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Goss v. Lopez, 95 S. Ct. 729 (1975)

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Courts following the *Fountaine* rule, recognizing the prejudice that exists in American society, have treated race as a relevant factor in custody proceedings in order to spare children the harmful effects assumed a priori to result from such prejudice. But it has been clear since *Brown v. Board of Education*[60] that the existence of prejudice does not compel courts to allow discrimination to follow in its wake. "Is it good public policy . . . to require people who have no prejudices to conform to the standards of the prejudiced? . . . [I]s it wise to require the socially healthy to keep step with the socially ill?"[61] The answer must be no.

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Constitutional Law—FOURTEENTH AMENDMENT—STUDENTS FACING SUSPENSION HAVE PROPERTY AND LIBERTY INTERESTS THAT QUALIFY FOR DUE PROCESS PROTECTION.—*Goss v. Lopez*, 95 S. Ct. 729 (1975).

During February and March of 1971 there was widespread student unrest in the Columbus, Ohio, public school system. Many students were summarily suspended for periods of up to 10 days pursuant to applicable Ohio law.[1] Dwight Lopez, a student at Central High School,

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sexual activity, since such activity "may have no bearing whatsoever on the welfare and upbringing of the children." *Id.* at 360. Although the *Smothers* court upheld the modification order, it did so because the mother's personal relationships had led to the continued presence in the home of a man to whom the children were unrelated by law or blood. The supreme court noted that the man's nearly permanent presence in the house, the fact that he physically disciplined the children, and his temperamental outbursts during the natural father's visits supported the trial court's conclusion that the mother's personal relationship with this man—rather than her sex life with him—was detrimental to the children. *Id.*

60. 347 U.S. 483 (1954).

61. MARRIAGE ACROSS THE COLOR LINE 73 (C. Larsson ed. 1965).

1. OHIO REV. CODE ANN. § 3313.66 (1972) provides in relevant part:

> The superintendent of schools . . . or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent . . . or principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education . . . and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester.

was among those suspended. The next friends of Lopez and eight other suspended students filed a class action under 42 U.S.C. § 1983 challenging the constitutionality of the Ohio statute and asking for injunctive and declaratory relief. The students alleged that a suspension without the minimal due process safeguards of notice and a prior hearing deprived them of the important right to an education without due process of law contrary to the fourteenth amendment. A three-judge court found for the plaintiffs.[2] On appeal, the United States Supreme Court in *Goss v. Lopez*[3] affirmed the decision of the lower court, holding that students facing suspension have property[4] and liberty[5] interests that qualify for due process protection under the fourteenth amendment.

The rights of students played an insignificant role in school and college discipline litigation prior to 1961.[6] The historical restraint of the courts in school discipline cases was due to the wide acceptance of the common law doctrine of *in loco parentis*.[7] Under this doctrine teachers could exercise the same control and authority over students as the students' parents since teachers were acting "in place of the parents."[8]

In 1961, however, the doctrine of *in loco parentis* was challenged and the courts entered a new era in student discipline cases. In that year, the Fifth Circuit, in *Dixon v. Alabama State Board of Education*,[9] prohibited a tax-supported college from expelling students with-

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2. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973).

3. 95 S. Ct. 729 (1975).

4. *See* note 25 and accompanying text *infra*.

5. *See* notes 27-28 and accompanying text *infra*. The Court in Meyer v. Nebraska, 262 U.S. 390 (1923), stated that the concept of liberty includes

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge*, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399 (emphasis added).

6. *See* 47 AM. JUR. *Schools* §§ 173-88 (1943); Annot., 58 A.L.R.2d 903 (1958); 79 C.J.S. *Schools and School Districts* §§ 493-505 (1952).

