

REPORTS OF SECTIONS AND DIVISIONS 1

American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

February 9, 2001

Criminal Justice (Report Nos.103B)

RESOLVED, That the American Bar Association adopts the revisions to the Second Edition of the *ABA Criminal Justice Standards on Electronic Surveillance* dated February 2001*.

The Section's second recommendation (Report No. 103B), supporting safe schools while proposing that school responses to alleged student misbehavior be individualized and fair and opposing "zero tolerance" policies that have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court without regard to the circumstances or nature of the offense or the student's history, which was cosponsored by the Section of Family Law, the Steering Committee on the Unmet Legal Needs of Children, the Commission on Mental and Physical Disability Law, the Young Lawyers Division, the Tort and Insurance Practice Section and the Standing Committee on Legal Aid and Indigent Defendants, was revised and approved.¹ As revised, it reads:

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

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

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

REPORT

There are many misconceptions about the prevalence of youth violence in our society and it is important to peel back the veneer of hot-tempered discourse that often surrounds the issue.... While it is important to carefully review the circumstances surrounding these horrifying incidents so that we may learn from them, we must also be cautious about inappropriately creating a cloud of fear over every student in every classroom across the country. In the case of youth violence, it is important to note that, statistically speaking, schools are among the safest places for children to be.

Final Report, Bi Partisan Working Group on Youth Violence
106th Congress, February 2000

Public policy towards children has moved towards treating them more like adults and in ways that increasingly mimic the adult criminal justice system. The most recent version of this movement is so-called "zero tolerance" in schools, where theories of punishment that were once directed to adult criminals are now applied to first graders.¹

"Zero tolerance" is the phrase that describes America's response to student misbehavior. Zero tolerance means that a school will automatically and severely punish a student for a variety of infractions. While zero tolerance began as a Congressional response to students with guns, gun cases are the smallest category of school discipline cases. Indeed, zero tolerance covers the gamut of student misbehavior, from including "threats" in student fiction to giving aspirin to a classmate. Zero tolerance has become a one-size-fits-all solution to all the problems that schools confront. It has redefined students as criminals, with unfortunate consequences.

While zero tolerance policies target the serious risk of students bringing guns to school, they also go after other weapons or anything—like a Swiss Army knife—that can be used as a weapon. Zero tolerance responds to student violence (covering a wide range of activities) or threats of violence. Zero tolerance is theoretically directed at students who misbehave intentionally, yet it also applies to those who misbehave as a result of emotional problems, or other disabilities, or who merely forget what is in their pocket after legitimate non-school activities. It treats alike first graders and twelfth graders.

Zero tolerance results in expulsion or suspension irrespective of any legitimate explanation. In many instances it also results in having the student arrested.

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Recent Trends

As reported in the April, 2000 *American Bar Association Journal*:

Nationwide, statistics gathered by the Justice Policy Institute and the U.S. Department of Education show that crime of all sorts is down at public schools since 1990— some studies say by as much as 30 percent. Less than 1 percent of all violent incidents involving adolescents occur on school grounds. Indeed, a child is three times more likely to be struck by lightning than to be killed violently at school.

Still, fueled by media hype, fear of the unthinkable and perhaps even a bit of guilt, more parents are demanding that school boards implement strict policies to deal with kids who step out of line.

So-called zero tolerance policies being implemented across the country are snaring large numbers of regular kids in broad nets designed to fish for troublemakers.²

The nets are indeed broad. In a report issued in the spring of 2000 by the Justice Policy Institute in Washington and the Kentucky-based Children's Law Center:

- A seventeen-year-old junior shot a paper clip with a rubber band at a classmate, missed, and broke the skin of a cafeteria worker. The student was expelled from school.
- A nine-year-old on the way to school found a manicure kit with a 1-inch knife. The student was suspended for one day.

The report notes that many of these children are also referred to juvenile court:

- In Ponchatoula Louisiana, a 12-year-old who had been diagnosed with a hyperactive disorder warned the kids in the lunch line not to eat all the potatoes, or "I'm going to get you." The student, turned in by the lunch monitor, was suspended for two days. He was then referred to police by the principal, and the police charged the boy with making "terroristic threats." He was incarcerated for two weeks while awaiting trial.
- Two 10-year-old boys from Arlington, Virginia were suspended for three days for putting soapy water in a teacher's drink. At the teacher's urging, police charged the boys with a felony that carried a maximum sentence of 20 years. The children were formally processed through the juvenile justice system before the case was dismissed months later.

