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School Discipline 101: Students' Due Process Rights in Expulsion Hearings

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Upholding the principle that school districts, as state actors, shall not deprive a student of liberty or property without due process of law, courts have expanded for more than four decades the Fourteenth Amendment's due process protection of public school students. Understanding this principle is essential to representing children in school discipline proceedings. Before presenting a practical guide to representing students in these proceedings, we offer a brief history of due process protection for children.

I. Before *Goss v. Lopez*: 1954–1975

The history of due process standards in school discipline proceedings probably begins with the Fourteenth Amendment to the U.S. Constitution, which says, inter alia: "No state shall … deprive any person of life, liberty or property, without due process of law."[1] In 1954 in *Bolling v. Sharpe*, a companion case to *Brown v. Board of Education*, the U.S. Supreme Court construed the word "liberty" to encompass a child's right to a public education.[2] *Bolling* was a class action brought on behalf of eleven black students who challenged segregation in the public schools of the District of Columbia. In ruling for the plaintiffs the Court, led by Chief Justice Earl Warren, relied on the guarantee of liberty in the due process clause to recognize that the concept of liberty encompasses a child's right to a public education.[3]

Notwithstanding *Bolling*, before 1961 due process played a "negligible role in school and college discipline" proceedings.[4] This near absence of due process protection began to change that year when the Fifth Circuit decided *Dixon v. Alabama State Board of Education*.[5] The plaintiffs in *Dixon* were African American students (all at Alabama State College) who engaged in various acts of civil disobedience to challenge legal segregation. Heeding an explicit request from Alabama's governor, the state summarily expelled six of the students without notice or hearing. In response, the students, alleging that they had been denied due process of law under the Fourteenth Amendment, sought injunctive relief in federal court.

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[1]U.S. Const. amend. XIV, § 1.

[2]*Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[3]*Bolling*, 347 U.S. at 497. (While the U.S. Supreme Court relied on the Fifth Amendment's due process clause because the Fourteenth Amendment applies to states, not to the District of Columbia, the same due process standard is widely understood to apply to the states through the Fourteenth Amendment.)

[4]William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 University of Pennsylvania Law Review 545, 552 (1971).

[5]*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).

Due process requires, the Fifth Circuit held in ruling for the plaintiffs, notice and some opportunity for a hearing before students at a public college may be expelled for misconduct. Judge Richard Rives reasoned:

> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital, and indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. There was no offer to prove that other colleges are open to the plaintiffs. If so, the plaintiffs would nonetheless be injured by the interruption of their course of studies in midterm.... Indeed, expulsion may well prejudice the student in completing his education at any other institution.[6]

The court in *Dixon* further opined that the example the Alabama Board of Education set could have "broken the spirits of the expelled students and of others familiar with injustice" and that "it is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play."[7] While binding only in the Fifth Circuit, *Dixon* set a precedent that notice and a hearing must precede expulsion from public colleges and universities, and the decision set in motion a domino effect of policy change at institutions of higher learning.[8]

Only six years later, in 1967, the Supreme Court decided *In re Gault* and revolutionized due process protection in juvenile court proceedings.[9] In *Gault* the Court continued to lay a foundation for explicit recognition of the due process rights of school-age children under the Fourteenth Amendment.

Fifteen-year-old Gerald Gault lived in Arizona and was charged with making lewd phone calls.[10] After being found delinquent in juvenile court, Gerald was sentenced to reform school until he was 21 years old, even though the maximum sentence an adult would have received for the same offense was a $50 fine or imprisonment of not more than two months.[11] Gerald and his parents had no right to appeal the juvenile case under Arizona law; instead Gerald filed a writ of habeas corpus with the Arizona Supreme Court and subsequently appealed to the U.S. Supreme Court, where he argued that he had been denied due process of law at trial.[12]

Writing for the Court, Justice Fortas stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[13] The Court reversed the juvenile court's finding of delinquency and held that a minor was entitled to the following procedural protections in a juvenile delinquency proceeding: (1) specific and timely notice of the charges,

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[6] *Id.* at 157.

[7] *Id.* at 157–58.

[8] *Student Procedural Due Process 2006*, Commonwealth Educational Policy Institute Education Law Newsletter (Commonw. Educ. Pol'y Inst., Va. Commonw. Univ., Richmond, Va.), Feb. 2006, at cepionline.org.

