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## STUDENT DISCIPLINE 2010: HOW MUCH PROCESS IS DUE?

## Overview

For more than four decades public school system policy makers and administrators have known that students facing disciplinary action (especially suspension or expulsion from school) must be afforded procedural due process of law. As school law experts consistently remind us, “[e]ven though courts uphold the use of discipline in schools, many cases hinge on whether educational officials provided students with adequate procedural due process protections.” Russo (2004) To put it another way, court decisions (federal and state) consistently demonstrate that student disciplinary actions are likely to be overturned where students have been denied procedural due process protections.

*Historical Foundations.* Beginning with the United States Supreme Court’s landmark juvenile law decision, In re Gault (1967), the right of young people to due process under the Fourteenth Amendment became a basic tenet of constitutional law. While Gault itself did not specifically involve public education, a number of subsequent lower court decisions involving youthful offenders applied and clarified Gault’s elements of procedural due process.

As public education moved through the late 1960’s and early-1970’s, post- Gault courts became more active with respect to addressing the procedural due process rights of public school students—especially those facing either suspension or expulsion from school. It must be emphasized, however, that all elements of due process articulated by the Supreme Court were not automatically applied in school cases.

*The Goss Mandate.* In 1975, the United States Supreme Court specifically treated the minimal procedural due process rights of public school students facing suspension from school. In Goss v. Lopez (1975) the high court held that in suspensions of ten days or less a student must be given: (1) at least *informal notice* of the charges against him/her, (2) at least the opportunity for an *informal hearing*, and, if he/she denies the charges, he/she must be (3) informed of the evidence against him/her and given an *opportunity to give his/her side of the story*. In Goss the Court did not address basic procedural due process in long-term suspensions and expulsions—nor did the Court require that a student be represented by counsel, or present witnesses, or have a right to confront and cross-examine witnesses. However, the Supreme Court did make it clear that “[l]onger suspensions or

expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required.” Goss v. Lopez (1975)

*Impact of Goss v. Lopez.* Suffice it to say, post-Goss court decisions served to bring about numerous changes both in state statutory law and local school system policies. The three basic elements articulated by the Supreme Court quickly and consistently became the foundation upon which all subsequent matters of student procedural due process would be judged. Vacca and Horner (2008)

As student procedural due process (*fundamental fairness*) grew in importance and expanded in scope, the disciplinary prerogatives of public school administrators drastically changed. Some experts argue that disciplinary authority became limited in scope—especially the discretionary authority of school principals. Vacca and Boshier (2008)

In 2010, what complicates the matter is the flexible nature of “adequate due process.” In contemporary public schools principals no longer ask whether students (especially those facing suspension or expulsion from school) have due process rights—of course they do. The relevant and obvious question now focuses on *how much process is due*. To put it another way, in 2010 *adequate due process* (i.e., *basic fairness*) changes from one situation to another. For example, school officials and administrators know that the seriousness of student discipline and punishment (e.g., the difference between a short-term or long-term suspension, and expulsion from school) dictates that the process afforded a student must be more formalized. Vacca and Horner (2008) So too does the nature and formality of due process change where the student being disciplined is covered by special education law (e.g., IDEA, ADA, Rehabilitation Act of 1973, Section 504). Honig v. Doe (1988) School administrators also know that statutes in their respective states and the policies of their local school board may, and more often do, mandate additional procedural requirements. Vacca and Horner (2008)

### **Recent Case Law Example**

Recently, I came across a student discipline case on point decided by the North Carolina Court of Appeals. Decided on November 17, 2009, Hardy ex rel. Hardy v. Beaufort County Board of Education (N.C.App. 2009) offers an excellent example of: (1) the importance of school officials carefully following procedural due process in carrying out the long-term suspension of two public high school students, and (2) the judicial analysis applied by the court in reaching a final decision in the case. In my view, even though Hardy is one case from one jurisdiction, the court’s rationale nonetheless contains important suggestions for local school system policy and administrative procedure.

*The Facts.* During the 2007-2008 school year the two female students (hereafter referred to as “petitioners”) involved in this case were in the tenth grade at a public high school in North Carolina. On January 18, 2008, multiple fights involving numerous students took place at the high school. One of the fights was between the petitioners in this case, and they were subsequently suspended from school for ten days. Additionally, the high school principal recommended to the school superintendent that petitioners be long-term suspended for the remainder of the school year. The superintendent followed the principal’s recommendation and suspended petitioners for the remainder of the 2007-2008 school year, beginning February 1, 2008. The superintendent also provided petitioners with an appeal form as per school board policy and procedure. Petitioners completed and returned the appeal form to school officials on February 6, 2008.

School board policy provided that students may first appeal their suspensions to the superintendent or his designee(s) and then to the school board itself. On February 13, 2008, petitioners received a first review of their appeal by an administrative panel designated by the superintendent. During the panel review the principal explained his reasoning behind his recommendation regarding long-term suspension. Petitioners, each of whom was represented by her mother, were given an opportunity to offer arguments to the panel as to why the length of their suspensions was inappropriate. Also, each mother admitted her daughter's involvement in the fight but maintained that overall the girls were good students and would benefit from another chance. At the conclusion of the panel's deliberations the long-term suspensions were upheld. Subsequently the superintendent followed through with the long-term suspensions and the petitioners appealed to the school board (hereafter referred to as the "Board").

On March 6, 2008, a Board hearing was held. Because it appeared that the administrative panel had considered evidence not formally introduced, the Board voted to conduct *de novo* hearings (new hearings conducted as if an original hearing had not taken place). This would allow petitioners to respond to any and all evidence against them. At the Board hearings each petitioner was represented by an attorney. Subsequently the Board voted to uphold the long-term suspensions. The petitioners next filed suit in county superior court.

