Educational Law: Democracy in the Classroom: Due Process and School Discipline

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COMMENTARY

DEMOCRACY IN THE CLASSROOM: DUE PROCESS AND SCHOOL DISCIPLINE

INTRODUCTION

A teacher walks into a classroom and hears glass breaking. Inside he sees two students running out the other exit. He recognizes them and gives their names and a report of the incident to the principal. The principal calls the boys into the office and tells them that they have been suspended for five days. A denial of due process?

The Fourteenth Amendment due process clause is comprised of both substantive and procedural elements. Substantive due process is concerned with the substantive rights of a person to speech, assembly, hair and dress style. This article will not include a discussion of the substantive due process rights of the student. It will instead concentrate on procedural due process, the right of a person to have a fair procedure followed to determine whether an interference with his rights is justified. More specifically, the discussion will focus on the basic elements of procedural due process, notice and hearing, and attempt to describe their application to the school disciplinary process.

Courts have traditionally demonstrated reluctance in exercising their judicial power in the area of school administration, deferring to the school authorities wide discretionary authority in operating their schools. Typical of the sentiments on the subject is the comment by the United States Supreme Court in the case of Epperson v. Arkansas\(^1\) where the Court stated:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and can not intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.\(^2\)

The underlying reasons for this position of judicial self-restraint are numerous and often reflect the personal predilections of the individual courts. There is, however, a common thread that

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1. 393 U.S. 97 (1968).
2. Id. at 104.
can be found in most of the opinions, and, expressed in its most basic terms, it is the special relationship between the student and the "teacher" that exists in the educational setting. The most often cited aspect of this special relationship in the early cases is the doctrine of *in loco parentis*.  

*In loco parentis* perceives the role of the school in dealing with a child as an extension of the concept of the state as parens patrie. The school, under this concept, performs the functions of surrogate parent while the child is at school since the parent is unable to care for the child. Among the duties that a school must exercise in this role is that of discipline. While the procedures adopted by each school vary, administrators believe that the procedure must be informal so that it will most closely resemble the methodology of the parent.

While the doctrine is conceptually sound, its application fails to recognize the realities of the school-student relationship in that it does not admit to the inherent differences between the role of school authorities and the parent as protector of the interests of the child. The basic difference in perspective from which each sees and deals with the child was explained over a century ago by the Vermont Supreme Court where it said:

> From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection on the alert, and acting rather by instinct than reasoning.

> The school master has no such natural restraint. Hence he may not safely be trusted with all a parent’s authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and with discretion, and hence is responsible for their reasonable exercise.

In recent years not only has the "surrogate parent" concept

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behind school discipline been attacked, but so has the belief that informality in discipline was beneficial and necessary to a child's growth and development. In the case of In Re Gault the court expressed the opinion that the paternal role of the juvenile courts was of dubious merit and practically ineffective as a substitute for due process safeguards. While the case involved juvenile courts rather than school discipline, the conclusion reached that the benefits of an informal procedure are either non-existent or such that they could be preserved under a proper application of due process is equally applicable to the area of school discipline. The court was not challenging the sincerity and interest of those who deal with children, but was simply saying that good motives are not enough when a serious threat to a person's liberty is at hand.

A second explanation for the history of judicial self-restraint in the area of school discipline can be found in the nature of the educational system itself. As the training ground for tomorrow's citizens, schools have been given the task of providing to each pupil through classroom experiences and the disciplinary process an understanding of the need in our society to have rules and to abide by those rules. The importance of school discipline in this development was stated by Supreme Court Justice Black when he said:

School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.

Since school discipline is a part of the educational process, the courts concluded that its implementation and application should be left to the educators who are best trained to that end.

The unique relationship between the student and the teacher

5. 387 U.S. 1 (1967).
6. The possible harm that can arise out of an informal proceeding was outlined in a report by the President's Commission on Law Enforcement:
   There is increasing evidence that informal procedures, contrary to original expectations, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judge and probation officers.
has provided the courts with reason for being hesitant about becoming involved in school discipline. It is a relationship built on trust, friendship and understanding and requires the teacher to perform many roles, including educator, friend and surrogate parent, depending on the needs of the student. An adversary relationship has no place in this context and the teacher seeks to avoid its appearance if at all possible.

The detached formal disciplinary proceeding is seen as a threat to the maintenance of the ideal teacher-student relationship with the corresponding detrimental effect on the student's ability to learn. Instead of being partners in the joint venture of learning, they will become combatants seeking to defeat each other. Regardless of the result, the teacher could never again regain the trust of the student and would remain forever a part of the "system" who could not be trusted.

These arguments were often used by courts as justification for their posture of judicial self-restraint in the area of student discipline even when confronted with the allegations of students who claimed that the informal procedures then in use denied them their due process rights guaranteed in the Constitution. It was not until 1961 in the case of Dixon v. Alabama State Board of Education that a court declared that a student who was not given a hearing before expulsion was denied due process of law. While this case was of great importance because it acknowledged that the judicial process must become involved in school discipline when constitutional rights are threatened, not until 1975 in the case of Goss v. Lopez was such a position adopted by the United States Supreme Court. In opening a new dimension to the role of the judicial branch of government in our society the courts were saying that despite the possible negative effects judicial interference might have on the operations of a school, students are citizens who do not shed their constitutional rights at the schoolhouse door and are therefore entitled to the protections of due process.

The moving force behind the change in attitude by the courts can be traced to a closer look and recognition of the student's right to and interest in an education. In the past half century it has

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become a necessity of our society and its importance to an individual defies measurement. As eloquently stated in *Brown v. Board of Education*:\footnote{11}  

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.\footnote{12}

As important as the interest in education is in our society, a person’s right to an education is not in itself a constitutionally protected interest so as to be clothed with due process protection.\footnote{13} This is not necessarily fatal, however, as protected interests in property are not normally created by the Constitution but rather are defined to be such by independent sources such as state or federal statutes.\footnote{14}

State laws\footnote{15} which extend the right to a free public education to all citizens have been found to create a “protected interest” that can not be denied without satisfying the requirements of due process. Such a position was pronounced in the case of *Goss v. Lopez*\footnote{16} where the Court stated:

> Having chosen to extend the right to an education to the people of appellees’ class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. (citation omitted).

> Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not “shed their constitutional rights at the schoolhouse door.” *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). The

\begin{footnotes}
\footnote{11}{347 U.S. 483 (1954).}
\footnote{12}{Id. at 493.}
\footnote{13}{San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973).}
\footnote{14}{Goss v. Lopez, 419 U.S. at 572, citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972).}
\footnote{15}{See Wis. Stat. § 120.13 (1973); Ohio Rev. Code Ann. §§ 3321.01 et seq.}
\footnote{16}{419 U.S. 565 (1975).}
\end{footnotes}
authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away from misconduct without adherence to the minimum procedures required by that Clause.17

The courts since Dixon generally recognized the effect that an expulsion or long term suspension would have on a student's right to an education and required schools to adopt disciplinary procedures that conformed with the requirements of due process.18 They were generally unwilling however, until Goss to accord the same protections to a student when the penalty involved was of short duration. The theory behind according different treatment to an expulsion and a short suspension was the belief that the short suspension constituted neither a severe detriment or grievous loss to the student, and being therefore de minimis, due process protections were not required.