[9] *In re Gault*, 387 U.S. 1 (1967). See, e.g., Buss, *supra* note 4, at 558.

[10] *Gault*. 387 U.S. at 7–8.

[11] *Id.*; Buss, *supra* note 4, at 557.

[12] *Gault*, 387 U.S. at 10.

[13] *Id.* at 14.

(2) legal counsel, (3) protection from self-incrimination, and (4) confrontation and cross-examination of adverse witnesses.[14] While *In re Gault* was limited to juvenile delinquency proceedings, it continued to lay a foundation for what was to come in the late 1960s and 1970s in cases involving minors.[15]

In 1969 the Supreme Court decided the landmark case of *Tinker v. Des Moines Independent Community School District*.[16] In *Tinker* parents sued the school district on behalf of their children to obtain an injunction against enforcement of a regulation that prohibited students, while on school grounds, from wearing black armbands to protest the Vietnam war.[17] The petitioners alleged, inter alia, that enforcement of the policy violated the students' rights to free speech and freedom of expression under the First and Fourteenth Amendments.

Justice Fortas's majority opinion in *Tinker* began with the now oft-repeated "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[18] The Court then held that, absent a finding that the armbands would "substantially interfere with the work of the school" or "impinge upon the rights of other students," the policy prohibiting black armbands violated the students' constitutional rights to freedom of speech and expression.[19] In so holding, the Court borrowed language from Justice Brennan in an earlier case: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[20]

II. Procedural Due Process in Public Schools

More than two decades after *Bolling* established education as a liberty interest that the due process clause protected, the Supreme Court addressed the procedural due process rights of public school students in *Goss v. Lopez*.[21] The Ohio public school students who brought that class action lawsuit argued that their suspension from high school without a hearing of any kind violated their due process rights under the Fourteenth Amendment. The students sought (1) a declaration that the Ohio law granting authority for the suspension was unconstitutional, (2) an injunction against future suspension pursuant to this law, and (3) removal of any reference in their records to suspension instituted pursuant to this law. The law, Ohio Revised Code Annotated § 3313.64, empowered a principal to suspend a student for misconduct for up to ten days, provided that the principal notified the student's parents within twenty-four hours and stated the reasons for the suspension.[22]

A student's attendance at public school, the Court said in an opinion by Justice White, is a *property right* that the Fourteenth Amendment protects. The Court reasoned (1) that "protected property interests are normally 'not created by the constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits," and (2) that Ohio's compulsory attendance statute granted all Ohio children between the ages of

[14] *Id.*

[15] *Student Procedural Due Process 2006*, *supra* note 8.

[16] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

[17] *Id.* at 504.

[18] *Id.* at 506.

[19] *Id.* at 508.

[20] *Id.* at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

[21] *Goss v. Lopez*, 419 U.S. 565 (1975).

[22] *Id.* at 567.

5 and 21 a "legitimate claim of entitlement to a public education."[23] Justice White explained that "having chosen to extend the right to an education … Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[24] The Court emphasized that the state had broad authority to prescribe and enforce conduct in its schools but that the state must exercise its authority to constrain a student's property right to education in accordance with the Constitution.

Then, in keeping with the historical view of the right to an education as a liberty interest, the Court reasoned that the application of the Ohio law also collided with the students' *liberty interests:*

> The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. [Citations omitted]. School authorities here suspended appellees for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.[25]

The *Goss* Court, having recognized the property and liberty interests implicated in depriving a student of an educational placement, then held that "at the very minimum, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and some kind of hearing."[26] The Court further held 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."[27]

While *Goss* established a new property right and additional protection for students, the Court predictably refused to articulate an inflexible procedure under the due process clause because the nature of the new right's application made it impossible to create procedures that would fit every situation.[28] And, although *Goss* did not involve expulsions per se, the Court opined that "longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures," leaving the door open for courts to implement more formal *Gault*-like requirements in cases of longer suspension and expulsion.[29]

III. Clarification and Application

Since 1975, courts have clarified and applied the *Goss* requirements. For example, in *Gonzales v. McEuen*, when

[23] *Id.* at 573 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

[24] *Id.* at 574.

[25] *Id.* at 574–75.

