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Due Process in the Public Schools -- An Analysis of the Procedural Requirements and a Proposal for Implementing Them

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COMMENT

Due Process in the Public Schools—An Analysis of the Procedural Requirements and a Proposal for Implementing Them

On January 22, 1975, the United States Supreme Court decided what may be the most important education case since *Brown v. Board of Education*.[1] In *Goss v. Lopez*[2] the Court held that public school students are constitutionally entitled to some form of due process protection before being totally excluded "from the educational process for more than a trivial period."[3] Although the Court's holding may, on first reading, seem innocuous,[4] one need only read Justice Powell's dissent to sense that procedural protections may also be required with respect to "a multitude of [previously] discretionary decisions" affecting school children.[5] Moreover, as if to emphasize the importance of its decision in *Goss*, four weeks later, in *Wood v. Strickland*,[6] the Court held that school board members may be individually liable for money damages if they violate a student's procedural rights, thus creating a potent weapon for the enforcement of the very rights that the Court had only recently recognized.[7]

Although the *Goss* decision can hardly be viewed as a complete surprise in light of the enormous expansion of procedural due process requirements mandated by the courts since the seminal case of *Goldberg v. Kelly*,[8] the decision comes at a particularly critical time for public education in the United States. Persuasive critiques of the school system have exposed a multitude of problems that face virtually every

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1. 347 U.S. 483 (1954).
2. 419 U.S. 565 (1975).
3. *Id.* at 576.
4. The court expressly limited its holding to suspensions of less than ten days, *id.* at 584, and required only minimal procedural protections with respect to such suspensions, *id.* at 581.
5. *Id.* at 597.
6. 420 U.S. 308 (1975).
7. *Id.* at 327-29 (Powell, J., dissenting); *see* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1274-75 (1975).
8. 397 U.S. 254 (1970). If there is anything surprising about *Goss* at all, it is the willingness of the Court to order due process protections with respect to suspensions of only one day. 419 U.S. at 585 n.3 (Powell, J., dissenting). This action prompted Judge Friendly to ask "whether government can do anything to a citizen without affording him 'some kind of hearing.'" Friendly, *supra* note 7, at 1275.

school system in the country.[9] At the same time, many systems are being confronted with new problems caused by school desegregation and its aftermath.[10] "[I]ndiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom"[11] would arrive at a time when divisiveness in the schools is already high and school administrators are searching for mechanisms that encourage unity rather than factionalism within the school community.[12]

What may be too easily forgotten is that due process is a flexible concept, not a yardstick or mechanical instrument.[13] Because what constitutes due process varies according to the interests involved,[14] adversary proceedings are not always required as long as the procedures that are adopted insure fundamental fairness.[15] Indeed, the *Goss* holding can be viewed, not as a statement of procedural orthodoxy but as a means of analyzing school officials' everyday determinations with an eye to devising safeguards against erroneous action without exacerbating tensions already present in the system.

DUE PROCESS—THE INTERESTS PROTECTED AND THE NATURE OF THE PROTECTION

The constraints placed upon the states by the due process clause of the fourteenth amendment "[are] not infinite."[16] In order for procedural protections to be constitutionally required, a deprivation of either liberty or property must be at stake.[17] Significantly, it is the *nature* of

9. *E.g.*, H. KOHL, 36 CHILDREN (1967); J. KOZOL, DEATH AT AN EARLY AGE (1967); C. SILBERMAN, CRISIS IN THE CLASSROOM, (1970).

10. For an explanation of the nature of the problems that face newly desegregated school systems and some of the disturbing responses to such problems see CHILDREN'S DEFENSE FUND REPORT, SCHOOL SUSPENSIONS—ARE THEY HELPING CHILDREN? (1975) [hereinafter cited as SUSPENSIONS]; SOUTHERN REGIONAL COUNCIL AND THE ROBERT F. KENNEDY MEMORIAL, THE STUDENT PUSHOUT—VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION (1973) [hereinafter cited as STUDENT PUSHOUT].

11. 419 U.S. at 594 (Powell, J., dissenting).

12. *E.g.*, Calkins, *Are Students Involved in Deciding Crucial Issues?*, 384 NAT'L ASS'N OF SECOND. SCHOOL PRINCIPALS BULL. 13 (1974); Lovetree, *Student Involvement on School Committees*, 373 NAT'L ASS'N OF SECOND. SCHOOL PRINCIPALS BULL. 133 (1973).

13. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

14. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

15. Friendly, *supra* note 7, at 1289; *see* Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 860 (1975); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1060 (1969).

16. Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

17. *Id.* at 569.

the interest at stake, and not its weight, that determines whether due process requirements apply.[18] Thus, the first step in any due process inquiry is an examination of the "precise nature [of the] interest that has been affected by governmental action."[19] Once it is established that a deprivation of property or liberty is not de minimis, its gravity is irrelevant to the determination that at least some form of due process is required.[20] It follows that, in order to ascertain whether a particular educational decision must be accompanied by due process procedures, the first inquiry is whether the decision infringes upon the property or liberty interests of a student or his parents.

The Property Interest[21]

"Much of the existing wealth of this country takes the form of rights that do not fall within traditional common-law concepts of property."[22] Rather, our society is built around a concept of entitlements, many of which flow from the government and may involve subsidies to farmers and businessmen, routes for airlines, channels for television stations and welfare for the poor.[23]

The landmark case in the recognition of this "new property" is *Goldberg v. Kelly*,[24] in which the Supreme Court was asked to decide whether the due process clause requires that persons receiving aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under the state sponsored New York Homes Relief Program should "be afforded an evidentiary hearing *before* the termination of benefits."[25] The Court held that welfare benefits are a statutory entitlement,[26] adding that "[i]t may be realistic to regard welfare entitlements as more like 'property' than a 'gratuity'."[27] Once this

18. *Id.* at 570-71.

19. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); *see* Hannah v. Larche, 363 U.S. 420, 440, 442 (1960).

20. Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

21. No discussion of the property interest as it is currently viewed by the courts would be complete without acknowledgement of the enormous influence of Charles Reich and his trilogy of pathbreaking articles on the subject: Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

22. Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

23. *Id.*, *citing* Reich, 74 YALE L.J., *supra* note 21, at 1255.

24. 397 U.S. 254 (1970).

25. *Id.* at 260.

26. *Id.* at 262.

27. *Id.* at 262 n.8.

broadened concept of property was recognized by the Court its scope expanded rapidly to include, for instance, a state employee's entitlement to continued employment absent sufficient cause for discharge,[28] an old age benefits recipient's entitlement to payments as long as specified qualifications are met,[29] a former prisoner's interest in his continued parole,[30] and a prisoner's interest in good time credits accumulated under state law.[31] None of these entitlements are " 'created by the Constitution. Rather, they are created' . . . by an independent source such as state statutes or rules entitling the citizen to certain benefits."[32] Once such an entitlement is created, however, a person cannot be deprived of it without first being afforded due process of law.[33]

In *Goss v. Lopez* the Supreme Court identified just such an entitlement in an Ohio law that directs local authorities "to provide a free education to all residents between six and 21 years of age"[34] and in a state law that requires student attendance for a school year of not less than 32 weeks.[35] The Court stated that once Ohio had chosen to extend the right to an education to the individual, the state "may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures . . . ."[36] The opinion stressed that the entitlement came not from the Constitution[37] but from state law and that the only constitutional rights involved were the student's due process rights.[38]

The kind of state created educational entitlements relied upon in *Goss* are virtually universal.[39] In addition, states are increasingly providing by statute for more than just the rudimentary entitlement to a public education. States have created by statute the right to *appropriate* educational services for the physically handicapped, mentally retarded

28. Connell v. Higginbotham, 403 U.S. 207 (1971).
29. Wheeler v. Montgomery, 397 U.S. 280 (1970).
30. Morrissey v. Brewer, 408 U.S. 471 (1972).
31. Wolff v. McDonald, 418 U.S. 539 (1974).
32. Goss v. Lopez, 419 U.S. at 572-73, *citing* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
33. Arnett v. Kennedy, 416 U.S. 134 (1974); *id.* at 164 (Powell, J., concurring); *id.* at 171 (White, J., concurring and dissenting); *id.* at 206 (Marshall, J., dissenting).
34. OHIO REV. CODE ANN. §§ 3313.48, -.64 (Page 1971).
35. *Id.* § 3321.04.
36. 419 U.S. at 574.
37. The Court has previously held that there is no constitutional right to an education at public expense. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
38. 419 U.S. at 572-73.
39. *E.g.*, N.C. GEN. STAT. § 115-1 (1971). Only Mississippi leaves to legislative discretion whether or not to provide public education. MISS. CONST. art. 8, § 213-B(b)-(c). Local school authorities also possess the authority to abolish their school district. MISS. CODE ANN. § 37-7-101 (1972).

and emotionally disturbed[40] as well as the right to bilingual education for non-English speaking students.[41] The entitlements involved in such statutes are generally harder to define than the ones discusssed in *Goss* because analysis may involve an evaluation of the appropriateness of the education that is provided rather than merely a determination of whether a deprivation has taken place.[42]

The Liberty Interest

The liberty interest involves, among other things, a person's reputation, or put another way, one's interest in keeping his name free from stigma.[43] The interest was given its broadest interpretation in the case of *Wisconsin v. Constantineau*,[44] an action challenging a Wisconsin statute which permitted designated officials to post the names of habitual drunkards in retail liquor outlets and other public places without a prior hearing. The Supreme Court held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him [due process] is essential,"[45] and thus, the Wisconsin posting procedures must be preceded by some kind of hearing.[46] The Court found some support for its holding in past cases that protected against "a badge of infamy"[47] and "grievous loss . . . though it may not involve the stigma and hardships of a criminal conviction";[48] but the reputational interest it described was broader than any it had

40. *E.g.*, N.C. GEN. STAT. § 115-179.1 (1975). All states but Mississippi provide for educational services for some handicapped children, though much of the legislation is limited in scope. For a summary of legislation in the area see BUREAU OF EDUCATION FOR THE HANDICAPPED, DEPT. OF HEALTH EDUCATION AND WELFARE, CLOSER LOOK (Spring 1974) (enclosed chart).

