

THE ILLUSION OF DUE PROCESS IN SCHOOL DISCIPLINE

Diana Newmark*

ABSTRACT

Long-term suspensions and expulsions can be enormously consequential for students and their families. Not only do exclusionary disciplinary measures directly result in lost learning opportunities for children, but school discipline decisions can also result in significant collateral consequences. These consequences range from lower rates of graduation and higher rates of contact with the criminal justice system to disruptions in foster care placements, violations of juvenile probation, and even possible immigration consequences for undocumented students.

The Supreme Court has recognized the significance of suspensions and expulsions, requiring due process for such exclusionary discipline measures. But the Supreme Court has never explained what process is actually due for long-term suspensions and expulsions. Lower courts have been left to fill in the gaps and, in doing so, have generally shown enormous deference to school officials, upholding hearing procedures that amount to kangaroo courts. For example, courts have found that a student facing exclusionary discipline has no right to know the identity of her accusers, confront witnesses, or have notice of the specific charges against them.

This Article argues that courts analyzing student due process cases have misunderstood the interests at stake in exclusionary discipline, undervaluing a child's interest in attending school and overestimating a school's capacity or inclination to adjudicate school discipline issues fairly. Drawing on case law, research into the consequences of exclusionary school discipline, and case studies from the Education Advocacy Clinic at the University of Arizona, James E. Rogers College of Law, this Article illustrates the high stakes for students facing suspensions and expulsions—and how brittle the due process protections are. As the Article shows, courts are wary of supplanting a school's judgment in school discipline matters, assuming schools will adjudicate discipline issues fairly so that additional process for students is not needed. But this assumption is wrong.

* Associate Clinical Professor of Law and Director, Education Advocacy Clinic, James E. Rogers College of Law, University of Arizona. The author would like to thank Albertina Antognini, Ellen Bublick, Chrystal Clodomir, Andrew Coan, Erin Einhorn, Janel George, Michael Heise, Toni Massaro, Suzanne Rabé, Shalev Roisman, Aarti Sidhu, Emily Stolzenberg, Nichole Tuchinda, Tammi Walker, and Andrew K. Woods. Thank you to Elise Robinson, Amanda Stevenson, Jordon Pollard, and the editors of the *William & Mary Bill of Rights Journal* for a fantastic symposium and to the organizers and participants of the AALS Education Law & Children and the Law Section Works in Progress Workshop. Thank you to the students and clients of the Education Advocacy Clinic.

A comparison to special education law demonstrates that courts do have reason to be wary of a school's decision-making in school discipline matters. Federal special education laws demonstrate a well-earned skepticism toward school officials and a concern that, without oversight, schools will exclude children they deem difficult to educate. In response, these laws establish detailed statutory requirements, numerous procedural safeguards, and regulatory oversight regarding the education of children with disabilities. This framework stands in stark contrast to the deference afforded school officials in the discipline context and shows that courts are naive to assume school officials will adjudicate discipline issues fairly without more due process protections.

This Article re-envisioning what process should be due to students facing exclusionary discipline under existing Supreme Court precedent and provides specific recommendations for procedures that should be required by the courts. Due process—or even basic fairness—can feel far off for many students facing exclusionary discipline. This Article provides a path forward.

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INTRODUCTION

A public school student's constitutional right to due process in disciplinary decisions is largely an illusion. While the Supreme Court recognized a child's right to attend school as one that cannot be taken away without due process,¹ courts have

¹ *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

upheld school suspension and expulsion procedures that seem fundamentally unfair and at odds with common understandings of what “due process” requires. For example, courts have found that a student has no right to know the identity of her accusers,² confront witnesses,³ or have notice of the specific charges against them.⁴

This Article argues that courts have fundamentally misunderstood the interests at stake in exclusionary discipline and that, under existing Supreme Court precedent, students deserve greater procedural protections. In *Goss v. Lopez*, the Supreme Court held that students have the right to due process in suspensions and expulsions but left open the question of what process might be due.⁵ *Mathews v. Eldridge*, decided a year after *Goss*, provides a framework for answering this question.⁶ *Mathews v. Eldridge* asks courts to consider the private interest at stake; the risk of error in the decision-making process and probative value in additional procedures; and the government’s interest, including administrative burdens associated with additional procedures.⁷ Whether explicitly or implicitly analyzing the *Mathews v. Eldridge* factors, lower courts have miscalculated the interests at stake. They have generally undervalued a child’s interest in attending school and overestimated a school’s inclination to adjudicate school discipline issues fairly. This jurisprudence has allowed suspension and expulsion hearings to serve as kangaroo courts, making a student’s constitutional right to due process in discipline largely illusory.

This Article proceeds as follows. Part I details the high stakes for students facing long-term suspensions or expulsions from school. The impact of exclusionary discipline for students has been documented by scholars in a variety of fields.⁸

² See *Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 924 (6th Cir. 1988).

³ See *C.Y. ex rel. Antone v. Lakeview Pub. Schs.*, 557 F. App’x 426, 431 (6th Cir. 2014) (“Students [in an expulsion hearing] do have a right to have the evidence against them explained and to be given an opportunity to rebut that evidence, but this right does not entitle them to know the identity of student witnesses, or to cross-examine students or school administrators.”).

⁴ See *Bd. of Educ. of Monticello Cent. Sch. Dist. v. Comm’r of Educ.*, 690 N.E.2d 480, 482 (N.Y. 1997).

⁵ See 419 U.S. at 584 (“We should also make it clear that we have addressed ourselves solely to the short [term] suspension, not exceeding [ten] days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.”).

⁶ 424 U.S. 319, 335 (1976) (identifying three factors to determine “the specific dictates of due process” in administrative hearings).

⁷ See *id.* at 334–35.

⁸ See, e.g., DANIEL J. LOSEN & PAUL MARTINEZ, *LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN THE OPPORTUNITY TO LEARN* (2020); Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372 (1999); Sheryl A. Hemphill et al., *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. ADOLESCENT HEALTH 736 (2006); Andrew Bacher-Hicks et al., *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on*

Abundant research shows that suspensions and expulsion do not have the desired effect of “scaring students straight” and increasing order on campus; instead, the opposite happens.⁹ Individual students who are suspended experience higher rates of further misbehavior,¹⁰ dropping out of school,¹¹ and increased contact with the criminal justice system.¹² And schools that rely heavily on suspensions and expulsions report lower academic scores and possibly higher rates of misbehavior among students overall.¹³ It nearly goes without saying that permanently expelling children from school has a lifelong negative impact: it denies them the opportunity to learn, grow their talents, and enjoy the benefits that flow from having an education.

But for children who are involved in other legal systems—such as foster care, juvenile delinquency, or immigration—the consequences of school exclusion can be even more severe. The specific collateral consequences of school discipline that attach to children involved in other legal systems are not typically examined as part of the literature on the school-to-prison pipeline. Part I addresses this gap and draws on case studies from the Education Advocacy Clinic to illustrate the unique consequences that arise for students who face not only school discipline decisions but also the immigration, child welfare, or juvenile delinquency systems. For these students, exclusionary school discipline can result in disrupted foster care placements, violations of juvenile probation, and even deportation, in addition to permanent exclusion from school. Part I demonstrates how high the stakes can be for students.

Part II then illustrates what due process looks like for children facing long-term suspensions or expulsion—the most extreme educational consequences. In the

Adult Crime (Nat’l Bureau of Econ. Rsch., Working Paper No. 26257, 2019), https://www.nber.org/system/files/working_papers/w26257/w26257.pdf [<https://perma.cc/XM5A-P67V>]; Am. Psych. Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?*, 63 AM. PSYCH. 852 (2008); CHRISTINA LICALSI ET AL., AM. INSTS. FOR RSCH., AN EMPIRICAL EXAMINATION OF THE EFFECTS OF SUSPENSION AND SUSPENSION SEVERITY ON BEHAVIORAL AND ACADEMIC OUTCOMES (2021), <https://www.air.org/sites/default/files/2021-08/NYC-Suspension-Effects-Behavioral-Academic-Outcomes-August-2021.pdf> [<https://perma.cc/3DS4-ZHWK>].

⁹ See Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 17, 31 (2003).

¹⁰ *Id.* at 25.

¹¹ MELANIE LEUNG-GAGNÉ ET AL., LEARNING POL’Y INST, PUSHED OUT: TRENDS AND DISPARITIES IN OUT-OF-SCHOOL SUSPENSION, at v (2022), <https://learningpolicyinstitute.org/product/crdc-school-suspension-report> [<https://perma.cc/SNW7-63T8>].

¹² Hemphill et al., *supra* note 8, at 736–37.

¹³ See M. Karega Rausch & Russell J. Skiba, *The Academic Cost of Discipline: The Relationship Between Suspension/Expulsion and School Achievement 2* (Ann. Meeting Am. Educ. Rsch. Ass’n, 2005), <https://web.archive.org/web/20180426153705/http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Academic-Cost-of-School-Discipline.pdf> [<https://perma.cc/8SHC-2Z5J>]; LICALSI ET AL., *supra* note 8, at 5; Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOCIO. REV. 1067, 1068 (2014).

absence of direction from the Supreme Court indicating what process might be *due* for long-term suspensions and expulsions, some lower courts have established the constitutional floor of due process, doing so with enormous deference to school officials.¹⁴ These courts are generally wary of supplanting a school's judgment in school discipline matters, assuming that schools will adjudicate discipline issues fairly and that additional process for students is not needed.¹⁵

The result of this jurisprudence is that the due process guardrails protecting students from unfair or arbitrary punishments are extremely brittle, even when the stakes are high. Part II describes the due process protections for students and illustrates what this looks like for a student going through the disciplinary process, drawing on our experience in the Education Advocacy Clinic at the University of Arizona, James E. Rogers College of Law. As Part II details, students facing long-term suspension or expulsion can be confronted with a process that often seems arbitrary and unfair.