[26] *Id.* at 579.

[27] *Id.* at 581. Regarding the timing of this notice, the Court explained that "there need be no delay between the time notice is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. 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.… [I]t follows that as a general rule notice and hearing should precede removal of the student from school." *Id.* at 582.

[28] *Id.* at 578.

[29] *Id.* at 584.

students in California challenged their expulsion as violating due process, the district court noted that "it is now beyond argument that due process protections apply to expulsion of students by public educational institutions."[30] The *Gonzales* court further clarified *Goss'* application in expulsion hearings: "*Goss* clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses."[31]

More recently, courts interpreting *Goss* have relied on the statutory law of their own jurisdictions to elucidate due process requirements where *Goss* is (arguably) silent. For example, in *D.F. v. Board of Education*, a federal district court in New York quoted *Goss* in recognizing that "a student has a protected property interest in education 'which may not be taken away for misconduct without adherence to the minimum procedures required by the due process clause.'"[32] However, the court turned to the state's own statutory framework to articulate students' due process rights in noting that "New York Education Law provides for certain, basic procedural protections for suspensions longer than (5) days … such … [as] … 'representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf.'"[33]

The history of due process demonstrates an evolving concept that forms the core of the constitutional protections available to students. Due process is also the foundation for the laws, regulations, and policies upon which advocates rely in representing students in school discipline proceedings.

IV. A Practical Guide to Representing Students

With this historical perspective, we now turn to a practical approach to suspension and expulsion cases.

A. State and Local Laws and Regulations

The first step in developing a school discipline practice is to review thoroughly your state's laws and regulations governing the suspension and expulsion of students.[34] One positive aspect of representing students in expulsion hearings is that the law in this area is relatively basic, allowing for easier mastery. In California, with rather lengthy

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[30]*Gonzales v. McEuen*, 435 F. Supp. 460, 466 (C.D. Cal. 1977).

[31]*Id.* at 467. Other courts require a hearing incorporating these safeguards before or shortly after a child is suspended for a prolonged or indefinite period. See *Black Coalition v. Portland School District, No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973); *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967). As for the timing of the *Goss* hearing, a federal district court in Virginia held that a right to hearing meant a "prompt hearing"; the court found that a hearing held thirty days after a student was suspended was not prompt and was therefore impermissible under *Goss*. See *Doe v. Rockingham County*, 658 F. Supp. 403 (W.D. Va. 1987).

[32]*D.F. v. Board of Education*, 386 F. Supp. 2d 119, 126 (E.D.N.Y. 2005) (quoting *Goss*, 419 U.S. at 574).

[33]*Id.*

[34]Ala. Code § 16-1-14 (2006); Alaska Admin. Code tit. 4, § 07.010 (2006); Ariz. Rev. Stat. Ann. § 15-840 (2006); Ark. Code Ann. § 6-18-500 (2006); Cal. Educ. Code §§ 48900-48927 (West 2006); Colo. Rev. Stat. Ann. § 22-32-109.1 (West 2006); Conn. Gen. Stat. Ann. § 10-233 (West 2006); Del. Code Ann. tit. 14, § 1601 (2006); Fla. Stat. Ann. § 1002 (West 2006); Ga. Code Ann. § 20-2-730-769 (West 2006); Haw. Rev. Stat. § 8-19 (2006); Idaho Admin. Code r. 08.02.03-160 (2006); Ill. Comp. Stat. Ann. 105 5/10-22.6 (West 2006); Ind. Code Ann. § 20-33-8 (West 2006); Iowa Code Ann. § 282.4 (West 2006); Kan. Stat. Ann. § 72-8900 (2006); Ky. Rev. Stat. Ann. § 158.150 (as amended by 2006 Ky. Laws Ch. 139 (HB 688)); La. Rev. Stat. Ann. § 17:416 (2006); Me. Rev. Stat. Ann. tit. 20-A, § 1001 (2006); Md. Code Ann., Educ. § 7-305 (West 2006); Mass. Gen. Laws ch. 71, § 37H (2006); Mich. Comp. Laws Ann. § 380.1311 (West 2006); Minn. Stat. Ann. § 121A (West 2006); Miss. Code Ann. § 71-37 (2006); Mo. Rev. Stat § 160.261 (2006); Mont. Code Ann. § 20-5-202 (2006); Neb. Rev. Stat. § 79-268 (2006); Nev. Rev. Stat. Ann. § 392.4655 (West 2006); N.H. Rev. Stat. Ann. § 193:13 (2006); N.J. Stat. Ann. § 18A:37-2 (West 2006); N.M. Stat. Ann. § 22-5-4.3 (West 2006); N.Y. Educ. Law § 3214 (McKinney 2005); N.C. Gen. Stat. Ann. § 115C-391 (West 2006); N.D. Cent. Code § 15.1-19-09 (2006); Ohio Rev. Code Ann. § 3313.66 (West 2006); Okla. Stat. Ann. tit. 70, § 24-101.3 (West 2006); Or. Rev. Stat. Ann. §339.240 (West 2006); 24 Pa. Cons. Stat. Ann. § 13-1318 (West 2006); R.I. Gen. Laws § 16-2-17 (2006); S.C. Code Ann. § 59-63-210 (2006); S.D. Codified Laws § 13-32-4 (2006); Tenn. Code Ann. § 49-6-3401 (West 2006); Tex. Educ. Code Ann. § 37.007 (Vernon 2005); Utah Code Ann. § 53A-11-903 (West 2006); Vt. Stat. Ann. tit. 16, § 1162 (2006); Va. Code Ann. § 22.1-277 (West 2006); Wash. Rev. Code Ann. § 28A.305.160 (West 2006); W. Va. Code Ann. § 18A-5-1 (West 2006); Wis. Stat. Ann. § 119.25 (West 2006); Wyo. Stat. Ann. § 21-4-305 (2006).

