CASE NO. C093475

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NATOMAS UNIFIED SCHOOL DISTRICT,
Respondent,

v.

SACRAMENTO COUNTY BOARD OF EDUCATION,
Appellant,

I.O., by and through his Guardian ad Litem, D.O.,
Appellant and Real Party in Interest.

On Appeal from the Sacramento County Superior Court
Case No. 34-2019-80003194
Hon. Michael Jones, Judge of the Placer County Superior Court
(sitting by designation per Cal. Code Civ. Proc. § 394)

[PROPOSED] *AMICUS CURIAE* BRIEF OF NONPROFIT EXPULSION REPRESENTATION PROVIDERS IN SUPPORT OF APPELLANT AND REAL PARTY IN INTEREST

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I. INTRODUCTION

Amici are nonprofit law firms who provide direct services to families on education matters, including school discipline. They submit this brief, in support of Appellants, to address the importance of adhering to the due process protections and administrative checks and balances afforded to students who are subjected to discipline and face exclusion from the full range of educational services and opportunities that California public schools offer in their general education settings. Far from being a mere change in placement, expulsion resulting in the assignment to a county community school or other alternative setting, results in the loss of access to extracurricular activities, advanced placement courses, broad career counseling services and the broad range of elective classes.[1]

In recognition of the impact such an action has on a child, the California Legislature, has established an administrative hearing process, giving separate local education professionals the initial role in making decisions about expulsions at the district level; and a reviewing role at the County Board of Education, designed to provide informed objectivity when considering whether a child's actions warrant expulsion and whether the district has fulfilled its statutory obligations when recommending expulsion. The lower court's decision failed to take into consideration the importance of these distinct procedural protections and substantive limits on the expulsion of I.O. Instead,

[1] Suspensions and expulsions have long been linked to dropout rates and involvement in the juvenile justice system for those students that were excluded. (Rokeach & Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline* (2006) 67 Ohio St. L.J. 277, 285-86.)

like the District in its opposition, the court focused solely on the characterization of the student's act as involving "shooting" a "gun," disregarding the fact that it was a plastic BB gun, with plastic pellets, that was never displayed in a threatening manner, and wasn't and couldn't have ever been shot, because there were no BBs in it.[2]

The District's Discipline Matrix distinguishes firearms from dangerous weapons. Students in possession of Dangerous Weapons are eligible for suspensions (or alternative) discipline. An expulsion is not mandatory or automatic. (See AR 0267) The Superior Court acknowledged this significant difference when writing, "An imitation gun is considered a dangerous weapon but not a firearm. If a student takes a dangerous weapon of any kind to school, they can face suspension or even expulsion. The dangerous weapon should not be confused with a deadly weapon. The student who takes a real firearm to school receives an automatic expulsion." (See Ruling on Petition for Writ of

[2] This blurring of the facts, as well as NUSD's request for judicial notice, appears designed to suggest that the recent tragedies somehow justify the District's response to I.O.s behavior. NUSD already added a count to I.O.'s Expulsion, which was based upon the conduct of his parents. Now, NUSD wants to justify I.O.'s expulsion upon the actions of strangers nationwide. Indeed, much of the recitation of the facts focuses on parent and teacher responses and what turned out to be unwarranted concerns about an unloaded airsoft BB gun at the school. But it does not change the fact that I.O. did not harm, did not threaten to harm, and did not intend to harm anyone. Yes, he broke a rule and caused an unfortunate disruption, which resulted in an action addressing the behavior becoming necessary. However, the District had a duty to consider alternative means of correction, and had a duty determine "[t]hat other means of correction are not feasible or have repeatedly failed to bring about proper conduct" or make a finding "[t]hat due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." (Ed. Code, § 48915, subd. (e).) NUSD did not consider alternative means of correction, and did not attempt alternative means of correction, even though the record does not demonstrate that I.O. constituted a continuing danger.

Administrative Mandamus, lines 21-26, pg. 30). However, the court then dismisses this difference and ventures into a discussion of the facts presented in an unrelated juvenile court proceeding and concludes by conflating the non-threatening actions of a young boy to "violent rioters" brandishing truly life-threatening weapons.[3] (*Id*. Footnote 20, pg. 35).

The District as well as the court ignored the District's Discipline Matrix and its important policy acknowledgment that state law[4] requires that alternatives to expulsion must be considered, and applied in appropriate cases, when a child is disciplined for possessing an "imitation gun" or other "dangerous weapon" as opposed to a firearm. Instead, I.O. was treated as if he had brought an actual firearm to school.

Amici acknowledge the District's need to prioritize school safety. We also know that a fair, thorough hearing process is the only way to truly determine which students actually present a safety risk. Expulsion decisions must be made on the basis of all the information available about the individual student involved. All too often, we have seen nationally publicized acts of violence at schools lead to local decisions that are based in fear, not facts. In these times, the robust hearing and review process put into place by the California Legislature and in furtherance of basic due process rights, is more important

[3] Courts have recognized the danger of invoking the notorious acts of others when evaluating the criminal culpability of an unrelated person. *See People v. Bloom*, (1989) 48 Cal.3d 1194, 1213, "In general, prosecutors should refrain from comparing defendants to historic or fictional villains, especially where the comparisons are wholly inappropriate or unlinked to the evidence. (*See People v. Hovey* (1988) 44 Cal.3d 543, 579-580, and cases cited.)"

[4](Ed. Code, § 48915, subd. (e).)

than ever because it is the only way to ensure districts are making rational, factually based decisions about the young person in front of them.

