REIMAGINING PENNSYLVANIA'S SCHOOL DISCIPLINE LAW AND STUDENT RIGHTS IN DISCIPLINE HEARINGS*

I. INTRODUCTION

Across the United States, schools are kicking children out for alleged misbehavior at higher rates than ever before.[1] This form of punishment is formally known as disciplinary exclusion.[2] Disciplinary exclusion can change a child's life.[3] Almost immediately, the punishment impacts a student's reputation among her peers, ability to secure a job, and access to higher education.[4] Many studies suggest that in the long term, disciplinary exclusion increases a student's risk of ending up incarcerated as an adult.[5] The serious consequences of exclusion from school warrant fierce protection of students' due process rights in their school disciplinary hearings.

This Comment suggests ways in which students may—and should—enjoy greater legal protection in public school disciplinary hearings.[6] Specifically, this Comment is written with an eye toward reforming Chapter 12 of the

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1. The rate of suspension alone doubled between 1974 and 2000. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005); DAVID R. DUPPER, A NEW MODEL OF SCHOOL DISCIPLINE: ENGAGING STUDENTS AND PREVENTING BEHAVIOR PROBLEMS 3 (2010).

2. *See, e.g.,* 22 PA. CODE. § 711.61 (2016).

3. For anecdotal insight into the stories of students affected by disciplinary exclusion, and an example of an organization that helps these students, see Anne Lee, *The Role of Public Interest Lawyers in Social Justice Movements: Seeking Justice Where Educational Inequality, School Discipline, and Juvenile Justice Converge*, 11 SEATTLE J. FOR SOC. JUST. 149, 149–53 (2012).

4. Goss v. Lopez, 419 U.S. 565, 575 (1975).

5. This phenomenon is known as the school-to-prison pipeline, discussed *infra* at Part II.C. Just a few of the organizations supporting the study of and fight against the school-to-prison pipeline are: the Advancement Project, Advocates for Children, American Civil Liberties Union, Bazelon Center, Charles Hamilton Houston Institute at Harvard Law School, Children's Defense Fund, Children's Law Center, Civil Rights Project at UCLA, Education Law Center, Juvenile Law Center, National Association of the Advancement of Colored People Legal Defense and Education Fund, Inc., National Disabilities Rights Network, National Economic and Social Rights Initiative, National Juvenile Defender Center, Southern Poverty Law Center, Texas Appleseed, and the Youth Law Center. Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from Antoine v. Winner School District*, 54 N.Y.L. SCH. L. REV. 955, 955 n.1 (2009).

6. This Comment will not discuss the procedures of charter school disciplinary hearings. Charter schools are independently operated public schools that are free from many local and state requirements that apply to traditional public schools. *See* 24 PA. CONS. STAT. § 17-1715-A (2008). As a result, charter schools conduct school disciplinary hearings in a variety of ways. An analysis and discussion of the problems this fact presents is ripe for an entirely separate commentary.

Pennsylvania Administrative Code.[7] The Overview gives the reader a comprehensive understanding of the moving parts behind school discipline law. It also provides a survey of the current landscape of school discipline nationally and in Pennsylvania.[8] In light of observed shortcomings in the execution of disciplinary hearings and recognized harms resulting from disciplinary exclusion, this Comment argues students should be afforded greater legal protections in school disciplinary hearings.

II. OVERVIEW

Education is one of the most important functions of America's state and local governments.[9] Aside from the obvious academic and intellectual benefits, schooling also prepares children to be good citizens.[10] Schoolteachers and administrators have a large hand in raising our children; they assume legal responsibility of students ages five through eighteen for up to eight hours a day.[11] An unavoidable reality in dealing with youth is that they are just beginning to learn how to interact in society.[12] Children have limited life experiences, developing emotions, and unique home situations.[13] It is no surprise that school is a place where children "practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend."[14] Discipline and education go hand in hand.[15]

School discipline is one of the most complex problems confronting educators and legislatures.[16] Both are tasked with balancing competing interests: fostering children's social and emotional growth and providing a safe school

7. 22 PA. CODE §§ 12.1–12.16 (governing student rights and responsibilities). See *infra* Part II.E for a discussion of the specific subsections of the statute most relevant to this Comment.

8. Knowledge of the laws, policies, and procedures first came to the author by way of secondhand knowledge and personal experience. The author served as a law student advocate for Philadelphia schoolchildren. For this reason, some information is cited to anecdotal and observational sources specific to Philadelphia.

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

10. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

11. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, SCHOOLS AND STAFFING SURVEY (2008), http://nces.ed.gov/surveys/sass/tables/sass0708_035_s1s.asp.

12. For a discussion of the stages of childhood development, see M. COLE & S.R. COLE, THE DEVELOPMENT OF CHILDREN (1989); ERIK H. ERIKSON, CHILDHOOD AND SOCIETY (1950).

13. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 672–73 (1999) (Kennedy, J., dissenting).

14. Brief for National School Boards Association et al. as Amici Curiae Supporting Respondent at 11, *Davis ex rel. LaShonda D.*, 526 U.S. 629 (1999) (No. 97-843).

15. Goss v. Lopez, 419 U.S. 565, 580 (1975).

16. Russell J. Skiba, Suzanne E. Eckes, & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1072 (2009) (citing STEPHEN B. THOMAS, NELDA H. CAMBRON-MCCABE & MARTHA MCCARTHY, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 224 (6th ed. 2009)). *See also* Morse v. Fredrick, 551 U.S. 393, 409 (2007) (noting that "[s]chool principals have a difficult job, and a vitally important one" in managing students and making disciplinary judgments).

environment.[17] In practice, it may be easier on overburdened and (understandably) frustrated educators to treat misbehaving students under the adage "out of sight, out of mind."[18] Schools can achieve this by initiating a disciplinary review process, commonly in the form of a disciplinary hearing.

This "out of sight, out of mind" attitude does little to solve issues other than the one facing the teacher in the classroom and has long been understood as having potentially harmful effects on a student's future opportunities.[19] Widespread research reveals a disturbing correlation between students who were punished by disciplinary exclusions and those who eventually dropped out.[20] Even worse, those excluded are at a higher risk of becoming involved in the juvenile or criminal justice system.[21] In light of the recognized harms resulting from exclusionary measures, the law governing disciplinary hearings must adequately safeguard students from unnecessary exclusion.

The following Section explains why exclusionary school discipline must be viewed as a crucial issue, both in society and under the law. Part II.A introduces the concept and methods of disciplinary exclusion from school. Part II.B cites the legal authority for school discipline in the United States' public school system. This authority includes the common law, the Constitution of the United States, Supreme Court precedent, and federal statutes. Part II.C highlights what studies tell us about the impact of the current law on the lives of children accused of misconduct in school. As the Comment narrows its focus to school disciplinary hearings, Part II.D defines school disciplinary hearings as administrative proceedings, distinguishing their procedural protections and rights from those afforded at criminal trials. Part II.E introduces the Pennsylvania statutes governing school discipline. Finally, Part II.F draws upon the author's experiences advocating for students in the Philadelphia School District and describes how that district conducts its disciplinary hearings.

A. Disciplinary Exclusions from School

State and local authorities control public education, including the forms of

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17. *See* William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 573–78 (1971) (discussing schools' interests and students' interests implicated in the balance).

18. *See* Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J. L. & EDUC. 281, 288–336 (2012) (providing examples of restorative justices practices implemented across the United States, including in Pennsylvania).

19. *Goss*, 419 U.S. at 575 (explaining how a student's disciplinary record may jeopardize future opportunities, such as access to higher education and employment).

20. *E.g.*, Robert Balfanz, Lisa Herzog, & Douglas J. MacIver, *Preventing Student Disengagement and Keeping Students on the Graduation Path in Urban Middle-Grades Schools: Early Identification and Effective Interventions*, 42 EDUC. PSYCHOLOGIST 223, 228 (2007); Elizabeth Stearns & Elizabeth Glennie, *When and Why Dropouts Leave High School*, 38 YOUTH & SOC'Y 29, 31–32 (2006). *See also* González, *supra* note 18, at 294–97 (detailing research connecting disciplinary exclusion with increased dropout rates).

21. *See* Deborah N. Archer, *Introduction: Challenging the School-to-Prison* Pipeline, 54 N.Y.L. SCH. L. REV., 867, 868–69 (2009) (detailing the direct and indirect ways through which schools push students out and into the criminal justice system).

punishment school administrators may use.[22] School discipline can be divided into two categories: in-school interventions[23] and exclusionary punishment.[24] The most common forms of exclusionary punishment are suspension, transfer, and expulsion.[25]

Suspensions are short-term exclusions from school grounds where after a certain period of time a student may return.[26] In Pennsylvania, a suspension may not exceed ten consecutive school days.[27] Pennsylvania distinguishes between short-term and long-term suspensions.[28] Temporary suspensions are those that last from one to three school days.[29] Long-term suspensions exceed three days, but may not exceed ten consecutive school days.[30] Expulsions are long-term exclusions from school grounds for an established period of time or indefinitely.[31]

Transfers require students to leave the school of incident and attend another school.[32] The School District of Philadelphia has established two types of transfers: lateral and disciplinary. A lateral transfer moves students from a "regular," or "neighborhood," school to another school, which is assigned according to a student's geographic location and a given school's enrollment availability.[33] A disciplinary transfer moves a student to a designated

22. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *See infra* Part II.E.2 for a discussion of Pennsylvania state statutes permitting various forms of school discipline.

23. In-school interventions include restorative justice practices, behavioral contracts, in-school work detail, peer mediation, parent/teacher conference, reflective essays, detention, and in-school suspension. *See, e.g.*, SCHOOL REFORM COMMISSION, THE SCHOOL DISTRICT OF PHILADELPHIA, CODE OF STUDENT CONDUCT (2015), http://www.phila.k12.pa.us/offices/administration/policies/CodeofConduct.pdf.

24. India Geronimo, *Systemic Failure: The School-To-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J. L. SOCIETY 281, 292 (2011); NATIONAL CLEARINGHOUSE ON SUPPORTIVE SCHOOL DISCIPLINE, EXCLUSIONARY DISCIPLINE, http://supportiveschooldiscipline.org/learn/reference-guides/exclusionary-disipline. *See, e.g.*, 22 PA. CODE § 12.6.

25. *See* NATIONAL CLEARINGHOUSE ON SUPPORTIVE SCHOOL DISCIPLINE, *supra* note 24 (noting that two common forms of disciplinary exclusion include suspension and expulsion); Geronimo, *supra* note 24, at 292 (noting that disciplinary exclusion includes suspension, expulsion, and transfers).

