

APPENDIX

APPENDIX II: Rationale for the Right to Counsel Provisions

The Model Code on Education and Dignity would guarantee a right to publicly funded counsel for students in certain discipline, truancy and manifestation proceedings.³⁸⁹ Such a right represents one of the more significant costs triggered by the Model Code, but at the same time is essential to the effectuation of all the other rights provided in the Code. While the concept of a right to counsel in certain types of government-initiated civil cases is not new (most states, for example, provide such a right either by statute or court decision in abuse/neglect or termination of parental rights cases),³⁹⁰ the issue has remained largely unaddressed in both courts and legislatures with respect to longer term suspension/expulsion/truancy proceedings.³⁹¹

This Appendix briefly addresses some of the concerns mentioned about providing counsel in education cases. The easiest framework for addressing these concerns was provided by the U.S. Supreme Court for testing for due process: examine 1) the strength of the individual interest(s) at stake, 2) the state's interest, and 3) the risk of a wrong decision absent counsel.³⁹² As to the first prong, an expulsion or long-term suspension hearing in states or districts that offer no alternative education programs can effectively mean the end of a child's public education. So can a truancy case or a failure to recognize the connection between a disability and misconduct in a manifestation determination review. Given that the right to education is guaranteed by the constitutions of many states,³⁹³ this is a serious deprivation indeed. Additionally, a suspension/expulsion hearing can lead to more serious consequences than those faced in a juvenile delinquency court proceeding for the same behavior, but without the protection of counsel. For example, a fistfight might lead to a disciplinary hearing where the child has no lawyer and where the hearing officer rules to expel the child due to a zero-tolerance policy.

In a juvenile delinquency court proceeding, the same child would likely have the right to counsel and might only face probation or even a diversion program, especially if it was the student's first contact with the juvenile justice system. With respect to truancy, a juvenile can be adjudicated as truant without counsel, even though such a finding can affect their educational placement, subject them to various restrictions (such as random drug screening), and put them under threat of jail if they later violate the truancy order.

As to the second prong, while providing counsel does require government funds, the amount may be significantly less than it seems at first blush. For one, if schools adopt the rest of the Model Code, there will be vastly fewer exclusion/truancy attempts overall and therefore fewer situations that require an attorney.³⁹⁴ And some students will either decline or waive counsel, choose not to pursue a formal hearing, or be financially ineligible. Additionally, erroneously expelling students or finding them truant (a result an attorney can help avoid) can be much costlier to the schools and the community at large: for one, schools can lose state/federal funding when students are out on expulsion. And when one understands that many students that are subject to long-term suspension/expulsion or a finding of truancy may never return to school, the costs mount even higher. For instance, one study found that high school dropouts are twice as likely to commit crimes as high school graduates, and one group of 12th-grade dropouts will generate \$1.1 billion in economic losses from juvenile crime and \$10.5 billion in economic losses from adult crime over their lifetimes.³⁹⁵

³⁸⁹ The right to appointed counsel at public expense is referenced in this Model Code in Section 3.1.d.D, Section 3.3.a.B.3, and Section 4.3.D.3.

³⁹⁰ See Laura Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. AND POLY 245 (2006), available at http://www.law.stanford.edu/display/images/dynamic/events_media/Civil%20Right%20to%20Counsel%20-%20Abel_2.pdf.

³⁹¹ *C.f. Bellevue School Dist. v. E.S.*, 257 P.3d 570, 579 (Wash. 2011) (finding no right to counsel in truancy proceedings, and reversing court of appeals); *Id.* at 580 (Madsen, C.J., concurring) (urging legislature to provide appointed counsel pursuant to ABA policy); *Goss v. Lopez*, 419 U.S. 565, 580, 584 (1975) (finding no right to counsel for discipline proceedings involving suspensions of 10 days or less, but commenting that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.").

³⁹² See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³⁹³ See Randal Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 270 (1999); Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96-97 (1989); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1342-47 (2004); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979) (listing state constitutional education clauses for 48 states).

³⁹⁴ The Code encourages the use of alternatives to disciplinary exclusion: mediation, restorative justice programs, Positive Behavior Interventions and Supports, and other school-based interventions can eliminate the need for an expulsion hearing and therefore the need for a lawyer.

³⁹⁵ C. Belfield and H. Levin, *High School Dropouts and The Economic Losses from Juvenile Crime In California*, California Dropout Research Project (2009).

Communities must also pay for additional policing, jails, and criminal case prosecutions. In Massachusetts, a study found that high school dropouts earned \$456,000 less over their lifetime than those with a high school degree.³⁹⁶

Finally, as to the third prong, some might say that only juvenile court proceedings are complicated enough to require a lawyer, and while truancy proceedings are court proceedings, suspension/expulsion hearings and manifestation determination reviews are more informal. However, while the hearings may be less formal than a court process, the fact remains that the children whose vital interests are at stake could be so young as to be in elementary school. And the reality is that students and families often find these hearings (whether informal or formal) to be a confusing and frustrating experience. Even if the school is not represented by a lawyer at the hearing, the school's representative is an official who is trained in school procedures and who has access to records, witnesses, and other resources that the student lacks. The student faces the allegations on their own,³⁹⁷ and is forced to try to present evidence, cross-examine witnesses, make objections, and otherwise act like an attorney without any of the skills or training to do so. Without counsel, a student will almost always find it difficult to clearly present their side. Providing a right to counsel when a student is being excluded from school allows the student the opportunity to be heard and to investigate and challenge discriminatory practices, ensures a fair hearing, and protects against mistakes that could lead to a deprivation of the right to an education.

In addition, whether the hearings are especially complicated or not, there is a significant risk of the decision being incorrect if the child is not represented by a lawyer. This is not only because hearing officers may make the wrong decision about whether a particular school rule was violated, but also because they may uphold punishments that are unnecessarily harsh. In some cases, a school may be using disciplinary exclusion as a way of "pushing out" a student who is doing poorly in their classes³⁹⁸ or who has a behavior-affecting disability, something only a lawyer could likely accurately figure out. While schools need discretion in making decisions about school safety and discipline, providing the child with a lawyer will not likely change the outcome where the school has valid reasons for trying to suspend or expel the child; it will simply prevent exclusions that should not be occurring.

In sum, providing the child with a lawyer is what is best for the student, the school, and the community, and while costs must certainly be addressed, such costs are, as the Supreme Court put it in a different context, "hardly significant enough to overcome private interests as important as those here..."³⁹⁹

³⁹⁶ Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts* (Sept. 2008), available at <http://www.bostonbar.org/prs/reports.htm>.

³⁹⁷ While some children may be supported by their parents, others may actually be in conflict with their parents over the alleged conduct. Additionally, children in foster care or group homes may not have parents that can support them.

³⁹⁸ Davin Rosborough, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U.L. REV. 663, 667 (2010); The Advancement Project, *TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE* at 5 (March 2010) (noting that increase in number of disciplinary proceedings has increased with "the passage of [No Child Left Behind] and other test-driven policies").

³⁹⁹ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (involving termination of parental rights).