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How SCOTUS's Recent Decision on the Cheerleader Case Impacts Public School Students' Due Process Rights for Their Off-Campus Conduct

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COMMENT

HOW SCOTUS'S RECENT DECISION ON THE *CHEERLEADER CASE* IMPACTS PUBLIC SCHOOL STUDENTS' DUE PROCESS RIGHTS FOR THEIR OFF-CAMPUS CONDUCT

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I. INTRODUCTION

This Comment identifies the current climate for students facing disciplinary actions in public schools, specifically in Texas. Additionally, this Comment brings more awareness to potential due process issues students face when punished at school for their conduct outside of the school day.

Prior to COVID-19 affecting public school attendance in 2019, over 50 million students were enrolled in public schools in the United States in grades K–12.[1] Specifically, over 35 million students were enrolled in primary school and over 15 million students were enrolled in secondary

1. *See* U.S. Dep't of Educ., *Enrollment in Public Elementary and Secondary Schools, by Level and Grade: Selected Years, Fall 1980 Through Fall 2029*, NAT'L CTR. FOR EDUC. STAT. (Aug. 2020), https://nces.ed.gov/programs/digest/d20/tables/dt20_203.10.asp [https://perma.cc/7A4K-8Z9N] (reporting school enrollment prior to the COVID-19 pandemic); *see also* Joanne Carminucci et al., *Student Attendance and Enrollment Loss in 2020–21*, AM. INST. FOR RSCH., 1 (June 2021), https://www.air.org/sites/default/files/2021-07/research-brief-covid-survey-student-attendance-june-2021_0.pdf [https://perma.cc/5DGF-Z5BB] (finding a significant drop in attendance due to COVID-19).

school.[2] During the 2019–2020 school year, an estimated 5.5 million students enrolled in Texas public schools in grades K–12.[3]

Over 1 million disciplinary actions were taken against students in Texas public schools during the 2019–2020 school year, ranging from in-school suspensions to expulsions.[4] The breakdown of how many public school students received each disciplinary action for the 2019–2020 school year is as follows: (1) Approximately 382,181 students received in-school suspensions (ISS);[5] (2) an estimated 173,285 Texas students were issued out-of-school suspensions (OSS);[6] (3) around 65,155 students were sent to a disciplinary alternative education program (DAEP);[7] (4) approximately 2,517 students were sent to a juvenile justice alternative education program (JJAEP);[8] and (5) roughly 1,101 students were expelled.[9] The numbers speak for themselves.

Part II explores the background of the public education system in the United States, including how and why our country guarantees that all students receive a free and adequate public education. Furthermore, Part II briefly introduces what constitutional protections students enjoy while at school. Lastly, Part II will also introduce the doctrine of *in loco parentis*, which enables schools to discipline students while at school. Part III highlights the constitutional protections of students in public schools provided by the First, Fourth, Fifth, and Eighth Amendments. Most importantly, Part III provides a background of the highlighted case, *Mahanoy*

2. U.S. Dep't of Educ., *supra* note 1.

3. Tex. Educ. Agency, *Enrollment in Texas Public Schools, 2020–21*, DIV. OF RSCH. & ANALYSIS 6 (June 2021), https://tea.texas.gov/sites/default/files/enroll-2020-21.pdf [https://perma.cc/UZK9-P2R3].

4. Tex. Educ. Agency, *Counts of Students and Discipline Actions by Discipline Action Groups*, PUB. EDUC. INFO. MGMT. SYS. (Sept. 21, 2020, 2:34 PM), https://tea.texas.gov/reports-and-data/student-data/discipline-data-products/discipline-action-group-summary-reports (select "Discipline Action Group Summary—State"; then select "2019–2020" from "School Year" dropdown menu; then select "Next") [https://perma.cc/2Y8H-AGZN].

5. *Id.*

6. *Id.*

7. *See* 19 TEX. ADMIN. CODE § 103.1201(a) (2008) (Tex. Educ. Agency, Commissioner's Rules Concerning Safe Schools) ("A disciplinary alternative education program . . . is defined as an educational and self-discipline alternative instructional program, adopted by local policy, for students in elementary through high school grades who are removed from their regular classes for mandatory or discretionary disciplinary reasons."); Tex. Educ. Agency, *supra* note 4.

8. TEX. EDUC. CODE ANN. § 37.011 (establishing the Juvenile Justice Alternative Education Program); Tex. Educ. Agency, *supra* note 4.

9. Tex. Educ. Agency, *supra* note 4.

Area School District v. B.L.,[10] more commonly known as the *Cheerleader Case*. Part IV analyzes various due process issues of students in public schools and delineates when the school is permitted to discipline students outside of the regular school day. Further, Part IV explores the possible ramifications and various sociological effects of suspending students from school. Part V provides readers with recommendations[11] for improving the disciplinary protocols within the public education system to create a better environment for future generations. Finally, Part VI concludes with an overview of this Comment.

II. BACKGROUND

The right to a free public education is often mistakenly considered a constitutionally protected right afforded to all United States citizens.[12] However, the right to an education appears nowhere in the Constitution.[13] Instead, it has become somewhat of an implied constitutional right through interpretation of the Due Process Clause of the Fourteenth Amendment.[14] The landmark 1972 case *Board of Regents of State Colleges v. Roth*[15] established that when a state statute creates a benefit, that benefit comes with a property interest protected by the Fourteenth Amendment's Due Process Clause.[16]

Thus, the first step is determining whether a property interest exists in a given state's statute.[17] If the enabling statute creates a property interest in a

10. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021).

11. Recommendations will include both the expansion of due process rights of public school students to prevent schools from imposing punishments for non-violent off-campus conduct and the repeal of a section of the Texas Education Code that enables discretionary suspensions and expulsions for off-campus conduct.

12. *See* Goss v. Lopez, 419 U.S. 565, 572 (1975) ("[T]here is no constitutional right to an education at public expense.").

13. *See generally* U.S. CONST. (lacking any mention of the word "education" whatsoever).

14. *See id.* amend. XIV, § 1 (establishing that no state shall "deprive any person of life, liberty or property, without due process of law").

15. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

16. *See id.* at 577 (holding state creation of a legitimate statutory entitlement to a specific benefit, causes the benefit to gain a property interest protected by the Due Process Clause of the Fourteenth Amendment); *see also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions[,] which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (describing property interests as creations of state law that enjoy the protections of the Due Process Clause of the Fourteenth Amendment).

17. Perry v. Sindermann, 408 U.S. 593, 601 (1972) (explaining property interests are created and secured by existing statutes); *see also* Bell v. Burson, 402 U.S. 535, 542 (1971) (establishing due process

benefit or entitlement, that benefit becomes protected by the Constitution.[18] The right to an education is a benefit created by each state's statute—typically in the form of a compulsory attendance law.[19] Once a state creates this type of statutory entitlement, the right to an education thereby carries a property interest protected by the Fourteenth Amendment.[20]

Currently, all fifty states have compulsory attendance laws.[21] It is important to note this is the compulsory attendance law,[22] not the requisite age range entitled to a free public education.[23] The difference between the two is that the former refers to the minimum age at which a child is required to begin attending school, and the latter is the maximum age at which a school district must provide a free public education.[24] All fifty states offer a free public education for longer than they require compulsory attendance.[25]

protection for a driver's license); Connell v. Higginbotham, 403 U.S. 207, 209 (1971) (establishing due process protection for government employment).

18. *See* Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998) ("[T]he Constitution protects rather than creates property interests . . . .").

19. *See* Goss v. Lopez, 419 U.S. 565, 573 (1975) (arguing based on Ohio state law that a statutory entitlement to a public education exists because of their compulsory attendance law, which requires attendance for a minimum of thirty-two weeks for school-aged children).

20. *Roth*, 408 U.S. at 577–78; *Goss*, 419 U.S. at 574; *see* Goldberg v. Kelly 397 U.S. 254, 262 (1970) (categorizing government benefits as a statutory entitlement deserving constitutional protection).

21. Cassidy Francies & Zeke Perez Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM'N OF THE STATES (Aug. 2020), https://reports.ecs.org/comparisons/free-and-compulsory-school-age-requirements-all [https://perma.cc/56A6-QWN8]. The biggest distinction in the data across state lines is the difference between the minimum age for compulsory attendance. *Id.* In Arkansas, Connecticut, Delaware, District of Columbia, Hawaii, Maryland, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, and Virginia the minimum age for compulsory attendance is five years old. *Id.* In comparison, Washington's minimum age for compulsory attendance is eight years old. *Id.*

22. *See* TEX. EDUC. CODE ANN. § 25.085(b) (representing the current compulsory attendance statute in Texas).

