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DUE PROCESS FOR STUDENTS—NEW DEVELOPMENTS

I. INTRODUCTION

A. *Background and Context: Goss v. Lopez*

The extent to which students in public schools and colleges are entitled to procedural due process before they may be suspended or expelled has concerned lower federal courts since the 1961 "landmark"¹ decision of *Dixon v. Alabama State Board of Education*.² Recently, in *Goss v. Lopez*,³ the Supreme Court addressed the issue for the first time. In *Goss*, nine Columbus, Ohio public high school students were suspended from school for up to ten days because of their alleged participation in disturbances at the school. Plaintiffs challenged the constitutionality of the statute permitting summary suspension⁴ on the ground that it was violative of fourteenth amendment procedural due process.⁵ In affirming the ruling of the three-judge district court,⁶ the Supreme Court held that the plaintiffs' statutory right to an education⁷ was an interest entitled to the protections of the fourteenth amendment.⁸ Specifically, the Court held that a student faced with suspen-

1. *Goss v. Lopez*, 95 S. Ct. 729, 737 n.8 (1975); Wright, *The Constitution on the Campus*, 22 *Vand. L. Rev.* 1027, 1032 (1969) [hereinafter cited as Wright].

2. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

3. 95 S. Ct. 729 (1975).

4. The Ohio law provided in pertinent part: "The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion." Ohio Rev. Code Ann. § 3313.66 (Page 1972). Thus, under the statute, although a student who had been expelled could appeal his expulsion, the decision of a principal to suspend a student for up to ten days was final. In neither case was a prior hearing required. For a comparable statute see Cal. Educ. Code §§ 10601-08 (West 1975).

5. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.

6. *Lopez v. Williams*, 372 F. Supp. 1279 (S.D. Ohio 1973), *aff'd sub nom. Goss v. Lopez*, 95 S. Ct. 729 (1975) (on direct appeal pursuant to 28 U.S.C. § 2281 (1970)).

7. Ohio Rev. Code Ann. § 3313.48 (Page 1972) and *id.* § 3313.64 (Page Supp. 1973) guarantee a free education to all Ohio residents between the ages of five and twenty-one.

8. The district court grounded its application of the fourteenth amendment on a finding of a "liberty" interest in public education. 372 F. Supp. at 1299. The Supreme Court found both "liberty" and "property" interests in the student's stake in his reputation and in the educational benefits conferred by the school, respectively. 95 S. Ct. at 736. See generally *Fuentes v. Shevin*, 407 U.S. 67, 88-90 (1972) (due process clause does not merely protect against deprivation of necessities); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (liberty interest in a person's "good name, reputation, honor, or integrity").

The Supreme Court previously has characterized the importance of education to a student: "[I]t is a principal instrument in awakening the child to cultural values, in preparing him for later

sion from public school for more than a "trivial period"⁹ must be given *prior* oral or written notice of the charges, an explanation of the evidence against him and an opportunity to be heard in his defense. The Court qualified its holding to provide for summary removal in the case of unruly students who pose "a continuing danger to persons or property or an ongoing threat of disrupting the academic process"¹⁰ In such situations, the Court held that the requisite notice and hearing should follow the removal as soon as practicable.¹¹

In *Dixon*, the Fifth Circuit had confronted the issue "whether the students [expelled for participating in an off-campus civil rights demonstration] had a right to any notice or hearing whatever before being expelled."¹² The court held that the students had a right to "a statement of the specific charges" and a hearing that provided "an opportunity to hear both sides in considerable detail."¹³ Although *Dixon* dealt with the expulsion of college students, later decisions have applied the requirements of notice and hearing to college

professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (racially segregated schools deny equal protection of the laws). Lower courts have agreed. See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961) ("[E]ducation is vital and, indeed, basic to civilized society."); *Ordway v. Hargraves*, 323 F. Supp. 1155, 1158 (D. Mass. 1971) ("[E]ducation is a basic personal right or liberty."); *Hosier v. Evans*, 314 F. Supp. 316, 319 (D.V.I. 1970) (public education is "so fundamental as to be fittingly considered the corner stone of a vibrant and viable republican form of democracy").

Whether public education is a constitutional right or a right created by statute is irrelevant. As the Court said in *Goss v. Lopez*, "[h]aving chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right . . . absent fundamentally fair procedures . . ." 95 S. Ct. at 736; see *Webster v. Perry*, Civil No. 74-1161, at 6 (4th Cir., Mar. 17, 1975); *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967), aff'd, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); accord, *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (rejection of "the wooden distinction between 'rights' and 'privileges'"); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

9. 95 S. Ct. at 737. It is unclear what was meant by "a trivial period," but it seems that a suspension of even one day may require the procedural safeguards mandated by the Court. *Id.* at 742 n.3 (Powell, J., dissenting).

10. *Id.* at 740.

11. *Id.* This is in accord with cases holding that persons may be deprived of constitutionally protected interests without prior notice and hearing in extraordinary situations. E.g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (summary seizure of misbranded food); *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566 (1921) (summary seizure of alien-owned securities during wartime); cf. *R.A. Holman & Co. v. SEC*, 299 F.2d 127, 131 (D.C. Cir.), cert. denied, 370 U.S. 911 (1962) (summary suspension of exemption from stock registration requirements).

