

4-1-2007

Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools

Frances P. Solari

Julienne E.M. Balshaw

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Education Law Commons](#)

Recommended Citation

Solari, Frances P. and Balshaw, Julienne E.M. (2007) "Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools," *North Carolina Central Law Review*: Vol. 29 : No. 2 , Article 2.
Available at: <https://archives.law.nccu.edu/ncclr/vol29/iss2/2>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

ARTICLES

OUTLAWED AND EXILED: ZERO TOLERANCE AND SECOND GENERATION RACE DISCRIMINATION IN PUBLIC SCHOOLS

FRANCES P. SOLARI*
AND
JULIENNE E.M. BALSHAW**

| | |
|---|-----|
| I. INTRODUCTION..... | 147 |
| II. CONSTITUTIONAL CLAIMS..... | 154 |
| A. Equal Protection..... | 155 |
| B. Due Process | 165 |
| 1. <i>Education as Property Interest</i> | 166 |
| 2. <i>Reputation as Liberty Interest</i> | 168 |
| 3. <i>Outlawed and Exiled</i> | 170 |
| 4. <i>Void for Vagueness</i> | 173 |
| III. POTENTIAL DEFENSES | 180 |
| A. Failure to Exhaust Administrative Remedies | 180 |
| B. Immunity | 187 |
| 1. <i>Sovereign Immunity</i> | 188 |
| 2. <i>Qualified Immunity</i> | 188 |
| 3. <i>Public Official Immunity</i> | 189 |
| 4. <i>Legislative Immunity</i> | 190 |
| 5. <i>Quasi Judicial Immunity</i> | 190 |
| C. Political Question Doctrine | 190 |
| IV. CONCLUSION | 191 |

I. INTRODUCTION

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in

* Associate Professor, North Carolina Central University School of Law.

** J.D. 2007, North Carolina Central University School of Law.

*preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*¹

More than half a century has passed since *Brown v. Board of Education* declared unlawful the long-standing national policy of “separate but equal”² and changed the face of American public school education. The doctrine of “separate but equal” permitted states and local school districts to maintain dual school systems, one for whites, another for African-Americans, and “created gross and obvious disparities” in the educational opportunities available to African-American public school children.³ Today, education remains a paramount responsibility of state and local governments. As Justice Robert Orr of the North Carolina Supreme Court recently observed:

The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount.⁴

Yet, now, fifty plus years after the decision in *Brown v. Board of Education*, policies of zero tolerance, widely adopted by public school systems nationwide, have spawned a second generation of discrimination in our public schools.⁵ Broadly defined, zero tolerance policies

1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (Warren, C.J., for the majority).

2. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the segregation of white and “colored” railway passengers as a reasonable law to preserve the peace and public order).

3. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289, 291 (2005) [hereinafter Hanson]. “Schools catering to only African-Americans had less trained and paid teachers, higher pupil-teacher ratios, fewer curricular and extra-curricular activities, and poor physical plants to which these students had to travel further and longer than white children.” *Id.*

4. *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 397 (N.C. 2004) (“In *Leandro*, this Court, in sum, decreed that the State and State Board of Education had constitutional obligations to provide the state’s school children with an opportunity for a sound basic education, and that the state’s school children had a fundamental right to such an opportunity.” *Id.* at 376 (citing *Leandro v. State*, 488 S.E.2d 249, 257 (N.C. 1997)).

5. Libero Della Piana, *Reading, Writing, Race and Resegregation: 45 Years After Brown v. Board of Education*, 4 COLORLINES (Spring 1999), available at <http://www.colorlines.com/article.php?ID=107>. See also Ira Glasser and Alan Levine, *Bringing Student Rights to New York City’s School System*, 1 J. L. & EDUC. 213 (1972) (finding a refined system of suspension and expulsion punishments toward black students the results of which were so profound and effective that “southern style” segregation was unnecessary).

are “administrative rules intended to address specific problems associated with school safety and discipline.”⁶ “Most state and local zero tolerance school policies have their genesis in the Gun Free School Act of 1994,”⁷ intended by Congress to promote school safety by declaring zero tolerance for weapons in public schools.⁸

“Over time, however, zero tolerance has come to refer to school or district-wide policies that mandate pre-determined, typically harsh, consequences or punishments (such as suspension and expulsion) for a wide degree of rule violation.”⁹ School authorities have “extended what appeared to be a necessary, fair, limited, and specific response to school violence provided by federal law into areas neither contemplated nor addressed by the initial enactment.”¹⁰ In many school districts, zero tolerance now applies to “frequent and usual student behaviors - minor, disruptive behaviors, such as tardiness, class absences, disrespect, and noncompliance,”¹¹ as well as any conduct identified by school officials as “gang-related.”

On the whole, zero tolerance policies adopted by local school boards, particularly policies prohibiting “gang-related” conduct, are poorly drafted and fail “to balance the need for school safety with

6. Hanson, *supra* note 3, at 301 (citing Tobin McAndrews, *Zero Tolerance Policies*, ERIC Dig. No. 146, Mar. 2001, available at <http://eric.uoregon.edu/publications/digests/digest146.html>).

7. James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J. L. & PUB. POL’Y 369, 372 (2001) [hereinafter Peden].

8. 20 U.S.C. § 8921(b)(1) (2000) (repealed 2002). (The Act mandated that all states receiving Elementary and Secondary Education Act (ESEA) funds adopt a policy under which any student determined to have brought a weapon to school would be suspended from school for not less than one year. Although Congress repealed The Gun-Free Schools Act with the enactment of the No Child Left Behind Act of 2001, under No Child Left Behind, the Gun-Free Schools Act was re-enacted as 20 U.S.C. § 1751(b)(1)).

9. The National Association of School Psychologists, *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, http://www.nasppcenter.org/factsheets/zt_fs.html. See also Hanson, *supra* note 3, at 301 (citing Phillip Kaufman et al., U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *Indicators of School Crime and Safety*, app. A, at 121 (1998) (defining zero tolerance as a policy that “mandates predetermined consequences or punishments for specific offenses”)); HARVARD UNIV., ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies 1* (2000) [hereinafter, OPPORTUNITIES SUSPENDED] (defining zero tolerance policies as “nondiscretionary punishment guidelines”), at http://www.civilrightsproject.harvard.edu/research/discipline/final_report.pdf.

Zero tolerance is a term that is used to characterize an institution’s responses to breaches in the code of conduct which the institution recognizes as being fundamental to its operation. It carries with it a connotation of absolutism and inflexibility which implies that once parameters of conduct have been established for any particular institution, no activity that occurs outside those parameters will be allowed. A code of conduct premised on such a concept does not contemplate an individual’s intent.

Peden, *supra* note 7, at 371.

10. Hanson, at 308-09.

11. *Id.* at 321-22 (citing Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, Ind. Educ. Policy Ctr., Policy Research Rept. #SRS2, 6 (Aug. 2000)), available at www.indiana.edu/~safeschl/ztze.pdf.

maintaining educational opportunity for students.”¹² Under the guise of protecting school safety, zero tolerance denies a public school education and creates a “schoolhouse-to-jailhouse” pathway for a statistically indefensible number of minority students.

Numerous accounts lead to the same issue and conclusion: School authorities disproportionately target African-American (and Latino) students for discipline. Much like the minority experience in other settings, minority students are subject to racial profiling in the application of zero tolerance policies. . . . It is found with clear and convincing evidence that minority students receive more harsh punitive measures (suspension, expulsion, corporal punishment) and less mild discipline than their non-minority peers, even controlling for socioeconomic status.¹³

African-American children represent 17% of public school enrollment nationwide, but 33% of all out-of-school suspensions.¹⁴ White students, on the other hand, represent 63% of public school enrollment, but only 50% of out-of-school suspensions.¹⁵ Also, Latino students are singled out for discipline. In Tennessee, for example, more than 38% of Latino public school students have been suspended.¹⁶ “Minority children are clearly being profiled for application of zero tolerance policies and bearing a disproportionate brunt of its effects.”¹⁷

12. *Id.* at 311. “[W]hile expulsion and suspension may be necessary tools for maintaining school safety, overuse and overapplication of these tools is viewed by some advocates as counter to ‘the fundamental purpose of public education – the purpose of preparing children to live in a democratic society.’” *Id.* at 316 (quoting William Haft, *More Than Zero Tolerance: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 797 (2000)).

13. *Id.* at 332-33 (citing CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 302 (W.W. Norton & Co. 2004); see La Griffe du Lion, *Racial Disparities in School Discipline*, Vol. 3, Number 3 (June 2001), available at <http://www.lagriffedulion.f2s.com/discipline.htm>; See also La Griffe du Lion, *Closing the Racial Learning Gap* (Jan. 2004), Vol. 6, Number 1, available at <http://www.lagriffedulion.f2s.com/gap.htm>.

[M]any school districts to subject minority students, particularly low-income African American males, to disproportionate amounts of punishment. Based ostensibly upon their desire to maintain a safe and orderly environment, a number of school districts engage in disciplinary practices that result in large numbers of minority students being suspended and expelled from school.

Pedro A. Noguera, *School Reform and Second Generation Discrimination: Toward the Development of Equitable Schools* IN MOTION MAGAZINE, Oct. 15, 2006, available at http://www.inmotionmagazine.com/er/pn_second.html.

14. See Harvard University Civil Rights Project, Action Kit, *Civil Rights in Brief: Zero Tolerance and School Discipline*, [hereinafter Action Kit] available at <http://www.civilrightsproject.harvard.edu>.

15. *Id.*

16. *Id.*

17. Hanson, *supra* note 3, at 334 (citing Bobby Iafolla, *School-to-Prison Pipeline*, BOSTON'S WEEKLY DIG, (July 1, 2003), available at http://www.weeklydig.com/news_opinions/articles/schooltoprison_pipeline_2) (New “zero tolerance” approaches to discipline have almost doubled

Students of color are more likely to receive suspension for non-violent, minor misconduct such as disobedience, disruption, and disrespect of authority.¹⁸ Research shows that these disparities are not due to poverty or inherently bad behavior,¹⁹ but instead, are largely the result of racial and cultural bias by public school officials.²⁰ Available empirical evidence suggests, for example, that such common behavior as student inattention is often viewed differently, depending on race. White teachers tend to interpret the inattentiveness of black students "as resulting from the students' putative low attention spans," while the same behavior by white students is viewed merely as "an indication that the teacher needed to do more to gain the student's interest."²¹

Beverly Cross, an urban education specialist at the University of Wisconsin-Madison says that, "Racism rests just beneath the surface of zero-tolerance decisions."²² In large part, black students are excluded because of what has been called "the 'hidden curriculum' or rules with respect to obedience to authority, time schedules, cutting class, and in some instances, fighting with other students. While white

the number of students suspended annually in the last 30 years, from 1.7 million to 3.1 million, while the total number of students enrolled in elementary and high schools has stayed flat since 1970 at about 50 million. Minorities have been disproportionately punished. According to the Department of Education's Office of Civil Rights, black students are 2.6 times more likely to be suspended than white students. The Department of Education's Office of Special Education Programs showed a similar racial inequality in the percentage of students suspended for more than one day from 1972 to 2000. For white students, the percentage rose from 3.1 percent to 5.09 percent; for black students, it rose from 6 percent to 13.2 percent.).

18. Vincent Schiraldi & Jason Ziedenberg, *Self-Reported Crime and the Growing Use of Suspensions* (November 30, 2001), available at <http://www.justicepolicy.org/reports/ss.pdf>.

There are disturbing racial disparities in student suspension rates by race, specifically with respect to black male students. In school year 1974-5, 65.7% of suspended students were white, 28.7% were African American, and 5% were Hispanic. By 1998, after the total number of suspended students doubled, whites represented 51.3% of suspended students; African Americans 32.7%; and Hispanics 14.5%.

Id. (citing Office of Civil Rights, U.S. Department of Education, *Projected Student Suspension Rate Values for the Nation's Public Schools, by Race and Ethnicity—Elementary and Secondary School Civil Rights Compliance Reports* (2000)). *The Condition of Education 1997*, published by the U.S. Department of Education, found that almost 25% of all African American male students were suspended at least once over a four-year period. *Id.* See also OPPORTUNITIES SUSPENDED, *supra* note 9.

19. Action Kit, *supra* note 14.

20. Rebecca Gordon, Libero Della Piana, & Terry Keleher, *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools*, ERASE Initiative (Expose Racism & Advance School Excellence) (March 2000), available at <http://www.arc.org/pdf/196apdf.pdf>.

21. Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 608 (1996) (citing EILEEN MCGUIRE, TEACHER-STUDENT INTERACTION, IN CHILDREN AT RISK 177 (Joan M. Lakebrink ed., 1989)).

22. JUDITH BROWNE, DANIEL LOSEN & JOHANNA WALD, ZERO TOLERANCE: UNFAIR, WITH LITTLE RECOURSE, IN ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE? (Russell Skiba and Gil Noam, eds., 2001). Cross contributed to a 2001 study of racial profiling and punishment in U.S. public schools published by the Applied Research Center's ERASE Initiative.

students are punished for the same activities, discipline of whites is imposed at disproportionately lower rates.”²³ Students of color are routinely denied the same educational opportunities provided to white students most often as a consequence of racially disparate disciplinary actions imposed without due process of law.²⁴

Equally alarming is the increasing frequency with which school disciplinary proceedings, especially for students of color, result in referral to the juvenile justice or adult justice system.²⁵ “[A]ctions formerly considered childish or adolescent acts, even actions where there is no violence, such as having a pager at school, have taken on or been given criminal definition, along with criminal consequences.”²⁶ Not surprisingly, the negative effects of these policies fall disproportionately on children of color.²⁷

“Zero tolerance enforcement is clearly a civil rights issue - perhaps the most compelling issue to be addressed in the context of *Brown* in the new millennium.”²⁸ Constitutional challenges to zero tolerance

23. Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 ED. LAW REP. 759, 767 (West 2000) (citing Mark Yudof, *Suspension and Expulsion of Black Students from the Public Schools: Academic Punishment and the Constitution*, 39 LAW AND CONTEMP. PROBS. 375, 377 (1975)).

24. Judith A. Browne, The Advancement Project, *DERAILED: The Schoolhouse to Jailhouse Track*, [hereinafter *DERAILED*], available at <http://www.advancementproject.org> (noting that even the African-American children who attend private schools cannot escape racist interpretations of zero tolerance policies).

25. Hanson, *supra* note 3, at 328 (citing OPPORTUNITIES SUSPENDED, *supra* note 9, at 13 (finding that school districts “are simply transferring their disciplinary authority to law enforcement officials” and that 41 states require schools to report students to law enforcement agencies for various conduct committed in school, fail to monitor implementation of referrals, and “perhaps unintentionally, set off an explosion in the criminalization of children for understandable mistakes or ordinary childhood behavior.”)).