7. *See* 1 W. BLACKSTONE, COMMENTARIES *453:

> [The father] may also delegate part of his parental authority during his life, to the tutor or school master of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

8. *See, e.g.*, North v. Board of Trustees, 27 N.E. 54 (Ill. 1891); Gott v. Berea College, 161 S.W. 204 (Ky. 1913); Anthony v. Syracuse University, 231 N.Y. Supp. 435 (App. Div. 1928).

9. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). In *Dixon*, nine

out providing any of the due process safeguards required by the fourteenth amendment. The *Dixon* court stated that whenever an act of a governmental body results in injury to an individual there is a constitutional requirement that the act be done in accordance with due process.[10] The *Dixon* court concluded that the interest of pupils in notice and an opportunity to be heard prior to dismissal outweighs academic administrators' interest in unfettered exercise of discretion.[11] Noting that procedural requirements necessary to satisfy the due process clause depend on the circumstances, individual rights, and interests involved, the court held that in school expulsion situations a trial-type hearing was not required, but at least the rudiments of an adversary proceeding must be maintained.[12]

Although *Dixon* dealt with college students, the decision was followed by some courts with respect to secondary school students.[13] As the number of student discipline cases increased, the due process rights of expelled[14] or indefinitely suspended students eventually became firmly established.[15] However, confusion and a lack of uniformity

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state college pupils who participated in peaceful demonstrations were expelled by the Alabama Board of Education for misconduct. The notices of expulsion mailed to the plaintiffs stated no reason for the action taken, and at no time were the plaintiffs provided with an opportunity to appear before the board. 294 F.2d at 152-55.

10. 294 F.2d at 155.

11. *Id.* at 156-59.

12. In *Dixon,* the court stated that the accused should be provided notice containing the specific charges, given the names of witnesses against him and a report on their testimony, and granted an opportunity to present his own defense and produce witnesses. The *Dixon* court did not go so far as to require cross-examination, and it was clear that a formal trial did not have to be held. *Id.* at 158-59.

13. *E.g.,* Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). *Cf.* Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.), *rev'd,* 386 F.2d, 778 (2d Cir. 1967), *cert. denied,* 390 U.S. 1028 (1968).

There seems to be little justification for applying any different legal principles to non-college students, particularly since the Supreme Court recognized in Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969), that high school students are "persons" under the Constitution and are thus entitled to exercise and be protected by constitutional rights.

14. Expulsion is a final separation of a student from school. Stetson University v. Hunt, 102 So. 637 (Fla. 1924). *See also* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Whitfield v. Simpson, 312 F. Supp. 889 (E.D. Ill. 1970); Buck v. Carter, 308 F. Supp. 1246 (W.D. Wis. 1970); Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969). *See generally* Van Alstyne, *The Judicial Trend Toward Student Academic Freedom,* 20 U. FLA. L. REV. 290 (1968).

15. In cases in which a student may be expelled or indefinitely suspended, procedural due process is complied with if the student has notice of the charges against him; has an opportunity to be heard in an informal or administrative-type hearing; has the right to call witnesses; has the right to cross-examine witnesses; and has prior notice of prohibited conduct which may lead to such disciplinary action. The decisions clearly do not provide all due process safeguards afforded a criminal defendant,

marked the decisions[16] involving suspensions[17] for shorter, definite periods of time.

In re Gault[18] granted due process rights to juveniles in delinquency proceedings and thus strengthened students' claims to due process protection in school disciplinary litigation. In *Gault,* the Supreme Court held that the due process clause of the fourteenth amendment requires that notice of hearing and charges, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses be provided in juvenile court proceedings in which a juvenile is threatened with a deprivation of his liberty based on a determination of delinquency.[19]

The *Gault* court based its decision in part on the serious threat to liberty posed by juvenile proceedings.[20] This analysis immediately suggested that in school disciplinary proceedings the application of due process standards should depend upon the nature and extent of the threat to a student's liberty and not upon the "character" of the discipline.[21] Numerous decisions since *Gault* have considered whether due process should be accorded students in disciplinary cases. Confusion and disparity, however, continued to earmark the lower federal court decisions relating to school suspensions.[22] Questions such as, "How long a suspension subjects a student to a severe detriment or grievous loss?", and "What type of hearing does due process require?", have

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such as appointment of counsel at public expense, a public hearing, and process to compel the attendance of witnesses. Linwood v. Board of Educ., 463 F.2d 763, 770 (7th Cir.), *cert. denied,* 409 U.S. 1027 (1972).

