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The Admissibility of Hearsay in Public Secondary School Disciplinary Hearings

Lynn M. Engel†

Accused, a high school senior, receives notice that she and her parents must attend a hearing before the school board regarding an allegation that she sold drugs on the school grounds. Accused appears before the board on the appointed day. The school principal testifies that two students informed him that they had witnessed Accused selling drugs to other students. The principal does not reveal the identity of these informers. Accused is permitted to refute the charge, but the board finds Accused's refutation unsatisfactory. Consequently, the board expels Accused from school. Accused never returns to high school and does not complete her high school education.

Reliance on hearsay evidence in school disciplinary hearings is troubling. Use of hearsay testimony as evidence presents questions regarding the informers' sincerity, memory, perception and narration. The informers may have fabricated the charge against Accused for such reasons as malice, prejudice or jealousy. Similar factors may have motivated the principal to manufacture the story. However, as in most school disciplinary hearings, Accused was given no opportunity to question either the principal or the informers.

Even if the informers are not lying, questions regarding their perception and memory still may exist. Perhaps the informing students saw Accused passing unidentifiable objects to her fellow students. The informers may simply have assumed drugs were being sold based on the reputation of Accused or the fellow students. How can the school board know that the informers were standing close enough to see that the objects were drugs? Moreover, how can the board be sure the informers were close enough to correctly identify Accused as being present? The informers' memories may also have been shaky depending on how much time passed between the incident in question and their report to the principal.

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Finally, the principal may have misunderstood the story told by the informers. For example, the principal may have misinterpreted expressions used by them. Moreover, even where the principal believes he accurately summarized their statements, he may in fact have misperceived the informers’ words due to his own assumptions about Accused. This would be of particular concern if Accused has a reputation as a troublemaker.

In a high school where school authorities are determined to do everything possible to safeguard Accused’s rights, the scenario is entirely different. A formal hearing is held and Accused is permitted to have counsel represent her. She is also given the protection afforded by the rules of evidence. Both student and faculty witnesses are called to testify. Without explanation, one of the informers refuses to appear before the board. On cross-examination by Accused’s counsel, the other informer testifies that her former boyfriend is now dating Accused, raising doubts about the informer’s sincerity. At the close of the hearing, Accused’s counsel asserts that the evidence is insufficient to expel Accused. The school authorities agree and Accused is not expelled. The hearing has cost the school money and has disrupted the student body and the faculty. Two weeks later, several students see a different student selling drugs. This time, aware of the formal and disruptive nature of an expulsion hearing, the students do not report what they have seen. Unfortunately, the procedural safeguards that protected Accused’s rights have also chilled school discipline.

The United States Supreme Court stated in *Goss v Lopez*¹ that a public education guaranteed under state law is a property interest protected by the Due Process Clause of the Fourteenth Amendment. The Court held that where a student was suspended for ten, or fewer days, due process required that the student be given notice of the charges and an opportunity to present his or her own side of the story.² The Court speculated that longer suspensions or expulsions might necessitate “more formal procedures.”³ The Court, however, did not specify what “more formal procedures” would entail.

Since the *Goss* decision, lower courts have set varying standards for what process is due in instances of long-term suspension and expulsion. The admissibility of hearsay testimony in public school disciplinary hearings is controversial in these cases. When

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¹ 419 US 565, 574-76 (1975).
² Id at 581.
³ Id at 584.
confronted with this question, most courts have held that hearsay is admissible.\textsuperscript{4}

This Comment argues that the importance of high school education should tip the balance the other way in all but a small number of cases. The accused student’s property interest in an education is substantial and justifies a more formal approach to disciplinary hearings. Excluding hearsay in high school disciplinary hearings is consistent with the specific due process principles and practical concerns advanced by the Supreme Court. Also, by safeguarding Due Process, fair hearings minimize the potentially life-altering, negative consequences of expulsion or long-term suspension.