41. Eleven states have made bilingual education for non-English speaking students mandatory where more than a specified number of students in the district do not speak English. *E.g.*, MASS. GEN. LAWS ch. 71A (1972). Many other states make bilingual education programs optional, leaving the decision to local school districts. *E.g.*, ME. REV. STAT. ANN. tit. 20 § 102(16) (1971). *See generally* HARVARD CENTER FOR LAW AND EDUCATION, BILINGUAL-BICULTURAL EDUCATION: A HANDBOOK FOR ATTORNEYS AND COMMUNITY WORKERS 274 (1975).

42. *E.g.*, MASS. GEN. LAWS ANN. ch. 71B, § 3 (Supp. 1974) which provides for a hearing if parents disagree with the special education placement of their child.

43. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

44. 400 U.S. 433 (1971).

45. *Id.* at 437.

46. *Id.*

47. Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

48. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

previously defined.[49] Like the new property interests established in *Goldberg*, the Court in *Constantineau* created a new liberty interest.

In determining that the short-term suspension of a high school student is an infringement upon a liberty interest, the *Goss* court looked to *Constantineau* as a basis for holding that the reputation of students is constitutionally protected against arbitrary action.[50] In deciding that the infringement was more than de minimis the Court detailed a number of harmful effects that may result from this infringement such as damage to the pupil's standing among his teachers and fellow pupils and interference with the opportunity for higher education and future employment.[51]

Although not discussed by the *Goss* court, the language of *Constantineau* is arguably broad enough to encompass a wide range of school determinations that in one way or another stigmatize or label a student.[52] For instance, the labeling of a student as a disciplinary problem may affect the way teachers and school administrators relate to him in the future as well as his own self esteem.[53] The classification of a normal student as mentally retarded may have disastrous implications not only for the quality of education that he receives but also for the way his family and friends perceive him as well as his chances for further education and employment.[54] Placement of an average student in a low, or worse still, "dead end" track[55] may produce a similar result.[56] In fact, some experts believe that giving a child a negative label, whether it be "emotionally disturbed," "slow," "troublemaker," or something comparable, is one way of encouraging the im-

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49. 400 U.S. at 437.

50. 419 U.S. at 574-75.

51. *Id.* at 575.

52. For a summary of the studies that document the harms associated with labeling of students by school officials, see W. FINDLEY & M. BRYAN, ABILITY GROUPING: 1970, STATUS, IMPACT, AND ALTERNATIVES (1971).

53. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 577 (1971); Kirp, *Schools As Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 733 (1973).

54. Larry P. v. Riles, 343 F. Supp. 1306, 1308 (N.D. Cal. 1972); Kirp, *supra* note 53, at 733-37. *See generally* R. ROSENTHAL & L. JACOBSON, PYGMALION IN THE CLASSROOM (1968).

55. Dead-end tracking is a term that is commonly used to refer to the phenomenon in which a student, once assigned to a low track, has little or no chance of advancing to a higher track. For an example of "dead-end" tracking in the Washington, D.C. schools see Hobson v. Hansen, 269 F. Supp. 401, 459-64 (D.D.C. 1967), *aff'd en banc sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

56. Kirp, *supra* note 53, at 735-36.

plicit prediction manifested by the label to come true.[57] If a student is already experiencing difficulty in school, unfairly or arbitrarily to saddle him with a stigmatizing label makes his chances of adjusting all the more difficult.[58]

The Protection Required

Once it is established that protected interests are at stake, they must be analyzed to determine what kind of protections are required. Such an analysis must be undertaken with the understanding that due process is "an elusive concept,"[59] highly practical in nature[60] which therefore does not entail "procedures universally applicable to every imaginable situation."[61] At a minimum, however, due process requires that deprivations of liberty and property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."[62]

In a recent article, Judge Friendly provided some guidance in determining what constitutes an appropriate hearing: "The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences . . . ."[63] A similar approach had already been suggested as a means of determining the elements necessary in school disciplinary hearings.[64] This approach could be applied to any decision made by public school administrators and entails an examination of the decision to determine what, if any, protected interests it infringes and if an infringement exists, an evaluation of those procedural elements that would be most useful in insuring fairness while minimizing adverse consequences.[65]

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57. *E.g.*, E. SCHUR, RADICAL NON-INTERVENTION—RETHINKING THE DELINQUENCY PROBLEM 118-26 (1973). When this "pygmalion effect" is coupled with the fact that researchers have found that school classifications have a marginal and sometimes negative impact on both student achievement and psychological development, the invasion of the liberty interest becomes more serious. *See* Kirp, *supra* note 53, at 725, *citing* Dunn, *Special Education for the Mildly Retarded: Is Much of it Justified?*, in PROBLEMS AND ISSUES IN THE EDUCATION OF EXCEPTIONAL CHILDREN 382 (R. Jones ed. 1971).

58. *Cf.* SUSPENSIONS, *supra* note 10, at 48-54.

59. Hannah v. Larche, 363 U.S. 420, 442 (1960).

60. Goss v. Lopez, 419 U.S. at 578.

61. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

62. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

63. Friendly, *supra* note 7, at 1278.

64. Buss, *supra* note 53. *See also* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463 (1963).

65. Judge Friendly lists eleven elements of a fair hearing: unbiased tribunal, notice of proposed action and the grounds asserted for it, opportunity to present reasons why

It should be remembered when determining appropriate procedural elements that school officials possess wide discretion in choosing a particular procedural mode. Professor Wright suggests that hearings paralleling criminal, civil, or administrative proceedings are appropriate "as long as [they are] reasonably calculated to be fair to the student involved and to lead to a reliable determination of the issues."[66] Other commentators have pointed out that *Goss* presents an opportunity to experiment with hearings that are less adversarial than is normally the case.[67] Others have proposed adopting mechanisms developed in civil law countries such as the ombudsman for use in the public school context.[68] Such innovations might be acceptable to the courts in light of their reluctance to impose an adversarial mode on school decision-making. Certainly the opportunity for procedural innovation should be explored.[69]

GOSS APPLIED—THE PROCEDURES THAT MUST ACCOMPANY EDUCATIONAL DETERMINATIONS

As Professor Wright has observed, "[w]ithout procedural safeguards the substantive protection [provided to students by the courts] would be virtually useless."[70] In *Goss* the Supreme Court established that public school students have constitutionally protected procedural as well as substantive rights.[71] Although the *Goss* court dealt specifically with short-term suspensions, its analysis of the liberty and property interests involved in such suspensions is equally applicable to almost every other determination made by school officials affecting students.[72]

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the proposed action should not be taken, right to call witnesses, right to know evidence against one, right to have the decision based only on the evidence presented, right to counsel, right to a record of the proceedings, statement of reasons for the decision, public attendance, and judicial review. Friendly, *supra* note 7, at 1279-95. Judge Friendly's discussion of the relative importance of these elements assumes the use of an adversary system, although he states he has "serious misgivings on that score." *Id.* at 1279 n.71.

66. Wright, *supra* note 15, at 1060.

67. Verkuil, *supra* note 15, at 860. *See* Friendly, *supra* note 7, at 1290-91.

68. W. GELLHORN, WHEN AMERICANS COMPLAIN 208-11 (1966); Verkuil, *supra* note 15, at 860.

69. *See* text accompanying notes 222-57 *infra*.

70. Wright, *supra* note 15, at 1059.

71. 419 U.S. at 574.

72. In his dissenting opinion in *Goss*, Justice Powell stated:

> Teachers and other school authorities are required to make many decisions that may have serious consequences for the pupil. They must decide, for example, how to grade the student's work, whether a student passes or fails a course, whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are near-

There are at least eleven important administrative determinations that school officials make that call forth differing substantive and procedural responses. Each can be analyzed to determine first, whether a protected interest is involved and, if so, second, the nature of that interest and the particular procedures that may be appropriate to protect it.

1. *Expulsions and Suspensions*

Although *Goss* sanctioned suspensions as both "a necessary tool to maintain order"[73] and "a valuable educational device,"[74] it held that protected interests are involved and thus due process procedures are required.[75] The property interest involved emanates from the state's compulsory education statute which has been held to entitle all who are required to attend school to a free public education.[76] Once the state has extended such an entitlement it cannot take it away for even a day without due process of law.[77]

The seriousness of the infringement on protected property interests varies with the length of the suspension. Short-term suspension is not so serious an infringement as long-term suspension, and expulsion is the most serious infringement of all.[78] The seriousness of the infringe-

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by, and whether he should be placed in a "general," "vocational," or "college-preparatory" track.

In these and many similar situations claims of impairment of one's educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification.

