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Cover Page Footnote

This Comment is dedicated to the 2002 class of West Muskingum High School, whose inspiration and energy I will always remember. Many thanks are also extended to Prof. Charles Russo for his vast expertise, my family for their unconditional support and strong belief in public education, and my editor, Cori Haper, for her limitless creativity and dedication.

ZERO ROOM FOR ZERO TOLERANCE: RETHINKING FEDERAL FUNDING FOR ZERO TOLERANCE POLICIES

*Jill Richards**

I. INTRODUCTION

School is the first place where children should learn tolerance; instead children learn that conduct, even if non-threatening, will not be tolerated as part of a national "get-tough" approach on school violence, drugs, and weapons. For instance, in Florida, a high school senior and National Merit Scholar was suspended for five days and missed his graduation when school officials found a kitchen knife in the back seat of his vehicle.¹ In Pennsylvania, school officials suspended a five-year-old for wearing a five-inch *plastic* axe to school as part of his fireman's costume on Halloween.² In Chicago, a high school student was expelled, taken to jail for seven hours, and encouraged to drop out when he accidentally hit a cafeteria worker with a paper clip, instead of his friend.³ Such use of intolerance in schools gives new meaning to the phrase, "silly cases . . . make bad law."⁴

Cases, like those demonstrated above, are the results of schools implementing discipline rules known as "zero tolerance" ("ZT") policies. A ZT policy is a school or district policy requiring predetermined consequences or punishment for particular offenses without consideration of the circumstances or the disciplinary history of the student.⁵

It was the federal government's tie of school funding to anti-gun legislation which resulted in the implementation of ZT policies in

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¹ Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice in New Directions for Youth Development No. 92, Zero Tolerance: Can Suspension and Expulsion Keep Schools Safe?* 17, 17-18 (Russell J. Skiba & Gil G. Noam eds., Wiley Periodicals, Inc. 2002).

² *Id.* at 17 (emphasis added).

³ Christine Wolff, *Has Zero Tolerance In Schools Gone Too Far?* The Cincinnati Enquirer 01A (May 22, 1999).

⁴ *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 128 (Rehnquist, J., dissenting) (1982).

⁵ Gale M. Morrison et al., *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline in New Directions for Youth Development No.92: Zero Tolerance: Can Suspension and Expulsion Keep Schools Safe?* 45, 47 (Russell J. Skiba & Gil G. Noam eds., Wiley Periodicals, Inc. 2002).

schools.⁶ For example, the Elementary and Secondary Education Act ("ESEA") provides funds for schools in numerous areas such as Title I, which provides grants to school districts to aid low-income and underachieving students.⁷ Today almost every school district in the United States is affected by the ESEA.⁸ In 1994, President Clinton signed into law the Gun Free Schools Act ("GFSA") which was later repealed and reauthorized by the No Child Left Behind Act ("NCLB") in 2002.⁹ As a means of enforcing the GFSA, Congress tied it to the funding in the ESEA.¹⁰ In other words, in order to receive federal education funds under the ESEA, the GFSA requires school districts to comply with its restrictions.¹¹ To demonstrate, the GFSA requires that all schools receiving ESEA federal funding expel a student for at least one year for bringing a firearm to school.¹² Thus, the GFSA did not explicitly mandate a ZT policy for states; however, Congress tied federal funding of the GFSA with all of the funding for schools provided by the federal government under the ESEA.¹³ As a result, schools implemented ZT policies, suspending and expelling students for any violent infractions, as a method to ensure that federal funding was not revoked.¹⁴

In general, ZT policies are rigid and inflexible because they provide no administrative discretion for certain actions pertaining to

⁶ 140 Cong. Rec. S13067 (daily ed. Sept. 12, 1994).

⁷ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 159.

⁸ *Id.*

⁹ Ronnie Casella, *At Zero Tolerance: Punishment, Prevention, and School Violence*, 21 (Joseph L. DeVitis & Linda Irwin-DeVitis, eds., Peter Lang Publishing, Inc. 2001); *The Gun-Free Schools Act of 1994*, 20 U.S.C. § 8921 (repealed 2002). The GFSA was reauthorized by the No Child Left Behind Act, Pub. L. No. 107-110 § 4141, 115 Stat. 1425 (2002) (maintaining the title of the "Gun Free Schools Act"). The reauthorized GFSA, under the NCLB act, was a clearer version of the 1994 act by reaffirming federal requirements of one year expulsions, referral to the criminal or juvenile justice systems for violations, and denial of federal funding for non-compliance. However, the reauthorized GFSA does not apply to firearms that are safely stored and locked away in a vehicle on school property. For the purposes of clarity and simplicity in this Comment, I will refer to the 1994 Act, given its 2002 reauthorization.

¹⁰ See Kathleen Uradnik, *Student's Guide to Landmark Congressional Laws on Youth* 160 (Greenwood Press 2002).

¹¹ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 161.

¹² *Id.* at 17.

¹³ See *id.* at 19-20. The ESEA was originally passed in 1965 and has since been amended every five years. It encapsulates federal funding to state school programs from Title I- to the Individuals with Disabilities Act. In a word, the ESEA is huge. It encompasses many sections and a large portion of the act is specified more clearly in the Code of Federal Regulations. In short, the ESEA requires states to comply with federal law to receive funding for numerous programs. See Uradnik, *Student's Guide to Landmark Congressional Laws on Youth* at 159-161.

¹⁴ See Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 20. For further information of the expansion of the "term" weapon, review the text accompanying *infra* notes 82-84.

weapons.¹⁵ These policies apply the same penalty irrespective of the individual or the circumstances in which the misconduct occurred.¹⁶ ZT policies were originally intended to provide students with equal fairness in disciplinary matters by providing a hard and fast approach to deal with any and all infractions in the same way.¹⁷ Not only are the policies easy to use, but easy for school officials and legislators to understand.¹⁸ For example, a student bringing a water squirt gun to school is subject to the same disciplinary measures as a student carrying a .38 magnum to school.¹⁹

However, ZT policies remain controversial to parents and administrators alike, because they require unwarranted punishment of students for minor or trivial infractions.²⁰ The "one-size-fits-all" method punishes *all* students alike even if the student failed to present a violent threat to himself, other students, or the school as a whole.²¹ ZT policies simply ensure accountability even if it is arbitrary. They do not, however, guarantee the prevention of violence in schools as the problem is not likely to be cured with the normal punishment of expulsions and suspensions.²² Rather than targeting the prevention of delinquent behavior, ZT policies simply punish the student after the misconduct has already occurred.²³

Section II of this Comment explains the evolution of discipline in public schools leading to the implementation of zero tolerance.²⁴ It outlines the purpose and background of the GFSA and its virtual mandate of ZT policies. Additionally, Section II analyzes the GFSA in the context of the Spending Clause. It concludes that the tie of federal funding to matters of school discipline is poor policy, that it invades the traditional role of deference to the state for educational matters, and that it produces negative effects on both students and the community as a whole. Section III proposes a more amicable solution to ZT policies by calling for the repeal of the GFSA and the creation of an educational reconstructive act. If followed, this proposal would implement an

¹⁵ See Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 20 (noting that the goal of one-size-fits all punishment is also to have a deterring effect on the student possibly considering violent conduct).

¹⁶ *Id.*

¹⁷ *Id.* (indicating that ZT policies sound very proactive and appealing to politicians).

¹⁸ *See id.* at 19-20.

¹⁹ *See id.*

²⁰ *Id.* at 21.

²¹ *Id.*

²² See Casella, *At Zero Tolerance* at 172-73.

²³ *Id.*

²⁴ In particular, this comment will focus only on public schools for general education students that are not governed by special education guidelines provided by the Individuals with Disabilities Act ("IDEA") for children with disabilities. See generally Uradnik, *Student's Guide to Landmark Congressional Laws on Youth* at 203.

approach that would give discretion to school administrators and would prevent school violence before it occurs.²⁵ This solution is also supplemented by a mental health approach for alternative education in the event that a child is suspended or expelled from school. ZT policies only address penalties for student violations, whereas the mental health approach applies a rehabilitative element to ZT policies. In essence, the proposed solution has two major parts: the preventative section, aimed at anticipating and blocking student violence, and the rehabilitation section, geared toward providing treatment for students afflicted with violent tendencies.

