Boston College Journal of Law & Social Justice

Volume 34 | Issue 1 Article 5

Confronting a Double-Edged Sword: Providing Bullies Due Process Protections Without Undercutting Massachusetts' Efforts To Combat Bullying

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CONFRONTING A DOUBLE-EDGED SWORD: PROVIDING BULLIES DUE PROCESS PROTECTIONS WITHOUT UNDERCUTTING MASSACHUSETTS' EFFORTS TO COMBAT BULLYING

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Abstract: In 2012, the Massachusetts legislature enacted Chapter 71, Section 37H3/4 of the Massachusetts General Laws, ensuring that students facing long-term suspensions or expulsions receive additional rights during disciplinary hearings. The Massachusetts law entitles accused students to representation by counsel and allows for the cross-examination of student witnesses. Unfortunately, awarding these additional rights undermines the necessary efforts taken by the state to address school bullying. Nevertheless, without these rights, accused bullies have little recourse to address unfair or inaccurate allegations at their school hearings. Ultimately, this Note proposes a solution to protect victims from the trauma of cross-examination by the bully's counsel without subjecting alleged bullies to unfair or inaccurate disciplinary hearings.

Introduction

On April 6, 2009, eleven-year-old Carl Joseph Walker-Hoover, a football player and Boy Scout in Springfield, Massachusetts, hung himself with an extension cord on the second floor of his family's home.[1] As early as September 2008, Carl told his mother that students at the New Leadership Charter School were bullying him for "acting gay."[2] Though his mother spoke to his teachers, principal, and guidance counselor, the bullies continued to harass Carl.[3] By October, Carl started acting out in school.[4] A month before his death, Carl told his mother

* Note Editor, Boston College Journal of Law & Social Justice (2013–2014).

[1] Susan Donaldson James, *When Words Can Kill: 'That's So Gay,'* ABC News (Apr. 14, 2009), http://abcnews.go.com/Health/MindMoodNews/story?id=7328091#.UJ7jbaWgfzI.

[2] *See A Parent's Worst Nightmare: The Real Story Behind Carl Walker-Hoover's Suicide*, Essence (Dec. 16, 2009), http://www.essence.com/2009/04/16/a-parents-worst-nightmare-the-real-story/ [hereinafter *Parent's Worst Nightmare*].

[3] *See id.* Carl never told his teachers the names of the children who bullied him. *Id.* His mother claims Carl was too afraid to because "he didn't want to be labeled as a snitch." *Id.*

[4] *See id.*

that he was being disruptive in class because a sixth grade gang had threatened to kill him.[5] On the day of his death, another student threatened to kill Carl after Carl knocked a television stand into the student.[6] In his suicide note, Carl apologized to his family but explained he "simply couldn't take it anymore."[7]

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Bullying is "a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child."[8] Unlike when students tease or occasionally insult another, the bully-victim relationship is characterized by a real or perceived imbalance of power between the bully and victim that allows the bully to inflict a sustained, cruel, inescapable, and irresistible torment that can last for years.[9] Studies have shown that a victim of such torment is more likely to engage in antisocial behavior, have increased health problems as a child, and carry "lasting emotional and psychological scars into adulthood."[10] In other words, bullying is child abuse by another child.[11]

Unfortunately, bullying and victimization in schools, like the violent threats against Carl Walker-Hoover, is common.[12] In 2009, officials at twenty-three percent of public schools observed that bullying occurred on a daily or weekly basis.[13] Moreover, from 1992 to 2010, between one and ten children committed suicide at school each year.[14]

As a result, finding methods to protect victims from school violence and bullying has become a priority nationwide.[15] Since 1999,

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[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 Temp. L. Rev. 641, 645 (2004).

[9] *See* T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 298 (E.D.N.Y. 2011); Weddle, *supra* note 8, at 645 (noting that victims are unable to resist because there is often an imbalance of power between bullies and victims, and when bullies are confronted they can often lie their way out of trouble).

[10] *See T.K.*, 779 F. Supp. 2d at 304–05 (discussing numerous studies that demonstrate the long-term effect of bullying on victims).

[11] Weddle, *supra* note 8, at 645.

[12] *See* Bureau of Justice Statistics, Indicators of School Crime and Safety: 2011 iv–v (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/iscs11.pdf.

[13] *See id.* at v. That year thirty-nine percent of sixth graders reported being bullied. *Id.*

[14] *See id.* at 6. These statistics do not account for the death of students who, like Carl Walker-Hoover, commit suicide while at home. *See id.*; James, *supra* note 1.

[15] *See, e.g.*, Weddle, *supra* note 8, at 642; Jackie Calmes, *Obamas Focus on Antibullying Efforts*, N.Y. Times, Mar. 11, 2011, at A18 (noting that President Barack Obama opened a

forty-nine states have passed anti-bullying laws, including Massachusetts.[16] Anti-bullying laws try to confront the problem of violence in school by requiring school districts to define an anti-bullying policy, with specific consequences for those students who are found to be bullies.[17] In an attempt to decrease the underreporting of bullying behavior, anti-bullying laws typically require school employees to report and encourage others to report any bullying suspicions.[18]

Still, many of the early anti-bullying laws were ineffective in reducing incidents of bullying because they did not change the culture of schools that inconsistently enforced anti-bullying policies.[19] These early attempts at anti-bullying laws granted schools wide discretion to implement anti-bullying policies even though, as scholars have noted, schools are naturally incentivized not to draw attention to any bullying problems at their school.[20] As a result, whether a school effectively enforced the policies prescribed in the early anti-bullying laws was largely based on the overall school culture, or climate, regarding bullying before the anti-bullying law was passed.[21]

Additionally, in response to the severe bullying of students like Carl Walker-Hoover, many schools implemented incident specific zero tolerance policies towards bullying instead of preventative anti-bullying policies.[22] Zero tolerance policies follow a strict liability approach to-

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White House conference aimed to "spur antibullying efforts in schools and communities nationwide").

[16] *See* MASS. GEN. LAWS ch. 71, § 37O (2010); BULLY POLICE USA, http://www.bullypolice.org (last visited Mar. 8, 2013) (compiling and grading each state's anti-bullying statute). While no federal anti-bullying law has been passed, the No Child Left Behind Act requires states receiving federal funding to provide students that are either victims of violent crimes or attend persistently dangerous public schools with the opportunity to attend safe public schools. *See* No Child Left Behind Act, 20 U.S.C. § 7912 (2006)

[17] *See, e.g.,* ch. 71, § 37O(d) ("Each school district . . . shall *develop, adhere to and update a plan to address bullying prevention* and intervention in consultation with teachers, school staff, professional support personnel, school volunteers, administrators, community representatives, local law enforcement agencies, students, parents and guardians.") (emphasis added); Weddle, *supra* note 8, at 674–75.

[18] *See, e.g.,* ch. 71, § 37O(g) ("A member of a school staff . . . shall immediately report any instance of bullying or retaliation the staff member has witnessed or become aware of to the principal or to the school official identified in the plan as responsible for receiving such reports or both."); Weddle, *supra* note 8, at 674.

[19] *See* Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools*, 9 NEV. L.J. 545, 555–57, 562 (2009) (discussing the general ineffectiveness of anti-bullying legislation).

[20] *See id.* at 557.

[21] *See id.*; Weddle, *supra* note 8, at 676.

[22] *See* Christensen, *supra* note 19, at 558–59; Melanie Riccobene Jarboe, Note, *"Expelled to Nowhere": School Exclusion Laws in Massachusetts*, 31 B.C. THIRD WORLD L.J. 343, 346–51

wards misbehavior; that is, administrators may enforce punishments without considering why the student did not follow the school rule.[23] When students are implicated in bullying behavior, these policies necessitate that the student be suspended or expelled and often require the schools to report the bullying to the police.[24] Research has shown, however, that zero-tolerance policies concerning bullying are not effective because such policies focus on punishing a particular incident of bullying rather than addressing why the student bullied the victim or why the class dynamic allowed such bullying.[25]

As scholars have noted, since schools began following zero tolerance policies in response to general school violence suspension and expulsion rates have increased without improving school safety.[26] Yet, studies have shown that a student who is removed from a school environment because of a long-term suspension or expulsion is more likely to drop out of school, use drugs, and become involved with the criminal justice system.[27] Consequently, instead of rehabilitating students who misbehave in an educational setting, zero tolerance polices give

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(2011) (discussing the evolution of zero tolerance policies in Massachusetts); Adrian Walker, *Vigilance to a Fault*, Bos. Globe, Jan. 23, 2010, at B11 (noting the use of zero tolerance policies in the Worcester public school district in Massachusetts in response to school violence).

[23] *See* Weddle, *supra* note 8, at 679–80.

[24] *See id.*; Greg Toppo, *Bullies as Criminals?*, USA Today, June 13, 2012, 1A ("Nine states require administrators to report bullying to the police."). In Massachusetts, principals are encouraged to report bullying to the police if they think criminal charges can be pursued against the bully. *See* Mass. Gen. Laws ch. 71, § 37O(g)(i) (2010).

[25] *See* Christensen, *supra* note 19, at 558–59; Scott R. Simpson, Comment, *Report Card: Grading the Country's Response to Columbine*, 53 Buff. L. Rev. 415, 442 (2005) (noting the failure of zero tolerance policies to work in general).

[26] *See* Kevin P. Brady, *Zero Tolerance or (In)tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU Educ. & L.J. 159, 165 (noting that schools that utilize zero tolerance policies are less safe than schools without those policies); India Geronimo, *Systemic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. Soc'y 281, 284–85 (2011) (noting the rapid increase of school suspensions and expulsions once zero tolerance policies are adopted). Zero tolerance policies have likely increased suspension rates because they do not consider the student's reason for violating the policy. *See* Christensen, *supra* note 19, at 559; Geronimo, *supra*, at 284–85.

[27] *See* Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. Sch. L. Rev. 867, 868 (2009–2010); Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in* Brown v. Board of Education, 9 U.C. Davis J. Juv. L. & Pol'y 289, 316, 331 (2005) (reasoning that students who are suspended or expelled are more likely to drop out of school because they struggle, fall behind when they are away from school, and struggle to ever get back on track).

students less access to educational opportunities, steering those students towards a life of crime.[28] As a result, zero tolerance policies have been largely unsuccessful and have contributed to the creation of the "school-to-prison pipeline."[29]

In an effort to limit the effects of the "school-to-prison pipeline", on August 6, 2012, Massachusetts passed Chapter 71, Section 37H3/4 of the Massachusetts General Laws.[30] Section 37H3/4 limits the length of any suspension or expulsion of a student to ninety days unless the student (1) is found on the school premises in possession of a "dangerous weapon" or "controlled substance;" (2) assaults a member of the educational staff on school premises; or (3) is charged and convicted of a felony.[31] In addition, section 37H3/4 grants specific due process rights to students who are suspended for more than ten days for either a singular infraction or the accumulation of multiple infractions.[32] The specifically afforded due process rights include the right to: (1) a hearing; (2) present oral and written testimony; (3) have counsel at the hearing; and (4) cross-examine witness.[33]

This increase in due process rights by permitting accused students access to counsel and the ability cross-examine witnesses has created a double-edged sword.[34] Under Section 37H3/4, bullies who face long-

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[28] *See* Archer, *supra* note 27, at 868–69; Hanson, *supra* note 27, at 316, 331 (noting that zero tolerance criminalizes behavior by punishing students with a life of inadequate education).

[29] *See* Archer, *supra* note 27, at 868–69; Geronimo, *supra* note 26, at 284. The phenomenon of the school-to-prison pipeline has been described as "the collection of education and public safety policies and practices that push our nation's schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system." Archer, *supra* note 27, at 868.

[30] *See* Mass. Gen. Laws ch. 71, § 37H3/4 (2012); Shannon Young, *New Mass. Law Gives Expelled Students More Options*, Associated Press (Aug. 10, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/08/10/new_mass_law_gives_expelled_students_more_options/?s_campaign=8315 (quoting Mitchell Chester, the Massachusetts Elementary and Secondary Education commissioner, when he said, "[w]e shouldn't be washing our hands of school aged-youth by expelling them"). Section 37H3/4 will go into effect on July 1, 2014. Ch. 71, § 37H3/4.

[31] *See* Mass. Gen. Laws ch. 71, § 37H(a)–(b) (2010) (subjecting students to expulsion for possessing weapons or narcotics, or assaulting school staff); *id.* § 37H1/2(2) (permitting principals to expel students who are convicted of a felony or who admitted in court that they were guilty of committing a felony); *id.* § 37H3/4(a) ("This section shall govern the suspension and expulsion of students enrolled in a public school in the commonwealth who are not charged with a violation of subsections (a) or (b) of section 37H or with a felony under section 37H1/2.").

