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OVERCOMING A LAWYER'S DOGMA: EXAMINING DUE PROCESS FOR THE "DISRUPTIVE STUDENT"

Jessica Falk*

This Note explores how traditional due process functions in the context of school expulsion hearings. Traditional due process is inadequate in the case of "chronically disruptive" students because these students have lost their property right in education long before the law requires a due process hearing. Instead, new avenues of due process that are better adapted to the educational setting must be explored. Lawyers should expect schools to identify students' with behavioral problems before expulsion becomes imminent and assist students in overcoming these problems. This "educational due process" not only helps to protect troubled student's education, but it is also an effective way to address the problem of violence in schools.

INTRODUCTION

The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.¹

The way it is taught in law school, one would think that law is an ancient mythology. Law school courses make it appear as if law exists in one realm while reality exists in another. We discuss the law as if it can be explained in the bipolar language of legal and illegal, or constitutional and unconstitutional. Yet, we are all aware that the law functions in a reality that is "all fuzzed along [its] edges."² If lawyers were to simply think precisely and work within the body of materials given, law and constitutional protections would be rendered useless. But we often ignore this fact and continue to discuss law as if it were an intellectual exercise based on

* J.D. Candidate, Michigan 2003. I would like to thank Michelle Light, Ruth Zweifler, Terry Weber, James Forman, Jr., and my family for all their help.

1. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON LAW AND ITS STUDY* 116 (1960), quoted in Stephen Wiesner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 *YALE L. & POL'Y REV.* 583, 586 (1998).

2. See *supra* note 1 and accompanying text.

abstract principles, not a tool to solve real-world problems. We forget that the lawyer's job is to help solve real problems, and that sometimes the solution cannot be found within the body of materials given. We forget that the Constitution is not sacred because it is the law; instead it only has value as a mechanism for protecting human beings. We think of due process as a mechanism for protecting *legal* life, liberty and property, but seldom discuss the value of these concepts in real terms. Therefore, lawyers often produce adequate mechanisms to protect the *concepts* as such, but do little to ensure that people actually retain their life, liberty, and property. This inadequacy is readily visible in the way due process protections have been formulated in the context of school expulsions.

Since the Supreme Court case of *Goss v. Lopez*,³ there has been considerable debate concerning the scope of process due in school expulsion cases.⁴ This debate, however, ignores students' realities in today's schools. Therefore, this debate does little to ensure students' property interest in their education. For instance, the "disruptive student"⁵ needs more than the due process typically claimed in key due process cases. He needs more than a due process that focuses on discipline and an end result. His due process must also focus on his well-being and his education. As of yet, courts and legislatures have refused to see the need for this type of due process. Lawyers fight for additional due process rights for students, but their restrictive interpretation of due process often makes these rights meaningless. The lawyer sees due process procedures⁶ only as mechanisms to ensure fairness in a final trial or hearing, not as mechanisms to prevent the loss of life, liberty, and property. The lawyer considers the "legal perspective" of due process, but often ignores its real world value.⁷ For youth, whose entire

3. 419 U.S. 565 (1975).

4. See *infra* notes 16–21, 25–35 and accompanying text.

5. For the purposes of this Note, the term "disruptive student" describes a student who has recurrent behavioral problems in school.

6. The following arguments, which do not focus on the procedures at a termination hearing, may appear at first glance to be issues of substantive due process. This Note, however, does not argue that education is a fundamental right. Instead this Note, in light of the fact that the Supreme Court has mandated due process when a student is deprived of his state-provided education, explores the type of *processes* that are necessary to ensure that a student may reap the benefits of his education.

7. See Jonathan Wren, Note, "Alternative Schools for Disruptive Youths"—A Cure for What Ails School Districts Plagued by Violence?, 2 VA. J. SOC. POL'Y & L. 307, 332 (1995) ("From a legal perspective, there does not appear to be any inherent contradiction between providing students with adequate constitutional protections and subjecting them to these school disciplinary procedures.") (emphasis added).

futures depend on their education,⁸ the real value of due process can only be realized by proactive measures. Lawyers, who are often in the position of advisers, counselors, and policy makers, have much power to see that this is done.

Part I of this Note examines why due process is required in school expulsion cases and highlights the debate surrounding this issue. Part II examines how traditional due process functions in the educational setting. It argues not only that traditional due process can harm students, but that in reality, traditional due process is not due process at all because students have lost their property right in education long before the law requires a due process hearing. Part III asserts that students need and deserve due process before they are expelled or placed in an alternative school. It then explores new avenues of due process that are better adapted to the educational setting. Part IV addresses the threat of school violence and the proper function of schools, which are issues likely to be raised in opposition to "educational due process." This last section asserts that educational due process is actually the best way to address the problem of violence in schools. Therefore, in order to achieve safe schools, the scope of what a school does must entail practices conducive to administering educational due process.

I. THE LEGAL BACKGROUND: HOW DUE PROCESS CAME TO APPLY TO SCHOOL EXPULSIONS

Goldberg v. Kelly,⁹ by expanding the notion of property beyond that recognized at common law, made the legal claim to due process in the educational context possible. Before *Kelly*, due process only applied if the property in question fit a traditional, restrictive definition of property.¹⁰ The government needed to provide due process before taking property only if it would be illegal for an individual person to take that same property at common law.¹¹

The plaintiffs in *Kelly* were welfare recipients who claimed that they were entitled to a due process hearing before their benefits were terminated.¹² The *Kelly* Court agreed with the plaintiffs, and

8. See JANA ZINSER, U.S. DEP'T OF EDUC., U.S. DEP'T OF LABOR, STATE EDUCATION FUNDING POLICIES AND SCHOOL-TO-WORK TRANSITIONS FOR DROPOUTS AND AT-RISK STUDENTS x, 9 (1996).

9. 397 U.S. 254 (1970).

10. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1048 (3d ed. 1996).

11. *Id.*

12. *Kelly*, 397 U.S. at 256.

expanded the traditional definition of due process to include “government entitlements”: when the government decides to provide certain benefits to a person, those benefits become that person’s property; therefore, due process applies.¹³ Significantly, the Court spent little time discussing why welfare benefits qualify as property, and instead focused its discussion on how much due process is necessary in such a case.¹⁴ The Court concluded that when the government seeks to remove a person’s welfare benefits the government must provide substantial due process, including a pre-termination hearing, the right to cross-examine witnesses, and the right to secure counsel.¹⁵

The Court’s acknowledgement of a property interest in welfare benefits made it possible to argue that students have a property right in their state-provided, mandatory educations. In *Goss v. Lopez*,¹⁶ the plaintiffs—students suspended for up to ten days from their school—claimed that they were entitled to notice and hearing before suspension.¹⁷ The Supreme Court decided that students do have a property right in their state-provided education; therefore, the Due Process Clause of the Fourteenth Amendment applies when a school wishes to expel or suspend a pupil.¹⁸ As in *Kelly*, the difficult question was not whether due process protections were necessary, but *how much* due process was necessary.¹⁹ The Court held that a school must give a student notice and opportunity to be heard for suspensions of ten days or less, and stated that “longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”²⁰

Shortly after *Goss*, the Supreme Court, in *Mathews v. Eldridge*,²¹ clearly stated the factors that it would take into consideration when deciding how much process is due. The *Mathews* Court faced that challenge when the federal government sought to terminate a person’s disability insurance benefits.²² In making this decision, the Court created what has come to be known as the “*Mathews* Balancing Test.”²³ This test considers three factors:

13. *Id.* at 261–63.

14. *Id.* at 260–61.

15. *Id.* at 266–71.

16. 419 U.S. 565 (1975).

17. *See id.* at 567.

18. *Id.* at 572–74.

19. *Id.* at 575.

20. *Id.* at 584.

21. 424 U.S. 319 (1976).

