

## Counsel in School Exclusion Cases: Leveling the Playing Field

*Julie K. Waterstone\**

*Access to education is crucial to a child's future. Although there is no federal constitutional right to an education, it has been deemed a property interest that cannot be taken away without adherence to due process. But over the last twenty years, with the rise of the zero tolerance movement, it has become far easier to exclude children from school. Despite the due process protections available, many children facing school exclusion do not have their rights adequately protected without the presence of counsel in school discipline proceedings. Using actual case studies, this Article seeks to broaden the discussion of the civil right to counsel movement to include a right to counsel in school discipline proceedings where a child's right to education is at stake. This Article will highlight the importance of education and bring to light the ease with which it can be taken away from a young person, particularly a young person of color from a low-income family. States should recognize the importance of education by ensuring that it is a right that cannot easily be taken away—this can be done through the availability of counsel as well as through legislative reforms to our school discipline laws. This Article will also consider the role that law school legal clinics can play in securing counsel for students facing school exclusion. This discussion will hopefully help guide the development of public policy surrounding school discipline and, at the very least, contribute to a discussion of needed legal reforms and the expansion of the services provided by law school legal clinics.*

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\* Visiting Clinical Professor, Northwestern University School of Law (2014–2015); Clinical Professor, Southwestern Law School; Director of the Children's Rights Clinic at Southwestern Law School in Los Angeles, California, which represents children in school discipline proceedings and children with disabilities in special education matters and advocates for better and more equitable educational opportunities for all children. Special thanks to Zepur Simonian and Tiffany Behfarin for their research assistance. Much gratitude to Michael Waterstone for his unwavering support.

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### INTRODUCTION

In 2013, a landmark year, we celebrated the fiftieth anniversary of the groundbreaking decision of *Gideon v. Wainwright*,<sup>1</sup> which affords the right to state-appointed counsel for criminal defendants. Many saw this as an opportunity to evaluate how far we have come in providing access to justice for the most vulnerable in our society and to contemplate the work that still remains to be done. Since the *Gideon* decision in 1963, advocates, academics, and policymakers have sought to establish a parallel right to counsel in civil issues related to areas such as housing, domestic violence and restraining orders, child custody, elder abuse, conservatorships, and guardianships.<sup>2</sup> The civil right to counsel, often referred to as Civil Gideon,<sup>3</sup> received a strong nod of support from the American Bar Association (ABA). Several years ago the ABA adopted a resolution calling for the provision of counsel, at public expense, to low-income individuals in cases “where

<sup>1</sup> 372 U.S. 335 (1963).

<sup>2</sup> See, e.g., Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187 (2009); Erik Pitschal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 663 (2006); John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 *DRAKE L. REV.* 763 (2013). In addition to the numerous articles written, a number of symposia have focused on the civil right to counsel. See, e.g., Symposium, *Gideon at Fifty: Fulfilling the Promise of Right to Counsel for Indigent Defendants* (Mar. 2013); New York State Bar Association’s Symposium, *Civil Right to Counsel: The Continuing Evolution of a Movement* (Oct. 2013); Symposium, *Gideon at 50: Reassessing the Right to Counsel* (Nov. 2013).

<sup>3</sup> See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37 (2009); Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, 41 *CLEARINGHOUSE REV.* 644 (2008). There are also bar associations and organizations dedicated to establishing a civil right to counsel. See, e.g., *Philadelphia Bar Association’s Civil Gideon Corner*, PHILA. BAR ASS’N, <http://www.philadelphiabar.org/page/CivilGideon> (last visited Nov. 5, 2014); NAT’L COALITION FOR A CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org> (last visited Nov. 30, 2015).

basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”<sup>4</sup> Yet despite the vast majority of the proposed legislative reforms, discussions, and scholarship surrounding Civil Gideon, the issue of education has been seemingly absent from the discourse on the civil right to counsel.<sup>5</sup> Surprisingly, this absence persists even though many states recognize education as a fundamental right<sup>6</sup> and the Supreme Court has acknowledged that education is of the utmost importance in a child’s life.<sup>7</sup>

Although not deemed a fundamental right under the United States Constitution,<sup>8</sup> education is widely recognized as one of the most important rights in the United States—a right that should not be taken away without adequate due process.<sup>9</sup> There is a widely held belief that

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<sup>4</sup> In 2006, the ABA adopted a policy that called on governments to recognize and implement a civil right to counsel in proceedings where basic human needs are at stake such as shelter, sustenance, safety, health or child custody. See HOWARD H. DANA, JR., AM. BAR ASS’N TASK FORCE ON ACCESS TO CIV. JUST., REPORT TO THE HOUSE OF DELEGATES 112A (2006), [www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf). Some states have enacted the right to counsel in various civil proceedings, including, but not limited to, dependency, paternity, involuntary mental health commitments, and contested adoptions. For an overview, see, for example, Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131 (2009), <http://www.brennancenter.org/page/-/Justice/Abel%20Current%20Developments%20in%20Civil.pdf>; John Pollock, *Where We’ve Been, Where We’re Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts*, 26 MIE J. 29, 30 (2012), <http://www.nlada.org/DMS/Documents/1342803913.27/MIE%20CRTC%20articles%205-16-12.pdf>.

<sup>5</sup> A report issued by the Boston Bar Association Task Force on Expanding the Civil Right to Counsel recommended providing counsel in several areas, including to those individuals facing school exclusion. See BOS. BAR ASS’N TASK FORCE ON EXPANDING THE CIV. RIGHT TO COUNS., GIDEON’S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS (2008), [https://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](https://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf) [hereinafter BOS. BAR ASS’N]. For a thorough review of the pilot projects that were ultimately undertaken in California and Massachusetts, see Clare Pastore, *Gideon is My Co-Pilot: The Promise of Civil Right To Counsel Pilot Projects*, 17 U. D.C. L. REV. 75 (2014).

<sup>6</sup> See, e.g., CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; FLA. CONST. art. IX, § 1; MONT. CONST. art. X, § 1, cl. 2.

<sup>7</sup> *Goss v. Lopez*, 419 U.S. 565, 577 (1975) (noting that the total exclusion from the educational process for more than a trivial period of time is a serious event in the life of the child).

<sup>8</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that education is not among the rights afforded explicit protection under the Constitution and the Court did not find any basis for such protection).

<sup>9</sup> *Goss*, 419 U.S. at 574 (“[T]he State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without

education is the ticket to success.<sup>10</sup> Any number of studies demonstrates that without an education, the prospects for a bright future tend to be grim.<sup>11</sup> For example, children who do not finish high school are 3.5 times more likely to be arrested as an adult than those who do complete high school.<sup>12</sup> The adult prison population confirms this as well; 82% of the adult prison population is comprised of high school dropouts.<sup>13</sup> Given society's high regard for education, it would seem that our nation would go to great lengths to protect that right. Yet, the opposite appears to be true.

Over the last twenty years, there has been a shift in the culture of our schools whereby misbehavior that was once viewed as typical of children is now seen as criminal.<sup>14</sup> This relatively benign behavior that was once handled by school administrators is now being turned over to the police.<sup>15</sup> And this criminalization of behavior is one illustration

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adherence to the minimum procedures required by that Clause.”).

<sup>10</sup> Social science research has shown that an individual with an education is more likely to have a higher income, be healthy, and avoid criminal activity. Research also shows that individuals with an education have a more positive influence on society. See generally CLIVE R. BELFIELD & HENRY M. LEVIN, *THE ECONOMIC LOSSES FROM HIGH SCHOOL DROPOUTS IN CALIFORNIA* (2007), [http://www.cdrp.ucsb.edu/pubs\\_reports.htm](http://www.cdrp.ucsb.edu/pubs_reports.htm) (expand the tab for “#1: The Economic Losses from High School Dropouts in California” and click “Full Report” hyperlink).

<sup>11</sup> Research suggests that dropping out of school is highly correlated with poor life outcomes. In 2005, school dropouts earned \$15,700 less than adults with a high school diploma and over \$35,000 less than those with a two-year degree. DAN BLOOM & RON HASKINS, *THE FUTURE OF CHILDREN POLICY BRIEF, HELPING HIGH SCHOOL DROPOUTS IMPROVE THEIR PROSPECTS 1–2* (2010), [http://futureofchildren.org/futureofchildren/publications/docs/20\\_01\\_PolicyBrief.pdf](http://futureofchildren.org/futureofchildren/publications/docs/20_01_PolicyBrief.pdf). Dropping out of school is also associated with increased chances of unemployment or completely dropping out of the workforce, increased incidence of divorce, greater likelihood of living in poverty, increased involvement with the welfare and legal systems, and poor health. See *id.*; see also *Economic Impacts of Dropouts*, NATIONAL DROPOUT PREVENTION CTR./NETWORK, <http://dropoutprevention.org/resources/statistics/quick-facts/economic-impacts-of-dropouts/> (last visited Nov. 27, 2015).

<sup>12</sup> See Sarah Biehl, *School Expulsion: A Life Sentence?*, AM. BAR ASS'N (Mar. 15, 2011), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/spring2011-expulsion-suspension-zero-tolerance.html>.

<sup>13</sup> *Id.*

<sup>14</sup> See generally RUSSELL J. SKIBA, IND. EDUC. POL'Y CTR., *ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE* (2000), <http://www.indiana.edu/~safeschl/ztze.pdf> (describing the rise of the zero tolerance movement).