26. Hanson, *supra* note 3, at 329 (citing Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, at 1 (City and suburban schools nationwide are increasingly sending students to the juvenile justice system for adolescent behaviors such as “shouting at classmates and violating the dress code” that used to be handled by school administrators.)). “[I]nstead of addressing discipline of students at the school level, our children are being treated as criminals - in the scheme of the criminal justice system - and without much of the legal protections afforded to adults charged with criminal violations.” *Id.* (citing Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 164-75 (1999)).

27. *DERAILED*, *supra* note 24 (citing DELAWARE DEPARTMENT OF EDUCATION, ANNUAL REPORT OF SCHOOL CLIMATE AND STUDENT CONDUCT, (1999-2000); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U.S. DEPARTMENT OF JUSTICE, *Challenging the Myths, 1999 National Report Series*, Juvenile Justice Bulletin. (2000)).

Despite common stereotypical beliefs by some about urban school children and African-American children, the profile of a gun-toting student who was likely to go on a killing rampage was not an urban black male, but was more likely to be a rural or small town white male who had readier access to guns.

Hanson, *supra* note 3, at 344.

28. Hanson, *supra* note 3, at 336-37 (citing National Association of Secondary School Principals, Statement on the Civil Rights Implications of Zero Tolerance Programs before the United States Commission on Civil Rights, Feb. 18, 2000 (advocating that discretion is needed to ensure

generally allege violations of equal protection and procedural or substantive due process under the Fourteenth Amendment, or that the policy itself is void for vagueness.²⁹ Regrettably, case law examining zero tolerance policies has been slow to develop, primarily because “many parents often do not have the mindset, time, or means to pursue redress against the educational ‘system’ beyond the administrative process through the courts, and the parents who do have the resources are often ostracized, frustrated, and unsuccessful.”³⁰

This article seeks to assist practitioners in identifying claims of second-generation discrimination against local school systems based on racially disparate enforcement of zero tolerance policies.³¹ It first sets out potential federal and state constitutional claims based on violations of equal protection, procedural due process, and vagueness.³² It concludes by identifying several defenses school systems commonly offer to escape accountability for perpetuating second generation segregation and depriving children of color of their constitutionally guaranteed equal access to a basic public education.

equal treatment of students), available at http://www.principals.org/publicaffairs/ps_zero_tol.html). See Daniel J. Losen & Christopher Edley Jr., *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline Is a Civil Rights Issue*, in ZERO TOLERANCE 230-55 (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001).

29. Hanson, *supra* note 3, at 360. See OPPORTUNITIES SUSPENDED, *supra* note 9, Appendix II, Legal Protections for Students Facing Zero Tolerance Policies, for a more detailed legal discourse on challenges to zero tolerance policies). See also Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2001) (generally explaining zero tolerance policies, means of challenging them, their effects on school students, and general ineffectiveness). “The importance of an education to a child is substantial, and the state cannot condition its availability upon compliance with an unconstitutionally vague standard of conduct.” *Myers v. Arcata Union High Sch. Dist.*, 75 Cal. Rptr. 68, 74-5 (1969) (citations omitted) (high school district governing board’s “dress policy” concerning hair styles, which provided that “extremes of hair style are not acceptable,” found unconstitutionally vague). See *infra* text accompanying notes 164-179.

30. Hanson, *supra* note 3, at 295 (citing Irwin A. Hyman & Patricia A. Snook, DANGEROUS SCHOOLS: WHAT WE CAN DO ABOUT THE PHYSICAL AND EMOTIONAL ABUSE OF OUR CHILDREN (Jossey-Bass Inc., Publishers 1999)).

There are relatively few reported court cases involving school discipline, probably for several reasons. School discipline matters are primarily handled in administrative proceedings that have usually been unreported, at least in traditional written legal reports. The courts in which juveniles usually appear are not courts of record. Additionally, it may be posited that few families can bear the expense of litigating these matters that may involve difficult constitutional claims and require attorneys. Few cases have reached the courts, but those cases that have been litigated demonstrate the common law, statutes, facts, and theories used to uphold zero tolerance applications.

Id. at 356-57.

31. See, e.g., *Copper v. Denlinger*, 06 CVS 03257 (N.C. filed Mar. 24, 2006), *appeal docketed*, No. COA07-205, (N.C. Ct. App. Feb. 14, 2007).

32. This article is intended as the first in a series. Follow-up articles will include discussion of other constitutional and state law claims, such as discrimination claims under Title VI and 42 U.S.C. § 1981, conspiracy to violate civil rights under 42 U.S.C. § 1985 and N.C. Gen. Stat. Ch. 99D, defamation, and negligent supervision, personal and official liability, available remedies, class actions, and pretrial litigation strategies.

II. CONSTITUTIONAL CLAIMS

The primary vehicle for bringing a Fourteenth Amendment equal protection or due process claim is 42 U.S.C. § 1983 which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.³³

“Person” within the meaning of § 1983 includes local boards of education, superintendents, and other school officials.³⁴ Even in state court, federal law controls actions brought under § 1983.³⁵

“One whose equal protection or due process rights have been abridged [by a State actor also] has a direct claim under the North Carolina Constitution.”³⁶

The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action under the rationale adopted in the above-cited authorities. The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State’s encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of

33. 42 U.S.C. § 1983 (2006). Although beyond the scope of this article, § 1981 may provide another avenue to challenge racially discriminatory school disciplinary policies. Originally enacted as part of the Civil Rights Act of 1866, Act Apr. 9, 1866, c. 31, § 1, 14 Stat. 27, § 1981 provides, “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” The Supreme Court has held that students have a protectable property interest in a public school education. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). See also *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (The North Carolina Constitution “guarantee[s] every child of the state the opportunity to receive a ‘sound basic education . . .’”).

34. *Monell v. Dep’t of Social Serv.*, 436 U.S. 658 (1978); *Ripellino v. N.C. Sch. Bds. Ass’n*, 627 S.E.2d 225, (N.C. Ct. App. 2006).

35. *NLRB v. Natural Gas Util. Dist. of Hawkins County*, 402 U.S. 600, 603-04 (1971) (federal law controls actions brought under federal law). See also, *White v. Pate*, 304 S.E.2d 199 (N.C. 1983); *Constantian v. Anson County*, 93 S.E.2d 163 (N.C. 1956); *Ripellino v. N.C. Sch. Bds. Ass’n*, 627 S.E.2d 225, (N.C. Ct. App. 2006); *Dobrowolska v. Wall*, 530 S.E.2d 590 (N.C. Ct. App. 2000); *Fennell v. Stephenson*, 528 S.E.2d 911 (N.C. Ct. App. 2000), *rev’d on other grounds*, 554 S.E.2d 629 (N.C. 2001).

36. *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 289 (N.C. 1992) (citing *Sale v. Highway Comm’n*, 89 S.E.2d 290 (N.C. 1955)). “It is clear, then, that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.” *Sneed v. Greensboro City Bd. of Ed.*, 264 S.E.2d 106, 113 (N.C. 1980) (citing U.S. CONST., amend. XIV; N.C. CONST., art. I, § 19; *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972)).

the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.³⁷

Although not directly controlling, federal decisions are highly persuasive in actions alleging State constitutional claims.³⁸

A. Equal Protection

We are confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution.

— John F. Kennedy³⁹

The Equal Protection Clause of the Fourteenth Amendment states, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁰ Similarly, the North Carolina Constitution states, “No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.”⁴¹ The North Carolina Constitution further provides that, “[t]he people have a right to the privilege of education,”⁴² and “public schools shall be maintained . . . wherein equal opportunities shall be provided for all students.”⁴³

Equal Protection claims under the Fourteenth Amendment and Article I, section 19 can be used to challenge school disciplinary actions or policies where disparate treatment can be traced, at least in part, to racial hostility on the part of school officials.⁴⁴ “The central purpose

37. *Corum*, 413 S.E.2d at 289-290 (1992) (citing *State v. Manuel*, 20 N.C. 144 (1838)).

38. See, e.g., *Toomer v. Garrett*, 574 S.E.2d 76, 86 (N.C. Ct. App. 2002) (“Decisions as to the scope of procedural due process provided by the federal constitution are highly persuasive with respect to that afforded under our state constitution.”).

39. John F. Kennedy, Civil Rights Address (June 11, 1963) (transcript available at <http://www.americanrhetoric.com/speeches/jfkcivilrights.htm>).

40. U.S. CONST. amend. XIV, § 1.

41. N.C. CONST. art. I, § 19. See *Corum*, 413 S.E.2d at 289 (N.C. 1992) (“The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . .”). “The Supreme Court of North Carolina has held that the guarantee of equal protection provided in the Fourteenth Amendment to the Federal Constitution has been expressly incorporated in Article I, § 19 of the N.C. Constitution, and thus the same analysis may be applied to both.” *Toomer*, 574 S.E.2d at 88 (N.C. Ct. App. 2002) (citing *Richardson v. N.C. Dept. of Corr.*, 478 S.E.2d 501, 505 (N.C. 1996)); *S.S. Kresge Co. v. Davis*, 178 S.E.2d 382 (N.C. 1971); *Hajoca Corp. v. Clayton*, 178 S.E.2d 481 (N.C. 1971).

42. N.C. CONST. art. I, § 15.

43. N.C. CONST. art. IX, § 1.

44. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.”). “The history of litigation challenging racial disparities in education suggests that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution may provide a means to contest school discipline policies.” Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL’Y 327, 335 (2005) (citing *Brown v. Bd. of Educ.*, 347 U.S.

of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”⁴⁵ “Any distinction made on the basis of race in a publicly-supported institution is a patent violation of the law, not to be tolerated by a court that is controlled by the Constitution of the United States.”⁴⁶ To state an equal protection claim under either the federal or state constitution, the plaintiff must allege purposeful discrimination by school officials motivated by racial animus.⁴⁷ A complaint that alleges purposeful discrimination based on race is sufficient to withstand a Rule 12(b)(6) motion to dismiss.

In *Coleman v. Franklin Parish School Board*,⁴⁸ the plaintiffs sued a public school teacher, the principal, the local school board, the school superintendent, and the school board’s insurer, alleging racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 (1976).⁴⁹ The district court granted the defendants’ 12(b)(6) motion to dismiss the plaintiffs’ race discrimination claims. On appeal, the Fifth Circuit held that plaintiffs’ complaint stated a valid claim and reversed the trial court’s order of dismissal.

In this case, the plaintiffs pleaded intent and purpose to discriminate on the part of the defendants. At this stage, we review only the sufficiency of these allegations. Whether there is evidence to support the charge, and, if so, its sufficiency may not be tested by a motion to dismiss. The district court, therefore, improperly dismissed plaintiffs’ claim for a violation of 42 U.S.C. §§ 1981 and 1983.⁵⁰

483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

45. *Washington v. Davis*, 426 U.S. 229, 238 (1976). See also *Richardson v. N.C. Dept. of Corr.*, 478 S.E.2d 501, 505 (N.C. 1996) (Equal protection “requires that all persons similarly situated be treated alike.”).

46. *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass’n*, 375 F.2d 648, 657 (4th Cir. 1967).

47. *Baldwin v. Birmingham Bd. of Educ.*, 648 F.2d 950, 954 (5th Cir.1981). “In order to make out a claim of racial discrimination, a plaintiff ‘must allege purposeful discrimination; that is, he must assert that [defendant] took some adverse action against him as a result of a discriminatory animus.’” *Peterkin v. Columbus County Bd. Of Educ.*, 486 S.E.2d 733, 734 (N.C. Ct. App. 1997) (quoting *Sterling v. Southeastern Pa. Transp. Auth.*, 897 F. Supp. 893, 896 (E.D.Pa. 1995)).

48. *Coleman v. Franklin Parish School Bd.*, 702 F.2d 74 (5th Cir. 1983).

49. *Id.* at 75-76. The complaint alleged that:

the black child was engaged in minor horseplay in the school hall with a white boy of similar age and grade; the teacher, Bobbie Bruce, struck him on the head with a coffee cup, causing a small cut on the black child’s head; the white child was not disciplined in any way; after school that day, the black child was taken by his mother to a doctor who sutured the cut with two stitches.

Id. at 75.

50. *Id.* at 77.

Allegations of selective prosecution of school disciplinary policies likewise state a valid equal protection claim,⁵¹ as do allegations of racial profiling.⁵²

In discrimination claims under § 1983, the plaintiff has the ultimate burden to prove, by a preponderance of the evidence, that the defendant's actions were motivated by racial animus.⁵³ The plaintiff is not required to prove that race discrimination was the sole reason for the defendant's actions, only that discrimination was a motivating factor in the defendant's decision to take the challenged action.⁵⁴

The plaintiff may meet this burden by resorting to "ordinary principles of proof using any direct or indirect evidence relevant to and sufficiently probative of the issue."⁵⁵ Although blatant acts of race discrimination do occur, most often, discrimination is carried out insidiously by persons quick to assert a ready explanation for their actions.⁵⁶ Recognizing the insidious nature of race discrimination, the Supreme Court developed an alternate method of proof for use by plaintiffs in cases where direct evidence of discriminatory motive is lacking. In such cases, plaintiffs may rely on the three-part burden shifting process established by the Supreme Court in *McDonnell Douglas v. Green*.⁵⁷ Under this process, once a plaintiff presents evi-

51. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). ("The decision whether to prosecute may not be based on 'an unjustifiable standard such as race. . . .'"). By this same token, the decision to discipline a student may not be so based. See *Alexander v. Fulton County*, 207 F.3d 1303, 1336-1341 (11th Cir. 2000) (court found sufficient evidence of discrimination when two white law enforcement officers were disciplined while their black counterparts were not disciplined for the same offenses); *State v. Rogers*, 315 S.E.2d 492, 505 (N.C. Ct. App. 1984) (selective prosecution claim not valid because "a failure to prosecute others because of a lack of knowledge that they were subject to prosecution for the same offense as defendant does not amount to a denial of equal protection under the Fourteenth Amendment." (citation omitted)). *Accord*, *Cohn v. New Paltz Cent. Sch. Dist.*, 171 Fed. Appx. 877 (2d Cir. 2006) (Suspended high school student's complaint, alleging that punishment imposed upon him by school official was disproportionate as compared to punishment official imposed upon two other students who engaged in similar misconduct, and alleging that "[t]his disparate treatment was without any rational basis and violated plaintiff's right to equal protection of the law," stated "class of one" equal protection claim, notwithstanding student's failure to identify actual instances where others had been treated differently, and his failure to assert that differential treatment was "intentional.").

52. *Fennell v. Stephenson*, 528 S.E.2d 911, 917-18 (N.C. Ct. App. 2000). In *Fennell*, the trial court dismissed plaintiff's action alleging a pattern and practice of racially-influenced traffic stops of Black motorists by the North Carolina Highway Patrol. The North Carolina Court of Appeals reversed.

53. *Washington v. Davis*, 426 U.S. 229, 241-43 (1976).

54. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (internal quotations, citations and footnote omitted)); *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 265 (1977). *Fuller v. Phipps*, 67 F.3d 1137, 1144 (4th Cir. 1995).

55. *Brinkley v. Harbour Rec. Club*, 180 F.3d 598, 607 (4th Cir. 1999).

