

January 2011

"Expelled to Nowhere": School Exclusion Laws in Massachusetts

Melanie Riccobene Jarboe

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/twlj>



Part of the [Constitutional Law Commons](#), and the [Education Law Commons](#)

Recommended Citation

Melanie R. Jarboe, *"Expelled to Nowhere": School Exclusion Laws in Massachusetts*, 31 B.C. Third World L.J. 343 (2011),

<https://lawdigitalcommons.bc.edu/twlj/vol31/iss2/5>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.

“EXPELLED TO NOWHERE”: SCHOOL EXCLUSION LAWS IN MASSACHUSETTS

MELANIE RICCOBENE JARBOE*

Abstract: Chapter 71, section 37H½ of the Massachusetts General Laws allows school principals to suspend any student charged with a felony and to expel that student if he or she is convicted or found to be delinquent. Students expelled from one school in Massachusetts have no right to attend any other school in the state. Therefore, expulsion has the potential to bring a student’s educational career to an end. This Note argues that chapter 71, section 37H½ of the Massachusetts General Laws is unconstitutional under both the Federal and Massachusetts Constitutions because it violates students’ right to a “minimally adequate education.” Further, this Note argues that the Massachusetts legislature should adopt House Bill 178, “An Act Relative to Students’ Access to Educational Services and Exclusion from School,” which strikes an appropriate balance between school safety and educational opportunity.

INTRODUCTION

One spring day in 1996, fourteen-year-old Tom Berrigan was with five of his friends in Woburn, Massachusetts when they met up with a group of younger boys.¹ One of Tom’s friends pulled up his shirt to reveal a small souvenir baseball bat that he had tucked into his pants.² The gesture convinced the younger boys to give up their chips and soda to the older boys.³ Police caught up with Tom and his friends and charged all six boys with armed robbery, a felony.⁴ Massachusetts law

* Editor in Chief, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2010–2011).

¹ See Anthony Flint, *State’s Tough Expulsion Law Draws Debate: Principals’ Approach Faulted*, BOS. GLOBE, Mar. 8, 1997, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*; see MASS. GEN. LAWS ch. 265, § 17 (2008) (defining armed robbery). In Massachusetts, any crime punishable by imprisonment in the state prison is a felony. MASS. GEN. LAWS ch. 274, § 1 (2008). In addition to more “serious” crimes like armed robbery, felonies include kicking another person with a shod foot and receiving stolen property worth more than \$250. See ch. 265, § 15B(b) (defining assault and battery with a dangerous weapon as a felony); *Commonwealth v. Tevlin*, 741 N.E.2d 827, 833 (Mass. 2001) (holding that, though not dangerous per se, a sneaker may be a “dangerous weapon” when used to stomp or kick); see also MASS. GEN. LAWS ch. 266, § 60 (2008) (defining receipt of stolen property worth more than \$250 as a felony).

allows principals to indefinitely suspend or expel students who get into trouble, even when they are off school grounds.⁵ Tom's principal took advantage of the law and suspended Tom from school for the final six weeks of the school year despite the fact that he had been a bystander.⁶ As a result, Tom missed the end of the year in all of his classes and the opportunity to try out for the high school football team.⁷ "Who could have known that a moment of bravado and a bag of potato chips would cost Tom Berrigan so dearly?"⁸

Every state, including Massachusetts, has zero tolerance policies with respect to in-school behavior such as assaulting faculty members or bringing drugs or weapons onto school property.⁹ Massachusetts takes this zero tolerance approach one step further by regulating conduct that occurs outside of school hours, during school vacations, or off school property.¹⁰ Chapter 71, section 37H½ of the Massachusetts General Laws ("37H½" or "section 37H½") allows a principal to suspend a student "for a period of time determined appropriate" if (1) the student has been charged with a felony and (2) the principal "determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school."¹¹ If the

⁵ Flint, *supra* note 1; see MASS. GEN. LAWS ch. 71, § 37H½ (2008).

⁶ Flint, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ See, e.g., Gun-Free Schools Act, 20 U.S.C. § 7151 (2006); § 37H(a) (providing that a principal may expel a student who is found on school property or at a school function in possession of a dangerous weapon or a controlled substance or who assaults a staff member). Although sections 37H and 37H½ invite discretionary application and are therefore not true zero tolerance laws, administrators across the state often apply them as though they are not discretionary. See *infra* Part III.B.

¹⁰ See § 37H½. The Massachusetts House of Representatives passed the law on December 22, 1993, and the Senate passed it the next day. *Advisory Opinion on Student Discipline: Attachment 3*, MASS. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC. (Jan. 27, 1994), <http://www.doc.mass.edu/lawsregs/advisory/discipline/AOSD1.html> (follow "Attachment 3: Chapter 380 of the Acts of 1993" hyperlink). Governor William F. Weld approved the law on January 4, 1994. See *id.* The law became effective on April 4, 1994. Robert V. Antonucci, *Advisory Opinion on Student Discipline*, MASS. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC. (Jan. 27, 1994), <http://www.doc.mass.edu/lawsregs/advisory/discipline/AOSD1.html>. Michigan, another state with tough expulsion laws, limits expellable offenses to possessing a dangerous weapon, committing arson, or committing criminal sexual conduct and applies only if those crimes occur in a school building or on school grounds. See MICH. COMP. LAWS § 380.1311(2) (2005).

¹¹ § 37H½(1); see *infra* note 115 (detailing procedural protections under 37H½). Section 37H½ does not define "substantial detrimental effect," nor does it give any guidelines on the determination in each case, leaving ample discretion in the hands of the administrator. See § 37H½. The expansive definition of a felony in Massachusetts means that students are subject to exclusion under 37H½ for a broad range of conduct. See *id.*; *supra* note 4.

student is found guilty of the felony charge, the principal is further empowered to expel the student.¹² Significantly, 37H½ also states: “Upon expulsion of such student, no school or school district shall be required to provide educational services to such student.”¹³ Once a student is expelled from one school in the Commonwealth, no other school is required to provide that student with an education.¹⁴ Though some cities and towns choose to provide alternative education for students who are excluded (suspended or expelled), they are not required to do so and funding considerations dictate that many do not.¹⁵

The Massachusetts legislature has considered and rejected several attempts to change the law.¹⁶ Nevertheless, House Bill 178, which State Representative Alice K. Wolf of Cambridge filed on January 19, 2011, provides a new opportunity to reconsider 37H½.¹⁷ House Bill 178, enti-

¹² See § 37H½(2).

¹³ *Id.*

¹⁴ See *id.* The Individuals with Disabilities Education Act (IDEA) protects the educational opportunities of special education students even when they are expelled for misbehavior. 20 U.S.C. § 1412(a)(1)(A) (2006); Antonucci, *supra* note 10. IDEA does not similarly protect the educational opportunities of general education students. See Antonucci, *supra* note 10. There are also educational opportunities for students incarcerated with the Department of Youth Services (DYS) in Massachusetts. MASS. GEN. LAWS ch. 18A, § 2 (2008) (“The department shall provide . . . services and facilities for the . . . education, training and rehabilitation of all children and youth referred or committed [to the department by the courts].”). Although 37H½ affects special education students and those who are ultimately committed to DYS, this Note focuses on general education students who are “expelled to nowhere” and are not guaranteed alternative education after expulsion from school. See *infra* Parts II–III. “Expelled to nowhere” is a term of art that first appeared in a 2003 law review article. See Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 107 (2003). In this Note, the term refers to students who are expelled and do not receive alternative educational services. See *id.*

¹⁵ See *Parkins v. Boule*, 2 Mass. L. Rptr. 331, 341–42 (Mass. Super. Ct. Aug. 3, 1994), available at 1994 WL 879558 (lamenting the lack of alternative educational options for excluded children while recognizing the mandate of the Supreme Judicial Court (SJC) that an expelled student, under current law, has no right to alternative education); Amy E. Mulligan, Note, *Alternative Education in Massachusetts: Giving Every Student a Chance to Succeed*, 6 B.U. PUB. INT. L.J. 629, 631 (1997) (discussing the Education Reform Act, which established a commission to study the feasibility of universal alternative education and calling the gap in educational services for those excluded “intolerable”); Antonucci, *supra* note 10 (acknowledging a gap in services for those students who are neither eligible for special education nor incarcerated).

¹⁶ See Flint, *supra* note 1; Jordana Hart, *More Pupils Ousted for Year, Without Backup, Report Says*, BOS. GLOBE, Feb. 12, 1998, at B1.

¹⁷ H.R. 178, 2011 Leg., 187th Sess. (Mass. 2011). The most recent effort to amend 37H½ was in 2009. See H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009). A hearing on the 2009 bill (House Bill 3435) was held on November 10, 2009. See *An Act to Help Students Stay in School: Hearing on H.R. 3435 Before the J. Comm. on Educ.*, 2009 Leg., 186th Sess. (Mass. 2009) [hereinafter *H.R. 3435 Hearing*], available at <http://www.massadvocates.org/documents> (follow hy-

tled “An Act Relative to Students’ Access to Educational Services and Exclusion from School,” proposes several key changes to the law that strike an appropriate balance between school safety and educational opportunity for Massachusetts students.¹⁸

Of course, each school in Massachusetts must be afforded the latitude to preserve decorum, both in service of safety and to create an optimal learning environment.¹⁹ Section 37H½, however, is overbroad because it affords schools the opportunity to regulate conduct that occurs off school grounds and to permanently end a student’s educational opportunities.²⁰ Part I of this Note discusses the evolution and effects of the zero tolerance movement, both nationwide and in Massachusetts. Part II describes the application of 37H½ in Massachusetts. Part III argues that 37H½ is unconstitutional. Section A argues that a minimally adequate education is a fundamental right. Section B argues that 37H½ violates students’ procedural due process rights. Section C argues that 37H½ violates students’ rights to equal protection. Finally, Part IV discusses House Bill 178 and proposes that the Massachusetts legislature adopt the bill because it furthers the legitimate state interest of keeping schools safe without infringing upon the constitutional rights of students. Part IV also proposes further changes to the law that House Bill 178 does not address.

I. THE EVOLUTION AND EFFECTS OF “ZERO TOLERANCE”

Across the nation, reports of youth violence and school shootings during the 1990s increased the public perception that “American children ha[d] become Public Enemy #1.”²¹ In 1993, a Massachusetts ap-

perlinks for individual testimonies). The November 2009 hearing is the most recent instance of testimony on 37H½, therefore statements made at the hearing will be used throughout this Note to support arguments in favor of amending 37H½, despite the fact that House Bill 3435 is no longer pending. *See id.*

¹⁸ *See* Mass. H.R. 178.

¹⁹ *See* Hart, *supra* note 16 (quoting Education Commissioner Robert Antonucci’s statements that “[s]uspending and expelling some disruptive students will strengthen the climate for learning” and that “[s]afe schools are a top priority”).

²⁰ *See* Flint, *supra* note 1.