<sup>15</sup> See Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L.REV. 861, 862 (2012) (noting that police officers have a noticeable presence on school campuses and that the number of referrals by school officials to the juvenile, and criminal justice systems for school misconduct is on the rise); see also RUSSELL SKIBA ET AL., AM. PSYCHOL. ASS'N *ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE*

of how schools are seeking to push out students that they deem problematic.<sup>16</sup> More often than not, cases that have been referred to police are coupled with a recommendation for long-term school exclusion<sup>17</sup>—an example of another way in which schools push students out.<sup>18</sup>

The case of eight year-old Frankie Johnson<sup>19</sup> highlights the criminalization of student behavior and the knee-jerk response to recommend long-term exclusion. During recess, Frankie was playing freeze tag with his friends. He accidentally tagged another little boy in the groin area. One of the aids on the yard observed Frankie's behavior and reported him to the principal. The principal met with Frankie and issued a two-day suspension. When Frankie attempted to return to school after the completion of his suspension period, he was apprehended by the school resource officer, arrested, and charged with sexual battery. Frankie was then recommended for long-term school exclusion, known in California as expulsion.<sup>20</sup> While he was not

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SCHOOLS?: AN EVIDENTIARY REVIEW AND RECOMMENDATIONS (2006), <https://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf> (finding that school infractions that a decade ago would have been handled by the principal internally are now more likely to lead to arrest or referral to the juvenile court). The zero tolerance movement did not grow out of tragic incidents like the shootings at Columbine or Virginia Tech. The movement pre-dated those events and arose as a result of a perceived increase in juvenile crime. In the early 1990s, school districts across the country started implementing zero tolerance policies for drugs, fighting, weapons and gang related activity. SKIBA, *supra* note 14, at 2; *see also* Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies As Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 305–06 (2011). This became national policy when the Gun-Free School Zones Act was passed in 1994. *See id.* at 306. As a result of these new policies, students were increasingly being expelled for minor infractions. *See id.* at 303–04 (noting that students were being expelled for tantrums, searing at a teacher, talking during an assembly, bringing crushed candy to school that resembled drugs, etc.).

<sup>16</sup> *See* CATHERINE KIM, DAN LOSEN, & DAMON HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 9 (2010) (discussing the various ways that schools push the neediest children out of schools).

<sup>17</sup> Some states refer to long-term school exclusions as suspensions whereas other states refer to them as expulsions. Because there is no uniformity and the terms have different meanings in different jurisdictions, this Article will use long-term school exclusions to refer to any school exclusion that is more than ten days.

<sup>18</sup> *See* KIM ET AL., *supra* note 16 (push-outs range from non-disciplinary measures to harsher forms of school exclusion, such as frequent suspensions, expulsions and school-based arrests).

<sup>19</sup> Frankie's story and the other stories recounted in this Article are the real experiences of actual clients of the Children's Rights Clinic. In each of the stories, the names used are pseudonyms to protect the client's identity.

<sup>20</sup> Expulsion has different consequences in different jurisdictions. In California, it means that a student is removed from the school district for a period up to one year.

ultimately expelled, the trauma and humiliation of being arrested has had a significant impact on Frankie.<sup>21</sup>

Frankie's case is not unique. With the rise of the zero tolerance movement, our legal and education systems have made it far easier to exclude children from school and to take away that precious right to education.<sup>22</sup> It used to be that schoolyard fights, disrespectful behavior, and other mischief were handled by the school administration through use of detention, in-school suspension or, for more severe behavior, out-of-school suspensions.<sup>23</sup> As zero tolerance policies have become more prevalent in our school system, the stakes for minor school incidents have risen considerably. Now, not only is long-term school exclusion a likely possibility, but, it seems, exposure to the juvenile justice system is almost guaranteed.

When misbehavior occurs and school administrators contemplate school exclusion, due process rights attach for students.<sup>24</sup> The due process protections typically afforded are in the form of a hearing where the student has the opportunity to tell his side of the story, present witnesses, and confront the evidence that is used against him.<sup>25</sup> These hearings are often conducted like mini-trials. While they are considered to be informal, students and their parents are expected to

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*See* CAL. EDUC. CODE § 48916 (West 2015). During the expulsion period, you must be provided with an alternative education placement. *See* § 48916.1. In other jurisdictions, expulsion can be the removal from a school district for up to two years. *See, e.g.*, 105 ILL. COMP. STAT. 5 / 10-22.6 (West 2015) (In Illinois, students can be expelled for a period up to two years without the right to an alternative education.).

<sup>21</sup> Because of the potential school implications, the public defender assigned to Frankie ultimately referred his parents to the Children's Rights Clinic at Southwestern Law School (CRC) to represent him at the discipline hearing. The delinquency charge was ultimately dismissed and the CRC was able to successfully halt the expulsion. Frankie was reinstated in school, but his parents requested that Frankie not be returned to the same school because he was so humiliated that he had been arrested in front of his classmates.

<sup>22</sup> *See, e.g.*, Bloomenthal, *supra* note 15, at 305–08 (describing the policies that have led to the shift toward criminalization of school misconduct); *see also* KIM ET AL., *supra* note 16, at 79–80 (describing the policies that have accounted for the rise of zero tolerance discipline).

<sup>23</sup> Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 855–56 (Dec. 2008), <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf> (noting that many schools seem to be using the juvenile justice system to a greater extent and for incidents that would not previously have been considered dangerous or threatening).

<sup>24</sup> *See Goss v. Lopez*, 419 U.S. 565, 574 (1975) (finding that education is a property interest that can not be taken away without due process).

<sup>25</sup> *See, e.g.*, CAL. EDUC. CODE § 48918; D.C. MUN. REGS. tit. 5, § B2505.4 (2015); MINN. STAT. ANN. § 121A.47 (West 2015).

do the same things that lawyers do at a trial—present evidence, cross-examine witnesses, and preserve a record for appeal, which can include making objections even though the technical rules of evidence do not apply. The student and his parents are essentially expected to do a lawyer's job without any of the training. School districts, on the other hand, are often represented by an attorney or a school official who is trained in school discipline law and intimately familiar with the hearing procedures. Although many states allow students to bring an advocate or counsel to school discipline proceedings,<sup>26</sup> most of the time families (particularly low-income families) do not have the means to obtain counsel, do not know how or where to find counsel, or do not fully understand the ramifications of not obtaining counsel in these types of cases. Without the assistance of counsel, it is unlikely that a student will have a meaningful opportunity to be heard.

This has consequences beyond being kicked out of school. Information presented at a school discipline hearing can be used in a juvenile delinquency proceeding, which can have a significant impact on a student's liberty interest. Often times, the school district has already provided the evidence that it possesses to the local law enforcement agency to support the delinquency charges. This raises the stakes on what is said at the hearing. Unknowingly, a student can implicate himself in the juvenile justice system—not just in the school discipline proceeding. Given the poor outcomes for those youth who are court-involved,<sup>27</sup> there should be greater protection granted to students at discipline hearings to prevent further involvement with the delinquency system.

This Article seeks to broaden the discussion of the Civil Gideon movement to include a right to counsel in school discipline proceedings where a child's right to education is at stake. It will highlight the importance of education and bring to light the ease with which it can be taken away from a young person, particularly a young person of color from a low-income family. Ideally, our schools will experience a shift in culture moving away from zero tolerance policies and the heavy police presence in school hallways. But, until that

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<sup>26</sup> See, e.g., CAL. EDUC. CODE § 48918(b)(5); D.C. MUN. REGS. tit. 5, § B2506.4; MINN. STAT. ANN. § 121A.47(2)(f)(1).

<sup>27</sup> Juvenile arrest impacts the likelihood that a child will drop out of school, their academic achievements, future employment prospects, and the likelihood of further entanglement with the criminal justice system. Only 12% of previously incarcerated youth have a high school diploma or General Education Development (GED). Fifty to eighty percent of those released from juvenile facilities are likely to be rearrested. KIM ET AL., *supra* note 16, at 128–29.

happens, the stakes are too high to let young people face school exclusion proceedings on their own. While due process is afforded in these matters, it is rendered somewhat meaningless without counsel present. States should recognize the importance of education by ensuring that it is a right that cannot easily be taken away; this can be done through the availability of counsel or through legislative reforms to our school discipline laws. This Article also considers the role that law school legal clinics can play in securing counsel for students facing school exclusion. It is the hope that this discussion will help guide the development of public policy surrounding school discipline and, at the very least, contribute to a discussion of needed legal reforms and the expansion of the services provided by law school legal clinics.

This Article proceeds in four parts. Part I briefly explains the history and current trajectory of the civil right to counsel movement. Part II brings the right to counsel in school discipline proceedings into the discussion and analyzes how such a claim would fare under prevailing constitutional interpretations. Although there are strong arguments that courts should create a right to counsel in discipline proceedings, they will unlikely do so. Using actual case studies, Part III explains why, from a policy perspective, a right to counsel in school discipline proceedings is so important to protect students from being at-risk of unnecessarily poor outcomes resulting from these proceedings. Part III suggests that the legislature may be the more natural body to enact protections. But until that happens, Part IV offers some insights on ways to meet this justice gap, with particular emphasis on the role that law school clinics can play in providing representation to students.

#### I. OVERVIEW OF THE CIVIL GIDEON MOVEMENT

The expansion of the civil right to counsel has its roots in the criminal right to counsel enjoyed by criminal defendants since 1932. The issue of a right to counsel can be traced, at the very least, to the early case of *Powell v. Alabama*.<sup>28</sup> In *Powell*, the Court examined whether states are obligated to provide their citizens with counsel in a capital case when citizens cannot afford an attorney under the Sixth Amendment.<sup>29</sup> The Court found that the right to counsel “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of

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<sup>28</sup> 287 U.S. 45 (1932).

<sup>29</sup> *See id.* at 52.



all our civil and political institutions.”<sup>30</sup> The Court went on to identify the right to counsel as one of the “immutable principles of justice” inherent in our society.<sup>31</sup>

The *Powell* decision laid the foundation for the right to counsel in criminal cases, but ten years later in *Betts v. Brady*,<sup>32</sup> the Court limited the right to appointed counsel to the facts of a particular case. In *Betts*, the petitioner was indicted for robbery and requested the assistance of counsel, but was told that counsel was only appointed in cases of murder and rape.<sup>33</sup> The petitioner was found guilty and sentenced to eight years in prison.<sup>34</sup> The issue before the Supreme Court was whether due process requires a state to provide counsel to those criminal defendants who cannot afford representation, regardless of the charges at issue.<sup>35</sup> The Court ultimately left the determination to appoint counsel to the individual courts where the “interest of fairness” required it.<sup>36</sup> The Court relied on the fact that a majority of states, at that time, did not provide a right to counsel in criminal proceedings.<sup>37</sup> As a result, the Court was concerned that if it provided counsel for all criminal defendants, then there would be a necessity for counsel in civil cases as well.<sup>38</sup> This case-by-case approach has been the approach used by the Court when reviewing whether a civil right to counsel exists.

