COMMENT

NAVIGATING A LEGAL DILEMMA: A STUDENT'S RIGHT TO LEGAL COUNSEL IN DISCIPLINARY HEARINGS FOR CRIMINAL MISBEHAVIOR

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INTRODUCTION

In recent years, school violence has repeatedly shocked the immediately affected communities and the entire country. While the shootings at Columbine High School and Virginia Tech represent the tragic extreme of school violence, increasing numbers of other criminal acts—including sexual assault, weapons possession, and drug-related activity—are occurring on high school and college campuses.[1] As violence and allegations of crime rise in schools, so too do the number of proceedings in which institutions attempt to discipline the perpetrators.

Such proceedings present a unique legal dilemma. A student faces a number of consequences and challenges when accused of conduct in violation of both criminal law and school policy. Say a student at a publicly funded university sells illegal drugs on campus: of course selling drugs violates criminal law. But many universities have also enacted student codes that impose disciplinary sanctions on students who sell drugs.[2]

If a student wants to remain enrolled and continue attending school, he may participate in a school disciplinary proceeding, which

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[1] *See* Alexander M. Kipnis, Gideon's Trumpet and the New Millennium: In Defense of Right to Counsel in Student Disciplinary Proceedings in Institutions of Higher Education 4 (Apr. 30, 2004) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931332 (articulating three areas of the law—sexual assault, drug use, and ownership of intellectual property—affecting student discipline at higher learning institutions).

[2] *See, e.g.*, *Policy Regarding Use of Illegal Drugs and Alcohol*, U. IOWA, http://dos.uiowa.edu/policy-list/current-policies-and-regulations-affecting-students-2011-2012-academic-year/student-responsibilities-6/policy-regarding-use-of-illegal-drugs-and-alcohol-4 (last visited Nov. 15, 2011) ("Illegal drug trafficking is viewed as a clear and present danger to the University community. Any student found to have sold, manufactured, distributed, or administered illegal drugs may be *suspended or expelled*." (emphasis added)).

may occur well before the criminal case has concluded. At the proceeding, a disciplinary panel will ask questions of the student and other witnesses to determine whether the alleged conduct actually occurred.

At this proceeding, one of two things could happen. The student could refuse to answer the questions, because he does not know what facts will incriminate him in his later criminal drug case. If he refuses, however, he may face suspension or expulsion on the basis of the testimony of the witnesses against him. Alternatively, the student, wishing to put the events behind him, could testify, admit to selling drugs, and receive a disciplinary sanction. Subsequently, he would stand trial in the criminal case, where his statements from the school disciplinary hearing can be introduced into evidence against him.[3]

With parallel proceedings—one criminal and one administrative—arising from the same set of facts, the student has conflicting interests and faces procedural obstacles in both. The dilemma is further complicated without the assistance or advice of trained legal counsel to warn the student of adverse legal consequences and recommend how best to proceed. Admittedly, a school disciplinary proceeding does not threaten a student's liberty in the same way a criminal proceeding does. But when a student faces this type of situation, he is forced to make decisions and meet challenges—including confusing legal questions concerning self-incrimination, admissibility of evidence, and confrontation of witnesses—that he is ill-equipped to handle without the advice of legal counsel.

The utility of a student's right to counsel in the above situation is obvious; however, entitlement to this right is not. A student is entitled to counsel, appointed by the court if he or she is indigent, in the criminal proceeding if he or she faces potential incarceration. But school disciplinary actions are civil proceedings. Thus under current Supreme Court Sixth Amendment jurisprudence, a person has no right to appointed counsel unless he faces potential imprisonment.[4]

Fortunately, the Sixth Amendment is not the only route to securing a student's right to counsel. Students in public schools and universities are entitled to minimal procedural due process before they

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[3] These statements would likely be admissible nonhearsay statements as they are admissions of a party-opponent under Federal Rule of Evidence 801(d)(2) or similar state evidence rules. *See* FED. R. EVID. 801(d)(2) (declaring that statements made by party-opponents are not hearsay).

[4] *See* Alabama v. Shelton, 535 U.S. 654, 674 (2002) (holding that a sentence of imprisonment cannot be imposed without access to the assistance of counsel).

can be suspended or expelled from school.[5] This Comment concludes that when a student faces both a disciplinary hearing and a potential criminal incarceration, an analysis of the interests at stake indicates that Fourteenth Amendment due process protection entitles a student to the assistance of counsel in both proceedings.

The Supreme Court decided two cases in the last Term that are related to the right to counsel in school disciplinary hearings. In *Turner v. Rogers*, the Supreme Court addressed a situation in which a father in a custody dispute was incarcerated for civil contempt because he failed to pay his court-mandated child support.[6] The Court determined that while counsel was not strictly necessary, alternative procedural safeguards are required before an indigent parent can be incarcerated for contempt.[7] In a case coming out of the public schools, *J.D.B. v. North Carolina*, a seventh-grade student was pulled out of class by a uniformed police officer and questioned without a *Miranda* warning at school about home break-ins that had occurred in his neighborhood.[8] Juvenile criminal charges followed this interrogation, and the Court addressed whether *Miranda* warnings were necessary due to the age of the suspect.[9] The Court concluded that age should be a factor in determining whether a child is in custody, and thus requires the *Miranda* warnings before questioning.[10] Attorney Ken Schmetter, author of the American Bar Association's brief in the case, characterized the *J.D.B.* decision as a "very significant decision for kids."[11] The Court, the *Washington Post* reported, recognized that "children are more easily coerced and impulsive than adults, less likely to foresee the implications of their actions and more likely to make false confessions."[12] Despite establishing important procedural safeguards in civil cases and recog-

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[5] *See* Goss v. Lopez, 419 U.S. 565, 581 (1975) ("Students facing temporary suspension have interests qualifying for protection of the Due Process Clause . . . ."); E.K. v. Stamford Bd. of Ed., 557 F. Supp. 2d 272, 276 (D. Conn. 2008) ("The parties do not dispute that plaintiff has the right to procedural due process in connection with his expulsion from school, and that constitutional compliance requires at least notice and opportunity for a hearing appropriate to the nature of the case." (citing *Goss*, 419 U.S. at 574-79)).

[6] Turner v. Rogers, 131 S. Ct. 2507 (2011).

[7] *Id.* at 2519-20.

[8] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2399 (2011).

[9] *Id.* at 2400-01.

[10] *See id.* at 2406 ("This is not to say that a child's age will be a determinative, or even significant, factor in every case.").

[11] Donna St. George, *Miranda-Rights Debate Unfolds at Fairfax School*, WASH. POST, July 18, 2011, at A1 (internal quotation marks omitted).

[12] *Id.*

nizing the vulnerability of children accused of misconduct at school, these two cases hardly guarantee any procedural protections for a student in the situation this Comment considers.

This Comment will analyze the issues of school disciplinary due process and the Sixth Amendment right to counsel, and their intersection in this factual situation—an instance where a student simultaneously faces academic and criminal penalties in parallel proceedings. Though infrequently addressed in litigation,[13] this is an important topic that concerns countless students in public schools and universities across the country. Several scholars have analyzed due process rights in school disciplinary cases and have discussed how schools and courts should address these rights.[14] The evaluation of the right to counsel in a disciplinary hearing, however, has remained one discrete issue among many in current scholarship. Thus, the scope of this Comment is limited to evaluating the particular situation of a student facing both criminal and disciplinary charges arising from the same event and looks only at the role of and right to counsel in that particular situation. In seeking to find a constitutional right to counsel for these students, I will explore the various obstacles to obtaining that right in constitutional provisions and interpretations.

Part I explains the theory behind and requirements of procedural due process in school disciplinary proceedings and how courts have previously addressed the right to counsel in these proceedings. Part II examines the right to counsel guaranteed by the Sixth and Fourteenth Amendments. The intersection of school disciplinary hearings and the right to counsel is analyzed in Part III, which asks whether the Sixth Amendment or the Fourteenth Amendment guarantees this right. I ultimately conclude that an application of the factors from

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[13] There are several possible explanations for the paucity of cases addressing counsel in disciplinary hearings. First, students and parents may not be aware of their due process rights when a student is expelled or suspended from school. If they are aware of such rights, then they may not believe that these rights include the assistance of counsel. Second, even if parents and students think counsel would be useful, they may lack the financial resources to secure such counsel. Along those same lines, poorer families likely fail to file a lawsuit to assert their due process rights precisely because they lack the financial means to assert their rights in a civil lawsuit. Finally, when parents or students make a valid claim that the student needs counsel, it is possible that the parties settle the matter privately before resorting to the courts.

[14] *See, e.g.*, Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 339 (1999) (recognizing that no school offers to find a student an attorney or pay for counsel if the student cannot afford one, in part because courts have rarely viewed due process in school disciplinary hearings as including a right to counsel).

Mathews v. Eldridge[15] compels the conclusion that the Fourteenth Amendment entitles a student to counsel in this situation. Finally, in Part IV, I explore persuasive extra-constitutional reasons for affording a right to counsel, along with some of the arguments against affording the right.

The Supreme Court has recognized the importance of education and the severe consequences that can occur when it is taken away.[16] The Court has also recognized in *Gideon v. Wainwright*, the seminal case guaranteeing appointed counsel, that "lawyers in criminal courts are necessities, not luxuries."[17] Given the dangers of action without counsel in a disciplinary proceeding where both expulsion and criminal imprisonment are possible outcomes, lawyers in school disciplinary hearings are no more of a luxury.

I. SCHOOL DISCIPLINARY PROCEDURAL DUE PROCESS

A. *Rise of Procedural Due Process Protections in Schools*

Arising out of the civil rights movement, procedural due process protection in school settings has developed into a flexible doctrine highly dependent on the specific facts involved. The decisive appellate case that laid the groundwork for Supreme Court–mandated due process is *Dixon v. Alabama State Board of Education*.[18] The plaintiffs in *Dixon* were six black college students who in Montgomery, Alabama, in 1960 entered a lunchroom and demanded to be served.[19] After their actions attracted the attention of the Governor and the Chairman of the State Board of Education, the Board of Education voted unanimously to expel the plaintiffs.[20] The students faced no formal charges and the school did not hold a hearing prior to their expulsion.[21]

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[15] *See* 424 U.S. 319, 348 (1976) (holding that to determine what process is required, the private interest must be weighed against the government's interest and the risk of erroneous deprivation as well as the value of additional procedure).

[16] *See* Goss v. Lopez, 419 U.S. 565, 575 (1975) (emphasizing that charges of misconduct could damage a student's reputation in school and interfere with future employment and educational opportunities).

[17] 372 U.S. 335, 344 (1963).

[18] 294 F.2d 150 (5th Cir. 1961); *see also Goss*, 419 U.S. at 576 n.8 (describing *Dixon* as a "landmark decision").

[19] *Dixon*, 294 F.2d at 152 n.3.

[20] *Id.* at 154.

[21] *Id.*

In this landmark decision, the Fifth Circuit emphasized the gravity of expulsion as a punishment.[22] The court held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."[23] Although the holding was limited, the court offered guidance for future proceedings.[24] Emphasizing that the nature of a hearing varies with the facts of each case, the court explained that a charge of misconduct differs from academic failure because a disciplinary board's findings depend on facts and testimony "easily colored by the point of view of the witness."[25] A hearing is therefore necessary to allow the decisionmaker to hear both sides of any given case.[26] Though emphasizing that a "full-dress judicial hearing" is unnecessary, the court declared that the "rudiments of an adversary proceeding" should be presented.[27] In the case before the court, it was necessary for the student to be given the names of the witnesses, a report of their testimony, and the opportunity to present a defense, including the student's own witnesses.[28] *Dixon* represents a shift in school disciplinary due process developments because the court recognized that unilateral action by a school disciplinary committee necessarily violates a student's right to due process.

Dixon, though not Supreme Court precedent, allowed other courts the opportunity to follow its logic in cases involving public higher education. Decisions after *Dixon* paved the way for enhanced procedural protections in school disciplinary proceedings.[29] But *Dixon*'s applicability to secondary school cases remained in doubt.[30]

In 1967, the Supreme Court decided *In re Gault*, establishing due process rights for juveniles before being committed to a juvenile home.[31] Though not directly applicable to school disciplinary situa-

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[22] *See id.* at 157 ("Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.").

[23] *Id.* at 158.

[24] *Id.*

[25] *Id.* at 158-59.

[26] *Id.* at 159.

[27] *Id.*

[28] *Id.*

[29] *See, e.g.*, Due v. Fla. Agric. & Mech. Univ., 233 F. Supp. 396, 401-02 (N.D. Fla. 1963).

