Legal Challenges to Connecticut's Public School Suspension and Expulsion Policies

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I. INTRODUCTION

The headline of the July 6, 2000, Hartford Courant was "*Kicking Out The Problem*."[1] The problem was the recorded suspensions and expulsions for the 1997-1998 school year in Connecticut's public schools. "About 14 percent of the state's public school students were suspended or expelled from school last year"[2] This is up dramatically from the national figures from the mid-70's, when the suspension and expulsion rate was less than 4 percent.[3] The article indicated that the number of suspensions and expulsions occurred disproportionately in the major cities of the state.[4] It also fell disproportionately on minorities.[5] Blacks and Hispanics accounted for 45 percent of the suspensions and expulsions, but only represented 27 percent of the public school population.[6] The article further indicated that over half of the suspensions and expulsions were for relatively minor offenses including truancy, insubordination, profanity and cutting class.[7]

A follow-up article on July 7, 2000, quotes a Hartford Public High School (HPHS) teacher saying, "You have to have good discipline so you can teach." Connecticut recently passed a law which requires mandatory school attendance for everyone up to the age of eighteen.[8] The prior law only required mandatory attendance up to the age of sixteen. The article conjectures that the extra two years of mandatory attendance will have the effect of further increasing the rate of suspension and expulsions.[9]

HPHS has a disproportionately high drop out rate. Fifty two percent of the freshman class each year does not graduate.[10] Part of the

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[1] HARTFORD COURANT, July 6, 2000, at A1, A11.
[2] *Id.*, at A1.
[3] Id. at A1, A11.
[3] HARTFORD COURANT, July 7, 2000, at A4.
[4] HARTFORD COURANT, July 6, 2000, at A11.
[5] *Id.* at A11.
[6] *Id.*.
[7] HARTFORD COURANT, July 6, 2000, at A1.
[8] HARTFORD COURANT, July 7, 2000, at A3.
[9] *Id.* at A3.
[10] HARTFORD COURANT, July 21, 2000 at A1.

problem is the high rate of suspensions and expulsion. There is a strong belief that once a student is expelled from school, there is a high likelihood they will never return. For 1998, the number of suspensions/expulsions as a percentage of the total number of students in the Hartford school system was over thirty-seven percent.[11]

With this as a backdrop, how would you, as a practicing attorney, handle the following two hypothetical cases:

> 1) Jermaine G. is a 15 year old male attending HPHS. Jermaine is an African-American, who has had a number of disciplinary problems throughout his public school life. Last week, Jermaine was being disruptive in class. His teacher, in frustration, had Jermaine removed from the classroom. Jermaine was required to go to the office of the Vice Principal, where he was informed that he would be suspended from school for one week, or five school days.
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> 2) Conchita P. is a 14-year-old female attending HPHS. She comes from a single parent household. Her mother is Puerto Rican. Conchita has been suspended from school on two prior occasions due to disruptive behavior. Conchita is responsible for caring for her two younger siblings while her mother is at work. Due to the pressures in her home, Conchita came to school last week very frustrated and upset. When she was called on in class to answer a question, Conchita unleashed her frustration in a verbal barrage at her teacher. She was sent to the Principal for discipline. The Principal informed Conchita that she was suspended from school while the school decided whether it was appropriate for her to be expelled for the balance of the school year—three months.

What rights do Jermaine and Conchita have? Both are minors. Are their rights the same as those of an adult? Are their rights in anyway affected by the school environment? Are their rights in any way different under State law or Federal law? As they have both been referred to your law office to seek advice, what would you tell them?

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[11] *Id*.. at A4

II. HISTORICAL DEVELOPMENT OF THE LEGAL RIGHTS OF MINORS

Minors have constitutional rights. Minors do not, however, have the same constitutional rights as adults. The first time the Supreme Court recognized the rights of minors was fifty seven years ago in 1944. Prior to that, whatever "rights" enjoyed by minors were derivative to the rights of others—their parents or the State.

Until the early part of the 20th century, the rights of minors were not recognized by the courts. The law assumed that minors were immature and in need of protection. Additionally, the law assumed that parents bore the responsibility for protecting their children. The earliest cases of legal rights associated with minors related to education. In *Meyer v. Nebraska,* [12] the Supreme Court, in 1923, held that the State of Nebraska did not have a sufficient interest in preventing parents from having their children learn German in school.[13] The State of Nebraska had passed a law, just after WWI, which forbade the teaching of selected languages to any child prior to their completion of the eighth grade.[14] The rationale for the law was to ensure children learned of American ways and values prior to being exposed to foreign influences.[15] The Court recognized that parents had a constitutional right to raise their children in the manner they saw fit, particularly as it related to education.[16] "[I]t is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws."[17] The Court also made clear that the state had the right to mandate attendance at school and determine the curriculum of those schools.[18] The Court in *Meyer* was silent, however, on the rights of the children.

Two years later, in *Pierce v. Society of Sisters*[19], the Supreme Court held that parents had the right to determine whether their children went to private or public school. The State of Oregon, under a 1922 law, required parents to send their children to public school until the eighth grade.[20] Failure to do so was a misdemeanor.[21] The rationale behind the

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[12] Meyer v. State of Nebraska, 262 U.S. 390 (1923).
[13] *Id*. at 396.
[14] *Id.*, at 397.
[15] *Id.*, at 398.
[16] *Id.*, at 401.
[17] *Id.*, at 400.
[18] *Id.*, at 402.
[19] Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[20] *Id*., at 530.
[21] *Id*.

law was to provide financial support and justification for public schools. Citing *Meyer,* the Court indicated that the 1922 law *"unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."*[22] It is interesting to note that the complaint filed by the Society of Sisters, a private school, included the right of the child to influence their parent's choice of schools.[23] In spite of this explicit claim on behalf of the child, the Court was again silent on the rights of the children. Both *Meyer* and *Pierce* support the legality of the State to require compulsory education for minors.[24] Both cases also support the right of the State to dictate the curriculum of schools in their state. The Court's rationale behind allowing the State to infringe upon the parental right to bring up their children as they see fit, related to the State's interest in preparing children for citizenship. The State's interest was deemed sufficiently high to curtail the freedom of children, as to their whereabouts, on weekdays. In contrast, the State did not have the ability to mandate where adults spent the majority of their weekdays, as it would be considered a restriction on the adult's right to liberty.