26. Philip T.K. Daniel & Karen Bond Coriell, *Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted From a Narrowing of Due Process?*, 13 HAMLINE J. PUB. L. & POL'Y 1, 10–11 (1992).

27. 22 PA. CODE §12.6(b)(1).

28. EDUCATION LAW CENTER OF PENNSYLVANIA, FAIRNESS IN SCHOOL DISCIPLINE IN PENNSYLVANIA: A GUIDE FOR ATTORNEYS AND ADVOCATES WHO REPRESENT STUDENTS, 27 (2009); SCHOOL REFORM COMMISSION, *supra* note 23, at 7.

29. SCHOOL REFORM COMMISSION, *supra* note 23, at 7

30. *Id.*

31. *See* 22 PA. CODE §12.6(b)(2).

32. *See* SCHOOL REFORM COMMISSION, *supra* note 23, at 10; EDUCATION LAW CENTER OF PENNSYLVANIA, *supra* note 28, at 27.

33. Everett v. Marcase, 426 F. Supp. 397, 397, 400 (E.D.P.A. 1977). The court held that lateral transfers are comparable to short-term suspensions, "at least in terms of what might constitute appropriate due process procedures." *Id.* at 401.

"disciplinary" school designed for "disruptive students."[34] The law refers to these types of schools as "alternative education program[s]"[35] or "private alternative education institution[s] [for disruptive students]."[36]

All public school districts in Pennsylvania create and disseminate a student code of conduct.[37] This code enumerates the types of punishments and the possible offenses a student may face while attending a school in the district.[38] The school discipline process begins when the school learns of an alleged violation of the code of conduct. In Philadelphia and other places, school administrators gather written statements from the accused student, student-victims (if applicable), and other witnesses, which account their understandings of the alleged misconduct and circumstances surrounding it.[39] The school may also attempt to gather documented evidence of the misconduct including surveillance footage, text messages, photos, cell phone videos, or social media

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34. EDUCATIONAL LAW CENTER OF PENNSYLVANIA, supra note 28, at 30. Pursuant to 24 PA. CONS. STAT. § 19-1901-C, a "disruptive student" is defined as:

> A student who poses a clear threat to the safety and welfare of other students or the school staff, who creates an unsafe school environment or whose behavior materially interferes with the learning of other students or disrupts the overall education process. The disruptive student exhibits to a marked degree any or all of the following conditions:
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> (i) Disregard for school authority, including persistent violation of school policy and rules.
>
> (ii) Display or use of controlled substances on school property or during school-affiliated activities.
>
> (iii) Violent or threatening behavior on school property or during school-affiliated activities.
>
> (iv) Possession of a weapon on school property . . . .
>
> (v) Commission of a criminal act on school property or during school-affiliated activities.
>
> (vi) Misconduct that would merit suspension or expulsion under school policy.
>
> (vii) Habitual truancy.

35. 24 PA. CONS. STAT. § 19-1901-C(1) defines an "alternative education program" as a state-funded program "implemented by a school district . . . which removes disruptive students from regular school programs in order to provide those students with a sound educational course of study and counseling designed to modify disruptive behavior and return the students to a regular school curriculum."

36. 24 PA. CONS. STAT. § 19-1901-E defines a "private alternative education institution[s]" as "[a]n institution operated by an individual or a for-profit or not-for-profit entity to provide alternative education programs as defined in section 1901-C(1)." For a discussion on the negative consequences of transferring a child to an alternative disciplinary school, see Deborah Gordon Klehr, *Addressing the Unintended Consequence of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL'Y 585, 595 (2009).

37. *See* 22 PA. CODE § 12.3(c) (requiring school boards to adopt a code of student conduct); *id.* at § 12.6 (requiring a board to define and publish the types of offenses that would lead to exclusion from school); *but see* Hamilton v. Unionville-Chadds Ford Sch. Dist., 714 A.2d 1012, 1015 (Pa. 1998) (holding that individual schools can promulgate their own rules as long as they do not conflict with those of the board). For an example of a code of conduct, see SCHOOL REFORM COMMISSION, *supra* note 23.

38. SCHOOL REFORM COMMISSION, *supra* note 23, at 10.

39. *See* Goss v. Lopez, 419 U.S. 565, 580 (1975) (noting that school administrators often act on the reports and advice of others in issuing discipline citations).

posts.[40] If the administration believes the accused student did violate the code of conduct, it may pursue punishment—including disciplinary exclusion.[41]

B. Legal Authority for School Discipline

There are four authoritative sources of school discipline law: the common law, the Constitution of the United States, Supreme Court precedent, and federal statutes and initiatives.

1. The Common Law

The common law doctrine *in loco parentis*—meaning "in place of the parent"—is the original basis for student discipline.[42] Under a parent's grant of authority, school officials may reasonably exercise custodial powers over their student during school hours.[43] American lower courts cited *in loco parentis* doctrine as early as the 1800s.[44] One of the earliest court opinions reasoned: "It is a power necessary to the welfare of the school; and without it the school might be interrupted."[45]

2. The Constitution of the United States and Supreme Court Precedent

Under the Due Process Clause of the Fourteenth Amendment, no state shall "deprive any person of life, liberty, or property, without due process of law."[46] The Fourteenth Amendment protects individuals against the state and all of its entities—boards of education included.[47] Public school students facing school discipline are less protected by procedural due process than adults in other settings.[48] However, children do not "shed their constitutional rights" once they arrive on school grounds.[49] Students still have constitutionally protected interests and must be afforded the fundamental requirements of due process.[50]

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40. *See also* Cory M. Daige, *Freedom of Speech in the Technological Age: Are Schools Regulating Social Media?*, 11 CONN. PUB. INT. L.J. 363, 371–78 (2012) (analyzing the lower courts' split concerning whether schools can discipline students for things shared on social media while not on school grounds).

41. There is no burden of proof at this stage of the discipline process. If a school thinks a student violated the code of conduct, that alone is sufficient to pursue disciplinary exclusion.

42. Skiba et al., *supra* note 16, at 1072–73.

43. 1 WILLIAM BLACKSTONE, COMMENTARIES 453 (1770); Skiba et al., *supra* note 16, at 1072.

44. For a discussion of early cases citing *in loco parentis*, see Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W. ST. U. L. REV. 105, 112–20 (2003).

45. Stevens v. Fassett, 27 Me. 266, 274 (1847). The court did not explicitly use the words *in loco parentis*, but this opinion exemplifies how the concept was pervasive even without a name.

46. U.S. CONST. amend. XIV, § 1.

47. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

48. School disciplinary hearings are classified as administrative proceedings. See *infra* Part II.D for a discussion of the procedural due process afforded in administrative hearings as contrasted with that afforded in criminal trials.

49. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

50. *See infra* notes 55–60 and accompanying text for a discussion of the process owed to a student when disciplinary action is taken.

A student's entitlement to public education is a property interest.[51] Exclusion from school amounts to the state's deprivation of that property interest.[52] A student also has a liberty interest in her reputation, which is inherently implicated in school discipline allegations and proceedings.[53] Both of these interests are substantial enough to warrant constitutional due process protection.[54] A student's property and liberty interests may not be compromised without minimum procedural protections.[55] First, disciplinary action against a student must be rationally related to a legitimate state interest.[56] Second, school officials must not arbitrarily exercise their authority to punish students.[57]

Goss v. Lopez[58] is the most significant Supreme Court case addressing school discipline.[59] In this case, the Court held that procedural due process must be afforded to students facing disciplinary exclusions, essentially mandating the use of disciplinary hearings.[60] The crux of due process is the opportunity to be heard.[61] Intertwined with this requirement is the right to notice—that is, to be informed that the school is taking disciplinary action against a student.[62] Putting those basic rights together, students facing exclusion from school "must be given *some* kind of notice and be afforded *some* kind of hearing."[63] Notice must be sufficiently informative to give the student a fair opportunity to explain her version of the facts.[64] This promotes fairness and allows disciplinary decision makers to weigh both parties' arguments before taking further disciplinary action.[65] In *Goss*, the Court stated that suspensions exceeding ten days and expulsions might require more formal procedures than these minimal

51. Goss v. Lopez, 419 U.S. 565, 574 (1975).

52. *Id.*

53. *Id.* at 576.

54. *Id.*

55. *Id.* at 574.

56. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–54 (1938) (articulating the rational basis standard of review for a statute's constitutionality); Hammock *ex rel.* Hammock v. Keys, 93 F. Supp. 2d 1222, 1230–31 (S.D. Ala. 2000) (holding that exclusion of a high school student found with drugs on campus was rationally related to a legitimate purpose of ensuring that schools are drug-free).

57. Lee v. Macon Cty. Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974).

58. 419 U.S. 565 (1975).

59. Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 354 n.4 (2008) (citing David M. Pedersen, *A Homemade Switch Blade Knife and a Bent Fork: Judicial Place Setting and School Discipline*, 31 CREIGHTON L. REV. 1053, 1066 (1998)) (noting that Pedersen is the former chairman of the National School Boards Association Council of School Attorneys).

60. *Goss*, 419 U.S. at 581 ("Students facing temporary suspension have interests qualifying for protection of the Due Process Clause.").

61. Grannis v. Ordean, 234 U.S. 385, 394 (1914).

62. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

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

64. *Id.* at 582.

65. *Id.* at 583–84.

requirements.[66]

3. Federal Statutes and Initiatives

Two federal statutes impacting school discipline law are the Gun-Free Schools Act[67] and Family Educational Rights and Privacy Act (FERPA).[68] The Gun-Free Schools Act is a funding statute, conditioning state funds on the creation and implementation of "zero-tolerance"[69] weapons policy. This policy requires public schools to expel students for a minimum of a year if that student possesses a firearm on school grounds.[70] In addition to expulsion, the Act requires schools to involve the police.[71] An exception in the provision allows the chief administrator of a local educational agency (or her designee) to modify the punishment on a case-by-case basis.[72]

FERPA regulates student records and applies to all public K-12 schools in the United States.[73] Generally, the statute makes student records and the information contained within them private.[74] However, several of FERPA's disclosure provisions allow schools to share information with police in specific circumstances.[75] The most pertinent of these exceptions for purposes of school discipline are reporting in cases of emergency,[76] sharing law enforcement unit records,[77] sharing information when police are school officials,[78] and sharing information in response to a subpoena.[79]

In 1999, the Department of Justice established the COPS in Schools

66. *Id.* at 584.

67. 20 U.S.C. § 7961 (2012).

68. 20 U.S.C. § 1232g (2012). Individuals with Disabilities Education Improvement Act (IDEA) is also a very important statute that affects students with disabilities and the ways in which they may be disciplined. For information regarding school discipline and IDEA, see 20 U.S.C. § 1415 (2012); EDUCATION LAW CENTER OF PENNSYLVANIA, *supra* note 28, at 44-50; Kristy A. Mount, Comment, *Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103 (2002).