II. ARGUMENT

A. Due Process Is Paramount to Ensure Every Student's Fundamental Right to Education.

Education is a fundamental right under the California State Constitution.[5] The California Supreme Court has characterized this express articulation of education in the constitution as recognizing education's "distinctive and priceless" role in creating responsible members of society inside and outside the classroom.[6] Likewise, the U.S. Supreme Court has stated that education extends beyond the teaching of formal lessons and into the holistic rearing of children to be qualified adults able to serve their communities and society.[7]

While not expressly mentioned in the U.S. Constitution, the U.S. Supreme Court in *Goss v. Lopez* established the unchallenged principle that "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 and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[8] The

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[5] (S*errano v. Priest* (1971) 5 Cal.3d 584, 589; *See also Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 (*Serrano II*); *Butt v. State* (1992) 4 Cal. 4th 668, 683.)

[6] (*Serrano v. Priest, supra,* at p. 608–09.)

[7] (See *Grutter v. Bollinger* (2003) 539 U.S. 306, 347-48.)

[8] (*Goss v. Lopez* (1975) 419 U.S. 565, 574; *see also Brown v. Board of Education* (1954) 347 U.S. 483, 493 ["[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."]; *Plyler v. Doe* (1982) 457 U.S. 202, 221 ["[E]ducation has a fundamental role in maintaining the fabric of our

Court held that a suspension, even a relatively short one of ten days was an "interference with a protected property interest" such that a student "must be given some kind of notice and afforded some kind of hearing."[9] California has complied with that constraint by imposing the notice and hearing requirements of Education Code sections 48900, *et seq*, on local school districts. Both the substantive and procedural protections included in that statutory scheme, must be construed in a manner that adheres to constitutional Due Process protections which protect children from being deprived of their education.[10] The lower court's decision disregards those protections.

B. Due Process Protections Must Be Rigorously Adhered to By Schools in Discipline Cases and Students and Families Must Be Allowed to Tell Their Stories.

If "America's public schools are the nurseries of democracy," as Justice Breyer wrote in 2021, then it is vital that school discipline tribunals and the processes that regulate them not only uphold, but teach our young people about our values of due process and fairness.[11] When youth learn that their input in these processes is unwelcome and often categorically excluded, they internalize the futility of exercising their voices and disengage with the institution. Silencing children is antithetical to one of the central

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society. We cannot ignore the significant social cost borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."].)

[9] (G*oss v. Lopez, supra,* 419 U.S. 565, 579.)

[10] (*Id.* at 584.)

[11] (*Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, (2021) 141 S.Ct. 2038, 2046.)

purposes of education—to create civically-minded citizens excited to contribute to society.

Courts have recognized the need for a heightened level of care when addressing the rights of children, for instance in juvenile proceedings.[12] Although less formal, like criminal proceedings, discipline proceedings have immense implications for a child's future.[13] In *Goss v. Lopez*, the Court recognized that a suspension "is a serious event in the life of the suspended child" and that the charges of misconduct underlying the suspension "[i]f sustained and recorded . . . could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[14] The court concluded by noting that "[l]onger

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[12] Courts have recognized that: a) when it comes to their rights and options within the legal realm, youth do not have the same level of understanding as adults, b) current and emerging brain science indicates that youth's decision-making and predictive abilities when it comes to consequences are significantly different than those of adults, as is their capacity to be influenced by external pressures, and c) there is a normative understanding of the duty to care for our youth by instilling in them a belief in our civic institutions and empowering them to advocate for themselves. (*See e.g*., *Graham v. Florida*, (2010) 560 U.S. 48, 68, *see also*, *Roper v. Simmons* (2005) 543 U.S. 551, 578-79 [holding the Eighth amendment forbids the death penalty for juvenile offenders under 18]; *Miller v. Alabama* (2012*)*567 U.S. 460, 472 [underscoring, "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."].)

[13] (*See e.g*., Rumberger & Losen, The Center for Civil Rights Remedies, *THE HIDDEN COSTS OF CALIFORNIA'S HARSH SCHOOL DISCIPLINE: And the Localized Economic Benefits From Suspending Fewer High School Students* (Mar. 2017), p. 10-18 https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/the-hidden-cost-of-californias-harsh-discipline/ [as of August 10, 2022].)

[14] (G*oss v. Lopez, supra,* 419 U.S. 565, 575-76.)

suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[15] The court's opinion about the impact of extended absence from the school system is supported by academic studies analyzing the academic and life success of students who have been expelled or suspended. They consistently demonstrate that this loss of instruction directly correlates to a lower likelihood of graduation, reduced enrollment in college, thwarted life success, and a higher likelihood of involvement in the juvenile or criminal justice system.[16]

When the fundamental right to education is at risk – as in the context of exclusionary school discipline – it is especially important that due process protections be enforced. This certainly includes the right for a student to communicate the facts and mitigating circumstances, and to have an impartial forum for determining who is telling the truth. "Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process."[17] The limits on imposing an expulsion and the hearing procedures afforded to students by Educ. Code §§ 48900, 48915 and 48918 are the safeguards

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[15] (*Id.* at p. 584.)

[16] (Rosenbaum, *Educational and criminal justice outcomes 12 years after school suspension* (2020 May), Vol. 54, No. 4, Youth Soc. 515, at p.532, at https://journals.sagepub.com/doi/abs/10.1177/0044118X17752208?journalCode=yasa [as of August 10, 2022].)

