

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

JOHN DOE, A MINOR, Appellant,

v.

ALLENDALE COUNTY SCHOOL, Respondent.

Appellate Case No. 2018-001567

The Honorable Perry M. Buckner, III  
Allendale County  
Trial Court Case No. 2018-CP-03-00102

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APPELLANT'S INITIAL BRIEF

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SC Court of Appeals

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## STATEMENT OF ISSUE ON APPEAL

- I. Did the school board violate the Student's due process rights by upholding a "zero-tolerance" policy in regards to a weapon being found in the locked trunk of the student's vehicle refusing to consider mitigating facts such as the vehicle belonging to his father, the Student having no knowledge of the found weapon, the Student having no intent to bring the weapon or use the weapon, and the Student causing no harm or disruption?

## STATEMENT OF THE CASE

### **1. Procedural History**

This Appeal arises from a disciplinary proceeding before the Allendale Fairfax County School Board. The original incident occurred on March 22, 2018, wherein the school conducted a campus-wide search, requiring student X.H. ("Student") to open the trunk of the vehicle he drove to campus. The Student consented, and two handguns registered to his father, a federal law enforcement officer, were discovered. Upon discovery, Student was found in violation of S.C. Code Section 59-63-235 for bringing a firearm to school grounds. The Hearing regarding the violation occurred on April 13, 2018. The Student had no attorney present at this initial hearing. The record includes no transcript of the hearing, and no evidence gathered by the school other than incident report. The Hearing Panel consisted of three (3) members, Dr. McClough, Mr. Grant, and Mr. Hayes. The Hearing outcome resulted in the Student being found guilty of possession of firearms at AFHS and expelled him from school for 365 calendar days. The Student appealed this decision and requested a hearing before the County School Board. The

Student appeared before the School Board *pro se*, and the Board voted to uphold the 365-day expulsion so long as the Student was provided home-based educational services simultaneously.

The Student secured counsel and filed an appeal in Circuit Court timely on May 21, 2018. The Court heard arguments on July 16, 2018 and Judge Perry J. Buckner, III issued his order finding that the Board's decision to expel the Student was supported by substantial evidence.

## **2. The evidence presented**

During the Circuit Court proceedings, the parties agreed upon the record of the Board's decision to include the following: A Hearing Procedures and Information Form; Letter to Lynda Hall; Plaintiff's brief; Appellant's Disciplinary History, Grade Report and Dates of Attendance; District Policy JICI; District Policy JKE; Hearing Outcome Form; and Office Holmes's Incident Report. Now included the Court Order at 2, *Hall v. Allendale County School District*, (2018) 2018-CP-03-00102.

## **3. Standard of review**

A school board's decision to expel a student from school "may be appealed to the proper court." S.C.Code Ann. § 59-63-240 (Supp.2008); *see Davis v. Sch. Dist. of Greenville County*, 374 S.C. 39, 44, 647 S.E.2d 219, 222 (2007) (stating the expulsion provision in the statute, unlike the suspension provision, expressly grants the student a right to appeal to the proper court). Judicial review of the school board's decision is limited to ascertaining whether the board's decision is supported by substantial evidence. *Laws v. Richland County Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978). The court further has the authority to review

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decisions to prevent the loss of educational opportunity to students. *Abbeville Co. School Dist. v. The State of South Carolina, et. al.*, 410 S.C. 619, 623 - 27 (2014).

## ARGUMENTS

### **I. The School District violated the Student's Due Process Rights.**

The U.S. Constitution requires Due Process to prevent the government from infringing upon citizen's rights. Due Process, in the context of public education, should include meaningful substantive due process rights, which should require school districts to consider factors before infringing on a student's educational opportunity. Substantive due process rights are incompatible with zero-tolerance policies, as they prevent relevant factors such as knowledge, intent, or harm from being analyzed when expelling or suspending a child, which denies them educational opportunity. Because the School District used the broadest definition of the alleged violated statute regarding weapons brought to school in a zero-tolerance application, failed to consider relevant factors required to minimally preserve substantive due process, and because continued application of zero-tolerance policies is detrimental to schools' pedagogical interests, the Court should overturn the School District's expulsion.

#### **A. The School District's expulsion of the student under their implementation of a Zero-Tolerance policy denied the student educational opportunity and his Constitutional Right to Due Process.**

Education is foundational to our society. The U.S. Supreme Court made this clear in *Brown v. Board of Education*, as the Court stated,

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance law 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. 347 U.S. 483, 493 (1954).

South Carolina's Constitution solidifies this idea. Article XI, section 3, provides the right to education, stated as follows:

The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable. S.C. Const. art XI, §3.

