DUE PROCESS PROTECTIONS FOR CHARTER SCHOOL STUDENTS IN LONG-TERM EXCLUSIONARY DISCIPLINE PROCEEDINGS

*Leah E. Soloff**

Charter schools—public schools that are subject to minimal state regulation—often employ high levels of exclusionary discipline. Because charter schools in many states are exempt from state laws regulating school discipline, the U.S. Constitution provides charter school students their only source of protections during such disciplinary proceedings. However, the constitutional due process protections afforded to public school students in disciplinary proceedings remain a source of significant disagreement among courts. Although the U.S. Supreme Court has established that public school students must be afforded due process protections in exclusionary discipline proceedings, the Court has yet to determine what process is actually due to students in long-term exclusionary discipline proceedings.

This Note explores and examines the disagreement among lower courts around three core due process protections: the right to confront and cross-examine witnesses, the right to an impartial adjudicator, and the right to retain legal counsel. This Note argues that due process guarantees these three protections to all public school students. Further, this Note argues that these protections are needed in order to best protect charter school students, as charter school students face exclusionary discipline more often than traditional public school students and often do not have an added layer of protection from state law.

* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2019, Duke University. I would like to thank Professor Bennett Capers for his knowledge and thoughtful guidance throughout this process. I would also like to thank my editor, Alex Breindel, and the other members of the *Fordham Law Review* for their feedback and careful editing. Finally, thank you to my family and friends—especially my parents, Peter and Denise, and my sister, Ali, for their endless love and support.

INTRODUCTION

New York City's largest charter school network, Success Academy, serves more than 17,000 students throughout fifty-three schools across the city.[1] The network principally serves low-income students and students of color throughout the city.[2] The network has been subject to significant controversy since opening in 2004, particularly in relation to its strict student discipline policies.[3] In 2015, Success Academy was strongly criticized when it was

1. *See* SUCCESS ACADEMY, https://www.successacademies.org/schools/ [https://perma.cc/WE7D-D628] (last visited Oct. 6, 2023); Jay Mathews, *A Revealing Look at America's Most Controversial Charter School System*, WASH. POST (Aug. 17, 2019, 12:00 PM), https://www.washingtonpost.com/local/education/a-revealing-look-at-americas-most-controversial-charter-school-system/2019/08/16/a3c09034-c02b-11e9-a5c6-1e74f7ec4a93_story.html [https://perma.cc/EY4J-DLAA].

2. *See* Dale Russakoff, *The Secret to Success Academy's Top-Notch Test Scores*, N.Y. TIMES (Sep. 10, 2019), https://www.nytimes.com/2019/09/10/books/review/how-the-other-half-learns-robert-pondiscio.html [https://perma.cc/NW7W-62MJ].

3. *See* Rebecca Klein, *Charter Schools Are Suspending Kids More than Other Schools, and That's a Problem*, HUFFPOST (Mar. 17, 2016, 7:37 PM), https://www.huffpost.com/entry/charter-school-suspensions_n_56e9939ee4b0b25c91841ed5 [https://perma.cc/33Q3-GJV4].

revealed that a principal at one of its schools had made a list of students entitled "Got to Go."[4] On this list were the names of students whom the principal found to be difficult or disruptive and whom the principal wished to push out of the school system.[5] Of the sixteen students on the list, nine ultimately left the Success Academy network "after facing continuous suspensions and harsh punishments."[6] Often, these suspensions came in response to minor disruptions that normally would not result in suspension, such as screaming, throwing pencils, or running away from school staff.[7]

This incident sparked a wider criticism of Success Academy: that the school uses frequent suspensions and harsh discipline to push out difficult students in order to maintain high levels of success in the public eye.[8] Success Academy publishes significantly higher average standardized test scores than traditional public schools, and many commentators argue that this is a result of its intense discipline practices, including frequent use of exclusionary discipline.[9] For example, in the 2013–2014 school year, most Success Academy schools suspended at least 10 percent of their student body, with some schools suspending up to 23 percent, while traditional public schools suspended, on average, 3 percent of students that year.[10]

Success Academy's heavy reliance on exclusionary discipline is emblematic of the strict discipline policies used by many charter schools across the nation.[11] "Exclusionary discipline" is defined as discipline policies that exclude students from access to their usual educational setting, including, most prominently, suspensions and expulsions.[12] Charter schools in the United States, which predominately cater to students from low-income communities and students of color, have been accused of using punitive and exclusionary discipline policies in order to control their student bodies and ensure that students meet the schools' high academic standards.[13]

---

4. *See* Kate Taylor, *At a Success Academy Charter School, Singling Out Pupils Who Have 'Got to Go,'* N.Y. TIMES (Oct. 29, 2015), https://www.nytimes.com/2015/10/30/nyregion/at-a-success-academy-charter-school-singling-out-pupils-who-have-got-to-go.html?_r=0 [https://perma.cc/KT64-L9EU].

5. *See* Klein, *supra* note 3.

6. *See id.*

7. *See* Taylor, *supra* note 4.

8. *See id.*

9. *See* Kate Taylor, *At Success Academy Charter Schools, High Scores and Polarizing Tactics*, N.Y. TIMES (Apr. 6, 2015), https://www.nytimes.com/2015/04/07/nyregion/at-success-academy-charter-schools-polarizing-methods-and-superior-results.html [https://perma.cc/56JR-U43K].

10. *See* Taylor, *supra* note 4.

11. *See* Klein, *supra* note 3.

12. *See* COMM. FOR CHILD., RECENT TRENDS IN STATE LEGISLATIVE EXCLUSIONARY DISCIPLINE REFORM 1, 2 (2018), https://www.cfchildren.org/wp-content/uploads/policy-advocacy/exclusionary-policy-brief.pdf [https://perma.cc/FD25-9BYD].

13. *See* Joanne Golann & Mira Debs, *The Harsh Discipline of No-Excuse Charter Schools: Is It Worth the Promise?*, EDUCATIONWEEK (June 9, 2019), https://www.edweek.org/leadership/opinion-the-harsh-discipline-of-no-excuses-charter-schools-is-it-worth-the-promise/2019/06 [https://perma.cc/2DWA-2LQ9]; Yueting "Cynthia" Xu, *Who Attends Charter Schools?*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Dec. 6, 2022, 11:38

Given charter schools' significant use of exclusionary discipline, which can have long-term effects on students,[14] it is necessary to examine the protections that charter school students are afforded in school disciplinary proceedings. This Note will analyze the relationship between charter schools and due process protections for students in exclusionary discipline proceedings. Part I of this Note will provide background on charter schools and exclusionary discipline. It will also introduce the basic standard for due process protections afforded to public school students in disciplinary hearings. Part II of this Note will further explore the due process protections provided to students in disciplinary proceedings, particularly examining the significant disagreement among courts as to what additional protections students facing long-term exclusion must be afforded. This part will focus on disagreement over three core due process protections: (1) the right to confront and cross-examine witnesses, (2) the right to an independent adjudicator, and (3) the right to retain legal counsel. Part III of this Note will argue that due process requires these three core protections in long-term disciplinary proceedings and that affording these rights to all public school students, including charter school students, is a just public policy decision.

I. CHARTER SCHOOLS AND THE USE OF EXCLUSIONARY DISCIPLINE

A charter school is generally defined as "a publicly funded school that is typically governed by a group or organization under a legislative contract—a charter—with the state, the district, or another entity."[15] In 1991, Minnesota passed the first charter school law, paving the way for the opening of the first charter school in the United States.[16] Since then, charter schools have significantly expanded across the country.[17] Currently, forty-five states and the District of Columbia have laws that allow for the establishment of charter schools.[18] In the 2020–2021 school year, there were more than 7,800 charter schools across the country, educating more than 3.7 million students.[19] Thus, 7.5 percent of all public school students were enrolled in a charter school that year, and the number of charter school students continues to increase each year.[20]

AM), https://data.publiccharters.org/digest/charter-school-data-digest/who-attends-charter-schools/ [https://perma.cc/U5VG-SASZ].

14. *See infra* Part I.B.3.

15. *Fast Facts: Charter Schools*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=30 [https://perma.cc/8DWB-5YBC] (last visited Oct. 6, 2023).

16. *See* Kevin P. Brady & Wayne D. Lewis, Jr., *Uncharted Territory for the "Bluegrass State": Lessons to Be Learned from Over a Quarter-Century of State Charter School Legislation*, 72 ARK. L. REV. 361, 366 (2019).

17. *See id.* at 362; Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 445 (2013).

18. *See* Jamison White, *How Many Charter Schools and Students Are There?*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Dec. 6, 2022, 11:38 AM), https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/ [https://perma.cc/BNV5-U7NQ].

19. *See id.*

20. *See id.*

This part will begin with a discussion of how the charter school movement commenced, followed by an overview of the legal status of charter schools.[21] In particular, it will focus on the state regulation of charter schools, specifically in relation to student discipline.[22] This part will then discuss the use of exclusionary discipline in schools, the significant effects of such policies on students, and charter schools' specific use of exclusionary discipline.[23] Lastly, it will introduce the basic constitutional framework for the due process protections afforded to students in exclusionary discipline proceedings at both traditional public schools and charter schools.[24]

A. The Legal Status of Charter Schools

In order to understand why it is important to examine due process protections for charter school students, it is necessary to explore how charter schools came into existence and their current legal status. The charter school movement began in the 1980s as a response to the failing public school system in America.[25] The concept of charter schools was first introduced by education professor Ray Budde in 1974, but the idea initially received little support.[26] In 1983, the Reagan administration published a report, *A Nation at Risk: The Imperative for Education Reform*, which detailed the administration's view that public schools in America were failing.[27] This report had a deep impact on the nation and led to a widespread belief that America's public schools needed reform.[28] Some scholars thus refocused on the idea that charter schools may be a better alternative to the nation's public school system.[29]

Charter schools soon gained the support of the president of the American Federation of Teachers along with other proponents of education reform.[30] The charter school movement was promoted as a way to encourage innovation in the education sector in order to decrease the achievement gap

21. *See infra* Part I.A.
22. *See infra* Part I.A.
23. *See infra* Part I.B.
24. *See infra* Part I.C.
25. *See* Michael A. Naclerio, Note, *Accountability Through Procedure?: Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1153 (2017); Ava L. Ferenci, Note, *Quasi-State Actor: How the Application of State Action Doctrine Can Fill a Regulatory Gap in New York Charter School Legislation*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 555, 561 (2017).
26. *See* Zachary Jason, *The Battle over Charter Schools*, HARV. ED. MAG., Summer 2017, at 26, https://www.gse.harvard.edu/sites/default/files/2023-06/2017-sum.pdf [https://perma.cc/3W2J-QV8V].
27. *See id.*; Anya Kamenetz, *What 'A Nation at Risk' Got Wrong, and Right, About U.S. Schools*, NPR (Apr. 29, 2018, 6:00 AM), https://www.npr.org/sections/ed/2018/04/29/604986823/what-a-nation-at-risk-got-wrong-and-right-about-u-s-schools [https://perma.cc/7GY3-WYDY] ("The educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a nation and as a people."); Ferenci, *supra* note 25, at 561.
28. *See* Kamenetz, *supra* note 27.
29. *See* Jason, *supra* note 26, at 26.
30. *See id.*

and provide quality education to all students, regardless of a student's background or economic status.[31] In particular, charter schools were seen as a way to create better educational outcomes for vulnerable students.[32] To this day, charter schools tend to operate most frequently in low-income communities and communities of color, and they tend to enroll a larger percentage of low-income students and students of color.[33]

Charter school proponents argued that charter schools needed to operate independently from traditional public school systems to be innovative and provide better educational opportunities for all students.[34] Proponents contended that having the freedom to operate autonomously would allow charter schools to "experiment with varying education models"[35] and that such experimentation would produce stronger educational outcomes.[36] Further, these advocates argued that traditional public schools had a monopoly over education and that autonomous charter schools would introduce competition into the education marketplace, forcing traditional public schools to perform at a higher standard.[37] Charter school proponents were successful in advocating for this vision, as almost every state has now passed charter school legislation, each of which allows for the establishment of highly independent charter schools.[38]

To allow for this freedom, charter schools function independently from democratically elected school boards.[39] Instead, charter schools are privately managed by independent organizations with a board of directors.[40] Many charter schools are managed by nonprofit organizations, whereas some are managed by for-profit companies.[41] These independent authorities dictate the schools' policies and operations.[42]

Although charter schools are not beholden to a public school board, a charter school must have an authorized charter to operate.[43] State statutes establish authorization agencies that issue charters to independent

31. *See* Naclerio, *supra* note 25, at 1159–60.

32. *See* Myron Orfield & Thomas Luce, *Charters, Choice, and the Constitution*, 2014 U. CHI. LEGAL F. 377, 377 (2014).

33. *See* Xu, *supra* note 13; *see also* Mikailla Carwin, Note, *The Charter School Network: The Disproportionate Discipline of Black Students*, 21 CUNY L. REV. F., 49, 51 (2018).

34. *See* Naclerio, *supra* note 25, at 1153–55.

35. Kerrin Wolf, Mary Kate Kalinich & Susan L. DeJarnatt, *Charting School Discipline*, 48 URB. LAW. 1, 2 (2016).

36. *See* Kayleigh Long, Note, *Indiana's Charter Schools: Taking a Holistic Approach to Determine Their Constitutional Legality*, 51 IND. L. REV. 797, 800 (2018).