Id. at 597 (footnotes omitted).

73. *Id.* at 580.

74. *Id.*

75. *Id.* at 574. Many educational experts disagree with the Court's assessment of the educational value of suspension. One commentator has stated that "[t]he real issue is not primarily whether Mary or Bob should be removed from somewhere. The issue is: what do we have to provide for Bobby or Mary to be included into?" Redl, *Disruptive Behavior in the Classroom*, 83 U. CHI. SCHOOL REV. 569, 593 (1975). A recent report by the Children's Defense Fund supports this position by detailing a wide range of harms that grow out of suspension and expulsion. The report also suggests a number of alternatives to such exclusionary practices. SUSPENSIONS, *supra* note 10, at 95-108. For a list of some of the alternatives to suspension that have been developed by educators, see text accompanying notes 146-50 *infra*.

76. *See* notes 34-41 and accompanying text *supra*.

77. Although the majority in *Goss* "speaks of 'exclusion from the educational process for more than a trivial period . . . ,' its opinion makes clear that even one day's suspension invokes the constitutional procedure mandated today." 419 U.S. at 585 n.3 (Powell, J., dissenting). See Friendly, *supra* note 7, at 1275.

78. *Compare* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) *and* Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969) (expulsions) *with* Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971) (long-term suspension) *and* Jackson v. Hepinstall, 328 F. Supp. 1104 (N.D.N.Y. 1971) (short-term suspensions).

ment is not always immediately apparent, however, because suspensions may become permanent as other factors come into play such as the difficulty of making up missed work and class discussion, the greater likelihood of running afoul of the law, and the generally negative attitudes toward school that suspensions may engender.[79]

A similar analysis is applicable to the protected liberty interests involved. The longer the exclusion from school, the greater the infringement. If a suspension of less than ten days will adversely affect a student's reputation with his teachers and peers, and hurt his chances of both furthering his education and gaining employment,[80] then suspension for a longer period of time or expulsion will create a degree of stigma that may well close completely a wide range of educational and employment opportunities.[81]

This sliding scale of harm associated with suspension and expulsion indicates that, the longer the suspension, the greater the need for procedural safeguards with expulsion requiring the most formal proceedings. However, because the harms associated with long-term suspensions and expulsions are nearly equivalent,[82] the case law has generally treated them alike for purposes of determining adequate procedures, choosing to draw the line between long-term suspensions and expulsions on the one hand and short-term suspensions on the other.[83] Because *Goss* gave Supreme Court approval to procedures involving suspensions of ten days or less it is likely that draftsmen will use the ten day period as a guide in drawing the line between long-term and short-term suspensions.

Lower federal courts have attempted to resolve these procedural issues in a variety of contexts. At one time or another the following procedures have been required: written notice specifying both the violation and the evidence upon which it is based,[84] the right to present

79. Brief for Appellee at 33-36, Goss v. Lopez, 419 U.S. 565 (1975). *See* SUSPENSIONS, *supra* note 10, at 50-54.

80. *See* text accompanying note 51 *supra*.

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

82. Vail v. Board of Educ., 354 F. Supp. 592, 603 (D.N.H. 1973).

83. Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1044 (9th Cir. 1973); Vail v. Board of Educ., 354 F. Supp. 592, 603-04 (D.N.H. 1973); Mills v. Board of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972). *Contra*, Givens v. Poe, 346 F. Supp. 202, 210-12 (W.D.N.C. 1972).

84. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Mills v. Board of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972).

witnesses,[85] the right to cross-examine,[86] the right to counsel,[87] the right to an unbiased decisionmaker,[88] and the right to specific findings of fact.[89] With respect to suspensions of less than ten days, *Goss* held that, except in exceptional cases,[90] prior to the suspension "the student [should] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence . . . and an opportunity to present his side of the story."[91] All of this may occur within a few minutes of the alleged infraction.[92] After ascertaining the facts, the disciplinarian "may determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses."[93] Although these summary procedures were designed to serve as a hedge against erroneous action, they may fall short of accomplishing that goal because the disciplinarian must choose between the word of the teacher and that of the student. At least one commentator has suggested that in this situation the student stands little chance of prevailing.[94]

An additional factor that might require alteration of the formula for determining when less formal procedures should be implemented is racial bias. Reports indicate that a disproportionate number of black students are suspended for disciplinary reasons; this is most likely to occur in the aftermath of school desegregation.[95] One judge has cited "institutional racism" as the cause of this phenomenon.[96] Although

85. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Mills v. Board of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972).

86. Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973); Mills v. Board of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972).

87. Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973); Mills v. Board of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972).

88. Sullivan v. Houston Indep. School Dist., 475 F.2d 1071, 1077 (5th Cir. 1973); Mills v. Board of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972).

89. Mills v. Board of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972); DeJesus v. Pemberthy, 344 F. Supp. 70, 76-77 (D. Conn. 1972).

90. The Court defined these exceptional cases as when a student's presence "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process . . . ." 419 U.S. at 582. In such cases the necessary hearing should follow "as soon as practicable." *Id.* at 582-83.

91. *Id.* at 581.

92. *Id.* at 582.

93. *Id.* at 584.

94. Weckstein, *The Supreme Court and the Daily Life of Schools: Implications of Goss v. Lopez*, 20 INEQUALITY IN EDUCATION 47, 49 (1975).

95. STUDENT PUSHOUT, *supra* note 10; SUSPENSIONS, *supra* note 10, at 63-75.

96. Hawkins v. Coleman, 376 F. Supp. 1330, 1338 (N.D. Tex. 1974). For a discussion of the events leading up to this case and its aftermath see Demarest & Jordan,

bias in the implementation of due process procedures may not be the cause of racially disproportionate suspensions, commentators are beginning to suggest that where a significantly disproportionate number of minority students are suspended or expelled from a school system, a presumption of racial bias exists that school officials should be required to rebut.[97] Such a presumption, whether judicially or administratively imposed, might force implementation of the more formalized procedures now reserved for long-term suspensions and expulsions in instances of short-term suspensions as well.

2. *Non-Disciplinary Exclusion*

The exclusion of a child from school because of a physical or mental handicap involves virtually the same infringement of protected interests as do suspensions and expulsions.[98] With respect to the property interest involved, even generally worded compulsory education statutes have been held to vest an entitlement to special education in children who by virtue of a physical or mental handicap need special attention.[99] Statutes in many states define the dimensions of the property interest in a special education.[100] The liberty interests involved are more obfuscated since some degree of stigmitization may already exist with respect to handicapped students, but the denial of a special education may result in further stigmitization that could be eliminated or at least minimized.

Because the protected interests infringed by exclusion and expulsion are almost identical, the same procedural protections would seem appropriate in both instances.[101] However, because exclusion also has

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Hawkins v. Coleman: Discriminatory Suspensions and the Effect of Institutional Racism on School Discipline, 20 INEQUALITY IN EDUCATION 25 (1975).

97. *E.g.*, SUSPENSIONS, *supra* note 10, at 75-78.

98. The Special Education Acts in many states make the exclusion of physically or mentally handicapped students on the grounds that they are uneducable or inadequate facilities exist to educate them illegal. *See* note 40 *supra*. In states that have more limited legislation, severely handicapped children are commonly denied access to any publicly supported education. Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 41 (1974) [hereinafter cited as *Special Education*]. Yet there is strong evidence that even the most severely handicapped children are capable of benefitting from an education. *Id.* at 42.

99. Mills v. Board of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972).

100. *E.g.*, N.C. GEN. STAT. §§ 115-179.1(a)(1) and (2) (1973) provide for a hearing whenever a child is denied entry or continuance in a program suitable to his needs or is placed in a program inappropriate to his needs. Such a statute, arguably, defines a property interest in a correct special education placement.

101. *See* Mills v. Board of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972).

many of the characteristics of a special education classification,[102] additional provisions should be included that allow both for parties other than the parents to challenge the exclusion of a student and for the use of expert testimony as part of the fact finding process.[103] An adversary proceeding may be appropriate only to determine whether a child is to be completely excluded;[104] less formal proceedings such as those recommended with respect to special education placement may be appropriate once it has been determined that the student is entitled to some kind of an education.[105]

3. *Involuntary Transfers*

Justice Powell declared the protected interests implicated by involuntary transfers as "identical in principal" to those discussed by the majority in *Goss*.[106] However, "involuntary transfer" is a broad term that may refer to at least three types of administrative action: disciplinary transfers, programmatic transfers, and public policy transfers. Each requires separate analysis.

With respect to disciplinary transfers, at least one court has viewed the interests infringed upon as "somewhat less drastic [than expulsion]"[107] while another has held that identical procedural safeguards are required for both.[108] In the case of *Quintinella v. Carey*,[109] an action challenging the transfer of a high school student, the court characterized a transfer to a high school equivalency class that met at night as the "functional equivalent of an absolute expulsion" because it infringed upon the student's right to obtain a "standard high school diploma" and therefore required a formal due process hearing.[110] The analytical difficulty with such transfers is that they may vary enormously in the degree that they infringe upon protected interests if, in fact, they

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102. *See* text accompanying notes 127-30 *infra*.
103. *Special Education*, *supra* note 98, at 126.
104. It should be noted that two recent decisions, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) and Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972), have prohibited the exclusion of children with special needs from the public schools. If these cases are followed, the need for adversary proceedings will no longer exist.
105. *See* text accompanying notes 135-41 *infra*.
106. 419 U.S. at 597.
107. Betts v. Board of Educ., 466 F.2d 629, 634 (7th Cir. 1972).
108. Mills v. Board of Educ., 348 F. Supp. 866, 880 (D.D.C. 1972).
109. No. 75-C-829 (N.D. Ill., March 31, 1975).
110. *Id.* at 5.

infringe upon them at all.[111] A transfer from one class to another or to a nearby school might have a beneficial effect on a student who has experienced problems in getting along with a particular teacher. On the other hand, as the *Quintinella* case illustrates, disciplinary transfers may be the functional equivalent of expulsion.[112] At the very least, the details of the transfer will probably appear on a student's permanent record. The best solution may be to require procedures similar to those formulated for alternatives to suspensions[113] in cases in which the transfer is between classes or to a nearby school and more formal procedures similar to the ones required for long-term suspensions[114] when there is a danger that the transfer will result in the discontinuation of a student's education.

