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STUDENT PROCEDURAL DUE PROCESS 2006**Overview**

For more than three decades, courts of law have extended the due process protections of the Fourteenth Amendment to public school students. More specifically, the constitutional principle that individuals functioning as state actors (e.g., public school officials and administrators) shall not deprive a student of liberty or property without granting that student due process of law is viable and applicable in every public school system in this country.

In 2006, while basic *procedural due process* is the *sine qua non* of sound and defensible student disciplinary policy, legal and policy issues usually find their genesis in determinations of *how much process is due* when individual students run afoul of the school system's disciplinary code. As legal experts remind us, "Even though courts generally uphold the use of discipline in schools, many cases hinge on whether educational officials provided students with adequate procedural due process protections." Russo (2004)

Procedural Due Process: What Is It? Characterized as "fundamental fairness," procedural due process is a flexible concept and exists on a continuum (with minor disciplinary offenses on one end and serious offenses on the other end). The formality and complexity of procedural due process is conditioned by the severity of the offense. Thus, in today's public schools the appropriate application of the basic elements of procedural due process depends on the specific facts and unique circumstances in each case.

The purpose of this commentary is twofold. First, the discussion will establish the historical foundations of procedural due process as it applies to public school students. Second, the commentary will explore the legal and policy implications of procedural due process in the aftermath of the United States Supreme Court's decision in Goss v Lopez (1975)

Historical Foundations

The foundations of law regarding procedural due process for public school students can be traced back to two specific cases decided in the 1960's. In the first case, Dixon v Alabama State Board of Education (5th Cir. 1961), the United States Supreme Court had a chance to speak regarding student *procedural due process* but denied certiorari.

Dixon involved public higher education, and dealt specifically with student expulsions from school. The issue was whether or not the students involved were entitled to notice and a hearing prior to their expulsion. While only binding on the states within the Fifth Circuit, the decision nonetheless created a judicial precedent that students enrolled in public colleges and universities are entitled to notice and a hearing prior to suspension or expulsion from school. The Dixon decision set in motion a chain reaction of policy change on college campuses across this country. Vacca and Boshier (2003)

Six years later, in a case involving juvenile law, the United States Supreme Court held that a minor in juvenile court was entitled to procedural due process. The high court opined that a minor in a juvenile court proceeding is entitled to: (1) specific notice of the charges against him/her, (2) time to prepare for a hearing, (3) legal counsel, (4) protection from self-incrimination, and (5) confrontation and cross-examination of witnesses against him/her. In re Gault (1967) While the elements outlined in Gault were never totally applied to public school settings, the decision laid a strong foundation for changes to come in the 1970's. Vacca and Boshier (2003)

Goss v Lopez: Procedural Due Process in Public Schools

Almost a decade later, the United States Supreme Court handed down a decision specifically addressing procedural due process and public school students. In Goss v Lopez (1975), several public school students in Columbus, Ohio, were suspended from school for various disciplinary infractions. At the time, Ohio law empowered a school principal to suspend any misbehaving student for up to ten days. Parents were to be notified of the suspension within twenty-four hours, reasons for the suspension were given to parents, a suspended student and/or his parent could appeal the suspension to the school board, and, if an appeal was filed, a hearing regarding the appeal was required. In an opinion written by Justice White, the high court set in motion major changes in student procedural due process in public schools across this nation when it held that attendance at a public school is a *property right* protected by the Fourteenth Amendment. This right can be taken away only after taking certain procedural steps. More specifically, Justice White opined that in suspensions from school for ten days or less certain procedural steps must be taken pre-suspension. A student must be given: (1) at least informal notice of the charges against him/her, (2) information regarding the evidence against him/her, and, if the student denies the charges, (3) an opportunity to present his/her side of the story (i.e., some form of hearing).

It is important to note that Goss does not require that an attorney represent students, nor did the court require confrontation and cross-examination of witnesses. The reader also is reminded that matters of academic discipline (for cheating on a test, plagiarism, etc.) are not addressed in the Goss opinion. Procedural due process and academic discipline is taken up by the high court three years later in Board of Curators v Horowitz (1978)

The Impact of Goss: Clarification and Application

Between 1975 and 2005, courts were busy clarifying and applying the Goss requirements. For example, the United States Supreme Court established that under certain conditions students who are suspended from school without being granted procedural due process have standing to sue school officials in a federal court. Wood v Strickland (1975)

The importance of adequate *notice* to a student of the charges against him/her became an important element of procedural due process. Courts have made it clear that notice must be timely, specific, and not stated in vague language. However, courts also have made it clear that that a Miranda-type warning is not necessary. For example, in Boynnton v Casey (D. Me. 1982) a student suspected of using marijuana was questioned on school grounds for one-hour by a school principal and vice principal, and not by police officers. At no time was he

informed of his right not to answer the questions, and he was not allowed to have his parents present during the questioning. Subsequently, he admitted to marijuana use and was suspended from school. Ultimately, a federal district court held, among other things, that he was not entitled to a Miranda warning.