37. *See id.*

38. *See* Preston C. Green III, Erica Frankenberg, Steven L. Nelson & Julie Rowland, *Charter Schools, Students of Color, and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. C.R. & SOC. JUST. 253, 254 (2012).

39. *See* Naclerio, *supra* note 25, at 1154.

40. *See* Wolf et al., *supra* note 35, at 4.

41. *See id.* at 4–5.

42. *See* Maryrose Robson, Note, *Charters' Disregard for Disability: An Examination of Problems and Solutions Surrounding Student Discipline*, 29 B.U. PUB. INT. L.J. 353, 359 (2020).

43. *See* Naclerio, *supra* note 25, at 1162.

organizations.[44] These authorizing agencies include boards of education, higher education institutions, and school districts.[45] Organizations apply to these agencies for a charter to initially open a school and must reapply every three to five years to renew their charter.[46] A charter is defined as a "performance contract [that] detail[s] the school's mission, program, goals, students served, methods of assessment, and ways to measure success."[47] To be renewed by its authorizing body, a charter school must satisfy the requirements set forth in its contract, including, most importantly, student outcome requirements.[48] Thus, accountability for the academic achievement of its students is core to a charter school's ability to survive.[49]

Although charter schools must meet the requirements set forth in their charters, they are generally exempt from many other state laws and regulations.[50] In particular, many states exempt charter schools from state laws or regulations concerning school discipline.[51] For example, in New York, the Charter Schools Act[52] establishes that charter school discipline policies must *only* "be consistent with the requirements of due process and with federal laws and regulations governing the placement of students with disabilities."[53] Thus, New York charter schools are exempt from New York State regulations and statutes regulating discipline in public schools.[54] Charter schools in New York, therefore, "have broad discretion to implement the discipline policy" that they choose to outline in their charter, regardless of what state discipline law requires.[55] Many other states similarly exempt

---

44. *See id*.

45. *See id*.; Carwin, *supra* note 33, at 56.

46. *See* Naclerio, *supra* note 25, at 1163; Green III et al., *supra* note 38, at 254.

47. Green III et al., *supra* note 38, at 254 (quoting U.S. Dep't of State, *U.S. Charter Schools: An Overview and History of Charter Schools*, INFOUSA, https://usinfo.org/enus/education/overview/charter_schools_history.html [https://perma.cc/Z2R7-B4QV]); *see also* Johanna F. Roberts, Comment, *No Excuses for Charter Schools: How Disproportionate Discipline of Students with Disabilities Violates Federal Law*, 70 OKLA. L. REV. 729, 731 (2018).

48. *See* Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303, 303 (2013); Naclerio, *supra* note 25, at 1161.

49. *See* Ferenci, *supra* note 25, at 562.

50. *See* Green III et al., *supra* note 38, at 254; Jessica Schneider, *What Rights Do Students Have in the Charter School Era*, AM. BAR ASS'N (Mar. 30, 2017), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2017/what-rights-do-students-have-in-the-charter-school-era/ [https://perma.cc/4L56-H256] (noting that "[m]ost of the laws and regulations governing school districts do not apply to charter schools, which is what gives them the freedom to operate in a different way").

51. *See* Green III et al., *supra* note 48, at 334; Robson, *supra* note 42, at 359; Schneider, *supra* note 50.

52. N.Y. EDUC. LAW § 2851 (McKinney 2023).

53. *Id.*

54. *See* Ferenci, *supra* note 25, at 571; SUNY CHARTER SCHS. INST., RESOURCE BOOK: STUDENT DISCIPLINE AND NEW YORK CHARTER SCHOOLS: DISCUSSION AND TRAINING 1 (2013), https://suny-charters-uploads.s3.amazonaws.com/wp-content/uploads/2020/12/13112405/Discipline-Resource-Book-1.pdf [https://perma.cc/HLQ7-SR6C].

55. *See* Parker Baxter, *On Charter School Discipline: Autonomy, Due Process, and Shared Responsibility*, NAT'L ASS'N CHARTER SCH. AUTHORIZERS (June 20, 2013),

charter schools from their state laws and regulations governing student discipline.[56]

Although charter schools are exempt from most state laws and regulations and are run by independent organizations, they are still considered public schools.[57] As public schools, charter schools are considered arms of the state. And as arms of the state, charter schools are subject to federal laws, and charter school students are entitled to constitutional protections.[58]

The principal reason that charter schools are considered public schools is that they are publicly funded and thus do not charge tuition.[59] Instead, like traditional public schools, charter schools receive much of their funding through the government.[60] This funding is generally raised through "state and local taxes based on their [schools'] enrollments."[61] However, charter schools are also able to seek additional private financing through grants and independent donations.[62]

Charter schools are also considered public schools because each operates conterminously with the local public school district and is thus open to all students who reside in that district.[63] Even though charter schools are public schools, they are considered schools of choice, as students can elect to attend a charter school, but they are not mandated to do so.[64] However, in practice, many charter schools must use a lottery system to allocate seats, as there is generally greater demand than spaces available.[65]

Nevertheless, charter schools are public schools and thus must abide by federal law and the Constitution.[66] This is significant because, as outlined above, many charter schools are exempt from state laws and regulations.[67] Consequently, in the context of school discipline, many charter school students are not guaranteed rights through state law and thus derive their

---

https://www.qualitycharters.org/2013/06/on-charter-school-discipline-autonomy-due-process-and-shared-responsibility/ [https://perma.cc/2AKJ-ZNZA].

56. *See* EDUC. COMM'N OF THE STATES, *What Rules are Waived for Charter Schools?*, *in* 50 STATE COMPARISON: CHARTER SCHOOL POLICIES (2020), https://reports.ecs.org/comparisons/charter-school-policies-14 [https://perma.cc/S5B9-26NP] (listing by state the laws and regulations from which charter schools are exempt, indicating that only a few states require charter schools to follow state discipline law); Green III et al., *supra* note 38, at 272 (noting the exemptions for school discipline policies for charter schools in many states).

57. *See* Green III et al., *supra* note 38, at 256; *See* Wolf et al., *supra* note 35, at 4; Carwin, *supra* note 33, at 55.

58. *See* Kevin C. Moyer, *Due Process Rights in Charter Schools*, AM. BAR ASS'N (Jan. 15, 2015), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2015/due-process-rights-charter-schools/ [https://perma.cc/V7B5-DMZC]; Green III et al., *supra* note 38, at 256; Carwin, *supra* note 33, at 55–56.

59. *See* Naclerio, *supra* note 25, at 1159; Jason, *supra* note 26, at 26.

60. *See* Wolf et al., *supra* note 35, at 2.

61. *See* Green III et al., *supra* note 48, at 303.

62. *See* Wolf et al., *supra* note 35, at 2.

63. *See id.* at 4; Robson, *supra* note 42, at 359.

64. *See* Wolf et al., *supra* note 35, at 2, 6–7.

65. *See id.*

66. *See* Moyer, *supra* note 58; Green III et al., *supra* note 38, at 256; Carwin, *supra* note 33, at 55–56.

67. *See supra* notes 50–56 and accompanying text.

protections solely from the Constitution. Therefore, it is imperative to understand charter schools' employment of exclusionary discipline and the federal protections that these students have when facing exclusion from school.

B. Charter Schools' Use of Exclusionary Discipline

Given charter schools' status as public schools with minimal state regulation, particularly around discipline, it is essential to understand the disciplinary tools exercised by these schools and the policy implications of those tools. This section will begin with an overview of how schools began relying on exclusionary discipline and then will discuss the effects of these policies. It will then specifically discuss the use of exclusionary discipline in charter schools.

1. The Emergence of Zero Tolerance Policies in Public Schools

Starting in the 1990s, public schools across the nation began transforming their approaches to student discipline.[68] At that time, Congress made it a priority to address rising juvenile crime rates and drug use, particularly through discipline in schools.[69] The federal government implemented two pieces of legislation aimed at combating these concerns.[70]

First, Congress passed the Gun-Free Schools Act of 1994,[71] which required that schools automatically expel any student found in possession of a weapon on school property.[72] With the implementation of this legislation, many schools began to adopt a punitive approach to school discipline more broadly and began deploying exclusionary discipline, including suspensions and expulsions, more frequently.[73]

Not only did schools begin to utilize exclusionary discipline tools more frequently, but they also began using these mechanisms as punishment for many different student misbehaviors, ranging from serious violations to minor infractions, such as cursing or disrespecting a teacher.[74] Such policies came to be known as zero tolerance policies because they mandated suspension or expulsion for various student behaviors, without taking into account specific circumstances or mitigating factors.[75]

At the same time, Congress passed the Violent Crime Control and Law Enforcement Act of 1994,[76] which provided significant federal funding to

68. *See* Wolf et al., *supra* note 35, at 14.
69. *See id.*
70. *See id.* at 15.
71. Pub. L. 103-227, 108 Stat. 270 (codified as amended in scattered sections of 5, 20, and 42 U.S.C.).
72. *See id.*
73. *See* Wolf et al., *supra* note 35, at 15.
74. *See id.*
75. *See id.*
76. Pub L. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of the U.S.C.).

schools for additional security measures.[77] This led to more police officers in schools and the implementation of other security measures like metal detectors and security cameras.[78] The emergence of zero tolerance policies, in conjunction with increased security in schools, often created more punitive school environments.[79]

2. The Failures of Zero Tolerance Policies

Although zero tolerance policies were intended to effectively control violence and promote order, there is limited data demonstrating that they help to achieve either goal.[80] Removing students from school has not been shown to increase school safety, deter future student misbehavior, or foster a more productive learning environment.[81] Additionally, zero tolerance policies were initially created to treat all rule-breakers equally, regardless of their backgrounds.[82] However, critics of zero tolerance policies note that, in practice, the inflexibility of the rules allow for "arbitrary, unfair, and unreasonable methods to mete out punishment."[83] Even though school districts have started to recognize the ineffectiveness of zero tolerance policies and have begun to pull back on some of these policies, many schools across the country still employ high rates of exclusionary discipline.[84]

3. The Effects of Exclusionary Discipline on Students

The use of exclusionary discipline has been correlated to negative long-term effects on excluded students.[85] For example, students who are excluded from school often face "chronic absenteeism, lower achievement, lower graduation rates, and heightened risk for grade retention and repeat

77. *See* Wolf et al., *supra* note 35, at 15.

78. *See* Zachary W. Best, Note, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671, 1677 (2011).

79. *See* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 879–80 (2012); Wolf et al., *supra* note 35, at 16 (explaining that these policies "had the effect of 'criminalizing' public school students").

80. *See* Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies?: Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J. 159, 164; Devon L. DiSiena, Note, *Back Down to Bullying?: The Detrimental Effects of Zero Tolerance Policies on Bullied Adolescents*, 22 CARDOZO J.L. & GENDER 337, 342 (2016) ("Research has shown that 'zero tolerance policies are ineffective in the long run . . . .'").

81. CHRISTINA LICALSI, DAVID OSHER & PAUL BAILEY, AM. INSTS. FOR RSCH, BRIEF: AN EMPIRICAL EXAMINATION OF THE EFFECTS OF SUSPENSION AND SUSPENSION SEVERITY ON BEHAVIORAL AND ACADEMIC OUTCOMES 3 (2021), https://www.air.org/sites/default/files/2021-08/NYC-Suspension-Effects-Behavioral-Academic-Outcomes-Brief-August-2021.pdf [https://perma.cc/6EB7-HMKU].

82. *See* DiSiena, *supra* note 80, at 342.

83. *See id.*

84. *See* Catherine Winter, *Spare the Rod*, APMREPORTS, (Aug. 25, 2016), https://www.apmreports.org/episode/2016/08/25/reforming-school-discipline [https://perma.cc/NQ87-HP32].

85. *See* Wolf et al., *supra* note 35, at 17.

suspensions or expulsions."[86] In addition, these students are more likely to interact with the criminal justice system as both victims and perpetrators of crimes.[87] For example, approximately 75 percent of crimes in the United States are committed by high school dropouts.[88] Another study found that "students who were suspended were twice as likely to be held back and three times as likely to be involved in the juvenile justice system later in life."[89] This long-term impact of exclusionary discipline on students is often referred to as the school-to-prison pipeline, as exclusions from school are strongly correlated with future incarceration.[90]

In addition, students' academic education and social-emotional learning can suffer when students are excluded from school.[91] Although schools are required to provide suspended students with alternative instruction during their period of exclusion, this alternative instruction is often less engaging and less challenging than their in-school work and often must be completed by students on their own.[92] This isolation from other students and general disengagement from school demonstrates other negative consequences of school exclusions.[93] For expulsions, students must also receive alternative instruction during the period of expulsion, which can often be for an entire calendar year.[94] After the period of expulsion, the student will likely reenter mainstream education, but it may be difficult to find a school willing to accept the student, or the student may be placed at an alternative school, which will often have a worse outcome for the student.[95] The poor level of education during a period of suspension or expulsion and the other negative

86. *See* Carwin, *supra* note 33, at 52.

87. Candace Moore, *Advocating for Access to Education: Breaking the School to Prison Pipeline*, CBA REC., Oct. 2015, at 29 (Oct. 2015), https://static1.squarespace.com/static/5871061e6b8f5b2a8ede8ff5/t/5942ff31d2b857d816e41588/1497562935274/Oct2015_MooreFeature.pdf [https://perma.cc/8TDV-FX2E].

