

## Boston College Law School

---

From the Selected Works of Cheryl S. Bratt

---

2008

# N.O. Schools or No Schools?: Absolute Deprivation of Educational Opportunity in Post-Katrina New Orleans as a Violation of a Fundamental Right

Cheryl S. Bratt

---

Available at: <https://works.bepress.com/cheryl-bratt/1/>



# N.O. Schools or No Schools? Absolute Deprivation of Educational Opportunity in Post-Katrina New Orleans as a Violation of a Fundamental Right to a Minimally Adequate Education

---

*Cheryl S. Bratt\**  
*Bradley W. Moore\*\**  
*Colin W. Reingold\*\*\**

## INTRODUCTION

In 1973, the Supreme Court decided in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental right.<sup>1</sup> The Court noted that “education is perhaps the most important function of state and local governments,”<sup>2</sup> echoing its decision in *Brown v. Board of Education*.<sup>3</sup> However, it held that San Antonio’s school financing scheme did not trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment and was therefore constitutionally permissible, despite major funding discrepancies that left poorer schools with substandard buildings, outdated supplies, and unqualified teachers.<sup>4</sup> This decision contains dicta, however, suggesting that an absolute deprivation of education could violate the Constitution, and thus that children may be entitled to at least some minimum quantum of education under the U.S. Constitution.<sup>5</sup>

Although the Supreme Court has not yet ruled on whether there is a fundamental right to a “minimally adequate education,” it has recognized that such a right might exist. The post-Katrina New Orleans school system may exhibit such an absolute lack of education that the Supreme Court would find it violates the Constitution. As the best available demonstration

---

\* University of Michigan Law School, J.D. candidate, December 2008; English Teacher, F.W. Gregory Junior High School, New Orleans, Louisiana, 2001–2003.

\*\* University of Michigan Law School, J.D. candidate, December 2008; Science Teacher, Mastery Charter High School, Philadelphia, Pennsylvania, 2003–2005.

\*\*\* University of Michigan Law School, J.D. candidate, December 2008; English Teacher, Edna Karr High School, New Orleans, Louisiana, 2003–2005.

We are grateful for the guidance and support from Professor Mark Rosenbaum, whose teachings on education litigation inspired this project. We are indebted to our friends and colleagues who shared with us their experiences of working in the public schools of New Orleans.

<sup>1</sup> 411 U.S. 1, 18 (1973).

<sup>2</sup> *Id.* at 29 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> *Rodriguez*, 411 U.S. at 128 (Marshall, J., dissenting).

<sup>5</sup> *Id.* at 36–37 (majority opinion).

of what the denial of such a right might look like, the New Orleans school system may present a novel opportunity to push on the constraints of the *Rodriguez* holding and to set a precedent for education litigation in other school districts around the nation where students are absolutely deprived of an education.

First, this Essay considers the existing federal legal framework for education litigation and particularly the idea that there may be a fundamental right to at least a minimally adequate education. Second, this Essay describes the situation in New Orleans before Hurricane Katrina and the resulting confusion in the months following the disaster. This Essay relies on interviews with New Orleans public school administrators, teachers, and personnel, as well as employees of local and national nonprofit organizations. Because of the goodwill of all those working in the New Orleans schools, and because of the importance of maintaining a strong sense of community within the educational system and the City of New Orleans, the sources' identities and their criticisms identifying specific players and schools have been withheld. Lastly, this Essay explains that exposing the lack of schooling for an unrecorded (but presumably substantial) portion of the school-age population could provide an opportunity to challenge the long-standing assumption that education is not a fundamental right.

Applying the dicta in *Rodriguez* to the facts of the New Orleans Public Schools, this Essay demonstrates that New Orleans is not providing its students a minimally adequate education. By establishing that, at least in post-Katrina New Orleans, a court might have found a denial of a constitutional right to a minimally adequate education, this Essay suggests that New Orleans could serve as the entry point into reforming education litigation. Establishing what an absolute deprivation of educational opportunity looks like in New Orleans may set standards that courts can apply to other jurisdictions, revitalizing some kind of federal right to education nationwide.