[17] (G*oss v. Lopez, supra,* 419 U.S. 565, 580.)

against error that the California legislature has imposed on districts, and they must be strictly adhered to given the fundamental nature of the right to education.

In this case, NUSD gave short shrift to those protections. This was recognized by the reviewing body when County Office of Education fulfilled its duty and reversed the expulsion decision. In stark contrast, the Superior Court completely disregarded the critical role of the County Office of Education, and validated NUSD's actions but disregarded its own responsibility as an impartial reviewer of actions that deprive students of the educational rights. That disregard is at odds with both the statutory and constitutional safeguards.

1. The Right to a Full and Complete Hearing Promotes Just Results

Arrival at a just decision in a school discipline case relies on a full and complete hearing. Student expulsion hearings must allow a meaningful opportunity for the presentation of the family's perspective. As demonstrated in the Appellants' brief, the expulsion proceeding conducted by NUSD includes multiple instances where I.O.'s parents were cut off, their evidence was ignored, and their requests that teacher witnesses attend and testify were denied, when they tried, without benefit of representation, to present their side of the story, while members of the administrative panel were allowed extensive questioning and offered their own opinions about the behavior and its impact on others.[18] In the experience of *amici*, this is an all too common occurrence at expulsion hearings conducted at the district level.

[18] (Appellant I.O.'s Opening Brief, pp.25,26-29.)

Under the California Education Code, families have the right to "to present oral and documentary evidence on the pupil's behalf, including witnesses."[19] School districts, including the NUSD, through its power delegated to the panel, have a duty to uphold this right. The opportunity to present a full and complete picture of not only the incident, but also the student, is critical to the district's obligation to fulfill its mandate to make the secondary findings that are required in most cases. Educ. Code § 48915 requires specific findings that "[o]ther means of correction are not feasible or have repeatedly failed to bring about proper conduct," or that "[d]ue to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others," and that evidence of the student's behavior apart from the expellable act is relevant and must be considered before denying the fundamental right to education.[20]

The singular incident at issue in a disciplinary hearing often represents only the child's *worst* day and *worst* choices. Understanding the child as a whole is crucial to making an informed decision about their educational future. Yet students and their parents often struggle during these proceedings to provide context and character witnesses that would facilitate such a holistic understanding.

Amici report that when families are able to bring character witnesses, such as other teachers, counselors, coaches, neighbors, clergy, or social workers, they are able to present a more complete picture of what support systems are in place, what services have

[19] (Ed. Code, § 48918, subd. (b)(5).)

[20] (Ed. Code, § 48915.)

been provided, what alternative means of correction have been attempted, and whether a student represents an actual threat. Such witnesses can attest to the potential impact of alternative means of correction that were not utilized. These include options such as providing the student with the behavioral supports needed to set them on the right track and better. Such testimony can inform the process about the student as a whole, resulting in fairer proceedings.

Here, NUSD did not permit the parents to invite their witness, and they were cut-off from their reasonable efforts to help the panel understand the circumstances from their perspective. In addition to undermining trust between the parent and the school, such evidence is also relevant to the question of whether "[d]ue to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others," which is a secondary finding that must be considered under Educ. Code § 48915(b)(2). In the experience of *amici, s*chool administrators automatically characterize the student as a continuing danger in every expulsion referral, irrespective of the nature of the act, or the perceived threat as expressed by staff or other students. They are motivated to do so because such a finding of that nature is a necessary prerequisite to extending a suspension pending appeal of the expulsion.[21] It is only at the hearing that parents are able to refute that "check the box" determination through testimony about the

[21] Education Code section 48911, subdivision (a) limits suspensions to five (5) consecutive school days. However, Education Code section 48911, subdivision (g) provides for an extension "if the district superintendent of schools or the district superintendent's designee has determined, …that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process."

child's behavior, school personnel assessment, and the circumstances surrounding the alleged expellable act.

Furthermore, *amici* have frequently heard that parents who attempted to contact witnesses, interview teachers or even just present supportive letters are denied their opportunity to do so. Such actions in the disciplinary process deny parents' participation in a critical decision about the future of their child's education. The district's position that it was "not appropriate"[22] in the expulsion process to visit a witness' house meant that neither the student nor his parent could contact percipient witnesses, a position contrary to the fundamental notions of due process and the right to confront witnesses. It is also at odds with the statutory right "to present oral and documentary evidence on the pupil's behalf, including witnesses."[23] The District's policy ties the hands of parents and denies them the opportunity to be meaningfully involved at all stages of discipline, as required by the Education Code. n NUSD's case.

In I.O.'s case the District, at the prompting of a supposedly neutral panel member, took this denial to an extreme by transforming the parents' honest attempt to obtain witness letters in support for their child – they had visited the parents of other students – into allegations of "intimidation" and an independent basis for expulsion.[24] Setting aside

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[22] (AR. at p. 216.)

[23] (Ed. Code, § 48918, subd. (b)(5).)

[24] This "offense" was not included in the expulsion hearing notice (AR 273, 276, 278, 281). It was raised at the administrative hearing by panel member Baker during the hearing (AR 216), added by the administrative panel (AR 110), and included in the findings submitted to the NUSD Board of Trustees (AR 283.) The Board used it as an independent basis for expulsion. (AR 108.)

the fact that such a finding was procedurally defective given the lack of notice, the District, bore the burden of making such a showing, but made no attempt to determine what lay behind the claim of intimidation, or whether it was anything other than an honest request for witness support. Moreover, it was the student's parents, not I.O., who approached the other families for support. NUSD expelled the student based upon the behavior of his parents, which was performed in their attempts to mount a defense in support of him. Even if I.O.'s parents' behavior could be characterized as somehow improper, our justice system does not countenance the notion that an educational system may penalize a student for the misdeeds of the parents.[25] While the District has authority to punish a student based upon the student's behavior, it has no authority to punish a student because the District is upset with the student's parents.