²¹ *Education on Lockdown: The Schoolhouse to Jailhouse Track*, ADVANCEMENT PROJECT ET AL., 11 (Mar. 2005), <http://www.advancementproject.org/sites/default/files/publications/FINALEOLrep.pdf>; *see* Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms As Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 514, 537 (2009) (calling attention to racial imagery and warnings of “youthful superpredators” from politicians and the media and reporting that in 1993, 48% of network news segments and 40% of newspaper articles about youth concerned violence). Though the national mood was decidedly fearful and media coverage of crime was on the rise, crime rates were actually

peals court ruled that a public school could not prevent a student from attending who had been found delinquent by reason of a homicide that occurred off school property during the summer.²² The court found that public policy in the Commonwealth dictated that “students should not be expelled from school for reasons having nothing to do with school.”²³ The Legislature enacted 37H½ to overturn the court’s ruling and to ensure that schools had the power to expel students for off-campus activity.²⁴ Nationwide, politicians capitalized on similar fears to enact laws that were “tough on crime.”²⁵ The timing was perfect; the public largely supported the adoption of harsh laws regulating student behavior in and out of school.²⁶

The national impulse to get tough on juvenile crime, both in and out of school, was mirrored by a similar shift in the rhetoric of the nation’s juvenile courts away from rehabilitation and towards punish-

decreasing, both in the juvenile population and overall. Anthony J. DeMarco, *Suspension/Expulsion—Punitive Sanctions from the Jail Yard to the School Yard*, 34 NEW ENG. L. REV. 565, 565 (2000) (reporting that, during the 1990s, crime decreased 13% but media coverage of crime increased 240%); Kim Brooks et al., Justice Policy Inst. & Children’s Law Ctr., Inc., *School House Hype: Two Years Later*, JUST. POL’Y INST., 4, 6 (Apr. 2000), http://www.justicepolicy.org/images/upload/00-04_REP_SchoolHouseHype2_II.pdf (reporting a 56% decline in juvenile homicide arrests, a 40% decrease in school-associated violent deaths, and a one-in-two-million chance that a child would die in a school).

²² Antonucci, *supra* note 10 (discussing *Petruzzelli v. Shawsheen Reg’l Technical High Sch.*, No. 1993-J-237 (Mass. App. Ct. Apr. 7, 1993) (case unavailable)); see Flint, *supra* note 1.

²³ Antonucci, *supra* note 10 (quoting *Petruzzelli*, No. 1993-J-237).

²⁴ See *id.*

²⁵ See Beale, *supra* note 21, at 520–21, 533 (“Between 1992 and 1995, . . . forty-seven states and the District of Columbia made changes in their laws targeting juveniles who commit serious or violent crimes.”); James Bell & Raquel Mariscal, *Race and Ethnicity in Juvenile Justice*, in JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE (Francine Sherman & Francine Jacobs eds., forthcoming Oct. 2011); Heather Cobb, Symposium Response, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.–C.L. L. REV. 581, 583 (2009) (stating that prominent politicians convinced colleagues and the public that the nation’s classrooms were filling with superpredators); Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1045–46 (2001). Enacted in 1994, the Gun-Free Schools Act fueled the development of zero tolerance policies for weapons possession and other offenses. Cobb, *supra*, at 586; see 20 U.S.C. § 7151(b)(1) (2006) (“Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school . . .”).

²⁶ See Flint, *supra* note 1; see also Paul M. Bogos, Note, “Expelled. No Excuses. No Exceptions.”—Michigan’s Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311, 74 U. DET. MERCY L. REV. 357, 364, 367–68 (1997) (suggesting that harsh measures help the state perform its duty to provide children a learning environment).

ment.²⁷ The U.S. Supreme Court extended the rights of defendants in adult criminal trials to juveniles, which protected the procedural due process rights of juveniles but also tended to shift the focus away from rehabilitation and towards punishment.²⁸ Massachusetts juvenile courts followed suit, adopting an offense-based sentencing grid, repudiating the infancy defense, and developing a high reliance on commitment to the Department of Youth Services.²⁹ These changes stood in stark contrast to the beliefs underlying the juvenile court system since its inception—namely that children are different from adults and should therefore be treated differently—and in spite of scientific research indicating that children’s brains are not fully matured.³⁰ In Massachusetts, the

²⁷ See Barry C. Feld, *The Politics of Race and Juvenile Justice: The “Due Process Revolution” and the Conservative Reaction*, 20 JUST. Q. 765, 774–75 (2003) (“*Gault* and its progeny precipitated a procedural revolution that unintentionally, but inevitably, transformed the juvenile court from its original Progressive conception of a social welfare agency into a legal one. . . . [and] altered juvenile courts’ focus from ‘real needs’ to ‘criminal deeds’”); Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 45–46 (2007) (citing the enactment of state laws eliminating or reducing the confidentiality of juvenile court records and proceedings, opening delinquency proceedings to the public, allowing various agencies access to records of juvenile court proceedings, facilitating the transfer of children from the juvenile justice system to the criminal justice system, and expanding sentencing options in juvenile courts).

²⁸ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (“[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”); *In re Winship*, 397 U.S. 358, 365–68 (1970) (holding that proof beyond a reasonable doubt is required in juvenile proceedings); *In re Gault*, 387 U.S. 1, 30–31, 33, 36, 55 (1967) (holding that due process requires that a juvenile must be given adequate notice of the charges against him or her, the assistance of counsel, and the right against self-incrimination); Feld, *supra* note 27, at 774–75; William Haft, *More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 797, 801 (2000) (suggesting that zero tolerance policies and restrictions on constitutional rights in the public schools are consistent with trends away from lenity in criminal law and contradict the premise that children are incapable of criminal mens rea); Kaban & Orlando, *supra* note 27, at 44–45 (citing the shift from rehabilitation to punishment).

²⁹ Kaban & Orlando, *supra* note 27, at 60–61. DYS is the juvenile justice agency of the Commonwealth of Massachusetts responsible for detaining and treating juveniles committed to its care by the courts. See Deborah Passarelli, Note, *Department of Youth Services: Control over Sentencing and Monitoring of Juvenile Delinquents*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 575, 575–76 (1995).

³⁰ See MASS. GEN. LAWS ch. 119, § 53 (2008) (“[A]s far as practicable, [juvenile defendants] shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.”); *Roper v. Simmons*, 543 U.S. 551, 569–75 (2005) (holding that the death penalty could not be imposed upon juvenile offenders because of their lack of maturity, their susceptibility to outside influences and peer pressure, and their still-developing character); Beale, *supra* note 21, at 514, 516; Kaban & Orlando, *supra* note 27, at 47–50 (citing studies confirming that brain immaturity in adolescents affects impulse control and the ability to

criminalization of juvenile court has increased the possibility that a juvenile will be charged with a higher-grade offense; if that offense is a felony, school authorities can invoke 37H½ and keep the student out of school.³¹

The zero tolerance movement focuses on the safety of schools and schoolchildren but does not account for the needs of the offending child or the long-term effects of school exclusion on the community at large.³² Zero tolerance policies eliminate a student's ability to learn from his or her behavioral mistakes and decrease the possibility that an at-risk student will develop trusting relationships with school personnel.³³ According to one study, students excluded from school are more likely to become involved in a physical fight, carry a weapon, smoke, use alcohol and drugs, and have sex.³⁴ In addition, students who are excluded from school face higher risks of dropping out of school later

assess risk); *Act Out, Get Out?: Considering the Impact of School Discipline Practices in Massachusetts*, RENNIE CTR. FOR EDUC. RES. & POL'Y, 4 (2010), http://renniecenter.issuelab.org/research/listing/act_out_get_out_considering_the_impact_of_school_discipline_practices_in_machusetts [hereinafter *Act Out, Get Out?*].

³¹ See Feld, *supra* note 27 at 772–75; Kaban & Orlando, *supra* note 27, at 44–45. Depending on the crime committed and past offenses, Massachusetts charges juveniles in juvenile court (potentially resulting in an adjudication of delinquency) or in adult court (potentially resulting in a guilty conviction). See § 54. Section 37H½ applies to juveniles with both delinquency adjudications and guilty convictions. See MASS. GEN. LAWS ch. 71, § 37H½(2) (2008).

³² See Haft, *supra* note 28, at 796–97; Flint, *supra* note 1 (citing the conflict between arguments that “schools must be kept safe at all costs” and the belief that “young people need to be led by the hand out of trouble—not kicked out of school at the precise time they need an education most”).

³³ ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 9–10 (June 2000), available at <http://www.advancementproject.org/digital-library/publications/opportunities-suspended-the-devastating-consequences-of-zero-tolerance>; DeMarco, *supra* note 21, at 571; Johanna Wald, *Zeroing in on Rule-Breakers: ‘One Strike and You’re Out’ Rules Are Doing More Harm Than Good*, BOS. GLOBE, Aug. 13, 2000, at F1 (arguing that subjecting a student who makes a mistake to the same consequence as a student who purposefully breaks the law or a school rule “make[s] a mockery of . . . justice and fairness” and makes children suspicious and distrustful of adults); see also *H.R. 3435 Hearing*, *supra* note 17 (statement of Joel M. Ristuccia, School Psychologist) (“When building principals rely heavily on student exclusion to achieve school safety, they create a school environment that is reactive and punitive. Such school environments . . . distance students from school and negatively impact learning.”).

³⁴ Brooks et al., *supra* note 21, at 22–23; see *H.R. 3435 Hearing*, *supra* note 17 (statement of Daniel J. Losen, Senior Education Law and Policy Associate, The Civil Rights Project at UCLA) (indicating that, although exclusion can be appropriate when students present a true danger to the school community, time away from school means that troubled students are unsupervised, increasing the risk of substance abuse and violent crime).

on (if readmitted), feeling isolated from society, committing further offenses, and becoming permanently court-involved.³⁵

The consequences for a community that relies on exclusion as a disciplinary measure are also severe.³⁶ A student who becomes involved in the criminal justice system costs the state much more money than a student who is sitting in a classroom.³⁷ More fundamentally, if one purpose of school is to educate productive members of society, a community suffers when it refuses to educate all of its children, especially those with trouble exhibiting appropriate behavior.³⁸

The public willingness to sanction such harsh consequences for the nation's youth stands in contrast to the ideals and motivations behind the nation's most well-known education case, *Brown v. Board of Education*.³⁹ In *Brown*, Chief Justice Earl Warren wrote:

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 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.⁴⁰

³⁵ See Haft, *supra* note 28, at 803; Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 605 (1996); *Act Out, Get Out?*, *supra* note 30, at 4-15; Brooks et al., *supra* note 21, at 4, 22.

³⁶ See Bogos, *supra* note 26, at 360; Hart, *supra* note 16 ("[N]othing positive can come of having hundreds of often troubled youngsters out of school . . .").

³⁷ See Bogos, *supra* note 26, at 386 (remarking that Michigan spends \$5000 per year to educate a student in school but \$23,000 per year when expelled students enter the juvenile justice system); see also *H.R. 3435 Hearing*, *supra* note 17 (statement of Daniel J. Losen, Senior Education Law and Policy Associate, The Civil Rights Project at UCLA).

³⁸ See Haft, *supra* note 28, at 803.

³⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); Blumenson & Nilsen, *supra* note 14, at 114-15.

⁴⁰ *Brown*, 347 U.S. at 493.

A similarly staunch commitment to education is also written into the Massachusetts Constitution, which states:

[I]t shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns; . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.⁴¹

Despite these lofty sentiments, Massachusetts excludes over one hundred students per year pursuant to 37H½.⁴²

II. THE APPLICATION OF SECTION 37H½ IN MASSACHUSETTS

The children we are banishing from our schools are the same children with whom we share an intertwined and interdependent future. . . . The students we expel from school will not disappear from society. We are in danger of not only creating an underclass, but creating an outclass that will come back to haunt us.

