A Disappointing Child of Estranged Parents: The Failure of New York’s School Suspension Procedure to Fulfill the Promise of Goss v. Lopez and the City’s 1969 Education Reforms

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Charles Gussow, New York University School of Law, Class of 2011
I. Introduction

Formal suspension hearings were promoted by school reformers in the 1970s as a method of reducing both the overall number of suspensions and the disparate impact of the punishment on minority children. However, in the four decades since suspension hearings were introduced in the United States, suspension numbers have increased and continue to fall disproportionally on black and Latino students. This article explores the history and current practice of New York City’s Department of Education as a case study for why procedural protections against suspensions have failed to meaningfully affect school discipline policy. I conclude by offering recommendations for a new student discipline system which could conform to legal standards while better meeting the concerns of the main stakeholders in the education process.

In Section II, I present the current situation for school discipline in New York. In part A, I summarize the rules of the formal hearings at the heart of the system, arguing that suspension decisions map common adjudicate administrative processes. In part B, I explain the political forces which led New York City’s Board of Education to first adopt formal suspension hearings in 1969\(^1\). The suspension scheme was implemented almost simultaneously with the New York State legislature’s school decentralization bill which devolved power from New York City’s centralized Board of Education to more than thirty new community school boards. Suspension hearings were conducted under the auspices of a district superintendent answerable to the community school board and appeals were heard by the central city Board of Education. The procedures were implemented to protect neighborhoods as collective holders of a right to control the education of their children.

In Part C, I contrast the political and community-oriented action that led to the Board of Education’s adoption of suspension hearings with the individual rights-focused litigation that led  

\(^1\) See By-Laws of the Board of Education of the City of New York § 90-42 (1970).
to the Supreme Court’s limited endorsement of hearings as a Constitutional rule in *Goss v. Lopez.* The controversy in the case arose from racial tensions in the Columbus, Ohio school system that reflected the social divisions that drove reform in New York. The NAACP initiated the litigation to promote more racially equitable access to education resources – a goal similar to New York’s reformers. These included: reducing the overall number of student removals (raised by the Children’s Defense Fund), enhancing student autonomy and fostering respect for law in future generations (raised by the New York Civil Liberties Union), and preserving teacher-student relationships and giving educators discretion to use their expertise to run their classrooms and schools (raised by the Buckeye Association and City of Columbus).

In Section III, I present the complication to the current system: despite extensive formal procedures, a history of political oversight for community engagement with school discipline, and student’s Constitutional right to due process before being removed from school, New York Superintendents’ Suspension Hearings have not achieved any of the policy objectives listed by the *Goss* amici. The system has allowed an ever increasing number of suspensions which continue to fall disproportionately on black and Latino students. More generally, the system drains tax dollars and imposes indirect costs on society.

In Section IV, I ask why the system has produced such bad results. First, I indicate the judges are reluctant to force educators to implement specific school discipline systems or second guess decision to suspend due. Recognition of public school students’ right to due process prior to being suspended has not led to an expansion of students’ substantive right to an education. Next, I present some of the main complaints voiced by the teachers and staff who must implement discipline procedures to argue that the system is unworkable in practice. Because core concerns of educators have not been addressed, they have no stake in improving the process.

\[2 \text{ 419 U.S. 565 (1975)}\]
Finally, in Section V, I ask how New York’s student discipline scheme could be reformed to produce better results, which I define as fewer overall days missed by students removed from their classes, reduced inequality between suspension rates for different ethnic groups, and discipline system that reinforces rather than undermines student respect for teachers and school rules. I suggest a hybrid procedure that allows a neutral decision maker to evaluate facts when there is a dispute as to whether student behavior constituted a discipline violation, but returns the punishment decision to the teacher, student and guidance staff member to determine through a social work style intervention rather than a quasi-judicial disposition. Students who must be removed from school should be placed in an alternative school that provides increased educational and behavioral intervention than their regular school to ensure that problems are corrected rather than exacerbated. In order for this hybrid model to succeed, it must be instituted along with broader school reforms, including minority teacher and principal recruitment, increased academic and behavioral standards, and community engagement.

Suspension hearings were created in New York as part of a broader project of community governance to reduce the disparate impact of school removals. The Goss amici sought a Constitutional rule recognizing that process is due prior to suspending students as a means to enhance students’ right to an education. In order for school discipline to be effective and fair, the system must recognize the students as stakeholders in their own education and operate in a system of community engagement. Otherwise, the hearings will continue to be empty procedures.
Section II: Situation - New York City’s Superintendent’s Suspension Hearings – Current practice, political history, and legal history.

Part A. New York City Superintendents’ Suspension Hearings

New York City runs school discipline as a formal administrative scheme. Following the general dictates of *Matthews v. Eldridge*[^3^], the hearings provide some due process protection for students who are threatened with denial of education, which is a state benefit[^4^]. In a pattern replicated throughout the modern administrative state, a statute lays out the basic standard for denying the education benefit, which is fleshed out by regulation by an administrative agency.

New York state statute permits schools to deny access to the public education system to “[a] pupil who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others.”[^5^] In New York City, the Department of Education implements that statute through NYC Chancellor’s Regulation A-443 (2004) (“Regulation A-443”), a 93-page document laying out specific rules for the investigation, adjudication, disciplinary response, and appeal procedure for infractions of school behavior code. School code infractions and punishment responses are published in a citywide discipline code that is distributed to all teachers and students at the start of each school year[^6^].

Regulation A-443 sets out an array of procedural protections for a student who faces suspension for any length of time. First, the regulation requires escalation before removal is appropriate.[^7^] Next, even short-term suspensions (up to five days) merit a “Principal’s Suspension

[^7^]: See id. (instructing educator to address behavior in the classroom before seeking formal suspension procedures)
Conference” to allow a student and family member to challenge the basis for the removal. Finally, suspensions for over five days and expulsions cannot be imposed by a principal but only by the regional superintendent. Charges must be supported by an investigation conducted by a designated school official (usually a dean or assistant principal). The student’s family must be given notice of the suspension, its basis and proposed length within 24 hours.

If the student goes forward with a suspension hearing, the student and his/her family and a representative from the school have the opportunity to present evidence to a Hearing Officer. The student may bring an advocate and the school is represented by a “staff advisor” (usually the investigating dean or assistant principal) who presents the school’s case and may also be called as a witness regarding the incident and/or investigation. At the hearing, the school must provide “competent and substantial evidence that the student actually participated in the conduct charged” for the superintendent to sustain the suspension. Like an administrative hearing and unlike a criminal trial, “...the evidence may consist of hearsay, and reasonable inferences drawn by a Hearing Officer will be sustained if the record supports the inference.”

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8 See generally Regulation A-443 at III.B.2.  
9 See Id. at III.B.3. School principals do not report directly to the city’s Chancellor Education, but to five Regional Superintendents. The Superintendents are ultimately responsible for determining the disposition of any discipline charge leading to a suspension.  
10 Id. at III.B.3(e).  
11 See id. at III.B.3(n).  
12 §3204(3)(c)(1). The Hearing Officer is the finder of fact, but not the ultimate decision-maker. He or she drafts an “advisory only” opinion to the superintendent, who decides the case disposition, i.e. the length of the suspension. The Hearing Officer is instructed to take into account “whether the school followed appropriate procedures” in drafting the decision, as way of encouraging school compliance with policy. Shirley A. Rowe, MANUAL FOR HEARING OFFICERS ON THE SUPERINTENDENT’S SUSPENSION PROCESS 8 (New York City Dep’t of Educ., Aug. 2004).  
13 Reg A-443 at III.B.3(s)(14).  
14 Herzog, supra at Note 6, 91 N.Y.2d 133, 140-141.  
15 Id. at 141. Prior to any judicial review, the State Commissioner of Education will also review findings of fact by the hearing officer with a deferential standard, requiring “clear and convincing evidence that the determination of credibility is inconsistent with the facts” before it will overturn decision. Appeal of Hamet, 36 Ed. Rep. __, Decision No. 13,692 (1996).
Even if the disposition is for a suspension, the student does not completely forfeit his or her right to an education during a suspension. During the period of their removal or suspension, Regulation A-443 requires suspended students “... be provided with alternative instruction... appropriate to the individual needs of the student.”\textsuperscript{16} This occurs at Alternative Schools designated for suspended students in District 79.\textsuperscript{17}

Part B. The history of superintendent’s suspension hearings: racial tensions and school suspension in New York in the late 1960s

The suspension system currently governed by Regulation A-443 has been in effect in New York for forty years. Formal suspension hearings by superintendents of multiple schools were created 1969 in response to two interlocking developments: devolution of education policymaking from the city to more than 30 local school boards and the racially-driven alienation of (mostly white) teachers from the (mostly racial minority) parents of public school students. The system was not created to advance student rights, but to balance power between communities of color and city governance that was dominated by white administrators. It is not a coincidence that both community school boards and formal school suspension hearings were

\textsuperscript{16} Id at § III.B.1(b). In practice, gaps in schooling can be tolerated, as "a school district must act \textit{reasonably promptly} to provide alternative instruction regardless of the length of the suspension." \textit{Appeal of R.F.}, Decis. No. 14,972 (Oct. 22, 2003) (my emphasis added). Similarly, New York State statute provides great flexibility in the amount of alternative education to be provided during suspensions. The law explicitly empowers removal from all education, as designated school officials “may suspend the following pupils from required attendance” provided due process is provided. N.Y. Educ Law § 3214(3)(a) (Consol. 2010). These authorities are not compelled by statute, but "\textit{may} establish schools or set apart rooms in public school buildings for the instruction of school delinquents, and fix the number of days per week and the hours per day of required attendance, which shall not be less than is required of minors attending the full time day schools." § 3214(1) (2010) (emphasis added). The law does not require that these alternatives be established, nor that any students be educated through them, only that if the sites are established that the hours of required attendance be the same as general education requirements. Students with designated disabilities have greater protection and are guaranteed alternative education, even while suspended. \textit{See} § 3214(3)(g) referencing 20 U.S.C. § 1415 (1994) (Individuals with Disabilities Education Act, “IDEA”).