Part I of this Comment discusses the importance of obtaining an education and the possible negative ramifications that unjust expulsion or long-term suspension may have on a student. Part II reviews Supreme Court precedent regarding due process in general, as well as in the school setting. This part concludes that the Supreme Court’s approach to students’ constitutional protections most likely would lead the Court to decide that excluding hearsay from school disciplinary hearings is not constitutionally-mandated. Part III discusses state statutory language that effectively minimizes the use of hearsay testimony in school expulsion hearings. Part IV discusses the primary policy rationales presented by many courts in holding hearsay admissible in school disciplinary hearings and argues that these are insufficient to warrant the use of hearsay. Finally, Part V recommends a policy-oriented rule that makes hearsay inadmissible in school disciplinary hearings, with a limited exception for those cases in which the informing party has a legitimate fear of reprisal if he testifies against the accused student.

I. HARM TO THE UNJUSTLY PUNISHED STUDENT

Approximately 30 percent of entering high school freshmen quit school.\textsuperscript{5} A significant percentage of dropouts never complete


\textsuperscript{5} Terrel H. Bell, \textit{The Great School Dropout Plague}, Chicago Tribune 1-13 (Jan 17, 1989). Mr. Bell served as the U.S. Secretary of Education during the early years of the Reagan administration. This article was adapted from his remarks after accepting the 1988 Harold W. McGraw, Jr., Prize in Education.
their high school education or receive an equivalency certificate. Moreover, a recent study suggests that fewer high school dropouts are seeking high school equivalency diplomas.

Suspension or expulsion may contribute to a student's failure to complete high school. It is reasonable to assume that a student who is unmotivated will be among those most likely to be expelled or suspended. Such students are least likely to re-enroll following a suspension or expulsion, particularly if they perceive the disciplinary process to be unjust. Even if they do re-enroll, the time spent away from school may impede their academic progress, causing them to fall behind their peers.

The negative economic repercussions for a student who does not complete high school are sobering. Education provides graduates with better employment opportunities, jobs that are less sensitive to economic conditions, higher earnings, and better opportunities to participate in employer-provided training. In addition, education generates greater interest and participation in civic affairs, better health and reduced criminal behavior. Not surprisingly, job opportunities for high school graduates are consistently better than those available for high school dropouts.

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* See Laurence T. Ogle and Nabeel Alsalam, eds, *The Condition of Education* 20-21 (National Center for Education, 1990). The proportion of dropouts was 17.3 percent for the sophomore class of 1980. Four years later, 9.3 percent had still not received a high school diploma or equivalency certificate. See also Thomas D. Snyder, ed, *Digest of Education Statistics* 106 (National Center for Education Statistics, 25th ed 1989). In October 1980, 15.9 percent of all 20 and 21 year olds were dropouts. In October 1986, 13.9 percent of 25 to 29 year olds were dropouts.

* See Study: *Fewer high school dropouts seeking GED*, Chicago Tribune 1-12 (Oct 22, 1990). In 1989, seven percent fewer dropouts took the equivalency test than in 1988. This article was adapted from a study conducted by the American Council on Education.

* Research suggests that students who fail to keep pace with their class are more likely to drop out of school. See Carnegie Council on Adolescent Development, *Turning Points: Preparing American Youth for the Twenty-First Century* (Carnegie Corporation of New York, 1989).


* Id.

* See Snyder, ed, *Digest of Education Statistics* at 363 (cited in note 6). The March 1988 unemployment rate for those sixteen and older who had one to three years of high school education was 13.3 percent compared with 6.4 percent for those with four years of high school education. Moreover, the median income in 1986 for men 25 to 34 years old with one to three years of high school education was $11,904; for women in the same age group, with one to three years of high school education, the median income was $5,308. The median income in 1986 for men in this age group who had completed high school was $17,551; for women in the same age group who had completed high school, the median income was $8,378. In 1986, the poverty line for a family of four was $11,203. *Low-income Renters Left with Few Options*, Chicago Tribune C10 (Dec 26, 1987).
Even if a suspended or expelled student completes high school, the suspension or expulsion may limit his or her higher education opportunities and inhibit his or her progress. If two students have otherwise equal qualifications, the student who has been suspended or expelled would probably be less likely to gain admission to a college or a university than the student whose record is free from such blemishes. Moreover, college graduates generally have better job opportunities than those available to high school graduates. In today’s job market, because the demand for high school educated workers appears to be shrinking, the potential negative consequences of an unjust suspension or expulsion may be magnified.