II. BACKGROUND

A. *The Evolution of Discipline from Corporal Punishment to Zero Tolerance*

1. The Early Methods of Educational Discipline

Schools naturally tend to be a reflection of society, shaped by American cultures, values, and social mores.²⁶ As such, school discipline has changed with the landscape of how America views punishment.²⁷ Schools originally disciplined students under the legal fiction of *en loco parents* (in place of the parent).²⁸ The concept stemmed from the idea that a parent chose to enroll his/her child in school and, thus, constructively allowed the school to act in the parent's place.²⁹ However, this concept truly became a legal fiction with the enactment of compulsory attendance statutes, because parents no longer had the option of enrollment.³⁰

Prior to compulsory attendance statutes, most schools, or schoolhouses, relied on corporal punishment as a means of discipline.³¹

²⁵ The issue has been raised as to whether the problem of ZT policies could be cured simply by removing the pertinent amendment in the ESEA. By removing the GFSA's attachment to the ESEA some, but however, not the entire "sting" of the GFSA is removed. The act would still be required, however school funding could not be withdrawn. The problem would still remain that the Federal government is regulating school discipline.

²⁶ See Symposium, *Creating a Violence Free School for the Twenty-First Century: Panel Three: Striking a Balance: Students, Educators, and the Courts: Student Rights: Can We Create Violence-Free Schools That Are Still Free?*, 34 New. Eng. L. Rev. (2000) (discussing the sociological landscape).

²⁷ *Id.*

²⁸ Charles J. Russo, *Reutter's The Law of Public Education* 713 (5th ed., Foundation Press 2004).

²⁹ America traditionally was an agrarian society in which much of the country was devoted to agriculture. Because farming was the prevalent occupation, education was not highly emphasized in the typical American family and thus when a parent (or parents) chose to send his/her child to school it was optional. This choice to send a child to school gave implicit consent for the school to act in the parent's place.

³⁰ Students were required to attend public schools under compulsory attendance statutes dating back to the Ye Old Deluder law of 1647.

³¹ Very few states allow corporal punishment in general and those that do highly discourage it, place strict limits on its use, and have safety guidelines. However, a few states in the South still allow

Teachers would whip or hit the disobedient child with a "switch" or similar instrument in order to scold him.³² The student was whipped or paddled in front of his classmates to demonstrate the punishment for misconduct.³³ Corporal punishment was effectively used as a method of daily classroom management to deter the possibility of violence in the classroom.³⁴

The number of students increased, leaving more students per classroom and thus teachers were no longer able to use corporal punishment to discipline students, as a matter of practicality.³⁵ Soon, it became the job of the school administration to punish the child.³⁶ Students were sent to the administrative officer for paddling, thus undermining the deterring and exemplary effect of corporal punishment.³⁷ Schools eventually began to use out-of-school suspension for student misconduct. This removed the disruptive student not only from the classroom, but from school all-together as a replacement for corporal punishment.³⁸ The out-of-school discipline was believed to be more beneficial to other students, because the disobedient student was sent home rather than class time being devoted to paddling or scolding the student.³⁹ As a result, the deterring effect of discipline was lost, resulting in an "out-of-sight/, out-of-mind" mentality toward the removed student.⁴⁰

2. Modern Disciplinary Methods

In the 1970's and 1980's, schools began to revert to a manner of in-school discipline with the use of in-school suspensions.⁴¹ In-school discipline removed the disruptive students from the classroom but kept

corporal punishment. *See generally* Troy Adams, *The Status of School Discipline and Violence*, 567 *Annals Am. Acad. Pol. & Soc. Sci.* 140 (2000).

³² *Id.* (explaining the various types of discipline used in American public schools and their effectiveness). For the purposes of this article the masculine pronouns, "him" and "he" shall be used. This is not intended to infer that the article applies only to men, rather than women. Instead, it is merely a reflection of pronoun choice for the purpose of simplicity.

³³ *See* Irwin A. Hyman & Eileen McDowell, *An Overview*, in *Corporal Punishment in American Education: Readings in History, Practice, and Alternatives* 1, 4 (Irwin A. Hyman & James H. Wise, eds., Temple University Press 1979) (explaining corporal punishment as the infliction of bodily pain by a school official as consequence for student misbehavior).

³⁴ *See id.*; Marsha L. Levick, *Zero Tolerance: Mandatory Sentencing Meets the One Room Schoolhouse*, 8 *Ky. L.J.* 2 (2000). However, generally schools have phased out corporal punishment because of the influx of population and the use of larger school systems and classrooms. *See* Adams, 567 *Annals Am. Acad. Pol. & Soc. Sci.* at 144-45 (explaining the breakdown of small class sizes with urban sprawl and inner-city overpopulation creating larger class sizes).

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.* at 143-44.

³⁸ *See id.* at 144-45 (explaining that expulsion and suspension were used as means to remove the child from school, so as to not interfere with the education of other students).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See* Fredric H. Jones, *Positive Classroom Discipline* 298-99 (McGraw-Hill Book Co. 1987).

them in school working on academic assignments.⁴² This method was more rehabilitative, because instead of removing the student, he remained at school.⁴³ Additionally, in-school suspensions were highly encouraged from the community as a beneficial disciplinary measure.⁴⁴ The shift to in-school discipline was the result of litigation which challenged student due process rights for out-of-school suspension and expulsions.⁴⁵ Specifically, in *Goss v. Lopez*, the Supreme Court announced that students have *limited* due process rights.⁴⁶ *Goss* required a hearing and notice for any out-of-school suspension (or expulsion) which would last for more than ten days.⁴⁷

With the political climate changing during the Reagan administration, the latter rehabilitative model of in-school discipline was abandoned in favor of a "get tough" on violence approach.⁴⁸ School violence became sensationalized in the media, which justifiably concerned both parents and teachers.⁴⁹ In response to the public outcry, schools began to adopt rigid guidelines which shifted the focus from rehabilitating to punishing students through ZT policies.⁵⁰

3. The Creation of the Zero Tolerance Policy

The concept of ZT is not unique to America's education system; rather, its roots began years earlier in America's "war on drugs".⁵¹ The concept originated in the Drug Enforcement Agency and quickly caught on.⁵² It applied to everything from environmental pollution to the homeless.⁵³ It began in 1986, when the U.S. Attorney in San Diego, Peter Nunez, decided to impound any sea-going vessel found with a trace of illegal drugs.⁵⁴ In 1988, U.S. Attorney General, Edwin Meese,

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *See Adams*, 567 *Annals Am. Acad. Pol. & Soc. Sci.* at 148. During this time period students received quite a bit of attention and schools feared sending problem students home from school for misbehavior. Thus, students were disciplined in schools.

⁴⁵ *Goss v. Lopez*, 491 U.S. 565, 572-573, 581 (1975).

⁴⁶ *Id.*

⁴⁷ *Id.* *Goss* marked the highpoint in student rights, however the High Court still reiterated that there is no constitutional right to education.

⁴⁸ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 18-19.

⁴⁹ *See infra* n. 166 (discussing the effects of the media's portrayal of school violence).

⁵⁰ *Id.* at 19.

⁵¹ *Id.* at 18-19.

⁵² *Id.* at 19.

⁵³ *Id.* The concept of "zero tolerance" was used to show that the government would not stand for pollution or that the homeless would not be allowed to loiter. The idea was that there would be no tolerance of any minor violation. For example, a homeless person that had been "loitering" in a prohibited area for say three minutes would be subject to the same criminal sanctions as an individual whom had slept on a park bench in the same area for a week. Similarly, in the environmental area the EPA would sanction factories that produced trace amounts of toxins the same as those that produced pounds of toxins.

⁵⁴ *See Casella, At Zero Tolerance* at 19.

adopted Nunez's policy as the national model, requiring customs officials to seize any vehicles or property with even slight amounts of drugs when entering the border.⁵⁵ "Zero tolerance" quickly became a national catchphrase.⁵⁶ As educators began to fear school violence, school districts in California, Kentucky, and New York began applying the term *zero tolerance* to school policies to prevent the use of drugs, fighting, and any gang-related conduct.⁵⁷ During the next four years, some schools around the nation further extended the concept of zero tolerance to smoking, weapons, and basically any school disruption.⁵⁸

B. *The Purpose and Effect of the Gun Free Schools Act*

The GFSA was perceived as the easiest and best solution to school violence.⁵⁹ The GFSA was enacted because of the public outcry against school violence.⁶⁰ It was believed the harsh punishment from ZT policies would quickly curb student violence.⁶¹ However, despite the well intentioned efforts of Congress, the result is that federal involvement in school discipline usurps the state's power to govern its own school system.