## I. EDUCATION AS FUNDAMENTAL RIGHT: THE *RODRIGUEZ* REGIME

Under the Equal Protection Clause, no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>6</sup> If education were a fundamental right, states would likely need a compelling interest and a narrowly tailored system to justify school districts that create marked disparities in the quality of education provided to students.<sup>7</sup> As a matter of state constitutional jurisprudence, recognizing a fundamental right to education under state constitutional provisions has led to significant tangible benefits for students.<sup>8</sup>

---

<sup>6</sup> U.S. CONST. amend. XIV, § 1.

<sup>7</sup> See *Rodriguez*, 411 U.S. at 16–17. Finding education to be a fundamental interest via substantive due process also would have triggered strict scrutiny. See *id.* at 17.

<sup>8</sup> See, e.g., *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) (ordering the state to bring per-pupil funding up to the level of spending in successful districts); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 213 (Ky. 1989) (“The General Assembly shall provide funding

The Supreme Court held in *San Antonio Independent School District v. Rodriguez*, however, that under the U.S. Constitution, education is not a fundamental right, notwithstanding any connection between education and the exercise of other fundamental or important rights, such as speech or voting.<sup>9</sup> Therefore, if the State offers a basic minimum of education to all of its students, relative differences among school districts do not matter for purposes of the Equal Protection Clause.<sup>10</sup>

However, dicta in *Rodriguez* suggest that there may be a fundamental right to at least some level of educational opportunity. First, the majority contrasts the funding scheme in *Rodriguez* with cases where plaintiffs are “completely unable to pay for some desired benefit, and as a consequence, they sustain[ ] an absolute deprivation of a meaningful opportunity to enjoy that benefit”—the latter situation potentially implicating a stricter level of scrutiny.<sup>11</sup> Second, there could be a claim where plaintiffs’ “lack of personal resources [has] occasioned an absolute deprivation of the desired benefit” such that “children . . . are receiving no public education . . . .”<sup>12</sup> A footnote in the opinion expressing this idea may contradict, in part, the idea that there is no fundamental interest in education:

An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of ‘poor’ people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.<sup>13</sup>

Finally, the Court concedes that it is possible that “some identifiable quantum of education is a protected prerequisite” of the exercise of other fundamental rights such as free speech, and that therefore a stricter level of scrutiny should be applied to a state’s actions when there is “an absolute denial of education opportunities to any of its children . . . .”<sup>14</sup>

---

which is sufficient to provide each child in Kentucky an adequate education.”). Many states have no such provisions in their constitutions, leaving students suffering from gross disparities in educational quality with little recourse. The Louisiana Constitution has not been interpreted to require more than the state is already doing to fund and operate schools in the state. See National Access Network, Teacher’s College, Columbia Univ., State by State, [http://www.schoolfunding.info/states/state\\_by\\_state.php3](http://www.schoolfunding.info/states/state_by_state.php3) (last visited Apr. 9, 2008).

<sup>9</sup> 411 U.S. 1, 37–38 (1973).

<sup>10</sup> See *id.* at 54–55.

<sup>11</sup> *Id.* at 20.

<sup>12</sup> *Id.* at 23.

<sup>13</sup> *Id.* at 25 n.60.

<sup>14</sup> *Id.* at 36–37. See also *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”).

The Supreme Court's ruling in *Plyler v. Doe* supports the claim that just because education has not been recognized as a fundamental right, the state cannot rationally deprive a class of children—in that case, the children of illegal immigrants—from receiving any education whatsoever.<sup>15</sup> Education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>16</sup> Applying an intermediate level of scrutiny, the Court held that the State's denial of school admission to those children was not rationally related to any “substantial goal” of the State in light of the costs of having that class of children enter society without an education.<sup>17</sup> As Justice Powell—the author of *Rodriguez*—noted in his concurrence:

A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a “fair and substantial relation” to these interests.<sup>18</sup>

While the “unique circumstances” of *Plyler* have not led the Court to rule against the state in other situations,<sup>19</sup> the intermediate level of scrutiny for some types of educational deprivation announced in the case could be particularly well suited to the situation in New Orleans or to other school districts where, as a result of state action or neglect, a group of students receives no meaningful education of any kind.<sup>20</sup>