—Isabel Raskin⁴³

In April 1994, the Massachusetts legislature enacted 37H½.⁴⁴ Before the end of the school year in June, schools had already excluded twelve students under 37H½.⁴⁵ Over the course of the next three school years, exclusions hovered in the low sixties before spiking to 130 in the 1997–1998 school year.⁴⁶ Exclusions pursuant to 37H½ dipped back down to around one hundred per year for the following three years.⁴⁷ Since then, 37H½ has been applied to between 93 and 180 students per year.⁴⁸

⁴¹ MASS. CONST. ch. V, § II. The first public school in America opened in Massachusetts, and the Commonwealth enacted the nation's first compulsory school attendance law in 1842. DeMarco, *supra* note 21, at 566.

⁴² See *infra* Tables 1, 2.

⁴³ H.R. 3435 Hearing, *supra* note 17 (statement of Isabel Raskin, Education Attorney, Suffolk University Juvenile Justice Center).

⁴⁴ Antonucci, *supra* note 10.

⁴⁵ See *infra* Table 1.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*; *infra* Table 2.

Though committed in their opposition to the law, advocates have had virtually no success reversing exclusions pursuant to 37H½ in Massachusetts courts, which almost universally defer to school administrators' decisions and rule against students.⁴⁹ Even more troubling, however, is the fact that although 37H½ affected almost 1800 students between 1994 and 2010, not all of those cases received judicial, political, or public notice.⁵⁰ As one scholar notes, "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."⁵¹ Additionally, time is of the essence—a student who misses more than seven school days in six months is already at risk for retention (being held back in the same grade for a second year), to say nothing of missing months or an entire school year waiting for judicial action.⁵² For those families with the resources to do so, it is more expedient and more effective to pay for tutoring or private school than to risk the negative effects of a total lack of education during the litigation process.⁵³

⁴⁹ See, e.g., *Doe v. Superintendent of Sch. of Stoughton*, 767 N.E.2d 1054, 1056, 1058–59 (Mass. 2002) (holding that the superintendent had acted within his discretion in suspending a student charged with sexual assault); *Doe v. Winchendon Sch. Comm.*, 18 Mass. L. Rptr. 53, 55 (Mass. Super. Ct. July 2, 2004), available at 2004 WL 1515905 (holding that the superintendent had acted within his discretion in expelling a student after he made "joke" bomb threats).

⁵⁰ See *infra* Tables 1, 2. Despite the many students excluded each year, there are only eight court or administrative cases that deal with student exclusions pursuant to 37H½. See, e.g., *Commonwealth v. Guy G.*, 758 N.E.2d 643, 647 (Mass. App. Ct. 2001); *Winchendon*, 18 Mass. L. Rptr. at 55; *Doe v. Sarno*, No. 011835, 2001 WL 34048061, at *1 (Mass. Super. Ct. Dec. 27, 2001), *rev'd sub nom. Stoughton*, 767 N.E.2d 1054; *Schaffer v. Hallion*, 11 Mass. L. Rptr. 331, 331 (Mass. Super. Ct. Mar. 6, 2000), available at 2000 WL 537242; *Morales v. Bialy*, No. 97-2210 A, 1997 Mass. Super. LEXIS 34, at *2 (Oct. 27, 1997); *Medford Pub. Sch.*, 16 MSER 191, 192–95 (Mass. Bureau of Special Educ. Appeals May 26, 2010), available at 2010 MSE LEXIS 27; *Harwich Pub. Sch.*, 13 MSER 188, 195 (Mass. Bureau of Special Educ. Appeals May 22, 2007), available at 2007 MSE LEXIS 28; *Blue Hills Reg'l Technical Sch.*, 13 MSER 25, 26 (Mass. Bureau of Special Educ. Appeals Feb. 14, 2007), available at 2007 MSE LEXIS 5. Decisions from the Massachusetts Bureau of Special Education Appeals are also available at <http://www.doe.mass.edu/bsea/decisions.html>.

⁵¹ 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, 295 (2005). Students are often denied a remedy after being excluded under 37H½. See *Stoughton*, 767 N.E.2d at 1059; *Winchendon*, 28 Mass. L. Rptr. at 55; *Morales*, 1997 Mass. Super. LEXIS 34, at *2; *Blue Hills*, 13 MSER at 28, 29.

⁵² See Hanson, *supra* note 51, at 358; see also MASS. GEN. LAWS ch. 76, § 1 (2008).

⁵³ See Hanson, *supra* note 51, at 358.

The problems caused by 37H½ are vast, its application is overbroad, and its benefits are uncertain, but the law has stood unchanged since its enactment in 1994.⁵⁴ Popular support from key stakeholders has ensured that the law stays on the books.⁵⁵ Principals and education officials worry about the possibility that a troubled youth could cause future incidents, bad publicity, and lawsuits if he or she is not excluded.⁵⁶ Schools benefit because the students they expel are often the same students who score poorly on standardized tests that are used in school evaluations.⁵⁷ Parents want disruptive students out of their children's classrooms.⁵⁸ Teachers benefit from a policy that allows them to rid their classrooms of troublemakers.⁵⁹ In the wake of highly publicized school shootings throughout the late 1990s and beyond, the public sympathizes with educators' attempts to run safe schools and seems willing to forgive any resulting missteps.⁶⁰ Virtually unanimous public support creates an absence of political pressure to change the law—

⁵⁴ See Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J.* 159, 161, 164, 189; Flint, *supra* note 1; Hart, *supra* note 16; Wald, *supra* note 33.

⁵⁵ See Brady, *supra* note 54, at 161, 164, 189; Flint, *supra* note 1; Hart, *supra* note 16; Wald, *supra* note 33.

⁵⁶ See Flint, *supra* note 1. Concerns about school bullying nationwide and the enactment of new anti-bullying legislation in Massachusetts have further increased the pressures on school administrators to maintain safety and order in their schools. See, e.g., Alyssa Giacobbe, *Who Failed Phoebe Prince?*, BOS. MAG., June 2010, at 112, 128; Peter Schworm & Brian Ballou, *9 Teens Charged in Girl's Bullying: S. Hadley School's Officials Faulted for Not Halting Abuse Before Her Suicide*, BOS. GLOBE, Mar. 30, 2010, at A1; see also MASS. GEN. LAWS ch. 71, § 37O (Supp. 2010) (setting forth Massachusetts' anti-bullying legislation, effective May 3, 2010).

⁵⁷ See Blumenson & Nilsen, *supra* note 14, at 68; Maureen Carroll, Comment, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure That Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1929 (2008). No Child Left Behind, which Congress enacted in 2001 as a reauthorization of the Elementary and Secondary Education Act, demands that public schools show adequate yearly progress (AYP) towards full proficiency in reading and math. See Carroll, *supra*, at 1927–28. Schools face increasingly harsh consequences for every year they fail to make AYP and there is corresponding pressure on principals to raise AYP at all costs. See *id.* at 1928. While ninety-five percent of enrolled students must participate in the standardized tests that factor into AYP, there is no requirement that schools allow any particular student to attend school. See *id.* at 1927–28. By expelling low-scoring students, principals increase the probability of making AYP and escaping tough sanctions. See *id.* at 1928–29. Moreover, because minority students are often some of the lowest scoring students in schools, the exclusionary incentive applies with greater force to them. *Id.* at 1930.

⁵⁸ Flint, *supra* note 1.

⁵⁹ See Blumenson & Nilsen, *supra* note 14, at 67–68.

⁶⁰ See *id.* at 65; Brady, *supra* note 54, at 159–60; Robert G. Fraser, *Student Discipline from the Perspective of the School Attorney*, 34 NEW ENG. L. REV. 573, 579 (2000); Flint, *supra* note 1.

thus, the Legislature has considered and turned down several bills that would lessen the impact of 37H½.⁶¹

III. SECTION 37H½ INFRINGES ON STUDENTS' FUNDAMENTAL CONSTITUTIONAL RIGHT TO A MINIMALLY ADEQUATE EDUCATION

A. *The Fundamental Right to a Minimally Adequate Education*

Despite the recognized importance of education in American society, the U.S. Supreme Court has repeatedly held that education is not a fundamental right.⁶² The Massachusetts Supreme Judicial Court (SJC) has also held that there is no fundamental right to education in the Commonwealth.⁶³ Nevertheless, both courts have indicated that a *minimally adequate* education may, in fact, be a fundamental right guaranteed by the U.S. and Massachusetts Constitutions.⁶⁴ If the right to a

⁶¹ See Flint, *supra* note 1. In 1997, Massachusetts State Representative Patricia D. Jehlen of Somerville filed a bill that would impose more guidelines on principals seeking to expel students and would increase the protections of the appeals process, but that bill did not result in an amendment to 37H½. *Id.* In 1998, the State Legislature considered a bill sponsored by Representative Barbara Gardner of Holliston that would require bi-yearly hearings for excluded students attempting readmission into school and would prohibit the expulsion of students younger than eleven. Hart, *supra* note 16. This bill did not result in amendments to 37H½ either—in 2007, 37H½ was applied to a fourth-grade student. See E-mail from Mass. Dep't of Elementary & Secondary Educ. (DESE) Admin., to author (Feb. 17, 2010, 08:31 EST) (on file with author) [hereinafter 2010 E-mail from DESE Admin.] (providing access to the 2007 statistics via a link that was live for seven days, in response to an e-mail sent to data@doe.mass.edu). In 2009, Representative Alice K. Wolf of Cambridge filed House Bill 3435, which would have made sweeping changes to the law. See H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009). House Bill 3435 did not make it out of committee before the end of the legislative session, and Representative Wolf filed House Bill 178 in January 2011. See H.R. 178, 2011 Leg., 187th Sess. (Mass. 2011); *infra* Part IV.

⁶² See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (“Nor have we accepted the proposition that education is a ‘fundamental right,’ like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual’s access to it.”); *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (“Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

⁶³ See *Doe v. Superintendent of Sch. of Worcester*, 653 N.E.2d 1088, 1095 (Mass. 1995) (holding that the Massachusetts Constitution does not guarantee the right to an education).

⁶⁴ See, e.g., *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”); *Plyler*, 457 U.S. at 221 (holding that the

minimally adequate education is a fundamental one, its denial would be subject to strict scrutiny.⁶⁵ Although there is certainly a compelling state interest in safe schools, 37H½ is not the most narrowly tailored means of achieving the state's compelling interest and therefore fails strict scrutiny.⁶⁶

1. The Right to a Minimally Adequate Education Is of a Fundamental Nature

In *San Antonio Independent School District v. Rodriguez* the U.S. Supreme Court held that education was not a fundamental right.⁶⁷ The plaintiffs in *Rodriguez* alleged that funding disparities between poor urban school districts and wealthy suburban school districts were unconstitutional.⁶⁸ The Court held that the funding disparities did not violate plaintiffs' constitutional rights because the funding scheme did not operate to the detriment of a suspect class and because "lack of personal resources has not occasioned an absolute deprivation of the desired benefit."⁶⁹ However, the Court stated that the "absolute denial of educational opportunities to any of [a state's] children" may give rise to a charge that "the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."⁷⁰

denial of a basic education requires a heightened level of scrutiny); *Rodriguez*, 411 U.S. at 23–25 (suggesting that complete deprivation of education is unconstitutional); *Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) ("Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge . . ."); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 606 (Mass. 1993) ("[T]he Commonwealth has a duty to provide an education for *all* its children . . ."); see also Emily Barbour, Note, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 208–16 (2009).

⁶⁵ See *Papasan*, 478 U.S. at 285; *Rodriguez*, 411 U.S. at 17; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose."); *infra* Part III.A.2.