56. *Id.*

57. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

dence to satisfy the elements of the applicable *prima facie* case, a presumption of discriminatory motive arises.⁵⁸

At the first stage of the *McDonnell Douglas* three-part burden shifting process, the plaintiff is required only to meet the minimal standard of demonstrating a *prima facie* case of discrimination.⁵⁹ To meet this burden, the plaintiff need only present some evidence of each element of the *prima facie* case.⁶⁰ This is not an onerous requirement⁶¹ and poses “a burden easily met.”⁶² Once a plaintiff satisfies the elements of the applicable *prima facie* case, a presumption of discriminatory motive arises.

During the initial proof stage, plaintiffs are not required to prove discriminatory motive.⁶³ When assessing a plaintiff’s *prima facie* case at the first stage of proof, the court must examine the plaintiff’s evidence independently and without regard to any nondiscriminatory purpose that may be asserted by the defendant.⁶⁴ The first stage is concerned only with the plaintiff’s *prima facie* case. Any justification or other evidence proffered by the defendant is not relevant at this stage. Otherwise, the first and second stages would be collapsed into one, contrary to the three-part process required under *McDonnell Douglas*.

At the first stage, the plaintiff is not required to offer direct evidence of discrimination. To the contrary, if the plaintiff presents direct evidence of discrimination, the *McDonnell Douglas* burden-shifting process does not apply.⁶⁵ Indirect evidence of discrimination is critical to proof of the plaintiff’s *prima facie* case. Indirect evidence is any evidence upon which the trier of fact could base a reasonable inference of discriminatory motive and can take a wide variety of

58. See *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 146 (2d Cir. 1999) (specifically applying the burden-shifting analysis to school discrimination claim).

59. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 263 (1981).

60. *Id.*

61. *Id.* See also *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996) (“[T]o establish a *prima facie* case, the plaintiff need only make a very minimal showing.”).

62. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). A major purpose behind the Supreme Court’s adoption of the three-part burden-shifting process in discrimination cases is to help the parties and the court resolve “the disparity in access to information between” the plaintiff and defendant regarding the true motives behind the defendant’s action. *Walker v. Mortham*, 158 F.3d 1177, 1192 (11th Cir. 1998). Courts should not use the first stage as a tool to dismiss plaintiff’s claims, but as a tool to help bring the parties “expeditiously and fairly to the ultimate question.” *Burdine*, 450 U.S. at 253.

63. *Cline v. Catholic Diocese*, 206 F.3d 651, 655 (6th Cir. 2000).

64. *EEOC v. Horizon/CMS Healthcare*, 220 F.3d 1184, 1193 (10th Cir. 2000).

65. *Brown v. E. Miss. Elec. Power Assoc.*, 989 F.2d 858, 862 (5th Cir., 1993), *reh’g denied*, 995 F.2d 225 (5th Cir. 1993). See also, *Bynum v. Hobbs Realty*, No. 1:00-CV-1143, 3, 2002 WL 1065866 (M.D.N.C. April 4, 2002) (plaintiffs’ claim “based upon what has been deemed to constitute a sufficient showing of direct evidence of discrimination, that is, the alleged racially derogatory statement of [the defendant], so as to create an issue of fact without resort to the *McDonnell Douglas* test.”).

forms. For example, evidence that school officials systematically disciplined minority students more harshly than similarly situated white students, whether or not such evidence is rigorously statistical, would constitute circumstantial evidence of intentional discrimination.⁶⁶

In *Hawkins v. Coleman*,⁶⁷ for example, after hearing expert witnesses, the court found that black students were suspended more often, and for longer periods, than white students, and that the majority of suspensions were for minor, nonviolent offenses.⁶⁸ The court attributed this disparity to “institutional racism.”⁶⁹ “Proof of disproportionate impact ‘may provide an important starting point’ by creating an inference of discriminatory intent and a challenge to a zero tolerance policy would likely rely heavily on such evidence.”⁷⁰

The disparate impact of zero tolerance policies can generally be shown using data on student populations and disciplinary actions. Statistical analyses that establish higher rates of punishment for students of color relative to their representation in the student body and correlations between race and the use of punishment will be particularly useful.⁷¹

Indirect evidence of discriminatory motive may also include evidence that the allegedly discriminatory action violated the defendant’s own policies,⁷² evidence that the plaintiff confided detailed accounts

66. *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (employment discrimination). Statistical evidence is often used as indirect evidence in discrimination cases. *Brown v. E. Miss. Elec. Power Assoc.*, 989 F.2d 858, 863 (5th Cir. 1993), *reh’g denied*, 995 F.2d 225 (5th Cir. 1993); Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 Ed. Law Rep. 759 (West 2000); Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL’Y 327, 337 (2005) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). In *Yick Wo*, the Supreme Court invalidated a San Francisco ordinance banning the operation of hand laundries in wooden buildings. The majority of such laundries were operated by Chinese persons. “The Supreme Court invalidated the statute based on its discriminatory application after finding that, while all non-Asian launderers who applied had received an exemption to the statute, no Chinese applicant had received an exemption.” *Id.* at n.86.

67. *Hawkins v. Coleman*, 376 F. Supp. 1330 (N.D. Tex. 1974).

68. *Id.* at 1337.

69. *Id.* at 1335. *See also* Siman, *supra* note 66, at 335. (“Despite the various alternative justifications, a number of analyses maintain that the best explanation for the disparities is racism or racial stereotyping.”).

70. Siman, *supra* note 66, at 338 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

71. *Id.* (citing *OPPORTUNITIES SUSPENDED supra* note 9, at 9-13 (June 2000)).

72. *Id.* at 349 (citing *Vill. of Arlington Heights*, 429 U.S. at 267). *See also* *Briscoe v. Fred’s Dollar Store*, 24 F.3d 1026, 1028 (8th Cir. 1994) (departure from the way defendant’s written policy is typically applied); *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992) (defendant’s failure follow its own procedures); *Ensing v. Vulcraft Corp.*, 830 F. Supp. 1017 (W.D. Mich. 1993) (defendant’s failure to follow established procedures); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1992) (defendant’s failure to comply with its own procedures); *Asbury v. Brougham*, 866 F.2d 1276, 1281 (10th Cir. 1989) (exceptions made to defendant’s policies for non-minorities).

to others at the time of the discrimination,⁷³ evidence of governmental or agency findings or statistics related to the discrimination,⁷⁴ and evidence of discrimination against others besides the plaintiff.⁷⁵

Before filing a complaint, plaintiff's counsel should develop strategies for collecting statistical data and other information that may provide indirect evidence of discrimination.⁷⁶ When possible, counsel should submit inquiries to federal and state civil rights agencies such as the United States Department of Education, Office for Civil Rights, and requests for public records under the Federal Freedom of Information Act⁷⁷ and the North Carolina Public Records Act.⁷⁸ Sample requests and other useful information is available through the Civil Rights Project of Harvard University.⁷⁹

Statistical evidence of racially disparate disciplinary procedures or the imposition of racially disparate disciplinary actions raises an inference of intentional discrimination and would establish a prima facie case of race discrimination against school officials.⁸⁰ Once the plaintiff has presented evidence to establish a prima facie case of discrimination, the process of proof moves to the second stage. In the second stage, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged action.⁸¹ By raising a re-

73. See *Carter v. Blakely*, No. 1:97CV00982, 1999 WL 1937226, at *3 (M.D.N.C. Sept. 1, 1999) (incidents of sexual harassment confided to coworkers).

74. *Soules v. U.S. Dep't of HUD*, 967 F.2d 817, 821 (2d Cir. 1992). See also *Bronson v. Bd. of Educ. of Cincinnati*, No. C-1-74-205, Amended Consent Decree (Doc. #840) (S.D. Ohio 1994) (originally 604 F. Supp. 68 (S.D. Ohio 1984)) (Because the court found that disparities in suspension and expulsion rates had not improved since the issuance of the original consent decree, the amended consent decree required schools, *inter alia*, to monitor disciplinary recommendations by teachers and intercede when teachers are responsible for disproportionate referrals). Cf. *Tasby v. Estes*, 643 F.2d 1103, 1107 (3d Cir. 1981) (holding that plaintiffs had not made out a *prima facie* case for racial discrimination, but noting "[w]e also recognize that prior judicial determinations of racial discrimination in the [school district]'s student disciplinary policies and practices make [the] statistical evidence [of disparities] more persuasive.").

75. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) (Prior claims by minority public school teachers may provide a source of indirect evidence of discrimination.).

76. For example, the North Carolina State Board of Education, Department of Public Instruction, publishes an annual study of suspensions and expulsions, broken down by school districts. According to the Annual Study for 2004-05, published in March 2006, of the 6,347 Durham public school students who received short-term suspensions, 5,836, or 92%, were children of color. Of the 64 Durham students suspended long-term, 57 were children of color. OFFICE OF CURRICULUM AND SCHOOL REFORM SERVICES AND OFFICE OF DEPUTY SUPERINTENDENT, AGENCY OPERATIONS & MANAGEMENT, STATE BOARD OF EDUCATION/DEPARTMENT OF PUBLIC INSTRUCTION, 2004-05 ANNUAL STUDY OF SUSPENSIONS AND EXPULSIONS, Appx. B (2006), available at <http://www.ncpublicschools.org/schoolimprovement/alternative/reports/>.

77. 5 U.S.C. § 552 (2006).

78. N.C. GEN. STAT. § 132-6 (2006).

79. Action Kit, *supra* note 14.

80. *Vill. of Arlington Heights*, 429 U.S. at 266 (To demonstrate discriminatory intent solely through the existence of a disparate effect of a policy, there must be "a clear pattern" that is "unexplainable on grounds other than race.").

81. *Ezold*, 983 F.2d at 523 (3d Cir. 1992) (quoting *Burdine*, 450 U.S. at 254).

buttable presumption of discrimination, the *prima facie* case forces defendants to articulate what they claim to be the true reason for the challenged action, thereby eliminating the most common nondiscriminatory reasons for the defendant's treatment of the plaintiff.⁸² The purpose of the first stage is simply to force the defendant to proceed with its case.⁸³

Because the ultimate burden of proof remains with the plaintiff, the defendant's burden at the intermediate stage is a burden of production, not a burden of proof. "The defendant need not persuade the court that it was actually motivated by the proffered reasons."⁸⁴ However, it must raise "a genuine issue of fact as to whether it discriminated against the plaintiff."⁸⁵

To do this,

[T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext⁸⁶

The Supreme Court has consistently stated that to satisfy the intermediate stage of the *McDonnell Douglas* burden-shifting process, a defendant must "produce admissible evidence which would allow the trier of fact rationally to conclude" that the challenged action was not motivated by discriminatory animus.⁸⁷

If the defendant declines to present evidence of a legitimate purpose, the plaintiff is entitled to the relief requested.⁸⁸ On the other hand, if the defendant satisfies its burden of production, the presumption of discrimination drops away and the case moves to the third stage in the *McDonnell Douglas* process.⁸⁹

82. *Hollins v. Atl. Co.*, 188 F.3d 652, 659 (6th Cir. 1999).

83. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861-62 (6th Cir. 1997).

84. *Burdine*, 450 U.S. at 248.

85. *Id.* at 255.

86. *Ezold*, 983 F.2d at 523 (3d Cir. 1992) (quoting *Burdine*, 450 U.S. at 255-56.) A proffered justification based on evidence acquired by the defendant *after* the alleged discrimination was not legally sufficient to justify a judgment for the defendant. *McKennon v. Nashville Banner*, 513 U.S. 352, 360 (1995).

87. *Burdine*, 450 U.S. at 257.

88. *Soules v. U.S. Dept. of HUD*, 967 F.2d 817, 822 (2d Cir. 1992).

89. *Id.*

As in any civil action, the plaintiff must be given an opportunity to rebut evidence presented in the defendant's case-in-chief. Thus, at the third stage, the burden shifts to the plaintiff to demonstrate that the defendant's proffered justification was not the true reason behind the challenged action but was a pretext for discrimination. The plaintiff may establish pretext directly or indirectly by persuading the trier of fact that the defendant's actions were more likely the product of discriminatory motives or that the defendant's proffered reason is unworthy of credence.⁹⁰

The plaintiff's evidence must persuade the trier of fact that the explanation offered by the defendant was not the true reason behind the challenged action. Although the plaintiff must demonstrate by competent evidence that the defendant's proffered justification was in fact a cover-up for a discriminatory decision,⁹¹ "explicit evidence of discrimination – i.e., the 'smoking gun' – is not required."⁹²

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a *prima facie* case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.⁹³

The plaintiff may be able to show that the defendant's proffered justification is unworthy of credence when the defendant's justification or explanation for taking the challenged action changes between the time the action was taken and the trial.⁹⁴

[I]f a plaintiff produces credible evidence that it is more likely than not that "the [defendant] did not act for its proffered reason, then the [defendant's] decision remains unexplained and the inferences from

90. *Burdine*, 450 U.S. at 256.

91. *McDonnell Douglas*, 411 U.S. at 805.

92. *Ezold*, 983 F.2d at 523.

93. *Burdine*, 450 U.S. at 256 n.10.

94. See, e.g., *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996), *en banc*, (explaining that an inference of discriminatory intent may exist where a defendant's proffered reasons are false). See also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134 (2000) (allowing an inference of discriminatory intent where the defendant's explanation is unworthy of credence); *Goodman v. Super Star Rent-A-Car*, NO. 3:96-CV-1092-R, 1997 WL 452737 at *6 (N.D. Tex. Jul 31, 1997) (upholding jury's finding that the defendant's proffered reasons were pretext where they were inconsistent and blatantly false).

the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent.”⁹⁵

When the plaintiff shows that the defendant’s actions were more likely the product of a discriminatory motive rather than the defendant’s articulated legitimate reasons, “sufficiently strong evidence” of defendant’s past discrimination may be enough.⁹⁶ As in any civil action, the trier of fact is entitled to draw reasonable inferences from the evidence presented. In the context of summary judgment, the plaintiff, as the non-moving party, is entitled to the benefit of “every legitimate inference” in her favor.⁹⁷ This is especially true in race discrimination cases, where the defendant’s motive is a critical issue to be determined.⁹⁸

Summary judgment is improper in a civil rights case whenever the defendant’s proffered justification raises a suspicion of mendacity on the defendant’s part. “[A] plaintiff should often or usually be able to avoid summary judgment simply by presenting (a) evidence supporting a *prima facie* case, and (b) evidence tending to falsify the [defendant’s] proffered justification.”⁹⁹ In *Goodman v. Super Star Rent-A-Car*,¹⁰⁰ an employment discrimination case, the court denied the defendant’s motion for summary judgment, saying:

95. *Ezold*, 983 F.2d at 524 (quoting *Chipollini v. Spencer Gifts*, 814 F.2d 893, 899 (3d Cir. 1987), *en banc* (stating that summary judgment is improper in a civil rights case whenever the defendant’s proffered justification raises a suspicion of mendacity on the defendant’s part.)). See also *Smith v. Equitrac Corp.*, 88 F. Supp. 2d 727, 737 (S.D. Tex. 2000); *Goodman v. Super Star Rent-A-Car*, No. 3:96-CV-1092-R, 1997 WL 452737 at *6 (N.D. Tex. Jul. 31, 1997) (citing *La-Pierre v. Benson Nissan, Inc.*, 86 F.3d 444, 449-50 (5th Cir. 1996) (upholding jury’s finding that the defendant’s proffered reasons were pretext where they were inconsistent and blatantly false)).