The Supreme Court in *Papasan v. Allain* continued this thread, once again recognizing that a fundamental right to some minimally adequate level of education might exist.<sup>21</sup> Commenting on *Rodriguez* and *Plyler*, the Court stated that it had “not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”<sup>22</sup> The Court found, in part, that the plaintiffs' claim that they had been denied a minimally adequate education was “a legal conclusion couched as a factual allegation”; only a showing that students had actually been deprived of an education, rather than a mere showing of funding problems, could be sufficient to reach the fundamental right issue, should such a right exist.<sup>23</sup> However, even if the Supreme Court were

<sup>15</sup> 457 U.S. 202, 223–24 (1982).

<sup>16</sup> *Id.* at 221.

<sup>17</sup> *Id.* at 223–24.

<sup>18</sup> *Id.* at 239 (Powell, J., concurring).

<sup>19</sup> See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988); *Martinez v. Bynum*, 461 U.S. 321 (1983).

<sup>20</sup> See *Plyler*, 457 U.S. at 230.

<sup>21</sup> 478 U.S. 265 (1986).

<sup>22</sup> *Id.* at 285.

<sup>23</sup> *Id.* at 286 (“The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been

ever to recognize a fundamental right not to be absolutely deprived of educational opportunity, such a right would not apply to all aspects of education. For example, the Supreme Court, distinguishing *Plyler*, refused to apply more than rational basis review to a statute in a South Dakota locality charging fees for school busing services in *Kadrmas v. Dickinson Public Schools*, another case discussing the possibility of a fundamental right to a “minimally adequate education.”<sup>24</sup>

The educational situation in post-Katrina New Orleans presents a unique opening to refine the understanding of the potential for claims based on an absolute deprivation of educational opportunity. While scholars have suggested that the potential for a constitutional right to “minimally adequate education” may exist,<sup>25</sup> no one has yet squarely taken on the question of what an absolute deprivation of educational opportunity would look like, as education litigation has shifted to adequacy suits under state constitutions.<sup>26</sup> The Supreme Court precedent hints at the type of violation that would deny a child a right to a minimally adequate education: In *Papasan*, the Court suggested it might have ruled differently if the “schoolchildren [were] not taught to read or write; [or] receive[d] no instruction on even the educational basics . . . .”<sup>27</sup> At the very least, when students are not present in school, that should constitute a denial of a minimally adequate education. Comparing the plight of students in New Orleans schools before and after Hurricane Katrina presents the perfect lens through which to examine the contours of a right not to be absolutely deprived of educational opportunity.

---

deprived of a minimally adequate education. As we see it, we are not bound to credit and may disregard the allegation that the petitioners have been denied a minimally adequate education.”).

<sup>24</sup> 487 U.S. 450, 462 (1988). The Court, while not reaching the issue, sought perhaps to constrain the scope of *Rodriguez* by stating, “[n]or have we accepted the proposition that education is a ‘fundamental right,’ like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual’s access to it.” *Id.* at 458. *But see id.* at 467 (Marshall, J., dissenting) (“In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right.”). Under *Lawrence v. Texas*, 539 U.S. 558 (2003), a court might find the denial of a minimally adequate education to have no rational state purpose. *See* Matthew A. Brunell, Note, *What Lawrence Brought for “Show and Tell”: The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343 (2005). *But cf.* Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409 (2006) (demonstrating that courts continue to apply *Glucksberg*’s substantive due process analysis even after *Lawrence*).

<sup>25</sup> *See, e.g.*, Timothy D. Lynch, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 HOFSTRA L. REV. 953 (1998); Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER L.J. 99 (1991); Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279 (1993); Peter S. Smith, Notes and Comments, *Addressing the Plight of Inner-City Schools: The Federal Right to Education After Kadrmas v. Dickinson Public Schools*, 18 WHITTIER L. REV. 825 (1997).

<sup>26</sup> *See, e.g.*, *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

<sup>27</sup> 487 U.S. at 286.