Twenty years later, in 1944, the Court again dealt with the right of parents to raise their children. In *Prince v. Massachusetts*, the Court held that an aunt did not have the right to have her niece, for whom she had legal custody, accompany her while she distributed religious material on the street at night.[25] Both the aunt and her niece were Jehovah's Witness'. They alleged they were performing their religious obligations by distributing the magazine, Watchtower. Massachusetts had a child labor law which made it illegal for children to sell magazines on the street at night.[26] The Court indicated the State had the right to legislate child labor laws that were far more restrictive than the labor laws constitutionally allowed for adults.[27] The State's interest in protecting its children outweighed the parent's right to have their child work.[28] The court also discussed the right of the State to mandate compulsory school attendance for children. "Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting

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[22] *Id*., at 534.
[23] *Id*., at 532.
[24] Meyer v. State of Nebraska, at 400, Pierce v. Society of Sisters, at 534.
[25] Prince v. Massachusetts, 321 U.S. 158 (1944).
[26] *Id*., at 160.
[27] *Id*., at 168.
[28] *Id*., at 170.

the child's labor and in many other ways."[29] *Prince* was the first Supreme Court case where the rights of minors were recognized. "The rights of children to exercise their religion, and of parents to give them religious training" have been recognized by this Court.[30] The Court went so far as to revisit both *Meyer* and *Pierce* and discuss the children's right in each of those cases to receive teaching in other languages and religious training, respectively.[31] Children's rights, however, were subordinated to those of both their parents and the State, acting in the role of *parens patriae*. Children were viewed as dependent, which allowed the State to intervene in a greater role than would be allowed for adults.[32] The Court re-emphasized that the State had the power, as it related to children, to invade traditionally protected freedoms. "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ."[33]

In *Ginsberg v. New York*, the Supreme Court, in 1968, addressed the legality of a state law which forbade the sale of a pornographic magazine to a minor.[34] A news vendor was arrested for selling an allegedly obscene magazine to a seventeen-year old. The *Ginsberg* Court held that the First Amendment rights of minors were not the same as those of an adult.[35] The Court, once again, affirmed that minors are in need of protection; this time to be protected from pornography.[36] The Court held the New York law in question was designed to help parents protect their children. "The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[37] Justice Stewart in his concurrence stated, "I think a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[38] He also pointed out that certain rights which are constitutionally protected for adults, are not protected rights

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[29] *Id*., at 166.
[30] *Id*., at 165.
[31] *Id*., at 166.
[32] *Id*., at 168.
[33] *Id*., at 170.
[34] Ginsberg v. New York, 390 U.S. 629, 631 (1968).
[35] *Id*., at 636.
[36] *Id*., at 640.
[37] *Id*., at 639.
[38] *Id*., at 649.

for children.[39] The right to vote and the right to marry are not rights of minors.[40] It is noteworthy that the magazine in question was clearly acceptable for sale to adults.[41]

In *Wisconsin v. Yoder*, the Court, in 1982, again was silent on the rights of children.[42] The Court held that Amish parents had the right to have their children work on the family farm and miss the last two years of mandatory public education. Under Wisconsin law, parents were required to send their children to school until the age of sixteen.[43] The state was pitted against the parents as to whose rights to protect children were pre-eminent.[44] The State contended that education was the best course of action for children up to the age of sixteen, while the parents contended that continuing the Amish religious tradition of working on the family farm was optimal for their children.[45]

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.[46]

Only the dissent raised the issue of the rights of the children. Justice Douglas, in dissent, queried why the majority didn't question the Amish children as to whether they wanted to complete their final two years of high school.[47] Justice Douglas also asked why the majority had not inquired whether the children wanted to choose their own religion.[48] The rights of children, although not explicitly addressed in the majority opinion, were minimized. An adult could not have her constitutional right to religious freedom curtailed to the same extent as the Court in *Yoder* allowed the rights of the Amish children to be curtailed.

The law established through these cases remain valid today. Both parents and/or the State can exercise greater control over children than

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[39] *Id*., at 650.
[40] *Id*.
[41] *Id*., at 634.
[42] Wisconsin v. Yoder, 406 U.S. 205 (1982).
[43] *Id*., at 207.
[44] *Id*., at 214.
[45] *Id*., at 209.
[46] *Id*., at 214.
[47] *Id*., at 242.
[48] *Id*., at 243.

either would legally be permitted to exercise control over adults. The constitutional rights of children are not as strong as the constitutional rights of adults. Adults are seen as mature, independent and capable of exercising control over all aspects of their lives. Minors, on the other hand, are seen as immature and dependent, in need of parental or state protection. Their constitutional rights are curtailed in light of their need of parental and/or state oversight.

III. LEGAL RIGHTS OF MINORS IN THE SCHOOL ENVIRONMENT

Minors enter the school environment with fewer or weakened rights than an adult would have. In the school environment, those rights are further weakened. Students rights of free expression, rights to privacy and protections under the due process clause of the Fourteenth Amendment become reduced rights in the school environment. Although the Court has held that students are "*persons*" under the Constitution and they have rights which the State must respect, those rights are often subordinated to the right of the State to educate its youth.[49]

The primary purpose of schools is to educate and train students.[50] The Court in *Pierce* held that the State may require children to attend school during certain years of their lives.[51] Although the Court indicated that parents were entitled to choose whether they send their children to private or public school, the Court was clear that the State has the right to ensure the curriculum of those schools is in alignment with teaching good citizenship.[52] The Court made it clear that the State had significant power over children in school. They also made it clear, however, that those powers were not unbounded. The Court in *West Virginia State Board Of Education v. Barnette* said

> [Public Schools] are educating the young for citizenship . . . . [This] 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 the important principles of our government as mere platitudes.[53]

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[49] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969).

[50] *Student's Under Siege? Constitutional Considerations For Public Schools Concerned With School Safety*, Jennifer L. Barnes, 34 U. RICH. L. REV. 621, 623, (2000).

[51] *Pierce*, 268 U.S., at 530.

[52] Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

[53] West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

The Court in *Shelton v. Tucker* further said, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"[54] The role of trying to groom students to be good citizens and to inculcate the values of our society requires schools and their administrators to maintain control over both the curriculum and order in the school.[55] This can directly conflict with maintaining an environment where students have the opportunity to challenge the status quo.[56] The Court in both *Barnette* and *Shelton* supported the idea of academic freedom and teaching children the value of individual freedoms.[57] The Court in *Tinker v. Des Moines School District,* in addressing the importance of free speech to our democracy, said, "our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[58] The Court in *Barnette*, *Shelton,* and *Tinker*, stated a common objective of having schools be a model of democracy. Schools were envisioned to be a place where students could question and challenge the basis of our society. Having such a model, it was felt, would lead to a stronger democracy. In recent years, however, the pendulum has swung more towards a controlled environment. School administrators, in trying to provide an academic environment free of disruption and one which ensures the safety of the student population, have exercised greater control over the school environment at the cost of student's individual rights.[59]

The courts have, in general, been deferential to school administrators. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities."[60]

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[54] Shelton v. Tucker, 364 U.S. 479, 487 (1960).
[55] *Ambach*, 441 U.S. at 77-8.
[56] Betsy Levin, *Educating Youth For Citizenship: The Conflict Between Authority And Individual Rights In The Public School*, 95 YALE L.J. 1647 (1986).
[57] *Barnette*, 319 U.S. at 631; *Shelton*, 364 U.S. at 487.
[58] *Tinker*, 393 U.S. at 508-09.
[59] *Student's Under Siege? Constitutional Considerations For Public Schools Concerned With School Safety*, 34 U. RICH. L. REV. at 645.
[60] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

A. First Amendment Rights

Due to the important and unique nature of the school setting, the First Amendment affords less protection to public school children than to adults in other contexts. The Court has held that school administrators can control student speech.

