



Goss v. Lopez to Today: The Evolution of Student Discipline

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“The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.”

Grant Gilmore, *THE AGES OF AMERICAN LAW* 111 (1977) (quoted in M.G. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 *WIS. L. REV.* 891, 923 (1981)).

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The Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law. . . .” On January 22, 1975, the United States Supreme Court held for the first time that a student’s entitlement to a public education is a property interest protected by the Fourteenth Amendment’s Due Process Clause “which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.” *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Over 40 years later, *Goss* remains the cornerstone for court decisions addressing procedural due process rights in student discipline proceedings.

At a minimum, students facing a suspension of 10 days or less are entitled to notice and a hearing. *Id.* at 581. The notice should apprise the student of the charges, and the hearing should offer the student an opportunity to “present his [or her] side of the story.” *Id.* Although the *Goss* decision warned that long-term suspensions (*i.e.*, those over 10 days) or expulsions “may require more formal procedures” to satisfy due process, the Supreme Court did not elaborate on what those procedures would entail. *Id.* at 584. In the initial report about the *Goss* decision, a reporter for the *New York Times* accurately predicted that the Supreme Court’s ruling “was certain to have broad impact on public school disciplinary procedures.”¹

This article first reviews the *Goss* decision and its application to suspensions of 10 days or less, then examines what process is due for students facing long-term suspensions or expulsions. This question is probed through a review of post-*Goss* judicial developments regarding procedural due process for long-term suspensions and expulsions, including the student’s pre-adjudication status, notice, hearing procedures, the right to counsel, witness confrontation, and evidentiary standards.² With a growing trend towards “restorative justice” models and away from “zero tolerance” suspension and expulsion consequences, it remains to be seen whether the use of extensive student disciplinary procedures will diminish.

¹ Warren Weaver Jr., *Supreme Court, 5-4, Backs Rights of Suspended Pupils*, N.Y. TIMES, Jan. 23, 1975, at A1.

² This article limits its scope to federal court decisions addressing K-12 student discipline matters issued since the Supreme Court’s 1975 *Goss* decision. Additional guidance can be gleaned from pre-*Goss* decisions (both state and federal court), as well as court decisions addressing higher education student discipline proceedings. *See, e.g.*, Lisa L. Swem, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359 (1987). Further, this article does not address rights and procedures for students with disabilities under federal or state law.

Goss v. Lopez

In February and March, 1971, the Columbus Public School System (Ohio) suspended a number of students for 10 days for misconduct during student unrest and racial demonstrations. Nine students (including Dwight Lopez) filed a lawsuit seeking declaratory and injunctive relief from their suspensions. Their suit named Norval Goss, the Director of Pupil Personnel, and other school administrators as defendants. Although the factual circumstances of each plaintiff's 10-day suspension differed, one constant applied to all – not one student received a hearing before the suspension.

At the time, an Ohio statute authorized a school principal to suspend a student for up to 10 days. Ohio Rev. Code Ann. § 3313.66 (1972). This statute required school administrators to notify a student's parents of the suspension within 24 hours and state the reasons for the disciplinary action. Neither Ohio law nor Columbus Public Schools' administrative guidelines provided for any type of hearing in connection with a student's suspension.

The students' complaint alleged a violation of their civil rights under 42 U.S.C. § 1983 and sought a declaration that the Ohio statute and the Columbus Public Schools' Administrative Code violated their Fourteenth Amendment due process rights. The students argued that the statute and the school's disciplinary procedure deprived them of both property (their statutory right to an education) and liberty (their reputation as reflected in school records) without due process of law as school administrators were permitted to take action without any kind of hearing. The complaint also sought expungement of the suspensions from the students' school records.

Although the plaintiffs' complaint did not allege racial disparity or discrimination, a reporter for the *New York Times* noted the presence of that issue: "Underlying the Columbus lawsuit were charges by civil rights organizations that white school officials across the nation had been increasingly relying on unjustified suspensions as a discriminatory weapon against black pupils in the city districts where their relative numbers had been on the increase."³

Lower Court Ruling

A three-judge District Court was convened pursuant to 28 U.S.C. § 2281.⁴ The factual issues were first tried in an evidentiary hearing before the Chief District Judge and the findings of fact were

³ Warren Weaver Jr., *Supreme Court, 5-4, Backs Rights of Suspended Pupils*, N.Y. TIMES, Jan. 23, 1975, at A20. For the 2011-2012 school year, black students nationwide were suspended and expelled at a rate three times greater than were white students. U.S. Department of Education Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot (School Discipline)* (March 21, 2014).

⁴ Section 2281 was enacted on June 25, 1948 and provided that an "interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute" on the grounds of the statute's unconstitutionality should not be granted unless the application is "heard and determined by" a three-judge District Court under 28 U.S.C. § 2284. See 62 Stat. 968. Sections 2281-2282 were repealed and § 2284 was amended on August 12, 1976. See Pub. L. No. 94-381, §§ 1-3, Aug. 12, 1976, 90 Stat. 1119 (1976).

adopted by the three-judge court. *Lopez v. Williams*, 372 F. Supp. 1279, 1281 (S.D. Ohio 1973). In a decision issued on September 12, 1973, the District Court declared that the plaintiffs were denied due process of law because they were “suspended without hearing prior to suspension or within a reasonable time thereafter.” *Id.* at 1302. The Court also ruled that § 3313.66 and the Columbus Public Schools Administrative Code were unconstitutional for permitting such suspensions. *Id.*

The District Court ordered Columbus school officials to remove from school files all references to plaintiffs’ suspensions. *Id.* The Court also ordered the Columbus Public Schools to adopt “fair suspension procedures” that included notice of charges and a hearing before a student could be suspended or expelled, unless an emergency required a student’s immediate removal from school. *Id.*

On to SCOTUS

As permitted by federal statute, school administrators appealed directly to the Supreme Court of the United States. Oral argument was conducted on October 16, 1974 and the 5-4 decision was issued on January 22, 1975, affirming the ruling of the three-judge District Court. *Goss v. Lopez*, 419 U.S. 565, 572 (1975).

The Court majority⁵ first addressed the nature of constitutional rights in a public school setting and observed that the Fourteenth Amendment “protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.” *Id.* at 574 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). The Court also noted that “young people” who attend the public school system “do not ‘shed their constitutional rights’ at the schoolhouse door.” *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

In considering the gravity of the disciplinary consequence, the Supreme Court observed that a “10-day suspension from school is not *de minimis* . . . and may not be imposed in complete disregard of the Due Process Clause.” *Id.* at 576. Labeling a suspension of 10 days or less as a “short” suspension, the Court noted that while a “short suspension is, of course, a far milder deprivation than expulsion,” education nonetheless “is perhaps the most important function of state and local governments.” *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Even for short suspensions, the Court found that, “[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.” *Id.*

Competing Interests – Students and Schools

⁵ Justice White wrote the majority opinion, joined by Justices Douglas, Brennan, Stewart, and Marshall. *Goss*, 419 U.S. at 566. Justice Powell wrote a sharply worded dissent and was joined by Chief Justice Burger and Justices Blackmun and Rehnquist. *Id.* at 584. Justice Powell, a former president of the Richmond (Virginia) Board of Education, viewed the majority’s decision as an unwarranted “judicial intervention in the operation of our public schools that may affect adversely the quality of education.” *Id.* at 585.

