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ARTICLES

EDUCATIONAL RIGHTS AND WRONGS: DEFENDING FLORIDA PUBLIC SCHOOL STUDENTS IN EXPULSION PROCEEDINGS

ROBERT HORNSTEIN*

I. INTRODUCTION

This article is about the representation of children facing expulsion from public schools and how to protect their due process rights. While the article focuses principally upon the representation of children in Florida's public schools, the personal narrative and legal analysis, as well as the state and federal decisional authority relied upon, is intended to have an application beyond the parochial confines of Florida law. Part II of the article¹ begins with a look at how federal and state courts across the country have treated and defined the due process rights of public school students facing expulsion. The article next examines what protections Florida law, both statutory and decisional, provides a student under expulsion from a public school. In Part IV, I share what I have learned defending public school expulsions based on my own experiences in two Florida cases, and in Part V the article concludes by briefly addressing the critical importance and constitutional significance of a student's right to counsel when facing expulsion from a public school.

This article has been in the making for a good number of years. I first represented students facing expulsion from public schools in 1988 in Jackson, Mississippi, and continued as a Legal Services lawyer in rural Delaware. In the early 1990's, I was practicing poverty law in

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1. This article is limited to an examination of the expulsion of regular education students and does not cover or address the expulsion rights of disabled students under the Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (IDEA). See, e.g., Terry Jean Seligmann, *Not As Simple As ABC: Disciplining Children With Disabilities Under The 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77 (2000); Theresa J. Bryant, *The Death Knell For School Expulsion: The 1997 Amendments To The Individuals With Disabilities Education Act*, 47 AM. U.L. REV. 487 (1998).

the southern-most part of Delaware, Sussex County, which lies just over the Maryland border. The county is part of the Delmarva Peninsula, a narrow strip of land running south from Delaware into coastal Virginia, bordered by the Atlantic on the east and covered with waterways and estuaries of all sizes and shapes that extend west to the Chesapeake Bay. By and large, Sussex County is very rural, and, in many instances, very poor, except for the beach communities that line Delaware's Gold Coast, which serve as a summer destination for many of Washington D.C.'s political elite.

On the far western side of Sussex County lies Highway 13, which runs south from Dover, the state capital, to Salisbury, Maryland. The western part of Sussex County is defined by large expanses of flat and fertile agricultural land that carry one's eyes to the horizon. As Highway 13 snakes its way south, it is framed on both sides by a menagerie of motels, local restaurants, and an assortment of other businesses that one might expect to find on a rural state highway. The Woodbridge School District sits a short distance from Highway 13 in the small town of Bridgeville, Delaware. It was at a Woodbridge School Board expulsion hearing² held the same night that the first Gulf War began, January 16, 1991,³ that I first experienced what I would describe as an unwritten, though clearly apparent, presumption of correctness that clothes a school principal's decision to expel a student.

This presumption of correctness took on the cast of an institutional orthodoxy strictly adhered to by most, though not all, of the teachers, school district administrators, and school board members.⁴ The 14-year-old middle school student I was defending that evening was expelled by the Woodbridge School Board, but several weeks later the Delaware State Board of Education overturned the local school board's expulsion order and reinstated the student.⁵

An important factor in the Delaware State Board of Education's decision to reverse the Woodbridge School Board's order of expulsion was the "automatic" nature of the student's expulsion as well as a finding that the local school board took personal offense at the stu-

2. *In re William Dickerson*, Decision and Order, (Del. State Bd. of Educ. March 21, 1991).

3. *Id.* at 2.

4. In *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458 (5th Cir. 1974), Judge John Godbold, writing for a three member panel of the Fifth Circuit, pointed out:

Formalistic acceptance or ratification of the principal's request or recommendation as to the scope of punishment without independent Board consideration of what, under all the circumstances, the penalty should be, is less than full due process. Appropriate punishment is for the Board to determine, in the exercise of its independent judgment.

5. It should be noted that Judge Godbold was a member of the Fifth Circuit during the period when that court was deciding a wide array of ground breaking civil rights and constitutional issues. See JACK BASS, *UNLIKELY HEROES* (Simon And Schuster 1981).
In re William Dickerson.

dent's effort to defend himself at the expulsion hearing.⁶ Specifically, the Delaware State Board of Education pointed to a Woodbridge School Board member's statement that he was "offended" by the introduction of evidence that showed one of the student's teachers had made a notation in the child's records that the student "had been set up to fail."⁷ The board member considered this evidence a "slight on the board" and on the school district.⁸

In 1992, I left Delaware to do housing litigation for a legal services program in Miami, Florida. After several years in South Florida, I again had the opportunity to represent school children facing expulsion, though this time it would be in Central Florida. In the fall of 1996, I took on the representation of an exceptional education student who had been placed under expulsion.⁹ I found the student's school district to be resistant, if not openly hostile, to the student's exercise of basic due process rights. Because the student was protected by the provisions of the IDEA,¹⁰ however, the Osceola County School Board was required to secure a judicial injunction excluding the student from the school district.¹¹ The open hostility of the student's school district is reflected in some of the remarks made by its counsel at the emergency judicial hearing before a circuit court judge:

Isn't it wonderful? Under Section 504 of the Rehabilitation Act, which is the statute that [the student's counsel] loves . . . there is now a category for socially maladjusted.

* * * *

I mean are we to be faulted that "we've come here today before someone has been hurt? Is what [the] student's counsel would suggest that we need to wait [until] there's blood?

* * * *

We can't run a school if we're forced to put [the student] back. I think the worst thing that . . . can happen to [the trial court] [is] you can get reversed and I'll go down fighting to make sure . . ." [P]erhaps [the student's counsel] would like to live in the world where the inmates run the prison.¹²

6. *Id.* at 11.

7. *Id.* at 4.

8. *Id.* at 4-5.

9. *Sch. Bd. of Osceola County, Fla. v. Student W.R.*, No. C196-1427 (Fla. 9th Cir. Ct. 1996).

10. 20 U.S.C. §§ 1400-1491.

11. *Honig v. Doe*, 484 U.S. 305 (1988).

12. Transcript at 80, 174-177, *Sch. Bd. Of Osceola County Fla.*, (No. C196-1427). The trial court refused to grant the Osceola County School Board an injunction. Because the suit was filed under the IDEA, the student was entitled to recover fees as the prevailing party. See 20 U.S.C. § 1415 (i)(3)(B) (1999). The Osceola County School District, however, took the curious position that the same court from which it sought an injunction nevertheless lacked subject matter jurisdiction to award fees under the IDEA. The trial court agreed and denied the claim for

Whether the venue was Mississippi, rural Delaware, or Central Florida, my clients were without exception poor, and frequently, though not always, minority children.¹³ In Florida each year nearly one thousand middle and high school students across the state are expelled from the public schools.¹⁴ Thousands more Florida students face short-term suspensions from the schoolhouse.¹⁵ The consequences of expulsion, however, are severe. Students who are expelled can be barred from attending a public school for nearly two years under Florida law.¹⁶

Given the singular importance contemporary society attaches to education, and considering that a free and equal public education continues to be one of the defining features of American democracy,¹⁷ it is hard to understand why such a vital and elemental component of democracy can be taken away, and, in some instances, abridged, with such relative ease. No doubt, this contention would be sharply disputed by school administrators and by the lawyers and law firms that represent them. It is no less discomfiting that a student's exercise of his due process rights can engender the type of hostility and vituperative reaction revealed in the excerpted comments by that one Florida school district's legal counsel.¹⁸

fees on jurisdictional grounds but was eventually reversed on appeal. *W.R. ex rel. Doe v. Sch. Bd. of Osceola County*, 726 So. 2d 801 (Fla. Dist. Ct. App. 1999).