The United States Supreme Court in Goss v. Lopez cast aside the distinction between expulsion and short suspensions and held that any penalty arising out of a disciplinary proceeding that denied a student the right to attend school could not be imposed without conforming to the requirements of due process. In reaching this conclusion the Court made the following comment:

. . . [W]hether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. (citation omitted). . . . [T]he length and consequent

17. Id. at 574.
severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. (citation omitted). The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. (citation omitted). *A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause.* (emphasis added).

It is generally conceded that due process in school discipline does not require a full trial laden with all the components of a court of law, as the disciplinary process is not to be considered a criminal proceeding.21 On the other hand, the procedure required must be something more than an informal interview and the rudiments of an adversary proceeding should be preserved.22 Additionally there is the requirement that findings of the disciplinary proceeding must be based on evidence of a nature from which a substantial basis of fact can be reached.23

I. WHAT PROCESS IS DUE

The actual form that the disciplinary proceeding must take so as to conform with the requirements of due process is no different than any other area of the law and was outlined in *Dixon v. Alabama State Board of Education*.24 According to Dixon, a student subject to discipline is entitled to:

1. Notice of the charges which includes a statement of the specific charges and grounds to substantiate those allegations,
2. A hearing, prior to the imposition of discipline, the nature of which depends on the circumstances.
3. The right of the accused to be given the underlying evidence which forms the foundation for the accusation leveled against the student, and
4. The right of the accused to be accorded the opportunity at the hearing to present his own defense and to produce either oral testimony or written affidavits on his behalf.21

In determining the scope and nature of these elements that is required to satisfy the requirements of due process one must balance the competing interest involved.26 The weighing of the competing interests must be performed for each situation separately, reflecting the flexible and fluid nature of due process itself. As stated by Justice Stewart, due process is an individual and practical matter that by its very nature "... negates any concept of inflexible procedures universally applied to every imaginable situation."27

The balancing process must therefore be performed whenever a charge of denial of due process is at issue and requires to be placed on one side the importance of allowing school personnel to operate the school, given the complex and special demands of education. This need of the school officials to handle all aspects of education, including discipline, with minimal outside assistance, is especially strong in emergency situations that threaten the tranquility of the school atmosphere.

Against this must be placed the student's protected interest in education. While the Court in Goss said that this interest was not de minimis,28 one should not infer from that statement that the court was suggesting that a student's interest at stake in a case of expulsion is the same as when he is subject only to the penalty of a short suspension.

The permanency of expulsion is likely to have far more impact on a student's emotional state and his ability to acquire an education than the short suspension. The due process that is required in each of these situations should therefore reflect this difference by requiring more formalized procedures in expulsion cases than is

25. Id. at 158-59.
28. 419 U.S. at 576.
required for short suspensions.

Such a basic difference at the outset between the requirements of due process for expulsions and short suspensions was recognized in Goss v. Lopez. While not spelling out how significant the differences between the two should be the Court said:

We should also make it clear that we have addressed ourselves solely to the short term suspensions, not exceeding 10 days. Longer suspension or expulsions for the remainder of the school term, or permanently, may require more formal procedures.

The balance of this article will consist of an analysis of the elements of due process that are subject to the balancing test outlined above. For the sake of clarity and a better understanding of the scope of each element, a separate analysis will be made of each element. It should be remembered, however, that denial of due process is not predicated on the failure to satisfy any one element but rather can only be determined from looking at the procedure as a whole.

In the analysis of these elements, a distinction will also be made between short suspensions and long term suspensions-expulsions where the courts have found a particular element requires different treatment. Exactly what constitutes a short term or long term suspension has been determined by the number of days that a student is prohibited from attending school. Goss draws the line at ten days. Whether this particular number of days is conclusive in this respect remains to be settled.

As a final introductory comment, this article's analysis of due process will concentrate on its procedural requirement, that is to say, what form the disciplinary proceedings must take. A very important aspect of school discipline, the rules and regulations that provide the grounds for discipline of a student and their compliance with the requirements of due process is beyond the scope of this article.

A. Notice

In outlining the notice component of due process, Dixon v. Alabama State Board of Education held that notice requires a statement of the specific charge and grounds which, if proven,
would justify expulsion. The purpose of the notice requirement is to provide sufficient information to the accused of the nature of the charges being made against him so that he can prepare and present an adequate defense.

1. Long Term Suspension-Expulsion

The courts since Dixon have expanded on this general statement of principle by saying that in severe disciplinary cases, the student should be given notice in writing of the specific grounds for discipline and the nature of the evidence on which the proceeding will be based. Exactly what will constitute a "sufficient statement" for due process purposes depends on the circumstances of each case, but the courts have required as a minimum that the substance of the charge to be described in sufficient detail, and that the notice contain the names of the principle witnesses and some explanation of the facts to which they will attest.

A second aspect of the notice requirement of due process is the interval of time between the notice of the hearing and the hearing itself. Giving a student notice of the charges which he faces is not very beneficial in preparing his defense and can not be considered adequate for due process purposes if he is not given sufficient time to analyze the charges so as to be able to intelligently prepare that defense.

32. Id. at 158-59.

33. Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416, 418 (W.D. Wis. 1969); Lowery v. Adams, 344 F. Supp. 446, 451-52 (W.D. Ky. 1972); Linwood v. Board of Education, City of Peoria Sch. Dist. No. 150 Ill., 463 F.2d 763, 765 (7th Cir. 1972), where the charge "for allegedly attacking and striking other students in the halls of the school on September 10, 1970" was found to be sufficient.

In Keller v. Fochs, 385 F. Supp. 262, 266 (E.D. Wis. 1974), the court found the following charge insufficient:

"Your son continues to conduct himself in an irresponsible and disruptive manner" and "he has been deliberately defiant of reasonable requests by teachers," "on three occasions within the past few weeks."

The court said that these statements require more approximate dates and recitation of the specific conduct that is in question.


In making a determination as to how much time should elapse between the notice and the hearing, one must look at the particular circumstances of each case. Factors to be considered in determining what is a sufficient time period include the nature and complexity of the charge, the type of evidence needed to answer the charge and its availability, and the time needed to gather witnesses.

While the timing aspect of the notice requirement has not been a determinative issue in most school discipline litigation, courts have commented on the need for the time to be reasonable. As a result, the cases do not fall into any particular pattern. In making a determination as to whether the time is sufficient in length for any particular case, the focus must be on whether the student was disadvantaged in fact in preparing his defense.

