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Procedural Due Process and Short Suspensions from the Public Schools: Prologue to Goss v. Lopez

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PROCEDURAL DUE PROCESS AND SHORT SUSPENSIONS FROM THE PUBLIC SCHOOLS: PROLOGUE TO *GOSS V. LOPEZ*

I. Introduction

In the milestone case of *Dixon v. Alabama State Board of Education*,[1] Judge Richard Rives held that the due process clause of the fourteenth amendment protects students at public colleges. Before they can be expelled, students must be given written notice of charges and an impartial hearing which allows presentation of witnesses and evidence. Subsequent decisions have extended *Dixon* to high school suspensions.[2] Now the courts agree that public high school students cannot be suspended for a "substantial" period of time without prior notice and hearing.[3]

The courts have not agreed upon the due process requirements when suspensions are for *short* periods of time. Indeed, the cases disagree on what constitutes "short." Some decisions have upheld suspensions imposed for ten days and longer without prior hearings.[4] Other courts have applied *Dixon* to shorter periods, intimating that only seriously disruptive conduct justifies denial of a prior hearing.[5]

In 1971 and 1972, the Supreme Court decided a series of cases culminating in *Board of Regents v. Roth*[6] which delineated revised analytical guidelines for procedural due process.[7] Applying these guidelines, two federal district courts in 1973 extended the prior hearing requirement to all public school suspensions, short or long.[8] The Supreme Court has noted jurisdiction in one of these cases, *Goss v. Lopez*,[9] and is expected to hear argument during the October term. With *Lopez* the Court can resolve the lower court disharmony and formulate a definitive standard for school disciplinary procedures.

II. The Lower Courts and Short Suspensions

Prior to 1969 the federal courts had not faced a short suspension case. *Dixon* and its progeny had established procedural guidelines only for long or

1 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). For an interesting discussion of *Dixon's* dramatic departure from precedent and subsequent rapid absorption into the law see Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1028-32 (1969) [hereinafter cited as Wright].

2 *E.g.*, Williams v. Dade County School Board, 441 F.2d 299 (5th Cir. 1971); Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970); Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).

3 Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328, 1343, 1346 (S.D. Tex. 1969).

4 *E.g.*, Farrell v. Joel, 437 F.2d 160 (2nd Cir. 1971); Rumler v. Bd. of School Trustees, 327 F. Supp. 729 (D.S.C. 1971); Banks v. Bd. of Public Instruction, 314 F. Supp. 285 (S.D. Fla. 1970); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969).

5 *See* note 39 and text accompanying notes 33-39 *infra*.

6 408 U.S. 564 (1972).

7 *See* note 44 and text accompanying notes 41-54 *infra*.

8 *See* text accompanying notes 55-66 *infra*.

9 Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), *prob. juris. noted sub nom.*, Goss v. Lopez, 94 S.Ct. 1405 (1974).

indefinite suspensions and expulsions.[10] Although there was dicta to the effect that milder penalties required less substantial safeguards,[11] the line between long and short suspensions remained undefined. Since 1969 the federal courts have confronted short suspensions over a dozen times in various factual guises. While the majority of these decisions have not required prior notice and hearing, they vary substantially in rationale as well as placement of the line dividing long suspensions from short.

A. *Judicial Deference to Educational Authority*

Baker v. Downey City Board of Education[12] was the first federal decision to directly confront a short suspension. Two students were suspended for ten days without notice or hearing for distributing a student publication named *Oink*. As required by school regulations, the principal conferred with the students' parents two days after the suspension had been imposed.[13] The court held that this postsuspension conference satisfied due process requirements.

The *Baker* court's reasoning reveals that deference to the educational system was its controlling consideration. *Madera v. Board of Education*[14] was cited for the proposition that due process procedures may vary according to the circumstances:

> Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspensions, into criminal adversary proceedings—which they definitely are not.[15]

The court distinguished temporary suspensions from "drastic disciplinary action" such as expulsion; for the lesser penalty, concluded *Baker*, formal procedures should not be required:

> In the instant case, the school officials were charged with the conduct of the educational program and if the temporary suspension of a high school student could not be accomplished without first preparing specifications of charges, giving notice of hearing, and holding a hearing, or any combination of these procedures, the discipline and ordered conduct of the educational

10 Minimum or "essential" due process safeguards for school suspensions have generally been defined as prior notice with written specification of charges, an impartial hearing after time to prepare which shall include an opportunity for both sides to present witnesses and evidence, and sanctions imposed only on substantial evidence. *See* Dixon v. Alabama St. Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961); Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328, 1346 (S.D. Tex. 1969); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147 (W.D. Mo. 1968) (en banc); Wright, *supra* note 1 at 1071-74.

11 General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968) (en banc); Wright, *supra* note 1, at 1071.

12 307 F. Supp. 517 (C.D. Cal. 1969).

13 *Id.* at 522.

14 386 F.2d 778 (2d Cir. 1967).

15 *Id.* at 788. *Madera* never considered whether suspensions require prior notice and a hearing. It held only that the right to counsel does not attach to school disciplinary hearings.

> program and the moral atmosphere required by good educational standards, would be difficult to maintain.[16]

Since *Baker* was the first case to specifically consider short suspensions, the reluctance to interfere with educators is understandable and perhaps prudent. However, this treatment is inadequate in light of subsequent developments in short suspension case law. For instance, while noting that due process can vary with the circumstances, *Baker* failed to consider the possibility of procedures less demanding than the *Dixon* safeguards which it rejected but more protective than the perfunctory postsuspension parental conference.[17] Also, the court only incidentally addressed the highly pertinent issue of the potential harmful effects of school suspensions.[18]

Baker is not the only short suspension case that deferred to school authority without thoroughly exploring pertinent issues. In *Farrell v. Joel*,[19] high school students were suspended for fifteen days (later changed to ten) for their part in a protest against previous school disciplinary actions. During the protest, the students were advised that their activity violated school rules and that they would be suspended; however no hearing was held prior to their dismissal. The court held that under the circumstances due process did not require notice or a prior hearing.[20]

In reaching this holding, the court did not sufficiently consider the student interest in avoiding a short suspension.[21] The *Farrell* court classified a ten-day suspension as minor disciplinary action similar to staying after school and extra homework which do not require formal procedures. Such a categorization ignores a significant difference between suspensions and other forms of school discipline: a suspension denies access to education.