## II. NEW ORLEANS BEFORE AND AFTER THE STORM

New Orleans public schools have never been a model for educational achievement or equity. After Hurricane Katrina hit, however, the schools reached a frightening new low of disorganization and dysfunction. In the 2004–2005 school year, the year prior to Hurricane Katrina, Louisiana ranked forty-sixth in a national ranking of “smartest” states,<sup>28</sup> and New Orleans was the second lowest performing district in Louisiana.<sup>29</sup>

In 2005, two-thirds of the district’s 127 schools<sup>30</sup> were classified as failures.<sup>31</sup> A failed school was one that had been identified as being “academically unacceptable” for at least four years. State legislation passed in 2003 provided for the takeover of such failing schools, allowing for the operation of a special state-run school district, the Recovery School District (RSD).<sup>32</sup>

In a stark example of the system’s educational insufficiency, the valedictorian of Alcee Fortier High School was unable to graduate on time because she failed to pass the state’s Graduation Exit Exam (GEE), which is taken initially in tenth grade. She failed the test six times before finally passing.<sup>33</sup> In all, it was a school system that many people believed needed to be leveled and rebuilt from the ground up.<sup>34</sup>

Hurricane Katrina struck New Orleans during the early morning hours of August 29, 2005, two weeks after public schools had opened for the year. Flooding from the combination of hurricane rains and the breaches in the levee caused large portions of the city to remain underwater for days, and high winds caused further damage. New Orleans was officially off-limits until September 30, after which there was limited re-entry to designated areas of the city, although utilities were not fully restored and the National

---

<sup>28</sup> Morgan Quitno Press, Which State is Smartest? Prior Years’ Rankings, <http://www.morganquitno.com/edpri06.htm> (last visited Mar. 16, 2008).

<sup>29</sup> *District Performance Score (DPS) and DPS Label*, TIMES-PICAYUNE (New Orleans), [http://www.nola.com/education/index.ssf?/education/content/2005\\_dps.html](http://www.nola.com/education/index.ssf?/education/content/2005_dps.html) (last visited Mar. 12, 2008).

<sup>30</sup> LA. DEP’T OF EDUC., ANNUAL FINANCIAL AND STATISTICAL REPORT 2005–2006 II–149 (2007).

<sup>31</sup> *All Things Considered: New Orleans Schools in Uneasy Condition* (National Public Radio broadcast May 25, 2005).

<sup>32</sup> La. Dep’t of Educ., Recovery School District: “Failing” Four or More Years (2007), <http://www.louisianaschools.net/lde/rsd/2266.html>. Louisiana established the Board of Elementary and Secondary Education (BESE) as a constitutional body in 1973 to set “key education initiatives and strive[ ] to provide leadership in setting an education agenda.” La. Dep’t of Educ., Louisiana Board of Elementary & Secondary Education (2007), <http://www.doe.state.la.us/lde/bese/home.html>.

<sup>33</sup> *All Things Considered*, *supra* note 31.

<sup>34</sup> See, e.g., Steve Ritea, *This is a Mess*, TIMES-PICAYUNE (New Orleans), July 24, 2005, available at <http://www.nola.com/education/t-p/index.ssf?/education/crisis/reports/mess.html>; Erik W. Robelen, *New Orleans Eyed as Clean Educational Slate*, EDUCATION WEEK, Sept. 21, 2005.

Guard maintained a significant presence.<sup>35</sup> Residents were finally allowed to enter the Ninth Ward, the last area of the city to reopen, on December 1.<sup>36</sup>

The destruction of the city left the school system in a state of confusion. In the immediate aftermath, it was unclear how many students would return, what parts of the city they would live in, and whether teachers and administrators would be able to come back to teach them. In the end, legislation passed in the November 2005 special legislative session expanded the definition of a “failed school” in Louisiana to include schools scoring below the state average in school systems declared to be in “academic crisis” with at least one school labeled as failing for four or more years.<sup>37</sup> Under this new definition, only five New Orleans schools would continue to be run by Orleans Parish School Board (OPSB); the rest of the schools—the failing schools—would become part of the RSD.<sup>38</sup>