Then, in 1963, twenty-one years after the *Betts* decision, the Court handed down the *Gideon* decision, which unequivocally held that the Sixth Amendment requires the appointment of counsel in all felony cases.<sup>39</sup> *Gideon*, the petitioner, was charged in a Florida state court with having broken and entered into a poolroom with the intent to commit a misdemeanor.<sup>40</sup> He was found guilty and sentenced to serve five years in prison.<sup>41</sup> Although *Betts* and *Gideon* share very similar facts, the Court in *Gideon* found that the Sixth Amendment guarantees the

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<sup>30</sup> *Id.* at 67 (citing *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

<sup>31</sup> *Id.* at 68 (citing *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

<sup>32</sup> 316 U.S. 455 (1942).

<sup>33</sup> *Id.* at 457.

<sup>34</sup> *Id.*

<sup>35</sup> *See id.* at 463.

<sup>36</sup> *Id.* at 455, 472.

<sup>37</sup> *See id.* at 467–71.

<sup>38</sup> *See Betts*, 316 U.S. at 473.

<sup>39</sup> 372 U.S. 335 (1963).

<sup>40</sup> *Id.* at 336.

<sup>41</sup> *Id.* at 337.

assistance of counsel unless that right is knowingly waived.<sup>42</sup> The Court acknowledged that the case-by-case determination set forth in *Betts* imposed a burden on state and federal courts.<sup>43</sup> The *Gideon* Court felt that enough precedent existed to demonstrate that the Sixth Amendment's guarantee of counsel is one of the fundamental rights that is obligatory upon the states through the Fourteenth Amendment.<sup>44</sup> While the *Betts* Court clearly acknowledged its fear that opening the door to the right to counsel in a criminal context would demand the same in the civil context, the *Gideon* Court did not discuss or even address such concerns in its opinion.<sup>45</sup>

Four years after the *Gideon* decision, the Court heard its first extension of the right to counsel in a civil context in the monumental decision, *In re Gault*.<sup>46</sup> *In re Gault* involved a fifteen-year-old boy accused of making inappropriate phone calls to a neighbor.<sup>47</sup> The boy was detained and held in custody without any written notice provided to his parents.<sup>48</sup> His parents were later notified about a hearing, yet there was no mention of the specific charges against their son, his right to counsel, his right to confront his accuser, his right against self-incrimination, his right to appeal, or his right to a written transcript.<sup>49</sup> At that hearing, Gault was committed to a juvenile detention facility.<sup>50</sup>

In finding that the Due Process Clause of the Fourteenth Amendment requires that the child and his parents be notified of the child's right to counsel, the Court commented that the "juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain where he has a defense and to prepare and submit it."<sup>51</sup> In

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<sup>42</sup> *See id.* at 339–40.

<sup>43</sup> *See id.* at 337–38.

<sup>44</sup> *See id.* at 342.

<sup>45</sup> *See Gideon*, 372 U.S. at 335.

<sup>46</sup> 387 U.S. 1 (1967). The *Gault* Court noted the differences between the juvenile delinquency system and the adult criminal justice system. Specifically, the Court stated that "[t]he idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." *Id.* at 15–16. The Court went on to note that because the state was acting as *parens patriae*, the proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty. *Id.* at 17.

<sup>47</sup> *Id.* at 5.

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at 10.

<sup>50</sup> *See id.* at 5.

<sup>51</sup> *Id.* at 36.

making its decision, the Court pointed to *Powell* and *Gideon* to demonstrate that, in adult proceedings, it is well settled that the right to counsel is guaranteed when an adult is facing the loss of liberty.<sup>52</sup> The Court concluded that because juveniles are facing a similar loss of liberty a child's right to counsel is no less important or enforceable.<sup>53</sup>

While the Court did not dedicate much discussion to the civil nature of juvenile delinquency proceedings, the Court was unequivocally clear that due process rights, specifically the right to counsel, are guaranteed in proceedings where a deprivation of a fundamental right is at stake.<sup>54</sup> In 1981, the Court heard *Lassiter v. Department of Social Services of Durham County*,<sup>55</sup> which has seemingly become a defining case for the Civil Gideon movement. The Court in *Lassiter* held that an indigent parent facing termination of parental rights was not entitled to court-appointed counsel under the Due Process Clause of the Fourteenth Amendment.<sup>56</sup> The Court found that because the mother's liberty was not at stake in *Lassiter*, no presumption in favor of the right to counsel existed.<sup>57</sup> The Court, however, left the door open for future indigent civil litigants by stating that they may be entitled to court-appointed counsel if they can show that the balance of the three-part procedural due process test in *Matthews v. Eldridge*<sup>58</sup> outweighs the presumption against the

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<sup>52</sup> See *In re Gault*, 387 U.S. at 36.

<sup>53</sup> See *id.* at 41. The Court specifically stated that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'" *Id.* at 27–28.

<sup>54</sup> The Court held that the United States Constitution guarantees a child specific notice of the charges, adequate time to prepare a defense, notice of the right to be represented by counsel, and, in certain circumstances, the state would be required to provide counsel if his parents were unable to afford it. See *id.* at 29. The Court further noted that any proceeding:

where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

*Id.* at 36.

<sup>55</sup> 452 U.S. 18 (1981).

<sup>56</sup> See *id.* at 31, 33.

<sup>57</sup> See *id.* at 26–27.

<sup>58</sup> *Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (contemplating the importance of the interest at stake, that the risk of erroneous deprivation is high given the complex nature of the law, and the cost of providing counsel is outweighed by the governmental interest).

appointment of counsel.<sup>59</sup> In this three-part test, the Court balances the risk of loss of physical liberty against: (1) the private interests at stake, (2) the risk that the procedures used will lead to erroneous decisions, and (3) the government's interests.<sup>60</sup> In *Lassiter* and other similar cases applying the *Matthews* factors, the discussion has focused on the deprivation at stake and whether the party is greatly disadvantaged without counsel.<sup>61</sup> After *Lassiter*, the presumption is that counsel is not warranted unless a physical liberty is in jeopardy. The *Lassiter* decision hindered the Civil Gideon movement because it has come to set the standard for a case-by-case approach to the right to appointed counsel in civil cases, which was the legal landscape for indigent criminal defendants before *Gideon*.<sup>62</sup>

## II. EXTENSION OF CIVIL GIDEON TO SCHOOL EXCLUSION CASES

The Civil Gideon movement provides a backdrop to analyze whether it makes sense to extend the right to counsel to school exclusion cases, which are civil in nature, but can lead to deprivation of a liberty and, at times, even deprivation of physical liberty. To establish a right to counsel in school discipline cases, there must be a denial of due process, which would need to be examined through the lens of the *Matthews* test.<sup>63</sup> As seen in *Lassiter* and other cases, typically the right to counsel has not fared well in a civil context.<sup>64</sup> The Court has been clear that there must be a risk of a deprivation of physical liberty as a result of the loss of the underlying proceeding.<sup>65</sup> The Court balances the risk of loss of physical liberty against: (1) the private interests at stake, (2) the risk that the procedures used will lead to erroneous decisions, and (3) the government's interests.<sup>66</sup>

<sup>59</sup> See Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, 37 U. BALT. L. REV. 21, 22 (2007).

<sup>60</sup> See *Matthews*, 424 U.S. at 335.

<sup>61</sup> See, e.g., Schwinn, *supra* note 59, at 23–25 (discussing different strategies to enact a civil right to counsel and citing various cases that have had both successes and failures in establishing such a right); see also Pitchal, *supra* note 2, at 670–75 (examining the various factors in the court's decision in *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) that led to the establishment of a right to counsel for children in dependency cases in Georgia).

<sup>62</sup> See Schwinn, *supra* note 59, at 23.

<sup>63</sup> See *Matthews*, 424 U.S. at 332–35.

<sup>64</sup> The right to counsel was established in juvenile delinquency cases, which are technically civil in nature, but the key to a successful right to counsel argument has been demonstrating that there will be a deprivation of physical liberty. See, e.g., *In re Gault*, 387 U.S. 1, 41 (1967).

<sup>65</sup> See *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 25 (1981).

<sup>66</sup> See *Matthews*, 424 U.S. at 335.

When going through that analysis in the context of a right to counsel, the private interest at stake—the first prong of the *Matthews* test—is a loss of education. As noted above, education is paramount in our society and just the type of right that deserves the ultimate protection. The Court has routinely held that education is an important right.<sup>67</sup> And, many states have gone one step further by deeming it a right embedded in their state constitutions.<sup>68</sup> The legislature has also declared the importance of education through the enactment of laws such as No Child Left Behind<sup>69</sup>—a law aimed at ensuring the quality of education for all students—or the Individuals with Disabilities Education Act<sup>70</sup>—a law aimed at ensuring equality in education for all students with disabilities.

With regard to the second prong of the *Matthews* three-prong test, there is a significant risk that students will lose their rights to an education without counsel in discipline proceedings. Students do not have the wherewithal to be able to present witnesses, cross-examine witnesses, argue points of law, or preserve a record for appeal, which is required to mount a successful case in these proceedings. Most parents do not have the ability or knowledge to build an effective defense on behalf of their child. But perhaps even more worrisome is the risk that mistakes made at the discipline hearing could lead to incarceration. For example, a student could foreseeably admit to committing a delinquent act in a discipline proceeding and then unknowingly engage in self-incrimination. All of the substantive and procedural due process rights available to students in discipline hearings lose their meaning when no one helps the child assert these rights.<sup>71</sup> Further, if the administrative panel (typically non-lawyers)

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<sup>67</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces.”); see also *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (“[T]he State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”).

<sup>68</sup> See, e.g., CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; FLA. CONST. art. IX, § 1; and MONT. CONST. art. X, § 1, cl. 1.

<sup>69</sup> 20 U.S.C. § 6301 (2014).

<sup>70</sup> Pub. L. No. 101-476, 104 Stat. 1142 (codified as amended at 20 U.S.C. §§ 1400–1482).

<sup>71</sup> The Court stated:

The Juvenile needs the assistance of counsel to cope with problems of

misinterprets the education code or misapplies the law, there is no one to enforce the child's rights. This speaks volumes to the significant imbalance of power that takes place at these hearings.<sup>72</sup>

Daisy Jones' case highlights these issues. Daisy, a tenth grader, was recommended for expulsion because she allegedly assaulted a teacher. At her expulsion hearing, which she attended without counsel, Daisy admitted to shoving the teacher away from her. There were no further inquiries made as to what events precipitated this encounter; there was no discussion as to why Daisy was failing nearly every class; there was no discussion as to any other factors that may have contributed to Daisy's behavior. The discussion simply focused on the fact that the shoving occurred. Daisy sat with a blunted affect and did not appear remorseful, which was a factor for the panel in its decision to exclude her from school for the year.