Also, in refusing to recognize a constitutional right to notice and hearing before a ten-day suspension, *Farrell* gave great weight to the lack of factual controversy in the particular circumstances under consideration. The suspended students had admitted they knew their conduct violated school rules. A prior hearing would have served no purpose except to set a penalty, the court explained, and therefore was not necessary.[22]

However, lack of factual controversy is a questionable basis for denying procedural safeguards. An alleged lack of procedural due process is not answered by saying that in the particular circumstances undisputed facts justify the sub-

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16 Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 522 (C.D. Cal. 1969).

17 *See* note 60 and accompanying text *infra*.

18 *See* text accompanying notes 90-97 *infra*.

19 437 F.2d 160 (2nd Cir. 1971).

20 Circuit Judge Feinberg had some misgivings about school disciplinary procedures:
> Certainly possible unfairness could be avoided in the future by promulgation of detailed, fair and reasonable procedures to be used when discipline less serious than expulsion is proposed. . . . *Id.* at 163.

21 See text accompanying notes 90-97 *infra*.

22 437 F.2d at 163. Two other cases withholding *Dixon* safeguards for short suspensions also explicitly relied on lack of factual controversy. Tate v. Bd. of Educ., 453 F.2d 975 (8th Cir. 1972) (prior hearing not required for a three-day suspension when there was no question as to what acts and individuals were involved); Rumler v. Bd. of School Trustees, 327 F. Supp. 729 (D.S.C. 1971) (indefinite suspension for long hair violation did not require a prior hearing).

stantive result.[23] Rather than resting on lack of factual dispute in the specific situation, *Farrell* should have considered whether the procedures employed would satisfy due process when applied to short suspensions in general.[24]

B. *Failure to Recognize the Emergency Situation*

A general principle of procedural due process is that the need for quick action by the state in serious emergency situations will overcome the individual interest in procedural protections.[25] This means that school officials may temporarily suspend students without notice or a prior hearing when their behavior has seriously disrupted the educational process.[26] Several short suspension decisions are flawed because they failed to recognize this exception to general prior hearing requirements.

In *Banks v. Board of Public Instruction*[27] the Fifth Circuit considered the constitutionality of Dade County, Florida, school regulations authorizing a ten-day suspension without prior hearing. The court discussed *Dixon* and decided that any suspension required a hearing, but that for short suspensions, a prior hearing would disrupt learning. Consequently, the court held that the regulations in question satisfied due process.[28]

The conclusion in *Banks* that prior hearings for short suspensions would disrupt learning was reached through a discussion of hypothetical classroom misconduct.[29] The discussion assumed extreme misconduct requiring immediate removal from school to maintain the learning environment.[30] A prior hearing would require the presence of the teacher and student witnesses, thus only further disrupting learning by their absence from the classroom. However, this analysis does not acknowledge that severe misconduct justifies dispensing with a prior hearing even when normally required.[31] By failing to recognize the emergency

23 Due process does not depend on the existence of factual dispute. *See* Fuentes v. Shevin, 407 U.S. 67, 87-88 & n.18 (1972); Black Students *ex rel.* Shoemaker v. Williams, 317 F. Supp. 1211, 1214 (M.D. Fla. 1970); Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970), *explained in* Note, *Student Rights—Dismissal and Due Process,* 38 TENN. L. REV. 112, 117 (1970). The appearance of fairness as well as actual fairness is important:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951), *explained in* O'Toole, *Summary Suspension of Students Pending a Disciplinary Hearing: How Much Process Is Due?* 1 J. LAW & EDUC. 383, 390-91 (1972).

24 Another reason to require a hearing even when the student admits misconduct is to allow argument in mitigation of punishment. *See* Betts v. Bd. of Educ., 466 F.2d 629, 633 (7th Cir. 1972).

25 *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 n.7 & 8 (1972); Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

26 For a broader discussion of the emergency situation in the school setting, see text accompanying notes 119-25 *infra.*

27 314 F. Supp. 285 (S.D. Fla. 1970).

28 *Id.* at 292.

29 *Id.* at 291.

30 The *Banks* hypothetical discussion is referred to again in the text accompanying notes 104-08 *infra.*

31 The emergency situation exception is further defined in the text accompanying notes 119-25 *infra.*

exception, *Banks* avoided the primary question of whether a prior hearing should be required in nonemergency situations.[32]

Similar incomplete analysis mars another Fifth Circuit decision, *Dunn v. Tyler Independent School District.*[33] *Dunn* sustained the right of the school system to impose three-day suspensions without a prior hearing. The particular suspensions in question were given for riotous activity that clearly qualified as an emergency. The three-day suspensions could have been sustained on this basis alone, and the court to some degree did emphasize the particular facts involved.[34] However, the applicability of the emergency exception was not explicitly recognized; to this extent, *Dunn* is not good authority for denying prior hearings for short suspensions.[35]

Another Fifth Circuit case, *Black Students ex rel. Shoemaker v. Williams,*[36] unlike *Banks* and *Dunn,* recognized the relation of emergency situations to due process protections. *Black Students* considered a ten-day suspension to be substantial and therefore like *Dixon. Pervis v. LaMarque*[37] was cited to explain that minimal punishment and emergency situations are the only exceptions to a prior hearing requirement. Thus *Black Students* is close to the position that, except in emergencies, any suspension requires a prior hearing.[38]

While other decisions have joined the short suspension melee,[39] few have significantly enriched the conceptual analysis. All decisions prior to 1972 must be reevaluated in the light of Supreme Court pronouncements in the series of procedural due process cases which culminated in *Board of Regents v. Roth.*[40]

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32 An explanation of *Banks* in *Williams v. Dade County School Bd.,* 441 F.2d 299, 301 (5th Cir. 1971) supports the textual analysis: A prior hearing was denied because the ". . . need to act quickly and in a manner that could not further disrupt the educational process outweighed the student's interest in a prior hearing."