12. 294 F.2d at 154.

13. *Id.* at 158-59. The court, however, emphasized that its ruling should not be read to require a "full-dress judicial hearing, with the right to cross-examine witnesses." *Id.* at 159. Also, the court observed that "[t]he nature of the hearing should vary depending upon the circumstances of the particular case." *Id.* at 158.

suspensions¹⁴ and have extended these protections to public high school students facing suspension or expulsion.¹⁵ The courts have disagreed, however, as to the duration of suspensions that require these procedural protections.¹⁶

The extension of procedural due process to short suspensions is the most innovative aspect of the *Goss* decision. In requiring notice and hearing, the Court did not impose any new procedural safeguards.¹⁷ The Court went no further than *Dixon* in the specific protections it required,¹⁸ and was considerably more restrained than some lower federal courts have been.¹⁹ The Court did not employ any new methods of analysis to determine what particular procedures were required, applying the customary, flexible balancing test²⁰

14. E.g., *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1089 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (college students suspended for two semesters); *Stricklin v. Regents of Univ. of Wis.*, 297 F. Supp. 416 (W.D. Wis. 1969), appeal dismissed, 420 F.2d 1257 (7th Cir. 1970) (college students suspended for 13 days).

15. E.g., *Sullivan v. Houston Indep. School Dist.*, 475 F.2d 1071, 1077-78 (5th Cir.), cert. denied, 414 U.S. 1032 (1973) (post-suspension hearing held sufficient for high school student suspended indefinitely); *Black Students of N. Fort Myers Jr.-Sr. H.S. v. Williams*, 470 F.2d 957 (5th Cir. 1972) (per curiam) (students must be afforded hearing within a reasonable time after suspensions for ten days or more); *Pervis v. Lamarque Indep. School Dist.*, 466 F.2d 1054 (5th Cir. 1972) (post-suspension hearing insufficient safeguard for high school students suspended for balance of school year); *Butler, The Public High School Student's Constitutional Right to a Hearing*, 5 Clearinghouse Rev. 431, 455-57 (1971).

16. See, e.g., *Murray v. West Baton Rouge Parish School Bd.*, 472 F.2d 438, 443 (5th Cir. 1973) (suspension for no more than "a few days" does not require a hearing); *Linwood v. Board of Educ.*, 463 F.2d 763, 768-69 (7th Cir.), cert. denied, 409 U.S. 1027 (1972) (seven day suspension is minor penalty not requiring due process safeguards); *Dunn v. Tyler Indep. School Dist.*, 460 F.2d 137, 145-46 (5th Cir. 1972) (three day suspension does not require procedural protections); *Vail v. Board of Educ.*, 354 F. Supp. 592, 603 (D.N.H.), vacated mem., 502 F.2d 1159 (1st Cir. 1973) ("at least an informal administrative consultation" before any suspension; if suspension is for more than five days, more formal hearing required).

17. The minimal requirements of prior notice and hearing long have been features of due process in a variety of factual contexts. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974) (cancellation of prisoners' "good time" credits); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (prejudgment seizure of personalty); cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (substituted notice to parties interested in trust).

18. See text accompanying note 13 supra.

19. Courts have found a variety of additional procedural requirements in different situations. The most extensive protections were required in *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972), where the court required, in addition to notice and hearing, the right to examine adverse evidence, to cross-examine adverse witnesses, to present evidence, to have a record kept of the proceedings, to be represented by counsel, to have the decision based upon substantial evidence, and to be judged by an impartial tribunal. Cf. *DeJesus v. Penberthy*, 344 F. Supp. 70, 75-76 (D. Conn. 1972) (disapproval of hearsay testimony as grounds for expulsion; presumption in favor of right of cross-examination). See also *Hagopian v. Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972) (military academy; right to present witnesses and evidence).

20. E.g., *Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970); *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

to reach an "appropriate accommodation of the competing interests involved."²¹

Because the *Goss* Court did not elaborate on the nature of the notice or hearing it mandated, substantial questions remain as to what constitutes adequate notice for short-term suspensions and precisely what form the hearing should take in such cases. In addition, while the Court explicitly refrained from extending to students the right to be represented by counsel, to confront and cross-examine adverse witnesses or to call their own witnesses in *short-term* suspension hearings,²² it did warn 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 the rudimentary procedures will be required.²³

Goss v. Lopez thus poses two problems for local school officials and lower courts: how to develop procedures for short suspensions consistent with the vague outlines of the opinion; and how to formulate standards for longer suspensions, expulsions and "unusual situations."²⁴ For example, in the short suspension situation, school officials must determine what forms of notice and hearing would be acceptable under *Goss*; and for more serious disciplinary proceedings,²⁵ they must decide whether due process requires that the student be represented by counsel or have the opportunity to cross-examine witnesses.

21. 95 S. Ct. at 739.

22. *Id.* at 740.

23. *Id.* at 741 (emphasis added).

