Beyond Actual Bias: A Fuller Approach to an Impartiality in School Exclusion Cases

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“Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”

-Justice Hugo W. Black

I. INTRODUCTION

Arthur Newsome, a sixteen-year old junior, was accused of selling marijuana cigarettes on the grounds of his Ohio high school. When the school principal confronted him, Newsome denied the accusations, asking the principal on what grounds he was being accused. The principal explained to Newsome that two students had informed the principal of Newsome’s conduct, and refused to identify the students by name. Three days later, the Batavia High School notified Newsome and his family that he would be suspended for ten days.

Eight days after Newsome was notified of his suspension, Newsome and his mother were present at the initial hearing. The superintendent of Newsome’s school district presided and heard testimony from the principal about the interviews with Newsome’s unnamed accusers. The principal testified about his investigation of the matter in support of his decision to suspend Newsome. Newsome’s juvenile court officer also testified, recommending that Newsome be immediately placed back in school because a urinalysis had tested negative for drug use. At the conclusion of the hearing, the superintendent and the principal retreated together to deliberate in a private session, from which Newsome and his mother were excluded, to “discuss the disposition of the case.”

Later that day, the superintendent informed Newsome and his mother of the final decision: Newsome would be granted a clean disciplinary record upon his acceptance of transfer to a local alternative disciplinary school. Should Newsome refuse, he would be expelled—a much stronger penalty than the original ten-day suspension that he was appealing. When Newsome refused to
take the superintendent’s proffer, he was expelled for the remainder of the fall term.12 Newsome appealed for a second hearing before the local board of education.13

At Newsome’s second hearing before the board, the principal and school superintendent acted as adverse parties in testifying against Newsome.14 Both advocated in support of the decision the superintendent had made at the initial hearing with input from the principal’s investigation of the matter.15 Newsome’s attorney, who was also present at the board’s hearing, requested permission to cross-examine the principal and superintendent.16 This request was denied.17

At the conclusion of this hearing, the school board deliberated in an executive session, a private meeting from which members of the public are excluded.18 No parties from Newsome’s side of the case were permitted to participate in the executive session.19 Though adverse parties, and not adjudicators, the principal and superintendent were permitted to join in the school board session while the board deliberated about the evidence presented at the hearing.20 Agreeing with the principal and superintendent’s findings below, the board affirmed the expulsion, holding that Newsome was not permitted back at Batavia High School until late January of the following year.21

The progression of Arthur Newsome’s case through various levels of the student disciplinary process illustrates how the composition of a disciplinary tribunal can have profound impacts on the outcome of that student’s case. The facts in Newsome’s case present some major concerns regarding the impartiality of those adjudicating his hearings, especially when Newsome’s situation is analogized to a traditional criminal courtroom setting. At the superintendent’s hearing,

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12 Newsome, 842 F.2d at 921.
13 Id.
14 Id. at 922.
15 Id. at 921-22.
16 Id.
17 The school board’s denial of Newsome’s right to confront and cross-examine the students who testified against him was upheld by the Circuit Court. Id. at 926. Though beyond the scope of this article, the inability to cross-examine students and administrators testifying against the student facing school exclusion raises its own due process issues. See Derek W. Black, The Constitutional Limit of Zero Tolerance in Schools, 99 Minn. L. Rev. 823, 879 (2015); see generally Brent M. Pattison, Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings, 18 Temp. Pol. & Civ. RTS. L. Rev. 49 (2008). Courts are divided on whether confrontation and cross-examination are constitutionally required at school discipline hearings. See also Carey v. Maine Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 919-20 (D. Maine 1990) (confrontation and cross-examination of witnesses not required where student admitted to the misconduct of which he was accused); B.S. ex rel. Schneider v. Bd. of Sch. Trustees, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003) (student expelled for on-campus sex not entitled to call as witness alleged partner); John A. v. San Bernardino Unified Sch. Dist., 654 P.2d 242, 251 (Cal. 1982) (finding a due process violation where a student was expelled without testimony from accusing witnesses); Stone v. Prosser Consol. Sch. Dist. No. 116, 971 P.2d 125, 128 (Wash. Ct. App. 1999) (finding a violation of due process where a student was kept from calling a witness at his disciplinary hearing); Colquitt v. Rich Twp. High Sch. Dist. No. 227, 699 N.E.2d 1109, 1116 (Ill. App. Ct. 1998) (cross-examination of witnesses allowed in school discipline hearing because it is fundamental element of a fair hearing).
19 Newsome, 842 F.2d at 922.
20 Id. Newsome prevailed on one issue, which was raised by the superintendent’s presence at the school board’s deliberations. Specifically, the superintendent disclosed new evidence to the board during the deliberations that was not presented at the hearing itself. The court found this violated Newsome’s due process right to notice of the charges and evidence against him. However, as has been cogently pointed out, this served as a “narrow victory” in light of the impartiality Newsome was shown throughout the school’s disciplinary procedures. See Black, supra note 17, at 856.
21 Newsome, 842 F.2d at 922.
the principal’s involvement with the superintendent—not only during the hearing but also during private, closed deliberations—is akin to a prosecutor presenting his case before the judge, then immediately joining the judge in chambers for an ex parte review of the hearing and evidence. The same conduct occurred at Newsome’s second hearing on his appeal before the school board, except that the decision-maker who presided over Newsome’s first hearing joined Newsome’s adversary (the principal) in advising the school board and reviewing the evidence in the case. In the judicial context, such activity would translate to a prosecutor and trial court judge joining a panel of appeals judges in their deliberations and advising those judges on how to make a determination on the facts and the evidence presented. Such conduct would be simply unacceptable in judicial contexts.

Newsome raised multiple issues in his appeal to the Sixth Circuit, the most prominent of which asserted a procedural due process violation due to the lack of an impartial tribunal. While conceding that “participation by the investigating administrators in the deliberation process of the fact-finders is an open invitation for the administrators to bring up evidence of the student’s guilt which had not been disclosed to the student as required by Goss,” the court found no violation from such participation.

Cases like Newsome’s are not uncommon, and the stakes are high for students in Newsome’s position. The consequences of long-term discipline may include total exclusion from school, long-term or permanent assignment to an alternative education program, and, according to studies, a much greater risk of ending up in the juvenile and criminal justice systems. Unfortunately, the law in this area is largely inadequate to provide students facing disciplinary charges with the appropriate level of procedural due process.

This Note seeks to address the deprivation of due process that occurs when a student’s disciplinary hearing is adjudicated by a tribunal whose impartiality is questionable. In so doing, this Note points to the inadequacy of the majority approach among lower courts, which requires a finding of actual bias in its determination of whether a disciplinary tribunal was impartial, thereby adopting a thin view of what constitutes an impartial tribunal consistent with minimal due process. This Note also presents a brief survey of disciplinary hearing practices among the states to show how most state legislation codes have failed to provide substantial, or “thick,” impartiality protections to prevent bias, much like the avenue the majority of federal courts have taken. Along

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22 Newsome, 842 F.2d at 926.
23 These include the denial of his right to cross-examine witnesses, the denial of his right to an impartial tribunal, and a denial of notice arising out of the tribunal’s consideration of evidence not made known to him. Id.
24 See Id.
25 Id. at 926–27 (“[W]e cannot say that, as a general matter, it is a violation of due process for investigating administrators to participate in the deliberation process”) (citing Goss v. Lopez, 419 U.S. 565 (1975)).
26 See infra Part II.A.
27 This Note refers to “long-term discipline” to denote any suspension lasting more than ten days, expulsion, and/or other removal from mainstream public education. At the outset, it is important to note that disciplinary due process procedures for students not receiving special education differ substantially from due process provided for special education students under federal civil rights statutes. See, e.g., Kristy A. Mount, Note, Children’s Mental Health Disabilities and Discipline: Protecting Children’s Rights While Maintaining Safe Schools, 3 BARRY L. REV. 103 (2002).
28 See infra Part II.A.
29 This note utilizes the phrases “thick” and “thin” impartiality protections in an effort to both avoid the vague and oft-used “substantial” and “insubstantial” terminology and to offer a more visually demonstrative lexicon for the due process protections the author proposes. In doing so, the author borrows from E. Thomas Sullivan and Toni M. Massaro, who coined this terminology in the due process context. See E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 5 (2003) (Borrowing terminology, it can be useful to
the way, this Note points to some laudable federal court opinions and state legislative provisions that provide thicker impartiality protections of the kind this Note proposes.

Finally, this Note presents a new approach that comports more fully with due process to provide thicker impartiality protections. That approach argues that constitutional due process requires students facing long-term discipline be provided a hearing officer free from the appearance of bias, consistent with Goss’ proscription that students be given “fundamentally fair” procedures. Such a requirement would replace the actual bias standard adopted by most lower courts. Instead, the approach this Note proposes would require the disqualification of an individual from acting as decision-maker in a student’s disciplinary tribunal whose neutrality may be questioned because of the individual’s role in the student’s case or because of influence of others involved in the student’s case. In support, this Note presents actual legislation as normative models drawn from states that have thick impartiality protections, along with suggested model provisions for a reformed education code.

II. THE PROBLEM

Cases like Arthur Newsome’s illustrate the difficulties faced by students, families, school districts, and the attorneys representing them in achieving a fair and impartial tribunal consistent with due process. This Part seeks to illustrate those difficulties in forging a path to a thicker view of impartiality by first addressing the rising level of adversarial practices in the school discipline context, a level that may be at full tide because of its resemblance to litigation rather than the benign system of cooperative family-administration relationships envisioned by professionals, judges, and justices of an earlier era, including at least one who decided Goss. Second, this Part attempts to resolve the question of why thick impartiality protections are necessary by demonstrating the high stakes of school exclusion in the well-researched phenomenon of the school-to-prison pipeline. Third, this Part surveys the lack of uniformity that has led to thin impartiality safeguards by surveying trends that state legislatures and local districts have taken. Finally, this Part discusses how the Supreme Court’s ground floor case for due process, Goss does not address the thick impartiality protections due process requires for students facing long-term discipline except for the simple requirement that procedures be “fundamentally fair.”

A. The Adversarial School Discipline Landscape

First, similar to the judicial context, the modern school discipline landscape has become, at its heart, adversarial. Though Goss may have imagined an educational atmosphere of benign
give-and-take between administrators and students, severe discipline, such as lengthier suspensions and lower tolerance for expulsion, has been on the rise for a number of years. According to the U.S. Department of Education, 3.5 million students are suspended in the U.S. per year. Suspension rates have doubled since the 1970s when Goss was decided. As one congressman put it, a fight in the schoolyard that at one time would have warranted a visit to the principal’s office, may now lead to exclusion from school and possibly referral to the juvenile justice system. The use of police, security cameras, and criminal justice methods has contributed to the increase in adversarial posturing in school discipline controversies. A possible explanation for the rise in school discipline occurrences is the trend toward zero tolerance policies—disciplinary provisions that mandate substantial consequences for a varying degree of behavior. The vagueness of disciplinary offenses in such policies afford administrators wide discretion, creating a space for potential racial animus to thrive undetected.

B. The High Stakes of School Exclusion

“The significance of suspension and expulsion has . . . grown to the point where they are more appropriately understood as educational death penalties than as corrective or management tools.” Research shows that the stakes are high for students facing long-term suspension or expulsion, suggesting that the balancing scheme used by the federal courts starts out from an

Best, Note, Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education, 99 Geo. L. J. 1671, 1676 (2011) (school suspensions have nearly doubled since the 1970s and trends show the increasing use of criminal justice tactics in addressing disciplinary issues); see generally Dean Hill Rivkin, Legal Advocacy and Education Reform: Litigating School Exclusion, 75 Tenn. L. Rev. 265 (2008).

35 See Black, supra note 17, at 845 (Goss implicitly assumed a benign relationship between administrators and students); Larry Bartlett & James McCullagh, Exclusion from the Education Process in the Public Schools: What Process is Now Due, 1993 B.Y.U. Educ. & L. J. 1, 24 (1993) (“the Court appears to presume . . . that school disciplinarians will proceed in good faith”).


38 See Best, supra note 34, at 1676.


43 See Black, supra note 17, at 833.
inaccurate calculation of the risk of an erroneous deprivation for the student. The commentary is abundant and persistent on the consequences of exclusionary discipline—both suspension and expulsion—on students’ later lives, a phenomenon commonly referred to as the “school-to-prison pipeline.” The overall body of research on the phenomenon has cogently shown that students excluded from school are more likely to become delinquent, to drop out, and to become involved with the criminal justice system as incarcerated offenders.

For example, according to a leading study, students who were suspended were twice as likely to be held back and three times as likely to be involved in the juvenile justice system later in life. Studies also show that students suspended in middle school are particularly subject to negative long-term consequences. For instance, in one large, Northeastern city, two-thirds of incarcerated ninth-graders had been suspended at least once in the eighth grade. The group had only attended school—voluntarily or involuntarily (that is, subject to suspension or expulsion)—58% of the time on average. While a full review of the extensive research connecting school exclusion to juvenile delinquency and incarceration is beyond the scope of this Note, the connection points to what is at stake for a student in a school disciplinary hearing, and thus, lends gravity to the consequences of disciplinary tribunal hearings.