In reality, plaintiff Banks was suspended for apparently nondisruptive behavior, failure to stand during the pledge of allegiance. Thus, the *Banks* holding largely rests on hypothetical reasoning not pertinent to the actual facts of the case.

33 327 F. Supp. 528 (E.D. Tex. 1971), *rev'd in part,* 460 F.2d. 137 (5th Cir. 1972).

34 460 F.2d at 145.

35 Judge Rives, the author of *Dixon,* dissented in *Dunn* and agreed with the District Court finding that the suspensions were actually indefinite, not short, and therefore required *Dixon* protections. 460 F.2d at 147 (Rives dissenting).

36 317 F. Supp. 1211 (M.D. Fla. 1970), *aff'd per curiam,* 470 F.2d 957 (5th Cir. 1972).

37 466 F.2d 1054 (5th Cir. 1972) (two-month suspension required a prior hearing). Judge Rives wrote that punishment requires a prior hearing unless it is only minimal or imposed in an emergency.

38 Of course this depends on whether a short suspension is considered "minimal punishment." Judge Rives in *Pervis* seemed to use "minimal punishment" as excluding suspensions, but this is not clear. 466 F.2d at 1058. In reality, it is difficult to contend that any suspension is minimal punishment. See text accompanying notes 90-97 *infra.*

39 Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438 (5th Cir. 1973) (prior hearing not required for short suspensions); Black Coalition v. Portland School Dist., 484 F.2d 1040 (9th Cir. 1973) (brief suspensions without hearing are justified); Linwood v. Bd. of Educ., 463 F.2d 763 (7th Cir.), *cert. denied,* 409 U.S. 1027 (1972) (seven days does not require prior hearing); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972) (dictum) (greater than two days requires prior hearing); Tillman v. Dade County School Bd., 327 F. Supp. 927 (S.D. Fla. 1971) (follows *Banks*); Jackson v. Hepinstall, 328 F. Supp. 1104 (N.D.N.Y. 1971) (dictum) (five days does not require prior hearing).

40 408 U.S. 564 (1972) (nontenured college teacher's interest in reemployment was not a liberty or property). Although they are 1973 decisions, *Murray v. West Baton Rouge Parish School Bd.,* 472 F.2d 438 (5th Cir. 1973) and *Black Coalition v. Portland School Dist.,* 484 F.2d 1040 (9th Cir. 1973) do not refer to *Roth* and do not follow the *Roth* analysis.

III. Procedural Due Process and the Supreme Court

Until 1971, the Supreme Court decided procedural due process questions by applying an imprecise balancing test. The interest of the individual in avoiding a fourteenth amendment deprivation of "life, liberty or property" was balanced against the state interest in summary adjudication.[41] Beginning with *Boddie v. Connecticut*,[42] and extending through several important due process decisions, a somewhat more systematic approach appeared in the Court's reasoning.[43] Finally, *Roth* clearly delineated the new guidelines. The previous balancing process was relegated to the second part of a two-phase analysis: (1) Is the individual interest encompassed by the fourteenth amendment "life, liberty, or property"? (2) If so, what procedures will satisfy the due process requirement?[44]

The first phase is crucial. If the individual deprivation is not of "life, liberty, or property," the individual has no constitutional right to any form of due process protection; if the interest is protected, some form of prior hearing is required.[45] This determination hinges on the "nature" as opposed to the "weight" of an interest.[46] Put differently, the court must ascertain the particular *type* of interest involved and decide whether that interest is a "liberty" or "property" or neither. During this process, the importance or "weight" of the interest should be discounted.

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41 *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 866, 894-95 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-64 (1951); Comment, *The Growth of Procedural Due Process into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in Our Economic System,"* 66 NW. U.L. REV. 502, 506 (1971).

42 401 U.S. 371 (1971) (due process requires that indigents cannot be denied access to divorce proceedings).

43 *See* Morissey v. Brewer, 408 U.S. 471 (1972) (parole revocation requires prior hearing); Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin without prior hearing generally violates due process); Bell v. Burson, 402 U.S. 535 (1971) (driver's license generally cannot be suspended without a prior hearing on liability).

44 [A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place we must look not to the "weight" but to the *nature* of the interest at stake. 408 U.S. at 570-71.

This approach was recently restated:

> The applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. Arnett v. Kennedy, 94 S. Ct. 1633, 1649 (1974) (Justice Powell concurring).

See Morissey v. Brewer, 408 U.S. 471, 481-84 (1972); Note, *"Liberty," "Property," and Procedural Due Process*, 5 CONN. L. REV. 685, 690-93 (1973).

45 Governmental deprivation of [a protected] interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing. Arnett v. Kennedy, 94 S. Ct. 1633, 1649 (1974) (Justice Powell concurring).

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing. . . . Bd. of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972).

See Fuentes v. Shevin, 407 U.S. 67, 81, 86 (1972); Groppi v. Leslie, 404 U.S. 496, 502-03 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971).