⁶⁶ See *Rodriguez*, 411 U.S. at 17, 36–37 (suggesting that if "some identifiable quantum of education" were a fundamental right, then its complete denial may trigger strict scrutiny); *McDuffy*, 615 N.E.2d at 555 (imposing a duty on cities and towns in Massachusetts to provide an adequate education to students and on the Commonwealth to ensure the mandate is carried out); Blumenson & Nilsen, *supra* note 14, at 109; *infra* Part III.A.2.

⁶⁷ *Rodriguez*, 411 U.S. at 37.

⁶⁸ *Id.* at 19–20.

⁶⁹ *Id.* at 22–25.

⁷⁰ *Id.* at 37. In his dissent, Justice William J. Brennan stated that "there can be no doubt that education is inextricably linked to the right to participate in the electoral proc-

Thus, the absolute denial of educational benefits under 37H½ may be constitutionally significant.⁷¹

Indeed, the Court has repeatedly suggested that public education is deeply rooted in our nation's history, values, and traditions and that an educated citizenry is a prerequisite to the continued functioning of our democratic system.⁷² Such deep roots in American society suggest that the right to receive a minimally adequate education is of a fundamental nature.⁷³ In *Wisconsin v. Yoder*, the Court stated that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."⁷⁴ In *Plyler v. Doe*, the Court characterized the public schools "as a most vital civic institution for the preservation of a democratic system of government" and distinguished public education from "some governmental 'benefit'" because of the "importance of education in maintaining our basic institutions, and the lasting im-

ess and to the rights of free speech and association guaranteed by the First Amendment" and suggested that "any classification affecting education must be subjected to strict judicial scrutiny." *Id.* at 63 (Brennan, J., dissenting). Also in dissent, Justice Thurgood Marshall stated that the fundamental importance of education was demonstrated "by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values." *Id.* at 111 (Marshall, J., dissenting). The *Rodriguez* Court "never rejected the nexus between education and the exercise of one's constitutional rights" and the Court "ultimately accepted the plaintiffs' arguments and observed that, under a different set of facts, an 'identifiable quantum of education' could be a constitutionally protected prerequisite to the exercise of other fundamental rights." Barbour, *supra* note 64, at 210; *see Rodriguez*, 411 U.S. at 36 (majority opinion). The Court has also recognized that students have a liberty right, guaranteed by the Fourteenth Amendment, against state barriers to learning. *See Meyer*, 262 U.S. at 396-97, 399-400, 403 (holding that a state law prohibiting teaching foreign languages to students who had not yet passed the eighth grade unconstitutionally violated the students' rights to learn).

⁷¹ Barbour, *supra* note 64, at 210; *see Rodriguez*, 411 U.S. at 36.

⁷² *See, e.g., Plyler*, 457 U.S. at 221 (noting the importance of education in maintaining basic national institutions); *Yoder*, 406 U.S. at 213, 221 ("[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); *Meyer*, 262 U.S. at 400 ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."). In fact, the Framers and early congresses promoted education as a central concern of the federal government. *See Barbour, supra* note 64, at 208-09.

⁷³ *See Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society.'" (alteration in original) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring))).

⁷⁴ *Yoder*, 406 U.S. at 221.

pact of its deprivation on the life of the child.”⁷⁵ Indeed, in *Papasan v. Allain*, the Court stated, “this Court has not yet definitively settled the question [] whether a minimally adequate education is a fundamental right” but indicated that the case did not “require resolution” of the issue.⁷⁶ Thus, the question of whether the U.S. Constitution protects the right to a minimally adequate education remains unresolved.⁷⁷

Even if the U.S. Constitution does not provide complete protection for students excluded under 37H½, the Massachusetts Constitution and the education jurisprudence of the SJC strengthen the case that students in Massachusetts have a fundamental right to a minimally adequate education.⁷⁸ The SJC has held that there is no fundamental right to education in the Commonwealth.⁷⁹ Even so, in *McDuffy v. Secretary of the Executive Office of Education*, the SJC held that the Commonwealth has a constitutional obligation to provide all public school students with

⁷⁵ *Plyler*, 457 U.S. at 221 (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)); see *Barbour*, *supra* note 64, at 209 & n.114.

⁷⁶ *Papasan*, 478 U.S. at 285–86. In *Papasan*, students brought suit challenging Mississippi’s distribution of public school land funds. *Id.* at 267–68. The Court stated, “The petitioners do not allege that schoolchildren . . . are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education.” *Id.* at 286. The Court therefore stated, “As we see it, we are not bound to credit and may disregard the allegation that the petitioners have been denied a minimally adequate education.” *Id.*

⁷⁷ See *id.* at 285–86.

⁷⁸ See MASS. CONST. ch. V, § II; *McDuffy*, 615 N.E.2d at 523–28. The Massachusetts Constitution directs the “legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, . . . especially . . . public schools and grammar schools in the towns.” MASS. CONST. ch. V, § II. The *Rodriguez* Court suggested that if a right is explicitly or implicitly mentioned in a state constitution, then that right is a fundamental right for the citizens of that state. See *Rodriguez*, 411 U.S. at 33–34. The education clause in the Massachusetts Constitution seems to pass this test, especially when the issue is the absolute denial of all educational opportunities in the Commonwealth. See MASS. CONST. ch. V, § II; *Rodriguez*, 411 U.S. at 23–25, 33–34. But see *Bd. of Educ. v. Sch. Comm. of Quincy*, 612 N.E.2d 666, 670 n.8 (Mass. 1993) (holding that the school attendance statute did not require the school committee to offer alternative education to an expelled student); *Parkins v. Boule*, 2 Mass. L. Rptr. 331, 341–42 (Mass. Super. Ct. Aug. 3, 1994), available at 1994 WL 879558 (finding expulsion without the provision of alternative education constitutional).

⁷⁹ See, e.g., *Worcester*, 653 N.E.2d at 1095. The Massachusetts courts have affirmed schools’ ability to expel students for misconduct and have held that there is no right to an alternative education after expulsion. See *Quincy*, 612 N.E.2d at 670 n.8; *Parkins*, 2 Mass. L. Rptr. at 341–42. The SJC stated, however, that it was for the legislature to determine whether and in what manner alternative education would be provided to expelled students. See *Quincy*, 612 N.E.2d at 670 n.8. This leaves room for the legislature to mandate the provision of alternative education after expulsion. See *id.*; *infra* notes 171–172 and accompanying text (discussing the mandate in House Bill 178 that principals provide alternative education to excluded students).

an “adequate” education.⁸⁰ Further, the court held that the education provided had to “prepare [students] to participate as free citizens of a free State to meet the needs and interests of a republican government.”⁸¹

In the inquiry into whether a right has been unconstitutionally infringed or merely burdened, courts consider “[t]he directness and substantiality of the interference.”⁸² In both *Rodriguez* and *McDuffy*, the issue was whether all students had the right to the *same* degree of education.⁸³ Conversely, in the case of 37H½, the issue is whether all students have the right to *some* degree of education.⁸⁴ Unlike in *Rodriguez* and *McDuffy*, where students had access to educational services, 37H½ leaves many students without even the minimally adequate education both the *Rodriguez* Court and the *McDuffy* court suggested was constitutionally guaranteed.⁸⁵

2. The Denial of a Minimally Adequate Education Fails Strict Scrutiny

If a minimally adequate education is a fundamental right, courts would subject permanent exclusion under 37H½ to strict scrutiny.⁸⁶ Under strict scrutiny, the government has the burden of proving that a law is necessary to achieve a compelling government purpose and that the law is narrowly tailored, meaning that it is the least restrictive means of achieving that purpose.⁸⁷ The Commonwealth would likely be able to satisfy the first prong and prove that 37H½ serves a compelling state in-

⁸⁰ See *McDuffy*, 615 N.E.2d at 545, 554–55.

⁸¹ *Id.* at 548.

⁸² See *Zablocki v. Redhail*, 434 U.S. 374, 386–87, 387 n.12 (1978).

⁸³ See *Rodriguez*, 411 U.S. at 11–17; *McDuffy*, 615 N.E.2d at 548.

⁸⁴ See MASS. GEN. LAWS ch. 71, § 37H½ (2008) (providing for permanent exclusion from Massachusetts schools after expulsion). The argument that “expulsion to nowhere” violates equal protection is unlike the arguments advanced in both *Rodriguez* and *McDuffy*. See *Rodriguez*, 411 U.S. at 28; *McDuffy*, 615 N.E.2d at 552. In both cases, students argued that funding disparities between schools violated equal protection. See *Rodriguez*, 411 U.S. at 28; *McDuffy*, 615 N.E.2d at 552. Even so, every student had the opportunity to sit in a classroom and learn; under 37H½ that opportunity is denied to some. See § 37H½; *Rodriguez*, 411 U.S. at 37; *McDuffy*, 615 N.E.2d at 519. Between 1993 and 2003, only 49.8% to 68.0% of excluded general education students received alternative education, leaving many students without any educational resources. See *infra* Table 1. After 2003, changing methods of categorizing disciplinary actions makes drawing firm conclusions about the exact percentage of general education students receiving alternative education difficult. See *infra* Table 2.

⁸⁵ See *Rodriguez*, 411 U.S. at 37; *McDuffy*, 615 N.E.2d at 521–22.

⁸⁶ See *Rodriguez*, 411 U.S. at 17; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); Wald, *supra* note 33.

⁸⁷ See, e.g., *Wygant*, 476 U.S. at 280; *Rodriguez*, 411 U.S. at 17, 97.

terest by citing the need to create safe and productive educational environments.⁸⁸ It is difficult to dispute the 1998 statements of the Commonwealth's Education Commissioner, Robert Antonucci, that "[s]uspending and expelling some disruptive students will strengthen the climate for learning" and that "[s]afe schools are a top priority."⁸⁹ In addition, Massachusetts courts defer to the decisions of educators because of the inescapable fact that "[s]chool officials have a duty to 'provide a safe and secure environment in which all children can learn.'"⁹⁰

Despite the compelling state interest in keeping schools safe, 37H½ is not the least restrictive or most narrowly tailored way of achieving that purpose.⁹¹ First, 37H½ gives principals discretion to take action against a student without regard to the actual crime the student has committed.⁹² While the continued presence in school of a student charged with sexually assaulting another child may indeed have "a substantial detrimental effect on the general welfare of the school," the presence of a student charged with felony theft may not be quite so detrimental.⁹³ In the latter case, a student who steals an iPhone, a bicycle, or an expensive jacket is subject to the same consequence of expulsion as a student who sexually molests another child.⁹⁴

⁸⁸ See Blumenson & Nilsen, *supra* note 14, at 108.

⁸⁹ See Hart, *supra* note 16. *But see H.R. 3435 Hearing*, *supra* note 17 (statement of Martha P. Grace, C.J., Juvenile Court Department (retired)) ("[K]eeping children in school, if possible, is a public safety imperative."). Antonucci served as the Commissioner of Education from 1992 to 1998. Robert V. Antonucci, *Statement by Massachusetts Commissioner of Education Robert V. Antonucci*, MASS. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC. (Feb. 4, 1998), <http://www.doe.mass.edu/news/news.aspx?id=1156>.

⁹⁰ See *Doe v. Superintendent of Sch. of Stoughton*, 767 N.E.2d 1054, 1057 (Mass. 2002) (quoting *Worcester*, 653 N.E.2d at 1096).