The detrimental effects of suspension or expulsion have led some schools to develop alternative, in-school suspension programs. In these programs, teachers can insure that the student continues her educational progress while simultaneously counseling the student regarding her unacceptable behavior. However, in-school suspensions do not remedy the problem of unjust disciplinary proceedings. Although this type of suspension minimizes the negative effects of unjust suspension, it fails to assure just results in long-term suspension hearings, and it does nothing to mitigate the risk of unjust expulsion.

II. DUE PROCESS CONCERNS AND PRINCIPLES ADVANCED BY THE SUPREME COURT

A. General Due Process

Since the 1970s, the Supreme Court has recognized that the Due Process Clause places certain limits on the allocation and means of distributing statutory entitlements. In addition, the Su-

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1 Mr. Snyder, ed, Digest of Educational Statistics at 363. The March 1988 unemployment rate for those with four or more years of college was 1.9 percent. This is a substantial difference from the unemployment figures listed in note 11.

11 See, for example, Job Market Tighter, More Demanding, Boston Globe NH12 (Dec 31, 1989); Lagging Education May Cost Georgians Jobs, Atlanta Journal A5 (July 15, 1989).

14 See, Randy Gordon, Planning/Evaluating Report for In-school Suspensions Grades 6-12 (June 1990). See also, Snyder, ed, Digest of Education Statistics at 134. Of the 29.9 occurrences of suspension per 100 students, 9.9 of these involved an in-school alternative to suspension.

16 See Goldberg v Kelly, 397 US 254 (1970). The Supreme Court held that due process requires that a welfare recipient be given notice and a hearing before benefits can be terminated. The Court held that the recipient must also be given an opportunity to confront and cross-examine the witnesses relied on by the welfare department in proceedings to terminate the recipient’s benefits. The Court reasoned that the interest of the eligible welfare recipient in uninterrupted public assistance coupled with the state’s interest in ensuring that his pay-
preme Court has emphasized that due process requirements must be flexible. Consequently, the Court tailors due process requirements to "such procedural protections as the particular situation demands." 

In determining what process is due, the Court engages in a balancing test. The Court formalized this test in *Mathews v Eldridge*, enumerating three factors that must be considered:

First, the private interest that will be affected by the official action; second, . . . the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

In *Mathews*, the Court held that due process, as defined by this balancing test, does not require an evidentiary hearing before a state agency can terminate a recipient's Social Security disability benefits. First, the Court determined that the private interest affected by an erroneous termination of disability benefits is low because the eligibility for disability benefits is not based on financial need. Second, the Court decided that the potential value of an evidentiary hearing prior to terminating benefits would be small since the decision whether to discontinue the benefits will normally turn on "routine, standard and unbiased medical reports." Finally, the Court decided that the administrative and fiscal burdens of requiring evidentiary hearings in these cases would far outweigh any gain to the disability benefit recipient.

B. Due Process in the Schools

The Supreme Court has significantly qualified due process requirements for students by broadening the factors comprising the state interest and construing the private interest more narrowly. Just as in *Mathews*, the Court has consistently determined how much process is due by balancing private and state interests. How-

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17 Id.
19 Id at 335.
20 Id at 340-43.
21 Id at 344, citing *Richardson v Perales*, 402 US 389, 404 (1971).
ever, the Court has expanded the number of state interest components. In addition to the fiscal and administrative burden further safeguards entail, the Court also considers the importance of maintaining discipline within the school setting. By contrast, in evaluating the private interest at stake, the Court has been more willing to deny a student full procedural due process where common law or statutory remedies exist. For the Court, the availability of these remedies has tended to tip the balance against providing full procedural protection of students' constitutional rights.

The Supreme Court, in *Tinker v Des Moines School Dist.*,\(^\text{23}\) acknowledged that a student in the school setting is a "person" entitled to constitutional rights. In *Tinker*, the Court struck down a school regulation prohibiting students from wearing armbands to protest government policy in Vietnam. The Court stated:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.\(^\text{24}\)

This decision signalled a significant departure from the common law view of the legal status of minors summarized by the Supreme Court in *In re Gault*.\(^\text{25}\) In *Gault*, the Court stated that under the common law, the nature of the state-child relationship was "custodial" and thus, the school could not "deprive the child of any rights, because he ha[d] none."\(^\text{26}\)