- In Denton County, Texas, a 13-year-old was asked to write a "scary" Halloween story for a class assignment. When the child wrote a story that talked about shooting up a school, he both received a passing grade by his teacher and was referred to the school principal's office. The school officials called the police, and the child spent six days in jail before the courts confirmed that no crime had been committed.
- In Palm Beach, Florida, a 14-year-old disabled student was referred to the principal's office for allegedly stealing \$2 from another student. The principal referred the child to the police, where he was charged with strong-armed robbery, and held for six weeks in an adult jail for this, his first arrest. When the local media criticized the prosecutor's decision to file adult felony charges, he responded, "depicting this forcible felony, this strong-arm robbery, in terms as though it were no more than a \$2 shoplifting fosters and promotes violence in our schools." Charges were dropped by the prosecution when a 60 Minutes II crew showed up at the boy's hearing.³

David Richart, Ph.D., Executive Director of the National Institute for Children, Youth and Families at Spalding University, has uncovered similar examples. Richart cites the suspension and arrest of an 11-year-old in South Carolina, who asked her teacher if she could use a smooth-edged steak knife which she had brought from home to cut a piece of chicken; an eight-year-old Louisiana girl who was suspended and transferred to an alternative school when she brought her grand-father's gold pocket watch, complete with chain and one-inch fingernail knife, to show and tell; the suspension, in Ohio, of a 14-year-old girl for 13 days because she gave a classmate a tablet of Midol; the suspension in Virginia of a high school senior for violating a school rule banning use of alcohol, after he took a swig of Listerine; and dozens of similar examples.⁴

Unintended Consequences of Zero Tolerance Policies

The *ABA Journal* story noted how unfair zero tolerance policies have become. One private attorney in Virginia observed that children are able to understand that there is a difference between being treated equally and being treated fairly. She said, "Kids are not going to respect teachers and administrators who cannot appreciate the difference between a plastic knife and a switch-blade."

An Illinois attorney observed, "Schools are confusing equal treatment with equitable treatment. . . Kids in middle school and high school care most about fairness. When they see two students whose 'offenses' are vastly different being treated exactly the same, that sense of fairness is obliterated and replaced with fear and alienation."

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There is increasing evidence that zero tolerance policies, while facially neutral, are having a disproportionate impact on students of color.⁵ By the end of 1999, a study of ten school districts in the country showed that:

Black students, already suspended or expelled at higher rates than their peers, will suffer the most under new "zero tolerance" attitudes toward rising school violence...zero tolerance means that black students will be pushed out of the door faster.⁶

Zero tolerance policies thus contravene ABA anti-discrimination policies.

The Hamilton Fish Institute on School and Community Violence recently observed that the costs of zero tolerance policies outweigh the benefits:

When the cost appraisal of the impact of zero tolerance includes impacts on an entire community, the financial benefits of suspension and expulsion may completely disappear. If the students who are suspended or expelled do not re-enter school right away, they are likely to fall further behind academically and are at increased risk of falling into criminal activity in the community. Their likelihood of being incarcerated increases accordingly. The high costs of incarceration are not generally weighed against the relatively lower costs of alternative education, as would be recommended in a "holistic" cost appraisal. Nor are the potentially negative socialization experiences faced by alternative education students typically weighed against the more severely negative socialization experiences faced by incarcerated youth. High recidivism in incarcerated settings urges a long-term view of the costs of initial incarcerations. It may be that keeping a child in school, even in alternative education, may reduce their likelihood of entering a career as a criminal.⁷

Zero Tolerance and Mandatory Punishment

Although few could quarrel with a policy of zero tolerance towards children who misbehave—adults who raise, teach or supervise children *should* react to misbehavior— their responses should be appropriate to the age, history and circumstances of the child as well as to the nature of the "offense." Unfortunately, when it is examined closely, "zero tolerance" turns out to have very little to do with zero tolerance, and everything to do with one-size-fits-all mandatory punishment.