In analyzing what process is due, the Court noted that the “interpretation and application of the Due Process Clause are intensely practical matters. . . .” *Id.* at 578. The Court added, “[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.” *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

Recognizing the oft-times competing interests of students and schools in disciplinary matters, the Court first addressed those interests from the student’s perspective:

The student’s interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is, in fact, unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

Id. at 579-80.

Turning to the school’s interests (as well as concerns raised in Justice Powell’s dissenting opinion), the Court acknowledged the challenges in operating the Nation’s public schools and observed:

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences, and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order, but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammelled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done.

Id. at 580.

Using the bright line 10-day suspension period raised by the Ohio statute under review, the Court attempted to balance the interests of students and schools when applying the Due Process Clause to student suspensions of 10 days or less. The Court concluded:

We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Id. at 581.

Writing for the dissent, Justice Powell derided the majority's decision as an "unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension." *Id.* at 585. Mindful of the dissent's criticism of judicial overreach, the Court majority reflected: "In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting." *Id.* at 583.

Timing Considerations – Within "Minutes" and "Almost Immediately"

Demonstrating its awareness of the practical implications for student discipline matters, the Court said that there "need be no delay between the time 'notice' is given and the time of the hearing." *Id.* A school administrator could fulfill the notice and hearing requirement simply by "informally discuss[ing] the alleged misconduct with the student minutes after it occurred." *Id.*

The Court explained: "We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is." *Id.* The Court added, "[s]ince the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school." *Id.*

The Court again acknowledged the practical considerations of student discipline matters and found that there could be "recurring situations in which prior notice and hearing cannot be insisted upon." *Id.* The Court recognized that "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." *Id.* at 582. Permitting flexibility "[i]n such cases," the Court held that "the necessary notice and rudimentary hearing should follow as soon as practicable...." *Id.* at 582-83.

It's About Fundamental Fairness

The Court described the impact of its ruling as imposing “requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.” *Id.* at 583. The Court also explained the rationale for its ruling in practical terms for the school context, embedded in the model of fundamental fairness:

[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

Id. at 583-84.

The Court also established what its ruling did *not* mean as to disciplinary procedures for short suspensions of 10 days or less:

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool, but also destroy its effectiveness as part of the teaching process.

Id. at 583.

Having its ruling framed by the issues raised on the record (*i.e.*, short suspensions of 10 days or less), the Court nonetheless recognized that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” *Id.* at 584. The Court stopped at that point and went no further. *See id.* The Court’s last pronouncement serves as the

cornerstone for countless court decisions exploring the contours and nuances as to just what those “more formal procedures” may entail to satisfy the Fourteenth Amendment’s due process clause. See *id.*

Substantive Due Process

Just a month after its decision in *Goss*, the Supreme Court again addressed a student discipline matter, this time from Arkansas. *Wood v. Strickland*, 420 U.S. 308 (1975),⁶ *rev’d on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). While *Goss* addressed a student’s procedural due process rights, *Wood* addressed substantive due process in the context of a student’s civil rights claim under 42 U.S.C. § 1983. The *Wood* decision held that school officials are entitled to qualified good faith immunity from liability for money damages under Section 1983 *unless* they knew or reasonably should have known that their actions would violate the constitutional rights of the affected student. 420 U.S. at 322.

The Supreme Court again focused on the practical implications of its ruling in the context of the daily operation of the Nation’s schools. In doing so, the Court limited the role of federal courts in reviewing student discipline matters and held: “It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”⁷ *Id.* at 326.

Citing to its decisions in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court declared: “Public high school students do have substantive and procedural rights while at school.” *Id.* Nonetheless, the Court again placed limitations on those rights:

But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and

⁶ In a 5-4 decision, Justice White wrote the majority opinion, which was joined by Justices Douglas, Brennan, Stewart, and Marshall. *Wood*, 420 U.S. at 309. Justice Powell wrote an opinion concurring in part and dissenting in part, arguing that the majority’s opinion placed too high a burden on school board officials by equating ignorance of the law with malicious intent. *Id.* at 327-28. Chief Justice Burger, along with Justices Blackmun and Rehnquist, joined in the opinion concurring in part and dissenting in part. *Id.*

⁷ See also *Bd. of Educ. of Rogers, Ark. v. McClusky*, 458 U.S. 966, 971 (1982) (holding that a court may not substitute its judgment for the school board’s interpretation of its own rules); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (“Given the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (holding that the scope of constitutional rights for students is limited by “what is appropriate for children in school”).

school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

Id.

Short-Term Suspension

Three years after *Goss*, the U.S. Supreme Court again examined the gradations of due process, this time in a case involving the dismissal of a medical student who failed to meet academic standards. *Bd. of Curators v. Horowitz*, 435 U.S. 78 (1978).⁸ In commenting about the due process requirements set forth in *Goss*, the Court stated:

All that *Goss* required was an “informal give-and-take” between the student and the administrative body dismissing him that would, at least, give the student “the opportunity to characterize his conduct and put it in what he deems the proper context.” But we have frequently emphasized that “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”

. . . .

Even in the context of a school disciplinary proceeding, however, the Court stopped short of requiring a formal hearing since “further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular discipline tool but also destroy its effectiveness as a part of the teaching process.”

Id. at 85-89 (internal citations omitted).

Given the Supreme Court’s clear pronouncement of what is required for suspensions of 10 days or less, the ensuing court decisions on this issue are relatively sparse.⁹ As illustrated by a recent decision of the Seventh Circuit Court of Appeals, school officials still have a wide margin of error before violating *Goss*’s dictates, despite the Court’s “reservations” about the administrators’ handling

⁸ In a 6-3 decision, the Supreme Court ruled that an academic dismissal from a university without a hearing does not violate due process. *Horowitz*, 435 U.S. at 90. Justice Rehnquist wrote the majority opinion, and was joined by Chief Justice Burger and Justices Stewart, White, Powell, and Stevens. *Id.* at 79. Justice Powell wrote a concurring opinion observing that the student was dismissed for academic deficiencies and was accorded due process. *Id.* at 92-93.

⁹ See, e.g., *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 707 (7th Cir. 2002) (declining to extend *Goss* to require pre-suspension parental notification or a pre-suspension hearing because the requisite due process “is minimal”); *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 566 (8th Cir. 1988) (holding no due process violation when notice and opportunity to be heard were not given to student for an in-school suspension); *C.B. v. Driscoll*, 82 F.3d 383, 386 (11th Cir. 1996) (finding that “once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands”).

of the suspension. See *Dietchweiler v. Lucas*, 827 F.3d 622, 628 (7th Cir. 2016) (ruling that the student received the “requisite notice and opportunity to be heard” before his 10-day suspension). Nonetheless, the *Dietchweiler* Court was “troubled” that administrators threatened to expel the student if he did not admit the charges and found that the case would have been “much more straightforward” if the administrators “had more fully explained” the evidence against him. *Id.*

A concurring opinion joined by the Chief Judge agreed and found that “the undemanding requirements of *Goss* were satisfied here.” *Id.* at 631 (Rovner, J., concurring). The concurrence continued:

Although I do not think *Goss* requires administrators to elaborate at a detailed level as to the basis of evidence against a student, I do think as a practical matter that administrators must be forthcoming enough so as to allow a student to formulate a response to the charges and present his [or her] side of the story. *Goss* itself recognizes that it is especially important that the student be allowed to present his version of events in a case such as this one, where the disciplinarian did not witness the charged conduct.

Id.