Part III argues that courts are wrong to assume that school officials will generally adjudicate school discipline issues fairly, and that more process is not needed to ensure a fair procedure. In making this argument, Part III draws on a comparison between the limited due process protections in school discipline with the far more robust requirements in special education law. A fundamental assumption behind these federal special education laws is that schools might seek to exclude or segregate students deemed difficult to educate.¹⁶ These assumptions are highlighted by the Supreme Court in *Honig v. Doe*, which recognized that public schools have a long history of excluding children with emotional disabilities through the use of suspensions and expulsions.¹⁷ In response to this historical backdrop, federal special education laws created a robust regulatory framework that demonstrates a skepticism toward schools and an assumption that, without regulatory oversight and the opportunity for families to assert due process protections, schools will not be inclined to treat all students fairly. Part III argues that there is no less reason to be skeptical of school officials' capacities and motivations in the school discipline context.

Part IV re-envisioning what process *should* be due to students facing exclusionary discipline. Applying the *Mathews v. Eldridge* factors to long-term suspensions and expulsions, Part IV argues that more process is needed to protect students against arbitrary and unjust decision-making. Not only is the student's interest in attending

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part II.

¹⁶ See 20 U.S.C. § 1400(c)(2) (stating congressional finding that millions of children with disabilities were excluded entirely from school prior to passing the Individuals with Disabilities in Education Act); 29 U.S.C. § 794(a)–(b) (prohibiting schools that receive federal funding from discriminating against children on the basis of disability).

¹⁷ “Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet.” *Honig v. Doe*, 484 U.S. 305, 309 (1988).

school higher than many courts assume, but the risk of erroneous deprivation of their right to education is higher, too. And the administrative burden of additional procedures is not likely as onerous as anticipated, as many districts across the country have adopted more robust procedures than required by the due process jurisprudence. Other schools already take on administrative burden in holding discipline hearings but lack meaningful procedures that would increase the probative value of the hearings they *do* have.

Part IV both argues that a more thorough application of the *Mathews v. Eldridge* factors in school discipline hearings requires additional procedural protections for students facing long-term suspensions and expulsions and provides specific recommendations for what those procedures might be. A brief conclusion follows.

I. THE STAKES

*One afternoon, a social worker reached out to the Education Advocacy Clinic, worried about T.M., a client in ninth grade. A video recently surfaced on social media, appearing to show T.M. and his friends using a marijuana vape pen on their public school campus. As soon as school administrators saw the video, T.M. was immediately suspended, and now his school was seeking a permanent expulsion. For many students, this situation would be serious enough, even if using marijuana is common among teenagers.*¹⁸

But T.M.'s social worker was especially worried. T.M. was in foster care, and a suspension meant that T.M. had to leave his foster home. The foster parent simply could not leave T.M. at home during the school day while she went to work. While some students in T.M.'s situation might be grounded or have cell phone privileges taken away, T.M. was forced to move.

Furthermore, T.M. had no other school to attend, and nowhere to go during the day. His school district did not offer alternative education for suspended or expelled students, and other districts and charter schools would deny enrollment to a student like him facing long-term suspension or expulsion. His only option was to stay at his group home during the school day with nothing to do—a plan with no end in sight.

T.M.'s social worker heard there was a discipline hearing in a couple of days and wanted to find someone to represent T.M. Hopefully, the social worker thought, someone could explain the situation to the district and T.M. could return to school.

¹⁸ Thirty-seven percent of high school students reported having used marijuana at least once according to a 2019 study. *Marijuana Use and Teens: What You Need to Know*, CTRS. FOR DISEASE CONTROL & PREVENTION 1, 1 (Oct. 2021) (citing Jones et al., *Prescription Opioid Misuse and Use of Alcohol and Other Substances Among High School Students—Youth Risk Behavior Survey, United States, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 38 (2020), <https://www.cdc.gov/marijuana/factsheets/pdf/MarijuanaFactSheets-Teens-508-compliant.pdf> [<https://perma.cc/ZGX3-3ANW>]).

T.M.'s case is typical of the clients who reach out to the Education Advocacy Clinic.¹⁹ Often, an adult—a parent, a lawyer, or social worker—worries that exclusionary school discipline could have enormous consequences in the child's life and is searching for a way to help. Sometimes, the adult has received notice that a discipline hearing is scheduled and reaches out for representation, hoping to get the child back in school. Other times, the family contacts us after a disciplinary decision is finalized, frustrated that the student received a months- or year-long suspension after a hearing that seemed like a sham.

Abundant research shows that exclusionary school discipline practices and zero-tolerance policies for school-based behavior have an enormous impact on children in our nation's public schools.²⁰ Over the last thirty years, the number of public school students suspended and expelled have ballooned, with suspension and expulsion rates nearly doubling in that period of time.²¹ Now, approximately one out of every fourteen students is suspended or expelled each year.²² And the decision to suspend or expel students for increasingly long periods of time has become commonplace.²³

The basic premise behind exclusionary school discipline is that a serious consequence will teach students appropriate behavior and deter them from misbehaving in the future.²⁴ But research shows that suspensions and expulsions are ineffective

¹⁹ This case study, like the others that appear in this Article, are based on Education Advocacy Clinic cases, although the child's initials and other identifying information have been changed.

²⁰ See, e.g., ABA COAL. ON RACIAL & ETHNIC JUST., ABA TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE: REPORT, RECOMMENDATIONS AND PRELIMINARY REPORT 8 (2018), <https://www.americanbar.org/content/dam/aba/administrative/corej/final-school-to-prisonpipeline.pdf> [<https://perma.cc/KR3G-KYL3>] (describing the school-to-prison pipeline as “one of our nation's most formidable challenges”).

²¹ See DEREK W. BLACK, ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE 7–8 (2016); see also LEUNG-GAGNÉ ET AL., *supra* note 11, at v (discussing the increase of suspension rates from 1973 to the early 2000s).

²² In one recent year, public school students in the United States missed over eleven million school days due to suspensions. *2017–2018 State and National Estimations, C.R. Data Collection*, U.S. DEP'T OF EDUC., <https://ocrdata.ed.gov/estimations/2017-2018> [<https://perma.cc/2CY4-4CU3>] (last visited Dec. 4, 2023) (select the drop-down menu for “Discipline”; then select the “2017–18 Days Missed Due to Out-of-School Suspensions Estimations” Excel file).

²³ See BLACK, *supra* note 21, at 7–8.

²⁴ In a 2021 survey of school principals, 81% agreed or strongly agreed that discipline is meant to teach students appropriate behaviors, although 69% of principals believed that “suspension and expulsion do not really solve discipline problems.” Only 12% of principals agreed that suspensions make students less likely to misbehave in the future; 0% strongly agreed with the statement. Rachel M. Perera et al., *Understanding School Leaders' Perspectives on Behavior and Discipline Survey*, BROOKINGS INST. 1, 4, 6 (Nov. 2021), <https://www.brookings.edu/wp-content/uploads/2023/01/Perera-et-al.-November-2021-School-Discipline-Survey-1.pdf> [<https://perma.cc/ZME4-ZCH6>].

tools at correcting misbehavior.²⁵ Some research suggests that a school suspension is, itself, a cause of future offending behavior.²⁶

Another common assumption is that suspension will have a positive impact on the remaining students, allowing them to focus more on their studies. But research shows this is not the case, either. Schools that rely heavily on suspensions and expulsions show decreased academic scores overall, including among students who were *not* suspended.²⁷

What the data shows is that exclusionary discipline has a distinct detrimental effect on students who are suspended or expelled. At a minimum, these students miss instructional time, making progress in the academic curriculum—or graduating from high school at all—more challenging.²⁸ Students suspended or expelled are more likely to drop out of school, become involved in the juvenile delinquency or criminal justice system, and suffer economic consequences as adults.²⁹ While the rise in exclusionary school discipline reaches all populations of public school students, it has the most significant impact on some of the most marginalized children—students of color,³⁰ students in foster care,³¹ and children with disabilities.³²

²⁵ See LICALSI ET AL., *supra* note 8, at 1.

²⁶ See Thomas J. Mowen et al., *The Effect of School Discipline on Offending Across Time*, 37 JUST. Q. 739, 739–40 (2019).

²⁷ LEUNG-GAGNÉ ET AL., *supra* note 11, at v.

²⁸ For a meta-analysis of studies on the effects of exclusionary discipline on student achievement, see generally Amity L. Noltemeyer et al., *Relationship Between School Suspension and Student Outcomes: A Meta-Analysis*, 44 SCH. PSYCH. REV. 224 (2015), <https://www.tandfonline.com/doi/full/10.17105/spr-14-0008.1> [<https://perma.cc/GQ5C-MLJY>] (finding a statistically significant inverse relationship between suspension and academic achievement). Of course, suspensions and expulsions are also difficult for parents and caregivers, as they must juggle work and the unexpected responsibilities of watching a child at home—a difficult situation that was forced into sharp relief with the COVID-19 pandemic.

²⁹ The economic impact of school suspensions extends beyond the students and their families. One analysis estimates that school suspensions among the nation’s tenth-grade students cost taxpayers approximately \$35 billion each year. See RUSSELL W. RUMBERGER & DANIEL J. LOSEN, CTR. FOR C.R. REMEDIES, *THE HIGH COST OF HARSH DISCIPLINE AND ITS DISPARATE IMPACT 2* (2016), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf [<https://perma.cc/T4B4-XMK8>]. Simply having a school disciplinary record can make it more difficult for a young person to gain admission to college or graduate schools. See generally Eve Rips, *The Collateral Consequences of School Disciplinary Records*, MICH. ST. L. REV. (forthcoming 2024).

³⁰ RUMBERGER & LOSEN, *supra* note 29, at 2.

³¹ Brianne H. Kothari et al., *A Longitudinal Analysis of School Discipline Events Among Youth in Foster Care*, 93 CHILD. & YOUTH SERVS. REV. 117, 117 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8204670/> [<https://perma.cc/4J7V-X64V>].

³² *Digest of Education Statistics, 2017 Tables and Figures, Table 233.28*, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d17/tables/dt17_233.28.asp [<https://perma.cc/VPT7-VA4X>] (last visited Dec. 4, 2023).

To illustrate how these consequences have an impact on students, Part I provides examples from the Education Advocacy Clinic at the University of Arizona, James E. Rogers College of Law. The Clinic provides representation to K–12 students in discipline hearings and appeals, as well as special education matters, with a focus on representing children who are also involved in other legal systems—such as child welfare, juvenile delinquency, or immigration. This focus gives the Education Advocacy Clinic a window into how the school discipline system operates for some of the most marginalized students. Drawing on this experience, this Part highlights specific collateral consequences that follow some students facing suspension or expulsion and shows how high the stakes are for students facing long-term suspension and expulsion.