⁹¹ See *Wygant*, 476 U.S. at 280; *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984) (holding that disciplinary measures are a deprivation of substantive due process when they are "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning"); Blumenson & Nilsen, *supra* note 14, at 109–10 (noting that a state may not constitutionally utilize "expulsion-to-nowhere" when "there are other, reasonable ways to achieve [the state's] goals with a lesser burden on constitutionally protected activity" (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972))).

⁹² See MASS. GEN. LAWS ch. 71, § 37H½ (2008); Wald, *supra* note 33 ("Zero tolerance laws treat all offenses falling within certain categories with equal severity, regardless of intent, mitigating circumstances, or previous record.").

⁹³ See § 37H½(1); MASS. GEN. LAWS ch. 266, § 30 (2008) (defining felony theft as theft of anything worth more than \$250); *Stoughton*, 767 N.E.2d at 1056–57 (upholding a principal's exclusion of a student charged with "indecent assault and battery on a child under the age of fourteen years, and rape and abuse of a child").

⁹⁴ See § 37H½ (allowing principals to suspend or expel students charged with or convicted of any felony). Moreover, three different students could have committed the same offense and receive different treatment after exclusion. See *id.*; see also Blumenson & Nilsen, *supra* note 14, at 109. A special education student has a right to receive alternative

Commissioner Antonucci recognized the potential for overly broad applications of 37H½ in an advisory opinion, stating:

Because of the range of offenses included in the term felony, educational professionals should view the circumstances of each case carefully and make a reasoned determination whether the specific conduct underlying the felony charge or conviction can support the required finding that the student's continued presence would have a substantial detrimental effect on the general welfare of the school.⁹⁵

Though the Commissioner urged restraint, there is ample indication that principals have applied 37H½ indiscriminately and have not heeded the call to carefully consider each case.⁹⁶ Therefore, even if the official policy is that a student should only be expelled if the student's continued presence would truly have a detrimental effect on the general welfare of the school, school officials seem to have jettisoned those guidelines in favor of exclusion in less serious cases.⁹⁷

In addition, 37H½ is not narrowly tailored to further the goal of school safety because it allows punishment for crimes occurring outside the school day, off school property, and without regard to the individuals involved in the incident.⁹⁸ Such punishment does not fit the crime because students are subject to school-based sanctions for their off-

education from the state under IDEA. See 20 U.S.C. § 1412(a)(1)(A) (2006). A general education student committed to DYS will also receive alternative education in the detention facility. MASS. GEN. LAWS ch. 18A, § 2 (2008). The third student, a general education student not committed to DYS, does not have the right to receive alternative education at all. See *Parkins*, 2 Mass. L. Rptr. at 341–42 (stating that students expelled from school do not have a right to alternative education).

⁹⁵ Antonucci, *supra* note 10.

⁹⁶ See *H.R. 3435 Hearing*, *supra* note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services) (“The notion that school administrators should have no patience for violence and drugs in schools has morphed into blanket permission to utilize nearly unreviewable discretion to damage kids['] lives for reasons that often do not relate to school safety.”); Flint, *supra* note 1.

⁹⁷ See *H.R. 3435 Hearing*, *supra* note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services); Flint, *supra* note 1.

⁹⁸ See § 37H½ (allowing punishment for a felony charge or conviction without regard to when and where the alleged offense took place); *H.R. 3435 Hearing*, *supra* note 17 (statement of John L. Reed, Education Chair, NAACP New England Area Conference) (“The concept of due process has always been a major issue with [37H½] because of the provision that indicates a student may be subject to school disciplinary actions after school, on the weekends, off school property, and [based on] any court-related matter if it is brought to the attention of school administration.”).

campus activities.⁹⁹ While crimes occurring during the school day, on school property, or involving school community members might justify the harsh penalties prescribed by 37H½, a crime happening outside of school hours, off school property, and involving no school community members gives rise to a much weaker inference that a student's presence in school is detrimental.¹⁰⁰ These differentiations would not be difficult to write into the law.¹⁰¹

Further, if a student's out-of-school conduct has garnered the attention of the juvenile justice system, that student is already answering for his or her conduct in court.¹⁰² A student should not also face punishment at school, especially when that student's conduct is unrelated to his or her behavior at school.¹⁰³ Otherwise, a student is doubly punished for only "one act of childish misconduct."¹⁰⁴

Finally, long-term or permanent exclusion of students charged with or convicted of felonies is not the least restrictive means of ensuring the safety of other children.¹⁰⁵ Services such as alternative education, counseling, and in-school suspension (removal to another location in the school) are currently or potentially available at every school in Massachusetts.¹⁰⁶ Expansion of these existing services is a more narrowly tailored way of furthering the state interest in keeping schools safe.¹⁰⁷ Though these services cost money and, in the short term, cost much more than simply kicking a student out of school, the long-term costs of permanent expulsion likely outstrip the short-term costs of educating a child after a felony exclusion.¹⁰⁸ Moreover, "surprisingly

⁹⁹ See Brady, *supra* note 54, at 176 (stating that a substantive due process inquiry includes the question of "[w]hether the punishment fits the crime").

¹⁰⁰ See *id.* Expulsion from school for activity occurring outside of school arguably does not meet this test in all situations. See *id.*

¹⁰¹ See, e.g., MICH. COMP. LAWS § 380.1311(2) (2005); H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009) (listing factors for administrators to consider, including the involvement of school community members and the alleged incident's proximity to school).

¹⁰² See *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 21, at 7 (stating that the "double dose of punishment" is the result of school districts teaming up with law enforcement to create a schoolhouse to jailhouse track).

¹⁰³ See *id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Brady, *supra*, note 54, at 176.

¹⁰⁶ See 34 C.F.R. § 300.530 (2010). IDEA requires that if a school removes a special education student from school for more than ten days after a violation of a code of conduct, the school must provide continued educational services to the student. See *id.* Because IDEA mandates alternative education for special education students, every district has alternative education services in place. See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See Bogos, *supra* note 26, at 386 (noting that prison costs more than school).

little evidence” exists documenting the effectiveness of zero tolerance policies in reducing school violence.¹⁰⁹ If the statute does not further the Commonwealth’s pursuit of school safety, the statute is unconstitutional at any level of review.¹¹⁰

B. *The Constitutionally Deficient Procedures of Section 37H½*

Section 37H½ deprives students of procedural due process because the procedures outlined in 37H½ are not “fundamentally fair.”¹¹¹ In *Goss v. Lopez*, the U.S. Supreme Court held that students have a property interest in an education and a liberty interest in their reputation and that access to education should not be limited unless pursuant to fundamentally fair procedures.¹¹² The Court also held that “some kind of notice” and “some kind of hearing” were required before suspensions of ten days or less.¹¹³ The Court further noted, “Longer suspensions or

¹⁰⁹ Wald, *supra* note 33; see *Act Out, Get Out?*, *supra* note 30, at 4.

¹¹⁰ See Adira Siman, Note, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL’Y 327, 344–45 (2005). Even if the courts applied intermediate scrutiny, the burden would still be on the government to prove that the law is substantially related to an important governmental purpose, and the means chosen must be a more than reasonable way of achieving that goal. See *Plyler*, 457 U.S. at 217–18, 218 n.16, 230 (applying intermediate scrutiny to analyze the denial of public education to undocumented immigrant children and holding that Texas had not met its burden); Blumenson & Nilsen, *supra* note 14, at 108 n.171. Even subjected to rational basis review, 37H½ is still unconstitutional because it is not rationally related to a legitimate state interest. See Blumenson & Nilsen, *supra* note 14, at 110–11. “Despite nearly two decades of implementation of zero tolerance policy and its application to mundane and non-violent misbehavior, there is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior.” *H.R. 3435 Hearing*, *supra* note 17 (statement of Daniel J. Losen, Senior Education Law and Policy Associate, The Civil Rights Project at UCLA). In the absence of evidence that 37H½ is making the Commonwealth’s schools safer, the law is not a reasonable means of achieving the goal of school safety. See Siman, *supra*, at 344–45; Wald, *supra* note 33. The availability of alternate means to secure school safety and to differentiate between students who are truly dangerous and students who merely need some guidance further illustrates the irrationality of permanent expulsion. See Siman, *supra*, at 344–45.

¹¹¹ See *Goss v. Lopez*, 419 U.S. 565, 574 (1975); accord U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

¹¹² *Goss*, 419 U.S. at 574–75. In *Goss*, various high school students were suspended without a hearing and sued the school district, alleging procedural due process violations. *Id.* at 567.

¹¹³ See *id.* at 579.

expulsions for the remainder of the school term, or permanently, may require more formal procedures.”¹¹⁴

An analysis under *Goss* shows that the procedural safeguards outlined in 37H½ do not satisfy the constitutional standard.¹¹⁵ First, 37H½ does not mandate that a school provide a hearing to a student before excluding him or her from school.¹¹⁶ The law merely states, “The student shall receive written notification of the charges and the reasons for such suspension [or expulsion] prior to such suspension [or expulsion] taking effect.”¹¹⁷ The student may appeal the principal’s decision and receive a hearing, but must remain out of school until the hearing occurs.¹¹⁸ Providing a right to a hearing only on appeal is in direct conflict with the *Goss* requirement that a hearing must accompany any suspension of ten days or less.¹¹⁹

¹¹⁴ *Id.* at 584. In addition, *Goss* highlights the lack of investigatory care and potential procedural violations stemming from exclusions that are the result of conduct occurring off school grounds. *See id.* at 580–81 n.9.

¹¹⁵ *See id.* at 574, 576, 584. Notice and hearing procedures for suspensions are detailed in 37H½:

The student shall have the right to appeal the suspension to the superintendent. The student shall notify the superintendent in writing of his request for an appeal no later than five calendar days following the effective date of the suspension. The superintendent shall hold a hearing with the student and the student’s parent or guardian within three calendar days of the student’s request for an appeal. At the hearing, the student shall have the right to present oral and written testimony on his behalf, and shall have the right to counsel. The superintendent shall have the authority to overturn or alter the decision of the principal or headmaster, including recommending an alternate educational program for the student. The superintendent shall render a decision on the appeal within five calendar days of the hearing. Such decision shall be the final decision of the city, town or regional school district with regard to the suspension.

MASS. GEN. LAWS ch. 71, § 37H½(1) (2008). The procedures for expulsions are the same as for suspensions. *See* § 37H½(2) (substituting “expulsion” for “suspension” throughout).

¹¹⁶ *See* § 37H½.

