St. Mary's Law Journal

Volume 7 | Number 2 Article 2

6-1-1975

Student Suspension and Expulsion Proceedings in Tax Supported Institutions: What Process Is Due.

Marc I. Steinberg

STUDENT SUSPENSION AND EXPULSION PROCEEDINGS IN TAX SUPPORTED INSTITUTIONS: WHAT PROCESS IS DUE?

MARC I. STEINBERG*

The procedural due process rights which students attending tax supported institutions enjoy in suspension and expulsion disciplinary proceedings is a subject of rapidly increasing interest. Before discussing these rights, however, it is first necessary to define the term "procedural due process."[1] In examining this concept, courts have concluded that it cannot be defined precisely but must be viewed in terms of what is just and reasonable, considering all relevant circumstances.[2] Thus procedural due process has been defined in the following terms:

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . . Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with different types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.[3]

---

* A.B., University of Michigan; J.D., University of California at Los Angeles.

1. U.S. CONST. amend. XIV states in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law." Within the context of the fourteenth amendment, tax supported institutional (*e.g.* public school) action is considered state action. As stated by the court in Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970):

> [I]t must not be forgotten, however small the community, however familiar to one another the characters in the drama, that when a school board undertakes to expel a public school student, it is undertaking to apply the terrible organized force of the state just as surely as it is applied by the police, the courts, the prison warden or the militia.

Id. at 707.

2. Sims v. Board of Educ., 329 F. Supp. 678, 683 (D.N.M. 1971); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1060 (1969).

3. Hannah v. Larche, 363 U.S. 420, 442 (1960); *see* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (concurring opinion). *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958). In determining whether due process requires a prior hearing, Professor Davis has stated:

> The true principle is that a party who has a sufficient interest or right at stake in a

Hence, the relevant question here is whether students attending tax supported institutions have procedural due process rights which are abridged if those students are suspended or expelled without being accorded these procedural rights. The answer to this question generally differs in relation to the severity of the action taken by the school. Thus, students are entitled to greater procedural rights when they are subject to expulsion than when short suspensions are at issue.

This article will examine the different procedural safeguards which students enjoy in connection with the various disciplinary measures imposed by public school authorities. First, the procedural due process rights which students have when they are subject to suspensions of up to 10 days will be discussed, followed by an examination of the issue of longer suspensions lasting from 10 days to three months. Finally, the procedural due process rights which students enjoy when they are subject to suspensions longer than three months and expulsions will be discussed.

SUSPENSIONS OF UP TO TEN DAYS

Until very recently, several courts had concluded that the imposition of brief suspensions without a hearing did not deprive the affected students of due process of law.[4] For instance, the United States Court of Appeals for the Seventh Circuit concluded that the Due Process clause was inapplicable to a seven day suspension in *Linwood v. Board of Education*.[5] And in *Dunn v. Tyler*,[6] the Fifth Circuit decided that three day suspensions did not abridge the Clause. *Goss v. Lopez*,[7] decided by the Supreme Court in January of this year, confronted this

---

determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts except in the rare circumstances when with some other interest, such as national security, justifies an overriding of the interest in fair hearing.

Id. at 115.

4. *See, e.g.*, Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438, 443 (5th Cir. 1973); Hatter v. Los Angeles City High School Dist., 310 F. Supp. 1309, 1312 (C.D. Cal. 1970), *rev'd on other grounds*, 452 F.2d 673 (9th Cir. 1971); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 523 (C.D. Cal. 1969).

5. 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972). In holding that due process was inapplicable to a seven day suspension, the Seventh Circuit concluded: "We are of the view that a suspension for so relatively a short period for reasonably proscribed conduct is a minor disciplinary penalty which the legislature may elect to treat differently from expulsion or prolonged suspension without violating a constitutional right of the student." *Id.* at 768-69.

6. 460 F.2d 137, 146 (5th Cir. 1972).

7. —U.S.—, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

very issue and held that procedural due process applies to suspensions of 10 days or less. The Supreme Court's decision thus guarantees to every student attending a public institution certain minimal safeguards when he is subject to such disciplinary measures by school authorities.