2. Short Term

The notice requirement for short term suspensions is far less structured than that required for expulsion. The United States Supreme Court in *Goss v. Lopez* said that a student facing a short suspension must be given "some kind of notice and some kind of hearing." Justice White later expanded on this requirement saying that there should be oral or written notice of the charges against the student and that the notice should inform the student of what he is accused of doing and what the basis of the accusation is.

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The time between the notice and hearing can be too long. In *Graham v. Knutyen*, 351 F. Supp. 642 (D. Neb. 1972) the court said that two to three months between notice and the hearing is unreasonable and excessive and constitutes constructive expulsion. The court recognized that delays may be partially justified because of the special subjective character of the individual problems that face school officials, including environmental, social and intellectual differences. Circumstances may require testing, conferences and consultation with outside third parties prior to the hearing. Delays may be caused by uncooperative parents or students. Regardless of these factors which tend to require time, the school still has a duty to arrive at a conclusion and decision without delay.

38. *Id.* at 579.
39. *Id.* at 581.
The timing requirement of notice is also less imposing in the short term suspension. The court in *Goss* stated:

There need be no delay between the time "notice" is given and the time of hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred.40

While the court found that there need be no delay between the time the student is given notice and the time of the hearing, care must be taken to note that the court qualified that statement by saying "in the great majority of cases," suggesting that this summary action is not applicable to all situations. A student can still be placed in a position of substantial disadvantage as a result of "insufficient timing" so as to be denied a fair hearing. While the length of time will seldom be equivalent of that required in expulsion cases, the test of whether in fact the student was disadvantaged as a result of a lack of time is still a viable test to be used.

**B. The Hearing**

1. **Overview**

Exactly what constitutes a "hearing" for due process purposes presents the same problems as defining due process because of the flexibility courts have accorded to the term. In its most elementary form it requires a hearing body to hear the evidence constituting the charge, hear the accused, and make available to the accused a statement which reflects the decision they have made.

In trying to define what type of hearing is required before disciplinary action can be taken against a student the courts have noted at the onset that it would be a very strange discipline system if there was no communication between the school and the student with all discipline decisions the product of a secret one-sided determination of the facts. Not only would such a system be contrary to the fundamental framework of education, but secrecy in itself is not congenial to truth seeking and would contradict all that the school tries to teach a student.41 Therefore, courts have stressed that some effort must be made to inform the student of his alleged wrong and provide him with the opportunity to tell his side of the story.42

40. *Id.* at 582.
42. *Id.* at 581; Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961).
2. Long Term Suspension-Expulsion

The framework of this hearing was enumerated in Dixon v. Alabama State Board of Education. The court made no attempt to establish a universal standard for the hearing but said that the form that such hearing would take depends on the circumstances of each case. The overriding consideration in the establishment of any procedure however, was to enable both sides to have the opportunity to be heard by the hearing body.

The court then outlined the basic rudiments of the hearing. They said that while a school disciplinary hearing was not of such a nature to require a full-dress judicial hearing, with the right to cross-examine witnesses not being required, the basic concept of an adversary proceeding should be preserved. This meant, said the court, that at a minimum the student must be given the names of the witnesses to be used against him and an oral or written report of the facts to which each would testify. In addition, he should be given the opportunity to present a defense to the charges and to be permitted to produce either oral testimony or written affidavits of witnesses on his behalf. While the hearing need not be a full fledged trial, the seriousness of school disciplinary matters requires that the student be given the fullest opportunity to present his case.

3. The Short Term Suspension

The Supreme Court in Goss v. Lopez held that in most short term suspensions only an “informal” hearing was required to satisfy the demands of due process. This informal hearing requires giving oral or written notice of the charges to the student and if he denies them, an explanation of the evidence the authorities have. The student is then provided the opportunity to present his side of the story.

This informal give-and-take proceeding that is authorized by Goss would be in most cases similar to the type of hearing that a father would give a child who he suspects has done something wrong. It is not however, to take on the character of explaining to the student why he is being punished but should retain an investigative and search-for-the-truth tenor.

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44. Id. at 159.
46. Id. at 581.
47. Id. at 582; see p. 720 infra.
This need for the hearing to serve the purpose of fact-finding rather than explaining the punishment should exist even where the disciplinarian himself witnessed the conduct which forms the basis for the charge. Justice White in speaking of this situation and the need to prevent hasty judgments commented:

But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.\(^\text{48}\)

Given this "informal hearing," the question arises about the duty of the disciplinarian at the culmination of the informal hearing with the student. Is he free to suspend the student immediately without inquiring into the information and explanation given to him by the student at the hearing?

The Court in \textit{Goss} at least suggested that in some circumstances the initial informal hearing may not be enough. The initial hearing may alert the disciplinarian to the existence of a genuine dispute about the facts and arguments concerning cause and effect. The student may offer an alibi. If these questions exist, the Court said that the disciplinarian may make a determination that there is a need to summon the accusor, permit cross-examination, and allow the student to present his own witnesses; in other words, conduct a more formal hearing.\(^\text{49}\)

This apparent requirement for the disciplinarian to take additional investigative measures if there exists a genuine dispute over facts or cause and effect would probably not require a more formal hearing in all circumstances. Many times a simple check of the student’s story by talking to witnesses or going to the scene of the occurrence would be sufficient. At relatively slight expense to the disciplinarian, it provides the student with a further safeguard to insure that the disciplinarian has all the facts before him in their proper light before any decision on the guilt of the student is made.

This additional requirement for the hearing body to take the added step of looking into the student’s story has found acceptance in another school suspension case, \textit{Buck v. Carter}.\(^\text{50}\) There the court said that if the student offers a statement that says that he was not present when the alleged act occurred, and says that there are witnesses who will say that he was elsewhere at the time, that

\(^{48}\) \textit{Id.} at 584.

\(^{49}\) \textit{Id.} at 583-84.

\(^{50}\) 308 F. Supp. 1246 (W.D. Wis. 1970).
it is probably constitutionally necessary to make an investigation of that alibi.\(^{51}\) Likewise if the student admits his presence when the act occurred but offers an explanation that might reasonably constitute an excuse, it may be necessary to provide a second hearing where the student could confront his accusers.\(^{52}\)

This duty for the disciplinarian to investigate facts that have been put in issue by the student's statements in the informal hearing seems to be fundamentally sound. While the interest of the student that is threatened by punishment is not as substantial in short term suspensions as in expulsions, *Goss* still found that the actions that led to that interest being taken away must comply with the requirements of due process. The need for this additional safeguard becomes even more apparent when one realizes that since the student is not entitled to present witnesses on his own behalf at the hearing as a matter of right,\(^{53}\) his defense is limited to what he tells the disciplinarian. A person could hardly be considered to have been afforded the right to present a meaningful defense if there was no vehicle available to the student through which his statements could be verified and reinforced.