\textsuperscript{17} Chancellor’s Regulation A-443 III B.1.[c]. The alternative instruction need not include any participation in school life for the duration of suspension, so that a suspended student can be excluded from prom and graduation. \textit{See Appeal of Lucas}, Decis. No. 14,233 (Oct. 25, 1999)
created in New York in the spring of 1969. The history of suspension hearings is tied to the highly contentious city-wide education reform battle.

In the 1960s, citywide administrative centralization was challenged by the neighborhood school movement, which advocated devolution of school policy making to multiple local school boards. The movement began in earnest in 1961, when test scores first showed a downturn in the performance of New York City public school students and a state investigation announced evidence of massive corruption in the Board of Education’s financial management. Local control of schools was seen as a method of providing greater accountability for school results and fewer opportunities for graft by centralized bureaucrats. As the decade progressed, the Ford Foundation put its institutional weight and money into the neighborhood schools movement as a means of improving education to enhance economic and civic opportunities for segregated minorities. The movement was also supported by groups uninterested in racial equality who sought to protect the ethnic and racial identity of neighborhoods from the dilution of bussing and other desegregation efforts.

The 1960s also saw the fracturing of the coalition between liberal white reformers and black communities. In particular white teachers found themselves in an antagonistic relationship

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18 See David Rogers 110 LIVINGSTON STREET (1968).
20 See McGeorge Bundy, ACTION FOR EQUAL OPPORTUNITY (Ford Foundation 1966) (excerpting address made at the National Urban League annual banquet) 13 available at http://beta.fordfoundation.org/archives/item/0325, describing “Foundation efforts to overcome cultural deprivation of pupils in poor neighborhoods through school-community projects in ten Northern cities and through intensive experiments to prevent delinquency.”
21 See Rogers at 67-69. Paradoxically, the Ford Foundation itself indicated at least some sympathy for this position. In addition to improving the quality of education, the Ford Foundation also supported cultural education projects as a “reaction to methods of desegregation that appear to handicap the learning of nonwhite children by subordinating their cultural heritage to other life styles and values.” FORD FOUNDATIONAL ANNUAL REPORT 1969 23 available at http://beta.fordfoundation.org/archives/item/1969. That a single organization would embrace the not entirely compatible goals of enhancing economic integration and halting cultural integration through education is illustrative of the tensions of the era and the convergence of interests which led to devolution of school power in New York,
with black students and parents. By 1970, New York’s white population was opting out of the public school system: approximately 63% of the city’s population was non-Hispanic White\(^{22}\), but only 40% of the public school population was non-Hispanic White.\(^{23}\) Schools were still controlled by the white population, as 90% of its teachers and 98.6% of principals were white in 1970.\(^{24}\) Racial tensions spread to the classroom, alarming white teachers who feared for their safety in ‘ghetto schools.’\(^{25}\) In 1964, the president of the United Federation of Teachers began advocating for giving principals greater power to suspend students to curb pupil attacks on teachers.\(^{26}\)

In 1967 contract negotiations that year, the UFT sought smaller school administrative units to increase funds for ‘ghetto schools’ and power for teachers to suspend disruptive students.\(^{27}\) This negotiating stance was backed up by walk-out threats by faculty in individual schools that felt the absence of mandatory suspension policies was putting them at risk of student violence.\(^{28}\) The UFT demand that teachers be allowed to unilaterally suspend students would prove a crucial turning point in the history of decentralization and race relations in New York schools. The demand was perceived as racist by Puerto Rican and black activists. The demand for greater teacher control over school discipline was also a threat to central control by the Board

\(^{22}\) See US Census Bureau, Table 33. New York - Race and Hispanic Origin for Selected Large Cities and Other Places: Earliest Census to 1990 available at http://www.census.gov/population/www/documentation/twps0076/NYtab.pdf. This was a dramatic shift from 1940, when 92% of the population was estimated to be non-Hispanic white. Id.


\(^{24}\) See Local boards want to appoint own principals, N.Y. Amsterdam News, Feb. 19, 1972 at D9.

\(^{25}\) These fears were compounded by incidents of assaults on teachers. For example, in March 1966, a parent hit a principal with an ashtray in an argument stemming from the principal’s suspension of a child. See Teacher Assault Case Off, N.Y. Amsterdam News, Mar. 19, 1966 at 27.


\(^{27}\) See Ravitch at 319.

\(^{28}\) See Marietta Tanner, The Community Conscious, N.Y. Amsterdam News, May 27, 1967 at 6. The article recounts the efforts of a black teacher to reverse the expulsion of a black student accused of assaulting a white teacher. Ms. Tanner notes that city schools suspended 10,202 students the previous year.
of Education, which rejected the demands.\textsuperscript{29} The teachers responded by calling a strike.

Unfortunately for the UFT, 1967 was no ordinary school year. It was also the first year of the Ford Foundation’s demonstration project for local control in the economically depressed and minority-dominated Ocean Hill-Brownsville neighborhood.\textsuperscript{30} The plan was to improve student performance by increasing community involvement and ownership over the education process, notably by giving a local school board power over budget and personnel instead of the city’s Board.\textsuperscript{31} The community entered the 1967-68 school year with high hopes for a new educational direction. These hopes were dashed by an unexplained and seemingly racially motivated strike of teachers, which was joined by the staff of Ocean Hill-Brownsville. Parents viewed the action as an “abomination” and came to “hate” the teachers assigned to the school.\textsuperscript{32}

The racial tensions were only exacerbated by a longer strike the following year. As school decentralization efforts continued, teachers were no longer seen as allies to communities of color but members of a racist “Monster UFT” organized to advance interests contrary to those of their community.\textsuperscript{33} Black and Hispanic activities now viewed teachers as yet another

\textsuperscript{29} See Ravitch at 327.
\textsuperscript{31} See FORD FOUNDATION ANNUAL REPORT 1967 at 38. The Foundation reported, “Grants totaling $163,000 went to three experimental school districts in New York City neighborhoods where residents (most of them Negro and Puerto Rican) are dissatisfied with the quality of education. The grants aided organization of locally selected governing boards and provided professional counsel in planning improved school programs. Whereas other local school boards in the city play only an advisory role, through district superintendents, the experimental units (consisting of junior high and feeder elementary schools) are responsible to the central Board of Education and were given expanded powers over budget allocation and selection of personnel. The experiments began as the Mayor, in response to an act of the State Legislature, prepared recommendations for increasing community participation by decentralizing the New York City schools; an advisory panel to the Mayor was headed by the president of the Foundation. Efforts to facilitate the movement of qualified Negroes and Puerto Ricans into school administrative posts were assisted...”
\textsuperscript{32} Mayer, Supra Note 30, at 21.
\textsuperscript{33} Sara Slack, School Fight Dividing NYC, N.Y. AMSTERDAM NEWS, Oct. 26, 1968 at 1. UFT actions in other school policy areas exacerbated this tension. In 1969, it sent a letter to all union members, including both white and black teachers, complaining of “instances when black teachers who were non-union were chosen for supervisory positions over more experienced, qualified white UFT teachers.” JHS 231 Teachers Charge Racism, N.Y. AMSTERDAM NEWS (May 10, 1969) 30.
representative of majority power who would exercise power antithetically to the interests of their children.

In this climate of racial mistrust between black parents and white teacher, civil rights groups in the black community began advocating for suspension reform. The goal of this campaign was not an increase in children’s rights, but a decrease in discretionary state power. In 1967 the Harlem Neighborhoods Association (HANA) listened to “the keen and heated questions of irate parents and community activists” at their annual meeting, and then called for an overhaul of the city’s suspension system. HANA argued that the Board of Education “should be more accountable to the community for what happens to the suspended child” and should seek to handle problem children within a school rather than diverting them to a suspension system without resources for changing behavior. The constituents of HANA were not seeking to enhance the autonomy of the child; they were concerned that the suspension system did not offer sufficient coercion to mold student behavior.

Meanwhile, in Albany, the state legislature passed a decentralization law on April 30, 1969, instructing the City Board of Education to divide the city into thirty to thirty three community school districts overseen by a community school board and governed by a local superintendent. The city-wide system would be overseen by the city Board of Education and central functions administered by a chancellor empowered to remove or suspend local boards which failed to comply with city-wide directives. In that first year of decentralization, the chairman of one of those local school boards wrote a letter to the city-wide superintendent

35 Id.
calling for formal suspension hearings to address the fact that the number of suspensions in his community had more than doubled since the previous year.\(^\text{38}\)

Six months after the decentralization bill was passed, on October 22, 1969, New York City’s Board of Education voted to require formal hearings to review suspensions given in city schools lasting longer than five days. The vote was cast in a raucous meeting attended by more than 500 people, including community activists, education reformers, and principals.\(^\text{39}\) The principals were primarily concerned with the provision allowing parents to bring two other people to the hearing, which they feared would disrupt school operations by giving “subpoena” and “cross-examination” powers to lawyers brought by families of suspended students.\(^\text{40}\)

At the end of the school year, on June 13, 1970, New York City’s Chancellor of Education promulgated rules establishing a two-tier suspension system, with school removals of five days or less in the discretion of principals without need for formal hearings and removals longer than five days requiring approval by Community Superintendents after a hearing.\(^\text{41}\) That November, the city’s central Board of Education gave itself final say over suspension decision by voting to empower itself as the appeals body in reviewing suspension decisions.\(^\text{42}\)

Suspension hearings were part of the governance compromise of decentralization, balancing the minority community interests championed by HANA with city-wide administration championed by the Board of Education at the expense of the teachers. Decisions for suspensions lasting longer than a week moved from mostly white principals to the community-representative community school superintendent. The city-wide Board of Education


\(^{42}\) Central School Board Votes to Act as Final Appeal Unit, NY TIMES (Nov. 6, 1970) at 83.
got to keep the final say by serving as appeals body. Utterly lost was the discretion of individual teachers to unilaterally suspend student. The minority communities simply did not trust them to exercise this power fairly.