22. *See id.*

23. *See, e.g.*, STEPHEN G. BREYER, ADMINISTRATIVE LAW AND REGULATORY POLICY 694 (4th ed. 1999); STONE, *supra* note 10, at 1064.

First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁴

Since *Mathews*, this test has been used to decide whether a person has the right to certain processes, including: an oral hearing, a hearing prior to the termination of property rights, an impartial arbitrator, the opportunity to cross-examine adverse witnesses, the opportunity to present favorable witnesses and evidence, and the right to be represented by an attorney.²⁵

Because the Supreme Court has not spoken on the extent of process due in the context of elementary and high school suspensions and expulsions since *Goss*, scholars and courts have struggled to define for themselves the contours of due process in these situations.²⁶ The due process procedures claimed in the school cases are

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

25. See BREYER, *supra* note 23, at 691-92. Since *Goldberg*, there has been a considerable number of cases assigned the task of deciding what process is due under differing circumstances. See, e.g., *Gilbert v. Homar*, 520 U.S. 924 (1997) (holding that no pre-suspension hearing was necessary for a government worker who was investigated for drug offenses); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (holding that the right to be represented by counsel was not constitutionally required; thus the ten dollar cap on attorney's fees was constitutional); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (finding that a pre-termination hearing was necessary when a government worker was terminated for lying on his application, but that this initial hearing could be abbreviated); *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) (holding that the standard of proof for parental rights termination hearings should be "clear and convincing" evidence); *Mackey v. Montrym*, 443 U.S. 1 (1979) (holding that a pre-suspension hearing is not necessary when the state seeks to suspend an individual's driver's license for refusal to submit to a breath-analysis test).

26. See, e.g., *Nevaras v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25 (5th Cir. 1997); *Buchanan v. City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996); *Corry v. Greene County Bd. of Educ.*, 82 F.3d 383 (11th Cir. 1996); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1988); *Jordan v. Sch. Dist. of the City of Erie*, 583 F.2d 91 (2d Cir. 1978); *Hammock v. Keys*, 93 F. Supp. 2d 1222 (S.D. Ala. 2000); see also RICHARD LAWRENCE, *SCHOOL CRIME AND JUVENILE JUSTICE* 104 (1998) (quoting Jackson Toby, *Crime in American Public Schools*, 58 *PUBLIC INTEREST*, Winter 1980, at 18); A. Troy Adams, *The Status of School Discipline and Violence*, 567 *ANNALS* 140 (2000); Thomas M. Melody, *Students' Rights to Confrontation and Cross-Examination at School Expulsion Hearings*, 85 *ILL. B.J.* 126 (1997); David M. Pederson, *A Homemade Switchblade Knife and A Bent Fork: Judicial Place Setting and Student Discipline*, 31 *CREIGHTON L. REV.* 1053 (1998); Brooke Grona, Note, *School Discipline: What Process is Due? What Process is Deserved?*, 27 *AM. J. CRIM. L.* 233 (2000); Audrey Knight, Note, *Redefining Punishment for Students: Nevaras v. San Marcos I.S.D.*, 20 *REV. LITIG.* 777 (2001).

not significantly different from the procedures claimed in other post-*Mathews* due process cases. In *Jordan v. School District of Erie Pennsylvania*,²⁷ the Third Circuit considered the factors that would make it necessary to provide a hearing *prior* to expulsion or suspension.²⁸ In *Cole v. Newton Special Municipal Separate School District*,²⁹ a district court considered whether due process was required for in-school suspensions where students could not attend regular classes.³⁰ In *Lamb v. Panhandle Community Unit School District No. 2*,³¹ the Seventh Circuit considered what process was due when a suspension barred a student from graduating high school.³² In *Newsome v. Batavia Local School District*,³³ the Sixth Circuit considered whether a student had the right to cross-examine witnesses against him at an expulsion hearing.³⁴ Most recently, this debate over the proper due process procedures in school suspension and termination proceedings has focused on whether due process is required when a school transfers a student into an alternative school³⁵ for disciplinary purposes.³⁶

As will be explored below, this continuing debate over the scope of due process in school cases is ill-placed. The debate focuses on expulsion procedures while ignoring events that lead up to the moment of expulsion. This focus provides little comfort for those struggling in today's schools.

27. 583 F.2d 91 (3d Cir. 1978).

28. *Id.* at 94–97.

29. 676 F. Supp. 749 (S.D. Miss. 1987).

30. *Id.* at 751–52.

31. 826 F.2d 526 (7th Cir. 1987).

32. *Id.* at 527–29.

33. 842 F.2d 920 (6th Cir. 1988).

34. *Id.* at 921.

35. The term “alternative school” encompasses many types of schools. The alternative schools discussed here are schools set up by the public school system to accommodate students who have been expelled or transferred from a regular public school. Many states now require that school districts provide such schools to students who are expelled. Others, such as Massachusetts and Michigan, do not require these alternative schools. See Grona, *supra* note 26, at 235–36. Another type of “alternative school” is simply an alternative to the regular school system that students may choose to attend. For a discussion of these alternative schools, see *infra* notes 86–102 and accompanying text.

36. See *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25 (5th Cir. 1997); *Buchanan v. City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996).

II. THE FUNCTION OF TRADITIONAL DUE PROCESS IN AN EDUCATIONAL SETTING

Much education reform today focuses on reducing violence in schools. "Zero tolerance" laws that mandate harsh penalties, such as expulsion and suspension for a student who commits an act of violence or is found in possession of a weapon, have been a common solution.³⁷ As a result of these policies, the number of students expelled from school has increased,³⁸ thus escalating the debate surrounding due process and school expulsions.³⁹ Most of this debate centers on "traditional" due process concerns and guarantees.⁴⁰ However, both zero tolerance laws and the due process debate fail to take into account the underlying causes of violence at schools and are, therefore, ineffective in limiting such violence.

*In 1965, Los Angeles and other urban areas exploded for a brief second and everyone got concerned. Those of us who live in these neighborhoods today are watching them implode all the time. The violence and the criminalization make people eat each other up. Most of what is proposed in response are Band-Aid solutions—build more jails, put more police on the street. That is working at the problem from the back end.*⁴¹

The only real effect of these reactive school policies is the increase in the number of students expelled from schools each year. Like building more jails, expulsion is a Band-Aid solution. Although schools often know that a student is having difficulty in

37. See 20 U.S.C.A. § 8921 (West 1994). Many schools also have such policies for certain drug offenses. See also Adams, *supra* note 26, at 147 ("Discipline moved away from more humane methods toward zero tolerance, a get-tough approach reminiscent of sixteenth-century draconian practices."); Paul M. Bogos, Note, "Expelled. No Excuses. No Exceptions."—Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311, 74 U. DET. MERCY L. REV. 357, 373 (1997); U.S. DEP'T OF EDUC., 1998 ANNUAL REPORT ON SCHOOL SAFETY 6 (1998), available at <http://www.ed.gov/PDFDocs/schoolsafety.pdf>.

38. See, e.g., SUSAN SANDLER ET AL., TURNING TO EACH OTHER, NOT ON EACH OTHER: HOW SCHOOL COMMUNITIES PREVENT RACIAL BIAS IN SCHOOL DISCIPLINE 4 (2000), available at <http://www.justicematters.org/pubs.html> (citing dramatic increases in the number of suspensions/expulsions in different localities).

39. See *supra* note 26 and accompanying text.

40. See *supra* notes 25–36 and accompanying text.

41. ROBERT P. MOSES & CHARLES E. COBB, JR., RADICAL EQUATIONS: MATH LITERACY AND CIVIL RIGHTS 6 (2001).

school before a major incident occurs,⁴² they wait for the incident to occur and then “fix” the student by kicking him out of school.

