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I. INTRODUCTION

In January, 1975, the United States Supreme Court in *Goss v. Lopez*[1] extended the right of procedural due process to students who were subject to out-of-school suspensions of ten days or less.[2] The Court's 5-4 decision[3] required public school authorities to provide "rudimentary"[4] procedures to include "*some* kind of notice and . . . *some* kind of hearing."[5]

Although the Court required only minimal formality to protect a student's entitlement to a public education and to protect a liberty interest in one's reputation,[6] Justice Powell, in dissent, lamented the unnecessary intervention by the Court.[7] Powell stated that the daily operation of public schools should be left to school officials[8] and that "the constitutionalizing of routine classroom decisions . . . [was] a significant and unwise extension of the Due Process Clause."[9]

Wilkinson, a sympathetic commentator of the Powell

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1. 419 U.S. 565 (1975).
2. *Id.* at 581.
3. The majority opinion was authored by Justice White and joined by Justices Douglas, Brennan, Stewart, and Marshall. A dissenting opinion was authored by Justice Powell and joined by Chief Justice Burger and Justices Blackmun and Rehnquist.
4. *Goss*, 419 U.S. at 581.
5. *Id.* at 579.
6. *Id.* at 574.
7. *Id.* at 585 (Powell, J., dissenting).
8. *Id.*
9. *Id.* at 595.

dissent[10] and clerk for Justice Powell during the 1971 and 1972 terms,[11] expressed deep concern that the majority in *Goss* would eventually seek to expand the rudimentary due process afforded students and further formalize due process.[12] Such expansion, he feared, would result in a diversion of scarce education resources[13] and the refocusing of educators' energies away from the educational process.[14] Wilkinson noted that public schools were becoming increasingly lawless. They needed more flexibility, and not due process, he argued, in order to control the flood of school violence.[15] Wilkinson's concern also extended to a fear of further formalizing and extending procedural safeguards not only to children facing suspension and expulsion from a public school but also to a broad range of discretionary decisions that teachers and school officials make almost on a daily basis.[16]

The primary purpose of this article is to determine what procedural due process is now available, nearly two decades since the *Goss* ruling, to public school students who may be subject to suspension or expulsion.[17] In exploring this topic, we also wish to assess the accuracy of concerns raised by persons, such as Powell and Wilkinson, that a requirement of procedural due process would greatly interfere with the operations of public education systems. This article is limited to court rulings involving constitutional procedural due process at the elementary and secondary levels and does not involve

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10. J. Harvie Wilkinson III, Goss v. Lopez: *The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25 (1975).

11. J. WILKINSON, III, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW xiii (1974).

12. Wilkinson, *supra* note 10, at 44.

13. *Id.* at 60.

14. *Id.*

15. *Id.* at 66. Wilkinson stated: "But I do question the sensitivity of any decision to begin constitutionalizing the disciplinary process at its lowest rungs at precisely that time when the public is deeply anxious over a lack of discipline in the schools and when the maximum flexibility may be required by school officials in different parts of the country to reduce the level of violence in secondary education."

16. *See* Goss v. Lopez, 419 U.S. 565, 597-598 (1975) (Powell, J. dissenting); Wilkinson, *supra* note 10, at 30.

17. 419 U.S. at 584. The *Goss* majority indicated that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *See* Dolores J. Cooper & John L. Strope, Jr., *Long-Term Suspensions and Expulsions After Goss*, 57 EDUC. L. REP. 29 (Jan. 18, 1990), for a straightforward review. See also Dolores Cooper & John L. Strope, Jr., *Short-Term Suspensions Fourteen Years Later*, 58 EDUC. L. REP. 871 (April 12, 1990), for a brief overview.

students in special education programs.[18]

II. PROCEDURAL DUE PROCESS[19]

A. When Due Process Is Applicable

The Fourteenth Amendment specifies that no State shall "deprive any person of life, liberty, or property, without due process of law."[20] Thus, procedural due process is required only when government takes action that denies an individual life, liberty, or property. Absent a denial of life, liberty, or property, under the Constitution, the government need not provide any process to the adversely affected individual.[21]

Since public schools do not engage in punishment which normally threatens life, the focus of most decisions involving schools is on the potential loss of property or liberty. Both have legal meaning beyond normal lay contexts.

Property in the due process context includes a reasonable expection of receipt of a government benefit. Such expection must be objective, rather than subjective and is created, not in the Constitution, but by statutes, rules and practices.[22] Thus, a teacher under a one year contract with a college that had no rules or policies creating a reasonable claim to reemployment

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18. This article does not analyze or critique court decisions pertaining to suspensions or expulsions at the college or university level. For a recent discussion, see James M. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132 (1987).

The Court in Honig v. Doe, 484 U.S. 305, 308, 328-29 (1988), held that under the relevant provision of the Education of the Handicapped Act 20 U.S.C., § 1415(e)(3) (1988), children with disabilities may not he excluded from the classroom because of "dangerous or disruptive conduct growing out of their disabilities." The Court concluded that there is no "'dangerous' exception in the "stay-put provision" of § 1415(e)(3) of the Act. *Id.* at 323. The Court, however, noted that schools could employ such procedures as the "use of study carrels, timeouts, detention, or the restriction of privileges." *Id.* at 325. And, when necessary, the school may suspend a student for up to 10 school days while the school considers utilizing § 1415(e)(2) to invoke the aid of the courts. *Id.* at 325-26. See also recent commentary: Eugene A. Lincoln, *Disciplining Handicapped Students: Questions Unanswered in* Honig v. Doe, 51 EDUC. L. REP. 1 (March 16, 1989); Gail P. Sorenson, *Special Education Discipline in the 1990s*, 62 EDUC. L. REP. 387 (Nov. 8, 1990); and, Larry Bartlett, *Disciplining Handicapped Students: The Legal Issues In Light of* Honig v. Doe, 55 EXCEPTIONAL CHILDREN 357 (1989).

19. For a critical summary of the development of procedural due process see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 10-8 to 10-11 (2d ed. 1988).

20. U.S. CONST. amend. XIV, § 1.

21. Board of Regents v. Roth, 408 U.S. 564, 578 (1972).

22. *Id.* at 577.

had no property interest in reemployment.[23] But, a college teacher who could demonstrate that college documents created an expection of continued employment after ten years of continued employment did have a property interest in reemployment.[24]

Thus, it can be seen that property interests protected by procedural due process extend beyond the lay concept of property in terms of real estate, possessions or money.[25] Property interests may take many forms, including the right to attend public school, if provided by state law.[26]

Similary, the concept of liberty has meaning beyond the lay person's normal viewpoint. In addition to the obvious freedom from bodily restraint and physical punishment, liberty also involves a person's good name, reputation and standing in the community.[27] This is especially true when the government's action will impose a stigma that forecloses a person's ability to take advantage of future employment opportunities.[28]

Assuming that the state (e.g., a public school board) has taken action adverse to an individual, the first step in the legal analysis is to determine whether an individual has a protected liberty or property interest.[29] When such interests are present, it must be determined "what process is due"[30] and whether the procedures used were constitutionally adequate.[31]

Since the 1970s, the Supreme Court has settled on a balancing approach to determine the process that is due and the form in which it is to be applied.[32] The factors to be considered are perhaps best formulated in the Supreme Court decision in *Mathews v. Eldridge*.[33] The issue in *Eldridge* was whether an evidentiary hearing is required by the Due Process Clause of the Fifth Amendment prior to the discontinuance of

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23. *Id.* at 578.
24. Perry v. Sindermann, 408 U.S. 593, 603 (1972).
25. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).
26. Goss v. Lopez, 419 U.S. 565, 573 (1975).
27. *Roth*, 408 U.S. at 573.
28. *Id.*; Paul v. Davis, 424 U.S. 693, 705-06 (1976).
29. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989).; Brock v. Roadway Express, Inc., 481 U.S. 252, 260 (1987).
30. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
31. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 460 (1989) (citing Hewitt v. Helms, 459 U.S. 460, 472 (1983)). The Court in *Helms* stated that "we must then decide whether the process afforded . . . satisfied the minimum requirements of the Due Process Clause."
32. TRIBE, *supra* note 19, at 715.
33. 424 U.S. 319, 335 (1976).

Social Security disability benefit payments.[34] The six-member majority, in an opinion authored by Justice Powell, concluded that such a hearing was not required.[35]

The Court specified three distinct factors that are critical to determining what process is due.[36] The factors to be included are 1) consideration of the importance of the individual's interest that will be taken away by government action,[37] 2) the risk of error in making the decision and possible benefits of requiring additional procedural safeguards, and 3) the government's interest in the activity involved and the difficulty created for the government by requiring additional due process procedures.[38] In regard to the third criterion, the Court concluded that although financial cost alone is not the controlling factor in determining whether due process requires a particular procedural safeguard, the public or government interest "in conserving scarce fiscal and administrative resources is a factor that must be weighed."[39] After balancing the three competing factors in *Eldridge*, the Court held that no evidentiary hearing is required prior to the termination of social security disability benefits.[40]

An important subsequent application of the *Eldridge* three-factor test involved the constitutionality of disciplinary corporal punishment in the public schools.[41] In a 5-4 opinion, also authored by Justice Powell, the Court held that the Due Process Clause does not require public schools to provide notice and a hearing prior to the imposition of corporal punishment so long as corporal punishment is authorized and limited by the state's common or statutory law.[42] The Court's balancing of the factors outlined in *Eldridge* was obvious in its reasoning; "[i]n view of the low incidence of abuse, the openness of our schools, and the common-law safeguards that already exist, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal."[43] Justice Powell clearly stated that additional procedural safeguards

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34. *Id.* at 323.
35. *Id.* at 349.
36. *Id.* at 335.
37. *Id.*
38. *Id.*
39. *Id.* at 348.
40. *Id.* at 349.
41. Ingraham v. Wright, 430 U.S. 651 (1977).
42. *Id.* at 682.
43. *Id.*

were unwarranted in light of potential additional burdens on school officials.[44] He noted that the Court has repeatedly emphasized the need for affirming the comprehensive authority of school officials to prescribe and control conduct in the schools.[45] Justice Powell, writing for the majority, was reluctant to impose additional procedural safeguards in corporal punishment situations out of a concern that such safeguards would "entail a significant intrusion into an area of primary educational responsibility."[46]

B. What Process Is Due?

After determining the presence of life, liberty or property interests that require procedural due process protection, it then must be determined which specific elements of due process must be provided. It is acknowledged that due process is flexible and calls for such procedural protections as the particular situation demands.[47] As noted by the Court in a decision not involving education, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[48] This flexibility in due process requirements sometimes leads to disagreement about the specific elements required. There is general agreement, however, that due process requires, as a minimum, notice of alleged improprieties and the opportunity to respond to the allegations in some type of hearing.

As stated in *Mathews v. Eldridge*, the Court consistently has held that some form of hearing is required before an individual is finally deprived of a protected interest.[49] But the right to be heard has little value unless the person is informed that the matter is pending and can choose how to respond.[50] Thus, notice and an opportunity to be heard are essential requirements of procedural due process.[51] Notice must convey

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44. *Id.*
45. *Id.*; *see* Goss v. Lopez, 419 U.S. 565, 589-90 (1975).
46. *Ingraham*, 430 U.S. at 682.
47. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring); *see also* Friendly, *infra* note 55, at 1278-79; Hart v. Ferris State College, 557 F. Supp. 1379, 1387 (W.D. Mich. 1983).
48. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).
49. 424 U.S. at 333; *see also*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).
50. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950).
51. *Id.* at 313-14; *See also*, Goldberg v. Kelley, 397 U.S. 254, 267-68 (1970).

information regarding the allegations against the person[52] and must be given in a timely manner[53] so the person may prepare a defense.

The question becomes what elements of due process are required at the hearing. Judge Henry Friendly,[54] a highly respected jurist, has provided a detailed discussion of the elements of a fair hearing.[55] He first noted that the hearing tribunal must be unbiased or impartial.[56] The Supreme Court has determined that there is a presumption that those who sit on tribunals are unbiased, and has noted that a presumption of impartiality can be rebutted only by a showing of conflict of interest or some other specific reason for disqualification.[57]

According to Judge Friendly, an essential element of a fair hearing is that a person must be provided an opportunity to prepare his or her case regarding the allegations contained in the notice.[58] He also stated that due process generally provides the right to call witnesses on behalf of the person, to know about the evidence upon which the allegations in the notice are based, to have decisions made only upon evidence presented at the hearing,[59] the right to legal counsel, the making of a record, a written statement and a finding of facts,[60] public attendance, and the right to judicial review.[61] The last two are seldom discussed in court decisions involving schools. Judge Friendly noted, as will be discussed later, that the right of confrontation and cross-examination of witnesses is highly debated, and the courts are greatly divided on the issue.[62]

The extent to which all of these elements of procedural due process are required, or not required, must be viewed in light of the unique aspects of the public school setting, the *Eldridge* three factor list, and most importantly, *Goss v. Lopez*.[63]

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52. *Mullane*, 339 U.S. at 313.
53. *Goldberg*, 397 U.S. at 267.
54. Then a judge for the United States Court of Appeals for the Second Circuit.
55. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).
56. *Id.* at 1279.
57. Schweiker v. McClure, 456 U.S. 118, 195 (1982); Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).
58. Friendly, *supra* note 55, at 1280-81.
59. *Id.* at 1282.
60. *Id.* at 1287, 1291.
61. *Id.* at 1293-94.
62. *Id.* at 1283.
63. *E.g.*, Palmer v. Merluzzi, 868 F.2d 90, 95 (3rd Cir. 1989); Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 918 (D. Me. 1990).