13. Research over the last twenty-five years has shown that minority children are disproportionately disciplined. For instance, national statistics show that in 1998-1999, while African American students constituted 17 percent of all students they nevertheless accounted for 31 percent of all students expelled. *Research Brief* (Bay Area School Reform Collaborative) Jan. 2001, at 1; See RUSSELL J. SKIDA & GIL G. NOAM, *ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE* 74 (Jossey-Bass, A Wiley Co. Winer 2001); See also *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, Harvard Civil Rights Project & The Advancement Project (June 2000), at http://www.civilrightsproject.harvard.edu/research/discipline/opport_suspended.php.

14. FLORIDA DEPARTMENT OF EDUCATION, DIVISION OF STUDENT ACHIEVEMENT AND ARTICULATION, BUREAU OF SAFETY AND SCHOOL SUPPORT DISCIPLINARY DATA, 2001-2002. This figure, however, does not include the thousands of students who are placed under expulsion but before the conclusion of the expulsion process are placed in an alternative school. These "alternative placements," however, are not included in the expulsion statistics by either local school districts or the Florida Department of Education. See FLORIDA DEPARTMENT OF EDUCATION INFORMATION DATA BASE REQUIREMENTS, VOL. I, AUTOMATED INFORMATION SYSTEM AUTOMATED STUDENT DATA ELEMENTS. If these alternative placements were included, the number of Florida students under expulsion would increase to 5960.

15. ACHIEVEMENT AND ARTICULATION, *Supra* at note 14. For the reporting period of 2000-2001, there were over 170,000 suspensions in Florida's public schools.

16. Fla. Stat. ch. 1003.01(6) (2004), permits a school to expel a student for a period of time not to exceed the remainder of the term or school year and one additional year of attendance.

17. In *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) the United States Supreme Court pointed out that "education is perhaps the most important function of state and local governments." Further, the Supreme Court noted that "compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."

18. See *supra* note 13.

In this connection, both state and federal courts have displayed a reticence to second-guess the decisions of school administrators to expel students.¹⁹ Importantly, however, this judicial reticence is qualified by the obligation of courts to examine the actions of a school board for constitutional and state law compliance.²⁰ Notwithstanding the willingness of courts to make such inquiries, federal and state courts have shown little enthusiasm to intervene in school discipline cases.²¹

II. THE LONG-SHADOW OF *GOSS v. LOPEZ*: WHAT PROCESS REMAINS DUE PUBLIC SCHOOL STUDENTS THREE DECADES LATER

Almost three decades ago, the United States Supreme Court held that a student facing suspension or expulsion is deserving of due process.²² In *Goss*, the Supreme Court established a general due process framework for public school disciplinary actions, but did not mandate the particular requirements of due process.²³ *Goss*, however, clearly held that a student's entitlement to a public education is a property interest that cannot be denied without due process.²⁴ The Supreme Court also made clear that school discipline implicates a student's "liberty interest in [his] reputation."²⁵ While the Supreme Court in *Goss* did not mandate a uniform set of protections applicable to all public school disciplinary proceedings, the court explained:

19. See *Remer v. Burlington Area Sch. Dist.*, 149 F. Supp. 2d 665, 675 (E.D. Wisc. 2001) (noting it is not the role of federal courts to set aside decisions of school officials which may be unwise or lack compassion); See also *Parent v. Osceola Sch.*, 59 F. Supp. 2d 1243, 1248-51 (M.D. Fla. 1999) (in context of an IDEA suit, which involved a claim of an unlawful expulsion under state and federal law, the court noted that district courts should not substitute their own notions of sound educational policy for those of school authorities).

20. In *Seal v. Morgan*, 229 F.3d 567, 579 (6th Cir. 2000), a zero tolerance expulsion case, the Sixth Circuit pointed out: "As a matter of federal constitutional law . . . the Board may not expel students from school arbitrarily or irrationally. . . . The fact that we must defer to the Board's rational decisions in school discipline cases does not mean that we must, or should, rationalize away its irrational decisions."

See also *C.J. v. Sch. Bd.*, 438 So.2d 87, 88 (Fla. Dist. Ct. App. 1983) (explaining strict standard of review in cases involving zero tolerance policies); See also Jennifer Smith Richards, *Official Discretion With Zero Tolerance Leaves Some Parents Wondering If The Policy Is Applied Evenly*, SAVANNAH MORNING NEWS, March 7, 2004, at A-1.

21. See *Wood v. Strickland*, 420 U.S. 308 (1975) (indicating that it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion); See also *Remer*, 149 F.Supp. at 675, (all the court may do is determine whether a school district expelling a student comported with the requirements of the constitution).

22. *Goss v. Lopez*, 419 U.S. 565 (1975).

23. *Id.* at 584.

24. *Goss* involved suspensions of short duration that did not exceed 10 days.

25. *Id.* at 576.

It also appears that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved.

* * *

Disciplinarians, although proceeding in good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost . . .²⁶

In *Goss*, the Supreme Court “stopp[ed] short of construing the due process clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.”²⁷ However, the Supreme Court recognized “. . . expulsions for the remainder of the school term . . . may require more formal procedures.”²⁸

Since *Goss*, courts have labored to give definition to *Goss*’s due process analysis as applied to a public school expulsion proceeding.²⁹ While courts have uniformly recognized that “due process is a flexible concept determined by the nature of the interest affected and the context in which the alleged deprivation occurs,” . . . [t]he immutable minimum requisites of due process, however, are notice and a meaningful opportunity to be heard.³⁰ Frequently, courts employ the *Matthews v. Eldridge* balancing test to determine what process is due a student facing expulsion.³¹ Due process for a public school student under expulsion has been held to include an impartial hearing with an opportunity to offer evidence and cross-examine witnesses.³² The failure to afford a student the opportunity to cross-examine witnesses has been

26. *Id.* at 580.

27. *Id.* at 583.

28. *Id.* at 584.

29. For instance, in *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 924-26 (6th Cir. 1988), the court held that the school board’s decision not to allow the student an opportunity to cross-examine student accusers, the principal, or the district superintendent, did not violate the student’s due process rights. However, in the same case the Sixth Circuit did find that the superintendent’s disclosure to the school board in closed deliberations of new evidence that had not been presented during the expulsion hearing was violative of due process. *Id.* at 927.

30. *Colquitt v. Rich TP High School*, 699 N.E. 2d 1109, 1115 (Ill. App. 1995); *See also Carey* on behalf of *Carey v. Maine Sch. Admin. Dist. #17*, 754 F. Supp. 906, 919 (D. Me. 1990) (enumerating seven minimum requirements that must be observed to satisfy due process in school expulsion hearings).