Students facing long-term suspension or expulsion after being found guilty are often assigned to alternative schools as a preference to total exclusion. Though assignment to an alternative education program may at first seem like a more attractive approach for student placement than complete removal from the educational setting, there is reason to be concerned about the educational quality of many alternative education programs. At least some research has indicated that alternative schools contribute to—rather than mitigate—the school-to-prison pipeline phenomenon. In 2009, a privately run alternative school in Georgia settled with the ACLU over claims that its practices deprived students of the fundamental right to basic public

44 See, e.g., C.B. by & Through Breeding v. Driscoll, 82 F.3d 383 (11th Cir. 1996).
45 See Christine A. Christle, et. al., Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency, 13 EXCEPTIONALITY 69, 70 (2010), available at http://youthjusticenc.org/download/education-justice/prevention-intervention-alternatives/Breaking%20the%20School%20to%20Prison%20Pipeline%20Identifying%20School%20Risk%20and %20Protective%20Factors%20for%20Youth%20Delinquency.pdf (exclusionary discipline practices such as suspension and expulsion have been identified by research as key risk factors in juvenile delinquency and antisocial behavior, which are the end result of the school to prison pipeline); see generally Best, supra note 34.
46 See Christle, supra note 45, at 70 ("[e]xclusionary discipline practices, such as suspension, interfere with the educational process and perpetuate a failure cycle, decreasing the opportunities to gain academic skills and appropriate social behaviors").
47 See School to Prison Pipeline, supra note 39, at 2.
48 See Urban Middle Schools, supra note 41, at 3.
49 Id.
52 See AUGUSTINA H. REYES, DISCIPLINARY ALTERNATIVE EDUCATION PROGRAMS IN DISCIPLINE, ACHIEVEMENT, AND RACE: IS ZERO-TOLERANCE THE ANSWER?, 47–69 (2006) (many alternative schools operate with a law and order approach that does not serve as a true alternative to the education provided in public schools from which alternative school students have been removed); see generally Alternative Schools and Pushout: Research and Advocacy Guide, NESRI (2007), https://www.nesri.org/sites/default/files/%20DSC_Alternative_Schools_GuideFinalSmall.pdf.
education guaranteed by the state’s constitution. Finally, alternative schools may be subject to fewer accountability requirements than ordinary public schools, which would lend less public scrutiny to the question of whether they are providing an appropriate public education.

Whether the consequence of a disciplinary hearing involves reassignment to an alternative educational placement or outright removal from the school system, the stakes for a student facing disciplinary charges at a hearing are very high. The gravity of these consequences undercuts the argument that disciplinary tribunals do not require the “trial-type procedures” of a criminal courtroom. As discussed above, research supports the notion that the potential consequences for a student facing disciplinary charges can be the loss of a basic education and dramatically increased chances of both delinquency and incarceration.

C. The Lack of Uniformity and Thin Impartiality Protections in State Legislatures

Education is inherently a function of the individual states. Each state legislature sets its own due process for discipline, unlike due process hearings regarding special education, which are set by federal legislation. Because the Supreme Court has not specified due process requirements for long-term suspensions or expulsions beyond the “some kind of hearing” language in Goss, states vary widely with how charges involving long-term suspension and expulsion are adjudicated. This Section presents an overview of some trends state legislatures have taken in addressing the question of who should constitute a student’s disciplinary tribunal or hearing officer, a choice that indicates the state’s own interpretation of the level of impartiality due to students facing long-term discipline.

As a preliminary matter, this Section first presents the typical models for the investigation of a disciplinary matter and the subsequent imposition of charges. A discussion of the more determinative question of who is allowed to adjudicate and be present at disciplinary tribunals follows. It is beyond the scope of this Note to look into the constitutionality of every state


54 Evidence for lesser accountability requirements for alternative schools is their lack of requirement to meet or report Adequate Yearly Progress under No Child Left Behind legislation. See Deborah Gordon Klehr, Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students, 16 GEO. J. ON POVERTY L. & POL’Y 585, 595-96 (2010) (noting that relaxed accountability measures make it “hard for the public to decipher the educational achievements of students in alternative education programs”).

55 Jennings v. Wentzville R-IV Sch. Dist., 397 F.3d 1118, 1124 (8th Cir. 2005).

56 See Christine, supra note 45; Losen & Martinez, supra note 36; U.S. Dep’t of Educ., supra note 37; Best, supra note 34.

57 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (Education is a state’s most important function); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (“By and large, public education in our nation is committed to the control of state and local authorities.”).


60 At this juncture it may be helpful to point out that where an individual is present during a disciplinary tribunal who is not a member of the tribunal, the question becomes one of ex parte communications. In other words, what if any ex parte communications should thick impartiality protections afford? This issue arises frequently with differing treatment by the lower courts. Compare Newsome, 842 F.2d at 926 (presence of principal and superintendent at closed, post-hearing deliberations of disciplinary panel did not violate due process) with Gonzales v. McEuen, 435 F. Supp.
education code, though helpful resources for such an endeavor certainly exist. Instead, this Section’s limited goal is to identify the variety of trends taken by various states with regard to individuals permitted to adjudicate student disciplinary tribunals in order to determine the kinds of procedural practices various states permit, regulate, and limit. Finally, this Section normatively evaluates the variety of trends, concluding that most practices do not fully comport with the thick impartiality protections this Note proposes.

i. Investigation and Imposition of Charges

In most states, an administrator at the building where the misconduct is alleged to have occurred serves as an initial investigator of a student’s discipline charges. The common-sense reasoning behind this method is that the possession of institutional knowledge by the administrator will presumably allow her to gather facts most efficiently. The administrator is typically physically present in the building on a daily basis, and he or she has familiarity with the students and teachers involved in disciplinary incidents. Just as a detective might be detailed to a certain precinct for investigating crimes occurring there over a period of time, it seems to make sense that a building-level administrator will handle the function of disciplinary investigations because he or she is institutionally well-equipped to do so. A further advantage to the general trend in allowing building-level administrators to conduct disciplinary investigations is that it prevents higher-level administrators, such as the superintendent or her staff, from being involved in the minutiae of potentially insignificant or petty disciplinary matters.

In states that allow or require a superintendent to adjudicate initial discipline hearings, limiting a superintendent’s involvement in early fact-finding matters mitigates the concern that the individual conducting the hearing is serving dual roles or is being affected by bias that may have arisen during factual investigations. However, beneficial the practice of allowing building-level administrators to maintain an investigative function may be, the practice is mainly a function of convenience, and not a matter of legislative proscription. Based on the author’s review, no state

460, 465 (1977) (presence of superintendent and school board attorney at closed deliberations was a due process violation).


62 Here, “administrator” is a catch-all term used to designate any professional educator working in a public school district who is not a teacher. Administrators act as supervisors to teachers and handle disciplinary matters often referred to them by teachers. See Daniel B. Abrahams, et. al. Sample Job Classification Specifications, Public Employers Guide to FLSA Employment Classifications ¶ 900, 903 (2015).

63 A building-level administrator would include a principal, vice principal, counselor, or other administrative staff who handles disciplinary matters within one particular school. See e.g., Graham v. Knutzen, 351 F. Supp. 642, 666 (D. Neb. 1972) (“It is clear that usually the building principals conduct their own investigation, and in nearly all cases, end up with a confrontation of the student.”); Jones v. State Bd. of Educ., 279 F. Supp. 190, 200 (M.D. Tenn. 1968) (“[i]t is of course the duty of a school administration to be aware of developments at the school and to attempt to solve problems as they arise”); see generally Five Key Responsibilities – The School Principal as Leader: Guiding Schools to Better Teaching and Learning, THE WALLACE FOUND., http://www.wallacefoundation.org/knowledge-center/school-leadership/effective-principal-leadership/Pages/key-responsibilities-the-school-principal-as-leader.aspx.

64 See source cited supra note 63.

legislature affirmatively limits the ability of a superintendent to be involved in the investigative functions of discipline cases should he or she choose to do so.

Most state legislatures specify in their education codes which school official is responsible for imposing the charges entailing long-term discipline upon the conclusion of an investigation. At one extreme are the states that allow long-term suspension and expulsion proceedings to be initiated by building-level administrators, such as the principal.66 State legislatures that reserve the power of assigning long-term suspension or expulsion to the local school board or an external governing body, such as a state education agency, are at the other end of the extreme.67 However, some states opt to allow the superintendent to initiate long-term suspension or expulsions before a later board hearing.68 The determination of which administrator orders or recommends the initial long-term disciplinary consequence is beyond the scope of this Note. However, in jurisdictions where that administrator is also the adjudicator in the students’ cases, this initial question has ramifications for the level of impartiality the student might receive.

The two extremes with regard to initiation of discipline proceedings can be seen by contrasting legislatures. Consider, for example, Ohio’s requirement that the superintendent, not a building-level administrator, initiate expulsion proceedings.69 Ohio permits superintendents to adjudicate expulsion hearings.70 Though the superintendent’s decision may be appealed to the school board, this appeal may not be as much of a neutral escape hatch for the condemned student as it first appears, since the superintendent was likely hired directly by the board and works closely with its members on administrative matters. Under such circumstances, a superintendent might be conceivably analogized as simultaneously occupying the roles of prosecutor as she investigates and initiates proceedings, trial court judge as she adjudicates at the initial hearing. In addition, in her ability to sway the board’s decision because of her close working relationship with those individuals, she may be analogized to the role of an appellate law clerk as she influences the board’s decisional process. Notably, none of the Ohio education code’s regulations restrict such ex parte interactions.71

All state codes proscribe the “some kind of hearing” required by Goss.72 However, states’ laws on who is eligible to be an adjudicator of that hearing vary widely. Following is a brief discussion of the typical multiple-hearing practice that most school districts employ. The Note then turns to a review of a broad grouping of state codes that have adopted similar practices with regard to the adjudication of disciplinary hearings.

ii. Adjudication of Charges and the Multiple Hearing Model

Before surveying the variety state disciplinary hearing practices taken by legislatures, it is helpful to gain a high-level institutional understanding of the skeletal discipline procedure

70 Id. § 3301.
72 See Goss, 419 U.S. at 579.
employed by many states when a student is faced with charges entailing severe discipline.\textsuperscript{73} This procedure involves multiple hearings, with differing degrees of formality, for students who face long-term suspension or expulsion.\textsuperscript{74} At the first “hearing,” the student and his or her parent will typically meet with the administrator who has investigated the disciplinary infraction, such as the principal or another building-level official.\textsuperscript{75} In some cases, the superintendent may be present at this meeting, and sometimes the superintendent is the sole school official present. Though legislatures often refer to this initial meeting as a “conference” rather than a “hearing,” the meeting operates as a hearing in most cases, since the decision of whether to suspend or expel is made upon its conclusion.\textsuperscript{76}

States vary widely in practices, but the overall trend is to allow a second, more formal hearing after the initial conference. This is especially common in cases carrying expulsion consequences.\textsuperscript{77} Though most legislatures provide for a second level of this formal hearing, that level may take the form of a second fact-finding hearing during which new evidence may be presented.\textsuperscript{78} However, another widely held practice is limiting the second level of review to an appeal before the county board of education, an impartial hearing officer, or an administrative panel.\textsuperscript{79}

Beyond the initial conference and hearings, many states allow for judicial inquiry, often by the county trial court.\textsuperscript{80} In such cases, a trial court’s review is almost always highly deferential to the findings and decisions already made by the school.\textsuperscript{81} States that allow review of an independent

\textsuperscript{73} Not all states follow this multiple-hearing practice. Some state education codes may only proscribe one level of formalized hearing, though one might safely assume that some kind of conference-style meeting has taken place before the formalized hearing. See e.g. CAL. EDUC. CODE § 48918(a)(3) (2016) (providing for only one hearing directly before local board).

\textsuperscript{74} See, e.g., Newsome, 842 F.2d at 148 for a general outline of the typical multiple-hearing process, from an informal hearing before an administrator overseeing the student’s particular school involving only the student and his parents, to a more formal hearing before the superintendent where the student’s counsel was present, to a final evidentiary hearing before the school board, serving as an appeal of the lower hearings. Notably, even at this last hearing, student’s counsel was not permitted to cross-examine administrator-witnesses.

\textsuperscript{75} See, e.g., Dietzweiler v. Lucas, 827 F.3d 622, 627-28 (11th Cir. 2016) (per curiam) (finding that due process required, at a minimum, the “opportunity to be heard,” which was satisfied by a meeting with the student and his parents at which an administrator explained the charges and supporting evidence).

\textsuperscript{76} See, e.g., Goss, 419 U.S. at 570.

\textsuperscript{77} See, e.g., Newsome, 842 F.2d at 921; D.C. MUN. REGS. tit. 5-B § 2505(3).

\textsuperscript{78} See D.C. MUN. REGS. tit. 5-B, § 2506.6 (2017) (“The parent or guardian or adult student shall have the opportunity to present testimony or documentary evidence, including the opportunity to call any witnesses[,]”).

\textsuperscript{79} CAL. EDUC. CODE § 48919 (2016) (County board of education, in reviewing the school board’s decision based on a fact-finding hearing, may elect to conduct a supplemental hearing or simply limit its review to an appeal of the record below). In such cases, this review is often highly deferential to the findings below. See, e.g., Lee v. Macon Cnty. Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974) (holding that Georgia Board of Education will only overturn a school district’s expulsion decision if it finds a “shocking disparity between the offense and penalty”). Elsewhere, Georgia’s Department of Education standard for review of local board decisions is described as an arbitrary and capricious standard. See Ransom v. Chattooga Cnty. Bd. of Educ., 242 S.E.2d 374, 376 (Ga. Ct. App. 1978).

\textsuperscript{80} See, e.g., COLO. REV. STAT. § 22-33-108(2) (2013).