and detailed regulations, our entire legislative scheme governing these hearings is no more than twenty-six pages.[35] Further, only some fifteen reported cases in California address and elucidate school discipline issues. You should review any regulations governing school discipline matters in the individual district where you represent a student. Many states give districts great discretion in establishing disciplinary policies and procedures. Local regulations may offer more information than state statutes.

Review your state regulations and case law and any local provisions to give you a framework of students' due process rights and a sense of the kinds of offenses for which students may face suspension or expulsion. These generally range from the innocuous and vague (e.g., disrupting school activities) to the serious and specific (e.g., possession of a gun).[36] Equally important, however, you must have a clear notion about acts for which students may *not* be expelled. Pay particular attention to where and when the alleged offenses took place. Some states require that to be grounds for expulsion a student's offense must have occurred at school or at a school-sponsored activity. Others cover anything that occurs on the way to or from school. Still others allow expulsion for offenses that have seemingly nothing to do with school.[37] States sometimes specifically exclude a class of offenses as grounds for expulsion (e.g. tardiness or truancy).[38] Begin by grasping the boundaries of your state and local laws and exploring the universe of acts that can lead to expulsion hearings.

B. Suspension Policies and Procedures

Once a student is alleged to have committed an expellable offense, the student is likely as a first step to be suspended for a short period (e.g., one to ten days).[39] Again, review state law to determine the permissible length of suspension. Short-term suspensions that precede expulsion attempts are frequently extended until the expulsion hearing is held. A basic level of due process—usually consisting of a meeting between student and parent and school officials to explain the circumstances leading to the suspension and the need for ongoing suspension pending further hearing—typically accompanies any such extensions.[40] Allowing for some minimal due process and an opportunity to be heard gives schools legal grounds to lengthen the suspension prior to holding an actual disciplinary hearing with more extensive due process rights. How long students may be excluded from school before an expulsion hearing varies from state to state, but the period may extend up to thirty consecutive school days.

These extended suspensions themselves are a critical area for advocacy. If the school did not comply with state law, ask that the student be allowed to return to school immediately, even pending further disciplinary action. A school's failure to meet minimal due process requirements for the suspension might also be a useful argument during the expulsion hearing itself. Even if an extended suspension was properly carried out, advocates

[35]Cal. Educ. Code §§ 48900–48927 (West 2006).

[36]*See id.* §§ 48900(k) & (b).

[37]E.g., Texas has a category of offenses for which students may be expelled only if the offenses happened while on school property and other offenses for which students may face expulsion if the offenses occurred within 300 feet of any school campus. *See* Tex. Educ. Code Ann § 37.007 (Vernon 2005).