23. *See id.* § 25.001(b) (identifying the current age-range for free education in Texas).

24. Louisa Diffey & Sarah Steffes, *50-State Review: Age Requirements for Free and Compulsory Education*, EDUC. COMM'N OF THE STATES 1 (Nov. 2017), https://www.ecs.org/wp-content/uploads/Age_Requirements_for_Free_and_Compulsory_Education-1.pdf [https://perma.cc/5APZ-KBM6].

25. *See id.* (noting the importance of states to provide free education for longer than the minimum age the statute requires).

A. Statutory Entitlement Creates a Property Interest in Public Education

Since 1876,[26] the Texas Constitution has established the legislature's duty to create and maintain an efficient, free public school system.[27] Texas consistently enacts and enforces compulsory attendance laws.[28] The first enactment was in 1915 and required sixty days of public school attendance for children between the ages of eight and fourteen.[29] As of 2021, Texas's compulsory attendance statute requires public school attendance for children between the ages of six and eighteen.[30]

Texas must offer free public education to children as young as five if they reach that age by the first of September.[31] Moreover, Texas must provide the same for students younger than twenty-one on the first of September.[32]

However, Texas must continue offering a free public education to persons between the ages of twenty-one and twenty-six if they meet the additional requirements of the enabling statute.[33] For over one hundred years, Texas has recognized a student's statutory entitlement to a free public education.[34] This entitlement creates a property interest, meaning students

26. *See* Allan E. Parker, Jr., *Public Free Schools: A Constitutional Right to Educational Choice in Texas*, 45 SW. L.J. 825, 831 (1991) ("The starting point for any analysis must be article 7 of the 1876 Texas Constitution, still in effect today.").

27. TEX. CONST. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

28. *See* Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 434 (Tex. 1994) (explaining the history of compulsory attendance laws in Texas).

29. Act of March 8, 1915, 34th Leg., R.S., ch. 49, § 1, 1915 Tex. Gen. Laws 92, 93 (repealed 1995).

30. *See* TEX. EDUC. CODE. ANN. § 25.085(b) ("Unless specifically exempted by Section 25.086, a child who is at least six years of age, or who is younger than six years of age and has previously been enrolled in first grade, and who has not yet reached the child's [nineteenth] birthday shall attend school.").

31. *See id.* § 25.001(b) (establishing the minimum age as five years old for eligibility for a free public school education in the state of Texas).

32. *See id.* ("The board of trustees of a school district or its designee shall admit into the public schools of the district free of tuition a person who is over five and younger than [twenty-one] years of age on the first day of September of the school year in which admission is sought . . . .").

33. *See id.* (stating a school district or its designee can admit "a person who is at least [twenty-one] years of age and under [twenty-six] years of age" in order for the person to complete the requirements to obtain a high school diploma).

34. Act of March 8, 1915, 34th Leg., R.S., ch. 49, § 1, 1915 Tex. Gen. Laws 92, 93 (repealed 1995).

are protected by the Fourteenth Amendment Due Process Clause.[35] Further, public school students maintain their entitlement even when they break rules at school that result in OSS or expulsion.[36]

B. History of Students' Constitutional Protections While at School

Since *Tinker v. Des Moines Independent Community School District*,[37] the United States Supreme Court has strongly supported the assertion that students in public school do not "shed their constitutional rights to freedom of speech or expression at the school-house gate."[38] The Court held that public schools are prohibited from expelling students without some form of procedural due process.[39] This is a very low threshold and merely requires a timely conversation with the student after the prohibited conduct.[40] This does not mean that public school students retain their constitutional protections to the fullest extent.[41] For example, the Supreme Court clearly stated the importance of lower courts applying First Amendment protections to students only "in light of the special characteristics of the school environment."[42]

C. Doctrine of In Loco Parentis

These special characteristics include the doctrine of *in loco parentis*.[43] This Latin phrase translates to "in the place of a parent."[44] Further, it relates to

35. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) (emphasizing the right to education, while not a constitutional right, enjoys due process protection once states create the statutory entitlement).

36. *See* 34 C.F.R. § 300.101(a) (2021) ("A free public education must be available to all children residing in the State between the ages of [three] and [twenty-one], inclusive, including children . . . who have been suspended or expelled from school.").

37. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

38. *Id.* at 506; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

39. *See Goss*, 419 U.S. at 579 ("[S]tudents facing suspension . . . must be given some kind of notice and afforded some kind of hearing.").

40. *See id.* at 582 (emphasizing how notice can take place immediately after student misconduct).

41. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (recognizing "rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings'" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986))).

42. *Tinker*, 393 U.S. at 506.

43. *Bethel*, 478 U.S. at 684 ("[C]ases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children . . . .").

44. *In Loco Parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

one "acting as a temporary guardian or caretaker of a child."[45] The doctrine is credited to Sir William Blackstone and dates back to the eighteenth century.[46] Blackstone was a famous English jurist who influenced many of America's landmark Supreme Court cases.[47] His *Commentaries* were cited over 10,000 times in early American cases.[48] The doctrine of *in loco parentis* allows parents to delegate their authority to care for and punish public school children to schoolmasters who can treat the children as if they were the schoolmasters' own children.[49] For example, Texas has a long history of interpreting the doctrine to enable public schools to use "reasonable force" or corporal punishment as a means of disciplining students.[50]

However, the doctrine of *in loco parentis* is not exclusive to education law; courts have also interpreted it in relation to family law jurisprudence.[51] For

45. *Id.*

46. 1 WILLIAM BLACKSTONE, COMMENTARIES *452–53 (1768) ("He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

47. Chief Justice Marshall frequently cited Blackstone's *Commentaries* in his opinions. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (relying on Blackstone repeatedly throughout the Chief Justice's opinion); *see* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 569 (1819) (proclaiming the synonymity of the words "franchise" and "liberty" because Blackstone said so); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 144 (1810) (depending on Blackstone's definition of the word "contract").

48. *See* DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 180 (1938) ("[R]esearch revealed that Blackstone had been referred to and quoted more than any other writer by the various courts in the United States.").

49. *See* Carpenter v. Commonwealth, 44 S.E.2d 419, 424 (Va. 1947) ("[T]hat one standing *in loco parentis* has the right to punish a child under his care, if the punishment is moderate and reasonable, and for the welfare of the child." (quoting Steber v. Norris, 206 N.W. 173, 175 (Wis. 1925))); *see also* State v. McDonie, 109 S.E. 710, 715 (W. Va. 1921) ("[O]ne standing *in loco parentis*, has the authority to administer chastisement or correction . . . ."); Lander v. Seaver, 32 Vt. 114, 123 (1859) ("The master is *in loco parentis*, and has such a portion of the powers of the parent committed to his charge, as may be necessary to answer the purposes for which he is employed." (internal quotation marks omitted)).

50. *See* Hogenson v. Williams, 542 S.W.2d 456, 460 (Tex. App.—Texarkana 1976, no writ) (indicating teachers may use "reasonable force" when there is a reasonable belief that the use of force is needed to "enforce compliance . . . for the purpose of controlling, training[,] or educating the child" or as a means of punishment for prohibited conduct); *see also* Balding v. State, 23 Tex. Ct. App. 172, 175 (1887) ("Teachers have the right, the same as parents, to prescribe reasonable rules for the government of children under their charge, and to enforce, by moderate restraint and correction, obedience to such rules."); Prendergast v. Masterson, 196 S.W. 246, 247 (Tex. App.—Texarkana 1917, no writ) ("[T]o enforce a compliance with the reasonable rules of such schools, a teacher may lawfully inflict such punishment on a pupil.").