[32] *See id.* § 37H3/4(d)–(e).

[33] *See id.*

[34] *See* Hanson, *supra* note 27, at 331 (noting that the use of zero tolerance policies may cause many children to turn towards a life of crime); Weddle, *supra* note 8, at 645; *see also*

term suspensions—like all students facing such punishment—are entitled to cross-examine student witnesses, including their victims.[35] Such cross-examination forces children like Carl Walker-Hoover to relive the bullying, thereby subjecting them to further unnecessary trauma.[36] Furthermore, because some children are highly suggestible when under cross-examination, adept attorneys may be able to distort the truth and undermine the victimized child's credibility and incentive to speak out about the bullying incident.[37] Consequently, discrediting the victim will enable bullies to justify their actions, thereby reinforcing bullying behavior and undermining the efforts that have been made to prohibit and prevent bullying in schools.[38]

This Note examines the conflict between Massachusetts's effort to protect bullying victims and its need to ensure alleged bullies are not unfairly deprived of educational opportunities. Part I of this Note presents the history of limited procedural due process protections afforded to students through the due process clauses of the Fourteenth Amendment of the United States Constitution and the Massachusetts State Constitution. Part II discusses a student's constitutional right to education in Massachusetts and analyzes the state court decisions that determined the level of substantive due process afforded to both bullies and victims.

Part III of this Note discusses the natural difficulties of implementing successful anti-bullying policies and examines the recent effort by the Massachusetts legislature to force schools to follow anti-bullying

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Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 925 (6th Cir. 1988) (holding it is "critically important" to protect the anonymity of students who report serious school offenses); *cf.* Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U. J. Gender Soc. Pol'y & L. 465, 475 (2002–2003) (noting symptoms of trauma are exacerbated in domestic violence victims when they are forced to repeatedly discuss the abuse).

[35] *See* ch. 71, § 37H3/4.

[36] *See T.K.*, 779 F. Supp. 2d at 304–05 (discussing the long-term and traumatic effects of bullying); Weddle, *supra* note 8, at 645 (noting that bullying is a form of child abuse); *cf.* George K. Goodhue, Comment, Maryland v. Craig: *Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26 New Eng. L. Rev 497, 497–98 (1991–1992) (noting that an extensive body of professional research indicates that children of sexual abuse forced to testify in court with the accused present suffer a second victimization and traumatization).

[37] *See* Tom Lininger, *Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children*, 82 Ind. L.J. 999, 1002–03 (2007) (examining the effects of cross-examination of children in child abuse cases).

[38] *See* Christensen, *supra* note 19, at 548–49 (suggesting that bullies feel victimized when reprimanded by the school, and justify their actions as a means of defending themselves); Lininger, *supra* note 37, at 1002–03; Weddle, *supra* note 8, at 642.

measures designed to change current school bullying cultures. Finally, Part IV critiques the effect of entitling bullies to additional due process rights and proposes an approach for schools to guarantee the rights of bullies without subjecting victims to unnecessary scrutiny under cross-examination. Ultimately, this Note concludes that the law should be amended so that victims will only be questioned by a neutral third party adult outside of the presence of the bully. Such a measure would protect victims while continuing to ensure alleged bullies are given a fair opportunity to defend against the victim's allegations at a disciplinary hearing.

I. Judicially Imposed Procedural Due Process Requirements for School Discipline

Unless regulated by state legislatures, students are not typically granted the right to counsel and cross-examination in disciplinary proceedings.[39] Students seeking these protections have two major avenues of recourse.[40] Students may either make a claim in federal court that the school's disciplinary procedures infringe upon the due process clause of the Fourteenth Amendment, or they may claim in state court that the school's procedures violate the respective state constitution's due process clause.[41] Nevertheless, federal and Massachusetts state courts have seldom afforded Massachusetts students the right to counsel or cross-examination.[42]

A. *Federal Constitutional Protection*

Federal courts have generally allowed educational officials and state legislatures to determine the procedural disciplinary rules appli-

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[39] *See* B.S. *ex rel.* Schneider v. Bd. of Sch. Trs., 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003) ("[T]he clear weight of authority holds that a student facing an expulsion hearing does not have the right to cross-examine witnesses or even learn their identities."); Ellen L. Mossman, Comment, *Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. Pa. L. Rev. 585, 600 (2012) (noting most courts have avoided requiring counsel in student disciplinary hearings).

[40] *See* Goss v. Lopez, 419 U.S. 565, 572 (1975) (considering whether the Due Process Clause of the Fourteenth Amendment affords students procedural due process rights before a suspension); Parkins v. Boule, No. 94-000987, 331, 338–39,(Mass. Super. Aug. 3, 1994), *available at* 1994 WL 879558 (alleging school suspension violated state procedural due process protections).

[41] *See Goss*, 419 U.S. at 572; *Parkins*, No. 94-000987, at 338–39.

[42] *See B.S.*, 255 F. Supp. 2d at 899; 38 Mass. Practice *Administrative Law and Practice* § 226 (2012) (noting that the Massachusetts Supreme Judicial Court (SJC) does not generally grant greater procedural due process protections than the federal Constitution requires); Mossman, *supra* note 39, at 600.

cable to children in public schools.[43] In the earliest era of school discipline, schools acted as *in loco parentis* to students.[44] Since schools essentially stood in for parents while their child was at school, students were not entitled to any procedural due process protections under the Fourteenth Amendment of the United States Constitution in school disciplinary proceedings.[45]

The *in loco parentis* doctrine pertaining to school discipline was abandoned by the Supreme Court in the seminal 1975 decision, *Goss v. Lopez*.[46] In *Goss*, the Court held that, pursuant to the Due Process Clause of the Fourteenth Amendment, public school students suspended for ten days or less without an informal hearing were unconstitutionally denied their property right to education.[47] The Court, however, refrained from requiring schools to implement trial type disciplinary hearings where students may have counsel and cross-examine witnesses.[48] Instead, the Court held that when a public school disciplines students with a suspension for ten days or less—a short-term suspension—the school is only constitutionally required to provide students with (1) notice of the suspension and (2) an informal hearing where accused students have an opportunity to present their side of the story.[49] The Court reasoned that, at least for short-term suspensions, these rudimentary protections are sufficient to prevent schools from arbitrarily or erroneously excluding students without overwhelming school resources.[50]

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[43] *See* Julie Underwood, *The 30th Anniversary of* Goss v. Lopez, 198 Educ. L. Rep. 795, 795–97 (2005) (tracing the history of federal procedural due process rights granted in the school setting).

[44] Underwood, *supra* note 43, at 795; *see also* Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947) ("The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption.").

[45] Underwood, *supra* note 43, at 795.

[46] *See Goss*, 419 U.S. at 580–81; Perry A. Zirkel & Mark N. Covelle, *State Laws for Student Suspension Procedures: The Other Progeny of* Goss v. Lopez, 46 San Diego L. Rev. 343, 343–44 (2009); *see also* Underwood, *supra* note 43, at 795.

[47] *See Goss*, 419 U.S. at 568–69, 574. Still, the court held that the students' "legitimate entitlement to a public education" was not derived from the Constitution. *See id.* at 573–74. Rather, this property right was derived from an Ohio statute, which required local communities to provide education to all residents between five and twenty one years old. *See id.*

[48] *See id.* at 583.

[49] *Id.* at 581. Additionally, while the Court cautioned that generally an informal hearing should take place before the suspension, the Court held that in situations where the student poses a continuing danger to the academic process, the notice and informal hearing need only take place "as soon as practicable." *See id.* at 582–83.

[50] *See id.* at 581, 583–84.

For long-term suspensions or expulsions, however, the Court suggested that students may be entitled to more formal disciplinary procedures.[51] Some subsequent lower court decisions have interpreted this suggestion to mean that, at least when the penalty is as severe as expulsion, the hearing officer must permit students to be assisted by an attorney and cross-examine witnesses.[52] Nevertheless, most subsequent court decisions have not interpreted *Goss* so rigidly.[53]

Instead, most courts have assessed whether additional procedures are necessary by following the flexible, policy-oriented analysis of procedural due process provided by the Supreme Court in *Mathews v. Eldridge*.[54] Under *Mathews*, the touchstone of a court's analysis is whether the procedure was fair.[55] Courts, therefore, do not determine whether

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[51] *See id.* at 584. Still, the Court made clear that it was not addressing the necessary due process protections for longer suspensions, which may be considered a greater deprivation of a student's property right to education. *See id.* at 576, 584.

[52] *See* Johnson v. Collins, 233 F. Supp. 2d 241, 248 (D.N.H. 2002) (citing Carey *ex rel.* Carey v. Me. Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 919 (D. Me. 1990)) (enumerating seven minimum requirements that must be observed in long-term student disciplinary hearings, including that the hearing officer must permit the student to have counsel and cross-examine adverse witnesses); Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D. Cal. 1977) ("*Goss* clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses.").

[53] *See* Gorman v. Univ. of R.I., 837 F.2d 7, 14–15 (1st Cir. 1988) (holding that requiring additional procedures, outside of the right to notice and a hearing, must be determined by carefully balancing the interests of the student and school); Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987) (reasoning that, in expulsion proceedings for university students, "[w]hat process is due is measured by a *flexible standard* that depends on the practical requirements of the circumstances") (emphasis added); *see also* Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1, 3–6 (2011) (noting the varying results by subsequent courts when addressing a student's right to cross-examination and counsel).

[54] *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[D]ue process is *flexible* and calls for such procedural protections as the particular situation demands.'") (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (emphasis added); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 924 (6th Cir. 1988); *Gorman*, 837 F.2d at 13–14; *Nash*, 812 F.2d at 660. The Court in *Mathews* addressed the procedures necessary under the Due Process Clause of the Fifth Amendment to terminate Social Security disability benefit payments. 424 U.S. at 323.

[55] *See Gorman*, 837 F.2d at 12. Under *Mathews*, to determine whether a procedure is fair a court must weigh three factors:

> First, the private interest 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.

the disciplinary process was totally accurate or properly imposed.[56] Rather, following *Mathews* and *Goss*, most courts inquire on a case-by-case basis whether the value the student gains from additional procedural safeguards outweighs the burden those safeguards place upon the school.[57]

With school violence having increased since the Court's 1975 decision in *Goss*, however, courts have struggled to find a balance between overly burdening school officials with intensive, formal adversarial hearings and ensuring that students are given a meaningful opportunity to be heard.[58] Accordingly, several courts have addressed whether students have a right to counsel and cross-examination in a long-term disciplinary proceeding with mixed results.[59]

1. Right to Counsel

Following *Goss*, courts have rarely found that due process includes the right to counsel in disciplinary proceedings.[60] Moreover, courts applying *Mathews* have reasoned that disciplinary hearings without counsel are fundamentally fair unless the proceedings are overly complex, the student is also implicated in criminal charges, or the school itself has legal representation at the hearing.[61] Courts have also recognized that entitling students to an attorney may force disciplinary proceedings to become overly adversarial, thereby imposing unnecessary administrative costs on the school.[62] Courts are therefore reluctant to rec-

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424 U.S. at 335.

[56] *See Nash*, 812 F.2d at 660–61.

[57] *See Newsome*, 842 F.2d at 924; *Gorman*, 837 F.2d at 14–15; *Nash*, 812 F.2d at 660.

[58] *See Goss*, 419 U.S. at 583–84 (warning against overly formalizing suspension procedures because it may make it too costly or destroy the suspension's effectiveness as a part of the teaching process); *Newsome*, 842 F.2d at 924–25 (holding that balancing the value of cross-examining student witnesses against the burden of allowing cross-examination must take into account the "severe challenges" that schools face in maintaining order and discipline).

[59] *See* Stone & Stone, *supra* note 53, at 4, 6–7.

[60] *See* Mossman, *supra* note 39, at 600.

[61] *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 636, 640 (6th Cir. 2005) (finding that the school hearing was not complex enough to require a school to allow the student to have an attorney present); *Gorman*, 837 F.2d at 16 ("[T]he weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question."); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) ("Had an attorney presented the University's case, or had the hearing been subject to complex rules of evidence or procedure, plaintiff may have had a constitutional right to representation.").