46 The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. Morissey v. Brewer, 408 U.S. 471, 481 (1972).

See note 44 *supra*.

For a liberty, however, "weight" cannot be entirely excluded from the first-phase analysis.[47] Some valuing is inevitably necessary to determine if a particular limitation of freedom rises to the level of a fourteenth amendment deprivation of liberty.[48] This valuation is affected by the extent to which the deprivation has subjected the individual to "grievous loss."[49] When state action has damaged an individual's good name so that his reputation in the community or ability to gain employment is impaired, the state must provide due process.[50] As a guide to this valuation, *Roth* states that ". . . there can be no doubt that the meaning of 'liberty' must be broad indeed."[51]

The second-phase analysis determines what process is due.[52] In the particular circumstances under consideration, what procedures will satisfy the due process mandate? The court must "weigh" the individual interest in avoiding the deprivation against the state interest in summary adjudication.[53] Greater deprivations will generally require more formalized procedural protections. Only in extraordinary situations will the state interest be so compelling as to defeat the individual interest in some form of prior hearing.[54]

IV. *Vail* and *Lopez*: Lower Court Application of *Roth* to Short Suspensions

The Supreme Court's new analytical framework was first applied to public school suspensions in *Vail v. Board of Education.*[55] *Vail* held that access to education is a protected interest requiring some prior hearing. For suspensions greater than five days, the court required *Dixon* safeguards.[56] In balancing the

47 This note will not treat property interests in detail since the courts have considered education to be a protected liberty. It is worthwhile to note that some earlier decisions indicate reduced protection for "property": "It is sufficient where only property rights are concerned that there is at some stage an opportunity for a hearing and a judicial determination." Ewing v. Mytinger and Casselbury, 339 U.S. 594, 599 (1950). Also *see* Philips v. Comm'r of Internal Revenue, 283 U.S. 589, 595-97 (1931). However these decisions were explained by *Roth* as "rare and extraordinary situations." 408 U.S. at 570 n.7. Also, both *Fuentes* and *Bell* held that "property" deprivations require a prior hearing. Note 43 *supra.*

48 For example in *Roth,* denial of reemployment to respondent Roth certainly restricted his liberty in the broadest sense of the word. He was no longer free to teach at Wisconsin State University. However this particular freedom was not important enough to be a fourteenth amendment liberty. 408 U.S. at 575.

49 *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951). "Grievous loss" pertains more to the second-phase balancing process than to the first phase and was cited by both *Goldberg* and *McGrath* in the context of the traditional balancing approach to procedural due process. *See* note 41 and accompanying text *supra.* However, at least so far as "grievous loss" means loss of good name, it applies to the first phase. This is clear from *Roth,* 408 U.S. at 573-74.

50 Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Weiman v. Updegraff, 344 U.S. 183, 191 (1952).

51 408 U.S. at 572.

52 *See* note 44 *supra.*

53 This second-phase weighing is essentially the same process as the traditional due process balancing of interests. *See* notes 41 & 49 and accompanying text *supra.* For a good example of the application of this balancing process see *Morissey v. Brewer,* 408 U.S. 471, 483-90 (1972). For a discussion balancing the interests involved in short suspensions see text accompanying notes 89-125 *infra.*

54 *See* text accompanying note 26 *supra* and notes 119-25 *infra.*

55 354 F. Supp. 592 (D.N.H. 1973). It should be noted that the Supreme Court bypassed an opportunity to apply their guidelines to short suspensions when they denied certiorari to *Linwood v. Bd. of Educ.,* 463 F.2d 763 (7th Cir.), *cert. denied,* 409 U.S. 1027 (1972).

56 *See* note 10 *supra.*

interests involved, the court gave great weight to the administrative burden of providing *Dixon* protection for short suspensions.[57] For this reason, the court concluded that an "informal administrative consultation" will satisfy the prior hearing requirement for suspensions of five days or less.

With the possible exception of *Black Students*,[58] *Vail* is the furthest extension of *Dixon* to short suspensions. It complies with the clear dictates of *Roth* by requiring some form of hearing before any suspension, short or long.[59] But *Vail* broke new ground by authorizing a reduced form of hearing for short suspensions as an alternative to the written notice and adversary hearing of *Dixon*.[60] This result can be viewed as a logical compromise between *Dixon* safeguards and no safeguards. However, the "informal administrative consultation" is grounded in practicality as well as logic. It is required in order that

> . . . the student can know why he is being disciplined and so that the student can have the opportunity to persuade the school official that the suspension is not justified, e.g., that this is a situation of mistaken identity or that there is some other compelling reason not to take action.[61]

The most recent contribution to short suspension law is *Lopez v. Williams*.[62] A number of students were suspended from the Columbus, Ohio, public schools during a period of racial tension involving student demonstrations in early 1971. The findings of fact establish that at least some of them were suspended without any form of prior hearing. Several of the students gave uncontroverted testimony that they were not involved in misconduct.[63] The suspensions were imposed under an Ohio statute authorizing public school principals to impose ten-day suspensions without prior notice and hearing.[64] The student plaintiffs claimed that this statute denied procedural due process.