Our Constitution and laws reflect our values that education is a cornerstone in our community. Because of this, constitutional protections are required before such educational opportunity is taken away from a student. Unfortunately, zero-tolerance policies remove discretion from the school during the suspension and expulsion process. Zero-Tolerance policies “are regulations that mandate specific consequences in response to outlined student misbehaviors, typically without any consideration for the unique circumstances surrounding a given incident. Rocio Rodriguez Ruiz, *School to Prison Pipeline: An Evaluation of Zero Tolerance Policies and their Alternatives*, 54 Hous. L. Rev 803 – 37, 808 (Winter 2017). The “school-to-prison-pipeline” as its been coined, refers to “the idea that a school’s harsh punishments – which typically push students out of the classroom—lead to the criminalization of student misbehaviors and result in increasing these children’s probability of entering the prison system. *Id.* at 807. Zero tolerance policies are a main contributor to the school-to-prison pipeline. *Id.* at 808. These policies often extract a student from the classroom, which increases the likelihood that he or she will not be a successful student or productive citizen. *Id.* at 810. These absences “inevitably lead to that child missing valuable instruction and feeling lost upon” his or her return, which often results in additional misconduct. *Id.* Additionally, “harsh penalties are also likely to taint a child’s view of her school and the educational system,” resulting in

poorer performance and greater social ills, including increased likelihood of dropping out. *Id.* at 810-11. The use of harsh consequences disproportionately affects students of color and students with learning disabilities. *Id.* at 810. Because Zero-Tolerance policies exacerbate the school-to-prison pipeline and have a disparate impact on minority and disable students, these policies are detrimental to school pedagogy.

As federal and state law protect educational opportunity, the South Carolina Supreme Court has made clear that it has the power and duty to review cases relating to education. Recently in *Abbeville County School District v. The State of South Carolina, et. al.*, the issue was presented to the South Carolina Supreme Court to decide if the State's education system afforded students in Plaintiff Districts the opportunity for a minimally adequate education and whether the Court should become involved in the controversy. 410 S.C. 619, 623 - 27 (2014)(amended by *Abbeville County School Dist. v. State*, 415 S.C. 19 (2015) (regarding review of efforts by both parties) ). The Court was not persuaded by the Defendants' argument that the Plaintiffs' claims were non-justiciable political questions, concluding that they rang "hollow when compared to the Defendant's failure to comprehensively analyze the troubling issues preventing educational opportunity in the Plaintiff Districts." *Id.* at 661-61. Because due process is a justiciable question, the Courts can and should review educational processes that result in the loss of educational opportunity.

In the case at hand, the Student had an initial hearing at the school level decided by a non-attorney. The student then had a hearing before the School District, decided by a panel of non-attorneys. In both the initial and first appeal, a non-judicial body stripped the Student of his educational opportunity, expelling him for 365 days, forcing him to miss his senior year of high school. At no point in the record is evidence that the School District engaged in fact finding or

review of circumstances or factors related to the Student's alleged violation of the Statute. The relevant statute is as follows:

The district board must expel for no less than one year a student who is determined to have brought a firearm to a school or any setting under the jurisdiction of a local board of trustees. The expulsion must follow the procedures established pursuant to Section 59-63-240. The one-year expulsion is subject to modification by the district superintendent of education on a case-by-case basis. Students expelled pursuant to this section are not precluded from receiving educational services in an alternative setting. SC Code § 59-63-235 (2013).

The Statute dictates that the district "must expel" a student "determined to have brought a firearm to a school." The "must" in the statute takes discretion away from the administrators, leaving the default zero-tolerance one-year expulsion in-place. Murkier, the definition of "to bring" includes active definitions such as "to lead" or "to carry," which would have a knowledge or intent component; however, "to bring" also includes "to cause" which lacks these components. Merriam Webster, <https://www.merriam-webster.com/dictionary/bring>. [Last Time Visited, Nov. 30, 2018] By defaulting to the broadest definition of the word, the school embraces the zero tolerance and actively declines to further explore a matter, preventing any meaningful substantive due process. Although the statute contains language regarding the superintendent having the ability to modify the expulsion, this is not applicable to the case at hand, as the Student's father sits on the District's Board of Trustees and potential conflict could arise from such modification.