III. *GOSS V. LOPEZ*: MINIMAL DUE PROCESS IN THE SCHOOLS

A. Facts and Procedural History

In 1971 a number of students were suspended from the Columbus Public School System in Ohio.[64] Subsequently, nine student plaintiffs, accused of engaging in demonstrations, refusing to obey a principal's directive, and attacking a police officer on the scene, challenged the constitutionality of the relevant provisions of the Ohio statute and the disciplinary policies set forth in the Columbus Public School Administrative Guide.[65] Of the nine plaintiffs, six were high school students whose disruptive behavior, observed by a school administrator, resulted in 10-day suspensions from school.[66] Dwight Lopez, also a high school student,[67] was suspended for a disturbance in a lunch room that he claimed he did not commit, and no contrary evidence was presented at trial by school administrators.[68] An eighth plaintiff, a junior high school student, was initially arrested but not formally charged for being present at a high school demonstration and then suspended by school officials for ten days.[69] The Court noted that absent testimony by school authorities, there was no indication of what factors school authorities considered in deciding to suspend the student.[70] The Court remarked that no testimony was offered regarding the suspension of a ninth student plaintiff.[71]

A three-judge district court panel held that the students were not accorded appropriate due process of law because they were suspended without a hearing prior to suspension or with-

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64. Lopez v. Williams, 372 F. Supp. 1279, 1281-82 (S.D. Ohio 1973) (three-judge panel), *aff'd*, 419 U.S. 565 (1975). It is well acknowledged that *Goss* was triggered by numerous racial incidents between black and white students. However, the Court declined to comment on such tensions. *See* Wilkinson, *supra* note 10, at 30-32.

65. *Id.* at 1281.

66. Goss v. Lopez, 419 U.S. 565, 569-70, n.4 (1975). One of these students was given a second ten-day suspension for misconduct occurring on another occasion but which followed immediately on returning to school. See n. 4. Thus, the Court had the opportunity to address suspensions longer than ten days but declined to do so.

67. *Id.* at 569-70.

68. *Id.* at 570.

69. *Id.* at 570-71. It should be noted that the Supreme Court holding in *Goss v. Lopez* also applies to students in junior high school and probably to students in elementary school.

70. *Id.*

71. *Id.* at 571.

in a reasonable time after suspension.[72] The decision was appealed to the United States Supreme Court by administrators of the Columbus Public School System.[73]

B. Students Have a Constitutionally Protected Interest in a Public Education

The Supreme Court concluded that a ten day suspension from school is a legally significant loss and may be imposed only with provision of appropriate procedural due process.[74] The Court noted that protected property interests are not created by the Constitution but are usually created by independent sources, such as state statutes, which entitle citizens to certain benefits.[75] Justice White, writing for the majority, indicated that while a right to a public education is not constitutionally mandated,[76] there are legitimate claims of entitlement to a public education that are recognized as a property interest when state law provides both for a public education and requires school attendance.[77] Such interests are protected by the Due Process Clause and may not be taken away without the provision of minimal due process elements.[78]

The majority also concluded that short-term suspensions infringed on a student's liberty interests which are protected by the Due Process Clause.[79] The majority noted that even short-term suspensions could damage the students' reputation and standing with their fellow pupils and teachers, and school records of the incident could interfere with later opportunities for higher education and employment.[80] This view of reputation being a liberty interest was revised in a subsequent Supreme Court ruling, and now state action must stigmatize a person's reputation in the community in order for a liberty interest to be involved.[81]

The Court rejected an argument that the Due Process Clause applies only when a student is subjected to a grievous

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72. Lopez v. Williams, 372 F. Supp. 1279, 1302 (S.D. Ohio 1973).
73. Goss v. Lopez, 419 U.S. 565, 567 (1975).
74. *Id.* at 576.
75. *Id.* at 572-73.
76. *Id.* at 572.
77. *Id.* at 573.
78. *Id.* at 574.
79. *Id.*
80. *Id.* at 575.
81. Paul v. Davis, 424 U.S. 693, 712 (1976); Boster v. Philpot, 645 F. Supp. 798, 805 (D. Kan. 1986).

loss or severe detriment.[82] It recognized that constitutional due process protections were triggered when the property loss was more than de minimis. The Court, citing *Board of Regents v. Roth*,[83] commented that courts must look to the nature of the interest at stake, and concluded that a ten day suspension is not de minimis.[84] It concluded that because an education is of such great import in the modern world, even suspension from school for as little as ten days is not so minor a penalty that due process protections could be ignored.[85]

C. The Process That Is Due for Short Term Suspensions

The majority in *Goss* concluded that for brief suspensions of ten days or less, a trial-type hearing is not required, but due process does require that the student be given either oral or written notice of the charges; if the charges are denied, a description of the evidence and an opportunity to present his or her side of the situation must be given.[86] When these rudimentary hearings occur, the student must be told what misconduct has been charged, the reasons for the accusation, and the student must be allowed to explain his or her version of the events surrounding the incident.[87] The Court stated that such procedures may occur immediately following notice or they may occur at a later time.[88] The Court added that the hearing between the student and school officials can be an informal give-and-take, so long as it allows the student to explain his or her views.[89] The primary purpose of the rudimentary hearing process is to assure that mistaken findings of student misconduct do not result in an arbitrary exclusion from school.[90] The Court noted that it was not requiring anything more than what a "fair-minded" principal would undertake in order to avoid errors in making decisions.[91]

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82. Goss v. Lopez, 419 U.S. 565, 575 (1975).
83. 408 U.S. 564 (1972).
84. Goss v. Lopez, 419 U.S. 565, 575-76 (1975).
85. *Id.*
86. *Id.* at 581.
87. *Id.* at 582.
88. *Id.*
89. *Id.* at 584. In Board of Curators v. Horowitz, 435 U.S. 78, 85-86 (1978), the Court, in dicta, essentially reiterated its position. "All that Goss required was an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'"
90. *Id.*
91. *Id.* at 583.

Notice and a rudimentary hearing should normally be provided to the student prior to the student's removal from school, but the Court identified certain situations that do not require notice and hearing prior to removal.[92] The Court stated that immediate removal is appropriate when students pose a continuing danger to themselves or to others or present a continuing threat of disruption to the educational environment.[93] In these situations, the student may be suspended prior to receipt of due process, but must be provided with notice and at least a rudimentary hearing as soon as reasonably possible.[94]

D. The Process that Is Not Required for Suspensions of Ten Days or Less

Short-term suspensions do not require that the student be afforded an opportunity to be represented by legal counsel, to confront and cross-examine witnesses, or to call witnesses to support his or her side of the situation.[95] The Court's rationale for limiting the availability of additional procedures included concern that such requirements would over burden school administrators and result in expensive court-like proceedings.[96] The Court also feared that further formalizing of the process of short-term suspension hearings would result in a limiting of the educational effectiveness of suspensions.[97]

Though additional procedural safeguards are not required in *Goss*, the Court noted that a school administrator could decide, when warranted, to allow cross-examination, the presentation of student's own witnesses and access to legal counsel.[98] In appropriate situations, such as when known personality conflicts exist between an accusing teacher and a student, a reasonable school administrator may seek to reach a fair result by allowing additional procedural rights.

IV. DUE PROCESS SINCE *GOSS V. LOPEZ*

A. When is an Educational Deprivation Protected?

In *Goss*, the Supreme Court did not state that all student

92. *Id.* at 582.
93. *Id.*
94. *Id.* at 582-83.
95. *Id.* at 583.
96. *Id.*
97. *Id.*
98. *Id.* at 584.

infractions require procedural due process — only those that involve a significant student interest. In reviewing due process issues, courts must initially determine if the deprivation suffered by a student results in "the total exclusion from the educational process for more than a trivial period."[99] If a deprivation is legally insignificant, then a property interest is not implicated and there is no requirement of constitutional due process. The Court in *Goss v. Lopez* clearly indicated that a ten day suspension from school is significant[100] but left open the possibility that a shorter suspension may be de minimis.[101] Justice Powell, writing a dissenting opinion, commented critically that a one-day suspension now involves "a new constitutional right."[102] Judge Friendly also commented that "a hearing may be required for a suspension of two days — or perhaps even two hours — at least when the sanction is noted on the student's record."[103]

Because the Court in *Goss* expressly addressed only out-of-school, short-term suspensions not exceeding ten days, it has been left to lower courts to extend the spirit of the law as outlined in *Goss*. To further understand when a property or liberty interest is implicated, a review of subsequent lower court rulings will focus on in-school and out-of-school suspensions and other sanctions that may be imposed on students, such as loss of academic credit and restrictions in participation in extra-curricular activities.

1. Out-of-school suspensions

A three-day suspension has been held legally significant because class-time missed can not be made up and, suspensions are noted on a student's school records which are often available to prospective employers and college admissions personnel.[104] Other courts in situations involving vandalism, insubordination, and fighting have also implicitly acknowledged that a three-day suspension implicated a property interest and

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99. *Id.* at 576.

100. *Id.*

101. *Id.* The Court perhaps intimated that some suspension for less than 10 days may be for only a "trivial period." The majority did, however, note that due process attaches for suspensions of "10 days or less." *Id.* at 581.

102. *Id.* at 585 (Powell, J., dissenting).

103. Friendly, *supra* note 55, at 1275, n. 50.

104. Hillman v. Elliott, 436 F. Supp. 812, 815 (W.D. Va. 1977). The court did not specifically address whether a liberty or property interest was implicated but one may surmise that the court was referring to a property interest.

therefore was not de minimis.[105] The Sixth Circuit has ruled that a seven-day suspension was controlled by the *Goss* ruling.[106] The court decisions referenced here did not expressly address the issue of liberty interest but generally referred only to the loss of a property interest.

2. In-school suspensions

In-school isolation in a detention room has been found to be a deprivation of education like the effect of an out-of-school suspension.[107] In Mississippi, a high school student who would not submit to corporal punishment was initially suspended from school for three days and then for an indefinite period until she would accept paddling.[108] Subsequently the school board allowed the student to return without submitting to paddling but decided that she would be placed in a school detention room.[109] The court indicated that not all in-school detentions would be equivalent to out-of-school suspensions, but determinations would depend on the extent of the deprivation of normal educational opportunities.[110] If exclusion from the educational process was total within the school, it would be equivalent to an out-of-school suspension.[111] If in-school isolation was found to be equivalent to out-of-school suspension, then the days absent from the normal classroom would be combined. If the total time of suspension exceeded ten days, more formal procedures than those found in *Goss* would be required.[112]

In an Arkansas case, a special education student's substan-

105. Students who had admitted vandalism of a grade school were suspended for three days in Boster v. Philpot 645 F. Supp. 798, 804 (D. Kan. 1986). A student was given a three-day suspension for insubordination in Wayne County Bd. of Educ. v. Tyre, 404 S.E.2d 809 (Ga. App. 1991). A student was given a three-day suspension for striking another student, but the suspension was not required to be served in a subsequent school year when the school did not impose the sanction during the school year in which the incident occurred in Rossman v. Conran, 572 N.E.2d 728 (Ohio App. 1988).

106. Webb v. McCullough, 828 F.2d 1151, 1159 (6th Cir. 1987).

107. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749, 752 (S.D. Miss. 1987), *aff'd*, 853 F.2d 924 (5th Cir. 1988). The court did not indicate whether a liberty or property interest was implicated. The court assumed that a student had an interest in attending school but primarily addressed the question of what procedural safeguards were due.

108. *Id.* at 751.

109. *Id.*

110. *Id.*

111. *Id.* at 752.