69. Zero-tolerance laws and policies mandate predetermined consequences or punishments for specific offenses. PHILLIP KAUFMAN ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY, 1999 app. A, at 117 (1999).

70. 20 U.S.C. § 7961(b)(1) (2012).

71. *Id.* § 7961(h)(1).

72. *Id.* § 7961(b)(1). The title "chief administering officer of a local education agency" is a fancy way of saying state superintendent of schools. The discretion to invoke this waiver of the mandatory expulsion is designated to district-level administrators as a practical matter.

73. Lynn M. Daggett, *Book 'Em?: Navigating Student Privacy, Disability, and Civil Rights and School Safety in the Context of School-Police Cooperation*, 45 URB. LAW. 203, 205 (2013).

74. 20 U.S.C. § 1232g(b)(1) (2012) ("No funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization."); Daggett, *supra* note 73, at 205–06.

75. Daggett, *supra* note 73, at 206.

76. 20 U.S.C. § 1232g(b)(1)(I).

77. *Id.* § 1232g(a)(4)(B)(ii).

78. *Id.* § 1232g(b)(1)(A).

79. *Id.* § 1232g(b)(1)(J).

Program.[80] This initiative aimed "to help law enforcement agencies . . . engage in community policing in and around primary and secondary schools."[81] As a result, many public schools across the country have an intimate relationship with their local police.[82] Some schools have school resource officers (SROs)—police officers assigned to that specific campus.[83] Although SROs remain employees of the police force, they have a prominent physical presence in the school.[84] SROs usually have their own office in the school and have pervasive day-to-day contact with students.[85] Other schools hire off-duty officers as security guards or full-time police officers as "school police."[86] As a result, these police officers are legal agents of their assigned schools and circumvent FERPA's prohibition on information sharing.[87]

C. Consequences of the Current School Discipline Framework

In 2000, 3.1 million school children were suspended, a figure that has nearly doubled over the last twenty-five years.[88] Disciplinary exclusion may cause a student to feel ashamed, cast out, or distrusting of adults.[89] Excluded children are more likely to underperform academically, drop out, and use drugs.[90] Instead of learning and maturing as a result of the punishment, some studies suggest that students who get one suspension become more likely to be excluded again.[91] It is morally and legally intuitive that only serious misbehavior warrants disciplinary exclusion. However, out-of-school suspension is implemented as a response to a much broader spectrum of behavior, including insubordination and dress code violations.[92] The same studies suggest that only a small percentage of suspensions are responses to threatening behavior.[93]

Inconsistent punishment without any preventative systems may be

80. *See* U.S. DEP'T OF JUSTICE, *COPS in Schools (CIS)*, COMMUNITY ORIENTED POLICING SERVICES, http://www.cops.usdoj.gov/default.asp?Item=54.

81. *See id.*

82. *See* Daggett, *supra* note 73, at 230–33.

83. *Id.* at 230.

84. *Id.*

85. *Id.*

86. *Id.*

87. See *supra* notes 71–79 and accompanying text for a brief explanation of FERPA's limitations on information sharing.

88. Archer, *supra* note 21, at 868; Courtney Marie Rodriguez, *Saving the Nation's Expendable Children: Amending State Education Laws to Encourage Keeping Students in School*, 51 FAM. CT. REV. 469, 471 (2013).

89. Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts Are Failing Students*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179, 200 (2013).

90. *Id.* at 200–01; Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L. J. 343, 377 (2011).

91. Curtis, *supra* note 69, at 1257. *See also* Archer, *supra* note 21, at 868.

92. *See* Skiba et al., *supra* note 16, at 1076.

93. *Id.* For anecdotal evidence of a student's seemingly harmless conduct leading to exclusion from school, see Rodriguez, *supra* note 88, at 469–70.

ineffective.[94] Research consistently fails to find that suspension and expulsion promote safety and an effective instructional environment.[95] One study found that sixty-nine percent of suspended students reported that the exclusion did not help solve the problem that led to the exclusion, they believed they would be suspended again, and disciplinary exclusion did not deter them from future misbehavior.[96] Despite the grim statistical and anecdotal evidence, school discipline policies increasingly function to remove students from the school rather than implement restorative justice practices.[97]

The most troubling correlation is that between disciplinary exclusions and criminal justice system involvement.[98] The phenomenon where students are pushed out of the classroom and into the juvenile justice system is called the "school-to-prison pipeline."[99]

Scholarship on the school-to-prison pipeline does not assert that there is a causal relationship between school failure and imprisonment.[100] Instead, it proposes that there is a developmental and logical relationship between failure in school and adult criminal activity.[101]

Zero-tolerance policies may account for the dramatic increase in disciplinary exclusions and the school-to-prison pipeline.[102] Students punished under zero-tolerance policies are at a higher risk of dropping out of school.[103] Sharing school records about the violation of a zero-tolerance policy is allowed under FERPA.[104] Under the Gun-Free Schools Act, students possessing a firearm on campus—with or without knowledge or intent—must be referred to the juvenile justice system, which may lead to a criminal arrest record.[105]

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94. Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 589 (2009). District-wide studies of school discipline have found inconsistencies in the use of suspension and expulsion across schools. Skiba et al., *supra* note 16, at 1075.

95. *E.g.*, Skiba et al., *supra* note 16, at 1074–75.

96. Patrick S. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL'Y, 203, 257 (2012) (citing Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL. 59, 76 (1998)).

97. Archer, *supra* note 21, at 868.

98. *See id.* at 868–69 ("Schoolchildren who are removed from mainstream education environments, even for short periods of time, are far more likely to become involved with the criminal justice system, use drugs, or dropout of school.").

99. *Id.* at 868.

100. *E.g.*, Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 2011 J. INST. JUST. INT'L STUD. 87, 107 n.87 (2011).

101. *Id.*

102. See *supra* notes 67–72 and accompanying text for a discussion on the Gun-Free Schools Act. See *infra* Part II.E(1) for a discussion of Pennsylvania's zero-tolerance law.

103. Curtis, *supra* note 69, at 1258.

104. See *supra* notes 73–79 and accompanying text for information regarding FERPA.

105. See *supra* notes 67–72 and accompanying text for information regarding the Gun-Free Schools Act.

Criminal referral for unauthorized possession of a weapon may lead to criminal charges, juvenile detention, or prison.[106]

Massive police presence and intervention in public schools also contributes to the school-to-prison pipeline.[107] As an example of enormous police presence in schools, New York City schools employ 5,200 police officers (but less than 3,200 guidance counselors).[108] Nationwide, more than two-thirds of students aged twelve to fifteen have security guards or police officers in their schools—an increase of fifty-four percent from 1999.[109] In Clayton County, Georgia, the implementation of police presence on school campuses led to a 1,248% increase of referrals from the school system to law enforcement in its first year.[110] Police presence "may increase the likelihood that students will be arrested for misconduct that otherwise would be addressed as a school discipline issue."[111]

Although a student arrested for in-school misconduct may not receive a harsh punishment from a judge, the student does receive a criminal record.[112] If the student gets in subsequent trouble—in or out of school—the original charge will cause more severe future penalties.[113] For example, a large number of adjudicated youth end up in juvenile detention facilities or prison as a result of violating their probation.[114]

Research shows that when students return to schools after juvenile or criminal detention, recidivism rates drop.[115] However, adjudicated youth are at risk of being denied reenrollment by their school district.[116] Even if a school does accept the student, some districts do not accept academic credits earned at juvenile detention facilities.[117] These impediments to reentry and grade-level

106. *See* Curtis, *supra* note 69, at 1258–59 (discussing the ways youth enter the juvenile justice system after being subjected to zero-tolerance policies).

107. There is a strong argument that zero-tolerance policies have led to increased police intervention on school campuses. *See* Steven C. Teske et al., *Collaborative Role of Courts in Promoting Outcomes for Students: The Relationship Between Arrests, Graduation Rates, and School Safety*, 51 FAM. CT. REV. 418, 419 (2013).

108. Daggett, *supra* note 73, at 230. For a closer look at the NYPD takeover of school discipline and its negative impact on students, see Aaron Sussman, *Learning in Lockdown: School Police, Race, and the Limits of Law*, 59 UCLA L. REV. 788, 805–10 (2012).

109. Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & EDUC. 653, 656 (2013).

110. Curtis, *supra* note 69, at 1260.

111. *Id.* at 1261.

112. CHILDREN'S DEFENSE FUND, AMERICA'S CRADLE TO PRISON PIPELINE 127 (2007), http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.html.

113. *Id.*

114. Curtis, *supra* note 69, at 1270.

115. Jessica Feierman et al., *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115, 1116 (2009/2010).

116. *Id.* at 1116–17.

117. *Id.* at 1117.

progression lead to a very high dropout rate among adjudicated youth.[118] In Philadelphia, ninety percent of adjudicated youth returning from placement between 2000 and 2005 ultimately dropped out of school.[119]

D. School Disciplinary Hearings as Administrative Proceedings

Students accused of violating codes of conduct do not enjoy the same procedural protections in their disciplinary hearings as defendants in criminal proceedings. As Judge Mencer of the Commonwealth Court of Pennsylvania cautioned: "We must be mindful that [a school discipline hearing] is not a criminal proceeding[,] but an administrative one."[120] There are five important distinctions in the rights afforded in administrative proceedings and criminal hearings: (1) burden of proof, (2) admissibility of hearsay evidence, (3) permissible party representation, (4) parties' invocation of Sixth Amendment right to legal counsel, and (5) appointment and role of the fact finder. It is also worth discussing a crucial right respected in both criminal and administrative hearings: a party's right to invoke her Fifth Amendment privilege against self-incrimination.

1. Burden of Proof

To render a guilty verdict in criminal court, a fact finder must find "beyond a reasonable doubt" that an accused committed a crime for which she is charged.[121] At a school disciplinary hearing, school authorities have to demonstrate a code of conduct violation only by a preponderance of the evidence.[122] This means that relatively thin evidence can support decisions to suspend, transfer, or expel.[123] In *A.B. v. Slippery Rock Area School District*,[124] a school expelled a student for allegedly placing a handwritten bomb threat in the bathroom. The evidence presented by the school failed to definitively prove the student authored the note, or that she intentionally put the note in the bathroom. However, the court upheld her expulsion because a fact finder "could draw a reasonable inference" she was responsible.[125]

118. *Id.*

119. RUTH CURRAN NEILD & ROBERT BALFANZ, PHILADELPHIA YOUTH NETWORK'S PROJECT U-TURN, UNFULFILLED PROMISE: THE DIMENSIONS AND CHARACTERISTICS OF PHILADELPHIA'S DROPOUT CRISIS 5 (2000–2005), http://www.csos.jhu.edu/new/Neild_Balfanz_06.pdf.