96. *Ezold*, 983 F.2d at 523.

97. *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 300 (4th Cir. 1998) (Murnaghan, C.J., dissenting) (citing *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1419 (4th Cir. 1991)).

98. *Id.* (citing *Taylor v. Home Ins. Co.*, 777 F.2d 849, 854 (4th Cir. 1985)).

99. *Smith v. Equitrac Corp.*, 88 F. Supp. 2d 727, 737 (S.D. Tex. 2000). In *Smith*, an employment discrimination case, the district court discussed the implicative power of mendacity, especially in discrimination actions. The court acknowledged that in some cases, evidence tending to show the falsity of a defendant’s proffered nondiscriminatory justification, in and of itself, will support a reasonable inference of discriminatory motive, thereby satisfying the plaintiff’s ultimate burden of proof. The court specifically addressed the power of finding that a defendant’s evidence is false:

[E]vidence which rises to the level of outright mendacity has considerably more implicative power than [false] evidence which simply suggests the defendant is mistaken, confused, or not as credible as the plaintiff. The explanation for this increased implicative power is that a lie is often considered evidence of the consciousness of guilt.

Id. at 741. See also *Briscoe v. Fred’s Dollar Store, Inc.*, 24 F.3d 1026, 1028 (8th Cir. 1994) (defendant’s justification at time of trial differed from reasons given at time of challenged action); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101 (8th Cir. 1988) (defendant’s proffered justification at trial differed from explanation originally given to plaintiff).

100. *Goodman v. Super Star Rent-A-Car*, NO. 3:96-CV-1092-R, 1997 WL 452737 (N.D. Tex. Jul 31, 1997).

Finally, the manner in which [defendant] has asserted different reasons for [plaintiff's] termination during different stages of this litigation is sufficient to raise a "suspicion of mendacity." The inconsistency of its allegations and the blatant untruthfulness of many of the facts in [defendant's] response to the EEOC engender reasonable skepticism with the Court as to all of the asserted reasons for [plaintiff's] termination. There is no question that a reasonable jury could find that [defendant's] reasons were pretextual.¹⁰¹

Similarly, if the jury disbelieves the defendant's proffered justification, it "can reasonably infer from the falsity of the explanation that the [defendant] is dissembling to cover up a discriminatory purpose."¹⁰²

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity), may, together with the elements of a *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.¹⁰³

The credibility of a defendant's proffered justification is to be assessed based on the information available to the defendant at the time of the challenged action.¹⁰⁴

The defendant's proffered justification does not have to rise to the level of outright untruthfulness to be rejected. Because "clever men may easily conceal their motivations," courts take a skeptical view of a defendant's proffered justification when the justification is based on the defendant's subjective rationales.¹⁰⁵ When a defendant offers its own subjective judgment to explain an otherwise poorly documented decision, it exposes itself to the risk that the jury will not believe the proffered justification.¹⁰⁶ A school official's unsubstantiated "suspicion" of gang-related activity proffered as justification for suspension or expulsion would constitute one such subjective rationale. "[A]s a recent report on public school racial discrimination points out, schools that retain some discretion to consider mitigating factors appear to confer leniency when they believe that the student has future pros-

101. *Id.* at *6 (citing *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 449-50 (5th Cir. 1996)).

102. *Lane v. Wal-Mart Stores, Inc.*, No. Civ. CCB-99-763, 2000 WL 1481638 at *4 (D. Md. Aug. 28, 2000) (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000)).

103. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) quoted in *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 201 n.15. (4th Cir. 1997).

104. *Warren v. Fort Lincoln Cemetery, Inc.*, No. Civ. A. AW-00-419, 2001 WL 743199 at *7 (D. Md. June 26, 2001).

105. *Soules v. U.S. Dep't of HUD*, 967 F.2d 817, 822 (2d Cir. 1992) (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974)).

106. *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992).

pects that would be destroyed by expulsion, and such calculations are easily influenced by racial stereotypes.”¹⁰⁷

B. Due Process

*That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.*¹⁰⁸

The Due Process Clause of the Fourteenth Amendment declares it is unlawful for a state actor to “deprive any person of life, liberty, or property, without due process of law” Echoing the Fourteenth Amendment guarantee of due process, the Law of the Land provision of the North Carolina Constitution provides, “No person shall be . . . outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.”¹⁰⁹ The North Carolina “courts have long held that “[t]he ‘law of the land’ clause has the same meaning as ‘due process of law’ under the Federal Constitution.”¹¹⁰ Both provisions reflect a centuries-old, fundamental principal of law that the honor, integrity, and reputation of private citizens should be protected from arbitrary injury by government officials.¹¹¹ As outlined in *Corum v. University of North Carolina Through the Board of Governors*,

It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. . . . We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.¹¹²

This right to due process is extended to the public school system. “[Y]oung people do not ‘shed their constitutional rights’ at the school-

107. Eric Blumenson and Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U.L.Q. 65, 85 (2003) (citing Applied Research Center, *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools*, (Mar. 2000), at 6, available at <http://www.arc.org/erase/FTC2zero.html>).

108. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). See also *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (describing schools as the primary vehicle for transmitting “the values on which our society rests”).

109. N.C. CONST., art. I, § 19.

110. *State v. Guice*, 541 S.E.2d 474, 480 (N.C. Ct. App. 2000) (quoting *Sumney Outdoor Adver., Inc. v. County of Henderson*, 386 S.E.2d 439, 444 (N.C. Ct. App. 1989)).

111. The Magna Carta of 1297 provided, “No Freeman shall be . . . outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by . . . the Law of the Land.” (Confirmation of the Charters Act, 1297, 25 Edw. I, c. 29, (Eng.)), <http://www.answers.com/topic/list-of-acts-of-parliament-of-the-english-parliament-to-1600-1> and http://www.archives.gov/exhibits/featured_documents/magna_carta/.

112. *Corum v. Univ. of N.C. Through Bd. of Governors*, 413 S.E.2d 276, 290 (N.C. 1992) (citations omitted).

house door.”¹¹³ In *West Virginia State Board of Education v. Barnette*,¹¹⁴ the Supreme Court held, “The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures Boards of Education not excepted.”¹¹⁵ “These [Boards of Education] have . . . important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”¹¹⁶ A public school student who is suspended or expelled without due process is deprived of both property and liberty in violation of the Fourteenth Amendment and Article I, section 19.¹¹⁷

1. *Education as Property Interest*

The North Carolina Constitution guarantees to all North Carolina children, a fundamental right of an equal opportunity to receive a public school education.¹¹⁸ “It is clear . . . that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.”¹¹⁹ That right may not be withdrawn on grounds of misconduct absent fundamentally fair due process procedures to determine whether the misconduct has occurred.¹²⁰

The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.¹²¹

113. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (citing *Tinker v. Des Moines Indep. Dist.*, 393 U.S. 503, 506 (1969)).

114. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

115. *Id.*

116. *Id.*

117. *See, e.g., Goss*, 419 U.S. at 576 (“Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.”); James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL’Y 369, 377 (2001) (“The authority possessed by the State to proscribe and enforce standards of conduct in its schools, although admittedly very broad, must be exercised in a manner consistent with the Constitution.”).

118. *Leandro v. State*, 488 S.E.2d 249, 255-56 (N.C. 1997) (applying N.C. CONST. art. I, § 15, art. IX, § 2(1)).

119. *Sneed v. Greensboro City Bd. of Ed.*, 264 S.E.2d 106, 113 (N.C. 1980) (citing U.S. CONST., amend. XIV; N.C. CONST., art. I, § 19; *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972)).

120. *See Goss*, 419 U.S. at 574.

121. *Id.*

The Supreme Court's view has long been that "as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."¹²² In *Goss v. Lopez*, the Court concluded that a ten-day suspension from school is not *de minimis* and may not be imposed absent minimal due process procedures.¹²³

A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.¹²⁴

"[Children have] a strong interest in [the] procedural safeguards that minimize the risk of wrongful punishment"¹²⁵ By failing to adhere to fundamental principals of due process, school officials "can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education."¹²⁶

When a public school student faces suspension for ten days or more, due process requires, at a minimum, the following essential procedures:

(1) notice to parents and student in the form of a written and specific statement of the charges which, if proved, would justify the punishment sought; (2) a full hearing after adequate notice and (3) conducted by an impartial tribunal; (4) the right to examine exhibits and other evidence against the student; (5) the right to be represented by counsel (though not at public expense); (6) the right to confront and examine adverse witnesses; (7) the right to present evidence on behalf of the student; (8) the right to make a record of the proceedings; and (9) the requirement that the decision of the authorities be based upon substantial evidence.¹²⁷

122. *Id.* at 576 (citing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); *Bd. of Regents v. Roth*, 408 U.S. 564, 571 n.8 (1972)).

123. *See id.* At least one district court has held that a student's constitutionally protected property interest in education is also implicated by removal from regular classes and placement in an alternative education program and that, in such cases, the student is entitled to due process prior to such removal and reassignment. *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 954 F. Supp. 1162, 1166-67 (W.D. Tex. 1996) *rev'd on other grounds*, 111 F.3d 25 (5th Cir. 1997).

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

125. *Ingraham v. Wright*, 430 U.S. 651, 676 (1977).

126. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

127. *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972). These same requirements are found in many disciplinary policies adopted by local school boards. *See, e.g.*, Durham Public School Policy 4303.4, governing the procedures for long-term suspensions. The Durham policy includes six of the eight "essential" procedures identified in *Givens*. It does not require that the hearing be "conducted by an impartial tribunal" or that the decision "be based upon substantial evidence." DURHAM PUB. SCH. CODE OF STUDENT CONDUCT POLICY 4303.4, Suspension and Expulsion (1999), available at http://www.dpsnc.net/index.php?option=com_kb&Itemid=1&page=articles&articleid=132.

Due process also requires school officials to warn students that certain types of behavior can result in long-term suspension or expulsion.¹²⁸ Whenever discipline may result in expulsion or long-term suspension, the student and his or her parent must be informed of specific charges and grounds for expulsion.¹²⁹ A hearing must be held before a student is formally expelled,¹³⁰ and the charges against the student must be supported by substantial evidence.¹³¹

2. Reputation as Liberty Interest

The United States Supreme Court has held that public school students have a protectable liberty interest in their good name and reputation and that school officials must afford due process to students suspended from school based on charges of misconduct.¹³²

If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.¹³³

128. Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 584 (1996) (citing LAWRENCE F. ROSSOW, *THE LAW OF STUDENT EXPULSIONS AND SUSPENSIONS* 3 (Education Law Association 2nd ed. 1989)). This policy is embedded in the North Carolina General Statutes:

Local boards of education shall adopt policies not inconsistent with the provisions of the Constitutions of the United States and North Carolina, governing the conduct of students and establishing procedures to be followed by school officials in suspending or expelling any student, or in disciplining any student if the offensive behavior could result in suspension, expulsion, or the administration of corporal punishment.

N.C. GEN. STAT. § 115C-391(a) (2006).

129. ROSSOW, *supra* note 128 (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Ep-person v. Arkansas*, 393 U.S. 97 (1968); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)). In this regard, due process violations may arise when school officials suspend or expel a student based on misconduct for which the student was not formally charged. Durham Public School Policy 4303.4(A), for example, requires:

In any case in which the principal recommends a student for a suspension of more than 10 school days, he/she shall provide notice of the suspension to the student's parent/guardian and to the Superintendent. The notice must state the dates for which the suspension is proposed, and provide notice of the alleged conduct and the rule it violates.

Subsection (C)(6) of the same policy provides that the hearing panel "shall determine whether the student violated the code of conduct." It does not require a determination that the student's conduct violated the specific rule under which the student was charged, thus setting the stage for this type due process violation. DURHAM PUB. SCH. CODE OF STUDENT CONDUCT POLICY 4303.4(A), Suspension and Expulsion (1999), available at http://www.dpsnc.net/index.php?option=com_kb&Itemid=1&page=articles&articleid=132.

130. *Id.* at 7-8.

131. *Id.* at 21 (citing *Birdsey v. Grand Blanc Cmty. Sch.*, 344 N.W.2d 342 (Mich. Ct. App. 1983)).

132. *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

133. *Id.*

The guarantee of due process is “intended to prevent government officials ‘from abusing [their] power, or employing it as an instrument of oppression.’”¹³⁴ Whenever government officials assign to someone a label or characterization that may be a stigma or badge of disgrace, due process requires notice and an opportunity to be heard.¹³⁵

In *Wisconsin v. Constantineau*,¹³⁶ the chief of police, acting under authority of a Wisconsin statute, posted notices in every liquor store in town that, because the plaintiff drank to excess, all persons were forbidden, under punishment of law, from selling or giving alcoholic beverages to the plaintiff for a period of one year. The plaintiff sued under 42 U.S.C. § 1983, seeking damages and injunctive relief for violation of her Fourteenth Amendment right of due process. The Court held the Wisconsin statute unconstitutional on its face and enjoined its enforcement:

It would be naive not to recognize that such “posting” or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter.¹³⁷

The North Carolina court reached a similar conclusion in *Toomer v. Garrett*.¹³⁸ In *Toomer*, a State employee sued her employer for violation of due process, alleging that he made false charges against her without notice and without allowing her opportunity to be heard. The North Carolina Court of Appeals expressly acknowledged that a right of due process arises whenever governmental action causes damage to a citizen’s reputation.¹³⁹ To establish a due process violation based on false charges by a government employer, a plaintiff must sufficiently allege four elements:

that the charges made by Defendants were false; 2) that the charges were made public; 3) that the charges were made in the course of discharge or serious demotion; and 4) that the “charges against [her] . . . ‘might seriously damage [her] standing and associations in [her] community’ or otherwise ‘impose on [her] a stigma or other disability that foreclosed [her] freedom to take advantage of other employment opportunities.’”¹⁴⁰

134. *Dobrowolska v. Wall*, 530 S.E.2d 590, 599 (N.C. Ct. App. 2000) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)).

135. *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

136. *Id.* at 436.

137. *Id.* (quoting *Constantineau v. Grager*, 302 F. Supp. 861, 864 (E.D. Wis. 1969)).

138. *Toomer v. Garrett*, 574 S.E.2d 76 (N.C. Ct. App. 2002).

139. *Id.* at 87.

140. *Id.* (quoting *Shelton Riek v. Story*, 75 F. Supp. 2d 480, 487 (M.D.N.C. 1999)) (internal citations omitted).