In arguing that the Due Process Clause did not apply to short suspensions, school boards had asserted that the finances and efficiency of the schools would be strained and that the process would result in a disruption of the academic atmosphere.[8] The Supreme Court rejected these contentions in *Goss*, the majority observing that these "young people do not 'shed their constitutional rights' at the schoolhouse door."[9] Hence, in possessing the authority to prescribe and enforce guidelines of conduct in its schools, the state must exercise this power consistent with constitutional principles.[10]

In defining the constitutional safeguards to which the public schools must adhere, the Court observed that having extended access to education to individuals of appellees' class generally, the state may not withdraw that entitlement on grounds of misconduct without assuring fundamentally fair procedures to assess whether the misconduct actually occurred. In advancing this principle, the Court recognized a protected "property interest" in public education, which "may not be taken away for misconduct without adherence to the minimum procedures required by" the Due Process Clause.[11]

Due process prohibits the arbitrary deprivation of liberty. This concept demands that the minimal requirements of the Due Process Clause must be fulfilled if the government injures an individual's good name, reputation, honor or integrity.[12] In the case at hand, the Court noted that school authorities suspended students from school for periods of 10

---

8. Note, *Nichols v. Eckert: Due Process Rights of Non-Tenured Teachers to Pre-Termination Hearings*, 4 UCLA-ALASKA L. REV. 180, 194 (1974).

9. Goss v. Lopez, —U.S. —, —, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725, 734 (1975). In Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969), quoted with approval in *Goss*, the Court stated:

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

Id. at 511.

10. Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725, 734 (1975).

11. *Id.* at —, 95 S. Ct. at 736, 42 L. Ed. 2d at 735. The Court recognized that although the state has broad authority to operate its schools, this authority must be exercised in such a manner so as to not abridge the constitutional rights of its students.

12. *Id.* at —, 95 S. Ct. at 736, 42 L. Ed. 2d at 735; Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

days or less because of alleged misconduct. In being subjected to such penalties, the student has an important liberty interest—reputation—at stake.[13] Thus, the Court concluded that a student in a tax supported institution has a liberty interest in reputation as well as a property interest in public education. Both of these interests demand that school authorities comply with the minimum safeguards of due process before suspending a student for any duration of time whatsoever.[14]

Upon determining that due process applies to suspensions of 10 days or less, the Court next considered "what process is due."[15] Although due process is a flexible concept, the Court noted that certain minimal procedures are required. Generally, these procedures mandate that the student facing suspension "must be given *some* kind of notice and afforded *some* kind of hearing."[16] In arriving at this conclusion, the majority reasoned that the student's interest is to have an opportunity to explain his version of the case so that he is not mistakenly or unfairly excluded from the educational institution, with all of its damaging consequences. Because school authorities do commit errors in imposing disciplinary measures and because this possibility of error is not at all remote, the Court concluded:

> [D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[17]

The Court noted that, generally, "[t]here need be no delay between

---

13. Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725, 735 (1975), where the Court recognized this interest by asserting:

> If sustained and recorded, those charges 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. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Id. at —, 95 S. Ct. at 736, 42 L. Ed. 2d at 735.

14. *Id.* at —, 95 S. Ct. at 736, 42 L. Ed. 2d at 734-35.

15. *Id.* at —, 95 S. Ct. at 738, 42 L. Ed. 2d at 737; Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

16. Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 738, 42 L. Ed. 2d 725, 737 (1975) (emphasis original). This notice may be oral or written. In reaching this conclusion, the Court relied upon the language in Baldwin v. Hale, 68 U.S. [1 Wall.] 223 (1863): "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." *Id.* at 233.

17. Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 740, 42 L. Ed. 2d 725, 739 (1975). As stated by Mr. Justice Frankfurter, concurring in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951): "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id.* at 171-72.

the time 'notice' is given and the time of the hearing."[18] Because of this fact, notice to the student and the subsequent hearing should normally be conducted prior to the removal of the pupil from school. There may exist circumstances, however, such as a student who poses a dangerous threat to persons or property or a substantial threat to disrupt the educational process, where the hearing should be held as soon as practicable after the student is removed from school.[19]

In determining what additional rights a student should have in such a suspension proceeding, the Court held that the Due Process Clause does not generally require that the student be afforded the presence of legal counsel, nor the opportunity to confront, cross-examine, or call witnesses.[20] The Court did state, however, that the disciplinarian is free to provide the student access to these safeguards if the complexity of the case demands it. In adopting this approach, the Court addressed itself solely to the short suspension of 10 days or less. In unusual circumstances, more than these rudimentary procedures may be necessary, even though only a short suspension is at issue. Furthermore, the Court concluded that for "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[21]

The Supreme Court's holding in *Goss* assures students attending tax supported institutions of certain procedural due process rights before school authorities may suspend them, even if that suspension is only for one day. The issue arises as to what additional safeguards students enjoy if they are subject to longer suspensions or expulsions. The Supreme Court has not yet confronted this question, but several lower courts have had to deal with this issue.

LONGER SUSPENSIONS

Before the Supreme Court's holding in *Goss*, there was some author-

18. Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 740, 42 L. Ed. 2d 725, 739 (1975).

19. *Id.* at —, 95 S. Ct. at 740, 42 L. Ed. 2d at 739; *see* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969). Where there is violence and rioting on the campus, Professor Wright observes that the conditions for holding disciplinary proceedings would be far from ideal. In such a situation, he believes that "there must be power in a university, when circumstances compel it, to suspend students summarily pending a later hearing at which they will be given all of the ordinary procedural protections." *Id.* at 1074.

20. Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 740, 42 L. Ed. 2d 725, 740 (1975). In ordinary circumstances, the Court believed that the utilization of these formal procedures would greatly hamper the effectiveness of the educational process.

21. *Id.* at —, 95 S. Ct. at 741, 42 L. Ed. 2d at 740.

ity that students did not have due process safeguards in regard to suspensions of 10 days to three months duration. One federal district court held that the Due Process Clause was inapplicable to suspensions of 25 days.[22] In light of *Goss*, however, it is clear that students subject to suspensions which are longer than 10 days enjoy, at a minimum, those procedural safeguards enumerated in that decision.

The question must be asked whether students subject to these longer suspensions have greater rights than those provided for in *Goss*. The answer largely depends upon the severity of the suspension. Generally, the longer the duration of the suspension, the more likely that a court will provide a student with the same safeguards as those guaranteed for students who are subject to expulsion. The closer a suspension is to the 10 days suspension, on the other hand, the more probable that a court will provide the student with only the *Goss* minimal standards.

Applying the above principles to relevant cases, in a case where students were suspended from February until May without being accorded any due process rights, the United States Court of Appeals for the Fifth Circuit concluded that the nature of the injury required that the students should have been accorded the same procedural due process rights as those provided for students subject to expulsion.[23] Similarly, in *Williams v. Dade County School Board*,[24] the same court held that students faced with 30 to 40 day suspensions should have access to those procedural guarantees available in expulsion hearings. A federal district court, in *Givens v. Poe*,[25] concluded that expulsion-like procedural safeguards must be afforded to students who are subject to "suspension for any considerable period of time."[26] On the other hand, in regard to a 10 day suspension, a federal district court held that most, but not all, of the guarantees provided for in expulsion proceedings apply as well to suspensions of 10 days.[27] In *North Fort Myers Junior-Senior High School v. Williams*,[28] the Fifth Circuit held that due process

22. Hernandez v. School Dist. No. 1, 315 F. Supp. 289, 293-94 (D. Colo. 1970).

23. Pervis v. La Marque Ind. School Dist., 466 F.2d 1054, 1058 (5th Cir. 1972); *see* Sullivan v. Houston Ind. School Dist., 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973).