Programmatic transfers, that is transfers for the purpose of availing a student of educational opportunities not available at his present school, also raise difficult questions. If the claim is that such a transfer deprives a student of an opportunity to a "regular" education or an education in his neighborhood school, the benefits of a special program may so outweigh these other factors that, on balance, the transfer enhances rather than infringes upon a protected interest.[115] Because they involve many of the same factors, programmatic transfers should be treated like special education determinations rather than disciplinary transfers.[116]

The interests involved in transfers designed to implement overriding public policy such as school desegregation are entirely different from those discussed thus far. If the transfer is either part of a court-ordered plan required by the fourteenth amendment or a general policy implemented by a law-making body,[117] those affected by the policy have no absolute right to be heard. Thus, due process procedures are unnecessary.

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111. One commentator has suggested that in light of the expressed policy of 20 U.S.C. § 1701(a) (1970), which makes the neighborhood the appropriate basis for determining public school assignments, students may have a vested property interest in attending a neighborhood school. Weckstein, *supra* note 94, at 53.

112. Quintinella v. Carey, No. 75-C-829 (N.D. Ill., March 31, 1975).

113. *See* text accompanying notes 154-56 *infra.*

114. *See* text accompanying notes 84-89 *supra.*

115. *See Special Education, supra* note 98, at 118-19.

116. *See* text accompanying notes 135-47 *infra.*

117. Bi-Metallic Inv. Co. v. State Bd. of Equalization 239 U.S. 441, 445 (1915). Although a due process challenge to court ordered or voluntary desegregation plans is not available, students and parents may still resort to judicially and administratively created remedies. For a list of these remedies see Weckstein, *supra* note 94, at n.46.

4. *Special Education*

Handicapped children "form an extraordinarily diverse group estimated to include between 8.7 and 35 percent of the entire student population."[118] The problems associated with this part of the school population have often been overlooked; but recently, the large number of handicapped children completely excluded from school, the likelihood that normal children may be incorrectly classified as mentally retarded, especially if they are members of a minority group, and the high likelihood of children initially classified as special remaining in such a category permanently, have come to the public's attention.[119] When they have ruled on the subject, courts have generally held that the classification of a child as in need of special education should be accompanied by extensive due process protections similar to those required for long-term suspensions and expulsions.[120] However, the ambiguous nature of the protected interests involved[121] combined with the complexity of a special education decision, which, unlike the questions of fact that due process procedures are best at answering, is really "a selection of the most appropriate [choice] from an unlimited range of alternatives,"[122] make increasing the burdens on the school system by requiring formal due process procedures in connection with every special education decision difficult to justify.[123]

The ambiguity of the protected interests involved stems from the large number of variables that enter into such a decision. For instance, if a student is correctly evaluated as in need of special educational opportunities, removal from the regular classroom and placement in a special program, rather than depriving him of the state-granted entitlement to an education, as in the case of suspension, expulsion, or

118. *Special Education, supra* note 98, at 41, *citing* N.Y. STATE COMM'N REPORT ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUC. 9B.2 (1972). The difference in the figures is accounted for by disparities in estimating the percentage of brain-injured and learning-disabled children. *Special Education, supra* note 98, at 41 n.2.

119. The ground-breaking cases in the area are Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) and Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972). *See* L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION: AN ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR CHILDREN (1973); *Special Education, supra* note 98, at 58-59.

120. Mills v. Board of Educ., 348 F. Supp. 866, 877-83 (D.D.C 1972); Pennsylvania Ass'n for Retarded Children v Pennsylvania, 343 F. Supp. 279, 303-06 (E.D. Pa. 1972) (consent decree).

121. *Special Education, supra* note 98, at 118-19.

122. *Id.* at 120.

123. *But see* McClung, *School Classification: Some Legal Approaches to Labels*, 14 INEQUALITY IN EDUCATION 17, 21-22 (1973).

exclusion, may be an enhancement of such an entitlement by providing a more expensive, personalized education.[124] On the other hand, if a normal student is misclassified and placed in a special education program, he is being denied a public education guaranteed by state statute and is also severely stigmatized by being labeled as in need of special education.[125] Moreover, assuming a student is correctly classified as in need of special education, if the education that is provided is inferior to that received by normal students, the state-provided entitlement to an education may be infringed upon.[126]

Due process procedures are traditionally designed to guard against erroneous action by insuring that the decisionmaker has heard both sides of a controversy before making a factual determination.[127] In special education decisions, factual determinations are often important only in making the initial determination that a child is in need of special education.[128] Once such a determination is made, the educational needs of the child must be evaluated and a choice from among available programs as to the most suitable placement must be made; highly formalized procedures may impede rather than facilitate this decision.[129] In addition, highly formalized adversary procedures may be particularly inappropriate when the parties involved have an equal interest in classifying the student correctly and the standards upon which decisions are to be made are relatively clear.[130]

Practical experience with due process hearings in special education determinations in the only two instances in which their implementation has been ordered by the courts confirms their problematic character. More than a year after a court mandated elaborate procedural safeguards in *Pennsylvania Association for Retarded Children v. Pennsylvania*[131] *(PARC)* there is a backlog of cases, uneven application of pro-

124. *Special Education, supra* note 98, at 119.

125. *Id.*

126. *Id.* at 118.

127. *E.g.*, Goss v. Lopez, 419 U.S. at 583.

128. Such a determination is traditionally made after evaluation of standardized tests and teacher recommendations. However, many commentators have pointed out the cultural bias inherent in such tests. *See* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Hobson v. Hansen, 269 F. Supp. 401, 475 (D.D.C. 1967), *aff'd en banc sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Kirp, *supra* note 53, at 754-58.

129. For instance, it is questionable whether the presence of counsel, whose orientation is toward an adversarial mode and who is particularly sensitive to procedural niceties, would be particularly helpful in the process of determining the *best* special education placement for a particular student. *See Special Education, supra* note 98, at 130-33.

130. *See* text accompanying note 231 *infra.*

131. 343 F. Supp. 279, 303-06 (E.D. Pa. 1972) (consent decree).

cedural guidelines, and little uniformity among decisions.[132] Similarly, a court order in *Mills v. Board of Education*[133] has been of little practical significance because the special educational programs mandated by the court have yet to be implemented.[134]

Both doctrinal analysis and practical experience indicate that something other than a traditional due process hearing is desirable in special education determinations. That there should be a presumption in favor of regular classroom placement,[135] adequate notice before a new placement is made,[136] and some chance for parents to discuss the placement with school officials is generally agreed upon.[137] However, some commentators believe that additional due process procedures are unnecessary in all cases, preferring to make formal review on the part of a review committee discretionary.[138] They also believe that the right to counsel and cross-examination may be unnecessary in connection with such hearings.[139]

A compromise between the highly formal proceedings mandated in *PARC* and *Mills* and a completely discretionary hearing provision might be the best solution. The compromise solution would require a hearing[140] with respect to the special education classification while allow-

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132. *Special Education, supra* note 98, at 79-80.

133. 348 F. Supp. 866, 877-83 (D.D.C. 1972). The opinion contains six pages of required procedures.

134. *Special Education, supra* note 98, at 92-94.

135. CAL. EDUC. CODE § 6902.06 (West 1975); MASS. ANN. LAWS ch. 71B, § 3 (1974); Mills v. Board Of Educ., 348 F. Supp. 866, 881 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 305 (E.D. Pa. 1972); *Special Education, supra* note 98, at 136.

136. Mills v. Board of Educ., 348 F. Supp. 866, 880-81 (D.D.C. 1972); Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. 279, 303-04 (E.D. Pa. 1972); *Special Education, supra* note 98, at 127-28.

137. The *PARC* and *Mills* cases require full blown due process hearings if parents request them, *see* notes 135-36 *supra*; however, some commentators would only make an informal conference mandatory. *Special Education, supra* note 98, at 123-30.

138. *Special Education, supra* note 98, at 123-25. Such a system, it is contended, would cut down on the volume of hearings while insuring that important decisions would be examined. *Id.* The discretionary process would be coupled with an elaborate screening process that would bring cases to the review committee for consideration whether or not they were contested. *Id.* at 124.

139. *Id.* at 130-35.