1. The Adoption and Purpose of the Gun Free Schools Act

In 1994, Congress enacted the GFSA under the Goals 2000: Educate America Act ("The Act").⁶² The GFSA marked the national arrival of zero tolerance as applied to schools. The GFSA required each state receiving federal funds to implement a state law demanding local school district agencies expel, for at least one year, any student "who is determined to have brought a weapon to school."⁶³ The Act originally

⁵⁵ *Id.* Attorney General Meese required not only the seizure of all property, but also federal charges to those associated with the property.

⁵⁶ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 19.

⁵⁷ See Casella, *At Zero Tolerance* at 19.

⁵⁸ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 17-20.

⁵⁹ 140 Cong. Rec. S6586 (daily ed. June 7, 1994).

⁶⁰ *Id.* at S6586.

⁶¹ *Id.* at S6586.

⁶² Casella, *At Zero Tolerance* at 18. The Goals 2000 was a redevelopment by President Clinton of George H.W. Bush's prior act under the same name. *Id.* at 173.

⁶³ 20 U.S.C. § 8921(b)(1); see generally *the Gun-Free Schools Act of 1994*, 20 U.S.C. §§ 8921-8923 (repealed and reauthorized by the 2002 No Child Left Behind Act). Section 8921(b)(1) required that:

[e]ach State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

limited the term "weapon" to firearms, but has since been amended to include any instrument that may be used as a weapon.⁶⁴ This resulted in states broadly interpreting "weapon" to include any device perceived as a threat.⁶⁵ The Act specifically addressed violence and focused punishment on mandatory expulsion.⁶⁶ Its purpose was the development of closer procedural practices amongst schools, police departments, and juvenile justice systems.⁶⁷ Schools and the justice system needed to work together because students needed to fear discipline, and would, given the possibility of criminal sanctions as a result of any

Section 8921(b)(2) states, "nothing in this subchapter shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting." Section 8921(b)(3) allows states one year from October 20, 1994 to comply with the Act. Section 8921(b)(4) clarifies that "the term 'weapon' means a firearm." Section 8921(c) requires that administrators construe the Act consistent with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 (1970 & Supp. 2000), a subject omitted from discussion in this Comment.

Under section 8921(d):

[e]ach local educational agency requesting assistance from the State educational agency that is to be provided from funds made available to the State under this chapter shall provide to the State, in the application requesting such assistance - (1) an assurance that such local educational agency is in compliance with the State law required by subsection (b) of this section; and (2) a description of the circumstances surrounding any expulsions imposed under the State law required by subsection (b) of this section, including - (A) the name of the school concerned; (B) the number of students expelled from such school; and (C) the type of weapons concerned.

Section 8921(e) requires each State to "report the information described in subsection (c) of this section to the [U.S.] Secretary [of Education] on an annual basis." 20 U.S.C. § 8921(e). Additionally, Section 8922 explains the "policy regarding criminal justice system referral" as: "no funds shall be made available under this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to school served by such agency."

Compare with H.R. Res. 1, 107th Cong. § 4141(b)(1), (h)(1) (Jan. 08, 2002) stating:

Each State receiving Federal funds under any title of this Act 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.

No funds shall be made available under any title of this Act to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency.

⁶⁴ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 19.

⁶⁵ *Id.*; see *supra* n. 14.

⁶⁶ See Casella, *At Zero Tolerance* at 173.

⁶⁷ *Id.*

misconduct.⁶⁸

Congress enacted the GFSA with the goal of mandating ZT policies in all states.⁶⁹ While the GFSA does not specifically mandate the disciplinary measures under the code, a school must defer federal funding to use its own policy.⁷⁰ Thus, by attaching federal funding to the adoption of mandatory expulsion procedures, Congress clearly intended ZT policies for all public schools in America.⁷¹ As recently reported, "[t]he Senate unanimously adopted the gun-free school amendments to [the ESEA to] require any school district that receives [f]ederal funds to adopt a zero tolerance policy"⁷² The GFSA applied a progressive approach, used in criminal law drug enforcement, to school children in America's public schools.⁷³ The concept of ZT was used mostly in the criminal field to demonstrate that criminal misconduct, no matter how small a violation, would not be tolerated.⁷⁴ Similarly, the GFSA applied this mindset to public education discipline by subjecting school children to criminal sanctions.⁷⁵

The GFSA was tied to some twelve billion dollars in funds for the implementation of ZT policies through the Elementary and Secondary Education Act of 1965.⁷⁶ This act provided funding only to schools that conform to the GFSA.⁷⁷ Unlike other educational acts which provide additional funding to schools, the GFSA "required that federal funding be withheld from a school in the event that it did not conform to the mandate."⁷⁸ Put simply, the GFSA withdraws the majority of federal funding (which is provided through the ESEA) for non-compliance.

⁶⁸ *Id.*

⁶⁹ 140 Cong. Rec. S13121 (daily ed. Sept. 12, 1994).

⁷⁰ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 19-20.

⁷¹ *Id.*

⁷² As stated in a senate report concerning the recent senate adoption of the GFSA. *Id.*

⁷³ See Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 18-19.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Casella, *At Zero Tolerance* at 174. Other Acts such as the Head Start Program, provided that the federal government will pay eighty percent of the school's cost as long as the school district can raise the remaining twenty percent. Uradnik, *Student's Guide to Landmark Congressional Laws on Youth* at 147.

2. State Responses to the Gun Free Schools Act

The United States Department of Education reported in 1998 that 94 percent of all schools had ZT policies for weapons and firearms.⁷⁹ State legislatures, fearing the loss of funding, quickly adopted ZT policies after the passage of the GFSA.⁸⁰ The legislatures, not willing to risk jeopardizing their funding, interpreted the definition of "weapons" in Congress' amendments as broadly as possible causing serious disciplinary measures to be issued for even minor infractions.⁸¹ Specifically, Congress' amendment to the term "weapon" provided that *anything* which could be used as a weapon would be included in its definition.⁸² State legislatures, reacting to this broad language, disciplined students for items that were largely non-threatening such as nail-clippers and water squirt guns.⁸³ Legislatures determined that a "weapon" could encapsulate even look-alike items such as toys or plastic guns.⁸⁴

⁷⁹ Shelia Heavyside et al., *Violence and Discipline Problems in U.S. Public Schools: 1996-1997* (U.S. Dept. of Educ., Natl. Ctr. for Educ. Statistics 1998). Every state has implemented ZT policies meeting the GFSA:

Ala. Code § 16-1-24.3 (2004); Alaska Stat. § 14.03.160 (2004); Ariz. Rev. Stat. Ann. § 15-841(B)-(G) (West 1991 & Supp. 1999); Ark. Code Ann. § 6-18-503(B)(ii) (2003); Cal. Educ. Code Ann. § 48915(b)(1)-(2) (West 2003); Colo. Rev. Stat. § 22-33-106 (2004); Conn. Gen. Stat. 10-233d (2003); D.C. Code Ann. § 31-451, 31-452, 31-453 (2003); Ga. Code Ann. § 20-2-751.1 (2003); Haw. Rev. Stat. Ann. § 302A-1134(b) (2003); Idaho Code § 33-205 (2003); 105 Ill. Comp. Stat. Ann. § 5/10-22.6(d) (West 2004); Ind. Code Ann. § 20-8.1-5.1-10(c)-(g) (LEXIS 2004); Iowa Code Ann. § 280.21B (West 2004); Kan. Stat. Ann. § 72-89a02 (2003); Ky. Rev. Stat. Ann. § 158.150(2) (West 2004); La. Rev. Stat. Ann. § 17:416(C)(2)(a)(i), (b)(i), (c)(i) (2004); 20-A Me. Rev. Stat. Ann. § 1001, 1001(9-A) (2004); Md. Educ. Code Ann. 7-305(e) (2003); Mass. Gen. Laws ch. 71, § 37H, 37H(c) (2003); Mich. Stat. Ann. § 380.1311(2) (LEXIS 2003); Minn. Stat. Ann. § 121A.44 (West 2004); Miss. Code Ann. § 37-11-18 (2003); Mont. Code Ann. § 20-5-202(2)-(4) (2003); Neb. Rev. Stat. § 79-263 (2003); Nev. Rev. Stat. § 392.466(2) (2004); N.H. Rev. Stat. Ann. § 193:13(III)-(IV) (2004); N.J. Stat. Ann. § 18A:37-7 (2004); N.M. Stat. Ann. § 22-5-4.7(A) (2004); N.Y. Educ. Law § 3214(3)(d) (McKinney 2004); N.C. Gen. Stat. § 14-269.2(b) (2003); N.D. Cent. Code § 15.1-19-10 (2004); Ohio Rev. Code Ann. § 3313.66 (Anderson 2003); Okla. Stat. Ann. tit. 70, § 24-101.3 (West 2004); Or. Rev. Stat. Ann. § 339.250(6) (2003); 24 Pa. Consol. Stat. Ann. § 13-1317.2(a) (2003); R.I. Gen. Laws § 16-21-18 (2003); S.C. Code Ann. § 59-63-235 (2003); S.D. Codified Laws § 13-32-4 (Supp. 2003); Tenn. Code Ann. § 49-6-3401(g) (2003); Tex. Educ. Code Ann. § 37.007(e) (2004); Utah Code Ann. § 53A-11-904(2)(a)-(c) (2004); Vt. Stat. Ann. tit. 16, § 1166 (2003); Va. Code Ann. § 22.1-277.01 (2004); Wash. Rev. Code Ann. § 28A.600.420 (West 2004); W. Va. Code § 18A-5-1-a(a), 18A-5-1-a(g) (2004); Wis. Stat. Ann. § 120.13(1)(c)(2) (West 2004); Wyo. Stat. Ann. § 21-4-305 (2004).

