts were selected for comparison because they reflect the lowest (Montgomery) and highest (Dorchester) rates of suspensions and expulsions over an eight-year period ending in 2001.<sup>171</sup>

Montgomery County's disciplinary policies are highly detailed, with over twenty-five policies accompanied by corresponding regulations.<sup>172</sup> To inform students about the conduct that is expected of them in all areas of school life, Montgomery County *provides A Student's Guide to Rights and Responsibilities* ("Student's Guide") to students each year.<sup>173</sup> The *Student's Guide* lists countywide discipline violations under two categories: nondiscretionary, expellable offenses<sup>174</sup> and offenses with a range of consequences.<sup>175</sup> Disciplinary

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167. See STATE CODE OF DISCIPLINE, *supra* note 33, at 8 ("These guidelines are offered as a foundation for local boards of education to assist them in developing local disciplinary policies based on the specific needs of the communities they serve.").

168. See *id.* at 8-10 (explaining that the consequences "provide a broad range from which effective interventions can be developed").

169. See MONTGOMERY COUNTY PUB. SCH., ANNUAL REPORT TO PARENTS, STAFF AND THE COMMUNITY 7 (last updated Oct. 29, 2002) (showing Montgomery County, the 19th largest school district in the United States, enrolled 136,832 students in the 2000-2001 school year), available at <http://www.mcps.k12.md.us/info/schoolyear/enrollment.html>).

170. See ENROLLMENT REPORT, *supra* note 92, at 1 tbl.1 (showing a total enrollment of 4884 students in Dorchester County as of September 30, 2001).

171. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 1 tbl.1 (providing a comparative look at suspension rates in Maryland public schools between 1992 to 2001).

172. See STUDENT'S GUIDE, *supra* note 17, at 8-9 (providing references to regulations and policies by name). It is significant that the guide, which is addressed directly to students, contains such detailed information about the source of the school district's policies. *Id.*

173. See *generally id.* at 1-12 (outlining general conduct expected of all students in Montgomery County Public Schools).

174. See *id.* at 8 (categorizing as nondiscretionary, expellable offenses which require expulsion and referral to the police as penalties: violent physical attack on a staff member, distribution of intoxicants, and possession of bombs or facsimiles, guns, or weapons used to cause bodily harm).

175. See *id.* (detailing offenses with a range of consequences to include, but are not limited by: sexual offenses, computer abuse, destruction of property, possession

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plans for violations not listed in the countywide categories, such as fighting, theft, cutting class, tardiness, obscenity, leaving school grounds without permission, smoking, plagiarism and insubordination, are left for individual schools to define.<sup>176</sup> By making information readily available about forbidden actions and their consequences, the Montgomery County Public School System gives students a clear and explicit picture about the conduct that is expected of them and the consequences that will result when they break the rules.<sup>177</sup>

By contrast, Dorchester County's Discipline Philosophy<sup>178</sup> describes conduct subject to punishment in broad terms<sup>179</sup> and depends on an imposition of outside authority, such as police and fire departments, to "strive to provide a safe environment for everyone in school."<sup>180</sup> Dorchester County's Discipline Philosophy distinguishes "Behaviors Leading to Suspension, Extended Suspension or Expulsion" from "Behaviors Requiring Suspension and Recommendation . . . for Expulsion Review and Action,"<sup>181</sup> which correspond generally to Montgomery County's "Offenses with a Range of Consequences" and "Nondiscretionary Expellable Offenses."<sup>182</sup> Dorchester County's

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of a portable communications device and physical attack on students or staff members). Punishments range from conferences to expulsion with police referral. *Id.*

176. *See id.* at 9 (delegating responsibility for issues not addressed by the countywide offenses to individual schools, and listing ten county policies and regulations for schools to consult).

177. *See id.* at 8 (summarizing countywide violations and noting to students that these particular actions are "forbidden").