51. Coons-Andersen v. Andersen, 104 S.W.3d 630, 635 (Tex. App.—Dallas 2003, no pet.) ("The [*in loco parentis*] relationship arises when a non-parent assumes the duties and responsibilities of

example, Texas cases have discussed *in loco parentis* in custody matters, including suits affecting parent-child relationships.[52] In family law cases, the doctrine "arises when a non-parent assumes the duties and responsibilities of a parent,"[53] such as the "protection and reasonable discipline, support of the child, . . . [and] the right to make decisions concerning the child's education."[54] The Texas Family Code clearly states the duties[55] and responsibilities[56] of a parent. The Code explicitly asserts which persons are permitted to use corporal punishment to discipline a child.[57]

III. CONSTITUTIONAL PROTECTIONS OF STUDENTS IN PUBLIC SCHOOL

At the very threshold of due process rights in public schools is the landmark case *Goss v. Lopez*.[58] In 1975, the Supreme Court clearly established that students have a property interest in their education, which is protected by the Due Process Clause of the Fourteenth Amendment.[59] *Goss* further established that when students are suspended for more than ten days, due process requires public schools to provide those students with some kind of notice and hearing.[60]

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a parent and normally occurs when the parent is unable or unwilling to care for the child. The defining characteristic of the relationship is actual care and control of a child by a non-parent who assumes parental duties.").

52. *See id.* (expanding the doctrine of *in loco parentis* to family law matters pertaining to suits affecting parent-child relationships).

53. *Id.*

54. Rey v. State, 280 S.W.3d 265, 269 (Tex. Crim. App. 2009) (citing TEX. FAM. CODE ANN § 151.001(a)).

55. TEX. FAM. CODE ANN. § 151.001(a)(2) ("[T]he duty of care, control, protection, and reasonable discipline of the child."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . . .").

56. FAM. § 151.001(a)(10) ("[T]he right to make decisions concerning the child's education.").

57. *See id.* § 151.001(e) ("Only the following persons may use corporal punishment for the reasonable discipline of a child: (1) a parent or grandparent of the child; (2) a stepparent of the child who has the duty of control and reasonable discipline of the child; and (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child."); *see also* State v. McDonie, 109 S.E. 710, 715 (W. Va. 1921) ("A parent, or one standing *in loco parentis*, has the authority to administer chastisement or correction to his child.").

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

59. *See id.* at 574 (referring to the entitlement of a free public education as a property interest which is afforded due process protection).

60. *See id.* at 579 ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864))).

Specifically, Goss requires that the student be provided with either an oral or written notice of the accusation against them prior to the imposition of any penalty.[61] If the student denies the accusation, the school must provide the student with an explanation of the evidence it has against the student, and it must provide the student with an opportunity to tell their side of the story.[62] Thus, for suspensions fewer than ten days, no formal hearing is required.[63]

Further, there is a general exception that if the student's continued presence on campus presents a danger to other students or school property, then the school is allowed to remove the student first and provide notice of the suspension at a reasonable time after the removal is complete.[64] The Court in *Goss* also noted the importance of distinguishing future cases that deal with suspensions longer than ten days as those "may require more formal procedures."[65]

Goss is known to have created the bare minimum due process rights of students in school.[66] In fact, it created the floor as to due process rights, not the ceiling.[67] This due process right is a benefit to both students[68] and

61. *Id.* at 581.

62. *See id.* at 581–82 (clarifying the notice requirement may be as simple as an informal discussion regarding the misconduct if it is within minutes after the incident); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard.'" (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))).

63. *See Goss*, 419 U.S. at 583 (denying the due process right of students facing suspension for up to ten days to be able to hire an attorney, cross-examine adverse witnesses, or provide their own witnesses). However, in any situation the school administrator always has the discretion to permit even more formal procedural rights to the student, such as allowing the student to hire an attorney. *Id.* at 584.

64. *See id.* at 582 (recognizing it is far more important to keep students and property safe from an ongoing threat than providing the dangerous student with their notice of suspension prior to their removal from the campus).

65. *Id.* at 584.

66. *Id.* at 579 ("At the very minimum, therefore, students facing suspension . . . must be given some kind of notice and afforded some kind of hearing.") .

67. *See* Ellen L. Mossman, *Navigating A Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. PA. L. REV. 585, 592–93 (2012) (explaining that these newly established due process rights "represented a floor rather than a ceiling" and that a "fair-minded school principal" would want to avoid enforcing unfair suspensions) (quoting *Goss*, 419 U.S. at 583); Heyne v. Metro. Nashville Pub. Sch., 655 F.3d 556, 559 (6th Cir. 2011) (involving potentially unfair discipline by public school officials).

68. *See Goss*, 419 U.S. at 579 (recognizing students' interest to avoid disciplinary action due to the inevitable consequences that follow). In Texas, one of these regrettable consequences includes the mandatory removal from extra-curricular activities if removed from school under certain conduct. *See* TEX. EDUC. CODE. ANN. § 37.006(g) (promulgating the mandatory prohibition of students from extra-curricular activities upon suspension from school).

schools[69] because wrongful suspensions of students are detrimental to both the student and the administrator imposing the suspension.[70]

However, it is essential to note that the due process clause does not shield students from suspensions when they are well-deserved and properly imposed.[71] Notably, the Supreme Court denied the due process right for students facing short suspensions to hire an attorney, cross-examine witnesses, or provide their own witnesses to rebut the evidence against them.[72]

A. First Amendment

In jurisprudence related to the Freedom of Speech Clause of the First Amendment,[73] it is crucial to weigh "[t]he interest of the state in maintaining an educational system" with the interest of protecting freedom of speech.[74] In *Tinker*, the Supreme Court held that public schools could only prohibit students' speech when there was a reasonable belief that their speech would substantially and materially interfere with either their schoolwork or discipline.[75] Nearly two decades later, in *Bethel School District v. Fraser*,[76] the Supreme Court held that lewd, indecent, or otherwise offensive speech could be punished in public schools and is not constitutionally protected speech.[77] Only two years later, in *Hazelwood School District v. Kuhlmeier*,[78] the Court held that censoring school-sponsored publications for a valid educational purpose does not violate the students' freedom of speech.[79] Finally, in *Morse v. Frederick*,[80] the Supreme Court held that suspending a student for displaying a banner that encouraged the use

69. *See Goss*, 419 U.S. at 583 (suggesting an additional benefit of due process rights in schools is the protection of school administrators from imposing erroneous discipline).

70. *Id.* at 579.

71. *See id.* (emphasizing due process does not preclude warranted punishments).

72. *Id.* at 583.

73. U.S. CONST. amend. I (establishing that there shall be no law "abridging the freedom of speech").

74. Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966).

75. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (citing *Burnside*, 363 F.2d at 749).

76. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

77. *Id.* at 686.

78. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

79. *Id.* at 273.

80. Morse v. Frederick, 551 U.S. 393 (2007).

of drugs at an off-campus (yet school-sponsored) activity did not violate their freedom of speech.[81]

In summary, the Supreme Court delineated three different categories of speech that permit schools to regulate students' speech, meaning there is no constitutional protection afforded by the First Amendment under the following circumstances.[82] First, public schools may regulate speech when it involves "indecent,"[83] "lewd,"[84] or "vulgar"[85] speech while on school grounds.[86] Second, public schools may regulate speech when it "promotes illegal drug use."[87] Third, public schools may regulate speech that may be reasonably perceived as "bear[ing] the imprimatur of the school."[88] In the recent landmark case, *Mahanoy Area School District v. B.L.*, the Supreme Court granted certiorari to decide whether *Tinker's* "substantial disruption"[89] standard applies to public student speech that occurs off-campus.[90]

81. *Id.* at 403.

82. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

83. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (citing F.C.C. v. Pacifica Found., 438 U.S. 726, 732 (1978) (defining the word "indecent" as language that is "patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience")). In *F.C.C. v. Pacifica*, there is an appendix at the end of the opinion detailing the monologue at issue in the case, which was ultimately labeled as "indecent" speech and not "obscene" speech. *See generally* F.C.C. v. Pacifica Found., 438 U.S. at 751–55 (differentiating between indecent and obscene speech).

84. *Lewd*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[T]ending to moral impurity or wantonness.").

85. *Bethel*, 478 U.S. at 685 ("[Vulgar] words offend for the same reasons that obscenity offends. . . . '[Such] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).

86. *Id.* at 684.

87. *Morse*, 551 U.S. at 428.

88. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); *Imprimatur*, BLACK'S LAW DICTIONARY (11th ed. 2021) (defining the word imprimatur as "a general grant of approval").

89. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

90. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2044 (2021).