24. The discussion of procedural protections in this Note is confined to situations in which a student is faced with school discipline for a non-criminal offense. When a student's alleged infraction of school rules also constitutes a crime (or, if the student is a juvenile, subjects him to possible delinquency proceedings) the fifth amendment's protection against self-incrimination may apply. See generally *Lefkowitz v. Turley*, 414 U.S. 70, 84-85 (1973); *In re Gault*, 387 U.S. 1, 47-55 (1967); *Garrity v. New Jersey*, 385 U.S. 493, 499-500 (1967); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. Pa. L. Rev. 545, 610 (1971) [hereinafter cited as Buss].

25. Local school officials are faced with an additional problem arising from the Supreme Court's recent decision in *Wood v. Strickland*, 95 S. Ct. 992 (1975), holding that public school administrators could be held personally liable for depriving high school students of, among other things, procedural safeguards prior to expulsion. See Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Addressing the standard of liability, the Court stated: "The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. . . . [A] school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. . . . [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected" 95 S. Ct. at 1000-01. *Wood* appears to broaden the standards of liability from those set forth in *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (upholding qualified immunity from § 1983 liability for official acts done in good faith).

B. *Evaluating the Considerations*

The Supreme Court in *Goss* cautioned that its ruling should not be read to impose the formalities of courtroom procedure on disciplinary hearings.²⁶ Indeed, the Court indirectly referred to the procedures it required for short suspensions as "rudimentary."²⁷ Consequently, in formulating procedures, school administrators might follow Professor Wright's advice regarding university disciplinary hearings:

[T]he fourteenth amendment does not impose on universities any particular procedural model, whether it be derived from criminal, civil, or administrative proceedings. Instead the courts should accept any institutional procedure so long as it is *reasonably calculated to be fair to the student involved* and to lead to a reliable determination of the issues.²⁸

In framing procedures for disciplinary hearings, local authorities must balance the student's "liberty" and "property" interests in remaining in school²⁹ against the school's interests in financial and administrative economy, maintenance of effective discipline and preservation of an academic atmosphere conducive to the educational process.³⁰ The respective interests of the school and the student are not mutually exclusive. Thus, to the degree that an unruly child profits from the lessons of discipline, his interests are not inconsistent with the school's interest in effective discipline.³¹ Finally, society has a broad interest in successful education and equitable treatment of its younger members.³²

The extent of the procedural protections to be afforded in suspension or expulsion hearings is determined in part by the extent to which a student would be condemned to suffer grievous loss through the school's action.³³ This is implicit in the *Goss* Court's statement that longer suspensions than those in the instant case might require additional safeguards.³⁴ Similarly, the

26. 95 S. Ct. at 740-41; cf. *Lai v. Board of Trustees of E. Carolina Univ.*, 330 F. Supp. 904, 905 (E.D.N.C. 1971) ("It is not necessary that [university disciplinary panels] adopt all the formalities of a court of law.").

27. See text accompanying note 23 *supra*.

28. Wright 1060 (emphasis added).

29. See Buss 575-77; Note, *Procedural Due Process and Short Suspensions from the Public Schools: Prologue to Goss v. Lopez*, 50 *Notre Dame Law.* 364, 374-75 (1974); note 8 *supra*.

30. See Buss 573-74; Note, *supra* note 29, at 375-77.

31. As the Court observed in *Goss v. Lopez*, "[s]uspension is considered not only to be a necessary tool to maintain order but a valuable educational device." 95 S. Ct. at 739

32. "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (compulsory flag salute and pledge of allegiance violates students' first and fourteenth amendment rights); cf. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

33. Cf. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (right to be heard before loyalty board). See also *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (prejudgment seizure of personalty); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (termination of welfare payments).

34. See text accompanying note 23 *supra*. As Professor Buss has observed, "the appropriate

Court's statement that school officials "may permit counsel" in "more difficult cases"³⁵ implies that the complexity of the issues or the particular circumstances of the student involved may determine when additional safeguards are constitutionally required.³⁶

Finally, the Court's language reveals a desire to minimize the adversarial aspects of the disciplinary hearing:³⁷ because the interests of the student, the school and society coincide in several ways,³⁸ the adversarial purposes of the hearing are lessened. For this reason, school disciplinary hearings should retain an essentially custodial orientation with the interests of the individual student given strong consideration.

II. THE SHORT-TERM SUSPENSION: "RUDIMENTARY" SAFEGUARDS

In *Goss*, the Court required, in general terms, that students receive oral or written notice and an evidentiary hearing prior to suspensions for even brief periods.³⁹ Yet, the Court emphasized that in "the great majority of cases" these requirements may be satisfied by an informal discussion between the student and the disciplinarian, in which the student is told the basis of the accusation and the evidence against him, and is allowed to present his version of any disputed facts.⁴⁰ Such minimal procedures could be abused, however, for the vague dictates of the opinion ostensibly could be satisfied simply by summoning the student to the principal's office, reciting the charges and suspending the student either without proper deliberation or against the weight of the evidence. The Court's requirements that notice be "effective" and that the hearing serve as "a meaningful hedge against erroneous action"⁴¹ provide the guidelines for preventing the single-step notice and hearing procedure from being misused.

A. "Effective" Notice

"Effective" notice implies that the student be apprised of the charges in enough detail to allow him to understand the nature of the accusation. Thus, although "the notice of charges need not be drawn with the precision of a criminal indictment,"⁴² it should be sufficiently detailed to enable the student

procedural requirements will vary with the relative severity of the applicable disciplinary sanction." Buss 577. See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1454 (1968); *Bell v. Burson*, 402 U.S. 535, 540 (1971).