[30] *See* RICHARD S. VACCA & WILLIAM C. BOSHER, JR., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 218 (7th ed. 2008) ("The question of the applicability of *Dixon* to the elementary school setting was not answered for several years.").

[31] *In re* Gault, 387 U.S. 1, 30 (1967).

tions, *Gault* implicitly encouraged lower courts to embrace the idea that due process rights attach to juveniles in public elementary and secondary schools.[32] In *Goss v. Lopez* in 1975, the Supreme Court specifically addressed due process rights for students in disciplinary hearings. Though directly presenting the question lower courts had grappled with since *Dixon*,[33] *Goss* did not provide solid direction to courts addressing disciplinary due process issues. Instead, the Court emphasized that determining whether due process is fulfilled depends upon the specific charges and sanctions involved.[34]

In *Goss*, nine students who were suspended from school for ten days denied their alleged misconduct.[35] The Supreme Court found they had both a liberty and a property interest in their education.[36] The Court held, concerning a suspension of less than ten days, that a student must be given oral or written notice of the charges, a summary of the evidence against him, and a chance to present his own version of the events.[37] The Court then went to great lengths to limit the holding to only short suspensions.[38] It also explained that the required

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[32] *See* VACCA & BOSHER, *supra* note 30, at 219 ("*Gault* did not apply specifically to school exclusions, but a number of lower courts began to clarify the procedural due process rights of students in exclusionary hearings.").

[33] *See, e.g.*, Marin v. Univ. of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974) (holding that a number of procedural rights, including notice of charges, a hearing, and a written decision of the findings are necessary, based in part on *Dixon*); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (citing *Dixon* for its procedural safeguards because the Supreme Court "has written no blueprint"); Rumler v. Bd. of Sch. Trs., 327 F. Supp. 729, 743 (D.S.C. 1971) ("On comparison, however, of *Dixon* and the case under consideration, the facts are so entirely different as to deny that *Dixon* would warrant relief to plaintiffs or censure of defendants in the manner in which a *simple* suspension was involved."); Knight v. State Bd. of Educ., 200 F. Supp. 174, 177 (M.D. Tenn. 1961) ("While there are factual differences between the *Dixon* case and the present one, and the principles enunciated so clearly therein are not necessarily determinative of this case, they are entitled to considerable weight insofar as the question of procedural due process is concerned."(italics added)).

[34] *See* Goss v. Lopez, 419 U.S. 565, 584 (1975) (emphasizing that the decision was confined only to short suspensions and that other punishments, or special situations, may require more formal procedures).

[35] *Id.* at 568-69.

[36] *See id.* at 574 ("Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." (citing Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring in part and concurring in the result in part); *id.* at 171 (White, J., concurring in part and dissenting in part); *id.* at 206 (Marshall, J., dissenting))).

[37] *Id.* at 581.

[38] *Id.* at 584 ("Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.").

procedures represented a floor rather than a ceiling that a "fair-minded school principal" would impose to avoid unfair suspensions.[39] The Court expressly noted that it did not interpret due process to require counsel, cross-examination, or the opportunity to call witnesses for hearings potentially leading to short suspensions.[40] The procedures mandated in *Goss* amounted to little more than an "informal give-and-take between student and disciplinarian" to guard against erroneous adverse action.[41]

Since *Goss*, the Court has not addressed due process in school disciplinary proceedings, leaving the interpretation and implementation of *Goss*, and later *Mathews v. Eldridge*, to the lower courts.[42] The Court was again invited to address the procedural due process rights of students in *Board of Curators of the University of Missouri v. Horowitz*.[43] There, the Court decided less stringent procedures were necessary for academic dismissals than for disciplinary decisions.[44] In an academic dismissal, the Court reasoned, school administrators rely upon their judgment and experience as academics in deciding whether a student can and should continue his or her studies.[45] Conversely, in a disciplinary hearing, the facts of the infraction must be determined by weighing the credibility of the student against that of his accuser.[46] In addressing the academic dismissal in *Horowitz*, the Court took the opportunity to emphasize that due process depends on the specific situation at hand[47] and the risks of encroaching on academic discretion.[48]

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[39] *Id.* at 583.

[40] *Id.*

[41] *Id.* at 584.

[42] After *Goss*, the Court held that a student could sue school board members for denial of procedural due process in an expulsion hearing. *See* Wood v. Strickland, 420 U.S. 308, 321-22 (1975) (holding that school officials who knowingly violate students' constitutional rights are not immune from liability).

[43] 435 U.S. 78 (1978).

[44] *Id.* at 89-90.

[45] *See id.* at 90 ("[T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

[46] *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005) (acknowledging the necessity of a more complete hearing when credibility is at issue).

[47] *See Horowitz*, 435 U.S. at 86 ("The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct.").

[48] *See id.* at 90 ("We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship.").

One final Supreme Court case has proved integral to lower courts' determination of the essential elements of due process in a hearing. Though not specifically addressing school disciplinary proceedings, *Mathews v. Eldridge* provides a rubric for assessing the procedures necessary to uphold constitutional procedural due process.[49] The Court in *Mathews* held that to determine the requirements of due process, a court[50] must weigh: (1) the private interest involved, (2) the risk of erroneous deprivation of the private interest through the procedures used and the benefit, if any, that additional procedure would add, and (3) the government's interest, including fiscal and administrative burdens caused by additional procedure.[51] With the limited guidance of *Goss* and *Mathews*, lower courts and schools set to work determining the required elements of due process in individual circumstances.

In 1979, a doctoral student at Northwestern University studied three public and three private secondary schools to analyze their respective reactions to the *Goss* decision.[52] The study demonstrated *Goss*'s substantial effect on disciplinary procedures and highlighted differences between public and private school suspension and expulsion procedures.[53] At the public schools, administrators exhibited a high level of awareness of the *Goss* decision, and two of the three schools formally modified their disciplinary procedures to comply with due process.[54] Although administrators at the private schools

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[49] *Mathews v. Eldridge*, 424 U.S. 319 (1976), concerned the procedure necessary before termination of Social Security disability benefits. Distinguishing the requirement of an evidentiary hearing requirement from *Goldberg v. Kelly*, 397 U.S. 254 (1974), the Court in *Mathews* found that the procedures given before revoking benefits were sufficient to meet the requirements of the Fourteenth Amendment. 424 U.S. at 340-41.

[50] Under the Supreme Court's decision in *Cleveland Board of Education v. Loudermill*, the procedure required to satisfy due process is a constitutional question that can only be determined by a court. *See* 470 U.S. 532, 541 (1985) (highlighting the fact that state statutes do not determine the appropriate minimal procedures when constitutional due process applies).

[51] *Mathews*, 424 U.S. at 335.

[52] *See* Cynthia Ann Kelly, Due Process in the Schools: The View from Inside 1-2 (June 1979) (unpublished Ph.D. dissertation, Northwestern University) (on file with the author) (detailing the methodology, research, and results of the study).

[53] *See, e.g.*, *id.* at 255 tbl.29 (comparing due process rankings across various levels of formalized schools).

[54] *See id.* at 238-39 (detailing the awareness of teachers and administrators of the *Goss* decision, due process generally, and the changes in procedures). Notably, the study found that in the third public school, though administrators were aware of the *Goss* decision, they avoided reforms by instituting a "blocking" punishment in lieu of suspension, which disallowed students from attending school unless accompanied by a parent. *Id.* at

were undoubtedly aware of the *Goss* decision,[55] the disciplinary procedures at these schools were more informal and continued to be so after *Goss*.[56] The study also found that despite general awareness of the *Goss* decision, its implementation in the schools was limited.[57] Only one school adopted official guidelines and none went beyond the decision to address other hearing elements.[58] This study reflects the fact that the reactions to the *Goss* decision in the schools closely paralleled that in the courts: an understanding that due process required something, but confusion and variance in how due process should actually be implemented in school procedures and individual cases.

As *Mathews*, *Goss*, and *Horowitz* emphasize, the necessary elements of a hearing vary greatly depending on the circumstances and interests involved. The necessary elements of a hearing may include: notice, an impartial decisionmaker, an opportunity for the student to present his or her side of the story, including presentation of witnesses and evidence, an opportunity to challenge adverse witnesses and evidence, the right to an attorney, and a decision based on the record available with a statement of its rationale.[59] While the Supreme Court explicitly required few hearing elements apart from notice and an opportunity to be heard,[60] some of the more frequently litigated elements include the opportunity to cross-examine, the right to call witnesses, the impartiality of the tribunal, and the right to counsel.[61] The struggle

238. The study noted that "blocking" without procedures likely violated *Goss* as well, because it deprived students of their right, at least temporarily, to education. *Id.*

[55] *See id.* at 239 ("An examination of suspension procedures at the three private schools in the study provides further evidence of the impact of the *Goss* decision.").

[56] *See id.* at 239-40 (explaining that though the private schools attempted to fairly enforce rules, they determined fairness independently, not in reaction to court-made rules).

[57] *See id.* at 264 ("While the public schools have made some steps toward recognizing students' due process rights, there have been no giant leaps.").

[58] The study looked at rights including "notice, hearing, right to an impartial decisionmaker, rights to confrontation, the right to call witnesses and the right to appeal." *Id.* at 265.

[59] *See* AMERICAN PUBLIC SCHOOL LAW 521 (Kern Alexander & M. David Alexander eds., 7th ed. 2009) (setting forth seven essential elements of a *Mathews* hearing adapted to an educational setting). Some courts and states also include the right to appeal as an element of due process, but it is not generally considered essential if an otherwise fair proceeding was conducted. *See* VACCA & BOSHER, *supra* note 30, at 222 (explaining that many states give students some way to appeal, either through the Department of Education or directly to the courts).

[60] *See* Goss v. Lopez, 419 U.S. 565, 581 (1975) (requiring "oral or written notice of the charges").

[61] *See* VACCA & BOSHER, *supra* note 30, at 220-22 (listing the elements of a hearing and noting which elements are more frequently contested in court).

over these more contested hearing elements demonstrates the tension between preventing disciplinary hearings from becoming too adversarial[62] and ensuring that adverse actions are not taken erroneously.[63]

B. *The Approach of Codes and Courts to the Right to Counsel in Disciplinary Hearings*

The right to counsel, as well as other criminal procedure protections,[64] comes into question when a student faces both disciplinary and criminal charges deriving from the same set of events. The inquiry into a student's right to counsel in a disciplinary hearing begins with the question of whether the applicable school code addresses counsel at all, forbids it, or allows it. Where either codes or administrators forbid meaningful participation of counsel, courts face a dilemma. On the one hand, allowing counsel to participate in disciplinary hearings could make the hearing more adversarial. On the other hand, denying a student's right to counsel threatens the student's constitutional due process rights.

1. A Brief Survey of Disciplinary Codes

Understandably, disciplinary codes vary significantly among different schools. Because public schools must comply with due process, their school codes are often more comprehensive and conclusive concerning hearing rights.[65] On the other hand, a number of private schools also afford significant procedural protections. Many colleges

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[62] *See* Richard Arum & Doreet Preiss, *Still Judging School Discipline* (citing judicial concern about the increasingly adversarial nature of challenging school authority), *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 238, 239 (Joshua M. Dunn & Martin R. West eds., 2009).

[63] *See Goss*, 419 U.S. at 576 (emphasizing the importance of an education and the adverse consequences a student faces after disciplinary action based on misconduct).

[64] Courts have uniformly held that rights against self-incrimination and double jeopardy do not apply to disciplinary proceedings. *See* Paine v. Bd. of Regents of the Univ. of Tex. Sys., 355 F. Supp 199, 203 (W.D. Tex. 1972) (concluding that because a school disciplinary sanction is administrative, not punitive, and the Double Jeopardy Clause applies only to two successive punitive sanctions, disciplinary sanctions on top of criminal punishment do not violate double jeopardy), *aff'd*, 474 F.2d 1397 (5th Cir. 1973); VACCA & BOSHER, *supra* note 30, at 222 ("The fifth amendment protection against self-incrimination does not apply to school disciplinary proceedings; it applies only to criminal proceedings."). However, the privilege against self-incrimination and use of a student's statements from a disciplinary hearing in a criminal proceeding constitute a strong argument for allowing students counsel in disciplinary proceedings so that they can preserve their rights in the criminal proceeding.

[65] See *supra* notes 54-56 and accompanying text.

and universities permit some representation in disciplinary hearings, although the extent and formality of this representation varies from school to school.[66] The variation among secondary public schools is even greater. While this Section primarily focuses on university codes, which are generally more fully developed and widely available, the end of this Section delves briefly into public secondary school codes.