A. Total Barrier to School

For students like T.M., a long-term suspension or expulsion does not mean a simple exclusion from the school the student most recently attended; it can mean months without any school to attend—or permanent removal from the school system entirely. In the Education Advocacy Clinic, we hear from students like T.M. who try to enroll as a suspended or expelled student in a new district, only to find out that the new school, per school board policy, will honor the previous disciplinary decision.³³

For students facing expulsion, there might not be *any* school that will accept them. In Arizona, where the Clinic practices, state law authorizes school districts and charter schools to deny enrollment to a student who is facing expulsion, or was expelled, from another school.³⁴ In our experience, most districts use that authority and do not accept students expelled elsewhere. Private schools are often not an option either, as they are free to set their own admissions criteria and can also deny students for their disciplinary history. This means that an expulsion from one school is effectively an expulsion from all. In T.M.’s case, the social worker was right to be worried that a suspension and possible expulsion meant he had no access to attending school.

Given the long-standing importance of education in our society, “[s]tripping a child of access to educational opportunity” amounts to “a life sentence to second-rate citizenship.”³⁵ Education through high school is “almost necessary for survival.”³⁶

³³ See, e.g., Tucson Unified Sch. Dist., *Policy-Code-JF: Student Admissions* (2007), <https://govboard.tusd1.org/Policies-and-Regulations/Policy-Code-JF> [<https://perma.cc/U8FB-XD8U>].

³⁴ ARIZ. REV. STAT. § 15-841(C) (2000) (“A school district may refuse to admit any pupil who has been expelled from another educational institution or who is in the process of being expelled from another educational institution.”); ARIZ. REV. STAT. § 15-184(I) (2022) (“A charter school may refuse to admit any pupil who has been expelled from another educational institution or who is in the process of being expelled from another educational institution.”).

³⁵ *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 706 (5th Cir. 1974) (Godbold, J., dissenting in part).

³⁶ *Id.*

And as the Supreme Court recognized in *Brown v. Board of Education*, “it is doubtful that any child may reasonably be expected to succeed in life” if denied an education.³⁷

Yet for some expelled students, attending school just might not be an option. There is no fundamental, federal right to education.³⁸ While some states have recognized a right to an education, others have not.³⁹ Depending on state law, students who are expelled might not even be able to attend alternative schools.⁴⁰ For some students facing expulsion, like T.M., the consequences could have a lifelong detrimental impact.

B. Foster Care

The consequences of a suspension or expulsion can extend beyond the academic context. In the Education Advocacy Clinic’s experience, it is not unusual for a long-term suspension or expulsion to be a key reason for a child in foster care to switch to a new home. A foster parent might be apologetic about the decision, but having to watch a child at home during the day instead of sending them to school can be yet another burden that some foster parents cannot take on. And children in foster care, although a heterogeneous group, are more likely to experience exclusionary school discipline than compared to their peers.⁴¹

These students have often already experienced trauma, neglect, or abuse.⁴² The lesson learned from school discipline is simply that their school—perhaps like many others in their lives—will just give up on them. The high rates of exclusionary discipline among students in foster care is possibly one of the reasons why this population of students is far less likely than their peers to complete high school or attend college.⁴³ For students in foster care, the collateral consequences of exclusionary discipline can reverberate.

C. Juvenile Delinquency

If T.M. also had a juvenile delinquency case, he might face a probation violation for getting suspended from school. In the Education Advocacy Clinic, I often take

³⁷ 347 U.S. 483, 493 (1954).

³⁸ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

³⁹ See DEREK W. BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 161–203 (3d ed. 2021) (discussing the variety of opinions from state courts of last resort finding a constitutional or fundamental right to an adequate or equal education under state law).

⁴⁰ See *Walter v. Sch. Bd.*, 518 So. 2d 1331, 1332–33 (Fla. Dist. Ct. App. 1987).

⁴¹ See Kothari et al., *supra* note 31, at 117.

⁴² See *id.* at 118.

⁴³ See U.S. DEP’T EDUC. & DEP’T HEALTH & HUM. SERVS., *NON-REGULATORY GUIDANCE: ENSURING EDUCATIONAL STABILITY FOR CHILDREN IN FOSTER CARE* 3 (2016), <https://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf> [<https://perma.cc/7CDL-8P3D>].

my students to visit a juvenile probation officer, who shows us the typical conditions for juvenile probation.⁴⁴ Along with requirements such as maintaining curfew and keeping in regular touch with the probation officer, these conditions typically require children to attend school daily and stay out of trouble there.⁴⁵

As with adults, a violation of juvenile probation can result in being detained.⁴⁶ This is not an empty threat. A recent study shows that 11% of children in detention settings are detained due to technical violations of probation conditions, not necessarily due to the severity of their underlying offense.⁴⁷ For children in the juvenile delinquency system, a long-term suspension or expulsion from school could have significant consequences, even resulting in their detention.

It is easy to understand why attending school would be important to a juvenile court judge overseeing a delinquency case: a young person with no school or job to attend during the day might engage in risky behavior and or engage in criminal activities. And a school suspension or expulsion undoubtedly affects the child's school attendance. Not only is staying in school important for children in the delinquency system so that they can learn and grow their talents, but it can also mean the difference between living at home and being detained.

D. Immigration

If T.M. were an undocumented immigrant or asylum seeker, like some of the Clinic's clients, he might face serious immigration consequences from his suspension or expulsion for marijuana possession, especially if the school alleged that he shared or provided marijuana to his friends. Even though marijuana possession, sale, and use are legal for adults in many states,⁴⁸ it is still a federal crime on school

⁴⁴ See NAT'L COUNCIL JUV. & FAM. CT. JUDGES, THE ROLE OF THE JUDGE IN TRANSFORMING JUVENILE PROBATION 22 (2021), <https://assets.aecf.org/m/resourcedoc/ncjfcj-the-role-of-the-judge-2021.pdf#page=19> [<https://perma.cc/HZ2U-ZSCC>] (recommending individualized goal-orientated case planning for children on juvenile probation in lieu of standard probation conditions).

⁴⁵ For one example of a template juvenile probation order, see Fort Bend County, Texas, *Conditions of Probation*, <https://www.fortbendcountytx.gov/sites/default/files/document-central/document-central/county-clerk-documents/form-library/juvenile-court/ConditionofProbation.pdf> [<https://perma.cc/3RFY-HQA2>].

⁴⁶ See, e.g., *In re J.L.D.*, 536 S.W.2d 685, 686 (Tex. Civ. App. 1976).

⁴⁷ OFF. JUV. JUST. & DELINQ. PREVENTION, EASY ACCESS TO THE CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT (2021), https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense_Facility.asp [<https://perma.cc/LZY2-W6C5>]; see also NAT'L COUNCIL JUV. & FAM. CT. JUDGES, *supra* note 44, at 62 n.80 (naming "schoolyard fighting" as an example of a less serious offense that results in a child's removal from home).

⁴⁸ See *State Approaches to Marijuana Policy*, THE COUNCIL OF STATE GOV'TS (Feb. 13, 2023), <https://www.csg.org/2023/02/13/state-approaches-to-marijuana-policy/> [<https://perma.cc/Q4NL-GLVY>].

campuses⁴⁹ and a barrier to immigration relief.⁵⁰ If an immigration officer has “reason to believe” that the child has engaged in drug trafficking, for example if he had a few marijuana vape pens to share with friends, the school suspension could possibly be grounds for deportation.⁵¹

A school’s accusation that a teenager provided marijuana vape pens to their classmates might not result in any attention from a local district attorney’s office, yet it might result in the child’s deportation or barriers to an asylum claim.⁵²

E. Considering the Consequences

Schools, of course, have little or no control over the collateral consequences that flow from a disciplinary decision on their campus. Although some school administrators might be aware that a long-term suspension or expulsion could impede efforts to get an education elsewhere, they may not even know that a student could face severe consequences in other legal systems—like disrupted foster placements, juvenile probation revocations, or immigration consequences like deportation. These consequences are not typically discussed as part of the literature on exclusionary discipline, and school officials are not likely thinking of them when they choose to discipline a student.

But just because a school cannot control the collateral consequences does not mean those consequences are irrelevant. For a student, the consequences matter a great deal.

II. BRITTLE DUE PROCESS GUARDRAILS

Despite the potentially severe consequences at stake in long-term suspensions and expulsions, courts have generally required little in terms of procedural protections for accused students. This Part illustrates that the due process guardrails protecting students from arbitrary and unfair punishments are brittle, drawing on case examples in the Education Advocacy Clinic as well as lower court decisions.

⁴⁹ 21 U.S.C. § 860(a).

⁵⁰ 8 U.S.C. § 1182(h); *see also* KATHY BRADY ET AL., IMMIGRANT LEGAL RES. CTR., IMMIGRANTS AND MARIJUANA 3 (2021), https://www.ilrc.org/sites/default/files/resources/immigrants_marijuana_may_2021_final.pdf [<https://perma.cc/RL8S-YAMT>].

⁵¹ BRADY ET AL., *supra* note 50, at 13. One might wonder whether immigration officials would learn of a school suspension or expulsion. But this type of information sharing can be a real risk, particularly for students who arrive in the United States as unaccompanied minors, many of whom are placed into the care of the Office of Refugee Resettlement, which cares for the children and ensures they attend school. Per a shared Memorandum of Understanding, the Office of Refugee Resettlement must provide information to ICE and DHS regarding possible criminal activities among the individuals in its care.

⁵² *See infra* Part IV.