1. Mahanoy Area School District v. B.L (the *Cheerleader Case*)

During the 2017–2018 school year, a young lady (B.L.)[91] in a small rural public high school in Schuylkill County, Pennsylvania, tried out for the varsity cheerleading team.[92]

Unfortunately, B.L. did not make the varsity team and instead was placed on the junior varsity team as a rising sophomore.[93] B.L. also found out around this same time that a rising freshman had made the varsity cheerleading team.[94] This was particularly upsetting to B.L. as she was under the impression that there was a requirement to cheer on the junior varsity team for one year before being eligible to cheer on the varsity team.[95]

Upon hearing the bad news, B.L. decided to express her anger on her Snapchat account.[96] Snapchat is a form of social media available as an application on smartphone devices, which allows users to communicate and share pictures with other users.[97] Her venting included posting a picture of herself to her Snapchat story while flipping off the camera and adding the following text: "Fuck school fuck softball fuck cheer fuck everything."[98] B.L. posted the Snapchat to her story on a Saturday and was neither on the

91. The plaintiff-respondent in this case was a minor, just fourteen years old at the time of the event in question and remained a minor throughout the entirety of this case. *See* Brief of Appellee at *1, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 19-1842), 2019 WL 4010647 ("When [B.L.] tried out for Mahanoy Area High School's cheerleading team in ninth grade . . . she was assigned to the junior varsity squad for the 2016–2017 school year."). Therefore, hereinafter she will only be referenced by her initials, B.L.

92. *Id.*

93. *Id.* at *2.

94. *Id.*

95. *Id.* at *5–6.

96. *Id.* at *2.

97. Joint Appendix at *22, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255), 2020 WL 8669753 [hereinafter Joint Appendix] (describing how Snapchat is used); *How to Use Snapchat*, SNAPCHAT SUPPORT, https://support.snapchat.com/en-US/article/how-to-use-snapchat [https://perma.cc/HH6C-XDJ6]. Snapchat is a unique application because it allows users to share pictures with other specific individuals, their Snapchat "friends," for a set amount of time, which upon that timer's expiration it disappears forever. Joint Appendix at *23. This notion of the picture disappearing forever is contingent on whether the receiving user took a screenshot. *Id.* at *26. If a user takes a screenshot of the received picture, the sending user is automatically notified by the application that their picture was screenshotted. *Id.* at *41. Snapchat also provides each user with a "story" platform, which allows users to post pictures that are available to be viewed by all of their Snapchat friends within twenty-four hours of posting the story. *Id.* at *23. The pictures posted on a Snapchat story can also be screenshotted and deleted by the user prior to the automatic twenty-four-hour expiration.

98. Brief of Appellee, *supra* note 91, at *3.

school's campus, nor participating in any school-related event.[99] Further, her Snapchat story did not specifically mention the school's name, any cheerleader coach's name, nor any of her fellow cheerleader teammates' names.[100]

One of her Snapchat followers was a fellow cheerleader.[101] This cheerleader decided to take a screenshot of B.L.'s post and sent it to another cheerleader, who happened to be the daughter of one of the cheer coaches.[102] The screenshot made its way directly to the cheer coaches, who dismissed B.L. from the cheerleading team due to her Snapchat story.[103] The coaches dismissed B.L. from the junior varsity team based on their interpretation of the school's cheerleading rules, which essentially stated the expectation of respect for the team as a whole.[104] Specifically, the dismissal was due to B.L.'s use of profanity in connection with the cheerleading team.[105]

Upon dismissal from the junior varsity team, B.L.'s parents appealed the coaches' decision to the athletic director, principal, superintendent, and eventually the school board, all of whom agreed with the dismissal.[106] B.L.'s parents then filed a lawsuit in federal district court, which entered a temporary restraining order against the Mahanoy School District to restore B.L.'s position on the cheerleading team.[107] The district court ruled in favor of B.L. and ordered the school to restore B.L. to the cheerleading team because it held her Snapchat story had not caused a substantial disruption at the school.[108] Further, the court held the removal of B.L. from the cheerleading team due to her Snapchat story was in violation of her First Amendment protected right to free speech.[109] The Mahanoy School District appealed the decision to the Third Circuit, which affirmed the district court's decision.[110] Ultimately, the Mahanoy School District filed a petition for certiorari to the United States Supreme Court to decide the issue

99. *Id.*
100. *Id.*
101. *Id.* at *3–4.
102. *Id.* at *4.
103. *Id.* at *7–8.
104. *Id.* at *4.
105. *Id.* at *8.
106. *Id.* at *9.
107. *Id.*
108. *Id.* at 10–11.
109. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2044 (2021).
110. *Id.*

of whether "public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school" if it occurred off-campus.[111] The Supreme Court granted certiorari.[112]

The Court first explained that public schools have a considerable interest in regulating students' off-campus speech in some instances.[113] The Supreme Court acknowledged what both of the parties listed in their respective briefs as "off-campus behavior that may call for school regulation."[114] This includes off-premises behavior involving "serious or severe bullying or harassment," or "threats aimed at teachers or other students."[115] Further, this includes off-campus activity involving the "failure to follow rules concerning lessons . . . the use of computers, or participation in other online school activities; and breaches of school security devices."[116]

The Supreme Court then explicitly denied setting forth a "rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent . . . substantial disruption of learning-related activities or the protection of those who make up a school community."[117] In other words, the Supreme Court hesitated to create any sort of bright-line rule related to public schools regulating students' speech off-campus.[118]

However, the Supreme Court nonetheless distinguished "three features of off-campus speech" that would prevent public schools from regulating students' speech off-campus.[119] First, the doctrine of *in loco parentis* is not applicable to regulating off-campus speech because "geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[120] The doctrine is only applicable when school administrators stand in the place of the parent because the parent is not physically at the school all day with the child and therefore

111. *Id.*
112. *Id.*
113. *Id.* at 2045.
114. *Id.* at 2044.
115. *Id.* at 2045.
116. *Id.*
117. *Id.*
118. *See id.* at 2045 (expanding public school student's First Amendment protection against regulation of off-campus speech by public school officials).
119. *Id.* at 2046.
120. *Id.*

cannot "protect, guide, and discipline them."[121] Second, the regulation of off-campus student speech would have a "chilling effect"[122] as the student would be under immense scrutiny for every utterance that comes out of their mouth twenty-four hours a day, seven days a week.[123] Third, schools are the "nurseries of democracy" and therefore have an interest in protecting students' unpopular expressions that take place off-campus.[124] The Supreme Court then articulated that it will be up to future courts "to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."[125]

The Supreme Court explained how, in the present case, while B.L.'s speech was "crude," it did not "amount to fighting words."[126] Further, while B.L.'s speech may have been "vulgar," it was not "obscene," and therefore, the content of the speech does not constitute an exception to her First Amendment protections.[127] The Supreme Court sought to determine when a school has an interest in "prohibiting students from using vulgar language to criticize a school team or its coaches" when the student is off-campus.[128] First, the Court decided the "school's interest in teaching good manners is not sufficient, in this case, to overcome B.L.'s interest in free expression."[129] Second, the Court held there was not any "substantial disruption" to the school, nor was there any "threatened harm to the rights of others."[130] Third, the Court concluded there was nothing to suggest "any serious decline in team morale" nor anything to suggest a "substantial interference in, or disruption of, the school's efforts to maintain team cohesion."[131] Moreover, the Court reaffirmed its reasoning in *Tinker* by reminding us that mere "undifferentiated fear or apprehension . . . is not

121. *Id.*

122. Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting).

123. *See Mahanoy*, 141 S. Ct. at 2046 ("[C]ourts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.").

124. *See id.* ("[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism 'I disapprove of what you say, but I will defend to the death your right to say it.'" (quoting S. G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (London, Smith, Elder, & Co. 1906))).

125. *Id.*

126. *Id.* (citing Chaplinsky v. State of New Hampshire, 315 U.S. 568, 573 (1942)).

127. *Id.* (citing Cohen v. California, 403 U.S. 15, 19–20 (1971)).

128. *Id.* at 2047.