As an example, Ruth Zweifler of the Student Advocacy Center of Central Michigan related a story of a student expelled from a Michigan public school.⁴³ Since middle school, this student’s father repeatedly asked for academic and other help for his son. The school did nothing for the student. By the ninth grade he had a 0.8 grade point average, yet the school still did nothing. It was not until the student was in the tenth grade and committed an “expellable offense” that the school finally did something—they expelled him.⁴⁴ In situations like this, due process does little to help students;⁴⁵ instead it only serves to make the expulsion seem more “fair” to the outside observer. Traditional due process procedures, when implemented, allow the schools, courts, and lawyers to claim that there is nothing more that can be done for the student. Expulsion is simply a Band-Aid schools apply to the problem of school violence, and therefore the due process associated with expulsion, instead of protecting the student, only gives the impression that the schools, courts, and lawyers have done all they can to prevent the loss of that student’s education. Instead of simply covering up problems with Band-Aids, lawyers should consider solutions that *prevent* the tragedy of school violence.

A. *Too Little, Too Late*

“Disruptive students” who have a history of poor behavior in school often also have low grade point averages and poor attendance records.⁴⁶ Clearly, these students have not been receiving an

42. See ROBERT D. BARR & WILLIAM H. PARRET, HOPE AT LAST FOR AT-RISK YOUTH 9 (1995) (“Using only a few identified factors, schools can predict with better than 80% accuracy students in the third grade who will later drop out of school.”); ROBERT C. DIGIULIO, EDUCATE, MEDICATE OR LITIGATE? 76 (2001); see, e.g., STUDENT ADVOCACY CENTER, THE CHILDREN LEFT BEHIND . . . OUR STUDENTS “AT-RISK” (n.d.) (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM). According to the Michigan Student Advocacy Center, 51.6% of students expelled from Michigan Public Schools in 1999–2000 had previously exhibited “identifiable risk factors.” *Id.* For more information, see the Student Advocacy Center web site at <http://www.studentadvocacycenter.org>.

43 Interview with Ruth Zweifler, Head of the Student Advocacy Center of Central Michigan (Nov. 20, 2001).

44. *Id.*

45. In this particular anecdote, the student did not even receive what is considered “traditional due process.” *Id.* This Note does not contest the assertion that *some* traditional due process is better than none at all. In these situations, however, it is surely inadequate.

46. See, e.g., ROBERT F. KRONICK & CHARLES H. HARGIS, DROPOUTS: WHO DROPS OUT AND WHY—AND THE RECOMMENDED ACTION 24 (2d ed. 1998) (describing “visible” potential

education for a long time. Students in this position are usually forced out of school by suspension or expulsion, or leave school because they see little value in attending. In either event, because little was done to prevent the student from leaving, the student feels "pushed out" of the school system.⁴⁷ There is little doubt that, in the suspension and expulsion context, both the student and the school are aware that the due process hearing is just a formal mechanism for pushing the student out of the school.

Unfortunately, as "[i]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,"⁴⁸ being pushed out of school, whether by suspension, expulsion, or other means, is often equivalent to being pushed onto the streets and into jail.⁴⁹ These youth have not only lost their property, but they have also lost their liberty and their future lives. If the intent behind due process is to assure that mechanisms are in place before students have their life, liberty, or property taken from them, they should have due process long before they are expelled or transferred into an alternative school.

Lawyers, when considering situations like school expulsions, should always keep their ultimate goal in mind. That goal is, in theory, to provide students with safeguards to ensure that they are given the best education possible. Lawyers are not seeking this end today, however. The attainment of procedures, which is a one-time battle fought in the courts, has too often come to be thought of as an end in itself. Instead, processes and procedures need to be thought of as means to the end, a battle to be fought on a daily basis for protecting students' educations.

It is also important to take into account the time that traditional due process procedures require. This time lapse itself can have

dropouts as being disruptive, and having poor attendance records and poor grades). Both visible and invisible dropouts have poor grades and attendance rates. The "visible" potential dropouts are also disruptive in class. *Id.*

47. See LAWRENCE, *supra* note 26, at 103; see also Adams, *supra* note 26, at 145 (citing Lawrence M. DeRidder, *How Suspension and Expulsion Contribute to Dropping Out*, 56 EDUC. DIC. 45 (Feb. 1991)).

48. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

49. According to a study by the Washington, D.C.-based Justice Policy Institute/Children's Law Center, suspended students are three times as likely to drop out. Dennis Niemiec & Peggy Walsh-Sarnecker, *Schools' Safety Rules Can Harm Students*, DETROIT FREE PRESS, Apr. 12, 2000, at 1A. See also BARR & PARRET, *supra* note 42, at 3 (in 1980 over 80% of inmates were high school dropouts); SANDLER ET AL., *supra* note 38, at 4; ADVANCEMENT PROJECT & THE C.R. PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 9 (2000) [hereinafter OPPORTUNITIES SUSPENDED]; AMALIA G. CUERVO ET AL., TOWARD BETTER & SAFER SCHOOLS: A SCHOOL LEADER'S GUIDE TO DELINQUENCY PREVENTION 18 (1984); Bogos, *supra* note 37, at 379.

serious negative effects on a student, particularly because of the young age of the individuals involved. This is not to say that additional, time-consuming procedures should be abandoned, but that ample due process procedures are not indicative of a quality discipline program. Lawyers should not feel successful simply because they provide mechanisms to prevent unjust expulsions; instead success should be measured by a decreased number of expulsion proceedings each year.

Consider the class action suit filed in New Jersey in 1981 addressing the blatantly unequal conditions of schools in that state due to a statutory school funding scheme.⁵⁰ After seven years of deliberations and appeals, the Supreme Court of New Jersey found that the funding system was in violation of the New Jersey Constitution, and that the Act had to be amended to assure equal funding to poorer districts.⁵¹ The child Raymond Abbott won his case, but it meant nothing to the adult Raymond Abbott, who, by the time the opinion came down, was confined to a Camden County Jail cell.⁵² According to the *Philadelphia Inquirer*, Mr. Abbott, 19 years old by this time, “would have a hard time reading the decision.”⁵³ This case illustrates the insufficiency of court battles, particularly in the education context. Although at times they greatly benefit future students, the plaintiffs rarely benefit.

Abbott’s case can be analogized to school expulsion cases, where the time element is just as essential to the student in question. When districts offer adequate due process, the student often spends a significant amount of time in “expulsion limbo,” unsure of what her standing in the school is or where she will be in the next month.⁵⁴ Although there appears to be little research on the effect of the waiting period, one can imagine that the wait undermines certain benefits that could come out of such a hearing. When a student receives the sanction over a month after the conduct occurred, the hearing is likely to be more punitive than corrective. One study that considered the waiting time between

50. *Abbott v. Burke*, 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984).

51. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

52. JONATHAN KOZOL, *SAVAGE INEQUALITIES* 172 (1992).

53. *Id.* (quoting Inga Saffron, *The Long Road to a School’s Ruling: for One Plaintiff, New Jersey’s Decision Came Too Late*, PHILADELPHIA INQUIRER, Aug. 28, 1988, at B1).

54. See, e.g., CHICAGO Bd. of Educ., CHICAGO PUBLIC SCHOOLS STUDENT DISCIPLINE PROCEDURE HANDBOOK 2000–2001 15 (2000) (“The entire student adjudication process should take approximately 4 to 6 weeks for most students provided that all time lines are followed.”); Lynda Mitchell, *The Effects of Waiting Time on Excluded Children*, in EXCLUSION FROM SCHOOL 116, 127 (Eric Blyth & Judith Milner eds., 1996) (noting that “[t]he average time taken to organise [sic] an exclusion case conference increased from 5 weeks in 1990–1 to 8.7 weeks in 1991–2”).

various stages of the expulsion process asked the following question: "What then is [the pupils'] chance of returning successfully into a system which has ignored their needs for so long?"⁵⁵ Although this study was concerned with the timing of the entire process, including the actual expulsion,⁵⁶ the question is quite relevant to the waiting time between the conduct and the expulsion.