[62] *See, e.g.*, *Flaim*, 418 F.3d at 640–41 (finding administrative cost of allowing counsel outweighed the value of improving the quality of a student's defense of expulsion); Osteen v. Henley, 13 F.3d 221, 225–26 (7th Cir. 1993) (implying that while a student may have a

ognize a student's right to counsel unless the consequences in a particular disciplinary hearing, such as a risk of error, substantially outweigh the administrative costs to the school.[63]

2. Right to Cross-Examine Student Witnesses

As a general rule, the Fourteenth Amendment does not entitle students to confront and cross-examine other students at long-term disciplinary hearings.[64] In *Newsome v. Batavia Local School District*, the plaintiff, a sixteen-year-old high school student, was expelled solely based on the statements of two accusing students.[65] Although he was permitted to have counsel at his disciplinary hearing, the school board denied the plaintiff's request to learn the identity of the accusing students or cross-examine the school official who took the accusing students' statements.[66]

The Court of Appeals for the Sixth Circuit held that schools can deny expelled students the right to cross-examine or know the names of the student accusers.[67] The court reasoned that school administrators, who generally know the accusing student firsthand, can properly gauge the believability of the student's accusation.[68] Accordingly, the court reasoned that while the value of cross-examination to discover the truth "cannot be overemphasized," that value is mitigated by the

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right to consult counsel, the counsel does not need to be allowed to participate in the hearing). As noted by the court in *Osteen v. Henley*, entitling students to counsel at a disciplinary proceeding may require the school to hire a lawyer to prosecute the case and to hire outside lawyers to serve as judges. *See* 13 F.3d at 225.

[63] *See Osteen*, 13 F.3d at 226 ("The cost of judicializing disciplinary proceedings by recognizing a right to counsel is nontrivial, while the risk of error—*specifically the risk that [the student] was unjustly 'sentenced'*—is rather trivial.") (emphasis added); *Gorman*, 837 F.2d at 16 (noting the weight of authority is against representation of counsel).

[64] *See, e.g.*, *B.S.*, 255 F. Supp. 2d at 897, 899 ("[T]he clear weight of authority holds that a student facing an expulsion hearing does not have the right to cross-examine witnesses or even learn their identities."); *Newsome*, 842 F.2d at 923–25 (finding high school student had no due process right to learn identity of or cross-examine accusing students in an expulsion proceeding); E.K. v. Stamford Bd. of Educ., 557 F. Supp. 2d 272, 276–78 (D. Conn. 2008) (finding student accused of making threatening comments to another student has no due process right to confront the student in an expulsion proceeding); Brown v. Plainfield Cmty. Consol. Dist. 202, 522 F. Supp. 2d 1068, 1070–71, 1075–76 (N.D. Ill. 2007) (finding school did not violate student's due process rights when refusing to allow him to cross-examine adverse student witnesses).

[65] 842 F.2d at 921–22. The plaintiff was accused of possessing and attempting to sell a marijuana cigarette on school property. *Id.* at 921.

[66] *Id.* The principal took the initial statements of the two accusing students. *Id.*

[67] *See id.* at 924–25.

[68] *See id.* at 924.

strength of a school administrator's judgment.[69] In addition, the court found it "critically important" to protect the anonymity of student witnesses who are willing to notify school authorities of serious offenses by other students.[70] Thus, the court held that a school's obligation to protect student witnesses outweighed the value of allowing accused students to cross-examine their accusers.[71]

Nevertheless, while many courts have adhered to or extended the rationale in *Newsome*, at least one court has held that due process is violated if the student is given no meaningful opportunity to challenge the validity of another student's allegations.[72] In *Johnson v. Collins*, the student was accused of writing a bomb threat on a classroom chalkboard.[73] Though he was acquitted in juvenile court, the student was expelled after the school board heard testimony from the captain of the local police department and the principal of the school.[74]

The *Johnson* court held that the student was denied due process in his expulsion proceeding because the school board had no opportunity to consider the credibility of the two accusing students.[75] The court reasoned that the school board could not rely on the police captain's testimony because the captain had not interviewed the two accusing students himself.[76] Instead, the captain had merely relied upon what he learned from the other interviewing officers.[77] Additionally, the court reasoned that the accusing students' allegations were unreliable because they had been implicated in the bomb threat and were given immunity

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[69] *See id.*

[70] *See id.* at 925.

[71] *See id.*

[72] *See B.S.*, 255 F. Supp. 2d at 898, 900 (noting that the rationale of *Newsome* has been extended to multiple courts for documents that might be used in cross-examination); *Johnson*, 233 F. Supp. 2d at 249–50 (finding school's refusal to permit student to cross-examine witnesses deprived the student of "*any* meaningful opportunity to defend against the [expulsion] charges"); *see also Brown*, 522 F. Supp. 2d at 1074 (applying *Newsome*); Wagner v. Fort Wayne Cmty. Schs., 255 F. Supp. 2d 915, 926–27 (N.D. Ind. 2003) (noting the "mountain of case law" derived from "*Newsome* and its progeny" that holds students do not have the right to cross-examine witnesses at school hearings).

[73] *Johnson*, 233 F. Supp. 2d at 243.

[74] *See id.* at 245, 250. The student was criminally charged by the police on two counts: (1) filing a false report of an explosive device, and (2) criminal mischief. *Id.* at 245. He was subsequently granted a directed verdict on the first count, but convicted on the second count. *Id.* As the court noted, though, the basis of the student's expulsion was not related to the criminal mischief conviction. *Id.*

[75] *See id.* at 249–50.

[76] *Id.* at 250.

[77] *See id.*

in exchange for their statements to the police.[78] Thus, the court held that the school board did not provide a fair hearing because without an opportunity to hear the cross-examination of the accusing students, the board would be unable to gauge the believability of the accusations.[79]

B. *Procedural Due Process Protections Under the Massachusetts Constitution*

Massachusetts courts have never addressed whether a student in elementary or secondary school is entitled to counsel or cross-examination in school disciplinary hearings under the due process protections of the Massachusetts Constitution.[80] Certainly, Massachusetts students have alleged in both federal and state court that they were deprived of their Fourteenth Amendment right to counsel and cross-examination in disciplinary proceedings.[81] Still, the Massachusetts Supreme Judicial Court (SJC) has generally held that the procedural due process protections derived from the Massachusetts Constitution are subject to the same analysis as, and provide no greater rights than, the Fourteenth Amendment.[82] Moreover, as scholars have noted, "even where a state procedural due process claim has been raised, the [SJC] has almost universally declined to rest its decision on state due process grounds or even to acknowledge any possible merit in the state due process claim."[83]

In addition, the Massachusetts legislature has provided students with greater procedural protections than *Goss* requires.[84] Since the early

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[78] *Id.*

[79] *See id.*

[80] *But see* Coveney v. President of Coll. of the Holy Cross, 445 N.E.2d 136, 140 (Mass. 1983) (finding private university student did not have right to counsel in expulsion proceeding); Protonotarios v. Duggan, No. CA99053L2, 389, 390 (Mass. Super. Nov. 10, 2000), *available at* 2000 WL 1716255 (finding public university student had no constitutional right to counsel or cross-examination in a student disciplinary proceeding for a six-month suspension unless the student is also facing criminal charges).

[81] *See, e.g.*, Pomeroy v. Ashburnham Westminster Reg'l Sch. Dist., 410 F. Supp. 2d 7, 12 (D. Mass. 2006) (alleging in federal court that public high school student was not permitted to have counsel at an expulsion hearing); Whitney v. Ashburnham-Westminster Reg'l Sch. Dist., 1996 WL 1185116, at *2 (Mass. Super. Feb. 22, 1996) (alleging in state court that the school had deprived the student of federal due process protections).

[82] *See* Sch. Comm. of Hatfield v. Bd. of Educ., 363 N.E.2d 237, 238 n.2 (Mass. 1977) ("The protection afforded property interests by both [federal and state due process] provisions is subject to the same analysis."); Cella et al., *supra* note 42, at 495; *see also* Mass. Const. pt. I, art. 10 ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.").

[83] 38 Mass. Practice, *supra* note 42, § 226.

[84] *See, e.g.*, Mass. Gen. Laws ch. 71, § 37H (Supp. 1987) (requiring school committees to establish written procedures for disciplinary proceedings); Carr v. Inhabitants of Dighton,

1900s, school committees in Massachusetts have been statutorily required to provide a student with an opportunity to be heard prior to a student's expulsion.[85] By 1987, every school district was required to establish written procedures assuring due process in disciplinary proceedings.[86]

Furthermore, in 1994 the Commissioner of the Massachusetts Department of Education encouraged districts to entitle students facing long-term suspensions or expulsions to legal representation at disciplinary hearings.[87] The Commissioner also suggested that students be entitled to cross-examine witnesses at the disciplinary hearing, but stopped short of encouraging districts from adopting an unrestricted policy.[88] Instead, he encouraged schools to prevent the cross-examination of student witnesses who would be subject to retaliation at school for appearing as witnesses.[89]

Finally, students who are unlawfully excluded from public school have historically been allowed to bring an action against the school district and town for monetary damages.[90] Thus, the school districts have had a pecuniary interest in assuring that long-term suspensions or expulsions comply with procedural due process.[91] Accordingly, prior to the passage of Chapter 71, Section 37H3/4 of the Massachusetts General Laws Massachusetts schools were encouraged, but not required by either

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118 N.E. 525, 526 (Mass. 1918) (analyzing procedural statutory rights entitled to a student before an expulsion).

[85] *See* Mass. Gen. Laws ch. 76, § 17 (2010) ("A school committee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him and his parent or guardian an opportunity to be heard."); *Carr*, 118 N.E. at 526 (acknowledging the statutory language providing students with a right to be heard prior to exclusion from school).

[86] *See* ch. 71, § 37H.

[87] Advisory Opinion on Student Discipline, Mass. Dep't of Elementary & Secondary Education, § 10 (1994), *available at* http://www.doe.mass.edu/lawsregs/advisory/discipline/AOSD1.html [hereinafter Advisory Opinion]. Still, the Commissioner suggested that the student, rather than the school district, must pay for his or her own legal representation. *Id.*

[88] *Id.* (providing that the students are entitled to "the right to request that witnesses attend the hearing, and to question them (although some courts have held that in the school context, the student's right to confront and cross-examine student witnesses may be outweighed by the need to protect them from possible retaliation)").

[89] *See id.*

[90] *See* Leonard v. Sch. Comm. of Attleboro, 212 N.E.2d 468, 470–71 (Mass. 1965) (discussing the statutory history of judicial remedies for exclusion from school); Learock v. Putnam, 111 Mass. 499, 500–01 (Mass. 1873) (finding student may remedy unlawful expulsion by an action in tort); *see also* ch. 76, § 16 (allowing student who is unlawfully excluded from school to recover from school district or town in tort).

[91] *See Leonard*, 212 N.E.2d at 470–71; *Learock*, 111 Mass. at 500–01.

federal or state courts, to allow students to obtain counsel and cross-examine witnesses in long-term suspension or expulsion proceedings.[92]

II. Victims' & Bullies' Substantive Right to Education Under the Massachusetts Constitution

Outside of providing minimal procedural due process protections in disciplinary proceedings, the Massachusetts Constitution obligates the Commonwealth to educate children enrolled in its public schools.[93] Nevertheless, in *Doe v. Superintendent of Schools of Worcester* the SJC expressly held that this requirement laid out in the education clause does not guarantee individual students the fundamental right to education.[94] Instead, the court held that Massachusetts's students must receive an equal opportunity to an adequate education.[95] Further, the court held that students can forfeit their right to an adequate education if their actions are detrimental to the safety of the school.[96] Thus, the court maintained that students may be suspended or expelled under such circumstances.[97]

The court in *Superintendent of Schools of Worcester*, however, indicated that the legislature and school officials have a duty to provide a safe and secure school environment that ensures all students have an equal op-

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[92] *See Newsome*, 842 F.2d at 925; Advisory Opinion, *supra* note 87, § 10; *see also* Mass. Gen. Laws ch. 71, § 37H3/4(e) (2012). Under Section 37H3/4, "[a] student who has been suspended or expelled from school for more than 10 school days . . . *shall* have the right to present oral and written testimony, cross-examine witnesses and *shall* have the right to counsel" in a hearing with the superintendent. Ch. 71 § 37H3/4(e) (emphasis added).

[93] Mass. Const. pt. 2, ch. V, § II ("[I]t shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish . . . public schools and grammar schools in the towns . . . ."); *see* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137 (Mass. 2005) (Marshall, C.J., concurring) (citing McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993)). Every state constitution contains an education clause, but the Massachusetts Constitution serves as a model because it was the first constitution ratified by the states to include a provision for public education. Maura M. Pelham, *Promulgating Preschool: What Constitutes a "Policy Decision" Under* Hancock v. Commissioner of Education*?*, 40 New Eng. L. Rev. 209, 214–15 (2005–2006). The U.S. Constitution, however, contains no such requirement. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Therefore, education is not a fundamental right protected by the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 37, 40; *see also* U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[94] 653 N.E.2d 1088, 1095 (Mass. 1995).