The hearing procedures are critical to due process and have thus been codified in the California Education Code. Procedures guaranteeing a reasonable opportunity to present a family's story – including submitting evidence and witnesses relating to facts beyond the isolated incident – are fundamental to arriving at a just answer in a school discipline case.

2. Strong Due Process and Meaningful Student Engagement Promotes Investment in the Education System and Increases School Safety.

Providing students and families the opportunity to share their stories confers benefits beyond the certainty of a just outcome. Increasing the sense of fairness of

[25] (*Plyler v. Doe*, *supra*, 457 U.S. 202, 238.)

disciplinary proceedings is consistent with Due Process protections and will not only increase engagement with educational institutions, but could also increase school safety.[26] "Empirical research…suggests that when individuals view rules or treatment as unfair, compliance is lower and authority is viewed as less legitimate."[27] "[S]chool disorder may not be because of more lenient disciplinary policies, but rather both disorder and policy are a function of the reduction of legitimacy of school-based authority."[28] As a result, the deterrence rationale for harsh discipline in the name of safety is misguided. If students observe disciplinary action that is unduly harsh or unfair, they will not be deterred from engaging in the same behavior, and they will be *less* invested in the school climate and less likely to feel the need to comply with school rules and norms.

A 2020 study that focused on Black students, a population subject to disproportionately high rates of school discipline, recorded the consistent feelings of frustration and marginalization during the disciplinary process.[29] Among the results of the research were statements by students including:

- "I feel like they didn't hear me out."

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[26] (Way, *School Discipline and Disruptive Classroom Behavior: The Moderating Effects of Student Perceptions* (2011), Vol. 52, No. 3, The Sociological Quarterly 346, at p. 346 at https://www.tandfonline.com/doi/full/10.1111/j.1533-8525.2011.01210.x?scroll=top&needAccess=true [as of August 10, 2022].)

[27] (*Id.* at p. 349.)

[28] (*Id.* at p. 350.)

[29] (Charles Bell, Children and Youth Services Review, *Maybe if they let us tell the story I wouldn't have gotten suspended: Understanding Black students' and parents' perceptions of school discipline* (2020), pp. 4-8, at https://www.sciencedirect.com/science/article/abs/pii/S0190740919312034 [as of August 10, 2022].)

- "I just felt like they should have listened to me and let me explain the whole situation."
- "Maybe if they let us tell the story I wouldn't have gotten suspended."[30]

Similarly, their parents "expressed feelings of being ignored throughout the disciplinary period."[31]

Peers observing these processes suffer collateral consequences from seemingly arbitrary enforcement, reducing overall trust in schools and school safety. Expulsions place strain on the communities in which students live. "Non excluded students will likely experience their friends, peers, or relatives being removed from school, potentially weakening their bonds and placing strains on the school community."[32] One study suggested that this breakdown in school communities contributes to a correlation they identified between the severity of exclusionary policies and higher levels of depressive symptoms in non-excluded peers.[33]

Because exclusionary policies have "unintended consequences for the emotional wellbeing of [non excluded] peers,"[34] it follows that when those already harmful policies

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[30] (*Id.* at p. 5.)

[31] (*Id.* at p. 6.)

[32] (*See* Eyllon et al., *Exclusionary School Discipline Policies and Mental Health in a National Sample of Adolescents without Histories of Suspension or Expulsion* (2020), Vol. 54, no. 1, Youth & Society 84, 95, at https://journals.sagepub.com/doi/abs/10.1177/0044118X20959591 [as of August 10, 2022] .)

[33] (*Id.* at p. 93.)

[34] (*Id*. at p. 88.)

are perceived by students as unfair, they can have "important consequences for [students'] sense of justice and self-worth."[35] Much of the research around zero tolerance policies further underscores how, when disciplinary action is enforced unfairly and without transparency, it leads to opposition towards the disciplinary policy and a reduced sense of safety.[36] A study examining the efficacy of zero tolerance policies after more than a decade of implementation reports a sense among students of a, "school environment riddled with double standards"[37] Overall, expulsions, especially those resulting from unfair processes, do the opposite of their intended outcome—they reduce safety by deteriorating student trust in the institution.

3. Due Process Rights Promote Necessary Parental Investment.

In addition to the issue of student disengagement, parents of students facing exclusionary discipline also lack faith in arbitrary disciplinary processes. In a study of families facing disciplinary action whose children have been identified as emotional disturbed, parents said, "they felt powerless because the expulsion procedures were unclear to them, they did not trust the system, they disagreed with the expulsion outcome and/or they just did not have enough knowledge of the expulsion process."[38] As one

[35] (*Id.* at pp. 87-88.)

[36] (McNeal & Dunbar Jr., *In the Eyes of The Beholder: Urban Student Perceptions of Zero Tolerance Policy* (2010), Vol. 53, No. 3, Urban Education 293, 301-308, at https://journals.sagepub.com/doi/10.1177/0042085910364475 [as of August 10, 2022].)

[37] (*Id.* at p. 305.)