At the point where expulsion seems necessary, school districts only have the option of picking between the best of two evils. Either they can give students adequate procedures, leaving the student's education in uncertainty for quite some time, or they can give students no protection at all. This situation is obviously one that should be avoided, and yet there is little legal discussion on what is necessary to avoid or limit expulsions.

B. More Harm Than Good?

Not only do traditional due process hearings often come too late to have a *beneficial* impact on a student, they can also, when used in isolation, *negatively* impact an "at-risk"⁵⁷ student's education. First, they may impair the student-school-teacher relationships that are crucial to discipline in the schools.⁵⁸ "According to a growing body of literature, the primary determinant of discipline policy effectiveness is a healthy relationship between

55. Mitchell, *supra* note 54, at 129.

56. *Id.* ("What is of major concern is the 'waiting time' between the various *stages* of the exclusion process: the time taken between the exclusion and the exclusion conference or the LEA decision; between the decision and the pupil returning to full-time education.")

57. The term "at-risk" is closely related to the term "disruptive student," as defined in this Note. See *supra* note 5 and accompanying text. "At-risk" is generally used to describe students whose background and behavior are indicators that the student will later display behavioral problems, or is in danger of dropping out. There are several different ways to define such a student. See, e.g., ZINSER, *supra* note 8, at 7. "[S]tates use a variety of student categories to determine the definition of at-risk . . ." *Id.* at 8.

58. See Matt Gushee, *Student Discipline Policies*, ERIC CLEARINGHOUSE ON EDUC. MGMT., ERIC DIG. NO. 12 (1984), at http://www.ed.gov/databases/ERIC_Digests/ed259455.html (last visited Aug. 28, 2001); Wendy Schwartz, *Preventing Violence by Elementary School Children*, ERIC CLEARINGHOUSE ON URBAN EDUC., ERIC DIG. NO. 149 (1999) (citing Soliel Gregg, *School-Based Programs to Promote Safety and Civility*, 1998 AEL POL'Y BRIEFS), at http://www.ed.gov/databases/ERIC_Digests/ed436602.html (last visited Dec. 22, 2001); DAVID W. MANN & MARTIN GOLD, UNIV. OF MICH. INST. FOR SOCIAL RESEARCH, *ALTERNATIVE SCHOOLS FOR DISRUPTIVE SECONDARY STUDENTS: TESTING A THEORY OF SCHOOL PROCESSES, STUDENTS' RESPONSES, AND OUTCOME BEHAVIORS* 134 (1980) (finding that the establishment of a positive relationship with the school, teacher, and student was "conducive to improvement in students' behavior in school").

school and student—as indicated by such variables as principals' leadership styles and students' perceptions of whether or not they are fairly treated.⁵⁹ Traditional due process hearings are adversarial in nature; the school becomes the student's prosecutor and the teacher becomes the key witness against the student. Students often learn what they had suspected all along—the schools and teachers are not on their side.⁶⁰ By destroying these relationships, the hearings help create a climate where students do not feel welcome, or where they even feel hated. These conditions are ripe for delinquency and serve to further marginalize youth.⁶¹

Second, these traditional due process hearings, when used alone, serve to criminalize youth. At these hearings, the student stands accused. The purpose of the hearings is to discover whether the student has committed an act that could be described as "criminal" in the school context, or, in other words, in violation of the school's "code of conduct." This adversely affects both the student and the educational process. Criminalizing a student often leads to more, not less, delinquent behavior.⁶² This increase in delinquent behavior is in part due to the fact that low self-esteem often causes delinquent behavior.⁶³ When students learn that they are labeled delinquent, their self-esteem goes down, and they act out even more.⁶⁴

Criminalizing a student also undermines the educational goals of the schools by blurring the line between the juvenile justice system and the education system.⁶⁵ Many commentators note that

59. Gushee, *supra* note 56, at 1.

60. See KRONICK & HARGIS, *supra* note 46, at 40; OPPORTUNITIES SUSPENDED, *supra* note 49, at 5; SANDLER ET AL., *supra* note 38, at 4; Philip Garner, *Schools by Scoundrels: the Views of "Disruptive" Pupils in Mainstream Schools in England and the U.S.*, in ON THE MARGINS: THE EDUCATIONAL EXPERIENCE OF 'PROBLEM' PUPILS 17–30 (Mel Lloyd-Smith & John Dwy-for Davies eds., 1995);

61. See BARR & PARRET, *supra* note 42, at 38 (describing the harm expulsion and other school policies have on at-risk youth); DIGIULIO, *supra* note 42, at 65 (describing how aggressive discipline techniques harm students); see also CUERVO ET AL., *supra* note 49, at 18; Grona, *supra* note 26, at 244 (noting that, if the processes seem biased to a student, "students only learn to be more detached from the system").

62. See DIGIULIO, *supra* note 42, at 11 ("[C]riminal-justice responses [used within the school] that emphasize punitive measures serve to foster aggression" in students.); SANDLER ET AL., *supra* note 38, at 4.

63. Martin Gold, *Scholastic Experiences, Self Esteem and Delinquent Behavior: A Theory for Alternative Schools*, in SCHOOL CRIME AND DISRUPTION 37, 40 (Ernst Wenk & Nora Harlow eds., 1978); MANN & GOLD, *supra* note 58, at 13–18 (citing several studies that found a positive correlation between poor self-esteem and disruptive behavior).

64. See Pippa John, *Damaged Goods? An Interpretation of Excluded Pupils' Perceptions of Schooling*, in EXCLUSION FROM SCHOOL 159, 174, 180–82 (Eric Blyth & Judith Minor eds., 1996).

65. See Gushee, *supra* note 58, at 2 ("This false analogy [between prisons and schools] has caused schools to turn to inappropriate penalties, to overreact to minor offenses, and to

schools today look more like prison systems than schools.⁶⁶ This affects students' attitudes toward their schools; they often perceive education as a punishment, not as an opportunity.⁶⁷

Reactive measures such as school expulsions also serve to undermine the effectiveness of alternative schools. Alternative schools were originally conceived as an *alternative* to an educational system that is not meeting the disruptive student's needs.⁶⁸ However, as alternative schools for expelled or disruptive students have become more and more common, alternative schools have started to look less like educational alternatives for students and more like discipline alternatives for schools.⁶⁹ A student now attends an alternative school because she is "bad," not because the new school will provide her with an educational alternative. Alternative schools, when used mainly for these discipline purposes, are not adequate to keep students off the streets and out of prisons. Students who have had little incentive to attend regular schools are not likely to attend the alternative schools assigned to them as punishment.⁷⁰ Additionally, when alternative schools are utilized, they are used as a threat to students

blame students for problems that may originate in the school environment."); see also SANDLER ET AL., *supra* note 38, at 4 (noting that schools now often "turn to police to handle school discipline matters").

66. Adams, *supra* note 26, at 147 (citing David Greenberg, *Students Have Always Been Violent: They're Just Better Armed Today*, SLATE ¶ 8 (1999), at <http://www.slate.msn.com/id/27715/>) (last visited Apr. 21, 2003) (describing high school security as similar to prisons); Telephone Interview with Michelle Light, Attorney at the Children and Family Justice Center, Northwestern University School of Law (Dec. 10, 2001) [hereinafter Light Interview] (discussing how security guards and metal detectors effect the atmosphere of the school).