In addition to the interpretation of the statute, it is important to note Code 1976 §16-23-2, (9)(a); Unlawful carrying of a handgun, is not violated when the handgun is secured in a closed trunk. The Student broke no law. Although the school can set its own policies, consideration should be made when no law is violated. The punishment should match the offense, and the Student did not violate any criminal statute. Further, not only did the Student not violated any

criminal statute, the Student had no knowledge that his father's weapons were even in the vehicle. This, coupled with an overly broad statute allowed for a Zero-Tolerance policy to be applied without mechanism protecting the Student's due process rights. Because the School District is expelling the Student for 365 days, causing loss of educational opportunity, the School District violated the Student's Constitutional Right to Due Process by applying a Zero-Tolerance policy to the Statute at issue with no meaningful form of review.

**B. The School District violated the Student's substantive due process rights by failing to gather or consider relevant information in its enforcement of a Zero-Tolerance Policy.**

The Due Process clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" DEREK W. BLACK, ENDING ZERO TOLERANCE 109 (New York University Press 2016) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)). Where the liberty interests are fundamental, the Constitution requires strict scrutiny review. Where the liberty interest is not fundamental, the challenged law or policy need only meet rational basis review, which requires the government have a legitimate end and that its chosen means of accomplishing that end are rationally related. *Black*, at 109. Rational review, although requiring a nexus between the government's legitimate end and its chosen means of accomplishing, does not equate to no meaningful review. *Id.* No meaningful review renders the Constitution moot, which "is not the intent of Supreme Court precedent." *Id.* Further, substantive due process includes foundational principles that set minimum thresholds for rationality. *Id.*

When a school recommends expulsion, "substantive due process would mandate the consideration of a particular category of circumstances and facts: intent, culpability, capacity, and harm (i.e. danger or disruption to school.). Without considering these factors, there is no way

to rationally distinguish between the dangerous student who should be excluded from school for a year and the student that poses no real threat but who warrants some type of reprimand.” *Id.* at 136-37. Because “numerous factors and circumstances are potentially relevant in determining whether and how to punish a student,” “hard lines are difficult to draw because the relevance of factors will vary according to what the student has done and the punishment the school is proposing. *Id.* at 136. Further, “Zero Tolerance, however, narrows the question and increases the stakes by mandating suspension and expulsion. If the punishment for misbehavior is just one hour of after-school detention, the need to carefully consider multiple factors is minimal and school’s discretion more expansive. But when the punishment is suspension or expulsion, due process would require that the school be more careful.” *Id.* at 136-37.

The Sixth Circuit Court of Appeals has upheld this issue of substantive due process. In *Seal v. Morgan*, Seal, a high school student, drove his mother’s car to his school to attend a high school football game. 229 F.3d 567 (6th Cir. 2000). A student claimed to have seen Seal and a friend drinking from a flask, and the band director inquired. *Id.* at 570-71. Despite the students denying and search of their persons and band equipment showing no evidence, the director and vice-principal announced they needed to search Seal’s car for a flask, and Seal consented. *Id.* at 571-72. The search found no flask but did find a knife in the glove box that Seal’s friend had left there the previous day unbeknownst to Seal and while they were not on school property. *Id.* Seal attended the school hearing without counsel regarding his possession of a weapon, and the school recommended expulsion. *Id.* at 572-72. Seal appealed to the School Board, who upheld the decision. *Id.* Seal’s father initiated an action claiming that his expulsion violated his rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment, and that the search of his mother’s car violated the Fourth Amendment. *Id.* at 573.

The Sixth Circuit Court of Appeals focused on the substantive due process issues regarding Seal's expulsion. *Id.* at 574-76. The Court explained, "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest. No student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its presence." *Id.* at 575. The Court stated that, "entire concept of possession—in the sense of possession for which the state can legitimately prescribe and mete out punishment—ordinarily implies knowing or conscious possession. *Id.* at 575-76 (citing *See* Wayne R. LaFare & Austin R. Scott, Jr., *Substantive Criminal Law* § 3.2, at 279 (1986 & Supp.2000))." The Court further rejects the Board's argument that knowing or conscious possession is a "technicality" and "would have thought this principle so obvious that it would go without saying." *Id.* at 576.

Of note, during the oral arguments for this hearing, the Court posed the "hypothetical example involving a high-school valedictorian who has a knife planted in his backpack without his knowledge by a vindictive student. The question was whether the valedictorian would still be subject to mandatory expulsion under the Board's Zero Tolerance Policy, even if the school administrators and the Board members uniformly believed the valedictorian's explanation that the knife had been planted." *Id.* at 576. The Board responded yes, and the Court was unable to accept this answer. *Id.*

"The fact that we must defer to the Board's rational decisions in school discipline cases does not mean that we must, or should, rationalize away its irrational decisions." The Court then upheld the district court's denial of the Board' motion for summary judgment as "a reasonable

trier of fact could conclude that Seal was expelled for a reason that would have to be considered irrational.” *Id.* at 579.