The concurrence recognized that while “the bar of *Goss* is low, the stakes of suspension may be high. Even a brief suspension of ten days or less may have serious and lasting consequences on a child’s short-term and long-term academic trajectory.” *Id.* at 632. The concurring opinion admonished administrators to “ensure that, circumstances permitting, students are given every reasonable opportunity to understand and respond to the charges against them.” *Id.*

The dictates of *Goss* also apply to other types of school exclusions for 10 days or less. For example, in *Engle v. Independent School District No. 91*, 846 F. Supp. 760, 765-66 (D. Minn. 1994), the Court ruled that the student could not be excluded from the last 10 days of school for his personal safety without “being afforded some minimum due process protection.”

To ensure compliance with *Goss* for short-term suspensions, Board policy and student handbook language should include the following standards:

- Before making the decision to suspend a student for 10 or fewer school days, an administrator will: (1) provide the student with verbal notice of the offense that the student is suspected to have committed, and (2) provide the student with an informal opportunity to explain the situation.
- Except in an emergency situation, an administrator will not suspend the student unless, after providing the student with notice and an opportunity to explain, the administrator is reasonably certain that the student violated the student code of conduct and the suspension is the appropriate consequence.

Although not required for short-term suspensions, an appeal process provides an extra safeguard which may ultimately weigh in the school's advantage. See, e.g., *Dietchweiler v. Lucas*, 827 F.3d 622, 628-29 (7th Cir. 2016) (noting that the Court's procedural concerns about a 10-day suspension were tempered by the additional due process afforded the student at a suspension appeal hearing where the student was represented by counsel). Any such appeal language should be limited in scope, for example: A suspension of 10 or fewer school days may be appealed to the Superintendent or designee, whose decision is final.

Long-Term Suspension or Expulsion

While limiting its ruling to suspensions of 10 days or less, *Goss* set the stage for courts to determine the parameters of constitutional due process for longer suspensions or expulsions, as those circumstances "may require more formal procedures." *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

Acknowledging that the *Goss* holding is limited to short-term suspensions, the Sixth Circuit Court of Appeals noted that *Goss* "nevertheless establish[ed] the minimum requirements for long-term expulsions as well." *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 927 (6th Cir. 1988). In that regard, students facing a long-term suspension or expulsion do "not have the right to a full-blown administrative appellate process." *Id.*; see also *Coronado v. Valleyview Pub. Sch. Dist.* 365-U, 537 F.3d 791, 795-96 (7th Cir. 2008) (finding that "expulsion does not require a more elaborate hearing in order to comport with due process so long as the student receives the 'fundamentally fair procedures' set out in *Goss*").

Long-term suspension and expulsion procedures must provide the student with an opportunity to be heard in his/her defense.¹⁰ Due process, however, requires only that the student "be permitted to present her side of the story, not that school administrators accept it." *Hammock v. Keys*, 93 F. Supp. 2d 1222, 1229 (S.D. Ala. 2000).

What Process Is Due?

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "The standards of procedural due process are not wooden absolutes." *Keough v. Tate Cnty. Bd. of Educ.*, 748 F.2d 1077, 1081 (5th Cir. 1984). Accordingly, the "sufficiency of procedures employed in any particular situation must be judged in

¹⁰ *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010-11 (7th Cir. 2002) (finding that notice of the charges, notice of the time of the disciplinary hearing, and a meaningful opportunity to be heard provided due process to a student recommended for expulsion); *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist.* 61, 78 F. Supp. 2d 812, 822 (C.D. Ill. 2000) (holding procedural due process met if the student "knew the charges against him, received notice of the expulsion hearing, and was given a full opportunity to explain his position in an evidentiary hearing"); *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990) (requiring student to receive "opportunity to be heard in his [or her] own defense").

the light of the parties, the subject matter and the circumstances involved.” *Id.* (quoting *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970)).

While a student’s advocate may argue for trial-like protections, “courts staunchly resist the suggestion that school disciplinary hearings should emulate criminal trials.” *Hammock v. Keys*, 93 F. Supp. 2d 1222, 1229 (S.D. Ala. 2000). Moreover, student discipline proceedings “need not take the form of a judicial or quasi-judicial trial.” *Brown v. Plainfield Cmty. Consol. Dist.* 202, 500 F. Supp. 2d 996, 1000 (N.D. Ill. 2007) (quoting *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010 (7th Cir. 2002)).

When determining the contours of what process is due for student disciplinary procedures, courts routinely apply the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).¹¹ A non-school case, *Mathews* reviewed procedures for terminating a person’s disability benefits under the Social Security Act. *Mathews*, 424 U.S. at 326. The Supreme Court explained that due process generally requires balancing three distinct factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedure used; and (3) the Government’s interest, weighed against the fiscal and administrative burden of any additional procedures. *Id.* at 335.

When faced with due process questions that may fall within the notorious “gray area” of the law, school officials and legal counsel should use the *Mathews* framework to balance the factors at issue. A healthy serving of “fundamental fairness” should be included for good measure.

Pre-Adjudication Status

For a student facing a long-term suspension or expulsion, school officials should conduct the hearing as soon as practicable and ideally within 10 school days from the student’s initial removal from school. “As a general rule the hearing should be given before removal from the school unless the student’s presence is dangerous or disruptive.” *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1359 (6th Cir. 1996).

Board policy should identify the hearing officer or tribunal for the formal hearing. Especially in smaller school districts, the school board may elect to retain this authority. Otherwise, as permitted by State law, the board may delegate this authority to a committee or appointed administrator. The delegation of this authority should be clearly reflected in board policy.

If the hearing cannot be held within 10 school days, an administrator who was not involved in the initial investigation should conduct a review hearing. This step provides the student with formal notice of the charges and an initial opportunity to respond and may limit a claim of due process violation for an indefinite suspension. *See, e.g., Hill v. Ranking Cnty. Sch. Dist.*, 843 F. Supp.

¹¹ *See, e.g., Coronado v. Valleyview Pub. Sch. Dist.* 365-U, 537 F.3d 791, 796-97 (7th Cir. 2008); *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1240 (10th Cir. 2001); *Palmer ex rel. Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d Cir. 1989); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 923-24 (6th Cir. 1988); *Caston ex rel. Berry v. Benton Pub. Sch.*, 2002 WL 562638, at *3 (E.D. Ark. Apr. 11, 2002); *Rippy v. Bd. of Sch. Trs., Mooresville Consol. Sch. Corp.*, 2000 WL 689340, at *3 (S.D. Ind. Feb. 4, 2000).

1112, 1118 (S.D. Miss. 1993) (holding that the student was entitled to formal hearing before school board's decision to place student on an indefinite suspension pending a hearing on the principal's expulsion recommendation).

If the student requests a delay in the proceedings, school officials should document that request, its reason(s), the school's response, and the student's status (e.g., "suspended, pending hearing on recommendation for expulsion"). *But see, Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (finding no due process violation when student did not receive notice he would be denied credit for "time served" during pendency of expulsion hearing when student requested hearing postponement).

A student facing a related criminal charge may request (typically through legal counsel) a continuance until the criminal matter is resolved. Generally, school officials are not required to hold the school discipline proceedings in abeyance until resolution of the criminal matter. The student's legal counsel may argue that the school discipline proceeding will violate the student's right against self-incrimination. That argument, however, does not require the school to delay the discipline hearing. The student, through legal counsel or other representative, may present information and argument for the decision maker's consideration. Because due process only requires the *opportunity* for a hearing, the student's hearing right may be waived.¹² Any such waiver should be placed in writing and signed by the student's representative.