67. See SANDLER ET AL., *supra* note 38, at 4-5.

68. See, e.g., 105 ILL. COMP. STAT. 5/13A-1(e) (2000) ("Disruptive students typically derive little benefit from traditional public school programs and may benefit substantially by being transferred from their school into an alternative public school program . . ."); U.S. DEP'T OF EDUC., SAFEGUARDING OUR CHILDREN: AN ACTION GUIDE 33 (2000), available at http://www.ed.gov/offices/OSERS/OSEP/Products/ActionGuide/Action_Guide.doc (last visited Apr. 21, 2003) [hereinafter SAFEGUARDING]; ZINSER, *supra* note 8, at 33 ("To better serve students who are unsuccessful in traditional schools, alternative schools have been created to meet their needs."); N.C. State Bd. of Educ., Dep't of Pub. Instruction, *Alternative Learning Programs and Schools*, at <http://www.dpi.state.nc.us/alternative/definitions.html> (Jan. 2000) ("Alternative Learning Programs are defined as services for students at risk of truancy, academic failure, behavior problems, and/or dropping out of school. Such services should be designed to better meet the needs of students who have not been successful in the traditional school setting."); Soliel Gregg, *Schools for Disruptive Students: A Questionable Alternative?*, 1998 AEL POL'Y BRIEFS 1 ("Alternative schools evolved decades ago to provide an academic option for students not successful in regular education programs . . .").

69. See Gregg, *supra* note 68, at 3-5.

70. See Light Interview, *supra* note 66.

who may engage in expellable behavior.⁷¹ If the school district utilizes alternative schools in this way, they are then compelled to create alternative schools that are unpleasant enough to deter bad behavior.⁷² These alternative schools, therefore, start to look less like schools and more like juvenile detention centers. This creation of prison-like schools serves to further blur the line between education and punishment for students.

III. "EDUCATIONAL DUE PROCESS"

Lawyers must consider a broader reading of due process in the context of education. The role a school plays in students' lives mandates that due process in this setting have a protective quality. A school's role is to protect youth, to guide them and to ensure that they have the ability to make the right choices. It is important to acknowledge the age of the group of people being affected. They are children. They make mistakes; we *expect* them to make mistakes.⁷³ Education, to a large extent, means *learning* from our mistakes. Too often, students are not allowed to learn from their mistakes; instead they pay for them for the rest of their lives.⁷⁴ Some suggest that we "give up on" the disruptive student.⁷⁵ This attitude, like the attitude behind many zero tolerance policies, undermines the goals of education and the educational system. If a school's goal is to educate, due process should be shaped to ensure that this is being done.

71. See Gregg, *supra* note 68, at 5; see also Knight, *supra* note 26, at 791.

72. *Id.*

73. See, e.g., Dennis Niemiec, *Expelled Students Suffer: There is No Plan to Educate Them*, DETROIT FREE PRESS, Feb. 7, 2000, at 1B (quoting Ruth Zweifler, who noted the number of middle-school students expelled: "They are silly kids at that age . . . They do kid things.").

74. Light Interview, *supra* note 66 (noting that zero tolerance policies often have the effect of transforming students into criminals early instead of helping them to learn and grow); Telephone Interview with Terry Weber, Teacher at the Urban Academy High School (Oct. 31, 2001) [hereinafter Weber Interview] (noting that following the letter of the law has the potential to ruin a lot of students' young lives). Terry Weber also stated that, at Urban Academy, discipline may include things like researching why an action is wrong, so that students may learn from their mistakes. *Id.*

75. LAWRENCE, *supra* note 26, at 104.

A. *The Spirit of Due Process*

The original intent of the Due Process Clause was to prevent our government from arbitrarily taking away rights of citizens.⁷⁶ Certainly, for that reason, schools should ensure that an expulsion, or the transfer of a student to an alternative school, is the correct decision. Ensuring a correct decision may mean that expulsion or transfer to an alternative school after a one-time offense requires a due process hearing that determines the student's guilt or innocence and considers mitigating factors. Additional due process, however, may be required for students who have had a history of disruption, or who has needs the school is not meeting. If the deprivation of an education requires due process,⁷⁷ these students, who do not appear to be receiving an education, should have had "due process" long before a hearing is held.

The harsh effects associated with traditional due process can be avoided by adding a new layer of due process. This new layer is possible because schools are able to predict early on that a student is in danger of dropping out,⁷⁸ or is prone to violence,⁷⁹ and much can be done to help these students.⁸⁰ The function of traditional procedural due process has been "to establish the officer's authority to invade on constitutionally recognized interests."⁸¹ Courts, as of yet, have only applied this traditional notion of due process in school due process cases. Consider, for example, United States District Judge Michael McCuskey's statements while upholding the expulsion of six students for fighting at a football game.⁸² He found that the Decatur School District "did not act illegally, improperly or deny the students their constitutional rights."⁸³ Whether or not the school acted to prevent the incident

76. See BREYER, *supra* note 23, at 643–44.

77. *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975).

78. See BARR & PARRET, *supra* note 42, at 9.

79. See Gerald A. Juhnke et al., *Assessing Potentially Violent Students*, ERIC CLEARINGHOUSE ON COUNSELING AND STUDENT SERVS., ERIC DIG. (1999), at http://www.ed.gov/databases/ERIC_Digests/ed435894 (last visited Feb. 2, 2003).

80. See SAFEGUARDING, *supra* note 68, at 7–8, 17–18.

81. See BREYER, *supra* note 23, at 644. Of course, initially the constitutionally recognized interests were restricted to those interests protected at common law. *Id.* However, those interests now encompass a broader range of government entitlements. See *id.* at 645; *supra* notes 9–20 and accompanying text.

82. See, e.g., Jay Hughes, *Court Says Expulsions of Students Were Proper*, DETROIT FREE PRESS, Jan. 12, 2000, at 4A.

83. *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812, 814 (C.D. Ill. 2000).

was inconsequential. In order to actually protect students, lawyers fighting for students' rights should expand this notion of due process to address the prevention of such problems.

B. Notice and Opportunity to be Heard

At a minimum, due process requires notice and an opportunity to be heard.⁸⁴ For a student, these two rights can have an immeasurable impact. In this way, the *Goss* ruling, which requires informal hearings for less severe acts of disobedience,⁸⁵ may provide guidance for schools to continue in the spirit of due process while keeping the student's education in mind. Schools can do this by using early discipline "hearings" as an opportunity to focus on a student's future. These hearings would not be adversarial hearings to determine the student's guilt or innocence, but rather a time set aside to hear from the student why he is having problems, and to discuss solutions.

Many successful "alternative"⁸⁶ schools implement programs where teachers make an effort to know students personally. This means that they know each student as an individual, not just as a generic student. They make efforts to understand a student's habits, beliefs and opinions. Real human relationships are formed between students and teachers. At these schools, staff members already take the time to hear their students.⁸⁷

For example, at the Urban Academy High School in New York, where the teachers know their students personally, a teacher notices immediately if a student is not doing his work or not showing up to class.⁸⁸ These teachers sit down with the student, find out why the student is having problems, and help the student correct unacceptable behavior.⁸⁹ Additionally, teachers and other adults are

84. "[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing . . ." *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

85. *Goss v. Lopez*, 419 U.S. 565, 579 (1974).

86. The "alternative" schools discussed here are schools students may choose to attend that offer students an alternative to the regular public schools. The alternative schools discussed earlier are schools maintained by the public schools for students who have been expelled from or transferred out of the regular public schools. See *supra* note 35 and accompanying text.

87. See OPPORTUNITIES SUSPENDED, *supra* note 49, at viii-ix (describing such "alternative schools").

88. Weber Interview, *supra* note 74. For more information about Urban Academy High School, see <http://www.urbanacademy.org>.