88. *See 11 Facts About High School Dropout Rates*, DOSOMETHING.ORG, (Nov. 5, 2015), https://www.dosomething.org/facts/11-facts-about-high-school-dropout-rates [https://perma.cc/HAX5-SZBR].

89. *See* John M. Malutinok, *Beyond Actual Bias: A Fuller Approach to an Impartiality in School Exclusion Cases*, 38 CHILD.'S LEGAL RTS. J. 112, 117 (2018).

90. *See id.*

91. *See* Jaymes Pyne, *Suspended Attitudes: Exclusion and Emotional Disengagement from School*, 92 SOCIO. EDUC., Jan. 2019, at 59, 74, 76.

92. *See* ADVOCS. FOR CHILD. N.Y., AFC'S GUIDE TO CHARTER SCHOOL DISCIPLINE 4 (2013), https://www.advocatesforchildren.org/sites/default/files/library/charter_school_discipline.pdf?pt=1 [https://perma.cc/AV7W-ACGX]; N.Y.S. OFF. OF CHILD. & FAM. SERVS., A GUIDE TO SCHOOL DISCIPLINE AND SCHOOL SUSPENSION FOR YOUTH, PARENTS, AND CAREGIVERS 10 (2019), https://ocfs.ny.gov/main/ombudsman/assets/docs/OOTO-School-Suspension-Guide.pdf [https://perma.cc/ZP36-EMV3]; Julie K. Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field*, 46 SETON HALL. L. REV. 471, 492 n.107 (2016).

93. *See* Pyne, *supra* note 91, at 74.

94. TALIA KRAEMER & ZABRINA ALEGUIRE, LEGAL SERVS. FOR CHILD., DEFENDING STUDENTS IN EXPULSION PROCEEDINGS 3 (2015), https://www.lsc-sf.org/wp-content/uploads/2016/02/LSC-Expulsion-Defense-Manual.pdf [https://perma.cc/2YV9-MBQH].

95. *See* Miranda Johnson & James Naughton, *Just Another School?: The Need to Strengthen Legal Protections for Students Facing Disciplinary Transfers*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 69, 75, 81–82 (2019).

effects described above exemplify the serious and long-term impact of exclusionary discipline on students.

4. The Disproportionate Impact of Exclusionary Discipline

Although exclusionary discipline impacts all students, it tends to disproportionately impact students of color.[96] For example, in 2014, the U.S. Department of Education Office for Civil Rights conducted a study analyzing the suspension and expulsion rates of students in all public schools across the country.[97] The study indicated that Black students are three times more likely to be suspended or expelled than white students.[98] Whereas 5 percent of white students are suspended or expelled on average each year, 16 percent of Black students are suspended or expelled on average during the same period.[99] Further, Black students make up 16 percent of the student population but account for 32–42 percent of students suspended or expelled.[100]

Similarly, in 2018, the U.S. Government Accountability Office (U.S. GAO) conducted a study evaluating disciplinary actions across K–12 schools in the United States.[101] The study examined data for all public schools, including both traditional public schools and charter schools.[102] The study similarly found that Black students were significantly overrepresented in suspensions or expulsions.[103] Black students represented around 15 percent of the student population, but they accounted for 39 percent of all students suspended or expelled.[104] This data demonstrates the disproportionate impact of exclusionary discipline on students of color across many public schools.

5. Exclusionary Discipline in Charter Schools

Even though all public schools across the country employ exclusionary discipline at high rates, many charter schools in particular tend to heavily rely

96. *See* U.S. DEP'T OF EDUC., OFF. FOR C.R., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1–3 (2014), https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf [https://perma.cc/R6SV-TTEP].

97. *See id.* at 20–24. The study included data from all public schools, including traditional public schools, alternative schools, career and technical education schools, and charter schools, but it did not separate the data by the type of public school. *Id.*

98. *See id.* at 1.

99. *See id.*

100. *See id.* at 2.

101. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-258, REPORT TO CONGRESSIONAL REQUESTERS, K–12 EDUCATION, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 1–4 (2018).

102. *See id.* at 6.

103. *See id.* at 12.

104. *See id.*; *see also* U.S. DEP'T OF EDUC., OFF. FOR C.R., SUSPENSIONS AND EXPULSIONS IN PUBLIC SCHOOLS (2022), https://www2.ed.gov/about/offices/list/ocr/docs/suspensions-and-expulsion-part-2.pdf [https://perma.cc/Z8A8-37Y8] (reporting similarly disproportionate discipline data for public schools during the 2017–2018 school year).

on exclusionary discipline.[105] Charter schools not only use this form of discipline for traditional purposes, like as an educational tool or to maintain order, but also often use exclusionary discipline to help project high success rates.[106] Because charter schools' ability to continue operating is directly contingent on the academic outcomes of their students, charter schools are incentivized to use a multitude of methods to create strong student outcomes.[107] Thus, charter schools have been accused of pushing out students deemed to be difficult or disruptive so that these students do not impact the schools' overall academic achievement numbers.[108] To accomplish this, charter schools tend to rely on exclusionary discipline.[109]

For these reasons, many charter schools employ exclusionary discipline policies at higher rates than traditional public schools.[110] In 2016, the Center for Civil Rights Remedies issued the first comprehensive study of charter school discipline in the United States.[111] Using data from the 2011–2012 school year, the center found that charter school suspension rates for K–12 students were 16 percent greater than for traditional public school students.[112] In particular, charter elementary schools suspended 40 percent more students than non-charter elementary schools.[113] As charter schools across the country vary widely in their approaches to discipline, there is not much additional data on nationwide discipline rates for charter schools.[114] However, local studies help to confirm that many charter schools employ high levels of exclusionary discipline.[115] For example, in the 2019–2020 school year, charter schools in the city of Chicago imposed discipline at

105. *See* Rebecca Mead, *Success Academy's Radical Educational Experiment*, NEW YORKER (Dec. 4, 2017), https://www.newyorker.com/magazine/2017/12/11/success-academys-radical-educational-experiment [https://perma.cc/DF88-YD8Q].

106. Emily DeRuy, *Unequal Discipline at Charter Schools*, ATLANTIC (Mar. 18, 2016), https://www.theatlantic.com/education/archive/2016/03/unequal-discipline-at-charter-schools/474459/ [https://perma.cc/LH29-ZK3Y].

107. *See id.*

108. *See* Taylor, *supra* note 4.

109. Julianne Hing, *Report: New York City Charter Schools Discipline Rules Violate Students' Rights*, COLORLINES (Feb. 13, 2015), https://www.colorlines.com/articles/report-new-york-city-charter-schools-discipline-rules-violate-students-rights [https://perma.cc/L5XE-X6SL] (quoting an attorney at Advocates for Children saying "[w]e hear from parents who celebrated winning the charter-school lottery only to have their students face repeated suspension or expulsion from school with no opportunity to challenge it"); DeRuy, *supra* note 106.

110. *See* DANIEL J. LOSEN, MICHAEL A. KEITH II, CHERI L. HODSON & TIA E. MARTINEZ, CTR. FOR C.R. REMEDIES, CHARTER SCHOOLS, CIVIL RIGHTS, AND SCHOOL DISCIPLINE: A COMPREHENSIVE OVERVIEW 8 (2016).

111. *See id.* at 6.

112. *See id.* at 8.

113. *See id*. at 19. The study also included state education department data demonstrating that, in many states, charter schools employed exclusionary discipline at higher rates than traditional public schools did. *See id.* at 8–9.

114. *See* Wolf et al., *supra* note 35, at 20–21.

115. *See id.* (citing other state and local studies that show increased use of exclusionary discipline at charter schools).

higher rates than traditional public schools.[116] For every 1,000 students, Chicago charter schools suspended 130 students, whereas traditional public schools suspended twenty-seven students.[117]

Additionally, charter schools tend to have more disproportionate discipline for students of color than traditional public schools.[118] For example, the U.S. GAO study discussed above found that although students of color, particularly Black students, were disproportionately disciplined across all public schools, "this was particularly acute in charter schools."[119] The study found that even though Black students represented approximately 29 percent of all students in charter schools, Black students accounted for more than 60 percent of students suspended from charter schools.[120] The long-term consequences of the use of exclusionary discipline and its disproportionate impact on students of color, as well as its increased use in charter schools, demonstrates why it is essential to examine the protections provided to students in exclusionary discipline hearings, discussed in the sections below.

C. Goss v. Lopez*: Constitutional Due Process Protections for Students in Exclusionary Discipline Proceedings*

The Fourteenth Amendment of the U.S. Constitution forbids any state from "depriv[ing] any person of life, liberty, or property, without due process of law."[121] This clause, known as the Due Process Clause, protects citizens from arbitrary deprivations of their property or liberty interests—that are not de minimis—by the state.[122] In terms of due process, a property interest refers to a "reasonable expection [sic] of receipt of a government benefit."[123] Thus, due process protections are afforded in a wide array of situations, not just those related to real property or material possessions.[124] Property interests protected by the Due Process Clause are generally not established by the U.S Constitution, but rather by independent sources, such as state constitutions or state laws.[125] The conception of a liberty interest under the Due Process Clause generally extends further than the traditional definition of liberty, meaning freedom from incarceration.[126] Courts have generally interpreted liberty interests in this context to also include a "person's good

116. *See* Margaret Kates, *This Chicago Charter Expelled More Students than any Other School. Can that Change?*, CHALKBEAT (Feb. 9, 2022, 7:00 AM), https://chicago.chalkbeat.org/2022/2/9/22918618/legal-prep-charter-academy-expulsion-suspension-rates-student-discipline-charter-schools [https://perma.cc/WHJ2-RYFL].

117. *See id.*

118. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 101, at 20.

119. *See id.*

120. *See id.*

121. U.S. CONST. amend. XIV, § 1.

122. Larry Bartlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process Is Now Due*, B.Y.U. EDUC. & L.J., Spring 1993, at 1, 5, 12; Sherry Maria Tanious, *Schoolhouse Property*, 131 YALE L.J. 1641, 1643 (2022).

123. *See* Bartlett & McCullagh, *supra* note 122, at 5.

124. *See id.* at 6.

125. *See id.* at 11; Peggy Nicholson, *When Virtual Discipline Becomes Virtual Suspension: Protecting the Due Process Rights of Virtual Learners*, 50 J.L. & EDUC. 133, 138 (2021).

126. *See* Bartlett & McCullagh, *supra* note 122, at 6.

name, reputation and standing in the community."[127] Therefore, the Due Process Clause protects many interests of American citizens, including the interest in their education.

In a series of cases, the U.S. Supreme Court established that due process applies to students' interest in their education.[128] In 1969, in *Tinker v. Des Moines*,[129] the Court for the first time established that students do not "shed their constitutional rights . . . at the schoolhouse gate."[130] The Court acknowledged that schools have "important, delicate, and highly discretionary functions" but nonetheless held that these functions may not violate the Bill of Rights.[131] Thus, the Court held that the Constitution protects students from the state—and therefore from schools, as arms of the state.[132] In 1975, in the seminal case *Goss v. Lopez*,[133] the Supreme Court went further and established that all public school students have a property interest in their education.[134] As all fifty states guarantee the right to an education by law, the Court held that states cannot deprive students of their property right in their education, such as through exclusionary discipline, without due process of law.[135] Thus, schools may not suspend or expel students without due process.[136]

The Court found that "education is perhaps the most important function of state and local governments" and that any exclusion from such education for more than a trivial period has a substantial impact on the student.[137] Although the Court acknowledged that expulsions and long-term suspensions cause a more significant deprivation than short-term suspensions, it still held that short-term suspensions constitute more than a de minimis deprivation, and thus students must be safeguarded from such suspensions by due process protections.[138] The Court also held that suspensions and expulsions deprive students of their liberty interests, as such disciplinary actions can have a substantial negative impact on a student's reputation and can interfere with later educational and employment opportunities.[139]

After finding that students are owed due process protections in exclusionary discipline proceedings, the Supreme Court then considered what level of process was due.[140] In *Goss*, nine public school students had

127. *Id.*
128. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975); Tinker v. Des Moines, 393 U.S. 503, 507 (1969).
129. 393 U.S. 503 (1969).
130. *Id.* at 506.
131. *See id.* at 507 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
132. *See id.* at 511.
133. 419 U.S. 565 (1975).
134. *See id.* at 574.
135. *See id.*; Nicholson, *supra* note 125.
136. *See Goss*, 419 U.S. at 574.
137. *See id.* at 576 (quoting Brown v. Bd. of Educ. 347 U.S. 483, 493 (1954)).
138. *See id.*
139. *See id.* at 575.
140. *See id.* at 577.

appealed their suspensions, which extended up to ten days.[141] None of the nine students were provided with a hearing to establish the facts of the situation or to share their version of the events.[142] The Court determined that these schools violated the students' due process rights and thus established that there are minimum due process requirements for students in disciplinary proceedings.[143]

Although the Supreme Court recognized that public education in the United States is generally the province of state and local governments, it found that judicial intervention is required to ensure that due process is met by schools.[144] The Court noted that due process protection is an inherently flexible mechanism and that what process is due must be determined in response to the individual situation.[145] Thus, courts must weigh the competing interests in each instance to determine the appropriate level of due process owed.[146]