The additional burden that would be placed on the hearing officer to conduct an inquiry into the student's statements before determining guilt would be minimal. In many cases the additional investigation will consist of nothing more than talking to the accusing teacher or student again in light of the questions raised by the student. In others it will involve talking to other witnesses whose existence was revealed to the disciplinary officer for the first time at the initial hearing or going to the scene of the incident to try to recreate what happened in light of statements by both sides. If these further inquiries are not conclusive in establishing the student's guilt, the disciplinarian would have to take the step suggested in *Goss* and permit a more formal hearing to take place where the accused student could confront the witnesses and present witnesses in his own behalf.

The interests of the school that prevented the requirement of a full hearing\(^{54}\) are not applicable to this type of secondary investigation. The only cost to the school would be the time spent by the person checking the information given by the student and could be

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51. *Id.* at 1249.
52. *Id.* at 1249.
54. *See Goss v. Lopez*, 419 U.S. at 583 for a detailed discussion of these interests.
done with minimal disruption of either teachers or students. While some may argue that this could be substantial given the great frequency of suspensions in our school systems today, it is small compared to the reduced risk of error that would result and may instill in the accused student the belief that his opportunity to explain his position was more than a formal meaningless gesture.

II. WHEN A HEARING IS NECESSARY

While *Dixon* and other cases speak of procedural due process requiring a hearing, the courts have not found that in all cases the failure to have a "hearing," in its most basic sense, is a denial of due process. Where a student unequivocally admitted misconduct that was the basis of the charge, courts have held that a hearing, functioning as a procedural device to insure a fair and reliable determination as to whether the student committed the alleged act, is not essential.\(^5\)

So too was a hearing not found to be necessary where a student has notice of the rule (it was read to him), the consequences of its violation, that the acts which he was doing were in violation of that rule, and yet nevertheless proceeds to violate the rule.\(^6\)

The courts however, have not completely eliminated the right to a hearing in these special circumstances. They have said that while the hearing is not required to serve as the vehicle for the establishment of whether the alleged misconduct actually occurred, a hearing must still be afforded the student for the more limited purpose of providing an opportunity to present mitigating circumstances that would be relevant to the issue of punishment.\(^7\) It would seem that a hearing should also be provided the student so that he can challenge the regulation that forms the basis for his suspension, either on grounds of an inherent defect in the statute or as it applies to him, including discriminatory enforcement.

III. CHARACTER OF THE HEARING

The hearing need not be a formalized proceeding.\(^8\) In short suspensions it can be of the nature of a fairly informal administrative consultation that bears very little resemblance to a trial.\(^9\) The

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\(^5\) Betts v. Board of Education of Chicago, 466 F.2d 629 (7th Cir. 1972).
\(^6\) Farrel v. Joel, 437 F.2d 160 (2nd Cir. 1971).
\(^7\) Betts v. Board of Education of Chicago, 466 F.2d 629 (7th Cir. 1972); Keller v. Fochs, 385 F. Supp. 262 (E.D. Wis. 1974).
\(^8\) See p. 716 supra.
discipline cases that would result in long term suspensions or expulsions, as we shall see, require more.

A critical element of either proceeding is the atmosphere in which the hearing is conducted. In *Williams v. Dade* the court in commenting on the character of the hearing held that the hearing must not be of such a character as to explain the decision that had already been reached, it instead must be so as to objectively hear the facts and reach a fair decision.

The importance of this aspect of the hearing can not be underestimated if the hearing is to fulfill its function of trying to establish the facts in question and to minimize the possibility of the result of the hearing being a miscarriage of justice. To permit the function of the hearing to be to explain rather than investigate the facts would be to assume the fact that is normally to be established by the hearing and to relegate the right of the student to present his side of the story into an exercise of futility. As Justice Frankfurter said:

... [F]airness can rarely be obtained by secret, one-sided determinations of the facts decisive of rights. ... Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.

**IV. IMPARTIAL HEARING BODY**

The question of who is to hear a case of alleged student misconduct is generally established by school board regulations or by state statute. The lack of financial resources, however, prevents the establishment of one person or body whose sole function is to hear discipline cases. As a result, school officials have been forced to staff their discipline hearing bodies with people who have other duties with the school.

The result of this multiplicity of roles within the school structure is that often the person who conducts the investigation of the alleged misconduct is the same person(s) who must determine if the conduct in fact occurred and warrants discipline. Immediately the

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question of whether a student received a fair hearing because of the lack of the impartiality of the hearing body arises.

The requirement of impartiality does not require or demand that a hearing body have no views whatsoever on matters that come before them for decision. It does, however, prevent one from holding predetermined views toward particular issues or parties (a personal bias) or a personal "interest" in the outcome of the controversy. This latter "interest" most often results when a person(s) occupies a combination of roles that can include advocate and judge.

The student who seeks to challenge the impartiality of a school official or board has to present a strong case of personal bias, interest or combination of functions in order to be successful. Recent cases in rejecting the need for an impartial decision maker have generally justified their decision on the grounds that to require an independent person (one who would not be a school official) to hear discipline cases would destroy the effective control over the schools by the people in charge with its management, a control mandated by law to be in the school board. A second reason presented is that it would deny the people who best understand the needs and working of the educational process the power to effectively control the school environment to insure the maxi-

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The courts have adopted the position that school officials involved in the initiation and investigation of charges are not per se disqualified for conducting hearings, but that particular circumstances of a case can require an individual(s) withdrawal from the hearing. In Center for Participant Education v. Marshall, 337 F. Supp. 126 (N.D. Fla. 1972) the court at page 135 illustrated this principle saying:

This limited combination by a school of prosecutorial and adjudicatory function is not fundamentally unfair in the absence of a showing of other circumstances such as malice or personal interest in the outcome, . . . extraneous political pressures, personal prejudice.


A few recent cases, however, have demonstrated that a lack of impartiality can be so substantial a deprivation to the student so as to constitute a denial of due process. In *Sullivan v. Houston* a student had used profanity toward the principal and resumed the sale of newspapers as a direct challenge to the principal. The court found that this principal in conducting the hearing did not possess sufficient detachment from the circumstances to provide the student with a fair and dispassionate hearing.

The reason for the finding was cast in terms of personal confrontation between the student and the principal to the extent that it would be difficult for the principal to conduct a fair hearing. In reaching this decision the court pointed out that the principal acknowledged that the purpose of the hearing in fact was not to hear the student's story but to extract an apology.

In an expulsion case involving a student's possession of marijuana the court found that the school board in acting in both the roles of investigator and hearing body could not maintain sufficient impartiality to satisfy due process. The court said that under these circumstances "for the board to act as investigator, prosecutor, judge, and jury makes a mockery of the notion of a fair hearing."

While these cases reflect a willingness of the courts to look at the impartiality of the hearing body, absent a strong combination of personal bias and/or dual functions, the argument of lack of an impartial tribunal being a denial of due process will likely fall on deaf ears.