In *Goss*, the Supreme Court spelled out the minimum due process protections for a student facing a suspension of ten days or fewer, with the understanding that the rudimentary procedures the Court mandated amounted to “requirements which are, if anything, *less* than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.”⁵³ For suspensions of ten days or fewer, this rudimentary process entails providing students notice of the charges, an explanation of the school’s evidence, and the opportunity to present their side of the story.⁵⁴ The Court in *Goss* opined that more procedures might be necessary for longer suspensions but did not specify what they might be.⁵⁵ This decision has been critiqued as one that does little to furnish courts with a principle that will enable them to decide future cases.⁵⁶

As a general matter, core components of due process include meaningful notice to prepare a defense, opportunity to contest the charges, and a hearing in front of an impartial decision-maker.⁵⁷ The purpose of these procedures is to guard against arbitrary and unjust deprivations of someone’s rights.⁵⁸ But what process might be due for a given proceeding can vary.⁵⁹ The relatively few courts⁶⁰ that have decided due process issues in school discipline cases generally failed to ensure meaningful guardrails to arbitrary decisions and overreach by school officials.⁶¹ This jurisprudence has been criticized as giving a green light to suspend and expel students with very few limitations; as long as schools “jump through a few hoops,” courts typically find no constitutional problem.⁶²

⁵³ 419 U.S. 565, 583 (1975) (emphasis added).

⁵⁴ *Id.* at 581.

⁵⁵ *Id.* at 584.

⁵⁶ See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1316 (1975) (“Now *Goss v. Lopez* has advanced the frontiers of due process without giving any indication where, if anywhere, the stopping place may be.”).

⁵⁷ See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950); see also Friendly, *supra* note 56, at 1273 n.35, 1279–87.

⁵⁸ See David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 843–45 (1976) (describing the “allure” of due process as a protection against arbitrary official behavior but ultimately criticizing additional due process for students in schools).

⁵⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“Due process is flexible and calls for such procedural protections as the particular situation demands.”).

⁶⁰ BLACK, *supra* note 21, at 76 (analyzing a decade’s worth of court decisions and calculating that approximately 0.000004% of student suspensions led to a published opinion).

⁶¹ For an empirical analysis of the lower court student due process cases post-*Goss*, see generally Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353 (2008) (noting that outcomes in lower courts have strongly favored school authorities).

⁶² BLACK, *supra* note 21, at 47 (“Schools, or their attorneys, have gotten the message that the courts will not second-guess decisions to exclude students so long as schools jump through a few hoops in advance.”).

In the absence of specific direction from the Supreme Court regarding required procedural due process in long-term suspensions and expulsions, lower courts have given school districts wide latitude to design their own procedures. The result of this jurisprudence is a patchwork of limited procedural requirements, enabling school districts to adopt procedures in suspension and expulsion proceedings that amount to kangaroo courts.⁶³ This Part examines the jurisprudence on due process in suspensions and expulsions, illustrating what this procedure can look like for students and their advocates.

A. Notice

A.B. was a third-year law student in the Education Advocacy Clinic, getting ready for a school discipline hearing scheduled for the next day. The client's mother had reached out to the Clinic earlier that week, saying she believed her son had a suspension hearing coming up, although she did not know the details. Her son denied any misbehavior.

A.B. notified the school that the Clinic was representing the student and requested notice, evidence, and a few extra days to prepare. Late that afternoon, the school sent over a notice letter and witness statements but declined to reschedule the hearing.

When A.B. saw the documents, he was confused. The notice letter said the student was "disrespectful" and "defiant" but alleged no facts about what the school thought had happened. The witness statements were anonymous, redacted, and contradictory anyway. A.B. wrote to the school again, asking for possible video footage of the incident. Although the school had video available, they declined to provide it. A.B. tried to prepare for the hearing anyway, unsure of what the student was actually accused of doing.

⁶³ Some states and school districts have responded to this jurisprudence by spelling out more detailed procedures. *See infra* Part IV. But there is often little recourse for failure to follow school district procedures. As a matter of constitutional law, a school district's failure to follow its own suspension or expulsion procedure is not necessarily a due process violation. *See Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1073 (9th Cir. 2013) (stating a school district's "failure to comply with their own administrative procedures does not, itself, constitute a violation of due process."). *But see T.T. ex rel. T.M. v. Bellevue Sch. Dist.*, 376 F. App'x 769, 771 (9th Cir. 2010) (leaving open the question of whether state administrative regulation regarding student suspensions created a property interest protected by the Due Process Clause). Further, some states do not establish any specific procedures. Arizona, for example, only requires a "notice and hearing procedure for cases concerning the suspension of a pupil for more than ten days," as long as those procedures are "consistent with the constitutional rights of pupils." ARIZ. REV. STAT. § 15-843(B) (2023). The statute says nothing about what those rights entail, thus deferring to the courts to fill in the gaps.

Notice is a key element of procedural due process⁶⁴ and, in theory, enables students to have a fair opportunity to explain their side of the story.⁶⁵ As a general matter, constitutionally adequate notice must be given in a timely manner⁶⁶ and with enough specificity to allow the person to prepare a defense.⁶⁷ In the school discipline context, this should mean that a student can head into a disciplinary hearing understanding what they are accused of and why their school believes they should be disciplined, with enough time to prepare.

As the Court in *Goss* observed, “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.”⁶⁸ Not only would it be “strange,” failure to provide notice of the alleged infraction would also be a violation of due process; the Court in *Goss* established that students facing short-term suspensions are entitled to receive “oral or written notice of the charges” and, if the charge is denied, an “explanation of the evidence the authorities have.”⁶⁹

But the Court has not issued any more guidance regarding the notice required beyond these minimal requirements for short-term suspensions, leaving open key questions regarding the timing and level of detail required before long-term suspensions and expulsions.⁷⁰ Courts generally agree that notice prior to a school discipline hearing must specify the time, date, and place of the hearing.⁷¹ But simply knowing when and where a hearing will take place is not enough for a student to be able to prepare a defense.

In A.B.’s case in the Education Advocacy Clinic, for example, the student had only a vague sense of what he was accused of. No facts were alleged; no witnesses were identified; no video was provided. Knowing when and where the hearing was to take place was not enough for the student—even with the assistance of counsel—to understand the nature of the charges against him, even as he was facing a month-long suspension. And yet procedures like these have been upheld by courts.

For example, courts have held that due process does not require schools to identify a student’s accusers.⁷² In *Newsome v. Batavia Local School District*, a sixteen-year-old high school student named Arthur Newsome was suspended for two months for possessing and attempting to sell a marijuana cigarette at school—a

⁶⁴ See *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

⁶⁵ See Larry Bartlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process is Now Due*, 1993 BYU EDUC. & L.J. 1, 27 (1993).

⁶⁶ See generally *Goldberg*, 397 U.S. at 267.

⁶⁷ See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

⁶⁸ 419 U.S. 565, 580 (1975).

⁶⁹ *Id.* at 581.

⁷⁰ See generally Bartlett & McCullagh, *supra* note 65.

⁷¹ See *id.* at 32–33.

⁷² *Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 924 (6th Cir. 1988); see also *Paredes ex rel. Koppenhoefer v. Curtis*, 864 F.2d 426, 430 (6th Cir. 1988) (affirming *Newsome*’s holding that a student is not entitled to cross-examine or know the identity of classmate accusers).

charge for which the only evidence the school presented at the hearing was the anonymous report of two unnamed classmates.⁷³ Arthur repeatedly denied engaging in the misconduct and provided a urinalysis that was negative for drug use.⁷⁴ The court held that although “even merely to know their names[] would have afforded Newsome the opportunity to challenge the students’ credibility,” the school was not required to disclose the accusers’ identity.⁷⁵ The court reasoned that the school’s principal had presumably already evaluated their credibility and, at the least, would have “particularized knowledge of the student’s trustworthiness” because the principal could access records and other information about them.⁷⁶ In other words, the court denied Arthur Newsome the right to know the identity of his accusers, trusting the principal to investigate and mete out punishment fairly.

Furthermore, courts have held that schools are not necessarily required to provide students the evidence used against them. In *Jahn v. Farnsworth*, the Sixth Circuit upheld the “indefinite suspension” of a high school senior who was accused of stealing a school computer, finding no procedural due process violation in the school’s refusal to show the student video evidence of the alleged incident.⁷⁷ The court reasoned that due process was satisfied because the student was “aware of the evidence” and had an “opportunity to rebut the accusation.”⁷⁸ Thus, the court deferred to the school’s judgment about what the video showed, preventing the student from determining for himself the nature of the evidence.⁷⁹

Schools are not required to provide specificity of the charges that would be required in the criminal context. As the New York Court of Appeals noted, “school officials need not particularize every single charge against a student.”⁸⁰ A broad description of a rule allegedly broken can be enough to pass constitutional muster.⁸¹ And the specific penalty sought is not necessarily required to be identified, as long as the school’s discipline code includes some notice of penalties that might be at stake for student rule breaking.⁸² Given that school discipline codes typically use

⁷³ 842 F.2d at 921–22.

⁷⁴ *Id.*

⁷⁵ *Id.* at 924.

⁷⁶ *Id.*

⁷⁷ 617 F. App’x 453, 454–55, 459, 461, 464 (6th Cir. 2015).

⁷⁸ *Id.* at 459.

⁷⁹ *Id.* at 459–60.

⁸⁰ *See Bd. of Educ. v. Comm’r of Educ.*, 690 N.E.2d 480, 483 (N.Y. 1997) (finding, as a matter of state law and constitutional due process, that notice for a suspension was sufficient despite certain specific facts not alleged in notice letter to student).

⁸¹ *Stratton ex rel. Stratton v. Wenona Cmty. Unit Dist. No. 1*, 551 N.E.2d 640, 649 (Ill. 1990) (finding that notice of “gross misconduct, disobedience, and disrespect” was sufficiently specific in an expulsion proceeding when parents had conversations with school officials repeatedly about the student’s behavior).

⁸² *See Palmer v. Merluzzi*, 868 F.2d 90, 94 (3d Cir. 1989). *But see Johnson v. Collins*, 233 F. Supp. 2d 241, 248–49 (D.N.H. 2002) (notice of potential penalty required in permanent expulsion proceeding).

broad language to describe student misconduct and large ranges of potential disciplinary responses,⁸³ the lack of specificity required in the school's notice can leave a student unable to prepare meaningfully for their defense.⁸⁴

The result of jurisprudence like this is that students might receive the basic formalities of notice—such as when and where a hearing will take place—but without the details that give them a meaningful opportunity to prepare, as in A.B.'s case.