120. Abremski v. Se. Sch. Dist. Bd. of Dirs., 421 A.2d 485, 487 (Pa. Commw. Ct. 1980).

121. *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

122. A.B. v. Slipper Rock Area School District, 906 A.2d 674, 677 n.5 (Pa. Commw. Ct. 2006).

123. EDUCATION LAW CENTER OF PENNSYLVANIA, *supra* note 28, at 34.

124. 906 A.2d 674, 675, 677 (Pa. Commw. Ct. 2006).

125. *Id.* at 678. Although a case that illustrates the lessened burden of proof at an administrative hearing, this is not the best example of a case with "thin evidence." A.B. admitted to writing this "bomb note" two weeks before the incident, but denied putting it in the bathroom. *Id.* at 676. Instead, she claimed she gave the note to someone else who subsequently put it in the bathroom. *Id.* This was a suspect claim since she was the one who "found" the note. *Id.* She also initially said she did not

2. Admissibility of Hearsay Evidence

In criminal trials, the parties are bound by rules of evidence established by state statute.[126] Universally, rules of evidence regulate the admission of hearsay testimony.[127] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.[128] Unless a statement qualifies for an enumerated exception, a fact finder may not consider it.[129] In contrast, parties in administrative hearings are not bound by the rules of evidence.[130] This means that hearsay is admissible in administrative hearings as long as it is relevant to the claims and issues.[131] However, hearsay must be corroborated with additional evidence to support an administrative decision.[132] Unless a school has video footage of misconduct or other real evidence, it usually will rely entirely upon student witness statements as evidence in a discipline hearing.[133]

In *Gonzales v. McEuen*,[134] the Central District of California rejected the admission of hearsay—the alleged victim's statements to a school official.[135] In that case, there was little evidence connecting the accused student to any wrongdoing absent the hearsay statements.[136] The court stated, "Although strict adherence to common law rules of evidence is not required in school disciplinary proceedings . . . due process does not permit admission of ex parte [hearsay] evidence given by witnesses not under oath, and not subject to examination by the accused student."[137]

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recognize her own handwriting. *Id.*

126. *See, e.g.*, FED. R. EVID. 1101(b). *See also* Giles v. California, 554 U.S. 353, 365 (2008) (asserting that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).

127. *See, e.g.*, FED. R. EVID. 800–07.

128. *See, e.g.*, PA. R. EVID. 801.

129. *See, e.g.*, *Id.* 802.

130. *See, e.g.,* 2 PA. CONS. STAT. § 505 ("Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received."); *but see* Gibson v. Workers' Comp. Appeal Bd. (Armco Stainless & Alloy Prods.), 861 A.2d 938, 947 (2004) (holding that expert and technical opinion testimony introduced in an administrative hearing must satisfy Pennsylvania's Rules of Evidence requirements).

131. 2 PA. CODE § 554; Richardson v. Perales, 402 U.S. 389, 400–01 (1971).

132. Davis v. Civil Serv. Comm'n., 820 A.2d 874, 879 (Pa. Commw. Ct. 2003) (citing DiSalvatore v. Municipal Police Officers' Commission, 753 A.2d 309 (Pa Commw. Ct. 2000)); EDUCATION LAW CENTER OF PENNSYLVANIA, *supra* note 28, at 34. *But see Richardson*, 402 U.S. at 407–08 (responding to an assertion that precedent rejected a hearsay statement's admissibility as substantial evidence, the Court stated: "This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case.") *discussed by* William H. Kuehnele, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 854–59 (2004–2005).

133. *But see* Goss v. Lopez, 419 U.S. 565, 580 (1975) (warning that the risk of error in school disciplinary hearings "is not at all trivial, and it should be guarded against").

134. 435 F. Supp. 460 (C.D. Cal. 1977).

135. *Gonzalez,* 435 F. Supp. at 469.

136. *Id.*

137. *Id.*

3. Permissible Party Representation

Criminal defendants have the right to legal counsel, which means an attorney licensed to practice in the state.[138] Parties to administrative actions may retain counsel, but parties do not enjoy a constitutional right to representation.[139] In some administrative hearings, a nonattorney representative may serve as a party's advocate.[140] The Pennsylvania Administrative Agency Law states: "Any party may be represented before a Commonwealth agency."[141] Individual agencies interpret the phrase "representation" to reflect the legislature's allowance of nonattorney advocacy in addition to representation by legal counsel.[142]

Law students and paralegals commonly provide representation in a nonattorney capacity.[143] Most pertinent to this Comment, a group of students from Temple University Beasley School of Law and the University of Pennsylvania Law School cofounded a student organization in 2011 named the School Discipline Advocacy Service (SDAS).[144] Students from the participating law schools advocate on behalf of Philadelphia public school students at their transfer and expulsion hearings.[145] In addition to direct advocacy, SDAS conducts know-your-rights workshops and educational trainings across the city

138. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (providing criminal defendants the guaranteed assistance of counsel). *But see* Faretta v. California, 422 U.S. 806, 813 (1975) (holding defendants have a constitutional right to refuse counsel and represent themselves in criminal proceedings).

139. *See* Lassiter v. Dept. of Soc. Servs. 452 U.S. 18, 25–26 (1981) (holding that the Sixth Amendment does not extend to civil proceedings unless circumstances make the presence of counsel imperative). *But see* Turner v. Rogers, 131 S.Ct. 2507, 2518 (2011) (noting that procedural safeguards are constitutionally required where liberty interests are implicated).

140. *See* 2 PA. CONS. STAT. §102(a) (1978) (granting administrative agencies the power to promulgate reasonable regulations); Budzinski v. Dep't of Pub. Welfare, 394 A.2d 1333, 1335 (Pa. Commw. Ct. 1978) (holding that courts may not disturb an administrative agency's rules, regulations, and standards absent extraordinary circumstances). *But see* 42 PA. CONS. STAT. § 2524 (providing that the unauthorized practice of law by a nonattorney is a criminal misdemeanor); Westmoreland Cty. v. Rodgers, 693 A.2d 996 (Pa. Cmmw. Ct. 1997) (holding that an agency, in exercise of its discretion, can forbid nonattorney representation in its proceedings).

141. 2 PA. CONS. STAT. § 502.

142. *See, e.g.*, 43 PA. CONS. STAT. § 774 (providing that parties in unemployment benefit hearings and appeals may be represented by "an attorney *or other representative*") (emphasis added).

143. Illustrative of this fact are the paralegals who represent clients in Philadelphia Housing Authority hearings and the law students who represent unemployment compensation claimants at benefit hearings. *See* PHILA. HOUS. AUTH., PUBLIC HOUSING GRIEVANCE PROCEDURE 7 (2015), http://www.pha.phila.gov/media/158195/grievancepolic.july132015finalrevised.pdf; *Employment Advocacy Project,* UNIV. OF PENN LAW SCH., https://www.law.upenn.edu/probonoprojects/eap/about.php (last visited March 6, 2015).

144. SCHOOL DISCIPLINE ADVOCACY SERVICE, http://www.sdasphiladelphia.com (last visited March 6, 2015). Drexel University Thomas R. Kline School of Law joined the SDAS coalition in the fall of 2014.

145. Those law students include the author. She is happy to plug the organization that enriched her law school experience and inspired her to write this Comment.

for parents, students, practitioners, and the community.[146]

People without legal knowledge can also serve as nonattorney advocates in certain legal proceedings. The Pennsylvania Court Appointed Special Advocate Association (CASA) supports and promotes court-appointed, volunteer advocacy for abused and neglected children.[147] CASA volunteers are ordinary citizens who complete roughly thirty hours of training.[148] Training workshop topics include courtroom procedure, effective advocacy techniques for children, child sexual abuse, early childhood development, and adolescent behavior.[149] A CASA volunteer serves as a judge's fact finder for placement hearings, speaks for the child in the courtroom, and represents the child's best interests.[150]

In *Shortz v. Farrell*,[151] the Pennsylvania Supreme Court distinguished which administrative hearings are and are not appropriate for nonattorney representation.[152] The court held that nonattorney advocates could not represent clients in workmen's compensation board proceedings.[153] The court determined that these matters in particular often involved intricate legal issues, making nonattorney representation inappropriate.[154] This implies that lay representation may be appropriate where the legal issues are few in number and simple in substance.

4. Parties' Invocation of Sixth Amendment Rights

The Sixth Amendment of the Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[155] The Supreme Court construes this provision "to mean that counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."[156] The right to counsel is extended as binding upon the states through the Due Process Clause of the Fourteenth Amendment.[157]

The Sixth Amendment applies only to individuals facing criminal prosecution.[158] Although a party to an administrative proceeding may retain counsel, it is well established that there is no absolute right to an attorney in this

146. *Our Mission,* SCHOOL DISCIPLINE ADVOCACY SERVICE, http://www.sdasphiladelphia.com/#!our-mission/c16ti (last visited March 6, 2015).

147. PENNSYLVANIA COURT APPOINTED SPECIAL ADVOCATES FOR CHILDREN, www.pacasa.org (last visited March 6, 2015).

148. *Id.*

149. BECOME A CASA VOLUNTEER ADVOCATE, http://www.pacasa.org/get-involved/become-a-casa-volunteer-advocate.php (last visited March 6, 2015).

150. *Id.*

151. 193 A. 20 (1937).

152. *Shortz*, 193 A. at 21–23.

153. *Id.* at 24.

154. *Id.* at 23.

155. U.S. CONST. amend. VI.

156. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

157. *Id.* at 340.

158. U.S. v. Zucker, 161 U.S. 475, 481 (1896).

setting.[159] Some scholars purport that parties who have representation are more likely to receive favorable outcomes in administrative adjudications than parties appearing without representation.[160] The argument is that the greater the imbalance of power between the parties—such as the assistance of counsel for only one side—the more likely it is that assistance will impact the case outcome.[161]

In *Everett v. Marcase*,[162] consolidated class actions sought to compel the School District of Philadelphia to recognize a student's right to be represented by legal counsel in lateral transfer hearings.[163] The court found that legal representation was not "a necessary ingredient of due process," assuming that the hearing was otherwise fair and impartial.[164] However, the court took note of a provision allowing students to bring "a representative of their choice to the hearing" in a proposed draft of what later became the "*Dunmore* consent decree."[165] The court lauded this provision as "clearly sufficient to comport with due process."[166] The final version of the *Dunmore* consent decree does not contain the provision relied upon by the *Everett* court.[167]

5. Trier of Fact

In a criminal trial, defendants face either a judge or jury that serves as fact finder. In administrative hearings, the fact finder varies depending on the proceeding. A basic requirement of due process is a "fair trial in a fair tribunal."[168] A fact finder's impartiality is essential to a fair tribunal.[169] Impartiality is defined as "freedom from bias, prejudice, and interest."[170] Inherent in the concept of due process is the principle that no party should have private access to the decision maker.[171] When agencies make "quasi-judicial" determinations on a case-by-case basis, and each determination exceptionally affects a very small number of people, "additional procedures may be required in

159. *E.g.*, *In re* Grand Jury Matter, 682 F.2d 61, 66 (3d Cir. 1982). *See* Turner v. Rogers, 131 S.Ct. 2507, 2515–16 (2011) (holding that procedural safeguards are needed to substitute the benefits good lawyering may provide in civil contempt proceedings).

160. Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation By Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97, 115 (2010).

161. *Id.*

162. 426 F. Supp. 397 (E.D. Pa. 1977).

163. *Everett*, 426 F. Supp. at 399.

164. *Id.* at 401.

165. *Id.* at 402.

166. *Id.*

167. Order, Dunmore v. Dist. of Philadelphia, No. 72-43 (E.D. Pa. 2004).

168. *In re* Murchison, 349 U.S. 133, 136 (1955).

169. *See* Furey v. Temple Univ., 730 F. Supp. 2d 380, 395 (E.D. Pa. 2010) (holding that a fundamental requirement of due process in school disciplinary proceedings is that the hearing must be in front of an impartial tribunal); Marie McManus Degnan, Comment, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 TEMP. L. REV. 225, 226 (2010).

170. Degnan, *supra* note 169, at 226 (footnotes omitted).

171. *See, e.g.,* Morgan v. United States, 304 U.S. 1, 19–20 (1938) (per curiam).

order to afford . . . due process."[172]

In *State Dental Council and Examining Board v. Pollock*,[173] the Supreme Court of Pennsylvania confronted whether an administrative agency violated the appellant's due process by permitting the board to combine investigatory, prosecutory, and adjudicatory functions.[174] The court determined that no violation occurred.[175] The court reasoned: "It is not uncommon for large agencies to fulfill both the prosecutory and judicial functions . . . . So long as the functions are separated adequately, Due Process is served."[176] In this case, "both functions were handled by distinct administrative entities with no direct affiliation to one another."[177]

In *Furey v. Temple University*,[178] the United States District Court for the Eastern District of Pennsylvania found that a genuine dispute of fact existed as to the impartiality of the fact-finding panel in a university discipline proceeding.[179] Here, Temple University expelled a student for assaulting an off-duty police officer whom the student mistook to be a gang member.[180] The written transcript revealed that at his discipline hearing, the accused student was cross-examined by the fact finders.[181] Based on this evidence, the court denied Temple University's motion for summary judgment on the student's due process claim.[182]

6. Parties' Invocation of Fifth Amendment Rights

The Fifth Amendment of the Constitution provides that in a criminal proceeding, no person can be compelled to give self-incriminating statements.[183] Evidence is incriminating if it could be "an essential link in a chain" of evidence in a prosecution.[184] The Fifth Amendment privilege implicates two rights: a defendant's right to refuse to testify at her own hearing and any witness's right to refuse to answer questions when the answers may be self-incriminating.[185]

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172. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 542 (1978) (internal quotation omitted); *c.f.* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (distinguishing a decision that affects few individuals from those that affect many individuals by stating that the decision concerning the former group may give rise to additional due process rights not afforded to the latter group).

173. 318 A.2d 910 (Pa. 1974).

174. *Pollack,* 318 A.2d at 914.

175. *Id.* at 915.

176. *Id.* at 914–15.

177. *Id.* at 915.

178. 730 F. Supp. 2d 380 (E.D. Pa. 2010).

179. *Furey,* 730 F. Supp. 2d at 396.

180. *Id.* at 386–91

181. *Id.* at 396.

182. *Id.*

183. U.S. CONST. amend. V (binding upon the States through its incorporation into the Fourteenth Amendment's Due Process Clause).

184. Commonwealth v. West, 468 A.2d 503, 505 (Pa. Commw. Ct. 1983).

185. Roach v. Nat'l Transp. Safety Bd., 804 F.2d 1147, 1151 (1986).

The scope of this privilege extends to administrative proceedings where answers might incriminate a party or witness in a future criminal proceeding.[186] This constitutional guarantee protects school children as well as adults.[187] Juvenile delinquency hearings are regarded as "criminal" proceedings for purposes of the self-incrimination privilege.[188]

The protection afforded to individuals invoking the privilege is limited. There is nothing in the Fifth Amendment prohibiting questions designed to provoke incriminating responses.[189] If a witness or defendant willingly testifies at a hearing, she waives her privilege on cross-examination in regard to questions discussed or made relevant on direct examination.[190] Additionally, a witness who chooses to testify must claim the privilege on each occasion she wishes to invoke it.[191]

Although the Fifth Amendment privilege applies both in criminal and administrative proceedings, an important limitation in administrative hearings exists. In noncriminal hearings, the decision maker may draw an adverse inference against the party claiming the privilege.[192] The Northern District of Georgia, however, held that in some circumstances an adverse inference in civil or administrative proceedings violates the Fifth Amendment.[193] The court ruled that an individual defending herself in concurrent criminal and civil cases should not be forced to choose between waiving the Fifth Amendment privilege and entering into a default, adverse judgment in the civil case.[194]

In *Gonzales v. McEuen*,[195] two high school students facing expulsion declined to testify at their school disciplinary hearings.[196] Counsel for the school district proceeded to argue that the students' silence without explicit invocation of Fifth Amendment privilege constituted a waiver.[197] The attorneys continued, asserting the fact finder should be free to assume an adverse inference against

186. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); City of Philadelphia v. Kenny, 369 A.2d 1343, 1347 (Pa. Commw. Ct. 1977), *cert. denied*, 434 U.S. 923 (1977). The mere threat of a potential criminal proceeding is enough to invoke the privilege—that is to say, there need not be a parallel criminal proceeding. Bruner Corp. v. Balogh, 819 F. Supp. 811, 814 (E.D. Wis. 1993).

187. *In re* Gault, 387 U.S. 1, 55 (1967).

188. *Id.* at 49–50.

189. *Roach*, 804 F.2d at 1151 (citing MCCORMICK ON EVIDENCE § 136, at 334 (Edward W. Cleary ed., 3d ed. 1984)).

190. *See* Brown v. United States, 356 U.S. 148, 155–56 (1958) (holding that a voluntary witness could not testify to bolster her position and also claim the right to be free from cross-examination on matters raised by her own statements).

191. *E.g.*, Nat'l Life Ins. Co. v. Hartford Accident & Indem. Co., 615 F.2d 595, 598–99 (3d Cir. 1980); *In re* Commonwealth Fin. Corp., 288 F. Supp. 786, 790 (E.D. Pa. 1968), *aff'd*, 408 F.2d 640 (3d Cir. 1969).

192. *See, e.g.*, *In re* Griffin, 690 A.2d 1192, 1212–13 (Pa. Super. Ct. 1997) (permitting an adverse inference that parties misstated their income in an adoption application).

193. Sec. & Exch. Comm'n v. Zimmerman, 854 F. Supp. 896 (N.D. Ga. 1993).

194. *Id.* at 899.

195. 435 F. Supp. 460 (C. D. Cal. 1977).

196. *Gonzales*, 435 F. Supp. at 470.

197. *Id.*

the students.[198] The Central District of California District Court held that "comment by the [school district's] counsel on the students' refusal to testify, and arguments that guilt could be inferred from such refusal was a violation of the students' Fifth Amendment rights."[199] However, Pennsylvania courts have held that the Fifth Amendment does *not* forbid adverse inferences against witnesses in civil suits—at least, when that witness invokes the privilege in the face of probative evidence offered against her.[200]

E. Pennsylvania School Discipline Law

1. Zero-Tolerance Law

In response to the Gun-Free Schools Act,[201] Pennsylvania enacted a nearly identical zero tolerance for weapons law, providing for mandatory expulsion of a student who possesses a weapon on campus or at a school function.[202] The law also requires every school district to develop a written policy reflecting the law's mandated expulsion for possession of a weapon.[203] Like the Gun-Free Schools Act, Pennsylvania's law contains a "safety valve" that allows each district's superintendent to modify the mandatory expulsion provision on a case-by-case basis.[204]

The commonwealth court has made clear that eliminating this discretionary power in a district-developed policy is unlawful.[205] In *Lyons v. Penn Hills School District*,[206] a twelve-year old "A" student was expelled for a year after a teacher saw him filing a fingernail with a miniature Swiss Army knife.[207] The district argued that it did not have to include the statutory exception in its policy because the superintendent's participation in the adoption and implementation of school policy was minimal.[208] The court disagreed with the district's position, stating, "[T]he District's argument contradicts the presumption that the legislature intends the entire statute to be given effect."[209] It held that any zero-

198. *Id.*

199. *Id.* at 471.

200. *See In re* Griffin, 690 A.2d 1192, 1212–13 (Pa. Super. Ct. 1997) (permitting an adverse inference that parties misstated their income in an adoption application).

201. See *supra* notes 67–72 and accompanying text for a discussion of the Gun-Free Schools Act.

202. 24 PA. CONS. STAT. § 13-1317.2(a) (1997). A weapon is defined as including, but not limited to "any knife, cutting instrument, cutting tool, nunchaku, firearm, shotgun, rifle and any other tool, instrument or implement capable of inflicting serious bodily injury." *Id.* § 13-1317.2(g). Anything from a gun to a pencil has been considered a weapon under zero tolerance. Klehr, *supra* note 36, at 592.

203. 24 PA. CONS. STAT. § 13-1317.2(b).

204. *Id.* § 13-1317.2(c); *see* Klehr, *supra* note 36, at 592 (noting that exercise of this discretion is virtually unheard of).

205. Lyons v. Penn Hills Sch. Dist., 723 A.2d 1073, 1076 (Pa. Commw. Ct. 1999).

206. 723 A.2d 1073 (Pa. Commw. Ct. 1999).

207. *Lyons*, 723 A.2d at 1074. The student claimed he found the knife in the hallway. *Id.*

208. *Id.* at 1075–76.

