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

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

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

Introduction

On January 22, 1976, the United States Supreme Court held that a student’s entitlement to a public education is a property interest protected by the Fourteenth Amendment’s Due Process Clause “which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.” Goss v. Lopez, 419 U.S. 565, 574 (1975).

At a minimum, students facing a suspension of ten days or less are entitled to notice and a hearing. Goss, 419 U.S. at 579. The notice should apprise the student of the charges, and the hearing should offer the student an opportunity to “tell his [or her] side of the story.” Id. Although Goss warned that long-term suspensions (i.e., those over 10 days) or expulsions “may require more formal procedures” to satisfy due process, the Supreme Court did not elaborate on what those procedures may entail. Id. at 584.

But precisely what process is due for students facing long-term suspensions or expulsions? This article addresses the post-Goss judicial developments addressing procedural due process for those situations, including the student’s pre-adjudication status, notice, hearing procedures, the right to counsel, witness confrontation, and evidentiary standards.1

Goss v. Lopez

The discipline under review in Goss involved a 10-day suspension without a hearing, which the students alleged to have violated their rights under the Fourteenth Amendment’s Due Process Clause. In addressing the nature of constitutional rights in a public school setting, the Goss majority2 observed that the Fourteenth Amendment “protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.” Goss, 419 U.S. at 574 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 637 (1943)). And, the “young people” who attend the public school system do not “shed their constitutional rights” at the schoolhouse door. Id. (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

The Court majority found that a “10-day suspension from school is not de minimis . . . and may not be imposed in complete disregard of the Due Process Clause.” Goss, 419 U.S. at 576. Noting that a “short

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1 This article limits its scope to federal court decisions addressing K-12 student discipline matters issued since the Supreme Court’s 1975 Goss decision. Additional guidance can be gleaned from pre-Goss decisions (both state and federal court), as well as court decisions addressing higher education student discipline proceedings.

2 In a 5-4 decision, Justice White wrote the majority opinion, joined by Justices Douglas, Brennan, Stewart and Marshall. Goss, 419 U.S. at 567-84. Justice Powell wrote a sharply-worded dissent and was joined by Chief Justice Burger and Justices Blackmun and Rehnquist. Goss, 419 U.S. at 584-600. Justice Powell, a former school board president, viewed the majority’s decision as an unwarranted “judicial intervention in the operation of our public schools that may affect adversely the quality of education.” Id. at 585.
suspension is, of course, a far milder deprivation than expulsion, education nonetheless “is perhaps the most important function of state and local governments. Id. at 576 (quoting Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954)). The Court observed, “Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.” Id. at 576.

In its analysis of what process is due, the Court noted that the “interpretation and application of the Due Process Clause are intensely practical matters.…” Id. at 577. The Court noted, “Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. … By and large, public education in our Nation is committed to the control of state and local authorities.” Id. (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

Recognizing the competing interests affected by its decision, the Court first addressed those interests from the student’s perspective:

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

Goss, 419 U.S. at 579-80.

Turning to the school’s interests, the Court acknowledged the challenges in the day-to-day operations of the Nation’s public schools and observed:

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

Id. at 580.

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

*Id.* at 581.

The Court stated that there “need be no delay between the time ‘notice’ is given and the time of the hearing.” *Id.* at 582. The notice and hearing requirement could be fulfilled simply by “informally discuss[ing] the alleged misconduct with the student minutes after it occurred.” *Id.* The Court explained: “We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.” *Id.*

“Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school.” *Id.* There are, however, “recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable…” *Id.* at 583.

“In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.” *Id.*

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

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

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the
disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.” *Id.* at 583-84.

Because the student suspensions under review occurred without a hearing, each suspension was invalid. *Id.* at 584.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 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. *Id.* at 584.

It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

States and schools typically take this requirement very seriously and may provide more process than constitutionally required.

The “standards of procedural due process are not wooden absolutes” and “the sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter, and the circumstances involved.” *Keough v Tate County Bd. of Educ.*, 748 F.2d 1077, 1081 (5th Cir. 1984).

*Brown v Plainfield Comm. Consol. Dist.* 202, 500 F. Supp. 2d 996, 1000 (N.D. Ill. 2007) (“to comport with due process, expulsion procedures must provide the student with notice of the charges against him, notice of the time of the hearing, and a full opportunity to be heard, but ‘need not take the form of a judicial or quasi-judicial trial.’”); *Remer v Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010 (7th Cir. 2002) (student discipline proceedings need not take the form of a judicial or quasi-judicial trial).