Although *Toomer* was decided in the context of State employment, the same right of due process arises whenever “government officials assign to someone a label or characterization that may be a stigma or badge of disgrace.”¹⁴¹ “Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.”¹⁴²

“It goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma.”¹⁴³ When school officials suspend or expel a student based on suspicion of gang-related activities, the harm to the student’s reputation can be devastating.¹⁴⁴ A reputation as a gang-member is a badge of disgrace that is all but certain to seriously impair a student’s future educational and employment opportunities. Before public school students are assigned such a label and robbed of their good name and reputation, due process requires they be afforded notice and an opportunity to be heard.

3. *Outlawed and Exiled*

Reflecting a fundamental principal of law dating back to the Magna Carta, the North Carolina State Constitution Law of the Land provision directs that, “[n]o person shall be . . . *outlawed, or exiled*, or in any manner deprived of his life, liberty, or property, but by the law of the land.”¹⁴⁵ A public school student accused by school officials of gang membership and suspended or expelled from school with no notice or opportunity to be heard is, in every sense, “outlawed” and “exiled” without due process of law in violation of Article I, section 19.

Many, if not most, school disciplinary policies define a “gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of criminal acts.”¹⁴⁶ Without regard for the devastation caused by their actions and, more often than not, based on little more than supposition, school officials routinely brand minority

141. *Constantineau*, 400 U.S. at 435.

142. *Id.* at 437.

143. *Vought v. Van Buren Pub. Sch.*, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969).

144. For example, Durham Public School Policy 4301.10 defines a “gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of criminal acts.” DURHAM PUB. SCH. CODE OF STUDENT CONDUCT POLICY 4301.10, RULE 10 (2006), available at http://www.dpsnc.net/index.php?option=com_kb&Itemid=1&page=articles&articleid=129.

145. N.C. CONST., art. I, § 19 (emphasis added).

146. See source cited *supra* note 144. Wake County defines a “gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of criminal acts, or the purposeful violation of any WCPSS policy, and having a common name or common identifying sign, colors or symbols.” WAKE COUNTY BD. OF EDUC. BD. POLICY 6424, available at <http://www.wcpss.net/policy-files/series/policies/6424-bp.html>.

students “gang-affiliated” without affording them any process at all. “In the name of school safety, schools have implemented unforgiving, overly harsh zero tolerance discipline practices that turn kids into criminals for acts that rarely constitute a crime when committed by an adult.”¹⁴⁷

Educational think tanks such as the Justice Policy Institute and the Children’s Law Center agree that “one of the most harmful effects of zero tolerance policies is the criminalization of minors for behavior that was once handled by school administrators.”¹⁴⁸ With no opportunity to defend themselves, minority students are slaves to the caprice of school officials. Suspicion of “gang-affiliation” almost always results in expulsion or long-term suspension of minority students. These students are not only denied a meaningful public school education, they are exiled from their community of peers.¹⁴⁹ They are “outlawed” and “exiled” within the plain meaning of Article I, section 19.

While neither term has been subject to judicial interpretation for some thirty years, the terms “outlawed” and “exiled” are in common usage and have a well-recognized, plain meaning.¹⁵⁰ When the language of a constitutional provision is clear, courts must give the provision its plain meaning.¹⁵¹ Further interpretation or construction is not only unnecessary but improper.

147. Advancement Project, *Education on Lockdown: The Schoolhouse to Jailhouse Track* 11 (March 2005), [hereinafter *Education on Lockdown*], <http://www.advancementproject.org/reports/FINALEOLrep.pdf>.

148. Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1070-71 (2001).

149. “Expel” is a commonly recognized synonym for “exile,” and *vice versa*. ROGET’S II THE NEW THESAURUS 360, 362 (Joseph P. Pickett et al. eds., Houghton Mifflin, 3rd ed. 2003). “Across the United States many public schools have turned into feeder schools for the juvenile and criminal justice systems. Youths are finding themselves increasingly at risk of falling into the school-to-prison pipeline through push-outs (systematic exclusion through suspensions, expulsions, discouragement, and high-stakes testing).” *Education on Lockdown*, *supra* note 147, at 11. “The negative and harmful psychological effects on school children of zero tolerance policies may also occur when a student is separated from the general student population by expulsion, not for violation of the law, but for a misapplied application of a policy.” Hanson, *supra* note 3, at 327. See also Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758, 758 (1963) (citation omitted) (“The device of thrusting out of the group those who have broken its code is very ancient and constitutes the most fearful fate which primitive law could inflict. The offender . . . was driven forth naked into the wild.”).

150. As a noun, the word “outlaw” means a fugitive from the law; a habitual criminal; a rebel; a nonconformist; or a person excluded from normal legal protection and rights. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1249 (Joseph P. Pickett et al. eds., Houghton Mifflin, 4th ed. 2000). As a verb, it means “to declare illegal; to place under a ban; to prohibit; or to deprive one of the protection of the law.” *Id.* As a noun, “exile” is commonly defined as an unwilling absence from a home country, or place of residence, banishment, or official expulsion from a home, country, or area. As a verb, “exile” means to banish, to order someone to leave and stay away from a home, country or place. MSN Encarta, *available at* http://www.encarta.msn.com/dictionary/_exile.html (2006).

151. Phillip Morris USA, Inc. v. Tolson, 626 S.E.2d 853, 856-57 (N.C. Ct. App. 2006).

At one time, the term "outlawed" appeared in the North Carolina Outlawry Statute, former section 15-48. Under that statute, judges and magistrates were authorized to issue proclamations declaring accused felons fugitives from the law.¹⁵² The statute also provided that, if an accused felon failed to surrender, "any citizen of the State may capture, arrest, and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation of any crime."¹⁵³

In 1976, the Federal District Court for the Eastern District of North Carolina declared the Outlawry Statute void as procedurally deficient under the Due Process Clause of the Fourteenth Amendment and unconstitutionally capricious and irrational under the Equal Protection Clause.¹⁵⁴ The statute was repealed the following year and superseded by the North Carolina Uniform Criminal Extradition Act, codified at N.C. Gen. Stat. section 15A-721, *et seq.* The term "outlaw" does not appear in the Uniform Act. The term "outlawed," within the meaning of Article I, section 19, cannot be interpreted by reference to the Outlawry Statute.

Likewise, the term "exiled" cannot be construed as an order of banishment, compelling an individual to leave the State. With or without due process, such an order is void. In *State v. Doughtie*,¹⁵⁵ after sentencing a defendant to two years on the road, the trial court suspended the sentence on condition the defendant leave the State of North Carolina and not return for two years.¹⁵⁶ The North Carolina Supreme Court reversed on grounds that the trial court's order was "in all practical effect a sentence of banishment or exile for two years."¹⁵⁷ The court held that no North Carolina court has the power to pass a sentence of banishment, and if it does so, the sentence is void.¹⁵⁸ In doing so, the court acknowledged:

In many cases this court has sustained the suspension of sentences on condition that the defendant remain for a fixed period of time of good behaviour [sic], pay a certain sum of money, etc.; conditions which were favorable to the defendant, permitting him if he obeyed the conditions to avoid serving the sentence, and in furtherance of sound public policy.¹⁵⁹

152. N.C. GEN. STAT. § 15-48 (repealed 1977).

153. *Id.*

154. *Autry v. Mitchell*, 420 F. Supp. 967, 970-72 (E.D.N.C. 1976).

155. *State v. Doughtie*, 74 S.E.2d 922 (N.C. 1953).

156. *Id.* at 924.

157. *Id.*

158. *Id.* See also, *State v. Culp*, 226 S.E.2d 841 (N.C. Ct. App 1976) (sentence of two years suspended on condition that defendant remove his trailer to some other location in the county is, in practical effect, a sentence of banishment for two years and therefore void).

159. *Id.*

The court's reasoning in *Doughtie* applies with equal force to expulsion and long-term suspensions of public school students, which often "represent a lost moment to teach children about respect, and a missed chance to inspire their trust in authority figures."¹⁶⁰ Students may act out at school for any number of reasons, including stress induced by family members or home situations. Such a student "could benefit from interventions to get on track in her education, but is excluded from the very institution that could and should offer help."¹⁶¹

There is no more certain way in which to make young people in whom rest the seeds of potential less likely to succeed than to rob them of their basic rights, place on them the stigma of the gang membership, and banish them to the perpetual pall of criminality. Perfectly obvious is that outlawing and exiling our public school students is the very antithesis of education.

The Constitution is a living instrument. All of its words have meaning.¹⁶² "It is proper to assume that a constitution is intended to meet and to be applied to new conditions and circumstances as they may arise in the course of the progress of the community."¹⁶³ Public school students who are publicly accused of gang membership and expelled or suspended long term are, in every sense, "outlawed" and "exiled." If these words, as used in the North Carolina Constitution Law of the Land, are to have any meaning at all, no other construction is possible.

4. *Void for Vagueness*

Essential to the notion of constitutional due process is the requirement that a law or regulation must provide adequate notice of the conduct prohibited and must offer clear guidance for those who enforce it.¹⁶⁴ To survive a constitutional challenge based on vagueness, a disciplinary policy must be written with "sufficient definiteness that

160. OPPORTUNITIES SUSPENDED, *supra* note 9, at 12 (citing Dirk Johnson, *Schools' New Watchword: Zero Tolerance*, N.Y. TIMES, Dec. 1, 1999, at A1).

161. Hanson, *supra* note 3, at 327 (citing Gail Morrison, Editorial, 'Zero Tolerance' Policies Becoming Sticky Webs, 93106 THE FAC. & STAFF NEWSPAPER, VOL. 13, NO. 17, (Santa Barbara, Cal.), May 12, 2003, available at <http://www.instdv.ucsb.edu/93106/2003/May12/zero.html> (Morrison, a school psychologist, asserts that many students who are not aggressive or violent are getting stuck in the zero tolerance web.)).

162. *State v. Emery*, 31 S.E.2d 858, 866 (N.C. 1944) (Rules of construction are "intended to make of the constitution a living thing, prospective in its application, applicable to the needs of humanity and the changed conditions of society where it is possible for the provisions to be so construed.").

163. *Id.*

164. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997). See also Jesse Christopher Cheng, *Gang-Specific Policies and Regulations in the K-12 Educational Context*, 2 WHITTIER J. OF CHILD & FAM. ADVOC. 55, 64 (2003) (discussing the dual conditions necessary to survive a constitutional challenge based on vagueness).

ordinary people can understand what conduct is prohibited” and must define the conduct prohibited “in a manner that does not encourage arbitrary and discriminatory enforcement.”¹⁶⁵ A school disciplinary policy that fails in either respect is subject to challenge as unconstitutionally vague.

In short, a regulation is void-for-vagueness if it “forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application” Second, the void-for-vagueness doctrine prevents arbitrary and discriminatory enforcement.¹⁶⁶

In *Stephenson v. Davenport Community School District*, a high school student challenged the school district’s gang policy as void for vagueness. The challenged policy stated, “Gang related activities such as display of ‘colors’, symbols, signals, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion.”¹⁶⁷ The student, who had a small cross tattooed between her thumb and index finger, was suspended from school after school officials determined her tattoo was a “gang symbol.”¹⁶⁸ She filed suit under 42 U.S.C. § 1983 against the school district, the school board, and two school officials in their individual capacity based on violations of procedural due process. The district court entered summary judgment for the school defendants, and the student appealed.

The Eighth Circuit began by noting that to “a significant portion of the world’s population,” a cross is viewed “as a representation of their Christian religious faith,” and that, as drafted, the list of “prohibited” materials included many other potential religious symbols.¹⁶⁹ “Accordingly, while a lesser standard of scrutiny is appropriate because of the public school setting, a proportionately greater level of scrutiny is required because the regulation reaches the exercise of free speech.”¹⁷⁰

Relying in part on the Supreme Court’s 1939 decision in *Lanzetta v. New Jersey*,¹⁷¹ the court concluded that, without more, the term

165. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

166. *Stephenson*, 110 F.3d at 1308 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

167. *Id.* at 1308.

168. *Id.*

169. *Id.* (citing *City of Harvard v. Gaut*, 660 N.E.2d 259, 261 (Ill. App. Ct. 1996) (officers testified at hearing that “the six-pointed star is a symbol of Judaism as well as of the gangs affiliated with the Folk Nation”)).

170. *Id.* at 1309 (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (“Given the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.”)).

171. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

“gang,” as used in the district policy, failed “to provide adequate notice of the prohibited conduct” and was therefore fatally vague.¹⁷² The statute at issue in *Lanzetta* provided:

Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.¹⁷³

Noting the numerous and varied meanings of the term “gang” found in dictionaries and in historical and sociological writings,¹⁷⁴ the Court concluded that terms the statute “employs to indicate what it purports to denounce are so vague, indefinite, and uncertain that it must be condemned as repugnant to the Due Process Clause of the Fourteenth Amendment.”¹⁷⁵ The Eighth Circuit found that, “The passage of nearly fifty years since *Lanzetta* has only added to the multiple meanings of ‘gangs.’ Experts studying gangs agree with the Supreme Court and consider the term ‘gang’ ‘notoriously imprecise.’”¹⁷⁶

“[T]he failure to define the pivotal term of a regulation can render it fatally vague.”¹⁷⁷ Since “gang” was the pivotal term in the challenged regulation, yet was undefined,¹⁷⁸ the court concluded that, “[a] person of common intelligence must necessarily guess at the unde-

172. *Stephenson*, 110 F.3d at 1310.

173. *Lanzetta*, 306 U.S. at 452.

174. *Id.* at 453-54.

175. *Id.* at 458. *Accord*, Jesse Christopher Cheng, *Gang-Specific Policies and Regulations in the K-12 Educational Context*, 2 WHITTIER J. OF CHILD & FAM. ADVOC. 55 (2003).

The majority of the vagueness claims . . . entail, in some form or another, alleged uncertainty about what comprises a “gang.” The inconsistencies among these opinions reflect disagreement within and between communities of social scientists, law enforcement officials, and citizens about how to conceive of gangs. Although courts are primarily concerned with the formal statutory context, problems arise when official policies adopt widely-disputed, common parlance notions of “gangs” without saying more.

Id. at 65-66.

176. *Stephenson*, 110 F.3d at 1310 (citing SCOTT CUMMINGS & DANIEL J. MONTI, GANGS—THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES (Albany: State University of New York Press 1993); ROBERT K. JACKSON & WESLEY D. MCBRIDE, UNDERSTANDING STREET GANGS 20 (Placerville, Calif: Copperhouse Pub. Co. 1992) (meaning of “gang activity” is “as varied as the background and perspectives of those attempting to define it”)). *Cf. Gaut*, 660 N.E.2d at 263 (“The subject matter of the law’s prohibitions is not merely broad, but open-ended and potentially limitless. The ordinance does not define, list, or explain what constitutes a ‘gang symbol’ or ‘gang colors’; it does not even define ‘gang.’”).