[38]See Cal. Educ. Code § 48900(v) (West 2006). See also Nev. Rev. Stat. Ann § 392.467(4) (West 2006) (restricts expulsion or suspension of truant students).

[39]California law allows only up to five consecutive days of suspension unless a student is facing expulsion. See Cal. Educ. Code § 48911(a) (West 2006). Cf., e.g., Ohio Rev. Code Ann. § 3313.66(A) (West 2006) (allowing suspensions for up to ten consecutive days).

[40]See, e.g., Utah Code Ann. § 53A-11-905(5)(c) (West 2006).

should recognize that thirty days is a significant portion of the entire school year. So that your client does not fall too far behind, insist that she be given work that allows her to keep up with classes while she is kept out. Although procedures vary widely, some school systems offer alternative educational venues where students who are out of school can get some education.[41] Request those opportunities and take advantage of them when offered. Not only can they help keep the student from falling behind, but also attending an alternative program can show, in an expulsion hearing, that the student takes school seriously and continued her studies to the extent possible even while she was suspended.

C. Gathering Evidence and Preparing Your Client

Although a ten- to thirty-day suspension while awaiting an expulsion hearing may seem excessive from the student's perspective, that is a very short time for an attorney to prepare for a hearing.[42] Once you know you will represent a client who faces an expulsion hearing, hit the ground running. Gather all the documents the school has regarding your client—not only those the school will use at the hearing but also everything the school has about your client's disciplinary and academic history and any records about the incident alleged to be the basis for the expulsion. This is your opportunity to conduct discovery. Do not define your request so narrowly that you miss crucial evidence.

Proper notice is an element of due process. While states vary on the exact form of notice required, generally notice must be in writing and detail the acts that the student is accused of committing and that make her eligible to be expelled. The notice must state the intent to expel the student and specify the student's procedural rights, including rights to a hearing before an impartial fact finder, to be represented by counsel or any nonattorney advocate, to present witnesses and other evidence, to question any evidence and cross-examine any opposing witnesses, and to have a recording of the hearing itself prepared and written findings developed that support a decision based on the evidence presented at the hearing.[43] Documents that support the school's determination that the student committed an expellable offense—narrative descriptions of what the school alleges occurred or actual witness statements—usually accompany the notice. Narratives of school discipline history, statements from teachers about the student's behavior or academic standing, and attendance and grade reports are also common. The same packet of documents is usually sent to the student and parent and presented to the fact finders prior to the hearing itself. In preparing and presenting your case, you must learn about what will already be known or assumed about your client. You must ask to see your client's entire school record and any documents the school has about the incident in question because schools commonly give the hearing officer only witness statements that support the school's position. The student's entire record can give you access to documents or evidence that call into question the school's version of what occurred or that support your client's story.

As you prepare for the hearing, be sure to meet with your client to hear her story of what took place. Get a detailed account not only of the incident but also of who might have witnessed it, what your client told others about it, and what school staff told her. Know your client's academic and disciplinary history from *her*

[41]E.g., N.J. STAT. ANN § 18A:37-2.2 (West 2006) (offers some suspended students an "alternative education program"). Cf. VA. CODE ANN. § 22.1-277.04 (West 2006) (parents must pay for alternative education programs).

[42]Some jurisdictions allow attorneys to request a continuance of the expulsion hearing in order to prepare more adequately. However, typically that request accompanies an agreement that the student's suspension is extended during the continuance period. If a student is allowed to return to school pending an expulsion hearing, more preparation time is almost always a good idea. However, if the student continues to miss school, advocates must carefully weigh the value of the additional preparation time and the likelihood of success against the loss of instructional time.

[43]For an example of a state statute that spells out the required notice elements, see WIS. STAT. ANN. § 120.13 (West 2006).

perspective and acquaint yourself with context about which the school might be unaware or might not have considered in its investigation. Decide with your client if you want to bring witnesses to the hearing and whom, if anyone, you should subpoena. Many states' laws provide for students to subpoena witnesses to testify at expulsion hearings. Witnesses not only can present evidence about the incident itself but also serve as character witnesses. You should explore whether people who cannot be present to testify may be willing to write letters of support. Decide whether your client will testify in her own defense and know what statements, either oral or written, she has already made—a special precaution for students who have also been arrested or face juvenile delinquency charges for the same offenses for which they face expulsion. Because anything a minor says during an expulsion hearing may be used against her later in juvenile court, be sure before the hearing to discuss the client's testimony with her public defender or other attorney handling any delinquency matters.