Indeed the Supreme Court held that the scope of constitutional rights for public school students is limited by “what is appropriate for children in school”) *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).

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1 The Supreme Court issued its *Wood* decision on February 25, 1975 – just a month after *Goss*, which was issued on January 22, 1975.
Remer v. Burlington Area Sch. Dist., 286 F.3d 1007, 1010-11 (7th Cir. 2002) (“As long as the student is given notice of the charges against him, notice of the time of the hearing and a full opportunity to be heard, the expulsion procedures do not offend due process requirements.”).

“Although the Goss court reserved the question whether more formal procedures might be necessary for longer suspensions or expulsions,” it has been observed “that expulsion does not require a more elaborate hearing in order to comport with due process so long as the student receives the ‘fundamentally fair procedures’ set out in Goss.” Coronado v. Valleyview Pub. Sch., 537 F.3d 791, 795-96 (7th Cir. 2008).

“(C)ourts staunchly resist the suggestion that school disciplinary hearings should emulate criminal trials.” Hammock ex rel. Hammock v Keys, 93 F. Supp. 2d 1222, 1229 (S. D. Ala. 2000).

Due process protections may also be implicated when a student is excluded from school for reasons other than misconduct. See, e.g., Horton v. Marshall Pub. Schs., 769 F.2d 1323, 1333 (8th Cir. 1985) (students excluded from school based on state law ineligibility must receive due process).

The Fifth Circuit introduced constitutional safeguards into the area of student discipline. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961). The Supreme Court acknowledged Dixon as a “landmark decision.” Goss v. Lopez, 419 U.S. 565, 577 n.8 (1975). In Goss, the Court followed Dixon and held that “[a]t the very minimum, students facing some kind of suspension . . . must be given some kind of notice and some kind of hearing.” 419 U.S. at 579.

The Supreme Court has explained that, “due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have, and an opportunity to present his side of the story.” Id. at 581. These requirements may be satisfied by an “informal give-and-take between student and disciplinarian, preferably prior to the suspension[.]” Id. at 584.

As the Goss Court explained, “things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.” Id. at 584.

Admonishment in Goss itself that if anything, the required procedures are “less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.” Id. at 583.

In Board of Curators of the University of Missouri v. Horowitz, the U.S. Supreme Court reviewed due process in the dismissal of a medical student who failed to meet academic standards. In commenting about the requirements set forth in Goss v. Lopez, the Court stated:

All that Goss required was an “informal give-and-take” between the student and the administrative body dismissing him that would, at least, give the student “the opportunity to characterize his conduct and put it in what he deems the proper context.” But we have frequently emphasized that “[t]he very nature of due process negative any concept of inflexible procedures universally applicable to every imaginable situation.” Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

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


See Pugel v. Board of Trustees of Univ. of Ill., 378 F.3d 659, 662-63 (7th Cir. 2004) (“The hallmarks of procedural due process are notice and an opportunity to be heard.”); see also Grannis v. Ordean, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”).


In Mathews, the Supreme Court explained that due process generally requires balancing three distinct factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedure used; and (3) the Government’s interest, weighed against the fiscal and administrative burden of any additional procedures. Mathews, 424 U.S. at 335.

Martin v. Shawano-Gresham Sch. Dist., 295 F.3d 701, 707 (7th Cir. 2002) (“[W]hile the U.S. Constitution requires a school which suspends a student to provide that student with due process, the process required is minimal.”)

**Short-Term Suspension**

Goss, 419 U.S. at 581 (minimum due process requirements for suspension include “oral or written notice of the charges ... and, if he [the student] denies them, an explanation of the evidence the authorities have against him and an opportunity to present his side of the story”).

“[A]lthough the bar of Goss is low, the stakes of suspension may be high. Even a brief suspension of ten days or less may have serious and lasting consequences on a child’s short-term and long-term academic trajectory.” Dietchweiler v. Lucas, 827 F.3d 622, 632 (7th Cir. 2016) (Rovner, J., concurring).

“O]nce school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands.” C.B. v. Driscoll, 82 F.3d 383, 386 (11th Cir. 1996).

Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 566 (8th Cir. 1988) (no due process violation when notice and opportunity to be heard were not given to student for three-day in-school suspension).

**Long-Term Suspension or Expulsion**

The Goss holding is expressly limited to short-term suspensions. “Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” Goss, 419 U.S. at 584. Therefore, a student facing expulsion is due a higher standard of due process than one facing temporary suspension. L.Q.A. v. Eberhart, 920 F. Supp. 1208, 1217 (M.D. Ala. 1996), aff’d, 11 F.3d 897 (11th Cir. 1997).

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\(^4\) Mathews involved procedures for terminating a person’s disability benefits under the Social Security Act.
Although Goss specifically limited its holding “to the short suspension, not exceeding 10 days,” Goss, 419 U.S. at 584, it “nevertheless establish[ed] the minimum requirements for long-term expulsions as well.” Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 927 (6th Cir. 1988). To comport with due process, suspension and expulsion procedures must provide the student with a meaningful opportunity to be heard. Remer v. Burlington Area Sch. Dist., 286 F.3d 1007, 1010-11 (7th Cir. 2002).

Students facing long-term suspensions or expulsion do “not have the right to a full-blown administrative appellate process.” Newsome v Batavia Local Sch. Dist., 842 F.2d 920, 927 (6th Cir. 1988).

Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 822 (C.D. Ill. 2000) (procedural due process met if the student “knew the charges against him, received notice of the expulsion hearing, and was given a full opportunity to explain his position in an evidentiary hearing.”)

**Pre-Adjudication Status**

Suspension (10 days or less) need only have rudimentary due process. If the suspension is longer, or pending a hearing on an expulsion charge, the hearing should be provided as soon as practicable.

A student facing a related criminal charge may request a continuance until the criminal matter is resolved. Generally, a student may be required to testify in the student discipline hearing. Brands v. Sheldon Comm. Sch., 671 F. Supp. 627, 632 (N.D. Iowa 1987).

“[W]here there is other evidence of misconduct, a student’s silence may properly become an additional factor point towards a guilty finding.” Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1126 (E.D. Wis. 2001); see also Boynton v. Casey, 543 F. Supp. 995, 997 (D. Maine 1982). But, the student’s refusal to testify cannot be the sole basis for determining misconduct. Gonzales v. McEuen, 435 F. Supp. 460, 471 (C.D. Cal. 1997) (argument that misconduct could be inferred from refusal to testify violated student’s Fifth Amendment rights).

If the Board-level hearing cannot be provided within 10 school days, a first-level hearing should be conducted. This step reinforces the Goss process by providing the student with formal notice of the charges and an opportunity to respond, and limits claims of a due process violation for an indefinite suspension. See, e.g., Hill v. Ranking County Sch. Dist., 843 F. Supp. 1112, 1118 (S.D. Miss. 1994) (student entitled to formal hearing before decision of indefinite suspension pending a hearing on the principal’s expulsion recommendation).

**Notice**

Judicial review of procedural notice typically addresses the general notice of prohibited conduct, and the specific notice to the student of the alleged misconduct subject to discipline.

**General Notice of Prohibited Conduct**

Advance notice to students of the types of prohibited conduct and related disciplinary consequences is a basic requirement of due process. School discipline rules, however, do not need to be as detailed as a criminal statute. Rather, the language must give the student adequate warning of behavior that could result in sanctions. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (“Given the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.”).
In advising school clients about notice requirements, consider recommending the including of an “elastic clause” in student handbook language. For example:

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

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

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

While this suggested language may be helpful in response to a constitutional notice argument, school officials must carefully review the situation’s circumstances to determine the nexus between the student’s conduct and the school. See, e.g., Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812 (C.D. Ill. 2000).

Specific Notice of Alleged Misconduct/Recommended Disciplinary Consequences


L.Q.A. v. Eberhart, 920 F. Supp. 1208, 1217 (M.D. Ala. 1996), aff’d, 111 F.3d 897 (11th Cir. 1997) (notice that student was being disciplined for marijuana possession was sufficient and need not cite particular code section); Smith ex rel. Smith v. Mt. Pleasant Pub. Schs., 298 F. Supp. 2d 636, 639 (E.D. Mich. 2003) (although school did not specifically inform the student that he was being disciplined for violating the code of conduct’s “obscenity” provision, he did receive notice that his comments violated school rules).

Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1082 (5th Cir. 1984) (no need to provide witness names and expected testimony if there is no surprise as to witnesses and their testimony).

Boynton v. Casey, 543 F. Supp. 995, 998 (D. Me. 1982) (no due process violation when notice did not advise student that parents may be present during questioning).

D.F. v. Board of Educ. of Syosset Cent. Sch. Dist., 386 F. Supp. 2d 119, 126-27 (E.D.N.Y. 2005) (notice was sufficient, even though parents were aware of only two of the three charges).


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

Consequences

Notice of the recommended consequences should be clearly stated. Johnson v. Collins, 233 F. Supp. 2d 241, 252 (D.N.H. 2002) (expelled student granted preliminary injunction when notice stated a different consequence than that sought at the hearing – expulsion for the remainder of the school year versus permanent expulsion).

Trujillo v. Taos Municipal Schs., 1995 U.S. Dist. LEXIS 22268 (D.N.M. 1995) (sufficient notice advising student was “recommended for expulsion” and that “expulsion from school is permanent”).

Baxter v. Round Lake Area Schs., 856 F. Supp. 438, 445 (N.D. Ill. 1994) (“failure of a school to notify a parent of the possible punishments that could result from the expulsion hearing is not a violation of due process”).

Rosa R. v. Connelly, 889 F.2d 435, 439 (2d Cir. 1989) (no due process violation when student did not receive notice he would be denied credit for “time served” during pendency of expulsion hearing when student requested hearing postponement).


Pre-hearing Disclosures


Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1082 (5th Cir. 1984) (no due process violation for not disclosing witness names when student was fully aware of the charges, supporting facts, nature of the hearing, and right to counsel).

London v. Directors of the Dewitt Pub. Schs., 194 F.3d 873, 877 (11th Cir. 1999) (no due process violation for not providing witness statements before hearing where student’s attorney had opportunity to cross-examine witnesses).


Role of Board’s Legal Counsel – Hearing Officer or Prosecutor

Snyder v. Farnsworth, 896 F. Supp. 96, 99 (N.D.N.Y. 1995) (attorney could serve as hearing officer, even when practicing in same firm as student’s father, who was the board’s attorney).

LaBrecque ex rel. T.N. v School Administrative Dist. No. 57, 463 F. Supp. 2d 88 (D. Me. 2006) (providing legal advice to the board while serving as a non-voting hearing officer at the due process hearing does not suggest bias).

**Follow Board Procedures**

Violation of a school’s policy is not *prima facie* evidence of a due process violation if the policy departure “was not particularly egregious” and the same result would have been reached by following the policy. *J.S. ex rel. Duck v. Isle of Wight County Sch. Bd.*, 362 F. Supp. 2d 675, 684-85, n.9 (E.D. Va. 2005).


**Hearing Procedures**

Escalating the formality and adversary nature of the suspension or expulsion process may render such hearings so costly as to destroy their effectiveness as a disciplinary tool. *Goss*, 419 U.S. at 583.


Adjudicative bodies considering student discipline matters have a presumption of fairness, unless there is a showing of actual bias. *Jennings v. Wentzville RIV Sch. Dist.*, 397 F.3d 1118, 1125 (8th Cir. 2005); *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1013 (7th Cir. 2002); *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102 (E.D. Wis. 2001).

*Lamb v. Panhandle Comm. Unit Sch. Dist. No. 2*, 826 F.2d 526, 528 (7th Cir. 1987) (when penalty tantamount to expulsion is involved, the school “must afford the student an opportunity to present evidence and argument in mitigation.”).

“In a school disciplinary context, the level of impartiality required for the decision maker does not reach the absolute neutrality required in the criminal justice system.” *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 656 (W.D. Tex. 2000).
Brewer ex rel. Dreyfus v. Austin Indep. Sch. Dist., 779 F.2d 260, 264 (5th Cir. 1985) (“A school administrator involved in the initiation and investigation of charges is not thereby disqualified from conducting a hearing on the charges, although the facts of an occasional case may demonstrate that a school official’s involvement in an incident created a bias ‘such as to preclude affording the student an impartial hearing.’”); c.f., Gonzales v. McEuen, 435 F. Supp. 460, 465 (C.D. Cal. 1977) (no impartiality when superintendent served dual role as prosecutor and advisor to the board).