The tenth grader was sent to an alternative school placement where she had an encounter with a school resource officer who put his hands on her shoulders in an attempt to physically stop her from leaving the premises. She shoved him away from her. She was then arrested for assaulting an officer. She was detained because this was not her first assault charge. At that point, a delinquency attorney contacted the Children's Rights Clinic to get involved with Daisy's case. The Clinic reviewed her school records and learned that Daisy was a student with special needs. She was eligible for special education due to depression and other emotional issues stemming from her childhood. This was all documented in her school records. The school failed to raise these issues at her exclusion hearing, and no one was there to ensure that her rights were protected.<sup>73</sup>

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law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel" at every step in the proceedings against him.

*In re Gault*, 387 U.S. 1, 36 (1967) (quoting *Powell v. State of Ala.*, 287 U.S. 45, 69 (1932)).

<sup>72</sup> For a thoughtful discussion of imbalance of power between the represented and the unrepresented litigant, see Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & C.R. L. REV. 697 (2006).

<sup>73</sup> Pursuant to the Individuals with Disabilities Education Act, when a student with a disability engages in misconduct, before removing him from school for more than ten days, there needs to be a manifestation determination review in which the Individualized Education Program team is asked, among other things, whether the misconduct was related to the child's disability. See 20 U.S.C. § 1415(k)(1)(E)(i) (2011). If the behavior was related to the child's disability, the child may not be removed from the educational placement except in limited circumstances. See §§ 1415(k)(1)(F), (G) (2011).

The final prong of the *Matthews* test examines the governmental interests, including the fiscal and administrative burdens that the additional or substitute procedures would entail.<sup>74</sup> Here, the governmental interests are to ensure that its students are educated, that they become productive citizens of society, and that the schools are safe. Research shows that school expulsion can lead to a greater rate of dropout, which will more likely lead to a life of crime.<sup>75</sup> This takes a great toll on the government and society as a whole because society now needs to pay to incarcerate that individual—which is far more expensive than educating an individual—and that individual will no longer contribute productively to society.<sup>76</sup> There is, of course, the issue of who would pay for counsel.<sup>77</sup> Leaving the cost of counsel aside, the cost of having a student receive an education is less than the overall societal cost of having a student drop out of school and certainly less than the cost of incarceration.<sup>78</sup> And, research does not support the

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<sup>74</sup> See *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (citation omitted).

<sup>75</sup> Juvenile arrest impacts the likelihood that children will drop out of school, their academic achievement, future employment prospects and the likelihood of further entanglement with the criminal justice system. See KIM ET AL., *supra* note 16, at 128; see also BLOOM & HASKINS, *supra* note 11 (discussing the negative outcomes associated with dropping out of school).

<sup>76</sup> The average annual cost of incarceration is anywhere from \$32,000 to \$88,000 per child depending on the length of the stay and the location of the detention facility. See BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL'Y INST., *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* 10 (2006), [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf); RICHARD A. MENDEL, *NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION* 19 (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>. In contrast, the annual cost of educating a student ranges from \$7200 to \$18,000 per year. See Doris Nhan, *Analysis: How Much States Spend On Their Kids Really Does Matter*, NAT'L J. (Oct. 16, 2012), <http://news.yahoo.com/analysis-much-states-spend-kids-really-does-matter-132224655-politics.html>.

<sup>77</sup> The Boston Bar Association proposed to fund a school exclusion project in which representation would be provided to those students facing long-term school exclusion in a particular geographical area. The proposed cost would be \$160,000 per year. See BOS. BAR ASS'N, *supra* note 5, at 25. A more thorough analysis would need to be conducted to see what the actual cost would be, which is beyond the scope of this Article.

<sup>78</sup> See *supra* note 76; see also *infra* Part III. School districts tend to rely heavily on zero tolerance policies to exclude children for less serious offenses than was initially contemplated when enacting such policies. See Bloomenthal, *supra* note 15, at 306–07. A study in Texas showed that the majority of suspensions and expulsions were for offenses other than those included in the state's zero tolerance mandate; rather, they were for minor infractions such as using tobacco or being disruptive. See JACOB KANG-BROWN ET AL., *A GENERATION LATER: WHAT WE'VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS* 3 (2013), <http://www.vera.org/sites/default/files/resources/downloads/>

idea that the use of suspension and expulsion keeps schools safer.<sup>79</sup>

While a traditional analysis under the *Matthews* test could result in a court granting the extension of the right to counsel in school exclusion cases, courts have been reluctant to apply *Gideon* in the civil context when there is not an imminent deprivation of physical liberty.<sup>80</sup> Despite the compelling arguments for providing counsel to students in discipline proceedings, courts will unlikely find that students should be granted an appointed right to counsel. A more plausible approach may be to examine the public policy reasons that warrant the extension of *Gideon* to school exclusion cases and to consider why the legislature might be the more likely entity to enact this right as opposed to the courts.

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zero-tolerance-in-schools-policy-brief.pdf. Some states, like California, are moving away from excluding students for infractions like defiance. See Susan Frey, *Suspensions, Expulsions Down Statewide*, EDSOURCE (Jan. 14, 2015), <http://edsource.org/2015/suspensions-expulsions-down-statewide/72857#.VM0268YS11Y>.

<sup>79</sup> No research suggests that removing students from campus actually benefits schools. In fact, research has shown that students tend to be less engaged and are more likely to drop out of school when they have been suspended at least one time. See KANG-BROWN ET AL., *supra* note 78, at 5; see also DANIEL J. LOSEN & RUSSELL J. SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2* (2010), [http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education\\_FINAL-2.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf) (noting that after “two decades of implementation of zero tolerance disciplinary policies and their application to mundane and non-violent misbehavior, there is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior”).

<sup>80</sup> See generally, e.g., *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18 (1981) (holding that an indigent parent facing termination of parental rights was not entitled to court-appointed counsel under the Due Process Clause of the Fourteenth Amendment because her liberty was not at stake); see also Engler, *supra* note 72, at 700–03 (discussing approach to achieving civil right to counsel and noting that past efforts have not been successful). Some states have enacted statutes that provide for a right to counsel in areas such as dependency, termination of parental rights, child custody, adult protective services, among other areas. See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. 245, 252–70 (2006), [http://brennan.3cdn.net/2f2ca53878e9299012\\_67m6ib9tv.pdf](http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf). There is a belief amongst some that we should not be discussing new rights, like a civil right to counsel, when we are not properly funding the ones that already exist (referring to the right to counsel in the criminal context). This view fails to see that this is really a gap in the delivery of justice and should be more aptly characterized as a right to legal assistance. See John Pollack, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 HUM. RTS. MAG., no.4, 2013, [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/2013\\_vol\\_39/vol\\_30\\_no\\_4\\_gideon/its\\_all\\_about\\_justice.html](http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/its_all_about_justice.html).



### III. POLICY REASONS WARRANT COUNSEL AT SCHOOL DISCIPLINE PROCEEDINGS

Historically, education has not been recognized as a fundamental right that would warrant the protections required for the right to counsel to attach.<sup>81</sup> Education, however, has been deemed a property interest that is deserving of due process protections.<sup>82</sup> The Court, in *Goss v. Lopez*,<sup>83</sup> called upon *Brown v. Board of Education*<sup>84</sup> in recognizing that “‘education is perhaps the most important function of state and local governments,’ and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.”<sup>85</sup> The Court went on to note that a state must recognize a “student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”<sup>86</sup> The Court in *Goss* did not go so far as to say that short-term school exclusions require the right to counsel or the right to confront and cross-examine witnesses.<sup>87</sup> But, the Court did note that longer-term school exclusions might require these types of formal procedures.<sup>88</sup>

In response to *Goss*, most states have enacted hearing procedures for long-term school exclusions that allow students an opportunity to introduce evidence, confront witnesses, and make statements on their own behalf.<sup>89</sup> Although the protections for students in school

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<sup>81</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (noting that education is not one of the fundamental rights under the federal Constitution). There are a number of states, however, that have created a state right to education. See, e.g., CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; FLA. CONST. art. IX, § 1; MONT. CONST. art. X, § 1. See generally Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979) (listing state constitutional education clauses for forty-eight states).

<sup>82</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>83</sup> 419 U.S. at 565.

<sup>84</sup> 347 U.S. 483 (1954).

<sup>85</sup> *Goss*, 419 U.S. at 576 (citing *Brown*, 347 U.S. at 493).

<sup>86</sup> *Id.* at 574.

<sup>87</sup> See *id.* at 583 (finding that the Due Process Clause does not require hearings, the opportunity to obtain counsel, confront and cross-examine witnesses, or to call one’s own witnesses in connection with short-term exclusions).

<sup>88</sup> See *id.* at 584 (clearly stating that the Court limits this application to short-term exclusions and specifically noting that longer-term exclusions may require protections like a hearing, the opportunity to obtain counsel, confront and cross-examine witnesses, and the opportunity to call his or her own witnesses).

<sup>89</sup> Compare CAL. EDUC. CODE § 48918(b) (West 2015), with § 105 ILL. COMP. STAT.

exclusion proceedings are stronger in some states than others, students in all states are still disadvantaged without counsel.

This disadvantage can be exemplified through an examination of the rights afforded to students in school discipline cases in California, a state that offers greater protections for students in school discipline cases. When a student in California is facing long-term school exclusion—a period of more than five days but no more than one year—that student has the right to a “pre-expulsion conference” in which he has an initial opportunity to tell his side of the story to a school administrator.<sup>90</sup> In many cases, only the student, a school administrator and a school resource officer (who has authority to arrest the child) are present at the pre-expulsion conference. Parents have the right to attend this meeting, but schools are under no obligation to schedule these meetings at a mutually convenient time.<sup>91</sup> As a result, parents are often unable to attend these meetings. And, many parents do not realize what is at stake with respect to the information obtained from these meetings.<sup>92</sup>

After the pre-expulsion conference, the school administrator has to decide whether to recommend expulsion based on the information acquired and the discretion afforded under California law.<sup>93</sup> If a

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5 / 10-22.6(b) (West 2015). Similar to California, students in Illinois are afforded the opportunity to discuss the incident with a hearing officer. But there may not be uniformity in procedure since each school district may enact its own specific procedures. See, e.g., *Student Code of Conduct for Chicago Public Schools*, CHI. BD. OF EDUC. 31 (July 22, 2015), <http://policy.cps.k12.il.us/download.aspx?ID=263>.