D. Hearing Officers and Impartiality

Be sure to learn who actually hears the case in your jurisdiction. This can vary even from district to district within a state; fact finders range from single individuals, such as superintendents or administrative law judges, to panels of administrators, to entire school boards. Battles have been waged in many states over fact finders' impartiality and who has the authority to make a final decision. Generally a hearing officer who had no role in the actual incident and no control over the decision to expel the student is deemed fair and impartial.[44] However, you should review state regulations and case law to ensure that whoever hears your case meets state mandates. Be sure that the fact finders themselves appear fair and impartial during the hearing and that they consider only what is presented to them. Because hearing officers are so often district officials who have close, and frequently personal, relationships with school officials who are presenting the case against your client, be attuned to information that might have been presented outside the hearing or to individuals who might have had access to the hearing officers to sway their decisions outside the hearing itself. In some states, for example, cases have addressed the impartiality of attorneys who simultaneously advise the hearing officers and help the school present its case against the student.[45] Watch for evidence of bias in decision making and promptly note any such evidence on the record.

E. Hearing Format and Procedural Considerations

To prepare for the hearing, consult someone who has represented clients at expulsion hearings in your area. Doing so can alert you to nuances of your audience and how the hearing will be structured. Hearings vary widely from district to district; some are orderly and much like minitrials, while others resemble a three-ring circus. In either case, remember that you are making a record for a potential appeal. Be sure to make yourself heard and note any irregularities of format or procedure, especially any jurisdictional questions. If you believe the panel lacks jurisdiction—because the incident is not an expellable offense or did not occur on school grounds, the school did not provide proper or timely notice, or even that the hearing itself is untimely, for example—note that immediately for the record.

Standards of proof will vary; be familiar with what elements the school must prove to expel your client. Hearing officers often are not attorneys and are unversed in legal requirements. A key part of your job is to educate them. School officials hearing these cases are often swayed by inflammatory charges or the student's poor attendance record or academic history. Legally, however, these matters are irrelevant. Try to keep your hearing panel focused only on what the law sets as grounds for expulsion.

[44]See, e.g., Neb. Rev. Stat. § 79-269(2) (2006).

[45]See, e.g., *Gonzales*, 435 F. Supp. at 463.

The fundamental issue before the hearing officers will be whether the student committed the alleged offenses and, if so, what punishment is authorized or fitting. State laws vary in the burden the school must meet for different offenses. For example, California has five "mandatory expulsion" (also referred to as "zero tolerance") offenses: possessing a gun, brandishing a knife at someone, selling drugs, committing a sexual assault, and possessing an explosive.[46] If the school can prove that the student committed any one of these, a hearing panel has no choice but to expel the student.[47] For any other offense, the fact finders would also need to make a secondary finding that no remedy other than expulsion would correct the student's behavior or that the student would pose a physical danger if she were not expelled.[48] Review your state's procedures and case law to know the nature of the evidence required and how to address each element. In California, if the student is accused of a "mandatory expulsion" offense, attacking evidence that she committed the offense at all is essential. With any other type of case you can not only attack any evidence that the student committed the offense but also contend that neither the incident nor the student's history merits the extreme punishment of expulsion.[49]

F. Evidence

Know how your state addresses rules of evidence during expulsion hearings. Formal rules of evidence typically do not apply, but policies vary as to whether students may be expelled solely on the basis of hearsay, which is often the only evidence the school presents. Thus the hearsay rules can be a crucial advocacy tool. If you can establish that hearsay evidence alone is insufficient to support a finding against your client, you have a strong chance of defeating a school's case on the merits.

The kind of evidence you develop on your client's behalf will inevitably vary widely with individual circumstances. Even if your client undoubtedly committed the offense, you can present character witnesses and have your client offer an apology in her own words, provided that doing so does not jeopardize the outcome of any delinquency proceedings. Even students who have committed expellable offenses are entitled to due process, and the presence of an advocate who offers evidence and tells the student's story can have a major impact on whether the student is expelled and the length of the expulsion—and thus ultimately on the student's educational future. Suggest alternative means of discipline, short of expulsion, to demonstrate to the district that your client understands the gravity of the situation and is willing to address the issues. Alternatives might include a transfer to another comprehensive school within the district, repair of any damage, community service, enrollment in anger management or counseling programs, or anything else that might convince the hearing officers that an outcome short of expulsion could be effective.