⁸⁰ *Id.*

⁸¹ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 19.

⁸² *Id.*

⁸³ *See id.* at 22; Casella, *At Zero Tolerance* at 5.

⁸⁴ Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 19, 22.

III. ANALYSIS

More than ten years have passed since the enactment of the GFSA, yet school violence continues to be as much of a problem as it ever was.⁸⁵ As a federal act, the GFSA infringes on school discipline. In turn, this infringement perpetuates school violence by limiting the state's ability to deal with school violence. The result of this federal infringement is an unworkable and inflexible system of discipline which focuses solely on punishing students. This Comment proposes a solution to ZT policies that is both effective and holistic. The proposed solution to the problem of school violence and the GFSA is twofold: a program of prevention and a system of rehabilitation. The end result is a system that is beneficial to the student and ensures co-existence for both the state and federal government.

A. *School Violence as a State Matter: Why Federal Legislation on School Discipline is Inappropriate*

School discipline has traditionally been an area for state regulation; however, the GFSA sterilize the local school district's ability to govern school discipline. In particular, the GFSA steps outside its constitutional restraints of matters for federal regulation.⁸⁶ The result is an act which threatens the financial ability of *local* schools for *federal* non-compliance.⁸⁷

1. *An Analysis of Congress' Funding Limitations on Schools in the Context of the Gun Free Schools Act*

The federal government should not regulate school discipline because it is beyond the scope of its powers. The GFSA violates the Spending Clause of the Constitution by threatening to withdrawal *all* federal education funds from states. Additionally, the GFSA allows Congress to articulate a Spending Clause argument by attaching federal funds with the ESEA, thus eschewing a potential Commerce Clause violation. Congress uses the Spending Clause as a means to circumvent the requirements of the Commerce Clause in order to indirectly violate the Constitutional limits of federal regulation.

a. *The GFSA Violates the Spending Clause of the Constitution*

As a matter of Constitutional law, Congress is restricted in its ability to attach strings to federal funding by the Spending Clause of the Constitution.⁸⁸ Generally, Congress may spend or dispense funds in any

⁸⁵ See Adams, 567 Annals Am. Acad. Pol. & Soc. Sci. at 148.

⁸⁶ *Infra* pt. IIIA(1)(a)-(b) (discussing how the GFSA circumvents the Commerce Clause only to violate the Spending Clause).

⁸⁷ *Infra* pt IIIA(2) (explaining the impact of federal involvement in a state matter).

⁸⁸ See *Steward Mch. Co. v. Davis*, 301 U.S. 548 (1937).

manner that does not violate other constitutional provisions provided that the condition is *expressly* stated and *related to the purpose* of the spending program.⁸⁹ Nevertheless, the Supreme Court has recognized that despite Congress' sweeping power, a "financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"⁹⁰ In other words, Congress may not explicitly force states to comply via monetary threats/gains.

While the GFSA likely passes the two prong requirements of the Spending Clause, it remains unconstitutional because the Act amounts to an invalid financial compulsion.⁹¹ The GFSA directly withholds some twelve billion dollars in funds from states that fail to adopt ZT policies consistent with the Act.⁹² Under Spending Clause guidelines, the GFSA's condition requiring that a student possessing a weapon must be expelled for at least one year, is expressly stated. Additionally, the condition is related to the purpose of the act because removing a student who brings a weapon to school, in theory, prevents violence. That is to say, that the GFSA's condition is both expressly stated and related to its purpose. However, the GFSA is unconstitutional because it amounts to a compulsory mandate from Congress. America's public schools cannot properly function without federal funding and thus they are left with no choice but to enact ZT policies that meet the requirements of the GFSA.

Further, the GFSA's mandatory compulsion prevents school officials from exercising disciplinary discretion as to when and how students may be punished. The only "discretion" in the GFSA provides that a "[s]tate law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis."⁹³ This discretion would seem to allow school administrators to have the final determination as to any discipline imposed on a student. However, such is not the case. Because Congress has interpreted the definition of "weapon" so broadly and school officials do not want to "risk" losing their federal funding, school officials are afraid to deviate from GFSA guidelines.⁹⁴ For instance, when a principal chooses not to

⁸⁹ *See generally id.* In particular, federal spending must be in furtherance of promoting the "general welfare." Congress's spending power is specifically implicated when Congress places conditions on funding to both state and local government. Further, Congress has the power to set limitations for dispensing federal funds to areas that Congress otherwise might not have been able to regulate. *See Okla. v. Civ. Serv. Comm.*, 330 U.S. 127, 143 (1947); *S.D. v. Dole*, 483 U.S. 203, 211 (1987).

⁹⁰ *Dole*, 483 U.S. at 211.

⁹¹ *See generally id.*

⁹² 140 Cong. Rec. at S6586. The GFSA is tied to funding based on an amendment to the Elementary and Secondary Education Act ("ESEA"). *See supra* n. 13.

⁹³ 20 U.S.C. § 8921(b) (1) (*see supra* n. 9 explaining the subsequent repeal and reauthorization under the 2002 No Child Left Behind Act). This is the only exception stated in that act, however, states are still required to pass ZT policies that suspend students with weapons for at least one year, contradicting any attempt at school official discretion. 20 U.S.C. § 8921(b)(1).

⁹⁴ *See supra* n. 66.

expel a student for bringing a pocket knife to school he takes a chance that the federal government will withdrawal funding because a pocket knife falls within the definition of a weapon. In other words, schools are in a position where they must err on the side of over-zealous discipline in order to give deference to the Federal government's interpretation of the term "weapon."

Although there is not a direct mandate on schools to comply with the GFSA, its tie to federal funding leaves little "wobble room" for a school that prefers to have an alternative policy on weapons. States are compelled to enforce the GFSA strictly because the risk of losing *all* federal funding far outweighs the benefit of utilizing alternative discipline strategies. Therefore, the broad language in the GFSA forces schools to punish students for look-alike weapons, such as squirt guns, where there may be no actual threat of harm.⁹⁵

The broad definition of "weapon" in the GFSA goes above and beyond protecting children; it condemns them.⁹⁶ In other words, the GFSA's broad language does more than apply zero tolerance to guns; it applies zero tolerance to non-threatening, non-harmful items.⁹⁷ Although some may not be convinced that the GFSA is a compulsion, it is certainly more than a mere inducement.⁹⁸ It is not an inducement because it withdraws federal funds, rather than add additional federal funds to a complying school district.⁹⁹ ZT laws would have been more equitable by providing additional funds for complying states because a state's failure to adopt a ZT policy would not limit its base amount of educational funding.¹⁰⁰ Nevertheless, the GFSA threatens to take *all* educational federal funding away from states.¹⁰¹

b. How the GFSA Uses the Spending Clause as the Backdoor to a Commerce Clause Violation.