16. A comprehensive survey of conflicting decisions may be found in Goss v. Lopez, 95 S. Ct. 729, 737 n.8 (1975).

17. Suspension is a temporary separation of a student from school. Stetson University v. Hunt, 102 So. 637 (Fla. 1924).

18. 387 U.S. 1 (1967). The case involved a 15-year-old who was taken into custody after a neighbor complained of receiving an obscene telephone call. The juvenile's parents were not notified by the authorities, but his mother learned of his detention from the family of another accused youth. At the detention home, the juvenile's mother was advised that a hearing in juvenile court would be held the following day. At the hearing, the complainant was not present, testimony was not sworn, no transcript of the proceedings was kept, and young Gault was questioned by the judge without him or his mother being informed of his right to remain silent or his right to be represented by counsel. *Id.* at 5. The judge declared Gault delinquent—without resolving the issue of whether Gault was responsible for the call. The judge then ordered Gault committed to the state reformatory until age 21. *Id.* at 8. The maximum criminal penalty would have been two months. *Id.* at 29.

19. *Id.* at 33-34, 41, 55, 56-57.

20. *Id.* at 27-28, 30-31.

21. *Cf.* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545, 558 (1971).

22. *See* note 16 *supra.*

been answered in widely varying ways by post-*Dixon* and post-*Gault* courts.

Goss v. Lopez should eliminate some of this confusion and disparity in the lower federal courts. The *Goss* court found that by providing a system of free public education[23] and compelling school attendance,[24] the state had conferred a property interest on students—an entitlement to a public education.[25] The decision makes it clear that once a state has created that property right, that right may not be withdrawn from a student on grounds of misconduct unless the requirements of the due process clause are met.[26] The Court also found that the suspensions affected due process liberty because they could impair students' reputations.[27] The opinion stated, "If sustained and recorded, those charges [of misconduct] could seriously damage the students' standing

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23. OHIO REV. CODE ANN. §§ 3313.48, .64 (1972) directs local authorities to provide a free education to all residents between ages six and 21.

24. OHIO REV. CODE ANN. § 3321.04 (1972) compels attendance at school for a school year of not less than 32 weeks.

25. 95 S. Ct. at 735-36. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court summarized previous entitlement cases. In characterizing those state-conferred benefits which had been held to rise to the level of a property interest, and hence were subject to the due process clause, the Court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . .
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> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

In *Goss* the majority and minority opinions assumed education was more than an abstract need or desire. *Cf.* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."). The majority and minority also agreed that state law had created an entitlement to public education. 95 S. Ct. at 735-36; *id.* at 742 (Powell, J., dissenting). The fundamental point of disagreement between the majority and the minority was the breadth of entitlement. Justice Powell in dissent emphasized the *Roth* statement that the dimensions of an entitlement, as well as its existence, are a function of state law. *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974). Justice Powell reasoned that the Ohio statute that created the entitlement defined its dimension by authorizing a principal to suspend a student for up to 10 days. 95 S. Ct. at 742. *See* OHIO REV. CODE ANN. § 3313.66 (1972); note 1 *supra*. Hence, in the minority's view, suspensions for less than 10 days pursuant to the state statute violated no property interest sufficient to invoke due process requirements.

26. 95 S. Ct. at 736.