The Fifth Amendment privilege against self-incrimination may be asserted in any forum, but only if the person's testimony might subject him or her to criminal prosecution. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964). If the student elects not to testify, school officials should not infer misconduct *solely* from the student's refusal to testify. *Gonzales v. McEuen*, 435 F. Supp. 460, 471 (C.D. Cal. 1977); *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1125-27 (E.D. Wis. 2001).

In *Butler*, the Court provided a thoughtful analysis regarding whether school officials could draw an adverse inference from a student's silence at a school disciplinary hearing where the student asserted his Fifth Amendment rights due to a related criminal proceeding. *Butler*, 172 F. Supp. 2d at 1125-27. The Court observed: "where there is other evidence of misconduct, a student's silence may properly become an additional factor pointing towards a guilty finding." *Id.* at 1126. But, "[a]bsent evidence in addition to the bare fact of arrest and formal charge," school officials "could not draw an adverse inference" from the student's silence without violating the Fifth Amendment. *Id.* at 1127.

Notice

Judicial review of procedural notice addresses the general notice of prohibited conduct, as well as the specific notice to the student of the alleged misconduct and recommended disciplinary

¹² See, e.g., *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 625 (5th Cir. 2004); *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010-12 (7th Cir. 2002); *Lotto v. Hamden Bd. of Educ.*, 400 F. Supp. 2d 451, 456 (D. Conn. 2005); *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist.* 61, 78 F. Supp. 2d 812, 823 (C.D. Ill. 2000), *aff'd on other grounds*, 251 F.3d 662 (7th Cir. 2001); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383-85 (C.D. Cal. 1995).

consequences. Notice of the hearing and its procedures should be given as soon as possible and in a manner that provides adequate time for the student to prepare.¹³

General Notice of Prohibited Conduct

Advance notice to students of the types of prohibited conduct and related disciplinary consequences is a basic requirement of due process. A school board may establish policy which identifies student conduct subject to disciplinary consequences. *Darby v. Schoo*, 544 F. Supp. 428, 435 (W.D. Mich. 1982). School discipline rules, however, do not need to be as detailed as a criminal statute.¹⁴ Rather, the student handbook or code of conduct must give the student adequate warning of behavior that could result in disciplinary sanctions.

The inclusion of an “elastic clause” in student handbook language helps to establish that the handbook’s list of “shall nots” is not exhaustive. For example:

To establish an appropriate learning environment for the student, as well as to provide for the health, safety, and welfare of all students and school personnel, the following categories of misconduct have been adopted, along with guidelines for disciplinary consequences for when a student engages in that misconduct. This list is not exhaustive and includes, but is not limited to, the following. . . .

Likewise, the student handbook should include flexible language addressing the place of conduct and application of school rules. For example:

The school’s policies and rules apply to any student who is on school property or school-affiliated transportation, who is at school or at any school-related activity, or whose conduct at any time or place substantially disrupts the operations, discipline, or general welfare of the school.

The suggested language may be helpful in response to a notice argument, especially to the student’s representative who may assert school overreach. Nonetheless, school officials must carefully review

¹³ *Waln v. Todd Cnty. Sch. Dist.*, 388 F. Supp. 2d 994, 1003 (D. S.D. 2005) (holding 1-day notice not sufficient); *Brian A. v. Stroudsburg Area Sch. Dist.*, 141 F. Supp. 2d 502, 510 (M.D. Pa. 2001) (finding 5 days’ notice sufficient); *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 592 (S.D. Ala. 1992) (finding 5 days’ notice sufficient).

¹⁴ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (“Given the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985) (“We have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures.”).

the situation's circumstances to determine whether there is a sufficient nexus between the school and the student's off-campus conduct.¹⁵

Specific Notice of Alleged Misconduct/Recommended Consequences

Notice of alleged misconduct resulting in a recommended long-term suspension or expulsion should be provided to the student in writing.¹⁶ Oral information, however, may correct the deficiencies of the written notice. *Watson v. Beckel*, 242 F.3d 1237, 1241-42 (10th Cir. 2001) (holding constructive notice may suffice if the student knows the allegations that are the subject of the investigation and hearing). While court decisions demonstrate that school officials may enjoy some latitude as to the specificity of the charged misconduct, best practice suggests that the charges should identify the school rule(s) at issue, both by number or other reference and a general description, e.g., Code of Conduct Rule 3.2(B) (distribution of controlled substances).¹⁷ The recommended disciplinary consequence (consistent with school rules) should also be clearly stated in the notice to the student.¹⁸

Notice is constitutionally deficient if the underlying basis for the discipline is not disclosed to the student. See, e.g., *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 928 (6th Cir. 1988) (finding inadequate notice when evidence against the student was not revealed except to the board during private deliberations); *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 658 (W.D. Tex. 2000) (finding student did not receive adequate notice before disciplinary hearing).

¹⁵ See Maryam T. Brotine, *How Far Can a School District Reach in Disciplining a Student for Off-Campus Speech?* NSBA COUNCIL OF SCHOOL ATTORNEYS INQUIRY & ANALYSIS (Dec., 2013); Lisa L. Swem, *Discipline of Students for Off-Campus Conduct*, in *SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS*, 181 (James C. Hanks, ed., 2004).

¹⁶ See, e.g., *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990) (requiring written notice of the charges); *Diggles v. Corsicana Indep. Sch. Dist.*, 529 F. Supp. 169, 172 (N.D. Tex. 1981) (requiring written notice of the specific charges, as well as the nature of supporting evidence); *Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (finding that notice must include the specific charge, "but also the basic rights to be afforded the student: to be represented by counsel, to present evidence, and to confront and cross-examine adverse witnesses").

¹⁷ See, e.g., *L.Q.A. v. Eberhart*, 920 F. Supp. 1208, 1217 (M.D. Ala. 1996), *aff'd*, 111 F.3d 897 (11th Cir. 1997) (finding that notice of drug possession was sufficient, even without citation to specific code section); *D.F. v. Bd. of Educ. of Syosset Cent. Sch. Dist.*, 386 F. Supp. 2d 119, 126-27 (E.D.N.Y. 2005) (finding notice was sufficient, even though parents were aware of only two of the three charges); *Smith v. Mount Pleasant Pub. Sch.*, 298 F. Supp. 2d 636, 639 (E.D. Mich. 2003) (finding adequate notice that comments violated school rules, even though the student was not specifically charged with violating the "obscenity" rule); *Pirschel v. Sorrell*, 2 F. Supp. 2d 930, 937 (E.D. Ky. 1998) (distinguishing between facts leading to suspension recommendation and the precise school policy violated).

¹⁸ *Johnson v. Collins*, 233 F. Supp. 2d 241, 251-52 (D.N.H. 2002) (granting preliminary injunction when notice stated a different consequence than that sought at the hearing – expulsion for the remaining school year versus permanent expulsion); *Trujillo v. Taos Mun. Sch.*, 1995 WL 868603, at *2, *9 (D.N.M. Aug. 10, 1995) (finding sufficient notice, which stated that the student was "recommended for expulsion" which "is permanent"). *But see Baxter v. Round Lake Area Sch.*, 856 F. Supp. 438, 445 (N.D. Ill. 1994) ("[F]ailure of a school to notify a parent of the possible punishments that could result from the expulsion hearing is not a violation of due process.").