112. *Id.*

tive due process rights were found not to have been violated when he received a three-day in-school suspension due to tardiness and was isolated in a special classroom.[113] The classroom had adequate floor space, lighting, and windows, and the special education placement committee had determined that the suspension would not adversely affect the student. The student completed all his assigned work and did not fall behind in his school work as a result of being placed in the special classroom.[114] Because the student was not actually excluded from the educational process, the court found that no property interest in a public education was implicated.[115] The court added that procedural due process was not implicated because on the facts, this three-day in-school suspension was de minimis.[116]

Similarly, a student who was given a three-day in-school suspension and an eleven-day restriction, including exclusion from the senior class outing and extra-curricular activities, did not receive a punishment sufficient to constitute deprivation of a property or liberty interest.[117] The punishment assigned was considered de minimis because the student was expected to do assigned school work while serving the in-school suspension.[118] The senior class outing alone was not found to be a constitutionally protected civil right.[119] The student's alleged liberty interest in his reputation was summarily dismissed. The court concluded that the student's reputation was not seriously damaged by his being kept in school with the restrictions imposed.[120]

In another decision involving an in-school suspension, a sixth-grade student was placed in "time out" within his classroom.[121] The student was permitted to remain in the classroom and perform class work and was allowed to attend all other classes in other parts of the school. He was allowed to leave "time out" for appropriate reasons, such as use of a restroom, and he was not physically restrained or subjected to

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113. Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 565 (8th Cir. 1988).
114. *Id.* at 566.
115. *Id.* at 563.
116. *Id.*
117. Fenton v. Stear, 423 F. Supp. 767, 772 (W.D. Pa. 1976).
118. *Id.*
119. *Id.*
120. *Id.* at 773.
121. Dickens v. Johnson County Bd. of Educ., 661 F. Supp. 155, 156 (E.D. Tenn. 1987).

pain.[122] The court concluded that interference with the boy's educational opportunity was trivial, and neither a property nor liberty interest was implicated.[123] A similar result was found when a student alleged violation of his due process rights when he was placed on probation without any actual school time missed.[124]

3. Loss of academic credit

A state supreme court has concluded, in accordance with its interpretation of *Goss v. Lopez*, that loss of academic credit for the entire semester was a property interest qualifying for protection under the Due Process Clause.[125] The decision involved a sixteen-year-old sophomore who had drunk two or three sips of beer in her home before going to school on the last day of the school term.[126]

4. Participation in academic programs

A student who had been discharged from an elite high school for failure to meet academic requirements and involuntarily transferred to a less selective school, argued that she had been denied procedural due process.[127] The court first distinguished the standards applicable to academic discharge from those related to misconduct and then noted that courts give considerable deference to education professionals in matters of academic standards.[128] It then determined that due process was satisfied in this instance, but noted that academic discipline does not implicate the same legal requirements as discipline for misconduct.[129] The court did not indicate what procedures would be required if, as in this case, the student could not attend any local high school.[130] One court has upheld student arguments that *Goss* should be applied to involuntary transfers between attendance centers for disciplinary reasons.[131] In a completely different situation, another court has

122. *Id.*
123. *Id.* at 158.
124. Boynton v. Casey, 543 F. Supp. 995, 1002-03 (D. Me. 1982).
125. Warren County Bd. of Educ. v. Wilkinson, 500 So.2d 455, 458 (Miss. 1986).
126. *Id.* at 456.
127. Spencer v. New York City Bd. of Higher Educ., 502 N.Y.S.2d 358, 359 (Sup. Ct. 1986).
128. *Id.* at 359.
129. *Id.*
130. *Id.*
131. Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977).

held that expulsion from a private school for misconduct does not require the protections of procedural due process unless substantial state action can be demonstrated.[132]

A student's decision to graduate earlier than originally planned because of what she claimed became an oppressive school environment after her removal as head cheerleader was found by one court not to constitute deprivation of either a property or liberty interest.[133] No property interest was implicated because students are afforded only the opportunity to graduate, not to graduate on a specified date.[134] In the absence of proven damage to her reputation or the school's publicizing her dismissal as a cheerleader, no liberty interest was involved.[135]

In the absence of a statute or rule creating a reasonable expectation, the United States Court of Appeals for the Fifth Circuit determined that a high school student who was not allowed to enroll in certain courses did not have a property interest in a specific course of study.[136] The United States District Court for the Southern District of New York has ruled that the shortening of the school day by forty-five minutes per day for two days a week in an effort to economize was not a deprivation implicating due process rights.[137] The court commented that the state did not significantly limit a right to an education any more than when decisions are made regarding curriculum requirements, the assignment of study halls, or requiring attendance at a school assembly.[138]

The United States District Court for the Western District of North Carolina found that a student who was denied the opportunity to participate in a graduation ceremony because he was in violation of the dress code for the ceremony did not have a property right in participation nor was he deprived of a liberty right.[139] In a subsequent ruling on the issue of a property right in participation in graduation ceremonies in California, another court ruled that even the completing of all graduation

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132. Wisch v. Sanford Sch., Inc., 420 F. Supp. 1310, 1313 (D. Del. 1976) (citing Reitman v. Mulkey, 387 U.S. 369 (1967)).
133. Haverkamp v. Unified Sch. Dist. No. 380, 689 F. Supp. 1055, 1059 (D. Kan. 1986).
134. *Id.*
135. *Id.*
136. Arundar v. DeKalb County Sch. Dist., 620 F.2d 493, 494 (5th Cir. 1980).
137. Zoll v. Anker, 414 F. Supp. 1024, 1028 (S.D.N.Y. 1976).
138. *Id.*
139. Fowler v. Williamson, 448 F. Supp. 497, 501-02 (W.D.N.C. 1978).

requirements did not give rise to a protected property interest in participating in graduation ceremonies.[140] The second court also rejected a liberty interest argument, noting that the student was not prevented from attending graduation ceremonies and that school officials did not publicize his situation.[141] In another ruling, a court held that the use of placement tests to assign students at different achievement levels in a non-graded elementary school did not implicate a protected property interest.[142]

5. Activities that facilitate school attendance

Parents and students have even challenged the implementation of a school policy that temporarily suspended certain school bus routes when students violated rules pertaining to proper conduct on the bus.[143] The First Circuit held that temporary suspensions of bus routes were de minimis because the loss resulted only in inconvenience and not in a loss of educational opportunity.[144]

6. Extracurricular activities

School attendance is usually required by state statute for school age children; also mandated is a course of required instruction sufficient to obtain a high school diploma. However, numerous other school activities not directly related to instruction are arguably essential to a well-rounded educational experience. Students are therefore encouraged to participate in activities such as student government, athletics, school bands and orchestras, and student newspapers and yearbooks. Deprivation of these extra-curricular activities has been periodically challenged by students as a violation of their property or liberty interest under the Fourteenth Amendment.

The *Goss* decision involved the issue of "total exclusion from the educational process" in the context of a ten day out-of-

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140. Swany v. San Ramon Valley Unified Sch. Dist., 720 F. Supp. 764, 773-74 (N.D. Cal. 1989).

141. *Id.* at 775-76.

142. Smith v. Dallas County Bd. of Educ., 480 F. Supp. 1324, 1338 (S.D. Ala. 1979).

143. Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982). The suspension "policy was applied to instances of serious disruption, significant vandalism, or danger." *Id.* at 280. Under the policy, school officials would first try to identify the guilty students but, when the students could not be identified, the school route would be suspended for a period not exceeding five days.

144. *Id.* at 282.

school suspension.[145] A year later, the United States Court of Appeals for the Tenth Circuit had occasion to interpret the meaning of the phrase "educational process" in the context of a transfer rule that barred transferring students from athletic competition for one year.[146]

> The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement. We do not read *Goss* to establish a property interest subject to constitutional protection in each of these separate components.[147]

The Tenth Circuit held that interscholastic athletic participation is not a constitutionally protected right.[148]

A previous decision involving a similar imposition of athletic ineligibility for transfer students supported the Tenth Circuit's opinion in *Albach*.[149] The court concluded that the property interest in an education involved the many combined activities of school attendance and could not be subdivided into separate property rights, each protected by the Constitution. According to the court, to find otherwise would result in a due process hearing being requirement for each removal from an athletic team, club, or activity.[150]

A 1992 ruling in Arkansas agreed and held that recognizing a property right in athletics, band, theater and choir would result in a deluge of litigation by students.[151] The court stated that participation in athletics was not a constitutionally protected claim of entitlement, but merely an expectation.[152] On a more philosophical note, the court stated that students

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145. Goss v. Lopez, 419 U.S. 565, 576 (1975).
146. Albach v. Odle, 531 F.2d 983 (10th Cir. 1976).
147. *Id.* at 985.
148. *Id.* at 984-85; *see also* Boster v. Philpot, 645 F. Supp. 798, 805-06 (D. Kan., 1986) (finding no right to attend athletic contests).
149. Dallam v. Cumberland Valley Sch. Dist., 391 F. Supp. 358 (M.D. Pa. 1975).
150. *Id.* at 361; *see also* Berschback v. Grosse Pointe Pub. Sch. Dist., 397 N.W.2d 234, 242 (Mich. App. 1986) (citing *Albach* with approval); Tiffany v. Arizona Interscholastic Ass'n, Inc, 726 P.2d 231, 234 (Ariz. Ct. App. 1986) (quoting *Albach* with approval); Hamilton v. Tennessee Secondary Sch. Athletic Ass'n, 552 F.2d 981 (6th Cir. 1976); Herbert v. Ventetudo, 638 F.2d 5 (1st Cir. 1980).
151. McFarlin v. Newport Special Sch. Dist., 784 F. Supp 589 (E.D. Ark. 1992).
152. *Id.* at 592.

should recognize that it is a fact of life that on occasion all people are subjected to arbitrary and unjust decision making.[153]

In 1986, the Kansas federal district court analyzed a number of cases regarding the question of a property right in extracurricular activities involving a student removed as a cheerleader, and concluded that there is no federally protected property right in interscholastic athletics under the majority rule.[154] The court, however, acknowledged three groups of cases that held that students have constitutionally protected interests in extracurricular activities.[155] These courts reasoned that participation in varsity athletics constituted a property interest because of students' potential future educational or professional sports opportunities, because participation in such activities is an integral part of the total education process, or because the denial of the right to participate may violate the Equal Protection Clause.[156] The Kansas court followed the majority view and held that no property interest existed in being a head cheerleader or a member of the cheerleading squad.[157] The court reasoned that future educational opportunities are mere expectations and are insufficient to create a constitutionally protected property interest.[158]

Court decisions since 1986 have generally followed the majority rule that students do not have a property or liberty interest in a variety of extracurricular activities.[159] In one, a high school senior and defending state champion wrestler was declared ineligible to continue on the wrestling team for misconduct he and three other males committed with a young

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153. *Id.* at 593.

154. Haverkamp v. Unified Sch. Dist. No. 380, 689 F. Supp. 1055, 1057 (D. Kan. 1986); *see* Bernstein v. Menard, 557 F. Supp. 90, 91 (1982) (finding no constitutional right to play a trumpet in a high school band).

155. *Id.*

156. *Id.*; *see e.g.*, Boyd v. Bd. of Educ. of McGehee Sch. Dist., 612 F. Supp. 86 (D. Ark. 1985); Kelley v. Metro Bd. of Educ. of Nashville, 293 F. Supp. 485 (M.D. Tenn. 1968); Gilprin v. Kansas State High Sch. Activities Ass'n Inc., 377 F. Supp. 1233 (D. Kan. 1974).

157. *Id.* at 1058.

158. *Id.*

159. *See, e.g.*, Simkins v. South Dakota Sch. Activities Ass'n, 434 N.W.2d 367, 368 (S.D. 1989) (finding that a student who transferred from one school to a Bible academy while his parents remained in the former school district which rendered student ineligible to participate in interscholastic athletics for one year did not have a life, liberty, or property interest as he had "not suffered a 'total exclusion' from the educational process"); Mississippi High Sch. Activities Ass'n v. Ferris, 501 So.2d 393, 397 (Miss. 1989).

woman in the student's home.[160] The student was held not to have a liberty or property interest notwithstanding his outstanding four-year high school wrestling record or the likelihood that if he continued to excel in wrestling tournaments, he would receive a college scholarship.[161]

The Sixth Circuit has held that participation in an election for student council president was not protected by the Due Process Clause, notwithstanding the possibility that the winner would receive a modest scholarship.[162] In another decision involving elective student office, a different court ruled that a student does not have a constitutionally protected interest in running for high school student office.[163]

In *Pegram v. Nelson*, a junior high school student received a ten day suspension and additional school restrictions under a probation that prevented him from remaining on school grounds after 3:15 p.m. or participating in or attending school activities for the remainder of the school year which was approximately four months.[164] Although acknowledging that there was no property interest in participating in extracurricular activities,[165] the court suggested that depending upon the circumstances, "*total exclusion* from participating in . . . extracurricular activities for a *lengthy period of time* could . . . be a sufficient deprivation to implicate due process."[166] The court declined to determine whether the student qualified for procedural due process but assumed that even if the student did qualify, he had previously received all the process that was due at the time he was suspended from school.[167] Applying the *Eldridge* test[168] the court concluded that the process required under *Goss* was sufficient.[169] However, the court did leave open the possibility that total exclusion from extracurricular

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160. Brands v. Sheldon Community Sch., 671 F. Supp. 627, 629 (N.D. Iowa 1987).

161. *Id.* at 631; *see also* Thompson v. Fayette County Pub. Sch., 786 S.W.2d 879, 882 (Ky.App. 1990) (finding no property right to continue on wrestling team when grade point average went below 2.0).

162. Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 723 (1990).

163. Bull v. Dardanelle Pub. Sch. Dist. No. 15, 745 F. Supp. 1455, 1461 (E.D. Ark. 1990).

164. 469 F. Supp. 1134, 1137 (M.D.N.C. 1979).

165. *Id.* at 1139.

166. *Id.* at 1140.

167. *Id.* at 1141.

168. *See supra* text accompanying notes 33-46.

169. *Pegram*, 469 F. Supp. at 1140-41.

activities for a semester or longer might qualify as a property interest.[170]

B. When Can a Student be Removed from School Prior to Notice and Hearing?

In *Goss*, the Supreme Court stated that as a general rule notice and hearing should precede a student's removal from school.[171] It acknowledged, however, that situations arise that do not require hearings to be held prior to suspensions.[172] The Court indicated that students may be removed immediately from school when their "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process."[173] The Court indicated that in such situations notice and hearing should be provided in a reasonable time thereafter.[174]

In one subsequent lower court decision, high school students who were suspended from all classes one day prior to rescheduled suspension hearings argued that they had been denied due process.[175] The court, citing the *Goss* analysis for exceptions to prior notice and hearing, first indicated that the students' use of drugs just outside the school would have justified immediate removal from the school by school officials.[176] The court then noted that the hearing delay actually resulted from mutual agreement of the students' attorney and the school's attorney.[177] The court concluded that the hearing conducted one day after removal of the students from school, was held as soon as feasible by the school officials and was sufficiently prompt to meet the *Goss* requirements.[178]

In another decision, a group of vocal and disruptive students led a walkout of students from a high school. The inci-

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170. *Id.* at 1140.