Writing for a three-judge panel, Chief District Judge Joseph Kinneary carefully followed the Supreme Court two-phase approach. He held that the statutory right to public education is a protected liberty requiring some form of prior hearing before deprivation, thereby invalidating the Ohio statute. The court "weighed" the interest of school authorities in regulating discipline and declined to specify a precise form of hearing:

> If school administrators follow procedures which result in a fair factual determination made after notice and an opportunity to defend against the charges of misconduct, then no matter how informal the procedure, the student has been accorded [due process] . . . .[65]

57 354 F. Supp. at 603.
58 Note 36 and accompanying text *supra*.
59 Although *Vail* did not expressly consider emergency situations, this exception is inherent in due process. *See* text accompanying note 26 *supra* and notes 119-25 *infra*.
60 A university suspension case, *Stricklin v. Regents*, 297 F. Supp. 416 (W.D. Wis. 1969), reached a similar position by holding that even an emergency suspension required at least a "preliminary hearing," less formal than a full hearing. The elements of a preliminary hearing were defined in a subsequent case. Note 115 *infra*.
61 354 F. Supp. at 603.
62 Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), *prob. juris. noted sub. nom.*, Goss v. Lopez, 94 S. Ct. 1405 (1974).
63 See the fact findings as to Dwight Lopez and Betty Crome, 372 F. Supp. at 1284-86.
64 Ohio Rev. Code § 3313.66 (1972), *cited in* 372 F. Supp. at 1282.
65 372 F. Supp. at 1302.

The decision also recognized that student conduct creating serious disruptions will justify suspension without a prior hearing. However even in such situations, an adversary hearing should be held within 72 hours.[66]

V. *Lopez* in the Supreme Court

The school system appealed the district court decision directly to the Supreme Court where, under the name of *Goss v. Lopez,* probable jurisdiction was noted in February, 1974. Although *Dixon* has been cited with approval,[67] the Court has never before taken a suspension case. *Lopez* affords an opportunity for the Court to clarify the status of education under the Constitution and define procedural due process guidelines for discipline in the public schools.

A. *Phase One: Is Access to Public Education a "Liberty"?*

Judge Kinneary noted in *Lopez* that the "Supreme Court has not resolved the question of whether a student's statutory right to an education is a liberty which is protected by due process of law."[68] Until 1973, few courts would have devoted much ink to this question. For years the lower federal courts had handled suspension cases as if there was no doubt that access to public school is a "liberty."[69] However, in 1973 in *San Antonio Independent School District v. Rodriguez,*[70] the Court ruled that education is not a fundamental right guaranteed by the Constitution. This holding compelled the court in *Lopez* to reconsider the constitutional status of public education, particularly the distinction between fundamental rights and due process liberties.

The *Rodriguez* holding that education is not a fundamental right does not necessarily determine the due process question. As Judge Kinneary recognized, fundamental rights are important to equal protection, not due process.[71] Fundamental rights are those "explicitly or implicitly guaranteed by the Constitution."[72] Due process liberties are not restricted to constitutionally guaranteed rights. "Liberty under law extends to the full range of conduct which the individual is free to pursue. . . ."[73] Or as Justice Stewart once noted: "One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."[74] A

66 *Id.*

67 Goldberg v. Kelly, 397 U.S. 254, 262 n. 9 (1970); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 n.2 (1969).

68 372 F. Supp. at 1297.

69 "It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty." Ordway v. Hargraves, 323 F. Supp. 1155, 1158 (D. Mass. 1971). *See* Williams v. Dade County School Bd., 441 F.2d 299, 302 (5th Cir. 1971); Graham v. Knutzen, 351 F. Supp. 642, 664 (D. Neb. 1972); Sullivan v. Houston Independent School Dist., 333 F. Supp. 1149, 1172 (S.D. Tex. 1971) (education is a fundamental right); Soglin v. Kauffman, 295 F. Supp. 978, 990 (W.D. Wis. 1968).

70 411 U.S. 1 (1973) (property tax system of supporting public education not violative of equal protection).

71 372 F. Supp. at 1298.

72 San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

73 Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972).

74 Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961), quoted in Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961).

survey of due process cases shows that many interests which are not constitutionally guaranteed have been protected.[75] Clearly, as *Lopez* concluded, *Rodriguez* does not control the first-phase analysis.[76]

In determining whether access to public schools is a protected liberty, the Supreme Court should consider its own pronouncements on the importance of education to society.[77] Of particular note, *Rodriguez* itself endorsed the statement in *Brown v. Board of Education*[78] that "education is perhaps the most important function of state and local governments."[79] Because of its esteemed status, denying due process protection to public education could not easily be reconciled with other decisions safeguarding less elevated interests.[80]

Although not conclusive, several Supreme Court cases go far toward holding that education is a "liberty." Fifty years ago the Court said that liberty "includes . . . not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge. . . ."[81] Two years later in *Pierce v. Society of Sisters*,[82] the Court reaffirmed this statement by holding that "the liberty of parents and guardians to direct the upbringing and education of children under their control"[83] is protected by due process. In view of this authority, it would be very surprising if the Supreme Court contravened *Lopez*'s holding that the right to public education is a "liberty."[84]

Could the Court, while sustaining *Lopez* on the constitutional status of public education, hold that only long and not short exclusions from school are protected interests? They cannot if they wish to adhere to *Roth* and *Morissey v. Brewer*.[85] To determine if an interest is protected, its nature not its weight is considered. The nature of a short suspension cannot be distinguished from a long one. They are both deprivations of access to public education. They differ only in weight.[86] "Weight" pertains to the first-phase analysis only in the valuing

75 For a list of interests which have been given due process protection by the Supreme Court see *Lopez v. Williams*, 372 F. Supp. at 1297.

76 In the spring 1974 term, the Supreme Court summarily affirmed another opinion by Judge Kinneary in which he recognized the inapplicability of fundamental rights to due process:

> . . . while education is not a fundamental right, that does not mean that the university may arbitrarily dismiss a student without due process of law. Kister v. Bd. of Regents, 365 F. Supp. 27, 39 (S.D. Ohio 1973), *summarily aff'd*, 94 S. Ct. 855 (1974) (constitutionality of Ohio statute authorizing emergency measures for college disruptions was upheld).

77 *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) '(Justice Brennan concurring).

78 347 U.S. 483 (1954).