B. Evidence

A.B.'s hearing unfolded like most disciplinary hearings in the Education Advocacy Clinic: the school presented just one witness—an administrator—who read anonymous, redacted witness statements into the record. At this hearing, the school presented no other evidence. The entirety of the school's case consisted of anonymous hearsay statements, which were exceedingly difficult for A.B. to challenge.

As A.B. quickly realized, it is impossible to cross-examine a witness who is unknown and not present. Without a live witness, A.B. could not probe key questions such as bias, faulty memory, or inaccurate perception of events. And cross-examining a school administrator about someone else's statement only invites more hearsay; any response by the administrator would be conjecture. Thus, it was exceedingly difficult for A.B. to challenge the school's case.

In school discipline hearings, the rules of evidence typically used in criminal trials or administrative proceedings do not usually apply. While “basic fairness and integrity of the fact-finding process are the guiding stars”⁸⁵ in determining how discipline hearings proceed, courts have not generally provided a check on schools in terms of the types of evidence they may introduce at a discipline hearing or rely on to sustain a decision. The hearings are designed to be informal and run by school officials, not lawyers or judges.⁸⁶ What this means is that usual due process

⁸³ *E.g.*, AMPHITHEATER SCHOOL DISTRICT STUDENT CODE OF CONDUCT 17, <https://www.amphi.com/cms/lib/AZ01901095/Centricity/Domain/1053/2022-2023%20Student%20Code%20of%20Conduct.pdf> [<https://perma.cc/3LGJ-6KPT>] (defining “assault” as a variety of behaviors, including both “causing any physical injury to another person” as well as “knowingly touching another person with the intent to . . . insult” and establishing consequences that range from short-term suspension to expulsion).

⁸⁴ *See* Carolina Youth Action Project v. Wilson, 60 F.4th 770, 781 (4th Cir. 2023) (holding South Carolina's “disorderly conduct” and “disturbing schools” criminal laws, which mirror language in the school discipline codes, unconstitutionally vague as applied to students).

⁸⁵ Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974).

⁸⁶ *See id.* This structure has implications for courts' deference placed on schools. Courts might be wary of requiring more formal procedures precisely because schools are not familiar with the formality in criminal law or other administrative hearings. In rejecting more formal procedures in an expulsion hearing, the court in *Boykins* stated simply: “[We] stand but a step away from the application of the *strictissimi juris* due process requirements of criminal trials to high school disciplinary processes. And if to high school, why not to elementary school? It will not do.” *Id.*

protections governing the type of evidence used against someone—such as the right to confront witnesses and challenge evidence—are strained or absent.

One key aspect of due process that is missing from discipline hearings is the right to confront witnesses. As the Supreme Court recognized, “[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”⁸⁷ Despite its importance in determining truth and providing due process to the accused, there is no clear right to confront witnesses in a school discipline hearing, even when expulsion is at stake.⁸⁸ Many courts have held that hearsay is admissible in suspension and expulsion proceedings as a matter of federal due process and that a long-term suspension or expulsion can be based on hearsay alone.⁸⁹

The primary reason courts find hearsay admissible and do not require live witness testimony is that they trust school officials to assess potential witnesses accurately and fairly. In a decision allowing the hearsay statement of a school staff member at a student’s expulsion hearing, the Wisconsin Court of Appeals stated that “we can conceive of no reason why school staff would fabricate or misrepresent statements,” absent a specific allegation of bias.⁹⁰ In other words, school officials are presumed honest and trustworthy in their investigation and decision to discipline a student, so—in the court’s view—there is no need for the student to cross-examine witnesses.

But even where bias is alleged and at the forefront of proceedings, courts are still wary of limiting the use of a school’s hearsay evidence. *Boykins v. Fairfield Board of Education*, a pre-*Goss* case that continues to be well cited among courts,⁹¹ upheld the expulsion of eight students based on hearsay evidence.⁹² The expelled students, Black children who were members of a class of plaintiffs in a desegregation case against their Alabama school district, were expelled for protesting their school’s integration policies.⁹³ The students challenged their expulsions, claiming that they were denied due process in part due to the reliance on hearsay statements; they also alleged racial discrimination.

⁸⁷ *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

⁸⁸ *See Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 921–25 (6th Cir. 1988); *see also Coronado v. Valleyview Pub. Sch. Dist.* 365-U, 537 F.3d 791, 796–98 (7th Cir. 2008) (finding no right to cross-examine school’s witnesses in year-long expulsion case). *But see Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (holding that due process requires the right to confront and cross-examine adverse witnesses in school expulsion cases).

⁸⁹ *See Bartlett & McCullagh, supra* note 65, at 43–47.

⁹⁰ *Racine Unified Sch. Dist. v. Thompson*, 321 N.W.2d 334, 338 (Wis. Ct. App. 1982).

⁹¹ *E.g., Newsome*, 842 F.2d at 926; *L.Q.A. ex rel. Arrington v. Eberhart*, 920 F. Supp. 1208, 1219 (M.D. Ala. 1996), *aff’d*, 111 F.3d 897 (11th Cir. 1997); *Tasby v. Estes*, 643 F.2d 1103, 1106 (5th Cir. 1981); *Witvoet ex rel. Witvoet v. Herscher Cmty. Unit Sch. Dist. No. 2*, No. 97-CV-2243, 1998 WL 1562916, at *5 (C.D. Ill. May 27, 1998); *Wagner ex rel. Wagner-Garay v. Fort Wayne Cmty. Schs.*, 255 F. Supp. 2d 915, 918 (N.D. Ind. 2003).

⁹² *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 700–02 (5th Cir. 1974).

⁹³ *See id.* at 699–700.

The court found no due process violation with the use of hearsay statements in the expulsion proceedings, holding that “the rights at stake in a school disciplinary hearing may be fairly determined upon the ‘hearsay’ evidence of school administrators charged with the duty of investigating the incidents.”⁹⁴ In other words, it was up to school administrators to investigate the incident, and their statements regarding the outcome of their investigation were deemed fair enough to serve as the basis for a disciplinary decision.

The dissent in *Boykins* doubted the fair determination of the school administrators, pointing to “good circumstantial evidence” that the students were unfairly singled out for their expulsion. The dissent noted that the expelled students received a much harsher punishment than the approximately 100 other classmates who also protested, and that school staff had taken efforts to prevent the expelled students from enrolling in other school districts.⁹⁵ Yet even this evidence of bias, in the backdrop of Black students permanently expelled for demanding more robust integration policies, was insufficient to persuade the court that the school’s use of hearsay evidence should be limited.

In our experience in the Education Advocacy Clinic, the entirety of the evidence presented at a disciplinary hearing is typically a summary narrative read by a school official who also reads anonymous witness statements into the record.⁹⁶ The problems with relying exclusively on hearsay testimony like this is that the accused student cannot challenge it and the factfinder cannot assess it. At most, the student can say: “No, it didn’t happen that way.” But the accused cannot meaningfully challenge the merits of the evidence. They cannot ask the witness to provide extra context, challenge the witness’s memory, perception, or bias, or allow the factfinder to assess the witness’s credibility independently. This practice, in effect, puts the burden on the accused student to *disprove* their guilt through their own testimony. Without the ability to confront witnesses, there is no other way to meaningfully challenge the school’s evidence.⁹⁷

And once the door to hearsay evidence is opened, there is no obvious endpoint to allowing multilayered hearsay. In one recent Education Advocacy Clinic case, the school presented evidence that included at least three layers of hearsay statements:

⁹⁴ *Id.* at 700.

⁹⁵ *See id.* at 702–07.

⁹⁶ This summary narrative seems similar to the “outline of the events” described as hearsay testimony presented at the expulsion hearing in *Racine*. 321 N.W.2d 335, 335 (Wis. Ct. App. 1982).

⁹⁷ This *de facto* burden shift presents a non-trivial challenge for the many students who are also arrested and prosecuted for events related to school, as their testimony at a suspension hearing could later be used against them in court. *See* U.S. DEP’T OF EDUC., OFF. FOR C.R., REFERRALS TO LAW ENFORCEMENT AND SCHOOL-RELATED ARRESTS IN U.S. PUBLIC SCHOOLS (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/referrals-and-arrests-part-5.pdf> [<https://perma.cc/PM8Z-GFXT>] (documenting 54,321 school-related arrests in the 2017–18 school year); *see also* FED. R. EVID. 801(d)(1) (witness’s prior statement at a hearing considered non-hearsay).

a handwritten note by a school staff member who was not present at the hearing, documenting an anonymous phone call from a blocked number by someone who claimed to be a parent at the school, reporting that their unnamed child accused our client of wrongdoing. Even with the assistance of counsel, it is exceedingly difficult to challenge a multilayered hearsay statement like that one.

By allowing hearsay evidence to sustain disciplinary decisions, courts enable schools to suspend or expel students for what could amount to mere rumor.

C. Impartiality

During A.B.'s hearing, the hearing officer did not appear to understand that her job was to be an impartial decision-maker. The hearing officer repeatedly stated that her job was to review a prior decision made by the school's administrators, who already decided to impose a month-long suspension. Our client never had a chance to make his case; the decision was already made before the hearing began.

In another case, the Education Advocacy Clinic represented a middle-school student facing permanent expulsion from a large school district. The district employed two attorneys: one senior, one junior. During the hearing, the junior attorney served as the hearing officer, while the senior attorney represented the district. This type of decision-making structure gives the strong appearance of bias, no matter how reasonable the individual hearing officer might be.

Although courts recognize that a student is entitled to an impartial decision-maker in a school discipline hearing, there is no agreement on what "impartial" means.⁹⁸ Courts emphasize that a hearing officer is not a judge and may not necessarily be neutral.⁹⁹ Generally, the hearing officer is someone from within the school district. Trusting that the hearing officer will mete out judgment fairly, courts have upheld decision-making structures that strain any commonsense understanding of what "impartiality" entails, relying on school districts to act in a fair manner without court oversight.

For example, a district court in Pennsylvania found no due process violation when a school's solicitor served in three potentially conflicting roles during a disciplinary board hearing: the solicitor prosecuted the school's case, ruled on motions and objections, and advised the school board as to its decision-making.¹⁰⁰ The court acknowledged that bias might have infected the decision-making process

⁹⁸ See, e.g., *Gonzales v. McEuen*, 435 F. Supp. 460, 464 (C.D. Cal. 1977) ("No one doubts that a student charged with misconduct has a right to an impartial tribunal. There is doubt, however, as to what this means.").