¹¹⁷ *Id.*

¹¹⁸ *Id.* In addition, anything a student says at a principal’s or superintendent’s hearing may be used against the student in the felony prosecution. Telephone Interview with Barbara Kaban, Deputy Dir./Dir. of Research & Policy, Children’s Law Ctr. of Mass. (Mar. 12, 2010); *see* H.R. 178, 2011 Leg., 187th Sess. (Mass. 2011) (requiring that a student be provided with “notice that statements at [a] hearing may be used against the student in investigative or criminal or delinquency proceedings”). Principals and superintendents want to know if a student committed the charged offense, and a student without counsel does not know to remain silent in the face of questioning. *See* Telephone Interview with Barbara Kaban, *supra*. Because most students are not represented by counsel at these hearings, the possibility of self-incrimination is high. *Id.*

¹¹⁹ *See Goss*, 419 U.S. at 579, 584; *H.R. 3435 Hearing*, *supra* note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services) (“Under current prac-

Despite the clear two-pronged test under 37H½, the second prong—the “dangerousness determination”—is either meaningless or fully collapses into the first prong—the felony charge or conviction.¹²⁰ In *Doe v. Superintendent of Schools of Stoughton*, the SJC confirmed the existence of a two-pronged inquiry when it stated that “more than a felony charge is required to impose suspension” under 37H½.¹²¹ Just a few sentences later, however, the SJC stated that 37H½ “does not prohibit the principal from drawing an inference of detrimental effect based on the nature of the crime alone.”¹²² Even after such inexact statutory compliance by schools, judges tend to defer to a principal’s decision to exclude a student unless that decision is “arbitrary and capricious, so as to constitute an abuse of discretion.”¹²³ According to the SJC, “Because school officials are in the best position to determine when a student’s actions threaten the safety and welfare of other students, we must grant school officials substantial deference in their disciplinary choices.”¹²⁴

When permanent expulsion is at stake, the procedures afforded by 37H½ are not “fundamentally fair,” as required by the *Goss* Court, and do not adequately protect a student’s property interest in his or her education.¹²⁵ There is no hearing, no meaningful judicial review, and a

tice, the decision to exclude a student from school long-term is accompanied by less process than, for example, an appeal of a decision to assess a surcharge on a driver’s insurance premium.”). Compare § 37H½ (providing for no hearings, even in cases of permanent exclusion), with Mass. H.R. 178 (providing detailed hearing procedures for exclusions of ten or more days).

¹²⁰ See *Stoughton*, 767 N.E.2d at 1058; see also § 37H½. Before excluding a student under 37H½, a principal must have (1) evidence of a felony charge or conviction; and (2) must determine that “the student’s continued presence in school would have a substantial detrimental effect on the general welfare of the school.” § 37H½. Despite the two-pronged test, “suspension upon the charge of a ‘felony,’ . . . is nearly automatic.” *H.R. 3435 Hearing*, *supra* note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services).

¹²¹ *Stoughton*, 767 N.E.2d at 1058.

¹²² *Id.* Though the crime at issue in *Stoughton*, the sexual assault of a minor, is admittedly quite shocking, the fact remains that the court allowed the principal to treat the dangerousness determination as flowing from the felony charge instead of basing it on a separate inquiry. See *id.*; *Parkins*, 2 Mass. L. Rptr. at 336 (noting that a student’s suicide attempts were sufficient to determine that she was a danger to others).

¹²³ See *Stoughton*, 767 N.E.2d at 1057–58 (noting “substantial deference” to school officials in matters of discipline in the absence of arbitrary and capricious action); Brady, *supra* note 54, at 162.

¹²⁴ See *Stoughton*, 767 N.E.2d at 1057. While it is undoubtedly true that school officials are in the best place to determine dangerousness, they are also subject to bias and their decisions about expulsion—especially expulsion for acts that did not occur in school—should be subject to meaningful judicial review. See Flint, *supra* note 1 (discussing principals’ broad application of the power to exclude under 37H½).

¹²⁵ See *Goss*, 419 U.S. at 574.

lack of compliance with the terms of the statute.¹²⁶ The procedures afforded by 37H½ and the lesser procedures actually followed by schools and courts do not meet the standard set in *Goss* for suspensions of ten days or less; therefore, they do not meet the standard necessary for a complete denial of educational opportunity.¹²⁷

C. *The Discriminatory Effects and Disparate Impact of Section 37H½*

Section 37H½ is also constitutionally suspect because minority students are over-represented in exclusion statistics, raising equal protection concerns.¹²⁸ Classification based on race is subject to strict scrutiny because of the history of de jure and de facto racial discrimination in this nation.¹²⁹ Even so, when a contested law is facially neutral, the Supreme Court has held that there is no equal protection violation without

¹²⁶ See MASS. GEN. LAWS ch. 71, § 37H½ (2008); *Stoughton*, 767 N.E.2d at 1058–59.

¹²⁷ See *Goss*, 419 U.S. at 576, 579.

¹²⁸ See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); Bell & Mariscal, *supra* note 25 (stating that while zero tolerance policies appear race-neutral, they have a discriminatory effect and propel youth of color into the juvenile justice system); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”); *Skinner*, 316 U.S. at 536, 541 (holding that a law requiring the sterilization of individuals convicted three times for crimes of “moral turpitude” unconstitutionally violated equal protection because it infringed on the fundamental right of procreation); Wald, *supra* note 33; *infra* Tables 1, 2. A common measure of whether a group is disproportionately affected is whether its proportion in the target classification (here, students excluded under 37H½) exceeds its representation in the population by ten percent of that classification. See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, IND. EDUC. POL’Y CENTER, 3–4 (June 2000), <http://www.indiana.edu/~safeschl/cod.pdf>. For example, if African American students made up twenty percent of the student population and more than twenty-two or less than eighteen percent of excluded students were African American, then the law would have a disproportionate effect on African American students. *Id.*

¹²⁹ See Robert W. Bennett, “*Mere*” Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1076 (1979); Carroll, *supra* note 57, at 1913 (noting that the history of legal racism compels a closer look at the denial of alternative education to expelled students because it further widens the achievement gap between minority and white students). The Supreme Court stated: “A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (citation omitted). Additionally, the nation’s history of race-based discrimination makes it less likely that the political process will protect racial minorities and more likely that states will pass laws that disproportionately impact minority groups, thus calling for a “correspondingly more searching judicial inquiry.” See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Carroll, *supra* note 57, at 1913.

proof of a discriminatory purpose.¹³⁰ Despite the profound impact of racism on laws and on the behavior of citizens, however, racist motives are rarely expressed and are difficult to prove.¹³¹ Some scholars suggest that, because analyzing the presence of discriminatory intent “does not tell the whole story,” courts should use a standard that considers the effects of discrimination.¹³² Under an effects test, “any action that has the same effects as obvious discrimination—the same insulting, stigmatizing, or subordinating effects—should also be unconstitutional.”¹³³

Decades after *Brown* mandated equality of opportunity in education, students of color do not have the same educational opportunities as white students.¹³⁴ In addition, African American students are ex-

¹³⁰ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that, in order to demonstrate an equal protection violation, the defendant “must prove that the decision-makers in *his* case acted with discriminatory purpose”); *City of Mobile v. Bolden*, 446 U.S. 55, 67 (1980) (holding that an election system that disadvantaged minorities would not be subject to strict scrutiny unless there was purposeful discrimination); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that the Court had never found that a racially disproportionate impact, standing alone, violated equal protection). But see *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (invalidating a facially neutral law that was enforced in a racially disparate manner). In contrast, the SJC has suggested that no discriminatory purpose is necessary to claim an equal protection violation under the Massachusetts Constitution. See *Sch. Comm. of Springfield v. Bd. of Educ.*, 319 N.E.2d 427, 434 (Mass. 1974) (holding that “regardless of legislative intent . . . , any action taken . . . which would tend to reverse or impede the progress toward the achievement of racial balance in Springfield’s schools would constitute a violation of . . . arts. I and 10 of the . . . Massachusetts Constitution”); see also MASS. CONST. pt. I, art. I (ratified as amended in 1976) (“Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”). Therefore, proof of disparate impact may be enough for a Massachusetts court to hold 37H½ unconstitutional as a violation of equal protection. See *Springfield*, 319 N.E.2d at 434.

¹³¹ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–56 (1987) (suggesting that a “cultural meaning test” is the best way to discover the unconscious or indirect source of racially discriminatory acts); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 960, 962 (1989) (suggesting a test which focuses on effects as well as intent).

¹³² See Strauss, *supra* note 131, at 962. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court stated that proof of discriminatory impact might provide “an important starting point” in an equal protection claim. See 429 U.S. 252, 265–66 (1977). Proof of discriminatory impact may create an inference of discriminatory intent. See *Washington*, 426 U.S. at 242. Students challenging racially disproportionate expulsions under the Equal Protection Clause, however, had no success in *Fuller v. Decatur Public School Board of Education School District 61*, where a court held that evidence of racially disparate school discipline policies did not violate equal protection in the absence of a discriminatory purpose. See 78 F. Supp. 2d 812, 825 (C.D. Ill. 2000), *aff’d*, 251 F.3d 662 (7th Cir. 2001).

¹³³ See Strauss, *supra* note 131, at 962.

¹³⁴ See Josie Foehrenbach Brown, *Escaping the Circle By Confronting Classroom Stereotyping: A Step Toward Equality in the Daily Educational Experience of Children of Color*, 6 AFR.-AM. L. & POL’Y REP. 134, 135–36 (2004); Hanson, *supra* note 51, at 334 n.127; *Dismantling the School-*

pelled and suspended at disproportionate rates nationwide.¹³⁵ Even when controlling for actual classroom behavior, socioeconomic status, and gender, minority students are disproportionately excluded from school.¹³⁶ In schools that rely heavily on suspension and expulsion as disciplinary tools, which are often schools with a high proportion of minority students, the risk that the application of these punishments will have a racially disparate impact increases.¹³⁷

Once one accepts that minority students have decreased educational opportunity to begin with, the disparity in the application of zero tolerance policies further decreases the probability that a minority student will obtain an education.¹³⁸ The disproportionate exclusion of minority students increases the risk that “African-American families who have benefited from the effects of education after *Brown* may very well lose their gains in social, economic, and community development.”¹³⁹ Indeed, a student who is “expelled to nowhere” has little chance to benefit from whatever educational opportunities are available.¹⁴⁰

to-Prison Pipeline, NAACP LEGAL DEF. & EDUC. FUND, INC., 3–4 (Oct. 10, 2005), http://naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf. American schools, especially in urban settings, are “moving toward resegregation” and African American and Latino students lag behind their white counterparts on academic assessments. Brown, *supra*, at 135. Additionally, children of color learn from teachers who have fewer years of experience and who may teach a subject in which they do not have an academic background. *Id.* at 136. Children of color are also more likely to be in a larger class in an underfunded school, further diminishing the quality of educational opportunity. *Id.*

¹³⁵ Hanson, *supra* note 51, at 332–33. A 1992 study found that African American students were suspended at a rate 250% higher than the rate at which white students were suspended. Donald H. Stone, *Crime & Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings*, 17 AM. J. TRIAL ADVOC. 351, 366 (1993). The notion that increased rates of exclusion among African American students are due to increased rates of poor behavior among those students is not supported by the facts. See Skiba et al., *supra* note 128, at 6. “Whether based on school records or student interviews, studies have failed to find racial disparities in misbehavior sufficient to account for the typically wide racial differences in school punishment. If anything, African American students appear to receive more severe school punishments for less severe behavior.” *Id.* (citations omitted). White students are disciplined more often for smoking, leaving school without permission, vandalism, and obscene language. *Id.* at 13. African American students are referred to the principal’s office more often for disrespect, excessive noise, threats, and loitering—offenses that are both subjectively defined and less serious. *See id.*

¹³⁶ See Bell & Mariscal, *supra* note 25; *Dismantling the School-to-Prison Pipeline*, *supra* note 134, at 6; *Act Out, Get Out?*, *supra* note 30, at 5; Skiba et al., *supra* note 128, at 15–16.

¹³⁷ See Siman, *supra* note 110, at 329; Skiba et al., *supra* note 128, at 18.

¹³⁸ See Brady, *supra* note 54, at 167 (stating that zero tolerance policies disproportionately impact students of color and special education students); Hanson, *supra* note 51, at 333.

¹³⁹ Hanson, *supra* note 51, at 333.