Because due process only requires the opportunity to be heard, the student’s hearing right may be waived. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 625 (5th Cir. 2004); Remer v. Burlington Area Sch. Dist., 286 F.3d 1007, 1012 (7th Cir. 2002); Lott v. Hamden Bd. of Educ., 400 F. Supp. 2d 451, 455 (D. Conn. 2005); Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 823 (C.D. Ill. 2000), aff’d on other grounds, 251 F.3d 662 (7th Cir. 2001); Coplin v Conejo Valley Unified Sch. Dist., 903 F. Supp. 1377, 1384-85 (C.D. Cal. 1995).

Engle v. Independent Sch. Dist. No. 91, 846 F. Supp. 760, 765 (D. Minn. 1994) (no due process violation for student excluded from last 10 days of school for his personal safety when he requested to finish the school year at home and administrators acquiesced; student could not be removed from school for his own protection without “being afforded some minimum due process protection.”).

With school “choice” (permitting enrollment of nonresident students); G.C. v. Owensboro Pub. Sch., 711 F.3d 623, 630 (6th Cir. 2013) (due process still required even though board policy stated that non-resident students could be removed “for any reason and at any time”).

Once a student is allowed to enroll, school officials do not have “unfettered discretion” to remove the student “at any time and for any reason.”

Due process requires opportunity to seek milder punishment, even when admitting misconduct. Lamb v. Panhandle Comm. Unit Sch. Dist. No. 2, 826 F.2d 526, 530 (7th Cir. 1987) (if student admits misconduct, proceeding errors usually relate to determination of the appropriate disciplinary consequence).


“Due process demands only that [the student] be permitted to present her side of the story, not that school administrators accept it.” Hammock ex rel. Hammock v. Keys, 93 F. Supp. 2d 1222, 1229 (S.D. Ala. 2000).

Hearing Record


State law, open meetings law, recordings, right to make transcript

Record may affect scope of judicial review. If no record, court may be tempted to have a de novo review.

While State law typically governs Board minutes and resolutions, these documents provide an opportunity for the board to “speak”. For example, in Michigan, a school board “speaks only through its minutes and resolutions.” Tavener v. Elk Rapids Rural Agricultural Sch. Dist., 341 Mich. 244, 251; 67 N.W.2d 136, 139 (Mich. 1954). The resolution set forth below addresses basic elements of procedural due process
that serve as a framework for the board’s decision. The initial recitals include the alleged misconduct, rule violation, and recommended disciplinary consequence, as well as notice of that information. Depending on State “sunshine” laws, the “open” or “closed” nature of the hearing should be included. The remaining recitals reflect the opportunity for the student to respond and the board’s responsibility to carefully consider the hearing evidence.

The resolution decision first determines whether the misconduct was established by the applicable evidentiary standard and identifies the violated rule. The next decision is to determine the disciplinary consequences. Additional language should be included for special education students, as well as the delegation of administrative authority to implement the board’s decision.

Recitals:

1. The Administration has recommended that a Student whose identity is known to the Board (Student #____) be subject to a disciplinary hearing for the alleged violation of Board Policy # ______ (____) and the recommended disciplinary consequence of _____.

2. The Administration notified the Student’s parents of the specific charge underlying the disciplinary recommendation, as well as the date, time, and place of the hearing.

3. Pursuant to the request of the Student’s parents and as authorized by Section __ of the State Open Meetings Law, the Student’s disciplinary hearing was conducted in a closed session meeting of the Board.

4. Consistent with Board policy, the hearing afforded the Student and the Student’s representatives an opportunity to respond to the charge and to present pertinent evidence for the Board’s consideration.

5. The Board has carefully considered all of the evidence produced in this discipline hearing.

Now, Therefore, Be It Resolved That:

1. A preponderance of the evidence establishes/does not establish that the Student engaged in _____, in violation of Board Policy # ______ (____).

2. The Student is suspended through ________/expelled from the District.

3. During the time of this suspension, the Student shall not be on school grounds or attend any function at the District without prior written approval from an appropriate administrator.

4. [For special education] Consistent with the Board’s action taken this date, the Administration shall promptly meet with the Student’s parents to determine those appropriate educational programs and services for which the Student may be entitled under state and federal law.