178. *See generally* DORCHESTER COUNTY PUB. SCH., DISCIPLINE PHILOSOPHY (addressing proscribed behaviors and resulting punishments procedures and due process requirements for suspensions and expulsions; procedures for students with disabilities; drug search procedures; and dress code).

179. *See, e.g., id.* at 2 (describing "behaviors leading to suspension, extended suspension or expulsion") (emphasis added). "Any conduct which causes a disruption of or interference with the academic process, or places in danger any person or property, or which creates a reasonable likelihood of such disruption, interference or danger shall be cause for suspension or expulsion." *Id.* (emphasis added). The regulations do not distinguish between behavior which threatens the safety of the school and actions which are not overtly dangerous: principals may suspend and/or recommend expulsion for arson or "making loud and unseemly noises . . . or otherwise causing . . . disruption to the atmosphere of order and discipline in the school necessary for effective learning." *Id.* at 3-4.

180. *Id.* at 1 ("Through partnerships with police authorities, fire departments, Maryland State Fire Marshal, and various other service authorities, Dorchester County Public Schools will strive to provide a safe environment for everyone in school.").

181. *See id.* at 2-4 (providing examples of behaviors falling into each category).

182. *Compare id.* (listing offenses "leading to" and "requiring" suspension or expulsion), with STUDENT'S GUIDE, *supra* note 17, at 8 (specifying the offenses that require expulsion and those with a range of consequences).

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policies, however, do not clearly delineate any correspondence between specific offenses and punishments.<sup>183</sup> Although both counties' most serious infractions involve zero-tolerance responses because punishment automatically results from an offense,<sup>184</sup> Dorchester County policies also include strict liability offenses<sup>185</sup> and automatic referral to the juvenile justice system for high school students involved in fights.<sup>186</sup> Students in Dorchester County, therefore, are subject to arbitrary and potentially highly variable standards of conduct, making it difficult for them to know when they are in violation of school rules. These policies also give principals wide discretion to determine whether a student's conduct disrupts "the atmosphere of order and discipline"<sup>187</sup> in the school, and the potential to impose severe sanctions that may result in an arrest record.<sup>188</sup> Because guidelines are not clear for students or for school personnel, Dorchester County school officials appear to rely heavily on removing students from school in order to discipline them.<sup>189</sup>

Montgomery County's school system has a population that is highly diverse ethnically<sup>190</sup> and socio-economically<sup>191</sup> and contains communities ranging from rural farm areas to urban concentrations.<sup>192</sup> Dorchester County, by contrast, is largely rural and

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183. See *supra* note 178 and accompanying text.

184. See STUDENT'S GUIDE, *supra* note 17, at 8 (listing nondiscretionary, expellable offenses); DORCHESTER COUNTY PUB. SCH., DISCIPLINE PHILOSOPHY at 2-4 (listing behaviors requiring suspension and recommendation to the Superintendent for expulsion review and action).

185. See DORCHESTER COUNTY PUB. SCH., DISCIPLINE PHILOSOPHY at 4 (providing that assault and/or battery on a teacher or school employee, *whether the actions were intended or unintended*, will result in suspension and a recommendation for expulsion) (emphasis added).

186. See *id.* at 5 (stating "[p]olice will be notified and asked to take the student(s) responsible for the fight into custody . . . a juvenile complaint for disorderly conduct will be filed.").

187. See *id.* at 3 (providing an example of the discretion vested in principals).

188. See *id.* at 5 (describing automatic referral to police for fighting).

189. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 2 tbl.2 (revealing that 15.8% of Dorchester County students were suspended in the 2000-2001 school year, just under twice the average statewide rate).

190. See *infra* app. tbl.1 (showing the public school population of Montgomery County in 2001 as 47.4% White, 21.1% African American, 17.2% Hispanic, 13.9% Asian/Pacific Islander, and 0.3% Native American).