[95] *Id.* at 1095–96.

[96] *See id.* at 1096 (citing *McDuffy*, 615 N.E.2d at 602).

[97] *See id.* at 1090, 1098 (upholding student expulsion for possession of lipstick knife); *see also* Nicholas B. v. Sch. Comm. of Worcester, 587 N.E.2d 211, 212–13 (Mass. 1992) (upholding student's expulsion for assaulting another student).

portunity to be educated.[98] At least in theory, then, the court's reasoning indicates that the education clause constitutionally requires the legislature and school officials to be proactive in preventing the victimization of students by bullying.[99] Otherwise, the victimized students could allege that the legislature or school district violated their substantive due process right to adequate education.[100] Still, while students theoretically have a right to a safe and secure school environment, schools are: (1) given broad discretion to make policy choices about school safety; and (2) subject to minimal judicial scrutiny under either the federal or Massachusetts equal protection clause.[101]

A. *Historically Broad Policy Discretion*

Courts have generally been reluctant to pass judgment on the wisdom or desirability of a school policy, even if the penalty for noncompliance is exclusion from school.[102] Much of this reluctance may be attributed to the SJC's interpretation of the separation of powers doctrine of the Massachusetts Constitution.[103] In the advisory opinion

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[98] *See Superintendent of Schs. of Worcester*, 653 N.E.2d at 1096 ("*McDuffy* . . . suggests that the Legislature's and school officials' duty to provide children an adequate public education includes the duty to provide a safe and secure environment in which all children can learn. Our prior decisions support the view that a student's interest in a public education can be forfeited by violating school rules.").

[99] *See id.* at 1096–97; Weddle, *supra* note 8, at 669.

[100] *Cf.* Weddle, *supra* note 8, at 666–70 (discussing the attempts of victims of bullying to convince courts that the school official's conduct as it relates to bullying is a "state-created danger" that violates the student's right to a safe school environment). *But see* Cady v. Plymouth-Carver Reg'l Sch. Dist., 457 N.E.2d 294, 297 (Mass. App. Ct. 1983) (suggesting that "there are no readily ascertainable standards" that courts can establish to deal with disruptive behavior, including bullying).

[101] *See Hancock*, 822 N.E.2d at 1156–57 (deferring to the executive and legislature to define how the state will fulfill its constitutional duty to provide adequate education); *Superintendent of Schs. of Worcester*, 653 N.E.2d at 1097 ("[A]pply[ing] the lowest level of scrutiny, the rational basis test, to [the student's] claim that [her expulsion] violated her right to substantive due process under the State Constitution.").

[102] *See* Leonard v. Sch. Comm. of Attleboro, 212 N.E.2d 468, 472 (Mass. 1965); Hammond v. Town of Hyde Park, 80 N.E. 650, 650 (Mass. 1907) (construing school committee's statutory power to make rules broadly).

[103] *See* Pelham, *supra* note 93, at 241–42, 244. Part 1, Article 30 of the Massachusetts Constitution construes the separation of powers:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. pt. 1, art. XXX.

Opinions of the Justices to the Senate, the SJC declared that the Massachusetts separation of powers clause is violated when one branch of government unduly restricts a core function of another branch.[104] Yet, while it is a core function of the legislature to make laws, the legislature may delegate the implementation details of a legislative policy to a board or individual.[105] Thus, because the state legislature has delegated broad power to school officials and boards, the Massachusetts courts have generally deferred to the decisions of school officials.[106]

1. General Judicial Deference Towards School Policies

Early in the Commonwealth's history the legislature delegated the "general charge and superintendence" of public schools to school committees.[107] Courts quickly interpreted this statutory language as a broad delegation of disciplinary authority.[108] For example, in *Hodgkins v. Inhabitants of Rockport*, the SJC held that due to the delegation of a "general charge and superintendence," the school committee's decision to expel a student was not subject to revision by the court unless the committee was not acting in good faith.[109] Likewise, in *Leonard v. School Committee of Attleboro*, the SJC upheld a school rule that barred a student from attending class solely because of the student's hair length.[110] The court presumed that the rule was "'based upon mature deliberation and for the welfare of the community.'"[111] Consequently, courts have upheld school rules so long as there is some rational basis for the rule.[112]

Further, courts have refused to reverse a disciplinary action unless the student can show that the suspending or expelling official acted

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[104] *See* 363 N.E.2d 652, 659 (Mass. 1977); Pelham, *supra* note 93, at 242.

[105] *See* Town of Arlington v. Bd. of Conciliation & Arbitration, 352 N.E.2d 914, 919 (Mass. 1976) (permitting legislature to delegate implementation details of legislative policy); Brodbine v. Inhabitants of Revere, 66 N.E. 607, 608 (Mass. 1903) (noting the universally adopted doctrine that the legislature cannot delegate the general power to make laws because that power was given only to the legislature by the constitution).

[106] *See, e.g.*, Doe v. Superintendent of Schs. of Stoughton, 767 N.E.2d 1054, 1057–59 (Mass. 2002) (applying arbitrary and capricious review to determine validity of school rule); *Leonard*, 212 N.E.2d at 470, 472 (allowing school to bar students from class because of hair length). *But see McDuffy*, 615 N.E.2d at 520, 548, 555 (holding school finance system based on local property taxes violated the Massachusetts education clause because schools in poorer areas were grossly underfunded).

[107] *McDuffy*, 615 N.E.2d at 543 n.68 (citation omitted).

[108] *See, e.g.*, Hodgkins v. Inhabitants of Rockport, 105 Mass. 475, 475–76 (Mass. 1870).

[109] *See id.* (reasoning school committees are in the best position to judge whether the student's misconduct affected the welfare of the school) (citation omitted).

[110] 212 N.E.2d at 470, 472.

[111] *See id.* at 472 (quoting Antell v. Stokes, 191 N.E. 407, 409 (Mass. 1934)).

[112] *See id.*

arbitrarily or capriciously, constituting an abuse of discretion.[113] Under arbitrary and capricious review, a court is permitted to reverse a school official's disciplinary decision only when there is no rational explanation for the decision and no reasonable mind could find that the original decision was proper.[114] Thus, courts have even affirmed suspensions and expulsions for conduct that was not prohibited in the school rulebook and permitted disciplinary actions based solely on an inference drawn from the student's alleged crime.[115]

2. A Limited Exception to Judicial Deference: School Finance

While the SJC generally adheres to a strict view of the separation of powers, its interpretation of school funding in *McDuffy v. Secretary of the Executive Office of Education* is the premier exception.[116] In *McDuffy*, the court confronted the issue of whether the Massachusetts school finance system effectively denied students who lived in poor areas an adequate education.[117] At the time, the Commonwealth's school finance system relied on local real property taxes as the primary source of school funds.[118] This meant that schools in areas with low real estate values were underfunded compared to schools in wealthy areas.[119] Ultimately, the SJC held that the Commonwealth had failed its duty pursuant to the Massachusetts education clause to provide education to students from poor areas.[120]

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[113] *See id.* at 473; *see also Superintendent of Schs. of Stoughton*, 767 N.E.2d at 1055, 1057–59 (applying arbitrary or capricious review to school decision to suspend students who had been charged with felonies).

[114] *Superintendent of Schs. of Stoughton* , 767 N.E.2d at 1058.

[115] *See id.* at 1058–59 (holding school principal may draw an inference of detrimental effect based on the nature of the crime alone); *Nicholas B.*, 587 N.E.2d at 212–13 (holding school committee's conduct was not arbitrary or capricious merely because there was no disciplinary rule governing the conduct).

[116] *See Hancock*, 822 N.E.2d at 1161–62 (Cowin, J., concurring) ("The *McDuffy* court cast aside this separation of powers doctrine and improperly inserted a final layer of judicial review on top of the public policy debate over education."); *McDuffy,* 615 N.E.2d at 553–54; Alan Jay Rom, "McDuffy *Is Dead; Long Live* McDuffy*!": Fundamental Rights Without Remedies in the Supreme Judicial Court of Massachusetts*, 21 ST. JOHN'S J. LEGAL COMMENT. 111, 125 (2006–2007).

[117] *McDuffy*, 615 N.E.2d at 517.

[118] *Id.* at 522.

[119] *Id.*

[120] *See id.* at 553–54. In *McDuffy*, the students also alleged that the Commonwealth's school finance system violated the state's Equal Protection Clause. *Id.* at 522. Due to the fact that the court decided that the Commonwealth violated the education clause, the court did not address the equal protection issue. *Id.* at 522 n.15.

The *McDuffy* court maintained that widespread education is both a duty and prerequisite of a republican form of government.[121] Deciding that the Commonwealth had neglected its obligations under the education clause, the court articulated seven broad "guidelines" to remedy the constitutional violation.[122] Still, the court also reasoned that the duty to educate evolves over time.[123] Thus, the court deferred to the executive and legislature to create a plan sufficient to meet the mandate of the education clause and retained jurisdiction to determine whether, after a reasonable period of time, the plan was appropriate.[124]

Heeding the SJC's call for action in *McDuffy* to create a plan sufficient to meet the mandate of the education clause, the Massachusetts legislature quickly drafted the Education Reform Act (ERA).[125] The ERA eliminated the school district's dependence on local tax revenues and created a formula that would bring state aid to students in districts that were unable to raise enough funds.[126] When students subsequently argued in *Hancock v. Commissioner of Education* that the ERA failed to meet the constitutional obligations articulated in *McDuffy*, the SJC ruled

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[121] *See id.* at 537. The *McDuffy* court noted that the framers of the Massachusetts Constitution believed a republican form of government must "indispensably" include "the education of youth, both in literature and in morals." *Id.* at 536 (quoting JOHN ADAMS, *Thoughts on Government*, *in* 4 THE WORKS OF JOHN ADAMS 194 (C.F. Adams ed., 1851)).

[122] *See id.* at 554. Adopting the seven guidelines set forth by the Supreme Court of Kentucky, the SJC in *McDuffy* held that an educated child must possess:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

[123] *See id.* at 555.

[124] *See id.* at 555–56.

[125] *See* Education Reform Act, MASS. GEN. LAWS chs. 69–71 (Supp. 1993); Rom, *supra* note 116, at 141 (noting the Education Reform Act was signed by the governor three days after the *McDuffy* decision).

[126] *See Hancock*, 822 N.E.2d at 1141 (Marshall, C.J., concurring); Rom, *supra* note 116, at 141.

in favor of the Commonwealth.[127] Cautioning that it was not retreating from *McDuffy*, a plurality in the *Hancock* court reasoned that by passing the ERA, the legislative and executive engaged in the long-term process of providing every child with a high quality education.[128] The plurality therefore limited the scope of judicial oversight imposed by *McDuffy* and declared that, in order for a student to successfully assert a violation of the education clause, the student must show that "the defendants are acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate."[129]

B. *Minimal Judicial Scrutiny Under the Equal Protection Clause*

Judicial review of substantive school policy decisions is minimal when a student alleges an equal protection violation under either the 14th Amendment or the respective state constitution.[130] Under federal Equal Protection Clause jurisprudence, the Supreme Court has divided the scope of judicial review of state actions into three types of classifications: (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis scrutiny.[131]

The Court applies strict scrutiny when a "fundamental right" or "suspect class" is implicated, and requires that the state demonstrate that its action is "'narrowly tailored' to achieve a 'compelling' government interest."[132] Similarly, when discriminatory classifications based on gender or illegitimacy are implicated, the Court applies "intermediate scrutiny," requiring the state to demonstrate that its action is "substantially related to an important governmental objective."[133] If none of the aforementioned heightened categories are implicated, the Court

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[127] *See Hancock*, 822 N.E.2d at 1137, 1139–40 (Marshall, C.J., concurring).

[128] *Id.* at 1140.

[129] *Id.*

[130] *See Superintendent of Schs. of Worcester*, 653 N.E.2d at 1097 (applying rational basis scrutiny). *See generally* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 Temp. L. Rev. 1151 (1995) (discussing the evolution of equal protection clause litigation in school finance cases).

[131] Clark v. Jeter, 486 U.S. 456, 461 (1988).

[132] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)); Romer v. Evans, 517 U.S. 620, 631 (1996); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding racial classifications in statutes are subject to strict scrutiny); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (holding right to vote is fundamental).