The current system of Superintendent Suspension Hearings for New York City public school students follows the basic layout of the original 1970 policy and Chancellor Directive. The Board of Education has been replaced by a mayoral-controlled Department of Education and Superintendents are now regional deputies for the mayoral-appointed Chancellor. However, the scheme preserves the power distribution which keeps low-level discipline decisions at the school and brings longer term decision to a higher level of bureaucracy and adds greater formality.

Part C. The legal history of suspension hearings: Columbus Ohio’s race riots and Goss

The Constitutional parameters for New York’s suspension hearings were established in Goss v. Lopez, a case decided by the Supreme Court in 1975, six years after the hearings were implemented. As in New York, the background of the decision was the era of deep racial unrest in schools and burgeoning legal recognition of children’s rights. The litigation was promoted by the NAACP to curb suspension practices that disproportionately affected minority students around the nation. The NAACP sought judicial oversight and legal formalization of suspension decisions because they assumed that the scope of children’s rights would continue to expand and that greater procedure would reduce the number of school suspensions, especially among minority students. These legal and statistical assumptions turned out to be wrong. New York

43 Article 52-A was substantially amended in 2003 to allow Mayor Bloomberg to take control over New York City’s school system from the Board of Education. For the current version of the statute, see NY CLS Educ § 2590 (2010). A summary of the “pendulum swings” between city-wide and community control of New York’s schools can be found at Patrice D. Johson, Decentralization vs. Centralization in New York City Public Schools (Jun. 10 2010) available at http://patricedj.wordpress.com/2010/06/10/decentralization-vs-centralization-in-new-york-city-public%20schools/.
continues to suspend more students each year and continues to suspend a disproportionate number of black and Latino students. Regulation A-443 does not fall afoul of *Goss* because the procedural due process extended by the decision does not cover a strong substantive right to access public education.

1. The Juvenile Rights Movement

When the NAACP litigated *Goss*, its attorneys had every expectation that children’s rights were a new front for the civil rights movement. In the late 1960s, a pair of Supreme Court decisions by Justice Fortas recognized a set of rights belonging to children in their own right, rather than to their parents or other actor as *parens patriae*. These rights were afforded the protection of due process of law guaranteed by the Fifth and Fourteenth Amendments. In 1967, Justice Fortas wrote the majority opinion for *In re Gault*, which held that juvenile delinquency proceedings must comport with basic due process norms since “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”

Rejecting an argument that informal procedures served rehabilitative purposes for young offenders, Fortas described due process of law as “the primary and indispensable foundation of individual freedom.” In *In re Gault* declared that children’s rights existed and set out procedural due process as the proper protection of those rights even within an area traditionally government by paternalistic norms.

Two years later, Justice Fortas wrote another major children’s right decision for the court in *Tinker v. Des Moines Indep. Cnty. Sch. Dist.* this time squarely in the field of school power. Holding that schools cannot prohibit speech acts out of fear of potential disruption, Fortas wrote “It can hardly be argued that either students or teachers shed their constitutional rights to

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45 387 U.S. 1, 13 (U.S. 1967).
46 387 U.S. at 20.
freedom of speech or expression at the schoolhouse gate.”\textsuperscript{48} The immediate holding was that it was unconstitutional for schools to ban black armbands protesting the Vietnam War out of a professed fear of unrest. Again, Fortas reached more broadly than the immediate subject matter to declare:

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.\textsuperscript{49}

Together \textit{Gault} and \textit{Tinker} suggested that children enjoyed Constitutional rights in their own right and that schools were obliged to recognize these rights even at the cost of substituting traditional educational processes for greater proceduralism.

As the 1970s began, \textit{Gault} and \textit{Tinker} were the strong pillars of juvenile rights law, but they were not unarrowed. After Justice Fortas left the Court, his replacement Justice Blackmun wrote \textit{McKeiver v. Pa.} which held that children are not entitled to all adult rights at juvenile delinquency hearings, particularly the right to a jury.\textsuperscript{50} The following year, Justice Burger’s majority opinion in \textit{Wisconsin v. Yoder} recognized the right of Amish parents to remove their children from school after eighth grade under the Free Expression Clause of the First Amendment\textsuperscript{51}. The majority decision rested squarely on the religious rights of the parents and refused to consider the implications of an abridged formal education on the rights of the child.\textsuperscript{52}

\textsuperscript{48} 393 U.S. at 506. Fortas did not make this declaration on an empty slate. The Court had previously recognized that the state may not punish children who exercise their free speech right to not salute the American flag. \textit{See W. Va. State Bd. of Educ. v. Barnette}, 319 U.S. 624 (U.S. 1943).
\textsuperscript{49} 393 U.S. at 511.
\textsuperscript{50} \textit{McKeiver v. Pa.}, 403 U.S. 528 (U.S. 1971). Justice Blackmun noted the importance of preserving the juvenile system from the "traditional delay, the formality, and the clamor of the adversary system." \textit{Id.} at 550.
\textsuperscript{51} 406 U.S. 205 (U.S. 1972).
\textsuperscript{52} \textit{See Id.} at 231. Noting that no claim of competing interests between parent and child had been raised before the Court, Justice Black wrote, “The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation.”
The state of the law in 1972 was that children enjoyed their own set of Constitutional rights, but these were not coterminous with adult rights.

2. Columbus Ohio suffers racial unrest

As in New York school discipline reform, the facts behind Goss arose from racial conflict between black community members and white school administrators. The litigation began after the contested observation of Black History Month in Columbus, Ohio in 1971. During the period of February through March, the city was rocked by racial unrest in its school system. This unrest occurred in the midst of Columbus struggle over desegregation and white flight which left a largely black school population administered by mostly white officials. Contemporary newspaper articles focused on the unrest and only explained the motivation of the demonstrators as protesting “alleged racism.”

Some of the activities at issue were simple political demonstrations in the Tinker mode, as when a group of four girls left an activity and refused to return and when black students protested an assembly by students standing, turning their back and giving the “Black Pledge”. Other activities were more violent, including overturning tables in a high school lunch room and breaking light bulbs and throwing glasses in a junior high school cafeteria. Some incidents were not violent, but challenged to school authority, as when black students gathered in their high school auditorium and refused orders to leave. In the beginning of March, a gathering of “several hundred persons” blocking the entrance to the Board of Education building.

53 Ohio blacks close down state office bldg, CHICAGO DAILY DEFENDER 5 (Mar. 9, 1971)
55 372 F. Supp. at 1289.
56 372 F. Supp. at 1285.
57 372 F. Supp. at 1286.
58 372 F. Supp. at 1289.
59 372 F. Supp. 1285. The District Court panel was somewhat more constrained in its description of this incident than the Chicago Tribune, which ran an article headlined “Blacks Smash Windows.” (Mar. 9, 1971) at 12. A crowd of approximately 1,000 people, including a mix of students and teachers first presented a list of demands to the
Despite the variations in behavior, the institutional response of the Columbus Public Schools was consistent: widespread suspension of students believed to be participating in the unrest. School principals and other administrators did not provide individualized hearings for students.\textsuperscript{60} There appears to have been a racial underpinning to the decisions. Dwight Lopez, a black student, was suspended from Central High School after being in the lunch room while black students overturned tables despite his insistence that he took no part in the activity.\textsuperscript{61}

3. The NAACP goes on the offensive

While black community activists in New York City pressed for school discipline reform through the city’s Board of Education and the state legislature, activists in Columbus pressed the case through the court system. On April 28, 1971, the NAACP held a conference for black attorneys in the Midwest at which General Counsel Nathaniel Jones announced a legal campaign to combat racism that would shift the organization from a “defensive posture to one of affirmative action.”\textsuperscript{62} Jones urged black attorneys nationwide to join the organization in a “massive effort” to press civil rights claims.\textsuperscript{63} Education was one of the key areas of interest, and the NAACP stated it was “investigating school rules which result in unusually large numbers of suspensions of black students.”\textsuperscript{64}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{60}] See 372 F. Supp, at 1283 (describing the suspension decision making process in effect at the time of the unrest, which required principals to explain the reason for the suspension upon request of the parent, but not take students’ assertions of fact into account).
\item[\textsuperscript{61}] Goss DC 1284-1285. While the District Court did not report Lopez’ race, the NAACP indicated he was black. Brief of NAACP as Amici Curiae Supporting Appellants at 3, Goss v. Lopez, 419 U.S. 565 (1975).
\item[\textsuperscript{62}] Faith C. Christmas, Comb area for lawyers: NAACP set war on racism here, CHICAGO DAILY DEFENDER, Apr. 29, 1971 at 3.
\item[\textsuperscript{63}] Id.
\item[\textsuperscript{64}] Id. Other areas of focus were housing, employment and conditions in state penitentiaries.
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\end{footnotesize}
The Columbus branch of the NAACP took up this call and assembled a team of pro-bono and legal services attorney to sue the school district in response to the mass suspensions after the Black History Month protests. The attorneys brought a class action on behalf of “all other students residing in the City of Columbus who are similarly situated and affected by” Ohio and Columbus suspension policies suspended in or after February 1971, regardless of reason. The plaintiffs did not press a claim of discriminatory application of the law by state actors, but mounted a facial attack on Ohio’s Education law and the Columbus school administrative procedures. The plaintiffs claimed that Ohio’s suspension law violated the Fourteenth Amendment by denying the “important public right” to an education without due process of law and was vague and overbroad. The litigation strategy avoided difficulties in attempting to prove that school officials exercised their disciplinary discretion with intentional discrimination. It also allowed the plaintiffs to be directly heard by a three-judge panel in federal district court without going through the state system first.