The landmark case of *Tinker v. Des Moines School District* in 1969 involved the suspension of students wearing armbands to school as a protest against the Vietnam War.[61] The school had recently passed a regulation which forbade the wearing of armbands.[62] Protests against the Vietnam War, a very unpopular war with young people, were at their height in 1969. Many protests were loud, disruptive and occasionally violent. The school regulation was enacted to minimize these potential disruptions in the school. The Court held for the students finding the school had violated their First Amendment rights by restricting their freedom to express their political beliefs.[63] The Court found that absent a showing by the school that the wearing of armbands "would substantially and materially interfere with the requirements of appropriate discipline," the school regulation interfered with the student's right of free expression.[64] The Court was clear that the right to free expression was a critical right for everyone.[65] These rights are particularly critical in a school environment.[66] The school would only have the right to abridge the freedom if the exercise of free expression would disrupt the educational process.[67] Although the Court held for the students, the justices made it clear that the State had the right to control conduct in the schools.[68] In this case, the State's interest in controlling conduct was based on the fear of disturbance, which the Court held was too tenuous.[69] The Court also held that the wearing of armbands was pure speech, the form of speech accorded the highest level of constitutional protection.[70] Justice Stewart, in his concurring opinion reaffirmed his view from *Ginsberg* that the constitutional rights of children are not "co-extensive

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[61] *Tinker*, 393 U.S. at 504.
[62] *Id.*
[63] *Id.* at 514.
[64] *Id.* at 508-9.
[65] *Id.* at 513.
[66] *Id.* at 511.
[67] *Id.* at 514.
[68] *Id.* at 507.
[69] *Id.* at 508.
[70] *Id.*.

with those of adults."[71] It can be said, however, that a foreshadowing of the Court's future direction was present in Justice Black's dissent. "The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens – to be better citizens."[72] The Tinker decision appeared to continue the idealistic view of schools set out in *Barnette* and *Shelton*. Unfortunately, this view would not continue.

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico,* (1982), the Court held that the school board did not have the right to determine what books were objectionable and therefore, the books in question could not be removed from the school library.[73] The local school board had characterized a number of books in the junior and senior high school libraries as being contrary to public tastes.[74] A group of students from these schools brought an action alleging the school board had abridged their First Amendment rights by restricting what they could read.[75] The students contended the school board had based their removal decision on personal tastes, rather than on the educational value of the books.[76] The Court was clear that their decision was limited to the removal of books from the shelves. Their decision did not extend to books being added to the library shelves, nor to what books were included as texts for the school's curriculum.[77] What appears to be a narrow Court decision; what books can be removed from the shelves of a public school library - is really another step in the Court's recognition of the importance of providing local school boards with the right to educate their students.[78] The Court reinforced the school board's power by indicating that the local school board "might rightfully claim absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values in schools"[79] Interestingly, it is not within the power of a local town council to decide what books may be removed from a town's public library for being vulgar. Attempts to remove books

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[71] *Id.* at 515.
[72] *Id.* at 524.
[73] Board of Educ. Island Tree Union Free School District, No. 26 v. Pico, 457 U.S. 853, 872 (1982).
[74] *Id.* at 856-7.
[75] *Id.* at 859.
[76] *Id.* at 858-9.
[77] *Id.* at 862.
[78] *Id.*
[79] *Id.* at 869.

from a public library due to their content would be held to be unconstitutional. The First Amendment protections to receive ideas is greater outside the environment of the school than it is inside the school.

In the latter half of the 1980s, the Court limited student's First Amendment rights in *Bethel School District No.403 v. Fraser* and *Hazelwood School District v. Kuhlmeier*. In *Bethel* (1986), the Court held that a school had the right to discipline a student who gave an off-color speech to an assembly of 600 students.[80] The student in question was giving a nomination speech in support of a fellow student in a school election. The student had been warned that repercussions would occur if the speech was given.[81] The Court said

> The First Amendment guarantees wide freedom in matters of adult public discourse. . . . It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.[82]

The Court further reiterated that it is the responsibility of the local school board to determine what manner of speech is appropriate within the school.[83] Allowing a potentially vulgar speech to be made was construed to undermine the school's basic educational mission.[84] Justice Brennan, in his concurrence, said, "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[85]

In *Hazelwood* (1988), the high school administration removed two pages of content from a school-sponsored student newspaper due to what the administration considered to be the inappropriateness of its content.[86] The Court held that the administration had the right to edit the content of the school newspaper.[87] The Court held that the student newspaper was part of a journalism class and subject to the control of the

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[80] Bethel School District No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
[81] *Id.* at 678.
[82] *Id.* at 682.
[83] *Id.* at 683.
[84] *Id.* at 685.
[85] *Id.* at 688.
[86] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 264 (1988).
[87] *Id.* at 275.

school administration.[88] They distinguished their holding from *Tinker*, where the Court held the wearing of armbands was an expression of political beliefs. In contrast, the Court held in *Hazelwood*, that the content of a school sponsored newspaper could not be an expression of political beliefs and was therefore not pure speech.[89] In *Tinker*, the question was whether the school had to tolerate certain student speech, while in *Hazelwood*, the issue was whether the school was required to affirmatively support it.[90] The Court indicated that, in reality, the newspaper was the voice of the school.[91] As such, the school had the right to censor its content.[92]

> Educators are entitled to exercise . . . control over . . . student expression to assure that participants learn whatever lessons that activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[93]

Student limits on speech, based on the holdings in *Hazelwood* and *Bethel* appear to apply only to school sponsored activities.[94] This distinction could be deceptive, however, as the school might insist that anything related to school bears the stamp of the school and therefore is subject to their control. Following this theme, Justice Brennan in his dissent to *Hazelwood* raised the specter of school censorship and school officials acting as the "*thought police*"[95] The holdings in *Hazelwood* and *Bethel* were in sharp contrast to the Court's earlier holdings from *Barnette*, *Shelton* and *Tinker*, where the Court held that schools were to be a model of democracy, a forum for a free exchange of ideas.