35. 95 S. Ct. at 741.

36. This approach is consistent with the Court's previous statement that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). See also *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

37. See 95 S. Ct. at 741.

38. See notes 31-32 *supra* and accompanying text.

39. See text accompanying note 9 *supra*.

40. 95 S. Ct. at 740.

41. *Id.* at 741.

42. *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992, 1000 (5th Cir. 1975); cf. *Linwood*

to reply.⁴³ Further, such notice must be offered "sufficiently in advance of the hearing to enable him to prepare a defense."⁴⁴

Although *Goss* allows that "[t]here need be no delay between the time 'notice' is given and the time of the hearing,"⁴⁵ it is clear that under some circumstances the complexity of the charges, the type of evidence needed to rebut accusations, and the possible appearance of counsel will necessitate that the student have time to formulate his case.⁴⁶ Moreover, the intelligence, age, sophistication and experience of the student should be considered by the disciplining body in each case to insure that the timing and specificity of notice is reasonably consistent with the needs of the particular student under threat of sanction.⁴⁷

The Court's requirement of "written or oral notice" raises the question of when written notice is necessary or when oral notice may suffice. In view of the Court's apparent emphasis on a speedy determination,⁴⁸ and within the confines of the factors discussed above regarding the timing and specificity of the notice, oral notice generally should be adequate for short suspensions. If a student does not understand the charges against him, however, a written notice that he could show to his parents or to counsel for interpretation would be appropriate.⁴⁹

v. Board of Educ., 463 F.2d 763, 767 (7th Cir.), cert. denied, 409 U.S. 1027 (1972) (school regulations need not be drawn as strictly as criminal statutes).

43. *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992, 1000 (5th Cir. 1975); cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

44. *Buss* 590. See also *K. Davis, Administrative Law Text* § 8.02 (3d ed. 1972). In the area of notice, the imperatives of education do not necessarily coincide with the requirements of due process. Due process may require a more detailed notice of charges than does the educational goal of communicating to the child the reason for his punishment. Conversely, the educational function of discipline might require a translation of the charge, if the student does not speak English, so that he will understand fully the reason for his punishment. The question of whether bilingual notice is required in school discipline cases was not decided in *Goss*; however, it has been held not to be essential in hearings leading to termination of welfare benefits. *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), cert. denied, 414 U.S. 1137 (1974); see Note, *Bilingual Notice—The Rights of Non-English Speaking Welfare Recipients*, 42 *Fordham L. Rev.* 626 (1974).

45. 95 S. Ct. at 740.

46. *Buss* 590; cf. Note, *The Evolving Right of Due Process at Prison Disciplinary Hearings*, 42 *Fordham L. Rev.* 878, 885 (1974).

47. See *Buss* 586-87; cf. text accompanying notes 95-98 *infra*.

48. See text accompanying note 45 *supra*.

49. Lower federal courts before *Goss* have not agreed as to whether notice should be oral or written. *Vail v. Board of Educ.*, 354 F. Supp. 592, 603 (D.N.H.), vacated mem., 502 F.2d 1159 (1st Cir. 1973) (suspension for more than five days requires written notice); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (written notice); 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) (written notice); cf. *Hagopian v. Knowlton*, 470 F.2d 201, 210 (2d Cir. 1972) (military student must be "apprised" of the charges; quoting *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967)); *Fielder v. Board of Educ.*, 346 F. Supp. 722, 729 (D. Neb. 1972) (student must be given "adequate notice"); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 197 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir.

B. "Meaningful" Hearing

In order that the hearing actually fulfill its function as a "meaningful hedge against erroneous action,"⁵⁰ the hearing officer must base his determination of the facts on substantial evidence "affording a substantial basis of fact from which the fact in issue can be reasonably inferred."⁵¹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵² Although the Supreme Court has characterized "substantial evidence" as "a term of art to describe the basis on which an administrative record is to be judged by a reviewing court,"⁵³ the requirement that substantial evidence must support administrative action⁵⁴ reflects the underlying judicial concern for affording fairness to the parties.⁵⁵ Professor Wright has asserted that the need for this standard, in the context of college discipline, is "so obvious, and so fundamental, [as to] require little elaboration."⁵⁶ Lower federal courts, prior to *Goss*, commonly required that findings of school and college disciplinary bodies be based upon substantial evidence.⁵⁷

Goss imposes standards defined more by common sense than by technical legal criteria upon school officials in formulating hearing procedures for short-term suspensions. The opinion refuses to inject the type of formality and adversarial structure found in the Court's procedural due process decisions in other areas.⁵⁸ It appears to evidence an interest in avoiding undue disruption

1969), cert. dismissed, 397 U.S. 31 (1970) (per curiam) (student must be given "adequate and timely" notice; quoting *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1089 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970).

The *Goss* Court did not discuss whether notice also must be given to the students' parents. It seems that such additional notice is not required in short suspension cases, since the informal hearing properly may follow soon after notice to the student. See text accompanying note 40 supra. Nevertheless, for longer suspensions or expulsions, notice to the parents is advisable because of their strong interest in the welfare of the child and because the parent may act as an effective intermediary between the student and the disciplinarian. *Buss* 587-89.