129. *Id.*

130. *Id.*

131. *Id.* at 2048.

enough to overcome the right to freedom of expression."[132] The overarching takeaway of *Mahanoy* is that it is "necessary to protect the superfluous in order to preserve the necessary."[133] The Supreme Court ultimately ruled in favor of B.L. and agreed that the school violated her First Amendment right of free speech while off-campus.[134] This decision clarifies that student speech, which occurs off-campus and does not cause a "substantial disruption" nor threaten any harm to others, will generally be protected by the First Amendment.[135]

B. Fourth Amendment

The Fourth Amendment protects against "unreasonable searches and seizures"[136] and enforces the old adage of "a man's house is his castle."[137] Since Justice Harlan's concurrence in *Katz v. United States*,[138] the word "search" under the Fourth Amendment has been associated with a "reasonable expectation of privacy."[139] However, this reasonable expectation of privacy may diminish when appropriate notice is provided.[140] A person has a reasonable expectation of privacy when there is a "legitimate expectation of privacy" in either a place or a tangible object.[141]

Some examples of places where the Supreme Court has recognized that individuals have a reasonable expectation of privacy include: apartments,[142]

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132. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

133. *Id.*

134. *Id.*

135. *Id.*

136. U.S. CONST. amend. IV.

137. *See* 3 BLACKSTONE, *supra* note 46, at *287 ("[E]very man's house is looked upon by the law to be his castle."); WILLIAM LAMBARDE, EIRENARCHA 158 (London, Newbery & Bynneman 1581) (coining the phrase in the sixteenth century).

138. Katz v. United States, 389 U.S. 347 (1967).

139. *See* Carpenter v. United States, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting) (quoting United States v. Jones 565 U.S. 400, 406 (2012)) (characterizing the Katz test as requiring a violation of a "person's 'reasonable expectation of privacy'" to constitute a search).

140. *See* Shoemaker v. State, 971 S.W.2d 178, 182 (Tex. App.—Beaumont 1998, no pet.) (asserting a student has no reasonable expectation of privacy in her locker because she was provided adequate notice of the school's locker policy in the student handbook); Aubrey v. Sch. Bd. of Lafayette Par., 92 F.3d 316, 319 (5th Cir. 1996) (indicating that an employee's advanced notice of random drug testing diminishes the expectation of privacy).

141. *See* Rakas v. Illinois, 439 U.S. 128, 143 (1978) (discussing how the Fourth Amendment's protection is dependent on whether a person has a valid privacy claim).

142. *See* Jones v. United States, 362 U.S. 257, 267 (1960) (recognizing an invited guest's reasonable expectation of privacy in an apartment).

places of employment,[143] hotel rooms,[144] public restrooms,[145] hospital rooms,[146] fitting rooms,[147] luggage,[148] and even public phone booths.[149] On the other hand, the Court has not recognized any reasonable expectation of privacy in the following: abandoned property,[150] trash left on the side of the street,[151] any odors that a canine can smell,[152] and that which is within the plain view of the public.[153]

143. *See* O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (rejecting the contention that no public employee can have a reasonable expectation of privacy in the workplace).

144. Stoner v. California, 376 U.S. 483, 490 (1964) ("[A] guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."); Hoffa v. United States, 385 U.S. 293, 301 (1966) ("A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office.").

145. *See* United States v. White, 890 F.2d 1012, 1015 (8th Cir. 1989) (confirming public restroom occupants' reasonable expectation of privacy).

146. *See* Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001) ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.").

147. *See* People v. Diaz, 376 N.Y.S.2d 849, 854–55 (N.Y. Crim. Ct. 1975) (concluding fitting rooms carry a reasonable expectation of privacy, even if not fully enclosed).

148. United States v. Place, 462 U.S. 696, 707 (1983) (affirming a privacy interest in luggage protected by the Fourth Amendment).

149. *See* Katz v. United States, 389 U.S. 347, 359 (1967) ("[Fourth Amendment] considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth.").

150. *See* Abel v. United States, 362 U.S. 217, 241 (1960) (citing Hester v. United States, 265 U.S. 57, 58 (1924)) ("There can be nothing unlawful in the Government's appropriation of such abandoned property.").

151. *See* California v. Greenwood, 486 U.S. 35, 40–41 (1988) (explaining there is no reasonable expectation of privacy for garbage left outside the home awaiting garbage collection because it is obviously open to "public inspection").

152. *See Place*, 462 U.S. at 707–08 (holding canine sniffs of odors from property are not subject to the expectation of privacy because it is less intrusive and does not subject the owner of the property to embarrassment or inconvenience if nothing is found).

153. *See* Kyllo v. United States, 533 U.S. 27, 38 (2001) (upholding precedent and explaining how visual observations of what is within the "plain view" of the public does not violate the Fourth Amendment protection against warrantless searches); California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."); *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

In the context of the school environment, public school administrators are considered state actors.[154] In *New Jersey v. T.L.O.*,[155] the Court rejected the argument that public school administrators are exempt from complying with the safeguards of the Fourth Amendment.[156] The Court ruled this way because when public school administrators are "carrying out searches and other disciplinary functions," they act as "representatives of the State, not merely as surrogates for the parents."[157]

Thus, public school students are entitled to a reasonable expectation of privacy in their purses or personal bags,[158]of their person,[159] and in their backpacks.[160] However, it is also true that students at public schools have a "lesser expectation of privacy than members of the population generally."[161] Nonetheless, even if there is a "lesser expectation of privacy,"[162] the school must still comply with the general safeguards of the Fourth Amendment.[163]

C. Fifth Amendment

Again, at the threshold of a public school student's due process protections is the landmark case *Goss v. Lopez*, which has been the standard for due process requirements of students in public schools in many cases across the United States.[164] In *Goss*, the Supreme Court held that when students are suspended for up to ten days, due process requires that those

154. *See* New Jersey v. T.L.O., 469 U.S. 325, 334 (1985) (quoting West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943)) (holding beyond dispute the idea the Fourteenth Amendment "protects the rights of students against encroachment by public school officials").

155. New Jersey v. T.L.O., 469 U.S. 325 (1985).

156. *See id.* at 336 (concluding school officials "cannot claim the parents' immunity from the strictures of the Fourth Amendment").

157. *Id.*

158. *See id.* at 339 ("[T]here is no reason to conclude that [children] have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.").

159. *See id.* (including items students may carry on their person as among the legitimate belongings in which students have a privacy interest)

160. *See* DesRoches *ex. rel.* DesRoches v. Caprio, 156 F.3d 571, 576 (4th Cir. 1998) (holding students "enjoy[] a legitimate expectation of privacy in [their] backpack[s]" sufficient to trigger Fourth Amendment protection).

161. *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring).

162. *Id.*

163. *See In re* Doe, 887 P.2d 645, 652 (Haw. 1994) ("[P]ublic school officials act as representatives of government and consequently, must comply with . . . the Fourth Amendment."); Morse v. Frederick, 551 U.S. 393, 406 (2007) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)) (upholding the idea that children "do not shed their constitutional rights . . . at the schoolhouse gate").

164. *See, e.g.*, Rosenfeld v. Ketter, 820 F.2d 38, 40 (2d Cir. 1987) (concluding the process provided to appellant satisfied the *Goss* standards).

students receive "oral or written notice of the charges against him," and if the student denies the accusation, due process requires an "explanation of the evidence the authorities have and an opportunity to present his side of the story."[165] Further, the Court explained the timing aspect of this mandatory notice was fairly relaxed and solely required the disciplinarian to "informally discuss the alleged misconduct with the student minutes after it has occurred."[166] A clear exception to this rule arises where a student's mere presence on campus presents a danger or threat to the school.[167] Under those circumstances, the Court held the due process requirement of notifying the student prior to their suspension is nonsensical.[168] Instead, the student may be promptly removed from the school in the interest of restoring safety on campus and counterbalancing any disruption to the "academic process."[169] Thus, for instances of ongoing danger, due process requires notice only after it becomes practicable to do so.[170] In other words, the requirement to provide notice to the student of their suspension becomes effective only after the public school campus seemingly returns to normalcy.[171]

In *Goss*, the Supreme Court explicitly denied public school students who were suspended fewer than ten days the due process right to "secure counsel . . . to confront and cross-examine [adverse] witnesses," and denied their ability to "call [their] own witnesses."[172] The Court also failed to

165. Goss v. Lopez, 419 U.S. 565, 581 (1975).

166. *Id.* at 582.

167. *Id.*

168. *See id.* at 582–83 (agreeing with the district court that "the necessary notice and rudimentary hearing should follow as soon as practicable" whenever the "continuing danger" exception exists).

169. *Id.*; *see* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) ("[M]aintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.").

170. *Goss*, 419 U.S. at 582–83.

171. *See id.* (clarifying the notice and hearing is required to happen only after it becomes "practicable" for the disciplinarian to do so).