191. See U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, CENSUS 2000: PROFILE OF SELECTED ECONOMIC CHARACTERISTICS: MONTGOMERY COUNTY, MARYLAND tbl.DP-3 (2000) (detailing the breakdown of income in the county), at <http://censtats.census.gov/data/MD/o5024031.pdf>.

192. See MD. DEP'T OF PLANNING, URBAN AND RURAL POPULATION IN MARYLAND: 2000 AND 1990 (last visited Oct. 7, 2001) (reflecting Montgomery County's population in 2000 being distributed between 96% in urbanized areas and 4% in rural regions), at [http://mdp.state.md.us/msdc/census/cen2000/urban\\_rural/](http://mdp.state.md.us/msdc/census/cen2000/urban_rural/)

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split primarily between White and African American ethnicities.<sup>193</sup> However, despite rapid population growth from 1991 to 2001,<sup>194</sup> Montgomery County has consistently exhibited the lowest suspension rate in the state,<sup>195</sup> a rate that remained largely unchanged over that period.<sup>196</sup> When compared to Dorchester County, and when viewed in light of its diversity and rate of change over a ten-year period, Montgomery County's experience suggests that providing clear discipline policies is itself a valuable policy, both for students and administrators.<sup>197</sup> This does not mean that a policy needs to be extremely complex, but it must be detailed enough to convey clearly its intent.<sup>198</sup>

Carefully constructed policies may still result in disparate application.<sup>199</sup> Even though Montgomery County has generally managed to avoid excluding students from the classroom, African American and disabled students receive suspensions at disproportionately high rates.<sup>200</sup> In fact, Montgomery and Dorchester Counties give short-term suspensions to African American students

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193. See *infra* app. tbl.1 (tabulating the public school population of Dorchester County in 2001 as 55.3% White, 42.3% African American, 1.3% Hispanic, 1.0% Asian/Pacific Islander, and 0.2% Native American).

194. See ENROLLMENT REPORT, *supra* note 92, at 18 tbl.10 (reflecting a 27.46% increase in public school enrollment).

195. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 1 tbl.1 (showing suspension rates in Montgomery County of 3.8% or lower for the years 1992 thru 2000, with a state average for that period of 7.5%).

196. See *supra* note 93 and accompanying text.

197. See *supra* notes 169-75 and accompanying text.

198. See, e.g., STUDENT'S GUIDE, *supra* note 17, at 7 (outlining the procedures accompanying suspensions and expulsions in a step-by-step manner); DORCHESTER COUNTY PUB. SCH., DISCIPLINE PHILOSOPHY at 4-6 (describing Dorchester County's loosely defined offenses subject to suspension); see also *supra* note 127 and accompanying text (recommending that schools adopt criminal code definitions of serious offenses to ensure clarity). Although Dorchester County employs criminal code definitions of such offenses as robbery or assault, these well-defined offenses are not accompanied by clear consequences. See DORCHESTER COUNTY PUB. SCH., DISCIPLINE PHILOSOPHY at 2 (stating that such offenses may lead to suspension or other action). In order for a policy to be effective, therefore, well-delineated offenses must result in equally clearly specified consequences. See *supra* notes 173-77 and accompanying text. Given that Montgomery County's population is so much larger than Dorchester's, it seems clear that bigger jurisdictions have more resources to devote to drawing up policies and seeing them implemented. See *infra* app. tbl.1 (indicating that Montgomery public schools had a total enrollment of 136,895 in 2001 compared to 4884 in Dorchester public schools).

199. See BROOKS, *supra* note 135, at 19 (stating that suspension rates "vary in a surprising way" among Maryland school districts, including that African American and special education students are generally overrepresented in suspension rates).

200. See *infra* app. tbls.2, 4 (noting percentage of suspensions by race/ethnic group and by students with disabilities).