In *Goss*, the Court held that the competing interests were the students' interest in preventing an unfair or mistaken exclusion from school and the school's interest in maintaining a safe and orderly educational environment.[147] In terms of the students' interest, the Court noted that although administrators are assumed to be benevolent and fair-minded disciplinarians, it is also clear that the disciplinary process is not without error or unfairness.[148] Thus, the Court held that the risk of error should be "guarded against if that may be done without prohibitive cost or interference with the educational process."[149]

However, the Court also recognized that a school's employment of exclusionary discipline measures is vital to its achievement of its educational goals.[150] Specifically, the Court found that suspensions are necessary tools to maintain order and are valuable educational devices.[151] Thus, the Court determined that the due process protections provided to students should not overburden school administrators or divert resources such that schools cannot effectively use this tool.[152] Finally, the Court stated that it did not want to over-formalize disciplinary proceedings, as this could add an adversarial nature to such proceedings, thus destroying their effectiveness as disciplinary tools and teaching devices.[153]

In previous cases regarding deprivations of other property interests, the Court held that due process requires at least "notice and [an] opportunity for

141. *See id.* at 567–68.
142. *See id.* at 570–71.
143. *See id.* at 584.
144. *See id.* at 578.
145. *See id.* at 577–78.
146. *See id.* at 579.
147. *See id.*
148. *See id.* at 579–80.
149. *Id.* at 580.
150. *See id.*
151. *See id.*
152. *See id.* at 583.
153. *See id.*

[a] hearing appropriate to the nature of the case."[154] For example, in the frequently cited case of *Mullane v. Central Hanover Trust Co.*,[155] the Court established that the fundamental requirements of due process are the opportunity to be heard and notice that a hearing is to take place.[156] Applying these prior holdings in the student discipline context, the Court in *Goss* found that students "must be given some kind of notice and afforded some kind of hearing" when faced with a possible deprivation of their interest in education.[157]

The Court determined that a student facing a temporary suspension of ten days or fewer must 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."[158] Further, there can be no delay between when notice is given and the time of the hearing.[159] In most cases, there only needs to be an informal conversation between the student and the school during which the student can explain their side of the story.[160] The Court further explained that the notice and hearing need only be an "informal give-and-take between student and disciplinarian."[161] Although the Court thus established the basic requirements of due process in school disciplinary hearings for short-term suspensions, it stopped short of construing the Due Process Clause to require that schools provide students with the right to be represented by counsel, to confront and cross-examine adverse witnesses, and to call their own witnesses.[162]

Importantly, the Court clarified that its decision applied only to short-term suspensions, defined as suspensions not exceeding ten days.[163] The Court acknowledged that long-term suspensions or expulsions result in a more serious deprivation of a student's interest in their education.[164] Thus, the Court held that longer suspensions or expulsions must meet the basic due process requirements laid out here and also "may require more formal procedures."[165] However, the Court did not elaborate on what these more formal procedures may be.[166] Consequently, as Part II will address, there is strong disagreement among lower courts as to what process is due in long-term disciplinary hearings.[167]

---

154. *See id.* at 579 (quoting Mullane v. Cent. Hanover Tr. Co., 339 U.S. 306, 313 (1950)); *see also* Armstrong v. Manzo, 380 U.S. 545, 550 (1965).
155. 339 U.S. 306 (1950).
156. *See id.* at 314; *see also Goss*, 419 U.S. at 579.
157. *See Goss*, 419 U.S. at 579 (emphases omitted).
158. *Id.* at 581.
159. *See id.* at 582.
160. *See id.*
161. *Id.* at 584.
162. *See id.*
163. *See id.*
164. *See id.*
165. *Id.*
166. *See id.*
167. *See infra* Part II.

II. DUE PROCESS IN LONG-TERM DISCIPLINARY PROCEEDINGS AFTER *GOSS V. LOPEZ*

The Supreme Court in *Goss* made clear that its holding was limited to short-term disciplinary proceedings, defined as suspensions that do not exceed ten days.[168] The Court merely noted that long-term disciplinary proceedings, defined as expulsions or suspensions lasting longer than ten days, "may require more formal procedures."[169] The Court thus left open the question of what procedures are required to satisfy due process in long-term disciplinary proceedings.[170] As the Supreme Court has yet to directly address this question, lower courts have reached different conclusions regarding what due process requires for students facing long-term suspensions or expulsions.[171]

This part examines this open question and the inconsistent judicial doctrine that surrounds it, looking specifically at three common due process protections over which courts disagree: (1) the right to confront and cross-examine witnesses, (2) the right to an impartial adjudicator, and (3) the right to retain legal counsel. For each of these due process protections, this part will analyze how courts vary widely with their approaches to the protections and will explore arguments that have been put forth both for requiring and for not requiring these rights in long-term disciplinary proceedings. Additionally, this part will compare judicial decisions to state discipline statutes that detail the discipline policies that traditional public schools must follow. This comparison will help demonstrate the difference between the protections afforded to traditional public school students, which are derived from both due process and state statutes, and the protections afforded to many charter school students, which are derived only from due process.

A. Mathews v. Eldridge*: Due Process Balancing Test*

Lower courts attempting to resolve the question of what process is due to students in long-term disciplinary hearings have turned to the Supreme Court's decision in *Mathews v. Eldridge*[172] for guidance.[173] In *Mathews*, the Court announced a new balancing test for determining what process is due when one's property or liberty interest is at stake.[174] The Supreme Court established this test as a way for courts to analyze the adequacy of procedural

168. *See Goss*, 419 U.S. at 584.
169. *Id.*
170. *See* Nicholson, *supra* note 125, at 148.
171. *See id.* at 148–49; Davin Rosborough, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U. L. REV. 663, 679–80 (2010).
172. 424 U.S. 319, 335 (1976).
173. *See, e.g.*, Newsome v. Batavia Loc. Sch. Dist., 842 F.2d 920, 923 (6th Cir. 1988) ("Without the aid of Supreme Court authority directly on point, we are left with resolving the procedural due process issues presented in this appeal under the more general rubric of *Mathews v. Eldridge*.").
174. *See* 424 U.S. at 334–35.

protections in a flexible manner.[175] "Under *Mathews*, the touchstone of a court's analysis is whether the procedure was fair."[176] This test requires consideration of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[177] Lower courts have often relied on this test to determine whether the process provided to a student during a long-term disciplinary hearing was sufficient to satisfy due process.[178] In the discipline context, this test asks whether the value of more procedural protections to students outweighs the burden placed on schools by requiring these protections.[179] Although this test was created in order to provide lower courts with a consistent way to evaluate allegations of due process violations, many courts still disagree over the key protections that students facing long-term disciplinary proceedings should be afforded.[180]

As courts have yet to establish a clear framework for what due process procedures must be in place for long-term disciplinary proceedings, many states have passed legislation and regulations further detailing procedures that public schools must employ for long-term disciplinary proceedings.[181] Such statutes provide additional layers of protection for traditional public school students by providing clear guidance as to what procedures are required by schools in these disciplinary proceedings.[182] However, as discussed in Part I.A, in many states, charter schools are exempt from these statutes.[183] Therefore, the only protections for many charter school students

175. *See id.*

176. Casey B. Nathan, Note, *Confronting a Double-Edged Sword: Providing Bullies Due Process Protections Without Undercutting Massachusetts' Efforts to Combat Bullying*, 34 B.C. J.L. & SOC. JUST. 111, 119 (2014).

177. *Mathews*, 424 U.S. at 335.

178. *See* Brent M. Pattison, *Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings*, 18 TEMP. POL. & C.R. L. REV. 49, 52 (2008); Nicholson, *supra* note 125, at 149 ("The majority of courts have followed a more flexible approach in determining what procedures are necessary, invoking the procedural due process framework provided by the Supreme Court in *Mathews v. Eldridge*.").

179. *See* Nathan, *supra* note 176, at 120.

180. *See* Nicholson, *supra* note 125, at 149–50 (noting that "the results have been mixed" for courts employing the *Mathews* analysis); Nathan, *supra* note 176, at 120.

181. *See School Discipline Laws & Regulations by State*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, https://safesupportivelearning.ed.gov/school-discipline-laws-regulations-state [https://perma.cc/CE85-JBY4], (last visited Oct. 6, 2023) (providing a comprehensive overview of school discipline laws and regulations by state).

182. For example, New York law states:

> [n]o pupil may be suspended for a period in excess of five school days unless such pupil . . . shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his or her behalf.

N.Y. EDUC. LAW § 3214 (McKinney 2023).

183. *See supra* notes 50–56 and accompanying text.

in disciplinary proceedings are the protections derived from the Due Process Clause.[184] Accordingly, there currently is no clear, nationwide guidance for what protections charter school students facing long-term exclusion must be afforded in disciplinary proceedings.

B. The Right to Confront and Cross-Examine Witnesses

Although *Goss* made it clear that students facing short-term suspensions do not have the right to confront and cross-examine witnesses supporting the charges against them, the Court left open whether students facing long-term exclusion should be afforded such a right.[185] With this open question, lower courts have disagreed over whether due process requires that students facing long-term exclusion have the right to confront and cross-examine witnesses.[186] Confrontation and cross-examination of witnesses allows for the credibility of the witness to be tested and is often thought to be the most effective way of getting to the truth.[187] The answer to the question of whether confrontation and cross-examination are required depends on whether witnesses in a long-term disciplinary hearing must testify in person or whether a witness may instead submit a written statement to the hearing officer.[188] Further, when witnesses do provide live testimony, the question becomes whether the student must have an opportunity to cross-examine the witness, or whether the witness's testimony may be entered into the record without challenge.[189]

Many courts have held that due process does not require the right to confront and cross-examine adverse witnesses in long-term disciplinary proceedings.[190] In *Newsome v. Batavia Local School District*,[191] the U.S. Court of Appeals for the Sixth Circuit held that students do not have the right to confront and cross-examine adverse witnesses.[192] In that case, the student, Newsome, was expelled for the remainder of the semester based solely on the accounts of other students.[193] The other students were not identified and did not provide live testimony.[194] Rather, school officials recounted the student witnesses' accounts of Newsome's conduct at the hearing.[195]

184. *See supra* notes 50–56 and accompanying text.

185. *See Goss*, 419 U.S. 565, 583–84 (1975); Bartlett & McCullagh, *supra* note 122, at 14.

186. *See* Bartlett & McCullagh, *supra* note 122, at 9 ("[T]he right of confrontation and cross-examination of witnesses is highly debated, and the courts are greatly divided on the issue."); Pattison, *supra* note 178, at 50; Nathan, *supra* note 176, at 119.

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

188. *See* Pattison, *supra* note 178, at 50.

189. *See id.*

190. *See id.* at 53; Nicholson, *supra* note 125, at 149–50; Nathan, *supra* note 176, at 119. The cases discussed throughout this Note feature traditional public schools. However, because charter schools are considered public schools and are thus subject to constitutional due process limitations, the decisions in each of the cases discussed also apply to charter schools and charter school students.

191. 842 F.2d 920 (6th Cir. 1988).

192. *See id.* at 924–25; Pattison, *supra* note 178, at 57.

193. *See Newsome*, 842 F.2d at 921.

194. *See id.*

195. *See id.*

Newsome was not provided an opportunity to cross-examine the accusing students, and he was also barred from cross-examining the school officials who recounted the student witnesses' stories.[196] Although the court acknowledged "[t]he value of cross-examination to the discovery of [the] truth," the court ultimately determined that the burden on school districts outweighed the potential value to the student.[197]

The court found that the value of cross-examination of student witnesses is diminished because school administrators with a "particularized knowledge of the student's trustworthiness"[198] evaluate a student's account prior to any hearing.[199] Further, the court noted that school administrators typically "know[] firsthand (or ha[ve] access to school records which disclose) the accusing student's disciplinary history," and this history can help administrators determine the credibility of the student witness's statement.[200] Finally, administrators also typically have an understanding of the relationship between the accused student and the accusing student and can factor that knowledge into their credibility evaluation.[201] Thus, the court held that cross-examination would be "merely duplicative" of the assessment previously conducted by school administrators.[202]

Additionally, the court determined that requiring an opportunity to cross-examine student witnesses places too significant a burden on school districts that need to be able to maintain order and discipline in their schools.[203] The court reasoned that school administrators perform a large number of responsibilities in addition to dealing with student discipline and that further judicializing the school discipline process would force administrators to perform a duty that they are "ill-equipped to perform."[204] Specifically, the court noted that cross-examination inevitably comes with "innumerable objections," and thus compelling school administrators to divert their time and attention away from their chief responsibilities to "learning and applying the common law rules of evidence" is a waste of school resources.[205]

The court also recognized that schools are increasingly dealing with serious, and often violent, offenses by students, and schools need to be able to protect the identity of student witnesses who are willing to blow the whistle on their fellow classmates.[206] The court stated that without the ability to maintain the anonymity of student witnesses, students would be less incentivized to come forward with information about their classmates, and

196. *See id.*
197. *Id.* at 924.
198. *Id.*; *see also* Bartlett & McCullagh, *supra* note 122, at 46.
199. *Newsome*, 842 F.2d at 924.
200. *Id.*
201. *See id.*
202. *Id.*; *See also* Bartlett & McCullagh, *supra* note 122, at 46.
203. *See Newsome*, 842 F.2d at 924–25.
204. *Id.* at 925–26.
205. *See id.* at 926; Bartlett & McCullagh, *supra* note 122, at 46–47.
206. *Newsome*, 842 F.2d at 925; Bartlett & McCullagh, *supra* note 122, at 46.

those students who do come forward may face "ostracism and reprisal."[207] Therefore, the court ultimately determined that the burden on school districts outweighs the "marginal benefit" that may come from cross-examination, and thus due process does not require an opportunity to cross-examine adverse witnesses.[208]

Likewise, in *Nash v. Auburn University*,[209] the U.S. Court of Appeals for the Eleventh Circuit held that students facing expulsion do not need to be afforded an opportunity to cross-examine adverse witnesses.[210] The court noted that student disciplinary hearings are not equivalent to other quasi-judicial proceedings.[211] Therefore, even though students do have a right to a fair hearing, their rights "are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial."[212] Other courts have similarly held that confrontation and cross-examination of adverse witnesses are not required by due process in long-term disciplinary hearings for comparable reasons.[213] Ultimately, courts that do not afford this protection find that the value of cross-examination is outweighed by the burden that it would place on schools.