Court decisions vary as to the scope of pre-hearing disclosure of the evidence to be used at the hearing.¹⁹ Again, look to school board policy and jurisdictional standards for more definitive guidance on this issue. To the extent practicable (and perhaps subject to redaction²⁰ of a student's personally identifiable information), school officials should promptly provide the student with the information that will be presented at the hearing. Unless there are compelling reasons not to disclose this information, disclosure advances fundamental fairness.

School Policy and Procedures

For most circumstances, board policy and student handbooks address the scope of hearing procedures for long-term suspension and expulsion. Board policy and handbook language, of course, should be consistent; unfortunately, that is not always the case! Student handbooks are a valuable means to convey essential and legally significant information to students, parents, and staff. Handbooks also function as an important tool in the administration of school policy and procedures.

While student handbooks have the primary purpose to effectuate communication and administration, be mindful of yet another purpose – litigation. School officials should annually review the student handbook so that its language is consistent with policy, actual practice, and evolving legal standards.

School officials should strive to comply with established school policy and procedures for student discipline matters. Violation of a school's policy, however, is not *prima facie* evidence of a due process violation if the policy departure “was not particularly egregious” and the same result would have been reached by following the policy. *J.S. ex rel. Duck v. Isle of Wight Cnty. Sch. Bd.*, 362

¹⁹ See, e.g., *R.M.B. v. Bedford Cnty. Sch. Bd.*, 2015 U.S. Dist. LEXIS 88193, at *12 (W.D. Va. July 7, 2015) (finding that student “has a due process right to exculpatory evidence” which is “already within the school’s control”), *sub. opinion*, 169 F. Supp. 3d 647, 657 (W.D. Va. 2016) (finding summary judgment for school on student’s due process claims); *London ex rel. Avery v. Dir. of the Dewitt Pub. Sch.*, 194 F.3d 873, 877 (8th Cir. 1999) (finding no due process violation for not providing witness statements before hearing when student’s attorney had opportunity to cross-examine the witnesses); *Keough v. Tate Cnty. Bd. of Educ.*, 748 F.2d 1077, 1082 (5th Cir. 1984) (finding no due process violation for not disclosing witness names when student was aware of the charges and supporting facts); *Gendelman v. Glenbrook N. High Sch.*, 2003 U.S. Dist. LEXIS 8508, at *10 (N.D. Ill. May 21, 2003) (holding no constitutional requirement to preview hearing evidence); *Whiteside v. Kay*, 446 F. Supp. 716, 721 (W.D. La. 1978) (stating that school officials are “not required to provide [students] with a list of witnesses and a summary of their testimony”).

²⁰ If student witness statements are to be released (see further discussion below), names and other personally identifiable information should first be redacted to comply with the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Pt. 99. The Act defines “education records” as “those records ... which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a party acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A). In comments to proposed amendments to the implementing regulations, the Department of Education stated: “Under this definition a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.” Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,832-33 (Dec. 9, 2008).

F. Supp. 2d 675, 684-85, n.9 (E.D. Va. 2005).²¹ But some courts have found a due process violation where school officials did not follow established standards when disciplining a student.²²

The Hearing Adjudicator

Board policy typically identifies the hearing adjudicator – whether the full school board, a committee, or an individual. “In a school disciplinary context, the level of impartiality required for the decision maker does not reach the absolute neutrality required in the criminal justice system.” *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 656 (W.D. Tex. 2000). Adjudicative bodies considering student discipline matters have a presumption of fairness, and courts will not find a deprivation of procedural due process unless there is a showing of actual bias.²³

“Impartiality is presumed in the school context and due process is not implicated simply because the disciplinarian observed the conduct, had some knowledge regarding it, or even investigated prior to the hearing.” *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 656 (W.D. Tex. 2000). Nonetheless, the *Riggan* Court denied summary judgment to the school defendants because the matter was “of such an obviously personal nature that any reasonable administrator would have deferred to another uninvolved individual to conduct any investigation or to mete out any discipline.”²⁴ *Id.* at 657.

Hearing Record

Due process does not require a verbatim record or transcript of the proceedings. *See, e.g., Coronado v. Valleyview Pub. Sch. Dist.*, 635-U, 537 F.3d 791, 796-97 (7th Cir. 2008); *Carey v. Maine*

²¹ *See also Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984) (“Procedural requirements ordinarily do not transform a unilateral expectation into a constitutionally protected property interest.”); *Wynar v. Douglas Cnty. Sch. Dist.*, 2011 WL 3512534, at *2 (D. Nev. Aug. 10, 2011) (stating that alleged failure to comply with school disciplinary process does not, by itself, violate constitutional due process); *Cohn v. New Paltz Cent. Sch. Dist.*, 363 F. Supp. 2d 421, 432 (N.D.N.Y. 2005) (“[V]iolation of state law is not a recognizable claim under 42 U.S.C. § 1983.”).

²² *See, e.g., Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 451 (W.D. Pa. 2001) (finding violation where no written notice of charges as required by state law); *Huebner v. Bd. of Educ. of Twp. High Sch. Dist. 211*, 1997 U.S. Dist. LEXIS 3568, at *16 (N.D. Ill. Mar. 19, 1997) (finding violation for non-compliance with state law); *Darby v. Schoo*, 544 F. Supp. 428, 438 (W.D. Mich. 1982) (finding violation for failure to follow school policy for hearings).

²³ *See, e.g., Jennings v. Wentzville R-IV Sch. Dist.*, 397 F.3d 1118, 1125 (8th Cir. 2005); *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1013 (7th Cir. 2002); *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1116 (E.D. Wis. 2001); *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 656 (W.D. Tex. 2000).

²⁴ *See also C.B. v. Driscoll*, 82 F.3d 383, 387 n.3 (11th Cir. 1996) (“In the school context, it is both impossible and undesirable for administrators involved in incidents of misbehavior always to be precluded from acting as decisionmakers.”); *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir. 1985) (“A school administrator involved in the initiation and investigation of charges is not thereby disqualified from conducting a hearing on the charges, although the facts of an occasional case may demonstrate that a school official’s involvement in an incident created a bias ‘such as to preclude affording the student an impartial hearing.’”) (quoting *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1077 (5th Cir. 1973)); *Gonzales v. McEuen*, 435 F. Supp. 460, 465 (C.D. Cal. 1977) (finding no impartiality when superintendent served as prosecutor and advisor to the board).

Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 920 (D. Me. 1990). Nonetheless, the decision maker should issue a report on the findings for the two salient issues in most discipline proceedings: (1) did the student engage in the alleged misconduct, and (2) what is the appropriate disciplinary consequence if the misconduct is established?²⁵

If the school board serves as the hearing tribunal, State law may govern the requirements of board minutes and resolutions. For example, the Michigan Supreme Court has ruled that a school board “speaks only through its minutes and resolutions.” *Tavener v. Elk Rapids Rural Agric. Sch. Dist.*, 341 Mich. 244, 251 (Mich. 1954). To assist in framing the school board’s action, the resolution set forth below reflects essential due process elements that should be in the board’s decision.

The resolution’s initial recitals include the alleged misconduct/rule violation and the recommended disciplinary consequence. The remaining recitals reflect prior notice, the “open” or “closed” nature of the hearing, the student’s opportunity to respond, and the board’s responsibility to consider carefully the hearing evidence.

The Administration has recommended that a Student whose identity is known to the Board as Student #___²⁶ be provided a disciplinary hearing for the alleged violation of the Student Code of Conduct # ___ (*describe*) and the recommended disciplinary consequence of _____.