G. Postexpulsion Considerations and Appeals

Written findings of fact supported by evidence introduced at the hearing typically must accompany a decision to expel the student, and the decision specifies the length of expulsion and terms for rehabilitation. If your client is expelled, you need to know what, if any, education services your state requires for expelled students. The permissible length of expulsions varies widely, and during the hearing itself this is often an

[46]Cal. Educ. Code § 48915(c) (West 2006).

[47]However, the governing school board, which must make the final decision, may impose a "suspended expulsion" as a lesser means of punishment. See Cal. Educ. Code § 48917 (West 2006). A "suspended expulsion" is like probation; the student may return to school but faces reinstatement of her expulsion should she violate any school rules during the suspended expulsion period.

[48]See Cal. Educ. Code § 48915 (West 2006).

[49]Before even going to hearing you should explore whether a deal akin to a "plea bargain" is possible in the district. E.g., the student might admit to an offense and agree to a punishment short of actual expulsion, such as transfer to another school or district or a suspended expulsion.

opportunity for arguing leniency. While California caps expulsion at one calendar year, some states allow longer periods or impose no cap at all.[50] Determine what will happen if your client's family moves to a new school district during the expulsion term. Most states require students to notify the new district of their expulsion, and typically the expulsion follows the student. Students cannot evade expulsion simply by starting over somewhere new.

Even after a decision to expel has been made, attorneys should carefully consider appealing that decision. Even if a student comes to you after an expulsion hearing at which she was not represented by counsel, you may still be able to defeat the expulsion order on appeal. Appeal procedures also vary widely. You may have to exhaust local levels of appeal before you can seek reversal in court, and you need to review each district's regulations. In California the first level of appeal is to the county board of education and must be made within thirty days of the decision.[51] These appeals are not rehearings; rather, their primary focus is on narrow jurisdictional or abuse-of-due-process grounds.[52] Particularly in districts where proper procedures are routinely ignored, appeals can be quite effective in forcing school districts to follow the law.

H. Issues for Further Research and Consideration

Although three issues are beyond the scope of this overview, advocates should consider and further research them: disability, racial discrimination, and language access. Find out right away whether the student you are representing receives special education services. The Individuals with Disabilities Education Act especially protects students with disabilities in school discipline matters.[53] Attorneys should also be attuned to discriminatory discipline that treats students of one race differently from others and consider filing complaints with the U.S. Department of Education Office of Civil Rights. Students with limited English proficiency and their families may have special due process needs with regard to notice and translation. Consider these issues and raise them during the expulsion process on a case-by-case basis.

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Expulsion hearings and the due process rights that shape them—the legacy of *Goss v. Lopez*—are a fundamental aspect of our educational system. The stakes in these cases are high in that students face deprivation of even basic educational instruction for anywhere from months to years. Although hundreds of thousands of expulsion hearings take place every year across the country, relatively few attorneys or advocates, particularly in low-income communities of color, take on these administrative matters and defend students' rights. As school districts grow used to parents' and students' failure to understand or enforce their rights, these districts increasingly cut corners and fail to follow established legal mandates and precedents. As a result, our children suffer and their future is irreparably damaged. If advocates and attorneys undertake even a handful of school discipline hearings, school districts will be reminded not to ignore the law and deny students their constitutional rights.

[50]See Cal. Educ. Code § 48916 (West 2006). New Hampshire, e.g., has no cap on expulsion periods. See N.H. Rev. Stat. Ann. § 193:13 (2006). Cf. Or. Rev. Stat. Ann § 339.250 (5) (West 2006) (students may not be expelled for more than one calendar year).

[51]See Cal. Educ. Code § 48919 (West 2006).

[52]See *id*. § 48922.

[53]See 20 U.S.C. § 1415(k) (2006); Eileen L. Ordover, *Disciplinary Exclusion of Students with Disabilities*, 34 Clearinghouse Review 50 (May–June 2000).