While not framed as a discrimination case, the advocates were responding to a racially imbalanced suspension system. NAACP lawyers intended to limit the opportunity for biased decisions by (mostly white) educators against (mostly black) students by corralling discretion to remove students within the due process of law as HANA had done in New York City. Instead of seeking school reform city by city, a Constitutional ruling by a federal court would require cities across the country to adopt procedural protections. The legal foundation had already been laid

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67 See 327. F. Supp. at 1281 (stating that plaintiffs challenge “§ 3313.66 of the Ohio Revised Code and § 1010.04 of the Administrative Guide of the Columbus Public Schools, and the Columbus Public School Policy Statement on Discipline”).
68 *Id.*
69 See 27 USC § 2281 (1976); 372 F. Supp at 1281.
since *Tinker* recognized that students maintained their Constitutional rights in school and *Gault* provided a template for mandating procedural due process protections to ensure those rights were enforced. This was the “affirmative action” the NAACP legal team had promised in April 1971.

The strategy worked. In its *Lopez v. Williams* decision, the District Court ruled for plaintiffs in a judgment on the pleadings, holding that “the State created entitlement to an education is a liberty protected by the due process clause of the Fourteenth Amendment.” The Ohio law was struck down. The court dismissed the notion that education could be a property interest, though noting in a footnote that entitlements “often take on the incidents of property.” The court, however, rejected the plaintiffs’ arguments that the school disciplinary regulations were constitutionally vague and overbroad as applied to the Black History Month observations. The court ordered all references to the suspension of members of the class be removed from the records of Columbus Public Schools.

Even while finding for plaintiffs, the court lent it support to the ultimate authority of school administrators to control discipline and assumed suspension decisions would usually be proper. The court commented that, “Due process is not a straitjacket imposed by the Courts upon educators” and indicated that schools might properly avoid process during “emergency situations.” The court declined to find that student unrest at issue was entitled to First Amendment protection, noting that “the evidence establishes that the various school administrators acted to restore order and discipline in their schools.” While requiring Ohio schools to fashion formal hearing procedures, the court did not impose many substantive

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70 372 F. Supp at 1300.
72 327 F. Supp at 1302.
73 327 F. Supp at 1301.
74 327 F. Supp at 1302.
requirements, stating, “The choice of the best procedure for a particular school system should be left to the school officials charged with the administration of that school system.”

The NAACP achieved relief for students suspended in February-March 1970 and struck down the Ohio law of untrammeled disciplinary discretion. Yet, they did not convince the district court that school systems must make suspension decisions under strong and consistent procedural requirements to ensure fair results. Having presented no evidence of intentional discrimination by school administrators, the NAACP gave the judges no reason to doubt that schools could provide fair results for black children with a minimal and flexible process.

4. At the Supreme Court, the NAACP is joined by Amici with Divergent Priorities

The Lopez v. Williams decision was appealed by “various administrators of the Columbus, Ohio, Public School System” directly to the Supreme Court in the case now captioned Goss v. Lopez. The briefs by the parties and the amici curae reflect a clash of values between the sides and inconsistent strategies and goals within those seeking to enhance procedural protections in school discipline cases.

In its amici brief, the national NAACP did not seek to enhance the rights of children in the face of state control, but was focused on the disparate impact of suspension decisions and was most concerned about the dichotomy between black students and white administrators. In the NAACP’s joint brief with the Southern Christian Leadership Committee, the organization framed the issue as a continuation of the black civil rights struggle rather than a new effort to

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75 327 F. Supp at 1302.
76 419 U.S. 565, 567 (1975). Prior the commencement of the district court case, Norval Goss had replaced Herbert Williams as Director of Student Personnel for Columbus Schools. The Judiciary Act provides the Supreme Court direct jurisdiction to hear appeals from three-judge panels challenging the constitutionality of state statutes. See 28 USC § 1253 (2010).
expand children’s rights.77 In contrast to the NAACP’s framing of the litigation, the brief vigorously argued that statistically disproportionate impact of suspension on black students and findings that white teachers perceive black students differently from white students created a strong presumption of discrimination.78 The black rights legal advocates wanted greater procedural protections because “broadly worded school rules are especially susceptible of discriminatory application” not because the state needed to respect the autonomous rights of children.79

Also arguing on behalf of Lopez and the class of suspended students were advocates for children’s rights who sought to strengthen students’ ability to access state-funded education and to limit the discretion of officials in restricting that access. In particular, Alan Levine of the ACLU sought to weaken the authoritarian structure of school discipline which he believed undermined the autonomy of students and ill-prepared children for civic engagement. On behalf of the ACLU, Levine argued that “public school is the governmental institution which represents the adult society in its most direct and controlling aspect. If we do not teach the viability of democratic modes of conflict resolution, and win respect for these as just and effective processes, we will lose more and more potential democrats.”80 Notably for this discussion, the ACLU brief attached as an appendix the Superintendent’s regulation laying out New York’s new suspension hearing process as a positive example of a system which first encouraged collaborative

77 See Brief of the National Association for the Advancement of Colored People and the Southern Christina Leadership Conference as Amici Supporting Appellee-Respondent at 13, Goss v. Lopez, 419 U.S. 565 (1975). The racial focus of the brief is set out at the beginning, when the advocates write, “The present case is of particular importance to amici because it centers around the role and responsibility of the state to assure that the rights of minority children, as enunciated [in Brown v. Bd. of Educ.], are in fact given the paramount attention that they were accorded at that time.” Id. at 2.
78 See Id. at 9.
79 Id. at 11.
resolution of problems then required adversarial proceedings before authorizing suspensions longer than 5 days.\textsuperscript{81}

The Children’s Defense Fund and the American Friends Service Committee crafted their brief to directly attack the use of suspensions as a school discipline tool, regardless of how racially equitable or fair was the decision making process.\textsuperscript{82} The extensive brief attached an appendix analyzing suspension data from Arkansas, Maryland, New Jersey, Ohio, and South Carolina, which found 150,000 students were removed from school during the 1972-1973 school year in those five states.\textsuperscript{83} The Children’s Defense Fund noted three bases for Supreme Court action:

(1) the problem of school "suspensions" is, at long last, recognized as one of shocking proportion, (2) the lower federal courts have, at last, cut through sterile legalisms surrounding school operations and have evolved a standard for due process in "suspensions", and (3) this court has sharpened due process doctrine, moving beyond the vague formulae of the past and establishing tests that may now be applied to school "suspensions."\textsuperscript{84}

As for the NAACP, the enhancement of legal protections through Due Process doctrine was a means to an end. The end sought by the Children’s Defense Fund was broader than the NAACP’s: it sought the elimination of suspensions rather than equitable application.

5. The Schools argue in defense of the teacher-student relationship

For Goss and the Columbus school system, an amicus brief was filed by a combined group of school administrators and principals from Ohio, organized by the Buckeye Association of School Administrators. Doctrinally, they argued that education was not a right protected by the Constitution. From a policy perspective, they argued “educational and that suspension

\textsuperscript{81} \textit{Id.} at 11; Appendix.
\textsuperscript{83} \textit{See Id.} at Appendix A.
\textsuperscript{84} \textit{Id.} at 19.
hearings are "more likely to cause stigmatization" then the punishment itself."

In their own Appellant brief, the City of Columbus argued that the right to education was a liberty interest only insofar as it allowed parents to direct the upbringing of their children and not as a state benefit. Using the NAACPs framing of the case against it, Columbus asserted “this case does not involve questions of race and invidious discrimination” so violation of the Fourteenth Amendment occurred where the state suspended a public benefit for a short period to advance educational goals. In its reply brief to Respondent’s Amici, Columbus quoted James Dobson’s assertion that “Discipline in a school classroom or building is not very different from discipline at home.” Teachers were on the same side as the parents, using discipline not as an adversary but to mold young students in better people and productive members of society.