*Superior Court Action.* The two students (and their mothers) filed suit in the Superior Court of Beaufort County, North Carolina. In their law suit they filed a Petition for Judicial Review and a Complaint for Declaratory Judgment against the Board. The Board filed motions to dismiss for failure to state a claim upon which relief could be granted. Ultimately the Superior Court affirmed the decision of the Board and the students joined their individual actions and took their case to the Court of Appeals of North Carolina.

*Appellate Court Rationale and Decision.* The Court of Appeals first addressed petitioners' request for Declaratory Judgment. In their respective complaints petitioners asserted that: (1) their fundamental right, under North Carolina law, to have an opportunity to obtain a sound, basic education had been violated by school officials, (2) the procedures followed did not adequately provide due process as guaranteed by North Carolina law, and (3) their constitutional right to equal protection had been violated. Subsequently, these claims were found to have no merit.

Turning next to the standard of judicial review applied by the County Superior Court, the Court of Appeals made it clear that the appropriate standard depends on the particular issues presented. Applying North Carolina law the court stated the rule as follows: "When the petitioner contends that the decision of the agency, here the local school board, was unsupported by the evidence or was arbitrary or capricious, the reviewing court must apply the 'whole record' test. The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular case. When the petitioner argues that the decision of the agency violates a constitutional provision, the reviewing court is required to conduct a *de novo* review." Hardy (2009)

The appeals court also opined that in examining a trial court's order for error of law the task is twofold. First, a determination must be made as to whether the trial court exercised the appropriate scope of review. Second, it must be determined that the trial court did do properly. Having applied this two-part test the North Carolina Court of Appeals concluded that the trial court's conclusions, affirming the Board's decision regarding the long-term suspensions, were in fact sound.

Finally, the appellate court turned to petitioners' due process claims. In their petition the students argued that their due process rights were violated because: (1) a full evidentiary pre-deprivation hearing should have been held prior to the imposition of a long-term suspension; and (2) the Board failed to follow its own published policies when it reviewed the suspensions. Both claims failed to pass judicial muster.

In its reasoning the appellate court reminds us that while students facing suspension have a property interest that qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and unfair and mistaken exclusion from the educational process must be avoided, students nevertheless must show "substantial prejudice from the allegedly inadequate procedure." Citing and quoting directly from Watson ex rel. Watson v. Beckel (10th Cir. 2001), the court emphasized that "when a student factually disputes the basis of his or her long-term suspension, due process requires that the student 'have the opportunity to have counsel present, to confront and cross-examine witnesses supporting the charge, or to call witnesses to verify his version of the incident.'" In the instant case, said the court, the students had ample opportunities to argue for mitigation of the punishment.

In concluding its analysis of the issues, the North Carolina Court of Appeals found important the fact that: (1) throughout the appeals process both students admitted their involvement in the altercation, (2) the students' parents during the administrative panel hearings and their attorney during the Board hearings attempted to mitigate the punishments, and (3) the students' guilt was not challenged. In the court's view, "[a] procedural due process denial cannot be established when the student admits guilt because prejudice cannot be shown." Here the court cites In re Roberts (N.C. 2002)

In affirming the lower court's decision the North Carolina Court of Appeals held that the students in this case "failed to prove that they were denied procedural due process."

### **Policy Implications**

As stated at the outset of this commentary, contemporary public school officials and administrators know that beginning with the Supreme Court's decisions in Gault (1967) and Goss (1975) all students facing disciplinary actions must be granted basic and adequate procedural due process. However, what complicates the matter is that basic and adequate procedural due process changes (in specificity, scope, and formality) from one situation to another—that is, it depends on the factual nature of the specific situation.

In my view Hardy ex rel. Hardy v. Beaufort County Board of Education (N.C.App. 2009) illustrates the application of the Goss criteria in a 2010 context. As such, the appellate court's issue analysis yields important implications for contemporary local public school system policies. What follow are suggestions for policy gleaned from the North Carolina Court of Appeals rationale in reaching a decision in Hardy .

School system policies must make it clear that:

- Student discipline and control are necessary to: (1) protect the welfare and safety of all students and school system personnel, and (2) maintain a leaning environment in every school where teachers can teach and students can learn.
- No student is exempt from policies, rules, and procedures regarding school discipline and control.
- School principals have the authority to immediately suspend from school and/or recommend expulsion to the school board any school student who, in the principal's judgment: (1) presents a danger to himself/herself, or (2) presents a danger to other students and/or school system personnel, or (3) willfully damages or otherwise destroys school system property.

- Every student facing school disciplinary action will be granted the protections of basic, rudimentary procedural due process.
- All disciplinary infractions, penalties and punishments associated with disciplinary infractions, and the procedures employed by school principals (or their designee) in the enforcement of school system disciplinary policies, are governed by and included in the official school system *Code of Student Conduct*. The *Code of Student Conduct*—published, made available, and distributed at the beginning of each school year to: (1) all students and their parents, (2) all school system personnel, and (3) the community at large.

One final comment is necessary. While fundamental fairness is the basic precept of contemporary procedural due process in public schools, and a balance must be struck between the legal duty of school officials to control a school and the constitutionally protected rights of students, the technicalities of criminal procedure (e.g., a *Miranda*-type warning, cross-examination of witnesses) do not automatically transfer into school disciplinary procedures. Vacca and Horner (2008) As the United States Supreme Court said in *Goss v. Lopez* (1975): “We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each case even truncated trial type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but destroy its effectiveness as a part of the teaching process.”

### **Resources Cited**

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**Note:** The views expressed in this commentary are those of the author.