B. Due Process Rights

The Due Process Clause of the Fourteenth Amendment protects all citizens, adults and minors alike, from the State infringing on their

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[88] *Id.* at 268, 270.
[89] *Id.* at 271.
[90] *Id.* at 270-71.
[91] *Id.* at 271-72.
[92] *Id.* at 272-73.
[93] *Id.* at 271.
[94] Hazelwood School Dist., 484 U.S. at 271; see also *Bethel*, 478 U.S. at 683.
[95] Hazelwood School Dist. 484 U.S. at 285.

rights. The Fourteenth Amendment forbids the State to deprive any person of life, liberty or property without due process of law.[96] In order to determine whether due process should be afforded, a two-step analysis is required.[97] The first step in the analysis calls for the individual to demonstrate that the State has infringed on their rights.[98] The second step, which only is necessary if the first step is achieved, determines the appropriate measure of process.[99] The standard measure of process has been notice and the right to be heard.[100] How notice and the right to be heard are interpreted has been based on the individual right involved, balanced by the State's interest in infringing on that right.[101]

The leading case on due process within the school environment is *Goss v. Lopez*, decided in 1975.[102] The case involved the suspension of several Ohio high school students from school for misconduct.[103] Their suspension took place without a hearing.[104] The City of Columbus, Ohio argued that due process was not required because education was a privilege and not a right.[105] Ohio, however, provides for free education to all its children.[106] "The state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause"[107] In *Goss*, the Court held that the student's property right to an education was significant.[108] Even a loss of as few as ten days of education merited the protection of the Fourteenth Amendment.[109] The length of the loss of the property right (how long the exclusion from school) would determine the requirements of due process.[110] The Court also held that the students had a liberty interest in

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[96] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
[97] Philip T.K. Daniel, Karen Bond Coriell, *Suspension And Expulsion In America's Public Schools: Has Unfairness Resulted From A Narrowing Of Due Process?*, 13 HAMLINE 1, 11 J. PUB. L. & POL'Y 1, (1992)
[98] *Id.*
[99] Goss v. Lopez, 419 U.S. 565, 579 (1975).
[100] Mullane v. Central Hanover Bank &Trust Co., 339 U.S. 306, 313 (1950).
[101] *Goss* 419 U.S. at 579.
[102] *Id.*
[103] *Id.* at 569.
[104] *Id.* at 567.
[105] *Id.* at 572.
[106] *Id*. at 567.
[107] *Id*. at 574.
[108] *Id*. at 576.
[109] *Id.*
[110] *Id*. at 584.

maintaining their good names and reputations.[111] The potential deprivation of this liberty interest also justified due process rights be accorded the students.[112] "A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause."[113]

The Court in *Goss* went on to define the specific due process requirements for a suspension as:[114]

- Notification orally or in writing of the possibility of exclusion from school
- The reason for the exclusion
- The rights of the student in a hearing – the right of the student to tell their side of the story.

The Court created flexible due process rules in order to minimize the judiciary's interference with the educational environment and the associated cost to the school system.[115]

> [T]here need be no delay between the time notice is given and the time of the hearing. In a great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of that accusation is.[116]

The Court also held that where a student represents a danger to other students, she can be suspended without any immediate due process.[117] The notice and hearing, however, should occur as soon after the suspension as practicable.[118] This was further recognition by the Court that the school is entrusted with the discipline and safety of the entire student body. The State's interest is sufficiently great in those situations, where the safety of the student body is in jeopardy, that the State can deal with it swiftly. The Court held the State could exercise a lower level of concern about the constitutional requirements of the

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[111] *Id*. at 575.
[112] *Id.*
[113] *Id*. at 576.
[114] *Id*. at 581.
[115] *Id*. at 583.
[116] *Id.* at 582.
[117] *Id.*
[118] *Id*. at 583.

student in those situations where safety of the student body was in question.

Although the Court held the expelled students were entitled to due process, the amount provided was minimal.[119] Contemporaneous notification to the student at the time of the infraction was considered adequate notice.[120] It is questionable whether the rules the Court fashioned provided any real due process. Being notified as an event is happening or has just happened does not provide adequate time to defend oneself. To expect a student, a minor, one who the Court in earlier cases had indicated to be immature and in need of protection, to be able to immediately mount a defense, is questionable. The more likely scenario is that the school official will orally notify the student, at the time of the incident, of the reason for the suspension. The suspension will most likely go into effect immediately as the student is unlikely to be able to defend herself. Contemporaneous notice and an immediate right to be heard in these situations appears to meet the letter of the Fourteenth Amendment, rather than its spirit.

The *Goss* decision was decided by a narrow 5-4 majority.[121] The dissent, led by Justice Powell, expressed great concern that the Court was now involving itself in "routine classroom discipline".[122] The dissent reiterated the long-standing history of the Court to defer to school authorities in performing their critical role of educating the youth of their state.[123] The dissent saw no need to provide due process rights in the school environment.[124] The dissent further contended that discipline was an important component of education.[125] It appears that the dissent, in opposing any due process, played an influential role in assisting the majority in defining due process requirements in the school environment. The result appears to be truly minimal.

Two years later the Court was called on to decide another case of whether due process was required prior to disciplining public school students. In *Ingraham v. Wright*, a group of students sued the school administrators of several Florida schools for violating their Eighth

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[119] Nadine Strossen, Comment: *Protecting Student Rights Promotes Educational Opportunity: A Response To Judge Wilkinson*, 1 Mich. L. & Pol'y Rev. 315, 316 (1996).
[120] *Goss,* 419 U.S. at 582.
[121] *Id*. at 584.
[122] *Id.* at 585.
[123] *Id.* at 591.
[124] *Id.*
[125] *Id.*

Amendment rights as well as their right to due process.[126] At issue was the school's administration of corporal punishment, which was legal in Florida.[127] The students argued that they had been subjected to cruel and unusual punishment and had not been provided with notice or the right to be heard prior to the administration of the corporal punishment.[128]

The Court first held that the applicable section of the Eighth Amendment did not apply to public school students, but rather, was intended for criminals.[129] It was intended to protect criminals from cruel and unusual punishment.[130] "The Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools."[131] The Court rejected the petitioner's contention that denying them Eighth Amendment rights left school children with less protection (rights) than those of criminals.[132] This continues the theme previously seen in Court decisions that in order for school officials to accomplish their educational goals they must be able to maintain discipline.

Florida law allowed for reasonable, but not excessive, corporal punishment.[133] "Where the legislatures have not acted, the state courts have uniformly preserved the common law rule permitting teachers to use reasonable force in disciplining children in their charge."[134] The Court held that this had been a common law principle since the American Revolution.[135] Florida law also allowed for civil liability of any school official found guilty of excessive corporal punishment.[136] Although the Court reiterated the *Tinker* mantra that students do not shed their constitutional rights at the school gate, they made it clear that the school had the right to reasonably mete out discipline.