68. 333 F. Supp. at 1175.
70. Id. at 839.
71. The necessity argument which provides justification for having people occupy two or more roles in the disciplinary process should be used carefully to avoid its being thought of as a valid defense in all cases. It would seem that when there are alternative procedures available to decide a particular case, the procedure which would produce the greatest appearance of impartiality should be used. In addition, a person who is on the hearing body should refrain from performing other functions wherever it is possible, and if not possible and he can disqualify himself from participating on the hearing panel without depriving the board of the power to act, he probably must do so if the result is an impartial board. American Cyanamid Co. v. F.T.C., 363 F.2d 757 (6th Cir. 1966); Texaco Inc. v. F.T.C., 336 F.2d 754 (D.C. C. 1964).

A school hearing body should also take steps wherever possible to insulate its decision-making and adversary function when setting up a procedure to be used in discipline cases. This could be accomplished by assigning the role of investigator to people who are prevented from then participating in the decision-making process; an example would be the creation
V. PRODUCTION AND CROSS-EXAMINATION OF WITNESSES

In outlining this aspect of the hearing Dixon found that the student must be given the names of the witnesses to be used against him and an oral or written report of the facts to which each testifies. Thereupon the student is to be given the opportunity to present to the hearing board his own defense in the form of oral testimony or written affidavits in his behalf. Cross-examination of witnesses was not required.1

In interpreting and implementing these guidelines courts have generally held that due process does not require the mandatory production of prosecution witnesses and the right to cross-examine witnesses that are present at the hearing.2 This strict and limited reading of Dixon has not been accepted by all courts however, and many courts suggest the desirability of the production of the accusatory witnesses and the right to cross-examine those witnesses.3

Before looking at the reasons for the difference in opinion on the issue by the courts it is especially important to reiterate again the nature of due process of being a balancing process that is to take into account the interest of both parties. Factors that are


considered in the "weighing" include the nature of the right claimed, the benefit to the student in having a procedure available to him, the disadvantage of not having it, and the burden that the procedure would place on the proceeding if the right was recognized.

In determining whether a student has the right to confront the witnesses at the hearing and to cross-examine them, the courts have frequently pointed to two factors that have caused them to be hesitant in finding such a right. These are the lack of authority of the school officials to compel the attendance of witnesses and the burden that the recognition of such right would place not only on the proceeding itself but also the effect this right would have on the educational process.

The principal concern of these courts if this right of the accused student was recognized is the effect it would have on the student-witness who provides to the school authorities the information upon which the disciplinary proceeding is based. There is a fear expressed that fellow students who are subject to cross-examination are often the subject of reprisal from students about whom information was given. They are also in a position where they could suffer extreme humiliation and embarrassment at the hands of a skilled questioner, especially an attorney. In addition, the time spent testifying at a hearing where cross-examination was permitted could be substantial, thereby denying the student the right to use such time for his own educational pursuits.

On the other hand, the interest of an accused person in the right to confront his accusers and submit them to cross-examination is a right that has been recognized as vital in a number of criminal and administrative hearings. The importance of such right was eloquently stated by Justice Warren in *Green v. McElroy* where he said:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental actions

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seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right to be confronted with the witnesses against him. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, (citation omitted) but also in all types of cases where administrative and regulatory action were under scrutiny. 81 (emphasis added).

A. Short Term Suspensions

In weighing the interests of the school against that of the student, the courts in the discipline cases where a short term suspension is the punishment have declared that the right to cross-examination was not necessary to insure a student a fair hearing. 82 In denying its applicability as a matter of right, the court cited the possible overwhelming burden it would place on administrative facilities and resources and also pointed out the impact it would have on the effectiveness of discipline as a part of the educational development of the student. The court concluded, however, with the statement that in some circumstances it might be required. 83

Exactly what circumstances will come under this exception is difficult to foresee. It would seem that the most likely situation will be where the witness is a teacher or other school personnel. Their appearance would present little threat to them personally, could be achieved with only slight disruption to the hearing, and yet at the same time provide a valuable safeguard to the accused student.

A second circumstance that may require the right to cross-examination arises out of the statement in Goss where the court said that when the disciplinarian is alerted to the existence of a dispute about facts and arguments concerning cause and effect he

81. Id. at 496-97.
83. Id. at 584.
may summon the accuser and permit cross-examination. While admittedly the decision lies in the discretion of the school authorities, it would seem that if this power was not exercised in good faith by the disciplinarian it could be grounds for finding that the student was denied a chance for a fair hearing. The burden of establishing the lack of good faith would of course fall on the student and most likely would be difficult to prove.

B. Long Term Suspension-Expulsions

Long term suspensions and expulsions may require more. Given the increased penalty and irreparable harm to the student that an expulsion imposes, the procedural due process "balancing of interest" test would seem to require increased emphasis to the student's interest in education being protected and a corresponding lesser concern with the additional burdens and inconveniences of time and money that may be imposed on the school than was required in the case of the short suspension.

This greater concern for protecting the student's rights would probably not be sufficient to sustain an objection to the use of an affidavit where the testimony is of minor importance or of a cumulative nature. When, however, the outcome of the hearing is directly dependent on the credibility of witnesses whose statements are conflicting, it would seem that cross-examination should be required in helping to establish the truth, absent compelling reasons for not so requiring it.

The need for the student to be able to cross-examine those who will testify against him has been recognized with increased frequency by the courts. They have pointed out that the identity of the student witness must be revealed as a matter of minimum due process under Dixon so that the threat of reprisal against the student witness exists even if he is not required to appear in person at the hearing and be subjected to cross-examination. Absent

84. Id.
85. Id.
87. Id. at 387; De Jesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972); Tibbs v. Board of Education of Franklin, 276 A.2d 165 (1971).
88. See cases cited note 74 supra.
89. Tibbs v. Board of Education of Franklin, 276 A.2d 165, 170 (1971). The court noted that while there may be in some cases a threat of reprisal to student witnesses, the schools must be content to deal with threats or intimidation by involving the help of the law enforcement authorities who must be present and be capable of fulfilling their responsibilities.
compelling circumstances, there would be little reason then for not requiring the substantially more revealing personal testimony of witness to be made available to the trier of the fact and the defense in the search for the truth.\textsuperscript{90}

Procedures that meet the requirements of due process could easily be formulated which would satisfy the student’s need for the right to confront and cross-examine his accusers yet at the same time recognize instances when the school’s and witnesses’ interests must be considered. What follows is a proposed outline of a procedure to that end.

\textbf{C. Proposed Procedure}

The accused student should by right be allowed to conduct a cross-examination of all witnesses subject to limitation, however, by the hearing body when they determined that the questions being asked by the student or his attorney were badgering the witness.\textsuperscript{91} The hearing body would be empowered to carefully control the scope of the cross-examination to prevent abuse by limiting it to the material essentials of the direct testimony and not permitting undue protraction.\textsuperscript{92}

While this somewhat restricted procedure for permitting cross-examination may be suitable for the vast majority of cases, there may be circumstances where requiring a student witness to tell his story in the presence of the accused student and to be subject to cross-examination would inhibit rather than encourage the search for truth.