31. *Matthews v. Eldridge*, 424 U.S. 319 (1976); *See, e.g., B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 898-99 (N.D. Ind. 2003) (court used *Matthews* test to find no due process violations); *See also Hammock ex. rel. Hammock v. Keys*, 93 F. Supp. 2d 1222, 1228 n.8 (S.D. Ala. 2000) (in school expulsion case, district court pointed out courts often use the *Matthews* test in school discipline cases).

32. *Rucker v. Colonial Sch. Dist.*, 512 A.2d 703, 705 (Del. Super. Ct. 1986).

the basis in a number of cases for setting aside an expulsion.³³ However, a fair number of courts have held a student's right to due process does not necessarily or always include an opportunity to cross-examine accusers or school officials.³⁴ Nevertheless, some courts have held the ability to compel the attendance of witnesses can be a required element of due process in a school expulsion hearing.³⁵ A student's inability to compel the attendance of witnesses has been interpreted as creating an unfair disparity between the student's and school board's abilities to present evidence.³⁶

Courts are uniform in holding that due process requires an impartial decision-maker.³⁷ Further, the failure to provide a student information about the identity of his accuser or the nature of the specific charge has been held violative of due process.³⁸ Additionally, a school board cannot use evidence to support an expulsion that was not disclosed to the student.³⁹ Moreover, a school board is obligated to comply with rules it promulgates that concern student expulsion rights.⁴⁰

The increasing use of alternative school placements has been the subject of appellate review. A number of courts have held that a school administrator's decision to transfer a student to an alternative school does not trigger substantive due process concerns because the "transfer [is an] executive act and the right infringed is not a fundamental right."⁴¹ In *Marner ex rel. Marner v. Eufaula City Sch. Bd.*, the

33. *Stone v. Prosser Consol. Sch. Dist.* No. 116, 971 P.2d 125, 128 (Wash. App. 1999) (reversing expulsion on due process grounds because the student was unable to cross-examine witnesses); *See also In Re Expulsion of E.J.W.*, 632 N.W. 2d 775, 778-783 (Minn. App. 2001).

34. *B.S.*, 255 F. Supp. 2d at 898-99. *B.S.* was an expulsion case involving charges of sexual misconduct. The student under expulsion was denied the opportunity to cross-examine his accusers. However, the court, using the *Mathews* test, found due process did not require cross-examination. *Id.* at 899. *See also Caston v. Benton Public Sch.*, 2002 U.S. Dist. LEXIS 1129 (W.D. Ark. April 11, 2002) (failure to allow cross-examination of student witnesses did not violate due process).

35. *Nicholas ex rel. Nichols v. DeStefano*, 70 P.3d 505, 508 (Colo. App. 2002) (failure of school board to allow student to compel attendance of witnesses was factor in court's decision that hearing did not comport with due process).

36. *Id.*

37. *See Hammock*, 93 F. Supp. 2d at 1229 n.10 (noting that due process requires impartial decision-maker, however, opining that a school administrator involved in the initiation of charges is not thereby disqualified from conducting a hearing on the charges).

38. *Camlin v. Beecher Cnty. Sch. Dist.*, 791 N.E. 2d 127, 131 (Ill. App. 2003).

39. *Id.*

40. *Id.*

41. *Marner ex rel. Marner v. Eufaula City Sch. Bd.*, 204 F. Supp. 2d 1318, 1323 (M.D. Ala. 2002); *See also C.B. by & Through Breeding v. Driscoll*, 82 F.3d 383, 387-89 (11th Cir. 1996) (rejecting substantive due process claim based on transfer to an alternative school and noting in dicta that a procedural due process claim would not succeed because it was doubtful the student had a property interest in attending a particular public school); *cf. Nevares v. San Marcos Consol. Indep. Sch.*, 111 F.3d 25, 26-27 (5th Cir. 1997) (indicating constitutional interests are not implicated by transfer to alternative program but noting student must be treated fairly and given an opportunity to explain why transfer is not justified).

district court reasoned that a fundamental right was not implicated because "the right to attend public school is not a right implicit in the concept of ordered liberty."⁴² However, the Sixth Circuit in *Buchanan v. City of Bolivar*, refused to foreclose a procedural due process claim when a student is transferred to an alternative educational setting.⁴³ In *McCall v. Bossier Parish School Bd.*, the Louisiana Court of Appeals concluded that transfer to an alternative school is not an expulsion in the traditional sense, but also explained that:

Nevertheless, despite the diminishment of a protected property interest, the *Goss* ruling also recognized that due process forbids arbitrary deprivation of liberty. The punishment imposed which may harm a student's good name and reputation may not be imposed without minimal requirements of due process being satisfied.⁴⁴

The court in *Buchanan* explained further:

[A student] may not have procedural due process rights to notice and an opportunity to be heard when the sanction imposed is attendance at an alternative school *absent some showing that the education received at the alternative school is significantly different or inferior to that received at his regular public school.*⁴⁵ (emphasis added)

The importance of not treating an alternative placement as an expulsion is made clear by the annual Florida Department of Education discipline statistics.⁴⁶ This definition obviously diminishes the protections these students enjoy and artificially masks and deflates the numbers of students reported as having been expelled.

III. DISCIPLINE AND DUE PROCESS IN FLORIDA'S SCHOOLHOUSES

Over the last three decades, Florida's appellate courts have examined a number of school expulsion issues - including the rights students facing expulsion enjoy under federal law.⁴⁷ Notably, Florida's school expulsion due process jurisprudence reflects the defining element of the *Goss* paradigm: flexibility. In *Student Alpha I.D. Number Guja v. School Board of Volusia County*,⁴⁸ a school suspension

42. *Marner*, 204 F. Supp. 2d at 1323; See also *Stafford Mun. Sch. Dist. v. L.P.*, 64 S.W. 3d 559, 563-64 (Tex. App. 2001) (transfer of student to alternative program does not impact a protected property or liberty interest implicating due process concerns).

43. 99 F.3d 1352, 1359 (6th Cir. 1996).

44. 785 So.2d 57, 66 (La. App. 2001).

45. *Buchanan*, 99 F.3d at 1359. See also *Marner*, 204 F. Supp. 2d at 1324 (holding absence of extracurricular activities at alternative school does not implicate due process concerns). In a report by the United States Commission on Civil Rights, Race and The Public Education System in Mississippi, it was pointed out that "the quality of education that students receive at these alternative schools leaves much to be desired." See <http://www.usccr.gov>.

46. See *supra* note 14.

47. See, e.g., *Student Alpha I.D. Number Guja v. Sch. Bd. of Volusia County*, 616 So.2d 1011, 1012-1013 (Fla. Dist. Ct. App. 1993).