Currently, New Orleans has a fragmented education system run by a mix of district, state, and independent agencies. In all, there are now seven different types of schools throughout the city—five types of charters, a few schools operated directly by OPSB, and the remainder operated directly by the RSD. As of March 30, 2007, there were a total of fifty-seven schools in New Orleans.<sup>39</sup> Of these, twenty-three were independently run charters; five schools were being run directly by the OPSB; eight schools fell under the control of the Algiers Charter School Association (ACSA), a charter association that is a mix of RSD and OPSB charters; and twenty-one were being run by the RSD.<sup>40</sup> Seventy-five schools remained closed.<sup>41</sup>

### III. A RODRIGUEZ VIOLATION?

The destruction of the city and the haphazard nature of its school system combined effectively to keep New Orleans students out of schools, thus depriving them of a minimally adequate education. According to *Rodriguez* and *Plyler*, the absence of an opportunity to receive an education could violate the constitutional guarantee to a minimally adequate education. The Court’s narrow definition of this right has admittedly left little opportunity for litigation. New Orleans, however, may represent the kind of situation that would exemplify a constitutional violation, as students have literally

---

<sup>35</sup> See, e.g., Keith Darcé, *N.O. Still In the Dark About Web, Phones*, TIMES-PICAYUNE (New Orleans), Sept. 30, 2005, at A1; Jeremy Scahill, *Blackwater Down*, THE NATION, Oct. 10, 2005, at 19.

<sup>36</sup> Gwen Filosa, *A War Zone*, TIMES-PICAYUNE (New Orleans), Dec. 2, 2005, at A1.

<sup>37</sup> La. Dep’t of Educ., Recovery School District: “District in Academic Crisis” (Orleans) (2007), <http://www.louisianaschools.net/1de/rsd/2267.html>.

<sup>38</sup> Amy Waldman, *Reading, Writing, Resurrection*, THE ATLANTIC, Jan.–Feb. 2007, at 89.

<sup>39</sup> Greater New Orleans Cmty. Data Ctr., Status of Public Schools in New Orleans for Spring 2007 (as of March 30, 2007), [http://www.gnocdc.org/maps/orleans\\_schools.pdf](http://www.gnocdc.org/maps/orleans_schools.pdf) (last visited Apr. 14, 2007).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

been deprived of their opportunity to attend school. Both parents and school officials have been unaware of school openings, and a class of students has been denied enrollment, ultimately resulting in a school enrollment waitlist for one month; open schools have failed to institute a system-wide attendance policy; and severe disciplinary measures have resulted in skyrocketing suspension and expulsion rates. Together, these practices amount to a deprivation of New Orleans students' fundamental right to receive an education.

### A. Enrollment Difficulties

Enrollment issues unfolded due to the lack of a system to announce school openings and the unofficial policy at some schools of turning away certain students. This resulted in both parental and institutional confusion, ultimately requiring a school enrollment waitlist. When our research was gathered in the spring of 2007, several community groups and education organizations maintained lists of active schools, but there was no centralized information source for parents and students. Parents had been showing up at district offices to register their children at a rate of fifteen to seventy-five a day.<sup>42</sup> District offices, however, were inadequately equipped to inform parents about their options. The RSD, OPSB, and ACSA all operated out of different locations, yet all opened their schools' doors to students from anywhere in the city. With the exception of the ACSA, the remaining charter schools lacked a central office to coordinate their enrollment.<sup>43</sup>

Despite the fact that charters represented the largest single school option in New Orleans, most parents did not have easy access to information that explained what a charter school was, which schools had openings, or which schools their children might be eligible to attend. One principal of an RSD charter school complained, "I keep getting emails saying they're setting up a clear information system for parents. We've filled out information sheets. But it hasn't happened yet."<sup>44</sup> A site coordinator for a national non-profit organization said the biggest problem he had observed was the lack of a mechanism for educating parents. "The RSD is operating all of the schools that parents are used to sending their kids to—John Mac, Douglas, et cetera—how are they supposed to know about charters?"<sup>45</sup>

As recently as February 2008, new superintendent Paul Vallas chastised the district for its poor outreach efforts and failure to explain enrollment options to parents and students. "If you provide choices, but nobody knows there's choices, is it really a choice? Freedom is information."<sup>46</sup>

---

<sup>42</sup> Darran Simon, *Two More Schools Open; N.O. Wait-Listing Ends*, TIMES-PICAYUNE (New Orleans), Feb. 6, 2007, at A1.