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and students with disabilities at similar rates, results which are consistent across Maryland.<sup>201</sup> These figures strongly indicate that solid policies are only a first step toward equitable treatment of students facing serious disciplinary action.<sup>202</sup>

Although countywide policies allow an examination of precisely defined serious infractions, offenses that fall under local jurisdiction typically involve more subjective evaluations and depend on school officials' judgments about whether an infraction has occurred.<sup>203</sup> Offenses defined by individual schools, which are not subject to state scrutiny and standard measurement to the same extent as countywide violations, are precisely those that carry the greatest danger of discriminatory application.<sup>204</sup> Because the appeals process governing disciplinary actions in public schools grants significant deference to the body whose action is being appealed, patterns of inequitable treatment at the local level are difficult to detect.<sup>205</sup> Therefore, disparate application at the county level *may* mirror similar treatment within individual schools, but a lack of coordinated policy-making and the structure of the appeals process hinders any inquiry.<sup>206</sup>

## III. RECOMMENDATIONS

Removing students who exhibit at-risk behavior from school only decreases opportunities to educate them as part of the school community.<sup>207</sup> At the state level, Maryland has begun to head off violent behavior by advocating prevention as the first component of

201. See *id.*; see also ENROLLMENT REPORT, *supra* note 92, at 1 tbl.1; SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 3 tbl.3 (demonstrating statewide disparities in application of a magnitude similar to those found in Montgomery and Dorchester Counties).

202. See *supra* notes 171-77, 196-98 and accompanying text.

203. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 7 (describing sweeping and indistinctly defined infractions such as defiance or disturbing order).

204. See generally Gale M. Morrison & Barbara D'Incau, *The Web of Zero Tolerance: Characteristics of Students who are Recommended for Expulsion from School*, 20 EDUC. & TREATMENT OF CHILD. 316, 316-35 (1997), available at <http://www.fswp.org/etc>; Russ Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, in EDUC. POL'Y CTR., POLICY RESEARCH REPORT #SRS1 (June 2000) (describing attorneys' reports that African American and Latino children across the country are more likely to be disciplined for minor infractions and to receive disproportionately harsh punishments), available at <http://www.indiana.edu/~safeschl/cod.pdf>.

205. See discussion *supra* Part II.B.

206. See *id.*

207. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 9-11 (discussing the academic, social and developmental importance of maintaining links between at-risk students and their schools). Because schools are the public institutions that are most likely to be consistently involved in students' lives, they can contribute to students' understanding of fairness and justice. *Id.*

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its school discipline program<sup>208</sup> and resorts to the use of zero tolerance policies only for the most serious offenses.<sup>209</sup> Maryland's policies, therefore, represent a broad-reaching attempt to reduce violence in public schools, not just to react to breaches of discipline.<sup>210</sup> Despite these carefully crafted policies, African American and disabled students continue to receive a disproportionate number of punishments that exclude them from the educational process.<sup>211</sup> The U.S. Supreme Court has recognized the importance of a student's right to obtain an education<sup>212</sup> and has established minimum due process requirements for short-term suspensions.<sup>213</sup> The following recommendations address the problems of application made evident in the preceding discussion.<sup>214</sup> These recommendations are conceived to be implemented as administrative corrections, rather than requiring changes in legislation.<sup>215</sup>

A. *Evaluate the Application of Local Policies and Correct the Conditions that Foster Disparate Treatment.*

Districts or individual schools are generally responsible for establishing policies to govern disruptive behavior that does not pose a general threat to the school.<sup>216</sup> However, such policies are

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208. See MD. CODE ANN., EDUC. § 7-304(a) (2001) (defining the purpose of special programs for disruptive students as establishing "a *continuum model of prevention* and intervention activities and programs that *encourage and promote positive behavior and reduce disruption*") (emphasis added).

209. See MD. CODE ANN., EDUC. § 7-305(e) (2001) (requiring expulsion, as required by the Gun Free Schools Act, for bringing a firearm onto school property). Maryland has elected, as permitted by the Gun Free Schools Act, to allow superintendents to specify alternative punishment on a case-by-case basis. *Id.* § 7-305(e)(3).