79 *Id.* at 493, *cited in* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 29.

80 *E.g.*, Vlandis v. Kline, 412 U.S. 441 (1973) (the right to resident status for college tuition); Bell v. Burson, 402 U.S. 535 (1971) (the right to a driver's license); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (the right to avoid the stigma of a publicly posted prohibition against purchasing liquor).

81 Meyer v. Nebraska, 262 U.S. 390, 399 '(1923).

82 268 U.S. 510 (1925).

83 *Id.* at 534.

84 Access to public education is probably a "property" as well as a "liberty." *Lopez* implied as much while declining to consider the question. 372 F. Supp. at 1299 n. 16. The state-created right to education is an entitlement that appears to meet the standards enunciated in *Roth*. 408 U.S. at 577. Also see note 47 *supra*.

85 408 U.S. 471 (1972). *See* text accompanying note 46 *supra*.

86 "While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

of a liberty after its nature has been determined in order to decide if it deserves fourteenth amendment status.[87] As explained by Judge Kinneary:

> If education is a protected liberty when expulsion is involved, then it remains a liberty when suspension occurs. The right to an education is the interest being afforded procedural protection. It either is, or is not a liberty under the Fourteenth Amendment. The difference between expulsion and suspension becomes important only when the Court confronts the question of what process is due to protect the Fourteenth Amendment liberty.[88]

B. *Phase Two: Balancing the Interests*

The constitutional issue in *Lopez* will be settled if the Court agrees with Judge Kinneary's first-phase analysis. Since the challenged Ohio statute requires no hearing before a ten-day suspension, it is invalid if education is a "liberty."[89] The Court could therefore refrain from considering other issues. However, in the interest of imposing some order on the morass of lower court decisions, the Court will likely proceed to balance the interests involved and outline some procedural guidelines. Such a balancing process requires that each of the various interests be identified and then assessed according to its relative importance.

1. The Student Interest

The interest of the high school student is to avoid the harm associated with a suspension from school. Compulsory attendance laws attest to the high value which society places on education. The courts have often endorsed this societal judgment.[90] Judge Doyle of the Western District of Wisconsin observed in the context of an indefinite suspension that "to deny . . . access to a public high school . . . is to inflict . . . irreparable injury" and took judicial notice of "the social, economic and psychological value and importance today of receiving a public education through twelfth grade."[91]

A suspension from school for even a few days may cause substantial harm. Often a suspended student receives zeros for missed academic work with no opportunity for make-up.[92] As one court explained:

87 If the Court departs from their previous approach and distinguishes the "nature" of short and long suspensions, in order to deny protection for short suspensions they would also need to find that short suspensions do not damage future employment potential or community reputation. *See* notes 49 & 50 and accompanying text *supra*. Such a finding would not be warranted. *See* text accompanying notes 94-97 *infra*.

88 372 F. Supp. at 1300.

89 Conceivably the court could determine that short suspensions are an "extraordinary situation" where the state interest justifies summary action. Such a holding would not be consonant with discussions that have limited the reach of "extraordinary situations." *See* Fuentes v. Shevin, 407 U.S. 67, 90-92 & n.23 (1972). *See also* text accompanying note 26 *supra* and notes 119-25 *infra*.

90 Note 77 and accompanying text *supra*.

91 Breen v. Kahl, 296 F. Supp. 702, 704 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). Also *see* Woods v. Wright, 334 F.2d 369, 373-75 (5th Cir. 1964); Black Students *ex rel.* Shoemaker v. Williams, 317 F. Supp. 1211, 1216 (M.D. Fla. 1970); Givens v. Poe, 346 F. Supp. 202, 208-09 (W.D.N.C. 1972).

92 *E.g.*, Lopez v. Williams, 372 F. Supp. at 1292; Vail v. Bd. of Educ., 354 F. Supp. at 603 n. 4. For this reason, the Director of Pupil Personnel of the Columbus Public Schools testified in *Lopez* that "any absence from school may have negative educational effects." 372 F. Supp. at 1292.

> [T]he "magnitude" of a penalty should be gauged by its effect upon the student and not simply meted out by formula. For example, a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final examination that provided for no "make-up."[93]

Probably even more significant than the academic harm directly associated with missing school are the collateral effects. Suspensions commonly become part of a student's permanent school record and thus may adversely affect future opportunities for college admission and employment. Several decisions have noted the gravity of this disciplinary record.[94]

A student may also suffer psychological harm from the stigmatization of a school suspension. Suspension represents a judgment that a student is a troublemaker. Educators have documented the self-fulfilling effects of teacher attitudes toward students.[95] Psychologists testified in *Lopez* that suspensions cause lowered self-esteem, resentment of school authorities, and withdrawal.[96] These same effects were examined in some detail in *Sullivan v. Houston Independent School District* where the court pungently observed that

> suspension is a particularly humiliating punishment evoking images of the public penitent of medieval Christendom and colonial Massachusetts, the outlaw of the American West, and the ostracized citizen of classical Athens. Suspension is an officially-sanctioned judgement that a student be for some period removed beyond the pale.[97]

The quantum of harm flowing from a particular short suspension cannot be precisely measured. In some cases it may be relatively insignificant. However, threats of reduced employment potential, lowered community status, and resultant adverse psychological effects accompany any short suspension. Since this potential for great harm is always present, the student interest in avoiding even a short suspension should substantially tip the Supreme Court balancing scales.