\textsuperscript{81} See Newsome, 842 F.2d at 149 (conceding a trial court’s “temptation to act as a ‘super’ Board of Education and make the decision that the Court deems appropriate,” in contravention of the reviewing court’s responsibility to show high deference to the decision of the institution below) (citing Bell v. Wolfish, 443 U.S. 816 (1979)); Nichols v. Destrado, 70 P.3d 505, 507 (Colo. Ct. App. 2002) (“The district court has the authority to review an action of a board of education for an abuse of discretion.”); Alicia C. Inslay, \textit{Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies}, 50 AM. U. L. REV. 1039, 1052 (2001) (courts are highly deferential to the determinations made by local districts).
administrative entity may also provide for an appeal in the county trial court, thereby increasing the level of review independent of those working in the school district.\textsuperscript{82}

iii. Permitted Decision-Makers at Disciplinary Hearings

Some legislatures have reverted to a \textit{laissez-faire} approach, delegating the development of discipline procedures to local boards of education, so long as they are consistent with state and federal constitutions.\textsuperscript{83} In the adjudication realm, this practice permits local boards of education to make their own decisions with regard to who hears a student’s disciplinary case. Other states delegate all practices to state-level departments of education to establish skeleton regulations, upon which local boards may develop constitutionally appropriate procedures.\textsuperscript{84}

Many states allow administrators to preside as adjudicators at discipline hearings. The permitted administrators may be lower level staff, such as principals, or district-level employees, like a superintendent.\textsuperscript{85} In states permitting administrators to impose long-term discipline, this practice is functionally consistent with the Fifth Circuit’s interpretation of impartiality because it permits those who impose or recommend the discipline to preside over the decisions they made. Though some legislatures do so by specific provision, other legislatures simply delegate all hearing procedures to local districts, requiring only that procedures comply with state and federal constitutional due process.\textsuperscript{86} In such cases, it would be permissible, and likely convenient, for a local board to delegate the hearing process to a superintendent, but that decision would lie with the board. Other states provide specifically for district-level staff, such as superintendents or their designees, to adjudicate disciplinary hearings.\textsuperscript{87} In such cases, a common practice is to allow the superintendent to preside at a due process hearing to establish a factual record, after which one or more appellate bodies will preside.\textsuperscript{88}

In states that afford the student a hearing before the local board, the superintendent’s hearing often precedes the board’s hearing.\textsuperscript{89} In other states, such as Colorado, the local board is permitted to delegate its requirement to conduct a hearing to the superintendent subject to a final, limited review with deference to the factual record developed at the superintendent’s hearing and an opportunity for the board to ask questions of the student and other hearing participants.\textsuperscript{90}

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\textsuperscript{83} \textsc{Ala. Code} § 16-1-24.1(f)(e)(1) (2016); \textsc{Alaska Admin. Code tit. 4, § 07.010} (2016).
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\textsuperscript{84} \textsc{Ark. Code Ann.} § 6-18-502 (2013).
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\textsuperscript{85} See, e.g., \textsc{Ohio Rev. Code Ann.} § 3313.66(A)(2), (B)(6)(b) (allowing administrator to preside over informal hearings prior to a student’s suspension or expulsion).
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\textsuperscript{86} See \textsc{Ala. Code} § 16-1-24.1(f)(3) (2016); \textsc{Alaska Admin. Code tit. 4} § 07.010 (2016); \textsc{Del. Code Ann. tit. 14, § 701(d)} (1953).
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\textsuperscript{87} See \textsc{Ohio Rev. Code Ann.} § 3301.121(D) (2016).
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\textsuperscript{89} The discipline procedure Ohio afforded Newsome is an example of this practice. \textit{See supra} Part I.
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\textsuperscript{90} See \textsc{Colo. Rev. Stat.} § 22-33-105(2)(c) (2013). Delaware allows the superintendent to hear the initial case to establish a factual record, after which appeal is allowed to the state board of education, rather than the local board. \textit{See Rucker,} 517 A.2d at 705 (holding that “there is no fundamental due process right to a hearing officer who is not an employee of the school district”).
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many instances, the superintendent’s hearing is the only fact-finding hearing, and the board’s review of that hearing will be limited to the factual record developed there.\textsuperscript{91}

Some states expressly provide for a hearing before the local board of education.\textsuperscript{92} Within this practice, some provide for an initial hearing before an administrator as detailed above, while others do not proscribe an initial hearing, providing instead for students faced with long-term discipline to present their cases directly to the board.\textsuperscript{93} In states where the only proscribed hearing is before the local board, the administrator is thereby prevented from serving in any adjudicatory role.\textsuperscript{94} After such a hearing, the local board is generally permitted to conduct private deliberations from which any non-board members are excluded,\textsuperscript{95} though this meeting may be open to administrators or the district’s attorney.\textsuperscript{96} Some states allow a student to object to closed deliberations, forcing the session to be conducted in the student’s presence.\textsuperscript{97} This practice may be limited by the privacy rights of other students protected by a state’s privacy laws.\textsuperscript{98} Some states give local boards or superintendents the option of delegating the hearing procedures to independent hearing officials who are not employees of the district or members of the local board. In these jurisdictions, the delegation of conducting the hearing is not an affirmative requirement.\textsuperscript{99} Rather, the school board may elect to delegate, but is not affirmatively required to do so.\textsuperscript{100}

In states where delegation of the formalized fact-finding hearing to independent hearing officers is permitted, some mandate impartiality requirements on those hearing officers. For example, Ohio provides that hearing officers may be licensed attorneys, but that no hearing officer serving as a board’s advising attorney may be appointed by that board to hear a case within that district.\textsuperscript{101} Connecticut’s education code provides that no member of the local board may serve on the impartial hearing panel.\textsuperscript{102} Similarly, California requires that, where larger counties utilize administrative hearing panels in lieu of the county board of education, those panels must be made up of individuals who hold a California education certification but are not board members or employees of the local school district seeking the disciplinary action.\textsuperscript{103} Arizona is one of a collection of states that employs a list of state-approved hearing officers available for local districts to utilize in discipline hearings,\textsuperscript{104} while California permits school districts to draw from a pool of

\textsuperscript{91} See COLO. REV. STAT. § 22-33-105(2)(c) (2013).
\textsuperscript{92} See 105 ILL. COMP. STAT. 5/10-22.6(b) (1988); ARK. CODE ANN. § 6-18-507(d)(1) (2013) (providing for local board’s review of superintendent’s recommendation for long-term discipline).
\textsuperscript{93} See 105 ILL. COMP. STAT. 5/10-22.6(b) (1988).
\textsuperscript{94} ARIZ. REV. STAT. ANN. § 15-843(i)–(j) (2013).
\textsuperscript{96} See Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 263–64 (5th Cir. 1985) (no due process violation where principal, superintendent, and school board attorney were present at closed-session, post-hearing deliberations).
\textsuperscript{97} CAL. EDUC. CODE § 35146 (2016).
\textsuperscript{98} Id.
\textsuperscript{99} See ARIZ. REV. STAT. ANN. § 15-843(F)(2)(a)–(b) (2013); CAL. EDUC. CODE § 48918(d) (2016); CONN. GEN. STAT. § 10-233d(b) (2015).
\textsuperscript{100} Id.
\textsuperscript{101} OHIO REV. CODE ANN. § 3301.121(D)(2) (2016).
\textsuperscript{102} CONN. GEN. STAT. § 10-233d(b) (2015).
\textsuperscript{103} CAL. EDUC. CODE § 48919.5(a) (2016) (requiring that “an impartial administrative panel” be composed of “three or more certificated persons”); See also John A. v. San Bernardino City Unified Sch. Dist., 654 P.2d 242, 244 (Cal. 1982).
\textsuperscript{104} ARIZ. REV. STAT. ANN. § 15-843(F)(2)(b) (2017).
hearing officers that preside at other state administrative tribunals in order to conduct a student’s expulsion hearing.\textsuperscript{105}

Though some states provide for the option of delegating hearing functions to independent officials, very few require their use.\textsuperscript{106} On the other hand, the District of Columbia’s school system provides for an independent fact-finding hearing using an impartial hearing officer for long-term suspensions or expulsions.\textsuperscript{107} That officer makes a recommendation upon hearing the evidence, which is then recommended to the Director of the District’s Office of Youth Engagement.\textsuperscript{108} An expulsion recommendation by the impartial hearing officer may then be appealed directly to the District’s Chancellor of Education.\textsuperscript{109} Throughout the process, the local school district remains an adversarial party with the burden of proof, and the hearing officer oversees whether due process is complied with.\textsuperscript{110}

Some legislatures require local districts to report long-term suspensions or expulsions to a state entity, such as a state superintendent or department of education.\textsuperscript{111} Such requirements contemplate the severe nature of school exclusion as a discipline because they ensure against districts using the tool at an overly frequent level.\textsuperscript{112}

A handful of states have requirements for how to handle the question of when a suspended or expelled student may be reinstated early, if the student has met conditions for such reinstatement.\textsuperscript{113} Wisconsin, for example, requires an administrator other than one in the student’s school to make the reinstatement evaluation.\textsuperscript{114}

iv. State Procedures in Review

A cursory review of state procedures for long-term discipline reveals that the administration and school board form integral roles in the fact-finding functions imposed by most state legislatures. Though some states separate the administration officials, such as building-level administrators and district-level administrators from the fact-finding and adjudicatory function,\textsuperscript{115} many states retain at least an option for those entities to play an adjudicatory role in the discipline

\textsuperscript{106} See, e.g., CAL. EDUC. CODE § 48918(d); Rossi v. W. Haven Bd. of Educ., 359 F. Supp. 2d 178, 179 (D. Conn. 2005) (“The Board has delegated expulsion decisions to an impartial hearing officer.”).
\textsuperscript{107} D.C. MUN. REGS. tit. 5-B, § 2507.1.
\textsuperscript{108} Id. at § 2507.3.
\textsuperscript{109} Id. at § 2507.9.
\textsuperscript{110} Id. at §§ 2506.7-2506.9.
\textsuperscript{111} See MASS. GEN. LAWS ch. 76 § 16 (2014) (the State Board of Primary and Secondary Schools annually reviews student exclusion days by districts. The code requires that districts who suspend students furnish reasons for the suspensions to the State Board and provides any student unlawfully excluded with a right of action in tort for damages against the board of education).
\textsuperscript{114} Id.
\textsuperscript{115} See, e.g., D.C. MUN. REGS. tit. 5-B § 2505.1 (providing that medium- and long-term suspensions and expulsions may be recommended by the principal, but may only be authorized by the Chancellor’s office); MINN. STAT. § 121A.47, subd. 6 (2017) (limiting the adjudicatory function of a student’s disciplinary hearing to an independent hearing officer, individual school board member, school board committee, or full school board).
case.\textsuperscript{116} While many states allow the option of utilizing impartial hearing officers, these states are mostly silent on the role of the superintendent in the board’s adjudicatory function,\textsuperscript{117} and it is conceivable to envision a high level of advisement and involvement of interested parties, such as district administrators, in the otherwise “impartial” board’s adjudication.\textsuperscript{118} In those states, the impartiality of a given administrator would remain in the hands of the court upon a fact-based inquiry of an administrator’s biased decision-making in the initial discipline process, either in the adjudicatory role, the personal occurrence of discipline, or both.\textsuperscript{119}

Finally, few states have fashioned procedures to separate the functions of adjudication and investigation.\textsuperscript{120} The states that have done so take distinct approaches, but generally require districts to hire state-level hearing officers to adjudicate the facts of a case, with the review of that decision either going back to the local board based solely on the record,\textsuperscript{121} or proceeding to a state-level education administrator.\textsuperscript{122}

Unsurprisingly, in response to the low standard for impartiality adopted by the federal court jurisprudence that will be discussed below, the majority of states do not adequately safeguard impartiality in the disciplinary process.\textsuperscript{123} A few education codes show signs of hope because of their allowance or affirmative requirement of the use of independent hearing officers in long-term discipline cases, but most states leave the question of who adjudicates at disciplinary hearings up to local boards of education. There is a caveat, though, that a local board, and possibly county court, will be available to review an appeal, albeit with high deference to the factual record.\textsuperscript{124} Such practices often leave the trier of fact role to those administrators who have served the discipline recommendation in the first place, which is problematic for the many reasons demonstrated above.\textsuperscript{125} State legislation must be more robust in protecting impartiality and model legislation and existing practices employing thicker protections show that this goal is not unreasonable.

\textsuperscript{116} See e.g., LA. STAT. ANN. § 17:416(A)(3)(c) (2017) (providing for student appeal to hearing before parish superintendent).

\textsuperscript{117} See, e.g., MINN. STAT. § 121A.47, subd. 6; ARIZ. REV. STAT. ANN. § 15-843(F)(2)(a) (2017).

\textsuperscript{118} See, e.g., Gonzales, 435 F. Supp. at 465 (noting the district superintendent’s presence at the school board’s closed deliberations despite not being permitted to serve an adjudicatory role).

\textsuperscript{119} See, e.g., Heyne v. Metro. Nashville Pub. Schs., 655 F.3d 556, 568 (6th Cir. 2011) (finding principal who imposed ten-day suspension was racially biased and thus impartial); Riggen v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 663 (W. D. Tex. 2000) (holding that the building-level administrator’s position as the personal target of a student so biased the administrator that it should have disqualified him from making a suspension recommendation to the board).

\textsuperscript{120} See, e.g., GA. CODE ANN. § 20-2-751.6(b) (2004); HAW. REV. STAT. ANN. § 302A-1134(a) (2014).

\textsuperscript{121} See, e.g., GA. CODE ANN. § 20-2-751.6(b) (2004).

\textsuperscript{122} See, e.g., HAW. REV. STAT. ANN. § 302A-1134(a) (2014).

\textsuperscript{123} See infra Part III.


\textsuperscript{125} See, e.g., J.M. v. Webster Cnty. Bd. of Educ., 534 S.E.2d 50, 58 (W. Va. 2000) (“If the principal does proceed, at this ‘principal’s informal hearing,’ the principal is to make a determination by principal determination as to whether or not the student violated the statute. Thus, the principal becomes the finder of fact at this stage in the process.”) (citing W. VA. CODE § 18A-5-1a(a)) (providing for determination of violation by principal subject to review by county board of education).