6. The Supreme Court’s decision and its (negligible) effect on New York’s Superintendent’s Suspension Hearing procedures

In Goss v. Lopez, the Supreme Court upheld the District Court in striking down the Ohio policy allowing students to be suspended from public school without any administrative review. The holding, per Justice White, was narrow:

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due 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. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

The Court did not require full hearings for “short suspensions” because of administrative burdens and the danger that imposing a formalistic, adversarial structure on school discipline could

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89 Id. at 581.
“destroy its effectiveness as part of the teaching process.”\textsuperscript{90} However, the Court noted that suspensions longer than ten days “may require more formal proceedings” and “unusual situations” might demand greater procedure for short suspensions.\textsuperscript{91} The 1975 decision did not reexamine \textit{Rodriguez},\textsuperscript{92} but simply held that if a state chose to provide education, it could “not withdraw that right on the grounds of misconduct, absent fundamentally fair procedure.”\textsuperscript{93}

Public school suspensions therefore implicate due process concerns by interfering with students’ state-granted property interest in free education. Once an entitlement is recognized as property, the Fifth and Fourteenth Amendments prevent the government from depriving individuals of that property “without due process of law.”\textsuperscript{94}

Justice Powell dissented. He was disturbed by the Court’s “indiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom.”\textsuperscript{95} He found adversarial proceduralism particularly ill-suited for teachers, who play a variety of roles in educating pupils. However, underlying his reasoning was an assumption that a “brief suspension is of less serious consequence to the reputation of a teenage student” than other administrative matters.\textsuperscript{96}

Suspension hearings such as those governed by Regulation A-443 in New York can satisfy the Due Process Clause with basic fact-finding and minimal procedural protections. When the Court recognized a “new property” interest in state benefits, it held that that the procedure

\textsuperscript{90} \textit{Id.} at 583.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} 411 U.S. 1 (1973).
\textsuperscript{93} 419 U.S. at 574. Though the Court indicated that states would face no Due Process Clause violation if they ended free public schools for all students, education has been a local government function since the free school movement of the mid-nineteenth century. The New York Constitution has included an Education Article since 1894. See N.Y. Const. art. XI, \S\ 1; \textit{Campaign for Fiscal Equity v. N.Y.}, 86 N.Y. 2d 307, 327 (N.Y. 1995) (Levine, J., discussing the history of New York’s education clause in his concurring opinion) (“CFE I”).
\textsuperscript{94} U.S. CONST. amend. V, XIV, \S\ 1.
\textsuperscript{95} \textit{Goss}, 419 U.S. at 594 (Powell, J., dissenting.)
\textsuperscript{96} \textit{Id.} at 589.
due varies by whether the recipient would suffer a “grievous loss” if the benefit is denied and “depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.” In Matthews v. Eldridge, the Court gauged the process provided in reviewing decisions to terminate disability benefits on a three-part balancing of (1) the individual interest at stake, (2) the risk of error in current procedures and the value of alternative procedures, and (3) the government interest, including the “fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

These factors weigh against judicial finding of inadequacy in almost any suspension hearing process, particularly one as extensively formalized as in New York City. Goss recognized an individual property interest in state education, but indicated the informal deliberation of a “fair-minded school principal” could provide adequate process and highlighted the crippling cost of providing “even truncated trial-type procedures” for the “almost countless” brief suspension decisions. A court applying the Matthews test would probably not determine that the benefit of additional procedures justified the cost.

Though New York’s suspension process precedes Goss, the Constitutional rule binds the Department of Education. In 1997, New York’s Court of Appeals formally adopted and

99 Id. at 335.
100 419 U.S. at 583.
101 Today, the Court would be less likely to rule that suspension hearings must provide greater procedures than in the Matthews and Goss era. Justice O’Connor’s controlling opinion in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), indicated that almost all procedural due process arguments must yield to administrative efficiencies. The opinion held that due process requires that a US citizen detained as an enemy combatant “...receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.” Id. at 533. However, even with his weighty interest in freedom and the rights of citizenship at stake, the Court allowed that “the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” When the Court later struck down the provisions of the military tribunal system denying habeas corpus review, the majority reconfirmed that the Matthews v. Eldridge’s balancing test constituted “our test for procedural adequacy in the due process context.” Boumediene v. Bush, 128 S.Ct. 2229, 2268 (U.S. 2008).
expanded *Goss* in statewide schools. Formal hearings are required for suspensions lasting longer than 5 days, not 10, but that “[a]s long as students are given a fair opportunity to tell their side of the story and rebut the evidence against them, due process is served.”

This ruling required no great leap of jurisprudence and simply affirmed New York City’s practice from 1970 on.

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102 *Board of Educ. v. Commissioner of Educ.*, 91 N.Y.2d 133 (NY 1997) (Often referred to as “Herzog” after the student appellant whose suspension was the source of the appeal.)
Section III: Complication - The Formal Procedures, Political Compromise, and Constitutional Jurisprudence Have Not Reduced Suspensions, Mitigated Their Disparate Impact on Black and Latino Students or Enhanced Students’ Right to Education

Part A. The outputs of the NYC suspension hearing system are bad

Despite the best hopes of the community activists in New York and the legal strategists behind Goss, the administrators of New York’s public school disciplinary system do not seek to limit the number of suspensions imposed. New York City inclusively interprets the statutory category of danger to “the safety, morals, health, or welfare of others”103 to allow suspensions for not only any kind of physical altercation104 or insubordination105, but taunting with slurs,106 throwing chalk,107 “academic dishonesty,”108 “violating the Department’s Internet Use Policy,”109 and possession of a laser pointer.110 111 Though a suspension is formally treated as an

103 N.Y. EDUC. LAW § 3214(3)(a) (Consol. 2010). See also Student Disciplinary Procedures, N.Y.C. CHANCELLOR’S REGULATION A-443, Introduction (2004), which states, “The Chancellor is committed to ensuring that school is a safe and secure environment for all students and staff. Toward that end, students must be taught that they are responsible for their behavior, that there are standards of behavior with which they must comply and that there are consequences when they do not meet those standards.”
105 See Id. at 20. A student in the sixth through twelfth grade range can be suspended for up to 10 days for “defying or disobeying” school personnel.
106 See Id. at 15, 22.
107 See Id. at 14, 20.
108 Id. at 13, 21.
109 Id.
110 Id. at 16, 23, 25.
111 Though presented as a safety-oriented system, suspension length does not vary with the continuing danger posed by the behavior but by the perceived gravity of the offense. In a typical case, the N.Y. Commissioner of Education upheld a three-month suspension issued by the Sachem Central School District to one student for fighting another after he discovered that the marijuana he had intended to purchase was actually “oregano or parsley.” Appeal of John Hamet, on behalf of Thomas Hamet, 36 NY Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 1,692 (1996). Although the record indicated no prior disciplinary actions, and the Commissioner cited no evidence indicating Hamet posed on ongoing threat, the Commissioner justified the long suspension by stating that the behavior charged “cannot be condoned” and “the sanction imposed must be proportionate to the severity of the offenses involved.” Id. See also Appeal of R.C., on behalf of his son C.C., 49 Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 16,023 (2010) (upholding a 60-day suspension issued by the Board of Education of
urgent safety or security response, the range of behaviors meriting removal indicate that it may be imposed as an ordinary educational punishment. Teachers and school officials must therefore implement formal hearing procedures appropriate for an extraordinary administrative response as part of their normal discipline scheme.

The broad interpretation of misbehavior meriting removal has facilitated a large and increasing number of suspensions in New York which have fallen unequally on students from different ethnic groups. Superintendent’s suspensions, lasting longer than five days, increased 76% from 2000 to 2005.\textsuperscript{112} In the 2007-2008 school years, there were more than 16,000 suspensions recorded in New York.\textsuperscript{113} The suspension rate widely varies between communities and schools. In 2006-2007, 12.2% of African-American students in low-performing schools were suspended (for any length of time), compared with 8% of Hispanic students, 7.2% of white students and 2.5% of Asian students in similar schools.\textsuperscript{114} New York’s education statutes are not being read to require the selective use of suspension or mitigate the disparate impact of the punishment on different groups.

Part B. The costs


\textsuperscript{114} See Annenberg Institute for School Reform at Brown University, \textit{How does race affect suspension rates in New York City’s highest- vs. lowest-performing schools? available at http://www.annenberginstitute.org/stat/archives/87} (last accessed May 5, 2010) (analyzing 2006-2007 New York State Department of Education data to find that suspension rates for African-American students were 6.7 per 100 students for high performing schools and 12.2 per 100 for low performing schools, 4.1 and 8.0 per 100 for Hispanic students in high and low performing schools, 1.6 and 2.5 per 100 for Asian students in high and low performing schools, and 2.5 and 7.2 per 100 for white students in high and low performing schools). Similarly, the New York Civil Liberty Unions reported that Black students accounted for 17% of public school students nationwide in 2000, but accounted for 34% of suspensions. See New York Civil Liberties Union, \textit{Fact Sheet: Zero Tolerance Discipline, Discrimination, And the School to Prison Pipeline available at http://www.nyCLU.org/schooltoprison/factsheet#_ftnref5} (last accessed May 4, 2010).
In addition to thwarting the hopes of the 1970s advocates by continuing to suspend a large number of students each year and continuing to suspend a disproportionate amount of black and Latino students, superintendent suspension hearings costs tax payer dollars in maintaining both the hearing sites and the alternative schools at which suspended pupils are placed. Unfortunately for researchers, the exact amount that is spent on school discipline has not been fully accounted. In complaining about the current discipline system, a public school dean from Queens wrote, “nobody knows how much of the city's $12 billion-plus annual budget is dedicated to school safety. But we do know that a significant portion of the funds that are earmarked for instruction and administration is actually used to maintain security.”

Every school has at least one assistant principle or dean dedicated to school discipline. Part of their duties is conducting investigations and writing disciplinary reports as required by Regulation A-443. The City Department of Education maintains five hearing offices which employee more than 60 full-time staff members dedicated to running the hearing process.

While no breakdown for the suspension sites is provided in the school budget, alternative high schools, which include suspension sites and schools for incarcerated children received $263 million in 2003-04. However, the school system might be saving money on the cost of educating those students removed from normal schools to District 79. Anecdotal evidence suggests that education resources spent in those schools is not nearly as extensive as those in normal schools – in fact they may be “warehousing” the students. The cost per pupil for a child in an alternative site is lower than even the cost of educating an average student at a school,

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115 Security Detail at 30.
and is much less than intensive behavioral management required keeping an at-risk or disabled student at school.