2. The Interest of the Schools

What are the corresponding interests of the public schools? School administrators, acting under the authority of school boards, are responsible for maintaining an educational atmosphere in the schools. This important responsibility requires concurrent broad authority to control student conduct. Therefore, school officials have an interest in avoiding restrictions on their ability to respond flexibly to varying disciplinary problems. The courts have vigorously and con-

93 Shanley v. Northeast Independent School Dist., 462 F.2d 960, 967 n. 4 (5th Cir. 1972).
94 Hatter v. Los Angeles City High School Dist., 452 F.2d 673, 674 (9th Cir. 1971); Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969).
95 For a short discussion with references to other sources see Sullivan v. Houston Independent School Dist., 333 F. Supp. 1149, 1157 n. 9 (S.D. Tex. 1971). *See generally,* D. FADER, THE NAKED CHILDREN (1971); J. HOLT, HOW CHILDREN FAIL (1964); C. SILBERMAN, CRISIS IN THE CLASSROOM 138 (1970).
96 372 F. Supp. at 1292. *See also* Buss, *Procedural Due Process for School Disciplines: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545, 575-76 (1971).
97 333 F. Supp. 1149, 1172 (S.D. Tex. 1971).

sistently recognized this interest as well as its constitutional limits.[98] "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[99] While defining due process procedures for the schools is a proper judicial function,[100] the procedures should be designed so as not to unduly limit discretion in the administration of school discipline.[101] Of course, as a basic constitutional value, due process must prevail if minimum procedural safeguards infringe on school authority.

The schools also have an interest in avoiding procedures which unduly tax school resources. Several courts have propounded the view that if *Dixon* procedures were required before short suspensions, the procedures themselves would be disruptive.[102] For this reason, *Vail* required only an "informal administrative consultation" for suspensions shorter than six days.[103]

The only case to elaborate on this view is *Banks v. Board of Public Instruction.*[104] There, a hypothetical discussion of classroom misconduct buttresses the conclusion that prior hearings are disruptive. However, as previously explained,[105] this discussion did not recognize the emergency situation exception to general due process requirements. If student misconduct is so severe that learning can be maintained only by immediate removal from school, extreme physical violence for instance, a prior hearing is dispensable even if normally required.[106]

In actuality, classroom misconduct is usually not as drastic as *Banks* assumed and seldom warrants summary action. Traditionally, when an unruly student does not respond to the classroom teacher, the learning processes are maintained by sending the student to the administrator responsible for discipline.[107] If the student is particularly recalcitrant, the administrator may decide that short suspension would be appropriate. However, sound educational policy requires that even short suspensions be sparingly employed.[108] In the relatively infrequent instances warranting suspension, a hearing could be scheduled so as to minimize

98 *See, e.g.,* Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969). For additional authority see *Lopez,* 372 F. Supp. at 1300.

99 Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

100 DeJesus v. Penberthy, 344 F. Supp. 70, 74 (D. Conn. 1972).

101 Judge Rives in *Dixon* was sensitive to this interest. The safeguards which he defined are only broad, the "rudimentary elements of fair play." 294 F.2d at 159. Wisely, none of the suspension decisions have attempted to define procedures more rigid than those of *Dixon. See* note 10 *supra.*

102 See the discussion of *Banks v. Bd. of Public Instruction,* 314 F. Supp. 285 (S.D. Fla. 1970) accompanying note 27 *supra* and the discussion of *Baker v. Downey City School Bd.,* 307 F. Supp. 517 (C.D. Cal. 1969) accompanying note 12 *supra.*

103 354 F. Supp. at 603. *Vail* is discussed in the text accompanying notes 55-61 *supra.*

104 314 F. Supp. at 290-91.

105 *See* text accompanying notes 29-32.

106 The emergency situation in the school setting is discussed in the text accompanying note 26 and notes 119-25.

107 *E.g.,* Lopez v. Williams, 372 F. Supp. at 1283. *See generally* J. GRAY, THE TEACHER'S SURVIVAL GUIDE, 27, 35-70 (1967).

108 The Dade County, Florida, school regulations under consideration in *Banks* recognized this principle:

> [S]uspension[s] . . . are extreme measures to be employed only when all available school resources are exhausted and school personnel are unable to cope constructively with pupil misconduct. 314 F. Supp. at 291.

See Sullivan v. Houston Independent School Dist., 333 F. Supp. 1149, 1171 (S.D. Tex. 1971); M. NOLTE, GUIDE TO SCHOOL LAW 78 (1969); Harwood, *Suspension: A Valid Disciplinary Tool?,* 44 CLEARING HOUSE 29, 30 (1969).

interference with school activities. Consequently, the view that a prior hearing is disruptive is not as important as *Banks* suggests.

The interest of schools in promoting respect for the Constitution and legal processes should also be weighed.[109] As Justice Jackson wrote in 1943:

> That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to . . . teach youth to discount important principles of our government as mere platitudes.[110]

Arbitrarily imposed discipline generates disrespect for the schools and for society.[111] If a student perceives that a suspension was judiciously imposed, he is less likely to suffer psychological harm and more likely to reevaluate his conduct.[112] In this respect, the interests of the schools as well as students are promoted by providing greater due process protections.[113]

VI. Conclusion

When the interests of both sides have been placed upon the balancing pans, the scales should finally come to rest at that point where, minimizing infringement on state interests, the magnitude of the individual deprivation is fully accounted for. In the case of short suspensions, the student interest in avoiding great potential harm considerably outweighs the school interest in avoiding burdensome procedures.[114] Short suspensions should be imposed, therefore, only when substantial procedural protections have been provided. However, these procedures should not be too narrowly defined. The school systems must be trusted to implement effective protections within broad guidelines that reserve a maximum of discretion to school authorities.

The range of procedural protection which can be applied is represented at the low end by the informal consultation of *Vail*. It is gross injustice not to give the reason for discipline and allow the student to explain or deny his conduct prior to imposing a suspension in all but emergency situations.[115] At the other

109 The Supreme Court has recognized a state interest in fostering respect for law in other procedural due process cases. *See* Morissey v. Brewer, 408 U.S. 471, 496 (1972); Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970).