89. *Id.*

always present, whether in the classroom, hallway or bathroom, and are able to mitigate problems between students before they escalate.⁹⁰

At Maya Angelou School in Washington, D.C., students who have been pushed out of the regular public schools have the opportunity to receive a high-quality education.⁹¹ Extremely small class sizes give teachers an opportunity to know their students on the personal level described above.⁹² Additionally, the school has three counselors on staff and each student is assigned to one counselor.⁹³ The low student-to-counselor ratio allows counselors to build trusting relationships with each student. If the student is having behavioral problems, the teacher may have the student talk with his counselor.⁹⁴ Recently, with the support of staff, each student wrote and signed an individualized contract that describes areas on which the student needs to work.⁹⁵

Huntington Beach High School in Huntington, California, implemented a successful "personalization" project targeting a group of youth identified by teachers as unlikely to graduate because of behavioral problems.⁹⁶ In this program, the staff makes a special effort to know the students by name, and match each student with a personal advisor.⁹⁷ This enables students to discuss their problems with someone with whom they have regular interactions.⁹⁸ After a year of the program, the school saw a forty-one percent decrease in suspensions.⁹⁹

Another example is Oregon's Lane School, an alternative school for students who require an "intensive targeted intervention" program.¹⁰⁰ In one report, three students were asked to describe what they like about the school; all three replied, they like that they can

90. *Id.*

91. Telephone Interview with Cindy Cowan, Social Worker at Maya Angelou School (Nov. 5, 2001) [hereinafter Cowan Interview]. For more information about Maya Angelou School, see <http://www.seeforever.org>.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Rebecca Martin Shore, *Personalization: Working to Curb Violence in an American High School*, PHI DELTA KAPPAN, Jan. 1996, at 362, 362-63 (describing the program implemented at Huntington High School).

97. *Id.*

98. *Id.* at 363.

99. *Id.*

100. MARY MAGEE QUINN ET AL., U.S. DEP'T OF EDUC., SAFE, DRUG-FREE, AND EFFECTIVE SCHOOLS FOR ALL STUDENTS: WHAT WORKS! 35 (1998), at http://cecp.air.org/resources/safe&drug_free/pdf/Safe&DrugFre_.PDF (last visited Apr. 21, 2003).

go to the teachers with their problems.¹⁰¹ These alternative schools all have one thing in common: adults “hear” the students on a regular basis.¹⁰² In other words, due process procedures are in place to make sure each student has adequate opportunity to receive an education.

Fulfilling the student’s right to be heard is, not surprisingly, an extremely effective educational tool. First, it serves to notify students of what is expected of them because the teachers sit down with the student to discuss what the student should be doing in class, as well as how problems may be corrected. Students who know and understand what is expected of them are less likely to act out.¹⁰³ Secondly, it allows students to feel that they are a part of the school. When schools alienate students, students’ active participation in their own education is unlikely.¹⁰⁴ Student participation and voluntary policies improve student performance because students feel that they have a stake in their education, and that they and their opinions are important to the school.¹⁰⁵ Fostering student participation utilizing voluntary policies is necessary if schools are to know their students on an individual basis and hear them regularly. For example, the Urban Academy High School, in addition to utilizing one-on-one “hearings” with students, also makes sure that students feel they have a stake in the school.¹⁰⁶ The students are encouraged to participate in forming school policy and to express their opinions.¹⁰⁷ Participation and self-expression are vitally

101. *Id.* at 36–37.

102. See also, e.g., OPPORTUNITIES SUSPENDED, *supra* note 49, at 14–28 (describing several schools that have taken alternative approaches to school discipline); SANDLER ET AL., *supra* note 38, at 9–10, 13–29 (describing several different schools that exhibit “outstanding school culture” and “meaningful approaches to school discipline”); The Minnesota New Country Day School, at <http://www.mncs.k12.mn.us/html/> (last visited Nov. 7, 2001) (noting that this school also utilizes customized learning plans designed by the student, parent, and teachers.).

103. See DIGIULIO, *supra* note 42, at 80; Gregg, *supra* note 66, at 3.

104. See William A. Firestone et al., *Restructuring Schools: Building Commitment Among Students and Teachers*, in AT-RISK STUDENTS AND SCHOOL RESTRUCTURING 101, 104 (Keith M. Kershner & John A. Connolly eds., 1991); see also KRONICK & HARGIS, *supra* note 46, at 23–25, 87–88; WILLIAM GLASSER, *THE QUALITY SCHOOL: MANAGING STUDENTS WITHOUT COERCION* 2, 62 (1990).

105. See Mel Lloyd-Smith & John Dwyfor Davies, *Issues in the Educational Careers of ‘Problem’ Pupils*, in ON THE MARGINS: THE EDUCATIONAL EXPERIENCE OF ‘PROBLEM’ PUPILS 1, 6 (Mel Lloyd-Smith & John Dwyfor Davies eds., 1995); LAWRENCE, *supra* note 26, at 134; *Michigan Governor’s Task Force on School Violence and Vandalism*, in REPORT AND RECOMMENDATIONS 3, 32 (Nov. 6, 1979); Gregg, *supra* note 68, at 3; Gushee, *supra* note 58, at 3 (recommending that students be involved in creating discipline policy); Schwartz, *supra* note 58, at 2 (noting that some theorists point to the overall school environment as the key to good discipline).

106. Weber Interview, *supra* note 74.

107. *Id.*

important to maintaining overall school discipline, and make ongoing hearings more effective because students are more likely to believe that teachers are actually listening.¹⁰⁸

These informal hearings, disciplinary and otherwise, are also vital because they give students something often overlooked in the legal world—individual treatment. It appears individual treatment is also unheard of amongst educational professionals:

Ordinarily, secondary school teachers are encouraged to assume a routine pleasantness towards their students that, in effect, amounts to affective neutrality. In the interests of fairness, student-teacher relationships are relatively constant from one student to another. Neither teachers nor students are supposed to take into account one another's peculiarities; rather, peculiarities must be submerged in the enactment of formal roles.¹⁰⁹

Despite this encouragement, seemingly fair due process hearings are often perceived by teachers as inflexible and, therefore, unsatisfactory because different students need different discipline procedures.¹¹⁰ Teachers are often discouraged from enacting different procedures for different individuals because of well-founded fear of liability. In many cases, the law regarding discipline procedures is intended to be inflexible.¹¹¹ In fact, in some instances, teachers may support inflexible legislation regarding discipline procedures to avoid liability.¹¹² When the consequences are high, as

108. See *supra* notes 102–05 and accompanying text.

109. See MANN & GOLD, *supra* note 58, at 7.

110. Michelle Light states that many teachers and administrators express dissatisfaction with the due process hearings (that actually provide students with many traditional due process safeguards) because the teachers and administrators have little input on the best punishment for an individual student. Light Interview, *supra* note 66.

111. See, e.g., Mike Rose, *Tougher Discipline, Safer Schools*, EDUC. DIG., Oct. 1996, at 15, 16 (condensed from 80 AM. TEACHER 10, 10–12 (Feb. 1996)). The task force implemented to study discipline problems in Texas schools noted “inconsistency” in how schools deal with students. To rigorously implement zero tolerance, they “sent a strong message” to the schools that all discipline problems are to be reported to central office. *Id.* See also, e.g., Plaintiff's Motion for Summary Judgment at 4, *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, No. A-96-CA-093 JN, 1996 WL 786122 (W.D. Tex. May 16, 1996), cited in Patti Blackburn Tillman, Note, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Educational Programs*, 3 TEX. WESLEYAN L. REV. 209, 212 (1996) (“the principal stated that ‘according to the education code she had no choice but to place Timothy in Rebound, and that since the statute did not provide for a hearing he was not entitled to one.’”).

112. See, e.g., Niemiec & Walsh-Sarnecki, *supra* note 49, at 1A (quoting Michigan State Representative Andrew Richner: “Teachers have supported the legislation because it gives them some protection from lawsuits.”).

in cases where expulsion is a possibility, this inflexibility may be necessary, as questions concerning differences in treatment are often legitimate.¹¹³ However, there are two ways to judge the fairness of school discipline. On one hand, it does not seem fair to give two students different punishments for the same conduct.¹¹⁴ On the other hand, “fairness” may be understood to mean disciplining a student in the way, and to the extent, that is appropriate for that student.