<sup>43</sup> Interview with Site Coordinator for National Education Nonprofit, in New Orleans, La. (Mar. 27, 2007).

<sup>44</sup> Interview with Principal of RSD Charter School, in New Orleans, La. (Apr. 10, 2007).

<sup>45</sup> Interview with Site Coordinator, *supra* note 43.

<sup>46</sup> Molly Reid, *School Fair Attendance Gets Failing Grades*, TIMES-PICAYUNE (New Orleans), Feb. 24, 2008, at B1.

Even upon finding an open school, students still faced enrollment difficulties, which were particularly acute for special education students who faced both official and unofficial enrollment denial. Louisiana law requires charter schools to operate via open enrollment and to allocate at least ten percent of their student body to special education students,<sup>47</sup> but schools were quick to find ways around these mandates or to blatantly ignore them.<sup>48</sup> For example, even if these schools accept their requisite ten percent, charter schools can create admissions requirements such as behavior records, test scores, writing samples, and letters of recommendation, to weed out the neediest students. The broad discretionary power over admissions policies gives charter schools power to cherry-pick the kind of students they want to educate.<sup>49</sup>

Unofficially, certain schools within the city reportedly turned away special education students, claiming a lack of adequate services. A school administrator noted that many of the special education students enrolled at his school initially tried to enroll at a different school close by but were turned away by an administration who claimed, “We can’t serve you the way you need to be served. Try enrolling [elsewhere].”<sup>50</sup> The State provides little oversight for any of these enrollment practices.

The confusion and discrimination in the district caused the RSD to create a waitlist in January 2007. Parents were told that their children could not go to school; they would have to wait until a spot or a new school opened.<sup>51</sup> Ultimately, there were more than 300 students on the waitlist. It took nearly a month before MacDonogh No. 42 Elementary School opened and admitted 200 of them;<sup>52</sup> the remaining 100 students were divided among other existing schools.<sup>53</sup>

### B. *Lack of a Citywide Attendance System*

The lack of a citywide attendance system further precluded New Orleans students from receiving minimally adequate education. Far beyond guaranteeing inaccurate numbers for state funding purposes, this lack of attendance accountability resulted in extremely high numbers of unreported absences. State policy requires parental notification after five student ab-

---

<sup>47</sup> ACSA requires that ten percent of the student body be special education students and at least twenty percent be students receiving free or reduced lunch. See Kathryn G. Newmark & Veronique D. Ruy, *Hope After Katrina*, EDUC. NEXT, Fall 2006, at 18, available at [http://media.hoover.org/documents/ednext20064\\_12.pdf](http://media.hoover.org/documents/ednext20064_12.pdf).

<sup>48</sup> Ellen Tuzzolo, Youth Advocate, Juvenile Justice Project of La., School to Prison Pipeline Statement (on file with the authors) (“Orleans Parish School Board’s selective admission schools and many charter schools are accepting less than their required ten percent of students with special needs.”).

<sup>49</sup> Telephone interview with School Administrator (Apr. 1, 2007). While not all charter schools employ these discriminatory methods, anecdotal accounts attested to their use. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Simon, *supra* note 42.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

sences; Orleans Parish implemented this policy by requiring teachers to call parents upon three-day absences and to report absences of over five days to school social workers who would then visit the parents' homes.<sup>54</sup> With no attendance system in place, however, schools were effectively absolved of their responsibilities to individual students, whose absences were never officially recorded. Even when teachers did notify social workers, home visits rarely occurred. "Some social workers don't go because they feel unsafe, some go, and others are too wrapped up in the emergency demands of the school day to take care of attendance issues," explained a program director of a nonprofit community-based organization focused on education.<sup>55</sup> Without a uniformly functioning system, schools and students were not held accountable, and students who were aware of this exploited the lack of a system. They were thus deprived of an education because no one reported their absences and no one required their attendance at school.