140. Whether the hearing should be adversarial in nature, providing for the presence of counsel and the right to cross-examination, or less formal, involving only the parties to the dispute and an unbiased decisionmaker should be determined by the needs of each particular school system. If "dead-end" placement is a recurring problem, then the more formal hearing is necessary. If there has been no history of special education placements being used as a means of discipline or punishment, non-adversarial hearings are appropriate. If informal hearings result in abuse by school officials of the special education placement, more formal hearing requirements should be required.

ing a further hearing regarding placement to be at the discretion of a review committee. Such a solution would provide procedural protections when protected interests are most clearly at stake; that is, it would protect the liberty and property interests of a normal student in a regular classroom education. Moreover, it would insure that school officials do not by-pass due process procedures required in other school decisions such as expulsion and suspension by merely labeling a student as mentally retarded and exiling him to a "dead end" track. On the other hand, the proposal would provide maximum flexibility in the decisionmaking process once a student's need for special education is legitimately established. In addition to a formal procedural mechanism, informal methods might be adopted to obtain informed parental consent with respect to placement decisions and thus, in most cases, avoid the need for a hearing at all.[141]

5. *Alternatives to Suspension and Expulsion*

As the shortcomings of suspension and expulsion as viable educational tools become more apparent, educators are beginning to develop a number of alternative approaches for dealing with disciplinary problems. In terms of procedural due process, such programs present a difficult dilemma. On the one hand, many educators believe that continued inappropriate behavior on the part of a student indicates that the student has special needs and should be placed in a program that can meet those needs.[142] The approach is, in reality, a form of special education for children with emotional problems and seems to warrant the non-adversarial procedures that have been suggested for special education determinations. On the other hand, the danger of erroneous action in connection with these alternatives is as great as it is with suspension or expulsion.[143]

Although such action does not constitute a complete exclusion from the educational process, the liberty and property interests of an innocent student are infringed, at least to some degree, by removing him from the regular classroom and requiring him to attend an alternative program.[144] Moreover, there is a danger that alternative programs will

141. *See* text accompanying note 259 *infra*.

142. *E.g.*, Redl, *Disruptive Behavior in the Classroom*, 83 U. CHI. SCHOOL REV. 569, 592-93 (1975).

143. The term "alternative to suspension" connotes that the student has committed an act that would justify his suspension. If the student denies the charges made against him, the danger of erroneous action is identical to the situation discussed in *Goss* with respect to suspensions.

144. McClung, *supra* note 123, at 28.

become "dumping grounds" for students who are "different" or hard to teach but have violated no rules.[145] Although the dilemma does not yield an easy resolution, an examination of specific alternatives using the mode of analysis employed with respect to other school determinations will at least give some examples of possible procedural approaches.

The following are examples of alternatives to suspension and expulsion currently in use in the public schools: the "cooling off" room, a non-threatening atmosphere where students are sent, or in some cases choose to go, for short periods of time in order to unwind;[146] in-school or after school counseling and group work designed to offer an opportunity for students to talk about the situations in school and at home that cause them problems as well as acceptable behavioral responses to these situations;[147] behavior modification programs in which appropriate student behavior is reinforced and inappropriate behavior discouraged, often on the basis of a point system;[148] alternative classes in which students may be placed temporarily so that they may receive intensive counseling and instruction for a limited period with the aim of returning them to the regular classroom;[149] and alternative schools for students who have exhibited repeated behavior problems in the traditional school atmosphere.[150]

With respect to alternatives that do not remove students from the regular classroom or remove them for short periods of time, the infringement on protected interests is probably de minimis[151] as long as no notation of such an assignment appears on the student's record; therefore, determinations with respect to such programs probably do not require a prior hearing.[152] Alternatives that remove students from the regular classroom for longer than one day present more difficult questions.[153] One approach would be to treat them like suspensions and

145. SUSPENSIONS, *supra* note 10, at 96 n.2.

146. McClung, *supra* note 123, at 22.

147. *Id.* at 63.

148. *Id.* at 65, *citing* Bright & Vincent, *JACS: A Behavior Modification Program That Works*, 55 PHI DELTA KAPPA 17 (Sept. 1973).

149. SOUTH CAROLINA COMMUNITY RELATIONS PROGRAM, YOUR SCHOOLS 16 (May 1975).

150. *Id.* at 8-11.

151. This assumes that such alternatives are not used continuously with respect to any one student. If a student is removed from class for three hours every day for a week the infringement is probably no longer de minimis.

152. One commentator believes that with respect to all alternatives, parents and students should be able to opt for exclusion rather than accept the proposed alternative. McClung, *supra* note 123, at 28.

153. One day seems to be the period of time that the Supreme Court held to meet the de minimis test in *Goss*. *See* note 77 *supra*. *Goss* dealt with complete exclusion

require the same procedures as those adopted for suspensions and expulsions. Such an approach would provide protection against erroneous action but have the disadvantage of placing the parties in an adversarial relationship when, in fact, they have a common interest in developing an effective alternative to the traditional classroom program.[154] In addition, any similarity of the procedures to those employed with respect to suspensions might cause these alternatives to take on many of the negative connotations associated with traditional disciplinary measures, a difficulty the alternative programs were expressly designed to avoid. On the other hand, the danger that such alternatives could become the functional equivalent of suspension and be used as a means of avoiding the more formal procedures required for other disciplinary action cannot be overlooked.[155]

One possible solution is creation of a presumption that the alternatives are a form of special education thus warranting analogous procedures. The presumption could be rebutted by evidence of either widespread unfairness in the use of these alternatives or evidence that the alternatives are the functional equivalent of suspension rather than a viable alternative. In either case, procedures identical to those required for actual suspensions would then be required.[156]

6. *Behavior Modifying Drugs*

Although the effectiveness of behavior modifying drugs, especially for hyperactive children, has come under increasing attack from experts,[157] for some students, school attendance is conditioned upon their use.[158] Such a policy probably constitutes an infringement on a student's liberty interest in that it is an invasion of both privacy and bodily

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from the educational process, however, which is not the case when alternatives to suspension are implemented. It could be argued that protected interests are not infringed upon since the exclusion is not total, and thus due process procedures are not required at all. *Contra*, Weckstein, *supra* note 94, at 51-52.

154. *See* text accompanying note 230 *infra*.

155. SUSPENSIONS, *supra* note 10, at 96 n.2.

156. These formal procedures should be imposed only until the defects which prompted them are corrected.

157. *E.g.*, FEINGOLD, WHY YOUR CHILD IS HYPERACTIVE (1975). Dr. Feingold has successfully treated hyperactive children, one of the major targets for behavior modifying drugs, by prescribing a special diet free of the artificial additives found in convenience foods and soft drink powders.

158. Divoky, *Toward a Nation of Sedated Children*, LEARNING 8, 10 (March 1973). *See generally* Ireland & Diamond, *Drugs and Hyperactivity: Process is Due*, 8 INEQUALITY IN EDUCATION 19 (1971).

integrity.[159] If the use of such drugs is permitted at all, it should occur only after a special education hearing and, in addition, provision should be made for continual and systematic review of the appropriateness of the drug so that its use can be discontinued as soon as possible.

7. *Corporal Punishment*

Although substantive attacks on corporal punishment per se have been generally unsuccessful,[160] courts have recently held that the infliction of corporal punishment violates a student's protected liberty interest, thus requiring at least some due process protection. In *Ingraham v. Wright*,[161] an action challenging the constitutionality of corporal punishment on substantive as well as procedural grounds, the United States Court of Appeals for the Fifth Circuit characterized the protected liberty interest as the right to remain free from unwarranted punishment.[162] In *Baker v. Owen*,[163] a challenge to North Carolina's corporal punishment statute on substantive and procedural grounds, as well as to the implementation of the statute in a specific instance, a three-judge district court, after describing the broad reach of the protected liberty interest,[164] described the student's interest in this way:

> [I]t seems uncontrovertable that the child has a legitimate interest in avoiding unnecessary or arbitrary infliction of a punishment that probably would be completely disallowed as to an adult. Moreover, North Carolina has itself given school children reasonable expectation of freedom from excessive or pointless corporal punishment by writing into [law] the requirements that such punishment be reasonable and used for specific purposes only.[165]

In determining what procedural safeguards are required, the *Baker* case is also instructive because it was decided after *Goss* and expressly built upon the procedural framework the Supreme Court had given for short-term suspensions.[166] Judge Craven, writing for the three-judge panel, required the following procedures in connection with the admin-

159. Roe v. Wade, 410 U.S. 113, 152-54 (1973); Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Schmerber v. California, 384 U.S. 757, 766-70 (1966).

160. *E.g.*, Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam*, 458 F.2d 1360 (5th Cir. 1972). *Contra*, Glaser v. Marrietta, 351 F. Supp. 555 (W.D. Pa. 1972).

161. 498 F.2d 248 (5th Cir. 1974).

162. *Id.* at 267.

163. 395 F. Supp. 294 (M.D.N.C. 1975) (three judge court), *aff'd*, 96 S. Ct. 210 (1975).

164. *Id.* at 301-02.

165. *Id.* at 302.

166. *Id.*

istration of corporal punishment: 1) corporal punishment must be approved by the school principal before it may be used in a particular school;[167] 2) except in rare instances,[168] corporal punishment must never be used either as a "first line of punishment for misbehavior"[169] or "unless the student was informed beforehand that specific misbehavior could occasion its use";[170] 3) the "teacher or principal must punish corporally in the presence of a second school official" who must be informed in the student's presence of the reasons for the punishment;[171] and 4) the "official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present."[172]

It is significant that the court in *Baker* required procedures to accompany the use of corporal punishment different from those required in *Goss* for short-term suspensions. Specifically, in addition to requiring some kind of hearing, the court required the presence of an official other than the disciplinarian at the time that punishment is administered. Although the court does not state its reasoning, apparently it is concerned with the potential for abuse in the use of force as a means of punishment. While the impact of a three-day suspension is relatively uniform, there may be wide disparities in the amount of physical force employed when virtually unbridled discretion is placed in the hands of the official administering it.[173] Especially in light of the Supreme Court's affirmance of *Baker*,[174] procedural safeguards accompanying the use of corporal punishment, in addition to providing for some kind of hearing, should probably be designed to limit the discretion of the disciplinarian in the amount of force that may be employed.