Congress has the ability to regulate under both the Commerce Clause and the Spending Clause. Under the Spending Clause, unlike the Commerce Clause, federal funding must be attached to an act. Typically, when Congress creates an act, funds are provided to individual states for

⁹⁵ See Skiba & Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* at 20-23.

⁹⁶ *Id.* at 20.

⁹⁷ *Id.* at 20-23.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

implementation.¹⁰² However, the GFSA does not add funds; rather it threatens to remove funds for non-compliance. In other words, Congress avoided a potential Commerce Clause conflict by merely tying the GFSA to federal funding provided under the ESEA.¹⁰³

The Gun Free Schools Zone Act, the parent act of the GFSA, was struck down by the Supreme Court in 1995 as unconstitutional.¹⁰⁴ In *U.S. v. Lopez*, the Court ruled that Congress did not have the power under the Commerce Clause to subject individuals to criminal sanctions for possession of a gun within a thousand yards of a designated school zone.¹⁰⁵ The latter act lacked a connection to interstate commerce because the federal government did not have a valid interest.¹⁰⁶ Like *Lopez*, here Congress was acting outside its lawful authority under the Commerce Clause to regulate guns in schools.

Similarly in the GFSA, we once again find Congress attempting to regulate the issue of guns and schools. However, in the GFSA it is the children, rather than adults, who are subject to criminal penalties.¹⁰⁷ Most significantly, the GFSA still remains a viable statute, whereas its parent statute, The Gun Free School Zones Act, was struck down because it did not pertain to interstate commerce.¹⁰⁸ The GFSA circumvents the Commerce Clause because, unlike its parent statute, it is tied to federal funding (via the ESEA).¹⁰⁹ The Spending Clause, as stated above, is much *more* deferential to the federal government than the Commerce Clause, in that Congress' purpose must merely be for the general welfare of society.¹¹⁰ In effect, this allows the Spending Clause to act as the "backdoor" to circumventing the Commerce Clause by using what amounts to a rational basis test.¹¹¹ Thus, the GFSA through the Spending Clause is constitutional by the mere fortuity of attaching federal funding, despite the fact that the parent act, similar in its very

¹⁰² See *infra* nn. 176-179 and accompanying text (explaining that the IDEA provides additional monetary and academic support to qualifying students).

¹⁰³ *Supra* nn. 70-78 and accompanying text (discussing the attachment of twelve billion dollars).

¹⁰⁴ *U.S. v. Lopez*, 514 U.S. 549, 580 (1995).

¹⁰⁵ *Id.*

¹⁰⁶ The federal government argued that their interest was that school shootings and violence in school zones caused serious economic issues that monetarily affected interstate commerce in the aggregate. The Supreme Court rejected this argument citing that this was not a close enough connection. Subsequent to *Lopez*, Congress amended the *Gun Free School Zones Act* with a jurisdictional nexus requirement that the gun in question must have been involved in interstate commerce at some point in time. *Id.* at 563-64; Pub. L. No. 107-296, § 116 Stat. 2135 (2004).

¹⁰⁷ See Casella, *At Zero Tolerance* at 18-19.

¹⁰⁸ See *Lopez*, 514 U.S. at 580.

¹⁰⁹ 140 Cong. Rec. at S13121.

¹¹⁰ See e.g. *Steward Mch. Co.*, 301 U.S. at 548.

¹¹¹ Statutes that would be void under the Commerce Clause may be supported constitutionally through the Spending Clause test requiring merely the rationality of pursuing a goal to help the general welfare of American citizens. *Id.*

nature, was ruled unconstitutional because it fell under the Commerce Clause.

2. School Violence is a Matter Solely for State Legislation
Education as a whole has traditionally been a matter reserved to

the states for regulation.¹¹² Under fundamental constitutional law principles, powers not delegated to the federal government are reserved to the states, and thus, education is conceptually a state matter because the power was not delegated to the federal government in the Constitution.¹¹³ In the words of Chief Justice Warren, "education is perhaps the most important function of the state and local governments."¹¹⁴

States have the power to regulate their schools on issues spanning from compulsory attendance and basic curriculum requirements to mandatory vaccinations.¹¹⁵ Every state in the U.S. has a compulsory attendance statute indicating that states value the education of their youth as to be so important to require all children to attend.¹¹⁶ Hence, states should also have the sole responsibility to discipline and protect the students because it is state law and not federal law that requires students to be at school.¹¹⁷

States have historically regulated such matters because they are in a better position to determine the specific needs of the children living within their states.¹¹⁸ For example, consider the following analogy: a national law is implemented requiring mandatory bussing for all students that live more than half of a mile from their local public school. Such a statute is illogical because transportation needs in northern states, such as Alaska, are very different than those in southern states, such as Florida, given the dramatic climate differences. In this same respect, it is

¹¹² See Russo, *Reutter's The Law of Public Education* at 713. Since the establishment of the first compulsory public education system in 1852, states alone generally have regulated and governed their education systems. See Mass. Gen. Laws Ann. ch. 76 § 1 hist. and stat. n. St. 1852, c. 240, §§ 1, 2, 4 (West 2004).

¹¹³ *U. S. v. Butler*, 297 U.S. 1, 68 (1936).

¹¹⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹¹⁵ States historically have had the sole ability to regulate schools in relation to compulsory attendance, curriculum requirements, oversight of home-schooling, mandatory vaccinations, and financing. See generally *Wis. v. Yoder*, 406 U.S. 205 (1972); *State v. Anderson*, 427 N.W.2d 316 (N.D. 1988); *Zucht v. King*, 260 U.S. 174 (1922); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977).

¹¹⁶ See *Id.*

¹¹⁷ Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 Cath. U. L. Rev. 817, 821 (1992).

¹¹⁸ See David M. Osher et al., *The Best Approach to Safety is to Fix Schools and Support Children and Staff*, in *New Directions for Youth Development: Zero Tolerance: Can Suspension and Expulsion Keep Schools Safe?* 127, 127-129 (Russell J. Skiba & Gil G. Noam eds., Wiley Periodicals, Inc. 2002).

unreasonable to impose the consistent policies for weapons in all schools nationally.

For instance, in Tennessee, an area known for wildlife hunting, a high school student was expelled for having a hunting knife in the glove compartment of the student's car, even though the knife did not belong to him.¹¹⁹ It is important to note that in this case it was a rural school district and there was no evidence that the weapon posed a threat to anyone at the school.¹²⁰ However, an expulsion of a student in Miami, Florida for a similar offense would likely be appropriate because hunting is not a prevalent activity.¹²¹ These two examples illustrate the point that there cannot be a one-size-fits all policy across the board. Each state is different and state legislatures are in the best position to determine what is appropriate to ensure the safety of their students.¹²² State legislatures are in such a position because they have more direct contact with their constituents, be it teachers, principals, board members or parents.

B. *The Gun Free School Act Takes an Easy to Apply "Get Tough" Approach on Violence, But the Very Reason the Rule is Easy to Use and Apply Makes it Unsuccessful*

ZT policies allow for a quick and fast method to deal with school violence. However, such policies lack a modicum of discipline because there is no graduated series of offenses and punishments.¹²³ Under ZT policies, the belief that the punishment should fit the crime has all but disappeared.¹²⁴ Using this mentality of treating all students the same, regardless of age and the circumstances, hurts the student and costs the community.¹²⁵

1. *An Examination into How Zero Tolerances Policies are Harmful for Both Students and the Community as a Whole*

ZT policies affect both students and society as a whole. ZT policies dispense harsh punishments upon students often causing retaliatory behavior, which may instigate further violence leading to a downward, self-deprecating spiral. Additionally, students "zero-

¹¹⁹ *Seal v. Morgan*, 229 F.3d 567, 570 (6th Cir. 2000).

¹²⁰ *See id.* at 585.

¹²¹ The presence of a hunting knife in a vehicle in a rural area, in which hunting is prevalent is logically a reflection of the community. However the *Seal* court stated, "[g]iven this national and local landscape of violence, it is perfectly rational to establish a strict zero tolerance policy to ensure students' safety." *Id.* at 582-583.

¹²² *See Osher, The Best Approach to Safety is to Fix Schools and Support Children and Staff* at 127-28.

¹²³ *See Casella, At Zero Tolerance* at 24.