48. *Id.* at 1011.

case arising from a student's possession of marijuana, the court made clear that "any analysis of procedural due process in a school suspension or expulsion case must begin with *Goss* . . ."⁴⁹ In *Student Alpha*, the court explained that due process in school disciplinary proceedings was not a fixed or static legal concept: "The . . . interpretation and application of due process are intensely practical matters, which negate any concept of inflexible procedures universally applicable to every imaginable situation."⁵⁰

Florida's appellate courts have held that a school cannot expel a student for conduct that did not occur on school grounds.⁵¹ Further, the adoption of zero tolerance policies by school boards "does not override the need for proof of a necessary element of the charged violation . . ."⁵² When school boards adopt student rules prohibiting conduct that would constitute a crime under Florida law, the school board "is prohibited from promulgating rules at variance with legislation."⁵³ In *W.E.R. v. School Bd.*,⁵⁴ two students were expelled for violating a school board rule prohibiting the battering of a school employee. The expulsion hearing officer, however, determined the students were unaware that the employee was a school official.⁵⁵ Based on this finding, the expulsion hearing officer recommended that the students be found guilty of a less severe offense that did not cover battery of an employee.⁵⁶ The school board, however, concluded that "knowledge of the employment status of the victim was immaterial . . ."⁵⁷ The appellate court found the school board rule at variance with Fla. Stat. ch. 230.23015 and 784.081 because the statutes required a showing that the student knew or should have known of the official position of the victim."⁵⁸ Additionally, under Florida law, an expulsion cannot be supported solely on hearsay.⁵⁹

Under a mandatory expulsion policy, now known as a zero-tolerance policy,⁶⁰ Florida's courts have observed: "Because of our sensi-

49. *Id.* at 1017.

50. *Id.*

51. *See M.T. v. Sch. Bd.*, 779 So.2d 328 (Fla. Dist. Ct. App. 1999) (held expulsion reversed because the incident which prompted the school board's action did not occur at an event or on property subject to the school board's authority).

52. *Crawley v. School Bd.*, 721 So.2d 396, 397 (Fla. Dist. Ct. App. 1998).

53. *W.E.R. v. School Bd.*, 749 So.2d 540, 542 (Fla. Dist. Ct. App. 2000).

54. *Id.* at 541.

55. *Id.*

56. *Id.*

57. *Id.* at 542.

58. *Id.*

59. *See Franklin v. Dist. Sch. Bd.*, 356 So.2d 931, 932 (Fla. Dist. Ct. App. 1978).

60. Fla. Stat. ch. 1006.13 (2003) requires school boards to adopt zero tolerance policies for criminal acts, substance abuse, and violence against students. Increasingly, zero tolerance policies have come under sharp criticism. Professors Russell J. Skida and Gil G. Noam, in their recent publication, *Zero Tolerance: Can Suspension and Expulsion Keep Schools Safe*, observed

tivity and concern, we intend that school boards turn square corners, dot all of their 'i's' and cross all of their 't's' if they intend to enforce such a rigid mandatory rule."⁶¹

However, Florida's courts have not been particularly forgiving of students who appear *pro se* and later seek to raise constitutional error for the first time on appeal.⁶² In a recent appellate decision, *Elvira Anderson v. School Bd. of Seminole County*,⁶³ the court upheld the expulsion of a student, who appeared *pro se* with her parent at the expulsion hearing, notwithstanding the fact that she only received notice of the hearing the Friday afternoon before the following Monday morning expulsion hearing.⁶⁴ The appellate court held, without qualification, that "pro se litigants . . . should not be treated differently from litigants in similar situations who are represented by counsel and are charged with knowledge of those rights."⁶⁵ Thus, Florida's school expulsion jurisprudence cannot be easily categorized as either liberal or conservative with respect to applying the protections available to students under Florida or federal law.

Florida decisional law, however, is not the only source of rights that public school students enjoy in Florida. The Florida legislature has enacted a latticework of provisions that imbue and authorize school boards,⁶⁶ district superintendents,⁶⁷ principals,⁶⁸ teachers⁶⁹ as well as bus drivers⁷⁰ with the authority to remove students from the classroom, school buses and to discipline students. However, the Florida legislature has also codified a wide array of rights and obligations that affect and in many ways expand the rights of students facing expulsion

that "zero tolerance as a school discipline philosophy developed in the political arena for political purposes." See *supra* note 14. (emphasis added). Skida and Noam also point out that there is a strong basis to claim that for "whatever its appeal, zero tolerance has failed to demonstrate effectiveness in reducing school violence or improving discipline." *Id.* Compounding the lack of efficacy is the racial unfairness of such policies. As to racial disparities in school discipline, "[s]tudies of school suspension have consistently documented over representation of low-income students . . . [and] racial disproportionality in the use of [discipline] has been a highly consistent finding." *Id.* at 30-31. See also RICK AYERS ET. AL., ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 166-175 (2001).

61. C.J. v. School Bd., 438 So.2d 87, 88 (Fla. Dist. Ct. App. 1983).

62. See *Anderson v. Sch. Bd. of Seminole County*, 830 So.2d 952, 953 (Fla. Dist. Ct. App. 2002).

63. *Id.*

64. *Id.*

65. *Id.* at 953.

66. For instance, local school boards must adopt rules for the, "control . . . discipline . . . and expulsion of students." Fla. Stat. ch. 1003.02(1)(c) (2004).

67. District superintendents are obligated by statute to support the decisions of teachers, principals and school bus drivers to discipline students. See Fla. Stat. ch. 1006.08(1) (2004).

68. See Fla. Stat. ch. 1006.09(1)(b) & (c) (2004).

69. See Fla. Stat. ch. 1003.32 (2004).

70. See Fla. Stat. ch. 1006.10 (2004).

from Florida's public schools. Included in the Florida Educational Code is a statutory definition of expulsion:

Expulsion means the removal of the right and obligation of a student to attend a public school under conditions set by the district school board, and for a period of time not to exceed the remainder of the term or school year and one additional year of attendance. Expulsions may be imposed with or without continuing services and shall be reported accordingly.⁷¹

While Florida's educational statutes leave no doubt that teachers as well as school principals are authorized to discipline students, the legislature has devoted considerably less statutory space to *explicitly* setting out the precise nature of rights that Florida law affords public school students facing expulsion. In fact, the Educational Code is silent on the precise elements of an expulsion hearing.⁷² Consequently, there is no mention of a student's right to counsel, the right to present evidence, to cross-examine witnesses, to compel the attendance of witnesses, or to undertake formal discovery.

The Educational Code, however, does obligate a district superintendent, at the time he makes a recommendation for expulsion to the school board, to "give written notice to the student and the student's parent of the recommendation" along with notice of the charges against the student and notice to the student and the student's parents "of the student's right to due process as prescribed by . . . 120.569 and 120.57 (2)".⁷³ To identify a student's expulsion hearing rights, though, it is necessary to refer to Florida's Administrative Procedure Act⁷⁴ because the Educational Code provides that "expulsion hearings shall be governed by" Florida's administrative hearing procedures.⁷⁵ Therefore, the Educational Code itself does not require a particular type of adjudicatory hearing for school expulsions but instead requires this determination to be made under Florida's Administrative Procedure Act.⁷⁶

Florida's Administrative Procedure Act provides for two types of adjudicatory hearings, each with a different degree of procedural protections. A formal hearing under ch. 120.57(1) contemplates a greater number of procedural safeguards designed to assist in deciding disputed questions of fact. In contrast, an informal hearing under

71. Fla. Stat. ch. 1003.01(6)(2) (2004).

72. Fla. Stat. ch. 1006.07 (1)(a) (2004).

73. Fla. Stat. ch. 1006.08 (1) (2004).

74. Fla. Stat. ch. 120.51-81 (2004).

75. See Fla. Stat. ch. 1006.07(1)(a) (2004). The actual statutory language states that "expulsion hearings shall be governed by ch. 120.569 and 120.57(2).