¹⁴⁰ *See id.*

Additionally, it is more likely that African American students will be subject to exclusion under 37H½ because they are more likely to be targeted by police and receive harsh sentences in court.¹⁴¹ Moreover, race makes an impact at selected stages of juvenile processing because juvenile justice officials may be more likely to confine a youth with no family presence or who lacks resources to pay for community-based alternatives to confinement.¹⁴² Most crucially, minorities receive more serious outcomes than their white counterparts.¹⁴³ If minority youth are more likely to be stopped by police and more likely to be sentenced harshly, they are also more likely to fall under the umbrella of 37H½ and to become a member of the uneducated underclass.¹⁴⁴

The data on the application of 37H½ shows that, whether due to police action, prosecutorial decisions, or school-based biases, African

¹⁴¹ See Beale, *supra* note 21, at 542; Hanson, *supra* note 51, at 334; Reed, *supra* note 35, at 609; Skiba et al., *supra* note 128, at 6 (“African Americans are twice as likely to be the target of stop-and-frisk practices, five times more likely to be detained, and up to ten times as likely to be incarcerated.” (citations omitted)). Between 2002 and 2004, African Americans were 16% of youth nationwide but 28% of juvenile arrests, 30% of referrals to juvenile court, 35% of youth judicially waived to criminal court, and 58% of youth admitted to state adult prison. *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, NAT’L COUNCIL ON CRIME & DELINQ., 3 (Jan. 2007), http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf. The same trends apply to Latino students. Neelum Arya et al., *America’s Invisible Children: Latino Youth and the Failure of Justice*, NAT’L COUNCIL OF LA RAZA & CAMPAIGN FOR YOUTH JUST. 6 (May 20, 2009), <http://www.modelsforchange.net/publications/213> (stating that, as compared with white youth, Latino youth are 4% more likely to be petitioned, 16% more likely to be adjudicated delinquent, 28% more likely to be detained, 41% more likely to receive an out-of-home placement, 43% more likely to be waived to the adult system, and 40% more likely to be admitted to adult prison).

¹⁴² Carl E. Pope et al., *Disproportionate Minority Confinement: A Review of the Research Literature from 1989 Through 2001*, U.S. DEP’T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, 2, 7 (2002), http://www.ojjdp.gov/dmc/pdf/dmc89_01.pdf; see Beale, *supra* note 21, at 515. See generally Bell & Mariscal, *supra* note 25 (discussing the racially disparate impact of zero tolerance policies and the resulting overrepresentation of African American youth in the juvenile justice system); *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, *supra* note 141 (discussing racial differences throughout the juvenile justice system); Arya et al., *supra* note 141 (discussing the overrepresentation of Latino youth in the juvenile justice system).

¹⁴³ See Beale, *supra* note 21, at 542; Alex R. Piquero, *Disproportionate Minority Contact*, FUTURE CHILD., Fall 2008, at 59, 60 (“The racial differences that begin with juvenile involvement in crime become larger as youth make their way through the different stages of the juvenile justice system—from detention, to formal hearings, to adjudications, to out-of-home placements, and finally to waiver to adult court.”); *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, *supra* note 141, at 3; Arya et al., *supra* note 141, at 6.

¹⁴⁴ See Beale, *supra* note 21, at 542; Reed, *supra* note 35, at 609; Skiba et al., *supra* note 128, at 6.

American students are disproportionately excluded from schools in Massachusetts.¹⁴⁵ Beginning in 2004, the Massachusetts Department of Education began tracking the application of 37H½ by race.¹⁴⁶ The more recent data reiterate the disproportionate exclusion of African American students under 37H½.¹⁴⁷ Although African American students only made up an average of 8.39% of the student population statewide between 2004 and 2010, between 19% and 39% of students excluded under 37H½ were African American.¹⁴⁸ Conversely, white students made up an average of 71.79% of the student population and between 36% and 56% of students excluded under 37H½.¹⁴⁹ Thus, white students are disproportionately underrepresented in the excluded population.¹⁵⁰ These statistics show that minority students bear the brunt of the consequences under 37H½ and are disproportionately denied a minimally adequate education in the Commonwealth.¹⁵¹

IV. HOUSE BILL 178: A FIRST STEP TOWARDS REFORM

Even if a court upheld 37H½ as constitutional, Massachusetts House Bill 178 provides an opportunity for the legislature to preserve principals' abilities to keep schools safe while removing many of the defects of the current law.¹⁵² House Bill 178 does not address all of the

¹⁴⁵ See *infra* Tables 1, 2.

¹⁴⁶ See *infra* Table 2. Between 1993 and 2003, African American students comprised between 8.0% and 8.8% of the students in the Massachusetts public schools but between 18.5% and 27% of all exclusions. See *infra* Table 1. During the same period, the percentage of Hispanic students in the statewide school population grew from 8.8% to 11.2%. See *id.* Even accounting for the increase in numbers, Hispanic students disproportionately represented between 25.3% and 39.4% of exclusions statewide. See *id.* In comparison, white students comprised between 75.1% and 79.3% of the student population but represented only 33.1% to 48% of the exclusions. See *id.*

¹⁴⁷ See *infra* Table 2.

¹⁴⁸ See *id.* Hispanic students made up an average of 13.21% of the statewide population during the same period but an average of 18.29% of exclusions pursuant to 37H½. See *id.* School officials disproportionately excluded Hispanic students every year between 2004 and 2010 except for 2006, when they were excluded slightly less often than statistically expected. See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*; see also Skiba et al., *supra* note 128, at 3.

¹⁵¹ See *infra* Table 2.

¹⁵² See H.R. 178, 2011 Leg., 187th Sess. (Mass. 2011). House Bill 177, a companion bill to House Bill 178, requires the commissioner to file a yearly report with the legislature concerning the number of, duration of, and reasons for exclusions in each school district, and a breakdown of excluded students "by grade level, race, gender, special education status, socioeconomic status, and English language proficiency," in addition to "the alternative education options provided to students and the number of students re-admitted under the provisions of this section." H.R. 177, 2011 Leg., 187th Sess. (Mass. 2011).

problematic features of 37H½, but it provides a necessary first step in the struggle to strike an appropriate balance between school safety and educational opportunity for all students in the Commonwealth.¹⁵³ House Bill 178 would amend 37H½ to ensure that procedures at the school level were standardized between schools and districts and preserved students' due process rights.¹⁵⁴ In light of the substantial deference that courts show towards the decisions of school administrators, fair process and standardized procedures must exist.¹⁵⁵

There are five main provisions in House Bill 178 that address the deficiencies of the current law.¹⁵⁶ First, House Bill 178 imposes a one-year cap on all exclusions and prohibits exclusions of more than ten days in a single school year unless the administrator determines that "the student's presence in school would have a substantial detrimental effect on the general welfare of the school."¹⁵⁷ Thus, while 37H½ permits all public schools to refuse admission to an excluded student, House Bill 178 ensures that a student's education does not end permanently after a felony exclusion.¹⁵⁸

Second, House Bill 178 provides guidance to administrators in considering whether a student's continued presence in school would have a substantial detrimental effect.¹⁵⁹ House Bill 178 requires a determination that a preponderance of the evidence supports three conclusions:

- (a) that the student engaged in one or more acts of intentional misconduct . . . ;
- (b) that the student's misconduct, because of its severity or a pattern of similar misconduct, indicates that if the student

¹⁵³ See Mass. H.R. 178; see also H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009) (narrowing the types of felonies within the scope of the law, providing explicit guidance to administrators in the substantial detrimental effect determination, providing a ninety-day cap on felony exclusions, and requiring other Commonwealth schools to admit a student who has been excluded pursuant to 37H½ after the exclusion period has ended).

¹⁵⁴ See *H.R. 3435 Hearing*, *supra* note 17 (statement of Peter Hahn, Co-Chair, Juvenile and Child Welfare Section Council of the Massachusetts Bar Association); see also *id.* (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services).

¹⁵⁵ See *id.* (statement of Peter Hahn, Co-Chair, Juvenile and Child Welfare Section Council of the Massachusetts Bar Association).

¹⁵⁶ See Mass. H.R. 178.

¹⁵⁷ See *id.* The one-year cap also applies to non-felony exclusions. See *id.*

¹⁵⁸ Compare MASS. GEN. LAWS ch. 71, § 37H½ (2008) ("Upon expulsion of such student, no school or school district shall be required to provide educational services to such student."), with Mass. H.R. 178 ("A school committee shall not exclude a student from public schools for any period in excess of one year . . .").

¹⁵⁹ See Mass. H.R. 178; *supra* notes 121–124 and accompanying text.

remains in school, the student is likely to engage in further misconduct threatening the institutional and personal security necessary for the learning and teaching environment, or that the student is likely to engage in illegal dealings in controlled substances and promote illegal drug use on school premises; and

- (c) that there is a clear nexus between the student's misconduct and the general welfare of the school.¹⁶⁰

Such clarity regarding when a student's continued presence in school would constitute a substantial detrimental effect prevents the dangerousness determination from collapsing into the felony charge or conviction, as it often does under the current law.¹⁶¹

Furthermore, House Bill 178 would require principals to issue written decisions when a student is excluded after a dangerousness determination.¹⁶² The decisions would need to "demonstrate that the standards required . . . have been considered and evaluated" and would need to be in the form of "a narrative reflecting an individualized analysis, specific to the student, that sets out whether and how the preponderance of the evidence supports the conclusion that the student should be excluded . . ." ¹⁶³ Written decisions would help ensure that a student is excluded only for reasons related to school safety and only after careful consideration and proper procedural steps.¹⁶⁴

Fourth, House Bill 178 requires a hearing in advance of or shortly after the start of any exclusion and provides detailed requirements for a

¹⁶⁰ Mass. H.R. 178. House Bill 3435, proposed in 2009, limited the scope of the law to reach only felonies involving violence toward a person, the use of a dangerous weapon, sexual assault, or trafficking in controlled substances. *See* H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009). Although the three required considerations of House Bill 178 arguably exclude most of the felonies excluded by House Bill 3435, House Bill 178 is not explicit. *Compare id.* (listing specific felonies that bring a student within the reach of the law), *and* MICH. COMP. LAWS § 380.1311(2) (2005) (limiting expellable offenses to weapons possession, arson, and criminal sexual conduct), *with* Mass. H.R. 178 (requiring a determination of a nexus between the misconduct and the general welfare of the school).

¹⁶¹ *See* *Doe v. Superintendent of Sch. of Stoughton*, 767 N.E.2d 1054, 1058 (Mass. 2002).

¹⁶² Mass. H.R. 178.