177. *Stephenson*, 110 F.3d at 1310. (citing Video Software Dealers Ass’n v. Webster, 968 F.2d 684, 690 (8th Cir. 1992) (criminal statute lacked “narrowly drawn, reasonable and definite standard” identifying the conduct restricted void-for-vagueness) (quoting Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 (1968))). *See also* Rios v. Lane, 812 F.2d 1032, 1038 (7th Cir. 1987) (prison regulation prohibiting “engaging or pressuring others to engage in gang activities or meetings, displaying, wearing or using gang insignia, or giving gang signals” void for vagueness).

178. *Stephenson*, 110 F.3d at 1310.

defined meaning of 'gang related activities,'" and declared the regulation "void-for-vagueness."¹⁷⁹

A regulation may be rendered void-for-vagueness if it violates the "well-recognized principle of language construction that it is inappropriate to define a word by using that same word in the definition."¹⁸⁰ In *Chalifoux v. New Caney Independent School District*,¹⁸¹ the district court declared unconstitutional a regulation that defined "gang-related apparel" as "[a]ny attire which identifies students as a group (gang-related)."¹⁸² Tautological definitions, such as "gang-related apparel" is "attire which is 'gang-related,'" are patently ambiguous and unconstitutional.

A regulation must also define the conduct prohibited "in a manner that does not encourage arbitrary and discriminatory enforcement."¹⁸³ A school disciplinary policy or regulation that "allows school administrators and local police unfettered discretion to decide what represents a gang symbol" is void.¹⁸⁴ "[A] central purpose of the vagueness doctrine [is] that 'if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.'"¹⁸⁵ Discretion cannot be absolute. Without specifically stated and enforced criteria for its exercise, discretion is absolute and "is authorization of arbitrariness."¹⁸⁶

In *Smith v. Goguen*, the Supreme Court emphasized the importance of defining prohibited conduct with specificity.¹⁸⁷ The statute before the Court attached criminal liability to anyone "who treats contemptuously the flag of the United States." The Court held the statute facially void-for-vagueness because it set forth a standard so indefinite that police and juries were free to act based on little more than their own views about how the flag should be treated.¹⁸⁸

"[G]ang symbols, as with display of the flag, take many forms and are constantly changing."¹⁸⁹ Accordingly, a school district must "'de-

179. *Id.* at 1311; Paul D. Murphy, *Restricting Gang Clothing in Public Schools: Does a Dress Code Violate a Student's Right of Free Expression?*, 64 S. CAL. REV. 1321, 1328 (1991).

180. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997).

181. *Id.*

182. *Id.* at 664.

183. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

184. *Stephenson*, 110 F.3d at 1310.

185. *Id.* at 1311 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

186. *Dobrowolska v. Wall*, 530 S.E.2d 590, 601 (N.C. Ct. App. 2000) (quoting *Brown v. Allen*, 344 U.S. 443, 496 (1953)).

187. *Smith v. Goguen*, 415 U.S. 566 (1974), cited in *Stephenson*, 110 F.3d at 1310.

188. *Id.* at 568-69. "[B]ecause display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw." *Id.* at 581.

189. *Stephenson*, 110 F.3d at 1310 (citing ROBERT K. JACKSON & WESLEY D. MCBRIDE, *UNDERSTANDING STREET GANGS* 76-77 (Placerville, Calif: Copperhouse Pub. Co. 1992)).

fine with some care' the 'gang related activities' it wishes students to avoid"¹⁹⁰ or risk arbitrary and discriminatory enforcement of its policies. "The degree of constitutional vagueness depends partially on the nature of the enactment."¹⁹¹ A school policy under which suspensions and expulsions are decided "solely on the basis of the subjective opinion of school administrators and local police" cannot withstand constitutional scrutiny.¹⁹² This is especially true in states like North Carolina, where students are constitutionally guaranteed a fundamental right to receive an equal educational opportunity.¹⁹³

While "'there are limitations in the English language with respect to being both specific and manageably brief,' [t]he gang problem, although complex, does not present such difficulties."¹⁹⁴ Ironically, the court in *Stephenson* found "evidence that a more precise definition of 'gang related activities' can be crafted" in the school district's amended gang regulation.¹⁹⁵ In *Stephenson*, the school district's amended gang policy adopted the definitions of "criminal street gangs" set out in Iowa Code section 723A.1. The district's amended policy defined a "gang" as

any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

The amended policy defined "pattern of gang activity" as "the commission, attempt to commit, conspiring to commit, or solicitation of two or more criminal acts, provided the criminal acts were committed on separate dates or by two or more persons who are members of, or belong to, the same criminal street gang."

Examples of constitutionally sound gang policies are readily available, yet many local school boards are unwilling to amend poorly drafted gang policies, no matter how constitutionally infirm. Under Durham Public School Policy 4301.10, for example, a student may be suspended for indeterminate period or even expelled for committing

190. *Id.*

191. *Id.* at 1308 (citing *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992)).

192. *Stephenson*, 110 F.3d at 1311. "[T]he law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials." *Bizzell v. Goldsboro*, 135 S.E. 50, 55 (N.C. 1926).

193. *See, e.g., Leandro v. State*, 488 S.E.2d 249, 255-56 (N.C. 1997) (applying N.C. CONST. art. I, § 15, art. IX, § 2(1)).

194. *Stephenson*, 110 F.3d at 1311, n.6 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n. of Letter Carriers*, 413 U.S. 548, 578-79 (1973)).

195. *Id.*

178 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 29:147

“any act which furthers gangs or gang-related activities.”¹⁹⁶ The policy defines a “gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of criminal acts and having a common name or common identifying sign, colors, or symbols.”¹⁹⁷

While this language is virtually identical to language found in the amended policy quoted with approval in *Stephenson*, the Durham policy falls short of a precise definition of the conduct prohibited. Unlike the policy in *Stephenson*, the Durham definition requires criminal activity of the “group,” but not that its “members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” The Durham policy subjects a student to suspension for committing “any act which furthers gangs or gang-related activities,” regardless of whether the student knowingly engaged in “gang-related activities.” As the *Stephenson* court observed, “a male student walking the halls of a [Durham] school with untied shoelaces, a Duke University baseball cap and a cross earring potentially violates the [Durham gang policy] in four ways.”¹⁹⁸

The Durham policy also prohibits the “[w]earing, possessing, using, distributing, displaying, or selling any clothing, jewelry, emblems, badges, symbols, signs or other items *which may be evidence* of membership or affiliation in any gang.”¹⁹⁹ This provision grants unfettered discretion to school officials to suspend or expel a student based on nothing more than their personal opinion of whether an item “may be evidence” of gang affiliation. Such a provision opens the door for discriminatory enforcement and is unconstitutionally vague. To paraphrase a long accepted axiom, “One man’s evidence is another man’s nonsense.”²⁰⁰

196. DURHAM PUB. SCH., STUDENT CODE OF CONDUCT POLICY 4301.10 (2006) (emphasis added), available at http://www.dpsnc.net/index.php?option=com_kb&Itemid=1&page=articles&articleid=130.

197. *Id.*

198. *Stephenson*, 110 F.3d at 1311.

199. DURHAM PUB. SCH. CODE OF STUDENT CONDUCT POLICY 4301.10, RULE 10 (2006), available at http://www.dpsnc.net/index.php?option=com_kb&Itemid=1&page=articles&articleid=129. Wake County likewise prohibits, “Wearing, possessing, using, distributing, displaying, or selling any clothing, jewelry, emblems, badges, symbols, signs, visible tattoos and body markings, or other items, or being in possession of literature that shows affiliation with a gang, or is evidence of membership or affiliation in any gang or that promotes gang affiliation.” WAKE COUNTY Bd. OF EDUC. Bd. POLICY 6424(A), available at <http://www.wcpss.net/policy-files/series/policies/6424-bp.html>.

200. Consider, for example, the admission of evidence obtained from “spectral sources,” such as apparitions seen by the accusers, once used at the Salem witchcraft trials. DAVID THOMAS KONIG, *LAW & SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY COUNTY, 1629-1692* 171-72 (Morris S. Arnold ed., University of North Carolina Press 1979).

The Durham policy also provides that, “The superintendent/designee shall consult with law enforcement officials semi-annually to establish a list of gang-related items, symbols and behaviors. The principal shall maintain this list in the main office of the school and shall notify students of the items, symbols and behaviors prohibited by this policy.” A similar policy was before the court in *Chalifoux v. New Caney Independent School District*.²⁰¹ The policy at issue in *Chalifoux* provided, “A sample list of specific items *that law enforcement agencies consider gang-related* is available in the principal’s office.”²⁰² The court held the policy void for vagueness because it delegated to law enforcement officers unfettered discretion to determine what items represented gang apparel or symbols.²⁰³

To avoid the risk of arbitrary and discriminatory enforcement by school officials and school resource officers, a school district should include a gang “validation” policy that identifies specific criteria sufficiently indicative of gang membership. To validate an individual as a gang member, statutes and school policies that require gang validation typically require school officials to establish satisfaction of three or more of the following criteria. The individual:

- is a self-proclaimed gang member;
- has tattoos of documented gang logos;
- demonstrates substantial knowledge of gang codes, hand signals, colors, and activities;
- is found in possession of writing, drawings, or photographs implicative of gang membership;
- is identified as a gang member by another law enforcement agency or other official source, such as the military or the department of corrections;
- is identified as a gang member by a parent or guardian;
- is identified as a criminal street gang member by a documented reliable informant;
- is identified as a gang member by an informant of previously untested reliability whose identification is corroborated by independent information;
- resides in or frequents a particular criminal street gang’s area and adopts their style of dress, their use of hand signs, or their tattoos;

201. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 669 (S.D. Tex. 1997).

202. *Id.* (emphasis in original).

203. *Id.*

- has been arrested more than once in the company of validated gang members for offenses which are consistent with usual criminal street gang activity, such as home invasions, drive-by shootings, or drug-related offenses; or
- has been observed on four or more occasions in the company of validated gang members.²⁰⁴

School districts should not be permitted to maintain codes of student conduct that fail to clearly inform students what conduct is prohibited or that vest unchecked discretion in school officials. If local school boards are unwilling to revise gang policies to prevent arbitrary and discriminatory enforcement, an action for declaratory judgment is proper to challenge the policies as void for vagueness.²⁰⁵

III. POTENTIAL DEFENSES

A. Failure to Exhaust Administrative Remedies

A motion to dismiss for failure to exhaust administrative remedies is treated, "according to its substance, as one challenging a court's subject matter jurisdiction" under Rule 12(b)(1).²⁰⁶ Appellate review of the trial court's order of dismissal for lack of subject matter jurisdiction is *de novo*.²⁰⁷ "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]."²⁰⁸ North Carolina courts have held that

in order to have standing for judicial review, five requirements must be satisfied: (1) the petitioner is an aggrieved party; (2) there was a final agency decision; (3) the decision was the result of a contested case; (4) all administrative remedies have been exhausted; and (5) there is no adequate procedure for judicial review under another statute.²⁰⁹

204. See e.g., ARIZ. REV. STAT. § 13-105 (2006); FLA. STAT. § 874.03 (2006); IDAHO CODE ANN. § 18-8502 (2006); S.D. CODIFIED LAWS § 22-10A-1-14 (2006); TENN. CODE ANN. § 40-35-121 (2006).

205. *Leandro v. State*, 488 S.E.2d 249, 261 (N.C. 1997) (action for declaratory judgment proper to determine the construction and validity of school board policies).

206. *Williams v. New Hanover County Bd. of Educ.*, 409 S.E.2d 753, 755 (N.C. Ct. App. 1991) (citing *Harrell v. Whisenant*, 281 S.E.2d 453, 454 (N.C. Ct. App. 1981), *disc. review denied*, 288 S.E.2d 380 (N.C. 1982)).

207. *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 614 S.E.2d 351, 353 (N.C. Ct. App. 2005) (citing *Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co.*, 563 S.E.2d 269, 274 (N.C. Ct. App. 2002). See also *Fuller v. Easley*, 553 S.E.2d 43, 46 (N.C. Ct. App. 2001) ("Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*.").

208. *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 576 S.E.2d 316, 319 (N.C. 2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 565 S.E.2d 9, 17 (N.C. 2002)).

209. *Radcliffe v. City of Dunn*, 636 S.E.2d 859, No. COA06-439, 2006 WL 3361524, at **1-2 (N.C. Ct. App., Nov. 21, 2006) (unpublished opinion) (citing *Charlotte Truck Driver Training Sch. v. N.C. DMV*, 381 S.E.2d 861, 862 (N.C. Ct. App. 1989)). In *Radcliffe*, the court interpreted and applied the definition of an "agency" under N.C. Gen. Stat. § 150B-2(la) (2005):

The requirement that a plaintiff exhaust administrative remedies before seeking judicial redress serves two main purposes:

First, exhaustion protects “administrative agency authority.” Exhaustion gives an agency “an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into [court],” and it discourages “disregard of [the agency’s] procedures.” Second, exhaustion promotes efficiency. Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in [court]. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in [court]. “And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.”²¹⁰

Exhaustion of either state judicial or state administrative remedies is not a prerequisite to the invocation of federal relief in actions brought under § 1983.²¹¹ This is especially true when violation of a substantive constitutional right, such as equal protection, is the subject of a § 1983 claim because the violation is complete when the prohibited action is taken.²¹² Beginning in 1963 with *McNeese v. Board of Education*,²¹³ the Supreme Court has “on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies.”²¹⁴ The

[A]n agency or an officer in the executive branch of the government of the State and includes the Council of the State, the Governor’s Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A *local unit of government is not an agency.*

(emphasis by court). The court held that the City of Dunn was “a unit of local government” and therefore did not fall under the statutory definition of “agency” within the meaning of § 150B-2(1a). *Id.* at *2.

210. *Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

211. *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982) (employment discrimination based on race and sex).

212. *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds*, *Monell v. Dep’t Soc. Serv.*, 436 U.S. 658 (1978).

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

Id. at 184. See also *Edward Valves, Inc. v. Wake County*, 471 S.E.2d 342 (N.C. 1996). “[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.” *Id.* at 347 (quoting *Zinermon v. Burch*, 494 U.S. 113, 124 (1990)).

213. *McNeese v. Bd. of Educ.*, 373 U.S. 668 (1963).

214. *Patsy*, 457 U.S. at 500-01 (citing *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 574 (1973); *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968); *King v. Smith*, 392 U.S. 309, 312, n.4 (1968); *Damico v. California*, 389 U.S. 416 (1967)) *Cf.* *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). (“When federal claims are premised on [§ 1983] – as they are here –

Court “has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and [has] not deviated from that position in the nineteen years since *McNeese*,”²¹⁵ regardless of whether the suit is instituted in state or federal court.²¹⁶

Two exceptions to this no-exhaustion rule have been recognized, however. First, Congress may explicitly provide that state administrative remedies must be exhausted before bringing suit under a particular federal law pursuant to § 1983. Second, Congress may implicitly require the exhaustion of state administrative remedies where “the obligation to require exhaustion of administrative remedies may be fairly understood from congressional action.” The mere provision of state administrative remedies, however, is not enough to demonstrate an implicit Congressional intent to impose an exhaustion requirement on a plaintiff seeking to bring a § 1983 action. If there is doubt as to whether an exception applies, courts should refrain from requiring exhaustion in § 1983 suits because “*Patsy* leaves no doubt that the presumption is *strongly* in favor of no exception.”²¹⁷

Actions based on violations of procedural due process present a more difficult question. The fundamental premise of procedural due process protection is notice and the opportunity to be heard; the opportunity to be heard must be at a meaningful time and in a meaningful manner.²¹⁸ “An undue burden exists, and therefore a provision of

we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.”).