Although subsequent Supreme Court decisions have expanded the list of recognized constitutional rights for students, the Court has never granted students constitutional rights co-extensive with those of adults. In *Goss v Lopez*, the Court held that although a student's statutory entitlement to public education is a property interest that is protected by the Due Process Clause of the Fourteenth Amendment, a student can be suspended for disciplinary matters if minimum due process requirements are satisfied.\(^\text{27}\) In actions resulting in suspension of ten or fewer days, due process

\(^\text{24}\) Id at 511.
\(^\text{25}\) 387 US 1 (1967).
\(^\text{26}\) Id at 17.
\(^\text{27}\) 419 US 565, 574 (1975).
requires only that the student be given notice of the charges and an opportunity to present the student's own side of the story. In so holding, the Court stated:

We stop 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. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

Because Goss involved suspensions of ten or fewer days, the Court implied that a more formal process, such as the opportunity to secure counsel and to confront adverse witnesses, might be required when the student faces a long-term suspension or expulsion.

More recently, the Supreme Court reiterated the importance of both avoiding additional administrative burdens and maintaining discipline within the schools. In New Jersey v TLO, the Court confronted the issue of how the Fourth Amendment prohibition against unreasonable searches and seizures applied to students at a public high school. The Court stressed the need to balance the students' "legitimate expectations of privacy with the school's equally legitimate need to maintain an environment in which learning can take place." Thus, the Court eased the restrictions to which public officials would otherwise be subject outside the school environment and held that: (1) school officials need not obtain a warrant before searching a student, and (2) school officials

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28 Id at 581.
29 Id at 583.
30 Id at 584.
32 Id at 340.
33 Id.
could base searches only on reasonableness, rather than on probable cause.\textsuperscript{34}

The Court concluded that the reasonableness standard would not be overly burdensome to school officials because they would only have to conform their conduct to reason and common sense, rather than on the factors that constitute probable cause.\textsuperscript{35} Additionally, the Court stated this standard would "ensure that the interests of students [would] be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools."\textsuperscript{36}

The Supreme Court has also indicated that where common law or statutory remedies are available to curb the infringement of a student's constitutional rights, further procedural protection is not necessary. In Ingraham v Wright, the Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishment Clause did not extend to students who faced corporal punishment as a means of school disciplinary matters.\textsuperscript{37} The Court conducted a Matthews-type analysis and held that, although corporal punishment in public schools implicated a constitutionally protected liberty interest, the traditional common law constraints and remedies provided an adequate level of due process.\textsuperscript{38} The Court stated that

In any deliberate infliction of corporal punishment ... there is some risk that the intrusion on the child's liberty will be unjustified and therefore unlawful. In these circumstances the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification.\textsuperscript{39}

The Court, however, decided that safeguards under the applicable state law were sufficient. These safeguards included: (1) the principal and the teacher determined together whether corporal punishment was reasonably necessary; (2) any excessive punishment could have resulted in the school authorities being liable for damages and subject to criminal penalties; (3) evidence indicated

\textsuperscript{34} Id at 341.
\textsuperscript{35} TLO, 469 US at 342-43.
\textsuperscript{36} Id at 343. See, for discussion, Note, Using the Reasonable Suspicion Standard to Maintain a Proper Educational Environment to Educate Today's Youth—New Jersey v TLO, 13 N Ky L Rev 253 (1986); Note, School Searches Under the Fourth Amendment: New Jersey v TLO, 72 Cornell L Rev 368 (1987).
\textsuperscript{37} 430 US 651 (1977).
\textsuperscript{38} Id at 682-83.
\textsuperscript{39} Id at 676.
that the instances of abuse were rare; and (4) punishment was usually inflicted in response to behavior directly observed by teachers, and therefore, the risk that the child would be paddled without cause was typically insignificant.\textsuperscript{40}

The Ingraham Court determined that the costs of additional procedural safeguards, such as notice and a hearing, would far outweigh the benefits.\textsuperscript{41} The Court stated that the costs of informal hearings would include “time, personnel and diversion of attention from normal school pursuits.”\textsuperscript{42} The Court also expressed the concern that teachers might rely on less effective disciplinary measures rather than comply with heightened procedural requirements.\textsuperscript{43}