76. Fla. Stat. ch. 1006.07 (1)(a) & 1006.08 (1): See also Fla. Atty. Gen. Op. 2001-5 (Feb. 2, 2001) (examining the statutory framework applicable to school expulsion proceedings).

§ 120.57(2) is essentially a meeting.⁷⁷ Fla. Stat. ch. 120.569 provides that the provisions of Florida's Administrative Procedures Act apply "in all proceedings in which the substantial interests of a party are to be determined by an agency . . ."⁷⁸ Further, ch. 120.569 also provides that: "Unless waived by all parties, ch. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, ch. 120.57(2) applies in all other cases." Florida law has long recognized that formal administrative proceedings "must be conducted in a quasi-judicial manner in which the basic requirements of due process are accorded and preserved."⁷⁹ These basic requirements contemplate reasonable notice, a decision based on competent and substantial evidence, sworn testimony, the right to confront and cross-examine witnesses and the right to present argument.⁸⁰ The enumeration of hearing rights under ch. 120.569 includes the right to present testimony under oath, to compel the attendance of witnesses, to engage in formal discovery, to challenge the admission of evidence, to conduct cross-examination, and to submit proposed findings of fact. Additionally, ch. 120.569(2)(b) specifies parties are entitled to at least 14 days notice; however, under ch. 120.81(1)(h), the hearing officer or superintendent can waive the 14 day notice requirement without the consent of the student. For these reasons, Fla. Stat. ch. 120.569 is critical to determining what procedural rights a student has in defending against expulsion.

Other sources for identifying student rights are student codes of conduct promulgated by individual school districts. Student codes are mandated by Florida's Educational Code,⁸¹ and each district must adopt a student code of conduct for elementary schools and one for middle and high schools.⁸² A school district's student code of conduct must be based on rules adopted by the local school boards, and must include discipline policies, the specific grounds for disciplinary action, the procedures that apply to disciplinary action and an explanation of the rights and responsibilities of students.⁸³

77. See *Autoworld of Am. Corp. v. Dep't of Highway Safety*, 754 So.2d 76, 77 (Fla. Dist. Ct. App. 2000).

78. In this connection, the statutory definition of an agency includes a local school district. Fla. Stat. ch. 120.52(6). Under Fla. Stat. ch. 120.81, hearings involving disputed facts pursuant to Fla. Stat. ch. 120.57(1)(a) can be conducted by the local school board rather than by an administrative law judge.

79. *Deel Motors Inc. v. Dep't of Commerce*, 252 So.2d 389, 394 (Fla. 1st Dist. Ct. App. 1971).

80. *Id.*

81. Fla. Stat. ch. 1006.07 (2) (2004).

82. *Id.*

83. *Id.*

A review of student codes from fourteen different school districts in the preparation of this article revealed a great degree of variance in the quality and quantity of information disclosed to students about the protections Florida law affords them in defending against an expulsion.⁸⁴ Some school districts, if not by an act of commission, then by an act of omission, fail to include critical information about the protections Florida law provides to students facing expulsion.⁸⁵ For example, the Orange County School Board's Code of Student Conduct contains a ten-step process for expulsion of students. However, the page long description of the ten-step process does not state that the student can request a hearing to put on evidence, call witnesses, or exercise the rights granted under Florida's Administrative Procedure Act.⁸⁶

Indeed, Step 7 of the Orange County School Board's student code procedures actually suggest the *only* hearing available to a student is one to "determine the sufficiency of the procedures."⁸⁷ Step 10 states that "the parent or guardian shall have the right to appear before the school board,"⁸⁸ however, the Orange County School Board's student code fails to fully disclose or explain critical information regarding the student's due process rights and can be interpreted as misleading if not outright wrong. There is no way that a student or her parent can learn what rights a student has to defend against an expulsion⁸⁹ from reading the Orange County School Board's Student Code of Conduct.

The Okeechobee School Board's Code of Student Conduct provides information on the nature of the rights available to a student under expulsion, but also fails to mention all the rights available to students under Florida law.⁹⁰ For example the Okeechobee School District student code of conduct informs the student that hearings are conducted under ch.120.57(2), but makes no reference to Fla. Stat. ch. 120.57 (1) or ch.120.569, though it does list the right to present evi-

84. The fourteen student codes of conduct reviewed were from the following school districts: 1) Pasco County Public Schools; 2) Hillsborough County Public School; 3) Putman County Public Schools; 4) Marion County Public Schools; 5) Pinellas County Public Schools; 6) Miami-Dade County Public Schools; 7) Orange County Public Schools; 8) Okeechobee County Public Schools; 9) Escambia County Public Schools; 10) Bradford County Public Schools; 11) Liberty County Public Schools; 12) Hendry County Public Schools; 13) Santa Rosa County Public Schools; and 14) Indian River County Public Schools.

85. See e.g., INDIAN RIVER PUBLIC SCHOOLS STUDENT CODE OF CONDUCT (2003-2004). Examples of other school districts that have student codes of conduct that fail to fully inform students of the rights available to defend against a proposed expulsion include the Hendry County Public Schools, the Liberty County Public Schools and the Bradford County Public Schools.

86. ORANGE COUNTY PUBLIC SCHOOLS CODE OF STUDENT CONDUCT 21-22 (2003-2004).

87. *Id.*

88. *Id.*

89. *Id.*

90. OKEECHOBEE COUNTY PUBLIC SCHOOLS CODE OF STUDENT CONDUCT (2003).

dence, to argue, to cross-examination, the right to present rebuttal evidence and the right to have counsel.⁹¹ Further, the Okeechobee School District Code of Student Conduct also provides that Florida's Model Rules of Administrative Procedure will govern the hearing,⁹² and under the student code, the hearing officer must prepare findings of fact, conclusions of law and a proposed final order.⁹³ Following the hearing officer's proposed action, the student is entitled to appear at the school board meeting.⁹⁴

Only one of the fourteen student codes reviewed informs students of their right to have a formal hearing under Fla. Stat. ch. 120.57(1)⁹⁵ and none make reference to ch. 120.569. Nor does any of the student codes reviewed inform students that they can compel the attendance of witnesses or obtain documents and information from the school district through discovery. Also, none of the student codes reviewed mention or recognize the fourteen day notice provided in ch. 120.569 or explain that a student can ask for a continuance of the hearing to obtain more time to prepare. In this regard, a number of the school districts use a question and answer form that provides general information on the rights available to a student under expulsion, but even these districts do not provide a clear or full description of the range of rights and protections available to students.⁹⁶ While student codes of conduct are a resource for identifying student rights, they cannot be relied upon to provide either a complete or accurate statement of rights available to students facing expulsion.