A common code formulation allowing assistance during a disciplinary proceeding permits a student to consult with an advisor before and during the proceeding.[67] Universities employing this provision vary on whether the advisors can participate or can be attorneys. Princeton University and Colgate University, both private, insist that the advisor be a member of the university community, effectively precluding participation by an attorney at Princeton and explicitly doing so at Colgate.[68] Temple University, a publicly funded institution, al-

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[66] *See* Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 23 (stating that while colleges vary in the extent of assistance of counsel provided, most allow some assistance).

[67] *See, e.g.*, COLGATE UNIV., STUDENT HANDBOOK 2011–2012, at 150 (2011), *available at* http://www.colgate.edu/portaldata/imagegallerywww/939d3f45-4876-4ef5-b567-1082dd4c58e4/ImageGallery/Studenthandbook2011.pdf (providing that a student whose behavior is in question has a right "to the assistance of an advisor at the hearing"); TEMPLE UNIV. BOARD OF TRS, POLICIES AND PROCEDURES MANUAL 11 (2009), *available at* http://policies.temple.edu/getdoc.asp?policy_no=03.70.12 ("[T]he Accused Student ha[s] the right to be assisted by any advisor they choose, at their own expense."); UNIV. OF WIS. SYS., STUDENT NONACADEMIC DISCIPLINARY PROCEDURES § 17.12(4)(b), at 47 (2009), *available at* http://www3.uwstout.edu/stusrv/dean/upload/uws017.pdf ("The student shall have the right . . . to be accompanied by an advisor of the student's choice."); *Board of Trustees Bylaws*, CITY U. N.Y., http://policy.cuny.edu/text/toc/btb/Article%20XV/Section%2015.3. (last visited Nov. 15, 2011) ("The notice shall contain . . . [a] statement that the student [has a right] . . . to be represented by legal counsel or an advisor at the student's expense."); *Judicial Procedure for Alleged Violations of the Code of Student Life (2010–2011 Academic Year)*, U. IOWA, http://dos.uiowa.edu/policy-list/archives/2010-2011-policies-and-regulations-affecting-students-archived/student-responsibilities-5/judicial-procedures-2/judicial-procedure-for-alleged-violations-of-the-code-of-student-life-6/ (last visited Nov. 15, 2011) [hereinafter *Violations of Student Code*] (stating that at a formal hearing a student has the right to be represented by an adviser at the student's expense); *Rights, Rules, Responsibilities, University-wide Regulations*, PRINCETON U., http://www.princeton.edu/pub/rrr/part1/index.xml#comp18 (last visited Nov. 15, 2011) ("Each party to the case may be accompanied by an adviser from within the university community.").

[68] *See* COLGATE UNIV., *supra* note 67, at 150 ("An advisor must be chosen from among current students, faculty, staff or administrators at Colgate University. The advisor may not be a practicing attorney, and no practicing attorney may be present in the hearing room."); *Rights, Rules, Responsibilities, Students and the University*, PRINCETON U., http://www.princeton.edu/pub/rrr/part2/index.xml#comp25 (last visited Nov. 15, 2011) (requiring that the advisor "must be a current member of the resident University community").

lows the student to have an advisor present at the hearing, and allows the advisor to be an attorney; however, the advisor may not actively participate in the hearing.[69] The University of Iowa, also publicly funded, does not place any limits on the representation by an advisor.[70] The City University of New York and the University of Wisconsin system—both publicly funded—allow an advisor or legal counsel to represent the student.[71] The publicly funded University of New Mexico gives the responsibility of presenting a case to the student alone, stating that "advisors (including attorney advisors) are therefore not permitted to present arguments or evidence or otherwise participate directly in the hearing."[72]

The ability of a student to retain an advisor or attorney varies greatly between universities, but the differences are even more pronounced among the multitude of independent elementary and secondary school districts throughout the United States. Public high schools, perhaps motivated by widely publicized tragedies like Columbine, often have detailed internal policies for school emergencies stemming from a student's unlawful conduct, including securing the situation, mounting an investigation, and notifying law enforcement officials.[73] Many public schools also have explicit rules prohibiting the sale or possession of tobacco, drugs, or alcohol on campus, and penalizing violent and criminal acts—often classifying the acts according to their severity and the disciplinary sanction involved.[74] However, with regard to disciplinary proceedings, suburban school codes tend to offer less detailed guidance as compared to codes of sprawling urban districts

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[69] *See* TEMPLE UNIV., *supra* note 67, at 11 ("[A]dvisors are not permitted to speak or to participate directly in any Student Conduct Board hearings.").

[70] *See Violations of Student Code*, *supra* note 67 ("The accused student also has a right to bring an advisor (e.g., attorney, parent, support person) to this meeting.").

[71] *Board of Trustees Bylaws*, *supra* note 67; UNIV. OF WIS. SYS., *supra* note 67.

[72] *Student Grievance Procedure*, U.N.M., http://pathfinder.unm.edu/policies.htm#studentgrievance (last visited Nov. 15, 2011).

[73] *See, e.g.*, LOWER MERION HIGH SCH., STUDENT/PARENT HANDBOOK 2011–2012, at 42-43 (2011), *available at* http://www.lmsd.org/documents/schools/lmhs/student_handbook.pdf (detailing specific types of prohibited behavior and the corresponding disciplinary options and procedures).

[74] *See id.* at 43 (classifying the most serious behaviors, including drug and weapons possession and assault as "clearly criminal and . . . so serious that they always require administrative action which may result in immediate removal of the student from school and/or action by the Board of School Directors"); SCH. DIST. OF PHILA., 2010–2011 CODE OF STUDENT CONDUCT 10-11 (2010), *available at* www.phila.k12.pa.us/offices/administration/policies/CodeofConduct_1011.pdf (defining major and minor infractions, including criminal acts, and their consequences).

more accustomed to disciplinary issues.[75] Suburban school district codes less frequently address the specifics of the procedures a hearing must include, instead only acknowledging that a student is entitled to a "due process hearing" for more serious offenses.[76] More urbanized school districts may have more detailed procedures addressing important elements of due process for long suspensions and expulsions.[77] The School District of Philadelphia, for example, specifically allows a student to have retained counsel at an expulsion hearing.[78]

Allowing an advisor to be present is an important step in protecting a student's rights at a disciplinary hearing. Permitting the advisor to be an attorney provides even better protections. However, when codes are vague about who the advisor may be and whether they may participate in the hearing, the value of allowing these advisors is diminished. Many in the academic community believe that counsel should be provided, although only some schools follow suit.[79] Furthermore, most courts have refused to enforce the requirement of counsel in lawsuits alleging a violation of due process in academic dis-

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[75] A U.S. Department of Education study found that urban schools experience more student behavior problems in some areas:

> About half of the student behaviors studied were more likely to be worse in public urban schools than in suburban or rural schools, even after accounting for the higher concentration of poverty in urban schools. More time was spent maintaining classroom discipline in urban schools, and student absenteeism, possession of weapons, and student pregnancy were greater problems.

LAURA LIPPMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, NCES 96-184, URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY 108 (1996), *available at* http://nces.ed.gov/pubs/96184all.pdf.

[76] *See* LOWER MERION HIGH SCH., *supra* note 73, at 43 ("The student is entitled to a due process hearing before the School Board if expulsion is recommended.").

[77] *See, e.g.*, Donald H. Stone, *Crime & Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings*, 17 AM. J. OF TRIAL ADVOC. 351, 356 (1993) (reporting that among thirty-five schools 44% of rural, 62.5% of suburban, and 53% of urban students involved in disciplinary hearings were not advised of their right to an attorney).

[78] SCH. DIST. OF PHILA., *supra* note 74, at 14 (allowing a student facing expulsion to be represented by counsel, to present witnesses, to cross-examine witnesses, and to review records).

[79] *See* Steven K. Berenson, *What Should Law School Student Conduct Codes Do?*, 38 AKRON L. REV. 803, 843 (2005) ("Nonetheless, most commentators suggest that [counsel] be provided in the academic disciplinary context, and most law school codes presently provide for such rights." (citations omitted)); Berger & Berger *supra* note 14, at 339 (noting that fewer than 60% of university respondents to a survey about disciplinary procedures allowed students to retain legal counsel).

ciplinary proceedings.[80] But in a disciplinary proceeding where the student faces parallel criminal charges, the student should have affirmative representation by counsel regardless of whether an advisor is allowed to be present.[81] The student should be guaranteed this protection under the Constitution.

2. Courts' Approach to the Right to Counsel in Disciplinary Proceedings

Although some courts have suggested that students should have limited assistance of counsel in certain situations,[82] most have avoided requiring counsel in routine student disciplinary hearings.[83] Before *Goss*, several lower courts found counsel to be necessary to afford due process in a disciplinary hearing.[84] But after *Goss*, courts have been decidedly more reluctant to require counsel, presumably because *Goss* mandated only minimal procedures: notice and an opportunity to be heard.[85] The notable exception to the post-*Goss* trend is *Gabrilowitz v. Newman*, in which the First Circuit held that counsel was necessary for the proceedings to comply with due process because of the parallel criminal proceeding.[86]

The student in *Gabrilowitz* was accused of assault with intent to rape another student at the University of Rhode Island.[87] Along with pending criminal charges, the student received notice of disciplinary charges stemming from the allegations, which also raised violations of

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[80] *See* Berenson, *supra* note 79, at 843 ("And while courts have divided over whether there is a right to counsel in academic disciplinary proceedings, most hold that there is no such right." (citations omitted)).

[81] *See* Gabrilowitz v. Newman, 582 F.2d 100, 106 (1st Cir. 1978) (requiring counsel to caution a student against self-incrimination in school proceedings where the student faces parallel criminal charges).

[82] *Id.*

[83] *See, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 640-41 (6th Cir. 2005) (finding counsel unnecessary at the disciplinary hearing given the additional administrative burden on the school); Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 74-75 (4th Cir. 1983) (holding that disciplinary proceedings in which the student lacked the assistance of counsel were constitutionally sufficient for due process purposes).

[84] *See, e.g.*, Marin v. Univ. of P.R., 377 F. Supp 613, 623 (D.P.R. 1974); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972); Texarkana Indep. Sch. Dist. v. Lewis, 470 S.W.2d 727, 735 (Tex. Civ. App. 1971).

[85] *See* 419 U.S. 565, 583 (1975) (requiring "effective notice and [an] informal hearing permitting the student to give his version of the events").

[86] 582 F.2d 100 (1st Cir. 1978).

[87] *Id.* at 101.

the University of Rhode Island's standards of behavior.[88] He was informed of the procedures for the disciplinary hearing, which prohibited presence or assistance of counsel.[89] The university appealed the district court's grant of a preliminary injunction to stop the hearing.[90] The First Circuit agreed with the district court, concluding that counsel was necessary given the circumstances of Gabrilowitz's charges and proceedings.[91] In so concluding, the court emphasized the perils facing a student in Gabrilowitz's situation:

> Were the appellee to testify in the disciplinary proceeding, his statement could be used as evidence in the criminal case either to impeach or as an admission if he did not choose to testify. Appellee contends that he is, therefore, impaled on the horns of a legal dilemma: if he mounts a full defense at the disciplinary hearing without the assistance of counsel and testifies on his own behalf, he might jeopardize his defense in the criminal case; if he fails to fully defend himself or chooses not to testify at all, he risks loss of the college degree he is within weeks of receiving and his reputation will be seriously blemished.[92]

Recognizing that courts had not previously granted an absolute right to counsel in disciplinary proceedings, the court distinguished Gabrilowitz's situation on the grounds that most disciplinary proceedings "did not involve the specter of a pending criminal case hovering over the hearing."[93] Thus the court concluded that an attorney was necessary to protect the student's rights and the integrity of both the disciplinary proceeding and the pending criminal action.[94] The court emphasized the unique challenges confronting a student who faces disciplinary and criminal charges from the same actions, and concluded that "[o]nly a lawyer is competent to cope with the demands of an adversary proceeding held against the backdrop of a pending criminal case involving the same set of facts."[95]

Few courts have followed the First Circuit's emphatic call for counsel.[96] In 1993, the Seventh Circuit considered the necessity of

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[88] *Id.* at 101 n.2.

[89] *Id.* at 101-02.

[90] *Id.* at 102.

[91] *Id.* at 106.

[92] *Id.* at 103.

[93] *Id.* at 104.

[94] *Id.* at 106.