The Supreme Court has had a number of opportunities to reaffirm its decision in Tinker, that students' constitutional rights are not “shed . . . at the schoolhouse gate.”\textsuperscript{44} However, Goss, TLO and Ingraham indicate that the Court continues to adhere to some remnant of the common law view. Although the Court considered the student interest in these cases, the Court emphasized the state interest more than it would in cases not involving students.\textsuperscript{45} Thus, in most cases the Court will hold that maintaining discipline and preventing additional administrative and fiscal burdens substantially outweighs any private interest. Given these concerns, it is unlikely that the Court would hold that excluding hearsay from school disciplinary hearings is constitutionally mandated by the Due Process Clause.\textsuperscript{46}

III. THE INADMISSIBILITY OF HEARSAY BASED UPON STATE STATUTORY LANGUAGE

At least one court has held hearsay inadmissible based upon state statutory provisions. A California statute governing the use of evidence in expulsion hearings states:

Technical rules of evidence shall not apply to such hearing, but evidence may be admitted and given probative effect only if it is the kind of evidence upon which rea-
sonable persons are accustomed to rely in the conduct of serious affairs. A decision of the governing board to expel must be supported by a preponderance of the evidence.47

In John A. v San Bernardino City Unified School Dist.,48 the California Supreme Court held that "a reasonable person in the conduct of serious affairs [would] not rely solely on written statements."49 In John A., a student accused of assaulting two other students was expelled after a hearing. The decision to expel the student was based in part upon signed statements from the other students who were allegedly involved in the altercation.50 The chairperson of the hearing panel read the student statements into the record.51 None of the witnesses testified directly.52 The court held that a reasonable person would demand that witnesses testify directly so that their credibility could be tested and their testimony weighed against conflicting evidence.53 The court, applying this standard, found that because the evidence was challenged by the accused student and the witnesses were readily available, the use of hearsay evidence was impermissible.54 Moreover, the court held that after excluding the hearsay, the decision to expel was not supported by a preponderance of the evidence.55 The court held that California law did not always preclude the use of written evidence, but it did limit the use of such hearsay to cases where disclosure of the witnesses' identities would subject them to a "significant and specific risk of harm."56

This statute, as interpreted by the court in John A., balances the student's and the state's interests more effectively than those courts that hold hearsay admissible.57 The California statute alleviates the administrative and fiscal burden by using fewer technical rules of evidence. In addition, the statute insures that the accused

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47 Cal Evid Code, § 48914(f) (West 1990).
48 33 Cal 3d 301 (1982).
49 Id at 307.
50 Id at 304-05.
51 Id.
52 John A., 33 Cal 3d at 305.
53 Id at 307-08.
54 Id at 308.
55 Id.
56 John A., 33 Cal 3d at 308.
57 See, for example, Tasby v Estes, 643 F2d 1103 (5th Cir 1981); Brewer v Austin Indep. School Dist., 779 F2d 260 (5th Cir 1985); Newsome v Batavia Local School Dist., 842 F2d 920 (6th Cir 1988); Brands v Sheldon Community School, 671 F Supp 627 (N D Iowa 1987); Racine United School Dist. v Thompson, 107 Wis 2d 637, 321 NW2d at 334 (1982); Sykes v Sweeney, 638 F Supp 274 (E D Mo 1986).
student's interest will be protected by allowing only that evidence "upon which reasonable persons are accustomed to rely in the con-
duct of serious affairs" and by basing the decision to expel upon a preponderance of such evidence. Moreover, the statute protects the informant who is at particular risk of harm.

IV. POLICY ARGUMENTS FOR EXCLUDING HEARSAY

A rule demanding that hearsay be excluded from disciplinary hearings helps guarantee the trustworthiness of the testimony and thereby protects a student's property interest in education. If the informers tell their story at the hearing, school authorities will be better able to assess the informers' credibility. The informers' presence will also give the school authorities an opportunity to question the informers. In addition, testifying at a hearing might impress upon the informers the seriousness of their allegations and the importance of telling the truth. Finally, knowing the identity of the informers could be critical to the accused student's ability to effectively refute a charge. This would be true particularly if a prior relationship between the accused and the informers helps to explain any possible bias or motive the informers may have in making their allegation.

Nevertheless, most courts have held that hearsay is admissible in school disciplinary hearings. These courts present either one or both of the following rationales for their decisions: (1) the administrative and/or fiscal burden of excluding hearsay is too high; and (2) an accusing party may be so afraid of reprisal that he may be unwilling to testify at the disciplinary hearing. However, many of these courts have overemphasized the risks faced by witnesses and school officials.