27. *Id., citing* Board of Regents v. Roth, 408 U.S. 564 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[28]

The Columbus Public School System argued that loss of 10 days from school was neither severe nor grievous and thus the due process clause was inapplicable.[29] The Court rejected such contentions, stating that so long as deprivation of property is not *de minimus,* the gravity of the deprivation is irrelevant in determining whether due process is applicable.[30] The Court then stated that a 10-day suspension from school was not *de minimus* and hence "may not be imposed in complete disregard of the Due Process Clause."[31] The opinion added that

> total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of a suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation . . . is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.[32]

The Court then turned to the nature of due process protection required when students are suspended from a public school for 10 days or less. It held that in such cases the student must be given

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28. 95 S. Ct. at 736. Justice Powell, writing for the minority, responded to this reasoning by noting that in Board of Regents v. Roth, 408 U.S. 564 (1972), the Court had found due process liberty considerations inapplicable to a nontenured public university teacher who was not rehired. In *Goss,* Justice Powell reasoned that if refusal to rehire a teacher did not create sufficient reputational detriment to make due process considerations applicable, then the brief suspension of a teenage student would create insufficient reputational damage to constitute a deprivation of due process liberty. 95 S. Ct. at 743-44.

Justice Powell's reading of *Roth,* however, seems somewhat selective. In discussing due process liberty issues, the *Roth* court stated:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. . . . Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437. . . . In the present case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor, or integrity" is at stake.

408 U.S. at 573.

29. These contentions were based on language in prior cases that indicated the due process clause was applicable to "severe," "serious," "grievous," "important," or "significant" deprivations of property or liberty interests. *See* Goss v. Lopez, 95 S. Ct. 743-44 (1975) (Powell, J., dissenting).

30. 95 S. Ct. at 737, *citing* Board of Regents v. Roth, 408 U.S. 564, 570 n.8 (1972); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337, 342-43 (1969) (Harlan, J., concurring).

31. 95 S. Ct. at 737.

32. *Id.*

oral or written notice of the charges, and, if the student denies the charges, an explanation of the evidence the school disciplinarian has compiled against him. In addition, the student is to be given an opportunity to explain his version of the story.[33] Generally, this hearing should precede actual suspension except in emergency situations.[34] The Court rejected the requirement of trial-type procedures imposed by some lower court decisions.[35] In the opinion of the Court, requiring trial-type procedures would create an undue administrative burden and hamper the educational effectiveness of disciplinary measures.[36] But an informal hearing procedure, the Court indicated, would not interfere with the educational process and would protect the student's interest in avoiding erroneous exclusion from school.[37] The hearing

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33. *Id.* at 740. The Court noted, however, that there need be no delay between notice and hearing.

34. The Court stated:

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.

Id. The lower court had held that in such emergency situations, due process required that parents receive notice of suspension proceedings within 24 hours of the decision to conduct them, and that a hearing be held in the student's presence within 72 hours of his removal. *Id.*, Lopez v. Williams, 372 F. Supp. 1279, 1302 (S.D. Ohio 1973).

35. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972). There, the court required formal procedures for disciplinary suspensions resulting in a denial of access to regular instruction in the public schools for a period greater than two days.

> Defendants shall not, on grounds of discipline, cause the exclusion, suspension, expulsion, postponement, interschool transfer, or any other denial of access to regular instruction in the public schools to any child for more than two days without first notifying the child's parent or guardian of such proposed action, the reasons therefor, and of the hearing before a Hearing Officer . . . .

Id. at 880.

> [Such notice shall] inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child's school records before the hearing, including any tests or reports upon which the proposed action may be based, to present evidence, including expert medical, psychological and educational testimony; and, to confront and cross-examine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action was based.

Id. at 881.

36. 95 S. Ct. at 740-44.