[38] (O'Neill*, Key Stakeholder Perceptions of the Expulsion Process for High School Students Identified as Emotionally Disturbed, Dissertation Department of Special*

parent put it, "I knew asking . . . questions wouldn't make the outcome of the meeting different anyway. So, I just sat there quietly."[39] This lack of a sense of purpose in the process contributes to the stark adverse outcomes parents experience as a result of disciplinary processes that do not appear to value their input. "Studies have examined consequences of school discipline on students' parents, finding that the mothers of students facing disciplinary action may experience emotional distress, anxiety about their children's futures, and financial problems relating to obtaining legal representation."[40] Insufficient procedural protections lead to socioemotional tolls on students and their parents, and drives distrust in and disengagement from the education system as a whole.

It is generally accepted, and the California Legislature has acknowledged, that there is a positive correlation between parental involvement or participation and positive outcomes for students.[41] State and federal law build parental involvement requirements into program and funding requirements.[42] The Education Code mandates that parents be

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Education University of South Florida (2007*)*, Graduate Theses and Dissertations, pp. 60 & 86, at http://scholarcommons.usf.edu/etd/2309 [as of August 10, 2022].)

[39] (*Id.* at p. 86.)

[40] (Eyllon et al., *Exclusionary School Discipline Policies and Mental Health in a National Sample of Adolescents without Histories of Suspension or Expulsion, supra,* at p. 87).

[41] (*See* Ed. Code, §§ 51100-51102; California Department of Education, *Family Engagement Framework A TOOL FOR CALIFORNIA SCHOOL DISTRICTS* (2014), pp. 40-41, at https://www.cde.ca.gov/sp/sw/t1/documents/familyengageframe1.pdf [as of August 10, 2022] (outlining the state and federal requirements for parental engagement and the correlation with student success).)

[42] Parent participation is a specific priority that must be addressed annually by districts in the Local Control Accountability Plan (LCAP). (Ed. Code, § 52060, subd. (d)(3).) It is also a required program element for districts that receive funding under the

involved at all stages of discipline.[43] Like their children, parents who are treated with disrespect or are marginalized when dealing with student behavior, have no incentive to work with school site personnel when behavior issues arise. When this plays out in more formal situations, like school discipline proceedings, that feeling of marginalization turns into distrust. Unless parents are given a reasonable opportunity to present relevant context about who their child is, the challenges they have faced, in their school experience apart from the expellable act, then the district cannot and does not fully address what behavior interventions are necessary, or assess whether they were, or should have been taken as an alternative means of correction. Without schools permitting a complete presentation of facts, parents will justifiably continue to believe the school is acting unfairly and arbitrarily.

C. The Court's Decision Validates Current School District Practices That Prevent Families from Access to Due Process to California Expulsion Hearings

The Education Code makes clear that school districts have the clear burden to establish that an expellable offense has occurred and that the student either presents an ongoing danger, or that other means of correction have failed.[44] However, the allocation of that burden becomes a legal fiction when parents are unrepresented and district staff are both making and hearing the case against them at the administrative panel.

ESSA, Title 1 funds for economically disadvantaged students, and Title III funding for English Learners. (ESSA § 1116(a), (b); 20 U.S.C. §§ 6312(e)(3)(c), 6825(c)(3)(a).)

[43] (*See* Ed. Code, §§ 51100-51102, 48980-48985.)

[44] (Ed. Code, § 48915, subds. (a), (b).)

1. Most Families Face Expulsion Hearings Without Legal Representation.

While there have been no comprehensive studies on the percentage of students and families who are represented in school discipline hearings, the landscape of legal service provision in education matters specifically, makes it clear that the vast majority of families face these hearings without representation.

To appreciate the scope of the legal services needed, during the 2018-19 school year – the last full year before the COVID-19 pandemic pushed many schools online – the California Department of Education reports 5,236 students were expelled state-wide.[45] Although no data on the number of expulsion hearings is available, the number of completed expulsions is necessarily less than that of expulsion hearings – since some percentage of student go through a hearing but are not expelled. Additionally, *amici* are aware that in many instances an expulsion proceeding is commenced but resolved by an involuntary transfer or a waiver of rights and "voluntary" transfer to an alternative school. These exits out of a general education setting are not reported as discipline matters. As more than 85 percent of students who were expelled in the state were from "socioeconomically disadvantaged" families[46], it is highly likely that the vast majority of parents faced with advocating for their children's rights fall within this group.

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[45] (California Department of Education, *2018-19 Expulsion Rate*, Data Quest, at https://dq.cde.ca.gov/dataquest/dqCensus/DisExpRate.aspx?cds=00&agglevel=State&year=2018-19&initrow=Eth&ro=y [as of August 10, 2022].)

[46] *Id.* (number of socioeconomically disadvantaged students expelled was 4,559 which is 85% of the 5,236 total.)

The parents of these students face significant challenges in identifying and acquiring legal representation to help them navigate the school discipline process. First, many families often do not know to seek representation for expulsion hearings or will actively decide to represent themselves. Districts frequently encourage these outcomes by presenting expulsion hearings as collaborative rather than adversarial, thus dissuading parents from seeking or even considering legal assistance. These cues lead families to understandably, if mistakenly, worry that involving lawyers would disrupt the relationship between themselves and their child's education providers. Sometimes, however, the suggestion from the District is more explicit. Families have expressed to *amici* that District representatives actively dissuade them from seeking representation, improperly suggesting that adding lawyers would increase the amount of time a student would be out of school pending a resolution.