5. The Administration is directed and authorized to implement all terms of this resolution and are delegated all necessary authority to do so.

Right to Counsel

In Goss, 419 U.S. at 583, the Supreme Court recognized that a student does not have the right to legal counsel for a short-term suspension.
Courts differ as to whether the role of the student’s counsel is adversarial or advisory. See Dillon v. Pulaski County Special Sch. Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978), aff’d, 594 F.2d 699 (8th Cir. 1979). The student’s attorney was not allowed to examine the teacher who had witnessed the student’s behavior. The court ordered reinstatement on procedural due process grounds, expunged the record, and awarded one dollar in nominal damages.


Where the Board proceeds through counsel, “the student has the right to be represented by counsel...” Diggles v Corsicana Indep. Sch. Dist., 529 F. Supp. 169, 172 (N.D. Tex. 1981).


“Students do not necessarily have a due process right to an attorney at an expulsion hearing, let alone a right to be notified that they are entitled to an attorney.” C.Y. v. Lakeview Pub. Schs., 557 Fed. Appx. 426, 434 (6th Cir. 2014).

Brian A. v. Stroudsburg Area Sch. Dist., 141 F. Supp. 2d 502, 509 (M.D. Pa. 2001) (no due process violation where request to delay hearing to retain an education law specialist was denied).

**Witness Confrontation**

While there is disagreement among the courts about whether due process required confrontation of witnesses in a school discipline hearing, the “general consensus” however, “is that there is no due process right to cross-examine witnesses or to examine the actual statements made by witnesses.” J.S. ex rel. Duck v. Isle of Wight County Sch. Bd., 362 F. Supp. 2d 675, 683 (E.D. Va. 2005).


Tun ex rel. Tun v. Fort Wayne Comm. Schs., 326 F. Supp. 2d 932, 944 (N.D. Ind. 2004), rev’d on other grounds, 398 F.3d 899 (7th Cir. 2005) (school’s refusal to allow student facing expulsion to view witnesses’ written statements or to confront witnesses did not violate due process.).

B.S. ex rel. Schneider v. Board of Sch. Trustees, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003) (no due process violation where school refused to provide student with names of student accusers, witness statement, and an opportunity to cross-examine).

L.Q.A. v. Eberhart, 920 F. Supp. 1208, 1219 (M.D. Ala. 1996) (no due process violation where board considered written statements from student witnesses who were not subject to cross-examination at expulsion hearing), aff’d, 111 F.3d 897 (11th Cir. 1997).


Bogle-Assegai v. Bloomfield Bd. of Educ., 467 F. Supp. 2d 236, 243 (D. Conn. 2006) (no due process violation for reliance on student statements to support expulsion without cross-examination, especially when other evidence also supported the decision).

Whiteside v. Kay, 446 F. Supp. 716, 721 (W.D. La. 1978) (school officials are “not required to provide students with a list of witnesses and a summary of their testimony.”).

Balancing Interests

Decisions addressing cross-examination rights are frequently tied to the circumstances of the particular case. E.K. v. Stamford Bd. of Educ., 557 F. Supp. 2d 272, 276 (D. Conn. 2008) (citing Mathews, 424 U.S. at 319) (“Under the particular circumstances of this case, the additional safeguard of allowing for plaintiffs confrontation of the student witnesses does not outweigh the school’s interest in avoiding a burdensome formal expulsion proceeding and in protecting student witnesses.”); E.K. v. Stamford Bd. of Educ., 557 F. Supp. 2d 272, 277 (D. Conn. 2008) (no due process violation for considering anonymous witness statements where the accused student admitted being present at the incident and knew the names of the involved students).

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

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

B.S. ex rel. Schneider v. Board of Sch. Trustees, 255 F. Supp. 2d 891, 900 (N.D. Ind. 2003) (“[T]he presence of corroborating evidence further diminishes the potential value of cross-examination at the expulsion hearing.”).

In light of the increasing challenges schools face in maintaining order and discipline, requiring them to permit the confrontation of student witnesses or even to disclose their identities in expulsion hearings is overly burdensome and unrealistic. Wagner ex rel. Wagner-Garay v. Fort Wayne Community Schs., 255 F. Supp. 2d 915, 927 (N.D. Ind. 2003) (citing Newsome, 842 F.2d at 924-25; Caston, 2002 WL 562638, at *5).