37. *Id.* at 741. The Court's primary concern was apparently that disciplinarians might act on erroneous information. *See id.* at 739. The Court felt that effective notice and a rudimentary, informal hearing would provide a "meaningful hedge" against such error:

> At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine *himself* to summon the accuser, permit cross-examination and allow the student to present his own witnesses. . . . In any event, his discretion will be more informed and we think

mandated by *Goss*, a hearing characterized by the Court as "informal give-and-take between student and disciplinarian,"[38] leaves serious problems unresolved. Although "the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context,"[39] the decision does not affect the disciplinarian's discretion. The student is guaranteed at least some type of informal hearing, generally to take place prior to suspension; but this is the only "guarantee" the student possesses. This "guarantee" might very easily be reduced to a mere formality void of meaningful due process protection.[40] The disciplinarian alone decides what action is to be taken after the "give-and-take" session.[41] Although his discretion will hopefully be more informed, the risk of an unfair suspension may not be substantially reduced.[42]

The *Goss* Court held that the informal procedures applied only to suspensions of up to 10 days.[43] The Court stated more formal procedures "may" be required for longer suspensions or expulsions for the remainder of the school term.[44] It also suggested that "in unusual situations" involving short suspensions more formal procedures might be required.[45]

The Court has thus invited continued confusion and disparity in school discipline cases. Lower courts attempting to apply *Goss* will have to determine whether suspensions for more than 10 days, or short term suspensions in "unusual situations," require more formal due process procedures than those outlined in the opinion. They will also, of course, have to define "unusual situations." If courts conclude the *Goss* procedure is inadequate in cases involving long-term suspensions or unusual situations, they will then have to decide whether trial-type procedures are required. There is no reason to believe that

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the risk of error substantially reduced.

Id. at 741 (emphasis added).

38. *Id.*

39. *Id.*

40. For instance, immediately following some alleged misconduct of a "trouble-maker," or problem student, with emotions of both disciplinarian and student still excited and possibly irrational, a "hearing" may become nothing more than a shouting session of accusations and denials.

41. *See* note 37 *supra.*

42. Justice Powell found it doubtful that the procedures mandated by *Goss* would add significantly to protection afforded students by existing Ohio law. He noted that the Court's notice requirements were less stringent than those imposed by OHIO REV. CODE ANN. § 3313.66 (1972), and that the informal hearing procedure outlined by the majority only required the principal to "listen to the student's 'version of events.' " 95 S. Ct. at 747.

43. 95 S. Ct. at 741.

44. *Id.*

45. *Id.*

judicial efforts to interpret the unclear language in *Goss* will be any more uniform and consistent than pre-*Goss* efforts to decide what due process rights were applicable when a student was suspended for a short period.[46]

Nonetheless, this decision may at long last bring much-needed judicial scrutiny to what was formerly the exclusive domain of educators and administrators. Justice Powell, calling attention to the "new 'thicket' the court now enters,"[47] aptly characterized many of the discretionary decisions in the educational process which may now be subject to judicial scrutiny.[48] These decisions range from grading students' academic performance to tracking students into a particular academic program.

The *Goss* Court, in discussing due process liberty, stated that suspensions of up to 10 days might "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[49] If damage to a student's standing and future opportunities constitutes a deprivation of liberty, many of the discretionary decisions pointed out by Justice Powell will now be subject to judicial review for due process defects. The most obvious of these is the decision to classify[50] or track[51] students.

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46. *See* note 16 *supra*.

47. 95 S. Ct. at 747.

48. The dissent noted eight of the many decisions made by teachers and other school authorities that may have serious consequences upon the students: (1) grading student work, (2) passing or failing students in a particular course, (3) promoting students, (4) requiring students to take certain subjects, (5) excluding students from interscholastic athletics or extracurricular activities, (6) removing a student from one school to another, (7) busing students, (8) classifying or tracking students. 95 S. Ct. at 747-48.

49. 95 S. Ct. at 736. The lower court felt that students respond to suspension in one or more of the following ways:

1. The suspension is a blow to the student's self-esteem.
2. The student feels powerless and helpless.
3. The student views school authorities and teachers with resentment, suspicion and fear.
4. The student learns withdrawal as a mode of problem solving.
5. The student has little perception of the reasons for the suspension. He does not know what offending acts he committed.
6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a troublemaker in the future.