Even if the school saves some money on individual students transferred to District 79, suspending students imposes social costs that have not yet been adequately accounted by New York’s Department of Education. The procedural protections of hearings impose a social cost in themselves by requiring deans to act like prosecutors and teachers act as hostile witnesses towards their own students. The civic education provided by New York City schools blurs the line between the two prime sources of state authority in young people’s lives: the police and teachers, which may undermine respect for both.119

Richard Arum argues the opposite in JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY, though he also believes that formalized suspension hearings impose social costs. Arum accepts that children respect authority more when it is fair, but argues that children are more likely to accept discipline as fair if they “believe that the creator or enforcer of a rule has the authority to enforce it.”120 For Arum, the problem in New York’s suspension system isn’t that teachers promote an authoritarian disciplinary system, but that the authoritarian entity is a distant superintendent instead of the teacher. He finds that strict discipline is correlated with positive educational outcomes. There is a certain common-sensical appeal to his call for deference to the educational expertise of teachers in imposing discipline on their own students. Unfortunately, Arum utterly fails to account for race and ethnicity in his study so does not consider how a student in a majority-black school might perceive the discipline decisions of a

white teacher differently than those of a black teacher. Yet his point is well taken that removing discipline authority from teachers has negative educational outcomes.
Section IV: Why Has A System That Offends the Values of so Many Constituencies and Imposes Unaccounted Social Costs Lasted So Long?

Part A. Courts after Goss have not often intervened to reverse public school suspension decisions

1. The Court shifted away from juvenile rights jurisprudence shortly after Goss.

The faith of the Goss amici in the expansive direction of juvenile rights turned out to be misguided as the reach of the holding was soon narrowed by a Court with a more conservative membership. Sociologist Richard Arum describes the post-Goss period as a time when “the institutional infrastructure that promoted [school discipline litigation] was severely weekend, and the Supreme Court took a decidedly pro-school turn.”

In 1977, the Court decided Ingraham v. Wright, holding that corporal punishment could be implemented without formal process even though the infliction of pain implicated Fourteenth Amendment liberty interests. The Court distinguished Goss by on the grounds that unlike suspension, punishment by pain could “correct a child's behavior without interrupting his education.” The following year, the Court limited liability for violations of due process in suspension decisions to nominal damages in cases where the punishment was justified and no “malicious deprivation of rights” occurred. The hearing requirement of Goss would neither extend beyond suspensions nor carry the weight of damages to enforce compliance.

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122 Ingraham v. Wright, 430 U.S. 651 (U.S. 1977). The Court ruled that given the long tradition of corporal punishment in education, common law remedies were sufficient to satisfy due process for children’s interest in liberty from pain. Id. at 675. In analyzing claims that the practice violated the Eight Amendment, the Court flatly held that corporal punishment was not cruel or unusual due to its long practice. Id. at 662.
123 Id. at 674.
124 Carey v. Piphus, 435 U.S. 247, 266 (U.S. 1978). The unanimous opinion was written by Justice Powell, whose Goss dissent was so concerned with preserving teacher’s prerogatives in the classroom. While Goss forced him to concede that the denial of a hearing deprived the student of a right, he was unwilling to give effect to that right when it would mean that a teacher would have to pay a student damages for suspending him or her on good cause, no matter what procedure the teacher used to come to that decision.

Despite Carey, teachers see the burden of litigation and danger of unlimited personal liability as more than hypothetical. A former chair of the National School Boards Association Council of School Attorneys argued
2. The due process protection recognized by Goss does not substitute for a fundamental right to education

Additionally, the suspension hearings are protecting only a property interest and not a fundamental right. Education should be, but is not, recognized as a fundamental right in federal and New York law. In San Antonio Indep. Sch. Dist. v. Rodriguez125, the Supreme Court ruled in a school finance case that no fundamental right to education exists. The Court held that “[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws... Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”126

In Levittown Bd. of Educ. v. Nyquist127, New York’s Court of Appeals determined that the education clause in the state constitution “does not automatically entitle [education] to classification as a ‘fundamental constitutional right’ triggering a higher standard of judicial review for purposes of equal protection analysis” and similarly found no fundamental right to

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that Goss litigation presents the “danger that school officials will become timid decisionmakers” or “overly dependent on lawyers” due to the fear of getting sued by students unsatisfied with school discipline action levied against them. David M. Pedersen, A Homemade Switchblade Knife and A Bent Fork: Judicial Place Setting and Student Discipline, 31 CREIGHTON L. REV. 1053, 1064 (Jun. 1998). In 2008, the Tenth Circuit wrote “we defer to a teacher’s expertise about how to manage disciplinary problems or inculcate appropriate behavioral skills in his or her class,” in finding qualified immunity protected a special education teacher, principal and school psychologist who ordered “time outs” for a child with behavior disabilities. Couture v. Bd. of Educ. of the Albuquerque Pub. Schs, 535 F.3d 1243, 1255 (10th Cir. 2008). However, this decision came two years after the trial court had rejected a motion for summary judgment. Couture v. Bd. of Educ. of Albuquerque Pub. Schs, 2006 U.S. Dist. LEXIS 97306 (2006). The teacher and principal faced more than two years of uncertainty as to whether they would be forced to pay damages to one of their students.

126 Id. at 33-34. Writing for the majority, future Goss dissenter Justice Powell worried that the Court would become a “super-legislature” if it continually found implicit rights in the Constitution justifying judicial override of legislative priorities. Id. at 31. Because a fundamental right was not at stake and funding disparities in Texas schools did not operate to the “peculiar disadvantage of any class,” the Court applied rational basis review and found the education financing plan constitutional. Id. at 22.
127 57 N.Y.2d 27 (N.Y. 1982).
education in state law.\textsuperscript{128} Because a fundamental right is not at stake, courts will only review suspension hearings to determine if there is a rational basis for the procedures rather than subject the system to the strict scrutiny.\textsuperscript{129}

New York law recognizes education as an important and pervasive part of civic life. Like every other state in the Union, its constitution includes a clause providing universal public education.\textsuperscript{130} The education clause of the state constitution aims at universality, stating “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”\textsuperscript{131} Despite refusing to recognize education as a fundamental right, New York’s Court of Appeals has recognized the “fundamental value” of education to a democratic society and ruled that the guaranty of an adequate education

\textsuperscript{128} \textit{id.} at 43 (N.Y. 1982). New York follows the majority of states in finding no fundamental right to education. However, 15 states recognize education as a fundamental right under their state constitutions: Alabama, California, Connecticut, Kentucky, Minnesota, New Hampshire, New Jersey, North Carolina, North Dakota, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Katherine L. Pappas, \textit{Can an Equal Protection Claim Pass the Test When Education Financing is Challenged? A Case for the Rational Basis Standard}, 41\textit{ Ariz. St. L.J.} 483, 486-487 (2009). California was the first to recognize a right, holding that “the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest.’” \textit{Serrano v. Priest}, 487 P.2d 1241, 1258 (Cal. 1971). The \textit{Nyquist} decision in 1973 neither caused California to renounce the fundamental right to education nor discouraged the other 14 states which found a fundamental right to education in state law despite the Supreme Court’s contrary interpretation of the federal Constitution.

\textsuperscript{129} \textit{Compare Rodriguez}, 411 U.S. at 51 (holding “[o]nly where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative”) with \textit{Clark v. Jeter}, 486 U.S. 456, 461 (1988) (stating “[c]lassifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny”) (internal citations omitted). \textit{See also Nyquist}, 57 N.Y. at 44 (stating in the context of funding, “[o]ur inquiry is therefore only whether there has been demonstrated the absence of a rational basis for the present school financing system”). There, the court determined that New York’s constitutional guarantee of education required the state to provide a “sound basic education” with the legislature having great latitude to meet that requirement “in the absence, possibly, of gross and glaring inadequacy.” \textit{id.} at 48.

\textsuperscript{130} \textit{See Ala. Const. art. XIV, 256; Alaska Const. art. VII, 1; Ariz. Const. art. XI, 1; Ark. Const. art. XIV, 1; Cal. Const. art. IX, 1; Colo. Const. art. IX, 2; Conn. Const. art. VIII, 1; Del. Const. art. X, 1; Fla. Const. art. IX, 1; Ga. Const. art. VIII, 1; Haw. Const. art. X, 1; Idaho Const. art. IX, 1; Ill. Const. art. X, 1; Ind. Const. art. VIII, 1; Iowa Const. art. IX, 2d, 3; Kan. Const. art. VI, 1; Ky. Const. 183; La. Const. art. VIII, 1; Me. Const. art. VIII, pt. 1, 1; Md. Const. art. VIII, 1; Mass. Const. pt. 2, ch. 5, 2; Mich. Const. art. VIII, 2; Minn. Const. art. XIII, 1; Miss. Const. art. VIII, 201; Mo. Const. art. IX, 1(a); Mont. Const. art. X, 1; Neb. Const. art. VII, 1; Nev. Const. art. XI, 2; N.H. Const. pt. 2, art. LXXXIII; N.J. Const. art. VIII, 4, P 1; N.M. Const. art. XII, 1; N.Y. Const. art. XI, 1; N.C. Const. art. IX, 2; N.D. Const. art. VIII, 1; Ohio Const. art. VI, 3; Okla. Const. art. XIII, 1; Or. Const. art. VIII, 3; Pa. Const. art. III, 14; R.I. Const. art. XII, 1; S.C. Const. art. XI, 3; S.D. Const. art. VIII, 1; Tenn. Const. art. XI, 12; Tex. Const. art. VII, 1; Utah Const. art. X, 1; Vt. Const. ch. 2, 68; Va. Const. art. VIII, 1; Wash. Const. art. IX, 1; W. Va. Const. art. XII, 1; Wis. Const. art. X, 3; Wyo. Const. art. VII, 1.

\textsuperscript{131} N.Y. Const. art. I, § 12 (emphasis added).
includes extensive rights. Because courts recognize a connection between school and community, a child in New York may be punished by the school system for behavior occurring off school property “so long as there exists a nexus between the behavior and the school.”

Unfortunately, New York and 34 other states only treat education as a benefit for which limited administrative process is due.