A. Administrative and Fiscal Burdens

Most courts that allow hearsay in school disciplinary hearings argue that school authorities should not have to conform to the technicalities of ruling on the admissibility of evidence. These courts reason that allowing cross-examination and confrontation of witnesses would be time-consuming and complicated.

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**Cal Evid Code, § 48914(f).**

**See, for example, Tusby, 643 F2d 1103; Brewer, 779 F2d 260; Newsome, 842 F2d 920; Brands, 671 F Supp 627; Racine, 107 Wis 2d 657, 321 NW2d 334; Sykes, 638 F Supp 274.**
In *Boykins v Fairfield Bd. of Educ.*, a number of students were suspended for boycotting classes. The principal presented evidence against the boycott participants, including reports that he had received from other students. The court held "that the rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of the school administrators charged with the duty of investigating the incidents," arguing that school boards should not have to apply common law rules of evidence. In so holding, the court stated that any other result would be "a step away" from the due process required for a criminal trial.

Although *Boykins* pre-dates *Goss*, numerous decisions since *Goss* have relied on *Boykins* for authority. For example, in *Brewer v Austin Indep. School Dist.*, the court emphasized the high burden imposed on school administrators by even informal notice and hearing requirements. The court stated:

We decline to escalate the formality of the suspension process even further by requiring school administrators to provide a fact hearing as to the accuracy of each bit of evidence considered in determining the appropriate length of the punishment.

A number of factors may be involved in the courts' determinations that administrative and fiscal burdens are too high to hold hearsay inadmissible. One factor underlying many of these decisions may be the courts' shared belief that the accused students truly are guilty of the misconduct of which they are accused. In *Brewer*, for example, the record contained evidence that upon the principal's request to see the contents of the accused student's

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60 492 F2d 697, 699 (5th Cir 1974).
61 Id at 700-01.
62 Id at 701.
63 Id.
64 See *Tasby*, 643 F2d at 1106 ("rights in a student disciplinary hearing may properly be determined upon the hearsay evidence of school administrators who investigate disciplinary infractions"); *Newsome*, 842 F2d at 925 ("[w]e hold that the burden of cross-examination on the administration of school discipline outweighs the benefits to be derived from that procedure"); *Sykes*, 638 F Supp at 279 ("The courts have consistently declined to impose the formal procedures and rules of evidence which govern court trials on student disciplinary proceedings."); *Brands*, 671 F Supp at 632 ("the Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings") (relying on *FCC v Pottsville Broadcasting Co.*, 309 US 134, 143 (1940)); *Racine*, 107 Wis 2d 657, 321 NW2d at 337-38 ("We agree with the fifth circuit's statement that lay board cannot be expected to observe the niceties of the hearsay rule.").
65 779 F2d 260, 262-63 (6th Cir 1985).
66 Id at 263.
pocket, the student removed a bottle of marijuana and a pipe hose. Presumably, this made credible anonymous accusations that the student was smoking marijuana and selling drugs on campus. However, in cases such as Brewer, where hearsay evidence is supported by physical evidence obtained by testifying school officials, the court does not need to focus on the administrative burden of excluding hearsay. In Brewer, for example, even if the hearsay evidence was inadmissible, it is likely that the possession evidence, obtained through a constitutional search of the student, would have been sufficient to warrant suspension.

A second factor may be that some courts assume that hearsay evidence is more reliable if the informing party has been "screened" by a school official. In Newsome v Batavia Local School Dist., the plaintiff was expelled for allegedly "possessing and offering a marijuana cigarette for sale on high school property." At the expulsion hearing, the school principal and superintendent simply recounted the substance of the accusations made by two students. In allowing the use of hearsay, the court stated that "the value of cross-examination in school disciplinary cases is . . . somewhat muted" because the veracity of a student's accusation is: (1) "initially assessed by a school administrator . . . who has, or has available to him, a particularized knowledge of the [accusing] student's trustworthiness . . . [and (2)] the school administrator often knows, or can readily discover, whether the student witness and the accused have had an amicable relationship in the past." The court therefore concluded that cross-examining the student witness might be "merely duplicative of the evaluation process undertaken by the investigating school administrator."