372 F. Supp. at 1292.

50. "Classification describes the welter of schooling practices which render differentiated judgments of academic worth or potential . . . ." Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classifications*, 121 U. PA. L. REV. 705, 710 (1973).

51. "Tracking" refers to the differential classification of students, usually on the

Public schools classify or sort students in a variety of ways.[52] From the moment a child enters kindergarten until he graduates from high school, he is tested at regular intervals. These tests together with grades and teacher recommendations determine into which classification the child is placed. The child may be placed in the "ineducable" class and excluded from school;[53] or he may be placed in special education or exceptional child programs;[54] or the child may be placed in the regular school but classified or tracked according to measured ability—fast learner, average learner, or slow learner. Exclusion results in absolute deprivation of the state-created right to an education and has been overturned by a number of courts;[55] additionally, there

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basis of "measured" aptitude, for instruction in the regular academic program. W. FINDLEY & M. BRYAN, ABILITY GROUPING: 1970, at 4 (1971).

The predominance of tracking in American public school systems may reflect the fact that such classification practices enjoy wide popularity among teachers. According to one study, only 18.4% of surveyed teachers preferred to teach non-tracked classes. Research Division, National Education Association, *Teacher's Opinion Poll: Ability Grouping*, 57 NAT'L EDUC. ASS'N J., Feb. 1968, at 53.

52. *See generally* BUSS, *supra* note 21. *See also* Sorgen, *Testing and Tracking in Public Schools*, 24 HAST. L.J. 1129, 1132-33 (1973).

53. As many as 60% of the school-age children labeled retarded may not be receiving an education. PRESIDENT'S COMM'N ON MENTAL RETARDATION, MR 69 TOWARD PROGRESS: THE STORY OF A DECADE 18 (1969), *cited in* Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HAST. L.J. 1087, 1089 n.7 (1973).

Many compulsory attendance laws contain exceptions that may be applied to children with mental or physical handicaps. *See, e.g.*, ALASKA STAT. § 14.30.010(b)(3) (1973); COLO. REV. STAT. ANN. § 22-33-106(2) (1973); D.C. CODE ANN. § 31-203 (1973); ME. REV. STAT. ANN. tit. 20, § 911 (Supp. 1974); N.Y. EDUC. LAW § 3208(2) (McKinney Supp. 1974); OHIO REV. CODE ANN. § 3321.05 (1972); S.D. COMPILED LAWS ANN. § 13-27-4 (1967); TEX. EDUC. CODE ANN. § 21.033(2) (Supp. 1974). It has been asserted that for some handicapped children such provisions amount to compulsory non-attendance laws. Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYR. L. REV. 1037, 1045 (1972).

54. Special education or exceptional child programs are usually referred to as EMR—educable mentally retarded—programs.

55. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (exclusion because of alleged ineducability due to behavioral problems, mental retardation, emotional disturbances or hyperactivity); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (exclusion due to mental retardation); Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971) (exclusion due to pregnancy); Hosier v. Evans, 314 F. Supp. 316 (D.V.I. 1970) (exclusion due to alien status). In these cases the classification determinations were overturned because of the failure to provide some education and an adequate hearing prior to exclusion.

Both the *Mills* and *Pennsylvania Association* cases spelled out constitutionally acceptable procedures for prior evaluation and for periodic review after placement. Those cases hold that no child shall be recommended for a special class, excluded from a regular class, or subjected to other significant change in educational status without, in the language of *Mills*, a "constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative." 348 F. Supp. at 878.

is substantial support in educational literature for the contention that placement in special education programs or in the lower ability tracks stigmatizes students.[56] Thus classification decisions may adversely affect the reputational interests referred to in *Goss*.