[133] *Clark*, 486 U.S. at 461. *See generally* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding, after applying intermediate scrutiny, that state statute excluding men from enrolling in state sponsored professional nursing school violated the Equal Protection Clause).

applies minimal rational basis scrutiny, whereby the state must only demonstrate that its action is "rationally related to a legitimate government purpose."[134]

For example, in *San Antonio Independent School District v. Rodriguez* the Court determined that there is no fundamental right to education under the United States Constitution, and therefore applied rational basis scrutiny to the Texas school finance system.[135] Under federal rational basis review, the state action is presumed constitutional and the Court places the burden upon the plaintiff to "'negate every conceivable basis which might support [the disputed state action].'"[136] Therefore, by holding there is no fundamental right to education under the United States Constitution, the *Rodriguez* Court "essentially closed the door" to federal Equal Protection Clause challenges of school actions unless the claim is based on a student's heightened classification.[137]

The judicial analysis under the Massachusetts Equal Protection Clause is similar to the federal system.[138] Thus, in *Doe v. Superintendent of the Schools of Worcester*, once the SJC held that each individual student does not have a fundamental right to education, the court applied rational basis scrutiny to the school's expulsion of a student.[139] Accordingly, as in the federal courts, unless a student's claim is based on a fundamental right or the school's action affects a student who is a

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[134] *See Clark*, 486 U.S. at 461; Rom, *supra* note 116, at 166.

[135] 411 U.S. at 37, 40.

[136] F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

[137] *See* Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742, 752 (S.D. Ohio 2011) (holding that the substantive due process clause does not impose a constitutional duty on the school to protect students from bullying by classmates); *Heise*, *supra* note 130, at 1156–57 (noting that while the *San Antonio Independent School District v. Rodriguez* decision "essentially closed the door," it was slightly left open by dicta that suggested the Constitution might guarantee a minimum amount of education to ensure a "meaningful opportunity to exercise other fundamental rights, such as free expression"); *see also Parents Involved*, 551 U.S. at 710–11 (holding public school plans that chose to classify by race when making school assignments violated the Equal Protection Clause).

[138] Rom, *supra* note 116, at 166–68 (noting that although Massachusetts has equal protection clause jurisprudence similar to the federal system, there are two significant differences). First, pursuant to the Massachusetts Equal Rights Amendment of 1976, Massachusetts courts apply strict scrutiny, rather than intermediate scrutiny, to gender based classifications. *See id.* at 166. Second, on rare occasions, courts apply what is known as "enhanced rational basis scrutiny," where the government must show its actions have a "real and demonstrable," rather than merely conceivable, connection to a legitimate government purpose. *See* Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 Alb. L. Rev. 415, 417–18 (2005–2006); Rom, *supra* note 116, at 168.

[139] *See* 653 N.E.2d at 1097.

member of a suspect class, Massachusetts courts are likely to hold that a school's disciplinary action does not violate the State's Equal Protection Clause.[140]

As a result, because Massachusetts schools are given broad policy discretion that is subject to minimal judicial scrutiny, both bullies and their victims have little judicial recourse to address any harm to their substantive right to an adequate public school education.[141]

III. Legislative Efforts to Protect Victims of Bullies

Most states attempted to combat bullying with anti-bullying statutes before Massachusetts developed a statewide policy.[142] The typical early anti-bullying statutes, though, were ineffective in reducing incidents of bullying.[143] As scholars have noted, victimized students and their peers are unlikely to report incidents of bullying because they fear retaliation or embarrassment.[144] Yet early anti-bullying legislation focused on punishing specific reported instances of bullying without incentivizing schools to enforce policies that encourage the victims to report the bullying.[145]

Nevertheless, without some anti-bullying legislation, schools are naturally reticent to make the necessary changes to identify and prevent bullying.[146] Prompted by public outcry over the suicides of stu-

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[140] *See id.*; Weddle, *supra* note 8, at 671–72 (noting that many victims of bullying are unable to show that the school's inaction to prevent bullying was because the student was a member of a suspect class); *cf. Heise*, *supra* note 130, at 1156–57 (noting that, by finding education is not a fundamental right, the Supreme Court's decision in *Rodriguez* essentially closed the door on federal equal protection review).

[141] *See Hancock*, 822 N.E.2d at 1156–57 (Marshall, C.J., concurring); *Superintendent of Schs. of Worcester*, 653 N.E.2d at 1096–97; *Cady*, 457 N.E.2d at 297.

[142] *See* Mass. Gen. Laws ch. 71, § 37O (2010); Bully Police USA, *supra* note 16 (noting that forty-nine states have passed anti-bullying laws and that all but eight states had passed anti-bullying laws before Massachusetts).

[143] *See* Christensen, *supra* note 19, at 555.

[144] *See* Weddle, *supra* note 8, at 645, 647–48, 679 (noting that victims cannot resist or end the torment of bullying if they fear the bully will later retaliate against them); Wayne N. Welsh, *The Effects of School Climate on School Disorder*, 567 Annals Am. Acad. Pol. & Soc. Sci. 88, 91 (2000) (noting that fear and embarrassment contribute to the underreporting of school violence).

[145] *See* Christensen, *supra* note 19, at 555–57 (citing Weddle, *supra* note 8, at 673) (noting that early state statutes provided little incentive to schools to actually enforce anti-bullying policies).

[146] *See* Weddle, *supra* note 8, at 679 (discussing the difficulties of discovering bullying). *See generally* Laura Parker-Roerden et al., Governor's Task Force on Hate Crimes, Direct from the Field: A Guide to Bullying Prevention (2007), *available at* http://www.mass.gov/eohhs/docs/dph/com-health/violence/bullying-prevent-guide.pdf (discussing reasons for the system-wide school failure to prevent bullying).

dents like Carl Walker-Hoover—and despite the early-perceived failures of anti-bullying legislation—in 2010 the Massachusetts legislature unanimously passed the Commonwealth's first anti-bullying law.[147] But unlike many earlier anti-bullying laws in other states, the Massachusetts law addresses school bullying by targeting both specific incidents of bullying and the underlying reluctance of schools to implement a strong anti-bullying culture.[148]

A. *Underlying School Reluctance to Confront Bullying*

While schools are certainly cognizant of the harms of bullying, for a myriad of reasons they are unable to implement successful bullying measures without strong legislative action.[149] First, teachers may be prone to underestimate the severity of the bullying problem at their schools.[150] Studies show that bullying is an "underground phenomenon" because it typically occurs when intervening adults are not around to witness the violence.[151] Victimized students often fail to ask for help because they either fear that intervention will incite more bullying or are too humiliated to admit that they are weak or unpopular.[152] Similarly, non-bullied students are reluctant to intervene for fear that the bully will retaliate.[153] Consequently, many instances of bullying are never reported to school officials.[154]

Furthermore, even when school officials learn of the bullying, they often either fail to report the incident to the school's discipline adminis-

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[147] *See* ch. 71, § 37O; Christensen, *supra* note 19, at 555; Peter Schworm, *State Bill Targeting Bullying Approved*, BOS. GLOBE, Apr. 30, 2010, at A1.

[148] *See* Schworm, *supra* note 147, at A1 (noting that the law emphasizes both discipline and community wide anti-bullying education); *see also* Christensen, *supra* note 19, at 555–57 (discussing the structure of many early anti-bullying laws).

[149] *See* PARKER-ROERDEN ET AL., *supra* note 146, at 69–100 (suggesting in an official state report an assortment of bullying prevention tools before any anti-bullying laws were passed in Massachusetts); Christensen, *supra* note 19, at 558 (noting that effective anti-bullying legislation is necessary to prevent bullying); Welsh, *supra* note 144, at 90 (citing a 1993 survey of the National School Board Association that claims "[e]ighty-two percent of school district administrators reported that the problem of school violence had worsened in the previous five years, and 35 percent believed that incidents were more serious.").

[150] *See* Weddle, *supra* note 8, at 650, 679. This was true even though schools readily admitted the increased severity and violence in schools. *Id.* at 650.

[151] *See id.* at 651, 679 (noting that bullying most likely occurs "behind the backs of adults who might intervene").

[152] *Id.* at 647–48, 651.

[153] *See id.* at 648.

[154] *See id.* at 647–48, 651.

trator, or report it with significant errors.[155] School disciplinary records reflect the ability of school officials to manage a safe school environment.[156] Accordingly, teachers or school administrators who report numerous incidents of bullying risk appearing incompetent and endanger their livelihood with each additional report.[157] School officials who intervene but do not report the bullying may also risk their positions if the bullying turns out to be more damaging than originally believed.[158] As a result, school officials are incentivized not to intervene at all.[159]

Moreover, incidents of bullying are also underreported because many school officials are unaware of bullying's inherent dangers.[160] Many school officials believe the commonly held myth that bullying is simply a part of growing up.[161] Thus, unless an incident reaches the point of assault or theft, school officials often overlook bullying because they believe that bullying makes the abused children tougher.[162] Otherwise, some school officials—who are aware of both the dangers of bullying and the unlikelihood of witnessing the bullying—can be reluctant to intervene because they fear that doing so will make the bully seek greater retribution when adults are not around.[163]

Finally, empirical research shows that a school's ability to prevent bullying is primarily dependent upon the school faculty's ability to maintain a safe school climate.[164] Studies show that incidents of bullying are highest where anti-bullying policies are inconsistently enforced or where the students do not believe the policy would be enforced.[165]

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[155] *See* Parker-Roerden et al., *supra* note 146, at 6 ("[S]tudents report that 71 percent of teachers or other adults in the classroom ignore bullying incidents."); Welsh, *supra* note 144, at 90 (discussing the prevalence of errors in school disciplinary records).

[156] *See* Welsh, *supra* note 144, at 90.

[157] *See id.*

[158] *See* Weddle, *supra* note 8, at 682.

[159] *See id.*; Welsh, *supra* note 144, at 90.

[160] *See* Parker-Roerden et al., *supra* note 146, at 6, 12–18 (discussing eight common myths about bullying like the perspectives that "bullying is just a part of growing up" or "boys will be boys").

[161] *See id.* at 12; Weddle, *supra* note 8, at 650.

[162] Parker-Roerden et al., *supra* note 146, at 12; Weddle, *supra* note 8, at 650. In fact, research suggests that bullying creates the opposite effect. Parker-Roerden et al., *supra* note 146, at 12. Bullied children tend to isolate themselves from the rest of their classmates, resulting in lower self-esteem and a lack of a peer support structure. *Id.*

[163] *See* Weddle, *supra* note 8, at 651.

[164] *Id.* at 652 (defining school climate as "'unwritten beliefs, values, and attitudes that become the style of interaction between students, teachers, and administrators'") (quoting Welsh, *supra* note 144, at 89).

[165] *See id.* at 654; Welsh, *supra* note 144, at 93.

As a result, a school that sincerely tries to redress bullying would need its employees to embrace a significant cultural shift.[166]

Nevertheless, schools that do take a proactive approach towards bullying may appear to have a broad violence and bullying problem.[167] Such an appearance is undesirable and noticeable to parents and may ultimately undermine the school district's political and financial support.[168] It is therefore much easier for schools to only address bullying in the most "egregious situations," thereby giving the illusion that the school is reprimanding dangerous bullies without exhibiting a broad underlying bullying problem.[169] Consequently, since the judiciary rarely intervenes with school policy decisions, schools are naturally reluctant to openly tackle problems of bullying on their own.[170]

B. *The Massachusetts Anti-Bullying Law*

The Massachusetts anti-bullying law can be separated into two parts.[171] First, like many early anti-bullying laws, the Massachusetts law addresses the punishment of specific incidents of bullying.[172] Then, to ensure effective bullying intervention and prevention, the law takes numerous steps to comprehensively reshape the culture of school bullying.[173]

1. Defining Bullying & Addressing Specific Bullying Incidents

The Massachusetts anti-bullying law broadly defines bullying to include written, verbal, or physical acts that cause a victim either physi-

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[166] *See* Weddle, *supra* note 8, at 679.

[167] *See* Christensen, *supra* note 19, at 574; Weddle, *supra* note 8, at 677.

[168] *See* Christensen, *supra* note 19, at 574; Weddle, *supra* note 8, at 677.

[169] *See* Christensen, *supra* note 19, at 557, 574; Weddle, *supra* note 8, at 650, 676.

[170] *See* Christensen, *supra* note 19, at 557 (noting schools have "every incentive to refrain from drawing attention to bullying problems at their schools"); *cf.* Weddle, *supra* note 8, at 682–95 (noting that schools are rarely held liable for failing to remedy school bullying).