210. See Skiba & Peterson, *supra* note 7, at 382 n.23 (citing numerous accounts in the professional education literature which stress the importance of maintaining consistent philosophy and procedures in order to manage student behavior effectively).

211. See discussion *supra* Part II.D.

212. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (establishing a student's interest in education as a property right).

213. See *id.* at 581 (stating that a student receiving a suspension of ten days or less should be given written and oral notice of the charges against him). If a student denies the charges, the school should provide an explanation of the evidence used and an opportunity for the student to present his side. *Id.*

214. See discussion *supra* Parts II.D-E.

215. However, if legislation were required to fulfill any goals of MSDE, statutory provisions direct MSDE to propose legislation. See MD. CODE ANN., EDUC. § 2-205(k) (2001).

216. See, e.g., STUDENT'S GUIDE, *supra* note 17, at 9 (listing offenses established at the school level, such as leaving school grounds without permission).

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sufficiently widespread that MSDE collects and publishes statewide data relating to them.<sup>217</sup> Patterns of disparate treatment only become clear through a comparative examination of MSDE data.<sup>218</sup> Since three of the four most frequent infractions involve a subjective determination of a student's behavior rather than an objective definition of the elements of an offense,<sup>219</sup> the perceptions and interpretations of individual teachers and administrators weigh heavily in the decision to punish students.<sup>220</sup> Because African American students and students with disabilities across Maryland consistently receive suspensions at significantly higher rates than their peers, MSDE must (1) act immediately to determine why this disparity in treatment exists and (2) involve students, parents, teachers and administrators in devising policies and actions to correct it.<sup>221</sup>

*B. Require Local School Districts to Provide Alternative Education*

Providing alternatives to regular classroom placement for students who are suspended or expelled will help separate the goal of punishing students from the collateral effect of lowered academic performance.<sup>222</sup> As of 1999, all Maryland school districts had established alternative high school programs and were developing programs at the middle school level.<sup>223</sup> However, school districts are

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217. See MD. CODE ANN., EDUC. § 7-304(e)-(f) (2001) (requiring school districts to author and evaluate their own programs for addressing disruptive behavior). However, the statute does not establish statewide benchmarks for performance. *Id.* See also SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 4-7 tbls.4-7, 13 tbl.10, 15-16 tbls.12-13 (summarizing data for all school districts).

218. See *infra* app. tbl.2 (comparing data tabulated in SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 2 tbl.2 with *id.* at 3 tbl.3).

219. See *infra* app. tbl.3 (reflecting the incidence of the three most frequent suspension offenses as compiled in SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 8-9, 14 tbls.8-9, 11: disrespect/insubordination, attack/threats/fighting, and refusal to obey school policies).

220. See *supra* note 201 and accompanying text.

221. See OPPORTUNITIES SUSPENDED, *supra* note 1, at 33-36, 44 (discussing the U.S. Department of Education's role in enforcing Title VI of the Civil Rights Act through its Office of Civil Rights ("OCR"), and recommending that community groups initiate an OCR investigation if they identify a pattern of discriminatory treatment). Under Title VI, any "adverse impact" of racially neutral state actions, which nevertheless impose a disproportionate burden on students of color, must be justified by a compelling state interest. *Id.* at 34. Although OCR has the authority to enforce Title VI by investigating complaints brought by students and other members of the community, commentators note that it has not vigorously applied the adverse impact doctrine in its investigations and findings. *Id.* at 35.