### C. *Severe Expulsion and Suspension Policies*

Finally, students were precluded from receiving an education by the high rates of suspensions and expulsions. Experts report that the elements of Post-Traumatic Stress Disorder facing over half of the returning student population may have caused behavior problems in school.<sup>56</sup> Schools have responded to student misbehavior by setting strict standards for acceptable behavior and by harshly enforcing those standards.

Students' mental health problems significantly impact attendance, participation, and behavior. While schools do provide social worker services for students, these social workers were often forced to handle clerical and administrative duties because of the lack of human capacity within schools. A program director of a nonprofit community-based organization focused on education remarked, "At one school, the two social workers were spending time sewing torn uniforms and making peanut butter sandwiches because the cafeteria services were inadequate."<sup>57</sup> Because schools are not addressing the students' emotional scars, the children are unable to learn and perform, and instead they act out.

Schools have responded to this misbehavior with stringent discipline policies. After the upsurge in crime in New Orleans, and the national and

---

<sup>54</sup> According to Chapter 1 of Title 17 of the Louisiana Revised Statutes, "Each school shall develop and implement a system whereby the school shall attempt to provide verbal notification, and if such verbal notification cannot be provided, then shall provide written notification to a child's parent, tutor, or legal guardian when that child has been absent from school for five school days . . ." LA. REV. STAT. ANN. § 17:221(D) (2006). According to a local nonprofit program director, the New Orleans Public School System policy was as listed above. E-mail interview with Program Director of a nonprofit community-based organization focused on education (Apr. 12, 2007).

<sup>55</sup> Interview with Program Director, *supra* note 54.

<sup>56</sup> Ellen Tuzzolo, Youth Advocate, Juvenile Justice Project of La., Statement at a Press Conference of the Downtown Neighborhoods Improvement Association (Jan. 18, 2007) (on file with authors).

<sup>57</sup> Program Director, *supra* note 54.

international media coverage that went with it,<sup>58</sup> fear of potential chaos within the schools led decision makers to invest heavily in security. In the RSD, over 250 security guards were hired to staff just seventeen schools, yielding a student to security guard ratio of 37:1 compared to 333:1 before Katrina.<sup>59</sup> When compared to the student to teacher ratio, 40:1 in some schools,<sup>60</sup> school environments have come to resemble mini police states.

The heightened-security environment is not specific to high schools; even elementary school children faced draconian measures. "We have heard numerous stories of students being arrested at school, sometimes handcuffed to tables and chairs, brutalized by police and security guards, and hauled off to the juvenile division for what amounts to nothing more than a verbal altercation with a teacher."<sup>61</sup>

### CONCLUSION

Students in New Orleans have arguably suffered a total deprivation of any educational opportunity in several ways: by not being able to enroll in school, by not having their attendance tracked to ensure that they are present in school, and by improper suspensions and expulsions. To the extent that state actions and state choices have caused these students not to be in school, the state is liable for violating the students' constitutional rights.

Post-Katrina New Orleans represents an unusually clear example of a state's failure to provide a minimally adequate education. Although a legal challenge has not been brought under these facts and the situation in New Orleans may slowly improve absent legal intervention, this analysis should be applied wherever such a denial manifests itself under similar circumstances. While New Orleans may have presented the best set of facts for advancing such a claim, school systems in other jurisdictions may also present comparable constitutional problems.

---

<sup>58</sup> See, e.g., Shaila Dewan, *New Orleans's New Setback: Fed-Up Residents Giving Up*, N.Y. TIMES, Feb. 16, 2007, at A1; Christopher Drew & Adam Nossiter, *Dysfunction Fuels Cycle of Killing in New Orleans*, N.Y. TIMES, Feb. 5, 2007, at A1; James Coomarasamy, *Crime Adds to New Orleans Gloom*, BBC, Jan. 25, 2007, available at <http://news.bbc.co.uk/2/hi/americas/6293083.stm>.

<sup>59</sup> Tuzzolo, *supra* note 56.

<sup>60</sup> Briana O'Neal & Walter Goodwin, Statement at a Press Conference of the Downtown Neighborhood Improvement Association (Jan. 18, 2007).

<sup>61</sup> Tuzzolo, *supra* note 48.