When found to exist, the right to cross-examination would have to give way. Whether this situation exists would be a determination to be made by the school officials.

This determination by the school not to require a witness to be subject to confrontation and cross-examination would not be subject to the unfettered discretion of the school officials. As was stated by the court which advanced portions of this procedure:

\ldots [T]he board’s conclusion to dispense with confrontation and cross-examination must be based on a good faith decision, supported by persuasive evidence, that the accusing witness will be inhibited to a significantly greater degree than would result sim-


\textsuperscript{92} Tibbs v. Board of Education of Franklin, 114 N.J. Super. 287, 276 A.2d 165 (1971).
ply from the inevitable fact that his accusations will be made known to the accused student. Such a conclusion may also be based on special circumstances concerning the accusing witness.93

If these special circumstances can be established convincingly to exist, the school then would be permitted to hear the witness’ testimony out of the presence of the accused student. Responsibility for probing the testimony of the witness would then fall upon the hearing body or perhaps an impartial person who could represent the interest of the accused student. All testimony taken in this matter would have to be furnished to the student in the form of a summary or transcript.94

Admittedly this procedure leaves the decision of whether to permit confrontation and cross-examination in the hands of school authorities. It does, however, require them to permit at least a limited form of cross-examination in the vast majority of cases and establishes standards against which their decision not to permit confrontation and cross-examination can be measured.

VI. RIGHT TO COUNSEL

The right to counsel has gained increasing acceptance in recent years in the administrative and civil aspects of the law.95 Its recognition as a vital part of due process is generally grounded on the need for added protection for an accused when he is subject to a severe penalty if found guilty of the act charged. In comparing the penalties of prison in criminal law (where the right to counsel is a matter of right) and expulsion in school discipline, U.S. District Court Judge Doyle said:

... [E]xpulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent academic credit for a particular term, may well be and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding.96

94. Id. at 76.
Not only is the student subject to a penalty severe enough to warrant the added safeguard of an attorney, the needs of the student in being able to have counsel as a matter of right are substantial. A student who is charged with misconduct in the secondary school is a fragile creature who is inexperienced in defending himself against accusation by adults. He will be awed by the nature and importance of the proceeding thereby becoming reluctant or unable to adequately present his position. His inability to analyze whether the regulation he is accused of violating is sufficient to withstand legal attack and his lack of skill in asking questions, particularly when in cross-examination, makes him no match when pitted against adults with an adversary proceeding.\(^7\)

The disadvantages of recognizing the right to counsel is found primarily in the fear of an increased adversary relationship that would develop between the student and the school authorities. Other disadvantages cited by the courts is the fear that an attorney through the use of his skills will dominate and control the hearing and its result and that it will substantially increase the formality, length and expense of the hearing.\(^8\)

The courts are divided as to whether the student should be afforded the right to counsel if he desires one.\(^9\) The question is not a real issue in most cases because most school authorities either grant the student the right to have counsel when he requests it or it is a right guaranteed by statute.\(^10\)

\(^7\) *In re Gault*, 387 U.S. 1, 36 (where the right to counsel was recognized in juvenile delinquency proceedings); Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378 (1969).


\(^10\) See for example Wis. STAT. § 120.13 (1973).
A. Short Term Suspensions

In short suspension cases, the informality of the hearing that was recognized as permissible by *Goss* would be inconsistent with granting the student the right to counsel. As explained earlier, in many cases the hearing may be on the same day and even within minutes of the alleged act by the student. To permit counsel in these situations would severely restrict the possibility of quickly resolving the problem since the hearing could not be held until counsel was retained and able to arrange a meeting.

The court in *Goss* recognized the impracticality of requiring an attorney in short term suspensions and declared that whether an attorney can be present for the hearing is a matter within the discretion of the disciplinarian. It would seem that the difficult cases that may require counsel would be rare and would probably involve either a substantial personality conflict between the student and hearing officer such that conversation to any meaningful extent is impossible or else a student who is unable to grasp and participate to any degree in the informal give and take of the informal hearing.

B. Long Term Suspension-Expulsion

The long term suspension and expulsion hearing stands on different footing. Due to the seriousness of the charge, the fact finding process is extremely important. In addition, the fear of an adverse atmosphere being created as a result of the presence of the attorney is pure folly, the fact that the student is subject to a serious penalty will create an atmosphere of antagonism that will exist irrespective of whether the student is permitted counsel. In light of the relative infrequency of this type of hearing, the cost and time arguments are not persuasive, especially when one considers the interest of the student at stake.

The school's fear of the possible disruptive effect that an attorney could have in a school disciplinary hearing has been overstated. In *Goldberg v. Kelly* Justice Brennan, in speaking of the advantages and disadvantages that the presence of counsel has on a hearing, said:

Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and gen-

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erally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.103 (Emphasis added).

In addition, it would seem necessary in the context of direct questioning and cross-examination that the student be entitled to appear before the hearing body with the same degree of skill and competence in questioning as those who are presenting the case against him. To deny this to the student would be to in effect deny the student the right to a meaningful cross-examination.104

While there seems to be a need for the student to have counsel with him at the hearing if he so desires, it is unlikely that it will take court action for this right to be given to him. Many states have statutes which permit by express language the right for the student to have an attorney.105 Secondly, there will be very few school officials who would deny the student the right to be helped by an attorney if he requested one. They are very cognizant of the interest of the student that is at stake and will accede to any reasonable demand, the request of permitting counsel to assist certainly being one.

VII. WHEN A HEARING IS NOT NECESSARY—EMERGENCY

A question that arises in this aspect of due process is whether, and under what circumstances, a suspension of a student can be enforced prior to the hearing to determine the validity of the charges that justify suspension or expulsion. While this issue could arise in the context of a short suspension, it is most likely to be found when the school would like to impose an interim suspension until such time as a final finding of fact can be made.106

A basic concept of due process requires that a person can not be deprived of a protected interest (the right to an education) prior to a hearing where guilt or innocence is determined that would

103. Id. at 270-71.
104. Procedures could be adopted that would reduce the threat of students' counsel controlling the hearing or intimidating witnesses. These could include requiring the lawyer to remain seated when speaking to witnesses or board personnel and requiring the counsel to receive permission to speak from the head of the hearing before he speaks. Abbott, Due Process and Secondary School Dismissals, 20 CASE W. RES. L. REV. 378 (1969). A second possible procedure could be that pronounced in Estaban v. Central Missouri State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967) that permitted counsel to be present with and help the accused student but not allow the attorney to cross-examine any adverse witness.
105. See for example Wis. Stat. § 120.13 (1973).
justify that deprivation.\textsuperscript{107} To be considered against this interest, however, is the obligation of the school to provide an atmosphere which is conducive to attaining an education and to protect the rights of other students to an education as well as their right to be free from assaults on their persons or property.