[171] *See* MASS. GEN. LAWS ch. 71, § 37H (2010) ("The superintendent of every school district shall publish the district's policies pertaining to the conduct of teachers and students . . . . The policies shall also prohibit bullying as defined in section 37O and shall include the student-related sections of the bullying prevention and intervention plan required by said section 37O."); *id.* § 37O.

[172] *See id.* § 37O; Christensen, *supra* note 19, at 555.

[173] *See* ch. 71, § 37O; Press Release, Martha Coakley, Mass. Att'y Gen., On Second Anniversary of Anti-Bullying Legislation, AG Coakley, Legislators Vow to Continue Efforts to Combat Bullying (May 2, 2012), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-05-02-anti-bullying-legislation-anniversary.html; *see also* Christensen, *supra* note 19, at 555–58 (noting the need for anti-bullying legislation to reform school culture).

cal or emotional harm.[174] Bullying is prohibited on school grounds, immediately adjacent to school grounds, at a school-sponsored or school related activity on or off school grounds, at school bus stops, in any school vehicle, and on any electronic device used by the school or school district.[175] Apart from school, the law extends to non-school-related activities and locations if the bullying: (1) creates a hostile school environment; (2) infringes on the victim's rights at school; or (3) "materially and substantially" interferes with the education process or operation of a school.[176]

The law additionally mandates that every two years each school district must develop an extensive bullying prevention and intervention plan that gives clear guidance for how staff and students should respond to bullying.[177] The plans must establish, inter alia: (1) clear reporting procedures, including procedures to report bullying anonymously; (2) clear procedures that help the victimized children feel safe at school; (3) strategies to protect victims from further bullying and retaliation; (4) procedures that promptly notify the parents of victims; and (5) a strategy to provide counseling for the victims.[178]

The law also takes steps to ensure that alleged bullies are not unfairly or wrongly punished.[179] First, the law prevents schools from disciplining alleged bullies solely because of an anonymous victim report.[180] Further, the law requires schools to discipline students who knowingly

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[174] Ch. 71, § 37O. As defined by Section 37O:

> "Bullying," the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.

Id. § 37O. Though the focus of this Note is public schools, the Massachusetts anti-bullying law also applies to charter, non-public, approved private day or residential, and collaborative schools. *See id.*

[175] *Id.* § 37O(b)(i).

[176] *Id.* § 37O(b)(ii).

[177] *Id.* § 37O(c)–(d).

[178] *Id.* § 37O(d); *see, e.g.*, Mass. Dep't of Elementary & Secondary Educ., Sample Bullying Prevention and Intervention Incident Reporting Form, *available at* http://www.doe.mass.edu/bullying/ModelPlan_appxA.pdf (enumerating procedures when a bullying incident is reported).

[179] *See* ch. 71, § 37O(d).

[180] *Id.* § 37O(d)(iii) (providing that "no disciplinary action shall be taken against a student solely on the basis of an anonymous report").

make false allegations of bullying, thereby deterring students from making up or exaggerating abuse.[181] Finally, school plans must include a range of disciplinary actions to take against bullies based on the severity of the bullying incident.[182] A school official must determine the degree of discipline only after balancing "the need for [student] accountability with the need to teach appropriate behavior."[183] The law thus requires schools to respond to bullying, while theoretically preventing them from strictly adhering to ineffective and potentially harmful zero tolerance policies.[184]

2. Reshaping Anti-Bullying Culture Through Community Involvement

Like many anti-bullying laws, the Massachusetts law requires every school staff member to report any bullying incidents.[185] To encourage schools to implement effective anti-bullying policies, the Department of Education is required to publish and distribute a model bullying prevention plan.[186] This measure has been criticized because schools may formally adopt the model yet fail to implement the policies.[187] When

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[181] *Id.* § 37O(d)(ix); The Governor's Acad., Anti-Bullying Policy and Intervention Plan 1, 5–6 (2012), *available at* http://www.thegovernorsacademy.org/uploaded/Student_Life/Student_Handbook/Anti-Bullying_Policy_and_Intervention_Plan_3413.pdf (noting that when establishing an anti-bullying policy in response to the Massachusetts law, false or exaggerated allegations are not tolerated because they can be extremely damaging to innocent students).

[182] Ch. 71, § 37O(d)(x).

[183] *Id.* § 37O(d)(v).

[184] *See id.* § 37O(d); Hanson, *supra* note 27, at 315–17, 323–24 (discussing the negative effects of zero-tolerance policies and likening the approach to child abuse). While the law aims for schools not to use zero-tolerance policies, in reality, schools are turning to police arrests for even the smallest school discipline issue. *See* Hanson, *supra* note 27, at 315–17; Robin L. Dahlberg, *Arrested Futures: The Criminalization of School Discipline in Massachusetts' Three Largest School Districts*, ACLU of Massachusetts 9, 19–21, http://www.aclu.org/files/assets/maarrest_reportweb.pdf (last visited Mar. 8, 2013) (noting that schools are now using on-site police officers to arrest students to deal with school discipline that has been classically addressed by school staff).

[185] Ch. 71, § 37O(g); *see* Weddle, *supra* note 8, at 675. Staff members are required to report the bullying to the principal or a designated school official who overseas bullying. Ch. 71, § 37O(g).

[186] Ch. 71, § 37O(j); *see, e.g.*, Mass. Dep't of Elementary & Secondary Educ., Model Bullying Prevention and Intervention Plan (2013), *available at* http://www.doe.mass.edu/bullying/BPIP.pdf [hereinafter Model Bullying Plan].

[187] *See* Christensen, *supra* note 19, at 557 (noting that schools have every incentive to merely adopt an anti-bullying policy, rather than change their culture, and thus only enforce bullying in egregious situations); Weddle, *supra* note 8, at 676 (implying that while model plans can help encourage conversation, they are often used as a crutch so that schools do not have to engage in time consuming and difficult community conversations about bullying).

this happens, a school can technically comply with the anti-bullying law without drawing attention to the severity of bullying on its campus.[188]

The Massachusetts anti-bullying law addresses this issue by requiring schools to involve the entire educational community in the policy making.[189] First, before adopting or making any prospective changes to the school district's bullying prevention plan, the district must seek input from the students, parents, local law enforcement, and overall educational community.[190]

In addition, every school must incorporate into the curriculum of each grade an age-appropriate evidence-based instruction on bully prevention.[191] Current research advocates that classroom bully prevention curricula include activities that empower students to know what to do—including seeking adult assistance—when they witness bullying.[192] Moreover, schools must educate parents about the dynamics of bullying.[193] Hence, under the law, parents are advised on how to reinforce the schools evidence-based anti-bullying curriculum.[194]

Finally, every school staff member must receive ongoing professional anti-bullying training.[195] Ongoing training is meant to ensure that all staff members are able to pierce the school's "underground" bullying culture by providing them with tools to create a safe school climate.[196] Given each of these requirements, Massachusetts has clearly

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[188] *See* Christensen, *supra* note 19, at 557; Weddle, *supra* note 8, at 676–77.

[189] *See* ch. 71, § 37O(c)–(d); Weddle, *supra* note 8, at 655–56 (suggesting that when the entire community is involved there is a shared sense of ownership to the bullying problem and a greater likelihood to change the school climate). Professor Weddle praised a similar approach taken by Oklahoma, which provided for methods to involve the school community in bullying prevention, because that approach ensured that model policies are not just photocopied and distributed to the public. *See* Weddle, *supra* note 8, at 676–77 (citing OKLA. STAT. tit. 70, § 24-100.4(A) (Supp. 2004)).

[190] Ch. 71, § 37O(d). Aside from students, parents and guardians, and law enforcement, the statute requires the school to seek input from professional support personnel, school volunteers, administrators, community representatives, and school staff. *Id.*

[191] *Id.* § 37O(c); *see, e.g.*, MODEL BULLYING PLAN, *supra* note 186, at 6–7.

[192] MODEL BULLYING PLAN, *supra* note 186, at 6–7.

[193] Ch. 71, § 37O(d).

[194] *Id.*

[195] *Id.*

[196] *Id.*; Weddle, *supra* note 8, at 679; *see* MODEL BULLYING PLAN, *supra* note 186, at 4. This ongoing staff training must include, inter alia: (1) age-specific strategies to prevent and effectively intervene in bullying incidents; (2) information that conveys the "complex interaction and power differential" between bullies and victims; and (3) bullying research findings that include information about which students are particularly at risk for bullying and how students engage in cyber-bullying. Ch. 71, § 37O(d). To ensure that impoverished schools can afford the staff training, the Commonwealth must provide at least one training option at no cost to every school district. *Id.; see* Christensen, *supra* note 19, at 557 (noting

taken extensive steps to combat the underlying reluctance of schools to address school bullying and therefore help create effective anti-bullying climates throughout the Commonwealth.[197]

IV. Awarding Bullies Rights at the Expense of Protecting Victims

Research has shown that once students are suspended or expelled they are more likely to quit going to school entirely.[198] Those students then enter into the real world as undereducated and unskilled young adults who are precluded from the same opportunities as their former classmates.[199] Consequently, many of the suspended or expelled students turn towards crime—often arrested within one year of the suspension.[200] Alleged bullies should therefore be entitled to some procedural protections before they lose their opportunity to receive an adequate education.[201] In other words, since the judiciary rarely intervenes in school disciplinary decisions or finds that students are entitled to more than minimal procedural protections, legislative measures to protect alleged bullies are essential.[202]

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that many anti-bullying laws fail to provide training to teachers because they do not provide funding to the schools).

[197] *See* ch. 71, § 37O; Christensen, *supra* note 19, at 557, 574; Weddle, *supra* note 8, at 652, 679.

[198] *See* Hanson, *supra* note 27, at 330–31 (discussing the negative effects of school suspensions). Professor Hanson notes that, depending on the time of the expulsion, the student can be out of school for over a full calendar year. *Id.* at 330; *see also* Mass. Gen. Laws ch. 71, § 37H3/4(f) (2012) (limiting suspensions up to ninety school days, which is equivalent to eighteen full calendar weeks without school holidays). As a result, it can be very difficult to get students back into class with younger classmates, especially if the student was psychologically damaged from the school's discipline. *See* Hanson, *supra* note 27 at 330–31.

[199] *See* Hanson, *supra* note 27 at 330–31.

[200] *See id.* (noting that studies have shown students that students who are expelled have an increased likelihood to "get into trouble with the law and get arrested within one year"); *see also* T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 306 (E.D.N.Y. 2011) (noting that bullies in general are more likely than non-bullies to commit a felony in the future and that one study found that "60 percent of boys identified as bullies in grades six to nine had at least one conviction by age 24 . . . a four-fold increase in the level of criminality over that of non-bullies").

[201] *See* Goss v. Lopez, 419 U.S. 565, 584 (1975) (implying that for long-term suspensions all students should be entitled to more formal procedures than notice and an opportunity to be heard); Doe v. Superintendent of Schs. of Worcester, 653 N.E.2d 1088, 1095–96 (Mass. 1995) (holding all Massachusetts students are entitled to an equal opportunity to receive an adequate education); Hanson, *supra* note 27, at 293 (noting the importance of receiving an education in the twenty-first century).

[202] *See Goss*, 419 U.S. at 583 (stopping short of requiring schools to provide trial type protections in expulsion proceedings); Doe v. Superintendent of Schs. of Stoughton, 767

Chapter 71, Section 37H3/4 of the Massachusetts General Laws, enacted to limit the expansion of the school-to-prison pipeline, protects alleged bullies by granting them the right to confront their accusers with the assistance of counsel.[203] Nonetheless, entitling alleged bullies to these procedural protections causes numerous harmful effects to victims, undermining the Commonwealth's efforts to create effective anti-bullying school climates.[204] Amending the law so victims may be interviewed by neutral third-parties away from the disciplinary hearing will alleviate the potentially traumatic harm to victims, while ensuring the fairness of the alleged bully's disciplinary hearing.[205]

A. *The Importance of Examining the Victim Before a Long-Term Suspension*

Ensuring a fair disciplinary hearing is dependent upon the examination of the victim, particularly when the discipline concerns bullying.[206] Schools rely upon the reports of victims, school officials, non-victimized students, and parents to reveal specific incidents of bullying.[207] Bullies are often successful at tormenting their victims for long periods of time precisely because the bullying is done away from intervening adults.[208] School officials and parents therefore are unlikely to

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N.E.2d 1054, 1057–59 (Mass. 2002) (applying arbitrary and capricious review to determine validity of school rule); Mossman, *supra* note 39, at 630–31 (calling for a "bright-line determination" of the right to counsel, but noting such cases never reach court).