More recently, the Georgia Supreme Court placed limits on zero-tolerance. In *Henry County Board of Education v. S.G.*, a fight broke out at Locust Grove High School and both students were suspended for the zero tolerance of “being involved in a fight on the school grounds.” 301 Ga. 794 (2017). However, the video showed that one student was a clear victim of the other, as the victimized student tried to avoid the aggressor, was chased down, held her hands up and walked away, and then the other student lunged at her and the fight ensued. *Id.* at 795. Although the Court hung its decision on statutory grounds, the Court found that being a participant to a fight is not enough. *Id.* at 795-803.

More aligned with the case at hand, *In re Expulsion of A.D.* out of the Minnesota Supreme Court placed limits on Zero-Tolerance Policy. 883 N.W. 2d 251 (2016). Here, a student had been working on her boyfriend’s family’s farm the previous weekend and used a pocket knife to cut hay bale twine. *Id.* at 254. The student admitted that she normally removes the knife from her purse but realized she had forgotten to this time when learning that the school was conducting a search. *Id.* The principal stated that she believed the student, but because of the zero-tolerance policy, the student was expelled for the rest of the school year. *Id.* at 254-55. The Minnesota Supreme Court held that “willful conduct is not the same thing as willful violation,” and the Act “does not allow for the punishment of a student who engages in willful acts without intending to violate the policy.” *Id.* at 259. The Court did determine that the school district could punish the student for bringing a knife in some other form but could not suspend or expel unless it could demonstrate that the student “intentionally violated the policy.” *Id.* As *Seal, Henry v.*

*S.G.*, and *In re Expulsion A.D.* show, the Courts can and need to place limits on Zero-Tolerance policies to protect students' educational opportunities.

Under both strict scrutiny review and rational basis review, the School District's Zero-Tolerance policy enforcement infringed upon the Student's right to due process. The South Carolina Constitution, through Article XI, §3, addresses education requiring the maintenance and support of free education open to all children in the state. This language in our South Carolina Constitution creates that right within children of the state. Because South Carolina chose to make this a right, strict scrutiny of the matter at hand is required. Under strict scrutiny, the legislature must have passed the law to further a "compelling government interest," and must have narrowly tailored the law to achieve that interest. Although the law was arguably passed for student safety to further the protection and education of students, the law is not narrowly tailored as it is currently serving as a large "catch-all" that is fueling the school to prison pipeline. As discussed previously, the statute is being interpreted in the broadest means and prevents School Districts from having any discretion. Because of this, the School's expulsion of the Student under the Zero-Tolerance cannot be said to be the most narrowly tailored application, as a student with no knowledge of a weapon in the locked trunk of their father's vehicle can be related to the Student committing harm on the school campus.

Even if the law warrants only a "rational basis" review, this does not mean no review at all. Meaningful review is necessary to uphold the Constitution, and by simply rubber-stamping an expulsion sentence on a student who has no knowledge of a policy violation, no meaningful review can have said to have taken place. The Student did not own the vehicle he drove to school but shared with his father. The record makes clear that the guns found were registered to his father, a federal law enforcement officer, and that the student had no knowledge that his father's

guns were in the trunk. The School Board did no additional fact finding, as it did not seem relevant to their application of the zero-tolerance policy. The record shows no consideration of the Student's knowledge, intent, or harm and therefore lacks the minimum considerations for a rational review.

*Seal* and *In re Expulsion A.D.* parallel the current matter while *Henry v. E.G.* shows that Courts intervene and place limits on School District's Zero-Tolerance policies. The Court of Appeals in *Seal* refused to "rationalize an irrational decision." Although the Circuit Court in this case upheld the expulsion, the Judge in the hearing stated, "You can dispense with the argument of knowledge. I certainly understand it. I'm sympathetic to it, but it has nothing to do with what our legislature put in the statute." As discussed previously, the plain reading of the statute shows that there is no room for meaningful substantive due process if a school board "must expel for no less than one year." There is also vagueness in how one can interpret a student "determined to have brought." This wording of the statute and its resulting implementation may not be a reflection on the results hoped for by the legislature. Although the statute does allow for the superintendent to modify, the record indicates that this would not be appropriate to the superintendent due to the father's membership on the Board of Trustees, which thus negates the Student's only option for relief. This conundrum further highlights the need for substantive due process as having only a singular form of relief by the superintendent is not enough to protect a student's due process rights.