⁹⁹ See BLACK, *supra* note 21, at 64.

¹⁰⁰ *Alex v. Allen*, 409 F. Supp. 379, 387-88 (W.D. Pa. 1976). *But see Gonzales*, 435 F. Supp. at 464-65 (finding a due process violation when multiple roles of district counsel raised presumption of bias); *Pittsburgh Bd. of Pub. Educ. v. M.J.N. ex rel. N.J.N.*, 524 A.2d 1385, 1389 (Pa. Commw. Ct. 1987) (finding a due process violation when school board commingled prosecutorial and advisory functions).

but narrowed the scope of its review so as to require only the most rudimentary hearing structure, finding no constitutional problem with the “impartial” nature of the hearing. The court stated: “It may well be that the school board was not neutral and unbiased. The same may be true of numerous school boards that make decisions of this type. *Goss* teaches us that our inquiry need be directed only to ensuring that the rudiments of fair procedure be followed.”¹⁰¹

This is a remarkable statement that enables schools to deny students an impartial decision-maker to hear their case, requiring only the “rudiments” of procedure, despite the guarantee of due process. The court acknowledged that “this presents a possibility for abuse and prejudice” but stated that “the federal courts must rely on the discretion, honor, and good judgment of school officials.”¹⁰²

But the constitutional right to due process exists because government officials—including educators and school administrators—might not behave honorably and with good judgment.¹⁰³ They might not be impartial.¹⁰⁴ By assuming that school officials will behave impartially without meaningful oversight, courts have allowed the promise of an impartial decision-maker to feel hollow.

Overall, courts have allowed schools to suspend and expel students by going through the motions of due process, deferring to the school officials’ judgment and assuming generally that schools will be fair. Of course, there is no reason to assume that school officials are any better at investigation and adjudication than any other governmental decision-makers. As *Goss* pointed out, “[d]isciplinarians, 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”¹⁰⁵

On the contrary, as Part III argues, there may be good reason to be skeptical of a school official’s judgment and decision-making when seeking to exclude students from campus.

III. LEARNING FROM SPECIAL EDUCATION LAW

A comparison to special education laws demonstrates how remarkable it is that courts readily defer to schools in making decisions about whether to suspend and

¹⁰¹ *Alex*, 409 F. Supp. at 388.

¹⁰² *Id.*

¹⁰³ See BLACK, *supra* note 21, at 23 (“Constitutional rights exist to protect citizens against the whims of local, state, and federal majorities. Each unjustifiably imposed suspension or expulsion is a deprivation of a right that demands a response. Each suspension or expulsion represents a potential educational death sentence and second-class citizenship.”).

¹⁰⁴ My clinic students often describe being shocked when they see how school officials treat the children we represent in discipline hearings, which appear adversarial, even hostile, but without key due process protections. This perception mirrors Professor Black’s analysis that school officials’ perception of the disciplinary process is “solidly adversarial” and that schools “routiniz[e] the process to produce the favored result.” BLACK, *supra* note 21, at 41.

¹⁰⁵ 419 U.S. 565, 580 (1974).

expel students, assuming good faith on the part of school officials. As the structure and legislative history of these laws show, school officials might *not* be inclined to treat all students fairly, and that there is good reason to be wary of granting unilateral authority over schools in determining whom to exclude from campus.

Federal special education laws such as the Individual with Disabilities in Education Act (IDEA)¹⁰⁶ and Section 504 of the Rehabilitation Act¹⁰⁷ are, in part, built on the premise that schools unfairly exclude children they deem difficult to educate.¹⁰⁸ This fundamental premise is highlighted by the Supreme Court in *Honig v. Doe*. *Honig* documented ways in which public schools historically excluded children with disabilities, with a particular focus on children with emotional or behavioral disorders. As *Honig* notes, one out of every eight children with a disability was entirely excluded from school prior to the passage of what is now known as the IDEA.¹⁰⁹ The Court stated that “[a]mong the most poorly served of disabled students were emotionally disturbed children,” as 82% of all children with emotional disabilities had unmet educational needs, many of whom were expelled from school.¹¹⁰

The Court in *Honig* described the development of the IDEA with a particular focus on the widespread exclusion of students with disabilities by use of suspensions and expulsions. As the Court recounted: “Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate *all* disabled children, regardless of the severity of their disabilities . . . and included within the definition of ‘handicapped’ those children with serious emotional disturbances.”¹¹¹ As a result, Congress developed what is now known as the IDEA, which establishes a substantive right to receive a public education for children with disabilities, including those who have been suspended or expelled.¹¹²

Congress not only created a substantive right, but it also protected that right by creating detailed procedures that govern how decisions regarding the education of students with disabilities are made.¹¹³ The statute provides specific direction to schools by dictating, for example, the ways in which a parent must be involved in

¹⁰⁶ See 20 U.S.C. § 1400(c)(1)–(2).

¹⁰⁷ See 29 U.S.C. § 701(a)(5)–(7).

¹⁰⁸ See § 1400(c)(2) (stating congressional finding that millions of children with disabilities were excluded entirely from school); 29 U.S.C. § 794(a)–(b)(2)(B) (prohibiting exclusion of students from school on the basis of disability under Section 504).

¹⁰⁹ 484 U.S. 305, 309 (1988).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 324.

¹¹² 20 U.S.C. § 1412(a)(1)(A) (“A free appropriate public education is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive, including children with disabilities who have been suspended or expelled from school.”).

¹¹³ See 20 U.S.C. § 1414.

the decision-making process,¹¹⁴ what sort of timelines the school district must follow,¹¹⁵ and whose input must be considered in creating an individualized plan for each student with a disability.¹¹⁶ The detailed procedural requirements required by statute demonstrate a skepticism towards schools and an assumption that, without these requirements, schools might not treat students with disabilities fairly.

To enforce these special education rights, the IDEA established numerous procedural safeguards and a menu of dispute resolution mechanisms,¹¹⁷ recognizing that schools might not uphold their obligations despite the detailed directives required by law. Under the IDEA, students and parents who dispute a school's decision and seek to enforce the child's education rights can seek mediation,¹¹⁸ file complaints with their state education department,¹¹⁹ and pursue an administrative due process hearing¹²⁰ with the opportunity to appeal in court¹²¹—and even recover attorney's fees.¹²² This enforcement structure demonstrates a skepticism that schools will not enforce students' rights without oversight.¹²³

Honig held that provisions of the law now known as the IDEA still apply when a student with a disability violates discipline code—even when that student is aggressive or violent.¹²⁴ The Court emphasized that the detailed structure of the IDEA was designed specifically to check schools' power in removing students with disabilities from schools through the use of suspensions and expulsions:

As the [IDEA's] legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of

¹¹⁴ *E.g.*, § 1414(a)(1)(D).

¹¹⁵ *E.g.*, § 1414(a)(1)(C).

¹¹⁶ *E.g.*, § 1414(d)(1)(B).

¹¹⁷ 20 U.S.C. § 1415.

¹¹⁸ § 1415(e).

¹¹⁹ § 1415(b)(7)(A); 34 C.F.R. § 300.153.

¹²⁰ § 1415(f).

¹²¹ § 1415(g).

¹²² § 1415(i)(3)(B).

¹²³ That oversight is provided not only through the state education agencies but also at the federal level, which provides multiple avenues for parents to seek support navigating and enforcing special education rights. For example, the United States Department of Education, Office for Civil Rights is authorized under section 504 of the Rehabilitation Act to investigate and enforce complaints of discrimination on the basis of disability, including in school discipline. *See* 34 C.F.R. § 104. The IDEA authorizes the Department of Education Office for Special Education and Rehabilitative Services to administer and oversee implementation of the IDEA. *See* 20 U.S.C. § 1402. The IDEA further establishes a system of parent training and information centers in each state where families can seek assistance and provides federal grants to cover the cost. § 1471. The Protection and Advocacy System, established by federal law, provides legal services to individuals with disabilities, including students, in each state and territory. 29 U.S.C. § 794(e).

¹²⁴ 484 U.S. 305, 323–24 (1988).

disabled children by *schools*, not courts, and one of the purposes of [the law], therefore, was ‘to prevent *school* officials from removing a child from the regular public school classroom over the parents’ objection pending completion of the review proceedings.’¹²⁵

As the Supreme Court understood it, the procedural safeguards in the IDEA were meant to attack the practice of removing students with disabilities from school under disciplinary procedures. The Court noted, “[w]e think it clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”¹²⁶

Federal special education laws recognize that there is good reason to be wary of granting schools the unilateral authority to exclude children from campus, even when those children have violated a discipline code.¹²⁷ Yet in the school discipline context, courts readily defer to the judgment of school officials.¹²⁸ And Congress has been silent on student discipline rights entirely.

Looking at the robust legal framework governing student special education rights highlights how little oversight there is over school discipline and how surprising it is that courts assume schools will mete out judgment fairly. The procedural guardrails that were deemed necessary to prevent the exclusion of students with disabilities are absent in the discipline space. There are no federal statutes governing discipline; parents are not required to be consulted before a suspension or expulsion; and there are no required dispute resolution options if a parent disagrees with a disciplinary decision. The due process protections are far weaker.

¹²⁵ *Id.* at 327.

¹²⁶ *Id.* at 323. The IDEA has since been amended to require a “manifestation determination review” prior to suspending a child with a disability for more than ten days, although allowing schools to remove students with disabilities from school for forty-five days regardless of disability in extreme situations, such as when a student inflicts “serious bodily injury” on someone else at school. *See* 20 U.S.C. § 1415(k)(1). These provisions, while allowing school authorities to suspend students with disabilities, include procedural requirements that continue to demonstrate skepticism toward schools and a need for oversight over decisions to exclude children with disabilities from school.

¹²⁷ This is not to say that the IDEA sufficiently protects children with disabilities from inappropriate exclusion from school; rather, the regulatory framework demonstrates that there is good reason to suspect that schools seek to push out children through discipline measures. For scholarly criticism that the IDEA does not do enough to support student rights in school discipline, see Claire Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. REV. 860, 875–76 (2018) and L. Kate Mitchell, “*We Can’t Tolerate That Behavior in This School!*”: *The Consequences of Excluding Children with Behavioral Health Conditions and the Limits of the Law*, 41 N.Y.U. REV. L. & SOC. CHANGE 407, 444–46 (2017).