[95] *Id.*

[96] *See, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629 (6th Cir. 2005) (applying *Goss* and *Mathews* and concluding that cross-examination and counsel were unnecessary for due process); Osteen v. Henley, 13 F.3d 221, 226 (7th Cir. 1993) ("But when we consider all the factors bearing on [the student's] claim to a right of counsel, we

counsel in *Osteen v. Henley*.[97] In an opinion by Judge Posner, the court posited, "Especially when the student faces potential criminal charges . . . it is at least arguable that the due process clause entitles him to consult a lawyer, who might for example advise him to plead the Fifth Amendment."[98] But the court ultimately emphasized the difference between the right to consult counsel and the right to participation of counsel in the hearing, concluding that *Mathews* balancing did not require active participation of counsel.[99] In *Flaim v. Medical College of Ohio*, the Sixth Circuit concluded that active participation of counsel was unnecessary because the hearing was not procedurally complex and the student had admitted the felony conviction.[100] The Sixth Circuit also expressed concern that retained counsel would increase the adversarial nature of the proceedings.[101]

Notably, Congress has explicitly permitted counsel in another type of school administrative hearing where the proceeding's outcome implicates similarly significant rights.[102] Parties in hearings involving handicapped students under the Individuals with Disabilities Education Act (IDEA) have the right to counsel.[103] Furthermore, if parents successfully challenge in court the administrative findings about their child with disabilities and the accommodations to be made, the statute provides for attorney's fees.[104]

This Comment has so far addressed the right of a student to bring counsel into a disciplinary hearing, assuming that the student retains counsel himself. To have a meaningful impact, the right cannot merely be a right to retain counsel; it must be the right to appointed

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conclude that the Constitution does not confer such a right on him. We doubt that it does in any student disciplinary proceeding."). *But see In re* Roberts, 563 S.E.2d 37, 42 (N.C. Ct. App. 2002) (holding that due process requires the student have the opportunity to have counsel present in long-term suspension cases).

[97] 13 F.3d 221, 226 (7th Cir. 1993).

[98] *Id.* at 225 (citing Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988)).

[99] *Id.* Active participation of counsel would include direct examination and cross-examination of witnesses, presentation of evidence, and the ability to directly address the tribunal. *Id.*

[100] 418 F.3d 629, 640 (6th Cir. 2005).

[101] *Id.* at 640-41.

[102] *See* 20 U.S.C. § 1415(h) (2006) ("Any party to a hearing . . . shall be accorded . . . the right to be accompanied and advised by counsel . . . .").

[103] *Id.*; *see also* Edgar H. Bittle et al., *Due Process for Students* (noting that the requirements for hearings under IDEA differ from other disciplinary hearing requirements under the Constitution), *in* SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 99, 126 (James C. Hanks ed., 2004).

[104] 20 U.S.C. § 1415(i)(B)(i) (2006).

counsel if the student is indigent. A right that rests on a student's financial ability to retain counsel would surely deny due process to many. This would be a right guaranteed only to the rich, and due process rights must be available to all, regardless of wealth.

II. THE RIGHT TO APPOINTED COUNSEL: FROM FELONIES TO CONTEMPT OF COURT

The right to counsel has been widely recognized in American jurisprudence. In an early case assessing the right to counsel, *Powell v. Alabama*, Justice Sutherland wrote, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[105] That a fair proceeding cannot be accomplished without the assistance of counsel speaks directly to the dilemma of a student simultaneously facing a disciplinary hearing and a criminal tribunal. Such a student requires assistance of counsel to obtain a fair disciplinary hearing and to protect his rights in the pending criminal proceeding. An analysis of the applicability of the right to counsel in disciplinary hearings requires an understanding of the development of this right and subsequent successful and failed attempts to widen its scope.

A. *Criminal Proceedings*

As originally intended, it is likely that the Sixth Amendment was meant only to protect an accused person's right to retain counsel, not the right to have counsel appointed.[106] The process of creating an absolute right to counsel, retained or appointed, began when the Supreme Court held in *Powell* that under special circumstances, where the defendant is unable to retain counsel and cannot adequately present his own defense, the court must assign counsel to comply with due process of law.[107] Shortly thereafter, the Supreme Court held that there is a constitutional right not just to retain counsel, but to have counsel appointed in federal court if the defendant is without means

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[105] 287 U.S. 45, 68-69 (1932).

[106] *See* JOHN B. TAYLOR, RIGHT TO COUNSEL AND PRIVILEGE AGAINST SELF-INCRIMINATION 50 (2004) ("It is a fair inference . . . that the Sixth Amendment was not intended to reform existing practice and that it guaranteed only the right to retain counsel, not the right of a needy defendant to have counsel supplied.").

[107] *See* 287 U.S. at 71 ("[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of the court . . . to assign counsel for him as a necessary requisite of due process of law.").

to retain his own counsel.[108] In *Betts v. Brady*, the Court declined to extend this right to defendants prosecuted in state court.[109]

Twenty years after *Betts*, the composition of the Court had changed and the Justices embraced the opportunity to reconsider the right to appointed counsel.[110] In *Gideon v. Wainwright*, the Court unanimously overruled *Betts v. Brady*, using prior reasoning along with "reason and reflection" to conclude that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[111]

Gideon v. Wainwright secured the right to counsel for persons charged with felonies.[112] But the question remained open whether there existed a right to appointed counsel for lesser offenses.[113] Reasoning that the legal challenges of defending against a minor charge can be as complex as defending against a felony,[114] the Supreme Court concluded in *Argersinger v. Hamlin* that a defendant could not be imprisoned for any offense, "whether classified as petty, misdemeanor, or felony," without the opportunity to be represented by appointed counsel.[115] The Court applied this actual imprisonment standard in *Scott v. Illinois*.[116] In that case, a man was faced with a maximum potential penalty of one year in prison, but actually was fined only $50.[117] Because his punishment was only a fine, the Court found the assistance of counsel unnecessary.[118] However, after *Scott* a state could de-

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[108] *See* Johnson v. Zerbst, 304 U.S. 458, 467 (1938) ("Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.").

[109] 316 U.S. 455, 471 (1942).

[110] *See* TAYLOR, *supra* note 106, at 61 (noting that the *Betts* dissenters, Justices Black and Douglas, and two Justices newly appointed the Court, Chief Justice Warren and Justice Brennan, had expressed the opinion that *Betts* was wrongly decided and should be overruled, leading the Court to grant certiorari to Clarence Earl Gideon's case).

[111] 372 U.S. 335, 344 (1963).

[112] *Id.* at 33.

[113] *See* TAYLOR, *supra* note 106, at 69 (summarizing the Court's approach to right to counsel in the years following *Gideon v. Wainwright*).

[114] *See* Argersinger v. Hamlin, 407 U.S. 25, 32 (1972) ("Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.").

[115] *Id.* at 37.

[116] 440 U.S. 367 (1979).

[117] *Id.* at 368.

[118] *Id.* at 369.

cline to provide counsel for more minor offenses, so long as the judge did not then sentence the defendant to prison.[119]

Questions remained about which offenses guaranteed a right to counsel, given the panoply of sentences judges could apply in courts across the country. In *Alabama v. Shelton*, the Court considered whether a suspended sentence[120] could be imposed or implemented without the assistance of counsel in the original proceeding.[121] The Court held that a suspended sentence, which could "end up in the actual deprivation of a person's liberty," could not be imposed without providing assistance of counsel.[122]

B. *Prison Disciplinary Proceedings*

In the 1970s, the Supreme Court concluded that inmates do not have a right to counsel, either appointed or retained, in a prison disciplinary hearing, even when the charges against the inmate are serious enough to be prosecuted as a crime.[123] The Court instead reasoned that it was best to leave the decision about which procedural elements to afford prisoners to the "sound discretion of the officials of state prisons."[124]

In *Vitek v. Jones*, a plurality of the Court did recognize specific circumstances where prisoners have "an even greater need for legal assistance."[125] Addressing a case where an inmate was to be moved to a mental hospital for involuntary psychiatric treatment, the plurality concluded that a prisoner in this situation had a more pressing need for legal assistance because he likely could not understand or exercise

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[119] *See* TAYLOR, *supra* note 106, at 71 (synthesizing the holdings of the *Argersinger* and *Scott* cases).

[120] A suspended sentence is a sentence "postponed so that the convicted criminal is not required to serve time unless he or she commits another crime or violates some other court-imposed condition." BLACK'S LAW DICTIONARY 1486 (9th ed. 2009).

[121] 535 U.S. 654 (2002).

[122] *Id.* at 658 (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (internal quotation marks omitted)).

[123] *See* Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) (holding that prisoners are not entitled to criminal protections in disciplinary hearings because these proceedings are not criminal prosecutions); Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974) (holding that prison inmates do not have a right to retained or appointed counsel in disciplinary hearings).

[124] *Baxter*, 425 U.S. at 322 (quoting *Wolff*, 418 U.S. at 569).

[125] 445 U.S. 480, 497 (1980) (plurality opinion).

his rights.[126] In that instance, the Court would have held that the Fourteenth Amendment required representation.[127]

There are many similarities between disciplinary hearings in prisons and schools, particularly regarding the rights implicated and the interests at stake. However, fundamental differences between the parties involved distinguish the two kinds of hearings and suggest that students should not be constrained by the more minimal due process protections provided for prisoners. In prison disciplinary hearings, much discretion remains with the prison officials.[128] The need for specific procedural elements is evaluated on a case-by-case basis.[129] State statutes can create liberty interests for prisoners, who receive protection under the Due Process Clause.[130] Such rights have been found in various prison amenities and in parole and probation; these rights, however, are generally neither constitutional nor inherent rights.[131] As such, these individual state-created rights in prison are distinguishable from education rights.

Restraints on liberty that would be intolerable restrictions of fundamental rights outside of prison can be tolerated in prison if the restriction is reasonably related to "legitimate penological interests."[132] On the other hand, absolute restrictions on fundamental rights are generally intolerable in school settings.[133] Students in school disciplinary proceedings who also face criminal charges are likely juveniles and objectively comparable to "prisoners who are illiterate and uned-

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[126] *Id.* at 496-97.

[127] *Id.*

[128] *See Wolff*, 418 U.S. at 568 ("[W]e are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.").

[129] *See Baxter*, 425 U.S. at 321-22 (citing *Wolff*, 418 U.S. at 569) (concluding that it is best to leave decisions about which elements are required to the discretion of prison officials).

[130] *See Vitek*, 445 U.S. at 488 ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.").

[131] *See id.* at 488-89 (noting that there were state-granted, not inherent or constitutional, rights to good behavior credits, parole, and probation).

[132] *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that restrictions on inmate marriages and correspondence were constitutional as they were related to a "legitimate penological interest"); *see also* Washington v. Harper, 494 U.S. 210 (1990) (applying *Turner* to a due process claim involving involuntary medication of a mentally ill prisoner).

[133] *See, e.g.*, Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

ucated" and who "have a greater need for assistance in exercising their rights."[134]

Finally, an intuitive difference separates prisoners from students. Prisoners, by their convicted criminal conduct, have surrendered significant liberty.[135] Students, by entering the schoolhouse gates as mandated by state law, retain constitutional protections, tailored to the "special characteristics" of the school environment.[136] Accordingly, students should be afforded more procedural protections than convicted prisoners, including a right to counsel at disciplinary hearings where there are parallel pending criminal charges.

C. *Juvenile Proceedings*

As briefly noted above, the Supreme Court decided in *In re Gault* that a juvenile has a right to assistance of counsel before being committed to a juvenile home.[137] This case demonstrates a successful expansion of the right to counsel beyond the realm originally intended by *Gideon v. Wainwright* through application of the Due Process Clause of the Fourteenth Amendment. In *Gault*, the Court concluded that "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of liberty for years is comparable in seriousness to a felony prosecution."[138] Because of the seriousness of this loss, the Court held that due process requires that the child and his parents be notified of their right to be represented by retained counsel or to have counsel appointed if they are unable to afford it.[139]

This notification requirement expanded the right to counsel beyond the criminal realm, at the very least in name, because juvenile proceedings were previously deemed civil actions designed to rehabili-

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[134] *Vitek*, 445 U.S. at 496.

[135] *See* Overton v. Bazetta, 539 U.S. 126, 131 (2003) ("Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.").

[136] *Tinker*, 393 U.S. at 506; *see also* Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 456 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

[137] *See supra* Section I.A.

[138] 387 U.S. 1, 36 (1967).