209. *Id.* at 1076 (citing Pennsylvania's Statutory Construction Act of 1972, 1 PA. CONS. STAT. § 1922 (1972)).

tolerance policy "which denies the superintendent, the Board and the students the exercise of discretion specifically provided by Section 1317.2 of the School Code . . . frustrates the clear legislative intent that this statute not be blindly applied."[210]

2. Student Rights in School Disciplinary Hearings

Pennsylvania law prescribes distinct procedures and processes for school disciplinary hearings.[211] The procedures vary depending on the exclusionary measure pursued.[212] Long-term suspensions warrant, but do not compel, an informal hearing.[213] Students referred for disciplinary transfer to an alternative program are entitled to an informal hearing.[214] In Philadelphia, students facing lateral transfers receive an informal hearing as well.[215] The statutorily prescribed purpose of an informal hearing is to allow a student to explain the circumstances surrounding the event or to show why she should not receive further punishment.[216] Further, the informal hearing is an opportunity for the student, parents or guardians, and school officials "to discuss ways by which future offenses might be avoided."[217] In the case of an informal hearing afforded to a student facing disciplinary transfer, the hearing provides the student an opportunity to argue that she does not meet the definition of a "disruptive student."[218] The statute mandates that the informal hearing shall occur within five days of the suspension.[219]

The School District of Philadelphia has implemented an intermediate parent conference between issuing a long-term suspension and initiating further disciplinary proceedings.[220] Transfer hearings rarely (if ever) occur within five days of the suspension, so it may be inferred that the parent conference serves to satisfy this statutory requirement.[221] However, parent conferences do not afford

210. *Id.*

211. 22 PA. CODE §§ 12.6, 12.8 (2005).

212. *Compare Id.* § 12.6, *with Id.* § 12.8.

213. *See id.* §12.6(b)(1)(iv). Recall from Part II.A, *supra*, that a long-term suspension is one that exceeds three school days.

214. D.C. v. Sch. Dist. of Philadelphia, 879 A.2d 408, 420 (Pa. Commw. Ct. 2005). The Pennsylvania Commonwealth Court suggests that entitlement to a hearing is not equivalent to a right. *Id.* ("Although a hearing is not required in all cases before a student may be assigned to an alternative education setting, in those cases where a student seeks to challenge the assignment there must be available some opportunity to do so.").

215. This assertion is based off of the author's experience in her capacity as a law student advocate.

216. 22 PA. CODE §12.8(c).

217. *Id.* §12.8(c)(1).

218. Feierman et al., *supra* note 115, at 1120. See *supra* note 34 for the statutory definition of a "disruptive student."

219. 22 PA. CODE § 12.8(c)(2)(v).

220. This assertion is based off of the author's experience in her capacity as a law student advocate.

221. *Id.*

the same rights to students as those required by the informal hearing laws.[222] The student is sometimes explicitly asked to refrain from speaking at the parent conference—or to not attend at all.[223] Some parents report that the conference's only purpose was for the school to inform the parent that it was pursuing further disciplinary action—namely, a transfer hearing.[224] The statutory language seems to allow parent conferences to serve as quasi-informal hearings. First, the statute does not compel an informal hearing for long-term suspensions, meaning there is no absolute right to one. This also suggests that a student waives her rights to an informal suspension hearing if it does not happen within five days of her suspension.

Chapter 12 of the Pennsylvania Administrative Code requires the following due process procedures for students in informal hearings: (1) written notice of the reasons for the suspension, (2) sufficient notice of the time and place of the hearing, (3) the right to confront and question witnesses, and (4) the right to produce witnesses and speak on her own behalf.[225] There is no explicit right to counsel or nonattorney representation.

Expulsions require a formal hearing.[226] Chapter 12 requires the following procedures to be observed in formal hearings:

> (1) Notification of the charges shall be sent to the student's parents or guardians by certified mail.
>
> (2) At least 3 days' notice of the time and place of the hearing shall be given. . . . *A student may request the rescheduling of the hearing when the student demonstrates good cause for an extension.*
>
> (3) The hearing shall be held in private . . . .
>
> (4) The student *may be represented by counsel, at the expense of the parents or guardians*, and may have a parent or guardian attend the hearing.
>
> (5) The student has the right to be presented with the names of witnesses against the student, and copies of the statements and affidavits of those witnesses.
>
> (6) The student has the right to request that the witnesses appear in person and answer questions or be cross-examined.
>
> (7) The student has the right to testify and present witnesses on his own behalf.
>
> (8) *A written or audio record shall be kept of the hearing*. The student is entitled, at the student's expense, to a copy [or] shall be provided at no cost to [an indigent student].
>
> (9) The proceeding shall be held within 15 school days of the notification of charges, unless mutually agreed to by both parties. *A hearing may be delayed for any of the following reasons,* in which case

222. *Id.*

223. *Id.*

224. *Id.*

225. 22 PA. CODE § 12.8(c)(2)(i)–(v) (2005).

226. *Id.* §12.6(b)(2).

the hearing shall be held as soon as reasonably possible:

. . .

(iii) *In cases in juvenile or criminal court* involving sexual assault or serious bodily injury, *delay is necessary due to the condition or best interests of the victim*.

(10) Notice of a right to appeal the results of the hearing shall be provided to the student with the expulsion decision.[227]

Understanding the significance of the emphasized text above requires observation of what the law does and does not provide. The statute does not provide a definition of "good cause," and there are no notes of decisions regarding the interpretation of this phrase.[228] The statute does not define the term "counsel."[229] Because of this ambiguity, it is fair to say the law does not provide an explicit right to a nonattorney advocate at a formal hearing. The statute mandates the recording of the hearing, which in modern practice is done with a recording device. In the event that the student has an open juvenile or criminal matter, this recording may be subpoenaed and, as permitted by FERPA, used against the student in her juvenile delinquency or criminal hearing.[230] The statute allows, but does not require, delay of a formal hearing, and limits the reasoning to that of necessity to the victim—not the student-defendant.

F. Observations and Mechanics of Philadelphia School Disciplinary Hearings

In Philadelphia, discipline hearings are held at the School District of Philadelphia (SDP) headquarters.[231] A predetermined hearing officer, appointed and employed by the SDP, presides over the hearing as judge and fact finder.[232] The SDP appoints and employs these hearing officers.[233] The student facing discipline must attend the hearing.[234] Neither the law nor the SDP requires a parent, guardian, or advocate's presence.[235] Since the student is considered the defendant, the school bringing the discipline action against her is considered the plaintiff or prosecutor. In this capacity, the school must send a representative on its behalf—typically the administrator responsible for student discipline. The deputy chief of the Office of Student Rights and Responsibilities or a legal

227. *Id.* § 12.8(b) (emphasis added).

228. *See id.* § 12.16.

229. *Id.*

230. See *supra* notes 73–79 and accompanying text for a discussion of the exceptions to FERPA's privacy provisions.

231. The SDP headquarters is located at 440 North Broad Street, Philadelphia, Pennsylvania, 19130.

232. *See Hearing Officers*, THE SCHOOL DISTRICT OF PHILADELPHIA, http://webgui.phila.k12.pa.us/offices/s/student-discipline/programs—services/hearing-officers (last visited March 6, 2015).

233. *See id.*

234. *See* 22 PA. CODE § 12.8.

235. *See id.*

assistant may be present.[236]

The hearing has two components: student responsibility (the "guilt" portion) and dispositional determination (the "punishment" portion).[237] In the student responsibility phase, the hearing office must determine whether the student violated the asserted code of conduct provisions.[238] To do so, both the school and student present their respective accounts of the incident.[239] The school's presentation of evidence typically consists of reading aloud written statements from any victims and witnesses.[240] Students present their evidence in a variety of ways.[241] Most often, the child speaks in an off-the-cuff narrative about the circumstances surrounding the alleged discipline violation.[242] After the student's narrative, the hearing officer typically engages the student with further questions about the incident.[243] If the student denies the allegations against her, the hearing officer may ask questions that go to the truth of her denial.[244] This becomes problematic when the hearing officer intermingles his prosecutory and adjudicatory roles, reminiscent of *Furey v. Temple University*.[245] If the student admits responsibility, the hearing officer asks a series of "restorative

236. This assertion is based off of the author's experience in her capacity as a law student advocate. More often than not, the SDP's legal representative sits silently and observes. The author has been in only one situation where the deputy chief questioned a witness—the alleged victim. This was only to clarify the victim's recollection of events and did not serve to create an adversarial dynamic. On some occasions—particularly where assault is alleged—a legal assistant from the Pennsylvania Office of the Safe Schools Advocate attends the hearing.

237. This assertion is based off of the author's experience in her capacity as a law student advocate.

238. *Id.*

239. *Id.*

240. *Id.*

241. The way a student presents evidence may depend on whether she has consulted education law resources and whether she has an advocate providing direct representation at the hearing.

242. This assertion is based off of the author's experience in her capacity as a law student advocate.

243. *Id.*

244. *Id.*

245. The following is an example of when a hearing officer extensively questioned a student who denied participating in a group assault:

> You were across the street? And the other students were on the other side of the street? . . . So what you're telling me is that you were right there—you saw the victim across the street? . . . At any point in time did you cross the street? . . . So from what you're telling me, you were on the other side of the street when the fighting was going on? You did not cross the street? . . . So at no point were you ever trying to pursue anything with this incident? And at no point did you cross the street? . . . Has there been any beef between you and this other student at the school? . . . So there were problems in the past at the beginning of the school year. What was that all about? . . . So just to set the record straight, there was no point in time you crossed the street, threw any punches, or make any threats? . . . Okay, thank you for your story . . . Could you identify the victim from where you were standing? . . . Can you name any other individuals who were across the street? . . . So from what you're telling me, the students fighting the victim were not students at your school? . . . I appreciate that.

Hearing Officer, Audio Recording of J.W. Discipline Hearing, 9:26–14:58 (Jan. 12, 2015) (on file with author).

questions."[246] These questions address the student's understanding of right and wrong, the degree to which she has reflected upon the incident, whether she is remorseful, and the extent to which the student accepts accountability for her actions.[247]

The latter part of the hearing is disposition oriented.[248] The hearing officer asks the school about the student's academic performance, attendance, and prior discipline violations.[249] The hearing officer may give the student an opportunity to respond to the school's statements.[250] Finally, the school states what punishment it recommends.[251] The proceeding concludes with an explanation of the possible outcomes.[252] Once the hearing officer reaches a decision, he sends an official notice to the school by email and the family by mail.[253] The student has the right to appeal this decision.[254] What this means is that a different hearing officer will review the evidence presented and listen to the audio recording of the hearing.[255] The hearing officer on appeal will determine whether the hearing was fair and whether the assigned punishment was appropriate.[256] For expulsions, the hearing officer must have his recommendation approved by the School Reform Commission.[257]

Ex parte communication[258] occurs between the school and the hearing officer.[259] Sometimes, these interactions have been witnessed by SDAS advocates.[260] Other times, it becomes clear from the nature of the hearing officer's questioning or offhand comments that he possesses more information

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246. This assertion is based off of the author's experience in her capacity as a law student advocate.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* In some instances, school administrators refuse to definitively state their recommendation. Instead, the administrator will ambiguously state that the school will "support whatever the hearing officer determines to be the appropriate punishment." *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. 22 PA. CODE § 12.8(b) (2005).