171. Goss v. Lopez, 419 U.S. 565, 582 (1975); *see* Everett v. Marcase, 426 F. Supp. 397, 403 (E.D. Pa. 1977) (ruling that a student must remain in school pending a hearing, unless an emergency exists).

172. *Id.*

173. *Id.*

174. *Id.*

175. White v. Salisbury Township Sch. Dist., 588 F. Supp. 608, 613 (E.D. Pa. 1984).

176. *Id.* at 613. The district judge, relying on the Goss analysis for exceptions to prior notice and hearing, indicated that the misconduct of student-plaintiffs "certainly raises the possibility of danger to persons or property as well as the threat of disruption of the academic process."

177. *Id.* at 614.

178. *Id.*

dent was partially related to interracial trouble at the school.[179] The principal later announced over the local radio station that all student participants in the walkout were suspended for ten days.[180] Obviously, no rudimentary hearings were held prior to the suspensions. However, within three school days, conferences were held with all the students and their parents, and all suspensions were ended.[181] The Fifth Circuit ruled that because of the ongoing threat of disruption to the education process, there had been no reasonable opportunity for hearings on the day of the suspension. It found that post-suspension hearings held with each student and his or her parents did not violate the procedural due process rights of the students.[182]

C. When is a Tribunal Not Impartial?

The *Goss* opinion did not specifically address the issue of impartiality of hearing officers. Rather, the Court appears to presume, with respect to short-term suspensions, that school disciplinarians will proceed in good faith.[183] It is also clear that school officials may perform multiple functions and still be presumed to be fair: observer of misconduct, provider of notice, hearing officer, and dispenser of short-term suspension.[184] However, if an administrator makes a disciplinary recommendation, such as an involuntary disciplinary transfer from one school to another, neither that administrator nor anyone subordinate should be the decision maker.[185] It would permissible for a person in a superior administrative position to make a final ruling.[186]

In a case arising in Virginia, a student's parents alleged

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179. Sweet v. Childs, 507 F.2d 675, 678 (5th Cir. 1975), *reh'g denied* 518 F.2d 320, 321 (5th Cir. 1975).
180. *Id.*
181. *Id.*
182. *Id.* at 681.
183. Goss v. Lopez, 419 U.S. 565, 580 (1975). The Court stated that a presumption exists that "hearing officers . . . are unbiased [citations omitted]. This showing can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *See also* Schweiker v. McClure, 456 U.S. 188, 195 (1982); Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) (holding that school board not biased in termination of striking teachers); Salazar v. Laty, 761 F. Supp. 45, 47 (S.D. Tex. 1991) (citing *Goss* as requiring an unbiased decision maker).
184. *Id.* at 582.
185. Everett v. Marcase, 426 F. Supp. 397, 402 (E.D. Pa. 1977).
186. *Id.*

that the student's due process rights had been violated when a principal suspended the student for a second time.[187] The student had been reinstated by the school after the first suspension because officials were uncertain whether due process had been satisfied. The parents argued that because the principal was involved in the first suspension proceeding and because he was an employee of the school, he was not an impartial decision maker at the subsequent hearing.[188] The court rejected the arguments, noting that there was no evidence of actual bias, that finders of fact are not considered biased merely because they are familiar with the facts, and that due process does not prohibit the finder of fact from being an employee of the school.[189]

A Delaware state court has held that a hearing officer who was an employee of the same school district as the student must be fair and impartial, but that due process does not require a fair and impartial hearing officer be chosen from among non-employees of the district.[190] Similarly, the California Supreme Court has held that a state statute providing for school district employees who are not employed at the student's school of attendance to serve on hearing panels considering expulsion, does not violate a student's due process rights.[191]

An interesting illustration of this situation arose in Texas, when an assistant principal involved in the initiation and investigation of drug use and sale found evidence through a search of the student.[192] The student was suspended from school for three days, and a review hearing was scheduled to consider the possibility of a long-term suspension.[193] The assistant principal also served as a judge on a campus-review board that recommended suspension for the remaining school year,[194] although the suspension actually lasted only about eight weeks.[195] The student argued in court that the assistant

187. Hillman v. Elliott, 436 F. Supp. 812, 814 (W.D. Va. 1977).
188. *Id.* at 814, 816.
189. *Id.*; *see also* Long v. Thornton Township High Sch. Dist. 205, 823 F.R.D. 186, 192 (N.D. Ill. 1979) (holding that dual roles does not automatically disqualify a decision maker); Gonzales v. McEuen, 435 F. Supp. 460, 464 (C.D. Cal. 1977) (holding that some familiarity with the facts does not disqualify a decision maker).
190. Rucker v. Colonial Sch. Dist., 517 A.2d 703, 705 (Del. Super. Ct. 1986).
191. John A. v. San Bernardino City Unified Sch. Dist., 654 P.2d 242, 247 (Cal. 1983).
192. Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 261 (5th Cir. 1985).
193. *Id.*
194. *Id.*
195. *Id.* at 262.

principal could not be an impartial member of the review board because he had previously been an investigator and then a witness before the board.[196] The Fifth Circuit concluded that absent actual demonstrated bias the student did not receive an impartial hearing, a school official may serve as both an investigator and a hearing officer.[197]

Courts have also found that when a school board goes into closed-session deliberations and includes school officials who participated in the deliberations, even though they previously engaged in such roles as prosecutor and adverse witnesses in the hearing, the school board may exclude the student and his counsel.[198] The Seventh Circuit reasoned, relying on *Goss*, that due process requirements are met when the student is provided an opportunity to present his or her story to the board.[199]

Consistent with the holding discussed above, the Sixth Circuit has held that school boards may allow school officials, including the superintendent, involved in prior disciplinary actions to attend and participate in closed sessions, but deny access to a student and his attorney.[200] The court added, in a footnote, that school officials could not have been decision makers in a pre-expulsion hearing if they "possessed either a pre-existing animus towards him or had developed a bias because of their involvement in the incident . . ."[201]

The court decisions are inconsistent on the issue of the role of the school board attorney and whether his or her activity results in a biased school board decision maker. It has been held that a school board attorney may engage in multiple roles at an expulsion hearing — including prosecution, ruling on motions and objections made by the student's counsel, and advising the school board — where a student receives a thirty day suspension, is represented by an attorney, and is afforded an opportunity to present his version of the alleged misconduct.[202]

However, one year later another federal district court reached a contrary result. That court concluded that when school district attorneys performed the dual role of prosecutor

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196. *Id.* at 264.
197. *Id.*
198. Lamb v. Panhandle Community Unif. Sch. Dist. No. 2, 826 F.2d 526, 529 (7th Cir. 1987).
199. *Id.* (citing Betts v. Board of Educ., 466 F.2d 629 (7th Cir. 1972).
200. Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 927 (6th cir. 1988).
201. *Id.*
202. Alex v. Allen, 409 F. Supp. 379, 387-88 (W.D. Pa. 1976).

and advisor to the school board in an expulsion hearing before the board, a presumption of bias existed.[203] Interestingly, in the same decision the court ruled that the superintendent's mere presence at board deliberations violated the students' due process rights to an impartial hearing tribunal because the superintendent served as both the chief advisor to the board and chief of the administrative team prosecuting the students.[204] This ruling is in sharp contrast to the Sixth Circuit's ruling that allowed superintendent participation in board deliberations as discussed above.[205]

D. What Type of Notice is Required?

Whenever proposed discipline by school officials involves a protected property or liberty interest, students "must be given *some* kind of notice and afforded *some* kind of hearing."[206] Effective notice requires that a student be told what the student stands accused of doing and what evidence exists to substantiate the accusation.[207] This is required so that the student has a fair opportunity to explain his or her side of the situation.[208] That is why notice is essential to due process.[209]

1. Short-term suspensions

Several court decisions rendered subsequent to *Goss* provide some direction in answering what type of notice is required in short-term suspensions. In one, a junior high school student had been involved in four fights at school over a period of two months. The student argued that he had received notice from an assistant principal that he would be suspended only for a single fight, but on the facts, a three-day suspension was rendered by the principal who considered evidence of each fight and based the decision to suspend on the cumulative of effect all four incidents.[210] On appeal, the school superintendent upheld the principal's decision. On review, the Nebraska Supreme

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203. Gonzales v. McEuen, 435 F. Supp. 460, 465 (C.D. Cal. 1977); *see also*, Pittsburgh Bd. of Public Educ., 524 A.2d 1385, 1389 (Pa. Commw. 1987) (commingling of duties by attorneys in same law firm at due process hearing impermissible).
204. *Id.*
205. Newsome v. Batavia Local Sch. Dist., 482 F.2d 920, 927 (6th Cir. 1988).
206. Goss v. Lopez, 419 U.S. 565, 579 (1975).
207. *Id.* at 582.
208. *Id.*
209. *See supra* text accompanying notes 47-50.
210. Walker v. Bradley, 320 N.W.2d 900, 900-01 (Neb. 1982).

Court first commented that state statutes comported with the requirements for due process set forth in *Goss v. Lopez*,[211] and that the school had complied with statutory requirements, including the notice requirement.[212] Specifically, the student and his parents had received actual notice of the date, time, place and circumstances of each prior violation.[213] The court concluded that it was "utterly frivolous" for the student to deny that he received due process rights under the facts and circumstances of the case.[214]

In a case with a similar result, a New Jersey student alleged that prior to a hearing resulting in a 10-day suspension, he should have been advised that he was also in jeopardy of being suspended from athletics for 60 days.[215] The Third Circuit rejected the argument because student handbooks and other materials available to the student, combined with common sense, should have warned the student of potential suspension from activities for misbehavior.[216]

In West Virginia, an eighth-grade student, suspended for three days for accumulating ten demerits,[217] argued that she should have been given notice that on appeal, the school board would use its own standard to determine whether the suspension should be upheld rather than the standard applied at an earlier review by the teacher-student appeals council.[218] The court found that previously published board regulations, whether actually seen by the student and her parents or not, and the fact that the student was orally advised at the board hearing of the standards to be applied, constituted adequate compliance with the *Goss* decision's notice requirements.[219]

In another decision involving the adequacy of notice, several high school students argued that the information regarding suspension procedures included in the high school student handbook did not detail the specific steps that would be taken to effectuate the notice-hearing process.[220] The court held

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211. *Id.* at 902.
212. *Id.*
213. *Id.*
214. *Id.*
215. Palmer v. Merluzzi, 868 F.2d 90, 94 (3d Cir. 1989).
216. *Id.*
217. *E.g.*, not being prepared for class.
218. Kirtley v. Armentrout, 405 F. Supp. 575, 576-77 (W.D. Va. 1975).
219. *Id.* at 577 (citing Goss v. Lopez, 419 U.S. 565, 582 (1975)). The court commented that the student easily could have obtained the school board regulations which included the appeal standard.
220. White v. Salisbury Township Sch. Dist., 588 F. Supp. 608, 614 (E.D. Pa.

that there are no constitutional provisions that require a school district to publish specific procedural safeguards that closely regulate what takes place at hearings.[221] If a state requires specificity through the regulatory process, any failure to comply would violate only state law.[222] Several courts have rejected parents' arguments that they are entitled to notice before their children are given short-term suspensions.[223]

2. Long-term suspensions or expulsions

The Supreme Court in *Goss* did not address long-term suspensions or expulsions other than to suggest that "more formal procedures" than those stipulated in its ruling on short-term suspensions may be required.[224] In 1961, the Fifth Circuit had addressed the specific requirements of due process for college students facing expulsion or long-term suspension.[225] That decision was subsequently considered a "landmark decision" by the Court in *Goss v. Lopez*.[226] The Fifth Circuit held that before a student can be expelled from a public college for misconduct, the student must receive notice and an opportunity for a hearing.[227] The court specified that notice to the student must be in writing and include a statement of the charges specific enough to allow the student to prepare a defense.[228] A subsequent ruling on the issue by a federal district court in Alabama found that students do not have to be found guilty of all the charges contained in a notice in order to be subjected to discipline.[229] If only one of the charges in the notice is proved on the record, the student may be disciplined.[230]

Although the Fifth Circuit's decision pertained to expulsion of college students, a number of courts have followed that ruling in applying due process to high school students. A Texas federal district court in 1981 commented, in its consideration of

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1984).
221. *Id.*
222. *Id.*
223. *E.g.*, Boster v. Philpot, 645 F. Supp. 798, 807-08 (D. Kan. 1986); Boynton v. Casey, 543 F. Supp. 995 (D. Me. 1982).
224. Goss v. Lopez, 419 U.S. 565, 584 (1975) (Powell, J., dissenting).
225. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).
226. 419 U.S. 565, 576 (1975).
227. *Dixon*, 294 F.2d at 158.
228. *Id.* at 158-159.
229. Scott v. Alabama State Bd. of Educ., 300 F. Supp. 163, 166 (M.D. Ala. 1969).
230. *Id.* at 167.

due process requirements for an eighth-grade student who had received a long-term suspension, that the same concepts, including written notice specifying the charges, were to be applied to all students facing lengthy suspensions from public high schools.[231]

In another decision, a high school student who had been expelled for gross misconduct, disobedience, and disrespect[232] argued on appeal that various aspects of the notice requirement were inadequate.[233] The Supreme Court of Illinois held that two days' notice was adequate time for preparation for the expulsion hearing and notice that the hearing issues involved a pattern of misbehavior without giving details was adequate since school officials had previously informed the parents of each instance of misconduct.[234]

A written notice may not be required in some circumstances. The Supreme Court of Vermont concluded in the case of a long-term suspension or expulsion that it is not constitutionally required that a student receive written notice even when such notice was required by the school's own regulations.[235] On the facts of the decision, a high school student had admitted to school officials both on the date of the incident and at a subsequent hearing, that he had sold marijuana to another student.[236] Relying on the concept that procedural due process is flexible, the court determined that because the boy had not been prejudiced or treated unfairly, and that both the student and his father had been provided actual notice of the charges, written notice was not required.[237]

A decision of the United States Court of Appeals for the Second Circuit involved a high school student who had been suspended initially for 10 days until such time that an expulsion hearing could be held on a charge of his bringing a gun to school. At the hearing, held after the student had missed three months of school, the boy was suspended for the next school year.[238] The Second Circuit ruled that the student was not

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231. Diggles v. Corsicana Indep. Sch. Dist., 529 F. Supp. 169, 172, 173 (N.D. Tex. 1981) (holding the student had received adequate notice).