1. The Administration notified the Student’s parents of the specific charge(s) and the disciplinary recommendation, as well as the hearing’s date, time, and place.
2. As authorized by Section ___ of the State Open Meetings Law, the Student’s disciplinary hearing was conducted in a closed session meeting of the Board.
3. Consistent with Board policy, the hearing afforded the Student and the Student’s representatives an opportunity to respond to the charge(s) and disciplinary recommendation and to present pertinent evidence for the Board’s consideration.
4. The Board has carefully considered all of the evidence produced in this discipline hearing.

After these recitals, the resolution moves to the findings, conclusions, and directives. A determination must first be made as to whether the alleged misconduct was established by the

²⁵ Even if the student admits the misconduct, a hearing opportunity must be afforded for the student to seek a milder disciplinary consequence. *See, e.g., Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985) (stating that even for admitted misconduct, “procedural errors” could arise from “the school’s determination of the appropriate punishment for the admitted wrongdoing”). *See also Lamb v. Panhandle Cmty. Unit Sch. Dist. No. 2*, 826 F.2d 526, 528 (7th Cir. 1987) (stating that when a penalty tantamount to expulsion is involved, the school must afford the student “an opportunity to present a mitigating argument”).

²⁶ For school board minutes and other publicly-available records, the Family Educational Rights and Privacy Act prohibits disclosure of the student’s personally identifiable information. 20 U.S.C. § 1232g; 34 C.F.R. Pt. 99.

applicable evidentiary standard. If the misconduct is established, the appropriate disciplinary consequence must be determined. Additional language should be included for special education students, as well as the delegation of administrative authority to implement the school board's decision.

1. A preponderance of the evidence *establishes/does not establish* that the Student engaged in (*describe*), in violation of Student Code of Conduct # ____.
2. The Student is *suspended through (date) or expelled* from the District. Also address, as appropriate, any reinstatement conditions and procedures.
3. During the time of this suspension, the Student shall not be on school grounds or attend any function at the District without prior approval from a designated administrator.
4. [*For special education students*] Consistent with the Board's action taken this date, the Administration shall promptly meet with the Student's parents to determine those appropriate educational programs and services for which the Student may be entitled under state and federal law.
5. The Administration is directed and authorized to implement all terms of this resolution and is delegated all necessary authority to do so.

This resolution also serves as a template for the essential components of a hearing decision, regardless of the adjudicator. And, of course, findings of fact and rationale to support the disciplinary consequence further strengthen the decision, especially if subject to legal challenge.

Right to Counsel

The *Goss* decision expressly held that a student does not have the right to legal counsel for a suspension of 10 days or less. *Goss*, 419 U.S. at 583. Board policy or state law may establish a student's due process right to legal counsel for long-term suspension or expulsion proceedings. If permitted, board policy should clearly state that the representation by an attorney or advocate is at the cost of the parent.

Federal court decisions vary on this issue when applied to proceedings for long-term suspension or expulsion.²⁷ Courts recognizing a student's right to counsel in school discipline proceedings justify this position in several ways: (1) the recommended exclusion from school is a serious deprivation which mandates additional safeguards; (2) legal counsel can help protect the student's interests in the proceeding; (3) permitting the student to use legal counsel is a minimal

²⁷ Compare *C.Y. v. Lakeview Pub. Sch.*, 557 F. App'x 426, 434 (6th Cir. 2014) ("Students do not necessarily have a due process right to an attorney at expulsion hearings, let alone a right to be notified that they are entitled to an attorney."), with *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990) (finding that student must be permitted the assistance of a lawyer in major disciplinary hearing), and *Diggles v. Corsicana Indep. Sch. Dist.*, 529 F. Supp. 169, 172 (N.D. Tex. 1981) (holding that when the Board proceeds through legal counsel the student also has the right to be represented by counsel).

burden to the school; (4) the student needs legal counsel to balance the school's use of legal counsel, especially in the role of "prosecutor"; and (5) the disciplinary matter arises from criminal activity for which the student may be or is subject to prosecution.

Courts also differ as to whether the proper role of the student's counsel should be adversarial or advisory. See *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699, 700 (8th Cir. 1979). In *Dillon*, the student's attorney was not allowed to examine the teacher who had witnessed the student's behavior. *Id.* at 56. The court ordered the student's reinstatement on procedural due process grounds, expunged the student's discipline record, and awarded \$1.00 in nominal damages. *Id.* at 58-59.

Cross-Examination of Witnesses

Confronting and cross-examining witnesses is an important notion in traditional concepts of justice and fair play. In *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), the United States Supreme Court stated: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* involved the termination of statutory welfare benefits. *Id.*

Regardless, "the clear weight of authority holds that a student facing an expulsion hearing does not have the right to cross-examine witnesses or even learn their identities." *B.S. v. Bd. of Sch. Trs., Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003) (citing *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925 (6th Cir. 1988));²⁸ see also *J.S. ex rel. Duck v. Isle of Wight Cnty. Sch. Bd.*, 362 F. Supp. 2d 675, 683 (E.D. Va. 2005) (finding that the "general consensus" is that "there is no due process right to cross-examine witnesses or to examine the actual statements made by witnesses").

On the other hand, some courts have concluded that a student's due process rights do extend to witness cross-examination in a school disciplinary proceeding for a long-term suspension or expulsion, particularly if witness testimony is critical to a determination of the preponderant facts.²⁹

²⁸ See also *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985); *Tun v. Fort Wayne Cmty. Sch.*, 326 F. Supp. 2d 932, 944 (N.D. Ind. 2004), *rev'd sub. nom. on other grounds*, *Tun v. Whitticker*, 398 F.3d 899, 904 (7th Cir. 2005); *E.K. v. Stamford Bd. of Educ.*, 557 F. Supp. 2d 272, 276-77 (D. Conn. 2008); *B.S. v. Bd. of Sch. Trs., Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 891, 901 (N.D. Ind. 2003); *Caston ex rel. Berry v. Benton Pub. Sch.*, 2002 U.S. Dist. LEXIS 11299, at *17-18 (E.D. Ark. Apr. 17, 2002); *Witvoet v. Herscher Cmty. Unit Sch. Dist. No. 2*, 1998 U.S. Dist. LEXIS 22948, at *1-2 (C.D. Ill. May 27, 1998); *Smartt v. Clifton*, 1997 WL 1774874, at *16 (S.D. Ohio Feb. 10, 1997); *L.Q.A. v. Eberhart*, 920 F. Supp. 1208, 1219 (M.D. Ala. 1996), *aff'd*, 111 F.3d 897 (11th Cir. 1997); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1387 (C.D. Cal. 1995); *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 593 (S.D. Ala. 1992).

²⁹ See, e.g., *Lopez v. Bay Shore Union Free Sch. Dist.*, 668 F. Supp. 2d 406, 422 (E.D.N.Y. 2009) (denying school's motion for judgment on the pleadings as student stated claim for due process violation when denied the right to confront accusers); *Rippy v. Bd. of Sch. Trs., Mooresville Consol. Sch. Corp.*, 2000 U.S. Dist. LEXIS 7427, at *15-17 (S.D. Ind. Feb. 4, 2000) (finding cross-examination may be permitted if student was challenging the reliability of his accusers' identification of him, and not solely attacking their credibility); *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990) (ruling that a student must be permitted to confront and cross-examine the witnesses); *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699, 700 (8th Cir. 1979) (finding that where witness

As this right varies by jurisdiction, board policy and practice should be consistent with applicable legal standards.