172. *Id.* at 583; *see* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution."); Meyer v. Austin Indep. Sch. Dist., 161 F.3d 271, 275 (5th Cir. 1998) ("As long as the student's story is told, either directly or through a reliable intermediary standing [*in loco parentis*] to the child, the requirements of Goss are met."); Swindle v. Livingston Par. Sch. Bd., 655 F.3d 386, 401 (5th Cir. 2011) ("[W]hen state law directs local authorities to provide public education, a student's 'total exclusion from the educational process' must be accompanied by the procedural protections

mention any requirement for the disciplinarian to provide parents or guardians of minor students with any notice of the alleged wrongful conduct prior to the suspension.[173] Thus, one possible implication is that students can be intimidated and compelled to admit their guilt inadvertently.

D. Eighth Amendment

Corporal punishment has been used in this country throughout history as a means of disciplinary action.[174] In *Ingraham v. Wright*,[175] the Supreme Court of the United States recognized the use of corporal punishment—which had previously only been recognized as a common-law principle—as an official means of disciplining children in public schools.[176] Specifically, the Court held that the Eighth Amendment protection against "cruel and unusual punishments"[177] was not applicable to the use of corporal punishment in public schools.[178] Even in 1977, the issue of corporal punishment in public schools was controversial and elicited strong opinions both for and against the decision.[179] During the 2013–2014 school year, over 100,000 students received some form of corporal punishment at school.[180]

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required by the Due Process Clause." (quoting *Goss*, 419 U.S. at 576)); Texarkana Indep. Sch. Dist. v. Lewis, 470 S.W.2d 727, 735 (Tex. App.—Texarkana 1971, no writ) ("It is not necessary to notify the student of his right to counsel in preliminary hearings before the superintendent, principal or administrative committee when the school district does not elect to proceed through counsel and does not intend to expel the student.").

173. *Goss*, 419 U.S. at 596 (Powell, J., dissenting); *see* Boynton v. Casey, 543 F. Supp. 995, 998 (D. Me. 1982) (holding there is no requirement to provide students with notice regarding any right to have their parents present during questioning).

174. Ingraham v. Wright, 430 U.S. 651, 660 (1977) (recognizing the historical background of the use of corporal punishment as discipline in schools).

175. Ingraham v. Wright, 430 U.S. 651 (1977).

176. *See id.* at 661 (attributing the historical common law principle of corporal punishment to Sir William Blackstone).

177. U.S. CONST. amend. VIII (establishing there shall not be "cruel and unusual punishments inflicted").

178. *Ingraham*, 430 U.S. 651, 664 (1977) (holding the use of corporal punishment in public schools is not an Eighth Amendment violation).

179. *Id.* at 660–61 ("Professional and public opinion is sharply divided on the [corporal punishment] practice, and has been for more than a century.").

180. U.S. DEPT. OF EDUC., *Number of Students Receiving Selected Disciplinary Actions in Public Elementary and Secondary Schools, by Type of Disciplinary Action, Disability Status, Sex, and Race/Ethnicity: 2013–14*, NAT'L CTR. FOR EDUC. STAT. (Jan. 2018), https://nces.ed.gov/programs/digest/d20/tables/dt20_233.27.asp [https://perma.cc/35W9-M8NY].

As of 2021, Texas is one of the nineteen states still allowing corporal punishment as a means of discipline in public schools.[181] At the same time, Texas has limited the use of corporal punishment in public schools through its decision in *Harris v. State*,[182] which explicitly held that excessive use of corporal punishment may constitute assault under the Texas Penal Code.[183] Further, in 2011, the Texas Legislature enacted a provision in the Texas Education Code that essentially allows parents to affirmatively deny the school's right to use corporal punishment as a means of disciplining their children at school.[184] Thus, while students may not have a constitutional protection against the use of corporal punishment at school,[185] they do have the ability to preempt it through their parents providing the school board with a letter expressing their forbiddance.[186]

IV. DISCIPLINE UNDER THE TEXAS EDUCATION CODE

Under the Texas Education Code, a student may be removed for certain conduct if the conduct occurs either on school property or "within 300 feet of school property, as measured from any point on the school's real property boundary line, or while attending a school-sponsored or school-related activity on or off of school property."[187]

181. Morgan Craven, *Stopping Harmful Corporal Punishment Policies in Texas*, THE INTERCULTURAL DEV. RSCH. ASS'N 1 (2021), https://www.idra.org/wp-content/uploads/2021/06/Stopping-Harmful-Corporal-Punishment-Policies-in-Texas-June-2021-IDRA.pdf [https://perma.cc/WVG2-T54U].

182. Harris v. State, 203 S.W. 1089 (Tex. Crim. App.1918).

183. *See id.* at 1090 (holding excessive corporal punishment at school can constitute criminal assault); Cunningham v. Beavers, 858 F.2d 269, 271 (5th Cir. 1988) (explaining possible repercussions for the use of excessive corporal punishments at school to include criminal charges of assault or injury to a child, or a monetary recovery in a civil suit); *see also* TEX. PENAL CODE § 22.04(a)(3) ("A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child . . . [a] serious bodily injury.").

184. *See* TEX. EDUC. CODE § 37.0011(b) ("[A] district educator may use corporal punishment to discipline a student unless the student's parent or guardian . . . has previously provided a written, signed statement prohibiting the use of corporal punishment as a method of student discipline."); *see also id.* § 37.0011(c) ("To prohibit the use of corporal punishment as a method of student discipline, each school year a student's . . . guardian . . . must provide a separate written, signed statement to the board of trustees of the school district in the manner established by the board.").

185. Ingraham v. Wright, 430 U.S. 651, 664 (1977); *see* Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1245 (5th Cir. 1984) ("Corporal punishment of school children does not of itself constitute cruel and unusual punishment.").

186. TEX. EDUC. CODE § 37.0011(c).

187. *Id.* § 37.006(a)(2).

A. Suspensions and Expulsions

The Texas Education Code defines the differences between suspensions and expulsions from school.[188] Students suspended from school under Section 37.005 of the Texas Education Code are not to be suspended for more than three school days and must receive an "alternative means of receiving all course work provided in the classes in the foundation curriculum . . . that the student misses as a result of the suspension."[189] Schools may expel students under Section 37.007 of the Texas Education Code either because they committed an offense that falls under mandatory expulsion or because, under the school's discretion, they deserve to be expelled.[190]

In 1995, the Texas Legislature created the Juvenile Justice Alternative Education Program (JJAEP), which provides an opportunity for education for students who have been expelled from school.[191] Whereas Disciplinary Alternative Education Programs (DAEPs) are still operated by the school district imposing the punishment on the student, JJAEPs are monitored by the Texas Juvenile Probation Commission and are often run by local juvenile probation departments.[192] The Texas Education Code provides a list of offenses that require expulsion.[193] These offenses are referred to as "mandatory" school expulsions, as the offenses are more severe than other offenses that merely fall under the school's discretion.[194] In Texas, the majority of expulsions from school fall under the discretionary category.[195]

The fact that the majority of expulsions are discretionary is concerning because discretionary expulsions mean precisely what they sound like: expulsions as the result of someone's discretion or choice.[196] The truth is, even in 2022, our world is not free of social injustices, especially when it

188. *Id.* §§ 37.005, 37.007.

189. *Id.* § 37.005(b), (e).

190. *See id.* § 37.007(f) ("A student who engages in conduct that contains the elements of the offense of criminal mischief . . . may be expelled at the district's discretion.").

191. *Id.* § 37.011; DEBORAH FOWLER, TEXAS' SCHOOL-TO-PRISON PIPELINE: SCHOOL EXPULSION 71 (2010).

192. *See* FOWLER, *supra* note 191, at 71 ("JJAEPs generally fall under the monitoring and oversight responsibilities of the Texas Juvenile Probation Commission at the state level, and the local juvenile boards at the county level.").

193. TEX. EDUC. CODE § 37.007(a).

194. *See id.* (including offenses such as aggravated assault, aggravated sexual assault, aggravated robbery, unlawfully carrying a weapon, indecency with a child, arson, and even manslaughter and criminally negligent homicide).