3. Courts are reluctant to overturn discipline decisions made by educators

Given the flexible procedures Goss allowed for suspension hearings, the Court’s move away from children’s rights, and the lack of a fundamental right underneath the procedural due process right, it is unsurprising that a 2008 study of the progeny of Goss v. Lopez found that school authorities won in 81% of disciplinary decisions challenged in state or federal courts. A follow-up study examining state statutes and regulations for suspension procedures within the

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132 Campaign for Fiscal Equity v. N.Y., 100 N.Y.2d 893, 901 (2003) (“CFE II”). The court had previously discussed a “sound basic education” as a general requirement which the legislature could use its discretion to fulfill. Nyquist, 57 N.Y. at 48. Now, the court interpreted sound basic education as a “catchphrase for an inferred constitutional guarantee of an education of a certain quality.” Id. at 948-949. While the CFE II court was certainly interpreting education guarantees to be more extensive than it previously had, the court was enhancing the commitment to education articulated in Nyquist rather than overturning the decision.

133 Cohn v. New Paltz Cent. Sch. Dist., 363 F. Supp. 2d 421, 436 (N.D.N.Y 2005). See also Appeal of T.W. and P.K., 46 Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 15,472 (2006) (upholding suspension of students who threw eggs at a teacher’s house off school property and after school hours, holding “[t]he authority to suspend a student is conferred on a board of education by Education Law §3214(3), which allows suspension of a student ‘who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others.’”) The “nexus” has been interpreted to include a range of behavior, including: hacking a school website from a home computer, Appeal of D.V., on behalf of her son C.V., 44 NY Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 15,168 (2005); off school threats to a guidance counselor, Appeal of C.R., Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 15,330 (2005); a knife fight at store in front of crowd of "25 to 40 students" after a verbal altercation which began on school grounds, Appeal of K.S., 43 Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 15,063 (2004). But see Appeal of A.Q., 41 Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 14,703 (2002) (while dismissing the appeal on procedural grounds, urging superintendent’s office to “reconsider the equity of its penalty” because alleged marijuana sale did not occur on school grounds.)

Cohn also stands for the proposition that a New York “...School District is not entitled to Eleventh Amendment immunity” because of the high level of local control over school districts and traditional lack of any state education function. 363 F. Supp. 2d 421, 431. While giving the school power to regulate its students’ off-grounds activity, the court also gave the community the power to sue the school district, while reminding them of the many levers of control they have over the institution. Schools and communities are deeply intertwined.

Goss range of one to ten days found that approximately two-thirds of states afford greater process than the Supreme Court’s baseline.\textsuperscript{135} Today Goss is viewed by courts as “a standard that is workable in the day-to-day school environment,” i.e. one that discourages judicial second-guessing for suspension decisions.\textsuperscript{136} School systems must offer an opportunity for students to challenge a suspension, but they need not reduce the number of suspensions or limit the circumstances of student removal to satisfy Goss.

Like federal law, New York state law provides procedure for challenging suspensions, but does not substantively limit the punishment. Despite exceeding Goss protections by offering formal hearings for suspensions lasting five days,\textsuperscript{137} New York courts have taken a minimalist interpretation as to what that hearing must entail. The Court of Appeals fastened on Goss’s statement that students deserve “some kind of notice and afforded some kind of hearing” to find that schools do not need to notify the student of precise charges prior to a suspension hearing.\textsuperscript{138} The appellate division found that education was not a sufficiently “substantial liberty and property interest” to require suspension decisions be made on a preponderance of the

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\textsuperscript{135} Perry A. Zirkel and Mark N. Lovelle, \textit{State Laws for Student Suspension Procedures: The Other Progeny of Goss v. Lopez}, 46 SAN DIEGO L. REV. 343 (2009). The study authors, an assistant high school principal and a graduate student, argue that this data supports the conclusion that “state authorities that forge binding rules in the form of legislation and regulations, with due allowance for further experimentation and variation at the local level, are the primary - and proper - sources of the procedural and substantive requirements for student suspensions.” \textit{Id} at 348.

\textsuperscript{136} Brian A. v. Stroudsburg Area School Dist., 141 F. Supp. 2d 502, 508 (M.D. Penn. 2001) (upholding the expulsion of a 10th grade Pennsylvania student for making terrorist threats for writing a bomb scare note, after the school staff determined he had been previously suspended from a New Jersey school for detonating an explosive in a school shack.) This reasoning is strikingly similar to a pre-Goss decision noting that, “…the Supreme Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent fundamental constitutional safeguards, to prescribe and control conduct in the schools.” \textit{Jackson v. Hepinstall}, 328 F. Supp. 1104, 1107 (N.D.N.Y. 1971). The continuing deference to school disciplinary authorities on suspension decisions gives credence to the 1975 prediction by Alan Levine, drafter of the ACLU Goss amici brief, that Goss’s impact on schools would be “minimal” because the Court did not address the underlying assumption “that suspension is a rational response to acts of student misconduct.” Alan H. Levine, \textit{Reflections on Goss v. Lopez}, 4 J.L. & EDUC. 579, 582 (1975).

\textsuperscript{137} See N.Y. EDUC. LAW § 3214(3)(c)(1) (Consol. 2010).

\textsuperscript{138} \textit{Bd. of Educ. of Monticello Central School District v. Comm’r of Educ.}, 91 N.Y.2d 133, 139 (N.Y. 1997) quoting \textit{Goss}, 419 U.S. at 579 (emphasis in original). The court distinguished the administrative context of school hearings from criminal proceedings to hold that school charges need only provide general notice of the basis of the suspension.
\end{footnote}
Generally, courts will not even provide substantive guidance, allowing the state Commissioner of Education to exercise primary jurisdiction over school discipline as a matter of administrative expertise. Because suspended students in New York City are placed in (deficient) alternative schools or classrooms rather than kept home, legal remedies are more limited: students have a property interest in education generally, not any specific type of education.

Part B. Teachers never bought into the system and view it as unworkable

Teachers in New York do not see Superintendents’ Suspension Hearings as a way to ensure fair discipline results or ensure community values are represented in their classroom. They see it as a set of formalities imposed on them by lawyers which hobbles their ability to control their classroom and their school. The dean of Jamaica High School in Queens, New York succinctly captured the frustration of those who shoulder the burden of administering the discipline system: “When [student] behavior becomes truly disruptive, the system responds with

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139 Bd. of Educ. v. Mills, 293 A.D.2d 37, 39 (N.Y. App. Div. 2002). The court factored the individual interest into the three Matthews steps to find “the substantial and competent standard of proof does not violate a student’s constitutional right to due process.” Id. at 40.

140 Cf. Matter of Connolly v. Rye School Dist., 31 A.D.3d 444, 446(N.Y. App. Div. 2006) (recognizing that “[p]ursuant to the doctrine of primary jurisdiction, the review of determinations to impose discipline and to decline to admit nonresident students is, as a general rule, committed to the Commissioner by reason of the Commissioner’s specialized expertise” but remanding a claim that the parent violated a stipulated agreement to state court because it was a common law contract claim). In turn, the Commissioner will generally defer to the fact-finding of hearing officers. See, e.g., Appeal of T.R. and M.D., on behalf of their son T.R., Jr., 43 Jud. Decisions of the N.Y. Comm’r of Educ., Decision No. 15,036 (2004) (“With respect to findings of fact in matters involving the credibility of witnesses, I will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the determination of credibility is inconsistent with the facts”).

141 See Torres v. Little Flower Children’s Services, 64 N.Y.2d 119, 128 (N.Y. 1984). In that case, the court rejected a claim that a child was denied an “appropriate education” without a hearing, “since [s]uch nebulous entitlements [to an appropriate education] do not lend themselves to protection through the procedural due process requirement.” Id. The court did acknowledge that “due process protection may well apply when the child is not placed in school at all,” but determined that placement choices for a student within the system are within the discretion of the professional judgment of educators and staff. Id at 128-129.
a stream of procedures that expends endless man-hours and appropriates uncountable treasure, often without anything to show for the effort.”  

The Public Advocate of New York wrote a report in response to a perceived “growing crisis in school safety” calling for strong disciplinary response and flexible exclusion policies. The report criticizes public schools for not removing “chronically disruptive” students in adequate numbers or with adequate speed and urged the city’s Department of Education to “ensure the maximal utilization of all alternative sites at its disposal for students with disciplinary problems.”

Teachers and their advocates seek to manage this needless impediment to classroom safety and discipline by aggressively pressing all school prerogatives in the hearing process and limiting the ability of students to ‘get off on technicalities.’ While denying that teachers should seek strict punishment, American Federation of Teachers President Randi Weingarten has implicitly endorsed New York’s mode of suspensions by saying there is a greater need for

142 Mark A. Epstein, Security Detail: An Inside Look at Safety and Discipline in the Hyperlegalized World of a New York City High School, EDUCATION NEXT 28-33 at 31-32 (Summer 2003). Mr. Epstein gives a good sense of the amount of human resources now devoted to discipline in a typical school. For a student population of 2,500, Jamaica High now has eight deans...who devote much of their time to disciplinary issues; an assistant principal for security; two secretaries, one part time, one full time; and a school aide assigned just to the dean's office. In addition, ten school security agents employed by the New York City Police Department patrol Jamaica's halls. The number increases on those days when "random scanning" of students for weapons is in effect. Id at 29.

143 Betsy Gotbaum, Public Advocate For the City of New York, New York City Department of Education’s Zero-Tolerance Policy for Chronically Disruptive Students 3 (2006) available at http://publicadvocategotbaum.com/policy/school_suspensions.html. Notably, this is the same office, led by the same Public Advocate, Betsy Gotbaum that co-published PUSHING OUT AT RISK CHILDREN four years earlier. The contradiction between the reports reflects the divergent concerns expressed by the Public Advocate’s constituents. However, neither report supports the status quo in the administration of New York school suspension.