D. The Lack of Supreme Court Guidance: Goss’ Sparse Language

Goss represents the starting point of what due process school districts must afford to students facing disciplinary charges.126 This case involved several students facing long-term suspensions arising from various accusations of disruptive conduct at several Ohio junior high and high schools.127 The opinion reviewed a decision issued by a three-judge panel of the U.S. District Court for the Southern District of Ohio, which granted an injunction in the students’ favor and ordered the administrators to expunge the students’ records because they were not afforded due process under the Fourteenth Amendment.128 In reviewing the District Court’s decision, the Court established that students facing removal from school on disciplinary grounds are entitled to due process under the Fourteenth Amendment.129 The Court reached this conclusion by recognizing that the removal of a student from school represents the deprivation of a property right—a severe, rather than de minimis right130—in public education conferred by a state’s constitution and thus protected by the Fourteenth Amendment due process clause.131 In addition, the Court recognized a liberty interest in a student’s right to be free from the stain of misconduct on his or her permanent record.132 Consistent with the constitutional requirement to safeguard these deprivations, Goss held that schools must provide students with “notice and opportunity for hearing appropriate to the nature of the case.”133 The Court briefly defined the required hearing as an “informal give-and-take between student and disciplinarian,” with an “opportunity to present [the student’s] side of the story.”134

Significantly, Goss limited the scope of its holding to short-term discipline, entailing a suspension of ten days or less.135 For discipline entailing longer-term exclusion from school, the Court simply stated that “longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”136 Because of this limitation and the absence of any subsequent Supreme Court decisions directly addressing the issue, the question of

126 Goss, 419 U.S. at 565.
127 Id. at 570-71.
128 Id. at 567.
129 Id. at 572-73.
130 Id. at 576 (Concluding that the nature of education, not the weight of the exclusion, is the primary factor in determining the severity of deprivation: “[T]he total exclusion from the educational process . . . is a serious event in the life of the suspended child”). In determining that the exclusion from education is more than a de minimis deprivation, the Court hearkened to the Brown court’s tenet: “education is perhaps the most important function in state and local government.” Id. (quoting Brown, 347 U.S. at 493).
131 Id. at 572-73 (where a state confers a right of basic public education and makes attendance compulsory, the state may not withdraw that right upon a student’s alleged misconduct without constitutional safeguards to ensure the misconduct occurred) (citing West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624, 637 (1943). The Court compared the right to receiving public education given by a state to other established rights requiring due process, such as the continued right to receive welfare benefits. Goss, 419 U.S. at 573 (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).
132 See Goss, 419 U.S. at 575.
133 Id. at 579 (citing Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950)).
134 Id. at 581, 584.
135 Id. at 584.
136 Id. (emphasis added).
what procedures are required for students facing long-term discipline\textsuperscript{137} remains open.\textsuperscript{138} This vacuum forms a basis for the question this Note seeks to address—namely, what constitutes a fair and impartial tribunal, consistent with “full and fundamental fairness,”\textsuperscript{139} for students facing long-term discipline.\textsuperscript{140} As this Note discusses below, few commentators have addressed the question directly, and lower courts vastly disagree when faced with the issue. Similarly, state legislatures have drafted differing figurations of impartiality into their respective education codes, presenting a widely varying tapestry of state-by-state legislation on the topic.\textsuperscript{141}

III. \textbf{The Inadequacy of Current Solutions}

Lower courts have necessarily formulated solutions to the variety of approaches on what constitutes impartiality, with a majority opting for thin protections.\textsuperscript{142} Additionally, commentators have identified the issue in light of the increasingly adversarial nature of school discipline cases, and those identifications have in some cases led to academic approaches to the impartiality question that focus on best practices.\textsuperscript{143} This Part reviews approaches to impartiality protections

\begin{itemize}
  \item \textsuperscript{137}For ease of language, the phrase “long-term discipline” is used in this Note to indicate disciplinary consequences resulting in a student’s exclusion from school for more than ten days.
  \item \textsuperscript{138}See generally Pattison, supra note 17 (addressing the question of whether students facing long-term discipline are required to confront and cross-examine witnesses); Dolores J. Cooper, \textit{Long-Term Suspensions and Expulsions after Goss}, 57 \textit{EDUC. L. REP.} 29, 30-34 (supporting the notion that c29 (“Courts have continued to define notice and hearing requirements after Goss for long-term suspensions”); Simone Marie Freeman, Note, \textit{Upholding Students’ Due Process Rights: Why Students are in Need of Better Representation at, and Alternatives to, School Suspension Hearings}, 45 \textit{FAM. CT. REV.} 638, 640 (recommending that due process safeguards include entitlement to counsel at discipline tribunals); Rivkin, supra note 34.
  \item \textsuperscript{139}Goss, 419 U.S. at 574.
  \item \textsuperscript{140}Though the Court did not specifically require that hearings be impartial, that requirement is of course imported by the decision’s use of the Fourteenth Amendment due process clause to address the deprivation it held to be significant. \textit{Id.}; Hill v. City of Clovis, 2012 WL 787609, at *8 (E.D. Cal.) (“as expulsion is a significant deprivation, the Fourteenth Amendment due process clause requires \textit{inter alia} that a student receive an impartial adjudicator for expulsion proceedings”); Morrissey v. Brewer, 408 U.S. 471, 485 (1972) (requiring an uninvolved, independent hearing officer for parole revocation hearings to ensure fair and impartial hearing); Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (“the right to an impartial decision-maker is required by due process”); Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (finding that members of an administrative hearing board who possessed a personal interest in the case should be disqualified to ensure impartiality, which is a requisite of due process). Prior Supreme Court due process jurisprudence also emphasizes the long-standing common law requirement of impartiality in ensuring a fair hearing. See, e.g., Arnett, 416 U.S. at 197 (“no man shall be a judge in his own case” (quoted \textit{Bonham’s Case}, 77 ENG. REP. 646, 652 (1610))); \textit{Murchison}, 349 U.S. at 136 (“our system of law has always endeavored to prevent even the probability of unfairness…. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome”); \textit{Goldberg}, 397 U.S. at 271 (requiring an impartial decision-maker for the determination of welfare benefits—namely, an individual who has not made “the determination under review”).
  \item \textsuperscript{141}See Freeman, supra note 138, at 642 (\textit{Goss} has left state legislators to decide what process should be afforded, who have in turn failed to develop adequate procedures or have delegated the development of procedures to local school districts, resulting in widespread due process violations at the local level); \textit{infra} Part III.D.
  \item \textsuperscript{142}See, e.g., \textit{Brewer}, 779 F.2d at 264; \textit{Newsome}, 842 F.2d at 921; \textit{Lamb v. Panhandle Cnty. Unit Sch. Dist.}, 826 F.2d 526, 528 (7th Cir. 1987); \textit{Jennings}, 397 F.3d at 1124; \textit{Hillman v. Elliott}, 436 F. Supp. 812, 817 (W.D. Va. 1977); \textit{C.B. by & Through Breeding}, 82 F.3d at 383.
  \item \textsuperscript{143}See, e.g., \textit{Rutz v. Essex Junction Prudential Comm.}, 457 A.2d 1368, 1380 (Vt. 1983) (finding that the student suffered prejudice by the departure from established due process procedures where his parents “determined not to bring an attorney to the hearing because of their understanding that the hearing would be a ‘family-type affair’” without attorneys while the school’s attorney was in fact present at the hearing).
\end{itemize}
lower courts and legal commentators have adopted, concluding that neither of these adequately comport with due process. However, a few courts have applied robust impartiality protections consistent with the thick view of impartiality for which this Note argues.

A. Divisions in the Lower Courts

Because the Goss decision’s procedural requirements were limited to short-term suspensions of ten days or less, lower courts have been left to formulate their own interpretations of what process is due for students facing long-term discipline.\(^\text{144}\) These formulations by necessity address the question of who is eligible to adjudicate disciplinary hearings to ensure the “more formal procedures” required by the Court for long-term discipline.\(^\text{145}\) Though courts agree that the formal hearing prescribed by Goss must be impartial to satisfy procedural due process, most courts interpret that requirement thinly, recognizing a violation only where a student can show actual bias on the part of the decision-maker presiding at the tribunal. Other circuits employ a more cautious approach through a thicker definition of “impartial tribunal.”\(^\text{146}\) These courts presume bias in certain circumstances in which a hearing officer has served in dual roles and prohibit individuals from serving as decision-makers who have an appearance of bias even where students have not demonstrated actual bias.\(^\text{147}\)

i. The Majority Approach: Thin Impartiality Protections

Most courts employ a thin definition of what constitutes an impartial tribunal required by Goss.\(^\text{148}\) Under this approach, an impartial tribunal may include, or consist solely of, an administrator who has played other roles in the application of the discipline prior to the hearing.\(^\text{149}\)

\(^{144}\)See Newsome, 842 F.2d at 923 (“Without the aid of Supreme Court authority directly on point, we are left with resolving the procedural due process issues presented in this appeal under the more general rubric of Matthews v. Eldridge” (citing Matthews v. Eldridge, 424 U.S. 319 (1976)); Aguirre v. San Bernardino City Unified Sch. Dist., 170 Cal. Rptr. 206, 211 (Cal. Ct. App. 1980) (“The question we must decide is whether the additional safeguards contemplated by [Goss] phrase ‘more formal procedures’ include confrontation and cross-examination”) (quoting Goss, 419 U.S. at 584). See also Pattison, supra note 17, at 51 (“Although the Supreme Court has not fully defined the contours of procedural due process in the context of long-term suspensions or expulsions, it has given lower courts the tool to do so with the Matthews test”).

\(^{145}\)Pattison, supra note 17, at 51. See also Brown v. Univ. of Kansas, 599 F. App’x. 833, 837 (10th Cir. 2015) (“Goss simply noted that severe disciplinary action could require ‘more formal procedures,’ not . . . the equivalent of a trial”) (quoting Goss, 419 U.S. at 584); Cooper, supra note 138, at 29 (courts are not in complete agreement as to what constitutes adequate notice for longer suspensions and expulsions); Gonzales, 435 F. Supp. at 465 (there is doubt as to what an “impartial tribunal” means in practice).


\(^{147}\)Supra note 143; see also infra Part III.A.2.

\(^{148}\)See William G. Buss, Procedural Due Process for School Discipline: Probing the Constitutional Outline, 119 U. Pa. L. Rev. 545, 618 (1971) (“[a] strong case must be made to establish personal bias. Combinations of functions also rarely succeed as a constitutional argument”); Brewer, 779 F.2d at 264; Newsome, 842 F.2d at 921; Lamb, 826 F.2d at 528; Jennings, 397 F.3d at 1124; Hillman, 436 F. Supp. at 817 (W.D. Va. 1977); C.B. by & Through Breeding, 82 F.3d at 383.

\(^{149}\)Brewer, 779 F.2d at 264 (administrator involved in the initiation and investigation of disciplinary charges is not by those roles disqualified from operating as an impartial decision-maker at the student’s disciplinary hearing); Newsome, 842 F.2d at 927 (“[w]e cannot say that, as a general matter, it is a violation of due process for investigating administrators to participate in the deliberation process”); John A., 654 P.2d at 247 (no due process violation where teachers sat on student’s tribunal hearing panel because plaintiff showed no evidence of actual bias).
Though many circuits taking this approach differ along subtle lines, what unites them all is their refusal to find per se impartiality, and thus a due process violation, where an administrator has served in multiple roles in the student’s disciplinary process.150 The Fifth Circuit approach finds no due process violation where a decision-maker or advisor to the decision-maker is also: (1) an employee of the district;151 (2) an investigator of the discipline matter or other fact-finder;152 (3) an initiator or prosecutor of the charges at issue;153 (4) an administrator who has recommended the exclusion to the decision-making body; 154 (4) or a school attorney representing the school district.155

Courts that follow the Fifth Circuit’s approach provide both practical and legal reasoning for their reluctance to recognize per se bias in tribunal hearing officers who have played multiple roles in a student’s decision process.156 The courts also point to the practice’s convenience, noting that it is far more practical to use school officials who may have been involved in the discipline and have a working knowledge of the details of the case and the particular student.157 Further, the practice of hiring outside, independent hearing officials is a drain on the school’s resources as those officials—often chosen from a pool of approved local attorneys158—must be compensated for their time.159

In addition to the convenience of the practice, courts point to legal distinctions that justify the thinner view of impartiality employed by the Fifth Circuit approach.160 Specifically, they distinguish the disciplinary due process hearing for a student enrolled in public school from hearings requiring a “full-blown administrative appellate process,” finding that less formal hearing procedures are due in the school discipline context.161 In their view, the provision of an entirely

150 See Brewer, 779 F.2d at 264; Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1077 (5th Cir. 1973); Levitt v. Univ. of Tex., 759 F.2d 1224, 1233 (5th Cir. 1985); Lamb, 826 F.2d at 529.
151 Hillman, 436 F. Supp. at 816.
152 Jennings, 397 F.3d at 1125 (because no personal animus was presented, the administrator could serve as an impartial hearing officer even though he investigated details of the case); Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1115 (E.D. Wis. 2001) (“absent evidence of particular bias or prejudice, the same person or entity may first investigate and later adjudicate whether proscribed conduct occurred”).
153 Lamb, 826 F.2d at 529 (“the combination of an advisory function with a hearing participant’s prosecutorial or testimonial function does not create a per se facially unacceptable risk of bias”); Hillman, 436 F. Supp. at 816 (Principal who initiated suspension charges was not thereby disqualified from acting as an impartial hearing officer without any evidence of principal’s actual bias).
154 See Lamb, 826 F.2d at 529; Butler, 172 F. Supp. 2d at 1115 (extending Supreme Court interpretation of federal common law interpreting Administrative Procedure Act to the school discipline setting) (citing Withrow v. Larkin, 421 U.S. 35 (1975)); Hillman, 436 F. Supp. at 816 (finding no due process violation where a hearing officer had also prosecuted the student’s case over which he presided).
155 See generally Alex v. Allen, 409 F. Supp. 379, 388 (W.D. Pa. 1976) (school board attorney may “prosecute the case against [the student], rule on evidentiary questions, and advise the board as to possible action”).
156 See C.B. by & Through Breeding, 82 F.3d at 388, n. 3.
157 Id. (“[i]n the school context, it is both impossible and undesirable for administrators involved in incidents of misbehavior always to be precluded from acting as decision-makers”).
158 See, e.g., Linwood v. Bd. of Educ. of City of Peoria, 463 F.2d 763, 765, n. 4 (7th Cir. 1972). The local district in that case affirmatively chose to develop procedures that mandated an independent review panel made up of three outside approved attorneys and was not required to do so, consistent with the Seventh Circuit’s adoption of the majority approach. See Lamb, 826 F.2d 526.
159 See e.g., Gorman v. Univ. of R.I., 837 F.2d 7, 15 (1st Cir. 1988) (providing outside, independent decision-makers in the education context will involve an “improper allocation of resources,” and may be “counter-productive”).
160 See, e.g., Newsome, 842 F.2d at 921.
161 See, e.g., Newsome, 842 F.2d at 921.
independent hearing officer—unassociated with the District, the incident at hand, or both—would lead to an “undue judicialization” of school discipline cases. Courts following this approach also draw heavily from administrative law procedures, some of which allow individuals who have engaged in fact-finding to also serve as adjudicators at a hearing. In doing so, these courts emphasize that the due process hearing is not meant to be a “judicial or quasi-judicial trial,” at which every precaution must be taken against the appearance of bias.