The Newsome court's analysis, however, is flawed. The trustworthiness of an informing student may be difficult to ascertain. Simply because the student's record does not indicate a problem with unreliability or untrustworthiness does not mean that the student will be trustworthy in the instant situation. It may be equally—or perhaps more—difficult to assess the impact of the relationship between the informing student and the accused. Absent convincing proof to the contrary, evidence suggesting a past rela-

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87 Id at 261.
88 Id.
89 842 F2d 920, 921 (6th Cir 1988).
90 Id.
91 Id at 924.
92 Id.
tionship—or even no relationship—may be irrelevant to the truth or falsity of the informer’s allegations.

The court’s analysis also mistakenly assumes that the investigating school administrator will have an interest equal to that of the accused student in exploring and examining the basis for the student informer’s accusation. The court fails to consider the possibility that the investigating school administrator may bring in personal, albeit perhaps unconscious, biases about the actual behavior of the accused. Thus, even if the informing student is sincere, there are still dangers of memory, perception, and narration that the accused student, or her counsel, could explore through cross-examination.

A third factor possibly influencing these decisions is that some courts presume that, where the informing party is a school official, the hearsay testimony is reliable. This presumption, however, may not always be valid. Presuming the school official is sincere, like the student informer, the official’s testimony is still subject to the hearsay dangers of faulty memory, perception, and narration.

If the courts believe that either a student is guilty of the alleged misbehavior based upon nonhearsay evidence and/or that a school official supplies added veracity to the hearsay testimony, the conclusion that the administrative and fiscal burdens of holding hearsay inadmissible would outweigh any benefit to the student’s case is somewhat understandable. However, a student facing long-term suspension or expulsion has a considerable property interest at stake. The student’s guilt or innocence should therefore be determined through a fair and thorough fact-finding process. Allowing hearsay testimony could seriously inhibit this process.

Moreover, so long as school authorities are not required to apply technical rules of evidence, administrative and fiscal burdens will not be greatly increased by excluding hearsay. The increase in fiscal and administrative burdens imposed by requiring an accusing party to testify directly at a disciplinary hearing is relatively low. Even at large public high schools, the circumstances in which school authorities find alleged misconduct so severe as to warrant a long-term suspension or expulsion are relatively infrequent.

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78 See Racine United School Dist. v Thompson, 107 Wis 2d 657, 321 NW2d 334, 338 (1982). The court found that absent an allegation of bias by the accused student, there was no reason to find the hearsay testimony of the school staff inadmissible since there was “no reason why [the] school staff would fabricate or misrepresent statements of this sort.”

79 In 1986, the U.S. Department of Education estimated the expulsion rate for 1983-84 in public secondary schools to be 0.3 percent. Suspension for disciplinary reasons was ten percent. However, this percentage does not distinguish between short-term (ten or fewer
those cases in which the school authorities determine that such punishment might be warranted, a substantial percentage of these students would probably resign themselves to the administration’s disposition of the case rather than challenge school authorities. Further, many disciplinary cases depend on documentary evidence, as, for example, in instances of expulsion or suspension for truancy. Finally, full-scale hearings will not be required in all cases in which hearsay is excluded. School authorities can rely on physical evidence to justify disciplinary action if such evidence is available.

B. Testifying Students’ Fear of Reprisal

Some courts have expressed concern that student informers who are forced to testify could face reprisals from other students. For example, the Newsome court noted that in a school environment, students who have witnessed misconduct by other students may be afraid to report it to school authorities, fearing ostracism or physical reprisal. The court concluded that although the student who was accused of serious misconduct had an “important interest” in his public education, the need to protect student informers from ostracism and reprisal outweighed the incremental value to the fact-finding process of allowing the accused student to cross-examine the informers.