¹⁶³ *Id.*

¹⁶⁴ *See id.*; *see also* H.R. 3435 Hearing, *supra* note 17 (statement of Dan French, Executive Director, Center for Collaborative Education); *id.* (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services) ("The requirement that a principal go down a checklist and write a reasoned decision creates no burden that does not already exist for the conscientious disciplinarian.").

fair hearing.¹⁶⁵ House Bill 178 requires that the school conduct a hearing “within ten calendar days of any pre-hearing decision to exclude a student.”¹⁶⁶ If an administrator makes a written determination that there is substantial evidence that “the student will engage in further misconduct, or incite others to misconduct, which is violent or which threatens violence if the student is not immediately barred from school premises,” the administrator may exclude the student immediately.¹⁶⁷ In cases of immediate exclusion however, the school must hold a hearing within five days of the alleged misconduct.¹⁶⁸ Whether the hearing occurs within five or ten calendar days of the alleged misconduct, House Bill 178 requires that the school provide written notice to the student at least three days in advance of the hearing.¹⁶⁹ Such notice must set forth the student’s procedural rights at the hearing, which include the right to bring an attorney, the right to cross-examine witnesses, and the right to examine the evidence that the school relied upon in assessing whether the alleged conduct occurred and in making the dangerousness determination.¹⁷⁰

Fifth, House Bill 178 requires principals to “develop a school-wide education service plan for all students who are excluded from school for more than ten consecutive school days.”¹⁷¹ Requiring principals to provide alternative education to students who are excluded for more

¹⁶⁵ Compare Mass. H.R. 178 (requiring a hearing in advance or shortly after the start of any exclusion of ten days or more), with MASS. GEN. LAWS ch. 71, § 37H½ (2008) (requiring a hearing only if the student appeals the suspension to the superintendent). Regarding notice and hearing requirements, one advocate stated, “While [the new definition of substantial detrimental effect] would prohibit principals from defining the term themselves, its clarification in law would not create an administrative burden, particularly if the term is reasonably applied at present.” *H.R. 3435 Hearing*, *supra* note 17 (statement of Phillip Kassel, Advocacy Director, South Coastal Counties Legal Services).

¹⁶⁶ See Mass. H.R. 178.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* House Bill 178 would guarantee that a student could be represented by a lawyer or advocate, could present evidence and witnesses and cross-examine adverse witnesses, and could delay the hearing to obtain representation or to prepare. See *id.* House Bill would also guarantee that an “impartial building administrator [would] preside at the hearing” and that the school would provide “a description of any evidence of which the school is aware, including copies of any written statements and reports on which the school may rely, concerning whether the student committed the alleged misconduct and [concerning the dangerousness determination],” an interpreter, a list of free and low-cost legal services, audio recording equipment, and notice that statements made at the hearing may be used against the student in legal proceedings. See *id.* Section 37H½ provides no such protections. See § 37H½.

¹⁷¹ See Mass. H.R. 178.

than ten days will prevent any student from being “expelled to nowhere” and will ensure that the student’s education continues during the period of exclusion.¹⁷²

Although House Bill 178 represents a significant improvement upon current practices, further changes are necessary in order to ensure that 37H½ only applies to students whose presence poses a serious threat to the school community.¹⁷³ First, even if principals consider the required elements before making a dangerousness determination, there is no guarantee that a student who has committed a non-violent felony will not be excluded.¹⁷⁴ Section 37H½ would better protect students’ ability to stay in school if it limited the types of felonies that triggered potential exclusion.¹⁷⁵ In addition, principals should be required to consider alternatives to exclusion before removing a student from school after a felony charge or conviction.¹⁷⁶ Especially if all felonies trigger potential action under 37H½, principals should be required to engage

¹⁷² See *id.* Although alternative education programs present another set of risks that a student will not receive a minimally adequate education, some education is preferable to no education at all. See generally Barbour, *supra* note 64 (arguing that alternative education programs infringe upon the right to a minimally adequate education).

¹⁷³ See, e.g., MICH. COMP. LAWS § 380.1311(2) (2005) (limiting expellable offenses to weapons possession, arson, and criminal sexual conduct); H.R. 3435, 2009 Leg., 186th Sess. (Mass. 2009) (limiting expellable offenses to violence towards a person, use of a dangerous weapon, sexual assault, or trafficking in controlled substances and requiring consideration of non-exclusionary alternatives); *supra* note 160.

¹⁷⁴ Compare Mass. H.R. 178 (applying to all felonies), with Mass. H.R. 3435 (limiting expellable offenses); *supra* note 160.

¹⁷⁵ See Mass. H.R. 3435 (limiting expellable offenses); see also § 380.1311(2) (limiting expellable offenses); *supra* note 160.

¹⁷⁶ See Mass. H.R. 3435. House Bill 3435 would have required principals to consider several factors in advance of exclusion, including whether the incident occurred in or near school; whether the conduct was defensive; whether similar conduct is likely in the future; and whether transfer—as opposed to exclusion—would lessen the threat posed by the student’s presence in school. *Id.* Other factors include “whether no[n]-exclusionary alternatives to suspension and expulsion are appropriate”; “whether other students from the school were involved”; “whether the conduct was egregious and involved violence or threats of violence causing or capable of causing serious bodily harm”; “the student’s relative culpability given his or her chronological and developmental age and ability to understand the consequences of the misconduct”; “whether the student has been identified or been referred for evaluation for special needs”; “whether it was the student’s intention to cause or create fear of serious bodily harm”; whether the incident involved a weapon and more than two students or the use of a dangerous weapon; and, if drugs were involved, the “relative seriousness of the controlled substance involved and the quantity found in the student’s possession.” *Id.* Many of these considerations have more to do with exclusions pursuant to section 37H (which addresses weapon and drug exclusions, not felony exclusions), but the list of factors is instructive because it requires nuanced consideration of the circumstances instead of a mechanical determination to exclude a student. See *id.*

in a nuanced consideration of the alleged conduct, the student's past behavior in school, and the actual risks to the school community.¹⁷⁷

In addition to legislative reform, schools and teachers across the state can take other steps to decrease the long-term consequences for students who come within the reach of 37H½.¹⁷⁸ Educators should lessen reliance on zero tolerance policies such as 37H½ and increase reliance on in-school counseling, parent communication, mediation, and behavioral modification techniques.¹⁷⁹ Not only would this decrease the number of students who misbehave during the school day, but it would also have a positive effect on students' out-of-school behavior and consequently, on the number of students who commit felonies.¹⁸⁰

Furthermore, lawmakers and school officials need to remember that children are different from adults—physically, mentally, socially, and emotionally.¹⁸¹ After a felony charge or conviction, a juvenile must be able to learn from his or her mistakes and decide to become a productive member of society.¹⁸² Education is a prerequisite to exercising other constitutional rights, to gaining employment, to service in the military, and to other basic functions of citizenship.¹⁸³ The fundamental importance of education in the life of every American dictates that, before taking it away, the government must meet a higher burden than 37H½ currently requires.¹⁸⁴

CONCLUSION

Section 37H½ was passed in a panic about school safety but has had hidden consequences since its inception, depriving far too many students of their right to a minimally adequate education. The disproportionate effect on minority students and the lack of alternative education in many cities and towns raises further questions about the law's wisdom. In addition, citizens without a basic education are not pre-

¹⁷⁷ See *id.* (requiring consideration of several non-exclusionary alternatives). Although factors (a) through (c) in House Bill 178, required as part of the dangerousness determination, address these concerns somewhat, they do not do so explicitly. See Mass. H.R. 178; *supra* note 160 and accompanying text.

¹⁷⁸ See Wald, *supra* note 33.

¹⁷⁹ See *id.*; *Act Out, Get Out?*, *supra* note 30, at 21.

¹⁸⁰ See Wald, *supra* note 33.

¹⁸¹ See *Roper v. Simmons*, 543 U.S. 551, 569–75 (2005) (noting juveniles' lack of maturity, their susceptibility to outside influences and peer pressure, and their still-developing character).

¹⁸² See DeMarco, *supra* note 21, at 571.

¹⁸³ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁸⁴ See *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

pared to fully exercise other constitutional rights, are unqualified for most careers, and cannot join the military or go to college. Pursuant to 37H½, over 1600 Massachusetts students have begun their journey into the uneducated underclass, a journey that may begin with something as foolish as stealing a bag of chips.

Though 37H½ is either unknown or popular in Massachusetts, the law has had severe consequences for communities. The excluded students of today are the repeat offenders of tomorrow and will crowd the Commonwealth's prisons for many years to come. Despite the fact that educating a child for one year costs less than imprisoning that same child for one year, communities are excluding students at alarming rates without regard to the long-term consequences.

Section 37H½ must be amended. The law must protect schools' ability to keep students safe, but it must also reflect the reality that children make mistakes and should not lose the opportunity to obtain a minimally adequate education after "one act of childish misconduct."¹⁸⁵ House Bill 178 provides the legislature with the opportunity to clarify the procedures that educators must follow in order to exclude a student and to ensure that exclusions balance the need for safe schools with students' interests in continued education.

¹⁸⁵ See *Education on Lockdown: The Schoolhouse to Jailhouse Track*, *supra* note 21, at 7.

Table 1: 1993–2003 Statistics*

School Year	Total Student Population by Race (%) AA/H/W	All Exclusions by Race (%) AA/H/W	37H½ Exclusions (#)	General education students receiving alternative education (%)
93–94	8.1/8.8/79.3	25.2/25.3/48.0	12	49.8
94–95	8.0/9.0/79.1	21.3/34.0/42.9	65	58.2
95–96	8.2/9.3/78.5	22.7/39.4/33.1	62	57.6
96–97	8.4/9.6/77.9	23.4/33.8/39.7	63	54.9
97–98	8.5/9.7/77.5	18.5/34.8/41.4	130	58.3
98–99	8.6/10.0/77.1	19.0/32.0/45.0	93	56.0
99–00	8.6/10.2/76.6	24.0/33.0/39.0	102	61.0
00–01	8.7/10.7/75.9	27.0/30.0/40.0	102	64.0
01–02	8.6/10.8/75.7	23.5/28.2/45.6	155	63.0
02–03	8.8/11.2/75.1	26.9/31.3/38.2	98	68.0

* The Massachusetts Department of Elementary and Secondary Education (DESE) keeps statistics on the racial makeup of the student population in Massachusetts public schools. See *Student Data*, MASS. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC., <http://profiles.doe.mass.edu> (follow “State Profile” hyperlink; then follow “Students” tab; then use arrows to navigate from year to year) (last visited Apr. 3, 2011). The data in the column labeled “All Exclusions by Race” was computed by dividing the number of African American (AA), Hispanic (H), or white (W) students expelled each year by the total number of expulsions each year. See *Student Exclusions*, MASS. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC., <http://www.doe.mass.edu/infoservices/reports/exclusions> (follow hyperlinks for each year’s report) (last visited Apr. 3, 2011). The data on the number of exclusions pursuant to 37H½ and the number of general education students receiving alternative education is contained in the DESE’s yearly reports as well. See *id.* All data about Asian and Native American students has been omitted from these calculations.

Table 2: 2004–2010 Statistics*

School Year	Total Student Population by Race (%) AA/H/W	37H½ Exclusions by Race (%) AA/H/W	37H½ Exclusions (#)
03–04	8.8/11.5/74.6	23/27/36	180
04–05	8.9/11.8/74.2	39/17/40	109
05–06	8.3/12.9/72.4	26/12/55	147
06–07	8.2/13.3/71.5	19/23/50	145
07–08	8.1/13.9/70.8	38/15/44	131
08–09	8.2/14.3/69.9	30/17/41	93
09–10	8.2/14.8/69.1	23/17/56	104

* See E-mail from Mass. Dep’t of Elementary & Secondary Educ. (DESE) Admin., to author (Jan. 10, 2011, 14:07 EST) (on file with author) (providing a link to the 2004–2010 statistics that was live for seven days, in response to an e-mail sent to data@doe.mass.edu); 2010 E-mail from DESE Admin., *supra* note 61; *Student Data*, MASS. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC., <http://profiles.doe.mass.edu> (follow “State Profile” hyperlink; then follow “Students” tab; then use arrows to navigate from year to year) (last visited May 8, 2011). All data about Asian and Native American students has been omitted from these calculations.