The *Mills* and *Pennsylvania Association* cases suggest the following are required:

1. Timely evaluation and placement of any child found to be ineducable in the public schools.

2. Public notification by the media, and personal notice to known children affected, of the newly enforceable rights to some education and to a hearing on appropriate educational programs.

3. A full evaluation of the child's needs by competent experts and development of a specific plan.

4. Submission to the family of the proposed placement, accompanied by reasons, with notice of opportunity for hearing before placement, and notice of availability of assistance essential in evaluating the proposed placement in preparing for a hearing. Notice must actually inform the family of all of the above in terminology understandable to the family.

5. Expungement and clarification of any statements by the family made in the course of a prior determination conducted without fair procedures.

6. A burden of proof on school authorities at the hearing as to all facts and as to the propriety of placement in other than a regular class—all in the context of a presumption that placement in a regular public school class, with appropriate auxiliary services, is preferable to any other placement.

7. The right to a representative of the student's choice, including legal counsel.

8. An open or closed hearing at the discretion of the parent or guardian.

9. A record of the hearing.

10. A hearing officer independent of the local school system.

11. Prior to hearing, access to all public school system records pertaining to the child.

12. The opportunity to cross-examine any witness testifying for the school.

13. The opportunity to present contradictory evidence.

14. Maintenance of the child's educational status pending resolution of the dispute, unless the parents consent to a change.

56. *See* Borg, *Ability Grouping in the Public Schools*, 34 J. EXPERIMENTAL EDUC., Winter 1965, at 1; Mann, *What Does Ability Grouping Do to the Self-Concept?*, 36 CHILDHOOD EDUC. 357 (1960). *Cf.* GOLDBERG, PASSOW & JUSTMAN, THE EFFECTS OF ABILITY GROUPING (1966).

There is also substantial support in educational literature for the proposition that low expectations of classroom instructors reduce the motivation of children in low ability tracks. The child who perceives that he is considered a school failure and who feels ignored may respond by being a problem student—provoking the teacher and refusing to do assignments. As a result, such children fail to develop the social skills which might lead to a more constructive response to their educational opportunities. *See, e.g.*, C. JENKS, THE COLEMAN REPORT AND CONVENTIONAL WISDOM (1970); Comer, *The Circle Game in Tracking*, 12 INEQUALITY IN EDUC. 25 (1972).

As Judge Skelly Wright said in Hobson v. Hansen, 269 F. Supp. 401, 491-92 (D.D.C. 1967),

> The real tragedy of misjudgments about the disadvantaged student's abilities is . . . the likelihood that the student will act out that judgment and confirm it by achieving only at the expected level. Indeed, it may be even worse than that, for there is strong evidence that performance in fact declines. . . . And while the tragedy of misjudgments can occur even under the best of circumstances, there is reason to believe the track system compounds the risk. . . .

In the past, courts have been reluctant to grant due process protection in student classification cases, claiming lack of expertise in matters of a purely educational nature.[57] On the basis of the *Goss* rationale, however, due process procedures may now be required before the classification is put into effect.[58]

Problems, however, will arise if the informal *Goss* procedures are applied to student classification issues. Students will, in most instances, be unable to protect themselves against unfair classification decisions; students are unlikely to have sufficient background or experience to convince school counselors that a classification would be educationally unsound. Conversely, students will not be able to effectively and objectively evaluate the educational reasons given by the school for such a classification.[59] In student classification areas, the *Goss* procedures seem insufficient to guarantee students their constitutional rights.[60]

See also Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F.2d 1285 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972).

57. Indeed numerous cases have recognized the propriety of educational classification based solely on academic competence. *See, e.g.*, Borders v. Rippy, 247 F.2d 268 (5th Cir. 1957); Youngblood v. Board of Pub. Instruction, 230 F. Supp. 74 (N.D. Fla. 1964). As the court declared in Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 61 (5th Cir. 1964), "[I]t goes without saying that there is no constitutional prohibition against an assignment of individual students to particular schools on a basis of intelligence, achievement or other aptitudes upon a uniformly administered program . . . ." Following *Stell*, the court in Miller v. School Dist. No. 2, 256 F. Supp. 370 (D.S.C. 1966), permitted a school district to divide students into slow or accelerated sections and to center its vocational curriculum at one school for financial or pragmatic reasons.