24. 441 F.2d 299 (5th Cir. 1971). "To deprive even a high school student, 'in these days,' of 40 school days may indeed cause serious harm." *Id.* at 302.

25. 346 F. Supp. 202 (W.D.N.C. 1972).

26. *Id.* at 209.

27. Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 292 (S.D. Fla. 1970), *vacated and remanded*, 401 U.S. 988 (1971). In particular, the district judge held that due process did not require the proceeding to be held prior to the suspension.

28. 470 F.2d 957 (5th Cir. 1972).

applies to 10 day suspensions but stated: "When the punishment to be imposed is minimal, full compliance with the requisites outlined in [expulsion proceedings] is not required."[29] Although there are few cases on point, it may be fairly concluded that as the length of the suspension approaches the 10 day limit with which the Supreme Court dealt in *Goss*, the lower courts will likely provide the student with only the *Goss* safeguards. Where the suspension exceeds 30 days, however, then the courts will probably secure for the student the same procedural guarantees which are provided for students who are faced with expulsion.

PROLONGED SUSPENSIONS AND EXPULSIONS

Until approximately 15 years ago, students who were subject to prolonged suspensions—those longer than three months—or expulsions did not enjoy any due process rights.[30] Commenting on this situation in 1957, Professor Seavey observed:

> [O]ur sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.[31]

Four years later, in *Dixon v. Alabama State Board of Education*,[32] the United States Court of Appeals for the Fifth Circuit recognized that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."[33] The court further held that the student must be supplied with the names of hostile witnesses and an oral or written report as to their testimony. He should also have the opportunity to present to the hearing authori-

29. *Id.* at 958, *quoting* Pervis v. La Marque Ind. School Dist., 466 F.2d 1054, 1058 (5th Cir. 1972).

30. *See* W. O'HARA & J. HILL, THE STUDENT/THE COLLEGE/THE LAW 120-21 (1972). The authors summarize the traditional approach in the following terms:

> The earliest views of education in America regarded attendance at a college or university, be it public or private, as a privilege that could be denied or revoked by the institution. Being a privilege, the due process provisions of the Constitution of the United States were not applicable, and dismissal could occur largely at the discretion of the institution.

Id. at 120-21.

31. Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406, 1406-07 (1957).

32. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

33. *Id.* at 158.

ties his own defense which may include oral testimony or written affidavits of witnesses. In establishing these guidelines, the court pointed out that its decision "is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required."[34] Rather, a hearing at which an impartial tribunal has the opportunity to listen to both sides in considerable detail fulfills the requirements of due process of law.

The *Dixon* decision has been accepted throughout the federal courts as establishing minimal standards for prolonged suspension and expulsion procedings. Numerous courts, while adhering to the *Dixon* procedures, have elaborated upon them. In an *en banc* proceeding, the United States District Judges for the Western District of Missouri concluded that three minimal due process requirements apply in cases involving prolonged suspensions or expulsions: notice to the student of the pending charges, a fair hearing, and disciplinary action based only on grounds supported by substantial evidence.[35] In promulgating these guidelines, the judges also indicated that under normal circumstances procedural due process does not require that the student be entitled to confront and cross-examine adverse witnesses, to secure legal counsel, to be afforded a public hearing, to have warnings about privileges, or to enjoy any other protective measure. The court did leave open the possibility, however, that in an exceptional case due process may require the use of one or more of these devices.[36]

Similarly, *Esteban v. Central Missouri State College*[37] held that in regard to expulsion proceedings, "procedural due process must be afforded . . . by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures."[38] In *Vought v. Van Buren Public Schools*,[39] the district judge held an expulsion hearing must be "conducted in accordance with the guidelines laid down in *Dixon*."[40] These

34. *Id.* at 159. In electing not to compel the school to furnish a full-dress adversary proceeding the Fifth Circuit contended that "[s]uch a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out." *Id.* at 159.

35. General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147 (W.D. Mo. 1967) (*en banc*).

36. *Id.* at 147-48.

37. 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1971).

38. *Id.* at 1089.