[203] Ch. 71, § 37H3/4(e) ("At the hearing, the student shall have the right to present oral and written testimony, cross-examine witnesses and shall have the right to counsel."); *see* Young, *supra* note 30 (noting the law requires schools to consider alternatives before suspending or expelling a student).

[204] *See* Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 925 (6th Cir. 1988) (noting the need to protect a student's anonymity to report violence at school); Weddle, *supra* note 8, at 652, 679; Coakley, *supra* note 173 (noting that the anti-bullying law is meant to comprehensively reshape the culture of bullying in schools).

[205] *See* Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) ("[T]he procedures employed in a disciplinary action must be tested by the extent to which they comport with the requirement of fundamental fairness."); Alison Cunningham & Pamela Hurley, Hearsay Evidence and Children 12 (2007), *available at* http://www.lfcc.on.ca/6_Hearsay Evidence.pdf (noting that Sweden uses a neutral third-party to interview child witnesses); *cf.* Maryland v. Craig, 497 U.S. 836, 855 (1990) (holding that emotionally abused children can testify at their abuser's criminal trial without face-to-face confrontation with their abuser).

[206] *See Gorman*, 837 F.2d at 12; Weddle, *supra* note 8, at 648, 651.

[207] *See* Mass. Gen. Laws ch. 71, § 37O (2010) (requiring school officials to report incidents of bullying, and providing parents with information about the schools anti-bullying curriculum); *see also* Model Bullying Plan, *supra* note 186, at 6–7 (emphasizing students to seek adult assistance when they witness bullying); *Parent's Worst Nightmare*, *supra* note 2 (noting that Carl Walker-Hoover's mother reported the bullying to the school).

[208] *See* Weddle, *supra* note 8, at 651.

be around when the bullying occurs.[209] In addition, non-victimized students avoid bullying incidents because they do not want to get the bully's attention.[210] Consequently, parents, school officials, and non-bullied students generally only have secondhand or incomplete knowledge of the bullying.[211] As a result, in many cases the disciplining school official cannot accurately gauge the credibility and severity of the bullying without hearing the victim's full account.[212]

Similarly, very few students accused of severe bullying can bear the legal risks of presenting their side of the story.[213] Any statement students make at a disciplinary hearing can be used against them in a later criminal prosecution.[214] In other words, while some bullies may be persuaded to speak at a school hearing because they fear the school official may infer guilt from their silence, many bullies will refuse to speak because they fear self-incrimination.[215] Thus, in many cases the only meaningful way to challenge a bullying allegation is to confront the victim.[216]

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[209] *See id.* at 651–52 (noting that the majority of bullying occurs at school and therefore that parents may feel powerless to change the situation because they are not around).

[210] *See id.* at 648.

[211] *See id.* at 648, 651–52; *see also* Johnson v. Collins, 233 F. Supp. 2d 241, 248, 250 (D.N.H. 2002) (holding that the hearing was unfair because it was based on the police captain's second hand hearsay and unreliable student accounts).

[212] *See* ch. 71, § 37O(d) (requiring school officials to measure the severity of the bullying before disciplining the student); *Newsome*, 842 F.2d at 925 (denying right to cross-examination because the school official could properly gauge the credibility of the victim's accusation).

[213] *See Goss*, 419 U.S. at 581–82; Russell Goldman, *Teens Indicted After Allegedly Taunting Girl Who Hanged Herself*, ABC News, Mar. 29, 2010, http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357 (noting that students have been indicted for bullying).

[214] *See* Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 n.9 (Mass. 1992) (noting that a school official should warn the student that any statement the student makes could be later used as evidence against the student in a criminal proceeding); Boston Public Schools Code of Conduct 26 (2010), *available at* http://www.bostonpublicschools.org/files/Code%20of%20Conduct.pdf [hereinafter Boston School Code] (stating that the hearing officer should warn students that their statements may be used against them in a later civil or criminal court).

[215] *See* C.O. v. M.M., 815 N.E.2d 582, 589 (Mass. 2004) (holding that an adverse inference may be drawn against student defendant in an "abuse prevention" proceeding, even if criminal proceedings are pending, so long as silence is not the sole basis of the complaint); Goldman, *supra* note 213 (reporting the indictments of nine bullies after the victim committed suicide); *see also* ch. 71, § 37O(g)(i) (encouraging principals to report potentially criminal bullying to the police). Like school hearings, abuse prevention proceedings are intended to be informal. *C.O.*, 815 N.E.2d at 591; *see Goss*, 419 U.S. at 583. Moreover, the Massachusetts judiciary is reticent to intervene in school disciplinary decisions. *See Superintendent of Schs. of Stoughton*, 767 N.E.2d at 1057. Thus, though the two proceedings are not identical, the adverse inference doctrine may extend to school hearings. *See C.O.*, 815 N.E.2d at 589, 591; *Superintendent of Schs. of Stoughton*, 767 N.E.2d at 1057. *But see* Boston School Code, *supra*

B. *Harmful Effects of Subjecting a Victim to Cross-Examination by Counsel*

Given that in many cases the victim is the only person who can attest to the severity of the bullying, the trustworthiness or reliability of the victim's claim is paramount.[217] Depending on the age of the child and the types of questions asked, however, counsel can undermine a victim's reliability merely by repeating similar questions within the same cross-examination.[218] By repeating questions, a common cross-examination tactic, abused children may perceive that they are expected to give a different, untruthful answer.[219] Studies show that abused children may do this for two reasons: (1) after the question is repeated, the children believe their first answer was incorrect; or (2) the children want to change their answer to make the adult questioner happy.[220] Moreover, school disciplinary officials, in a position similar to jurors, may not realize the effect that the repeated questioning had on the child.[221] Although this effect is mitigated when the disciplining school officials know firsthand if the victim is reliable, the final decision is made by the superintendent—someone who is less likely to have had previous contact with the victim.[222] As a result, adept cross-examination by counsel can obfuscate the severity of the bullying, thereby increasing the likelihood that bullies are under-punished.[223]

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note 214, at 26 (stating that the hearing officer should warn students that their statements may be used against them in a later civil or criminal court).

[216] *See Johnson*, 233 F. Supp. 2d at 249–50 (holding due process is violated when students have no meaningful opportunity to be heard).

[217] *See id.*; Weddle, *supra* note 8, at 648, 651.

[218] *See* Thomas D. Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions*, 65 Law & Contemp. Probs. 97, 97, 108 (2002). Still, Professor Lyon argues not to exaggerate the risks of repeated questions for older children. *See id.* at 110.

[219] *See id.* at 106.

[220] *Id.*

[221] *See id.* at 104–05.

[222] *See* Mass. Gen. Laws ch. 71, § 37H3/4(e) (2012) (granting the student the right to appeal the suspension to the superintendent, but warning that the decision "shall be the final decision of the school district"); *Newsome*, 842 F.2d at 924 (reasoning that the value of cross-examination is mitigated by the strength of the school official's judgment).

[223] *See* Mass. Gen. Laws ch. 71, § 37O(d) (2010) (requiring schools to include a range of disciplinary options based on the severity of the bullying); Lyon, *supra* note 218, at 121–23 (noting that repeated questions may increase inconsistency but not necessarily inaccuracy). Even if the abused child is accurate that the bullying occurred, the inconsistent account of the severity of the bullying undermines the disciplining process. *See* ch. 71, § 37O(d); Lyon, *supra* note 218, at 121–23.

When bullies are under-punished, schools officials give victims the impression that they are unable to protect them from abuse.[224] The under-punishment thus undercuts the trust victimized students must have in adults to overcome their fears of embarrassment and potential retaliation.[225] Consequently, cross-examination that leads to under-punishing the bully will deter victims from reporting the abuse, inevitably resulting in more torment for the victim and an overall more dangerous school climate.[226]

On the other hand, cross-examination that obfuscates a victim's credibility can also create a more dangerous bullying climate by creating a school-wide perception that the bully was arbitrarily over-punished.[227] Many school administrators err towards criminalizing a student's misconduct rather than rehabilitating the misconduct at school, regardless of evidence that the student's misconduct was minor or that the allegations were false.[228] In such situations, the hearing officer's discipline of the bully may remain severe even when the bully's counsel successfully downplays the severity of the bullying, thereby resulting in the perception throughout the school that the bully has been arbitrarily over-punished.[229]

When bullies are arbitrarily over-punished, the disproportionate discipline shows that the school can "lord [its] power" over its students

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[224] *See* Weddle, *supra* note 8, at 645 (noting that victims cannot resist or end the torment of bullying if they fear the bully will retaliate against them).

[225] *See id.* at 651 (noting that student victims tend not to trust adults enough to ask for help if they fear the help will lead to retaliation); Welsh, *supra* note 144, at 91 (arguing that victims may also not report bullying because they are embarrassed).

[226] *See* Christensen, *supra* note 19, at 559–60, 564; Weddle, *supra* note 8, at 645, 651; Welsh, *supra* note 144, at 91.

[227] *See* Parker-Roerden et al., *supra* note 146, at 6, 12–18; Archer, *supra* note 27, at 868–69; Christensen, *supra* note 19, at 549; Weddle, *supra* note 8, at 680.

[228] *See* Archer, *supra* note 27, at 868–69 (noting that the recent trend by school officials across the country to "crack down" on the behavior of students—rather than attempt to rehabilitate the students in a school environment—has resulted in an increase of student suspensions and expulsions compared to earlier generations for what many would consider nonviolent behavior); Hanson, *supra* note 27, at 329 (noting that actions that may be considered childish acts, like having a pager at school, have been treated like criminal acts that merited suspension); *see also* Seal v. Morgan, 229 F.3d 567, 570–76 (6th Cir. 2000) (pointing out that school board expelled student for possession of a knife in his car, even though evidence at school hearing showed student had no knowledge of the knife because another student had planted it there); Weddle, *supra* note 8, at 680 (noting how, at one school, "[a] six-year-old was suspended for offering a classmate a lemon drop because the teacher did not know what the candy was").

[229] *See* Weddle, *supra* note 8, at 680 (noting how administrators abandon common sense punishments when school violence is implicated and often err on the side of "draconian" zero-tolerance punishments).

in the same way that bullies do.[230] In other words, the school becomes a bully and the bullies become the victims.[231] Once victimized, bullies often feel justified in treating their victims in the same way the school treated them and may turn even more violent against their victims.[232]

Moreover, over-punishing bullies can deter much of the school community from reporting the incidents.[233] When students are over-punished, teachers and non-bullied students face an unenviable catch-22: either report the bullying and subject the students to overly harsh punishment, or fail to report the bullying and subject the victim to further torment.[234] Given that many people underestimate the traumatic effects of bullying, some school officials and students will undoubtedly choose not to report the bullying.[235] Cross-examination that leads to arbitrary over-punishing, therefore, can create an even more dangerous bullying climate.[236]

Finally, even assuming that the bullies are appropriately punished, the cross-examination can serve as yet another avenue for bullies to torment their victims.[237] Victims must already overcome their fear of retaliation and embarrassment in order to report the bullying.[238] Extensive research indicates that this fear is difficult to overcome; many victims of abuse have the natural inclination to try to avoid thinking about their abusers.[239] Likewise, many abused children are particularly vulnerable to the pressures of speaking in intimidating forums where

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[230] *Cf. id.* at 680–81 (noting that zero-tolerance approach to bullying, where the punishment is often unjust or disproportionate, confirms to children that some groups can abuse others without any consequences).

[231] *See* Christensen, *supra* note 19, at 548–49 (noting that bullies who are punished with severe reprimands tend to feel like victims); Weddle, *supra* note 8, at 681.

[232] *See* Christensen, *supra* note 19, at 549 (noting that bullies often feel powerless and resort to extreme violence when school officials do not listen to their side of the story).

[233] *See id.* at 559–60 (citing Weddle, *supra* note 8, at 682) (noting the reluctance of teachers and students to report bullying if the punishment is excessive or unjust).

[234] *See id.* at 559–60, 564.

[235] *See id.*; *see also* Parker-Roerden et al., *supra* note 146, at 6, 12–18 (discussing eight common myths that cause many to underestimate the traumatic effects of bullying).

[236] *See* Parker-Roerden et al., *supra* note 146, at 6, 12–18; Christensen, *supra* note 19, at 549; Weddle, *supra* note 8, at 680–81.

[237] *See* Weddle, *supra* note 8, at 645 (noting that bullying is a form of child abuse); Goodhue, *supra* note 36, at 498 (describing how child abuse victims forced to testify in court in front of the accused are often re-victimized).

[238] *See* Weddle, *supra* note 8, at 645; Welsh, *supra* note 144, at 91.