¹²⁴ As a mode of deterring school violence the punishment need not fit the crime, but rather be applied in all circumstances without consideration of any mitigating factors such as student records, etc. *Id.*

¹²⁵ *Id.* at 23-24.

toleranced" out of the system will likely become a burden on their community as adults, causing the community to incur costs for social service programs such as welfare and unemployment.

a. The Harmful Psychological Consequences to Students under the Gun Free Schools Act

The GFSA crumbles the very foundation of the education system because it prevents the child from learning and developing into a successful citizen. "Today, [an education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."¹²⁶

When students are subject to the harsh realities of ZT policies, such as expulsion, it contradicts the very nature of child development.¹²⁷ Specifically, students subjected to punitive disciplinary measures, such as expulsions, are more likely to engage in anti-social behavior.¹²⁸ Students are likely to feel isolated, whereby they may retaliate against the system and engage in further acts of violence.¹²⁹ Schooling is conceptually based on a trust relationship, and when a child is expelled/suspended he loses his "trust" in the system because he has been rejected.¹³⁰ Most significantly, this rejection allows for students to become lost and disconnected from their peers.¹³¹

Often ZT policies affect students that are potentially at-risk, thereby intensifying their misbehavior.¹³² An "at-risk" student means a student that is on the verge of flunking out of school, because of a lack of familial support.¹³³ Studies indicate that when students are not in school they are increasingly more likely to become involved in gangs, crime, fighting, drugs, and alcohol.¹³⁴

¹²⁶ *Brown*, 347 U.S. at 493.

¹²⁷ See Harvard University Advancement Project and The Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, 1, 10 http://www.civilrightsproject.harvard.edu/research/discipline/opport_suspended.php [hereinafter Civil Rights Project].

¹²⁸ Morrison, *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline* at 57.

¹²⁹ See *id.* at 56-57.

¹³⁰ *Id.*

¹³¹ U.S. Dept. of Educ., *More Than 6,000 Students Nationwide Expelled for Bringing a Firearm to School*, <http://www.ed.gov/PressReleases/05-1998/gfsint.html> (May 8, 1998).

¹³² See Adams, *The Status of School Discipline and Violence* at 147 (noting that students expelled or suspended are most often the very students who need to be in school the most).

¹³³ *Id.* (stating students that are "at risk" are often from low-income households that lack a structured family system for support).

¹³⁴ Centers for Disease Control and Prevention, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School-United States, 1992*, <http://www.cdc.gov/mmwr/preview/mmwrhtml/00025174.htm> (March 4, 1994) (finding children removed from school environment more likely to engage in hazardous behavior).

Policies that exclude children from the educational process increase their feelings of resentment and retaliation toward the school system.¹³⁵ Students may feel that because they have been hurt by the school, it should in turn "suffer" too.¹³⁶ For instance, in one case, a student who was suspended for bringing a weapon to school came back the next day during his suspension to unload a gun into three students.¹³⁷

Finally, the GFSA subjects students to the juvenile justice system by criminalizing minors.¹³⁸ The Act requires that any student found in possession of a weapon must be referred to law enforcement officials.¹³⁹ With the recent increase of school violence, school administrators are now required to let law enforcement officials perform what was once their duty.¹⁴⁰ For instance, in Virginia, two fifth-graders committed the childish prank of placing soap in their teacher's drinking water and both were subject to felony charges with a maximum punishment of twenty years jail time.¹⁴¹ In another case, a student was arrested and charged with disorderly conduct when he hit a cafeteria worker with a paperclip.¹⁴²

The focus on punishment, rather than rehabilitation, is inconsistent with the establishment of the juvenile system because children are individuals possessing "less than fully developed moral and cognitive capacities."¹⁴³ Moreover, sending children into the criminal system dispenses of the role of teachers and administrators in disciplining students and leads to feelings of animosity between the school system and the students.¹⁴⁴

The Department of Education has studied ZT policies for several years and there is little statistical evidence that such policies are effective

¹³⁵ Jones, *Positive Classroom Discipline* at 268-70.

¹³⁶ *Id.*

¹³⁷ See Casella, *At Zero Tolerance* at 23.

¹³⁸ See 20 U.S.C. § 8922(a) (1999 and Supp. 2003) (*see supra* n. 9 explaining the subsequent repeal and reauthorization under the 2002 No Child Left Behind Act). ("No funds shall be made available under this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to school served by such agency.") *Id.*

¹³⁹ *Id.*

¹⁴⁰ Osher, et. al., *The Best Approach to Safety is to Fix Schools and Support Children and Staff*, in *New Directions for Youth Development: Zero Tolerance: Can Suspension and Expulsion Keep Schools Safe?* at 147 (explaining that providing professional development to teachers better prepares them for violent conflicts).

¹⁴¹ See Patricia Davis, *Fifth-Graders Charged Over Soapy Drink; Boys Going to Arlington Court for Spiking Teacher's Water*, Wash. Post B1 (Nov. 16, 1999).

¹⁴² Julie Blair, *Charges Reduced in "Clip" Case*, News in Brief: A National Roundup, <http://www.edweek.org/ew/vol-18/23briefs.h18> (last updated Feb. 17, 1999).

¹⁴³ See Howard N. Snyder & Melissa Sickmund, U.S. Dept. of Just., *Juvenile Offenders & Victims: 1999 National Report* 86; ("The drop in serious violence was led by reductions in victimizations by juveniles.") *Id.* at 62.

¹⁴⁴ Civil Rights Project at 9-11, 13-14.

at curbing violence in schools.¹⁴⁵ In fact, juvenile delinquency on the whole was on the decline even before the GFSA was established.¹⁴⁶ In a study by the Department of Education, children between the ages of twelve and eighteen are more likely to fall victim to a violent crime occurring outside of school, rather than in the school setting.¹⁴⁷ In fact, less than one percent of all homicides involving school age children happened at, in, or around schools.¹⁴⁸ As the statistics indicate, there is no evidence that ZT policies have played any role at all in curbing school violence. Instead, such policies perpetuate student misbehavior by introducing the student to the criminal justice system, placing him in direct contact with "career criminals." In light of this ineffectiveness, the negative effects of ZT policies necessitate the reconsideration of such policies because they perpetuate the exact problems they aim to prevent.

b. The Costs to the Community of a Federally Required Zero Tolerance Policy

The long term effects of refusing educational opportunities to millions of children through ZT policies are extremely detrimental to society.¹⁴⁹ The major impact resulting from the implementation of ZT policies is the economic hardship placed on society to support an uneducated adult.

The uneducated adult costs society over his lifetime an estimated \$243,000 to \$388,000 in social services.¹⁵⁰ Suspensions lead to students lagging behind in school work which tends to be a particular problem for those students at-risk.¹⁵¹ Moreover, when a student is expelled there is no requirement under the GFSA that the student receive alternative educational opportunities.¹⁵² Instead, he is rejected by the educational system in an effort to keep other students "safe." With what cost does this "safety" come? Students without a high school degree are less likely to be able to support themselves and will depend on the system for

¹⁴⁵ Adams, 567 *Annals Am. Acad. Pol. & Soc. Sci.* at 148.

¹⁴⁶ Ira M. Schwartz, Neal Alan Weiner, Tammy White, & Sean Joe, *School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 *Hous. L. Rev.* 1, 6 (2000). Decline in youth violence is the reflection of a general decline in violence in America and not the establishment and implementation of the GFSA.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 7.

¹⁴⁹ See Snyder & Sickmund, U.S. Dept. of Just., *Juvenile Offenders & Victims: 1999 National Report* at 62, 82-83.

¹⁵⁰ See *id.* at 83; see also Margaret Graham Tebo, *Zero Tolerance, Zero Sense: School Violence is a Hot-Button Issue but are Strict, Inflexible Policies the Answer? Some Say Yes, While Others Insist That All-Or-Nothing Punishment Merely Alienate Students*, 86 *ABA J.* 40, 41 (Apr. 2000) (estimating that it is vastly more expensive to support an individual over his lifetime than to fund his education).

¹⁵¹ Anthony, *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline* at 50.