**C. Zero Tolerance Policies are harmful as they disconnect students and exacerbate dropout rates.**

In addition to the School District violating the Student's due process rights, the continued application of zero-tolerance policies causes greater harm to students than it protects them. These

policies often extract a student from the classroom, which increases the likelihood that he or she will not be a successful student or productive citizen. *Ruiz*, at 810. These absences “inevitably lead to that child missing valuable instruction and feeling lost upon” his or her return, which often results in additional misconduct. *Id.* Additionally, “harsh penalties are also likely to taint a child’s view of her school and the educational system,” resulting in poorer performance and greater social ills, including increased likelihood of dropping out. *Id.* at 810-11. The use of harsh consequences disproportionately affects students of color and students with learning disabilities. *Id.* at 810.

The American Psychological Association also conducted a study, with results showing that a key assumption of zero tolerance policy is that the removal of disruptive students will result in a safer climate for others. Although the assumption is strongly intuitive, data on a number of indicators of school climate have shown the opposite effect, that is, that schools with higher rates of school suspension and expulsion appear to have less satisfactory ratings of school climate, to have less satisfactory school governance structures, and to spend a disproportionate amount of time on disciplinary matters. Perhaps more important, recent research indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement, even when controlling for demographics such as socioeconomic status. American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools: An Evidentiary Review and Recommendations*, AMERICAN PSYCHOLOGIST, Vol 63, No. 9, 854 Dec. 2008, <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

A recently published study discussed in the *New Criminal Law Review* analyzes zero-tolerance policies as addressed by courts. Brian G. Sellars and Bruce A. Arrigo, *Virtue*

*Jurisprudence and the Case of Zero-Tolerance Discipline in U.S. Public Education Policy: An Ethical and Humanistic Critique of Captivity's Law*, 21 NEW CRIM. L. REV. 514 (Fall 2018). The authors discuss “that the enforcement of zero tolerance in elementary and middle schools advances retributive directives and deterrence-based objectives that erode (and undo) the civil liberties and constitutional rights of students.” *Id.* at 517. Because “challenges to school-based, zero-tolerance case law on the grounds of First, Fourth, Eighth, and Fourteenth Amendment rights violations have largely been dismissed by the courts,” the study analyzed intertextual themes used to justify the zero-tolerance position. Nearly half the time (48%), the court used the logic of “empowered discretion of school authorities,” meaning, that teachers and administrators must be empowered with wide discretionary authority to classify and remove students perceived to be a threat.” *Id.* at 533-34. This is exemplified by the decision in *Cuff v. Valley Center School District* (2012) decision: “Although plaintiffs seek to second-guess with hindsight the judgment of school administrators, that is not the role of the courts. It is not the role of the federal courts to set aside decisions of school administrators, which the court may view as lacking a basis in wisdom or compassion. (pp.460-470).” *Id.* at 534.”

This is one type of logic currently embodied in zero-tolerance caselaw which presently serves “as social control mechanisms of the state, (unwittingly) intent on targeting marginalized populations (especially minorities and the poor) for costal exclusion and subsequent criminal confinement. *Id.* at 38. This study shows that Courts deference to schools without engaging in minimal judicial review has allowed for Zero-Tolerance policies to go unchecked until more recently, with cases such as *Seal, Henry v. S.G., In re Expulsion A.D.*, and others. These cases mark the important return of judicial review protecting students’ education opportunities. Without this, the collateral consequences of unchecked Zero-Tolerance policies will continue.

Because the School District expelled the Student, denying his educational opportunity without considering factors required for minimal and meaningful due process, and because of the negative collateral consequences associated with such Zero-Tolerance policies, the Court should reverse the School District's decision to expel the Student X.H.

**Conclusion**

The School District failed to consider whether the Student possessed any knowledge, intent, harm, or risk when he drove his father's vehicle to school which contained, unbeknownst to him, two guns registered to his father, before expelling Student Doe for 365 days. Thus, the School District denied the student his substantive due process rights. Because the School District's Zero Tolerance Policy violates the Student's due process rights, the Court should reverse the School District's decision to expel Student X.H.

Respectfully,



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The Honorable Perry M. Buckner, III  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Appellant's Initial brief together with the Appellant's Designation of Matter was served by first class pre-paid mail on the 30TH of November, 2018 on:

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November 30, 2018

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Re: *John Doe v. Allendale School District*  
Appellate Case No: 2018-001567

Dear Ms. Kitchens:

Enclosed please find a copy of the initial brief of the appellants as well as the designation of matter to be included in the record which contains the required Rule 209 certification. I also enclose a certificate of mailing on opposing counsel.

Thank you for your assistance in this matter.

Sincerely,



Mallery L. Scheer

cc: Kierra Brown  
William K. Swope  
Susan K. Dunn

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