232. Stratton v. Wenona Unif. Dist. No. 1, 526 N.E.2d 201, 203 (Ill.App. 3 Dist. 1988), *rev'd*, 551 N.E.2d 640 (Ill. 1990).

233. Stratton v. Wenona Community Unit Dist. No. 1, 551 N.E.2d 640, 641 (Ill. 1990).

234. *Id.* at 648-49.

235. Rutz v. Essex Junction Prudential Comm., 457 A.2d 1368, 1373 (Vt. 1983).

236. *Id.* at 1369-70.

237. *Id.* at 1372-73.

238. Rosa R. v. Connelly, 889 F.2d 435, 439 (2d Cir. 1989), *cert. denied*, 496

entitled to receive notice from the school that the time he was absent from school during the continuances would not be considered "time served."[239] The court held that due process does not require that school officials provide, as a part of required notice, a detailed listing of all possible discipline that might be imposed.[240]

A middle-school student, who was expelled for admitted possession of marijuana, was found not to have been denied due process or prejudiced even though he had not been provided, as a part of the notice requirement, a copy of the school's code of conduct outlining all of his rights. The student had, however, subsequently availed himself of the hearing procedures provided by the school board.[241] The court commented that even though the student did not receive a copy of the entire code, he had not been prejudiced. This was especially true because he had recourse to three additional opportunities to present his case before the school board and the State Board of Education.[242] In another decision involving the lack of formal written hearing guidelines, a high school student, expelled from school for possession of marijuana, was found not to have been denied procedural due process.[243] The court reasoned that actual notice was adequate, and the student's legal counsel had full opportunity to present testimony, offer evidence, and ask questions at the school board hearing.[244]

A Pennsylvania federal district court found that a high school student who received a thirty day disciplinary suspension was afforded due process when he was given almost three weeks notice of the charges prior to a scheduled board hearing even though he had not been given notice of each specific charge nor given notice of the specific school regulations under which he would be punished.[245] The court concluded that a general but clearly stated notice of the charges was adequate because it was sufficient notice to enable the student to prepare a defense.[246] In another decision, a high school student who

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U.S. 941 (1990).

239. *Id.* at 436.

240. *Id.*

241. Rucker v. Colonial Sch. Dist., 517 A.2d 703, 705 (Del. Super. Ct. 1986).

242. *Id.*

243. M. v. Bd. of Educ. Ball-Chatham Community Unit Sch. Dist. No. 5, 429 F. Supp. 288, 291 (S.D. Ill. 1977).

244. *Id.*

245. Alex v. Allen, 409 F. Supp. 379, 386-87 (W.D. Pa. 1976).

246. *Id.* at 387.

was initially suspended for five days and then expelled for the balance of the school year after having the opportunity to be heard at three different hearings before three different bodies, was found to have received adequate notice.[247] The court applied the three-part balancing test of *Eldridge* and concluded that the student was entitled to receive notice of charges adequate in detail to prepare a defense, but he was not entitled to notice of charges "drawn with the specificity required for a criminal trial proceeding or a list of potential witnesses and a summary of their anticipated testimony."[248]

Not all courts agree on the issue of specificity of notice. A California federal district court has ruled that when severe penalties, such as expulsion from school, are contemplated, constitutional due process requires that notice must "include a statement not only of the specific charge, but must also include the basic rights to be afforded the student: to be represented by counsel, to present evidence, and to confront and cross-examine adverse witnesses."[249]

The courts are generally consistent in finding that in order to be adequate, a hearing notice must specify the time and place of the hearing, even when the misconduct is admitted.[250] In one decision, high school students who had admitted their misconduct to school officials were given a temporary suspension, in compliance with the requirements of *Goss*.[251] However, when school officials allowed the suspension to extend indefinitely, it became, in effect, an expulsion, and the student's due process rights were violated because a written notice of a hearing scheduled at a reasonable time and place had not been provided.[252]

The courts are split over the issue of whether notice must include a list of potential witnesses and a summary of their likely testimony. The Fifth Circuit, citing a number of cases previously decided between 1961 and 1975, has ruled that providing a list of witnesses who are adverse to the student and a summary of their intended testimony has usually been held to be essential with regard to long-term suspensions.[253]

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247. Whiteside v. Kay, 446 F. Supp. 716, 720 (W.D. La. 1978).
248. *Id.* at 721.
249. Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D. Cal. 1977).
250. *E.g.*, Strickland v. Inlow, 519 F.2d 744, 746 (1975); *remanded, sub. nom*, Wood v. Strickland, 420 U.S. 308 (1975).
251. Darby v. Schoo, 544 F. Supp. 428, 430-31 (W.D. Mich. 1982).
252. *Id.* at 438.
253. Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1081-82 (5th Cir.

However, the court added that the process due is dependent upon the totality of the circumstances and engaged in a balancing of the factors involved.[254] It held that providing a list of witnesses prior to a hearing is not required when an analysis of the relevant facts showed that the student was not materially prejudiced at the hearing.[255] A similar result occurred in a Louisiana federal district court.[256] The Supreme Court of Mississippi, however, came to a contrary conclusion.[257] It determined that procedural due process was violated when school officials refused to provide the requested lists of names of witnesses as provided in school rules designed to protect the constitutional rights of the students.[258]

E. What Kind of Hearing is Required?

An essential requirement of procedural due process is the opportunity to be heard in a meaningful way. Due process is not a technical concept with fixed elements.[259] It is, by its very nature, a highly flexible legal concept. As a concept, due process attempts to balance the government's responsibility to provide procedural due process with the particular life, liberty, or property interest of the person involved.

The federal district court in Nebraska explained the flexibility of due process in a pre-*Goss* ruling.[260] The court said that the requirements of due process vary with each situation because they involve a balancing test wherein a person's right, such as school attendance, is weighed against the government's authority, such as maintaining discipline in the schools. The court concluded that as the importance of a person's right increases, the government must provide a correspondingly in-

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1984).

254. *Id.*

255. *Id.* at 1082. In Nash v. Auburn Univ., 812 F.2d 655, 663 (11th Cir. 1987), the court concluded that two veterinary medicine students who had been suspended for cheating on an anatomy examination were "in this academic disciplinary process . . . not constitutionally entitled to advance notice of statements by witnesses who, along with the appellants [students who were alleged to have cheated on the examination], were to appear at the hearing."

256. Whiteside v. Kay, 446 F. Supp. 716, 721 (W.D. La. 1978).

257. Warren County Bd. of Educ. v. Wilkinson, 500 So.2d 455 (Miss. 1986).

258. *Id.* at 460-61.

259. *E.g.*, McLain v. Lafayette County Bd. of Educ., 673 F.2d 106, 110 (5th Cir. 1982); White v. Salisbury Township Sch. Dist., 588 F. Supp. 608, 613 (E.D. Pa. 1984).

260. Graham v. Knutzen, 362 F. Supp. 881 (D. Neb. 1973).

creasing amount of procedural due process.[261]

Procedural due process does not speak to the merits or wisdom of a decision. It is intended only to help protect individuals from mistakes made by government officials.[262] A number of courts have stated that the burden of providing due process is on the schools and that students are not responsible for requesting it.[263]

1. Admission of misconduct

In a pre-*Goss* decision, the Ninth Circuit held that a high school student who admitted that he had assaulted another student was not entitled to a due process hearing on the grounds that he had admitted all the important facts that a due process hearing was supposed to establish.[264] Thus, the fact that the student had not been allowed to have representation by counsel, to cross-examine witnesses or to present witness in his own behalf were not violations of his right to due process.[265] In a more recent decision, a Maine student's allegation that he was denied cross-examination during an expulsion hearing was rejected on the ground he had confessed his guilt to an administrator.[266]Upon admission of misconduct, another high school student, who had been immediately given a three-day in-school suspension and additional school restrictions,[267] was found not to be entitled to notice or hearing.[268] In 1980, another federal district court concluded that an infor-

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261. *Id.* at 883.

262. Carey v. Piphus, 435 U.S. 247, 259 (1978).

263. *E.g.* Gonzales V. McEuen, 435 F. Supp. 460, 469 (C.D. Cal. 1977); Fielder v. Board of Educ., 346 F. Supp. 722 (D. Neb. 1972).

264. Black Coalition v. Portland Sch. Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973).

265. *Id.*

266. Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 920 (D. Me. 1990); *see also* McLain v. LaFayette County Bd. of Educ., 687 F.2d 121 (5th Cir. 1982), *reh'g denied*, 673 F.2d 106 (5th Cir. 1982) (inadequate notice of issues to be addressed at the hearing were not prejudicial as a result of the student's confession).

267. Fenton v. Stear, 423 F. Supp. 767, 769 (W.D. Pa. 1976).

268. *Id.* at 771-72. The parent did in fact receive written notice but not the student. The incident occurred off campus in the evening when the student, while sitting in a car, noticed his teacher drive by, and proceeded to call him "a prick." At this hearing the teacher, who was the recipient of the unwanted remark, was not present and hence the student was denied the opportunity of cross-examination. Further the student was not allowed to present his own witnesses. The court concluded that since the student had admitted to the offensive remark he had not been denied due process even though the above mentioned procedural safeguards were not afforded.

mal hearing is not necessary regarding suspension or expulsion when a student admits his culpability.[269]

Students who had admitted vandalizing school property and were then suspended for three days[270] were held to have received due process.[271] Relying on *Goss*,[272] the district court concluded that once guilt is admitted, there is no need for students to present their versions of what had happened.[273] Critical to this decision was the *Goss* requirement that students must be given an explanation of the evidence and an opportunity to present their version of the situation if they deny the charges.[274] The inference the court obtained was that if a student does not deny the charges, then neither an explanation of evidence by the school or an opportunity to be heard is required.

A high school student who was wearing sunglasses in school, a violation of school rules, was given a one-day suspension and time in detention because she refused to remove her glasses and give them to the teacher.[275] The student admitted that she refused to obey the teacher's command.[276] The court concluded that "when a student admits to the conduct [refusal to turn over glasses] giving rise to the suspension, the need for a due process hearing is obviated, since the purpose of a hearing is to safeguard against punishment of students who are innocent of the accusations against them."[277] A number of additional cases support the contention that admission of guilt does not require any prior hearing.[278]

Only one court ruling has been found taking the opposite

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269. Montoya v. Sanger Unified Sch. Dist., 502 F. Supp. 209, 213 (E.D. Cal. 1980).

270. Boster v. Philpot, 645 F. Supp. 798, 800 (D. Kan. 1986).

271. *Id.* at 804.

272. Goss v. Lopez, 419 U.S. 565, 581 (1975).

273. *Boster*, 645 F. Supp. at 805.

274. *Goss*, 419 U.S. at 581.

275. Cole v. Newton Special Mun. Sch. Dist., 676 F. Supp. 749, 752 (S.D. Miss. 1987).

276. *Id.*

277. *Id.* The court relied on Black Coalition v. Portland Sch. Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973) and Montoya v. Sanger Unified Sch. Dist., 502 F. Supp. 209, 213 (E.D. Cal. 1980).

278. *E.g.*, Hillman v. Elliott, 436 F. Supp. 812, 815 (D.W.V. 1977); Long v. Thornton Township High Sch. Dist., 52 F.R.D. 186 (N.D. Ill. 1979); Coffman v. Kuehler, 409 F. Supp. 546, 550 (N.D. Tex., 1976); Abremski v. Southeastern Sch. Dist., 421 A.2d 485, 487 (Pa. Commw. Ct. 1980); Birdsey v. Grand Blanc Community Sch., 344 N.W. 2d 342, 346 (Mich. App. 1983); Greenspan v. Antin, 423 N.Y.S.2d 197, 198 (1979), *aff'd* 433 N.Y.S.2d (N.Y. 1980).

view. The United States Court of Appeals for the Eighth Circuit has held that students have the right to present their views of the misconduct at a hearing, even when they admit the offense.[279] The Eighth Circuit relied on the then recent *Goss* statement that "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."[280]

A fair reading of *Goss* might require that a hearing be held in some circumstances regardless of admission of guilt or school official observation of misconduct by the student. Those situations would exist when the student does not deny his or her action, but may have a justifiable or mitigating reason for the misconduct. Such might be the situation, for example, when a student is observed hitting another student, but can claim that he or she was struck by the other student first.