Factual nuances may influence a court's conclusion about the right to cross-examine student witnesses. One such consideration includes the student's opportunity to question the investigating administrator. The Sixth Circuit Court of Appeals explained:

The value of cross-examining student witnesses in school disciplinary cases . . . is somewhat muted by the fact that the veracity of a student account of misconduct by another student is initially assessed by a school administrator . . . who has, or has available to him [or her], a particularized knowledge of the [accusing] student's trustworthiness.

Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 924 (6th Cir. 1988); *see also Werner ex rel. B.W. v. Bd. of Educ. of Pope Cnty. Cmty. Unit Sch. Dist. No. 1*, 2012 U.S. Dist. LEXIS 115851, at *10-11 (S.D. Ill. Aug. 16, 2012) (finding no due process violation based on student-witness statement attained by principal when the student's attorney was allowed to cross-examine the principal and did not request the student witness to personally appear at the hearing).

Other considerations for denying cross-examination include the student's admissions or the availability of other corroborating evidence.³⁰ In his dissent in *Goss*, Justice Powell warned about the "ultimate frontiers of the new 'thicket' the Court now enters." *Goss*, 419 U.S. 565, 597 (1975). Perhaps attempting not to add more branches to this proverbial thicket, the majority of courts have declined to extend the right of cross-examination in student disciplinary proceedings. The Sixth Circuit Court of Appeals observed:

To saddle [school administrators] with the burden of overseeing the process of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill-equipped to perform. The detriment that will accrue to the educational process in general by diverting school board members' and school administrators' attention from their

testimony was critical, "due process clearly demanded that the [student] should have been given an opportunity to question" the witness); *Gonzales v. McEuen*, 435 F. Supp. 460, 469 (C.D. Cal. 1977) (holding that "due process does not permit admission of *ex parte* evidence by witnesses not under oath, and not subject to examination by the accused student").

³⁰ *See, e.g., Paredes v. Curtis*, 864 F.2d 426, 430 (6th Cir. 1988) (finding no due process right to review statement of anonymous student witness when "essential facts" of the allegations are provided); *E.K. v. Stamford Bd. of Educ.*, 557 F. Supp. 2d 272, 277 (D. Conn. 2008) (finding no due process violation for considering anonymous witness statements where the accused student admitted being present at the incident and knew the names of the involved students); *Bogle-Assegai ex rel. N.B. v. Bloomfield Bd. of Educ.*, 467 F. Supp. 2d 236, 243 (D. Conn. 2006) (holding no due process violation for reliance on student statements to support expulsion without cross-examination, especially when other evidence also supported the decision); *B.S. v. Bd. of Sch. Trs., Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 891, 900 (N.D. Ind. 2003) ("[T]he presence of corroborating evidence further diminishes the potential value of cross-examination at the expulsion hearing.").

primary responsibilities in overseeing the educational process to learning and applying the common law rules of evidence simply outweighs the . . . benefit that will accrue to the fact-finding process by allowing cross-examination.

Newsome, 842 F.2d at 926.³¹

Outside of the hearing room, this additional burden may manifest in the reluctance of some students to share information with administrators. *See, e.g., Caston v. Benton Pub. Sch.*, 2002 WL 562638, at *5 (E.D. Ark. Apr. 11, 2002). (“These students may be understandably reluctant to come forward with information if they are faced with the prospect of formal cross-examination by the offending student or an attorney....”). Moreover, concern about reprisal to student witnesses, however, remains a very significant reason to deny cross-examination.³²

In a similar vein, the U.S. Department of Education’s Office for Civil Rights addressed the issue of cross-examination in a hearing involving allegations of sexual assault and stated:

OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing [involving sexual assault]. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.

³¹ *See also Brown v. Plainfield Cmty. Consol. Dist.* 202, 522 F. Supp. 2d 1068, 1075 (N.D. Ill. 2007) (stating that “[s]addling high school administrators with the burden of overseeing the process of cross-examination” would significantly outweigh the benefits to the accused student and that “[i]ncreasing the complexity of school disciplinary hearings would also divert time and attention away from the administration’s primary purpose: overseeing the educational process”); *Tun v. Fort Wayne Cmty. Sch.*, 326 F. Supp. 2d 932, 943 (N.D. Ind. 2004), *rev’d sub. nom. on other grounds, Tun v. Whitticker*, 398 F.3d 899, 904 (7th Cir. 2005) (“[I]n light of the increasing challenges schools face in maintaining order and discipline,” it is important “to avoid the formalistic trappings, complexity and cost of adversarial litigation” in student discipline and expulsion cases); *Wagner v. Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 915, 928 (N.D. Ind. 2003) (“[I]n light of the increasing challenges schools face in maintaining order and discipline, requiring schools to permit the confrontation of student witnesses or even to disclose their identities in expulsion hearings is overly burdensome and unrealistic.”) (citing *Newsome*, 842 F.2d at 924-25)).

³² *Newsome*, 842 F.2d at 925 (“[W]e conclude that the necessity of protecting student witnesses from ostracism and reprisal outweighs the value to the truth-determining process of allowing the accused student to cross-examine his accusers.”); *E.K. v. Stamford Bd. of Educ.*, 557 F. Supp. 2d 272, 278 (D. Conn. 2008) (upholding rule that “Board may refuse to allow a witness against the pupil to appear when the Board believes that fear on the part of the witness would prevent the giving of accurate testimony”); *D.F. v. Bd. of Educ. of Syosset Cent. Sch. Dist.*, 386 F. Supp. 2d 119, 127 (E.D.N.Y. 2005) (finding that school officials had “a keen interest” in keeping the identity of the student witnesses confidential due to the need to guard against “possible retaliation” by the accused student whom school officials considered to be “potentially violent”); *B.S. v. Bd. of Sch. Trs., Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 891, 901 (N.D. Ind. 2003) (holding that school’s strong interest in protecting students who report misconduct outweighs the minimal value of permitting cross-examination of those students); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995) (finding that the student “victims have an interest in not being identified and subjected to reexperiencing the harassment”); *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff’d*, 594 F.2d 699, 700 (8th Cir. 1979) (holding that the “need for anonymity of student accusers, who might otherwise be the victim of reprisals from fellow students, could prevail over the right to confrontation”).

U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, at 12 (April 4, 2011).

Evidentiary Issues

Evidence includes “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact.” BLACK’S LAW DICTIONARY 635 (9th ed. 2009).

That “something” is a significant component of due process. As the Sixth Circuit Court of Appeals emphasized, once a student is allowed to enroll, school officials do not have “unfettered discretion” to remove the student “at any time and for any reason” even when board policy permits administrative discretion to enroll nonresident students. *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 630 (6th Cir. 2013). In reversing a grant of summary judgment for the school district on this issue, the Sixth Circuit concluded that even an enrolled nonresident student “would still be entitled to due process.” *Id.* at 629. With the growing popularity of school “choice” (i.e., permitting enrollment of nonresident students), board policy (consistent with applicable state law) should treat enrolled resident and nonresident students alike for purposes of due process.

As the charging party, school officials have the burden to prove the alleged misconduct in student discipline proceedings. While the substantial evidence standard generally applies for the burden of persuasion, that standard may vary by state statute³³ or applicable case law authority for a particular jurisdiction. See, e.g., *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990) (applying the substantial evidence standard).

Frequently used in administrative proceedings, the substantial evidence standard requires “[e]vidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla.” BLACK’S LAW DICTIONARY 640 (9th ed. 2009). The preponderance of the evidence standard is typically used in civil trials and is described as the “greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force.” BLACK’S LAW DICTIONARY 1301 (9th ed. 2009). Unless applicable statutory or case law authority clearly permit the substantial evidence standard, it is recommended that the preponderance standard be used.