Because many students are unable to afford counsel, the omission of a complete statement of rights in the student code can severely prejudice a student's efforts to defend the expulsion. The fact that additional information on a student's rights may be found in school board rules or policies is of little assistance because these are rarely, if ever, voluntarily or promptly given to students or their parents.⁹⁷

91. *Id.* at 13.

92. *Id.* at 13-14; See F.A.C. Vol. 5-28-106-101 (rules applicable to administrative proceedings in which the substantial interests of a party are to be adjudicated).

93. *Supra* note 90 at 14.

94. *Id.*

95. PUTNAM COUNTY SCHOOL BOARD STUDENT CODE OF CONDUCT 14 (2003-2004).

96. See, e.g., PINELLAS COUNTY SCHOOL BOARD STUDENT CODE OF CONDUCT (May 7, 2003).

97. This statement is based on my own experience in representing children in school expulsions and interviewing parents of children under expulsion.

IV. NOTES ON DEFENDING PUBLIC SCHOOL STUDENTS
FACING EXPULSION

A lawyer defending a student facing expulsion from Florida's public schools should keep in mind that Florida law provides students a far greater number of legal protections than does the *Goss v. Lopez* due process paradigm. The hearing rights guaranteed by Fla. Ch. 120.569 and ch. 120.57(1) go beyond what a substantial number of federal and state courts have been willing to hold due process requires under the federal constitution.⁹⁸ For example, under Fla. Stat. ch. 120.569, witnesses can be compelled to appear and a student is entitled to conduct formal discovery. Consequently, a lawyer defending a student in an expulsion proceeding should not depend alone on due process under the framework of *Goss* to safeguard the student's rights.

After establishing the student's right to invoke the protections available under Fla. Stat. ch. 120.569 and ch. 120.57 (1), two threshold tasks should be: (1) gathering information generated by the school and (2) obtaining school district expulsion policies, procedures and guidelines. School boards frequently have a written set of guidelines that school administrators must follow in deciding whether to expel a student and in carrying out an expulsion.⁹⁹ These written guidelines may include specific forms and particular types of information.¹⁰⁰ Also, school administrators frequently ask the student's classroom teachers to supply background information that is then used by the school in deciding whether to proceed with an expulsion.¹⁰¹ Consequently, teacher statements and records can prove critical to defending the student. Also, witness statements are gathered by school officials and the facts relating to the incident are collected in several different formats. All of this information should be obtained because it can yield helpful facts to defend against the expulsion on the merits.

Obtaining this type of information is essential for another reason: to overcome the effect of what I described earlier as a *presumption of correctness* that clothes a school administrator's decision to expel a student and the institutional orthodoxy that can taint the entire expulsion process. Just how completely this institutional orthodoxy can influence an expulsion proceeding is illustrated by a high school expulsion case I handled several years ago, *Central Florida, Paul J.*

98. See, e.g., *Caston v. Benton Pub. Sch.*, 2002 U.S. Dist. LEXIS 1129 (W.D. Ark. April 11, 2002).

99. See SCHOOL BOARD OF SARASOTA COUNTY, DISTRICT DISCIPLINARY PROCEDURES, A GUIDE FOR ADMINISTRATORS § 5 (2002-2003).

100. See *Id.* § 8.

101. See *Id.*

*Hagerty, Superintendent v. S.S.*¹⁰² My client, S.S., was a 15-year-old African-American high school student under expulsion from the Seminole County Public Schools for allegedly threatening other students on a school district bus with a weapon described as a knife or blade.¹⁰³

By way of background, Seminole County, which is located in Central Florida, is near Eatonville, the home of the gifted African-American writer and folklorist, Zora Neal Hurston.¹⁰⁴ Hurston was born in 1891 in Eatonville, which at that time was one of the only self-governing black communities in the nation.¹⁰⁵ Historically, Seminole County always had a sizeable African-American population,¹⁰⁶ and, as was the case across the South, Seminole County's communities and schools were segregated both by law and by tradition.¹⁰⁷ Hurston, who was acutely aware of the absurdity of America's racial conventions, and who celebrated the richness of African-American culture, also had a keen sense of social irony. It was her appreciation for social irony that is reported to have allowed her to avoid receiving a traffic infraction for crossing a street when the light was red. When approached by the police officer, Hurston explained to him that since the whites had crossed with the green light, she just assumed the red light was for African-Americans. According to the story, the police officer declined to charge her with a traffic citation.¹⁰⁸

Seminole County's African Americans provided a source of low-wage labor for the area's farming operations.¹⁰⁹ Margaret Barnes, a

102. Paul J. Hagerty, *Superintendent v. S.S.*, (Case No. 97-11, Sch. Bd. of Seminole County). I represented S.S. and was aided by the counsel of two other public interest lawyers, Treena Kaye and Peter Sleasman.

103. Seminole County Public Schools Secondary Discipline Referral (August 20, 1997); Seminole County Public Schools Principal's Recommendation for Expulsion (August 20, 1997).

104. ZORA NEALE HURSTON, *DUST TRACKS ON A ROAD* 1-7 (Harper Perennial 1996). Hurston was also an anthropologist, a dramatist in the WPA Federal Theater Project, and member of the Federal Writer's Project. *Id.* Hurston's literary labors produced such notable works as *Their Eyes Were Watching God*, *Mules and Men*, *Jonah's Gourd Vine* and *Moses, Man of The Mountain*. *Dust Tracks On A Road* was Hurston's autobiography. As if out of a Greek tragedy, however, Hurston, who in spite of the burden of American racism, produced a rich and original body of literary works, and who today is both celebrated and studied across the nation, died a pauper in a Florida welfare home.

105. *Id.*

106. Margaret Barnes, *The Introduction & Growing of Celery in Seminole County* (Nov. 5, 1964) in SEMINOLE COUNTY WRITERS PROGRAM, FEDERAL WRITERS PROJECTS, AMERICAN GUIDE 31.

107. Zora Neale Hurston in her autobiography, *Dust Tracks On A Road*, briefly describes her experiences attending a "Negro School"; HURSTON *supra* note 105 at 34-35.

108. This anecdote was included in Zora Neale Hurston materials on display at the University of Florida Smathers Library Special Collections African American History Exhibit in the spring of 2004, but its original source was not identified. It also is found on a number of websites but none attributes the story to any original source. See e.g. www.jocelync.com/portfolio_paths.html

109. BARNES, *supra* note 107 at 3-5 (Nov. 5, 1936). See also ARTHUR E. FRANK, JR., FLORIDA SEMINOLE COUNTY HISTORICAL COMMISSION EARLY DAYS OF SEMINOLE COUNTY 32 (Uni-

local writer employed by the Federal Writer's Project, in a 1936 manuscript, observed that many African-Americans living near Sanford "all work on the farms" and that the "laborers in and around Sanford are transported to and from the fields in huge trucks, with slatted sides . . . and wedged in literally like sardines in a can."¹¹⁰ As if taken from the pages of a John Steinbeck novel, Barnes noted that in 1936, "[f]armers from California, during the lettuce strike, sneaked in under cover of night and carried off two truck loads of [African-American laborers]."¹¹¹

Sanford, which sits about 20 miles east of Orlando on the I-4 corridor, long prided itself on being the celery capital of the nation.¹¹² Until the mid 1970's, celery and other vegetable crops covered the fields around Sanford but a drive through the area today finds those former celery and vegetable fields replaced by upscale housing subdivisions and malls. Many of the poor African-American families that labored in the celery and vegetable fields for subsistence wages, however, still call run-down public housing and poor racially segregated housing home.¹¹³ To this extent, Seminole County has changed little.