Reprisal

Courts have expressed concern about the student witness who may face “ostracism at best and perhaps physical reprisals.” Newsome, 842 F.2d at 925.
Dillon v. Pulaski County Special Sch. Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978), aff’ed, 594 F.2d 699 (8th Cir. 1979) (“[T]he need for anonymity of student accusers, who might otherwise be the victim of reprisals from fellow students, could prevail over the right to confrontation.

D.F. v. Board of Educ. of Syosset Cent. Sch. Dist., 386 F. Supp. 2d 119, 127 (E.D.N.Y. 2005) (“the School District had a keen interest in keeping the identity of the students confidential” due to the need to protect the students from “possible retaliation” by the student whom school officials considered to be “potentially violent.”)

E.K. v Stamford Bd. of Educ., 557 F. Supp. 2d 272, 278 (D. Conn. 2008) (upholding rule that “Board may refuse to allow a witness against the pupil to appear when the Board believes that fear on the part of the witness would prevent the giving of accurate testimony”).

Caston v. Benton Pub. Schs., 2002 WL 562638 *5 (E.D. Ark. 2002) (“Those students may be understandably reluctant to come forward with information if they are faced with the prospect of formal cross-examination by the offending student or his attorney....”).

B.S. ex rel. Schneider v. Board of Sch. Trustees, 255 F. Supp. 2d 891, 901 (N.D. Ind. 2003) (school’s strong interest in protecting students who report misconduct outweighs the minimal value of permitting cross-examination of those students).

Coplin v. Conejo Valley Unified Sch. Dist., 903 F. Supp. 1377, 1383 (C.D. Cal. 1995) (“victims have an interest in not being identified and subjected to re-experiencing the harassment”).

U.S. Department of Education, Office for Civil Rights Dear Colleague Letter (April 4, 2011) (“OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing [involving sexual assault]. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”).

Burden

Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 925 (6th Cir. 1988) (“we conclude that the necessity of protecting student witnesses from ostracism and reprisal outweighs the value to the truth-determining process of allowing the accused student to cross-examine his accusers”; see also Paredes v. Curtis, 864 F.2d 426, 430 (6th Cir. 1988) (student does not have due process right to review statement of anonymous witness when “essential facts” of the allegations are provided).


Brown v. Plainfield Comm. Consol. Dist. 202, 522 F. Supp. 2d 1068, 1075 (N.D. Ill. 2007) (“Saddling high school administrators with the burden of overseeing the process of cross-examination would significantly outweigh the benefits to the accused student.” Moreover, “[i]ncreasing the complexity of school disciplinary hearings would also divert time and attention away from the administration’s primary purpose: overseeing the educational process.”).

Craig v. Selma City Sch. Bd., 801 F. Supp. 585, 593 (S.D. Ala. 1992) (student does not have a right to obtain materials to prepare for witness cross-examination as there is no right to cross-examine witnesses), sub.
opinion, 522 F. Supp. 2d 1068, 1075 (N.D. Ill. 2007) (again holding no due process violation, court expressed concern about burdening school officials with overseeing the cross-examination process).

To saddle [school administrators] with the burden of overseeing the process of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill-equipped to perform. The detriment that will accrue to the educational process in general by diverting school board members’ and school administrators’ attention from their primary responsibilities in overseeing the educational process to learning and applying the common law rules of evidence simply outweighs the . . . benefit that will accrue to the fact-finding process by allowing cross-examination.

Newsome, 842 F.2d at 926.

Tun ex rel. Tun v. Fort Wayne Comm. Schs., 326 F. Supp. 2d 932, 943 (N.D. Ind. 2004), rev’d on other grounds, 398 F.3d 899 (7th Cir. 2005) (“in light of the increasing challenges schools face in maintaining order and discipline, “it is important “to avoid the formalistic trappings, complexity and cost of adversarial litigation” in student discipline and expulsion cases”).

Required

Gonzales v. McEuen, 435 F. Supp. 460, 469 (C.D. 1977) (“Although strict adherence to common law rules of evidence is not required in school disciplinary proceedings, . . . due process does not permit admission of ex parte evidence by witnesses not under oath and not subject to examination by the accused student.”).