Second, there are simply few organizations that provide free legal services to low-income Californians in education matters. As recently illustrated in a study by the federally funded Legal Services Corporation, low-income families experience a wide variety of legal problems that substantially affect their lives, including those related to education rights. Ninety-two percent of those surveyed who experienced one or more legal issue reported that they did not receive any legal help or enough legal help for those problems.[47] Although no formal studies exist regarding free legal services focused on

[47] (Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans* (Apr. 2022), p. 8, at https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1 [as of August 10, 2022].)

education issues, *amici* have found that relatively few attorneys or advocates take on these administrative matters and defend students' rights. *Amici* have found that private attorneys are often unwilling (or unable) to take on school discipline cases for which there is no statutory scheme whereby successful parties can collect attorney's fees. The statutes governing school discipline hearings, contrary to the statutes for special education cases, do not contain an attorney fee provision. Thus, private attorneys will typically only take cases from families with means to ensure direct compensation for their work.

Parents turning to nonprofit legal service providers instead will quickly learn that they lack the capacity to meet the need. For example, the Legal Aid Association of California (LAAC) is the leading membership organization for nonprofit legal service providers that serve low-income Californians. Of more than 100 member organizations, just 11 list education as a primary focus. *Amici* are aware of a total of eight nonprofit organizations that regularly provide direct representation in school discipline cases. When polled, these eight providers, most of whom are *amici* in this brief, reported handling a total of under 200 expulsion cases in 2018-2019. Many of these cases were successful, meaning no expulsion was reported. But the total number of students these organizations had the capacity to represent was less than 4% of the 5,236 total number of expulsions, and only 4.3% of the 4,559 socioeconomically disadvantaged students expelled in California that year. This is a stark demonstration of the fact that the nonprofit legal service providers most likely to serve low-income families who make up the majority of school discipline cases are unavailable, or not known to them. Consequently,

it is unsurprising that the vast majority of families in school discipline cases face an uphill battle to obtain legal representation.

2. Expulsion Proceedings Are Stacked Against Families.

School expulsion hearings are stacked against many families from the outset. Because families are generally experiencing the proceedings for the first and only time, they are at a substantial informational and power disadvantage when entering an expulsion hearing. Consequently, the educational rights and futures of students are decided in adversarial hearings that, based on the experience of *amici*, families find incredibly intimidating.[48]

In contrast, as parties with experience, school administrators have the upper hand in disciplinary proceedings. *Amici* liken having an expulsion case heard by a panel of principals[49] from the district to having a criminal case with a jury full of police officers. Cognizant of "parents' and students' failure to understand or enforce their rights," school districts may "cut corners and fail to follow established legal mandates and precedents."[50]

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[48] *Amici* report that the power imbalance in disciplinary hearings causes families to act out of fear when making decisions about their child's future, even agreeing to waive their rights and to school transfers that may not be in the student's best interest simply to avoid expulsion.

[49] The school district may appoint current or former district administrators to "an impartial administrative panel," provided that none are "member[s] of the governing board of the school district or employed on the staff of the school in which the pupil is enrolled." (Ed. Code, § 48918, subd. (d).)

[50] (Frydman & King, *School Discipline 101: Students' Due Process Rights in Expulsion Hearings* (Sept.-Oct. 2006), Clearinghouse Rev. 370, 379, at https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1213&context=facultypub [as of August 10, 2022].)

Because of the difficulty in acquiring legal counsel described above, students and families are at a considerable disadvantage.[51] The intrinsic power imbalance is further exacerbated for low-income families.[52]

School expulsion hearings, while often considered relatively informal, are essentially "mini-trials."[53] Families, with or without counsel, are expected to "present evidence, cross-examine witnesses, and preserve a record for appeal, which can include making objections even though the technical rules of evidence do not apply."[54] In these hearings, school discipline panels routinely and unilaterally decide whether or not such evidence or witnesses may be admitted – and even exceed their discretion by deciding whether a defense is permitted. In this case, the family attempted to call a teacher and a family member in law enforcement as witnesses and was denied the ability to call these witnesses by the panel. This is exemplary of other families who appear unrepresented in expulsion hearings and are left to advocate for themselves with little recourse if the arbiters, using their discretion, exclude relevant evidence – hearsay or otherwise – and prevent them from being heard.

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[51] (Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field* (2016), 45 Seton Hall L. Rev. 471, 488.)

[52] (Upton, *Some Kind of Notice Is No Kind of Standard- The Need for Judicial Intervention and Clarity in Due Process Protections for Public School Students* (2018), 86 Geo. Wash. L. Rev. 655, 660.)

[53] (Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field*, *supra*, at p. 476.)

[54] (*Id.* at pp. 476-77; Ed. Code, § 48918, subd. (b)(5).)

As a result, despite low evidentiary standards relative to civil court,[55] students and families often struggle to put on their own evidence at expulsion hearings. One *amicus* described a case in which a 15-year-old client was unable to attend her expulsion hearing because she was being held in juvenile hall, and the school administration refused to schedule the hearing for a date following the student's release. If not for a recorded statement made by the student's attorney, the student's voice would not have been heard at all in a hearing upon which her education and future depended.