Although courts have generally been reluctant to challenge scholastic classifications or to make judicial determinations of educational needs, courts have felt compelled to act when it was apparent that some educational need existed and that school officials were providing no education. *See* note 55 *supra*. Otherwise, classifications are viewed as essentially scholastic decisions, better left to the school authorities.

However, a judicial role has been found when racial disparities or racial separation resulted from school classification practices. Such decisions, however, are usually based upon a denial of equal protection of the laws for a particular class of individuals. *See, e.g.*, Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1971); United States v. Sunflower County School Dist., 430 F.2d 839 (5th Cir. 1970); Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir.), *cert. denied*, 396 U.S. 1032 (1970); Green v. School Bd., 304 F.2d 118 (4th Cir. 1962).

58. A distinction may be drawn between disciplinary decisions involved in suspension cases and educational decisions involved in classification litigation. However, when one looks to the nature of the threat to a student's liberty and not to the character of the discipline or classification, the distinction becomes irrelevant for due process purposes.

59. *Cf.* Sullivan v. Houston Ind. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969), in which the court, when faced with a suspension problem, indicated that high school students as minors occupy a special status under the law because they are too inexperienced to know how to protect themselves against charges of misconduct.

Indeed, it is doubtful whether many parents would be able to meaningfully and successfully challenge a school classification decision. *See* note 60 *infra*.

With the *Goss* decision the Court has indeed plunged into a "new thicket." Significant questions remain unanswered, but the Court has at least suggested its willingness to evaluate the due process rights of school-age children. The *Goss* guidelines are far from comprehensive, even as to school suspensions. Though decisions attempting to follow these guidelines may therefore produce disparate results, it seems inevitable that the due process rights of school children will be more closely examined than ever before.

In the final analysis, the *Goss* ruling on disciplinary proceedings may prove to be but a minor facet of a larger problem. *Goss v. Lopez,* for all its caution, may prove to be the first step towards judicial review of educators' discretion in areas far more complex than student suspensions. It is at least clear that teachers and school administrators must begin to consider the due process implications of a wide range of decisions affecting their pupils' futures.

STEPHEN J. KUBIK

Evidence—ATTORNEY-CLIENT PRIVILEGE—PUBLIC DEFENDER NOT AUTOMATICALLY DISQUALIFIED BY ATTORNEY-CLIENT PRIVILEGE FROM EXAMINING WITNESS WHO NEGOTIATES PLEA AND TESTIFIES AGAINST FORMER CODEFENDANT.—*Olds v. State,* 302 So. 2d 787 (Fla. 4th Dist. Ct. App. 1974).

The appellant, an attorney for the public defender's office, was held in contempt of court for attempting to impeach a critical prosecution witness. The conviction resulted from the representation of multiple defendants by the public defender.

V. L. Odums and Clarence Perry had been charged with first degree murder. The public defender was appointed to represent both of them. Appellant represented Perry; another member of the staff was assigned to defend Odums. Odums subsequently pled guilty to a lesser charge. After being sentenced, Odums appeared as a prosecution wit-

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60. Professor Kirp feels a trial-like procedure is necessary to guarantee the due process rights of the student in a classification dispute:

> [E]ffective review of the decision requires both access to the school's records and the opportunity to have the school's determination reviewed by an impartial outside authority. Unless parents can examine test scores, psychological interview writeups, teacher recommendations and the like, the school's decision is not only unchallengeable; it is simply incomprehensible. And unless the parents can obtain the services of a disinterested professional, they may well lack the competence to understand the basis of the school's action.

Kirp, *supra* note 50, at 788-89.