In a 1987, a federal district court in Virginia added that a student's right to a hearing meant a right to a "prompt hearing." In this case the court found fault with a state law that allowed for a student suspension to remain in effect for a period of 30 days pending a decision of the school board. Doe v Rockingham County (W.D. Va. 1987)

It must be stressed, however, that a student disciplinary hearing is an administrative hearing not a court trial. The key is that a student must be allowed time to present his/her case before an impartial person or persons. In other words, a student must be given a "meaningful opportunity" to present his/her side of the story. Meyer v Austin I.S.D. (5th Cir. 1999)

The reader is reminded that the formality of a disciplinary hearing increases in situations where a student is being considered for expulsion from school. Because expulsion from school is the most serious form of disciplinary action the process to be followed becomes more formalized. Vacca and Boshier (2003)

The Goss Elements in More Recent Cases

The impact of Goss and the importance of procedural due process can be observed in variety of recent student disciplinary cases. For example, in a 2005 First Amendment expression case from a federal district court in New York, a student contested, among other things, his suspension from school. He was suspended by the principal because of thoughts expressed in a journal that he kept as a part of a sixth grade assignment. He also read the "fictional story" to fellow students.

In deciding the procedural due process aspects of the case the court quoted directly from Goss. A student, said the court, "has a constitutionally protected property interest in education, 'which may not be taken away for misconduct without adherence to the minimum procedures required by [the Due Process] clause.'" D.F. v Board of Education (E.D.N.Y. 2005) The district court outlined, expanded, and restated the Goss elements of procedural due process. A student must be given: (1) *advanced notice of the charges* (including specific incidents) that (a) will be levied against him or her, and (b) form the basis of the suspension hearing, (2) a *fair and impartial hearing* (which the court emphasizes does not equate to the procedural protections of a criminal trial), and (3) a *chance to present a defense* of his behavior with counsel.

This past year in a Virginia case, a federal district court gave a less detailed description of procedural due process. In the court's opinion, minimum due process protections require that a student be given (1) notice of the charges levied against him, and (2) an opportunity to explain his side of the story. J.S. v Isle of Wright County School Board (E.D. Va. 2005)

The reader is encouraged to also see Jacobs v Clark County (D. Nev. 2005), involving a challenge to a "mandatory school uniform policy." In this case the impact of Goss v Lopez (1975) on state law procedural issues can be observed.

Procedural Due Process and Students With Disabilities: More Process is Due

Student procedural due process took a new path when the United States Supreme Court handed down Honig v Doe (1988). In this decision the high court made it clear that in disciplinary actions involving students covered by special education law, state and local school officials are bound by the "stay put" provision of the

Individuals With Disabilities Education Act (IDEA). 20 U.S.C. 1400, *et seq.* In essence the Supreme Court held that public school authorities shall not unilaterally exclude from school or classes students covered by IDEA whose misbehavior is *causally linked to* (currently referred to as a *manifestation of*) their disability. Horner and Vacca (2005)

The Supreme Court in Honig did not forbid school authorities from implementing general education disciplinary procedures in disciplinary matters involving students covered by IDEA. For example, a suspension from school for up to 10 days was considered a viable option, and not a change of placement, when dealing with highly disruptive and dangerous students with disabilities. Such suspensions were not considered violations of due process.

In 1997, IDEA was again reauthorized and placement in an Interim Alternative Education Setting (IAES) for up to 45 days for drug or weapons offenses became a part of the law. The reader is encouraged to look at the 2004 reauthorization of IDEA for additional changes in procedural due process requirements for students with educational disabilities. (P.L. 108-446, IDEA 2004). The bottom line is that while the Goss elements apply to all students (including students with disabilities), *more process is due* in situations involving students covered by IDEA.

Policy Implications

As the above discussion demonstrates, the basic elements of procedural due process must be applied to all students in every disciplinary situation. The reader is reminded, however, that procedural due process is flexible and not a “one size fits all” concept. The appropriateness and adequacy of its application will depend on the specific facts and circumstances in each situation. Thus, the legal and policy implications are many.

What follow are some suggestions to consider when revisiting existing student disciplinary policies and considering new ones. Local school system policies must make it clear that:

- No student is immune from school discipline.
- The board, school officials and administrators, classroom teachers, and other professional and support staff honor and respect the procedural due process entitlements of all students.
- All students who represent an imminent threat of harm to themselves or to others, or who materially disrupt the educational environment of a school or school-sponsored activity will be dealt with immediately and fairly.
- Fair treatment of all students means that every student will be given, at a minimum: (1) timely notice of the charges against him or her, (2) an opportunity to hear the evidence, and (3) an opportunity to present their side of the story before an impartial person(s).
- In situations where a student must be immediately dealt with, procedural due process will follow as soon practicable.
- Students covered by special education law will be afforded the procedural protections required by law (*e.g.*, IDEA 2004)

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