¹⁵² See *id.* at 50-51.

governmental social services, such as welfare and unemployment.¹⁵³

Additionally, studies show that students subject to suspension under ZT policies are more likely to drop out.¹⁵⁴ In one study, statistics showed that sophomores who were suspended were three times more likely to drop out than their peers.¹⁵⁵ In this same study, ten percent of all reporting drop out students cited a suspension or expulsion as the reason for leaving school.¹⁵⁶ The problem is that ZT policies increase the likelihood of students dropping out, failing out, or being kicked out, only to add to the growing number of Americans who lack the basic educational skills to support themselves.¹⁵⁷ Consider the following effect of ZT policies: Dana Heitner was a straight-A student on his way to class valedictorian at Madeira High School, outside Cincinnati, Ohio.¹⁵⁸ In an effort to help his girlfriend win a student council election, Dana designed a poster intended to play off the theme of the movie, *Speed*.¹⁵⁹ Dana hung his poster on the inside of one of the men's restroom stall doors.¹⁶⁰ The poster stated,

There is a bomb in this receptacle. If the weight on the seat goes over 50 pounds, the bomb will be activated. . . . The only way to get off the seat safely is to scream as loud as you can that you will vote for Robin Cox in the coming election.¹⁶¹

Although none of the students viewed the sign and school officials admitted that they never considered it to be an actual threat, Dana was suspended for ten days for making a "terrorist threat" in violation of Ohio's ZT policy.¹⁶² As a result of this suspension, Dana received no credit for any assignments during the suspension period, including a calculus exam which prevented him from becoming valedictorian.¹⁶³ He was also required to report his suspension on his college applications.¹⁶⁴ The Madeira superintendent simply commented on the incident that he would still be more than happy to write a letter of recommendation for

¹⁵³ See Snyder & Sickmund, U.S. Dept. of Just., *Juvenile Offenders & Victims: 1999 National Report* at 82-83.

¹⁵⁴ See Ruth B. Ekstrom et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 Teachers Coll. Rec. 356, 364 (1986).

¹⁵⁵ *Id.*

¹⁵⁶ See *id.*

¹⁵⁷ See Roni R. Reed, *Education and State Constitutions: Alternatives for Suspended and Expelled Students*, 81 Cornell L. Rev. 582, 605 (1996) (noting that students affected by ZT policies experience self-fulfilling prophecies).

¹⁵⁸ See Tebo, 86 ABA J. at 41.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Dana's college entrance, "[b]ut rules are rules, and he knew better."¹⁶⁵ This example illustrates that ZT policies deny students opportunities for the very success that an education is supposed to provide.

C. *A Proposed Solution*

There is a dramatic need to reevaluate the GFSA given its ineffectiveness and negative implications on both students and communities.¹⁶⁶ The GFSA should be repealed, and an educational reconstruction act should be implemented in its place. The new act would have two main sections: prevention and rehabilitation. Unlike the GFSA, the new act focuses on preventing the problem before it occurs, following the adage that prevention is the best treatment. Additionally, the proposed solution encapsulates a system to rehabilitate students prone to violent conduct with the ultimate goal of returning to the public school system. This approach of the proposed solution as a whole is more beneficial to school systems and the student.

1. Part 1: Preventing School Violence in the Educational Reconstruction Act

An education reconstruction act is a federal law that which reduces federal involvement in education to a minimum by allowing each state to develop its own educational policies.¹⁶⁷ In order to maintain the

¹⁶⁵ *Id.*

¹⁶⁶ The connotations with school violence propagate the concept that our public schools are out of control and the media coverage of school violence gives credence to this hype. The media itself has become engrossed with school violence, causing communities to believe that the problem is more pervasive than it really is in reality. In a study reported by the Center for Media and Public Affairs ("CMPA"), the television networks, CBS, NBC, and ABC aired approximately 378 stories, amounting to ten hours of news reports for only eight school shootings that occurred between 1997 and 1999. *Violence Goes to School: How TV News Has Covered School Shootings*, 13-3 Media Monitor 2 (July/Aug. 1999). Specifically crime, including school violence, was the second most reported topic in 1998, moving from third in 1997. See *1999 Year in Review: TV's Leading News Topics, Reporters, and Political Jokes*, 14-1 Media Monitor 1, 2 (Jan./Feb. 2000). For instance in 1999, on the same three networks, reports about the shooting at Columbine High School encompassed fifty-four percent of all news stories concerning homicide in that year alone. *Id.* at 2. The media devotes an excessive amount of time to school violence leading the public to believe that schools are running rampant with shootings. Schwartz et al., 37 Hous. L. Rev. at 6. In all this coverage however the media fails to report that school violence has actually decreased, in matching with the decreasing crime rates in America. *Id.* Moreover, even Hollywood seems to be fixated with the misconception of pervasive school violence; in 2003, filmmaker, Michael Moore released his film, *Bowling for Columbine*, in which Moore questions America's insidious history of violence in the context of the Columbine shootings. Additionally, in 2000, a shocking seventy-one percent of parents polled indicated that they believed a school shooting was a possibility in their school district, despite the fact that statistics demonstrated that school violence was on the decline. Kim Brooks et al., *School House Hype: Two Years Later*, Policy Rep. (Just. Policy Inst. & Children's L. Ctr. Ky. Apr. 2000) at 6.; see Schwartz et al., 37 Hous. L. Rev. at 4 (explaining that contrary to a gross amount of media attention to school violence that the amount of violence crime perpetrated by minors has decreased, as has the probability that students will fall victim to a violent crime, noting that students are more like to be struck by lightning).

¹⁶⁷ Many of the ideas that should be incorporated in a reconstruction act may be found in a 2001 American Bar Association ("ABA") proposal. The ABA sets forth three critical concepts to

separation between federal and state governments, federal legislation should offer incentives to schools that do not overlap with the state's traditional power of governing state education. A federal education reconstruction act that provides additional funding to states that *choose* to participate allows states, most significantly, to make their own laws regarding school violence while gaining regular assistance from the federal government. Such an act would encompass three main features: implementing preventive and early identification programs, using methods of in-school discipline only, and providing methodical training of educators and administrators.¹⁶⁸

The education reconstruction act considers the source of the problem in a particular educational setting in order to alleviate it - helping schools become preventative and not just punitive.¹⁶⁹ An educational reconstruction act would also focus on several areas not addressed by the GFSA.¹⁷⁰ First, the Act would encourage implementing preventative programs. The GFSA only pertains to punishment and it does not address the problem of preventing school violence.¹⁷¹ It is only after the violence has happened that the GFSA comes into effect. Prevention programs focus on students working together to resolve conflicts and address issues important to other students.

The programs would include peer mediation groups. Students would learn different approaches to conflict resolution and would become involved in mentoring programs between their teachers and other students. The close contact within such individual programs would allow more interaction between teachers and students and would allow teachers to identify students who exhibit signs of emotional instability. Students who display such signs could be placed under a plan similar to students covered under the Individuals with Disabilities Act ("IDEA").¹⁷² Under IDEA, students are given individual educational goals under an Individual Educational Plan ("IEP") and an IEP team.¹⁷³ Students are

deconstruct zero tolerance: implementing comprehensive prevention programs, creating alternative discipline strategies to replace school expulsion, and finally developing clear policies and procedures for suspension and expulsion. Ralph C. Martin, Jr., American Bar Association Online, <http://www.abanet.org/crimjust/juvjus/zerotolreport.html> (accessed Feb. 13, 2001).

¹⁶⁸ Federal funding for such programs is readily available through federal grants.

¹⁶⁹ *Supra* n. 167 (explaining the origin of an Educational Reconstruction Act).

¹⁷⁰ The ABA sets forth three critical concepts to deconstruct zero tolerance: implementing comprehensive prevention programs, creating alternative discipline strategies to replace school expulsion, and finally developing clear policies and procedures for suspension and expulsion. Martin, *supra* n. 167.

¹⁷¹ *Supra* nn. 20-23 (discussing the punitive approach of ZT policies).

¹⁷² Judith A. Browne et al., *Zero Tolerance: Unfair, with Little Recourse*, in *New Directions for Youth Development: Zero Tolerance: Can Suspension and Expulsion Keep Schools Safe?* 73, 89 (Russell J. Skiba & Gil G. Noam eds., Wiley Periodicals, Inc. 2002).

¹⁷³ *Id.* at 92.

reassessed frequently by specialists, such as school psychologists.¹⁷⁴ Additionally, when there is a violent act the IEP team will meet within a matter of days for a "manifestation determination" to determine if the conduct was a result of the disability.¹⁷⁵

Under IDEA, a student may not be removed from school through the unilateral action of one school officer unless he/she poses an immediate threat to the safety of the other children.¹⁷⁶ Still, the child removed from school on an IEP, under IDEA, must be provided alternative education for the entire time the child is removed from school.¹⁷⁷ For example, a student on an IEP for being cognitive delayed ("CD")¹⁷⁸ is required to have a manifestation determination if he sets a fire in the school restroom. A school official may immediately send him home, but a tutor will have to be sent to help the student every day he is away from school at the district's expense. Thus, for students identified as "at risk," it would prove beneficial because the student would receive individual attention consistent with his/her needs. Although school specialists are extremely busy already tending to students with learning disabilities and behavioral problems, federal funding can help students receive mental services from outside professional counselors.¹⁷⁹ Therefore, the IDEA may be used as a model to ensure students are receiving all educational opportunities available.