8. *Ability Grouping*

Ability grouping or tracking is a practice in which students are placed in curriculum levels according to the school's assessment of their ability to learn.[175] Its purpose is to provide "maximum educational op-

167. *Id.*

168. Rare instances are defined as "misconduct . . . so anti-social or disruptive in nature as to shock the conscience." *Id.*

169. Judge Craven suggests "keeping after school," or assigning extra work as preferable alternatives. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 302-03.

173. *E.g.*, Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974).

174. *See* note 163 *supra.*

175. Hobson v. Hansen, 269 F. Supp. 401, 442 (1967), *aff'd en banc sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

portunity for children of widely ranging ability levels . . . ."[176] However, like other educational decisions that "label" students and provide for something other than a mainstream education, at least some forms of ability grouping may require due process procedures.

Determining the protected interests involved in ability grouping or tracking decisions involves a substantive analysis of the context in which the decisions are made. If there exists little difference in the quality of education between tracks, special efforts to tailor the curriculum to the needs of the students in each track, and opportunity for movement between tracks, misclassification may involve only a de minimis infringement on protected property and liberty interests.[177] On the other hand, if there exist disparities in the quality of education between tracks with the highest tracks getting a larger share of available resources,[178] little effort to provide compensatory programs as part of the lower track curriculum,[179] and little or no opportunity to move from the lower to the higher tracks,[180] misclassification may involve a serious infringement on protected interests.[181] A student who is mistakenly placed below the average track may be denied the kind of education to which state statutes entitle him. Such mislabeling may also stigmatize the student in the eyes of fellow students and teachers, as well as make further education virtually impossible and job opportunities limited.[182] One commentator characterized placement in a low track this way: "A child who is effectively labeled "dumb" will inherit a diluted education and a stigma which will signficantly affect all his future dealings with his friends, teachers, family, and prospective employers."[183]

If a student is mistakenly placed in an average track instead of the college preparatory track, it is more difficult to find an infringement of protected interests especially if the state entitlement is merely to a public

176. *Id.* It should be noted that at least one court has distinguished between tracking within a school and the establishment of special schools for the academically talented, stating that the latter is not "predictive" nor does it isolate students of "less promising ability." Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1268 (9th Cir. 1974).

177. The dividing of a class into "reading groups" is an example of this kind of classification.

178. Hobson v. Hansen, 269 F. Supp. 401, 468-74 (1967), *aff'd en banc sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

179. *Id.* at 469-73.

180. *Id.* at 464-68.

181. *See* McClung, *supra* note 123, at 21.

182. *See id.* at 21-22.

183. *Id.* at 22 (footnote omitted).

education.[184] It might be argued, however, that placing an above average student in an average track infringes on protected liberty interests in view of the impact of such a placement on future educational and employment opportunities.[185] The argument would gain additional force if there is little realistic opportunity for upward movement within the tracking system, for in such a situation, there is little opportunity to correct the mistaken classification.

Since tracking decisions are often made by relatively standardized criteria,[186] due process procedures need only insure that there is no mistake in the application of such criteria.[187] Notice of the tracking determination, access to the data used to arrive at the decision, and an opportunity for an informal hearing so that possible errors could be called to the attention of the decisionmaker would probably suffice.[188] If tracking decisions involve more than the mere mechanical application of test scores and are made on the basis of teacher recommendations and psychological evaluations,[189] there exists a greater opportunity for abuse of discretion on the part of the decisionmaker, and procedures similar to those used with respect to special education might be more appropriate.

9. *Extracurricular Activities*

The courts generally consider extracurricular activities an integral part of the total school program.[190] Not only do they provide additional educational opportunities but also they often have a significant impact on a student's future educational and employment opportunities. For this reason, some courts have recognized participation in extracurricular activities as a property right that is entitled to due process protection.[191]

184. *Cf.* Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1267-68 (9th Cir. 1974).

185. The analogy to *Goss* here is particularly appropriate. If suspension from school for only one day infringes upon protected liberty interests, then certainly unfair denial of access to a college preparatory track, a decision with much greater implications for a student's future, should also constitute an invasion of a protected interest.

186. *See* Kirp, *supra* note 53, at 755.

187. An analysis of the substantive problems associated with standardized achievement tests, especially the potential for racial bias, can be found in Kirp, *supra* note 53, at 754-59.

188. *But see* McClung, *supra* note 123, at 20-22.

189. *See* Kirp, *supra* note 53, at 754.

190. Davis v. Meek, 344 F. Supp. 298, 301 (N.D. Ohio 1972); *see* Moren v. School Dist. No. 7, 350 F. Supp. 1180, 1184 (D. Mont. 1972).

191. *See* Moren v. School Dist. No. 7, 350 F. Supp. 1180, 1182-84 (D. Mont. 1972) (relating participation in interscholastic sports to future educational opportunities); Davis v. Meek, 344 F. Supp. 298, 301 (N.D. Ohio 1972) (relating participation in interscholastic sports to future vocational opportunities).

In addition, prohibitions against participation in extracurricular activities may result in stigmitization that would have a serious negative impact on a student's future, thus infringing upon the liberty interest. In *Warren v. National Association of Secondary School Principals*,[192] an action challenging the expulsion of a student from the National Honor Society, the district court considered the infringement serious enough to require not only notice and a hearing but also an impartial decisionmaker.[193]

Because the interests involved may vary considerably, no one set of procedures will be adequate to deal with all prohibitions on participation in extracurricular activities. If the prohibition involves a generalized school board policy, is non-accusatory in nature, and can be applied without an involved factual determination, then summary procedures may be adequate. Such was the case in *Dallam v. Cumberland Valley School District*,[194] an action challenging on substantive and procedural grounds a school board rule that prohibited a transfer student whose parents resided in a different school district from participating in interscholastic sports.[195]

On the other hand, some determinations about extracurricular activities involve interests analogous to those involved in suspensions and expulsions. The *Warren* case is a good example. There, expulsion from the Honor Society was actually a form of disciplinary action taken in response to allegations that the student had been seen drinking at a local restaurant.[196] Serious liberty interests are at stake in connection with such a charge[197] and thus, the court required formal procedural safeguards.[198] When expulsion from an activity in which the student has previously participated is involved and the expulsion is based on allegations that the student violated a rule that conditions participation, the same procedures adopted for suspensions and expulsions should apply. In most cases, the interests involved are serious enough to

192. 375 F. Supp. 1043 (N.D. Tex. 1974).
193. *Id.* at 1047.
194. 391 F. Supp. 358 (M.D. Pa. 1975).
195. Although the fact situation in *Dallam* distinguishes it from other denials of participation in extracurricular activities, the court based its decision on the fact that there was not a "complete exclusion from the educational process," thus distinguishing this case from *Goss*. *Id.* at 361. For an analysis of the shortcomings of this point of view see Weckstein, *supra* note 94, at 51-52.
196. 375 F. Supp. at 1046.
197. *Id.* at 1048.
198. The court stressed the importance of an impartial decisionmaker when a determination to suspend a student from the Honor Society is made. *Id.* at 1047.

require the procedures mandated for long-term suspensions.[199]

10. *Censorship of Student Publications*

If prior restraints on student publications are constitutional at all,[200] the first amendment requires that the accompanying review procedures be "prompt and adequate."[201] A recent decision by the United States Court of Appeals for the Fourth Circuit indicates that, after *Goss*, such review procedures must also include "the right of the student to appear and present his case" if suspension from school is involved.[202] In *Nitzberg v. Parks*,[203] an action challenging a school system regulation which empowered a principal to prohibit distribution on school property of literature not sponsored by the school if obscene or libelous, Justice Tom Clark held that *Goss* requires "confrontation and a hearing of some type before a step as drastic as suspension is taken."[204] It is reasonable to believe that similar procedures will be required with respect to other forms of student expression.[205] Interestingly, Justice Clark suggested that questions of prior restraint of student publications[206] might best be handled by some form of student-faculty committee that would give all sides a chance to air their grievances so that the "bitterness generated by an unpopular refusal of [an] administrator to allow circulation of a student publication might thus be alleviated."[207] The opinion indicates that, notwithstanding the seriousness of the first amendment claims raised in cases such as *Nitzberg*, the courts will allow, and even encourage, innovation in the implementation of protective procedures.[208]

199. Although *Warren* does not detail all of the procedures necessary in connection with suspension from extracurricular activities, the court pointed in the direction of requiring procedural formality in such decisions. *Id.* at 1047-48.

200. *Compare* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 (5th Cir. 1972), Quarterman v. Byrd, 453 F.2d 54, 57-59 (4th Cir. 1971), *and* Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 805-08 (2d Cir. 1971) *with* Fujishima v. Board of Educ., 460 F.2d 1355, 1357 (7th Cir. 1972) *and* Riseman v. School Comm., 439 F.2d 148, 149 n.2 (1st Cir. 1971).

201. Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975).

202. *Id.* at 384.

203. 525 F.2d 378 (4th Cir. 1975).

204. *Id.* at 384. Although the opinion deals specifically with first amendment procedures which must exist independently of any due process requirements, it indicates that any school regulation which involves suspension as a penalty for violation must include an opportunity for the accused student to be heard as part of the fact-finding process, a position consistent with the holding in *Goss*.

205. *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

206. A problem, he states, which has continually plagued the Fourth Circuit. 525 F.2d at 384.

207. *Id.* at 385.

208. *See* text following note 231 *infra*.

11. *Grades*

The process of evaluating a student's performance has uniformly been characterized by the courts as "an educational question, the final determination of which is vested . . . in the [school] officials."[209] The only exceptions to this rule arise when school officials abuse their discretion,[210] act arbitrarily or capriciously,[211] or act in "bad faith."[212] The exceptions are most often applied when school officials use academic penalties for disciplinary purposes. Thus, in *Brookins v. Bonnell*,[213] an action in which a nursing student was dismissed from school allegedly for academic reasons, the court held that the school was in reality enforcing rules of student conduct and therefore the student was entitled to a hearing with respect to her alleged misconduct.[214] If the action of school administrators can be characterized as disciplinary rather than academic, due process procedures may be necessary.[215] The only additional qualification requires the infringement on liberty or property interests to be more than de minimis, a limiting principle of questionable significance in view of the *Goss* determination that a suspension of only one day does not fall within that category.

The courts have previously upheld challenges to expulsion from college and graduate school for allegedly academic reasons[216] but have not yet been faced with actions challenging a final course grade. One cannot help but think that such challenges are not far away in light of the enormous competition for entrance into college and graduate school as well as the impact that grades seem to have on a student's future employment opportunities. The logic of *Goss* indicates that at least some procedural safeguards are necessary with respect to virtually any grade challenge[217] although the scope of review would probably be limited in view of the courts' reluctance to intervene in academic matters. Only when it is alleged that academic penalties are being exacted in place of disciplinary action as a way of compromising the

209. Connelly v. University of Vt., 244 F. Supp. 156, 159 (D. Vt. 1965), *citing* Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913).
210. State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943).
211. Frank v. Marquette Univ., 209 Wis. 372, 377, 245 N.W. 125, 127 (1932).
212. Gasper v. Bruton, 513 F.2d 843, 851 (10th Cir. 1973).
213. 362 F. Supp. 379 (E.D. Pa. 1975).
214. *Id.* at 383-84.
215. *See* Buss, *supra* note 53, at 585.
216. *E.g.*, Connelly v. University of Vt., 244 F. Supp. 156 (D. Vt. 1965).
217. 419 U.S. at 597-98 (Powell, J., dissenting).

student's procedural rights would the courts be likely to require formal due process procedures similar to those required in disciplinary matters.

THE INVESTIGATORY MODEL—AN ALTERNATIVE TO ADVERSARINESS

Establishing the existence of protected interests with respect to a wide range of determinations made by school officials is a relatively simple process when compared with the task of devising a system that protects these interests. Traditionally, courts have relied almost exclusively on procedures that can be characterized as modifications of the adversary system. Yet even the casual reader of *Goss* will detect in both the majority and dissenting opinions an uneasiness about imposing an adversarial mode of decisionmaking upon a school system.

Justice Powell, in his dissent, states that one of the most "disturbing aspects [of the majority decision is its] reliance upon . . . the adversary process" which may be harmful to the ongoing student-teacher relationship that is "rarely adversar[ial] in nature."[218] The majority stresses that it is not requiring a traditional adversary proceeding that includes the right to counsel and the right to cross-examine witnesses in connection with short suspensions because it may be "inappropriate in a classroom setting."[219] In fact, it can be argued that the majority's reluctance to impose an adversarial mode generally in the public school context resulted in its formulation of summary procedures for short-term suspensions which provide little or no real protection for students against arbitrary administrative action.[220]

There is, however, nothing about our concept of due process that requires school officials to adopt an adversary proceeding in every instance in which procedural safeguards are required.[221] Indeed, commentators are beginning to suggest that, at least in certain areas of mass justice such as welfare eligibility determinations, the adversary system might be replaced by an investigatory system in which the decisionmaker plays a more active role.[222] With respect to some, but not all, of the school determinations discussed thus far, such a system has much to commend it. An investigatory system could efficiently provide procedural safeguards for the majority of school decisions, reserving adver-

218. *Id.* at 594.
219. *Id.* at 583.
220. Weckstein, *supra* note 94, at 49.
221. Wright, *supra* note 15, at 1060.
222. Friendly, *supra* note 7, at 1289; Verkuil, *supra* note 15, at 852-55.

sary proceedings for instances in which they are particularly appropriate.

The investigatory model of decisionmaking is characterized by the large amount of control vested in the decisionmaker.[223] Unlike the adversary model in which the "judge" plays an essentially passive role and maximum control is vested in the opposing attorneys, the investigatory model gives the decisionmaker complete control of the proceeding allowing him to determine what evidence he thinks is relevant, to call and examine his own witnesses, to ascertain applicable rules and, through this process, eventually reach a result.[224]

Although such a system might, on initial consideration, seem autocratic, many important determinations are made in our society daily in just such a way. A prime example is the forest ranger who issues or denies a camping permit on the spot even if the applicant has a prior reservation.[225] Thibaut and Walker, in their groundbreaking study of procedural models, found the investigatory model effective in resolving disputes that are cognitive or non-competitive in nature.[226] In such disputes, both parties "have a common interest in deciding on the correct or best solution" and thus, "share in any gains or losses that attend their interaction."[227] If the parties are interested in reaching a quick decision and a clear standard for decisionmaking exists, the investigatory model becomes even more desirable as a mode of decisionmaking.[228] Thus, if the parties implicated by a particular decision do not have a high conflict of interest there is no advantage in placing them in an adversarial relationship in order for the decision to be made.

Many of the decisions that are made daily in the public schools are suited to this investigatory mode. As one commentator perceptively stated, school officials and students are seldom placed in an adversarial relationship except when school officials attempt to end the educational relationship entirely by means of expulsion, suspension, exclusion, or "dead-end placement."[229] When the determination involves a judgment concerning the most effective educational approach for a particular

223. J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 22-23 (1975).

224. *Id.* at 24.

225. 36 C.F.R. § 2.5 (1966).

226. THIBAUT & WALKER, *supra* note 223, at 8. It should be noted that the study found the adversary system a superior method of conflict resolution in most instances except cognitive decisionmaking.

227. *Id.*

228. *Id.*

229. Weckstein, *supra* note 94, at 49.

student, all parties affected by the decision have a common interest in the decision being correct.

For instance, in a special education determination, neither parents nor school officials have any interest in classifying a student incorrectly. If a retarded student is placed in a regular classroom without being given special support services he will inevitably have great difficulty in keeping up with the class and will also pose problems for the teacher who has neither the time nor the training to provide the needed attention. Moreover, misclassification will probably increase the likelihood that the student will drop out of school entirely. On the other hand, if a correct special education placement is made, almost any child, no matter how retarded, can benefit from the educational process.[230] Similarly, if a normal child is placed in a special education class not only is the child denied the chance to receive the kind of education to which he is entitled, but also the school is unnecessarily expending what are usually scarce resources for special education.[231]

This reasoning applies to other determinations made by school officials such as those involving tracking and alternatives to suspensions. Other determinations, such as those involving grades and censorship may involve at least some conflict of interest among the parties. However, school officials gain little by giving a student an arbitrary grade or unfairly prohibiting distribution of a student publication. Such determinations fall somewhere between those that can be resolved through a pure investigatory mode and those that are appropriate for the adversary system.

Nevertheless, just because some conflict of interest exists among the parties is no reason to abandon the investigative model completely, especially when the degree of conflict is not high. Thibaut and Walker suggest that the greater the amount of conflict among the parties, the more fruitful it is for them to exercise some control over the decisionmaking process.[232] Thus, mechanisms are needed that can shift the amount of control that the parties have in the decisionmaking process according to the nature of the decision. This shifting can be accomplished in a number of ways. Student-faculty committees provide for a diversity of input in the decisionmaking process, allowing the parties an

230. *See Special Education, supra* note 98, at 42.

231. The assumption that there is a congruence of interests between school officials and normal children with respect to special education placements assumes that school officials are acting in good faith. For a discussion of possible abuses of the special education classification, see note 119 and accompanying text *supra*.

232. *See generally* THIBAUT & WALKER, *supra* note 223.

opportunity to present their points of view to a decisionmaking body that is at least partly composed of their peers.[233] Even review boards that merely engage in discretionary review of initial determinations give the parties some control over the decisionmaking process in that they can have an initial determination reassessed by an impartial third party.