The courts in looking at these competing interests have decided that when the disruption of the educational process will be imperiled if the student is permitted to remain in the school pending a hearing, the rights of the accused student must give way to the rights of the school. In \textit{Hernandez v. School District \#1, Denver}\textsuperscript{108} the court prescribing to this position said:

The application of such a rule (a hearing prior to suspension) would mean that the plaintiff could, and the evidence indicates they would, continue their disruptive conduct during the period that written charges were being prepared, an "impartial decision maker" selected, reasonable notice of the time and the place of the hearing given the plaintiff, the time necessary to subpoena witnesses and the time required for hearing . . . for the meantime, the other students would be denied their rights to the educational processes of the school. The requirement of procedural due process cannot be so construed.\textsuperscript{109}

This position has been recognized by the great majority of the courts as a necessary infringement of due process rights in school suspension cases.\textsuperscript{110} The United States Supreme Court in \textit{Goss} addressed this question and stated that there are recurring situations where prior notice and hearing cannot be required before a student is suspended. Justice White said:

Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . .\textsuperscript{111} (Emphasis added).

Recognition of the school's power to administer summary suspension from school in emergency situations requires the school in

\textsuperscript{109} \textit{Id.} at 293.
\textsuperscript{111} \textit{Goss v. Lopez}, 419 U.S. 565, 582 (1975).
the first instance to determine if there is an emergency. Relevant factors that should be evaluated by the school in deciding whether the nature and quality of the conduct and the setting in which it occurred indicate that immediate suspension is necessary include: (1) the physical and emotional safety and well-being of the accused student, (2) whether the accused's continued presence will incite other students to disruptions, and (3) whether the accused student has demonstrated that the alleged misconduct will recur if he is permitted to remain in school.

If an emergency situation is found by the school to exist, the school is entitled to immediately suspend the student. They must, however, provide the student with a hearing as soon after the suspension as possible.\textsuperscript{112} How soon after the suspension the hearing must take place would, of course, depend on the facts of each case, but certainly it would be less than what is required between the notice of disciplinary action and the hearing. In cases where the discipline to be taken is expulsion or an extended suspension, this means an interim hearing (functionally similar to a preliminary hearing) to decide if there are sufficient grounds and need to suspend the student pending the hearing which would determine his guilt.\textsuperscript{113}

\section*{VII. THE WISCONSIN STATUTE}

Wisconsin has adopted a statute, 120.13\textsuperscript{114} which provides the

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} Buck v. Carter, 308 F. Supp. 1246 (W.D. Wis. 1970).
  \item \textsuperscript{114} Wis. Stat. § 120.13 (1973):
\end{itemize}

\textbf{SCHOOL BOARD POWERS.} The school board of a common or union high school district may:

\begin{enumerate}
  \item School Government Rules; Suspension; Expulsion. (a) Make rules for the organization, gradation and government of the schools of the school district, including rules pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere, which shall take effect when approved by a majority of the school board and filed with the school district clerk.
  \item The school district administrator or any principal or teacher designated by him also may make rules, with the consent of the school board, and may suspend a pupil for not more than 3 school days or, if a notice of expulsion hearing has been sent under par. (c), for not more than a total of 7 consecutive school days for noncompliance with such rules or school board rules, or for conduct by the pupil while at school or while under the supervision of a school authority which endangers the property, health or safety of others. Prior to any suspension, the pupil shall be advised of the reason for the proposed suspension. The pupil may be suspended if it is determined that he is guilty of noncompliance with such rule, or of the conduct charged, and that his suspension is reasonably justified. The parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension and the reason

\end{enumerate}
authority and basic framework for school districts to handle student disciplinary proceedings. In light of *Goss* and other recent school disciplinary cases there arises the question of whether the statute satisfies the requirements of due process.

**A. Short Term Suspensions**

The statute provides in short term suspensions\(^\text{115}\) that "prior to any suspension the student shall be advised of the reason for the proposed suspension." If advised is used here in its common parlance, (to inform someone of action taken or about to be taken) a serious issue is presented as to whether this statement is sufficient to satisfy the requirement of a hearing required in *Goss*.

In emergency situations\(^\text{116}\) there is little doubt that advisement therefor. The suspended pupil or his parent or guardian may, within 5 school days following the commencement of the suspension have a conference with the school district administrator or his designee who shall be someone other than a principal, administrator or teacher in the suspended pupil’s school. If the school district administrator or his designee finds that the pupil was suspended unfairly or unjustly, or that the suspension was inappropriate, given the nature of the alleged offense, or that the pupil suffered undue consequences or penalties as a result of the suspension, reference to the suspension on the pupil’s school record shall be expunged. Such finding shall be made within 15 days of said conference. A pupil suspended under this paragraph shall not be denied the opportunity to take any quarterly, semester or grading period examinations missed during the suspension period.

\(^{(c)}\) The school board may expel a pupil from school whenever it finds him guilty of repeated refusal or neglect to obey the rules, or finds that he engaged in conduct while at school or while under the supervision of a school authority which endangers the property, health or safety of others, and is satisfied that the interest of the school demands his expulsion. Prior to such expulsion, the school board shall hold a hearing thereon. Not less than 5 days’ written notice of the hearing shall be sent to the pupil and, if the pupil is a minor, to his parent or guardian, specifying the particulars of the alleged refusal, neglect or conduct, stating the time and place of the hearing and stating that the hearing may result in the pupil’s expulsion. The pupil and, if the pupil is a minor, his parent or guardian may be represented at the hearing by counsel. The school board shall keep written minutes of the hearing. Upon the ordering by the school board of the expulsion of a pupil, the school district clerk shall mail a copy of the order to the pupil and, if the pupil is a minor, to his parent or guardian. The expelled pupil or, if the pupil is a minor, his parent or guardian may appeal the expulsion to the state superintendent. An appeal from the decision of the state superintendent may be taken within 30 days to the circuit court of the county in which the school is located. This paragraph shall be printed on the face or back of the notice.

In light of the adoption of ch. 89 by the Wisconsin legislature which provides for special programs for exceptional and special students, there exists a serious question as to whether a student can ever be totally excluded from school without being in violation of ch. 89. Whether ch. 89 will be so interpreted remains to be determined.

\(^{115}\) Any suspension for not more than 3 school days.

\(^{116}\) See p. 732 *supra*, for discussion of due process requirements in emergency situations.
prior to suspension is sufficient. The courts have uniformly held that a hearing is not required in these circumstances due in large part to the hazard posed to the school atmosphere and the resulting need for swift summary action to prevent further disruption to the educational process.\textsuperscript{117}

When there is no crisis present that demands immediate action, the courts seem to require more. As \textit{Goss} stated, "... some kind of notice and some kind of hearing"\textsuperscript{118} is required. This statement has been found to mean a presentation of the charge to the student and if denies it, an explanation of the evidence the authorities have and the opportunity to present his side of the story.\textsuperscript{119} In appropriate circumstances, even more may be required.\textsuperscript{120}

While \textit{Goss} expressly recognized the need for an informal hearing, these requirements demand more than merely explaining to the student why he is being suspended. An effort must be made in the "hearing" to ascertain whether the alleged act occurred, not to merely inform the student of the conclusion reached by the hearing officer. Courts have insisted that when a hearing is held merely for the purpose of explanation (advisement) rather than to investigate the charges, the student has been denied due process.\textsuperscript{121}

A second question which arises is whether a student who is merely told that he is being suspended for violation of the school regulations can have a second conference with the school district administration,\textsuperscript{122} complying with the hearing requirements outlined above, "cure" an initial inadequate hearing and provide due process for the student.