In contrast, some courts have held that due process requires that students be afforded the right to confront and cross-examine witnesses in long-term disciplinary proceedings.[214] These courts tend to hold that the value of cross-examination in helping an adjudicator get to the truth of the matter outweighs any burden that such a right may place on a school.[215] For example, in *Colquitt v. Rich Township High School District No. 227*,[216] the Illinois Appellate Court considered an appeal by a student, Colquitt, who was expelled for three semesters after a disciplinary hearing.[217] At the hearing, the school district admitted into evidence written statements by several student witnesses supporting the charges against Colquitt, despite these witnesses not being present at the hearing.[218] Colquitt argued that the admittance of these statements without an opportunity to confront and

207. *See Newsome*, 842 F.2d at 925; Nicholson, *supra* note 125, at 150–51 (recognizing that schools have "an obligation to protect student witnesses").

208. *See Newsome*, 842 F.2d at 926; Nicholson, *supra* note 125, at 151.

209. 812 F.2d 655 (11th Cir. 1987).

210. *See id.* at 664.

211. *Id.*

212. *Id.*

213. *See, e.g.*, B.S. *ex rel.* Schneider v. Bd. of Sch. Tr., 255 F. Supp. 2d. 891, 899 (N.D. Ind. 2003) (holding that "the clear weight of authority" is against requiring the right to cross-examine witnesses in expulsion hearings); Craig v. Selma City Sch. Bd., 801 F. Supp. 585, 593 (S.D. Ala. 1992) (finding that "a student has no constitutional right to cross-examine witnesses at an expulsion hearing").

214. *See* Pattison, *supra* note 178, at 53; 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, 442–43 (2017) (explaining that some courts have held that, in long-term disciplinary cases, "students have heightened due process rights, including . . . the ability to cross-examine witnesses").

215. *See* Pattison, *supra* note 178, at 54.

216. 699 N.E.2d 1109 (Ill. App. Ct. 1998).

217. *See id.* at 1111.

218. *See id.* at 1111–12.

cross-examine the witnesses who wrote the statements violated his due process rights.[219]

Conversely, the school argued that school administrators have a "particularized knowledge of . . . student[s'] trustworthiness" and thus can make valid credibility determinations about students' testimony without cross-examination.[220] Further, the school district argued that all of the "common-law rules of evidence and procedure" do not apply at school disciplinary hearings, and thus an opportunity to cross-examine witnesses is not required at such hearings, as it would be in criminal trials.[221]

However, the Illinois Appellate Court, applying the *Mathews* balancing test, held that Colquitt's interest in avoiding an erroneous deprivation of his education necessitated a fair hearing, which required an opportunity for him to cross-examine adverse witnesses.[222] The court determined that cross-examination was imperative in Colquitt's case, as the decision of the hearing officer was directly dependent on the witnesses' credibility.[223] The court acknowledged that a disciplinary hearing is "not a judicial or quasi-judicial proceeding," and thus not all of the common law rules of evidence are applicable.[224] However, the court did recognize that "certain protections, such as from witnesses 'motivated by malice, vindictiveness, intolerance, prejudice, or jealousy,' must be maintained."[225] It further determined that simply relying on the credibility determinations of school administrators without any challenge is a "particularly egregious departure from the adversarial standard."[226]

The school also argued that its lack of subpoena power should excuse it from needing to provide students with an opportunity to cross-examine witnesses.[227] The court noted that a school's lack of subpoena power may allow hearing officers to rely only on written testimony in specific instances in which witnesses are completely unavailable, but that it "cannot excuse noncompliance with principles of due process" in all cases.[228] Similarly, the court acknowledged that there may be instances in which witnesses could face reprisal for testifying, such as violence or stigmatization.[229] However, the court held that schools may only dispense with the requirement of cross-examination when a serious fear of reprisal can be clearly

219. *See id.* at 1115.
220. *Id.* at 1116.
221. *Id.*
222. *See id.* ("In expulsion proceedings, the private interest is commanding; the risk of error from the lack of adversarial testing of witnesses through cross-examination is substantial; and the countervailing governmental interest favoring the admission of hearsay statements is comparatively outweighed.").
223. *Id.*
224. *Id.*
225. *Id.* (quoting Greene v. McElroy, 360 U.S. 474, 496 (1959)).
226. *See id.*
227. *See id.*
228. *See id.*
229. *See id.*

demonstrated, and thus there is not a complete excusal of this requirement in all cases.[230]

In *Stone v. Prosser Consolidated School District No. 116*,[231] the Washington State Court of Appeals similarly employed the *Mathews* balancing test and held that cross-examination is necessary in long-term exclusionary disciplinary proceedings.[232] The court discussed how long-term discipline deprives a student of their education interest for a significant period of time and found that the risk of an erroneous deprivation must be taken seriously.[233] Although the court recognized that all the rules of evidence do not apply to disciplinary hearings, it also recognized that discipline decisions are made based on the evidence presented at the hearing and, accordingly, the "credibility of that evidence is critical to the disposition."[234] The court thus found that a student should be given the opportunity to cross-examine adverse witnesses "unless the burden on the school administration [is] prohibitive."[235] The court went on to hold that this burden is generally not prohibitive and that a student's interest in their education generally outweighs the burden placed on school administrations by requiring cross-examination.[236]

However, the Washington State Court of Appeals qualified this decision by acknowledging, like the court in *Colquitt*, that there may be specific circumstances in which the burden on schools is prohibitive, such as when a student witness fears reprisal or a school's lack of subpoena power makes it impossible for the witness to appear.[237] The court said that in such circumstances, a witness's failure to appear may be excused, but in the absence of such specific facts, an opportunity to confront and cross-examine adverse witnesses must be provided.[238] Other state high courts have followed suit and held that due process requires the opportunity for students to confront and cross-examine witnesses in long-term disciplinary hearings.[239]

---

230. *See id.*; *see also* David Doty, *By the Book:* Fuller v. Decatur Public School Board of Education School District 61 *and the Essential Elements of Student Due Process in K-12 Expulsion Proceedings*, 151 EDUC. L. REP. 353, 359 (2001) (arguing that "[w]hile disciplined students may not be entitled to cross-examine student witnesses in every circumstance, particularly where there exists legitimate fear of retaliation, in most cases the need for fairness and accuracy will override the need to limit or deny the opportunity to cross-examine").

231. 971 P.2d 125 (Wash. Ct. App. 1999).

232. *See id.* at 127.

233. *See id.*

234. *Id.*

235. *Id.*

236. *See id.* at 128.

237. *See id.*

238. *See id.*

239. *See, e.g.*, Carey *ex rel.* Carey v. Me. Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 919 (D. Me. 1990) (holding that due process rights are violated by a failure to permit students to confront witnesses); Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (determining that "*Goss* clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right . . . to confront and cross-examine adverse witnesses"). From the cases discussed above, the trend seems to be that state high courts

As courts continue to diverge over whether due process requires an opportunity to confront and cross-examine adverse witnesses in long-term disciplinary hearings, many states have passed legislation requiring that traditional public schools afford students this right.[240] For example, under New York state law, "no pupil may be suspended for a period in excess of five school days unless such pupil . . . shall have . . . the right to question witnesses against such pupil."[241] However, this law applies only to traditional public schools.[242] Charter schools, on the other hand, are exempt.[243] Thus, as there are not state regulations that apply to many charter schools and judicial doctrine on the question is unsettled, there is no consistent nationwide standard for whether charter school students facing long-term exclusion must be afforded an opportunity to confront and cross-examine witnesses.

C. The Right to an Impartial Adjudicator

In *Goss*, the Court held that a state may not deprive a student of their right to an education "on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred."[244] Although the Court established that fairness is required in all student disciplinary proceedings, it did not determine what constitutes fairness in long-term disciplinary proceedings.[245] Therefore, one question that remains open is what constitutes an impartial tribunal for long-term disciplinary hearings in line with the "fundamental fairness" baseline set forth in *Goss*.[246] Even though the *Goss* Court did presume that school administrators operate in good faith when disciplining students and presumed hearing officers to be unbiased in short-term proceedings, the Court did not address impartiality for long-term proceedings.[247]

Courts generally hold that long-term disciplinary hearings must be impartial to comport with the "more formal procedures" requirement from *Goss*.[248] This requirement stems from the universal belief among courts that a decision made by an impartial tribunal is a fundamental component of due process.[249] However, lower courts have disagreed over what actually

---

generally provide greater due process protections to students, by providing a right to confront and cross-examine witnesses, than circuit courts do.

240. *See* Pattison, *supra* note 178, at 64.

241. N.Y. EDUC. LAW § 3214 (McKinney 2023); *see also* GA. CODE ANN. § 20-2-754(b)(3) (2023) (explaining that in long-term disciplinary hearings, "[a]ll parties are afforded an opportunity to . . . examine and cross-examine witnesses on all issues unresolved").

242. *See supra* notes 50–56 and accompanying text.

243. *See supra* notes 50–56 and accompanying text.

244. 419 U.S. 565, 574 (1975).

245. *See* Malutinok, *supra* note 89, at 126–27.

246. *See id.*

247. *See Goss*, 419 U.S. at 584; Bartlett & McCullagh, *supra* note 122, at 24.

248. *See* Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 15, 19–20.

249. *See* Gorman v. Univ. of R.I., 837 F.2d 7, 15 (1st Cir. 1988); James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 375 (2000);

constitutes impartiality in long-term disciplinary proceedings, with a particular variance over who is eligible to adjudicate such hearings.[250]

The majority of courts tend to interpret this impartiality requirement loosely.[251] These courts have generally held that an impartial tribunal "may include, or consist solely of, an administrator who has played other roles in the application of the discipline prior to the hearing."[252] This means that administrators can serve multiple roles in a disciplinary hearing without compromising its impartiality.[253] These courts do not presume bias in an adjudicator merely because the adjudicator was involved in the disciplinary actions prior to or during the hearing, even when such involvement is substantial.[254] Rather, these courts establish an actual bias standard, requiring that a student prove actual bias on the part of the adjudicator in order to prove a due process violation.[255]

The U.S. Court of Appeals for the Fifth Circuit has presumed the impartiality of an adjudicator in a wide variety of circumstances, such as when the decision-maker is also a school employee, had previously investigated the conduct at issue, had initiated the charges against the student, had recommended the charges to the ultimate decision-maker, or had served as an attorney for the school.[256] For example, in *Brewer v. Austin Independent School District*,[257] the Fifth Circuit held that an assistant principal who voted to suspend a student was impartial despite also playing the role of both investigator and witness in the proceedings.[258] The court presumed impartiality on the part of the administrator even though he was extensively involved in other aspects of the situation and found no basis for a due process violation.[259]

Other courts have similarly followed the Fifth Circuit's approach.[260] For instance, citing the decision in *Brewer*, the Sixth Circuit in *Newsome v.*

Juliana Carter, Comment, *Reimagining Pennsylvania's School Discipline Law and Student Rights in Discipline Hearings*, 88 TEMP. L. REV. ONLINE 4, 19 (2017).

250. *See* Malutinok, *supra* note 89, at 128; Brady, *supra* note 80, at 174 n.62 (noting that "the courts are split on this issue"); 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.").

251. *See* Malutinok, *supra* note 89, at 127.

252. *Id.*

253. *See id.*; Bartlett & McCullagh, *supra* note 122, at 25–26.

254. *See* Malutinok, *supra* note 89, at 128; *see, e.g.*, Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 656 (2000) (holding that "[i]mpartiality is presumed in the school context and due process is not implicated simply because the disciplinarian observed the conduct, had some knowledge regarding it, or even investigated prior to the hearing").

255. *See* Malutinok, *supra* note 89, at 128.

256. *See id.* at 129; *see also* Bartlett & McCullagh, *supra* note 122, at 24.

257. 779 F.2d 260 (5th Cir. 1985).

258. *See id.* at 264; *see also* Bartlett & McCullagh, *supra* note 122, at 25–26.

259. *See Brewer*, 779 F.2d at 264; *see* Bartlett & McCullagh, *supra* note 122, at 25.