Additionally, *amici* representing students in expulsion hearings describe a persistent double standard for what evidence administrative panels or hearing officers admit. Another *amicus* recounts representing an 8th grade student who was recommended for expulsion for having explosives (firecrackers) in his possession at school. The student maintained that he did not have possession of the firecrackers at any time, and the only evidence against him was a statement of another student, on which the principal built his case recommending expulsion. Testimony from a teacher who had placed the student facing expulsion far away from the location where the firecrackers went off was not allowed to come in during the hearing. Instead, the dean of the school testified for expulsion, stating that whether the student had the firecrackers or not, he had surely caused enough trouble at the school that would make him worthy of expulsion.

In another instance, *amicus* represented a student at a County Office of Education appeal, in which a student had been unrepresented at the student's administrative panel

[55] (Ed. Code, § 48918, subd. (h)(1) ["Technical rules of evidence shall not apply to the hearing"].)

hearing. At the hearing, testimony was elicited from a teacher who had not witnessed the event leading to the expulsion about the fact that the student sometimes had a "mean" look and "stared down" others. Similar to the case at hand, additional charges were added at the expulsion that were not included in the expulsion notice. There was no evidence in the administrative record of alternative means of correction, and none was offered at the hearing. Yet on the basis of the admitted evidence, and with little concern for relevant evidence the District failed to adduce, the panel and school board decided to expel. At the County Office of Education hearing, newly retained counsel for the student asked the school administrator what alternative means of correction were available and tried. The administrator admitted there were none. The County Office of Education there, like here, reversed that expulsion.

In each of these exemplary expulsion cases, students and their families were subject to the discretion of school administrators. These administrators understand the rules of the game in far more sophisticated detail than unrepresented students and families can be expected to, and have an incentive to, use the system to support a decision made by their superiors or peers. Consequently, expulsion cases often take place on an uneven playing field.

D. Justice Demands Stronger Due Process Protections, Particularly the Right of Appeal to the County Board of Education.

1. The Right to Appeal to the County Board is Critical to Ensuring Fairness.

The anti-student, anti-parent presumptions described in the preceding sections, though at odds with the Education Code, are perhaps to be expected. The district is, after

all, defending its own teachers, its own administrators and, from its perspective, protecting other students. It is perhaps unrealistic to expect an administrative panel comprised of teachers and staff from that district, or the local school board to act objectively when weighing the subjective decision of a teacher or principal about whether a student should be expelled, against the evidence presented by the student or parent. That is why the Legislature created an additional level of appeal, to the County Board of Education, whose members are not defending their own districts actions, and are not burdened with the implicit bias in favor of the decisions made by co-workers. The Superior Court in its decision ignored and demeaned this critical check and balance.

When a student's education and future are at risk, a fair hearing is critical to ensure a just outcome. The systemic lack of representation for students and families and the nature of expulsion hearings result in an immense power differential between school administrators and students and their families. This imbalance makes a fair process – including the right of appeal to the county board – ever more important. Short of doing away with punitive school discipline or providing a right to counsel, the solution is to increase the dignity of students facing expulsion by maximizing due process protections. At district level expulsion hearings "where proper procedures are routinely ignored," appeals to the county board of education can be "quite effective in forcing school districts to follow the law."[56]

[56] (Frydman & King, *School Discipline 101: Students' Due Process Rights in Expulsion Hearings, supra*, at p. 379.)

California undertakes its constitutional duty to provide a free school system by delegation of responsibility to local school districts. This notion of "local control" is reflected throughout the Education Code which recognizes both the interests of school districts and elected county boards of education in promoting the education of the students that reside in their area.[57] In the first instance local school districts are given broad discretion to run their schools. However, that discretion is not unfettered, and particularly not in the context of discipline.

Section 48900 specifies the behavior that may result in expulsion and section 48915 imposes limits on when the district may exercise their discretion to expel by requiring specific findings. The Legislature then added a local layer of review by the County Office of Education. (Ed. Code, § 48919). This preserves that notion of local control, while recognizing the inherent self-interest that a school district has in supporting its decisions requires an objective review. This commitment to local control is underscored by the fact that there is no state-level administrative review of an exclusion from California's public school system. The County Office of Education is the last informal administrative remedy that a student and parent may invoke before filing a Code of Civil Procedure section 1094.5 writ. It is also a mandatory step and precursor to such a

[57] The County Office of Education is charged with a number of duties related to the operation of local school districts. These include review and approval of each district's Local Control and Accountability Plan. (Ed. Code, § 52070.) which by statute must address school climate, which includes pupil suspension and expulsion rates and the sense of safety and connectedness. (Ed. Code, § 52060, subd. (d)(6).) The County Office of Education is also responsible for developing a County wide plan for service to expelled students in conjunction with local school districts. (Ed. Code, § 48926.)

writ.[58] The county offices of education are uniquely suited for this role as they are responsible for providing services to expelled students through community schools.[59] They also provide technical assistance to districts that fail to meet their goals for services in the priority areas identified in their LCAP, including those related to school climate such as expulsions and suspensions.[60]

It is this highly qualified body in which the Legislature has vested the final, local administrative decision. It is that decision, not the decision of the school district that is the subject of review by the Superior Court. Yet, the court below disregarded that review in a manner best summed up by quoting the court directly:

> Whether this court believes that other means of disciplinary action could be administered is not germane to the evaluation of the evidence…. NUSD had substantial evidence to expel I.O. Deference is thus accorded to NUSD.[61]

With those lines the court both relieved NUSD of its duty to consider alternative means of correction, imposed by 48915(b) AND eviscerated the protection from bias afforded by the Legislature through of the local review mandated by 48919. Justice demands stronger due process protections than those afforded by the Superior Court, including deference to the appellate decision of the County Board of Education.