Perhaps the most promising means of altering the control of the parties in the decision-making process is the office of the ombudsman.[234] This procedural devise has already found wide acceptance in some civil law countries which have had wide experience with the investigative mode[235] and is gaining increasing acceptance in the United States.[236] Although the term ombudsman technically connotes a rather specialized governmental office,[237] it has come to stand for an independent official whose job it is to protect against arbitrary administrative action.[238] Typically, an ombudsman is available on short notice to any member of his constituency to hear complaints and when necessary to investigate them through informal channels.[239]

Where it has been implemented, the effectiveness of the office of ombudsman has been remarkable. Its chief value seems to be its ability to humanize the bureaucracy so that officials remember that "their acts touch beings, not cases—people, not papers."[240] Often, the matters handled, even if they are "technically justiciable, would almost certainly never be taken to court."[241] Typical of these disputes is a disagreement between a fisherman and a game warden about the interpretation of the law, a request by a craftsman that he be able to keep his expired license

233. *See* note 13 and accompanying text *supra*. *See also* Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

234. For an overview of past experience with the ombudsman as well as proposals for its implementation in the future see W. GELLHORN, OMBUDSMEN AND OTHERS (1966); W. GELLHORN, WHEN AMERICANS COMPLAIN (1966) [hereinafter cited as GELLHORN]; THE OMBUDSMAN: CITIZEN'S DEFENDER (D. Rowat ed. 1965) [hereinafter cited as Rowat].

235. *See generally* Rowat.

236. *See generally* B. FRANK, OMBUDSMAN SURVEY: JULY 1, 1974—JUNE 30, 1975 (International Bar Association Ombudsman Committee and American Bar Association Section of Administrative Law, Ombudsman Committee 1975) [hereinafter cited as OMBUDSMAN SURVEY].

237. Rowat at 24.

238. Freedman, *Philadelphia: What Being Brotherly Means*, N.Y. TIMES, Feb. 1, 1974, § 1, at 29, col. 2.

239. *E.g.*, Freedman, *An Ombudsman's Angle of Vision*, U. PA. ALMANAC, Sept. 17, 1974, at 4-5 [hereinafter cited as Freedman].

240. GELLHORN at 42. This is actually another way of saying that the ombudsman provides the parties to a disagreement at least some control over the decisionmaking process. *See* text accompanying note 228 *supra*.

241. GELLHORN at 42.

as a momento, and the citizen's demand that his fingerprint record be destroyed after he was exonerated of the crime for which he was arrested.[242] Although in many cases the ombudsman has few, if any, formal sanctions to utilize in enforcing his opinions, he is generally respected and has an enormous capacity both to right past wrongs and to implement corrective measures so that governmental machinery will function more smoothly in the future.[243] The reason for this remarkable effectiveness seems to lie in the approach that is generally taken by ombudsmen. Rather than directing their efforts at castigating individuals, attention is aimed at procedures, policies, and procrastination.[244] Any disciplining of individual officials comes from the department or agency involved while the ombudsman concentrates on providing guidance for the future.[245]

Proponents of the ombudsman have singled out the educational setting as a particularly appropriate place for its implementation.[246] In fact, between the years 1966 and 1970 approximately seventy colleges and universities established the position of ombudsman[247] and by 1974 fifteen schools or school districts had followed suit.[248] Although there is not a great deal of information yet available about the effectiveness of these newly created positions, preliminary reports are encouraging.

Professor James O. Freedman, who has served as ombudsman at the University of Pennsylvania since 1973, is enthusiastic about the office especially with respect to matters of academic tenure and allegedly unfair grades.[249] His office listened to the grievances of more than 200 people, students, faculty, and non-academic employees of the university during the years 1973-74 and that experience has convinced him of the important role of the ombudsman in insuring that the university observes fair administrative procedures.[250] Luther W. Seabrook, principal of William O'Shea Intermediate School 44 on Manhattan's West Side, and Steven R. Kaminsky, the Student Ombudsman for I.S. 44, are also enthusiastic about the office of ombudsman in the public school context.[251] Kaminsky sees himself as a person not aligned with any partic-

242. *Id.*
243. *Id.* at 44-48; Freedman, *supra* note 239.
244. GELLHORN, *supra* note 234, at 46.
245. *Id.*
246. *Id.* at 208-11; Verkuil, *supra* note 15, at 857-60.
247. Freedman at 4.
248. OMBUDSMAN SURVEY, *supra* note 236, at 46-47.
249. Freedman at 4-5.
250. *Id.*
251. *See* SUSPENSIONS, *supra* note 10, at 21-25.

ular element of the school administration and consequently, he maintains, students feel more comfortable talking to him about difficulties that they encounter in school.[252] He functions as a troubleshooter and facilitator who tries to identify both students' problems before they become serious and resources within the school and the community that may be helpful in solving these problems.[253] Kaminsky is a paid member of the school administration[254] but in Philadelphia, the election of a volunteer ombudsman who may be a student, parent of a student, or school counselor is provided for as part of a "Bill of Rights and Responsibilities for High School Students."[255] The volunteer ombudsman is charged with informing students of their rights and attempting to facilitate compromises with respect to disputes between students and faculty.[256] Thus it is hoped that the ombudsman will encourage informal discussions between the parties involved in a dispute prior to the invocation of formal grievance procedures.[257]

As these preliminary reports indicate, the office of ombudsman can perform a number of important functions within the school context. The position is particularly attractive in the framework of the investigative model because of its potential to shift at least some control of the decisionmaking process from the decisionmaker back to the parties.[258]

This result can be achieved in a number of ways. First, and foremost, the existence of an ombudsman encourages the resolution of disputes before a hearing of any kind is necessary.[259] Typically, the ombudsman might arrange an informal conference involving all parties to a determination with the hope that such a discussion could resolve the dispute. Second, an ombudsman aids students and parents who want to avail themselves of a hearing to obtain one.[260] In this way, the ombudsman can insure that members of the school community are aware of their procedural rights and know how to exercise them. Third, the ombudsman is present at all hearings as an impartial observer. Specifically, the ombudsman can keep an eye on the admittedly autocratic

252. *Id.* at 24.
253. *Id.*
254. *Id.*
255. Philadelphia Board of Education, Bill of Rights and Responsibilities for High School Students 6 (1974). All persons elected to serve as ombudsmen are required to undergo special training before assuming office. *Id.*
256. *Id.* at 6-7.
257. *Id.* at 7.
258. *See* text accompanying notes 233-34 *supra.*
259. *E.g.*, Philadelphia Board of Education, Bill of Rights and Responsibilities for High School Students 7 (1974).
260. *E.g., id.* at 6.

aspects of the investigatory model and make recommendations for the conduct of future hearings if he believes that the broad discretion vested in the decisionmaker is being abused. He might also be given the power either to order a new hearing or to submit a report as part of an appeals mechanism. Fourth, the ombudsman can keep an eye on many of the broad issues that are implicated by school determinations. For instance, he could keep records on the racial composition of the lower tracks, the various alternatives to suspension, and the special education classes; if one race was disproportionately represented he could scrutinize the procedures involved to determine if they were racially biased. He might also observe the movement between tracks, especially from lower tracks to higher ones in order to determine whether evaluation of students' abilities was an on-going process instead of a one-shot determination.[261]

It can readily be seen that the ombudsman has the potential to become an indispensable element in the implementation of the investigatory mode of decisionmaking. By providing a mechanism for shifting some control of the decisionmaking process back to the parties, the ombudsman makes it possible, in many cases, to dispense with an adversary system completely and yet provide a meaningful check on the procedural abuses that are always possible when broad discretionary power is vested in the decisionmaker. If the ombudsman can perform that function effectively, then the investigatory mode becomes a very attractive means of providing fairness with respect to the majority of school decisions, reserving the adversary system for situations in which it is both necessary and appropriate.

CONCLUSION

Although the full implications of *Goss v. Lopez* for the everyday conduct of schools may not be realized for some time, Justice Powell's prophetic dissent points to a large number of previously discretionary decisions made by school officials that are encompassed by the majori-

261. Challenges involving these broad issues have been and can be made in the context of the legal system. In fact, in the past the courts seemed to be the only place that such grievances could be redressed. *See* Blatt, *The Legal Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 991, 993 (1972). But law suits are expensive, divisive, and often ineffective. *See Special Education, supra* note 98, at 58-96. If the ombudsman is qualified to do the job and is given enough independence to do it effectively, recent experience suggests that he can be more useful and effective than continual resort to litigation. Thus, the ombudsman may, in some cases, be in a position to remedy the kind of systemic unfairness that has previously been resolved only by highly complex law suits.

ty's reasoning. *Goss* has already influenced lower courts to require due process safeguards in connection with corporal punishment and prior restraint of student publications. The key issue that must be faced with respect to this expansion of procedural requirements is how it can be accomplished without destroying the fundamental institutional relationships that the procedures are designed to protect. Justice Powell in his dissent implicitly raises this issue when he expresses his concern about the future of the student-teacher relationship in the context of required procedures that place parties to a particular educational determination in an adversarial position.

Alternatives to adversariness exist where they are appropriate. Civil law countries, for instance, base their judicial system on an inquisitorial or investigative mode which facilitates decisionmaking by placing maximum control in the hands of the decisionmaker. Although empirical research tells us that such a procedure is not optimal with respect to all conflict resolution, it may be particularly suited to many of the educational determinations implicated by *Goss*. When the ombudsman, a procedural device that allows for shifts in the amount of control the parties have in the decisionmaking process depending on the nature of the controversy, is incorporated into the investigatory model, the integrated model stands as a viable alternative to adversary procedures for many everyday school determinations.

Thus, *Goss* need not be viewed by those responsible for making public school policy as an unwarranted imposition of a decisionmaking process that is ill suited to the educational setting. Rather, the landmark decision can be seen as an invitation to develop informal procedures that provide for fundamental fairness. Whether the challenge is welcomed or not, those who are responsible for the public schools must face it as they come to grips with the implications of *Goss*.

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