The *Ingraham* Court then addressed whether the students were entitled to the minimal due process requirements of *Goss*. The Court found that corporal punishment of public school students implicates a liberty interest.[137] The students were, therefore, entitled to due process.[138] The Court found the traditional common law remedies for

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[126] Ingraham v. Wright, 430 U.S. 651, 653, 97 S.Ct. 1401, (1977).
[127] *Goss,* 419 U.S. at 655.
[128] *Id.* at 653.
[129] *Id.* at 664.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 669.
[133] *Id.* at 661.
[134] *Id.* at 663.
[135] *Id.* at 661.
[136] *Id.*
[137] *Id.* at 672.
[138] *Id.* at 674.

excessive use of punishment, which were codified in existing Florida statutes, to be adequate due process, however.[139] The Court also found the school environment sufficiently open to public scrutiny that any abuses would be detected by the community.[140] The Court felt the codified remedies would curb any teacher excesses.[141] Florida statutes require the principal to be consulted prior to the administration of corporal punishment.[142] The statute further requires that the punishment not be excessive.[143] Finally, the statute holds school officials liable in damages if found guilty of excessive use of corporal punishment.[144] The Court rejected the *Goss* requirements of advance notice and a hearing as being too burdensome on school officials.[145] The Court indicated that hearings require time, which would result in school officials abandoning the use of corporal punishment as a disciplinary measure.[146] The Court further indicated that the likelihood of mistaken corporal punishment was sufficiently slight that no further due process was required.[147]

The *Ingraham* decision appears to be another step away from protecting the rights of students in the school environment. The issue was again decided by a 5-4 margin, but this time it appears that the dissenters from the *Goss* decision, held sway. The dissent in *Ingraham* pointed out that one student received fifty whacks with a paddle for making an obscene phone call.[148] An adult in Florida, caught making an obscene phone call, would be punishable as a misdemeanor.[149] If the adult received the same punishment as the student mentioned above, the adult would certainly be entitled to the protection of the Eighth Amendment.[150] The dissent also took issue with the lack of minimal due process as required under *Goss*.[151] The dissent contended that Florida law shields school administrators who mete out corporal punishment as long as their actions are based on good faith.[152] Recovering damages from school administrators, unless bad faith could be shown, was,

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[139] *Id.* at 672.
[140] *Id.* at 670.
[141] *Id.*
[142] *Id.* at 676.
[143] *Id.* at 677.
[144] *Id.*
[145] *Id.* at 680.
[146] *Id.*
[147] *Id.* at 682.
[148] *Id.* at 688.
[149] *Id.*
[150] *Id.* at 685.
[151] *Id.* at 695.
[152] *Id.* at 694.

therefore, deemed to be highly unlikely.[153] For the student who is mistakenly punished, there is no protection, no ability to explain or even know the reason for the punishment. Under the Court's interpretation of Florida law, the student punishment can take place without any real notice or the right to be heard.

C. Fourth Amendment Rights

The Fourth Amendment protects the rights of citizens from invasion of privacy and inappropriate search and seizure.[154] These rights are generally recognized as being equal for adults as well as minors.[155] In the school setting, however, these rights are weakened.

Public school students should feel and be safe at school.[156] They should be free from violence by other students as well as from unreasonable invasions of privacy and regulations of individuality by school officials.[157] This requires a balancing act between the fundamental Fourth Amendment rights of individuals and the right of the State to provide a secure, safe educational environment. The increase in school violence and the associated clamor in the media have brought about substantially heightened security in the schools. Metal detectors, guards, locker checks and random book bag checks are all commonplace within the school environment.[158] An individual, adult or minor, going through airport security cannot be searched unless "probable cause" exists.[159] This is the right afforded everyone under the Fourth Amendment. Why then can students, in a school environment, be searched subject to a lesser standard?

In *New Jersey v. T.L.O.,* the Court held that the need to maintain order in the school environment allowed for a relaxed standard for school searches.[160] At issue was the school's search of a student's purse.[161] The student was suspected of violating the school's no-smoking

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[153] *Id.* at 693.
[154] New Jersey v. T.L.O., 469 U.S. 325, 335, 105 S.Ct. 733 (1985).
[155] *Id.*, at 338.
[156] Jennifer L. Barnes, Comment: *Student's Under Siege? Constitutional Considerations For Public Schools Concerned With School Safety*, 34 U. RICH. L. REV. 621, 631-32 (2000).
[157] *Id.* at 631, 632.
[158] Amy E. Mulligan, Note, *Alternative Education In Massachusetts: Giving Every Student A Chance To Succeed*, 6 B.U. PUB. INT. L.J. 629, 629 (1997).
[159] Victoria J. Dodd, *Student Rights: Can We Create Violence-Free Schools That Are Still Free?*, 34 NEW ENG. L. REV. 623, 630 (2000).
[160] *T.L.O.*, 469 U.S. at 340-41.
[161] *Id.* at 328.

policy.[162] The Court held that the school's search of the student's purse, which occurred without a search warrant or probable cause, was reasonable.[163] During the search, the school found rolling paper which led to a further search for marijuana.[164] The Court found this second search was also reasonable.

The Court maintained that the rights afforded under the Fourth Amendment exist in the school environment.[165] "Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy."[166] In the cases discussed in the prior section, "Historical Development of the Legal Rights of Minors", we saw the State, in assuming the role of the parent, involve itself in the life of the minor. In this role the State intended to protect the interests of the minor. In *New Jersey v. T.L.O.,* it can be said the State's involvement is in two concurrent roles. The first role is again parens patriae, acting to protect the safety and welfare of the general student population. A second role, however, is one of law enforcement to apprehend a wrong doer.[167] Parents, in raising their children, are not subject to the restrictions of the Fourth Amendment. Parents have legal control over their children and can therefore, if they so choose, trample their child's rights to privacy. Using this logic, that schools are acting as parents,

> a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. . . . If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process [referring to Tinker and Goss], it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.[168]

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[162] *Id.*
[163] *Id.* at 347.
[164] *Id.* at 328.
[165] *Id.* at 333.
[166] *Id.* at 338.
[167] Betsy Levin, *Educating Youth For Citizenship: The Conflict Between Authority And Individual Rights In The Public School*, 95 YALE L.J. at 1662.
[168] *Id.*

The Court would not go so far as to allow the State, in the school environment to act, with regard to the Fourth Amendment, as if they were the parent. The Court appeared to imply that school administrators are "government", while parents are private actors. The Court was cognizant of the additional role of law enforcement and insisted on some level of protection for students from the power of the State. In the final analysis, the Court, using a balancing approach, held that Fourth Amendment rights are applicable in the school environment, but the protections of that right are significantly reduced.