[139] *Id.* at 41.

tate the child, rather than to punish.[140] Nevertheless, whether the action was termed criminal or civil, the Court emphasized that juvenile detention constituted incarceration against a person's will, and thus is "deprivation of liberty."[141] A school disciplinary proceeding, unlike a juvenile court hearing, does not directly threaten loss of liberty, but does threaten the student's liberty interest in education and reputation.[142] The potential for loss of liberty is particularly high in cases where there is a pending parallel criminal charge as well.[143]

D. *Civil Hearings*

In 1981, the Supreme Court decided in *Lassiter v. Department of Social Services* that an indigent woman did not have a right to appointed counsel in a parental rights termination hearing.[144] This case has posed a significant obstacle for efforts to establish a right to appointed counsel in civil cases.[145]

In coming to the decision in *Lassiter*, the majority relied upon consideration of the *Mathews v. Eldridge* balancing factors[146] and a presumption that there exists a constitutional right to counsel only when the party would be deprived of liberty if she lost the case.[147] The Court concluded that for Lassiter, the *Mathews* factors did not overcome the presumption against the right to appointed counsel. Recognizing that the factors would not always be alike in every case, the Court left the decision of whether due process requires appointment of counsel to the trial courts.[148]

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[140] *See id.* at 15-16 ("The child was to be 'treated' and rehabilitated,' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.").

[141] *Id.* at 50.

[142] *See* Goss v. Lopez, 419 U.S. 565, 574-75 (1975) (finding that erroneous misbehavior charges could damage a student's reputation and future employment and educational opportunities).

[143] *See infra* subsection III.B.2.

[144] 452 U.S. 18, 33 (1981).

[145] *See* Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 CATH. U. L. REV. 1057, 1059 (2010) ("[E]fforts to establish a commensurate federal constitutional right to counsel in civil proceedings for persons unable to afford private counsel have been weighted down and constitutionally hindered by the Supreme Court's 1981 decision in *Lassiter v. Department of Social Services*.").

[146] *Lassiter*, 452 U.S. at 31.

[147] *Id.* at 26-27.

[148] *Id.* at 31-32.

A dissent written by Justice Blackmun also employed the *Mathews v. Eldridge* factors to evaluate Lassiter's need for counsel.[149] However, Justice Blackmun and the Justices joining his dissent opposed the presumption against a right to counsel and concluded that the *Mathews* factors compelled a right to counsel in Lassiter's case.[150] The Blackmun dissent also disapproved of the majority's resolution to treat each case individually.[151] Instead, the dissent concluded that the class of parents facing termination of parental rights, in factually similar situations, should all be treated similarly.[152] Justice Blackmun emphasized, that "the flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context."[153] Considering that the costs involved were "relatively slight" and the threatened loss is "severe and absolute," the Blackmun dissent concluded that there was a right to counsel in parental rights termination hearings.[154] A separate dissent by Justice Stevens went even further: even if the costs were high, Justice Stevens would have found a right to counsel in this category of cases.[155]

Discussing a person's interest in retaining his or her parental rights, the majority noted in a footnote that some parents had an additional interest: "Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create."[156] This statement in the *Lassiter* opinion supports a right to counsel for the class of students this Comment concerns. It suggests that if these students were treated as a class, then the majority in *Lassiter* could find that these students need the assistance of counsel in school disciplinary hearings in order to comply with the dictates of due process. The arguments from *Lassiter* are

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[149] *Id.* at 37-38 (Blackmun, J. dissenting).

[150] *Id.* at 48-49.

[151] *Id.* at 49.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 48. In finding that the costs were relatively slight, Justice Blackmun relied upon the fact that the State's role was so "clearly adversarial and punitive," and that the right would be limited to parental rights termination cases started by the State. *Id.*

[155] *Id.* at 60 (Stevens, J. dissenting) ("Accordingly, even if the costs to the State were . . . just as great as the costs of providing prosecutors, judges and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases.").

[156] *Id.* at 27 n.3 (majority opinion).

striking—they constitute the most compelling direct constitutional support for a right to counsel in school disciplinary proceedings where the student faces criminal charges arising from the same facts.

E. *Civil Contempt Hearings*

In the recent case *Turner v. Rogers*, the Supreme Court addressed the necessity of appointed counsel in a civil contempt proceeding that could have led to the indigent defendant's incarceration.[157] In analyzing the question presented, the Court reviewed its previous decisions on both the Sixth and Fourteenth Amendment rights to counsel.[158] The Court then analyzed the question under the Fourteenth Amendment framework from *Mathews v. Eldridge*, after having noted that "the Sixth Amendment does not govern civil cases."[159]

Given the paucity of cases directly concerning the right to counsel in civil matters, the Court found the application of its previous decisions unclear. Mentioning *In re Gault*, *Vitek*, and *Lassiter*, along with *Gagnon v. Scarpelli*—which denied an ordinary right to counsel at a probation revocation hearing[160]—the Court reasoned that the precedents were best read as "pointing out that the Court previously had found a right to counsel '*only*' in cases involving incarceration, not the existence of a right to counsel in *all* such cases."[161] Critically, after introducing the right to counsel precedents and noting *Lassiter*'s presumption,[162] the Court still analyzed the importance of the interests under *Mathews v. Eldridge*.[163]

Because the underlying case was a civil proceeding, the Court analyzed "the 'specific dictates of due process' by examining the 'distinct factors' that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair."[164] The Court then discussed the private interest, the "opposing interests," and the

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[157] 131 S. Ct. 2507 (2011).

[158] *Id.* at 2512-17 (summarizing that an indigent defendant has a right to state-appointed counsel in criminal cases and criminal contempt proceedings under the Sixth Amendment, and that the Fourteenth Amendment's Due Process Clause has been read to require state-provided counsel in some civil proceedings).

[159] *Id.* at 2516.

[160] 411 U.S. 778, 787-88 (1973).

[161] *Id.* at 2516-17.

[162] *Id.* at 2516-17.

[163] *Id.* at 2517-18.

[164] *Id.* at 2517 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

value of additional or substitute procedures.[165] The Court found that these three factors weigh strongly against providing indigents with counsel in every civil contempt proceeding involving child custody payments.[166] First, the critical question in determining the indigent defendant's potential for incarceration is determining his or her ability to pay child support.[167] This is similar to an indigence determination, and, according to the Court, "sufficiently straightforward" to warrant a decision prior to providing counsel.[168] Second, the Court explained that often both parties in a civil custody support hearing are unrepresented.[169] Consequently, there is less of a threat of an unrepresented defendant confronting counsel on the opposing side. Finally, the Court acknowledged the availability of "a set of 'substitute procedural safeguards,' which, if employed together, can significantly reduce the risk of erroneous deprivation of liberty."[170] These alternative safeguards include: notice of the importance of ability to pay in the proceeding, use of a form to elicit financial information, an opportunity to address financial status at the proceeding, and an express finding by the court regarding ability to pay.[171] In giving weight to these alternative procedures, the Court noted the government's "considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders."[172] Given these considerations, the Court concluded that "a categorical right to counsel in proceedings of the kind before us carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned."[173]

In rejecting automatic provision of counsel, the Court simultaneously cabined hopes of a categorical right to counsel and invigorated the Fourteenth Amendment requirement of fundamental fairness. The decision could be read both positively and negatively for those arguing for a right to counsel in school disciplinary hearings. The opinion largely ignores *Lassiter*'s presumption and instead analyzes the

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[165] *Id.* at 2518-19.
[166] *Id.* at 2520.
[167] *Id.* at 2518.
[168] *Id.* at 2519.
[169] *Id.*
[170] *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
[171] *Id.*
[172] *Id.*
[173] *Id.* at 2520.

particular situation using *Mathews*. The opinion ultimately relies upon alternative procedures to refrain from categorically requiring counsel. Although prudent in theory, in application alternative procedures do not offer the same protection that counsel would. In the end, the Court's fact-and-situation-specific inquiry provides hope that if it is forced to address the narrow question of whether a right to counsel is required in a school disciplinary hearing with a parallel criminal proceeding, the Court could analyze the interests and facts and conclude that counsel is categorically necessary.

* * *

Though some efforts to expand the right to counsel outside the confines of criminal cases have failed (prison disciplinary proceedings, parental termination hearings), some have succeeded (juvenile proceedings, suspended sentences), and some can be declared partial victories (alternative procedures in civil contempt cases). Furthermore, important arguments can and have been made that *Lassiter* should be overturned.[174] Nevertheless, even without overturning the opinion, *Lassiter* itself suggests that parallel criminal charges warrant a different due process treatment and analysis.

III. CONSTITUTIONAL AVENUES TO AFFORDING COUNSEL IN SCHOOL DISCIPLINARY HEARINGS

A. *Sixth Amendment Right to Counsel*

The most comprehensive and straightforward way to guarantee counsel for students in a school disciplinary proceeding is via the Sixth Amendment's absolute right to counsel—appointed or retained—in criminal proceedings. The obstacles to obtaining this constitutional right for school disciplinary hearings are obvious once one considers the Supreme Court's Sixth Amendment jurisprudence. Under current Supreme Court case law, the proceeding itself must

[174] *See* Bruce A. Boyer, *Justice, Access to the Courts, and The Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 649-50 (2006) (calling for reassessment of *Lassiter*'s "pinched view of due process" by noting that civil matters such as child custody hearings can prove to be as liberty-depriving as criminal detentions); Hornstein, *supra* note 145, at 1060 (noting an "increasing crescendo of criticism" of the *Lassiter* decision).

subject the party to a possible deprivation of physical liberty;[175] however, a school disciplinary hearing can culminate only in suspension or expulsion, not incarceration.[176]

The Court has expanded the right to counsel in criminal cases, extending the right to any case in which there is a mere possibility of incarceration.[177] However, it remains unlikely that this right will be expanded to include proceedings where there is no direct threat of a deprivation of liberty.[178]

One can imagine that if there were a Sixth Amendment right to counsel in school disciplinary hearings corresponding to criminal proceedings, the system would be flooded with requests for Sixth Amendment appointed counsel not only in school disciplinary cases, but also in numerous other administrative hearings where a state-granted right, like education, could be withheld because of a criminal conviction.[179] Although this increase in requests for counsel should have no effect on the determination of the existence of a Sixth Amendment right, the additional costs imposed consistently weigh in arguments made against extending this right.[180]

One area of Sixth Amendment law that is important to school disciplinary hearings concerns the role of counsel when a student pleads guilty to the criminal charges he faces. Under the recent Supreme Court decision *Padilla v. Kentucky*, a defendant who faces mandatory

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[175] *See supra* Section II.A.

[176] A school disciplinary proceeding itself is a civil proceeding and the school does not have the power of a court to impose incarceration.

[177] *See* Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding that a suspended sentence, which could result in imprisonment if probation is violated, cannot be imposed or implemented without representation by counsel).

[178] The deprivation of liberty does not occur only through incarceration in a penitentiary. *See* Vitek v. Jones, 445 U.S. 480, 481-82 (1980) (plurality opinion) (finding a right to counsel for an indigent person who was transferred to a civil commitment facility). Justice Powell concurred that assistance was required but might be provided by appropriately trained nonlawyers. *Id.* at 500 (Powell, J. concurring in part); *see also In re* Gault, 387 U.S. 1, 41 (1967) (finding due process requires that a child facing delinquency proceedings that may result in a loss of liberty be notified of his right to counsel if indigent). However, these rights to counsel were not found via the Sixth Amendment; rather, the Court held that due process requires counsel in these limited situations. *See Vitek*, 445 U.S. at 492-93; *In re Gault*, 387 U.S. at 41.

[179] *See* Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1250-52 (2010) (describing the overburdened criminal justice system and arguing that extending the right to counsel to civil actions would only exacerbate the situation).

[180] *See, e.g.*, *Shelton*, 535 U.S. at 668 ("Nor do we agree with *amicus* or the dissent that our holding will 'substantially limit the states' ability" to impose probation or encumber them with a 'large, new burden' . . . ." (internal citation omitted)).

deportation as a result of pleading guilty to an offense has constitutionally ineffective assistance of counsel when counsel fails to advise him of the deportation risk associated with pleading guilty.[181] Although the holding was limited to the risk of deportation, the opinion's logic could be extended to other near-automatic, and potentially hidden, consequences of a guilty plea, such as civil forfeiture, loss of the right to vote, or even sex offender registration or expulsion from school on the basis of the conviction.[182] Following the *Padilla* logic, a student's criminal counsel, whether appointed or retained, would have a duty to inform him that pleading guilty to the criminal offense would have consequences in his disciplinary proceeding. Although a reassuring step in the direction of involving counsel in a disciplinary hearing, this situation is limited in a number of ways. First, it would only apply to a student accepting a guilty plea. Second, it would only have an effect if the student pleaded guilty *before* his disciplinary charges had been resolved. Finally, this situation assumes a judicial extension of the *Padilla* logic beyond deportation, which is far from guaranteed.[183]

As desirable as a Sixth Amendment right to counsel may be in school disciplinary cases to ensure fairness and protect the student in the subsequent criminal proceeding, the reality of the Supreme Court's formulation of this Sixth Amendment right effectively precludes its application to civil school disciplinary proceedings that carry no direct threat of depriving the student of his liberty.