50. 95 S. Ct. at 741.

51. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299 (1939).

52. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); accord, *Peoples Bank v. Saxon*, 373 F.2d 185, 189 (6th Cir. 1967).

53. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963).

54. The Administrative Procedure Act, which governs procedures before federal administrative agencies, provides that "[a] sanction may not be imposed . . . except . . . in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d) (1970).

55. C. McCormick, *Evidence* § 352 (2d ed. E. Cleary 1972).

56. Wright 1072.

57. *Vail v. Board of Educ.*, 354 F. Supp. 592, 603-04 (D.N.H.), vacated mem., 502 F.2d 1159 (1st Cir. 1973); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969), cert. dismissed, 397 U.S. 31 (1970) (per curiam); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161, 171 (W.D. Mo. 1968), quoting 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).

58. E.g., *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation requires written

of the relationship between school—as teacher and surrogate parent—and student. In short, it would be error to read *Goss* as mandating the promulgation of standardized regulations governing student disciplinary proceedings. Rather, the decision speaks directly to the disciplining official, requiring that he evaluate the needs of the particular student brought before him and calculate his actions so as to treat the student reasonably and in a fair manner.

III. LONG-TERM SUSPENSION AND EXPULSION CASES: AN ARGUMENT BY ANALOGY

Although *Goss* specifically refused to accord students either the right to be represented by counsel or the right to cross-examine adverse witnesses in short-term suspension hearings, it did warn that safeguards other than informal notice and hearing may be required in the case of long-term suspensions and expulsions.⁵⁹ The Court's mention of counsel and cross-examination may imply that these safeguards will constitute areas of particular concern in future cases dealing directly with the adequacy of procedures in long-term discipline hearings. In order to determine the probable course of judicial determinations, examination of the Supreme Court's recent treatment of these two protections⁶⁰ in a related context—the procedural rights of prisoners, probationers and parolees—provides useful analogies and profitable insights into the trend of the law.⁶¹

notice, hearing, opportunity to testify and to present evidence and witnesses, cross-examination—subject to discretion of hearing officer—impartial hearing body, written statement of factfinding); *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) (welfare termination requires notice, hearing, cross-examination, opportunity to testify orally, allowance of retained counsel, a decision based on the evidence, statement of factfinding, impartial hearing body); *In re Gault*, 387 U.S. 1, 31-59 (1967) (adjudication of juvenile delinquency requires particularized notice, hearing, right to retained or appointed counsel, cross-examination, privilege against self-incrimination, appellate review, transcript of proceedings).

59. See text accompanying note 23 *supra*.

60. Although the remainder of this Note deals separately with the protections of counsel and cross-examination, they are interrelated. Thus, in certain situations, see text accompanying notes 96-98 *infra*, cross-examination should be conducted by counsel to be effective.

61. Other useful analogies may be found in cases expanding the substantive rights of students and in the procedural protections afforded in welfare termination, civil commitment and juvenile delinquency proceedings. For student rights cases see *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (student right of symbolic speech); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (students may not be compelled to salute flag or pledge allegiance); *Stevenson v. Board of Educ.*, 426 F.2d 1154 (5th Cir.), cert. denied, 400 U.S. 957 (1970) (grooming code is constitutional if reasonably related to school administration), noted in 84 *Harv. L. Rev.* 1702 (1971); *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir.), cert. denied, 400 U.S. 826 (1970) (school may not prohibit publication of student "underground" newspaper absent reasonable showing of substantial disruption); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970) (school's prohibition of long hair is unconstitutional absent showing of actual disruption); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972) (corporal punishment forbidden if prohibited by parents); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex.), *aff'd per curiam*, 458 F.2d 1360 (5th Cir. 1971), cert. denied, 409 U.S. 1027 (1972) (corporal punishment

In *Morrissey v. Brewer*,⁶² the Supreme Court held that a state may not revoke an individual's parole without a hearing leading to "a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation."⁶³ To effectuate this standard, the Court required that the parolee be given, among other protections, an opportunity to cross-examine adverse witnesses "unless the hearing officer specifically finds good cause for not allowing confrontation."⁶⁴ The Court did not reach the question whether the hearing body must allow counsel to be present.

As in *Goss*, the *Morrissey* Court employed a balancing test⁶⁵ to accommodate the relevant interests of the parolee, the correctional authorities and society. It identified the parolee's interest as being able to live with his family and to seek employment,⁶⁶ and the authorities' interest as the avoidance of "the burden of a new adversary criminal trial."⁶⁷ In addition, the Court noted that society has an interest in effective rehabilitation, which is enhanced by "treating the parolee with basic fairness" and thereby avoiding "reactions to arbitrariness."⁶⁸ These interests parallel those of students, schools and society in the student discipline context:⁶⁹ parolees and students have common "liberty" interests in their reputations;⁷⁰ parole boards and schools share interests in administrative economy;⁷¹ and society has closely corresponding interests in the effective education of students and successful rehabilitation of parolees.⁷² It is arguable, however, that the analogy is not perfect, since a parolee faced with return to prison may be confronted with a more "grievous

implementing competent state policy is permitted). See generally Gyory, *The Constitutional Rights of Public School Students*, 40 *Fordham L. Rev.* 201 (1971).