Early, less formal hearings, held when the consequences faced by the student are less severe or non-existent, may alleviate some of the tension between the conflicting notions of fairness. The result of expulsion proceedings may be uniform for students if there are early hearings that treat students as individuals with individual problems. These early hearings, such as the ones described by a teacher at Urban Academy and the students at Lane School, are carried out in a way that looks into *why* a particular student is having difficulties, and works out solutions for that individual.¹¹⁵ If an expulsion proceeding becomes necessary, the school will have already enacted individually tailored “discipline” for the student, and will have given him the opportunity and support necessary to correct his behavior. This previously enacted discipline thereby decreases the potential for inequitable treatment between different students at the time of expulsion, without alienating the student by not treating him as an individual.

This individualization also encourages the teacher and the student to work toward the same goals. “[A]t the heart of any quality programs and curricula that are being implemented, lies the person-to-person relationships between teacher and student.”¹¹⁶ In order for programs to work, students must believe that teachers care about them.¹¹⁷ Such “individualization” programs foster strong working relationships between students and teachers, which are

113. There is much evidence of unequal treatment with seemingly “equal” procedures. See, e.g., SANDLER ET AL., *supra* note 38; Paul Shepard, *Students’ Suspension Rates Different By Race*, DETROIT FREE PRESS, Feb. 19, 2000, at 2A; OPPORTUNITIES SUSPENDED, *supra* note 49, at 6–7 (describing “[t]he [c]olor of [z]ero [t]olerance”).

114. See Grona, *supra* note 26, at 247 (noting that different treatment in this context may serve to undermine the “fairness” of the system for students, who may see different treatment as unjust).

115. Weber Interview, *supra* note 74; QUINN ET AL., *supra* note 100, at 35.

116. DiGIULIO, *supra* note 42, at 89.

117. *Id.* at 80–81, 89 (explaining how support from school staff members reduces anti-social behavior); see also SAFEGUARDING, *supra* note 68, at 7–8, 17–18; Garner, *supra* note 60, at 21–22; Janet Testerman, *Holding At-Risk Students: the Secret is One-on-One*, PHI DELTA KAPPAN, Jan. 1996, at 364, 364.

key to helping students regain self-confidence and begin on tracks of their own choosing.¹¹⁸

With these procedures in place, the due process required when deciding to expel or transfer a student to an alternative school will not be illusory. In this scenario, the student will have had an opportunity to improve his behavior before a school's final decision, and will be a part of the decision-making process. In the context of alternative school transfers, this final expulsion hearing will be the last step in a line of educationally appropriate decisions for that student.¹¹⁹

IV. ANTICIPATED CONCERNS REGARDING EDUCATIONAL DUE PROCESS

A. "These Kids are Violent"

Some may argue that "these" disruptive students are violent, and endanger our schools. Therefore, for the sake of safe school environments, their rights are secondary to others.¹²⁰ These advocates of "the hard-line" approach praised Joe Clark, "the militant principal of Eastside High School in Paterson, New Jersey" in 1988, when he was on the cover of *Time*.¹²¹ The advocates now applaud the "zero tolerance" approach to school discipline.¹²² This approach appears to advocate for the criminalization of youth discussed in

118. See John, *supra* note 64, at 180–82.

119. See, e.g., SANDLER ET AL., *supra* note 38, at 10 (describing a "meaningful" disciplinary transfer where the principal made an effort to assure that the transfer would have a positive effect on the student). According to Sandler, "[t]his principal used the most exclusionary of practices in a way that respected Julia, encouraged her growth, and maintained a connection with her." *Id.* Expulsions that terminate an education can hardly be considered a "continuance" of a student's education. The question of whether it is ever appropriate to expel a student without providing some way for an alternative education must be answered by another Note.

120. See LAWRENCE, *supra* note 26, at 144; Rose, *supra* note 111, at 18 (discussing teachers' rights to "safe, orderly schools"); Wren, *supra* note 7, at 312 (stating that "increasingly punitive measures" is currently the popular societal response); SANDLER ET AL., *supra* note 38, at "Executive Summary" ("The idea is that if such practices are not used, these schools will become violent, chaotic places."); see also OPPORTUNITIES SUSPENDED, *supra* note 49, at 3–6 (describing districts that have adopted "take no prisoners" discipline policies).

121. See *Getting Tough is Not Enough*, AMERICA, Feb. 20, 1988, at 179 (Joe Clark, in order to "restor[e] order," and slightly improve the school's academic performance, expelled 400 "disruptive" students between 1983 and 1988.).

122. See Adams, *supra* note 26, at 147 (discussing the rise of "zero-tolerance"); OPPORTUNITIES SUSPENDED, *supra* note 49, at 12–13; Rose, *supra* note 111, at 15–18; Bogos, *supra* note 37, at 377.

Part I.¹²³ This attitude resurged with vengeance after recent events, such as the tragedy at Columbine High School.¹²⁴ Advocates of this approach to discipline and education overlook the fact that expulsions occur *after* the violent acts occur. There is little or no evidence that these harsh measures limit violence in the schools.¹²⁵ In place of these techniques, safe-school advocates should consider creating school environments conducive to early intervention and personalized treatment. Early intervention is ongoing; it addresses students' problems continuously and long before an act that would necessitate expulsion occurs. Educational due process is certainly not getting soft on discipline. Instead, it is asking students to be responsible for their actions every day. In fact, the schools described in this Note as utilizing early hearings have stricter discipline policies than traditional public schools. Teachers are constantly in students' faces and students are not allowed to get away with poor behavior.¹²⁶ Traditional public schools, in contrast, either allow students to slide by until it is too late,¹²⁷ or create environments in which students feel they are criminals, and that there is no use in trying to improve their behavior or school work.¹²⁸

123. See, e.g., KOZOL, *supra* note 52, at 162 (discussing Joe Clark's fame: "[I]f you didn't know he was a principal, you would have thought that he was the warden of a jail.").

124. See OPPORTUNITIES SUSPENDED, *supra* note 49, at 13; see also Niemiec, *supra* note 73 (discussing the "crackdown" in Michigan after the tragedy at Columbine High School: "Columbine made everybody a little more aware, said Mark Schultz, supervisor of public safety for Livonia Schools. You bring a weapon to school, we're going to take the hard line.") (internal quotes omitted).

125. See Adams, *supra* note 26, at 148 (citing studies which found that zero tolerance has no effect on reducing violence); Kathleen Cotton, *School-Wide and Classroom Discipline*, SCH. IMPROVEMENT RES. SERIES (stating that punishment delivered without support is not likely to be effective), at <http://www.nwrel.org/scpd/sirs/5/cu9.html> (last visited July 3, 2001); see also Peter Scharf, *Democratic Education and the Prevention of Delinquency*, in SCHOOL CRIME AND DISRUPTION: PREVENTION MODELS 220, 221 (1978) ("The administration seems more concerned with 'covering up' atrocities committed upon and by students than with remedying the situation."); QUINN ET AL., *supra* note 100, at 48 ("Such schools are characterized by high rates of disciplinary referral, coercive disciplinary practices, and high suspension rates, all of which are related to high drop-out rates . . ."). Additionally, this "hard-line" approach is a questionable reaction to the tragedy at Columbine. It seems that preventing such a tragedy would entail knowing students, trying to understand them, and helping them to work through their problems.

126. Weber Interview, *supra* note 74; Cowan Interview, *supra* note 91; QUINN ET AL., *supra* note 100, at 35 (all three students commented they like that Lane School has close supervision and a lot of discipline); see also QUINN ET AL., *supra* note 100, at 47 (stating that "safe" schools have both high academic and behavioral standards, and *they also provide students with support to achieve those standards*); Cotton, *supra* note 125, at 3-4 (noting that high behavioral expectations, concern for students as individuals, and support for students to meet expectations, are necessary for effective discipline).