B. *An Essential Element of Due Process Under* Mathews v. Eldridge *Balancing*

Courts, and theoretically schools seeking to preemptively comply with the dictates of due process, use the *Mathews v. Eldridge* analysis to determine which procedures are necessary for a disciplinary hearing to comply with the due process.[184] *Mathews* requires a court to evalu-

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[181] *See* 130 S. Ct. 1473, 1486 (2010) (holding that "counsel must inform her client whether his plea carries a risk of deportation").

[182] *See id.* at 1496 (Scalia, J., dissenting) (criticizing the majority's opinion because "[a]dding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping point").

[183] *But cf. id.* (speculating that issues related to an attorney's failure to warn could percolate in the lower courts for years).

[184] *See, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 635 (6th Cir. 2005) (observing that the specific requirements of due process for a school disciplinary hearing "will vary based on the circumstances and the three prongs of *Mathews*"); E.K. v. Stamford

ate several factors: the strength of the private interest; the risk of erroneous deprivation of the private interest; the government's interest, including the burdens caused by additional procedure; and the value that would be added with additional procedures.[185] In this Section, I argue that an analysis of those factors suggests that a right to counsel is an essential element of due process in a disciplinary hearing when a student faces parallel criminal charges. Although *Lassiter v. Department of Social Services* presents obstacles to securing this right, these obstacles are surmounted when a student faces a parallel criminal proceeding that risk being compromised by proceeding without counsel in the disciplinary proceeding.

1. Dispensing with the Presumption Against Counsel

A significant obstacle to a due process–mandated right to counsel in these disciplinary proceedings is the presumption against a right to counsel.[186] Justice Stewart, writing for the five-Justice majority in *Lassiter*, introduced the presumption against counsel:

> In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.[187]

This presumption against counsel effectively terminated Lassiter's possibility of obtaining appointed counsel for her parental rights termination hearing.[188] But Justice Stewart noted an additional factor to be considered when seeking to rebut the presumption against the

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Bd. of Educ., 557 F. Supp. 2d 272, 276 (D. Conn. 2008) (applying *Mathews* to determine whether a student's expulsion proceeding violated due process).

[185] Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970)).

[186] The Court in *Lassiter* asserted that it was drawing upon precedents in invoking a presumption against counsel. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981). In his dissent, Justice Blackmun disagreed that the precedents supported such a presumption at all: "Indeed, incarceration has been found to be neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant." *Id.* at 40 (Blackmun, J., dissenting). Justice Blackmun then pointed to the deprivation of physical liberty did not require counsel in *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973), and where counsel was required though no new incarceration would result in *Vitek v. Jones*, 445 U.S. 480, 492 (1980). *Lassiter*, 452 U.S. at 40-41 (Blackmun, J., dissenting).

[187] 452 U.S. at 26-27.

[188] *See id.* at 31-32 (refusing to say that the *Eldridge* factors will overcome the right to counsel in every parental termination proceeding).

right to counsel, writing, "Some parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions create."[189]

The four dissenting Justices disagreed with the majority's analysis and emphasized that precedent instead favored "adoption of different rules to address different situations or contexts."[190] The dissenters did not think that the case law supported a presumption against counsel when there was no possibility of a loss of liberty.[191] The dissent disapproved of generalizing a presumption against counsel, emphasizing instead the importance of a "flexible approach to due process."[192] The Brennan dissent thus would have inquired into "the interests on both sides" and the need for counsel in the "specific type of proceeding" involved.[193]

There is wide support for a civil right to counsel. The American Bar Association (ABA) called for a civil right to counsel in proceedings where "the most basic human needs are at stake,"[194] hoping that the Supreme Court would eventually reconsider the "cumbersome *Lassiter* balancing test and unreasonable presumption that renders the test irrelevant for almost all civil litigants."[195] Scholars have analyzed this presumption against counsel and the shortcomings of *Lassiter*.[196] Even members of the *Lassiter* majority were wary of the breadth of the

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[189] *Id.* at 27 n.3.

[190] *Id.* at 37 (Blackmun, J., dissenting, joined by Brennan & Marshall, JJ.); *see also id.* at 59-60 (Stevens, J. dissenting) (agreeing with the conclusion of the Blackmun dissent and adding that "the issue is one of fundamental fairness, not of weighing pecuniary costs against the social benefits").

[191] *Id.* at 40 (Blackmun, J. dissenting).

[192] *Id.* at 41.

[193] *Id.* at 42.

[194] Task Force on Access to Civil Justice et al., *Am. Bar Ass'n Report to the House of Delegates*, 2006 RESOLUTION 112A, 12, *available at* http://www.nlada.org/DMS/Documents/1154019065.09/06A112A.pdf.

[195] *Id.* at 6.

[196] *See, e.g.*, Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 63 (2007) (criticizing the presumption against counsel as "particularly disturbing"); Hornstein, *supra* note 145, at 1063 ("I argue that due process remains a viable, constitutional basis on which to ground a civil right to counsel and that the Court should reconsider and overrule its 1981 decision in *Lassiter*.").

presumption against counsel.[197] Justice Powell, who joined Justice Stewart's opinion in *Lassiter*, had previously expressed qualms over the restriction of liberty requirement for a right to counsel, cautioning in his concurrence in *Scott v. Illinois* that "the drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences."[198]

Criticism of the presumption against counsel established in *Lassiter* focuses on unfairness and misuse of precedent. The dissent in *Lassiter* observed that restriction of liberty had not previously been a decisive factor in determining whether a defendant had a right to counsel, commenting that "[t]he prospect of canceled parole or probation, with its consequent deprivation of personal liberty, has not led the Court to require counsel for a prisoner facing a revocation proceeding."[199] And although there is no new threat to liberty when an incarcerated inmate faces transfer to a mental hospital, a plurality of the Court in *Vitek v. Jones* required counsel.[200] In *Goss* itself, the Court evaluated the necessity of counsel instead of presuming from the beginning that counsel was unwarranted because there was no threat to liberty.[201] And critically, the presumption against counsel undermines the case-dependent analysis endorsed in *Mathews v. Eldridge*.[202]

Although it is unclear what today's Supreme Court would do,[203] there is scholarly support for dispensing with the presumption against

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[197] *See* Hornstein, *supra* note 145, at 1094 (analyzing Justice Powell's personal papers from *Lassiter* and concluding that he still harbored concerns originally expressed in *Scott v. Illinois*).

[198] Scott v. Illinois, 440 U.S. 367, 374 (1979) (Powell, J., concurring); *see also* Hornstein, *supra* note 145, at 1092-1098 (illuminating the background considerations and motivations of the Justices in arriving at the *Lassiter* decision).

[199] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 40 (1981) (Blackmun, J., dissenting) (citing Gagnon v. Scarpelli, 408 U.S. 778, 785-89 (1973)); *see also* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

[200] 445 U.S. 480, 492 (1980); *see also Lassiter*, 452 U.S. at 40-41 (discussing *Vitek* in repudiating the presumption against counsel) (Blackmun, J., dissenting).

[201] *See* Goss v. Lopez, 419 U.S. 565, 583 (1975) (declining to construe the Due Process Clause to afford counsel in all cases where a student faces a short suspension).

[202] *See Lassiter*, 452 U.S. at 41 n.8 (Blackmun, J., dissenting) ("[T]he Court today grafts an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test.").

[203] The closest indicator of what today's Court would do is *Alabama v. Shelton*, 535 U.S. 654 (2002), where the members of the 2002 Term's "liberal" wing (Justices Breyer, Ginsberg, Souter, and Stevens) were joined by Justice O'Connor to hold that a suspended sentence triggers the right to counsel. Given the changed makeup of today's Court, it is unclear, and somewhat unlikely, that the Court would be supportive of fur-

counsel.[204] Even dicta in the *Lassiter* opinion suggest that the presumption would have a greater chance of rebuttal if there were also criminal charges.[205] Whether by overruling *Lassiter*'s presumption against counsel or by rebutting the presumption with the seriousness of the interest at stake, the presumption should be overcome when a student faces disciplinary and criminal proceedings stemming from the same incident.

2. A Class Requiring Counsel Under the *Mathews* Analysis

Once *Lassiter's* presumption against counsel is dispensed with, or at least called into question, a straightforward analysis of the *Mathews* factors suggests that students facing disciplinary and criminal charges stemming from the same event should be constitutionally guaranteed counsel. Although the Court often cautions that each situation should be treated on a case-by-case basis, this case-by-case inquiry should analyze each context, not each individual litigant's situation.[206] This analysis would consider the interests of students charged with violating both a school disciplinary code and criminal law, such that the student faces a possibility of incarceration if found guilty of the criminal charges.[207] Students facing this situation require the assistance of counsel because of (1) the urgency of the interests at stake, (2) the schools' interests in resolving disciplinary matters in a fair and efficient way, and (3) the value that assistance of counsel would add to the proceeding in order to protect against erroneously disciplining these students and compromising criminal proceedings.

The student's interest in this case derives not only from the threat to his liberty posed by the criminal proceeding, but also the threat to his education by the disciplinary hearing. A student confronting par-

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ther expanding the right to counsel, even if it did so on due process rather than Sixth Amendment grounds.

[204] *See, e.g.*, Hornstein, *supra* note 145, at 1093-94 (arguing that the presumption of counsel misconstrues precedent).

[205] *See Lassiter*, 452 U.S. at 27 n.3 (clarifying that when a parent also faces criminal charges, there is an additional interest to protect that may require assistance of counsel).

[206] *See id.* at 49 (Blackmun, J., dissenting) ("The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context."); *see also* Mathews v. Eldridge, 424 U.S. 319, 339-45 (1976) (distinguishing disability recipients as a class from welfare recipients); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (treating welfare recipients as a class).

[207] Thus this approach treats these students as a class for the purpose of due process analysis, rather than conducting such analysis for each individual student facing these circumstances.

allel disciplinary and criminal proceedings usually faces a long suspension, if not expulsion, from the school because of the severity of the charges giving rise to the dual proceedings.[208] Courts have emphasized the seriousness of expulsion because it prevents the student from studying at that particular institution and may also "prejudice the student in completing his education at any other institution."[209] Charges of misconduct might "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[210] The mere accusation of misconduct disrupts a student's studies and may be emotionally draining and traumatic.[211] Indeed, a child or young adult facing serious disciplinary charges can hardly be expected to "exercise cool judgment, to think clearly, to question effectively, or to testify helpfully."[212] Federal Rule of Civil Procedure 17 recognizes these difficulties in making a juvenile proceed in court alone, allowing a juvenile to sue or defend against a suit only with a representative, next friend, or guardian ad litem.[213] This rule acknowledges that in court proceedings juveniles have special needs where adults do not.

Beyond serious educational consequences, the student has an additional interest to safeguard. Because these particular disciplinary charges are based on or parallel to criminal activity, the student has a strong interest in protecting his rights for the criminal proceeding. Similar to parents facing parental rights termination petitions based on criminal activity,[214] students require the assistance of counsel to guide them through complicated issues of criminal procedure and evidence implicated by their testimony at the disciplinary hearing. One such issue is mounting a defense without making self-incriminating statements that would be admissible in a later criminal

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[208] *See, e.g.*, *Policy Regarding Use of Illegal Drugs and Alcohol*, *supra* note 2 ("Any student found to have sold, manufactured, distributed, or administered illegal drugs may be suspended or expelled.").

[209] Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

[210] Goss v. Lopez, 419 U.S. 565, 575 (1975).

[211] *See* Berger & Berger, *supra* note 14, at 341 (describing a student's discomfort and tension in facing his accusers in front of a hearing body).

[212] *Id.*

[213] *See* FED. R. CIV. P. 17(c) (explaining that unrepresented minors or those deemed incompetent may sue by a next friend or a guardian ad litem).

[214] *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 n.3 (1981) ("Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create.").

proceeding.[215] If, in order to conclude his disciplinary hearing, the student admits all or some responsibility for the alleged transgression, this could be introduced as a party admission against the student in his criminal proceeding.[216] The gravity of the student's interest in avoiding possible educational and criminal consequences of the hearing is undoubtedly very significant.