“prevention and intervention strategies and alternative placements for disruptive students”\textsuperscript{145} The United Federation of Teachers (“UFT”) publishes a guide for New York City public school teachers on how to navigate administrative requirements and successfully suspend disruptive students.\textsuperscript{146} Educators can see the benefits of running a safe, stable, and ordered classroom. They simply do not see the benefit of abiding by a hearing process run by lawyers, nor agree that failing to abide by dictates of “due process” to remove a disruptive child harms anyone’s rights.


\textsuperscript{146} United Federation of teachers, \textit{Handling Disruptive Students} (Nov. 26, 2009) available at http://www.uft.org/news/teacher/rights/handling_disruptive_students. The guide insists that “educators have the right to teach in a safe environment” and “it only takes one or two disruptive students to interrupt the education of an entire class.” \textit{id.}
V The Solution: More Minority Teachers, Increased Community Control and Standards, and Greater Emphasis on Guidance Intervention For Disruptive Students

While the plaintiff class won in *Goss* and school systems throughout the country created formal hearings to review suspension systems, the objectives of the groups advocating for Lopez have never been met. The NAACP has not stopped disparate impact of suspensions on minority youth. The Children’s Defense fund has not reduced the number of suspensions. The ACLU has not enhanced student autonomy nor fostered greater respect for law by young people. Sadly, the well intentioned educators on the other side have also seen their objectives stymied. The Buckeye Association and City of Columbus have not been able to grant teachers the discretion to run their classroom in a manner that best responds to their students’ needs.

Just as the teachers continue to fight for the disciplinary authority they lost in the 1960s, advocates for discipline reform continue to fight for recognition of student rights which faded in the late 1970s. The NAACP has taken up the Children’s Defense Fund’s argument that taking children out of school for even a few days disrupts their education and often escalates poor behavior by “removing them from a structured environment and giving them increased time and opportunity to get into trouble.”147 Returning the favor, the New York Civil Liberties Union (NYCLU) now argues that the best predictor of suspension likelihood for students is the “color of their skin, their special education status, the school they go to, and whether they have been suspended before asserts that school suspensions.”148 The NYCLU remains true to its roots in its

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proposed solutions: increase education spending, explore “successful, non-punitive discipline models,” and “allow students to have a role in designing school discipline codes.”

It is a measure of the frustration with the current discipline scheme that a certain level of paranoia has set in. Whereas Jamaica High School Dean Epstein believes “the system” seeks to waste teacher hours to satisfy lawyers, Advocates for Children used high suspension rates and “anecdotal information” to conclude that “the system” is systematically “pushing out” students who would be costly to educate or produce lower test scores. Because the hearing procedures engender the strongest dislike from the advocacy groups most committed to student well being, it is hard for Superintendents to engage school staff and advocates in ensuring they run well.

Fortunately for reformers, the high level of procedure surrounding school discipline and typified by the New York City suspension system is currently well beyond what Goss mandated. Therefore, even a drastic change in policy would require no shift in Constitutional jurisprudence. NY CLS Educ § 3214 allows great flexibility in disciplinary approaches, provided the schools focus on alternative punishments rather than routinely excluding students from school for longer than give days. Even the hearing mandated by the statute for superintendent’s suspensions need not be elaborate as the process enumerated in Chancellor’s Regulation A-443.

The best way to advance reform in New York is to find areas in which those goals, first articulated 35 years ago and unmet today, converge. Perhaps foremost among these is the longstanding racial disparity of suspensions. Black community activists in New York did not impose suspension hearings because they felt students should be able to avoid punishment, but rather they did so to curb racially charged suspensions. If there are more minority teachers and

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149 Id.
principals, minority communities will be more willing to give those educators discretion to make education decisions without oversight. The interests voiced by the NAACP and Buckeye amici briefs can be met through a hiring program designed to make school staffs mirror the communities they serve.152

Another effective means of reducing suspensions is to invest the money and social resources founding and maintaining schools that have rigorous academic and behavioral standards and deep community engagement. Often today, these are charter schools, but they need not be. Reformers should apply the Ford Foundation's insight of the 1960s that led to the Brownsville experiment: granting some measure of control over a school to the local community can promote a better educational outcome. This idea has successfully been replicated in experiments and charter schools numerous times.153

To address the Children’s Defense Fund’s concern about interrupted education, New York’s Department of Education needs to fund and staff alternative schools to provide real education, real guidance, and real discipline. Children sent to alternative schools with weak structure and little education are all but doomed to get back in trouble upon returning to their original school. These children need more intensive teacher interaction and greater services in alternative schools. As an added benefit, if the alternative school costs more per pupil than

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152 A thoughtful discussion of the divide between white teachers and black students is presented in Jawanza Kunjufu, BLACK STUDENTS - MIDDLE-CLASS TEACHERS (African American Images 2002). Kunjufu notes that currently African Americans make up 6% of teachers in the United States, and black men only 1%. Id. at v. The book is presented as a guide for urban teachers, so is not focused on recruiting more black teachers. However, Kunjufu does write, “If we seriously want to close the achievement gap, we must empower parents and increase communication between staff and parents.” Id. at viii.

153 One of the many iterations of this formula is the Promise Academy Charter Schools, run by Harlem Children Zone. See http://www.hcz.org/programs/promise-academy-charter-schools.
regular schools, the Department of Education will be incentivized to implement forms of discipline that do not result in removal.  

Finally, there needs to be a way to square the Buckeye Association’s concern with teacher authority and the ACLU’s concern for fair results and respectful procedures. Where student and teacher disagree about factual basis for discipline, the best way to determine what happened may be a proceeding with an impartial adjudicator. Common law bias aside, there is no reason that this must be an adversarial hearing rather than an inquisitorial model or even a mediation. However, the facts are found, the current disposition phase should be eliminated. If a student is found to have committed a serious infraction, the next step should be a meeting in which the teacher, student and a guidance staff member create a discipline plan to address problematic behavior. If a student must be sent to an alternative school, this conference will create goals he should/must meet to return to regular school (if possible). While social disapproval should be expressed and the authority of the teacher affirmed, the model for this meeting should be social work, rather than legal.

154 This idea predates suspension hearings in New York City. In 1968, the Board of Education initiated Project ABLE, an alternative education site for suspended pupils that was served by a staff of psychologists, social workers and guidance counselors. See Project ABLE Proves Helpful to Alleged Disruptive Pupils, N.Y. AMSTERDAM NEWS, Aug. 3, 1968 at 3. The mission of District 79 is still presented in these terms: to “empower students through rigorous instruction and quality support services.” District 79 website available at http://schools.nyc.gov/Offices/District79/default.htm. This formal mission does not meet reality. In 2008, Donna Lieberman of the NYCLU testified before New York’s City Council, ”We have received reports of inappropriate or non-existent learning materials, overcrowding, and lack of supervision at these placements. It is not surprising that these sites have an attendance rate of less than 35 percent or that students sent to these placements often drop out of school altogether.” Available at http://www.nyclu.org/content/impact-of-school-suspensions-and-demand-passage-of-student-safety-act#. Lieberman did not that some of the schools for students on year-long suspension provided excellent services, but asserted that quality varied widely within the system.
VI Conclusion

The legitimacy of the current discipline system in New York City rests on three legs: the flawed analysis of education that does not recognize it as fundamental right,\textsuperscript{155} the flexible application of due process to education that allows suspension decisions to be made after “rudimentary” proceedings,\textsuperscript{156} and administrative regulation and practice which broadly implements suspensions despite a statute\textsuperscript{157} suggesting a more limited role for the punishment. New York’s suspension system would be dramatically changed if any of the three legs were eliminated by court or legislative action. Additionally, the Commissioner of Education could promulgate regulations and review superintendents’ suspension decisions with a more narrow interpretation of behavior endangering “the safety, morals, health or welfare of others.” In the absence of a shift in one of those areas, students and their advocates should not expect to gain greater protection of education rights from suspension hearing procedures.

New York and national law currently regard public education as a property right that requires some proceedings before it can be denied through school suspension. This property right is too weak to change substantive decisions, so hearings have not decreased the number of suspensions or made them fall more equally across ethnic groups. The procedural right is sufficient to require educators engage in formalistic behavior before making discipline decisions, which hampers control over their classrooms and distorts teachers’ relationship to their students. This was not the outcome sought by the Harlem Area Neighborhood Association in New York in 1969 or by the ACLU, NAACP, and Children’s Defense Fund in federal court in 1975.

To improve the fairness of school discipline, the New York Department of Education should not enhance procedural protections, since they are not tied to a meaningful substantive

\textsuperscript{155} See Rodriguez, 411 U.S. 1; Nyquist, 57 N.Y.2d 27.
\textsuperscript{156} Goss, 419 U.S. at 581
\textsuperscript{157} N.Y. EDUC. LAW § 3214(3)(a) (Consol. 2010).
right. Instead, the Department should utilize the wide latitude granted by state law and the Constitution in discipline matters to implement a hybrid discipline model. This model will allow for an impartial fact finder to determine whether a student has actually violated the discipline code, while shifting responsibility back to the teachers and students in formulating a response.

The procedural shift must be coupled with greater investment in education for this to produce fewer suspensions and reduce the collateral consequences of suspensions on students. Alternative schools must be operated as sites of intensive intervention for troubled students, Regular schools must be staffed by teachers who better reflect the racial makeup of the communities they serve and instill rigorous standards of education and behavior on their students while heavily engaging the community to ensure that parents trust and support the discipline decisions they make.

Education reformers will encourage better results from New York City’s school discipline decisions by working around the procedural requirements of *Goss* rather than relying on them.