The leading case dealing with procedural due process at welfare termination hearings is *Goldberg v. Kelly*, 397 U.S. 254 (1970). See also *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), cert. denied, 414 U.S. 1137 (1974). For a thorough discussion of procedural due process in the context of civil commitment see Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications*, 42 *Fordham L. Rev.* 611 (1974).

Recent Supreme Court cases increasing procedural protections in juvenile proceedings include *In re Winship*, 397 U.S. 358 (1970), and *In re Gault*, 387 U.S. 1 (1967). See also *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-46 (1971).

62. 408 U.S. 471 (1972).

63. *Id.* at 488.

64. *Id.* at 489. One court has suggested that "good cause" is limited to danger to informants. *McNeill v. Butz*, 480 F.2d 314, 323 (4th Cir. 1973).

65. See notes 20-21 *supra* and accompanying text.

66. 408 U.S. at 482; cf. note 8 *supra*.

67. 408 U.S. at 483.

68. *Id.* at 484; cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (quoted in note 32 *supra*); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

69. See text accompanying notes 29-32 *supra*.

70. See note 8 *supra*.

71. See text accompanying note 30 *supra*.

72. See text accompanying note 32 *supra*.

loss" than a student facing suspension or expulsion.⁷³ Similarly, the state's interest in summary adjudication may be greater in the parole revocation context, where the possibility exists of a dangerous parole violator remaining at large during the proceedings.⁷⁴

A year after *Morrissey*, the Court ruled in *Gagnon v. Scarpelli*⁷⁵ that in certain circumstances indigent probationers are entitled to be represented by appointed counsel at hearings prior to revocation of probation.⁷⁶ Drawing heavily on *Morrissey*, the *Gagnon* Court found the relevant interests to be the same in the context of probation as in parole;⁷⁷ it is clear that the *Gagnon* ruling extends to parolees as well.⁷⁸ Under *Gagnon*, the determination of when probationers or parolees are entitled to counsel must be made on a case-by-case basis⁷⁹ because the "need for counsel . . . derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases."⁸⁰ The Court ruled that counsel is required if fundamental fairness depends "on the use of skills which the probationer or parolee is unlikely to possess."⁸¹ Thus, while avoiding precise guidelines, the Court held that counsel should be present if a parolee or probationer denies having committed the offense or if the case presents complicated mitigating factors. The Court further suggested that the agency responsible for revocation should consider the capability of the probationer to speak effectively for himself.⁸²

Finally, and most recently, the Supreme Court, in *Wolff v. McDonnell*,⁸³

73. But see note 8 supra; *Fielder v. Board of Educ.*, 346 F. Supp. 722, 729 (D. Neb. 1972); *Buss 575-77*; *Seavey, Dismissal of Students: "Due Process,"* 70 Harv. L. Rev. 1406, 1407 (1957).

74. Under *Morrissey*, this danger is greatly reduced since a suspected parole violator may be returned to prison on a finding of probable cause preceding the hearing. 408 U.S. at 485-87; see *The Supreme Court*, 1971 Term, 86 Harv. L. Rev. 95, 103 (1972).

75. 411 U.S. 778 (1973).

76. *Id.* at 791. In *Mempa v. Rhay*, 389 U.S. 128, 133-37 (1967), the Court previously had held that a probationer is entitled to appointed counsel at a combined revocation and sentencing hearing.

77. 411 U.S. at 782-85.

78. The Court held that "revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole." *Id.* at 782 n.3.

79. *Id.* at 787-91; cf. *Betts v. Brady*, 316 U.S. 455 (1942) (case-by-case approach to right to counsel in felony prosecutions; overruled in favor of per se rule in *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963)).

80. 411 U.S. at 789.

81. *Id.* at 786. "[T]he unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence." *Id.* at 787; cf. *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

82. 411 U.S. at 790-91. For subsequent lower court applications of *Gagnon v. Scarpelli* see *Preston v. Piggman*, 496 F.2d 270, 275 (6th Cir. 1974) (presence of counsel required where mitigating facts exist and counsel would help present them in an orderly fashion; counsel may call witnesses and cross-examine adverse witnesses); *Lane v. Attorney Gen.*, 492 F.2d 121 (5th Cir. 1974) (per curiam); *Forbes v. Roebuck*, 368 F. Supp. 817, 820 (E.D. Ky. 1974) (admission of breach of parole may render counsel unnecessary).

83. 418 U.S. 539 (1974).

addressed the question of what procedural protections are required before prison authorities may revoke or withhold an inmate's "good time"⁸⁴ credits. Balancing the prisoner's liberty interest⁸⁵ against the prison's need to maintain order in a "closed, tightly controlled environment peopled by those who have chosen to violate the criminal law,"⁸⁶ the Court refused to extend the full range of protections afforded parolees and probationers under *Morrissey* and *Gagnon*.⁸⁷ Thus, although the Court required written notice, an opportunity to present evidence and to call witnesses, and a written statement of the findings of fact and evidence relied on by the disciplinary authority,⁸⁸ it ruled that due process does not afford to inmates the right to be represented by counsel or to cross-examine adverse witnesses.⁸⁹