Schools also have several interests at stake in the disciplinary proceedings. Schools have a pressing need to remove students who are disruptive or dangerous to the school community and the academic process.[217] They must be able to do so without unreasonably large fiscal and administrative burdens.[218] Schools also have an interest in minimizing formal judicial presence in academic decisions.[219] More official hearings weaken the beneficial aspects of retaining informality within the academic community, like strong faculty-student relationships and academic discretion.[220] Furthermore, some schools see the disciplinary process as an "instructional vehicle allowing students to gain wisdom and better judgment from their mistakes" that the involvement of lawyers would disrupt.[221]

The advantages of maintaining less formal procedures in order to preserve academic discretion decrease as the hearing moves from strictly academic misconduct, such as cheating or failing, to alleged criminal misdeeds.[222] An academic decision hinges on academic discretion and experience, while disciplining behavior relies less on the

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[215] *See* VACCA & BOSHER, *supra* note 30, at 222 (explaining that testimony given by a student in a disciplinary hearing can later be used in the criminal proceeding).

[216] *See supra* note 3 and accompanying text.

[217] *See, e.g.*, Draper v. Columbus Pub. Sch, 760 F. Supp. 131, 133 (S.D. Ohio 1991) (noting the state's interest in "maintaining safe, orderly, and effective public schools").

[218] *See* Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ., 574 F.3d 214, 221 (3d Cir. 2009) (evaluating the school district's interest under the *Mathews* framework and finding that the school must be able to act without "disproportionate" burdens); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 925-26 (6th Cir. 1988) (using the *Mathews* framework to find that granting an accused student the right to cross-examination at a disciplinary hearing would impose a heavy burden on school officials that "simply outweighs the marginal benefit" to the student).

[219] *See* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 88 (1978) ("A school is an academic institution, not a courtroom or administrative hearing room.").

[220] *See id.* at 90 (explaining the benefits of more informal procedures in a dismissal for academic deficiencies).

[221] Berger & Berger, *supra* note 14, at 340; *see also* Goss v. Lopez, 419 U.S. 565, 583 (1975) (reasoning that making a hearing more formal "destroy[s] its effectiveness as a part of the teaching process.").

[222] *See id.* (distinguishing a dismissal for academic reasons, which is an academic judgment, from a dismissal for disciplinary reasons, which is more fact-dependent).

experience and judgment of administrators and more on factual findings and determinations of credibility, especially in cases of criminal misbehavior.[223] Since the sanctions available for serious disciplinary charges are greater, the "informal give-and-take between student and disciplinarian" required by *Goss* necessarily increases to a more formal level with a more formal hearing and greater procedural safeguards.[224] Schools can no longer look at the disciplinary process as a way for students to learn from their mistakes because important liberty interests are at stake. Because due process likely already compels a more formal hearing when the student faces the penalty of a long suspension or expulsion, allowing counsel to be present at the hearing does not impose burdensome additional costs. Although schools may believe that lawyers will make the hearing more contentious, formal, and lengthy, the lawyer's presence could actually be helpful in resolving the issues by negotiating a compromise or securing a deferral of the disciplinary charges until after the criminal proceedings have concluded.[225]

Schools also have an interest in avoiding the costly fiscal burdens of providing counsel. Though requiring appointed counsel for those unable to retain counsel for disciplinary proceedings could present a significant expense for schools, there are solutions that would mitigate this cost, as discussed in Part IV.[226] The presence of lawyers, rather than impeding these hearings by making them more formal, could actually prove to be helpful. The interest of the school, though significant, is not as weighty as the liberty interests of the student.

The value that counsel would add to the proceeding is extremely great. Counsel protects the student's rights and guards against erroneous deprivation of either the student's education, by expulsion, or liberty, by compromising the criminal proceeding. The risk of erroneous deprivation hinges on the choices a student would make at the hearing without the assistance of counsel. If the student does not speak to avoid self-incrimination, then he risks losing his degree.[227] If the student speaks, he risks self-incrimination and possible future

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[223] *Compare Horowitz*, 435 U.S. at 90 (addressing issues in academic hearings), *with* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005) (evaluating the need for more process as issues of fact and credibility arise).

[224] *See Goss*, 419 U.S. at 583-84 (describing the minimum procedure required for a ten-day suspension).

[225] *See* Berger & Berger, *supra* note 14, at 343 ("A lawyer's presence may be helpful rather than disruptive in bringing about compromise.").

[226] See *infra* notes 252-57 and accompanying text for suggestions on how a school could find low-cost resources to provide counsel to those unable to afford it.

[227] Gabrilowitz v. Newman, 582 F.2d 100, 105 (1st Cir. 1978).

incarceration.[228] The student here must balance the loss of a degree or education against the possible loss of liberty,[229] deemed by the Supreme Court to be of the utmost importance.[230] Without counsel, the student is faced with the dilemma of whether to mount a defense at the disciplinary hearing.

A lawyer's utility in this situation is obvious. Only a lawyer can "cope with the demands of an adversary proceeding held against the backdrop of a pending criminal case involving the same set of facts."[231] A lawyer can advise his client when to remain silent and how to question witnesses to expose the true events or a witness's motivations in accusing him. A lawyer is more attuned to the potential for bias in the hearing panel than a student.[232] Perhaps more importantly, a lawyer is better suited to negotiate with administrators in order to have the disciplinary hearing postponed or perhaps settled altogether than a young, emotional student.[233]

As compelled by *Mathews*, the interests of the student, those of the government (the school), and the value of the procedure are weighed against each other to determine whether counsel is necessary when a student faces a disciplinary proceeding and criminal proceeding stemming from the same events.[234] Given the strength of the student's interest in this situation, the lack of overwhelming inconvenience to the school, and the value added to the disciplinary proceeding by allowing counsel, due process mandates that students who face these charges be afforded counsel.

3. Requiring "Alternative Procedural Safeguards" in Lieu of Counsel

At the very least, students facing disciplinary sanctions and criminal charges arising from the same actions should receive "alternative

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[228] *Id.*

[229] *Id.*

[230] *See* Alabama v. Shelton, 535 U.S. 654, 658 (2002) (finding the threat or possibility of deprivation of liberty as a situation necessitating counsel); Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 26 (1981) (hinging the right to counsel on the potential for deprivation of liberty).

[231] *Id.* at 106.

[232] *See, e.g.*, Brewer v. Austin Indep. Sch. Dist. 779 F.2d 260, 264 (5th Cir. 1985) (suggesting that sometimes a school official's involvement could create bias, precluding an impartial hearing).

[233] *See* Berger & Berger, *supra* note 14, at 343 (discussing the ability of a competent lawyer to reach settlement and how this would be beneficial to both the student and the school).

[234] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

procedural safeguards," as did the indigent defendants facing civil contempt in *Turner v. Rogers*.[235] If a blanket protection of counsel cannot be obtained, then alternative procedural safeguards can protect against some of the undesirable consequences previously mentioned. The alternative procedural safeguards for disciplinary proceedings would differ from those suggested in *Turner*. Schools could be required to issue a notice to the student that anything they say in the disciplinary proceeding could be admitted into evidence against them in the criminal proceeding. Schools can be required to put in place a mechanism by which the disciplinary proceeding cannot begin until the criminal one has concluded.[236] Although a student may not obtain the best representation of his or her interests without counsel, these alternative procedural safeguards would do something to protect against the greatest threats to the student's liberty interests.

IV. NONCONSTITUTIONAL AND POLICY AVENUES: WHAT A "FAIR-MINDED SCHOOL PRINCIPAL" WOULD IMPOSE

In *Goss v. Lopez*, the Supreme Court held that mere notice and an opportunity to present the student's side of the story were necessary for a ten-day suspension to comply with due process.[237] In doing so, the Court observed that these procedures were "less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[238] Thus the Court in *Goss* hinted at the most effective way to ensure fairness and compliance with the Due Process Clause: school disciplinarians should voluntarily introduce more procedures to ensure fairness and accuracy in disciplinary actions. Undoubtedly, the addition of counsel would help to ensure such fairness; however, the fiscal and administrative burdens of ensuring counsel can discourage schools from initiating such action. But there are pressing reasons beyond compliance with constitutional due process for schools to implement counsel for disciplinary proceedings where the student also faces criminal charges. Furthermore, the burdens are misperceived. There are feasible ways to implement counsel in

[235] 131 S. Ct. 2507, 2519-20 (2011) (finding that the government should employ safeguards designed to reduce the risk of erroneous deprivation of liberty such as providing adequate notice and a fair opportunity to dispute factual findings).

[236] However, this presents a problem, discussed *infra* note 269 and accompanying text, that schools must maintain safe academic atmospheres, which means removing potentially dangerous students from the classroom.

[237] 419 U.S. 565, 581 (1975).

[238] *Id.* at 583.

schools that minimize the costs and lessen the formalization that some fear would accompany the guarantee of counsel.

A. *Voluntary Implementation of the Right to Counsel in Schools*

The easiest, non-court-mandated way to ensure that students facing criminal charges have counsel in their disciplinary hearing is a system-wide provision of counsel throughout public secondary schools and universities. Many universities already allow students to bring a retained attorney or advisor to the disciplinary hearing via provisions in their school disciplinary codes.[239] And those schools that do not explicitly allow counsel may allow it in extraordinary situations.

However, this does not account for students who are unable to afford retained counsel or who attend those universities that explicitly forbid counsel or outside advisors.[240] Schools that do not allow counsel inevitably point to the costs involved in permitting counsel at hearings.[241] There are numerous reasons, however, to allow counsel in a disciplinary hearing beyond fundamental fairness. There are also ways a school could implement use of counsel that would not overly formalize the process or impose excessive costs.

One reason to implement the right to counsel is to reduce litigation, which arises with some frequency over disciplinary hearings.[242] Students contest the hearing elements in these lawsuits, most often alleging constitutional deficiencies in federal courts,[243] vary according to the school involved, the student, and the situation. But these lawsuits have one thing in common. When a student files a complaint

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[239] *See supra* note 67 and accompanying text.

[240] *See supra* note 67.

[241] *See* Berger & Berger, *supra* note 14, at 340 (pointing to reasons to refrain from allowing counsel, including delay, contentiousness, an aggressive litigation stance, insensitivity to the academic atmosphere, and a possibility that, due to the increased adversarial nature, codes would be underenforced).

[242] Although there are forces working against a student filing a lawsuit against a school, *see supra* note 13, it is clear that these lawsuits do get filed with some frequency. *See, e.g.*, Coronado v. Valleyview Pub. Sch. Dist. 365-U, 537 F.3d 791 (7th Cir. 2008); Flaim v. Med. Coll. of Ohio, 418 F.3d 629 (6th Cir. 2005); Jennings v. Wentzville R-IV Sch. Dist., 397 F.3d 1118 (8th Cir. 2005); Smith v. Severn, 129 F.3d 419 (7th Cir. 1997); Bogle-Assegai v. Bloomfield Bd. of Educ., 467 F. Supp. 2d 236 (D. Conn. 2006); Murphy v. Fort Worth Indep. Sch. Dist., 258 F. Supp. 2d 569 (N.D. Tex. 2003); Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647 (W.D. Tex. 2000); Donohue v. Baker, 976 F. Supp. 136 (N.D.N.Y. 1997).

[243] *See supra* note 50.

with at least some facial merit,[244] the school is subjected to a process of motions, discovery, and potentially a trial. Compared with the costs of allowing counsel in the disciplinary process, the costs—administrative, reputational, and monetary—of defending against a lawsuit are substantially higher.[245] Although allowing counsel does not provide a complete guarantee that a lawsuit will not occur, it would reduce the likelihood of contention over commonly litigated procedural elements such as adherence to the university's own procedures[246] and insufficient cross-examination.[247] Furthermore, a lawyer's role in looking out for the interests of the student at a hearing, like defense counsel's role in a criminal proceeding, "keep[s] the process 'honest,' thereby lowering the risk that prosecutors in their zeal, or judges through inadvertence or error, will make mistakes that taint the outcome."[248] Since the decisionmakers in hearings—faculty or fellow students, for example—are usually neither legally trained nor involved in academic administration, they are more prone to error than prosecutors and judges.

While allowing some participation of counsel introduces additional cost, the financial burdens have not been too great for the significant number of schools already allowing counsel to participate in hearings.[249] Requiring all schools to implement a right to counsel in

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[244] The complaint would require sufficient merit to survive a motion to dismiss for failure to state a claim, which is accomplished when a student sets forth facts that he was subject to a disciplinary proceeding in a publicly funded university. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (articulating the standard for surviving a motion to dismiss, which is that a complaint must "contain sufficient factual matter" such that the claim for relief is "plausible on its face").