195. FOWLER, *supra* note 191, at 5.

196. *Id.* at 17.

comes to racial discrimination.[197] Each disciplinary action should be looked at holistically to ensure there is no racial bias involved in a discretionary decision to suspend a student, especially when dealing with something as life-altering as a suspension from school.[198] Unless a school is being overtly racist, it is usually difficult to discern when racial bias is involved.[199] However, the numbers do not lie.[200] For example, during the 2007–2008 school year in the Galveston Independent School District, African American students comprised only 30% of the student body, yet this group made up 77% of the students expelled under the school's discretion.[201]

Section 37.006(d) of the Texas Education Code allows schools to suspend students and place them in a DAEP for their conduct that occurs both off-campus and completely unrelated to the school if "the superintendent or the superintendent's designee has a reasonable belief that the student has engaged in conduct defined as a felony offense."[202] This section enables schools to send students to DAEPs based solely on their subjective "reasonable belief" that a student merely "engaged in conduct."[203] This statute is problematic because it is extremely vague and provides schools with excessive discretionary power to suspend students for conduct unrelated to school.[204]

B. Disciplining Conduct or Speech During Off-Campus Activities

In *Mahanoy Area School District v. B.L.*, the Court clarified that they would not "determine precisely which of many school-related off-campus activities

197. Domenico Montanaro, *Where Views on Race and Police Stand a Year After George Floyd's Murder*, NAT'L PUB. RADIO (May 17, 2021), https://www.npr.org/2021/05/17/996857103/poll-details-the-very-different-views-of-black-and-white-americans-on-race-and-p [https://perma.cc/24XX-589C] (reporting on views on race in America as of 2021).

198. *See* Janet E. Rosenbaum, *Educational and Criminal Justice Outcomes 12 Years After Suspension*, 52 YOUTH & SOC'Y 1, 10 (2020) (explaining how suspensions create long-term consequences for the student).

199. Ashley Peabody, *Overt and Covert Racism*, R-SQUARED (Sept. 2020), https://www.r2hub.org/library/overt-and-covert-racism [https://perma.cc/G6NA-B9GD] (differentiating overt racism, which consists of racial slurs and blatant discrimination, from covert racism, which is more common as it is more subtle, appearing as "implicit biases, microaggressions, and racially coded language").

200. FOWLER, *supra* note 191, at 45.

201. *See id.* (presenting statistics provided by the Texas Education Agency showing an overrepresentation of African American students in expulsions).

202. TEX. EDUC. CODE § 37.006(d).

203. *Id.*

204. *Id.*

belong on such a list."[205] Further, the Court explicitly held it would be up to future courts to decide the details on when students are out of the school's disciplinary reach.[206] The Court erred by failing to set clear guidelines for schools to follow when it comes to disciplining students for their conduct or speech off-campus. Instead of being ambiguous and absolving from the issue, the Court should have formally defined what comprises school-related off-campus activities.

1. History of the Supreme Court Upholding Punishments for Students' Conduct Off-Campus

Throughout the years, there has been case law supporting public schools taking various disciplinary actions against students for conduct that occurs off-campus.[207] For example, in *Bush v. Dassel*,[208] a high school student attended a house party where alcohol was present.[209] Law enforcement eventually arrived at the house party and approached the student to determine if the student had been in possession of or was under the influence of alcohol or drugs.[210] Officers determined there was "no probable cause to suspect a violation of the law" and sent the student home.[211]

However, the officers did write the student's name down on a list of people in attendance at the party.[212] Eventually, the activities director at the high school caught wind of the party, and the list of attendees was shared with him.[213] As the student was a member of the school's athletic programs,

205. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).

206. *Id.*

207. *See* Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562, 573 (D. Minn. 1990) (holding disciplinary actions taken against students for consumption of alcohol off-campus as permissible because it is rationally related to the legitimate interest of protecting the general welfare of the school); Schaill *ex rel.* Kross v. Tippecanoe Cnty. Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1989) ("[P]articipants in interscholastic athletics are . . . subject to training rules, including prohibitions on smoking, drinking, and drug use both on and off school premises."); Clements v. Bd. of Educ., 478 N.E.2d 1209, 1213 (Ill. App. Ct. 1985) (upholding the disciplinary action against a public high school student for their mere presence at an off-campus event with alcohol).

208. Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990).

209. *Id.* at 563.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

the student was suspended from participating in various athletic events as punishment for attending the party with alcohol present.[214]

To reiterate, the student was banned from participating in a school athletic event because of her mere presence at an off-campus party where alcohol happened to be present.[215] While the law enforcement present at the party admittedly did not have probable cause to believe there was any sort of deviant behavior on behalf of the student in question, the school supported the athletic director's decision to suspend the student from athletic events without any proof the student had actively participated in underage drinking.[216] Nevertheless, the student brought suit and argued that under the First Amendment, she enjoyed the freedom to associate and "attend social gatherings at which minors are engaged in the unlawful consumption of alcohol."[217]

The district court found in favor of the school and held that the student's suspension from the athletic event was "within the authority of the school board, even if the activity regulated occurs off school grounds."[218] The court reasoned that there is a direct correlation between the consumption of alcohol and the "welfare of the school," and in order to keep students educated, they must maintain an environment appropriate for learning.[219] Thus, the court determined there was no violation of the student's freedom to associate under the First Amendment.[220]

C. Ramifications and Sociological Effects of Suspensions from School

It should be no surprise that there are countless ramifications for students who are suspended or expelled from school.[221] The most obvious result is that the student acquires a reputation as being a deviant troublemaker by their peers, teachers, parents of other students, school administrators,

214. *Id.* at 564.

215. *Id.*

216. *Id.* at 562–64.

217. *Id.* at 566.

218. *Id.* at 573.

219. *See id.* ("If the schools are to survive and prosper, school administrators must have reasonable means at their disposa[l] to deter conduct [that] substantially disrupts the school environment." (quoting Schaill *ex rel.* Kross v. Tippecanoe Cnty. Sch. Corp., 864 F.2d 1309, 1324 (7th Cir. 1989))).

220. *Id.*

221. *See* Rosenbaum, *supra* note 199, at 10 (discussing the sociological effects of school suspension).

athletic coaches, and even other community members.[222] Sociologists refer to this as the "labeling theory."[223] Once the student is labeled as deviant, they are placed under a microscope with their every move being watched, and they become the easiest target to blame for any future mischief involving unknown wrongdoers.[224] Another consequence is that once the suspended or expelled student is removed from their normal school campus, they no longer benefit from the socialization of being at school around positive influences.[225]

The school-to-prison pipeline is a phenomenon described as the "pattern of school disciplinary problems escalating from suspension to removal from school, juvenile justice system involvement, and school dropout," eventually leading to prison.[226] In Texas, over 80% of prison inmates dropped out of school.[227]

D. Relation of the Double Jeopardy Clause of the United States Constitution to Discipline in Public Schools

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[228] The clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."[229]

Texas courts have consistently held that the Double Jeopardy Clause does not apply to administrative law proceedings.[230] The United States

222. *Id.* ("School suspension may function similarly to stops and arrest in labeling youth as deviant so that the youth are likely to engage in further deviance.").

223. Kerrin C. Wolf & Aaron Kupchik, *School Suspensions and Adverse Experiences in Adulthood*, 34 JUST. Q., 407, 413 (2017) ("Labeling theory holds that once a person is publicly labeled as deviant, he or she often has difficulty shedding that label and may come to embrace that label as part of his or her self-identity.").

224. *Id.*

225. *See* Rosenbaum, *supra* note 199, at 10 ("During suspension, suspended youth may meet and socialize with more deviant peers, and begin to engage in further deviant behavior as a result of these peers.").

226. FOWLER, *supra* note 191, at 1.

227. *Id.*

228. U.S. CONST. amend. V.

229. United States v. Halper, 490 U.S. 435, 440 (1989).

230. *See Ex parte* Tharp, 912 S.W.2d 887, 891 (Tex. App.—Fort Worth 1995) ("[D]ouble jeopardy clauses of the Texas and Federal Constitutions are not applicable to administrative proceedings."); Burrows v. Texas Dep't of Pub. Safety, 740 S.W.2d 19, 21 (Tex. App.—Dallas 1987)

Department of Education is a federal agency.[231] Therefore, the Double Jeopardy Clause does not apply to education proceedings, which are administrative in nature.[232] In *United States v. Halper*,[233] the Court held "under the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."[234]

However, regarding the Double Jeopardy Clause of the United States Constitution and public school discipline, the consensus is that there is no preclusion to punishing juveniles within the criminal justice system even after the student is first suspended or expelled from school for the same conduct in question.[235] Thus, when public school students are suspended for their conduct at school, if warranted, they are not immune from possible criminal charges in addition to their suspension from school.[236]

This Comment takes no issue with the fact that when a public school student's in-school conduct simultaneously breaks the school's rules and the law, the student may be punished both at school and within the juvenile or

("[T]he doctrine of criminal collateral estoppel which prevents a second prosecution for the same conduct or subject matter, is inapplicable in an administrative proceeding.").