The American Bar Association has long had policies against mandatory sentencing in the criminal justice system. In 1974, the ABA adopted a resolution opposing, "in principle, legislatively imposed mandatory minimum prison sentences . . ."

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The Criminal Justice Standards urge legislatures to authorize sentencing courts to impose a range of available sanctions, specifying *maximum* but not mandatory minimum sentences. See Standards on Sentencing, 18-3.11, 18-3.21.

The American Bar Association, which opposes mandatory minimum sentences for adults convicted of serious crimes, should also oppose mandatory minimum sanctions for school children who misbehave.

Unfortunately, “zero tolerance” is public education’s effort to import to education the concept of adult mandatory sentencing.* Zero tolerance is a perverse version of mandatory sentencing, first, because it takes no account of what we know about child and adolescent development, and second, because at least in the criminal justice system (despite ABA policy) when mandatory sentences exist, there are different mandatory sentences for offenses of different seriousness.

For example, a gun-related offense might lead to a mandatory five-year-sentence, but only murder leads to a mandatory life sentence. Zero tolerance in schools, however, is closer to a mandatory life sentence for a wide range of student misconduct. (In some places this is literally true. In Georgia children who are expelled from school are expelled for life. In Massachusetts, expelled students also permanently lose their right to a public education.)

Despite the obvious harshness of mandatory sentencing, which reduces judicial discretion, it at least has the benefit of being related to the perceived seriousness of the offense, or tied to the criminal history of the defendant. America’s criminal justice system has yet to embrace a single sentence for all crimes-- indeed, America moved beyond single draconian sentences for minor offenses two hundred years ago.

* 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.

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Thus, zero tolerance policies for students adopt a theory of mandatory punishment that has been rejected by the adult criminal justice system because it is too harsh! Rather than having a variety of sanctions available for a range of school-based offenses, state laws and school district policies apply the same expulsion rules to the six-year-old as to the 17-year-old; to the first time offender as to the chronic troublemaker; to the child with a gun as to the child with a Swiss Army knife.

Adults— especially those who teach children— are expected to have the skills and knowledge to teach behavior in age-appropriate ways. Unfortunately, zero tolerance as practiced today is not rooted in theories of pedagogy or child or adolescent development. It teaches children nothing about fairness, and often creates injustice.

In contrast, the proposed resolution is consistent with and compliments existing ABA policy supporting the Individuals with Disabilities Education Act (IDEA), which in turn underscores the need for individualized attention to needs and behavior of students with disabilities whose responses in certain situations may be misinterpreted as disciplinary problems.

Alternatives to Zero Tolerance

The Hamilton Fish Institute, in its report, notes that “numerous alternatives to zero tolerance policies exist.” The report cites an array of prevention programs.

Prevention is typically focused on known risk factors for suspension and expulsion. If prevention and intervention efforts are focused on the more potent risk factors for suspension and expulsion, they are more likely to be effective. Based on research of suspension or expulsion among twelfth-graders (looking back over their entire school careers) from the 1997 Monitoring the Futures Study a number of key risk factors may be identified. The more important risk factors include race, absence of either a male or female guardian, use of cigarettes and alcohol, and being offered drugs at school. This can be interpreted to say that inner-city youth (regardless of race) without intact families, who smoke, drink, and are targets of drug pushers are more likely to have been suspended or expelled from school but have managed to return to school and continue into grade 12. Youth who were suspended or expelled and who did not return to school are not included in the study, and may have a different set of risk factors.

When the analysis is focused specifically on out-of-school suspension or expulsion (which picks up more serious incidents), and younger students are added (grades 7 through 12, which picks up some who will not continue in school as far as grade 12), the higher risk factors for suspension and expulsion include being a victim or witness of violent acts, being a runaway, stealing expensive merchandise, breaking and entering, stealing cars, selling drugs, painting graffiti

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on other people's property, being a perpetrator of violent acts, and feeling rejected by fellow students or teachers and/or feeling unsafe at school (Table 2, National Longitudinal Study of Adolescent Health, 1995; 1994/95 data). These are clearly troubled and rejected kids living in troubled neighborhoods, a fact which urges us to consider the importance of community factors equally with individual risk factors. "Lowering the boom" on youth that are victims of circumstance through suspension and expulsion is a questionable practice despite their poor behavioral choices. A more effective approach would be to meet their individual basic human needs as much as possible to allow them to continue in school to rise above their circumstances and poor choices.