222. See discussion *supra* Part II.D.

223. See MD. STATE DEP'T OF EDUC., SCHOOL SAFETY PROGRAMS/INITIATIVES [hereinafter MSDE SCHOOL SAFETY PROGRAMS] (last visited Nov. 2, 2002) (summarizing the development of school safety programs throughout the state),



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not explicitly required to provide educational opportunities for students who must be removed from their usual school environment.<sup>224</sup> The governing statutes require school districts to establish “special programs” for disruptive students without stipulating the nature of such programs,<sup>225</sup> and allow superintendents to assign a student who has violated the Gun Free Schools Act to an alternative educational setting.<sup>226</sup> New Jersey provides a model in requiring the state to provide an alternative educational placement or home instruction to students who are expelled for Gun Free School Zone Act offenses.<sup>227</sup> Making alternative education a required component of the matrix of programs available in each district, rather than obliquely recommending it through the allocation of funding, would ensure that students who are being punished do not also suffer academically.<sup>228</sup>

*C. Provide Support and Resources to Smaller Districts that Lack the Capacity to Evaluate, Revise and Implement Policies Consistent with State Guidelines*

Generally speaking, the size of a Maryland school district is inversely related to the percentage of its students who are suspended.<sup>229</sup> Predictably, districts with small populations do not

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available at <http://www.msde.state.md.us/schoolsafety/safetyprograms.html>.

224. See MD. CODE ANN., EDUC. § 7-304(e)(2) (2001) (providing the required “continuum model for the prevention and intervention of disruptive student behaviors”). At the district level these programs must include “removal and re-entry programs necessary for effective learning.” *Id.* The state therefore expects school districts to employ suspensions and expulsions as part of their intervention programs for disruptive students, but does *not* require districts to provide alternative *educational* opportunities when students are removed from their assigned classrooms. *Id.*

225. See *id.* § 7-304(b) (providing that “[e]ach county board of education . . . shall establish special programs . . . for students in the public school system who exhibit disruptive classroom behavior”).

226. See *id.* § 7-305(e) (authorizing a superintendent to specify an alternative educational setting *if* one has been approved by the county board).

227. New Jersey’s equivalent statute to MD. CODE ANN., EDUC. § 7-305(e) provides:

Any pupil that is removed from the regular education program pursuant to this section shall be placed in an alternative education program. If placement in an alternative education program is not available, the pupil shall be provided home instruction or other suitable facilities and programs until placement is available . . . Nothing herein shall be construed as prohibiting the expulsion of a pupil.

N.J. STAT. ANN. § 18A:37-8 (West 2001). The approach embodied in this legislation is effective because it addresses the need to punish offending students and to protect others, but does not additionally penalize the offenders academically. *Id.*

228. See SUSPENSIONS AND EXPULSIONS REPORT, *supra* note 16, at 15 tbl.12 (providing raw data showing that educational services were provided in 64.2% of expulsions but only 10.9% of suspensions in Maryland in 2000-2001).

229. See ENROLLMENT REPORT, *supra* note 92, at 1 tbl.1 (summarizing Maryland public school populations for the state as of Sept. 30, 2001); SUSPENSIONS AND

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have a broad tax base from which to generate the revenue to support a specialized professional staff or complex programs.<sup>230</sup> Larger districts with proven policies can provide insight and expertise to smaller districts that lack the capacity to create such policies on their own.<sup>231</sup> Although the State Code of Discipline provides guidelines,<sup>232</sup> districts that have successfully put those guidelines into practice can aid their implementation throughout the state.

#### D. Strengthen Peer Mediation and Preventive Strategies

Studies have shown that teaching students conflict resolution skills can reduce the level of aggression in schools.<sup>233</sup> Student-to-student conflict resolution efforts reduce administrative burdens that would otherwise fall on school staff in two ways: (1) students speak directly to each other, rather than with a teacher or administrator, to solve problems; and (2) fewer conflicts mean less administrative time spent dealing with discipline problems.<sup>234</sup> Peer mediation, therefore, serves an educational purpose in teaching students effective methods for solving conflicts, and helps to reduce violence in schools as a result.<sup>235</sup>

#### E. Strengthen Training for School Professionals in Dealing with Disruptive Behavior

School districts are required to show that they have programs for in-service training and staff development in order to obtain funding for programs designed to deal with disruptive student behavior.<sup>236</sup>

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EXPULSIONS REPORT, *supra* note 16, at 1 tbl.1 (summarizing the percentage of Maryland public school students suspended 1992-2000).