¹²⁸ *See supra* Part II.

Of course, special education laws apply only to children with disabilities. Not all children with disabilities experience exclusionary discipline, and not all children who are suspended or expelled have disabilities. But there is significant overlap, as students with disabilities are far more likely than their peers to experience exclusionary discipline, despite the additional procedural protections that they receive under special education laws. Among students who are suspended or expelled, approximately 28% have disabilities.¹²⁹

But even for children who do *not* have any disabilities, a school's incentive is the same: push out children deemed difficult to educate. Courts should not be surprised if schools act on similar incentives to exclude children who are perceived to be troublemakers.

IV. WHAT PROCESS IS DUE?

So, what process is due to students facing long-term suspensions and expulsions from school? *Mathews v. Eldridge* requires balancing the student's private interest at stake in the disciplinary decision; the risk of error and probative value in additional procedures; and the school's interest, including administrative burdens associated with additional procedures.¹³⁰ The relatively few courts deciding student due process cases have created a patchwork of limited protections, leaving few specific guidelines for schools to follow and deferring heavily to the judgment of school officials.¹³¹ This Part argues that courts have miscalculated the interests at stake, denying student due process protections that they *should* be entitled to receive.¹³² It then recommends procedures that will re-envision the constitutional due process requirements for exclusionary discipline.

A. The Student's Interest in Attending School

It nearly goes without saying that any child has an enormous interest in attending school. As Part I illustrates, the consequences of school exclusion can be severe, with collateral consequences extending beyond the academic context into other areas

¹²⁹ U.S. DEP'T OF EDUC., OFF. FOR C.R., SUSPENSIONS AND EXPULSIONS OF STUDENTS WITH DISABILITIES IN PUBLIC SCHOOLS (Aug. 2022), https://ocrdata.ed.gov/assets/downloads/Discipline_of_Students_with_Disabilities_Part3.pdf [<https://perma.cc/QVB3-PFYJ>].

¹³⁰ See 424 U.S. 319, 334–35 (1976).

¹³¹ See *supra* Part II.

¹³² *Mathews v. Eldridge* has been criticized as both intrusive and ineffectual as a test for determining how administrative hearings should proceed. See generally Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). But *Mathews* has value in providing *some* framework for balancing a student's interest in a discipline proceeding against a school's interest, when the Supreme Court has been silent otherwise in determining the scope of student discipline rights.

of children's lives. For some children, a school suspension or expulsion can have a lifelong impact.¹³³

Yet some courts have specifically ignored the consequences of the disciplinary decision when deciding due process cases, ignoring that the student's interest is one of the required considerations under *Mathews*.¹³⁴ *Keough v. Tate County Board of Education* serves as an example of this.¹³⁵ In *Keough*, a high school senior was brought into the principal's office because he allegedly had not sat in his assigned seat during study hall.¹³⁶ The student became angry, briefly left campus, and then returned to the office.¹³⁷ When he returned, he refused to apologize for his behavior and was "given the choice of a ten-day suspension or a paddling."¹³⁸ Although the suspension was scheduled over the student's final exam period, he chose the suspension.¹³⁹

The court declined to require any procedures greater than the "informal give-and-take session" required by *Goss* as the minimal requirements for short-term suspensions, despite the reality that the student was not allowed to take final exams, which would have a significant impact on his high school career.¹⁴⁰ The court wrote:

Goss makes no distinction between ten-day suspensions that occur during examination periods and those that do not, and, it seems to us, for obvious reasons. In any school year, a number of examinations may take place at various times throughout a given semester which are crucial to a student's performance for the semester. Thus, to hold that the *Goss* guidelines do not apply to suspension periods that include scheduled examinations would significantly undermine, if not nullify, its definitive holding.¹⁴¹

¹³³ See *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 705–06 (5th Cir. 1974) (Godbold, J., dissenting in part) (describing expulsions as a "sentence of banishment from the local educational system" as "the ultimate punishment" and "a life sentence to second-rate citizenship").

¹³⁴ 424 U.S. at 319. The students most likely to be disproportionately suspended and expelled are also the students most at risk of collateral consequences of disciplinary decisions and least likely to be represented in discipline matters; the collateral consequences that they face might not never be raised.

¹³⁵ 748 F.2d 1077, 1078–79 (5th Cir. 1984); see also *Lamb v. Panhandle Cmty. Unit Sch. Dist. No. 2*, 826 F.2d 526, 528 (7th Cir. 1987) (declining to impose any greater procedures than those required by *Goss* for short-term suspensions when a high school senior was suspended for the last three days of school—including final exams, which prevented him from graduating—for drinking whiskey on a senior class trip).

¹³⁶ 748 F.2d at 1078–79.

¹³⁷ *Id.* at 1079.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1080–81.

¹⁴¹ *Id.*

This reasoning fails to consider the student's actual interest at stake in the disciplinary decision, which should be required under *Mathews v. Eldridge*. It also misunderstands *Goss*, characterizing its holding as “definitive.”¹⁴² The Court in *Goss* establishes the floor of procedures, which it described as possibly “less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.”¹⁴³

Some of the actual consequences children face as a result of school discipline extend beyond the school gates.¹⁴⁴ Other legal systems might rely on school discipline decisions, and the consequences can be severe for children. In a Texas case, for example, a middle school student's juvenile probation order was revoked because he had been suspended from school, in violation of his probation conditions, and he was detained in state custody.¹⁴⁵ The court rejected the student's claim that he was suspended without due process, citing the minimal requirements from *Goss*.¹⁴⁶ In the immigration context, children have been detained and eventually deported on the basis of school-based allegations like doodling on a desk or wearing a T-shirt color associated with a gang.¹⁴⁷

Of course, schools have no control over how other legal systems use their disciplinary decisions. But that does not mean that schools—or the courts—must ignore the consequences that might follow children who are suspended or expelled. To the contrary, *Mathews v. Eldridge* asks courts to analyze the student's interest at stake in a disciplinary proceeding. Many courts have failed to appreciate just how high the stakes can be.

B. Risk of Error in Discipline Proceedings

Courts have also failed to appreciate the real risk of error in school discipline proceedings. Courts often assume school officials will investigate and adjudicate behavior incidents fairly. This assumption is why, for example, students do not necessarily have a right to know the identity of their accusers or confront them.¹⁴⁸ The reasoning is that a school official will already have assessed the accuser's

¹⁴² *Id.*

¹⁴³ 419 U.S. 565, 583 (1975) (emphasis added).

¹⁴⁴ *See supra* Part I.

¹⁴⁵ *In re J.L.D.*, 536 S.W.2d 685, 686 (Tex. Civ. App. 1976).

¹⁴⁶ *Id.* at 688.

¹⁴⁷ For in-depth reporting on cases of students suffering immigration consequences as a result of school-based allegations, see Alice Speri, *From School Suspension to Immigration Detention*, THE INTERCEPT (Feb. 11, 2018, 12:10 PM), <https://theintercept.com/2018/02/11/ice-schools-immigrant-students-ms-13-long-island/> [https://perma.cc/AMB9-TLE7] and Hannah Dreier, *He Drew His School Mascot—and ICE Labeled Him a Gang Member*, PRO-PUBLICA (Dec. 27, 2018), <https://features.propublica.org/ms-13-immigrant-students/hunting-ton-school-deportations-ice-honduras/> [https://perma.cc/L3RT-YCQH].

¹⁴⁸ *See supra* Part II.

trustworthiness, and the underlying assumption is that a school would not seek a suspension unless a suspension is truly justified.¹⁴⁹

But this assumption is wrong. There is no reason to think school administrators would be better than any other government officials at investigating and adjudicating. There is no clear reason why “the federal courts must rely on the discretion, honor, and good judgment of school officials.”¹⁵⁰ The right to due process exists specifically *because* government actors might not make just decisions when given near-limitless authority. As *Goss* cautions, “[t]he risk of error is not at all trivial.”¹⁵¹

Furthermore, schools *do* sometimes suspend and expel students unfairly. Schools have historically used suspensions and expulsions to exclude children with disabilities, particularly emotional and behavioral disorders.¹⁵² The framework established by special education laws demonstrates a well-earned skepticism towards schools’ inclination to educate *all* children—without specific due process and regulatory oversight.¹⁵³

Importantly, studies on racism in school discipline show that school officials often make biased disciplinary decisions. In their influential study “The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment,” Russell Skiba, Robert Michael, Abra Carroll Nardo, and Reece Peterson document systemic differential treatment among students on the basis of race.¹⁵⁴ As the study shows, Black students are referred for disciplinary action for more subjective behaviors, such as “disrespect” or “disruptive behavior,” and for more severe punishments when compared to white students.¹⁵⁵ Other researchers have shown that greater levels of explicit racial bias in a community correlate with a larger disparity in discipline outcomes between Black and white students.¹⁵⁶ These studies and others strongly suggest that racial bias unfairly contributes to school-based decisions about which students to discipline and how harshly.

¹⁴⁹ See *supra* Part II.

¹⁵⁰ *Alex v. Allen*, 409 F. Supp. 379, 388 (W.D. Pa. 1976). Student discipline is not the only area where schools are assumed to protect student rights and therefore are granted deference in their decision-making. For a critique that the deference afforded schools in protecting student privacy rights serves to reinforce and compound disadvantage among students along lines of gender, race, class, and disability, see generally Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315 (2023).

¹⁵¹ 419 U.S. 565, 580 (1975).

¹⁵² See *Honig v. Doe*, 484 U.S. 305, 309 (1988).

¹⁵³ See *supra* Part III.

¹⁵⁴ See generally Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317 (2002), <https://doi.org/10.1023/A:1021320817372> [<https://perma.cc/F7VT-93Z7>].

¹⁵⁵ *Id.* at 334–35.

¹⁵⁶ See generally Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias*, 116 PROCS. NAT’L ACAD. SCI. 8255 (2019), <https://doi.org/10.1073/pnas.1808307116> [<https://perma.cc/RFL9-UK42>].