Though courts taking the Fifth Circuit’s approach steer clear of finding a presumption of bias resulting from a hearing officer’s dual roles in the disciplinary process, their approach allows the student to show actual bias of the hearing officer or a member of the hearing panel, which in some cases has resulted in a finding of bias that violated due process. The discipline at issue in Riggan was the result of a student’s conduct toward a high school principal. The student was disciplined for photographing the male principal’s car in front of the house of a female teacher. In that case, the trial court held that because of the personal nature of the student’s conduct that resulted in discipline, the principal should have removed himself from presiding over the student’s disciplinary hearing. The court in Riggan articulated surprisingly vigorous language by stating that due process violations may occur when an administrator is “in any way unable to function fairly as a trier of fact.” Other circuits have similarly found due process violations where a student was able to prove egregious forms of actual bias on the part of an individual presiding at her hearing. Thus, in severe cases where the factual scenario allows a plaintiff to show open and undisguised bias, courts taking the Fifth Circuit approach do not permit administrators to play a role in the student’s adjudication. However, the same courts generally refuse to presume bias in cases where a decision-maker has been extensively involved in the case, even where the hearing officer initiated the discipline charges or rendered the initial decision on the discipline being appealed.

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162 Gorman, 837 F.2d at 15.
163 Id. (upholding the constitutionality of social security adjudications in which hearing officers are permitted to operate as investigators who gather facts prior to issuing a decision on a recipient’s case) (citing Richardson v. Perales, 402 U.S. 389 (1971)).
164 Linwood, 463 F.2d at 770 (“[t]he type of administrative hearing here involved need not take the form of a judicial or quasi-judicial trial”).
166 Id. at 650-51.
167 Id.
168 Riggan, 86 F. Supp. at 657 (“The conduct alleged in this particular situation is of such an obviously personal nature that any reasonable administrator would have deferred to another uninvolved individual to conduct any investigation or to mete out any discipline”).
169 Id. at 656 (quoting Murray v. West Baton Rouge Parish Sch. Bd., 472 F.2d 438, 443 (5th Cir. 1973)).
170 Heyne, v. Metro. Nashville Pub. Schs., 655 F.3d 556, 568 (6th Cir. 2011) (finding a due process violation where the administrator presiding over the white student’s disciplinary, which involved an altercation between that student and an African-American student, had earlier recommended to staff that African-American students be treated more leniently in order to maintain racially balanced discipline statistics and had admitted to reducing the African-American student’s discipline for the same incident at the threat of a lawsuit).
171 See Id.
172 See, e.g., C.B. by & Through Breeding, 82 F.3d at 388.
ii. The Minority Approach: Thick Impartiality Protections

Other courts interpret Goss’ requirement of “some kind of hearing” for long-term disciplinary consequences more substantively, opting for procedures that are meant to prevent an appearance or “unacceptable risk of bias.”\(^\text{173}\) These courts view impartiality through a different lens, recognizing that an absence of actual bias may not fully comport with due process, where the appearance of bias is still present.\(^\text{174}\) This approach is not novel to administrative adjudications.\(^\text{175}\) However, in the school discipline context, only a few courts take the approach, and these circuits are often internally inconsistent.\(^\text{176}\)

Courts favoring a thicker view of impartiality have held that a decision-maker who serves as the initial recommender of the discipline cannot serve as an impartial decision-maker.\(^\text{177}\) Additionally, some of these courts do not permit individuals functioning in prosecutorial or disciplinary roles to advise the deciding school board or, in some cases, to even be present during closed deliberations following a hearing.\(^\text{178}\) Finally, these courts have found due process violations where a school district’s attorneys both “prosecuted the charges against the [students] in the expulsion hearings” and provided counsel to the school board members who made the ultimate

\(^{173}\) See Gonzales, 435 F. Supp. at 465 (noting that where a district did not employ the use of an unbiased hearing officer, “it would have been more reasonable to provide procedures that insured not only that justice was done, but also that it appeared to have been done”) (emphasis added).

\(^{174}\) Gonzales, 435 F. Supp. at 464 (“[t]he question before the court is not whether the Board was actually biased, but whether, under the circumstances, there existed probability that the decision-maker would be tempted to decide the issues with partiality to one party or the other”) (emphasis added).

\(^{175}\) See, e.g., Morrissey, 408 U.S. at 486 (finding presumed bias where a parole officer overseeing an inmate’s parole status serves as a decision-maker at the inmate’s parole revocation hearing); Withrow, 421 U.S. at 47 (noting that there are situations where, in the absence of actual evidence of bias on the part of an adjudicator, the risk of bias is intolerably high, foreclosing the opportunity for an impartial tribunal); Goldberg, 397 U.S. at 271 (requiring that the decision-maker in a welfare benefits review case should not be the individual who recommended the termination of benefits under review at the hearing); Procurer v. Martinez, 416 U.S. 396 (1974) (prisoner’s claim that his letter was wrongfully censored could not be adjudicated by the same officer who censored the letter initially); Gibson v Berryhill, 411 U.S. 564, 579 (1973) (administrative adjudicator with pecuniary interest in case could not impartially adjudicate dispute even in absence of actual bias); American Cyanimid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966) (Commissioner who had previously served as counsel for Senate subcommittee investigating company could not serve as impartial decision-maker at the company’s later regulatory hearing); Greenberg v. Bd. of Governors of Federal Reserve System, 968 F.2d 164, 167 (2d Cir. 1992) (holding that the Administrative Procedure Act prohibits agency prosecutors from serving adjudicatory function in same matter).

\(^{176}\) For instance, where the Central District of California has presumed bias where a decision-maker initiated or prosecuted a student’s charges, the Eastern District has no concerns with the practice, instead requiring “significant evidence” to overcome a presumption of neutrality on the part of any administrator who serves as decision-maker. See Hill v. City of Clovis, 2012 WL 787609, at *6, *8 (E.D. Cal. 2012) (“due process is not necessarily violated when the school official who initiates, investigates, or prosecutes charges against a student plays a role in the decision to suspend the student”) (quoting Heyne, 655 F.3d at 568).

\(^{177}\) Gonzales, 435 F. Supp. at 465 (Superintendent who served as “chief of the ‘prosecution’ team” could not have constitutionally operated as decision-maker).

\(^{178}\) Id. at 465 (Superintendent’s presence during board’s deliberation after expulsion hearing violated due process because of risk of bias from superintendent’s role as prosecutor of the student’s charges).
decision at the disciplinary hearings.\textsuperscript{179} This practice can occur frequently.\textsuperscript{180} The courts taking this approach have found a presumption of bias without requiring the student to show actual bias on the part of a decision-maker, leading to the conclusion that the procedural due process required was not afforded.\textsuperscript{181} This cautious approach taken by these courts contrasts directly with the majority Fifth Circuit approach that requires a showing of actual bias in order to disqualify an individual from serving as a hearing officer or from serving multiple roles in the proceedings.\textsuperscript{182}

In Gonzales v. McEuen, a federal district court in California presumed bias from the nature of individuals’ roles in the disciplinary process and their presence at a deliberation session of the local school board.\textsuperscript{183} The court in Gonzales found that the involvement of both the district’s attorney and its superintendent in a student’s initial disciplinary proceedings rose to the level that bias could be presumed, regardless of whether actual bias existed.\textsuperscript{184} There, the district’s attorney had both prosecuted the student’s expulsion and advised the school board of its legal obligations during the hearing.\textsuperscript{185} The court presumed bias on the part of the attorney without any actual evidence, finding that the attorney’s multiple roles violated the student’s right to an impartial tribunal.\textsuperscript{186}

The court also presumed bias from the role the superintendent played, where he served as both chief of the prosecution team for the expulsion and was present during the school board’s closed deliberations after the hearing.\textsuperscript{187} Significantly, the court rejected the district’s contention that the superintendent was not actually biased because he did not participate at all in the deliberations but was merely present to serve refreshments to the board, reasoning that “[w]hether he did or did not participate, his presence to some extent might operate as an inhibiting restraint

\textsuperscript{179} Gonzales, 435 F. Supp. at 464-65 (“It is undisputed that attorneys for the District who prosecuted the charges against the plaintiffs in the expulsion proceedings, also represent the Board members in this action. . . . Counsel for defendants admit that they advised the Board prior to the hearings with respect to its obligations regarding these expulsions[,] . . . A reading of the transcript reveals how difficult it was to separate the two roles. Special mention should be made of the fact that the Board enjoys no legal expertise and must rely heavily upon its counsel. This places defendants’ attorneys in a position of intolerable prominence and influence.”).


\textsuperscript{181} Gonzales, 435 F. Supp. at 465.

\textsuperscript{182} Brewer, 779 F.2d at 264; See also Lamb, 826 F.2d at 529 (holding that no violation existed where school board attorney prosecuted the student’s charges and advised the board during closed-session deliberations, and where principal and superintendent, who testified against the student, were also present during deliberations because student presented no evidence of actual bias).

\textsuperscript{183} See Gonzales, 435 F. Supp. at 464-66.

\textsuperscript{184} Id. at 464-65.

\textsuperscript{185} Id. By way of illustration, the trial court cited the transcript of the disciplinary tribunal, at which the school board attorney served as prosecutor while also alerting the board how to rule on evidentiary questions. Id. at 464 (“[c]ounsel for defendants admit that they advised the Board prior to the hearings with respect to its obligations regarding these expulsions, but they deny that they advised the Board during the proceedings themselves. A reading of the transcripts reveals how difficult it was to separate these roles”).

\textsuperscript{186} Id. at 464 (calling the dual roles difficult to separate and citing to a dialogue in the hearing transcript in which counsel for the district objected to a request by counsel for the student and made legal recommendations that the school board uphold its objection).

\textsuperscript{187} Id. at 464-65.
upon the freedom of action and expression of the Board.” The court’s rejection of the district’s argument here represents the court’s sensitivity to facts showing an appearance of bias even in the absence of actual bias, forming the basis for an entirely different impartiality standard than courts following the Fifth Circuit approach.

Other courts have adopted a similar standard. In Butler v. Franklin Oak Creek School District, a student was charged with misconduct for violating a provision of the district’s athletic code. He faced the possibility of a twelve-month suspension from participation in student athletics. Consistent with the district’s procedures, the student was afforded a hearing before the Coaches’ Council, a decision-making body comprised of various school administrators including the athletic director who had recommended the student’s removal. After the hearing, the Coaches’ Council voted to suspend the student. As a threshold matter, the court determined that the removal from participation in school athletics constituted a deprivation of a property interest guaranteed by state law and district regulations. The court found the athletic director’s role as both initiator of discipline and decision-maker unconstitutional, reasoning that the athletic director’s role was not merely investigatory, but required him to make an initial recommendation of discipline. According to the court, a tribunal reviewing the athletic director’s discipline recommendation could not be impartial where the director cast a vote in the adjudication of his own decision. Thus, in absence of actual evidence of bias, the court found the dual roles of initiator of discipline and member of decision-making tribunal to be constitutionally impermissible.

The concern for impartiality emphasized by the Gonzales court and those following its approach represent a distinct departure from the thin interpretation used by courts taking the Fifth Circuit’s approach. Cases like Gonzales and Butler acknowledge a constitutionally intolerable risk of bias when an individual serving as a hearing officer or on a disciplinary hearing panel has been involved in initiating or prosecuting a student’s case. By contrast, the Fifth Circuit approach recognizes no presumption of bias and grants express approval of the use of hearing officers who

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189 In doing so, the court employed the Ninth Circuit’s standard for impartiality used in administrative tribunals, a standard rejected in the school context by courts taking the majority Fifth Circuit approach. See Stivers v. Pierce, 71 F.3d 732, 748 (9th Cir. 1995) (“We therefore hold that where one member of a tribunal is actually biased, or where the circumstances create the appearance that one member is biased, the proceedings violate due process”) (emphasis added).
190 See, e.g., Everett, 426 F. Supp. at 402 (precluding the “principal of the school who holds the first informal hearing and recommends” the discipline from operating as an impartial hearing officer because such an individual would not be “fair and impartial”).
192 Id. at 1107.
193 Id. at 1108.
194 Id. at 1110 (as a matter of state law and the school district’s own student handbook, student-athletes have right to continued participation in school athletics and may not be suspended from such without good cause).
195 Id. at 1116 (“[t]hese adjudicative and decision-making functions far exceed mere investigation”).
196 Id.
197 Butler, 172 F. Supp. at 1116.
198 See Gonzales, 435 F. Supp. at 465 (finding that students’ due process was violated where the superintendent, as “chief of the ‘prosecution’ team,” was present in the school board’s closed deliberation session “whether he did or did not participate [because] his presence to some extent might operate as an inhibiting restraint upon the freedom of action and expression of the board”); Butler, 172 F. Supp. 2d at 1115-16 (finding that the initiator of the student’s discipline could not constitutionally serve on the adjudicatory council because of the inherent risk of bias).
have also investigated, prosecuted, or handed down charges at earlier stages in the proceeding absent actual evidence of bias.\textsuperscript{199} The judicial disparity in what constitutes an impartial tribunal muddies the waters of a major constitutional doctrine and leads to potential litigants presenting arguments within that doctrine supported by unreliable federal court precedent and that results in unpredictable results.