2. Short-term suspensions

For short-term suspensions the Supreme Court in *Goss* stated that a student must be afforded at least a rudimentary hearing.[281] The Court clearly indicated that it did not want to unduly burden public education by imposing elaborate detailed due process elements in each situation.[282] In fact, the Court indicated that the hearing need only be "an informal give-and-take discussion between the student and the disciplinarian."[283] These rudimentary hearings will typically occur immediately following the misconduct, but prior to suspension. The Court acknowledged, however, that emergency situations may occur that will force a hearing to follow a suspension after a reasonable amount of time.[284]

The rudimentary hearing is intended to provide the school

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279. Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975). Three female tenth grade students admitted that they had spiked the punch at an extracurricular function in violation of school regulations.

280. *Id.* (citing *Goss*, 419 U.S. at 584). The Court in *Goss* acknowledged that "[r]equiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be . . . "

281. *Goss*, 419 U.S. at 579.

282. *Id.* at 580.

283. *Id.* at 584.

284. *Id.* at 582. Under certain emergency circumstances a student may be immediately removed from school. A "hearing should follow as soon as practicable." *Id.* at 582-583.

official with an opportunity to inform the student of alleged misconduct and to give the student an opportunity to explain his or her version of the situation.[285] Additional procedural safeguards beyond notice and a rudimentary hearing[286] were not required, although the Court noted that school officials had discretion to afford additional procedures if the situation warranted.[287] The court noted that a school official might find it necessary to "summon the accuser, permit cross examination, . . . allow the student to present his own witnesses . . . .[and even] permit counsel" in an effort to avoid error.[288]

The general due process requirement that the hearing "must be granted at a meaningful time and in a meaningful manner"[289] appears to be totally at the discretion of school officials. In *Goss*, the Court assumed that the school official would usually conduct the hearing immediately after providing notice.[290] Allowing the student a delay between notice and hearing would, the Court feared, unduly formalize the adversarial nature of the proceeding.[291] The Court reasoned that delay would be too costly and destructive to the educational process.[292] The ruling in *Goss* was an obvious effort to strike a balance between school officials possibly making a mistake in erroneously suspending a student and the added burden of a full due process hearing to administration of public schools.

In a ruling subsequent to *Goss*, a federal district court in Illinois had before it a situation involving a boy who had been suspended for 10 days for possession of a knife in school.[293] The principal met informally with the boy and discussed the situation before imposing the suspension. The boy's parents requested and received a hearing before the local board and the board upheld the suspension.[294] The parents' suit alleged violation of procedural due process on the grounds that their son

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285. *Id.* at 580-81.
286. *Goss*, v. Lopez, 419 U.S. at 582.
287. *Id.* at 583-584.
288. *Id.*
289. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
290. *Goss*, 419 U.S. at 582.
291. *Id.* at 583.
292. *Id.*
293. Reineman v. Valley View Community Sch. Dist. No. 365-U, 527 F. Supp. 661, 663 (N.D. Ill. 1981).
294. *Id.*

had not been allowed to confront or cross-examine witnesses against him and had not been allowed to make a verbatim recording of the hearings.[295] The court noted that the *Goss* decision had expressly declined to require full-scale hearings for short-term suspensions and required no more than rudimentary hearings such as those provided by the principal and board. The court found that appropriate due process had been afforded the boy through "a mere informal encounter between the student and disciplinary authority."[296]

The federal district court in Maine was faced with the suspension and subsequent expulsion of a student for use of marijuana on school property.[297] The student's parents alleged their son's due process rights had been violated because the principal denied him permission to leave school during the time he was being questioned by the principal. Moreover, the parents alleged that the student was not informed of his right to remain silent, was not notified that he could have his parents present during questioning and his parents were not notified at the time of the questioning.[298] The court found no legal basis in the parents' allegations and upheld the procedures used by the principal in the suspension.[299]

3. What "unusual situations" call for more than rudimentary procedures?

The Sixth Circuit addressed the meaning of "unusual situations," referred to in *Goss*,[300] that would call for more than rudimentary due process procedures for short-term suspensions.[301] In the decision, an eighth-grade student was suspended for 10 days for possession of a drug look-alike. The student's parents argued that the drug-associated charge was stigmatizing and had a harmful effect on a student's reputation,[302] and that therefore the *Mathews v. Eldridge*[303] balancing test should be applied instead of *Goss*' rudimentary requirements of notice and hearing. The court concluded that

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295. *Id.* at 665.
296. *Id*; *see also* Webb v. McCullough, 828 F.2d 1151, 1159 (6th Cir. 1987) (finding that an informal discussion of charges was adequate for seven-day suspension).
297. Boynton v. Casey, 543 F. Supp. 995, 996 (D. Me. 1982).
298. *Id.* at 997.
299. *Id.* at 998.
300. *Goss*, 419 U.S. at 584.
301. Paredes v. Curtis, 864 F.2d 426, 427 (6th Cir. 1988).
302. *Id.* at 428.
303. 424 U.S. 319, 335 (1975).

the case did not present an unusual situation but was precisely the type of school situation the *Goss* standard was meant to address.[304]

A seventh-grade student who refused to attend a required physical education class was suspended from school until such time as she would participate in the class.[305] Various meetings of school officials and school board members were held with the father and daughter without resolution.[306] By the time the action was filed in federal district court, the student had missed about six weeks of school due to the indefinite suspension and the student's voluntary non-attendance.[307] The court noted that school officials were confronted with a disciplinary problem and not a truancy problem; the student had been only suspended and not expelled from school.[308] The court held that proper notice and hearing had been afforded the father and daughter at an initial hearing and that the extenuating circumstances of the voluntary non-attendance did not change that result.[309]

In a situation arising in Texas, a junior high school student who had been adjudicated a delinquent was ordered to attend school, but was subsequently suspended from school for various forms of misconduct.[310] A modification hearing on his delinquency was held within four weeks of the suspension, and the student argued that the modification order committing him to the state detention school should be rescinded because he had been denied due process in his suspension from school.[311] Though the student's suspension from school had exceeded ten days at the time of the modification hearing, the court noted that the student would have been readmitted to school earlier if his mother would have requested a conference with school teachers and officials.[312] The court concluded that the evidence did not establish that the student was absent longer than ten days from school by other than his own choice.[313]

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304. *Id.* at 429. The court continued: "Therefore, we decline the invitation to apply the *Mathews* balancing test and instead will apply the *Goss* standard in resolving both of Paredes' procedural due process contentions."
305. Ouimette v. Babbie, 405 F. Supp. 525, 526 (D. Vt. 1975).
306. *Id.* at 526-28.
307. *Id.*
308. *Id.* at 528.
309. *Id.* at 529.
310. In the Matter of J.L.D., 536 S.W.2d 685, 686 (Tex. Civ. App. 1976).
311. *Id.*
312. *Id.* at 687.
313. *Id.* at 688.

The court found therefore that no additional due process was required and that school officials had met the minimal notice and hearing requirements specified in *Goss* for short-term suspensions.[314]

The Fifth Circuit reviewed a decision involving a suspension during the time of scheduled final examinations. In *Keough v. Tate County Board of Education*, the Fifth Circuit noted that no distinction was made in *Goss* between suspensions occurring during examination periods and those occurring at other times.[315] The court concluded that although final examinations are important to a student's grade and have a long-term effect on a student's life, they are not materially different from examinations that take place throughout the semester.[316] To exclude final examination periods from the ruling in *Goss* and requiring more formal proceedings would significantly undermine its meaning.[317]

In another decision, a high school senior who admitted he had consumed whiskey while attending a school outing was suspended for three days.[318] The suspensions happened to coincide with examinations.[319] As a result, the student failed three courses and did not graduate.[320] The student argued before the Seventh Circuit that he was in effect expelled rather than suspended and claimed that he was entitled to procedural due process in addition to that required in *Goss*.[321] The Seventh Circuit was in agreement with the Fifth Circuit's discussion above[322] and concluded that the student received legally required process due.[323] The court noted that the student would have graduated without taking final examinations if his grades had been high enough and concluded that the action taken was not really an expulsion despite the long-term and harsh effects of the timing of his misconduct.[324] In a state court decision, a student who was suspended from school for

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314. *Id.*
315. 748 F.2d 1077, 1080 (5th Cir. 1984).
316. *Id.*
317. *Id.* The court noted that the student was eventually allowed to take his final examinations.
318. Lamb v. Panhandle Community Unit Sch. Dist. No. 2, 826 F.2d 526, 527 (7th Cir. 1987).
319. *Id.*
320. *Id.*
321. *Id.* at 529.
322. *See supra* text accompanying notes 315-17.
323. *Lamb*, 826 F.2d at 529.
324. *Id.*

three days, and consequently missed an important test, needed only be afforded rudimentary due process.[325]

A high school student who received both a ten-day academic suspension and a 60-day athletic suspension was held not to be entitled to any more procedural safeguards than that required for only a 10-day suspension.[326] The Third Circuit found that the student was not entitled to a second notice and hearing for the athletic suspension, even though he had not been advised in the initial notice or hearing that he might be subject to suspension from athletics as an additional penalty for his misconduct. The court ruled that *Goss* requires only notice of alleged misconduct and its evidentiary basis, but does not require that a statement of all potential penalties be included.[327]

The Third Circuit also held that the student was not entitled to additional due process even though he faced the cumulative effect of both an academic and an athletic suspension.[328] The court applied the *Eldridge* balancing test and concluded that requiring different types of due process — one for athletes and another for all other students — would be unduly disruptive.[329] The minimal due process procedures required by *Goss* were found to be sufficient under the circumstances.[330]

To date, courts have not identified any "unusual situations" calling for procedural safeguards in addition to those minimally required in *Goss*.[331] The unusual situation would seem to require that a student suffer a severe penalty not reasonably contemplated by a ten day suspension or restrictions on extracurricular activities. Such an unusual situation it might be conjectured, could involve a student being denied a scholarship award or admission to a college or military academy as a result of a notation of discipline on a student's record.

4. Expulsions and long-term suspensions

In *Goss*, the Supreme Court did not expressly state what additional safeguards would be afforded students who are sub-

325. Wayne County Bd. of Educ. v. Tyre, 404 S.E.2d 809, 810-11 (Ga. Ct. App. 1991).
326. Palmer v. Merluzzi, 868 F.2d 90, 91-92 (3d Cir. 1989).
327. *Id.* at 96 (citing Goss v. Lopez, 419 U.S. 565, 582 (1975)).
328. *Id.* at 95.
329. *Id.* at 96.
330. *Id.* at 95.
331. *Goss*, 419 U.S. at 584.

ject to suspensions longer than ten days or to expulsions. The majority of the Court merely indicated that "more formal procedures" may be required.[332] Recently, the federal district court in Maine, after considering the *Mathews v. Eldridge* balancing test, reiterated its list of minimum procedural safeguards to be used when student disciplinary hearings are conducted.[333] Those requirements are:

> (1) The student must be advised of the charges against him;
> (2) the student must be informed of the nature of the evidence against him;
> (3) the student must be given an opportunity to be heard in his own defense;
> (4) the student must not be punished except on the basis of substantial evidence;
> (5) the student must be permitted the assistance of a lawyer in major disciplinary hearings;
> (6) the student must be permitted to confront and to cross-examine the witnesses against him;
> (7) the student has the right to an impartial tribunal.[334]

Providing perhaps a startling contrast to this list of minimum requirements is a recent Sixth Circuit's opinion wherein the court held that due process does not require that a student be allowed to cross-examine or even know the identities of students who accused him of selling marijuana, to cross-examine school officials, or to attend closed deliberations held by the school board even though prosecuting school officials were present.[335] The Sixth Circuit also relied on the *Mathews v. Eldridge* test, which was characterized as providing for a "flexible, policy-oriented analysis of procedural due process issues."[336]

Granted, as outlined previously, that notice and hearing are required, the question remains what other procedural due process safeguards are constitutionally required in order to ensure a fair hearing with respect to expulsions or suspensions

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332. *Id.*
333. Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 918-19 (D. Me. 1990).
334. *Id.* at 919 (quoting Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970)). The court in footnote 7 added: "Although the Court spoke on this issue prior to the landmark Supreme Court precedents governing this subject, the Court's decision is consistent with those precedents and, therefore, retains its vitality."
335. Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 924 (6th Cir. 1988).
336. *Id.*

longer than ten days.

a. The right of confrontation and cross-examination

The United States Supreme Court in *Goss* all but eliminated the right to confrontation and cross-examination of witnesses for short-term suspensions, with the possible exception that an "unusual situation" may require something more than minimal due process procedures.[337] The Court was silent regarding the process required for longer suspensions or expulsions,[338] and it has been the lower federal courts that have attempted to determine the law on this point.

At least one federal district court, relying on the *Goss* decision, offered students facing expulsion a complete panoply of procedural safeguards, including the right of confrontation and cross-examination of adverse witnesses.[339] The court inferred from *Goss* that the rights to have counsel present and to confront and cross-examine witnesses were required because of the severe nature of the penalty of expulsion,[340] especially when heresay evidence was involved.[341] In 1990, the federal district court in Maine, after considering the three-factor balancing test of *Mathews v. Eldridge*, included among its minimum procedural safeguards for expulsion, the right of a student to confront and cross-examine the witnesses presented against him at the hearing.[342] However, because the student admitted the charge of bringing an automatic weapon to school, the lack of cross-examination had no bearing on the decision.[343]

In a case before the Eighth Circuit, a school board had refused to allow a student being considered for expulsion to cross-examine the teacher who had brought two charges against him.[344] The district court had balanced the competing interests of effective school administration with the protection

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337. *Goss*, 419 U.S. at 583-84 (indicating that a school official could "permit cross-examination, and allow the student to present his own witnesses" if the school official chose such action).