The question of whether a second hearing that complies with due process requirements can "cure" an earlier constitutionally deficient hearing is an unresolved issue in school discipline cases.\textsuperscript{123} In light of \textit{Goss} which determined the impact of a suspen-

\textsuperscript{117} See cases cited note 110 \textit{supra}.
\textsuperscript{119} \textit{Id.} at 583.
\textsuperscript{120} \textit{Id.} at 584.
\textsuperscript{121} See p. 20 \textit{supra}.
\textsuperscript{122} This is authorized by Wis. \textsc{Stat.} \textsection{} 120.13 (1973):
The suspended pupil or his parent may within 5 school days following the commencement of the suspension, have a conference with the school district administration.

\textsuperscript{123} Cases that recognize a "cure" include: Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973); Murray v. West Baton Rouge Parish School Board, 472 F.2d 438 (5th Cir. 1973).
Cases not recognizing "cure" include: Pervis v. La Marque, 466 F.2d 1054 (5th Cir. 1972).
sion on the student’s education and reputation to be substantial enough to require due process protection, it would seem that cure would not be possible to achieve.

Goss held that the student’s interest in education was so important that it could not be taken away prior to a hearing to determine whether that deprivation was indeed warranted. To allow a second hearing that would be held subsequent to the imposition of the suspension to provide the necessary protections would render the emphasis by the court that the hearing be held prior to the suspension, in effect meaningless. It is of little solace to the student to find that after he has served his “sentence” there will be a hearing to determine whether that “sentence” was justified. The damage feared by Goss will be imposed on the student and it would be too late for all of the hearings in the world to erase the harm done.

B. Long Term Suspension-Expulsions

The statute provides a separate procedure when the act of the student could result in his expulsion from school. Foremost is the requirement that the student is entitled to written notice of the hearing at least five days prior to the actual hearing. This notice is to specify (1) the particular of the alleged refusal, neglect or conduct, (2) the time and place of the hearing, and (3) that the hearing may result in the pupil’s expulsion.

What is sufficient statement to constitute notice is of course dependent on the circumstances. In addition, notice does not require that it be contained in one document or offered at one time. Courts, however, have included as a required element of notice that the student be provided with the names of the principal witnesses and the facts to which they will attest.

While this particular issue has not yet been resolved, the failure to provide these names to the student in advance of the hearing could very possibly in itself be sufficient to the student so as to constitute a denial of due process.

A second possible infirmity in the procedure outlined by the statute is the form of the order, more specifically, the failure to require that the order state the finding of the school officials which justifies expulsion. The reasons for this requirement are self apparent. The statute declares under what circumstances a student can

124. See note 122 supra.
125. See note 34 supra.
be expelled and if the findings of the school board were not articulated, the expulsion may rest on grounds that the student had neither notice or an opportunity to defend, an obvious denial of due process. Courts have held even the possibility that the school officials' decision rests on an improper basis is sufficient to require that the decision be set aside. A number of courts that have considered this question have required the findings of facts for the reasons outlined above. While it may be questionable whether the lack of this requirement alone would constitute a denial of due process, it is something that can be easily satisfied and should be done as a matter of sound suspension policy.

While no mention is made in the statute of the actual ground rules of the hearing itself, leaving this matter to the discretion of each school district, mention should be made of a few parameters that have been accepted by some courts concerning the admission and consideration of evidence. These include permitting the hearing body to consider only that evidence which is presented to them at the hearing in reaching a decision, prohibiting consideration of any evidence obtained in violation of Fourth Amendment rights, preventing the refusal to testify to be taken as an admission of guilt, permitting the hearing body to rely on factual determinations made in the course of the judicial process, and admitting of hearsay evidence in the hearings. While the student disciplinary process is not a criminal process, these limits placed on the proceedings by the courts recognize the basic need for fairness and give the school officials the opportunity to consider almost all relevant evidence in reaching their decision.

126. Wis. Stat. § 120.13(c) (1973) lists the following as grounds for discipline:
1) noncompliance with such rules [rules made by school district administrator, principal, or teacher with the consent of the school board] or school board rules.
2) conduct by the pupil while at school or while under the supervision of a school authority which endangers the property, health, or safety of others.
131. Id. at 841.
The recent court intervention into school discipline should not be seen by school administration as a direct attack on their authority to manage and control the educational process. It instead should serve as the impetus for schools to transform the traditional concepts of due process into a classroom demonstration of how a democratic society functions.

Students have a peculiar need for receiving fair treatment. In a time when the "system" is being challenged on all fronts, students are looking for evidence that they live in a fair society in which rules, not the arbitrary action of men, governs. If their first contact with the "system" results in feelings of unfairness and bitterness, the damage done may be irreparable.

In measuring the needs of the student, Justice Powell, in his dissent in *Goss*, pointed out that throughout our history there are differences which must be considered in determining the right of children as compared to adults. The result of these differences, concludes Powell, is that a student should not be awarded the same protection as adults when a right is subject to deprivation.

The error in Justice Powell's analysis is that while it is true that we treat children different than adults, it has been the practice of society to award infants more protection not less. The law is replete with examples in contract, tort, and criminal law where the infant has protections more extensive than that which is given to adults. How ironic it would be if when a young person's most coveted interest is at stake he is suddenly given less protections in defending that interest than is given adults.

The courts, contrary to the dissent in *Goss*, are not demanding that the school officials abdicate their responsibility of running an educational institution. They only seek to have the student accorded the same right to fair treatment that is given an adult. Let him know what he is accused of doing and give him a real chance to explain his position. The additional time and cost that may result from this procedure will not be wasted if the end product of the proceeding is that the student feels that he received a "fair shake."

This is not to say that a full-fledged proceeding should be required. The courts have recognized that not only would the cost be prohibitive, but that a lesser proceeding can achieve the same sense of fairness and remain a part of the educational process. Minimum requirements should include (1) adequate notice of the
hearing, (2) a hearing that is investigative and not explanatory, and (3) an impartial hearing body if possible. When an expulsion is the possible penalty, the additional safeguards of the right to confront and cross-examine witnesses in all but special circumstances and the right to counsel if the student requests should be added.

There will be circumstances when less may be required, but the emphasis by the school should be not to provide only the very minimum required to satisfy due process but to provide as much opportunity for the student to defend his position as time, resources and the educational setting will allow.

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