[239] *See* Weddle, *supra* note 8, at 651 (stating the reasons that bullying victims fail to ask for help); *see also* Epstein et al., *supra* note 34, at 475 (analyzing how symptoms of trauma are exacerbated in victims of domestic violence when they are forced to repeatedly come to court or discuss the abuse because the victims often try to avoid thinking about the abuse).

they must confront their abusers face-to-face.[240] Given these vulnerabilities, through cross-examination, bullies get one last opportunity to bully their victims, thereby forcing the victims to relive the abuse.[241] By permitting bullies to cross-examine their victims with counsel, Section 37H3/4 undermines the necessary legislative efforts to combat bullying.[242]

C. *An Alternative Approach That Protects Both Bullies & Victims*

Before Section 37H3/4's enactment, schools could refuse an accused student's request for the victim to appear and be cross-examined at a disciplinary hearing.[243] Bolstered by court decisions like *Newsome v. Batavia Local School District*, schools could justify keeping school disciplinary proceedings relatively informal in order to protect student anonymity and encourage reporting of school violence.[244] Nonetheless, informal disciplinary proceedings have immense consequences for accused bullies.[245] Without an opportunity to examine the victim, alleged bullies may be disproportionately punished for the severity of their actions.[246] Considering that school officials currently err towards suspen-

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[240] *See* Goodhue, *supra* note 36, at 516–17 ("[C]hildren's cognitive and emotional development make them particularly vulnerable to the pressures of testifying in a forum which to them is both alien and intimidating."); *cf.* Epstein et al., *supra* note 34, at 475 (noting that trauma may be intensified by triggering flashbacks, when an abused victim has to testify in front of her accuser).

[241] *See* Epstein et al., *supra* note 34, at 475 (stating that testifying makes victims relive the trauma); Weddle, *supra* note 8, at 645 (describing how bullying is meant to intimidate, harass, or frighten the victim).

[242] *See* Mass. Gen. Laws ch. 71, § 37H3/4(e) (2012); Christensen, *supra* note 19, at 558; Epstein et al., *supra* note 34, at 475 (noting that testifying makes victims relive the trauma); Coakley, *supra* note 173.

[243] *See* ch. 71, § 37H3/4(e); Advisory Opinion, *supra* note 87, § 10 (advising, but not requiring, schools to allow students to cross-examine witnesses); Boston School Code, *supra* note 214, at 32 (reserving the right, before the enactment of Section 37H3/4, to reject the calling of student witnesses if the identification or presence of the student would endanger their physical safety).

[244] *See Newsome*, 842 F.2d at 924–25. Additionally, schools likely preferred informal disciplinary hearings because they allowed schools to avoid the monetary costs of extensive disciplinary hearings and excessive attorney's fees. *See Goss*, 419 U.S. at 583 (warning that imposing "even truncated trial-type procedures" might overwhelm school resources); Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993) (reasoning that entitling students to a lawyer may require schools to hire their own expensive lawyer).

[245] *See* Mass. Gen. Laws ch. 71, § 37O(d) (2010); Lyon, *supra* note 218, at 121–23; Weddle, *supra* note 8, at 680.

[246] *See* ch. 71, § 37O(d) (requiring school officials to determine the severity of the bullying before punishment); Archer, *supra* note 27, at 868–69 (noting the misuse of school suspensions and expulsions for typical, nonviolent, childhood behavior); Lyon, *supra* note 218, at 121–23 (highlighting the risk of inconsistency); Weddle, *supra* note 8, at 680 (argu-

sions and expulsions when they punish students for committing violence like bullying, such disproportionate discipline greatly increases the likelihood that the disciplined students will drop out of school and wind up in jail.[247] Thus, repealing Section 37H3/4 to allow schools to control which witnesses appear at disciplinary hearings is inadvisable.[248]

Instead, the harms that arise from undermining victim credibility through cross-examination can be alleviated if the victim is questioned outside of the disciplinary proceeding by a neutral third-party.[249] The Supreme Court in *Maryland v. Craig* allowed a similar approach for abused children witnesses in formal criminal trials.[250] In *Craig*, the Court held that the Confrontation Clause of the Sixth Amendment does not categorically prevent child witnesses of sexual abuse from testifying through a one-way closed circuit television outside of the presence of the defendant.[251] The Court maintained that the primary safeguard provided by the right to confrontation—enhancing accuracy of criminal trials by reducing the risk that a witness will wrongfully implicate an innocent person—is protected only when the accused is given an opportunity to cross-examine and the fact-finder can observe the witness's demeanor.[252]

The Court stressed that the Confrontation Clause may only be overcome when the procedure is necessary to further an important state interest.[253] General trauma created by appearing in a courtroom, however, is not enough to overcome the Confrontation Clause.[254] To protect children from such trauma, the Court reasoned that the child could in-

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ing that school violence can cause administrators to abandon common sense punishments).

[247] *See* Archer, *supra* note 27, at 868–69 (noting the increased likelihood of students who are suspended to become involved with the criminal justice system, use drugs, and drop out of school); Hanson, *supra* note 27, at 330–31 (stating that students who are suspended are likely to be in jail within one year); Weddle, *supra* note 8, at 680; Walker, *supra* note 22 (discussing the recent use of zero-tolerance policies in Massachusetts in response to school violence).

[248] *See* Archer, *supra* note 27, at 868–69; Hanson, *supra* note 27, at 330–31; Lyon, *supra* note 218, at 121–23; Weddle, *supra* note 8, at 680.

[249] *See* CUNNINGHAM & HURLEY, *supra* note 205, at 12 (noting that some countries use a similar approach for cross-examining children in criminal proceedings).

[250] *See* 497 U.S. at 855–56.

[251] *Id.* at 840, 855; *see* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . .").

[252] *See Craig*, 497 U.S. at 846, 851–52.

[253] *Id.* at 852.

[254] *See id.* at 856 (reasoning the trauma must be caused by the actual presence of the defendant).

stead be permitted to testify in a less intimidating setting than a courtroom, provided that the defendant is present during the testimony.[255]

Nevertheless, the Court reasoned that the state's interest in protecting the welfare of children coupled with the growing body of evidence documenting the psychological trauma suffered by child abuse victims who testify can outweigh a defendant's constitutional right to confrontation.[256] The Court recognized that when face-to-face confrontation causes significant emotional distress in a child witness, the confrontation could actually disserve the Confrontation Clause's truth-seeking function.[257] Thus, the Court held that where it is necessary to protect a child witness from trauma that would be caused by testifying in the defendant's presence, face-to-face confrontation may be denied.[258]

The remedy that the Court applied in *Craig* should be extended to the cross-examination of bullied victims in school disciplinary hearings.[259] As noted by the *Craig* court, the truth seeking process is hindered when victims are exposed to more trauma while testifying.[260] Following this reasoning, the trauma that victims experience by appearing in a school disciplinary hearing can be at least partially alleviated if the victim is allowed to testify in a more comfortable forum.[261] The Confrontation Clause, however, does not apply to school disciplinary hearings and, unlike the Clause, Section 37H3/4 does not grant a general right to confront accusers.[262] Instead, Section 37H3/4 entitles students to cross-examine witnesses at the disciplinary hearing, thereby implying that schools have no right to require bullies to examine their victims

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[255] *See id.*

[256] *See id.* at 855–56.

[257] *Id.* at 857 (citing Coy v. Iowa, 487 U.S. 1012, 1032 (1988) (Blackmun, J., dissenting) (reasoning that face-to-face confrontation may overwhelm children from testifying accurately and therefore undermine the "truth-finding function of the trial itself")).

[258] *See id.*

[259] *See id.* at 855–56; Christensen, *supra* note 19, at 546 (likening bullying to child abuse); Epstein et al., *supra* note 34, at 475 (noting that testifying may cause abused victims to relive the trauma).

[260] *See Craig*, 497 U.S. at 856–57 (implying that if children are not overwhelmed by the trial's setting, they will be more accurate and reliable witnesses).

[261] *See Craig*, 497 U.S. at 856; Goodhue, *supra* note 36, at 516–17 (noting that abused children are particularly vulnerable when they testify in intimidating forums).

[262] *See* U.S. CONST. amend. VI. (granting "the right . . . to be confronted with the witnesses against him" only in "*criminal prosecutions*") (emphasis added). *Compare Craig*, 497 U.S. at 849 (holding that, in general, "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial") (citation omitted), *with* MASS. GEN. LAWS ch. 71, § 37H3/4(e) (2012) (granting the right to cross-examination "at the [disciplinary] hearing").

elsewhere.[263] Accordingly, amending Section 37H3/4 to allow neutral third-parties to cross-examine victims is necessary to permit victims to present their side of the story in a less intimidating setting.[264]

Directly applying the holding in *Craig*, however, is not enough to prevent the cross-examination of victims from undermining the implementation of an effective anti-bullying climate.[265] The *Craig* Court maintained that any out-of-court witnesses must still be cross-examined.[266] Consequently, following *Craig* would change the forum but not prevent the victims from reliving the abuse through cross-examination.[267]

To ensure that disciplinary proceedings are truth-seeking without subjecting the victim to unnecessary trauma, the law must limit the ability of the bully's counsel to unfairly undermine the credibility of the victim by asking repeated questions using traditional cross-examination techniques.[268] This can be achieved by requiring a neutral third-party to question the victim with the questions developed by the bully's attorney.[269] A neutral examiner, preferably one who is experienced at discussing abuse with victimized children, could create an inquisitorial—as opposed to adversarial—atmosphere that encourages the bullied child to speak accurately about the severity of the bullying.[270] This process would still allow the accused bully's counsel to amend its list of questions during the examination to account for any inconsistencies in the victim's

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[263] *See* ch. 71, § 37H3/4(e).

[264] *See id.*; *Craig*, 497 U.S. at 856–57.

[265] *See* Weddle, *supra* note 8, at 651 (noting victims will not report bullying if they think adults will not intervene or be able to stop the bullying); Lyon, *supra* note 218, at 121–23 (stating that children often change their answers when asked similar questions, thereby undermining the child's credibility); *see also Craig*, 497 U.S. at 857.

[266] *See* 497 U.S. at 846.

[267] *See id.* at 846, 857; Epstein et al., *supra* note 34, at 475 (noting that victims who testify about the abuse may experience further trauma); Weddle, *supra* note 8, at 651.

[268] *See Craig*, 497 U.S. at 846 (reasoning that confrontation helps to ensure the trial seeks the truth); Epstein et al., *supra* note 34, at 475; Lyon, *supra* note 218, at 121–23.

[269] *See* CUNNINGHAM & HURLEY, *supra* note 205, at 12 (noting the use of neutral third-parties during the video-taped cross-examination of children under twelve using questions posed by the defense).

[270] *See id.*; *see also Goss*, 419 U.S. at 583 (cautioning that school disciplinary proceedings should not be overly adversarial). In Massachusetts, this approach would create little added cost for school districts because the Massachusetts anti-bullying law already requires schools to have a strategy to provide counseling to victims of bullying. *See* MASS. GEN. LAWS ch. 71, § 37O(d)(x) (2010).

allegation.[271] Therefore, this proposal would both protect a bully's opportunity to a fair hearing and prevent further harm to the victim.[272]

Conclusion

The Massachusetts legislature has recently entitled students to the right to counsel and cross-examination in most long-term suspension and expulsion hearings. Unfortunately, these additional rights undermine the extensive and necessary efforts that the state legislature has taken to address school bullying. Furthermore, victims of bullying, who are entitled to a safe and secure environment at school, will likely have little judicial recourse to address the harms of cross-examination. As a result, the Massachusetts legislature may have made the school bullying climate even more dangerous.

At the same time, accused bullies have little judicial recourse to address the unfairness or inaccuracies of the allegations at their disciplinary hearing. Given that students who are suspended for long periods of time are more likely to drop out of school and wind up in jail, it is unwise to repeal the recent measures enacted by the Massachusetts legislature. Instead, to ensure that alleged bullies are given a fair opportunity to defend allegations at their disciplinary hearing without undermining the necessary efforts to protect victims from bullying, the law should be amended to allow victims to be cross-examined by a neutral third-party away from the bully's counsel.

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[271] *See Goss*, 419 U.S. at 583; Lyon, *supra* note 218, at 113–14 (noting that when children are questioned in a non-leading or non-accusatorial manner, the questions repetition has a lesser effect on the child's consistency).

[272] *See Craig*, 497 U.S. at 846; *Gorman*, 837 F.2d at 12; Cunningham & Hurley, *supra* note 205, at 12; Epstein et al., *supra* note 34, at 475; Weddle, *supra* note 8, at 651.