<sup>90</sup> See CAL. EDUC. CODE § 48911(g).

<sup>91</sup> See *id.*

<sup>92</sup> These meetings often result in a child making a statement, which can then be used against him at the expulsion hearing and often serves as the basis for an arrest and referral to the juvenile justice system. It is highly unusual for students to have lawyers at these meetings largely due to the fact that children and their families are either not aware of the right to have a lawyer present or do not understand the gravity of the situation. Specifically, most families do not realize that a written or oral statement with an admission of guilt can be provided to the district attorney as evidence for an arrest or in a juvenile delinquency proceeding. While some may believe that a written statement should be treated as an admission, there are many flaws in applying that line of thinking to these pre-expulsion conferences. Anything said in these meetings should be thoroughly scrutinized, particularly if a school resource officer is present and the child does not have a lawyer present, if the parent is not present, or if the parent is present but does not understand the severity of protecting the child's statements. Courts have differed on whether school resource officers are required to Mirandize students before speaking with them about a school discipline incident. See KIM ET AL., *supra* note 16, at 120. Certainly school administrators are not required to give *Miranda* warnings prior to questioning a child about a school discipline incident. See *id.* at 118.

<sup>93</sup> See CAL. EDUC. CODE § 48915.

student is recommended for expulsion, the student has a right to a hearing within thirty days of the initial suspension date.<sup>94</sup> Ten days prior to the hearing, the student has the right to written notice. The notice must include: the date and time of the hearing; a statement of facts and the charges upon which the expulsion is based; a copy of the school district's disciplinary rules relating to the alleged violation; the right to representation; the right to inspect all documents; the right to confront witnesses; and the right to present evidence.<sup>95</sup>

Despite these seemingly elaborate protections, many students and families report that discipline hearings are a confusing and frustrating experience. Discipline hearings tend to be technical and adversarial. Often times, school districts are represented by counsel or, at the very least, by a school administrator who is extensively trained in school discipline procedures. Students, on the other hand, tend to face these allegations without anyone present to protect their interests.<sup>96</sup> The student is forced to submit factual contentions in an orderly manner,

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<sup>94</sup> See *id.* § 48918(a)(1). The statute states that the hearing must be held within thirty days "after the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in Section 48900." The common understanding is to hold the hearing within thirty days of the initial suspension date. This practice of holding a hearing within thirty days, however, is not uniform amongst different jurisdictions. Other jurisdictions have much shorter time frames. In Massachusetts for example, there is generally no explicit time requirement in which the hearing must be held. Rather, a hearing must occur before a student can be suspended. The only specified time frame in their statute is for an emergency removal situation wherein a hearing must take place within two days of the incident. See 603 MASS. CODE REGS. 53.06 & 53.07 (West 2015). In North Carolina, a hearing must take place before a long-term suspension can be imposed. See N.C. GEN. STAT. § 115C-390.7 (West 2015). A hearing, however, is not automatically offered; the student needs to affirmatively request it. See *id.* § 115C-390.8.

<sup>95</sup> See CAL. EDUC. CODE § 48918.

<sup>96</sup> To date, there has not been a study of how many students appear at school discipline hearings pro se or whether outcomes are different when they have counsel as opposed to when they do not. That is something that necessitates further investigation and will be the subject of my future research. Thus, this conclusion is based on the number of students that are excluded from school in a given year, which is just over two million according to the most recent statistics from the U.S. Department of Education. See U.S. DEP'T EDUC. OFF. FOR C.R., CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>. Legal Services Corporation (LSC) funded organizations report handling approximately 850 discipline cases a year. See 2013 LSC by the Numbers: The Data Underlying Legal Aid Programs, LEGAL SERVS. CORP., <http://lsc.gov/about/lsc-numbers-2013#LSCEligibleCaseServicesbyCaseType> (last visited Nov. 28, 2015). In an informal survey conducted, for the purposes of this Article, using the clinic listserv, law school legal clinics handle approximately 150 school discipline cases per year (results of the survey are on file with the Author). This statistic leaves a significant number of students unrepresented.

cross-examine witnesses, make objections, and preserve a record for appeal.

Continuing with California as an example, there are some nuances that make these proceedings even more challenging for students to tackle *pro se*. For example, a student cannot be excluded from school based on hearsay alone.<sup>97</sup> Without counsel present, the student is effectively forced to understand the complex concept of hearsay and to be able to argue, when applicable, that his case should be dismissed if no corroborating witnesses are present at the hearing. Another nuance in California law is that an accuser can only be excused from a discipline hearing if the decision not to appear is due to a showing that the accuser has a reasonable fear of harm.<sup>98</sup> If this threshold cannot be established, then the accuser's statement is deemed hearsay.<sup>99</sup> A middle school or high school student and many parents do not know how to establish that an accuser voluntarily chose not to appear and does not actually have a reasonable fear of harm.

These issues highlight the gross imbalance of power that exists in school discipline proceedings. Most students and their parents also do not realize that they are entitled to see the evidence that will be used at the hearing prior to the hearing date. In many situations, students view the documents for the first time at the hearing. These students are also entitled to know who will be testifying against them. But even when they have this information, students and their families are often not familiar with how to go about challenging these documents or the witness's testimony.

David Ortiz's case further exemplifies some of the inherent issues associated with the school discipline process. In his case, the principal was informed that David had a razor blade on campus and called David's mother to notify her that David was going to be suspended. The principal told Ms. Ortiz to come pick David up from school and that there would be a meeting to discuss his suspension. By the time David's mother arrived to campus (an hour after receiving the phone call), the meeting had already taken place. The principal, the school resource officer, and David were present at this meeting. The school resource officer told David that he would be arrested and taken to jail if he did not admit to having a dangerous object on campus. Ultimately, David wrote a statement in which he admitted to possessing a razor blade on campus but did not write how he obtained the blade

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<sup>97</sup> See CAL. EDUC. CODE § 48918(f)(2).

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

and did not describe the blade in any fashion. When his mother brought him back to campus after the suspension concluded, David was arrested and recommended for long-term exclusion.

A discipline hearing was held within a month and David attended without counsel. He was present with his mother, who was not educated in this country and had only completed the tenth grade. At the hearing, a panel of three administrators from the school district sought to exclude David. While the members of the panel did not work for the school David previously attended, in his eyes, they were on the school's side because they worked for the district.<sup>100</sup> The school district seeking to exclude David was represented by an administrator from the school he previously attended. That administrator had represented the district in countless discipline hearings before David's. The district provided the panelists with David's statement, the citation by the resource officer, and statements from other students who said they saw the blade but were not threatened by the blade. There were no pictures introduced or any witnesses called.

When it was David's turn to tell his side of the story, he simply stated that he found the blade on campus and showed it to a friend before then throwing the blade down. David and his mother did not mention that the blade was from the inside of a pencil sharpener,<sup>101</sup> that he did not threaten anyone with the blade, or that the police dropped the charges against him. David and his mother did not question why the district failed to bring any witnesses to testify at the hearing. In addition, the two did not ask if the district had any pictures of the blade to show the panel.

While the technicalities of the types of questions that should be asked are important and certainly daunting for parents, the bigger issue is what will happen to these students as a result of parents not being familiar with the process or experienced enough to know what questions to ask. There are two main concerns. First, without appropriate representation or guidance, a student can face the loss of

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<sup>100</sup> Pursuant to California law, the panel members may not be members of the School Board staff at the school that the student attended. *See* CAL. EDUC. CODE § 48918(d).

<sup>101</sup> This is relevant because California has a specific definition about what is considered a blade for purposes of expulsion. This type of blade would not meet the definition. *See, e.g., id.* § 48915(g) (using "knife" to mean "any dirk, dagger, or other weapon with a fixed, sharpened blade fitted primarily for stabbing, a weapon with a blade fitted primarily for stabbing, a weapon with a blade longer than 3 1/2 inches, a folding knife with a blade that locks into place, or a razor with an unguarded blade").

an education—a right that has been deemed a property interest<sup>102</sup> and one that has been noted by the Supreme Court as being so important that without it, “it is doubtful that any child may reasonably be expected to succeed in life.”<sup>103</sup> Second, a student can face the deprivation of physical liberty if they are incarcerated as a result of an incident that was related to school.

In some states, like New Mexico,<sup>104</sup> North Carolina,<sup>105</sup> and Wisconsin,<sup>106</sup> when students are excluded from school, they are not necessarily offered an alternative educational placement, which means that these students may not receive any type of formal education during the period of exclusion.<sup>107</sup> This seems to fly in the face of the *Brown* decision, which emphasized the importance of receiving a quality education.<sup>108</sup> In fact, ample research supports the notion that children who are excluded from school face poor outcomes.

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<sup>102</sup> See *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>103</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>104</sup> See N.M. CODE R. § 6.11.2.12(G)(2) (LexisNexis 2015) (stating that “[a] student who has been validly expelled or suspended is not entitled to receive any educational services from the local district during the period of exclusion from school”).

<sup>105</sup> In North Carolina, students who are suspended long-term are offered alternative educational placements unless the superintendent provides a compelling reason not to offer such services. These reasons include that the student is violent, disruptive to the learning process, or no viable alternative is available. See N.C. GEN. STAT. § 115C-390.9 (West 2015).

<sup>106</sup> See WIS. STAT. § 120.13(f) (West 2015) (noting that a school board is not required to enroll a student during the expulsion period).

<sup>107</sup> While a number of states do require that expelled students be provided with an alternative education, it is arguable whether these environments are actually providing quality instruction. Many alternative settings do not require students to attend a full day of school, which affords students a lot of unstructured time where they are more apt to get into trouble. In California, for example, the county-run alternative schools for students who have been expelled (which is long-term exclusion for one year) are only required to have a minimum of four hours of instruction a day. See, e.g., *County Community Schools—CalEdFacts*, CAL. DEP’T OF EDUC. (Jan. 22, 2015), <http://www.cde.ca.gov/sp/eo/cc/cefccountycommunity.asp>. In addition, some of the Children’s Rights Clinic’s former clients report that these programs do not provide actual instruction; instead, they offer homework packets and a few hours in class where students can complete the work.