127. See *supra* Part I.A.

128. See *supra* Part I.B.

Additionally, schools that consistently force students to take responsibility for their everyday actions help students to become successful, respected adults in the "outside" world.¹²⁹ It may appear that "getting tough" makes the schools safer, but getting tough does little to stop crime. Students who are expelled or suspended are more likely to end up on the streets and in jail.¹³⁰ Safe schools do not always mean a safe world.¹³¹ Instead, so-called safe schools may mean that already troubled students are left with no one to guide them or give them the support necessary to achieve the life they desire.¹³²

B. "You are Expecting Too Much From the Schools"

Eventually, one must abandon theories and ask, "How are we supposed to achieve these goals?" "Is it unreasonable to ask so much from the schools?"

The first answer to these questions would seem to be another question: if not in the schools, then where will the problem of violence in schools be addressed? If safe *schools* are the goal, it seems reasonable that schools should be designed to educate students, not only on academic matters, but also on how to deal with anger and the difficult situations they face. Without also teaching students to deal with anger and life's difficulties, schools will not be safe or successful. Additionally, schools are capable of addressing inappropriate behavior. Behavior is learned, and interaction at schools appears to have a great effect on learned behavior.¹³³

There are some who argue that schools should be primarily concerned with academic success, and school programs that

129. See Joan N. Burstyn & Rebecca Stevens, *Involving the Whole School in Violence Prevention*, in PREVENTING VIOLENCE IN SCHOOLS 139, 140–42 (2001) (advocating teaching students social skills necessary in school, in the community, and for a democracy).

130. See *supra* note 49 and accompanying text; see also KOZOL, *supra* note 52, at 163 ("Where do you put these kids once they're expelled? You build more prisons.")

131. Nor do these "safe schools" always mean quality schools. See Richard R. Verdugo & Jeffrey M. Schnieder, *Quality Schools, Safe Schools: A Theoretical and Empirical Discussion*, 31 EDUC. & URB. SOC'Y 286, 304 (1999) ("Although it is important to work toward making schools safe, the more productive work is to put our efforts into developing quality schools. Quality schools are safe schools, but safe schools are not necessarily quality schools.")

132. See OPPORTUNITIES SUSPENDED, *supra* note 49, at 1 ("Policymakers, educators, and parents should be very concerned with the long-term implications of denying educational opportunities to millions of children, particularly when the effectiveness of these policies in ensuring school safety is highly suspect.")

133. DIGIULIO, *supra* note 42, at 36.

emphasize helping the whole student undermine the goal of achieving academic success.¹³⁴ However, as Joan Burstyn and Rebecca Stevens believe,

academic excellence for the individual flourishes within a civil society where citizens demonstrate concern and compassion for one another . . . [and e]ach child has to learn how to function as a member of a community, and those skills, as well as the skills involved in academic subjects, have to be taught and practiced in our public schools.¹³⁵

Additionally, research suggests that schools can, without putting other educational goals on hold, address discipline problems.¹³⁶ The programs that have been explored in this Note are examples where schools utilized such early “due process” programs.¹³⁷ Whether schools can implement successful educational due process, is dependent on whether schools design themselves around the goal of treating students as individuals. The success of informal hearings previously described depends on the overall school environment. A school must be designed in a manner conducive to maintaining discipline, which means treating students as individuals. As Terry Weber, a teacher at Urban Academy High School, describes, there is a large difference between a small school environment such as the Urban Academy, and a small school environment that simply emulates the traditional public school.¹³⁸ The mentality of those who work at and with the school is just as important as the actual school structure.¹³⁹

A second answer to the question of whether expecting educational due process is too much for the schools, however, is not so clear. The “hearings” previously described cannot simply be put into a package and implemented in every school, for every student, in the same way. Lawyers continually look for remedies that can be reflected in a policy, and expect that everyone, and every school, will be exactly the same. They search for *the* solution, the perfect policy. These expectations are not possible, and uniform procedures are not the answer.¹⁴⁰

134. Burstyn & Stevens, *supra* note 129, at 142.

135. *Id.*

136. See LAWRENCE, *supra* note 26, at 4, 7; see also DIGIULIO, *supra* note 42, at 76.

137. See *supra* notes 86–102 and accompanying text.

138. Weber Interview, *supra* note 74.

139. *Id.*

140. See Gushee, *supra* note 58 at 1; see also SANDLER ET AL., *supra* note 38, at 38. Instead of recommending that district, state, and federal governments implement practices, Sandler

Again, we must realize that reality is “all fuzzed along [the] edges.”¹⁴¹ The answer may not be prescribing certain procedures; instead it may be looking at what *is actually being done* in the schools for students, and considering what kinds of things, such as “hearings,” *can be done* to help students stay in school and live safe, happy lives.

CONCLUSION

As this Note tries to reveal, sometimes it is a mistake to suppose that there is one solution to every problem. Lawyers must be pragmatic; they must design the law to be flexible and they must acknowledge the law's shortcomings. In this way, this Note suggests more of a “lawyer reform” than a “law reform.” In law school, great emphasis is placed on court cases. This gives a warped view of what the law should do. Lawyers' involvement in people's lives is not limited to the final conflicts. If it were, lawyers' usefulness would be quite limited. As illustrated, hearings come too late for many students. Expulsion hearings often come at a point when the student's education has long been terminated. Yet, the legal discussion of school expulsions focuses almost exclusively on the moment of expulsion. Legislatures, like lawyers, take this ex-post view of reality. This is exhibited by the legislative reactions to school violence. These reactions center on punishing perpetrators instead of eliminating violence. They perceive young people as criminals, instead of as children and young adults who *will* make mistakes, but *can* learn from them.

The intent of school expulsion and zero tolerance policies is to deter bad behavior and limit school violence. Without implementing other school-level practices, however, these policies only serve to criminalize youth. They push students out of school, thus increasing the likelihood that the students will end up in jail.¹⁴² Therefore, the policies, which do nothing to prevent the expulsion, actually increase the likelihood that youth will commit crimes against others. The fact that the threat of expulsion is unlikely to have a deterrent effect on the disruptive student aggravates the

recommends that they “develop policies, funding, and legislation that *supports* caring and culturally responsive school cultures.” *Id.* (emphasis added).

141. See *supra* note 1 and accompanying text.

142. See BARR & PARRET, *supra* note 42, at 3; SANDLER ET AL., *supra* note 38, at 4; CUERVO ET AL., *supra* note 49, at 18; Bogos, *supra* note 37, at 379.

problem. These students' interactions with teachers and the schools are generally more negative than positive.¹⁴³ In fact, studies show that these students' self-esteem actually increases when they drop out.¹⁴⁴ Expelling students is not going to change the fact that they are angry and hurt. Instead, it ends up producing that which it sought to avoid, a hostile school environment that fosters delinquency and school dropout. To avoid this conflict, lawyers need to stop viewing procedural due process for students as an end in itself, and start viewing it as a means to an end.

Clearly, mere procedures are not adequate due process for a student. Goal-oriented practices, such as limiting expulsions and helping students to reach individual goals, are also necessary. These practices are the due process that students need—a due process that protects them from losing their property right in education. This due process cannot be won in the courtroom alone. The Supreme Court has long recognized that “[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”¹⁴⁵ Even if the Court has the power to order the educational due process advocated in this Note, it cannot specify, nor implement, a procedure that will work for every school every time. Lawyers, who work directly with the people affected, can.

Lawyers need to approach problems with an eye toward real world solutions. They must see outside the law and into the real world. They must learn to work within different contexts and with other professionals, and they must learn to adapt to different environments. Most importantly, they must remember that it is the rationale behind the law, not just the law itself, that is important.

143. See KRONICK & HARGIS, *supra* note 46, at 40 (“These students will not feel valued in the classroom, and they will be right.”); see also GLASSER, *supra* note 104, at 46–47 (describing certain types of negative teacher-student relationships).

144. See Testerman, *supra* note 117, at 364.

145. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (quoted in *Goss v. Lopez*, 419 U.S. 565, 578 (1975)).