Effective interventions for addressing these risk factors are listed below. Generally programs are more effective if they start earlier in a child's life, are interactive, are longer in duration, involve skill-building and behavioral rehearsal, focus specifically on the risk factors that are amenable to change in school settings, and if they involve adults in the lives of youth in meaningful ways.

Conclusion

The ABA recognizes that school officials need to address true disciplinary problems, and that they face pragmatic concerns in trying to do so while facing many other challenges in public school settings. We believe that the proposed policy, focusing on individualized responses to students, will be more beneficial than burdensome to school administrators.

It is easy to imagine school discipline policies that are grounded in common sense, and that are sensitive to student safety and the educational needs of all students. Such policies are the kind that most parents would want if their own children were being disciplined. Unfortunately, most current policies eliminate the common sense that comes with discretion and, at great cost to society and to children and families, do little to improve school safety.

Respectfully submitted,

Ralph C. Martin, II
Chairperson
Criminal Justice Section

February 2001

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Endnotes

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1. This observation is gaining currency. In mid-June, a new report noted:

In the aftermath of a number of high profile, extremely violent incidents at public schools, many state and local education entities have adopted the same harsh and mandatory, "take-no-prisoners" approach to discipline currently being used in this country's criminal justice system.

Hair et al., "Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline," Advancement Project/Civil Rights Project at Harvard University, June 2000.

2. Tebo, M.G., "Zero Tolerance, Zero Sense," *ABA Journal*, April 2000.
3. Brooks, K., Schiraldi, V., Zeidenberg, J., "School House Hype: Two Years Later," Justice Policy Institute/Children's Law Center, March 2000.
4. Richart, D., "Civil Religion & Other People's Children: An Illustration of Zero Tolerance in Action," April 2000.
5. Hair et al., "Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline," *supra*.
6. May, M., "Blacks Likely to Lose Out in School Crackdown," *San Francisco Chronicle*, December 18, 1999.
7. _____, "Zero Tolerance - A Critical Analysis," Hamilton Fish Institute on School and Community Violence, April 2000.

GENERAL INFORMATION FORM

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To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Criminal Justice Section Council

Submitted By: Ralph C. Martin, II

1. Summary of Recommendation(s).

The recommendation supports safe schools, while proposing that school responses to alleged student misbehavior be individualized and fair; it urges the ABA to oppose "zero tolerance" policies that mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student's history.

2. Approval by Submitting Entity.

The Criminal Justice Council approved this resolution, as amended, at its fall meeting on November 18, 2000 in Washington, DC.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This resolution has not been submitted to the House of Delegates or the Board of Governors.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association currently has no relevant policies on this topic.

5. What urgency exists which requires action at this meeting of the House?

As described with in the report, zero tolerance policies have very little to do with zero tolerance and everything to do with one-size-fits-all mandatory punishment. Of particular urgency and concern is that the policy treat alike a gun and a nail file. They have broad-based negative consequences for all children who see these polices in practice as they contravene any sense of fairness. This resolution would allow the ABA to actively assist jurisdictions as they look at more appropriate ways to maintain safety in schools.

6. Status of Legislation. (If applicable.)

To our knowledge, information and belief no bills are currently pending on this issue.

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7. Cost to the Association. (Both direct and indirect costs.)

Adoption of this resolution would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendations implemented. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who are already budgeted to lobby for Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

The report has been circulated to the following Association entities:

Center on Children and the Law
Coalition for Justice
Commission on Domestic Violence
Commission on Homelessness and Poverty
Commission on Mental and Physical Disability Law
Consortium on Legal Services and the Public
Coordinating Committee on Gun Violence
Judicial Division
Section of Family Law
Section of Individual Rights and Responsibilities
Standing Committee on Legal Aid and Indigent Defendants
Standing Committee on Pro Bono and Public Service
Standing Committee on Public Education
Standing Committee on Substance Abuse
Steering Committee on the Unmet Legal Needs of Children

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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