The majority of federal courts’ approach as detailed above, inadequately safeguards students’ due process right to an impartial tribunal by rejecting a strict construal of “impartial” in the school discipline context. The courts have unfairly separated school exclusion from other deprivations requiring due process because of the increasingly adversarial nature of the school discipline landscape and the scale of the deprivations students face in being excluded from mainstream public education. This reality is most popularly conceived in the recent and prolific school-to-prison pipeline scholarship. Because courts have failed to adequately take into account the elements at stake for students facing long-term discipline, their due process balancing calculation, as imposed by the Supreme Court in \textit{Matthews v. Eldridge}, is discretely unbalanced, with procedures convenient to the public schools outweighing potential student hardships.\textsuperscript{200} A constitutional jurisprudence of due process requires a new calculation that would account for the modern school discipline landscape and contemporary school exclusion research that shows the severe consequences of students excluded from school. Constitutional due process requires more of the federal courts than what protections they have provided, and a Supreme Court challenge to the majority approach would have strong arguments in its favor.

Courts holding to the Fifth Circuit approach generally reject the importation of judicial norms into the school discipline context.\textsuperscript{201} The most common rationale for this approach is that the school discipline context is far-removed from the consequences and deprivations of civil or criminal proceedings that justify cautious approaches to biased adjudicators under the \textit{Matthews} test.\textsuperscript{202} However, there is reason to compare the criminal judicial context and the school discipline context favorably, especially in light of what is at stake for students facing severe disciplinary charges.\textsuperscript{203} The extensive research since \textit{Goss} shows that the deprivations that decision contemplated—namely, reputational harm and property interest in education itself—fall short of what students who receive long-term discipline consequences actually suffer.\textsuperscript{204}

\textsuperscript{199} \textit{Brewer}, 779 F.2d at 264; \textit{Sullivan}, 475 F.2d at 1077.

\textsuperscript{200} \textit{Matthews}, 424 U.S. at 335.

\textsuperscript{201} See supra note 198 (collecting cases).

\textsuperscript{202} See supra note 198 (collecting cases). See also \textit{Gorman}, 837 F.2d at 14 (holding that a fair hearing in the student disciplinary context need not mirror the common law adversarial method nor criminal trial procedures). \textit{Jennings}, 397 F.3d at 1124 (affording full due process protections beyond “trial-type procedures” for students facing long-term suspensions would be cost-prohibitive and inefficient for school districts) (citing \textit{Goss}, 419 U.S. at 565). See also id. at 585 (J. Powell, dissenting); \textit{Black}, supra note 17, at 845 (positing that one of \textit{Goss}’ central flaws was its expectations that “the non-adversarial theory of education would persist naturally, notwithstanding the Court’s intervention,” and that “administrators would implement and apply due process with good faith and benevolence”). One of Justice Powell’s law clerks who served a few years before Goss was decidedly against Goss’ holding, objecting to what he termed the constitutionalizing of the disciplinary process “at a time...when the maximum flexibility may be required by school officials in different parts of the country to reduce the level of violence in secondary education.” J. Harvie Wilkinson III, \textit{Goss v. Lopez: The Supreme Court as School Superintendent}, 1975 \textit{Sup. Ct. Rev.} 25, 66 (1975).

\textsuperscript{203} See supra Part II.B.

\textsuperscript{204} Id.
Further, the modern adversarial landscape of school discipline cases presents reasons to insist that due process requires thicker impartiality protections.\textsuperscript{205} According to the flexible principles of due process,\textsuperscript{206} where the school discipline tribunal operates less like the “informal give-and-take” envisioned by \textit{Goss}\textsuperscript{207} and more like an adversarial, administrative hearing, as the research suggests, courts should adapt by applying thicker impartiality protections. The benign administration relationship is no longer present. Rather than urging its continued presence\textsuperscript{208}, or mourning its loss, courts should recognize the necessity of providing the same impartiality protections in school discipline cases that are applied in other administrative contexts.\textsuperscript{209}

B. The Best Practices Approach and its Inadequacy

Many commentators have adeptly examined student due process questions left open by \textit{Goss}, and there are simply too many cogent challenges of ineffectual due process protections afforded students to name here. However, this Section will mention a few notable resources that may be used for further insight. In an early, pre-Goss outline of student discipline due process, Professor Buss provides a comprehensive approach to the open due process issues, many of which remained open after \textit{Goss} was decided.\textsuperscript{210} His article, titled \textit{Procedural Due Process for School Discipline: Probing the Constitutional Outline}, begins with a lucid and foretelling description of the “mystique” surrounding school issues that is the foundation of judicial reluctance to import due process principles into the school discipline context.\textsuperscript{211} Professor Black, in his excellent article discussing the ambitions and failures of \textit{Goss}, points out the need for a more robust substantive due process regime for students facing long-term discipline, especially in light of the rise of zero-tolerance discipline policies and the trend of disciplinary matters being handled in the courtroom instead of the principal’s office.\textsuperscript{212} Commentators have confronted procedural due process defects with persistence, with voices emerging from the fields of legal and education scholarship, as well as from the emerging field of education law advocacy.\textsuperscript{213} As an attorney representing families in student discipline cases, Brent M. Pattison, argues convincingly for students’ right to confront and

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\item \textsuperscript{205} See \textit{supra} Part II.A.
\item \textsuperscript{206} Matthews, 424 U.S. at 334.
\item \textsuperscript{207} \textit{Goss}, 419 U.S. at 584.
\item \textsuperscript{208} See, e.g., \textit{C.B. by & Through Breeding}, 82 F.3d at 388 (opportunities for student to “discuss” her concerns with the imposition of a nine-day suspension adequate procedural due process) (citing \textit{Goss}, 419 U.S. at 584).
\item \textsuperscript{209} See \textit{infra} Part IV for examples of non-judicial administrative hearing contexts where courts provide adequate impartiality consistent with due process.
\item \textsuperscript{210} See Buss, \textit{supra} note 148.
\item \textsuperscript{211} Buss, \textit{supra} note 148, at 570 (“Transcending all of the particular reasons . . . to explain the refusal to hear student due process claims is a . . . reluctance by the courts to intrude into educational matters. Educational institutions seem to be ensnared with a mystical immunity from judicial interference”).
\item \textsuperscript{212} See \textit{generally} Black, \textit{supra} note 17.
\item \textsuperscript{213} The emergence of a niche practice area filling a demand in the legal market for attorneys representing students in discipline and special education hearings and attorneys representing districts themselves—a practice area not widely in existence until recent years—is itself further evidence for the increasingly adversarial nature of school discipline issues. See, e.g., Diane E. Millet, \textit{Back to School Education Law}, 23 G.P. SOLO 24 (2006); Lori Tripoli, \textit{A Marketing Ploy That’s Worked... Law Firm Commitments to Industry Niche Practices Reap Benefits}, 18 \textit{OF COUNSEL} 1, 13 (1999) (noting defensive education law as a profitable emerging niche practice alongside nuclear power, airport law, mining, and insurance tax law).
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cross-examine witnesses at discipline tribunals. Meanwhile, Alicia Insley’s note, authored as a law student at Washington College of Law, criticizes zero-tolerance discipline policies because they apply harsh punishments that can only be reviewed by courts applying highly deferential standards. Professor Perry A. Zirkel, an education and law professor, and Youssef Chouhoud, a graduate student, examine post-Goss due process empirically, comparing procedural due process outcomes in state and federal courts finding in favor of students to those finding in favor of districts. The student discipline procedural due process commentary is thus rife with well-researched and persuasive scholarship.

Commentators have focused to a much lesser extent on the open question of what constitutes impartiality for students facing long-term discipline. Though much commentary has identified the question, such as Professor Kern Alexander’s preeminent volume on school law, and Professor Kirp’s cogent and predictive analysis of due process in the school discipline context immediately following Goss, few commentators have addressed the question normatively. Some earlier commentary that has done so distinguished the school discipline setting from other administrative contexts.

For instance, in early, pre-Goss commentary encouraging fuller impartiality protections against institutional bias in administrative law settings, Professor McCormack rejects the need for per se bias in the school exclusion setting, holding ranks with what has become the majority approach as outlined above. Pre-Goss commentary was not all in favor of limited impartiality protections; Professor Buss includes a persuasive section in his outline of constitutional processes on the need for a different approach to the right of an impartial tribunal more akin to protections provided in comparable administrative law settings. Buss’ insistence that institutional biases

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216 See Kern Alexander, et al., AMERICAN PUBLIC SCHOOL LAW 459 (6th ed. 2005) (lower courts including the fifth and sixth circuits will not disqualify an administrator from serving as a decision-maker at the student’s disciplinary tribunal without a showing of pre-existing animus or actual bias); Pattison, supra note 17, at 52, n. 26 (lower court decisions have required an impartial hearing officer and have at times questioned the impartiality of a tribunal that has relied on district counsel as advisor of procedures and prosecutor of the student’s disciplinary charges) (citing Gonzales, 435 F. Supp. at 460-65).
217 David L. Kirp, Proceduralism and Bureaucracy: Due Process in the School Setting, 28 STAN. L. REV. 841, 862 (1976) (recognizing likelihood that due process requirements in the public schools could transform into perfunctory affairs, which could lead to the importation of biased decision-making).
220 Id. at 1287-89 (bias at in school discipline cases “should disqualify only if it is so strong that it prevents the compilation of an adequate record for review”).
221 See Buss, supra note 148, at 618–30.
threatened the fairness of students’ due process hearings while powerful, was not accompanied by the empirical data for consequences to school exclusion that is now widely known and available. However, scarce commentary can be found since Goss that has picked up on Buss’ constitutional fairness arguments with the same force.

In the recent era, those commentators who have argued normatively for thicker impartiality protections have recommended more robust safeguards without confronting the issue head-on through the lens of legal mandate from constitutional due process.223 Educational practitioner David Doty, for example, emphasizes the importance of districts providing thick impartiality protections by using independent decision-makers not involved in prosecuting roles without recognizing a constitutional mandate to do so.224 Likewise, in their wide-ranging survey on post-Goss due process requirements for short and long-term school discipline cases, Larry Bartlett and James McCullagh argue against allowing prosecution team members into post-hearing deliberations if the student and his attorney are excluded, while also stressing that “not all of the foregoing elements of due process are required.”225 Rather than arguing from a constitutional due process requirement lens, commentators like Bartlett, McCullagh, and Doty encourage efforts at providing neutral decision-makers neutrality through a best practices approach.226 This approach offers suggestions for more benevolent procedures to avoid “legal challenge,” to increase the chances of school district success in ensuing due process claims,227 and to call educators to act ethically in order to “model[] valuable lessons to students that will have a positive impact on the future of the country.”228

While the best practices approach typified by the scholarship above presents school districts with incentives to provide heightened due process protections, the approach falls short of advocating for the type of thick safeguards against the appearance of bias that have long been afforded individuals in other comparable administrative settings.229 In doing so, the approach stops short of arguing that constitutional protections require thick impartiality protections, such as a decision-maker free from the appearance of bias or the existence of unduly influential ex parte communications with administrators playing multiple roles in disciplinary functions.

This best practices approach—aimed at local school officials rather than state legislatures—has at its foundation, litigation prevention strategies and moral reasoning that suggests administrators should police their own behavior out of a sense of educational duty, rather than by constitutional mandate.230 In this way, the approach proceeds where Goss left off, using

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223 See Bartlett & McCullagh, supra note 35, at 57; Doty, supra note 34, at 358.
224 See Doty, supra note 34, at 358 (pointing out potential impartiality issues where a hearing officer’s neutrality may be undermined by her involvement in the investigation and prosecution of the student’s disciplinary charges) (“[t]he importance of avoiding even the appearance of impropriety during expulsion proceedings cannot be overstated”).
225 Bartlett & McCullagh, supra note 35, at 57.
226 Id.; Doty, supra note 34, at 358.
227 Bartlett & McCullagh, supra note 35, at 55.
228 Id. at 57.
229 See generally Goldberg, 397 U.S. at 271; Morrissey, 408 U.S. at 491.
230 Doty, supra note 34, at 359 (while the normative methods encouraged are not all required by legal mandate, “[t]hey merely represent the items of due process that public school officials should observe for better decision making, being a role model, fairness, exhibiting good educational principles, and lessening the likelihood of being in or losing a lawsuit”). Some lower courts strike a similar tone, emphasizing reliance on the “honor and good judgment” of administrators to police themselves for bias. See, e.g., Alex v. Allen, 409 F. Supp. 379, 388 (W.D. Pa. 1976) (allowing school board attorneys and school administrators to serve multiple roles while also serving as tribunal decision-makers even though such practices present possibilities “for abuse and prejudice”).
as its starting point a school discipline landscape occupied by benign administrators rather than the adversarial landscape research shows it has become.\textsuperscript{231} Other recent commentators seem to go further toward recognizing the constitutional necessity of thicker protections, but still stop short of asserting that their recommended procedures are required by due process.\textsuperscript{232} To be fair, the commentary normatively prescribing solutions to the question of what constitutes an impartial tribunal cited above is often a component part of larger scholarly works addressing procedural questions and defects presented by Goss’ progeny, and the purpose of their discussions generally lay outside the purview of the constitutionality of the current impartiality standard.\textsuperscript{233}

Further, the best practices approach lacks a realistic vision for thicker impartiality protections. By limiting the source of its normative impartiality recommendations to educational best practices and litigation prevention, it does not generally envisage an in-depth, realistic approach of how the goal of providing independent, uninvolved decision-makers above the appearance of bias and beyond undue influence might be conceivably achieved. It thus fails to address one of the main arguments in favor of construing impartiality thinly—namely, the argument that thick impartiality protections require unreasonable expenditures of public resources.\textsuperscript{234}

While appreciating that others have identified issues and offered up potential normative solutions, this Note goes further by arguing that the impartial tribunal guaranteed to students through due process requires independent and uninvolved decision-makers who are free from the appearance or influence of bias. In this way, this Note seeks to revive the more cautious, thicker approach to impartiality on which Professor Buss struck ground in his pre-Goss scholarship, drawing parallels to other administrative hearing contexts and appropriately adjusting the due process balancing scheme using evidence from the school-to-prison pipeline research.\textsuperscript{235} Further, this Note offers on-the-ground illustrations of (1) the appropriate standard for impartiality as seen in some lower court decisions presented above, (2) some ways state legislatures have complied with the standard through effective school discipline procedures, and (3) some provisions for use in model legislation to afford thicker impartiality protections.