231. *Education Department*, FED. REG. (2021), https://www.federalregister.gov/agencies/education-department [https://perma.cc/ZSU7-QYNA] ("The U.S. Department of Education is the agency of the federal government that establishes policy for, administers, and coordinates most federal assistance to education. . . . The Department's mission is to serve America's students—to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.").

232. *See* State v. Davis, 485 S.E.2d 329, 331 (N.C. App. 1997) (explaining why the Double Jeopardy Clause of the United States Constitution does not apply to school expulsions because they are "administrative discipline, not judicial punishment").

233. United States v. Halper, 490 U.S. 435 (1989).

234. *Id.* at 448–49.

235. *See In re* Gila Cnty. Juvenile Delinquency Action, Nos. DEL 6280–82, 816 P.2d 950, 951 (Ariz. Ct. App. 1991) ("Because we believe that the primary purpose of the expulsion order as a sanction is remedial rather than punitive, the minors' double jeopardy rights are not violated by delinquency proceedings in the juvenile court."); *Ex parte* K.H., 700 So. 2d 1201, 1205 (Ala. Crim. App. 1997) ("We find no authority holding that a school discipline bars subsequent juvenile prosecution for the same conduct."); *In re* Welfare of E.R.D., 551 N.W.2d 238, 243 (Minn. App. 1996) ("[T]he sanction of suspension . . . undoubtedly carries the 'sting of punishment.' It also has a deterrent effect. But because the suspension also serves remedial goals . . . the suspension may 'fairly be characterized as remedial' and passes that test set forth in *Halper*." (quoting United States v. Halper, 490 U.S. 435, 448–49 (1989))).

236. *In re* Gila Cnty, 816 P.2d at 951; *Ex parte* K.H., 700 So. 2d at 1205; *In re* Welfare of E.R.D, 551 N.W2d at 243.

criminal justice system.[237] Instead, the primary concern pertains to a situation where a public school student's off-campus illegal activity results in a suspension or even an expulsion from school on top of the punishment they are already receiving from the juvenile or criminal justice system.[238]

Consider the following hypothetical to better understand this Comment's position on how schools should handle students' conduct off-campus. A high school student ends up with a Minor-in-Possession (MIP) charge during their spring break from school. The officer does not call the school or alert anyone else about the student's MIP, except for the student's parents. Nonetheless, the school finds out about the student's MIP, and upon returning to campus, the student is kicked off the varsity football team and is given a five-day suspension from school. In Texas, is the school allowed to suspend the student simply because they received an MIP, even though they were completely off-campus? The answer is yes.[239]

This should no longer be the case. Instead, the student should be shielded by the Double Jeopardy Clause of the United States Constitution to prevent additional punishment from the school because the doctrine of *in loco parentis* does not apply.[240] Additional punishment should be at the parents' discretion.[241] The main benefit would be that the student is not forced to miss school and is not automatically barred from participating in an extracurricular activity that may have a positive influence on them.[242] Sadly, while extracurricular activities may be fundamental to a student's success

237. *Id.*

238. *See* Caldwell v. Cannady, 340 F. Supp. 835, 836 (N.D. Tex. 1972) (expelling students after an arrest for possession of marijuana while off-campus and unrelated to school).

239. *See* TEX. EDUC. CODE § 37.007(f) (enacting a provision allowing schools to expel students at the school's discretion); AMANDA PETTERUTI, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 18 (2011), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf [https://perma.cc/QY4X-CC76] ("[M]ost states allow a school to suspend or expel a student in relation to an arrest or adjudication, whether or not it happens at school.").

240. *See Mahanoy*, 141 S. Ct. at 2046 (explaining the different zones of parental responsibility and school responsibility for disciplining students).

241. *See id.* at 2047 (suggesting it is the parent who should decide additional consequences, not the school).

242. Rosenbaum, *supra* note 199, at 6 (explaining suspensions' ongoing effects on students).

within their academic career,[243] there is no "fundamental right" to participate in extracurricular activities as it is a merely a privilege.[244]

V. RECOMMENDATIONS

Just as the Court recently expanded public school students' freedom of speech in *Mahanoy Area School District v. B.L.*, students should also enjoy an expansion of their due process protections from school-imposed punishments for their non-violent, off-campus conduct. Specifically, when public schools impose any suspension or expulsion for non-violent off-campus conduct, schools should be required, in addition to the guidelines set forth in *Goss v. Lopez*,[245] to notify the student that they have a right to call their parents, guardians, or any other mentor before discussing the accusation against them. The reasoning behind this recommendation is to prevent students from inadvertently admitting their guilt.[246] Further, because of the detrimental effects of suspension or expulsion from school, it is very important that all students have a fair and adequate chance to defend themselves to avoid tarnishing their character and reputation.[247]

Regarding alternatives to mandatory or discretionary suspension for non-violent conduct, both on and off campus, schools can implement a variety of positive reinforcements to keep students on track. For example, schools can partner with local volunteer organizations where students can work off their school's punishment by providing mutually beneficial services at places like local animal shelters, food banks, or homeless shelters. The intention behind this alternative is to provide potentially troubled students with an outlet for any stressors in their lives as well as to provide local establishments with extra help. Another recommendation is to require mandatory counseling services for all students facing any type of suspension

243. Steven W. Craft, *The Impact of Extracurricular Activities on Student Achievement at the High School Level*, DISSERTATIONS 543, 562–66 (2012).

244. *In re* Univ. Interscholastic League, 20 S.W.3d 690, 692 (Tex. 2000) ("[T]here was no constitutional violation because the right to participate in extracurricular activities is not a fundamental right." (citing Eanes Indep. Sch. Dist. v. Logue, 712 S.W.2d 741, 742 (Tex. 1986))).

245. Goss v. Lopez, 419 U.S. 565, 579 (1975).

246. Boynton v. Casey, 543 F. Supp. 995, 997 (D. Me. 1982) (holding there is no requirement to provide students with notice of their right to remain silent until they have a parent or guardian present with them).

247. *Goss*, 419 U.S. at 579 (acknowledging the many detrimental effects of suspensions on students); Rosenbaum, *supra* note 199, at 10 (identifying lower rates of educational achievement, continued deviant behavior, and worse criminal justice outcomes as consequences for suspended youth).

or expulsion. The number of sessions of counseling services should be contingent on the type of offense and length of the punishment.

Most importantly, Section 37.006(d) of the Texas Education Code should be repealed along with any other vague statute that enables discretionary suspensions and expulsions for off-campus conduct.[248] This change would prevent discrimination in the decision-making process of imposing suspensions and expulsions.[249]

VI. CONCLUSION

Due process protects the right to a free public education, as students have a legitimate property interest in their education.[250] Under the doctrine of *in loco parentis*, school administrators have the ability to discipline students.[251] While students at public schools do not fully retain their constitutional protections,[252] they do enjoy the general protections of the First, Fourth, Fifth, and Eighth Amendments. Recently, in *Mahanoy Area Sch. Dist. v. B.L.*, the Supreme Court expanded students' off-campus freedom of speech.[253] *Mahanoy* is an important case for public school students as it has placed them in a better position to defend their constitutional rights.[254] Schools must find ways to discipline students while maintaining students' due process rights.

In conclusion, public schools should confront the school-to-prison pipeline and research how to eliminate the racial disparity of suspended students. The goal of this Comment is to raise awareness about the issue of disciplining students at school for their off-campus conduct, and also to bring hope for students who have faced improper disciplinary actions.

248. TEX. EDUC. CODE § 37.006(d).

249. Rosenbaum, *supra* note 199, at 10; FOWLER, *supra* note 191, at 45.

250. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); s*ee Goss*, 419 U.S. at 574 ("The State is constrained to recognize a student's legitimate entitlement to a public education as a property interest[,] which is protected by the Due Process Clause . . . .").

251. Carpenter v. Commonwealth, 44 S.E.2d 419, 424 (Va. 1947); State v. McDonie, 109 S.E. 710, 715 (W. Va. 1921); Lander v. Seaver, 32 Vt. 114, 122–23 (1859).

252. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

253. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2063 (2021) (Thomas, J., dissenting) ("Schools can regulate speech less often when that speech occurs off[-]campus.").

254. *Id.* at 2045.