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[58] (Code Civ. Pro., § 1094.5, subd. (a).)

[59] (Ed. Code, § 1981.)

[60] (Ed. Code, §§ 52071, 52060.)

[61] (2AA-421.)

2. The Attorney Fees Awarded by the Superior Court Interfere with the County Board's Delegated Purpose of Acting as a Check-and-Balance Branch in School Discipline.

The County Board of Education has a limited authority under California Education Codes §48919-48922 as the administrative body charged with reviewing the action taken by a school district in its expulsion process. The county board is not the initiating party and does not subject the district to such a review on its own motion. It responds, as it is required to, when a parent/student seeks review of an expulsion, as part of the due process protections designed to ensure that there is not an arbitrary deprivation of educational rights. The trial court's imposition of an attorneys' fees award is an unprecedented punishment of an agency for complying with its statutory mandates, designed to put pressure on county boards to continue the rubber stamping of expulsion decisions made by local administrators. Here, the Sacramento County Board of Education pursuant to Education Code section 48919 conducted an appeal hearing and reversed the decision of the district. For doing nothing more than exercising its non-discretionary mandate to review an appealed expulsion, the District sought, and the trial court awarded attorneys' fees.

This monetary sanction against it, for fulfilling its statutory duty, establishes a bad precedent. It conveys a threat to county boards that if you dare to overrule a district for violating the educational rights of students, parents, and guardians, the district may come after you for hefty attorney fees. It turns a neutral, statutory reviewing body into one that has a monetary interest in upholding the very decision it is charged with scrutinizing.

This is tantamount to this court ordering the Superior Court to pay fees to Appellants and Real Parties in Interest in the event they are successful in this appeal.[62]

The sum of $154,678.50 is not a small sum; it is an amount that will necessarily weigh on the minds of other County Boards when considering appeals brought before them. This fear will erode the entire foundation of the administrative appeal process and prevent the county boards from fulfilling their designed purpose of acting as a neutral check-and-balance branch in expulsions.

The county board's role is not to simply rubber stamp a District's expulsion decisions. If the Superior Court's attorney fees ruling is permitted to stand, it will create one more impediment for students, parents, and guardians who seek a fair and impartial review, as guaranteed by Education Code sections 48919-48922.

III. CONCLUSION

Amici urge the court to look to the Due Process protection in school discipline cases as a core principle in this appeal. When Due Process protection is enforced, we build students' and parents' confidence in those procedures, and our legal system generally. Students subject to discipline, as well as their peers, recognize schools' authority as valid. Parents see administrators as partners in their child's future, rather than

[62] While this analogy may seem far-fetched, consider the other impact such a decision would have on other independent, administrative review bodies such as the California Unemployment Insurance Appeals Board, if it were ordered to pay fees to Employment Development Department under Civil Code section 1021.5, for merely fulfilling its statutory duty. This is more accurate, because there are limited circumstances when a claimant could get fees.

wardens of it. Simply put, Due Process values matter. Because public schools are the "nurseries of democracy," the benefits they generate in students and parents pays lifelong, community-wide dividends for our society.

In this case, Due Process was denied at every step. A school exercised arbitrary discretion to expel a child from school. A family, proceeding without a lawyer, was whipsawed by a process in which district staff acted as judge and jury. The checks and balances system the Legislature imposed to protect them for such inequity worked, and the County Board of Education reversed the erroneous decision. The Superior Court's complete disregard for the decision of that body, and total deference to the school district, undermines that system and eviscerates the due process protections afforded I.O.

As it stands, the decision degrades the little protection afforded to families in school disciplinary proceedings. *Amici*, as providers of legal services for families in school discipline, can predict the grave consequences that will flow if this court affirms the Superior Court's decision. It will send a message of tolerance to school districts who fail to follow the procedural protections afforded students and their families. Further, the prospect of an award of attorneys' fees will be impossible to for county boards to ignore when reviewing other cases and will create one more impediment for parents and students who hope that a neutral body will vindicate their children.

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Thus, to bring justice to the current appellant and protect families in California, we urge the Court to recognize the central role that the right to Due Process protection plays in school discipline cases and reverse the Superior Court decision.

Dated: August 18, 2022

Respectfully submitted,

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Nonprofit Expulsion Representation Providers

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the foregoing **[Proposed] Amicus Curiae Brief of Nonprofit Expulsion Representation Providers** contains **8,248** words, including footnotes, as counted by the Microsoft Word program used to generate the document. The brief is set in proportionately spaced 13-point Times Roman typeface.

DATED: August 18, 2022

/s/ Abigail Trillin
Abigail Trillin

PROOF OF SERVICE

I, Abigail Trillin, hereby declare:

I am a U.S. citizen, over the age of 18 years, an active member of the State Bar of California and not a party to the instant action. My electronic service address is atrillin@law.stanford.edu and my business address is 559 Nathan Abbott Way, Stanford, CA 94305.

On the date set forth below, I caused to be served the within **[Proposed] Amicus Curiae Brief of Nonprofit Expulsion Representation Providers** *via* First Class U.S. Mail on the following interested party or agency by placing one true copy of the above-listed document in a sealed envelope and with postage fully pre-paid, in a collection box regularly maintained by the U.S. Postal Service at Palo Alto, California, addressed as follows:

Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

Executed this 18th day of August 2022 at Stanford, California.

/s/ Abigail Trillin
Abigail Trillin