260. *See, e.g.*, Gorman v. Univ. of R.I., 837 F.2d 7, 15 (1st Cir. 1988) (finding that an administrator who wore "multiple-hats" including witness and advisor to the board did not compromise the impartiality of the hearing); Lamb v. Panhandle Cmty. Unit Sch. Dist. No. 2, 826 F.2d 526, 529–30 (7th Cir. 1987) (holding that "the combination of an advisory function with a hearing participant's prosecutorial or testimonial function does not create a per se

Batavia Local School District[261] held that it was permissible for a school principal and superintendent to participate in the deliberations of the school board that made the final decision, even though the principal led the investigation of the student's misconduct and the superintendent ordered the expulsion.[262] The court further held that it would not have violated due process for the principal and superintendent to have voted with the board or to have held the expulsion hearing and made the final decision themselves.[263] The court held that the student could only prove partiality if "the principal and/or superintendent possessed either a pre-existing animus towards him, or had developed a bias because of their involvement in the incident," and that the student failed to do so.[264]

Courts may take a loose approach to the impartiality requirement of due process for several reasons. First, courts note that student disciplinary proceedings are distinguishable from full appellate proceedings or criminal trials and thus do not require all of the same procedures.[265] These courts do not want to excessively "judicialize" the student disciplinary process and do not want to make the process more adversarial than it needs to be.[266]

Second, courts state that finding a violation of due process when an adjudicator plays multiple roles in a disciplinary proceeding would be impractical and make the process too complex.[267] Courts find it much more practical to allow school administrators who have been involved in the incident and are aware of the facts of the situation to serve as decision-makers than it is to force schools to provide an independent party who has no previous knowledge of the situation or the parties.[268] For example, in *C.B. ex rel. Breeding v. Driscoll*,[269] the Eleventh Circuit compared a student disciplinary proceeding to an employment termination proceeding.[270] The court had previously held that the state does not have to offer a completely independent decision-maker at a pretermination hearing to satisfy due process.[271] As supervisors are likely to be involved in events leading up to termination, the court held that barring a supervisor from acting as the

facially unacceptable risk of bias"); Alex v. Allen, 409 F. Supp. 379, 388 (W.D. Pa. 1976) (holding that a school solicitor playing conflicting roles in a student's disciplinary proceeding including prosecutor, judge, and advisor to the board did not violate due process).

261. 842 F.2d 920 (6th Cir. 1988).

262. *See id.* at 925–27; *see also* Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 856–57 (2015).

263. *See Newsome*, 842 F.2d at 927.

264. *Id.* at 927 n.5; *see also* Black, *supra* note 262, at 857.

265. *See Newsome*, 842 F.2d at 927 (holding that a student has a right to a "hearing before an impartial trier-of-fact [but] . . . not . . . a full-blown administrative appellate process"); *see also Gorman*, 837 F.2d at 16.

266. *See* Malutinok, *supra* note 89, at 129–30, 134.

267. *See, e.g.*, C.B. *ex rel.* Breeding v. Driscoll, 82 F.3d 383, 387 n.3 (11th Cir. 1996) (noting that "it is both impossible and undesirable for administrators involved in incidents of misbehavior always to be precluded from acting as decisionmakers").

268. *See* Malutinok, *supra* note 89, at 129.

269. 82 F.3d 383 (11th Cir. 1996).

270. *See id.* at 387 n.3.

271. *See id.*

decision-maker and requiring that an independent party instead play that role would make the process too complex.[272] The Eleventh Circuit thus held that, like employment termination proceedings, barring school administrators who were previously involved in a student's misconduct incident from serving as a decision-maker would create too many unnecessary complications.[273] In addition to making the proceedings too complex, courts following this approach find that presuming bias in an adjudicator merely because they were involved in the incident prior to the hearing would deplete school resources.[274] If school administrators were barred from serving as decision-makers, schools would be forced to pay independent parties to serve in that role, using money and resources that could be better spent in other ways.[275]

Although courts following this approach presume impartiality despite an adjudicator serving in multiple roles throughout a proceeding, they do allow for a finding of partiality and thus a due process violation if the student can prove "actual bias" on the part of the adjudicator.[276] A court will find actual bias when a student pleads specific facts that demonstrate that the decision-maker is unable "to function fairly as a trier of fact."[277] Generally, courts find actual bias when there is such extensive personal involvement that any reasonable jury would determine that there was partiality.[278]

For example, in *Heyne v. Metropolitan Nashville Public Schools*,[279] the Sixth Circuit found a due process violation because there were sufficient facts to prove a preexisting bias on the part of the hearing officer.[280] In that case, an administrator was responsible for disciplining two students, one white and one Black, after an altercation between the students.[281] The administrator suspended the white student but did not discipline the Black student.[282] The court found that the white student's due process rights had been violated because the administrator was biased against him.[283] Actual bias was found because of the administrator's previous instructions to school staff to discipline Black students more leniently in order to doctor the school's discipline statistics.[284] The administrator also admitted that he suspended the white student in response to the parents of the Black student threatening a

272. *See id.*
273. *See id.*
274. *See* Malutinok, *supra* note 89, at 129; *see also* Gorman v. Univ. of R.I., 837 F.2d 7, 15 (1st Cir. 1988) (holding that requiring a school to hire an independent party to play the role of decision-maker would be an "improper allocation of resources").
275. *See* Malutinok, *supra* note 89, at 129.
276. *See id.* at 130.
277. Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 656–57 (W.D. Tex. 2000) (quoting Murray v. W. Baton Rouge Parish Sch. Bd., 472 F.2d 438, 443 (5th Cir. 1973)).
278. *See generally id.*
279. 655 F.3d 556 (6th Cir. 2011).
280. *See id.* at 568.
281. *See id.* at 559–60.
282. *See id.* at 568.
283. *See id.*
284. *See id.*

lawsuit.[285] Thus, the court found sufficient facts to establish a finding of actual bias that denied the student a fair hearing in front of an impartial tribunal.[286] Other courts have similarly found a due process violation when there are facts that show an overt, preexisting bias on the part of the adjudicator.[287]

In contrast, a minority of courts disagree with this approach and interpret the impartiality requirement more strictly.[288] These courts find that an actual bias standard is too stringent and does not comport with due process.[289] Rather, these courts hold that when there is an appearance of bias, even if there is not sufficient evidence of actual bias, the tribunal should be found partial.[290] These courts tend to presume an appearance of bias on the part of an adjudicator who serves multiple roles in a disciplinary hearing.[291] Thus, these courts generally bar administrators from serving as a decision-maker or an advisor to the decision-maker if those administrators also initially recommended discipline for a student, investigated the misconduct, or played a prosecutorial role in the disciplinary hearing.[292]

For example, in *Gonzales v. McEuen*,[293] the U.S. District Court for the Central District of California said "[t]he question . . . is not whether the [hearing] Board was actually biased, but whether, under the circumstances, there existed probability that the decisionmaker would be tempted to decide the issues with partiality to one party or the other."[294] The court found that there was a risk of bias because the school's attorneys, who prosecuted the case against the student, also served as advisors to the board in their final decision.[295] The court held that by playing these two roles, the school's lawyers were "in a position of intolerable prominence and influence."[296]

This risk of bias was compounded by the fact that the superintendent of the school, who was part of the prosecution team, sat with the board during the student's expulsion hearing and was present during the board's deliberations.[297] Although the student did not present evidence that the superintendent advised or influenced the board in their decision-making, the court held that there was still an appearance of bias due to the fact that the superintendent was present.[298] The court found that it was possible that the

285. *See id.*
286. *See id.*
287. *See, e.g.*, Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 656–58 (2000) (finding actual bias by the principal because he served as an investigator and hearing officer of a discipline proceeding against a student who had previously taken photographs of the principal in relation to rumors about the principal's sexual misconduct).
288. *See* Malutinok, *supra* note 89, at 131.
289. *See id.*
290. *See id.* at 131–32.
291. *See id.*
292. *See id.*
293. 435 F. Supp. 460 (C.D. Cal. 1977).
294. *Id.* at 464.
295. *See id.*
296. *See id.* at 465.
297. *See id.*
298. *See id.*

superintendent's mere presence could have acted as a "restraint upon the freedom of action and expression of the Board."[299] Thus, the court concluded that the multiple roles played by several of the administrators throughout the hearing made it "fundamentally unfair" and therefore violated due process.[300]

Likewise, in *Everett v. Marcase*,[301] the U.S. District Court for the Eastern District of Pennsylvania held that for a hearing officer to be fair and impartial, they cannot be the principal or the same administrator who held the first informal hearing or initially recommended the disciplinary charges against the student.[302] Further, the court said that the hearing officer also cannot be someone under the direct control of that initial school administrator.[303] Several other courts have followed this strict approach and found due process violations not just when there is actual bias, but also when there is an appearance of bias based on the roles played by the decision-makers.[304]

As it remains unsettled what constitutes an impartial adjudicator in long-term disciplinary hearings, some states have passed legislation detailing who may adjudicate a school disciplinary hearing.[305] Some jurisdictions, such as the District of Columbia, have passed statutes that require traditional public school districts to appoint independent hearing officers for long-term disciplinary hearings.[306] Other jurisdictions have created lists of preapproved independent hearing officers from which school districts can choose.[307] However, these statutes generally do not apply to charter schools.[308] Thus, charter school students still do not have a clear understanding of when their due process rights are violated.

D. The Right to Retain Legal Counsel

Although the Court in *Goss* explicitly declined to construe the Due Process Clause as requiring that students have the right to retain legal counsel for

299. *See id.*
300. *See id.*
301. 426 F. Supp. 397 (E.D. Pa. 1977).
302. *See id.* at 402.
303. *See id.*; Bartlett & McCullagh, *supra* note 122, at 24.
304. *See, e.g.*, Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1116 (E.D. Wis. 2001) (holding that when a school administrator investigates a student's conduct and recommends the initial charges against the student, that administrator cannot serve as the final decision-maker); Pittsburgh Bd. of Pub. Educ. v. MJN, 524 A.2d 1385, 1389 (Pa. Commw. Ct. 1987) (finding that when attorneys from the same firm functioned as both prosecutor and adjudicator on behalf of the school in a discipline hearing, there was a presumption of bias and thus a due process violation).
305. *See* Malutinok, *supra* note 89, at 143–44.
306. *See, e.g.*, D.C. Mun. Regs. tit. 5-B, § 2507.2 (2023) (establishing that long-term exclusion cases in the District of Columbia must be heard by a hearing officer from the Chancellor of District of Columbia Public Schools hearing office).
307. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-843(F)(2)(b) (2023); GA. CODE ANN. § 20-2-753(a) (2023).
308. *See* DC's CHILDREN'S L. CTR., DISCIPLINE 24 (2018), https://childrenslawcenter.org/wp-content/uploads/2021/07/Tab-14.pdf [https://perma.cc/8ZEV-PUYW].

short-term suspension hearings, the Court left open the question of whether students facing long-term exclusion must be afforded such a right.[309] Lower courts have disagreed over whether students must be afforded the right to retain legal counsel in long-term exclusion hearings.[310]

Many courts have held that students do not have the right to retain legal counsel in long-term disciplinary hearings.[311] In *Flaim v. Medical College of Ohio*,[312] the Sixth Circuit held that schools do not need to allow students to be represented by legal counsel.[313] Employing the *Mathews* test, the court determined that requiring a right to retain counsel places too high an administrative burden on schools, as schools are "in the business of education, not judicial administration . . . ."[314] The court held that due process in school disciplinary proceedings does not require "[f]ull-scale adversarial hearings" and that requiring the presence of legal counsel would excessively judicialize the process.[315] Such a requirement would make the proceeding overly complex and would cost the school significant resources.[316] The court also worried that allowing counsel for students would make the process too adversarial.[317] The court ultimately decided that the value in students being represented by counsel did not outweigh the burden this would place on schools.[318]

Similarly, in *Osteen v. Henley*,[319] the U.S. Court of Appeals for the Seventh Circuit held that the Constitution does not confer a right to counsel on students in long-term disciplinary hearings.[320] The court acknowledged that a student is permitted to consult legal counsel prior to a hearing, but it ultimately held that a student is not entitled to counsel that will "perform the traditional function of a trial lawyer" during the hearing.[321] Similar to *Flaim*, the court found that requiring such a right would turn disciplinary hearings into adversarial litigation that would overburden school administrations, costing them too much time and expense.[322] For example, requiring that students be allowed to retain counsel could force schools to hire their own counsel to prosecute the charges or to hire lawyers to play the role of judge

309. *See* Goss v. Lopez, 419 U.S. 565, 583 (1975); Nicholson, *supra* note 125, at 148.

310. *See* Brady, *supra* note 80, at 174 n.63 ("State and federal level courts are divided on the issue of the right to an attorney at a student suspension or expulsion hearing."); *see also* Bach, *supra* note 248, at 24 ("Court decisions vary dramatically on the issue of representation by counsel at student disciplinary hearings . . . .").

311. *See* Nicholson, *supra* note 125, at 149–50; Ellen L. Mossman, Comment, *Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. PA. L. REV. 585, 600 (2012).

312. 418 F.3d 629 (6th Cir. 2005).

313. *See id.* at 636.

314. *Id.* at 640; *see also* Mossman, *supra* note 311, at 600 n.83.

315. *See Flaim*, 418 F.3d at 640–41.

316. *See id.*

317. *See id.*

318. *See id.*

319. 13 F.3d 221(7th Cir. 1993).