The concern that informers might be afraid openly to confront the accused is reasonable. No student wants to be labelled or perceived by other students as someone who is willing to report misbehavior to school authorities. In addition, in some situations there

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days) and long-term (more than ten days) suspensions. Thus, the long-term suspension percentage is probably less than ten percent. Snyder, ed, Digest of Education Statistics at 134 (cited in note 6). See also Lee T. Teitelbaum, School Discipline Procedures: Some Empirical Findings and Some Theoretical Questions, 58 Ind L J 547, 562-63 (1983). A study of fifteen Indiana high schools in the spring of 1981 indicated that only five schools expelled “more than one percent of the student population and only one school . . . more than three percent.” Id at 562. Although these numbers may seem high, it is interesting to note that at those schools with larger expulsion percentages, truancy was the most frequently cited cause for the disciplinary action. In such instances, the use of hearsay would probably be unnecessary because truancy is usually proven through attendance reports (i.e., documentary evidence). Rarely would a student eyewitness be called upon to testify against truants. Further, expulsion for truancy is based on repeat offenses, so the majority of evidence supporting the disciplinary action in these cases is not dependent on hearsay at all.

See, for example, Charles Alan Wright, The Constitution on the Campus, 22 Vanderbilt L R 1027 (1969) (discussing these considerations in the context of university students).

See note 74 and accompanying text.

Newsome, 842 F2d at 925.

Id.
may be a legitimate fear of physical reprisal. This reluctance to recount fellow student misbehavior further complicates the already difficult task of maintaining discipline in schools.

These risks to student informers must be weighed against the due process concerns of the accused. Protection for student informers can be designed so that it will affect only minimally the accused's procedural safeguards. For example, a school district could admit hearsay upon some showing that direct testimony by the informer would create a danger to witnesses or cause a breakdown in discipline.

V. RECOMMENDED RULES

Rules on hearsay admissibility must balance the need to protect the accused students' property interests against the importance of maintaining order within high schools. Courts are properly wary about intruding upon school officials' authority to discipline students.79 However, where school disciplinarians act on others' reports and advice and controlling facts are disputed, the "risk of error is not at all trivial and it should be guarded against if that may be done without prohibitive cost or interference with the educational process."80

A standard similar to that set forth in the California statute, as applied by the court in John A.,81 seems to offer the best balance between protection for the accused and the need to maintain order. As noted above, this California statute imposes procedural safeguards to protect a student's property interest without significantly burdening school officials or testifying students.

Recommended rules regarding the admissibility of hearsay in school disciplinary hearings include the following: (1) technical rules of evidence should not apply to school disciplinary hearings; (2) if oral evidence is necessary, witnesses must testify directly and cross-examination must be allowed; (3) direct testimony will not be required if it is shown that testifying would endanger the witness; and (4), if a witness is unwilling to testify because of fear of repri-

79 Interestingly, in a 1989 survey, teachers ranked the three most serious problems in the schools as lack of parental support and interest, lack of proper financial support, and lack of pupil interest and repeated truancy. However, in a 1988 survey, the public ranked the three most serious problems in the schools as drug use, lack of discipline, and lack of proper financial support. Ogle & Alsalam, eds, The Condition of Education at 74 (cited in note 6). Comparing the perceptions of the teachers with those of the public may be useful in understanding courts' perceptions of disciplinary problems in the schools.

sal, the disciplinary body should require corroborating evidence to show that the informing student’s reluctance is well-founded before it admits the hearsay testimony of that student.

These recommended rules fairly balance the interests of the school with the important property interests of the student. In addition, setting out a standard that prefers corroborating physical evidence to hearsay testimony signals school authorities that only legitimate fears of reprisal justify shielding potential witnesses and encroaching on the rights of the accused.

**Conclusion**

Even if hearsay is excluded from secondary school disciplinary hearings, two legitimate concerns remain: (1) the burden on school administrators, and (2) the informer’s fear of reprisal. However, the importance of the accused student’s education makes these arguments less convincing in circumstances in which the student faces long-term suspension or expulsion.

The policy reasons behind the hearsay rule, unreliability because of the declarant’s sincerity, perception, memory, and narration faults, are as compelling in a hearing before a school disciplinary board as they are in a formal trial. Moreover, the important property interests at stake in school disciplinary hearings overshadow the small administrative and/or fiscal burdens that may result from requiring informers to testify directly. Because these hearings are relatively infrequent the increase in administrative or fiscal burdens will likely be small. Thus, even if direct testimony is not constitutionally required, most courts give too little weight to the possible detrimental impact of allowing hearsay—denial of a high school education and potentially, depriving a student of the ability to function as a self-sufficient adult. Fairness to students facing the severe penalty of expulsion or long-term suspension requires that hearsay be excluded from school disciplinary hearings, unless it can be shown that testifying before the accused will endanger the witness.