258. Ex parte communication refers to that which was neither on the record nor on reasonable prior notice to all parties that takes place between an interested person (in this case, the school attorney, a school administrator, or a victim) and the fact finder. *See Ex Parte,* BLACK'S LAW DICTIONARY 661–62 (4th ed. 1972) ("In its more usual sense, *ex parte* means that an application is made by one party to a proceeding in the absence of the other.").

259. To be fair, there do not seem to be measures taken to conceal post-hearing interactions with the school. Often the school administrator will remain in the hearing room while the family and student leave. Additionally, the school administrator is already present in the hearing room when the student and family enter. This assertion is based off of the author's experience in her capacity as a law student advocate.

260. The author has seen the hearing officers and administrators speaking privately after hearings have concluded. In these instances, it is unclear what purpose this conversation serves.

than what has come to light in the hearing. In one case, the author accidentally received the hearing officer's notes that he took and saw written "Admin. reports . . . ." This information, omitted here for privacy purposes, was never brought up in the hearing and was not contained in the evidence packet provided by the school. In these same notes, the author discovered that after the disciplinary hearing, the hearing officer met privately with, and took statements from, the alleged victim.[261] The hearing officer did not record the meeting with the accused student.[262] After the hearing, and before speaking with the victim, the hearing officer recommended a lateral transfer.[263] The student received a disciplinary transfer.[264]

III. DISCUSSION

School discipline law's earliest foundation is based in the common law doctrine of *in loco parentis*.[265] This phrase literally translates to "in place of the parent."[266] Keeping with the spirit of its origin, school discipline law must protect children as a mother or father would. This means trying to get to the root of an issue before exacting harsh punishment. This means fighting for children's constitutionally protected interests in education and reputation. This means always keeping the best interests of a student in mind, even when she has misbehaved. The current law surrounding school discipline disrespects these values. This Comment argues it is time for legislatures to reimagine school disciplinary hearing law and procedure.

Part III.A recommends when exclusionary measures should be invoked—as a last resort following an exhaustion of all intermediate punishments. Zero-tolerance laws should be eradicated, or at least FERPA should be revitalized. If a student is suspended for longer than three days, an informal suspension hearing should be mandatory. This hearing should serve in practice what it purports in statute—to address the source of the problem and attempt to find a resolution before taking the disciplinary action further.

The subsequent Parts address how to bolster due process protections afforded to students. Students do not "shed their constitutional rights" once they arrive on school grounds.[267] The Supreme Court has unequivocally held that procedural due process must be afforded to students facing disciplinary

261. Statements made by the hearing officer on the record and statements made off the record by the school administrator served as corroborating evidence of a private meeting.

262. This incident occurred in early 2015, and the common practice may have changed in response to raised concerns. In fact, SDAS received the audio recording of an ex parte meeting between the hearing officer and a victim when advising a family about a possible appeal. It is not clear that the audio recording was shared with the student.

263. Notes of Hearing Officer, (Jan. 12, 2015) (on file with author).

264. After a month of SDAS pushing various issues with the case, the SDP granted a new hearing for the student. His disposition was commuted to a lateral transfer.

265. See *supra* notes 42–45 and accompanying text for a discussion of the doctrine of *in loco parentis*.

266. See *supra* note 42 and accompanying text for the literal translation.

267. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

exclusions.[268] Part III.B suggests changes to the ways hearings are conducted. The law should grant all students facing disciplinary exclusion an explicit right to nonattorney representation. Further, the requirement of an impartial hearing officer should be strictly enforced and monitored. This means hearing officers must not have ex parte communications with school district employees, witnesses, or victims. If a hearing officer speaks separately with a victim, it should be recorded and made available to the accused student prior to her hearing.

Part III.C asserts that students should enjoy increased protection in their disciplinary hearings when they face concurrent criminal matters arising from the in-school misconduct. A pending criminal matter related to the factual basis for the hearing should constitute "good cause" for a delayed hearing. If a student elects to go forward with a hearing in lieu of a continuance, she should be free to invoke her right against self-incrimination without penalty of negative inferences.

A. Exclusionary Measures

1. Education Law Statutes Should Make Disciplinary Exclusion a Last Resort

With emerging recognition of the impact exclusions from school have on children, courts and legislatures must assess whether disciplinary exclusion is an effective means of reducing misconduct.[269] Research consistently fails to support the notion that disciplinary exclusion promotes safety and a positive instructional environment.[270] Excluded students are more likely to underperform academically, drop out, and use drugs.[271] Even worse, students are being pushed out of the classroom and into prison with the help of disciplinary exclusion.[272] Although a school can remove a student from its halls, it cannot remove that person from society. Disciplinary exclusions undermine public education's function of preparing children to be good citizens.[273]

Zero-tolerance laws mandate referral to the juvenile justice system.[274] Mandatory reporting goes directly against the purpose of FERPA: to keep what

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

269. See *supra* note 1–5 and accompanying text for an introduction to disciplinary exclusion and the school-to-prison pipeline.

270. See *supra* notes 95–97 and accompanying text for a brief discussion of the reported failures of disciplinary exclusion.

271. See *supra* notes 89–91, 100–01, 115–19 and accompanying text for a discussion of the correlation between disciplinary exclusion and subsequent poor academic performance and/or destructive behavior.

272. See *supra* notes 98–119 and accompanying text for an overview of the school-to-prison pipeline.

273. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

274. 20 U.S.C. § 7151 (2006).

happens in school private.[275] The laws have slithered around FERPA to exploit its exceptions.[276] As an example, the COPS in Schools Program allows schools to circumvent FEPRA by claiming the police officer as an agent.[277] Outsourcing school discipline violations to the criminal justice system neglects students' best interests. Police intervention distances students from the school environment and pushes them closer to prison. Creating an "us-versus-them" dynamic serves only to promote a student's idea that she is not good enough to be in a "regular" school. Our laws should not alienate children in this way. FERPA should be revised to confront the conflicts between it and the Gun-Free Schools Act. What has happened to FERPA exemplifies how exclusions can swallow the primary purpose of a law. The exception allowing information sharing when officers are agents of the school should be eliminated. This may reduce the number of school discipline referrals to the police, thus helping to close the school-to-prison pipeline.

2. Informal Suspension Hearings Should Be Mandatory

In the context of long-term suspensions, informal hearings are ineffective—if they even happen. Most students are not afforded informal suspension hearings because they do not know they have a right to one.[278] Most schools do not offer informal suspension hearings because they do not regard the law as mandating them to provide those hearings.[279] It is common for administrators to decide prior to a student's reinstatement that the school no longer wants the student on its roster.[280] At the parent conference, the school will inform the family of its decision to pursue further disciplinary action, but does not use the conference to get the student's version of events or discuss ways to prevent future incidents.[281] Informal suspension hearings are ripe with the potential to be useful tools for preventing future misconduct and implementing restorative justice practices.[282] If this potential can be realized, mutual agreements between students, families, and administrators may reduce future exclusions. In turn, the number of students with extensive discipline records may decline.[283] By implementing informal hearings as the legislature intended for long-term suspensions, Pennsylvania school discipline law could combat the school-to-prison pipeline.

275. See *supra* notes 73–74 and accompanying text for the applicable FERPA provision.

276. See *supra* notes 75–79 and accompanying text for a discussion of these exceptions.

277. See *supra* notes 80–87 and accompanying text for a discussion of the COPS in Schools Program.

278. This assertion is based off of the author's experience in her capacity as a law student advocate.

279. *Id.*

280. *Id.*

281. *Id.*

282. The statute itself recognizes this. See *supra* notes 216–17 and accompanying text for the statutory purpose of an informal hearing.

283. See *supra* notes 3–5, 19–21, and accompanying text for a discussion of how students' disciplinary records impact their potential for future success.

B. Changes in Hearings

1. Students Should Have the Explicit Right to a Nonattorney Advocate

In *Everett v. Marcase*,[284] the court found that representation by legal counsel in a Philadelphia school disciplinary hearing was not required of due process, assuming that the hearing was otherwise fair and impartial.[285] However, the court took special note of the *Dunmore* consent decree's proposed language, allowing students to bring "a representative of their choice to the hearing."[286] The finalized version of the *Dunmore* consent decree does not contain the language referenced by the *Everett* court.[287] It is time for this proposed language to be included in Pennsylvania's school discipline law.

Chapter 12 should define "counsel" to explicitly include nonattorney advocates, or change the word "counsel" to "representative." It should also extend the right to representation to informal hearings. Formal hearings in particular boast a chilly air of, well, formality.[288] They can feel the same way a criminal trial feels.[289] There are parties presenting evidence, witnesses testifying, and a hearing officer ruling on objections.[290] It is unlikely that a student can fully appreciate or make informed decisions about how to present her case.[291] On a less cerebral level, students and families are often confused, frustrated, and even upset by allegations of misconduct.[292] A nonattorney advocate provides an emotionally detached voice and perspective for the family both before and during a discipline hearing.

School disciplinary hearings do not involve "intricate legal issues" that require a licensed attorney's knowledge to address.[293] Almost all of the issues considered are limited to whether the school and district complied with the law, whether there is enough evidence to show the student violated the code of conduct, whether the student was afforded the opportunity to be heard on all matters, and whether alternative solutions to disciplinary exclusion exist.[294]

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284. 426 F. Supp. 397 (E.D. Pa. 1977).

285. *Everett*, 426 F. Supp. at 401.

286. *Id.* at 402.

287. Order, Dunmore v. Dist. of Philadelphia, No. 72-43 (E.D. Pa. 2004).

288. This assertion is based off of the author's experience in her capacity as a law student advocate.

289. *Id.*

290. See *supra* Part II.F for an overview of the mechanics of school disciplinary hearings in Philadelphia.

291. See *supra* notes 241–42 and accompanying text for a discussion of how students typically present evidence during the student responsibility phase of their disciplinary hearings. There are maturity and age variables to consider as well.

292. This assertion is based off of the author's experience in her capacity as a law student advocate.

293. See *supra* notes 151–54 for a discussion of *Shortz v. Farrell* and the need for counsel when a matter involves intricate legal issues.