338. *Id.*

339. Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D. Cal 1977).

340. *Id.*

341. *Id.* at 469.

342. Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 918-19 (D. Me. 1990).

343. *Id.* at 920; *see supra* text accompanying notes 263-279.

344. Dillon v. Pulaski County Special Sch. Dist., 594 F.2d 699, 700 (8th Cir. 1979) (the charges were public display of affection on school grounds, and failure to comply with reasonable commands of teachers).

of the student's entitlement to an education under state law and concluded that even expulsion proceedings could have some limits on confrontation, such as anonymity for student accusers who might be the victim of reprisals.[345] However, as in the instant case, when a teacher brought the charges and was present at the hearing, the minor loss of time for her testimony and cross-examination did not weigh heavily against the student's loss of an education. The court therefore ruled that the student should have been allowed to cross-examine the teacher.[346] The ruling was affirmed by the Eighth Circuit, and one judge, in a concurring opinion, stated that the rationale of *Goss* required that the student be allowed to cross-examine the teacher as to the facts of the situation.[347]

A number of court decisions are in agreement, partially because of state statutory or local rule requirements based on constitutional concepts. In a decision involving a student who lost a semester's academic credit because she had a few sips of beer in her home before school on the last day of a school term,[348] the Mississippi Supreme Court reversed the school board's decision because the school had not complied with its own rules which required the right to confront and cross-examine witnesses against students charged with misconduct.[349]

Several other courts have ruled that schools must provide the right to cross-examine students where state statutes have established that right. One state court has ruled that a school board is required to examine the evidence and not merely rely on school officials' reports when evidence is conflicting and when it has not been shown that available witnesses are at risk of being harmed if they testify.[350] The court added that it would be appropriate for the board to rely on hearsay reports only when it is established that the disclosure of the witness' identity would subject the witness to retaliation.[351] The court

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345. Dillon v. Pulaski County Special Sch. Dist., 468 F. Supp 54, 58 (E.D. Ark. 1978).

346. *Id.*

347. *Dillon*, 594 F.2d at 700-01 (Benson, Chief Dist. J., concurring).

348. Warran County Bd. of Educ. v. Wilkinson, 500 So.2d 455, 456 (Miss. 1986); *contra* Jones v. Pascaqoula Mun. Sep. Sch. Dist., 524 So.2d 968, 973 (Miss. 1988) (noting that the issue of testimony from school employees may be treated differently).

349. *Id.* at 460-61.

350. John A. v. San Bernardino City Unified Sch. Dist, 654 P.2d 242, 246-47 (Cal. 1983).

351. *Id.* at 246. The court referenced Morrissey v. Brewer, 408 U.S. 417, 482 (1972) (stating that with regard to a parole violation hearing, a hearing officer may

apparently would require that there be an express finding of risk before witnesses would be considered unavailable.[352] A similar result was reached in Florida when a state appeals court held that a high school student could not be expelled based exclusively on hearsay evidence.[353] State statute required that hearsay evidence could be used only to substantiate other evidence and could not be the exclusive evidence presented.

Some courts have reached contrary results on the right of cross-examination. One federal district court, after balancing the *Mathews v. Eldridge* factors, concluded contrary to some of the above rulings, that the burden and cost to school officials outweighed any risk of error. The court held that the school board was not required to conduct full-scale hearings with cross-examination and provision of a list of witnesses with a summary of their testimony and discovery prior to expelling students for the remainder of the school year.[354] With regard to the "guilt phase of suspension hearings,"[355] the Fifth Circuit has declined to formalize the suspension process by requiring school administrators to establish a basis in fact as to the accuracy of each piece of evidence considered at a hearing.[356] Written statements of three unidentified students implicating the charged student with use and sale of drugs at school that were read at the hearing were sufficiently specific regarding the student's use of and dealing in drugs and thus constituted a sufficient form of confrontation.[357]

A similar result was found in a decision of the Sixth Circuit involving a high school student accused of possession and sale of a marijuana cigarette.[358] At a hearing before the school board, the student was denied permission to learn the names of and cross-examine student accusers or to cross-examine the principal and superintendent[359] who had conducted the investigation, imposed sanctions, and relayed their results

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determine that if "the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination").

352. *Id.* at 247.

353. Franklin v. Dist. Sch. Bd. of Hendry County, 356 So. 2d 931, 932 (Fla. Dist. Ct. App. 1978).

354. Whiteside v. Kay, 446 F. Supp. 716, 720-21 (W.D. La. 1976).

355. Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 261-63 (5th Cir. 1985).

356. *Id.* at 263.

357. *Id.*

358. Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 921 (6th Cir. 1988).

359. *Id.* at 922.

of the investigation to the board.[360] The court was satisfied that the superintendent and principal used only reliable information provided by the informants in their earlier administrative decision to expel the student.[361]

In reaching its decision, the Sixth Circuit applied the *Mathews* test and determined that allowing the accused student to know and cross-examine his student accusers was outweighed by the necessity of protecting student witnesses from reprisal.[362] The need to protect the school environment against the increasingly serious problem of drug use and violent crime,[363] coupled with the need to protect student-informants from reprisal, was determined essential in order to protect students who are willing to report offenses by their fellow students.[364] The value of the additional procedural safeguard — an opportunity to confront and cross-examine student-informants — was not found to be sufficiently compelling because school officials would be able to evaluate the veracity of incriminating statements provided by other students.[365]

The Sixth Circuit assumed that cross-examination of the student witness would duplicate the original assessment undertaken by the investigating school administrator.[366] With regard to cross-examination of the school administrators, the court concluded that allowing their cross-examination was too heavy a burden when weighed against the small benefit the student would receive.[367] Also, in applying the *Mathews* balancing test, the court recognized that allowing cross-examination of school administrators would interfere with their normal duties as they worked to become familiar with legal principles involving cross-examination.[368] The court reasoned that school board members should not be diverted from their prima-

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360. *Id.* at 921. The principal recommended a ten-day suspension and the superintendent expelled the student for the balance of the fall semester.
361. *Id.* at 921-22.
362. *Id.* at 925. The Sixth Circuit also reached the same conclusion in Paredes v. Curtis, 864 F.2d 426, 429 (6th Cir. 1986) (noting that the student-plaintiff who had been suspended for ten days did not have the right of cross-examination of the student-informant when such right was denied in *Newsome*, 842 F.2d at 925, which was an expulsion case).
363. *Id.*, (quoting New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) which, in turn, cited a 1978 report to the U.S. Congress).
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.* at 925.
368. *Id.* at 925-26.

ry goal of educating young people to assume a new responsibility of a "quasi judicial" body and perform a role they are not well equipped to perform.[369] The court clearly stated that school boards should not have to follow all the formal rules of evidence in hearings.[370]

A Wisconsin state appellate court has taken a similar position of balancing and has held that allowing hearsay statements of students not present at the hearing and not subject to cross-examination did not violate a student's right to due process.[371] The court stated that a school board made up of non-attorneys should not be expected to follow the requirements of the hearsay rule.[372] In the absence of a showing that the teacher witnesses had reason to lie, hearsay statements should be allowed, at least in part, to serve as the basis for the board decision.[373]

b. When is counsel required?

Rudimentary hearings for short-term suspensions, absent an unusual situation, do not require schools to allow the student to secure legal counsel.[374] However, such procedures may be required for expulsions or suspensions longer than ten days[375] though the Supreme Court declined to expressly elaborate. The Third Circuit has held that only minimal due process was required where a student was suspended for 10 days and also received a 60-day athletic suspension.[376] The court specifically declined to require the right to counsel.[377] Recently, the federal district court in Maine stated that students must be allowed legal assistance in major disciplinary hearings, but noted that in the situation before it that the student had been not denied that opportunity.[378] A federal district court in Pennsylvania ruled that there is no right to an attorney or a right

369. *Id.*
370. *Id.* at 926, (citing Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974) *cert. denied*, 420 U.S. 962 (1974)).
371. Racine Unified Sch. Dist. v. Thompson, 331 N.W.2d 334, 337 (Wis. Ct. App. 1982).
372. *Id.* at 337-38.
373. *Id.* at 338.
374. Goss v. Lopez, 419 U.S. 565, 583 (1975).
375. *Id.* at 584.
376. Palmer v. Merluzzi, 868 F.2d 90, 95 (3d Cir. 1989).
377. *Id.*
378. Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 919 (D. Me. 1990).

to an attorney at school expense in a situation involving an involuntary transfer of a student between attendance centers for disciplinary reasons.[379]

In general, most courts reviewing student due process issues since Goss have not needed to address the right to counsel. The schools had allowed or encouraged legal representation when long-term suspension or expulsion were involved.[380]

c. Other due process elements

The foregoing discussion of procedural due process elements represents those which are commonly at issue in court reviews of procedural due process. However, there are several other issues that arise on a less frequent basis.

Inherent in the requirements of notice and an opportunity to respond is the requirement that decisions be based only on the evidence produced at the hearing. In an important case before the Sixth Circuit, a school board decision to expel a student was reversed because the superintendent revealed new evidence during board deliberations after the hearing was concluded.[381] The court concluded that such an action deprived the student of his required opportunity to rebut the evidence.[382] It was discovered that the superintendent had given false information to the board.[383]

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379. Everett v. Marcase, 426 F. Supp. 397, 401-02 (E.D. Pa. 1977).

380. Allegations of denial of procedural due process involving expulsion typically have had representation by counsel or were afforded the opportunity to be represented by counsel. For example, in John A. v. San Bernardino City Unified Sch. Dist., 645 P.2d 242, 244 (Cal. 1983), school officials, when informing parents of the scheduled hearing also advised them that they be represented by counsel. In Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 921 (6th Cir. 1988), the student was represented by counsel at a hearing before the school board. Other decisions wherein there was representation by counsel include: Dillon v. Pulaski County Special Sch. Dist., 468 F. Supp. 54, 56 (E.D. Ark. 1978); Draper v. Columbus Pub. Sch., 760 F. Supp. 131, 132 (S.D Ohio 1991); Jones v. Pascaqoula Mun. Separate Sch. Dist., 524 So.2d 968, 969 (Miss. 1988); Lamb v. Panhandle Community Unif. Sch. Dist. No. 2, 826 F.2d 526, 528 (7th Cir. 1987) (three day suspension); Ouimette v. Babbie, 405 F. Supp. 525, 526 (D. Vt. 1975) (suspended until student attends physical education class); Paredes v. Curtis, 864 F.2d 426, 428 (6th Cir. 1988) (ten day suspension); Smith v. Little Rock Sch. Dist., 582 F. Supp 159, 160 (E.D. Ark. 1984); Sykes v. Sweeney, 638 F. Supp. 274, 278 (E.D. Mo. 1986); Whiteside v. Kay, 446 F. Supp. 716, 721 (W.D. La. 1978).

381. *Newsome*, 842 F.2d at 927.

382. *Id.* at 928; *see also* Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 919 (D. Me. 1990) (included in a list of due process rights); De Jesus v. Penberty, 344 F. Supp. 70 (D. Conn. 1972) (a pre-*Goss* ruling holding that a decision must be based only on evidence introduced at hearing).

383. *Id.*, n. 7.

Court decisions are divided on the issue of requiring a written decision in long-term suspensions. One view states written decisions require the decision maker to weigh the evidence more heavily, and in a balance of competing interests, the student should be provided a written decision.[384] In the other view, no reason justifying the requirement of a written decision has been identified.[385]

One court has ruled that due process does not require that witnesses at expulsion hearings be sworn to tell the truth or that formal rules of evidence be followed.[386] The requirement of such additional procedures would result in a significant burden being placed on the school without providing any additional important protection against error.[387] Several courts ruled that due process in the school setting does not require the right to appeal a decision to a higher authority.[388] While pre-*Goss* rulings were split on the issue of requiring a verbatim record of hearings,[389] no post-*Goss* ruling on the issue has been identified.

V. CURING DEFECTS IN PROCEDURAL DUE PROCESS

Many school officials have determined after the fact that a particular student may not have been afforded appropriate procedural due process. Some have proceeded with a "let the chips fall where they may" attitude, but others have taken a constructive approach to the problem. One such approach would involve the removal from the student's record of all mention of the previous faulty hearing and any discipline rendered, thus placing the student in the same position he or she faced before the faulty hearing was held. A second hearing could then be held with procedural defects cured. While no court has expressly ruled that such an approach is legal in the context of

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384. Takeall v. Ambach, 609 F. Supp 81, 85-87 (S.D.N.Y. 1985); Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 920 (D. Me. 1990); *see* pre-*Goss* rulings requiring a written decision in Fielder v. Board of Educ. 346 F. Supp. 722 (D. Neb. 1972); De Jesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972).

385. Long v. Thornton Township High Sch. Dist. 205, 82 F.R.D. 186, 192 (N.D. Ill. 1979); *see also* pre-*Goss* ruling in Linwood v. Board of Educ., 463 F.2d 763 (7th Cir. 1972) (holding that a written decision not required).

386. Sykes v. Sweeney, 638 F. Supp. 274, 279 (E.D. Mo. 1986).

387. *Id.*

388. Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 263 (5th Cir. 1985); Everett v. Marcase, 426 F. Supp. 397, 403 (E.D. Pa. 1977).

389. *E.g.*, Pierce v. School Committee, 322 F. Supp. 957 (D. Mass. 1971) (verbatim record not required); Fielder v. Board of Educ. 346 F. Supp. 722 (D. Neb. 1972) (verbatim record was required).

school discipline, several courts have implicitly upheld the curing of earlier procedural defects through subsequent hearings.