<sup>108</sup> The Court in *Brown* noted that:  
[Education] is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

*Brown*, 347 U.S. at 493.

Specifically, a task force of the American Psychological Association found that students who face expulsion or long-term school exclusion are associated with a higher likelihood of dropping out of school.<sup>109</sup> The same task force found that students who face long-term school exclusion are more likely to be involved with the juvenile justice system.<sup>110</sup> Another study by the California Dropout Research Project found that high school dropouts commit crimes at higher rates than high school graduates.<sup>111</sup> According to the Brookings Institute, dropping out of school is linked with increased chances of unemployment, increased involvement with the welfare and legal systems, and even poor health.<sup>112</sup>

Since children who have been excluded from school are more likely to experience poor outcomes, as a society, we should be very concerned when children face disciplinary proceedings to ensure that these proceedings do not further harm them. Early cases that dealt with school exclusion, like *Goss*<sup>113</sup> and *Gonzales v. McEuen*,<sup>114</sup> were decided under a very different climate. At that time, resorting to

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<sup>109</sup> See SKIBA ET AL., *supra* note 15, at 49–51.

<sup>110</sup> See Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 23, at 856 (discussing the increase in referrals to the juvenile justice system by schools as a means of addressing misbehavior); see also *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Const., C.R., & Hum. Rts. of the S. Comm. on the Judiciary*, 112th Cong. 2 (2012) (statement of Melodee Hanes, Acting Administrator, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice), <http://www.judiciary.senate.gov/imo/media/doc/12-12-12HanesTestimony.pdf> (noting that students who have been suspended or expelled were three times more likely to have juvenile justice contact within the subsequent academic year); see also DANIEL J. LOSEN & JONATHAN GILLESPIE, THE C.R. PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6 (2012), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf> (describing studies that link high suspension rates with higher likelihood of contact with the juvenile justice system).

<sup>111</sup> See BELFIELD & LEVIN, *supra* note 10, at 24 (noting that persons with more education are less incentivized to commit crimes because they likely have a higher income). High school dropouts comprise approximately two-thirds of the prison population in California. For an in-depth discussion on the impact of education on reducing juvenile crime, see CLIVE BELFIELD & HENRY LEVIN, HIGH SCHOOL DROPOUTS AND THE ECONOMIC LOSSES FROM JUVENILE CRIME IN CALIFORNIA (2009), [http://www.cdrp.ucsb.edu/pubs\\_reports.htm](http://www.cdrp.ucsb.edu/pubs_reports.htm) (expand the tab for “#16: High School Dropouts and the Economic Losses from Juvenile Crime in California” and click “Full Report” hyperlink).

<sup>112</sup> See BLOOM & HASKINS, *supra* note 11, at 2.

<sup>113</sup> *Goss v. Lopez*, 419 U.S. 565, 565 (1975).

<sup>114</sup> 435 F. Supp. 460, 466 (C.D. Cal. 1977) (explaining that due process protections apply to students facing school expulsion or long-term exclusion).

school exclusion was the exception rather than the rule.<sup>115</sup> The end of the twentieth century, however, brought about a different norm. With several highly publicized juvenile crimes, a movement trended toward labeling children as “super-predators.”<sup>116</sup> As a result of this movement, along with the passage of the Gun Free Schools Act of 1994<sup>117</sup> and the horrific school shooting at Columbine High School in 1999, there has been a surge in the use of zero tolerance policies.<sup>118</sup> While school exclusion was reserved initially for possession of firearms, weapons, or the sale of drugs (certainly more severe incidents), over time school exclusions resulted from more minor offenses, such as school yard fights, talking back to a teacher, possession of lawful medications, and even bringing toy guns to school.<sup>119</sup> These harsher disciplinary policies

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<sup>115</sup> See KANG-BROWN ET AL., *supra* note 78, at 4–5 (noting that the culture of school discipline has changed drastically over the last twenty-five years); see also KIM ET AL., *supra* note 16, at 78 (explaining that schools are now more likely to suspend and expel students in “far more questionable circumstances”); Am. Psychological Ass’n Zero Tolerance Task Force, *supra* note 23 at 856 (noting that many schools seem to be using the juvenile justice system to a greater degree and for incidents that would not previously have been considered dangerous or threatening). In a survey conducted by the National Center for Education Statistics for the periods 1990–1991 and 1996–1997, principals across the country reported the most pervasive disciplinary issues were student tardiness, student absenteeism, and physical conflicts among students, while the least pervasive were student possession of weapons, physical abuse of teachers, and sale of drugs. See Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, PHI DELTA KAPPA INT’L (Jan. 1999), [http://cranepsych.edublogs.org/files/2009/07/dark\\_zero\\_tolerance.pdf](http://cranepsych.edublogs.org/files/2009/07/dark_zero_tolerance.pdf).

<sup>116</sup> See David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642–44 (2002) (discussing the labeling of youth as super-predators and the legislative response by enacting harsher laws for youth). This “super-predator” theory perpetuated the idea that there was this group of amoral youth that were taking over America. See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 10 (2010), [http://b.3cdn.net/advancement/d05cb2181a4545db07\\_r2im6caqe.pdf](http://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf).

<sup>117</sup> 20 U.S.C. § 8921 (1994) (repealed 2002 and reenacted under the No Child Left Behind Act, 20 U.S.C. §§ 7151(b)(1), (f) (2012)). The Gun Free Schools Act mandates that every state enact a law to require school districts to expel, for at least one year, any student who has brought a firearm to school. See KIM ET AL., *supra* note 16, at 78; see also ADVANCEMENT PROJECT, *supra* note 116, at 11.

<sup>118</sup> “By 1993, zero tolerance policies were being adopted by school boards across the country, often broadened to include not only drugs and weapons, but also smoking and school disruption.” SKIBA ET AL., *supra* note 15, at 24 (citation omitted). One study noted that for the 1996–1997 school year, 79% of schools across the country had adopted zero tolerance policies for violence that went beyond the federal mandate. See KANG-BROWN ET AL., *supra* note 78, at 2. The Columbine shooting in 1999 is said to have “opened the floodgates to the increased use of zero-tolerance approaches.” ADVANCEMENT PROJECT, *supra* note 116, at 10.

<sup>119</sup> See Bloomenthal, *supra* note 15, at 306.



have yielded an increased reliance on law enforcement to deal with school-related disciplinary problems, which has yielded an increase in referrals to the juvenile justice system.<sup>120</sup> According to a recent study by the National Incident Based Reporting System, which maintains records of crime incidents from 20% of the nation's police agencies, approximately one in six (17%) juvenile arrests stems from school-based misconduct.<sup>121</sup>

It is undisputed that schools need to ensure the safety of their students, teachers, and administrators. But, most excluded students are not excluded for serious offenses.<sup>122</sup> Typically, these students are excluded for relatively minor offenses like talking back to a teacher, dress code violations, possession of small amounts of marijuana, or

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<sup>120</sup> School officials refer a growing number of children to the juvenile and criminal justice systems for school-based misconduct, which has resulted in the increased criminalization of student misbehavior (this is known as the “school-to-prison pipeline”). See Kim, *supra* note 15, at 862. The Kim article examines the effect of over-policing in schools and concludes that it has a negative impact on educational outcomes for the entire student body. There has been an increase in police presence on school campuses (these officers are typically known as school resource officers (SROs)). According to the U.S. Department of Justice, there has been a 38% increase in the number of SROs between 1997 and 2007. See JUSTICE POLICY INSTITUTE, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS I (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest\\_fullreport.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf) (citing Law Enforcement Management and Administrative Statistics from the Bureau of Justice Statistics for the years 1997, 2000, 2003, and 2007). As a result of the increased police presence, more schools are engaging in law enforcement tactics. One report by the National Center for Education Statistics found that one in ten public school students aged twelve to eighteen pass through a metal detector, and more than half are subject to locker checks. See KIM ET AL., *supra* note 16, at 112. In a study conducted by Judge Steven Teske in Clayton County, Georgia, the placement of SROs in schools increased the number of referrals to juvenile court from eighty-nine referrals per year in the 1990s to 1400 per year in 2004. See JUSTICE POLICY INSTITUTE, *supra*, at 14–15. Another study looked at thirteen schools with SROs and fifteen schools without and found that those schools with SROs had nearly five times the number of arrests for disorderly conduct as schools without an SRO, even when controlling for the level of economic disadvantage of the school. See *id.* at 15. SROs are also very costly. In 2004, the U.S. Department of Justice gave sixty million dollars to school districts and police departments to hire SROs. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 17 (2005), [http://b3cdn.net/advancement/5351180e24cb166d02\\_mlbrqgxlh.pdf](http://b3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf).

<sup>121</sup> See Kim, *supra* note 15, at 881. State-level data shows that the share of juvenile court cases that originate from school-based misconduct ranges from a low of 4% in some jurisdictions to a high of 43% in others. See *id.* at 882.

<sup>122</sup> See ADVANCEMENT PROJECT, *supra* note 116, at 13–14 (describing the intolerance that schools demonstrate toward children for engaging in misconduct that is consistent with their age). It is questionable whether the presence of SROs is creating safer campuses. Some studies show that SROs tend to overreact to student behavior and give tickets for “disorderly conduct” or “disruption.” ADVANCEMENT PROJECT, *supra* note 120, at 17–18.

typical schoolyard fights (with no weapons involved).<sup>123</sup> The impact of these types of exclusions is far more harmful than helpful. These exclusions tend to remove perceived troublemakers or low academic performers from the school campus, but do not result in improved outcomes for the school or the individual student.<sup>124</sup> As a result, children are deprived of valuable instruction time and tend to be further alienated from their education.<sup>125</sup>

These harsh disciplinary policies disproportionately affect students of color and students with disabilities.<sup>126</sup> National data has shown that students of color experience school exclusion at a notably higher rate than their Caucasian peers.<sup>127</sup> With regard to long-term school suspensions and expulsions, Black students were three-and-a-half times more likely to be expelled than their White peers, while Latino and Native American students were more than one-and-a-half times more likely to be expelled than their White peers.<sup>128</sup> Students

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<sup>123</sup> For examples of the types of offenses for which students across the nation have been suspended or expelled, see ADVANCEMENT PROJECT, *supra* note 116, at 13–14; David M. Pedersen, *Zero-Tolerance Policies*, in *SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS* 49 (James C. Hanks, ed., 2004); Skiba & Peterson, *supra* note 115.