In *Wolff*, the Court denied the protection of counsel because "[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals."⁹⁰ The Court based its denial to the prisoner of the opportunity to cross-examine his accusers on the "considerable potential for havoc inside the prison walls,"⁹¹ noting that to reveal the identities of unknown inmate accusers might lead to reprisals.⁹²

The similarity of the interests found in the parole-probation and student discipline situations⁹³ justifies the use of the *Morrissey* and *Gagnon* reasoning to extend representation by counsel to students facing long-term suspensions or expulsions. As will be developed below, however, the analogy of interests between the school and prison situations is weaker.⁹⁴ *Morrissey* and *Gagnon* provide support for allowing counsel to students facing more severe discipline than the ten-day suspension involved in *Goss*. Thus, if a student denies having committed the offense or if the issues are complex, it is likely that courts will require counsel in future suspension or expulsion cases.⁹⁵ The

84. A revocation or withholding of "good time" credits results in the extension of a prisoner's term of confinement. *Id.* at 547.

85. *Id.* at 557. See also *Procunier v. Martinez*, 416 U.S. 396, 418 (1974) (prisoner's interest in uncensored mail is fourteenth amendment liberty interest).

86. 418 U.S. at 561.

87. *Id.* at 571-72; see text accompanying notes 62-64, & 75-76 *supra*.

88. 418 U.S. at 563-66.

89. *Id.* at 567-70.

90. *Id.* at 570; cf. *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973). The *Wolff* Court provided, however, that when an inmate is illiterate or the issues are complex, the assistance of a member of the prison staff or a fellow inmate should be permitted. 418 U.S. at 570.

91. 418 U.S. at 567.

92. *Id.* at 568-69.

93. See text accompanying notes 70-72 *supra*.

94. See text accompanying notes 111-20 *infra*.

95. Lower federal courts before *Goss v. Lopez* have divided on the question of representation by counsel. Compare *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972), *French v. Bashful*, 303 F. Supp. 1333, 1337 (E.D. La. 1969), appeal dismissed, 425 F.2d 182 (5th Cir. 1970), and *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 752 (W.D. La. 1968) (cases allowing counsel), with *Hagopian v. Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972), *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967), and *General Order on Judicial Standards of Procedure* and

suggestion in *Gagnon* that the determination of whether to permit counsel should include consideration of the probationer's ability to speak for himself is particularly relevant to school discipline. Some students, especially younger ones, may not be capable of representing themselves adequately,⁹⁶ or may become emotional when confronted with the prospect of suspension or expulsion.⁹⁷ In such cases, the presence of counsel would aid in the accurate finding of disputed facts and further the common interests of the student, the school and society⁹⁸ in an equitable resolution of the controversy.

Whether *Morrissey* and *Gagnon* necessarily point to a right of cross-examination in long-term student suspension or expulsion cases is less clear than the question of representation by counsel.⁹⁹ The Supreme Court has recognized that cross-examination is "a fundamental aspect of procedural due process."¹⁰⁰ Nevertheless, in *Morrissey* the Court explicitly qualified the right of cross-examination in parole revocation hearings, subjecting it to the discretion of the hearing officer.¹⁰¹ The Court's reason for so limiting cross-examination was the possibility of harm to the adverse witness if his identity were revealed to the parolee.¹⁰² Although one may assume that, in general, students are less prone to serious violence than convicted criminals, the possibility of reprisals against accusing witnesses at suspension or expulsion hearings cannot be overlooked. The undesirability of escalating the adversary nature of the proceedings¹⁰³ is another factor militating against requiring cross-examination in school hearings. Further, in determining whether cross-examination is required, local authorities might consider the possibility that confrontation with the accused student would deter witnesses to misconduct from coming forward because of possible harm or peer pressure.¹⁰⁴ Balanced

Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968) (en banc) (citing cases denying representation). See generally Buss 605-612; Butler, The Public High School Student's Constitutional Right to a Hearing, 5 Clearinghouse Rev. 431, 462-63 (1971).

96. Cf. *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (counsel not required when college student is, inter alia, educated, mature and can present his own defense).

97. See, e.g., *Goldwyn v. Allen*, 54 Misc. 2d 94, 95, 281 N.Y.S.2d 899, 901 (Sup. Ct. 1967) (high school student, allegedly caught cheating, "highly excited, emotional state and in tears").

98. See text accompanying notes 29-32 supra.

99. As with the right to counsel, see note 95 supra, lower courts before *Goss* have disagreed on the question of a student's right to cross-examine witnesses. Compare *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (cross-examination allowed), and *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970) (same), with *Madera v. Board of Educ.*, 386 F.2d 778, 788 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968) (cross-examination not allowed), and *Davis v. Ann Arbor Pub. Schools*, 313 F. Supp. 1217, 1227 (E.D. Mich. 1970) (same).

100. *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969); see *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963).

101. See text accompanying note 64 supra.

102. *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); cf. *Wolff v. McDonnell*, 418 U.S. 539, 568-69 (1974).