Seminole County's history includes the unmistakable American signpost of racial segregation - - including segregated schools.¹¹⁴ Even after the downfall of "separate but equal"¹¹⁵ and the passage of Title VI of the Civil Rights Act of 1964,¹¹⁶ voluntary efforts to dismantle its racially segregated dual system came about slowly.¹¹⁷ In 1970, a federal civil rights suit brought by the United States Department of Justice eventually replaced those voluntary efforts with judicial oversight through a series of consent orders.¹¹⁸ However, even though it has been over three decades since the lawsuit was initially filed, judicial intervention has yet to bring a complete end to the legacy of school segregation in Seminole County.¹¹⁹ The disproportionate discipline of

versity of Florida Smathers Library, Special Collections 1984). Celery, lettuce and other vegetables were grown on thousands of acres by large agribusiness enterprises like A. Duda and Sons. In the nineteenth century, Sanford, Florida "was the largest orange shipping point in Florida." A severe freeze in 1894 diminished Seminole County's role in orange production. *See Id.*

110. BARNES *Supra* note 110 at 3.

111. *Id.* at 4.

112. FRANKE, JR., *Supra* at note 110, at 10.

113. Elaine Backhaus and Gary Taylor, *Low-Income Families Fear Losing Homes*, ORLANDO SENTINEL, July 20, 1999; Rene Stuzman, *Sanford's Help Would Be A Breath of Fresh Air*, ORLANDO SENTINEL, Aug. 10, 2000, at D1. (recounting stories of tenants that were former agricultural workers who still live in public housing).

114. *See* United States v. Seminole County Sch. Dist., 553 F.2d 992 (5th Cir. 1977).

115. *Plessy v. Ferguson*, 16 U.S. 1138 (1896).

116. 42 U.S.C. ch. 2000(d) *et seq.*

117. *Seminole County. Sch. Dist.*, 553 F.2d at 994-95.

118. *Id.* at 993-95.

119. *Id.* at 995. The history of desegregation (and resistance to integration) in the Seminole County schools is examined by Sallie Jenkins in her recent doctoral dissertation, *A Historical*

African-American students is part of that legacy. One of the continuing areas of concern of the United States Department of Justice is the unfair and disproportionate discipline of African American students¹²⁰ - - which brings me back to the expulsion of S.S., my fifteen-year-old client.

The incident giving rise to the expulsion charges against my client occurred on a school bus taking students home for the day.¹²¹ On that afternoon, another student, who had been involved in previous altercations with S.S., verbally harassed and threatened her.¹²² At the time, the other student was under a juvenile court order prohibiting her from having any contact with my client.¹²³ Soon after the other student began verbally harassing S.S., the other students on the bus joined in with yelling, jumping from seat to seat, and actively encouraging the altercation - - until the point at which the bus became riotous.¹²⁴ My client was innocent, but to prove her innocence I first had to overcome the anticipated testimony of eight student eyewitnesses, each of whom had given a written statement.¹²⁵ Ironically, my efforts to prove my client's innocence were unintentionally assisted by the *institutional orthodoxy* that I described earlier.

During the course of the expulsion proceeding, it was discovered that the school's vice-principal had interviewed almost all of the student eyewitnesses together in the same room and had them write their witness statements while sitting together in the same room.¹²⁶ It was also disclosed during the expulsion hearing that the vice principal *destroyed* the first set of statements given by the student eyewitnesses and that he used threats to get some of the students to sign statements.¹²⁷ The vice principal, however, explained the spoliation of the first set of statements as justified because they were written on the wrong form.¹²⁸ The school district, prior to the day of the expulsion hearing, however, never disclosed that an earlier set of statements had

Investigation of School Desegregation in Seminole County School District (University Of Central Florida, 2002) Salley Jenkins credits Seminole County with substantial efforts to desegregate in the past six years, but nevertheless concluded "there is still much more that must be done" to comply with *Brown*. See JENKINS at 183.

120. U.S. v. Seminole County Sch. Dist. 2000 Consent Decree at § VII (E) & VIII (8).

121. Seminole County Public Schools Secondary Student Discipline Referral (August 20, 1997); August 18, 1997 Incident Report By Seminole County Public School Bus Driver.

122. Transcript at 93, *Hagerty v. S.S.*, (Case No. 97-11) Sch. Bd. of Seminole County, Fla. (October 23, 1997).

123. *Id.* at 80.

124. Incident Report by Seminole County Public School Bus Driver (August 18, 1997).

125. Seminole County Public Schools Student Discipline Witness Statements in *Hagerty v. S.S.*

126. Transcript at 35, *Hagerty* (Case No. 97-11).

127. *Id.* at 71, 153-155, 140 & 145-146, 149-150.

128. *Id.* at 154.

ever existed or that they had been destroyed. When the spoliation of the first set of statements was uncovered at the expulsion hearing, the Seminole County School Board's attorney offered the following *existential* explanation: "They're not in existence. At the time they were requested, [the vice principal] didn't have them, so you can't provide what you don't have."¹²⁹

It was also revealed at the expulsion hearing that the day before the hearing the school district's lawyer had gone to the high school and, with the assistance of a school security staff person, removed a student witness from class to interview her.¹³⁰ At the expulsion hearing, another student disclosed she had been threatened by the vice principal unless she gave a statement.¹³¹ The student explained under oath that: "[The vice principal] said he can have me hand cuffed when I refused to sign it."¹³² This student further corroborated the vice principal's use of threats. She testified that the vice principal "said that he would have [her] butt in jail [and] arrested . . ." ¹³³ even though the student had told the school official she did not see a knife.¹³⁴ After these disclosures were made, it took very little time for the Seminole County School District to agree to a settlement that included withdrawal and expungement of the expulsion charges against the student.¹³⁵

At the outset of the expulsion proceeding, the task of proving the student's innocence looked both daunting and, as an evidentiary matter, almost beyond reach. What made it possible to prove her innocence though, was the very *institutional orthodoxy* that permeated the school's judgment and which colored virtually all of its actions - - leaving almost no room for the truth to breathe except within the confines of an adversarial proceeding that provided the full measure of due process. Because the student had the ability to cross-examine witnesses, compel the appearance of witnesses, present evidence, take depositions, and had access to legal counsel, she was able to mount a successful defense.

This was not the case, however, in *Anderson v. Sch. Bd. of Seminole County*.¹³⁶ In *Anderson*, it was the student's *lack* of representation at the expulsion hearing that puts in sharp focus the importance of a student's access to counsel. The student in *Anderson*, J.A., had been

129. *Id.* at 151.

130. *Id.* at 121-122.

131. *Id.* at 140.

132. *Id.*

133. *Id.* at 145-149.

134. *Id.* at 147.