<sup>124</sup> See ADVANCEMENT PROJECT, *supra* note 116, at 17 (finding that zero tolerance discipline policies are felt not only by the students being disciplined, but by the whole school). There are a number of reasons that school personnel keep zero tolerance policies in place, among them are the ability of teachers to get rid of troublemakers and low performing students. See Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 67–68 (2003).

<sup>125</sup> School exclusion can create a sense of alienation from school and increases the chances of a student dropping out. No research shows that suspensions and expulsions improve the classroom or learning environment; in fact, the opposite tends to be true. See KANG-BROWN ET AL., *supra* note 78, at 4. One study suggested the importance of keeping children connected to school even when they are having behavioral problems. See *id.* at 5. Research has shown that schools with higher rates of suspension and expulsion have a less satisfactory school climate. Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 23, at 854. Research has also shown a negative relationship between the use of school exclusion and school-wide academic achievement. *Id.* Between 2009 and 2010, over three million children in grades K–12 were estimated to have lost instructional time because they were excluded from school. LOSEN & GILLESPIE, *supra* note 110, at 10.

<sup>126</sup> KANG-BROWN ET AL., *supra* note 78, at 3–4.

<sup>127</sup> *Id.* at 3; see also ADVANCEMENT PROJECT, *supra* note 116, at 20; Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 23, at 854.

<sup>128</sup> ADVANCEMENT PROJECT, *supra* note 116, at 20. In a study conducted in 2006–2007, not a single state in the nation suspended more White students than Black students. *Id.* at 21. Another study found that nearly one out of every six African American students (17%), one in twelve Native American students (8%), and one in fourteen Latino students (7%) were suspended at least once in 2009–2010, compared with one out of every twenty White students (5%) and one out of every fifty Asian American students (2%). LOSEN & GILLESPIE, *supra* note 110, at 12.

with special needs are also excluded from school at disproportionately higher rates.<sup>129</sup> One study found that high school students with disabilities are nearly three times more likely to receive an out-of-school suspension compared to their peers without disabilities.<sup>130</sup>

Similarly, the increased police presence in schools has had a devastating effect on students of color and students with disabilities.<sup>131</sup> One study in 2002 found that Black children made up 16% of the juvenile population but constituted 43% of juvenile arrests, while White children were 78% of the juvenile population but constituted 55% of juvenile arrests.<sup>132</sup> Another study found that Black students in Florida were two-and-a-half times as likely as White students to be arrested and referred to the state's Department of Juvenile Justice in 2007–2008.<sup>133</sup> In Colorado, Latino students were 50% more likely than White students to be referred to law enforcement.<sup>134</sup> And in Philadelphia, a Black student was three-and-a-half times more likely to be taken into police custody than a White student.<sup>135</sup> When looking at students with disabilities, the picture is not much better. According to one study, approximately 9% of students aged six to twenty-one were identified as having a disability that impacted their ability to learn, while 34% of youth in correctional facilities were identified as eligible for special education.<sup>136</sup> When breaking these statistics down even further by specific categories of qualifying disabilities under the Individuals with Disabilities Education Act, another study found that students identified as seriously emotionally disturbed are 13.3 times

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<sup>129</sup> See DANIEL J. LOSEN & TIA ELENA MARTINEZ, THE C.R. PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 3, 10–11 (2013), [http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack\\_UCLA\\_4-8.pdf](http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack_UCLA_4-8.pdf) (finding that one in five high school students with disabilities was suspended (19.3%), nearly triple the rate of all students without disabilities (6.6%), based on data from the U.S. Department of Education's Office of Civil Rights from 6835 school districts, which covered approximately 85% of all students attending U.S. public schools, in the 2009–2010 school year); see also SKIBA ET AL., *supra* note 15, at 62–63 (noting that students with disabilities typically represent between 11% and 14% of the total school, district, or state population, but represent between 20% and 24% of the suspended and expelled population).

<sup>130</sup> KANG-BROWN ET AL., *supra* note 78, at 3–4.

<sup>131</sup> See KIM ET AL., *supra* note 16, at 113.

<sup>132</sup> ADVANCEMENT PROJECT, *supra* note 120, at 18.

<sup>133</sup> *Id.* at 19.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> KIM ET AL., *supra* note 16, at 51.

more likely to be arrested while in school.<sup>137</sup>

The impact of police presence in schools and the accompanying harsh discipline policies are deeply troubling. Not only do these practices lead to time away from the classroom, but they can also have significant psychological consequences such as “public humiliation, diminished self-worth, distrust of the police, distrust of the school, and further alienation.”<sup>138</sup> To truly have an impact on the future of children, there must be a shift away from harsh disciplinary policies, including the reliance on law enforcement and the overuse of school exclusion, particularly for minor offenses. It seems that there may be a trend emerging to shift away from these types of practices. Both the American Academy of Pediatrics and the American Psychological Association have stated that, due to the harmful effects of zero tolerance policies, students should be disciplined in a developmentally appropriate manner and on an individual, case-by-case, basis.<sup>139</sup> Some school districts across the country are beginning to change their exclusionary policies.<sup>140</sup> Indeed, some states are following suit by amending their laws and encouraging school districts to move away from suspensions and expulsions.<sup>141</sup>

While the tide may be slowly turning away from zero tolerance policies and other harsh disciplinary practices, the current has not moved far enough to enable the legislature to require a complete overhaul of schools’ disciplinary practices. It is more likely that change

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<sup>137</sup> Bonnie Doren et al., *Predicting the Arrest Status of Adolescents with Disabilities in Transition*, 29 J. SPECIAL EDUC. 363, 370–74 (1996), [http://www.academia.edu/8412062/Doren\\_B.\\_Bullis\\_M.\\_and\\_Benz\\_M.\\_R.\\_1996\\_.PREDICTING\\_THE\\_ARREST\\_STATUS\\_OF\\_ADOLESCENTS\\_WITH\\_DISABILITIES\\_IN\\_TRANSITION.\\_Journal\\_of\\_Special\\_Education\\_29\\_363-380](http://www.academia.edu/8412062/Doren_B._Bullis_M._and_Benz_M._R._1996_.PREDICTING_THE_ARREST_STATUS_OF_ADOLESCENTS_WITH_DISABILITIES_IN_TRANSITION._Journal_of_Special_Education_29_363-380).

<sup>138</sup> ADVANCEMENT PROJECT, *supra* note 116, at 17.

<sup>139</sup> KANG-BROWN ET AL., *supra* note 78, at 6.

<sup>140</sup> See, e.g., *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Const., C.R., & Hum. Rts. of the S. Comm. on the Judiciary*, 112th Cong. 16–17 (2012) (testimony of Judith A. Browne Dianis, Co-Dir., Advancement Project), [http://b.3cdn.net/advancement/c8f295385a896db4ee\\_f1m6iiqgd.pdf](http://b.3cdn.net/advancement/c8f295385a896db4ee_f1m6iiqgd.pdf) (stating that Denver public schools revised its disciplinary code to match low level misbehavior with low level interventions and eliminated arrests and that Baltimore public schools adopted similar reforms).

<sup>141</sup> See, e.g., KANG-BROWN ET AL., *supra* note 78, at 6 (stating that in 2012, Colorado amended the state law to encourage school districts to rely less on suspension and expulsion and also required additional training for school resource officers); *California Enacts First-in-the-Nation Law to Eliminate Student Suspensions for Minor Misbehavior*, ACLU OF NORTHERN CAL. (Sept. 27, 2014), <https://www.aclunc.org/news/california-enacts-first-nation-law-eliminate-student-suspensions-minor-misbehavior> (reporting that in 2014, California enacted a law that precludes schools from using expulsion for minor misbehavior like “willful defiance”).

will continue to occur on a state-by-state basis.

#### IV. FILLING THE JUSTICE GAP IN SCHOOL EXCLUSION CASES

In the absence of a right to counsel for education cases being established by the courts or by the legislature, there still needs to be a mechanism through which we ensure that students can be represented in exclusionary proceedings, particularly given the potential impact of such an event on their futures. Some criminal lawyers will represent students in school discipline cases for a fee. But for many students facing school exclusion, paying for a lawyer is not a viable option.<sup>142</sup> Some students can seek assistance from legal service corporations and non-profit organizations.<sup>143</sup> Legal clinics at law schools may also be a potential source of help.<sup>144</sup> Legal clinics, in many ways, are perfectly poised to help fill this need.

According to Best Practices for Legal Education, clinics should teach students about the practice of law in a deeper, more meaningful way that can only truly be achieved through the opportunity to practice as a lawyer.<sup>145</sup> This allows law students to more fully understand some of the key values of the profession—the importance of seeking justice and providing access to justice, respect for the rules of law, integrity and truthfulness, and the need to deal sensitively and effectively with diverse clients and colleagues.<sup>146</sup> The mission of most law schools' legal

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<sup>142</sup> According to a statement issued by the Academy of American Pediatrics' Committee on School Health, children living in homes near or below the poverty level are more likely to be expelled. DANIEL J. LOSEN, THE C.R. PROJECT, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 9 (2011), [http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB\\_FINAL.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf).

<sup>143</sup> Although there are not a lot of non-profits or legal services corporations that represent students in school exclusion proceedings, representation by those entities is only a possibility for some students. To illustrate how few students take advantage of this option, in 2013, there were 847 LSC eligible discipline cases closed, which represents 0.1% of the total cases closed for that year. *2013 LSC by the Numbers: The Data Underlying Legal Aid Programs*, LEGAL SERVS. CORP., <http://lsc.gov/about/lsc-numbers-2013#LSCeligibleCaseServicesbyCaseType> (last visited Nov. 28, 2015).