320. *See id.* at 225–26.

321. *Id.*

322. *See id.*

at the hearing.[323] Other courts have similarly held that due process does not afford students the right to counsel.[324]

Although the court in *Flaim* held that students generally do not have a right to counsel in disciplinary proceedings, it did acknowledge that there may be specific circumstances in which a right to counsel is necessary, such as when the disciplinary proceeding is exceedingly complex.[325] The court also stated that if the student is simultaneously facing long-term exclusion from school as well as criminal charges, the student may be afforded the right to counsel.[326] Similarly, the First Circuit, in *Gabrilowitz v. Newman*,[327] found that a school needed to allow a student facing long-term disciplinary action to be represented by counsel because the student was also facing criminal charges for the same alleged misconduct.[328] In such a situation, what happens in the disciplinary hearing could affect the student in their criminal proceeding.[329] Thus, the court recognized that a student facing both disciplinary action and criminal charges faces a particular set of circumstances and that "[o]nly a lawyer is competent to cope with the demands of an adversary proceeding held against the backdrop of a pending criminal case involving the same set of facts."[330] Some courts have also held that if the school is represented by counsel at a disciplinary hearing, then the student must be afforded that same opportunity.[331]

However, a few courts have imposed a constitutional right to retain legal counsel for students facing long-term disciplinary action in all circumstances.[332] In *Gonzales v. McEuen*,[333] the Central District of California held that "*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 . . . ."[334] The court focused on the significant deprivation that occurs because of an expulsion and held that more formal procedures, including a right to counsel, are necessary to protect students

323. *See id.*

324. *See, e.g.*, Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988) (holding that "the weight of authority is against" the right to be represented by counsel); Jaksa v. Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (finding that students do not have a constitutional right to be represented by counsel at disciplinary hearings).

325. *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 636, 640–41 (6th Cir. 2005); Bach, *supra* note 248, at 24; *Jaksa*, 597 F. Supp. at 1252.

326. *See Flaim*, 418 F.3d at 636.

327. 582 F.2d 100 (1st Cir. 1978).

328. *See id.* at 105–07.

329. *See id.*

330. *See id.* at 106.

331. *See* Nathan, *supra* note 176, at 120; *see, e.g.*, French v. Bashful, 303 F. Supp. 1333, 1337–38 (E.D. La. 1969) (holding that the right to counsel was necessary because the school had their own counsel throughout the proceeding).

332. *See* Elizabeth J. Upton, Note, *"Some Kind of Notice" Is No Kind of Standard: The Need for Judicial Intervention and Clarity in Due Process Protections for Public School Students*, 86 GEO. WASH. L. REV. 655, 668 (2018).

333. 435 F. Supp. 460 (C.D. Cal. 1977).

334. *See id.* at 467.

from wrongful punishments that are so severe.[335] Likewise, in *Carey ex rel. Carey v. Maine School Administrators*,[336] the U.S. District Court for the District of Maine set forth seven minimum requirements of due process in school disciplinary proceedings, including a right to retain counsel in "major" disciplinary hearings.[337] In *In re Roberts*,[338] the North Carolina Court of Appeals "construe[d] the Due Process Clause of the United States Constitution . . . to require that petitioner have the opportunity to have counsel present."[339] Generally, these courts justify this requirement by arguing that allowing students to be represented by counsel is a minimal burden on schools and that the significant value that counsel provides to students outweighs this burden.[340] Further, it is difficult for a student to have a meaningful opportunity to be heard, a fundamental notion of due process, without representation by counsel.

As courts diverge over whether due process requires a right for students to retain counsel in long-term disciplinary hearings, some states have passed legislation requiring traditional public schools to afford students this right.[341] For example, under South Carolina law, any student facing expulsion must have the right to legal counsel.[342] However, this law applies only to traditional public schools.[343] Charter schools, on the other hand, are exempt.[344] Therefore, because of both exemptions from statutes and inconsistent jurisdictional approaches, there is no clear standard for whether charter school students facing long-term exclusion must be afforded the right to retain counsel.

III. STRENGTHENING DUE PROCESS PROTECTIONS FOR CHARTER SCHOOL STUDENTS

As the number of students attending charter schools continues to increase substantially each year,[345] it is essential that charter school students have full rights and protections. In particular, because charter schools often rely heavily on exclusionary discipline procedures,[346] which typically have

335. *See* Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspensions and Due Process Rights*, 13 J.L. & FAM. STUD. 1, 4 (2011).

336. 754 F. Supp. 906 (D. Me. 1990).

337. *See id.* at 919.

338. 563 S.E. 2d 37 (N.C. Ct. App. 2002).

339. *See id.* at 42. Much like they treat the right to confront and cross-examine witnesses, circuit courts seem to afford weaker protections to students with respect to the right to counsel, as they tend to hold that students do not have the right to retain counsel in disciplinary hearings, whereas district and state courts more often hold that students do have this right.

340. LISA L. SWEM, NAT'L SCH. BDS. ASS'N, *GOSS V. LOPEZ* TO TODAY: THE EVOLUTION OF STUDENT DISCIPLINE 18–19 (2017).

341. *See supra* notes 181–82 and accompanying text.

342. S.C. CODE ANN. § 59-63-240 (2023); *see also* N.Y. EDUC. LAW § 3214 (McKinney 2023).

343. *See* S.C. CODE ANN. § 59-40-50 (2023).

344. *See id.*

345. *See* White, *supra* note 18.

346. *See supra* Part I.B.

significant negative effects on students,[347] it is vital that courts have a consistent way to interpret what due process protections these students should be afforded. A consistent judicial doctrine is particularly crucial because these students generally do not have additional layers of protection from state statutes and regulations.[348] Therefore, not only is it necessary to develop clear and consistent guidance for what protections due process requires in long-term disciplinary hearings, but also due process must be construed in a way that provides strong protections for these students.

This part will argue that the Due Process Clause requires heightened protections for students in long-term school disciplinary proceedings in order to best protect charter school students. Specifically, this part will argue that due process requires students in long-term disciplinary proceedings be afforded (1) the right to confront and cross-examine witnesses, (2) the right to a strictly interpreted "impartial adjudicator," and (3) the right to retain legal counsel. This part will argue that constitutional law and policy arguments support the contention that these rights be afforded to all students in order to provide adequate safeguards for charter school students.

A. The Right to Confront and Cross-Examine Witnesses

Courts should consistently adopt the view that due process requires an opportunity for students in long-term exclusionary disciplinary proceedings to confront and cross-examine adverse witnesses. Adopting this approach would create greater protections for all public school students but have an even more significant effect on charter school students. A requirement that this right be afforded to students facing long-term discipline is justified by both policy and constitutional law.[349]

Supreme Court precedent tells courts to employ the *Mathews* balancing test when determining what process is due in a given situation.[350] The *Mathews* test's three factors support the idea that due process requires an opportunity for students to confront and cross-examine witnesses in long-term disciplinary proceedings.[351] The *Mathews* test first asks what interest is at stake and the significance of that interest.[352] In long-term exclusion cases, the interest in a student's education is substantial.[353] Although every court considering this question agrees that a student has an interest in their education, not all courts seem to recognize the true value of a student's education and the harmful impact that a serious deprivation of their education can have on a student and their future.[354] Data demonstrates that students who have been excluded from their education face serious

347. *See supra* Part I.B
348. *See supra* Part I.C.
349. *See* Pattison, *supra* note 178, at 60.
350. *See supra* notes 173–78 and accompanying text.
351. *See* Pattison, *supra* note 178, at 60–61.
352. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
353. *See* Rosborough, *supra* note 171, at 690 (noting the importance of a student's education, "as it is the very foundation of good citizenship").
354. *See* Pattison, *supra* note 178, at 61.

repercussions, such as being less likely to graduate from high school and more likely to interact with the criminal justice system.[355] Further, for charter school students in particular, who tend to come from low-income communities and communities of color, the value of education and the negative effects of an exclusion can be even greater.[356]

Under the *Mathews* test, the next factor considered is the value of the procedural safeguard.[357] The value to students of having the right to confront and cross-examine adverse witnesses is significant.[358] Confrontation and cross-examination are widely held to be the best way to test the credibility of witnesses and reach the truth in an adversarial proceeding.[359] The key purpose of due process is to ensure that one's property or liberty interest is not arbitrarily or erroneously deprived.[360] Without the ability to challenge the statements of witnesses and ensure their reliability and truth, it is hard to argue that a deprivation is not arbitrary or erroneous.[361] As the court in *Stone* held, the evidence presented at the hearing is central to the determination of the decision-maker and thus there is a responsibility to ensure that the evidence is accurate and reliable.[362] It is difficult to ensure this without providing the student with the opportunity to confront and cross-examine adverse witnesses.

Many of the courts that do not afford this right find that students do not need this opportunity because school administrators can determine the reliability of witnesses on their own due to the nature of their position.[363] However, this argument fails to recognize that, in practice, school administrators often do not have the knowledge or close enough relationships with students to accurately make these determinations.[364] In addition, as some courts have held, allowing credibility determinations to be made solely by a school administrator is too significant of a deviation from the typical standard.[365] Although courts consider school disciplinary hearings to be less formal than judicial proceedings—and thus not all evidentiary rules are applicable—there are certain procedural protections, including cross-examination of witnesses, that remain in other less formal proceedings.[366] For example, an opportunity to confront and cross-examine witnesses must be provided to all parties in administrative hearings on the termination of welfare benefits.[367] The permitted use of cross-examination

355. *See supra* notes 85–95 and accompanying text.
356. *See* Xu, *supra* note 13.
357. *See Mathews*, 424 U.S. at 335.
358. *See* Pattison, *supra* note 178, at 62–63.
359. *See supra* note 187 and accompanying text.
360. *See* Tanious, *supra* note 122, at 1643.
361. *See* Pattison, *supra* note 178, at 62.
362. *See* Stone v. Prosser Consol. Sch. Dist. No. 116, 971 P.2d 125, 128 (Wash. Ct. App. 1999).
363. *See supra* notes 198–202 and accompanying text.
364. *See* Pattison, *supra* note 178, at 63.
365. *See supra* note 226 and accompanying text.
366. *See* Pattison, *supra* note 178, at 63.
367. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

in other less formal proceedings helps to reiterate the value of this protection. Thus, despite the potential that school administrators can make reliability determinations themselves, the value of confrontation and cross-examination remains notable.

Lastly, the *Mathews* test asks whether the interest in one's education and the value of confrontation are outweighed by the burden that requiring this safeguard would place on the school.[368] Requiring this right does place an additional burden on schools, as it can lengthen the time of hearings, require schools to learn some rules of evidence, and require schools to assemble the witnesses to provide live testimony.[369] For the courts that find that due process does not require this right, they generally hold that this additional burden on schools is too high.[370] However, this argument overstates the burden placed on schools and understates the value of this right.[371]

In terms of the weight of the burden, many state statutes already require this right, demonstrating that traditional public schools can easily handle this burden and still effectively mete out disciplinary action.[372] This shows that the additional burden placed on schools by requiring this right is not so significant as to impact schools' ability to use exclusionary discipline as an educational tool. Further, even with this minimal additional burden, the value of ensuring that a decision to exclude a student for a significant period of time is based on true and credible statements outweighs this burden.

Courts can also deal with the issue of potentially overburdening schools by providing that the right to confrontation is not absolute.[373] Courts can find that there may be specific circumstances in which schools can demonstrate that the burden placed on the school by requiring an opportunity for cross-examination is prohibitive.[374] In such a situation, like when a student witness can demonstrate a serious fear of reprisal or when a witness is clearly unavailable, a court can excuse this protection for that case.[375] However, in the majority of cases, such a set of facts will not be present.[376] Therefore, under the *Mathews* test, courts should consistently hold that due process requires the right to confront and cross-examine adverse witnesses in order to ensure fairness and accuracy in long-term disciplinary hearings.[377]

In addition to the *Mathews* analysis supporting this conclusion, there are several strong policy reasons for requiring the right to confrontation in long-term disciplinary hearings. First, it is against fundamental notions of

368. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
369. *See id.*
370. *See supra* notes 203–05 and accompanying text.
371. *See* Pattison, *supra* note 178, at 64.
372. *See* Waterstone, *supra* note 92, at 487 (noting that most states have passed statutes that provide students with the right to confront witnesses in long-term disciplinary proceedings).
373. *See supra* notes 237–39 and accompanying text.
374. *See supra* notes 237–39 and accompanying text.
375. *See supra* notes 237–39 and accompanying text.
376. *See supra* notes 237–39 and accompanying text.
377. *See* Pattison, *supra* note 178, at 65; Stone & Stone, *supra* note 335, at 5; Doty, *supra* note 230, at 359.

fairness to bar students from questioning witnesses.[378] Cross-examination has generally been found to be "an important notion in traditional concepts of justice and fair play."[379] If students do not have the opportunity to confront witnesses, it is possible that a student could be excluded from school for a significant period of time based solely on the "uncorroborated hearsay of an anonymous student accuser . . . ."[380] Finding an individual guilty of charges without sufficient and credible proof does not comport with basic ideas of fairness. Moreover, finding that due process does not require students to have the right to cross-examination grants too much power and discretion to schools to base serious deprivations of a student's constitutionally guaranteed right to an education off of minimal evidence.[381]

Additionally, with the significant use of exclusionary discipline by schools and the substantial negative effects of such discipline on students,[382] it is increasingly important that students have sufficient protections in disciplinary hearings.[383] It is difficult to argue that students have sufficient protections without the ability to confront and cross-examine witnesses. Lastly, as most charter school students do not have the additional layer of protection from state statutes that detail more thorough procedures for disciplinary hearings in traditional public schools and because charter schools tend to rely heavily on exclusionary discipline,[384] courts must find that due process requires these students to have adequate safeguards, including the right to confront and cross-examine witnesses.

