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Courtroom Rules Don't Apply In Expulsion Hearings

Attorneys are often surprised by inability to question witness

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A 2007 amendment to Connecticut General Statutes 10-233d requires a notice of a student expulsion hearing to include information about how to access free or low-cost legal services. As a result, several legal organizations, such as the Appleseed Project and various local bar association programs, have recruited attorneys to provide such services pro bono.

The resulting proliferation of attorneys has led to a concomitant increase in challenges to hearing procedures, as attorneys skilled in criminal and civil trial practice seek to impose more of that structure on expulsion hearings. It is well settled, however, that student disciplinary hearings do not need to mirror court trials. Indeed, most student expulsion hearings are noticed and held within three weeks of the alleged disciplinary infraction, and expulsion hearings typically are completed in less than two hours.

Some practices that may surprise attorneys new to the expulsion process include the small number of witnesses called to testify, the lack of a formal pre-hearing discovery process, and the limited amount of information available about other students who may have witnessed or participated in the offense.

In an expulsion hearing, the school administration generally presents its case through an administrator or police officer, who testifies about the investigation that was conducted, the information gathered, and the results. Such testimony frequently will include references to statements made by witnesses to – or victims of – the alleged misconduct. Indeed, expulsions routinely proceed without direct testimony from any student other than the one being considered for expulsion.

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All students, including potential witnesses, victims and those students subject to the expulsion process, retain the right to confidentiality of their student records under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. The unique legal protections applicable to student under FERPA may make it difficult to prepare a defense in an expulsion case that involves claims made by other students.

For example, FERPA might preclude the student who is being considered for expulsion from obtaining copies of records related to another student who may have been involved in the same incident–such as statements made by that student, or a record of the discipline imposed on that student for that incident. In addition, FERPA affects the ability of a student to obtain a copy of a surveillance tape that captured a fight between multiple students, as such tapes are treated as educational records. Other documents may be withheld or redacted to protect confidential information relating to the other students.

Similarly, a school will not disclose discipline records, special education records or other information relating to a student witness without a release or court order. Hence, an attorney representing a student at an expulsion hearing may have very little information about student witnesses until the hearing.

An attorney also may not have an opportunity to question witnesses, as schools frequently try to avoid calling student witnesses as a matter of administrative efficiency and to encourage students to be forthcoming during the investigation process. Attorneys who represent the accused student understandably would like an opportunity to confront directly the student accuser rather than an adult administrator. Thus, even if FERPA precludes disclosure of certain records related to student accusers and witnesses, attorneys have claimed that the right to due process includes the right to confront these student accusers and witnesses.

Neither the U.S. Supreme Court nor the 2nd Circuit Court of Appeals has addressed directly the scope of the right to confrontation and cross-examination of minor student witnesses in public school expulsion hearings. However, the 2nd Circuit, in conformi-

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ty with the weight of national authority, has stated in the contest of a public university disciplinary hearing that the "right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings." *Winnick .v Manning*, 460 F.2d 545, 550 (2d Cir. 1072). Therefore, the lower courts have been left to define in what circumstances the failure to call a witness for cross-examination might deprive an accused student of due process.

In the District of Connecticut, two of our judges have addressed this topic in recent years. In *Bogle-Assegai v. Bloomfield Board of Education*, 467 F.Supp 2d 236 (D.Conn. 2006) a student was expelled for her involvement in a fight inside the school.

At the expulsion hearing, the administration relied in part on statements taken from students who witnessed the fight. The administration did not produce those witnesses, however, and the attorney for the student was, therefore, unable to cross-examine the witnesses. Federal Judge Janet Bond Arterton rejected the student's subsequent claim that this failure to permit cross-examination violated her due process rights, as the student "provided no authority, and the Court has found none, which would require such an opportunity be provided by the Board of Education."

In reaching the same conclusion in a similar case, Judge Warren W. Eginton stated that "the weight of authority has concluded that due process does not afford high school students the right to confront and cross-examine student witnesses or accusers at expulsion hearings." *E.K. v. Stamford Board of Educaton.*, 557 F. Supp. 2d 272, 276 (D.Conn 2008).

In that case, a student was expelled for his role in leaving racist messages on a classmate's voice mail. At the expulsion hearing, the police officer testified about a tape recording containing the racist messages, yet the student's attorney was precluded from cross-examining the police officer regarding other voices on the tape. Judge Eginton cited numerous cases from across the country for the proposition that "due process does not afford high school students the right to confront cross-examine student-witnesses or accusers at expulsion hearings."

Judge Eginton also cited several reasons why this limitation is particularly appropriate in expulsion cases, including the need to protect student witnesses and encourage them to come forward; the need to avoid excessive costs; the complexity of such administrative proceedings; and the need to avoid duplicative testimony.

These reasons have led courts to approve a practice whereby the administration's case typically is presented through a school administrator or a police officer, as described above. Indeed, some courts have gone so far as to permit the introduction of hearsay testimony from a student without requiring disclosure of the identity of the student who made the report.

Although these two Connecticut cases contain sweeping language about the limitation on cross-examination in expulsion hearings, it is significant that both decisions also closely examined the evidence produced by the administration at the hearing.

In the *Bogle-Assegai* matter, the court highlighted the fact that the parent attorney did not exercise her right to call any witnesses, and the fact that the school had presented testimony from several adult eyewitnesses. Similarly, in the *E.K.* case, the court commented on the fact that the student had admitted participation in the event that resulted in his expulsion, and stated that the presence of corroborating evidence reduced the potential value of cross-examination.

The one possible exception to this limitation on cross-examination involves the narrow circumstance where the credibility of the student and the accuser is at issue due to a lack of any other evidence to corroborate the accuser's statement to the administration. In other words, the entire case would be based on hearsay. In a 1972 decision, the 2nd Circuit denied relief to a student who claimed that his due process rights were violated because of the procedures used in an expulsion hearing at the University of Connecticut. The Court suggested that cross-examination might be required if a case needed to be decided *solely* on the statements of the accuser and the accused, as this situation would make credibility a more significant factor. Other courts have indicated that a school may not rely solely on hearsay statements, which would eliminate the possibility of cross-examination. Cases discussing such situations are rare, however, because schools typically do not proceed with expulsions in such circumstances.

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Attorneys new to the expulsion process also may be surprised to find that, even if a student accuser or witness is called to testify, the hearing process may not involve direct questioning of that student. Courts routinely have approved of hearing procedures that were modified to protect student witnesses and yet provide the student subject to the expulsion with some ability to question the witness.

For example, courts have approved the use of partitions so that the witness need not be seen during the examination, the advance submission of written questions for student witnesses, and a rule that all questions for student witnesses will be asked by the hearing officer, rather than counsel for either party. In addition, although expulsion hearings are closed to the public, hearing officers generally let the parents of all students involved remain in the hearing room.

Attorneys have become more frequent in expulsion hearings, and those attorneys often have attempted to institute more trial-like procedures into those hearings. Courts across the country, however, have declined to transform expulsion hearings into mini-trials. ■