The requirements of a search warrant and the relatively high standard of "probable cause" are not necessary in the school environment.

> The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.[169]

All that is required to protect the student's Fourth Amendment rights in school is that the search be reasonable under all the circumstances.[170] This calls for a balancing of the individual's legitimate expectation of privacy and personal security against the school's need for effective methods to deal with breaches of public order.[171] A two-prong test is required to determine the reasonableness of a school search.[172] One prong is to determine whether the search was justified at its inception, while the second prong requires that the search be reasonably related to the original reason for the search.[173] Whether a search is justified at its inception is a significantly lower standard than probable cause. Under this standard, it would not take much for a school administrator to justify most searches. The second prong affords some protections in ensuring the scope of the search does not wander from its original purpose. In spite of the Court's statement in *Tinker* that students do not *"shed their*

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[169] *Id.* at 340.
[170] *Id.* at 341.
[171] *Id.* at 337.
[172] *Id.* at 341.
[173] *Id.*

constitutional rights . . . at the school house gate", many of those rights are significantly reduced when the student passes through that gate.[174]

III. THE RIGHT TO AN EDUCATION UNDER FEDERAL LAW

The Supreme Court has had several occasions to rule on the constitutional right to an education. Although the Court addressed education in *Brown v. Board of Education* in 1954, the real issue before the Court was racial discrimination in schools.[175] Education was just the vehicle used to overturn the "separate but equal doctrine" of *Plessy v. Ferguson*.[176] The Court consolidated Equal Protection claims from Kansas, Delaware, South Carolina and Virginia.[177] At issue was whether it was constitutionally permissible to provide education to African American children in separate public schools.[178] The lower courts in all the above states used the analysis from *Plessy* to determine whether the education provided was equal.[179] Their analysis included examination of the physical plants of the schools, the class sizes, the teacher/student ratios, among other factors.[180] None of these lower courts addressed whether separate educational facilities could ever provide an "equal" education.

In trying to discern the true meaning of the Fourteenth Amendment as it related to education, the Court provided some interesting background history of education in this country. At the time of the writing of the Fourteenth Amendment, just after the Civil War, public education was inconsistently provided.[181] The Southern states predominantly did not provide public education.[182] In those states, whites were educated privately and African Americans were not educated at all.[183] In contrast, public education was the standard in the Northern states.[184] This history is instructive in trying to discern whether the framers of the Constitution ever intended education to be considered a fundamental right. As public education was not common at the time of

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[174] *Tinker*, 393 U.S. at 506.
[175] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).
[176] *Id.* at 487-88.
[177] *Id.* at 486.
[178] *Id.* at 487.
[179] *Id.* at 488.
[180] *Id.* at 492.
[181] *Id.* at 490.
[182] *Id.*
[183] *Id.*
[184] *Id.*

the writing of the Constitution, it seems apparent that it was not explicitly enumerated as a right.[185] It would also follow, inferentially, that it was not implicitly intended as a fundamental right either.

The Court in *Brown*, however, stated that education was the "very foundation of good citizenship" and the most important function that state and local governments perform.[186] The Court further said that education was a right only if the state had undertaken to provide it.[187] The implication was that it was not a right guaranteed by the Constitution, but rather was a right that a state could, if it so chose, grant.[188] Although this was considered dicta, it foreshadowed the Court's holding in *San Antonio Independent School District v. Rodriguez*.[189]

In *San Antonio* (1973), the Court held that education was not a fundamental constitutional right.[190] The issue in San Antonio was whether the taxation scheme for financing public education in Texas afforded all state residents an opportunity to an equal education.[191] The plaintiffs contended that since the basis of taxation was property value, the towns with high property values could spend more, per pupil, on the education of their students.[192] The students in the poorer towns were, therefore, deprived of an equal education.[193] The claim was that the Texas taxation scheme violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution.[194] The plaintiffs stated their case based on two claims. The first was that wealth was a suspect class and, secondly, that education was a fundamental right.[195] The plaintiffs wanted the standard of review to be strict scrutiny, which would occur only if a suspect class or a fundamental right were in question.[196]

The Court went on to say that wealth was not a suspect class.[197] With regard to education as a fundamental right, the Court reiterated its long-standing opinion that education was the corner stone of our free society.[198] The Court referred back to its earlier opinions on the

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[185] *Id.*
[186] *Id.* at 493.
[187] *Id.*
[188] *Id.*
[189] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[190] *Id.* at 35.
[191] *Id.* at 6.
[192] *Id.* at 5.
[193] *Id.*
[194] *Id.* at 6.
[195] *Id.* at 18.
[196] *Id.* at 16.
[197] *Id.* at 28.
[198] *Id.* at 30.

importance of education discussed in *Meyer*, *Pierce*, *Yoder* and *Brown*.[199] The Court further said that many rights are of great importance, but not all are fundamental rights.[200] A fundamental right needs to be explicitly enumerated in the Constitution or inferred from its wording.[201] The Court expressed concerns that were they to consider education, as well as other important rights, as fundamental, they would in effect be acting as a super legislature.[202] If the number of rights considered fundamental by the Court were to increase, the legislative branch of government would have a difficult time tailoring laws that could curtail those rights. The legislature would be constrained by a strict scrutiny standard of review, requiring the laws to be narrowly tailored to the governmental interest.

The Court did not find that education was explicitly stated as a right in the Constitution, nor could they find it implicitly protected.[203] "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."[204] The plaintiffs contended that in order to make a person's First Amendment rights meaningful as well as a citizen's ability to meaningfully participate in elections, an education was required.[205] The Court dispensed with this line of reasoning saying that there was no guarantee of the most effective free speech or the most informed electoral choice.[206] The Court was satisfied that if a basic minimal education was provided, then the protected rights of free speech and ability to participate in elections would not be in jeopardy.[207] This case was not about depriving anyone of an education, but rather, it was about providing an unequal education.[208] With no suspect class identified and no fundamental right in jeopardy, the Court applied a rational basis of review.[209] The Court found that the Texas taxation scheme had a rational basis and was therefore, constitutional.[210]

The court also said that education was best left to state and local officials.[211] Four years later, at least in Connecticut, it appears that the

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[199] *Id.*
[200] *Id.*
[201] *Id.* at 33.
[202] *Id.* at 31.
[203] *Id.* at 35.
[204] *Id.*
[205] *Id.*
[206] *Id.* at 36.
[207] *Id.* at 37.
[208] *Id.* at 38.
[209] *Id.* at 55.
[210] *Id.*
[211] *Id.* at 58-9.