103. This concern was expressed by the Court in *Goss*, 95 S. Ct. at 741

104. Cf. *Wolff v. McDonnell*, 418 U.S. 539, 561-62 (1974).

against these considerations is the student's interest in not being suspended or expelled because of mistaken or fabricated testimony.¹⁰⁵

In reconciling these interests, school officials should follow a case-by-case approach similar to that applied by the Court to the right to counsel in *Gagnon*.¹⁰⁶ Thus, as Professor Wright suggests, "if the case resolves itself into a problem of credibility, and the tribunal must choose to believe either the accused or his accuser, cross-examination is the condition of enlightened action and is therefore required in the interests of fairness and reasonableness."¹⁰⁷ If circumstances such as physical danger to the witness are present, however, school officials might follow the approach prescribed by one district court in *DeJesus v. Penberthy*,¹⁰⁸ in which the court held that cross-examination should be required in expulsion situations except in "extreme" cases.¹⁰⁹ In such situations, the disciplinary body may take the adverse testimony, but it must exercise the responsibility to question the witness and furnish the accused student with a summary of the testimony.¹¹⁰ Presumably, the student then could suggest to the hearing body questions which would test the accuracy of the testimony.

An examination of the reasons why the Court in *Wolff* denied counsel and cross-examination to prisoners facing discipline reveals that *Wolff* is less analogous to student discipline than are *Morrissey* and *Gagnon*. *Wolff* did not require counsel¹¹¹ because the Court found that the presence of counsel would make the disciplinary hearing inordinately adversarial, thus inhibiting the correctional process.¹¹² This consideration parallels the *Goss* Court's concern about increasing the adversary character of student disciplinary hearings,¹¹³ and reflects, to some degree, the common interests of the inmate, the prison and society in effective rehabilitation. It is significant, however, that the *Wolff* Court held that revoking or withholding "good time" credit did not constitute as severe a deprivation of liberty as the revocation of parole because it did not immediately change the prisoner's status. Since it was "not the same immediate disaster that the revocation of parole is for the parolee,"¹¹⁴ the Court declined to extend the full range of protections provided by *Morrissey* and *Gagnon*.¹¹⁵ The Court also pointed out that "good time" credits may be

105. Cf. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). See also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

106. See text accompanying note 79 *supra*.

107. Wright 1076.

108. 344 F. Supp. 70 (D. Conn. 1972).

109. In order for cross-examination to be dispensed with, the court held that the testifying witness must be "inhibited to a significantly greater degree than would result simply from the inevitable fact that his accusations will be made known to the accused student." *Id.* at 76.

110. *Id.*

111. The Court excluded both the right of retained and appointed counsel in *Wolff*. 418 U.S. at 570.

112. See text accompanying note 90 *supra*.

113. 95 S. Ct. at 741.

114. 418 U.S. at 561.

115. *Id.* at 560-61.

restored.¹¹⁶ Applying this reasoning to *long-term* student suspensions or expulsions, the disciplining of a student by his removal from school is an "immediate disaster;"¹¹⁷ it works an instant change in his status and, although he is removed from school while a parolee is returned to prison, the adverse consequences of both actions are, in large part, equally irreversible.

The denial of cross-examination in *Wolff* was grounded in the necessity of maintaining order in the prison and in protecting the physical welfare of witnesses.¹¹⁸ The prison's interest in preventing "havoc" inside its walls was deemed to outweigh the prisoner's interest in confrontation of adverse witnesses. In this regard, schools are readily distinguishable from prisons; for, while they have an interest in maintaining discipline and even may be characterized as "closed, tightly controlled environment[s]," they are not "peopled by those who have chosen to violate the criminal law."¹¹⁹ While there may be violent students likely to harm those who testify against them, this problem is obviated by a case-by-case approach consistent with *Morrissey* and *Gagnon* and suggested in *DeJesus v. Penberthy*.¹²⁰

IV. CONCLUSION

Goss v. Lopez is an attempt to quiet one of the "[m]any controversies [which] have raged about the cryptic and abstract words of the Due Process Clause . . ."¹²¹ by a balancing of the interests involved in school suspensions. Because the opinion is limited to short suspensions, and because of the Court's dictum that longer suspensions or expulsions may require more formal procedures, further litigation is unavoidable. For the present, however, school officials should be guided in their conduct of disciplinary proceedings by the spirit of *Goss* as much as by its specific holding. It is a spirit of fair dealing and reasonableness between student and disciplinarian requiring, above all, an exercise of sound judgment by school administrators of the appropriateness of particular procedures, considering the needs of the individual student and the institutional requirements of the school. The Supreme Court has said in a similar context that it will not set aside decisions of school administrators simply because they lack "wisdom or compassion."¹²² Nevertheless, to the extent that fundamental fairness depends upon a compassionate treatment of students by those charged with their education,¹²³ due process requires a compassionate and reasoned application of procedures to school hearings.

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116. *Id.* at 561.

117. The emphasis here is on the "immediacy" of the event, not necessarily its "disastrous" quality.

118. See text accompanying notes 91-92 *supra*.

119. 418 U.S. at 561; see text accompanying note 86 *supra*.

120. See text accompanying notes 64, 79, 106 & 108-110 *supra*.

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

122. *Wood v. Strickland*, 95 S. Ct. 992, 1003 (1975); see note 25 *supra*.

123. Professor Seavey has observed that "a university and its instructors are subject to fiduciary duties in dealing with their students . . ." Seavey, *Dismissal of Students: "Due Process,"* 70 *Harv. L. Rev.* 1406, 1409 (1957).