IV. A Thicker Approach From Constitutional and Administrative Law Principles

A fuller approach to impartiality would go beyond the Fifth Circuit’s “actual bias” test, instead opting for the nature of a standard chosen by the Gonzales decision, which recognizes the ability of bias to slip in unnoticed or unproven by discoverable evidence.\textsuperscript{236} In that approach, the provision of a decision-maker free from the appearance of bias is not simply a best practice for school

\textsuperscript{231} See supra Part II.A.
\textsuperscript{232} See Doty, supra note 34, at 358–59 ("it behooves districts to employ a truly independent individual as the hearing officer, particularly where school administrators and attorneys are integrally involved in the investigation, and prosecution, of serious misconduct").
\textsuperscript{233} See, e.g., Doty, supra note 34.
\textsuperscript{234} See C.B. by & Through Breeding, 82 F.3d at 388 (“always requiring an impartial decisionmaker to be educated on the facts would render the process too complex”); Gorman, 837 F.2d at 14–15 (providing heightened impartiality safeguards would represent an “undue judicialization” that would require “unjustifiable” expenditures and “improper allocation of resources”).
\textsuperscript{235} See Buss, supra note 148.
\textsuperscript{236} See Gonzales, 435 F. Supp. at 465.
districts as commentators have suggested. Rather, constitutional principles require this practice under the Supreme Court’s traditional balancing test for the implementation of additional procedural safeguards to prevent an erroneous deprivation of a property or liberty interest. Further, the practice of providing a decision-maker free from the appearance of bias is not limited to the judicial setting, and has been implemented in certain administrative settings that compare favorably to school discipline hearings.

A. Balancing Interests: Providing a Decision-Maker Free from the Appearance of Bias

As Goss instructed, when a public school district excludes a student from school, it deprives a student of a property right guaranteed by the state’s constitutional provision of public education and delegated to the local district for administration. Such a deprivation triggers the state’s burden to proceed under procedural due process consistent with the Fourteenth Amendment. A deprivation that involves a suspension of more than ten days or expulsion from the school will require greater due process, including a formal hearing presided over by hearing officers who are free from bias or its appearance. This approach might allow a school disciplinary hearing to reflect the same due process in administrative contexts afforded individuals facing severe consequences from deprivation. Such a standard would demand that an “uninvolved person” hear the case, requiring that person to be uninfluenced and independent from the inner workings of the student’s discipline case, so that “complete objectivity” may be afforded. A challenge to the Fifth Circuit’s approach, which presumes an absence of bias and allows administrators and school board attorneys to perform multiple roles in the “prosecution” and hearing process, would argue that providing such an impartiality standard is more than “best practice” for a school district, but instead is constitutionally required.

The on-the-ground realities of the public school setting suggest that caution and a willingness to presume bias from prior involvement in a student’s case is not over-reaching because an administrator who investigates a student’s disciplinary matters possesses at least a modicum of interest in the outcome of the case. Indeed, if the administrator did not, that individual would be hard-pressed to explain to her supervisors, conscious of the time scarcity of public resources, why she so intently prosecuted or investigated the charges in the first place. In the criminal law setting, a detective or prosecutor would never be permitted to serve as an adjudicator of the defendant’s charges, though they be free from any form of actual bias toward the subject of their investigations. This is because we assume that the role they play is dissonant with making an adjudication on the evidence, and because we are interested in a certain standard

237 See supra Part III.B.
238 See Matthews, 424 U.S. at 323 (in order to determine whether additional safeguards are necessary to prevent an erroneous deprivation of a constitutionally-recognized property or liberty interest, a court must weigh the private interest that will be affected by the official action, the risk of erroneous deprivation, and the probable value of any additional safeguards).
239 See, e.g., Morrissey, 408 U.S. at 486 (applying the presumption of impartiality to administrative parole hearings).
240 See Goss, 419 U.S. at 573.
241 Black Coal. v. Portland Sch. Dist. No. 10, 484 F.2d 1040, 1045 (9th Cir. 1973).
242 See id. at 1044 (“[t]he requirement of a prior hearing will depend primarily on the nature of the penalty imposed”).
243 Morrissey, 408 U.S. at 486.
244 Matthews, 424 U.S. at 334 (“[d]ue process is flexible and calls for such procedural protections as the particular situation demands”) (quoting Morrissey, 408 U.S. at 481.). See also Pattison, supra note 17, at 51.
of propriety at the hearing that is discordant with the possibility of bias. Likewise, in the school discipline context, a prosecutor or investigator, no matter how well intentioned, should be excluded from the adjudication process because of her role in earlier stages of the proceeding.

Advocates of the Fifth Circuit’s more lenient approach toward impartiality would counter by asserting that providing adjudicators who are absolutely uninvolved in the proceeding in any other way unduly “judicializes” the proceeding and is not required to ensure an impartial hearing.\textsuperscript{245} They would argue that the educational process is harmed through such judicialization. However, the proper test of whether a safeguard is constitutionally required is whether the private interest outweighs the burden to the government.\textsuperscript{246} Here, because of the nature of the public-school context, the student’s interest in having an uninvolved adjudicator overseeing his or her hearing outweighs the district’s burden of providing one. Regarding the student’s interest, where an adjudicator has been involved in the charges in an investigatory or prosecutorial role, the threat of bias, and in turn, an erroneous exclusion of the student from school, is substantial. This is because school discipline becomes an adversarial process immediately once an allegation is entered.\textsuperscript{247} An administrator who initiates discipline against a student is in a position of authority and has often already been involved in instituting prior discipline against the student (especially in serious suspension or expulsion cases). The disciplinary history alone indicates the appearance of bias.

To satisfy the due process requirement of providing an impartial tribunal without the existence of bias, a proper resolution would align with Gonzales’ approach presented above.\textsuperscript{248} Specifically, it would guarantee that an administrator or counsel who has initiated charges, prosecuted the case, advised the school board, or recommended the disciplinary consequence at issue would not serve as an adjudicator over the student’s disciplinary due process hearing.\textsuperscript{249} Such a safeguard would ensure that the student’s constitutional rights are afforded and would limit the attention federal courts are required to give to claims of impartiality.

\textbf{B. Lessons from Administrative Law: Impartiality in Parole Revocation Hearings and the APA’s Separation of Functions Doctrine}

Both the Administrative Procedure Act\textsuperscript{250} and federal court common law doctrines have recognized the need for the provision of impartial decision-makers to claimants facing administrative hearings where a deprivation is at stake.\textsuperscript{251} Within the jurisprudential realm of the APA, the separation of functions doctrine is the best example of thick impartiality protections in

\textsuperscript{245} See, e.g., C.B. by & Through Breeding, 82 F.3d at 388, n. 3.
\textsuperscript{246} Matthews, 424 U.S. at 335.
\textsuperscript{247} See supra Part II.A.
\textsuperscript{248} See supra Part III.A.
\textsuperscript{249} See Gonzales, supra note 47, at 464–66.
\textsuperscript{250} The Administrative Procedure Act [hereinafter APA] is the federal statute that governs rulemaking and adjudicative functions of federal agencies. See 5 U.S.C. §§ 551-59.
\textsuperscript{251} See, e.g., Finer Foods, Inc. v. U.S. Dep’t of Agric., 274 F.3d 1137, 1140 (7th Cir. 2001); Morrissey, 408 U.S. at 471.
the administrative law context, though the doctrine is not applied in all circumstances.

A pre-APA administrative law case, *Morrissey v. Brewer*, shows that raising the standard of decision-maker impartiality in state-level administrative proceedings is not a novel concept. The holding in *Morrissey* echoes the general preference for decision-makers free from the appearance of bias through the separation of investigative and adjudicative functions in certain types of adjudications. In *Morrissey*, the Supreme Court identified a deficit in the state’s procedures for parolees facing revocation, which was to permit the parolee’s law enforcement officer to adjudicate the case. In doing so, the Court went beyond the definition of impartiality state penal systems were employing by requiring that parole revocation be administratively adjudicated by an “uninvolved person.” The Court’s reasoning relied on a balancing of interests of the parolee against those of the State, recognizing the primary interest of the parolee in retaining his liberty and the primary interests of the State in preventing once-convicted individuals from again committing antisocial behaviors. The Court further noted the State’s interests associated with saving time and resources by returning the parolee to prison rather than re-trying him or her for the violations of parole conditions. The Court also noted society’s interest in the parolee’s continued freedom from the utility the parolee would provide to society outside of prison, as well as the alleviation to taxpayers of the burden of the parolee’s prison costs. While acknowledging that it would be unfair to assume all parole officers were biased or partial in their adjudication of revocation hearings, the Court found that on balance, parole revocation hearings require that a hearing for the parolee be conducted by a person uninvolved with the parolee’s case. In so

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252 See 5 U.S.C. § 554(d); Grider v. F.T.C., 615 F.2d 1215, 1220 (9th Cir. 1980) (“by forbidding adjudication by persons engaged in the performance of investigative or prosecuting functions, Congress intended to preclude from decision-making in a particular case only individuals with the title of “investigator” or “prosecutor,” but all persons who had, in that or a factually related case, been involved with *ex parte* communication, or who had developed, by prior involvement with the case, a will to win”); Elliott v. S.E.C., 36 F.3d 86, 87 (11th Cir. 1994) (“[a]n agency may combine investigative, adversarial, and adjudicative functions, *as long as no employees serve in dual roles*”) (emphasis added); Girard v. Klopfenstein, 930 F.2d 738, 742 (9th Cir. 1991) (validating a procedural hearing where investigative and adjudicative functions were not merged); Wong Yang Sung v. McGrath, 339 U.S. 33, 45–46 (1949) (finding a due process violation where a hearing was conducted by members of an administrative agency’s investigative branch).

253 See *Withrow*, 421 U.S. at 58 (“the combination of investigative adjudicative functions does not, without more, constitute a due process violation”). See also, e.g., *In re Seidman*, 37 F.3d 911, 925 (3d Cir. 1994) (using an actual bias test for adjudicators who have served investigative functions in financial oversight body hearings); Simpson v. Office of Thrift Supervision, 29 F.3d 1418, 1424 (9th Cir. 1994) (initiation of charges against claimant by director of financial oversight body did not render director unable to act as impartial decision-maker at claimant’s hearing); Hinkle v. Merriweather, 629 F.2d 490, 496 (8th Cir. 1980) (“[w]ithin the context of public administrative law and procedure, a claimant or litigant is not denied a constitutionally guaranteed fair hearing before an impartial tribunal simply because the agency factfinders or decision-makers may have had some prior knowledge or even preliminary participation in the case”). See generally Roland M. Frye, Jr., *Restricted Communications at the United States Nuclear Regulatory Commission*, 59 ADMIN. L. REV. 315 (2007); but see *Finer Foods*, 274 F.3d at 1140 (finding that even informal adjudications under the APA require impartial decision-makers “without a stake in the outcome”).

254 *Morrissey*, 408 U.S. at 471.

255 See *supra* note 253.

256 *id.*

257 *Morrissey*, 408 U.S. at 486.

258 *id.* at 483.

259 *id.*

260 *id.* at 484.