State's highest court understood the message the Supreme Court in *San Antonio* was communicating. As discussed in the next section, the Supreme Court of Connecticut, in 1977, based its decision in *Horton v. Meskill* on *San Antonio*.[212] The Supreme Court of Connecticut, in contrast to the federal decision, however, held that education was a fundamental right under the Connecticut state constitution.[213]

Two years later, in 1975, the U.S. Supreme Court decided *Goss v. Lopez*. In deciding what due process rights the Columbus, Ohio students had prior to being suspended, the court held that the students had both a property interest in an education as well as a liberty interest in their reputation.[214] The property interest found by the Court in *Goss*, was consistent with the holding of the Court in *San Antonio*. The students had a property interest which arose from living in a state where the state undertook the responsibility to provide a free public school education.[215] The finding of this property right in Ohio's provision of a free public education, rather than from an explicit or implicit Constitutional guarantee, reaffirmed the Court's view that education was not a fundamental right.[216] This was the second time the Court was called upon to address whether education was a fundamental right under the Constitution. For the second time, the Court said no.

The next time the Court had to explicitly address whether education was a fundamental right was in 1982. In *Plyler v. Doe*, the Court was called upon to decide whether Texas was required to provide a public school education to illegal immigrants.[217] At issue was a state law which denied a public school education to children of illegal immigrants.[218] The plaintiffs, in a class-action suit, brought an Equal Protection claim.[219] The Court first had to find that illegal immigrants and their children were persons under the law.[220] Having found so, the Court next addressed whether the right in question was fundamental.[221] Citing their opinion in *San Antonio*, the Court reiterated that education was not a fundamental right.[222] "But neither is it merely some

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[212] Horton v. Meskill, 376 A.2d 359 (Conn. 1977).
[213] *Id.* at 373.
[214] *Goss*, 419 U.S. at 574, 575.
[215] *Id.* at 574.
[216] *Id.* at 586.
[217] Plyler v. Doe, 457 U.S. 202, 205 (1982).
[218] *Id.*
[219] *Id.* at 206.
[220] *Id.* at 210.
[221] *Id.* at 215.
[222] *Id.* at 221.

governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."[223] The Court did, however, state that in this case, the issue was deprivation of an education, rather than the quality of the education as in *San Antonio*.[224]

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.[225]

Justice Blackmun, in his concurring opinion worried that the Texas law would create a "discrete underclass."[226]

Although the Court did not find the children to be a suspect class, the Court found the law in question inappropriately penalized the children of illegal immigrants.[227] The Court said the children had done nothing wrong; they had not crossed the border illegally.[228] Using the logic of prior opinions - that children are under the care and protection of their parents, the Court found the parents to be culpable of crossing the border illegally.[229] Their children, however, were innocent.[230] The combination of deprivation of an education, plus the children being viewed as innocent victims, resulted in the Court finding the law unconstitutional.[231] In doing so, the majority appear to apply a standard of heightened scrutiny, a standard mid-way between a rational basis and strict scrutiny. The concurring opinion of Justice Powell indicated that the majority applied a standard of heightened scrutiny.[232] In further support, the concurring opinion of Justice Blackmun indicated that the majority could have applied a standard of heightened scrutiny.[233] For the

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[223] *Id.*
[224] *Id.* at 230.
[225] *Id.* at 223.
[226] *Id.* at 234
[227] *Id.*
[228] *Id.*
[229] *Id.* at 238.
[230] *Id.*
[231] *Id.* at 230.
[232] *Id.* at 238.
[233] *Id.* at 235.

first time, the Court was holding that education was a "near" fundamental right. Based on a review of subsequent cases, however, the implied standard of review from *Plyler* has not had any precedential value.

There are two major themes that surface in addressing the importance of education in federal case law. One is the theme which arose in *Brown* and was repeated regularly thereafter; education is the most important function that the states perform.[234] The second theme arose in *San Antonio*. The business of education is best left to the state and local governments. Had the Court in *San Antonio* found that education was a fundamental right, they would have been required to find that the method of financing education, in place in every state in the nation, was unconstitutional. This would have forced all the states to scramble to find alternative ways to finance public education. It appears the Court took a results-oriented approach to ensure that nation-wide education was not de-stabilized. The Court was, however, sending a strong message to the states that the state courts were not constrained from viewing this issue more aggressively.

IV. THE RIGHT TO AN EDUCATION UNDER STATE LAW

Every state has its own constitution. Each state constitution enumerates the rights and privileges that the state affords its citizens. In some instances, the state constitution is a source of greater protection of rights than the Federal Constitution. "State constitutions provide an alternative for plaintiffs seeking to enforce civil rights that either have not been recognized or have been narrowly interpreted by the federal judicial system."[235]

Every state constitution has an education clause.[236] As the Supreme Court said in *Brown v. Bd. of Educ*., education is the most important function the states perform.[237] The State of Connecticut and the federal government view the right to an education differently. From an historical perspective, in 1964, Connecticut was the only state in the nation that did not have an express right to an education in its constitution.[238] At its Constitutional Convention in 1965, that was

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[234] *Brown v. Bd. of Educ*., 347 U.S. at 493.
[235] Roni R. Reed, Note, *Education And The State Constitutions: Alternatives For Suspended And Expelled Students*, 81 CORNELL L. REV. 582, 582 (1996).
[236] Sheff v. O'Neill, 678 A.2d 1267, 1283 (Conn. 1996).
[237] *Brown*, 347 U.S. at 493.
[238] *Sheff*, 678 A.2d at 1283.

corrected with the addition of Article eighth, §1.[239] In Connecticut, the state constitution, article eighth, section 1 provides "there shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."[240] Article eighth, §1 has been interpreted by the Supreme Court of Connecticut to mean that education is a fundamental right in Connecticut.[241] "In the realm of the state constitution, the state's highest court is the ultimate interpretive authority."[242] As noted above, the Supreme Court of Connecticut can provide more, although not less, protection for its citizen's rights under the state's constitution, than they would be afforded under the Federal Constitution.[243]

Four years after the U.S. Supreme Court decided *San Antonio*, the Supreme Court of Connecticut was called upon to address the constitutionality of Connecticut's method of financing public education in *Horton v. Meskill*[244]. The facts of the case were similar to those in *San Antonio*. The plaintiffs, representing the Town of Canton, argued that property-poor towns were forced to provide a lesser education to their children.[245] The Supreme Court of Connecticut acknowledged the U.S. Supreme Court's holding in *San Antonio* that education was not a fundamental right.[246] They found that holding to be persuasive authority, requiring *"respectful consideration,"* but concluded that the Connecticut constitution provided a greater right to an education.[247] The Court held that education was a fundamental right, and as such they would apply a strict scrutiny analysis to the method of financing public education.[248] The Court also held that the state had delegated the "obligation of overseeing education on the local level . . . to local school boards which serve as agents of the state."[249] If *Horton* is read in conjunction with *San Antonio*, it appears that the message the U.S. Supreme Court was communicating in *San Antonio* about the need for states to address the constitutionality of their own educational financing method, was heeded by Connecticut in *Horton*.