B. The Right to a Strictly Interpreted "Impartial Adjudicator"

In order to best protect charter school students, courts must declare that due process requires a strictly interpreted "impartial adjudicator." Thus, courts must hold that students have a right to a long-term disciplinary hearing in front of a tribunal that is free from an appearance of bias. Courts should replace the majority approach—which establishes a standard of actual bias—with the approach taken by the district court in *Gonzales*, in which the court ruled that, to be impartial, tribunals must be free from the appearance of bias.[385] With this approach, decision-makers would be barred from playing other roles in a disciplinary hearing, such as investigator, prosecutor, or advisor.[386] This approach is supported by both policy and constitutional law.

Fundamental fairness, which is the basis of due process, requires that an adjudicator be impartial.[387] Balancing the three factors of the *Mathews* test,

---

378. Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 24 (1981) (reiterating that due process expresses the "requirement of fundamental fairness").
379. *See* Swem, *supra* note 340, at 19.
380. Pattison, *supra* note 178, at 67.
381. *See id.*
382. *See supra* Part I.B.
383. *See* Pattison, *supra* note 178, at 68.
384. *See supra* Parts I.A–B.
385. 435 F. Supp. 460, 464 (1977); *see also* Malutinok, *supra* note 89, at 138–39.
386. *See Gonzales*, 435 F. Supp. at 464.
387. *See* Malutinok, *supra* note 89, at 128.

courts must establish an "appearance of bias" standard, in which an adjudicator is impartial only when they do not play other roles in the disciplinary hearing. The first prong of this test asks what interest is at risk of deprivation and what the significance of that interest is.[388] As described above, both a student's interest in their education and the risk of an erroneous or arbitrary deprivation of that interest is substantial.[389]

The second prong of the test relates to the value of the protection at issue.[390] The value of requiring that an adjudicator be free from an appearance of bias in order to be impartial cannot be understated. When an adjudicator plays multiple roles in a disciplinary proceeding, there is an obvious appearance of bias.[391] When a school administrator chooses to investigate an incident of alleged misconduct, recommend charges against a student, or prosecute the charges against a student, they are invested in and have preconceived opinions about the situation. This creates an appearance of bias, as their prior interaction with the situation has the possibility of influencing the final decision. Because the appearance of bias by the decision-maker (even when there is no evidence of actual bias) can impact the ultimate determination in a disciplinary hearing, the value of ensuring a fully impartial adjudicator, free from both an appearance of bias and actual bias, is significant.

Under the last prong of the *Mathews* test, the possibility of bias when a decision-maker plays multiple roles outweighs the burden that this requirement places on schools. Even though schools will have an additional burden of finding an independent decision-maker, this burden is not as significant as the risk of an erroneous deprivation due to a partial adjudicator. Imposing a burden on schools of appointing independent hearing officers will likely not make hearings nearly as complex as some of the courts make it seem. Schools would merely need to create a list of independent hearing officers and appoint an individual from the list when a hearing is scheduled.[392] This could help to alleviate some of the complications that arise in these hearings, as the hearing officer would enter the hearing with no personal interest in the case or predetermined opinions that could affect the procedure of the case.

Additionally, several state statutes already place this burden on traditional public schools, requiring schools to use independent parties as decision-makers in long-term disciplinary hearings.[393] Traditional public schools in states that have these statutes have been able to absorb this burden and continue to effectively use exclusionary discipline.[394] This helps to demonstrate that this burden is not as significant as the majority of courts make it out to be.

---

388. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
389. *See supra* notes 353–57 and accompanying text.
390. *Mathews*, 424 U.S. at 335.
391. *See supra* notes 290–92 and accompanying text.
392. *See supra* note 306 and accompanying text.
393. *See supra* notes 305–07 and accompanying text.
394. *See id.*

There are also strong policy reasons for the strict approach as to what constitutes an impartial tribunal. First, allowing decision-makers to play multiple roles and still remain "impartial" assumes that administrators are always benevolent and fair-minded.[395] This assumption is flawed and should not be applied to long-term disciplinary proceedings.[396] The idea that school administrators inherently make every decision in the best interest of students is inaccurate.[397]

In practice, there are often other motivations behind school administrators' decisions, including their discipline decisions—such as their personal feelings, experiences, or prejudices.[398] Despite this, courts generally assume that administrators will always be fair-minded and objective, unless there is clear evidence of actual bias. This standard is too stringent and compromises the objectivity of these hearings. Even if students are guaranteed other procedural protections in these hearings, having a hearing in front of a decision-maker who can "make decisions unrelated to the facts in the dispute" puts students at a heightened risk of an erroneous deprivation.[399]

In particular, charter schools have often been accused of using exclusionary discipline as a pretext to push out difficult students.[400] Charter schools often do this in order to ensure strong academic outcomes by their students, as their survival depends on fulfilling the positive student outcomes outlined in their charters.[401] These alleged ulterior motives in employing exclusionary discipline in many charter schools make it critical that students have a hearing in front of a fully independent decisionmaker. If charter schools are required to use hearing officers that are not part of their school and are not aware of their goal of excluding students who may harm the school's outcomes, a risk of an erroneous deprivation, based on ulterior motives, is substantially diminished. Ultimately, courts should require that adjudicators of long-term disciplinary hearings are free from any appearance of bias in order to ensure that all students, but particularly charter school students, are subject to objective and independent hearings that safeguard their constitutional due process rights.

C. The Right to Retain Legal Counsel

Courts should clearly establish that due process requires that students have the right to retain legal counsel in long-term disciplinary proceedings. In particular, charter school students who do not have this protection from state statutes, unlike most traditional public school students, will benefit the most from the establishment of this right. The right to counsel should be afforded to all students for both constitutional and policy reasons.

---

395. *See* Goss v. Lopez, 419 U.S. 565, 579–80 (1975).
396. *See* Tanious, *supra* note 122, at 1676–77.
397. *See id.*
398. *See id.*
399. *See id.*
400. *See supra* notes 106–09 and accompanying text.
401. *See supra* notes 106–09 and accompanying text.

Under the *Mathews* balancing test, due process requires schools to afford students the right to retain legal counsel. First, as stated above, a student's interest in their education and the long-term effects of a deprivation of one's education are substantial.[402] Students who are subject to significant exclusions from school are more likely to be disengaged from school, not graduate from high school, and interact with the criminal justice system, demonstrating the serious implications of an erroneous deprivation of one's education.[403]

Second, the value of the procedural safeguard of the right to counsel is significant.[404] As one scholar has argued, "[w]ithout the assistance of counsel, it is unlikely that a student will have a meaningful opportunity to be heard,"[405] which is the most fundamental component of due process.[406] Without counsel, students are forced to defend themselves on their own, which is a challenging task.[407] Students likely do not have the skills or knowledge to fully understand the proceedings or know how to best defend themselves.[408] Students also likely do not have the ability to recognize when other due process rights are being violated and, without counsel, likely would not know when or how to challenge a procedurally flawed decision.[409] Thus, the challenges that students without counsel face during a disciplinary hearing help to demonstrate the value of a right to counsel.

Although courts that do not recognize a right to retain counsel acknowledge the value of counsel for students, they argue that this value is outweighed by the burden this right places on schools.[410] However, in practice this right places only a minimal burden on schools.[411] Allowing a student to retain counsel does not impose a direct cost on schools.[412] Some courts argue that allowing students to retain counsel would place a burden on schools because it could further judicialize the proceedings or make them too adversarial, as it could force schools to be represented by counsel or lengthen the time of a hearing.[413] However, this argument fails to recognize that most schools are already "represented by an attorney or a school official who is trained in school discipline law and intimately familiar with the hearing procedures" in these proceedings, regardless of whether the student is represented.[414] Additionally, allowing counsel to be present can actually

402. *See supra* notes 353–57 and accompanying text.
403. *See supra* notes 86–90 and accompanying text.
404. *See* Waterstone, *supra* note 92, at 477–78, 484.
405. *See id.* at 477.
406. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)) ("The fundamental requisite of due process of law is the opportunity to be heard.").
407. *See* Waterstone, *supra* note 92, at 477–78, 484.
408. *See id.*
409. *See id.*
410. *See supra* notes 314–18 and accompanying text.
411. *See supra* note 340 and accompanying text.
412. *See id.*
413. *See supra* notes 319–23 and accompanying text.
414. *See* Waterstone, *supra* note 92, at 477.

help to make the hearing process run more smoothly and effectively, as a lawyer who has expertise in the area can help to run the proceedings, rather than a student with a limited understanding of the process. The few courts that have held that due process requires a right to retain counsel have relied on the argument that the value to students outweighs any burden placed on schools by this right.[415]

Moreover, some states have passed legislation that requires traditional public schools to allow students to retain counsel for long-term disciplinary hearings.[416] These statutes show that traditional public schools are not overburdened by this requirement and continue to effectively use discipline to run their schools. In addition, Congress requires that schools provide students with the option of retaining counsel in other circumstances, such as in hearings for students with disabilities, further demonstrating that the burden placed on schools by requiring this right is not that onerous.[417] Thus, under the *Mathews* balancing test, due process requires a right to retain legal counsel.

Several policy arguments also support the contention that students should be afforded the right to be represented by counsel. First, securing this right for students would create a system of checks and balances to ensure that schools are not abusing their power.[418] This system would "level[] the playing field"[419] by allowing the student to have access to the same resources and advice that schools generally do. A lawyer representing a student would be able to more easily recognize when a school is violating a student's due process rights and would be better equipped to defend a student against erroneous charges.

Second, efforts to provide students with counsel in long-term disciplinary hearings have been successful in lowering average rates of suspension and expulsion.[420] As long-term exclusion can negatively impact a student for years into the future and such discipline policies continue to be used at high rates across the nation,[421] it is necessary that students have the option to be supported by counsel in proceedings that can often be too complex and overwhelming for them to comprehend on their own. Lastly, expanding this right for students in all long-term disciplinary proceedings would positively impact charter school students who only derive due process protections from the Constitution.[422] These students generally face disproportionate rates of

415. *See supra* notes 332–41 and accompanying text.
416. *See* Waterstone, *supra* note 92, at 477.
417. *See* Mossman, *supra* note 311, at 602.
418. *See* Simone Marie Freeman, Note, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 642 (2007).
419. *See* Stone & Stone, *supra* note 335, at 6.
420. *See* Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 271 (2008).
421. *See supra* Part I.B.
422. *See supra* Part I.A.

exclusionary discipline[423] and thus deserve access to counsel in order to be best protected during these proceedings.

Although requiring the right to retain counsel through due process is a necessary first step in achieving protection for students, it is not sufficient to ensure equality for all students. The right to retain counsel benefits only the students who have the ability to obtain their own counsel and be represented by that counsel in the hearing. In order to achieve this, students must have the means to hire counsel or access to the resources needed to find pro bono counsel.[424] Thus, not all students will be able to take advantage of this due process protection, and it will likely help students who come from advantaged backgrounds the most.[425] In particular, many charter school students tend to come from low-income communities,[426] and therefore it may be difficult for charter school students to afford to hire their own counsel for these proceedings. To solve this inequality issue, courts could impose on schools a requirement of not only allowing students to retain their own counsel, but also of providing students with counsel or, at a minimum, some sort of legal advocate.

However, courts would likely be reluctant to impose this requirement under *Mathews*, as such a requirement would place a much more significant burden on schools than merely requiring schools to allow students to retain their own counsel. Courts would likely find that this increased burden outweighs the value of the protection to students. A possible solution to this problem could be that schools be required to provide accused students with access to a list of resources to help students find counsel, particularly pro bono counsel. Such a requirement would not be a substantial burden on schools and could help ensure that any student who wishes to be represented by counsel at a long-term disciplinary hearing has the ability to do so. Ultimately, for both policy and constitutional law reasons, and in order to safeguard protections for charter school students, courts must require schools to allow students to retain counsel in long-term disciplinary hearings.

CONCLUSION

Charter school students are deserving of strong due process protections during disciplinary hearings that could result in exclusion from school. The current inconsistent judicial doctrine regarding the due process protections afforded to these students does not provide the level of protection required by due process. Because many charter school students derive their protections only from the Due Process Clause, and not from state statutes, there must be consistent, nationwide guidance for courts regarding the due process protections afforded to students in long-term disciplinary hearings. Due process requires that such guidance include (1) a right to confront and cross-examine witnesses, (2) a right to a strictly interpreted "impartial

423. *See supra* Part I.B.5.
424. *See* Waterstone, *supra* note 92, at 477.
425. *See id.*
426. *See supra* note 13 and accompanying text.

adjudicator," and (3) a right to retain legal counsel. Without these due process protections, charter school students, who are most often vulnerable students, are at risk of serious deprivations of their education interests and all of the negative, life-long consequences that come with such deprivations.