Ripp v. Board of Sch. Trustees, 2000 U.S. Dist. LEXIS 7427 (S.D. Ind. 2000) (cross-examination may be permitted if student was challenging the reliability of his accusers’ identification of him, and not solely to attack their credibility or sincerity).


Dillon v. Pulaski County Special Sch. Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978), aff’d, 594 F.2d 699 (8th Cir. 1979) (where witness testimony was critical, “due process clearly demanded that the student be given an opportunity to question” the witness.).

Permit question of witnesses who testify. What facts elucidated, especially if critical facts are not in dispute.

Evidentiary Standards

The majority of courts who have addressed this issue have permitted the rights at stake in a school disciplinary hearing to be determined on the hearsay testimony of the school administrators who investigated the incident. See, e.g., Brewer ex rel. Dreyfus v. Austin Indep. Sch. Dist., 779 F.2d 260, 263 (5th Cir. 1985) (no due process violation for reliance on summaries of student witness statements without witness identified or present for cross-examination).

But, decisionmaker should not rely solely on hearsay, especially if there is a dispute about a material fact. Absent direct contradictory evidence, the decisionmaker may rely on hearsay, which has a “rational probative force”. Brands v. Sheldon Comm. Sch., 671 F. Supp. 627, 632 (N.D. Iowa 1987).

Unless the student is charged with “persistent disobedience”, evidence of the student’s previous misconduct should not be reviewed until determining the disciplinary consequence. Likewise, the student’s grades and attendance are typically not relevant to determining the charged conduct.

School officials bear the burden of proof in student disciplinary proceedings. While the substantial evidence standard generally applies, that standard may vary by state statute or jurisdictional case law. When adequate procedural safeguards are provided, the court’s sole function is to determine whether there was substantial evidence supporting the charge against the student.

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

Section 1983 does not entitle the student “to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations.” Wood, 420 U.S. at 326.

Once the school establishes that the student is in possession of a “dangerous weapon” at school, the burden shifts to the student who must establish in a “clear and convincing manner” that one of four statutory exemptions apply. MICH. COMP. LAW 380.1311(2).


Rethinking Zero Tolerance

The federal Gun-Free Schools Act of 1994, 20 U.S.C. § 8921, mandates that as a condition of receiving federal funds, state law must require local educational agencies to expel from school for at least one year a student who possesses a firearm at school. The Columbine High School shooting (1999) led to so-called “zero tolerance” policies and legislation.

A “zero tolerance policy” typically encompasses a school policy that mandates “strict, predetermined consequences to specified student behavior(s), with little to no discretion on the part of school officials charged with enforcing the policies”). Jenkins & Dayton, Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools, 171 EDUC. L. REP. 13, 14 (2003). The American Bar Association asserts that:

“Employing a blanket policy of expulsion, clearly a serious penalty, precludes the use of independent consideration of relevant facts and circumstances.” Colvin ex rel. Colvin v. Loudes County Sch. Dist., 114 F. Supp. 2d 504, 512 (N.D. Miss. 1999) (due process violation for student expelled under a zero tolerance policy for carrying in backpack a small Swiss Army knife key chain).

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

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

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

Mich. Comp. Law 380.1310d(2)

Consideration of these factors is mandatory before suspending or expelling a student. The method used for consideration of the factors is at the sole discretion of the board . . . or its designee. Mich. Comp. Law 380.1310d(4).

Alternatives to School Removal


Restorative justice is an approach that holds the offender accountable for rectifying the harm he or she has done and attempts to mediate conflicts and resolve problems through conversations between the involved students and staff. In contrast with punitive or zero-tolerance approaches, restorative justice focuses on the rehabilitation of offenders through reconciliation with victims and the school community. See Jordan Green, In the Alternative: Restorative Justice in Student Discipline, NSBA Council of School Attorneys July 2016 INQUIRY & ANALYSIS (June 28, 2016).

“[Title IX] grievance procedures . . . may include voluntary informal mechanisms for resolving some types of sexual harassment complaints. . . . [I]t is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school.” OCR Dear Colleague letter (April 4, 2011).

Lessons Learned and Advising Clients

- School district documents should be consistent with applicable legal standards, and consistent within the district, e.g., board policy, administrative guidelines, student handbooks, building/classroom/program rules.

- Administrators should be trained.

- No ex parte communications or independent fact finding by decision makers.