In a case before the Eighth Circuit, a local school board had suspended three girls for three months for allegedly spiking the punch at a school event.[390] The board had not provided the girls or their parents with proper notice of the hearing at which the initial decision was made and held a second hearing about two weeks later in which the notice defects were corrected.[391] Without expressly ruling on the issue of cured defects, the court ruled that the second hearing procedure was faulty because the school board had distributed a written statement of its finding of facts before the second hearing had begun. Because the record did not establish that the board actually considered the discipline issue anew, the court found that the second hearing had not, in fact, cured the procedural defects.[392]

In a situation before a Virginia federal district court, a student was suspended for three days for being disrespectful toward a teacher and using abusive language.[393] When uncertainty arose about the legality of the procedures used, the school allowed the student to remain in school and began the disciplinary process anew. The student was offered all required procedures.[394] The court ruled that the initial defects did not taint the later proceedings and the student had been afforded proper due process.[395] A similar result occurred in a Texas case where procedural defects in a rudimentary suspension hearing were found to have been corrected by a second hearing two hours later with the student's father.[396] A pre-*Goss* ruling in Louisiana also upheld the use of a second hearing to cure a procedural defect and stated that the amount of time lapse between the first hearing and the curative hearing was not important.[397]

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390. Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975).
391. *Id.*
392. *Id.*
393. Hillman v. Elliott, 436 F. Supp. 812, 814 (W.D. Va. 1977).
394. *Id.*
395. *Id.* at 815.
396. Coffman v. Kuehler, 409 F. Supp. 546, 551 (N.D. Tex. 1976).
397. Williams v. Vermillion Parish Sch. Bd., 345 F. Supp. 57 (W.D. La. 1972).

VI. DAMAGES FOR PROCEDURAL DUE PROCESS VIOLATIONS

School officials who may have inadvertently violated the procedural due process rights of students, even though the discipline imposed was justified on the facts, may have only nominal damages awarded against them. In *Carey v. Piphus*, the Supreme Court reviewed a situation involving several elementary and secondary students in Illinois who had been suspended from school for 20 days without being provided appropriate procedural due process.[398] The district court had not awarded any damages to students, because they had not shown any specific monetary injury resulting from missing school for 20 days. However, the Seventh Circuit held that the students were entitled to recover substantial damages regardless of proof of actual injury.[399]

The Supreme Court disagreed with both lower courts and ruled that in the absence of proof of actual injury, students whose procedural rights were violated, but whose suspensions were justified on the facts, are entitled to recover only nominal damages not to exceed one dollar.[400] The rationale for the decision was that due process was not meant to protect against loss of protected rights, only against the mistaken or unjustified loss of life, liberty, or property.[401] Of course, if a student can show that his or her procedural due process rights were violated and, had the student been provided an opportunity for a fair hearing, he or she would not have been found guilty and punished, the student may be given an opportunity to prove actual damages in excess of nominal damages.[402]

Several subsequent court rulings have applied the concept of awarding one dollar as nominal damages in situations involving student due process violations, where the student was guilty of the infraction. In one decision, students had been suspended by school administrators indefinitely without adequate due process.[403] In another, a student was awarded one dollar in nominal damages when school officials refused to al-

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398. 435 U.S. 247, 250-51 (1978).
399. *Id.* at 251-53.
400. *Id.* at 266-67.
401. *Id.* at 259.
402. *Id.* at 248.
403. Darby v. Schoo, 544 F. Supp. 428, 442 (W.D. Mich. 1982).

low cross-examination of a teacher at an expulsion hearing, but the student was actually guilty of insubordinate behavior toward the teacher.[404]

School officials should not be mistaken, however, in assuming that the *Carey* ruling will prevent considerable out-of-pocket loss for violations of student due process rights. As provided in federal statute, if the student prevails in civil rights litigation, in addition to paying for their own legal services, school officials may have to pay for the student's attorney.[405]

VII. SUMMARY

Whatever else procedural due process may be, it remains little more than a process. It does not speak to the merits or the wisdom of a decision. Its purpose is merely to aid in achieving a proper and fair result. This is accomplished by requiring an appropriate procedure that better enables the decision maker to arrive at a fair and just decision.

The most important court interpretation concerning procedural due process in the context of discipline of public school students is found in *Goss v. Lopez*. In that ruling, the Supreme Court held that involuntary removal of students from public school, even for short periods of time, involved property and liberty interests protected by the Due Process Clause and thus, school officials must provide students with at least a rudimentary hearing. They must provide students with notice of the allegations of misconduct, and if the student denies the allegations, the student must be provided with the evidence substantiating the allegations and an opportunity to explain his or her version of the situation. At that time, school officials may determine to investigate the matter further or they may make a decision regarding the punishment, or lack of punishment, of the student. School officials may provide additional due process, but none is generally required. The Court did not require any more due process than that required by good educational practice.

Subsequent court decisions have expanded and applied the spirit of the *Goss* ruling to long-term suspensions and expulsions, but they have not generally expanded student due process rights into other areas, such as athletic participation, in-

404. Dillon v. Pulaski County Sch. Dist., 468 F.Supp. 54, 59 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699, 700 (8th Cir. 1979).
405. 42 U.S.C. § 1988 (1988).

school suspension where access to the educational program is allowed, and participation in school ceremonies, such as commencement. Some situations, such as loss of a semester's academic credit or exclusion from all school activities for an extended time, may have different results.

Generally a due process hearing must precede any decision to punish a student. If an emergency situation exists, such as the student being under the influence of drugs or acting in a violent manner, a hearing may be held at a later time.

There is a universally accepted requirement that decisions made as a result of due process hearings be made by impartial decision makers. There is a strong legal presumption that school officials are not biased unless the student can establish actual bias. Mere allegations of bias do not result in improper decision making or a violation of due process. A decision maker is not biased merely because he or she observed the incident, conducted an investigation, or is employed by the same school considering the discipline of the student. If the alleged misconduct was perpetrated against the decision maker, however, bias would more likely be present. The courts are divided on the issue of dual roles of prosecutor and advisor to the decision maker played by attorneys and administrators.

Removal from school for longer than 10 days or possibly a short-term suspension coupled with other deprivations may result in the need for additional due process to be afforded the student. As the potential loss to the student increases, the school requirement to provide more process generally increases.

In situations involving exclusion from school for longer than 10 days, it is desirable to have a written notice outlining the charges and stating the time, place, and date of the hearing. The courts are divided on the issue of providing a list of witnesses and a summary of their proposed testimony in the notice.

Court decisions are generally consistent in requiring students who are being considered for long-term suspension or expulsion be given the opportunity to explain their version of the situation in a meaningful way. That is why due process requires little in the way of procedure if the student admits the misconduct and the facts are not in dispute.

In addition to the requirements of notice and a meaningful opportunity to be heard in situations of long-term suspension or expulsion, some courts have stated that a student can be punished only on the basis of evidence introduced at the hearing; must be allowed to have an attorney present; must be

permitted to examine documents and confront and cross-examine witness, and must be allowed to have a verbatim record made.

The courts are not consistent in their rulings on many of the elements of due process, especially those enumerated immediately above. Those differences in court interpretation are a result not only of different interpretations in the various jurisdictions, but also of court efforts to weigh student protected interests against additional procedural burdens on school officials. When the facts of a specific situation are weighed in this balance, prediction of result becomes quite difficult.

Some court decisions have indicated that recognized errors in providing due process can be curred by starting over and providing the proper due process in a second hearing. If the student was guilty of an alleged infraction of school rules and was merely deprived of an element of due process without other loss, only nominal damages will be awarded.

School officials and their attorneys must be aware of the law and the spirit of the *Goss* decision, and the precedential value of due process decisions in their various jurisdictions. They need to attempt to predict how a court might weigh the facts of a specific situation in making its decision. Taking a position of providing more due process than is minimally required gives school officials and their attorneys more latitude in defending against law suits and provides additional benefits to the school community.

VIII. CONCLUSION

Probably no other language in the Constitution has engendered more court decisions and legal discussion than the phrase "due process of law." Yet, with all the discourse and all the decisions, the exact meaning of the phrase remains elusive. We know that procedural due process is a flexible concept that results in differing requirements dependent upon differing factual circumstances. It is challenging, if not impossible, on a national scale to reasonably predict court application of specific elements of procedural due process in specific factual circumstances. More than any other area of education law, procedural due process is dependent upon the totality of the circumstances and the court jurisdiction involved.

We also know that early fears of undue and meddlesome court intervention into the operation of the schools as a result of the *Goss* ruling has not come to pass. The courts have gen-

erally been restrained in applying due process concepts to educational deprivations, other than exclusion, and have generally done a good job in balancing the students' interests against the added burdens that due process requirements might place on schools. After much litigation over the nearly two decades since *Goss* was decided, the courts have not greatly expanded due process beyond minimum protections of students' property and liberty interests.

Yet, public schools continue to be taken into court to defend their due process procedures. Much of the problem appears to be that educators spend a great deal of effort attempting to determine what minimal due process requirements are required and then end up spending a great deal of time attempting to defend the minimum due process they provide. They forget that while in the eyes of the law you can provide inadequate due process, you can never provide too much. If educators would become more concerned with treating students as they themselves would like to be treated, so that when due process minimums are not clear, an effort is made to provide students with extra process, they will save much time, effort, and money in the long run. While it sometimes takes a little more time and effort to give students more process than may be minimally due, much time and money may be saved because mounting a legal defense to challenges will be easier. If there are no gaping oversights or questionable areas in the process offered students charged with violation of school rules, legal challenges may not even arise.

If a student being considered for short-term suspension alleges that a teacher's allegations against him are founded in the teacher's being out to get him, there will be little economy lost in confirming the teacher's allegations by conferring with other students or teachers, even though this is not required by the *Goss* decision. The time spent in further investigation may serve the real purpose of procedural due process, assuring the likelihood of correct decisions, and may eliminate, or make more defensible, the legal challenges made regarding the principal's action or inaction. Why spend legal fees and educational time defending decisions refusing cross-examination of teachers available for hearings, the making of verbatim records, or providing written decisions outlining the finding of facts in expulsion proceedings? None of these elements of additional procedural due process will overburden the school, but they may deter lawsuits from being filed, and they certainly will make it more likely that lawsuits will be won by schools.

For schools that want to extend reasonably full constitutional procedural due process to students, both for their own self-protection and to serve as role models in the education of impressionable youth, the task is not difficult. In situations of short-term suspensions, or other deprivations arguably involving liberty or property interests, follow the *Goss* requirements of no removal prior to rudimentary hearing and oral or written notice of the alleged misconduct. If the student denies the allegations, an explanation of the evidence and a chance for the student to present the student's position must be provided. If an emergency need to remove the student is present, provide the hearing as soon as reasonably possible thereafter. Although not required, if the student raises credible issues of fact, follow up with additional investigation or give the student a reasonable opportunity to provide evidence.

If the issue involves a long-term suspension or expulsion, it is better to provide greater due process than is minimally required, than to provide questionably adequate due process, inviting legal challenge. Generally, the student should not be punished by removal or by any other action prior to the hearing. If the student must be removed immediately for the protection of the student or others, a separate rudimentary hearing can be held for that purpose. Notice of the proposed long-term suspension or expulsion hearing should be in writing and should provide the time, place, and date of the hearing, as well as an explanation of the charges in sufficient detail to allow preparation of a defense. Sometime prior to the hearing, the student may be provided a list of likely witnesses and a brief summary of their planned testimony. If the student reasonably requests additional time to obtain legal counsel or gather evidence for the defense against charges, continuances should be granted. If the student contests the allegations, the student should be provided ample opportunity to present evidence in support of the defense of the charges. While subpoena of witnesses may not be required, school officials should encourage witnesses requested by the student to attend the hearing. The student should be allowed to examine all evidence presented and to cross-examine all available witnesses. Affidavits and hearsay evidence should be kept to a minimum and student witnesses should testify unless it can be established that retaliation is a strong possibility. Hearsay evidence should be substantiated by other evidence so that decisions are not based wholly on hearsay evidence. The student should have a right to be represented by legal counsel or other adult representative,

but the school should not be responsible for the student's defense expenses. A verbatim record should be made by electronic recording or stenographer. The decision should be in writing and should include findings of facts with regard to each allegation against the student. Discipline can be handed out regarding each allegation. All allegations don't have to be proven in order for discipline to be administered. Decisions should be based only on evidence introduced at the hearing and subject to cross-examination by the student — facts not in evidence at the hearing should not be considered. Persons involved in the prosecution of the student should not be present at the deliberation stage, unless the student is also allowed to be present. Decision makers should excuse themselves from the process when information is present that would indicate that they may not be objective in making a decision.

Obviously, not all of the foregoing elements of procedural due process are required in all circumstances or in all jurisdictions. They merely represent the items of due process that public school officials should observe for purposes of better decision making, being a role model, fairness, exhibiting good educational principles, and lessening the likelihood of being in or losing a lawsuit.

Time, money, and effort will eventually disclose what minimal procedural due process elements are required on almost any set of facts in any jurisdiction. Additional school officials' time, money, and effort will be used in defending the use of minimal procedural due process in court. But educators' time, money and effort can be better spent in other pursuits if they plan ahead to provide more than minimal due process to students. They will at the same time be modeling valuable lessons to students that will have a positive impact on the future of the country. Students will learn to treat others fairly when they are treated fairly.