294. This assertion is based off of the author's experience in her capacity as a law student advocate.

As the law stands, an informal hearing does not afford the right to representation at all.[295] Informal hearings still involve excluding a child from school and thus trigger due process protection.[296] There should be an explicit right to representation provided by Chapter 12 to students facing any long-term disciplinary exclusion.

2. Hearing Officer Impartiality Should Be Strictly Enforced and Monitored

Due process requires a "fair trial in a fair tribunal."[297] A fact finder's impartiality is essential to a fair tribunal.[298] Impartiality implicates freedom from bias, prejudice, and interest.[299] Inherent in the concept of due process is the principle that no party in an administrative adjudication should have private access to the decision maker.[300] "It is not uncommon for large agencies to fulfill both the prosecutory and judicial functions," and "[s]o long as the functions are separated adequately, Due Process is preserved."[301] It may be argued that the SDP has violated these impartiality principles.[302] First, hearing officers are not free from bias. Second, hearing officers engage in ex parte communications with school administrators, witnesses, and victims.[303] Third, hearing officers have engaged students in cross-examination and aggressive questioning much like that seen in *Furey v. Temple University*.[304]

Hearing officers are salaried by the SDP. They are considered part of the Office of Student Rights and Responsibilities and report to the deputy chief.[305] It is difficult to imagine how the nature of this relationship fosters impartiality. If Pennsylvania students are to be truly afforded due process, they must have the opportunity to be heard by someone who does not have an interest in, or close relationship with, the SDP and its employees.

Hearing officers converse with school administrators, witnesses, and victims outside the hearing.[306] Ex parte communication violates accused students' right

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295. *See* 22 PA. CODE § 12.6 (2005).

296. *See* Goss v. Lopez, 419 U.S. 565, 581 (1975) ("Students facing temporary suspension have interests qualifying for protection of the Due Process Clause.").

297. *In re* Murchison, 349 U.S. 133, 136 (1955).

298. *See* Furey v. Temple Univ., 730 F. Supp. 2d 380, 395 (E.D. Pa. 2010) (holding that a fundamental requirement of due process in school disciplinary proceedings is that the hearing must be in front of an impartial tribunal); Degnan, *supra* note 169, at 226.

299. Degnan, *supra* note 169, at 226.

300. *See, e.g.,* Morgan v. United States, 304 U.S. 1, 20–22 (1938) (per curiam).

301. State Dental Council & Examining Bd. v. Pollock, 318 A.2d 910, 914–15 (Pa. 1974).

302. See *supra* Part II.F for a discussion of the SDP disciplinary hearing process.

303. See *supra* notes 258–64 and accompanying text for a discussion of an occasion where an advocate discovered that the hearing officer engaged in ex parte communications.

304. See *supra* notes 178–82 and accompanying text for a discussion of *Furey*.

305. *See Hearing Officers*, THE SCHOOL DISTRICT OF PHILADELPHIA, http://webgui.phila.k12.pa.us/offices/s/student-discipline/programs—services/hearing-officers (last visited March 6, 2015).

306. See *supra* notes 258–64 and accompanying text for examples of ex parte meeting both

to be heard by depriving the student of a fair opportunity to respond to all statements against her. It also undermines hearing officers' credibility as "impartial." The law should provide a sanction, exclusionary rule, and/or judicial review for discipline hearings tainted by ex parte communication in violation of due process. This way, the importance and necessity of impartiality will require districts to modify their current practices and deter ex parte communication.

Cross-examination by the fact finder must also be monitored on a state and local level. Chapter 12 should require districts to create and promulgate procedures for supervising their hearing officers. The law could require random screenings of audio recordings to check to see what kind, if any, questioning the hearing officers are pursuing.

C. Concurrent Criminal Matters

Due to zero-tolerance policies and increased police presence in schools, many students face concurrent school disciplinary hearings and juvenile or criminal charges stemming from the same misconduct.[307] However, school disciplinary hearings more often than not are scheduled prior to a student's court date.[308]

1. A Pending Criminal Matter Arising from the Alleged Misconduct Should Constitute "Good Cause" to Grant a Requested Continuance

The fact that a criminal or juvenile matter is pending creates "good cause" for delaying a discipline hearing. "The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination . . . ."[309] Most school disciplinary hearings are informal.[310] As the titles suggest, these often feel informal. A student may be intimately familiar with the school official representing the school.[311] These facts make it more likely that a student will speak candidly about the circumstances of the alleged event and her own role in the misconduct.[312] Further, the perceived incentive of avoiding further disciplinary action may coerce a student into admitting

before and after a disciplinary hearing.

307. See *supra* notes 102–14 and accompanying text for a discussion of the negative impact zero tolerance policies and increased police presence has on students.

308. This assertion is based off of the author's experience and collective knowledge in her capacity as a law student advocate.

309. Sec. & Exch. Comm'n v. Dresser Indus., 628 F.2d 1368, 1376 (D.C. Cir. 1980) (en banc), *cert. denied*, 449 U.S. 993 (1980).

310. This assertion is based off of the author's experience in her capacity as a law student advocate. Out of sixty-five cases referred to SDAS between August 2014 and March 2015, only nine were for expulsions.

311. The school's representative is always the administrator whose duty it is to issue discipline violations. See *supra* notes 232–36 and accompanying text for a brief overview of each party's role in the disciplinary hearing.

312. Age, maturity levels, and emotional state may also exacerbate how worked up a student gets in a hearing. This assertion is based off of the author's experience in her capacity as a law student advocate.

responsibility.[313] This admission, captured by a state-mandated recording,[314] can be subpoenaed by the Commonwealth and used against the student in court.[315]

The outcome of a juvenile adjudication or criminal proceeding may affect the utility of a disciplinary hearing. If a student is placed in a detention facility, the need for a school disciplinary hearing disappears. There is no need for the district to take further exclusionary measures against the student because the child is already out of the school. The only purpose a hearing serves in this scenario is to add another disciplinary violation to the student's record. This harms the student's chance at reentry to a school upon release from detention.[316] Juveniles returning from placement are already at a high risk of dropping out of school.[317] If a student is found not guilty in the juvenile or criminal trial, she may use that finding as support during her school disciplinary hearing. Additionally, without the concern of a lingering criminal matter, the student may speak freely in the disciplinary hearing about the alleged misconduct without facing repercussions in the courtroom.

Upholding a student's constitutional rights must be recognized as "good cause" for delaying a school disciplinary hearing. Where the alleged misconduct is serious enough to warrant police intervention, schools should employ the police for assistance.[318] However, schools must acknowledge the gravity of the decision to involve a student in the criminal justice system. Allowing schools and administrators to circumvent and undermine students' constitutional rights for the purposes of building a school discipline case against the student is unconscionable.

2. Students Facing Pending or Possible Criminal Charges Should Have the Right to Invoke Their Fifth Amendment Privilege

Students are particularly vulnerable to self-incrimination issues due to police presence in schools. Students are familiar and sometimes friendly with the police in their school.[319] The blurry line between faculty member and law enforcement may lead to students misunderstanding a school officer's relationship to the local police. Despite an SRO or full-time school police officer's intimate relationship with the school, the officer remains an agent of the

313. See *supra* notes 243–47 and accompanying text for a discussion of students' incentives to admit responsibility during the hearing and avoid extensive questioning.

314. See *supra* notes 226–30 and accompanying text for a discussion of the state-mandated procedures for formal disciplinary hearings.

315. See *supra* notes 75–79 and accompanying text for an examination of FERPA's disclosure provisions allowing schools to share student information with law enforcement in such circumstances.

316. Students returning from placement face great barriers to reentry and may as a result drop out of school altogether. See *supra* notes 115–19 and accompanying text for research supporting this phenomenon.

317. See *supra* note 119 and accompanying text for the drop-out rate for adjudicated youths in Philadelphia.

318. See *supra* note 76 and accompanying text for the applicable statutory provision.

319. See *supra* notes 80-87 and accompanying text for a discussion of the establishment of the COPS in Schools Program.

Commonwealth.[320] Incriminating statements made to that officer or in his presence can—and usually will—be used against a student in court. Chapter 12 should include a provision dealing explicitly with code of conduct violations that overlap with criminal activity. It should provide a student with the opportunity to obtain a continuance on the disciplinary hearing when they have a pending criminal matter. Further, it should require districts to send separate literature to a student facing these allegations. This literature would inform a student of her rights to a continuance or to remain silent during a hearing. Additionally, the law should protect those students who choose to invoke their Fifth Amendment privilege. In *Gonzales v. McEuen*, the Central District of California held that any comment about a student's refusal to testify at the hearing and any argument about inferring guilt from this silence violated the student's constitutional rights.[321] Pennsylvania's legislatures and courts should adopt this view of student-invoked Fifth Amendment privilege.

IV. CONCLUSION

The liberal use of disciplinary exclusion as a punishment for schoolchildren is the civil rights issue of our generation. Studies show that the harmful effects far outweigh the potential benefits. Children will always misbehave—it is an inevitable part of development. Schools—and our society at large—should prioritize restorative justice practices over punishment that removes students from their communities. For this reason, informal suspension hearings should be a mandatory first step before pursuing exclusionary measures. These hearings should be implemented as the statute intended—to prevent further misbehavior and discover the issues underlying the conduct. Until then, students are owed adequate and thorough procedural due process protections in their school disciplinary hearings.

School disciplinary hearings should be set up to achieve fair results. Inevitably, students are disadvantaged by virtue of being accused by a school administrator. Much of a proceeding's fairness lies in the hands of the fact finder. Hearing officers must be impartial, and school districts must vehemently ensure hearing officers' freedom from bias, prejudice, and interest. Without this, the integrity of the school discipline process is compromised. Information about the incident should never be communicated to a hearing officer outside of the hearing. Although representation is not required by due process, it may improve the quality of a student's presentation of evidence. Having someone with a neutral perspective explain the strengths and weaknesses of a student's disciplinary matter alleviates some of the hearing's inherent tensions. It is certainly an added benefit to have an advocate educated on school discipline law who can empower families with knowledge of student rights and responsibilities. Police intervention in episodes of student misconduct complicate the school

320. See *supra* notes 82–87 and accompanying text for an examination of the officers' dual roles as legal agents of both the school and the Commonwealth.

321. 435 F. Supp. 460, 471 (C.D. Cal. 1977).

discipline process in ways that the law must address—by reducing police presence, strengthening laws intended to protect the privacy of student records, or adding statutory protections for students facing concurrent discipline and criminal hearings.

Schools mirror society. The rights and protections we want for ourselves as adults should be exactly what we grant to our children. Students need more chances to stay in school even when they misbehave, and they need heightened due process protection when their student status is in jeopardy. If the legislature considers these recommendations, Pennsylvania will be a step closer to honoring the goals of public education and protecting its citizens at every age.