39. 306 F. Supp. 1388 (E.D. Mich. 1969).

40. *Id.* at 1393. There have been other decisions adhering to the *Dixon* standards in prolonged school suspension or expulsion proceedings: Hagopian v. Knowlton, 470 F.2d

decisions thus represent the general view that Dixon procedures are the minimal guidelines required by the Due Process Clause.

Although a majority of courts have held that under normal circumstances a student in a prolonged suspension or expulsion proceeding does not have the right to confront and cross-examine witnesses or to secure legal representation, there is a rapidly growing minority of courts which have held otherwise. Probably the most influential of these decisions is *Black Coalition v. Portland School District No. 1*,[41] decided in 1973 by the United States Court of Appeals for the Ninth Circuit, holding that procedural due process requires that students subject to prolonged suspensions or expulsions must be provided "a hearing at which the student could be represented by counsel and, through counsel, present witnesses on his own behalf, and cross-examine adverse witnesses."[42] These decisions thus represent the growing viewpoint that due process requires, in addition to the *Dixon* procedures, the right for students to employ legal representation and to confront and cross-examine the witnesses against them.

Reflections On the Goss and Dixon Standards

In *Goss v. Lopez*,[43] the United States Supreme Court established certain procedures to which school authorities must adhere before suspending a student for up to 10 days. In promulgating these standards, the Court held that, under normal circumstances, due process does not require that students be afforded the opportunity to secure legal representation nor to confront, cross-examine, or call witnesses.[44] Hence, the question must be asked whether students should be provided these safeguards in short suspension proceedings.

In determining whether students should be afforded these guarantees, the school boards' interests must also be considered. By providing students fullscale hearings, it is argued that such a procedure would im-

201, 211 (2d Cir. 1972); De Jesus v. Penberthy, 344 F. Supp. 70, 74 (D. Conn. 1972); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970); Soglin v. Kauffman, 295 F. Supp. 978, 990 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

41. 484 F.2d 1040 (9th Cir. 1973); *accord*, Fielder v. Board of Educ., 346 F. Supp. 722, 730 (D. Neb. 1972) (cross-examination required in expulsion proceedings); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (right to counsel and confrontation of witnesses); *see* Esteban v. Central Mo. State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

42. Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973).

43. — U.S. —, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

44. *Id.* at —, 95 S. Ct. at 740, 42 L. Ed. 2d at 740.

pose great burdens upon the finances and efficiency of the schools and would cause disruption of the academic atmosphere.[45] In relation to short suspension proceedings, these arguments appear to have merit. The dissenters in *Goss* pointed out that studies have indicated approximately 10 per cent of the junior and senior high school pupils sampled were suspended at least once during a given academic year.[46] To provide these large numbers of students with elaborate hearings would leave school authorities with "time to do little else."[47] Writing for the minority, Mr. Justice Powell recognized this fact:

> Suspensions are one of the traditional means . . . used to maintain discipline in the school. It is common knowledge that maintaining order and discipline decorum in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years.[48]

The majority also recognized the severity of the discipline problem throughout the schools: "Brief disciplinary suspensions are almost countless."[49] In view of the increasing use of this disciplinary measure, Mr. Justice White concluded that the employment of formalized procedures would greatly hinder the efficiency of the educational process.[50]

The Court's reasoning in *Goss* is certainly persuasive. In viewing procedural due process, "[t]he touchstones in this area are fairness and reasonableness."[51] By securing the student a hearing at which he may present his side of the story, the Court has fulfilled these requirements. At the same time, it has not burdened the efficiency and finances of the schools.[52]

---

45. *See* Note, *Nichols v. Eckert: Due Process Rights of Non-Tenured Teachers to Pre-Termination Hearings*, 4 UCLA-ALASKA L. REV. 180, 194 (1974).

46. Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 745 n.10, 42 L. Ed. 2d 725, 745 n.10 (1975) (dissenting opinion).

47. *Id.* at —, 95 S. Ct. at 745, 42 L. Ed. 2d at 745.