135. Notice of Withdrawal & Cessation of Proceedings for Expulsion, *Hagerty* (Case No. 97-11) (Nov. 10, 1997).

136. 830 So.2d 952 (Fla. Dist. Ct. App. 2002).

involved in a physical confrontation with another middle school student.¹³⁷ Prior to the incident, however, J.A.'s parent had actually contacted the school and discussed with the school's assistant principal the difficulties J.A. had been having with the other student.¹³⁸ During the incident between the two students that led to the expulsion, a school administrator attempted to intervene but, in trying to intervene, the administrator was injured.¹³⁹ J.A. was placed under expulsion for battery on a staff person and for fighting.¹⁴⁰

In *Anderson*, the student's right to a fair proceeding was compromised at the very outset when the notice of the expulsion hearing was delivered on the Friday before the following Monday expulsion proceeding.¹⁴¹ This provided the student with less than one full business day to prepare. Retaining counsel was not possible because J.A. was indigent.¹⁴² The notice did not inform J.A. of the actual charges on which the expulsion proceeding would be based, of her right to appear with counsel, her right to cross-examine witnesses, her right to confront witnesses, her right to present mitigating evidence¹⁴³ on the appropriate punishment, or her right to compel the attendance of witnesses.¹⁴⁴ As a practical matter, the Seminole County Public School's approach to informing students who are under expulsion of their due process rights could fairly be described as a "don't ask, don't tell" policy. If a parent does not ask the school what protections are available, the School District does not tell them.

At J.A.'s expulsion hearing, the school used hearsay evidence, failed to produce the other student to testify, and made no mention whatsoever of the fact that J.A.'s parent had contacted the school about her concerns regarding the other student's conduct toward J.A. Further, J.A. was not given an opportunity to cross-examine the two school officials who gave statements in support of expulsion.¹⁴⁵ Not

137. *Id.*; see also Transcript at 4-5, *Anderson*.

138. Transcript at 9, *Anderson*.

139. *Id.* at 6.

140. Seminole County Public School Preliminary Recommendation for Expulsion, *Anderson* (Feb. 14, 2002).

141. *Anderson*, 830 So.2d at 953.

142. Following the expulsion hearing, J.A. learned of a local legal services office, which in turn, contacted me about taking on J.A.'s appeal. I agreed and co-counseled the appeal with Treena Kaye, the managing attorney of the local legal services office. Because of her indigency, the student was able to prosecute her appeal *in forma pauperis*. See April 22, 2002 School Board Order Granting Motion To Waive Appellate Court's Filing Fee; April 29, 2002 Fifth District Court of Appeal Order allowing appeal to proceed without payment of fees.

143. The Supreme Court in *Goss v. Lopez*, 95 U.S. 729, 741 (1975) also recognized that even when a student is culpable, due process also requires providing the student an opportunity "to characterize his conduct and put it in what he deems the proper context." This requirement goes to the nature and severity of the sanction rather than to guilt or innocence.

144. Seminole County Public School Notice of February 25 2002 Expulsion Hearing

145. Transcript at 7, *Anderson*.

surprisingly, not a single objection was made at the hearing.¹⁴⁶ Consequently, J.A. failed to preserve any claim of error and the expulsion was affirmed on appeal.¹⁴⁷

V. LESSONS LEARNED

The most salient lesson of *Hagarty v. S.S.* is the vital importance of a student's access to legal counsel. Ironically, this was also the lesson drawn from *Anderson*. The appellate court that reviewed the expulsion in *Anderson* was unmoved by J.A.'s *pro se* status at the hearing or by her claims of fundamental error that were raised for the first time on appeal. While the appellate court's decision in *Anderson* draws ample support from Florida judicial precedent, which has largely refused to give *pro se* litigants any favored treatment in the review of unpreserved error on appeal, the ruling in *Anderson*, however, was not *compelled* by precedent.¹⁴⁸ The IDEA governs the rights of disabled students. Federal courts have recognized that not only do "schools have an affirmative obligation to inform parents of their procedural rights under the IDEA," [but] also "where a parent is unrepresented and does not have notice of his or her rights . . . failure to raise a procedural violation at the due process hearing may not bar judicial consideration of that violation."¹⁴⁹

The *Anderson* decision, though, can perhaps be better understood if the outcome is seen more as the result of the general discomfort courts have with intervening in the school disciplinary process¹⁵⁰ than as judicial approval of a school district's abridgment of a student's due process rights. *Anderson*, however, teaches us an old lesson: Constitutionally inadequate notice combined with lack of counsel will almost always deny a public school student facing expulsion the process she is due. Over seven decades ago in the notorious *Scottsboro* case, *Powell v. Alabama*,¹⁵¹ the United States Supreme Court explained:

146. *Id.* at 4-23.

147. *Anderson*, 830 So.2d at 953.

148. See e.g. *Wood v. State*, 544 So.2d 1004, 1006 (Fla. 1989) (court held that adequate notice and meaningful hearing prior to termination of substantive rights or other state enforced penalty is central to due process and denial of these basic constitutional rights constitutes fundamental error); *Creppey v. City of Lauderhill*, 774 So.2d 61 (Fla. 4th Dist. Ct. App. 2000) (twenty-four hour notice was not adequate notice in statutory forfeiture case).

149. *Briere By & Through Brown v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1253 (D. Vt. 1996); See also 34 C.F.R. § 300.504 (mandating that parents of disabled children under the IDEA must be given written notice of a range of procedural safeguards).

150. See e.g. *Remer v. Burlington Area Sch. Dist.*, 149 F. Supp. 2d 665, 675 (E.D. Wisc. 2001).

151. 53 U.S. 55 (1932).

It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment . . .

[T]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law.¹⁵²

The most effective way to insure students are given the full measure of due process is to provide students who cannot afford private counsel with appointed representation in expulsion proceedings. No doubt, this proposal will be considered by many as heresy,¹⁵³ but absent appointed counsel, the right to counsel in expulsion hearings, as well as the right to a fair hearing, is illusory. This concern is put in even sharper relief by the draconian use of zero tolerance policies and the continuing legacy of racial discrimination reflected in the disproportionate discipline of African-American students. The United States Supreme Court in *Brown* explicitly affirmed that public education is a cornerstone of our participatory democracy. Almost two decades later, Justice Thurgood Marshall, writing in dissent in *San Antonio Independent Sch. Dist. v. Rodriguez*,¹⁵⁴ eloquently remarked that “no other state function is so uniformly recognized as an essential element of our society’s well-being.”¹⁵⁵ If this remains true today, then poor children¹⁵⁶ who face complete exclusion from our public schools *should* be given a constitutionally meaningful opportunity to protect their earliest participation in our democracy.

152. *Id.*

153. In acknowledging this, I readily concede there is little judicial precedent to support this position. An examination of this issue, however, is deserving of separate treatment and will be left to others to consider. The point, however, is not what the law currently requires, but what it *should* require. Over the course of American history in general, and American legal history in particular, schisms between what the law (judge-made or legislative) required and protected and what it should require and protect have frequently been slow to close, sometimes taking even centuries to occur.

154. 411 U.S. 1 (1973).

155. *Id.* at 112.

156. *See* note 14.