110 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1934). *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Shelton v. Tucker, 364 U.S. 479, 487 (1960).

111 Justice Frankfurter's discussion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) partially quoted in note 23, *supra*, emphasizes the increased moral authority attached to decisions reached through procedures which are perceived to be fair.

112 *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d at 157; C. SILBERMAN, CRISIS IN THE CLASSROOM 340 (1970); O'Toole, *Summary Suspension of Students Pending a Disciplinary Hearing: How Much Process Is Due?* 1 J. LAW & EDUC. 383, 400 (1972).

113 Following due process may enhance operation of the schools. DeBruin, *Education and Due Process*, 90 EDUCATION 174, 182 (1969).

114 "A prior hearing always imposes some costs of time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right." Fuentes v. Shevin, 407 U.S. 67, 90 n. 22 (1972).

115 The elements of the "preliminary hearing" suggested in *Stricklin v. Regents*, 297 F. Supp. 416 (W.D. Wis. 1969) were defined in a subsequent case in the same court, *Buck v. Carter*, 308 F. Supp. 1246, 1248 (W.D. Wis. 1970): (1) Evaluate reliability of the accusing information. (2) Decide whether the conduct warrants prompt removal from school. (3) In-

end of the procedural range is *Dixon:* prior notice with a statement of charges, an impartial hearing with opportunity to refute damaging evidence and present a defense, and penalty imposed only on substantial evidence.[116] These safeguards are nothing more than the "rudimentary elements of fair play."[117] While insuring basic fairness, they are not unduly restrictive. The schools have much latitude within the broad definition to implement notice and hearing requirements within their particular capabilities.[118] Accordingly, guidelines similar to *Dixon* should be promulgated for short suspensions. The relative severity of the sanction demands these basic procedural protections.

In addition to setting procedural guidelines, the Court should circumscribe the exceptions to their application. The "emergency situation" for schools should be defined to reflect two competing considerations: School officials must feel free to act decisively in seriously disruptive situations; and conversely, if the emergency exception is defined too broadly, procedural guidelines will be of little practical consequence.[119]

All courts that have considered the question agree that school officials must have authority to take summary action to restore order when mass riots or demonstrations occur.[120] In addition, *Lopez* allows "immediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property."[121] This standard states three separate situations allowing summary removal. The latter two, conduct endangering others or damaging property, are clearly appropriate. However a standard that allows no prior hearing when student conduct "disrupts the academic atmosphere of the school" is too broad.[122] Such language could encompass waving at a friend when walking by a classroom, thereby effectively negating a prior hearing requirement. A better phrase would be: "conduct so disruptive that continuation of the educational processes is impossible."[123]

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form the student of the nature of the offense and allow him an opportunity to make a statement. If he denies the charges, further investigation should be made before imposing a suspension. See note 60 *supra.*

116 Note 10 *supra.*

117 Dixon v. Alabama State Bd. of Educ., 294 F.2d at 159.

118 For one suggested hearing model see DeBruin, *supra* note 113, at 175. *See also* NATIONAL EDUCATION ASSOCIATION, CODE OF STUDENT RIGHTS AND RESPONSIBILITIES 38-42 (1971).

119 *See* Sullivan v. Houston Independent School Dist., 333 F. Supp. 1149, 1170-71 (S.D. Tex. 1971).

120 *See e.g.,* Lopez v. Williams, 372 F. Supp. at 1301; Williams v. Dade County School Bd., 441 F.2d 299, 301 (5th Cir. 1971); Banks v. Bd. of Public Instruction, 314 F. Supp. 285, 291 (S.D. Fla. 1970).

121 372 F. Supp. at 1302.

122 *Id.* Judge Kinneary may have had in mind the *Tinker* standard: "substantial disruption of or material interference with school activities." Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 513-14 (1969). However, this standard is not necessarily appropriate for due process. *Tinker* defines when the schools may restrict conduct which would, if not disruptive, be protected by the first amendment. Due process does not affect a school's right to regulate conduct but requires only that it be regulated in accordance with fair procedures. An exception to due process needs to be more restrictive than *Tinker* since due process defines only *how* not *when* conduct can be regulated.

123 In fashioning due process guidelines and their exceptions, the Court should note the educational value of disruptive behavior. M. NOLTE, DUTIES AND LIABILITIES OF SCHOOL ADMINISTRATORS 186 (1973); C. SILBERMAN, CRISIS IN THE CLASSROOM 113-57 (1970); Ladd, *Toward an Educationally Appropriate Legal Definition of Disruptive Behavior,* 7 EDUCATIONAL ADMINISTRATION QUARTERLY 1, 14 (1971).

Even for emergency suspensions, *Lopez* requires an informal adversary hearing within 72 hours.[124] This requirement prevents a temporary suspension from extending indefinitely for lack of administrative follow-through.[125] A 72-hour limit is reasonable. When three days have passed, a suspended student has already borne a heavy penalty for his conduct. Further absence from school can be justified only if the student is given a fair opportunity to respond to the charges against him.

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124 372 F. Supp. at 1302. This requirement is crucial to Judge Kinneary's final disposition of the case. It is clear that at least some of the student suspensions in question fit the emergency exception to a prior hearing requirement. However, since no hearing was provided within a reasonable time after the initial action, the students were not accorded due process.

125 The facts of several cases suggest that this has happened too often. *See* Dunn v. Tyler Independent School Dist., 460 F.2d 137 (5th Cir. 1972); Lopez v. Williams, 372 F. Supp. 1379 (S.D. Ohio 1973); Rumler v. Bd. of School Trustees, 327 F. Supp. 729 (D.S.C. 1971); Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970).