48. *Id.* at —, 95 S. Ct. at 745, 42 L. Ed. 2d at 745.

49. *Id.* at —, 95 S. Ct. at 740, 42 L. Ed. 2d at 740.

50. Mr. Justice White further stated:

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

Id at —, 95 S. Ct. at 740-41; 42 L. Ed. 2d at 740.

51. Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970); *see* Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1060 (1969).

52. *See* Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 740, 42 L. Ed. 2d 725, 740 (1975), where the Court observed: "[W]e have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."

It is submitted, however, that an entirely different approach should be adhered to when prolonged suspension or expulsion hearings are at issue. At these proceedings, public school students should be provided the safeguards of securing legal representation and of confronting and cross-examining adverse witnesses. Contrary to the brief suspension, the prolonged suspension or expulsion occurs much more infrequently and, as recognized by Mr. Justice Powell, "is an incomparably more serious matter than the brief suspension . . . ."[53]

High school students, as well as collegiates, suffer grievous injury if they are subjected to prolonged suspensions or expulsions. Courts have taken "judicial notice of the social, economic and psychological value and importance today of receiving a public education through twelfth grade."[54] The possible consequence of such disciplinary action is that the student may decide not to pursue his education.[55] If he does continue, he may feel deep resentment and hostility against the educational system. In any event, the student may not receive the value from his education he would have otherwise received. The possible result of the prolonged suspension or expulsion experience is that the student will not acquire the amount of education which he needs to achieve his career goals.[56]

---

53. *Id.* at —, 95 S. Ct. at 742 n.2, 42 L. Ed. at 741 n.2 (dissenting opinion); *see* Fielder v. Board of Educ., 346 F. Supp. 720, 722 (D. Neb. 1972), where the district judge recognized that the "[d]eprival of a student of a right to education is a solemn act, pregnant with painful consequences." Fielder v. Board of Educ., 346 F. Supp. 720, 722 (D. Neb. 1972). The district judge's observation is consistent with the Supreme Court's approach in its landmark decision, Brown v. Board of Educ., 347 U.S. 483 (1954), in which the Court concluded:

> Today, education is perhaps the most important function of state and local governments. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. The seriousness of this disciplinary measure was recognized by the *Dixon* court:

> It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.

Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

54. Givens v. Poe, 346 F. Supp. 202, 208 (W.D.N.C. 1972), *quoting* Breen v. Kahl, 296 F. Supp. 702, 704 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

55. Givens v. Poe, 346 F. Supp. 202, 208 (W.D.N.C. 1972).

56. As stated by the *Dixon* court, without sufficient education, the student will "not be able to earn an adequate living, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *See also*

By being subjected to such an irreparable injury, it is difficult to perceive how the school's interest can be considered paramount to that of the student's. The financial costs and the possibility of disruption in the efficiency of the educational process are minimal when compared to a student's entitlement to public education. The imposition of severe disciplinary measures could very well signify the termination of that pupil's education and his hopes for a better life. For the school, the disruption rationale is, at most, a speculative theory. It would be the highly unusual case where disruption of the educational process would be caused by affording the student these extra safeguards. Furthermore, prolonged suspension or expulsion hearings are not everyday affairs. They are relatively rare, especially in relation to the large number of brief suspensions imposed by school authorities.[57]

The procedural guarantees which students seek are basic to the assurance that fundamental fairness will be accorded in these severe disciplinary proceedings. The potential benefits of counsel are indisputable. To the confused, apprehensive student facing expulsion, presence of counsel will enable him to confront the charges with greater confidence that the hearing authorities will believe him. It must be remembered that the student, although perhaps an adult by legal standards, is inexperienced in these matters. He is possibly faced with a penalty which can ruin his future, ostracize him from certain groups, and cause great embarrassment to his family and friends.[58] Confronted with such a traumatic experience, it is no small wonder that the student may be afraid and unsure of himself. In such a situation, presence of counsel is necessary for the student to have a fair hearing. At the very least, the burden should be placed upon school authorities to show that the student was not prejudiced by the absence of counsel.[59]

Givens v. Poe, 346 F. Supp. 202, 208 (W.D.N.C. 1972). In Vought v. Van Buren Schools, 306 F. Supp. 1388 (E.D. Mich. 1969), the district judge noted that "a record of expulsion from high school constitutes a lifetime stigma." *Id.* at 1393.