<sup>144</sup> In an informal survey I conducted through the use of the clinical education listserv, approximately twenty-five law schools responded that they currently represent students in school discipline matters. Approximately fifteen of the responding schools reported that they handle two to three school exclusion cases a year. This survey is not accurate since I did not receive a response from every law school, but it gives a sense of an approximate number of schools that already have programs that could accommodate a request for representation.

<sup>145</sup> See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 140 (2007), [http://www.cleaweb.org/Resources/Documents/best\\_practices-full.pdf](http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf).

<sup>146</sup> *Id.* at 140.

clinics is typically two-fold—(1) to educate law students in the practical skills of lawyering and (2) to further social justice by advocating for the underserved or disadvantaged in the community.

There has been some critique over the last several years that law students, upon graduation, are not prepared for the practice of law.<sup>147</sup> In response, the ABA adopted new standards for the law school curriculum, which requires every law student to take at least six credit hours of an experiential course.<sup>148</sup> The California State Bar is in the process of revising its admission standards which, if approved, will require each applicant to have completed fifteen credit hours of experiential coursework.<sup>149</sup> All law schools will have to comply with the ABA standards and, while all law schools will not have to follow the proposed California State Bar rule, any student at a law school who wishes to practice in California will need to comply. As a result, law schools will need to ensure that there are adequate experiential offerings.

Experiential offerings in which law students are working on school discipline cases would certainly meet both the ABA requirement and the California Bar's proposed rule. Incorporating discipline cases into law school experiential offerings would serve multiple purposes—it would enable law students to hone their legal skills, make students more ready for practice, demonstrate the importance of seeking justice, and help fill a need in the community by providing access to justice. In examining school discipline cases from the pedagogical standpoint, these matters offer ample opportunity for students to sharpen a wide range of legal skills, including the opportunity to interview and counsel a client, investigate a case, research, write letters and possibly a brief, prepare for a hearing (which is like a mini-trial), write and deliver an opening and/or closing statement(s), examine witnesses, cross-examine witnesses, negotiate a settlement, and possibly engage in oral argument.<sup>150</sup>

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<sup>147</sup> See, e.g., David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), [http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?\\_r=2&adxnnl=1&ref=general&src=me&pagewanted=print&adxnnlx=1423249412-R/4Gy1597LF1wp467gvZKQ](http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=2&adxnnl=1&ref=general&src=me&pagewanted=print&adxnnlx=1423249412-R/4Gy1597LF1wp467gvZKQ).

<sup>148</sup> See AM. BAR ASS'N, 2015–2016 STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. 16 (2015), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf).

<sup>149</sup> See ST. BAR OF CAL. TASK FORCE ON ADMISSIONS REG. REFORM, PHASE II FINAL REPORT 2–5 (2014), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000012730.pdf>.

<sup>150</sup> Not every discipline case will afford the opportunity to hone each of these skills,

Discipline cases not only meet the pedagogical goal of clinical education, but also further the goal of providing access to justice. Over the last several years, as funding for the primary provider of civil legal aid has decreased, there has been increased attention on the justice gap that exists in our country.<sup>151</sup> Studies have shown that less than 20% of low-income Americans have their legal needs met.<sup>152</sup> As a response to the funding challenges, there have been innovations in the delivery of legal systems, including the development of hotlines, incubators, use of the low bono model, and the un-bundling of legal services.<sup>153</sup> There has also been greater reliance placed on non-profits, pro bono attorneys, and legal clinics to help fill the gap.<sup>154</sup> Some state bars are responding by requiring applicants to complete a certain number of pro bono hours before they can be admitted to practice in the state. For example, the New York State Board of Law Examiners now requires applicants to complete fifty hours of pro bono work before

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but it is likely that students will be exposed to many of them. Students will undoubtedly be exposed to the values, behaviors, attitudes, and ethical requirements of a lawyer.

<sup>151</sup> In 2011, Congress reduced the legal services budget by \$15.8 million. See Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, in CLOSING THE JUSTICE GAP: HOW INNOVATION AND EVIDENCE CAN BRING LEGAL SERVICES TO MORE AMERICANS 19, 27 (2011), [https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose\\_all.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose_all.pdf). Those legal service providers that get federal funding have to turn away almost one million cases a year due to lack of resources. See Joy Moses, *Grounds for Objection: Causes and Consequences of America's Pro Se Crisis and How to Solve the Problem of Unrepresented Litigants*, in CLOSING THE JUSTICE GAP: HOW INNOVATION AND EVIDENCE CAN BRING LEGAL SERVICES TO MORE AMERICANS 13, 18 (2011), [https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose\\_all.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose_all.pdf). In 2014, the ABA President, William Hubbard, stated that there is great urgency in ensuring that legal services are available to those of low- and middle-incomes to prevent the justice gap from widening further. See James Podgers, *New ABA President William Hubbard Wants to Close Legal Services Delivery Gap for Poor*, AM. BAR ASS'N J. (Sept. 1, 2014, 7:40 AM), [http://www.abajournal.com/magazine/article/new\\_aba\\_president\\_william\\_hubbard\\_wants\\_to\\_closing\\_the\\_gap\\_in\\_legal\\_service](http://www.abajournal.com/magazine/article/new_aba_president_william_hubbard_wants_to_closing_the_gap_in_legal_service).

<sup>152</sup> Houseman, *supra* note 151, at 21.

<sup>153</sup> See, e.g., *id.* at 25 (noting innovative ways to help meet the justice gap like the use of hotlines, websites, and video conferencing); see generally Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553 (2015) (discussing ways that technology can improve access to justice for Americans with low and moderate incomes); Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1 (2009) (suggesting that a low bono model of representation would help increase access to justice).

<sup>154</sup> See Jeffrey Selbin et al., *Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low- and Moderate-Income Americans*, in CLOSING THE JUSTICE GAP: HOW INNOVATION AND EVIDENCE CAN BRING LEGAL SERVICES TO MORE AMERICANS 51, 55 (2011), [https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose\\_all.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose_all.pdf).

admission.<sup>155</sup> In a similar vein, the California State Bar has proposed to add a requirement for all applicants prior to admission or by the end of their first year of admission to provide at least fifty hours of legal services to pro bono or “modest means” clients.<sup>156</sup> A number of law schools already require their students to complete a certain number of pro bono hours per year.<sup>157</sup>

Although a study has not been conducted to determine the impact of having a lawyer in education cases, research has been conducted to show that those excluded students are at risk for poorer outcomes.<sup>158</sup> And while school discipline proceedings may be designed for a child and his parent to appear without counsel, given the technical nature of the proceedings and the potential outcomes at stake, it stands to reason that having a lawyer present protects the student’s rights in the immediate proceeding and in a possible delinquency proceeding. In a given year, there are approximately 130,000 students expelled and another two million students suspended.<sup>159</sup> Most excluded students are from low-income families<sup>160</sup> and are likely to not have access to counsel. By having law school legal clinics provide representation in the area of school discipline, these clinics will be able to serve children who would otherwise not have counsel at these critical proceedings.<sup>161</sup> While legal clinics will not fix

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<sup>155</sup> *Mandatory 50-Hour Pro Bono Requirement*, THE N.Y. STATE BD. OF LAW EXAM’RS, <http://www.nybarexam.org/MPB.html> (last visited Feb. 9, 2015).

<sup>156</sup> See ST. BAR OF CAL. TASK FORCE ON ADMISSIONS REG. REFORM, *supra* note 149, at 2.

<sup>157</sup> As of June 2014, there were approximately forty-one schools that had a pro bono requirement prior to graduation. *Directory of Law School Public Interest and Pro Bono Programs*, AM. BAR ASS’N, [http://apps.americanbar.org/legalservices/probono/lawschools/pb\\_programs\\_chart.html](http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html) (last visited Feb. 11, 2015).

<sup>158</sup> See, e.g., *supra* note 11.

<sup>159</sup> This is according to the most recent statistics from the U.S. Department of Education. The Department does not define what is to be included in suspension versus expulsion, only that it is an out-of-school suspension as opposed to an in-school suspension. See U.S. DEP’T EDUC. OFF. FOR C.R., *supra* note 96. In the absence of a definition of what is to count as suspension versus expulsion, the number of suspensions may include long-term suspensions and short-term suspensions.

<sup>160</sup> See LOSEN, *supra* note 142.

<sup>161</sup> When thinking about adding any new program, law schools will undoubtedly be concerned about the cost. Although discipline cases are litigation-based, they are not nearly as costly as most litigation based clinics. Aside from minimal office supplies and the salary of a clinical professor or supervising attorney, there are few, if any, additional costs. On rare occasion, one might use an expert witness. And in some instances, a case may need to be appealed. Since its inception, the Children’s Rights Clinic has handled approximately seventy-five discipline cases and fifteen appeals. Of those appeals, only one case was appealed to a state court. The other appeals were handled by the Los Angeles County Board of Education. In the appeals to the Board



the problems inherent in school discipline or be able to serve every child in need of representation, they will be able to create a generation of lawyers that can take these cases and will help fill the gap until hopefully there is a greater shift in the education culture. By providing representation in the area of school discipline, these clinics will further the social justice mission of clinical education and help fulfill any bar or law school requirements to engage in pro bono work.

#### CONCLUSION

While the importance of education has been touted by the courts and the legislature, children across the United States are excluded from school under the pretense that they have been afforded due process. Yet, without counsel, students face insurmountable hurdles to challenge the charges levied against them. The natural question is whether students should be appointed counsel when there is so much at stake in school discipline proceedings. Given the high value society places on education, it is somewhat surprising that education has not been included in the conversation on establishing a civil right to counsel. Even if it were to be included in the conversation, courts are unlikely to find a right to counsel using the *Mathews* analysis as there is not always an imminent deprivation of physical liberty in education cases like there is in the majority of criminal cases. The legislature does not seem poised at this time to enact laws to establish a right to counsel for education cases despite the poor outcomes that face those students who are excluded from school. Students, however, still need to have their rights protected when facing school exclusion. The Court, in a seminal case regarding children, noted that a child needs “the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain where he has a defense and to prepare and submit it.”<sup>162</sup> In the absence of appointed counsel, pro bono lawyers, volunteer law students, and law school legal clinics should represent more children in school discipline proceedings to ensure that they have a chance for a successful future even if the child has had a misstep along the way.

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of Education, there were no additional costs.

<sup>162</sup> *In re Gault*, 387 U.S. 1, 36 (1967).