A student discipline hearing “need not take the form of a judicial or quasi-judicial trial.” *Brown v. Plainfield Cmty. Consol. Dist.* 202, 500 F. Supp. 2d 996, 1000 (N.D. Ill. 2007) (quoting *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010 (7th Cir. 2002)). Accordingly, the rules of evidence do not have strict application and hearsay is permitted. The majority of courts who have addressed this issue have permitted the use of hearsay testimony from school administrators who investigated the incident.³⁴ Absent direct contradictory evidence, the decision maker may rely on hearsay, which

³³ For example, in Michigan, once the school establishes that the student is in possession of a “dangerous weapon” at school, the burden of proof shifts to the student who must establish in a “clear and convincing manner” that one of the four statutory exemptions for permanent expulsion applies. Mich. Comp. Laws § 380.1311(2).

³⁴ See, e.g., *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985) (finding no due process violation for reliance on summaries of student witness statements without witness identified or present for cross-examination); *Wagner v. Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 915, 926 (N.D. Ind. 2003) (finding hearsay is admissible in student discipline

has a “rational probative force.” *Brands v. Sheldon Cmty. Sch.*, 671 F. Supp. 627, 632 (N.D. Iowa 1987). But, the decision maker should not rely *solely* on hearsay, especially if there is a dispute about a material fact.

From “Zero Tolerance” to “Restorative Justice”

Before 1994, federal and state legislation did not specify consequences for student discipline and “generally decreed it to be a local issue.”³⁵ As a condition of receiving federal funds for education, the federal Gun-Free Schools Act of 1994 requires each state to enact legislation that, at a minimum, requires local education agencies to expel for at least one year any student who is determined to have brought a firearm to school, although the chief school administrator may modify the punishment. 20 U.S.C. §§ 8921-8923 (1994). State legislatures can enact mandates that are even more stringent.³⁶

These legislative enactments led to the local school board adoption of so-called “zero tolerance” policies. Such a policy typically mandates “strict, predetermined consequences to specified student behavior(s), with little to no discretion on the part of school officials charged with enforcing the policies.” J. Kevin Jenkins & John Dayton, *Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools*, EDUC. L. REP. 13, 18 (West 2003).

Some federal courts, however, have ruled that the implementation of such policies violate a student’s due process rights.³⁷ Moreover, in 2001, the American Bar Association approved a resolution endorsing a proactive approach to maintaining safe schools and opposing zero tolerance policies “that mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student’s history.” American Bar Association, Resolution to the House of Delegates (Feb. 19, 2001).

These criticisms of zero tolerance, are coupled with concerns about disparate treatment based on race and disability as well as a lack of evidence to demonstrate the efficacy of this approach.

proceedings); *Hammock v. Keys*, 93 F. Supp. 2d 1222, 1228-29 (S.D. Ala. 2000) (finding no due process violation for discipline based on written reports of law enforcement officers and assistant principal).

³⁵ Chris Pipho, *Living With Zero Tolerance*, PHI DELTA KAPPAN, June 1, 1998, available in 1998 WL 13658413.

³⁶ For example, Michigan expanded mandatory expulsion to possession of a dangerous weapon (defined as a firearm, dagger, dirk, stiletto, knife with a blade over 3 inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles. Mich. Comp. Laws § 380.1311(2); Mich. Comp. Laws § 380.1313(4)). In addition, to weapon possession, Michigan mandates the expulsion of students who commit arson or criminal sexual conduct at school, who physically assault a school employee, volunteer, or contractor. Mich. Comp. Laws § 380.1311(2); Mich. Comp. Laws § 380.1311a(1).

³⁷ See, e.g., *Seal v. Morgan*, 229 F.3d 567, 581 (6th Cir. 2000) (“Nevertheless, the Board may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a Zero Tolerance Policy that purports to make the students’ knowledge a non-issue.”); *Colvin v. Lowndes Cnty., Miss. Sch. Dist.*, 114 F. Supp. 2d 504, 511-12 (N.D. Miss. 2000) (“Employing a blanket policy of expulsion, clearly a serious penalty, precludes the use of independent consideration of relevant facts and circumstances.”).

Accordingly, there appears to be a shift moving away from that retributive method and instead favoring a “restorative” approach to student discipline.³⁸

Restorative justice is an approach that holds the offender accountable for rectifying the harm he or she has done and attempts to mediate conflicts and resolve problems through conversations between the involved students and staff. In contrast with punitive or zero-tolerance approaches, restorative justice focuses on the rehabilitation of offenders through reconciliation with victims and the school community. See Jordan Green, *In the Alternative: Restorative Justice in Student Discipline*, NSBA COUNCIL OF SCHOOL ATTORNEYS INQUIRY & ANALYSIS (July 2016).

While these practices are gaining popularity, their use should be universal. For example, according to the Office for Civil Rights, restorative justice is not a proper mechanism to resolve sexual harassment complaints:

[Title IX] grievance procedures . . . may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints. . . . [I]t is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school. . . .

U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, at 8 (April 4, 2011).

Conclusion

The legal and societal standards for student discipline certainly have evolved since the Supreme Court’s *Goss* decision in 1975.

³⁸ For example, Michigan’s zero tolerance requirements – enacted in 1995 and 1999 for mandatory expulsion – were amended in December 2016 to now require school officials to consider each of the following factors the student’s age, the student’s disciplinary history, whether the student has a disability, the seriousness of the student’s violation, whether the violation threatened the safety of another student or staff member, whether restorative practices were used to address the violation, and whether a lesser intervention would properly address the violation. Mich. Comp. Laws § 380.1310d(1) (enacted through Public Act 360 of 2016).

Except for a student expelled for possessing a firearm in a weapon-free school zone, Michigan school officials have discretion over whether to suspend or expel a student.

In exercising this discretion with regard to a suspension of more than 10 days or an expulsion, there is a rebuttable presumption that a suspension or expulsion is not justified unless the board . . . or its designee, can demonstrate that it considered each of the factors listed [above]. For a suspension of 10 or fewer days, there is no rebuttable presumption, but the board . . . or its designee, shall consider each of the factors listed [above].

Mich. Comp. Laws § 380.1310d(2).

Two years after its *Goss* ruling, the Supreme Court ruled that the use of disciplinary corporal punishment in public schools did not violate the Eighth Amendment's prohibition against "cruel and unusual punishment." *Ingraham v. Wright*, 430 U.S. 651 (1977). Yet, since that time, the majority of states would ban this practice, recognizing that its use was not an appropriate school discipline measure. Today, corporal punishment remains legal in 19 states. Elizabeth T. Gershoff and Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy* (2016).

The popularity of zero tolerance policies ushered in by the 1994 Gun-Free Schools Act has diminished due, in part, by legal challenges raising due process implications. While restorative justice practices are gaining acceptance, it remains to be seen whether they are just another educational fad or a cornerstone for a new approach to discipline.

In his dissent in *Goss*, Justice Powell concluded: "As it is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day, it is equally difficult to perceive any principled limit to the new reach of procedural due process." *Goss*, 419 U.S. at 600. Over 40 years of post-*Goss* jurisprudence have demonstrated that Justice Powell's fears have not materialized as courts have imposed principled limitations on a student's due process rights, even for long-term suspensions and expulsions. More importantly, the legacy of *Goss* is a common understanding that the principles of fundamental fairness are inherent to the student discipline process.