57. *Cf.* Goss v. Lopez, — U.S. —, —, 95 S. Ct. 729, 745 n.10, 42 L. Ed. 725, 745 n.10 (1975) (dissenting opnion).

58. *See* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 577 (1971).

59. As stated by one commentator:

> [D]enial of the right to be represented by retained counsel produces an unconstitutionally unfair hearing unless the school comes forward with an affirmative showing that serious adverse consequences would result from counsel's participation or that the potential advantages of legal representation were clearly supplied through other procedural safeguards.

Id. at 612; *see* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969), where the author states:

The purpose of the prolonged suspension or expulsion hearing is to ascertain the truth. According to Dean Wigmore, the use of cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[60] In minor disciplinary actions, the expenditure of time and finances, the possible negative consequence of eliminating sources of information, and the potential for destroying in-school relationships may very well outweigh the benefits of cross-examination.[61] But when a student's reputation and career are at stake, as they clearly are in severe disciplinary proceedings, then fundamental fairness and reasonableness demand that the student be provided the right to confront and cross-examine his accusers. When the accuser lacks direct knowledge or feels hostility toward the student, the need for cross-examination is imperative. Unfortunately, this lack of personal knowledge or sentiment of hostility may only become known upon cross-examination. Furthermore, much of the ability of this technique "lies in its capacity to expose latent truth unknown by all until it surfaces."[62] Thus, it is submitted that the disadvantages to the school board by allowing cross-examination in severe disciplinary proceedings are far outweighed by both the interests of the student and society in securing a fair hearing. When such important elements as reputation and property interests are at issue, fairness should require that the student be afforded the fundamental safeguard of due process.[63]

If 'fairness, impartiality and orderliness—in short, the essentials of due process' require, as has recently been held, both the right to counsel and, where it is needed, to appointed counsel in proceedings for determination of juvenile delinquency, I do not see why they do not require recognition of similar rights in major disciplinary proceedings.

Id. at 1075.

60. 5 J. WIGMORE, EVIDENCE § 1367, at 29 (3d ed. 1940); *see* Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Jenkins v. McKeithen, 395 U.S. 411, 428 (1969); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-104 (1963). In *Goldberg*, the Court observed: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

61. *See generally* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 603 (1971).

62. *Id.* at 603.

63. *See* Joint Statement on Rights and Freedoms of Students in W. O'HARA & J. HILL, THE STUDENT/THE COLLEGE/THE LAW 209 (1972). This statement, which enumerates the rights and freedoms of students, has been endorsed by such organizations as the American Association of University Professors, United States National Student Association, Association of American Colleges, American Association for Higher Education and the American College Personnel Association. The statement provides that the student should have the right "to be assisted in his defense by an adviser of his choice . . . and should have an opportunity to hear and question adverse witnesses." *Id.* at 217.

CONCLUSION

In *Goss v. Lopez*,[64] the Supreme Court held that students attending tax supported institutions have important property and liberty interests at stake when they are suspended from school, even for only one day. Because of these interests, students must be afforded minimal procedural due process rights when they are subject to suspensions of up to 10 days. What additional guarantees should be provided when students are confronted with prolonged suspensions or expulsions, however, are still unsettled. The Fifth Circuit's holding in *Dixon v. Alabama State Board of Education*[65] has generally been accepted throughout the country as establishing minimal standards for severe disciplinary proceedings. An increasing minority of courts, while adhering to *Dixon*, hold that due process also requires that students be given the opportunity to secure legal representation and to confront and cross-examine the witnesses against them. Because of the gravity of the charge and the ensuing consequences if these severe penalties are imposed, students should be afforded the above safeguards.

64. — U.S. —, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).
65. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).