[245] *See* Marcus Rayner, Op-Ed, *The High (and Hidden) Costs of Lawsuits Against Local Governments*, NJ SPOTLIGHT (May 26, 2011), http://www.njspotlight.com/stories/11/0525/2157 (explaining that the crippling costs municipalities face in defending against lawsuits affect taxpayers via increased property taxes).

[246] *See* Winnick v. Manning, 460 F.2d 545, 550 (2d Cir. 1972) (considering whether departures from hearing procedures established by a university code constitute a denial of due process); *see also* Berger & Berger, *supra* note 14, at 342 ("[Counsel] will compel the school to adhere to its own procedures that benefit his client and challenge those procedures that are prejudicial.").

[247] *See, e.g.*, *Flaim*, 418 F.3d at 641 (concluding that since there was no issue of credibility, cross-examination would not have added value); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 925-26 (6th Cir. 1988) (explaining that the burdens of cross-examination to the school outweighed the benefits to the student).

[248] Berger & Berger, *supra* note 14, at 342.

[249] *See supra* note 67 and accompanying text; *see also* Berger & Berger, *supra* note 14, at 344 (suggesting that the fact that sixty percent of schools the authors surveyed allow counsel implies that these schools have found the practice feasible to implement and maintain).

their codes could be done without excessive costs to the institution. Furthermore, allowing students to bring counsel would not require the school to similarly "lawyer up." In many cases, the school's legal counsel is already involved, even if only peripherally.[250] And any additional time or resources spent on a disciplinary hearing due to counsel's involvement would likely prove worthwhile by increasing fairness, decreasing the risk of erroneous disciplinary action, and reducing the likelihood of post-discipline litigation.[251]

As a policy matter, it would not be wise to allow those students who can pay for legal counsel to have counsel at a hearing, while denying counsel to students who cannot afford it. There are untapped resources to aid students seeking counsel if they cannot afford their own or to alleviate financial constraints for universities seeking to provide counsel in hearings.

For students facing both disciplinary and criminal charges in an area with a law school nearby, a network of law school students and professors could be established to provide pro bono advice or representation. Law schools could set up programs where law students with some training volunteer their time to represent students in disciplinary hearings at public schools in the community. New York University Law School has already set up one such organization: the Suspension Representation Project trains and assigns law students to represent students in New York City public schools at suspension hearings.[252] By pairing new student advocates with seasoned ones, the organization allows law students to develop valuable legal skills while helping to safeguard the public school students' right to an education in schools with some of the city's "most punitive disciplinary policies."[253] This would guarantee that those unable to retain their own preferred counsel would still benefit from the experience of someone with legal training.[254]

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[250] Berger & Berger, *supra* note 14, at 343 ("[T]he rules do not prevent the school from turning for advice to its own Office of Legal Counsel, and we know that such contact often occurs. Counsel may not formally appear; yet she is only a telephone call away.").

[251] Although we are considering extraconstitutional reasons for implementing counsel, constitutional constraints are always in the background binding the schools' actions. This increased cost-benefit tradeoff echoes the *Mathews* factor analysis.

[252] *See Suspension Representation Project*, NYU LAW, http://www.law.nyu.edu/studentorganizations/suspensionrepresentationproject/index.htm (last visited Nov. 15, 2011).

[253] *Id.*

[254] There is, of course, a chance that overeager law students could make disciplinary proceedings even more quasi-judicial. However, law students frequently volunteer their

Alternatively, public schools and universities could maintain the names of local counsel willing and able to volunteer their time to represent students in a pro bono capacity.[255] Given the encouragement of pro bono service by law firms and the ABA,[256] one would expect some lawyers to volunteer their time to this worthy and low-commitment representation.[257] When it comes down to it, if a school plans to conduct a fact-finding disciplinary hearing and allow counsel, that school would likely incur more costs. But this will only be necessary when more is on the line—for example, expulsion or long suspensions accompanying serious charges.

With the increased use of counsel, disciplinary hearings will inevitably become more formalized. A student who might have testified without advice of counsel could refuse to put forth his side of the story, in an effort to preserve his right against self-incrimination in advance of the criminal prosecution. A student who might not have otherwise cross-examined his accusers will now use counsel to cross-examine, or at least have counsel advise him how to cross-examine. Greater formalization produces a fairer determination and avoids jeopardizing the student's position in criminal prosecution.

Schools could create safeguards to ensure that the presence of lawyers does not overly formalize the proceeding. For example, a university could establish informal rules that allow hearsay, permit admission of otherwise judicially inadmissible evidence, maintain a lower standard of proof,[258] or allow only the hearing panel, rather than the student or attorney, to question the witnesses. Schools could limit counsel's involvement to the role of an advisor, which would provide some protection of the student's rights without introducing courtroom procedures such as cross-examination and opening argu-

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time successfully representing clients in various administrative hearings, such as child custody and unemployment compensation hearings. *See Student Groups*, PENN LAW, http://www.law.upenn.edu/pic/students/groups.html (last visited Nov. 15, 2011).

[255] Berger & Berger, *supra* note 14, at 343-44.

[256] *See* THE ABA STANDING COMMITTEE ON PRO BONO & PUBL. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 7-8 (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/probono_public_service/report_2011.authcheckdam.pdf (explaining the continuing need for pro bono legal services for the poor).

[257] In most cases, the only commitment required of the attorney would be attendance at the hearing and minimal participation, should the need arise.

[258] *See* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 85 (1978) (noting that the decision to expel a student must be "careful and deliberate"). However, this forgiving standard does not preclude a school from using a preponderance of the evidence or a "more likely than not" standard.

ments directed at the hearing body. But, just as the greater severity of the cases considered by this Comment justifies the additional cost, proceedings should be more formalized when a school subjects a student to a disciplinary hearing while criminal charges remain pending. Some larger universities maintain several hearing bodies, some of which resolve minor charges, while others handle the most serious cases.[259] Some school districts also make accommodations for different procedures in the case of charges carrying severe punishments.[260]

Ultimately, it is in the best interests of the school to allow a student the advice of counsel when undergoing both disciplinary proceedings and criminal charges arising from the same events. Universities should seek to resolve the matter in the fairest way, without subjecting the student to erroneous disciplinary action.

B. *Addressing Arguments Against Counsel*

There are many reasons why allowing counsel could prove to be burdensome and overly ambitious. There are constitutional arguments against this right, as discussed throughout this Comment. Some scholars argue that the proponents of civil counsel cannot overcome the presumption against counsel the Court instituted in *Lassiter*.[261] I believe I have substantially weakened these arguments by showing that given the concerns that arise when a student faces simultaneous disciplinary and criminal charges the presumption against counsel is reduced or eliminated.[262] The analysis of the *Mathews v. Eldridge* factors illustrates that counsel is required to comply with due process.

Some argue against a right to counsel in school disciplinary proceedings, expressing concern that the proceedings will become overly adversarial and that involvement of courts will challenge school ad-

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[259] *See, e.g.*, Office of Student Conduct, *Top Ten Most Frequently Asked Questions*, PENN ST., http://studentaffairs.psu.edu/conduct/faq/top10.shtml (last visited Nov. 15, 2011) ("If there is potential for the assignment of a suspension or expulsion, the incident will be referred to the University Hearing Board. All other incidents will be reviewed in an Administrative Hearing.").

[260] *See, e.g.*, SCH. DIST. OF PHILA., *supra* note 74, at 13-14 (providing different rights and procedures for short-term suspension, long-term suspension, and expulsion).

[261] *See* Barton, *supra* note 179, at 1247 (criticizing scholars arguing for a civil right to counsel because they cannot overcome the presumption against counsel and the court's reluctance to mandate counsel).

[262] *See supra* subsections III.B.1 and III.B.2.

ministrators' ability to maintain order.[263] But, as previously discussed, the addition of counsel would only apply in the most serious of cases. These are cases when schools are likely to use the most formal system available and discipline to according the harshest sanctions permitted. Furthermore, these hearings are already somewhat adversarial because of the fact-finding tasks of the tribunals. Therefore, the addition of counsel to protect the student only serves to place the student and the institution on a more equal footing.

Objections to the costs requiring counsel would impose on academic institutions are well taken. However, considering the interests involved, the mechanisms available to reduce costs, and the money saved by avoiding litigation, the costs do not pose an insurmountable obstacle to the right to counsel. As discussed earlier, students facing disciplinary and criminal charges arising from the same set of facts face a Catch-22. If they defend themselves at the disciplinary proceeding, what they say could be used against them during the criminal trial.[264] If students remain silent, they will likely receive disciplinary sanctions.[265]

Additionally, the costs of allowing counsel can be reduced by using the services of student-run defense organizations at colleges and universities.[266] And law school clinics and pro bono organizations, along with efforts organized by the ABA and similar lawyer-affiliation groups, could provide pro bono assistance to students unable to afford counsel.[267] These organizations would take the financial pressure off schools and allow them to provide counsel in serious disciplinary cases where the student faces parallel criminal charges.

Finally, parents and students often do sue schools alleging that their due process rights were violated at disciplinary hearings. Allowing the presence of counsel would protect and assert the students'

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[263] *See* Edith H. Jones, *The Nature of Man According to the Supreme Court*, 4 TEX. REV. LAW & POL. 237, 257 (2000) ("Decisions like *Tinker*, *Goss* and *Pico* have made it more difficult to maintain order in public schools. Lawsuits, whether filed, threatened, or merely feared, chill school boards and administrators into temporizing in enforcement of rules governing discipline and decency.").

[264] *See supra* note 3 and accompanying text.

[265] The students will not be punished simply for remaining silent. But if the students do not mount a defense, the charges against them will likely be deemed proven, and the student will be disciplined for the charges against them.

[266] *See* Kipnis, *supra* note 1, at 25 ("[T]he allowance of counsel usually fosters the formation of volunteer organizations, whether run by the students themselves or the community, that provide disciplinary assistance to accused students.").

[267] *See supra* notes 252-57 and accompanying text.

due process rights at the hearing itself, thereby reducing the number of lawsuits after the disciplinary proceeding.

There is also a concern that the imposition of counsel might prolong disciplinary proceedings and thus prevent schools from removing dangerous students from school immediately. To address this valid objection to requiring counsel, schools could impose a temporary suspension that would not appear on the student's record until the charges are resolved. For example, in situations where a student is believed to be an immediate threat to the school community, the School District of Philadelphia provides an informal hearing for the student.[268] If it is determined that the student cannot remain in school due to safety concerns, the school provides for an interim assignment.[269] This procedure would ensure that other students would not be threatened by the presence of a dangerous student, while still guaranteeing that a student's right to an education is not unconstitutionally withheld.

As compared to the consequences of not allowing a student the assistance of counsel in this perilous situation, the costs of allowing counsel are minimal. The arguments against counsel, though valid, are significantly less concerning in the factual circumstances this Comment addresses.

CONCLUSION

Disciplinary sanctions and criminal charges can have potentially life-altering results. Losing the statutorily guaranteed and widely upheld right to education has extensive implications for a student's life. The Supreme Court has recognized the impact of noncriminal consequences on a person.[270] It is the magnitude of this individual interest and the lack of an interest of similar magnitude on the school's side that compel the conclusion that due process requires assistance of counsel at a disciplinary hearing when a student faces parallel criminal charges. Beyond being constitutionally compelled by due process, it is highly prudent for a school to provide this procedural protection. The paucity of court cases directly addressing this question, along with empirical evidence, suggests that many schools al-

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[268] *See* SCH. DIST. OF PHILA., *supra* note 74, at 14 ("In the event that a student is being considered for expulsion, an informal hearing will be held to determine if the student poses a threat to the school community.").

[269] *Id.*

[270] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (holding that an attorney must advise his client of the possibility of deportation as a life-altering consequence of a criminal guilty plea).

ready recognize the importance of this procedural protection and provide it to students facing this dilemma.[271] It also suggests that, perhaps, many schools only proceed with the disciplinary hearing after the criminal proceeding has been completed.[272]

Nevertheless, a bright-line determination on the constitutional requirement and prudential advisability of affording counsel in this situation should be made. Some cases never reach court because of lack of resources or knowledge on the part of the students. A clear determination on counsel rights would help these students protect their rights ex ante. In a society where violence and drug use plague schools, cases like these become, unfortunately, more and more frequent. It is only by treating the cases fairly and uniformly that we can be assured that justice has been done and the responsible parties have been properly sanctioned.

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[271] *See supra* note 67 and accompanying text; *see also* Berger & Berger, *supra* note 14, at 339 (presenting study results that just under sixty percent of schools surveyed allow counsel).

[272] *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005) (noting that because criminal charges had concluded and the student admitted his felony conviction, neither counsel nor cross-examination was necessary).