215. *Id.* at 500. “Since *Patsy*, the Supreme Court, this court, and other circuit courts of appeals have confirmed that, as a general rule, exhaustion of state administrative remedies is not required prior to bringing suit under § 1983.” *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215, 218 (4th Cir. 1997) (citing *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 523 (1990) (“The availability of state administrative procedures ordinarily does not foreclose resort to § 1983.”)); *Felder v. Casey*, 487 U.S. 131, 147 (1988) (“[P]laintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court.”); *VanHarken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir. 1997) (*Patsy* expressly rejected a requirement of exhausting administrative remedies before suing under § 1983.); *Jeremy H. v. Mt. Lebanon Sch. Dist.*, 95 F.3d 272, 283 n.20 (3d Cir. 1996) (“[T]he policies of section 1983 strongly disfavor the imposition of additional exhaustion requirements.”); *Thornquest v. King*, 61 F.3d 837, 841 n.3 (11th Cir. 1995) (“[A] section 1983 claim cannot be barred by a plaintiff’s failure to exhaust state administrative remedies with respect to an unreviewed administrative action.”); *Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995) (“[E]xhaustion of state judicial or administrative remedies is not a prerequisite to the bringing of a section 1983 claim.”); *Wilbur v. Harris*, 53 F.3d 542, 544 (2d Cir. 1995) (exhaustion of state administrative remedies not required as prerequisite to action under § 1983); *Hall v. Marion Sch. Dist. No. Two*, 31 F.3d 183, 190-91 (4th Cir. 1994) (exhaustion of state administrative remedies not a prerequisite to § 1983 action)).

216. *Felder v. Casey*, 487 U.S. 131, 138 (1988). See also *Good Hope Hosp., Inc. v. N.C. DHHS*, 620 S.E.2d 873, 879 (N.C. Ct. App. 2005) (“State courts have concurrent jurisdiction with federal courts over § 1983 claims, and may hear certain constitutional claims even if administrative remedies have not been exhausted.”).

217. *Talbot*, 118 F.3d at 219 (citation omitted) (quoting *Alacare, Inc.-N. v. Baggiano*, 785 F.2d 963, 966-67 (11th Cir. 1986)) (emphasis in original).

218. *PNE AOA Media, L.L.C. v. Jackson County*, 554 S.E.2d 657, 664 (N.C. Ct. App. 2001).

law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a party seeking to exercise her constitutional right.”²¹⁹ When “[t]he question presented is the due process of fairness of the *procedures* by which discipline in public schools is administered, rather than the substantive correctness of the disciplinary decision or punishment itself; . . . exhaustion of administrative remedies is not required.”²²⁰ Due process provides heightened protection against government interference with fundamental rights and liberty interests.²²¹ The equal opportunity to receive a public school education is just such a fundamental right.

“A pleading that alleges inadequacy of administrative remedy states a claim upon which equitable relief may be granted if the circumstances warrant it.”²²² “[T]he exhaustion requirement may be excused if the administrative remedy would be futile or inadequate.”²²³ “In order, however, to rely upon futility or inadequacy, ‘allegations of the facts justifying avoidance of the administrative process must be pled in the complaint.’”²²⁴ Inadequacy of administrative remedies may arise in a number of circumstances.

The well-settled rule in North Carolina is that a constitutional challenge to a statute is “determined by the judiciary, not an administrative board.”²²⁵ Because it is the province of the judiciary to make

219. *Anderson v. Assimos*, 553 S.E.2d 63, 68 n.4 (N.C. Ct. App. 2001) (internal quotations omitted).

220. *Givens v. Poe*, 346 F. Supp. 202, 203 (W.D.N.C. 1972) (emphasis in original). “[T]here are situations in which exhaustion serves no useful purpose. Courts universally recognize that parents need not exhaust the procedures . . . where resort to the administrative process would be either futile or inadequate.” *Hoef v. Tucson Unified School Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992) (citing *Honig v. Doe*, 484 U.S. 305, 327 (1988); *Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984); *Kerr Ctr. Parents Ass’n v. Charles*, 897 F.2d 1463, 1469 (9th Cir. 1990); *Wilson v. Marana Unified Sch. Dist. No. 6*, 735 F.2d 1178, 1181 (9th Cir. 1984)).

221. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

222. *Lloyd v. Babb*, 251 S.E.2d 843, 851 (1979) (citing 2 COOPER, *STATE ADMINISTRATIVE LAW* 579 (1965)).

223. *Justice for Animals, Inc. v. Robeson County*, 595 S.E.2d 773, 777 (N.C. Ct. App. 2004) (citing *Huang v. N.C. State Univ.*, 421 S.E.2d 812, 815 (N.C. Ct. App. 1992)).

224. *Id.* (quoting *Bryant v. Hogarth*, 488 S.E.2d 269, 273 (N.C. Ct. App. 1997), *disc. review denied*, 494 S.E.2d 406 (N.C. 1997)). See also *Jackson v. N.C. Dep’t of Human Res.*, 505 S.E.2d 899, 904 (N.C. Ct. App. 1998), *disc. review denied*, 537 S.E.2d 213 (N.C. 1999) (“The burden of showing inadequacy [of the administrative remedy] is on the party claiming inadequacy, who must include such allegations in the complaint.”).

225. *Shell Island Homeowners Ass’n v. Tomlinson*, 517 S.E.2d 406, 412 (N.C. Ct. App. 1999) (quoting *Meads v. N.C. Dep’t of Agric.*, 509 S.E.2d 165, 174 (N.C. 1998)). In *Meads*, defendant agency argued lack of subject matter jurisdiction on grounds that the plaintiff had failed to exhaust administrative remedies by seeking a declaratory judgment from the agency as to the constitutionality of the regulations at issue. The North Carolina Supreme Court stated:

[Defendant’s] argument, however, ignores our well-settled rule that a statute’s constitutionality shall be determined by the judiciary, not an administrative board. Because it is the province of the judiciary to make constitutional determinations, any effort made by [plaintiff] to have the constitutionality of the . . . regulations determined by [defendant agency]

constitutional determinations, administrative remedies are inadequate, and plaintiffs are not required to exhaust them before bringing a declaratory judgment action to challenge the constitutional validity of a school board policy.²²⁶

In *Lloyd v. Babb*,²²⁷ a voting rights case, the available administrative remedy would have required the plaintiffs to individually challenge the voting rights of between 6,000 and 10,000 persons. On that basis, the North Carolina Supreme Court held that plaintiffs were not provided an effective administrative remedy and that plaintiffs' claim for equitable relief could properly go forward.²²⁸ In cases alleging racially disparate disciplinary actions, the same reasoning would apply. In *Copper v. Denlinger*,²²⁹ for example, to support going forward as a class action, plaintiffs alleged, "On information and belief and based on statistics published by the Durham Public Schools, the class may include as many as 10,000 Durham Public School students."²³⁰

The school board's failure to properly publish disciplinary policies and procedures may also render administrative remedies inadequate.²³¹ By statute, local boards of education are required to

adopt policies not inconsistent with the provisions of the Constitutions of the United States and North Carolina, governing the conduct of students and establishing procedures to be followed by school officials in suspending or expelling any student, or in disciplining any student if the offensive behavior could result in suspension, expulsion, or the administration of corporal punishment . . . Each local board shall pub-

would have been in vain. Accordingly, given the constitutional nature of this issue, the [administrative remedies] were inadequate, and therefore [plaintiff] was not required to exhaust them.

Meads, 509 S.E.2d at 174 (citing *Great Am. Ins. Co. v. Gold*, 118 S.E.2d 792 (N.C. 1961); *Johnston v. Gaston County*, 323 S.E.2d 381 (N.C. Ct. App. 1984), *disc. review denied*, 329 S.E.2d 392 (N.C. 1985)).

226. *Meads*, 509 S.E.2d at 174 (N.C. 1998).

227. *Lloyd v. Babb*, 251 S.E.2d 843 (N.C. 1979).

228. *Id.* at 851. In *Lloyd*, the plaintiffs alleged a pattern of illegal practices on the part of election officials. The defendants responded that plaintiffs had failed to exhaust available administrative remedies and moved to dismiss the complaint for lack of subject matter jurisdiction. The North Carolina court disagreed:

In this plaintiffs are essentially attempting to require election officials to perform their legal duties. Plaintiffs' standing to make such a claim has not been challenged. Nor should their failure to make challenges preclude them from seeking this kind of relief. If plaintiffs' allegations are true, the challenge procedure would not provide an effective remedy. The challenge procedure might correct past wrongs by removing from the voting rolls those who had been improperly registered. It could do nothing, however, to halt ongoing improprieties nor could it prevent future ones. In summary, insofar as plaintiffs allege continuing improprieties in the registration practices of [election officials] they have stated a claim upon which relief can be granted.

Id. at 852.

229. *Copper v. Denlinger*, 06 CVS 03257 (N.C. filed Mar. 24, 2006), *appeal docketed*, No. COA07-205, (N.C. Ct. App. Feb. 14, 2007).

230. Complaint at ¶ 18, *Cooper* (No. 06 CVS 03257).

231. *Orange County v. N.C. Dept. of Transp.*, 265 S.E.2d 890, 908 (N.C. Ct. App. 1980).

lish all the policies mandated by this subsection and *make them available* to each student and his parent or guardian at the beginning of each school year.²³²

It is not uncommon for school board policies to be “published,” yet not made “available” to all students and their parents. School board policies that are published on-line are generally not available to economically disadvantaged students and their families. Policies that are not clearly written are likewise not available to many students and parents. Administrative remedies provided by such policies are inadequate.

While it is generally said that ignorance of the law is no excuse for a failure to comply with the law, such a rule does not apply where the citizen is, as a matter of practicality, denied a reasonable means for finding out what the law is in the first place. . . . [I]t would contravene the most rudimentary principles of due process for [the court] to deny [suspended or expelled students] a right of judicial review because they had not exhausted an administrative remedy . . . which is effectively hidden in the catacombs of the [school board] bureaucracy.²³³

The exhaustion requirement may be excused by futility of the administrative remedy, as when a school board creates barriers or routinely fails to enforce its published disciplinary policies and procedures. In *Copper v. Denlinger*, for example, plaintiffs alleged that, as a common policy, custom, and practice, the superintendent of Durham Public Schools intentionally failed to timely notify minority students of their right to appeal a long-term suspension to the school board, thereby effectively precluding exhaustion of their administrative remedies.²³⁴

Under section 115C-391 of the North Carolina General Statutes, a student suspended for more than ten days by the superintendent may appeal the superintendent’s decision to the local board of education. A decision of the local board on appeal or a decision of expulsion by the local board is final and “is subject to judicial review in accordance

232. N.C. GEN. STAT. § 115C-391(a) (2006) (emphasis added). These policies must also include “a reasonable dress code for students.” *Id.*

233. *Orange County*, 265 S.E.2d at 908.

234. *Copper*, *supra* note 31, at ¶¶ 273-78. Two plaintiffs alleged that the superintendent notified them by letter that she had approved the principal’s recommendation of long-term suspension for the remainder of the school year and advised them of their right to appeal her decision to the school board by delivering written notice of appeal to her office by January 9, 2006. Plaintiffs alleged that the superintendent’s letters, both of which were dated December 14, 2005, were not postmarked until January 14 and January 16, 2007, well after the appeal deadline had expired. A third plaintiff, also suspended for the remainder of the school year, received no notice, timely or otherwise, of his right to appeal the superintendent’s decision to the school board.

with Article 4 of Chapter 150B of the General Statutes.”²³⁵ Under the provisions governing the right to judicial review,

[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.²³⁶

In addition to allegations that administrative remedies were precluded by the failure to timely notify plaintiffs of their right to appeal their suspensions, the complaint in *Copper v. Denlinger* also alleged that, on December 13, 2004, the superintendent suspended one student for the remainder of the school year, that the student’s family retained counsel, and that the school board ignored repeated letters from counsel explaining that the student had missed the appeal deadline because his father was hospitalized for major surgery and asking the board to extend the time to appeal the superintendent’s decision of long-term suspension.²³⁷ Counsel’s letters were dated February 17, March 22, and April 5, 2005.²³⁸ In his March 22, 2005, letter, counsel wrote, “The possible mistaken suspension of a student who has no serious record of misbehavior and is academically accomplished, should be seriously and timely considered.”²³⁹ Counsel’s letter of April 5, 2005, stated, “To refuse a hearing and state your reasons is one thing. However, to simply ignore the plea of a parent and child who have an arguable right to appeal is unconscionable,” and that, “The Constitution, case law and your Board Policy provide the opportunity for every student to challenge allegations made against them in a long term suspension. This right has been denied to [the suspended student] with no reason given.”²⁴⁰

On May 12, 2005, five months after the student was suspended, three months after receiving the first letter from the student’s retained counsel, and with less than two weeks remaining in the school year, the school board agreed to retroactively reduce the student’s long-term suspension to ten days.²⁴¹ The board’s delay of five months profoundly impacted the student’s educational progress and indicated a

235. N.C. GEN. STAT. § 115C-391(e) (2006).

236. N.C. GEN. STAT. § 150B-43 (2006).

237. *Copper*, *supra* note 234, at ¶¶ 138-52.

238. *Id.* at ¶¶ 143, 145, 149.

239. *Id.* at ¶ 146.

240. *Id.* at ¶¶ 150-51.

241. *Id.* at ¶ 152.

careless, if not willful, disregard of his rights to a fair administrative remedy. Regrettably, in many instances, disregard for the administrative remedy denied to students of color is not the worst of it.

The futility of administrative remedies is all too evident when school officials falsify documents to cut off a student's right to appeal to the school board a superintendent's decision of long-term suspension²⁴² or when a school board willfully turns a deaf ear to repeated complaints of equal protection and due process violations by the superintendent and other school officials.²⁴³

While school policies may ostensibly provide administrative remedies for students who are expelled or suspended long-term, if the administrative remedies are inadequate, they need not be exhausted before bringing claims based on equal protection or due process violations. Practitioners should be prepared to face these challenges head-on.