261 *Morrissey*, 408 U.S. at 485 (“[i]t would be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality…. However, we need not make any assumptions…to conclude that there should be an
holding, the Court reasoned that this procedure was necessary in light of the interests of the parolee and to ensure the parolee received an adjudicator with “complete objectivity,” which a parolee’s officer who recommended the revocation could not be expected to possess.262

V. **Thicker Impartiality for Students Facing School Exclusion**

In light of the similarity of school discipline due process hearings to parole revocation hearings in *Morrissey*, the standard of impartiality extended in that case should likewise be extended to students facing long-term discipline by local school boards, consistent with principles of constitutional procedural due process and long-held administrative law doctrines. Rather than creating an “undue judicialization”263 of the school discipline process, the implementation of a *Morrissey*-like impartiality standard in school discipline hearings would not be overly burdensome to school districts. The acceptance of the standard by some forward-thinking state legislation supports this notion and provides a starting point for provisions that would comport more fully with due process.264

A. *Extending Morrissey Protections to School Discipline Hearings*

The parole board hearing and the student discipline contexts are similar; the articulated function of parole that the *Morrissey* Court outlined as launching “the parolee into constructive development,”265 parallels the hoped-for functions of school discipline, where the goal is not simply to punish a student, but to restore the student to a readiness for education.266 The liberty interests of parolees in *Morrissey* are also similar to the interests of students facing long-term discipline in not being excluded from school erroneously. Like a parolee who is kept from obtaining gainful employment, the freedom to be with family and friends, and the ability to enjoy “the attachments of normal life,” students who face exclusion from school could reasonably suffer future employment consequences.267 Students likewise face the loss of enjoyment of a “normal life” for a person of their age, which includes both academic and social opportunities stemming from attending mainstream public school, as well as the liberty interests associated with pursuing opportunities limited by the stain of a disciplinary charge on the student’s record.268 Additionally, just as society shares an interest in a parolee’s continued liberty, society shares an interest in a student’s ability to remain in mainstream public education. Research strongly supports the contention that society is benefited by an educated population,269 and this notion is maximized by

262 *Id.* at 486.
263 *Gorman*, 837 F.2d at 15.
264 *See*, e.g. D.C. MUN. REGS., tit. 5-B § 2506.
265 *Morrissey*, 408 U.S. at 478.
266 *See Goss*, 419 U.S. at 583 (discipline must remain “part of the teaching process”).
267 *Goss* explicitly recognized the deprivation of liberty interest stemming from educational and occupational consequences of a student’s discipline record long before school-to-prison pipeline research began to take shape. *Id.* at 575 (charges of misconduct, “if sustained and recorded…could seriously damage those students’ standing with their fellow pupils and their teacher as well as interfere with later opportunities for higher education and employment”).
268 *Id.*
the prison-pipeline research tying first-time school exclusion to dropout rates and criminal activity. Thus, similar to the termination of interests of a parolee facing revocation, the termination of a student’s ability to participate in public education would be tantamount to a “grievous loss” for the student and likely for society as well.

The state’s interests in having a lower standard of impartiality in Morrissey and in the school discipline context similarly correspond with the state’s interest in the school discipline context being arguably lower than those involved in parole revocation hearings. School districts and college governing bodies have echoed the state’s argument in Morrissey that maintaining a lower standard of impartiality retains non-adversarial procedures essential to the efficient process of adjudication already in place. The Court rejected this argument, declaring that a state’s interest in its own discretion over parole procedures would not be interfered with by the requirement of a hearing before an uninvolved adjudicator. Similarly, a school district’s argument that a requirement of higher standards for impartiality is an unnecessary judicial interference with uniquely local functions must fail because the interference is minimal. Thus, the corresponding interests and deprivations at stake show Morrissey to be a strong case for the requirement of a higher standard of impartiality in the school discipline setting that would guarantee the provision of an independent, “wholly disinterested” decision-maker, free from the influence or appearance of bias, for a student’s long-term discipline adjudication.


As noted above, the asserted burden on a school district of providing an impartial adjudicator of a student’s disciplinary charges is much slighter than the case law suggests. State legislation and practices that routinely employ the use of independent decision-makers in school discipline cases provide evidence that the practice is not unfeasible or unreasonably burdensome. At a minimum, a district’s provision of school board members who do not know the student or have not seen any of the facts of the charges prior to the hearing would not


270 See supra Part II.B.


272 C.B. by & Through Breeding, 82 F.3d at 388 n. 3 (calling the disqualification of prosecuting administrators as decision-makers “impossible,” “undesirable,” and “too complex”); Newsome, 842 F.2d at 926 (“We decline to place upon a board of laymen the duty of observing and applying common-law rules of evidence”); Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) (Strictly providing for a separation of investigative and adjudicative functions at all times is “unduly burdensome”).

273 Morrissey, 408 U.S. at 483.

274 As discussed above, states like Georgia use independent and uninvolved hearing officers routinely as required by statute. See generally GA. CODE ANN. § 20-2-753 (2004). Other states, like Illinois, employ the practice routinely even in the absence of statutory requirements to do so. See COLO. REV. STAT. § 22-33-105(2)(c) (2013); 105 ILL. COMP. STAT. 5/10-22.6(b) (1988).

275 See In re Murchison, 349 U.S. at 137.

276 See, e.g., C.B. by & Through Breeding, 82 F.3d at 388, n. 3.

277 See, e.g., ARIZ. REV. STAT. ANN. § 15-843(F) (2010); CAL. EDUC. CODE § 48918(d) (Deering 2016); COLO. REV. STAT. § 22-33-105 (2013); GA. CODE ANN. § 20-2-753 (2004); 105 ILL. COMP. STAT. 5/10-22.6(a) (1988); OR. ADMIN. R. 581-021-0070(2) (2016).
overburden the district. However, in order to be effective, such a practice would have to grant the board the ability to develop the factual record rather than deferring to an administrator’s factual record developed below. Simply giving the board a deferential view of the facts developed below by an involved, and potentially biased, administrator would defeat the purpose of the separation of hearings.

To ensure freedom from bias, a better practice by far is illustrated by districts that employ independent hearing officers who are neither district employees nor board members. The District of Columbia stands out as a strong example of this practice by affirmatively relocating long-term suspension or expulsion cases to the Chancellor of Education’s hearing office for adjudication requiring the use of an independent hearing officer in long-term exclusion cases.278 Such a practice prevents the appearance of bias, but does so without administratively overburdening the district, since the hearing method is essentially “outsourced” to other individuals or entities, thereby decreasing the district’s burden in providing better safeguards against bias.279

A myriad of other examples is found in states that do not require the use of an independent hearing officer as advocated by this Note but permit their use by local district delegation.280 Even in the absence of the requirement, districts in those states routinely employ the use of hearing officers.281 In states requiring or permitting the use of independent hearing officers, those officers may be selected from a wide range of individuals. Some states, such as Arizona, allow districts to select officers from lists of individuals approved by the school board who serve as administrative hearing officers.282 Other states require the selection of specifically sanctioned school discipline hearing officers,283 and some states with well-developed administrative adjudication regimes permit the use of state administrative law judges to serve as discipline hearing officers,284 a practice which lends efficiency and experience to the process to the benefit of both students and districts. Though the “how” is less important than the “why,” the above models serve as examples to show that providing an impartial, uninvolved hearing officer can be achieved with a low burden on school districts, especially when compared to the high burden of consequences with which students at disciplinary hearings are faced.

Finally, this Note presents a sampling of model provisions representing strong impartiality protections that would go beyond the current thin impartiality safeguards and fall along the protections afforded by the education code of Washington D.C. and the federal court decisions of Gonzales and Butler. Section 1 of the model legislation should read:

Section 1: Requirement of Hearing: (A) Local boards of education shall hold a Due Process Hearing for any student facing charges of suspension of more than ten days or expulsion, to occur within seven calendar days of the principal’s initiation of disciplinary charges. (B) The hearing required by this Section may be in addition

278 See D.C. MUN. REGS. tit. 5-B § 2507.1.
279 Id.
280 See supra note 277.
281 See ARIZ. REV. STAT. ANN. § 15-843(F); CAL. EDUC. CODE § 48918(d) (Deering 2016); COLO. REV. STAT. § 22-33-105 (2013); 105 ILL. COMP. STAT. 5/10-22.6(a) (1988); OR. ADMIN. CODE. § 581-021-0070(2) (2016).
283 GA. CODE ANN. § 20-2-753(a) (2004).
284 CAL. EDUC. CODE § 48918(d) (2016).
to, and shall not be replaced by, any preliminary hearing before an administrator employed by the District.\footnote{This Section also might include additional procedures that may be constitutionally required such as a right for the student to have counsel present and to confront and cross-examine accusers and witnesses that are beyond the scope of this Note. See supra note 17.}

Section 2 of the model legislation should read:

Section 2: Adjudication of the Hearing by Impartial Decision-Maker: (A) Local boards of education shall appoint a Hearing Officer or Hearing Panel to serve as impartial decision-makers presiding over the Hearing required by Section 1. (B) The following functions shall disqualify an individual from serving as a Hearing Officer or member of a Hearing Panel: (1) Initiation of disciplinary charges against the student including recommendation of charges to the local board of education; (2) Investigation of the student’s misconduct related to the charges; (3) Prosecution of the charges; (4) Employment at the student’s school. (C) No attorney who has ever represented the local board of education or District may serve as a Hearing Officer or member of a Hearing Panel. (D) Any session at which the Hearing Officer or Hearing Panel deliberates after the Hearing that is closed to the public shall also be closed to any individual not serving as a Hearing Officer or member of the Hearing Panel.

Section 2 is the most significant provision in guaranteeing a decision-maker free from the appearance of bias. By limiting the hearing’s decision-maker to an individual with no prior official function in the student’s case, the provision brings the pool of available decision-makers within constitutionally tolerable bounds, guaranteeing that decision-makers will be beyond the appearance of bias. However, the provision remains flexible enough to allow members of the board of education to serve as adjudicators, so long as they do not violate one of the disqualifying limitations. In this way, the provision does not make the adjudication process unduly burdensome for districts because it does not affirmatively require them to look outside the confines of the local board of education for selecting truly impartial decision-makers.\footnote{Because most members of local boards of education are unpaid, the flexibility in this provision also refrains from imposing substantial costs on a District in that they may use one or more of their own board members to adjudicate the hearing as long as they otherwise qualify under Section 2’s other requirements.} Necessarily, these limitations will also \textit{per se} exclude certain individuals from qualifying as a hearing officer regardless of actual bias, such as a student’s principal, a superintendent who has recommended disciplinary charges to the board of education, or any other administrators who have been involved in investigating the student’s conduct. Thus, the provision ensures a constitutionally appropriate separation of investigative and adjudicative functions employed in other administrative settings.\footnote{\textit{See supra} Part IV.}

Section 3 should read:

Section 3: Standard of Review at Local Board Hearing and Judicial Review of Appeal:(A) The decision of the Hearing Officer or Hearing Panel shall be based on a de novo review of the factual record developed at the Hearing without regard to any prior hearings or meetings. (B) A decision issued by the Hearing Officer or
Hearing Panel under Section 1 of this Title may be appealed within 21 days of issuance to the County Trial Court in which the District sits. (C) The Court shall review the appeal based on the factual record developed at the Hearing. (D) A Court’s ruling on the appeal allowed by this Section is final.

Section 3 ensures that a student is afforded judicial review over a local board of education ruling. This Section maintains the flexibility inherent in this model legislation by allowing the factual record developed below at the disciplinary hearing to serve as the basis for the trial court’s appeal, thus preventing the re-litigation of disciplinary matters and retaining judicial efficiency. The higher standards of impartiality this model legislation requires will ensure that a factual record is developed in full fairness at the administrative level. It is important to note, however, that this deference may not be preferential in states that do not allow the presence of counsel or the confrontation and cross-examination of witnesses at the discipline hearing because in the absence of those safeguards, it is unlikely that a full factual record will have been developed. In such cases, this Note would propose that a reviewing trial court be required to conduct a de novo evidentiary hearing in lieu of a deferential appeal.

States that do not have a requirement for individuals who may serve as impartial decision-makers should adopt the above legislation in full. States that have already adopted legislation permitting the selection of an independent hearing officer need only amend those provisions to affirmatively require the utilization of hearing officers, though those states should provide for de novo review at the disciplinary hearing and judicial review of possible appeal. In certain circumstances, those states may also elect to scale back the selection requirements of the individual who will constitute an “independent hearing officer” to ease districts’ transition from an optional provision to an affirmative requirement while still maintaining minimum impartiality safeguards.

States already affirmatively requiring the use of independent hearing officers should further amend those provisions to ensure that none of those hearing officers have served disciplinary roles in the District, consistent with Section 2 above. States providing a pool of administrative law judges or officers from which school districts can hire their hearing officers do not face the constitutional problems inherent in states who leave the practice open to local boards of education. Those states may choose to continue their constitutionally sound practices, though the strength of the provisions above include flexibility for the selection of uninvolved board of education members as hearing officers that is not available to districts in states with an administrative law judge regime. In short, this Note argues that the Fourteenth Amendment requires greater due process protections from state legislatures for students facing long-term discipline by providing a decision-maker free from the appearance of bias. The model legislation presented above provides a beneficial starting point for doing so.

VI. CONCLUSION

The school landscape has changed dramatically since Goss v. Lopez was decided in 1975. Though great strides have been made in due process protections across many adjudicative contexts, students facing long-term discipline are still left with a mismatched tapestry of procedural rights that desperately require uniformity and adaptation to the norms of the modern public educational setting.288 Federal, state, and local governments and federal and state courts have adapted with

288 See generally Black, supra note 17.
289 See supra Part III.
great flexibility and speed to the due process needs of certain classes of students by developing statutory regimes for servicing students with disabilities, providing education for non-native students, and ensuring all American children receive a public education regardless of legal status.  

The next horizon in education may properly be viewed as the heightened provision of constitutional safeguards for students facing disciplinary consequences that, according to abundant research, have the overwhelming power to end students’ educational careers and channel them toward the criminal justice system. This goal calls for strong procedural safeguards, to include impartial adjudicators beyond the appearance of impropriety or bias that is present in many school discipline settings with unfortunate persistence. In spite of the presence of many skilled and caring educators who would nobly do their utmost to serve as impartial adjudicators and would most likely succeed in doing so, the consequences at stake for students facing school exclusion require a heightened standard, akin to comparable administrative settings, to comport with the minimum of procedural due process. A best practices approach is simply not enough for our students, nor are thin protections that allow the specter of bias to linger. Because our students deserve justice to perform “its highest function in the best way, justice must satisfy the appearance of justice.” The stakes for our students are simply too high for anything less.

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291 See supra, notes 35, 38, 40.

292 In re Murchison, 349 U.S. at 136.