230. See MD. CODE ANN., EDUC. § 7-304(c) (2001) (allowing two or more county boards to establish special programs for disruptive students for joint use). *But see* BROOKS ET AL., *supra* note 135, at 9 (citing nationwide statistics which demonstrate that urban and suburban areas experience higher rates of crime than rural areas). Given national crime trends and the tendency of schools to be subject to the same social forces that shape the surrounding communities, the incidence of violent behavior would generally be expected to be lower in rural districts. *Id.* at 18-19.

231. See discussion *supra* Part II.E, at 57-68.

232. See *generally* STATE CODE OF DISCIPLINE, *supra* note 33.

233. See Skiba & Peterson, *supra* note 7, at 382 n.22 (referring to research which shows that conflict resolution has a more “moderate effect” on student aggression) (citing RICHARD J. BODINE ET AL., CREATING THE PEACEABLE SCHOOL: A COMPREHENSIVE PROGRAM FOR TEACHING CONFLICT RESOLUTION (1995)).

234. See *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (recognizing the burden that discipline measures place on schools, which results in a loss of time and resources devoted to education).

235. See Skiba & Peterson, *supra* note 7, at 382 n.22 (citing RICHARD J. BODINE ET AL., CREATING THE PEACEABLE SCHOOL: A COMPREHENSIVE PROGRAM FOR TEACHING CONFLICT RESOLUTION (1995)).

236. See MD. CODE ANN., EDUC. § 7-304(e) (5) (2001) (requiring “training and staff development” but not elaborating further).

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Maryland has conducted training sessions in early behavioral intervention to selected groups of school personnel,<sup>237</sup> but teachers report being overwhelmed and unprepared for a perceived increase in disruptive behavior among students.<sup>238</sup> Coupled with peer mediation training for students,<sup>239</sup> training teachers in effective behavioral intervention skills will help prevent disruptions from escalating into incidents that require disciplinary measures.

#### CONCLUSION

School districts and the State Board in Maryland enjoy unique latitude as self-regulating administrative bodies.<sup>240</sup> Because the courts are reluctant to substitute their discretion for that of school boards, MSDE must ensure that it does not reinforce actions at the local level that result in unfair treatment of students.<sup>241</sup>

Maryland's existing policies provide a comprehensive resource that school administrators can draw on to articulate and enforce local policies.<sup>242</sup> However, Maryland needs a mechanism for ensuring that education remains the mission of the public schools, that schools remain safe and that students are punished fairly.<sup>243</sup> To this end, students who are removed from their regular classrooms as the result of their behavior should nevertheless continue to have the opportunity to obtain an education.

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237. See MSDE SCHOOL SAFETY PROGRAMS, *supra* note 223, at 4 (describing an anticipated workshop, "Building the Capacity of Schools to Meet Challenges Through Early Behavioral Intervention," for staff from nine local school districts in 1999, and a week-long institute for representatives from all districts scheduled for the summer of 2000).

238. See Perlstein, *supra* note 88, at B1 (describing Howard County, Maryland, teachers' frustration with disruptive behavior and a lack of training to deal with it).

239. See discussion *supra* Part III.D (arguing that Maryland should strengthen peer mediation and preventative strategies).

240. See discussion *supra* Parts II.A-B (providing a general analysis of the state of Maryland and the authority of its State Board of Education).

241. See discussion *supra* Part II.D (examining the disparities within the application of Maryland discipline policies on African American students and student with disabilities).

242. See discussion *supra* Part II.A (noting that although MSDE policies represent a wide-ranging approach to school safety, they still create discrepancies in policy by leaving certain types of sanctions exclusively to the judgment of local boards).

243. See discussion *supra* Part III (recommending that Maryland schools evaluate the application of local policies and correct the conditions that foster disparate treatment by requiring local school districts to provide alternative education).