Courts that defer to school officials' good judgment as a reason to deny students due process protections such as the right to confrontation or non-hearsay evidence have miscalculated the risk of error. As *Goss* recognizes, disciplinarians "frequently act on the reports and advice of others" and the underlying facts "are often disputed."¹⁵⁷ Practices such as sustaining a long-term suspension on hearsay alone or failing to identify a student's accusers prevent the accused student from having a meaningful opportunity to challenge the school's evidence. This compounds the risk that bias will infect the school's decision-making process. The risk of error is real.

C. Administrative Burdens

Courts are wary of requiring specific school disciplinary procedures, "mindful of the burden placed on school administrative facilities by the notice and hearing requirements" imposed during suspension hearings already.¹⁵⁸ Undoubtedly, requiring some additional procedural elements—such as an impartial hearing officer outside of the district or requiring non-hearsay evidence—would increase a school's administrative costs in adjudicating certain discipline hearings. But there is reason to suspect that these burdens might not be as hefty as courts imagine.

First, many states and school districts have already imposed more robust procedural requirements than those required by the courts.¹⁵⁹ In Kansas, for example, students facing long-term suspensions or expulsions have the right to be represented by counsel; review all testimony against the student; cross-examine witnesses; present witnesses and evidence; and have a "fair and impartial decision based on substantial evidence."¹⁶⁰ New York City students facing suspension are entitled to numerous procedural protections, including receiving a list of possible student

¹⁵⁷ 419 U.S. 565, 580 (1975).

¹⁵⁸ See *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985) (rejecting "any suggestion that the technicalities of criminal procedure ought to be transported into school suspension cases").

¹⁵⁹ See, e.g., CAL. EDUC. CODE § 48918 (West 2015) (stating that an expulsion cannot rest on hearsay evidence and requiring disclosure of witness identity unless, upon a finding of good cause, that disclosure of witness identity would subject them to an "unreasonable risk of psychological or physical harm); MINN. STAT. § 121A.47 (including the right to present and confront witnesses; notice of list of witnesses and description of their testimony; and list of free or low-cost legal assistance resources); OHIO REV. CODE ANN. § 3301.121 (West 2023) (including the right to confront, cross-examine, and compel attendance of witnesses); D.C. Mun. Regs. tit. 5, § 5-B2505.6 (notice includes summary of facts, length of proposed suspension or expulsion, and student's right to appeal). For an investigation into the varying school discipline rights nationwide, see Erin Einhorn, *In States with Few Legal Protections, Students Say They've Been Unfairly Punished at School*, NBC NEWS (Aug. 22, 2023, 10:00 AM), <https://www.nbcnews.com/news/us-news/expulsion-rights-suspension-students-state-law-school-punishment-rcna100438> [<https://perma.cc/HT6Z-KKYG>].

¹⁶⁰ KAN. STAT. ANN. § 72-6116 (West 1994).

witnesses; the ability to subpoena their own witnesses; and contact information for free and low-cost legal assistance agencies.¹⁶¹ Under the same regulation, New York City schools have the burden of proving the charges against a student and can only do so with direct or circumstantial evidence; a suspension finding cannot be sustained on hearsay alone.¹⁶²

That some states and districts have imposed stricter requirements on themselves shows that they are willing and able to take on additional obligations.¹⁶³ In these states, greater procedural protections for students facing suspensions and expulsions do not create an onerous burden on the schools.

Additionally, schools already take on administrative burdens by following the rudiments of due process: they send out notice letters, schedule hearings, and find a hearing officer. Schools spend resources “jump[ing] through a few hoops.”¹⁶⁴ But they do so without procedures that would make the hearing a meaningful exercise in determining the truth of what happened and issuing a just decision. The administrative burdens that schools already experience would be better worth their effort with greater procedural protections for students, increasing the probative value of the hearing process.

Undoubtedly, additional procedure may increase some administrative burdens in the disciplinary process. But there are costs associated to suspending and expelling students, too—particularly when the suspension was in error or perceived to be unfair. Given the risk of error and the high stakes facing students, additional procedures are worth it.

D. Re-Envisioning Due Process

What might those additional procedures be? The process due to students facing long-term suspensions and expulsions is likely to remain a question with some flexibility in the answer. But the following procedures would, at a minimum, address current gaps in the case law and create a constitutional floor that would give students a more meaningful opportunity to be heard:

1. *Notice.* Schools provide written notice at least three days before the hearing, alleging specific facts the school believes occurred and the proposed length of suspension or expulsion. The notice should explain how students can access evidence prior to the hearing.

¹⁶¹ N.Y.C. Chancellor’s Regul., A-443.III.B.3.n.

¹⁶² *Id.* at III.B.3.s(10).

¹⁶³ See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 149 (2018) (noting that nearly two-thirds of states have enacted statutes or regulations that “far exceeded” the basic procedural requirements outlined in *Goss*).

¹⁶⁴ BLACK, *supra* note 21, at 47.

2. *Access to Counsel.* Students should be notified that they can be represented by an attorney at the hearing, and schools should provide contact information for local attorneys, including legal aid organizations or *pro bono* counsel.
3. *Review of Evidence.* Students should be able to view the evidence the school has against them, not just a description or summary. Names of witnesses should not be redacted, absent evidence of a compelling reason to do so.
4. *Burden of Proof.* A school should bear the burden to prove the case against the student with a preponderance of evidence.
5. *Non-Hearsay.* Students should be able to confront the witnesses against them. A long-term suspension and expulsion finding should require some non-hearsay evidence, such as live witness testimony or a confession.
6. *Independent Hearing Officer.* Discipline hearing officers should not be employed by the school district. Discipline hearings should take place at the state's office for administrative hearings or whichever state office presides over special education administrative hearings.

Without a doubt, there is reason to be skeptical that additional procedures would result in just and reasonable outcomes for children. Due process does not speak to the substantive merits or wisdom of a decision.¹⁶⁵ Without some robust substantive due process protections for students facing suspensions and expulsions,¹⁶⁶ there will still likely be children that experience exclusionary discipline that seems disproportionate to their behavior—even with additional procedural protections.

But I have hope that greater process *will* result in more just decision-making. The suggested procedures not only enable the student to have a meaningful opportunity to contest the charges but also aid the hearing officer in determining what happened. Notice alleging specific facts and proposed length of school exclusion would give families a greater ability to assess whether and how they might contest the case, including whether to seek counsel. Reviewing evidence the school has relied on, including the names of witnesses, gives students the opportunity to assess the school's case, make their own arguments, and prepare a defense.

Requiring non-hearsay evidence provides a guard against a decision based on mere rumor or evidence that the hearing officer cannot possibly assess. A right to confrontation not only enables the student to challenge the evidence but also aids the fact-finding by drawing out additional context or introducing evidence of bias or faulty perception. And a hearing officer outside the school district would serve as an independent check on the decision-making process and make progress toward

¹⁶⁵ See Bartlett & McCullagh, *supra* note 65, at 52.

¹⁶⁶ For a thorough argument on the need for more robust substantive due process protections in school discipline, see generally BLACK, *supra* note 21.

limiting the bias in school discipline.¹⁶⁷ Finally, access to counsel is enormously important in securing due process rights, in the school discipline context just as any other.

But my hope that additional process will result in better outcomes for students also comes from our work in the Education Advocacy Clinic. In representing students in discipline hearings, we can see the difference it makes for school administrators to fully hear a student's side of the story through tools like cross-examination, introduction of evidence, and a closing statement. Using these tools, we provide greater context around what happened—or what did not happen—and demonstrate that the child really *does* want to be in school. This advocacy can have a real impact on the student and the decision-making process.

Teachers and school administrators go into the profession because they care about young people, and I suspect that hearing a child tell their story in a meaningful way might—as we see in the clinic—make an impact not only in the length of suspension the student receives, but also in how the school views the child. A fair hearing might even impact how the child views the school, too.

CONCLUSION

In 1957, Professor Warren A. Seavey wrote: “It is shocking that the officials of a state educational institution . . . should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.”¹⁶⁸ Nearly two decades later, the Supreme Court declared that students have the right to due process in exclusionary discipline decisions.¹⁶⁹ Yet decades later, Professor Seavey's words still ring true.

As this Article illustrated, courts have generally miscalculated the interests at stake in long-term suspensions and expulsions. They have underestimated how important it is for children to attend school and overestimated a school's inclination to discipline students fairly. This jurisprudence has denied students procedural

¹⁶⁷ This recommendation is likely to increase administrative burdens, but there is precedent for this model. Washington, D.C. schools seeking to suspend a student for six days or more must request a hearing in the Office of Administrative Hearings, which serves as the discipline hearing officer. See *DCPS Discipline*, D.C. OFF. ADMIN. HEARINGS, <https://oah.dc.gov/page/dcps-discipline> [<https://perma.cc/EQJ6-SZZC>] (last visited Dec. 4, 2023). In many states, the state office for administrative hearings handles disputes over special education rights under the Individuals with Disabilities in Education Act, already overseeing some dispute resolution between schools and families. See, e.g., *Individuals with Disabilities Education Act/Special Education*, TEX. STATE OFF. ADMIN. HEARINGS, <https://www.soah.texas.gov/individuals-disabilities-education-act-special-education> [<https://perma.cc/4LBT-G53E>] (last visited Dec. 4, 2023).

¹⁶⁸ Warren A. Seavey, *Dismissal of Students: “Due Process,”* 70 HARV. L. REV. 1406, 1407 (1957).

¹⁶⁹ *Goss v. Lopez*, 419 U.S. 565, 583–84 (1975).

protections they should be entitled to receive before being excluded from school. Students deserve greater procedural protections, not only as a matter of general fairness, but also as a matter of due process.

Of course, robust procedures are not enough to ensure fair outcomes and wise disciplinary decisions, but stronger due process rights would guard against disciplinary hearings that can amount to—and appear to the accused student to be—a kangaroo court. Indeed, they also might work toward teaching positive lessons to students. As education law scholar Justin Driver has remarked, “[s]tudents are invariably going to derive *some* lessons about justice (and injustice) from the treatment they and their classmates receive within the corridors of our nation’s public schools. The only real question is what the content of those lessons will be.”¹⁷⁰

¹⁷⁰ DRIVER, *supra* note 163, at 155.