B. Immunity

A defense based on immunity may be raised in a motion to dismiss under Rule 12(b) made prior to any responsive pleading.²⁴⁴ At the initial pleading stage, a defense of immunity is treated as a motion to dismiss for failure to state a claim under Rule 12(b)(6), and the plaintiff's allegations of fact are taken as true.²⁴⁵ In ruling on a motion to dismiss, a trial court may look only to the allegations of the complaint to determine whether qualified immunity is established.²⁴⁶ Beyond the initial motion to dismiss, defendants bear the burden of establishing a justification for immunity.²⁴⁷

242. *Id.* at ¶¶ 99-120. The complaint alleges that a student and his mother met with the school principal and others on October 6, at which time the student was told he could return to school on October 14. Upon his return to school on October 14, a counselor presented the student with a letter from the superintendent dated October 8 approving a transfer request "effective immediately." The request was allegedly submitted by the school principal on October 2, four days before he told the student he could return on October 14. These two documents made it appear that the student had only been suspended short-term, from which he had no right to appeal. The student was in fact suspended for thirteen days, or long-term, from which he was owed a right to appeal his suspension.

243. *Id.* at ¶ 517 ("In the fall of 2005, in response to growing public outcry against the ongoing racial discrimination in Durham Public Schools, [white school board members] ordered the arrest of the most outspoken citizens, . . . and refused to hear their complaints.").

244. *Toomer v. Garrett*, 574 S.E.2d 76, 86 (N.C. Ct. App. 2002), *appeal dismissed & review denied*, 579 S.E.2d 576 (N.C. 2003).

245. *Meyer v. Walls*, 471 S.E.2d 422, 429 (N.C. Ct. App. 1996). *See also Toomer*, 574 S.E.2d at 86 (when raised by motion, immunity generally raised by Rule 12(b)(6) motion to dismiss).

246. *Toomer*, 574 S.E.2d at 86 (citing *McWaters v. Rick*, 195 F. Supp. 2d 781, 789 (E.D. Va. 2002)). *See also Harwood v. Johnson*, 388 S.E.2d 439, 442-43 (1990) (motion to dismiss properly granted where a defendant is immune from suit under alleged facts taken as true).

247. *Hyatt v. Town of Lake Lure*, 225 F. Supp. 2d 647, 656 (W.D.N.C. 2002). *See also Stephenson v. Town of Garner*, 524 S.E.2d 608, 612 (N.C. Ct. App. 2000) (burden on defendant to

1. *Sovereign Immunity*

The doctrine of sovereign immunity is not available as a defense to claims based on federal law,²⁴⁸ nor does it bar claims brought under the North Carolina State Constitution. “[W]hen there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail.”²⁴⁹ “[T]he doctrine of sovereign immunity does not bar a direct claim against the State when the claim is based on a violation of the Declaration of Rights of the North Carolina Constitution.”²⁵⁰

In *Fennell v. Stephenson*, the trial court dismissed plaintiff’s action alleging a pattern and practice of racially-influenced traffic stops of Black motorists by the North Carolina Highway Patrol. The North Carolina Court of Appeals reversed. “Because this claim alleged a violation of [plaintiff’s] right to equal protection under the North Carolina Constitution, the Highway Patrol was not entitled to assert the doctrine of sovereign immunity as a defense to this claim.”²⁵¹

2. *Qualified Immunity*

In certain cases brought under § 1983, qualified immunity may serve to protect government officials from personal liability.²⁵² Whether qualified immunity should shield an officer from personal liability depends on three considerations: (1) whether the plaintiff has identified a specific constitutional right; (2) whether that right is clearly established; and (3) whether a reasonable person in the officer’s position would have known the actions complained of would violate that right.²⁵³ Defendants have the burden to establish the defense of qualified immunity.²⁵⁴

The first two considerations, whether plaintiffs have identified a specific constitutional right and whether that right is clearly established, are questions of law for the court, more properly decided at the

justify legislative immunity); *Moore v. Evans*, 476 S.E.2d 415, 425-26 (N.C. Ct. App. 1996) (burden on defendant to justify qualified immunity).

248. *Corum v. Univ. of N.C.*, 413 S.E.2d 276 (N.C. 1992). See also *Ripellino v. N.C. Sch. Bd. Ass’n*, 581 S.E.2d 88, 93 (N.C. Ct. App. 2003) (sovereign immunity no bar to actions brought under § 1983).

249. *Corum*, 413 S.E.2d at 292.

250. *Fennell v. Stephenson*, 528 S.E.2d 911, 917-18 (N.C. Ct. App. 2000) (quoting *Corum*, 413 S.E.2d at 292). See also *Fabrikant v. Currituck County*, 621 S.E.2d 19, 25 (N.C. 2005) (for purposes of motion to dismiss, complaint need only allege facts that, if taken as true, are sufficient to establish waiver of sovereign immunity and lack of specificity is not fatal).

251. See *Fennell*, 528 S.E.2d at 918.

252. *Moore v. Evans*, 476 S.E.2d 415, 425 (N.C. Ct. App. 1996).

253. *Id.* at 425-46 (citing *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992)).

254. *Id.*

summary judgment stage.²⁵⁵ For purposes of a motion to dismiss, the allegations in a plaintiff's complaint must be accepted as true. The threshold inquiry is whether plaintiffs' allegations, taken as true, establish a constitutional violation.²⁵⁶

The second inquiry, whether the identified right was clearly established, is also a question of law.²⁵⁷ In making this determination, the Court need not look beyond decisions of the United States Supreme Court, the Fourth Circuit Court of Appeals, and the Supreme Court of North Carolina.²⁵⁸ A public school student's constitutional rights to due process and equal protection are clearly and incontrovertibly well-established.²⁵⁹

The third consideration, whether a reasonable person in the officer's position would have known that challenged actions would violate that right, requires a factual determination of any disputed aspects of the officer's conduct.²⁶⁰ The finder of fact must first determine "whether the conduct at issue actually occurred," and if so, "whether a reasonable officer would have known that his conduct would violate" the right identified.²⁶¹ If there are disputed questions of fact regarding the officer's conduct, this inquiry cannot be answered as matter of law, even at the summary judgment stage.²⁶²

3. *Public Official Immunity*

Public official immunity protects public officials from personal liability for negligence.²⁶³ In proper cases, a public official "engaged in the performance of governmental duties involving the exercise of judgment and discretion" is shielded from liability unless his actions "were allegedly: (1) corrupt; (2) malicious; (3) outside of and beyond the scope of his duties; (4) in bad faith; or (5) willful and deliber-

255. *Davis v. Town of S. Pines*, 449 S.E.2d 240, 244 (N.C. Ct. App. 1994) (citing *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992)).

256. *Hyatt v. Town of Lake Lure*, 225 F. Supp. 2d 647, 663 (W.D.N.C. 2002) (citing *Hope v. Pelzer*, 536 U.S. 730, 736 (2002)). *See also id.* (whether plaintiff has identified specific constitutional right is a question of law for the court).

257. *Id.*

258. *Id.* at 663-64.

259. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975) (student's right of due process); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-96 (1954) (equal rights to public education); *Hyatt v. Town of Lake Lure*, 225 F. Supp. 2d 647 (W.D.N.C. 2002) (equal protection under the federal and state constitutions is a clearly established right of which a reasonable public official would have known), cited with approval in *Toomer v. Garrett*, 574 S.E.2d 76, 87 (N.C. Ct. App. 2002).

260. *Davis*, 449 S.E.2d at 244 (citing *Lee v. Greene*, 442 S.E.2d 547, 550 (N.C. Ct. App. 1994)).

261. *Id.*

262. *Id.* at 246. *See also Lee*, 442 S.E.2d at 550 (summary judgment improper if there are disputed questions of fact regarding the officers' conduct).

263. *Meyer v. Walls*, 489 S.E.2d 880, 888 (N.C. 1997).

ate.’”²⁶⁴ However, immunity does not apply when the official is engaged in purely ministerial functions.²⁶⁵

4. *Legislative Immunity*

School board members may sometimes assert the defense of legislative immunity. To establish this defense, defendants must show: (1) they were acting in a legislative capacity when the challenged acts were committed; and (2) their acts were not illegal.²⁶⁶ Illegal acts of race discrimination are not “in aid of legislative activity” for purposes of legislative immunity.²⁶⁷

5. *Quasi-Judicial Immunity*

If applicable, the doctrine of quasi-judicial immunity protects individual public school officials from personal liability.²⁶⁸

In determining whether quasi-judicial immunity should be available, courts consider three main criteria: (1) whether the official’s functions are similar to those of a judge; (2) whether a strong need exists for the official to perform essential functions for the public good without fear of harassment and intimidation; and (3) whether adequate procedural safeguards exist to protect against constitutional deprivations.²⁶⁹

A complaint, which does not allege actions taken by school defendants during hearings related to disciplinary actions and appeals, does not give rise to quasi-judicial immunity as a possible defense.

C. The Political Question Doctrine

The political question doctrine is “based on constitutional provisions relating to the distribution of powers among the branches of government, and it is as a function of the separation of powers that political questions are not determinable by the judiciary.”²⁷⁰ Under the political question doctrine, a question may become “not justiciable . . . because of the separation of powers provided by the Constitution.”²⁷¹ “The . . . doctrine excludes from judicial review those contro-

264. *Id.* at 888-89 (quoting *Smith v. Hefner*, 68 S.E.2d 783, 787 (N.C. 1952)).

265. See *Hyatt v. Town of Lake Lure*, 225 F. Supp. 2d 647, 657 (W.D.N.C. 2002) (“Insofar as the acts of composing and sending letters to Plaintiff might be grounds for liability, these acts of Defendant Place are ministerial in nature and not entitled to immunity.”).

266. *Stephenson v. Town of Garner*, 524 S.E.2d 608, 612 (N.C. Ct. App. 2000) (citing *Vereen v. Holden*, 468 S.E.2d 471, 473 (N.C. Ct. App. 1996)).

267. See e.g., *Scott v. Greenville County*, 716 F.2d 1409, 1422 (4th Cir. 1983) (illegal acts, such as bribery, “obviously” are not in aid of legislative activity).

268. *Hyatt*, 225 F. Supp. 2d at 656.

269. *Howard v. Food Lion, Inc.*, 232 F. Supp. 2d 585, 595 (M.D.N.C. 2002).

270. 16 C.J.S. *Constitutional Law* § 309 (2006).

271. *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001) (quoting *Powell v. McCormack*, 395 U.S. 486, 517 (1969)).

versies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions”²⁷²

School defendants may move to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction on grounds that claims relating to adoption, interpretation, and enforcement of school policies are non-justiciable under the political question doctrine. The North Carolina Supreme Court has specifically addressed and rejected this argument.²⁷³

It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution. When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits. Therefore, it is the duty of this Court to address plaintiff-parties’ constitutional challenge to the state’s public education system. Defendants’ argument is without merit.²⁷⁴

As the Supreme Court observed even before *Brown v. Board of Education*,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²⁷⁵

IV. CONCLUSION

*Ubuntu*²⁷⁶

The North Carolina State Constitution decrees that, “Religion, morality, and knowledge being necessary to good government and the

272. *Id.* (quoting *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230, (1986)).

273. *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

274. *Id.* at 253-54 (citing *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 159 S.E.2d 745, 750 (N.C. 1968); *Ex parte Schenck*, 65 N.C. 353, 367 (1871); *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787)). *See also Maready v. City of Winston-Salem*, 467 S.E.2d 615, 620 (N.C. 1996) (“It is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith.”). *Cf. Baker v. Carr*, 369 U.S. 186, 209-10 (1962) (“[I]f ‘discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.’”) (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)).

275. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

276. *Ubuntu*, a Bantu word, defines what it means to be truly human. “We affirm our humanity when we acknowledge that of others.” *Buzzle.com: Intelligent Life on the Web*, available at <http://www.buzzle.com/editorials/7-22-2006-103206.asp>.

happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."²⁷⁷ Congress has declared it to be:

the policy of the United States that a high quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and [will] improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others.²⁷⁸

What we in America have yet to grasp is that our civic health is similarly indivisible. We have embarked on a path of triage, lost in the fantasy that by banishing children at risk from our schools, we are delivering law, order, and morals. On the contrary: there is no morality in depriving any child of the most basic tools she needs to succeed in life, and there is no order in constructing what threatens to be a large, enduring, and hopeless underclass.²⁷⁹

With each passing day, our young people journey further along the uncertain road to adulthood. The nature of their journey, the kind of adults they will become, the lives they will lead, the joy they will know, the good they will do, will be profoundly influenced by the educational opportunities open to them along the way. Without question, providing our children a safe environment in which to learn is a critical concern. Just as critical, however, is what they are to learn in that environment.

Zero tolerance does not teach citizenship. It teaches racial mistrust by perpetuating the stereotype of young black men and other children of color as gang members and criminals. It teaches cowardliness. It teaches self-interest, disrespect, and intolerance. It teaches dishonesty and irresponsibility. It teaches bigotry. It teaches complicity. It is a lie. In far too many instances, zero tolerance is a pretext offered by school boards and school officials to avoid their duty to provide an equal educational opportunity to all students and to teach poor minority

Ubuntu really means that I am because you are. We belong together. Our humanity is bound up with one another. We say in our languages, a person is a person through other persons. A solitary human being is a contradiction in terms. I learn how to become a human being through association with other human beings.

ABDULKADER TAYOB & WOLFRAM WEISSE, *RELIGION AND POLITICS IN SOUTH AFRICA: FROM APARTHEID TO DEMOCRACY* 72 (Waxmann Publishing Co. 1999) (quoting Desmond Tutu as quoted by Hallencreutz and Palmberg).

277. N.C. CONST. art. IX § 1.

278. Improving America's School Act of 1994, 20 U.S.C.S. § 6301(a)(1) (1994).

279. Blumenson and Nilsen, *supra* note 107, at 117. "On average, a high school dropout costs society between \$243,000 and \$388,000 over his or her lifetime due to both a lack of productivity and dependence on government subsidies." Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1065 (2001) (citing Howard N. Snyder & Melissa Sickmund, U.S. Dep't of Just., *Juvenile Offenders & Victims: 1999 National Report* 82-83). Noting that lack of education imposes even higher costs on society when high school dropouts become involved in crime or drug use, in which case the societal cost rises to between \$1.7 and \$2.3 million dollars over a lifetime. *Id.*

children the skills they will need to walk away from poverty and take their rightful place in our community.

No child should be denied the benefit of a public school education except in the most compelling circumstances and then only after the accused child is afforded the rights of due process guaranteed by the Constitutions of the United States and the State of North Carolina. In a nation that pledges allegiance to the precepts of liberty and justice for all, the frequency with which racial animus deprives our most vulnerable citizens of their fundamental, constitutionally mandated civil rights remains a shadow of shame.²⁸⁰ When public school officials fail to honor the pledge of allegiance and the promise of *Brown v. Board of Education*, persons of integrity and ability, especially members of the legal profession, must step forward on their behalf.

Consider this a call to arms.

280. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALTIES AND FUTURE REPARATIONS* 128 (New York: Routledge 2000). Most white Americans today believe that racial oppression is no longer a problem in this country. They are mistaken. "Today most white Americans greatly underestimate the degree to which the nation is still such a total racist society." *Id.* at 26. "In one way or another, all black Americans continue to suffer discrimination because white domination of black Americans and other people of color remains a major organizing principle for life in the United States." *Id.* at 128.