Another feature not addressed by the GFSA is an alternative method of discipline. In-school discipline is most productive because the students benefit the most from remaining with their peers in the school setting. However, in order for this to occur, most of the discipline needs to take place as part of daily classroom management. In order to implement such practices, teachers and administrators should receive specialized training through faculty and staff "in-service" program training. In addition, daily classroom management must involve procedures and limitations that students are aware of at all times.¹⁸⁰ This means that the students must be made aware of the consequences of their

¹⁷⁴ See *id.* (noting that with special safeguards for children with disabilities they are to have the effect of "an equalizer for children with special needs to ensure that they are not unfairly punished for behavior they could not control").

¹⁷⁵ 20 U.S.C. § 1415 (K)(1)(A) (1997).

¹⁷⁶ *Id.* § 1415 (K)(4) (1997).

¹⁷⁷ Uradnik, *Student's Guide to Landmark Congressional Laws on Youth* at 206.

¹⁷⁸ CD is the new term for what was once called "developmentally handicapped." See generally Ohio Admin. Code § 3301-51-01(2004).

¹⁷⁹ Martin, *supra* n. 167; see *infra* nn. 190-200 and accompanying text.

¹⁸⁰ See Harry K. Wong & Rosemary Tripi Wong, *The First Days of School* (Harry K. Wong Publications, Inc. 1991) (finding that when students are aware of set procedures, the classroom functions in a much smoother and safer manner because of the intensive daily classroom management required by procedures).

behavior at any given moment.¹⁸¹ In other words, the disciplinary code may not just be set forth in a student handbook passed out at the beginning of the year, where the students are deemed to have constructive notice of anything within. Rather, the disciplinary policy must be posted in every classroom and explained by every teacher on the first day of class.¹⁸²

Implementation of these policies requires methodical training of school officials, which is accomplished most effectively through legal counsel as they are in the best position to explain the legal ramifications for denying students educational opportunities.¹⁸³ Although legal counsel may be expensive for some schools, it clearly outweighs the burdens that the school and the community will bear in the future under ZT policies.¹⁸⁴ Implementing an educational reconstruction act allows schools to step away from zero tolerance, because they will not be compelled by their fear of the loss of their funding.¹⁸⁵ However, the proposal leaves states with sufficient funding and enough discretion to determine what is in its own best interest.

2. Part 2: Rehabilitating Students and Preventing Zero Tolerancing Students Out of the System under the Educational Reconstruction Act

Some proponents of the GFSA argue that the act is effective, even though it denies students their education once they are suspended or expelled.¹⁸⁶ While the GFSA is a punitive act in that it punishes students, it fails to tell the states how to deal with students that are removed from school.¹⁸⁷ The Act fails to provide educational opportunities to those students subject to it.¹⁸⁸ In essence, the GFSA "zero tolerances" students out of the system.¹⁸⁹ Students that have been expelled should not be denied their education.

¹⁸¹ Morrison, *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline* at 66-67.

¹⁸² *Id.*

¹⁸³ *Id.* at 67. Students that remain in school are less likely to lose educational opportunities as they remain in the building, among their peers, and are provided individualized instructions from another teacher. See generally *id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Morrison, *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline* at 46, 58.

¹⁸⁷ *Id.* at 58.

¹⁸⁸ See generally 20 U.S.C §§ 8921-8923 (see *supra* n. 9 explaining the subsequent repeal and reauthorization under the 2002 No Child Left Behind Act); *No Child Left Behind Act of 2002*, Pub. L. No. 107-110, § 4141, 115 Stat. 1425.

¹⁸⁹ See Morrison, *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline* at 56-57.

Under the proposed solution students would be subject to in-school discipline as a last resort because they are a serious threat to themselves or others. However, any student subject to the discipline system, expelled or suspended, would be provided an alternative education. Further, as an alternative to the Educational Reconstruction Act, educational instruction may be provided to students through local counseling centers where employees are better suited to deal with behavioral disturbances and acts of violence.¹⁹⁰

Students who engage in violence demonstrate mental or emotional disturbances that should qualify as a mental disability.¹⁹¹ Allowing students to qualify for a mental disability status opens a new door to educational resources. Qualifying students may be treated at local mental health counseling centers.¹⁹² Some schools have even started to engage in such programs.¹⁹³ For example, in some Ohio counties, students that are expelled for violent offenses, such as possession of a weapon, are referred to the local mental health counseling center.¹⁹⁴ At the mental health center they receive three and a half hours of school instruction online, one hour of mental health counseling, and the remainder of the time is spent working on academics under the supervision of a licensed teacher.¹⁹⁵ Although there is a risk in labeling children as having a mental disability, it is often true that acts of violence are more often than not manifestations of behavior problems and disturbances in which immediate attention is needed. While there is a risk in labeling students, it must be understood that they are still in fact children that are constantly developing and changing. Moreover, other students with disabilities are already labeled and provided with educational assistance as needed under IDEA. In essence, it is better to label a child with an emotional disability than it is for him/her to be permanently denied his/her education.

However, some may argue that the federal government should not have to pay for alternative education when it is the student's own behavior that led to their removal from school. Students that are removed from school are denied educational opportunities and are likely to cost their community more in expenses for social services than it

¹⁹⁰ See Osher, *The Best Approach to Safety is to Fix Schools and Support Children and Staff* at 148.

¹⁹¹ See Tebo, 86 ABA J. at 44. Students do not necessarily qualify for IDEA treatment if they have a "mental disability" because IDEA requires a separate determination for its purposes. See *supra* nn. 172-179 (explaining the IDEA's qualifications).

¹⁹² Morrison, *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline* at 66.

¹⁹³ Telephone Interview with Tom Miller, Dir., Thomkins Counseling Center in New Concord, Ohio (Feb. 19, 2004).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

would to rehabilitate a student.¹⁹⁶ Thus, purely from an economic perspective, it is much more wasteful to both the student and the community to allow the child to grow up without an education because he will not be able to support himself.

Referring students to mental health centers is beneficial to the centers, the students, and the community. It provides business for such centers and, most importantly, allows the student to continue learning.¹⁹⁷ Additionally, after a period of about a year, a judicial official would make a recommendation as to whether the child may re-enter the public school system.¹⁹⁸

The issue of funding is also not particularly complicated under this solution. Children with mental disabilities should be covered for treatment under parental insurance coverage in which funds are transferred to the centers.¹⁹⁹ However, when a child does not have health insurance, the child is also covered under Medicaid for his mental illness and required treatment.²⁰⁰ Thus, this solution provides prevention, staff training, and rehabilitation through a federal act which works with states to encourage their own development of more innovative and student-centered programs.

IV. Conclusion

Zero tolerance policies continue to become more controversial each year as the ineffectiveness of such disciplinary measures becomes more evident. The GFSA stands in direct contradiction to remedying school violence problems. Congress is not, nor has it ever been, in a position to decide matters of school discipline. Moreover, the GFSA punishes America's school children with no attempt to rehabilitate them. Rather, the GFSA discards children under zero tolerance at the cost of both the child and the community.

An educational reconstruction act would focus on preventing the problem of school violence before it occurs. The act would work with states and allow them to develop their own disciplinary procedures as needed in their districts, leaving matters of education, for the most part, in the hands of the states. The act, unlike the GFSA, would not refuse to fund schools that chose not to comply.

The reconstruction act would particularly focus on identifying and involving at-risk students. Most significantly, the act provides a

¹⁹⁶ See *supra* pt. IIIB(1)(b) (explaining the financial hardships ZT policies place on communities).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

rehabilitative approach in which students would be provided professional help on an individual basis. Students would be able to re-enter the school system with their peers having received the help they needed. Some ten years after the GFSA was implemented, students continue to be “zero tolerated” out of the system. Sometimes we all need to be reminded of the famous adage: America's children are not dispensable - they are our most valued resource and our best investment in the future.