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[239] *Id.*
[240] CONN. CONST., art. VIII, §1.
[241] *Horton*, 376 A.2d at 373.
[242] Reed, *supra* note 236 at 592.
[243] *Id.* at 614.
[244] *Horton*, 376 A.2d at 361.
[245] *Id.* at 316.
[246] *Id.* at 371.
[247] *Id.*
[248] *Id.* at 373.
[249] *Id.* at 374 (quoting Murphy v. Berlin Bd. of Educ., 355 A.2d 265 (1974)).

In 1996, the issue of educational rights arose in *Sheff v. O'Neill*.[250] The issue at stake was similar to the issue in *Brown v. Bd. of Educ.*; whether the school children of Hartford were being afforded a substantially equal educational opportunity.[251] The Supreme Court of Connecticut, citing its holding in *Horton*, reaffirmed that education is a fundamental right in Connecticut.[252] The Court again distinguished its view on the right to an education from the federal view of that right.[253] As the Connecticut Court was analyzing the issue under the Connecticut Constitution, the Court was not bound by the holdings in the relevant federal cases.[254] The Court further held that their decision in *Horton*, as it related to education, was not limited to school financing.[255] The Court again held that the applicable standard of analysis was strict scrutiny.[256] In citing *Brown*, San *Antonio* and *Plyler*, the Supreme Court of Connecticut reiterated the pre-eminent role education played in American society, which had been noted in each of those decisions.[257]

The most recent, relevant Supreme Court of Connecticut case on education was *Packer v. Board of Education*, decided in 1998.[258] At issue was the legality of the plaintiff's expulsion from the town high school.[259] The plaintiff, a high school senior, was stopped by a state trooper for failing to wear his seat belt while driving his car in a nearby town.[260] The trooper noticed a marijuana cigarette in the ashtray.[261] Suspicious, the trooper searched further and discovered two ounces of marijuana and drug paraphernalia in the trunk of the car.[262] The plaintiff was arrested and the high school was notified of his arrest.[263] The plaintiff was expelled for "disrupting the educational process" at the school.[264] The Court overturned the expulsion on the grounds of vagueness.[265] The school policy and the state statute on expulsion "did

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[250] *Sheff*, 678 A.2d at 1271.
[251] *Id.*
[252] *Id.* at 1280.
[253] *Id.* at 1279.
[254] *Id.*
[255] *Id.* at 1281.
[256] *Id.*
[257] *Id.* at 1289.
[258] Packer v. Bd. of Educ., 717 A.2d 117 (Conn. 1998).
[259] *See id.* at 91.
[260] *See id.* at 91-2.
[261] *See id.* at 92.
[262] *See id.*
[263] *See id.*
[264] *See id.* at 93.
[265] *See id.* at 120.

not provide the plaintiff with constitutionally adequate notice that possession of two ounces of marijuana in the trunk of his car, off the school grounds, in the town of Morris, after school hours, without any tangible nexus to the operation of Thomaston High School, would subject him to expulsion."[266]

In addressing what constituted a disruption to the educational process at the school, the Court made it clear that a violation of a school policy did not, of itself, constitute a material disruption.[267] The Court rejected the State's contention that the high school senior had received notification, along with the entire student population, that expulsion could occur for violations of school policy, both off and on campus.[268] The State further contended that the school's policy on drug use would be undermined if the plaintiff were not expelled.[269] This argument was also rejected. The Court held the key element was how disruptive was the event in question.[270] Utilizing the meaning from the dictionary, the Court substituted "markedly interrupts" and "severely impedes" for "material disruption."[271] The discussion clearly indicated that a high threshold existed for an event to be a material disruption.[272]

The court also appeared to suggest that location had a bearing on whether an event was a material disruption. Events occurring within the school itself seemed to have a closer nexus to what could constitute a material disruption. "The legislature intended that the phrase, 'seriously disruptive of the educational process,' apply to conduct that markedly interrupts or severely impedes the day-to-day operation of a school."[273] School sponsored events, even those occurring off campus, could also, it appears, constitute a material disruption. A non-school sponsored event, occurring in a neighboring town, seemed to be too far a stretch for the Court to envision the event as a material disruption.[274]

It is interesting to note the Court made no mention of education as a fundamental right. It appears the Court wanted to reach the correct conclusion by a means that would be least disruptive to the school administrators. Had the Court applied strict scrutiny to this issue, they could have potentially set a precedent that would allow future expulsions

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[266] *Id.* at 119.
[267] *See id.* at 112.
[268] *See id.* at 110.
[269] *See id.* at 93.
[270] *See id.* at 112.
[271] *See id.* at 109.
[272] *See id.*
[273] *See id.* at 116.
[274] *See id.* at 109-10.

to be challenged through the legal process. Under a strict scrutiny analysis, the Court could have found that the school's and the State's policies regarding expulsion were not narrowly tailored enough to justify the invasion of the plaintiff's fundamental right to an education. Instead, by attacking the school policy on vagueness, the Court left the control and discipline of the school environment to the school administrators.

The magnitude of the issues at stake in these Connecticut cases appears to be important to how the Court undertook its analysis. The expulsion of a student for an off campus infraction in *Packer* appears to be a lesser issue than the state-wide financing of schools in *Horton* or the issue of having the opportunity of an equal education for all Hartford High School students in *Sheff*. It appeared that the Court did not want to apply strict scrutiny and thereby insert themselves into the administration of the schools, unless the issue was sufficiently great. It is also interesting to note that neither *Horton*, nor *Sheff*, using a strict scrutiny analysis, were concerned with the day to day administration of schools. As *Packer* was directly involved with the administration of schools, it appears that the Court looked for a less intrusive way to arrive at the correct result.

V. SUSPENSION AND EXPULSION IN CONNECTICUT

Connecticut has promulgated title 10, section 233c of the Connecticut General Statues, a statute regarding suspension.[275] The statute closely follows the principles outlined by the Court in *Goss*. A suspension can be given if the student violates a stated school policy or is seriously disruptive of the educational process.[276] The statute requires that a suspension not exceed ten days in length and that no more than ten suspensions be given in any school year.[277] The due process requirements for suspension are that the student must be provided an informal hearing prior to being suspended.[278] At the informal hearing, the student shall be notified of the reason for the disciplinary action and be provided an opportunity to explain.[279] The Connecticut statute permits the contemporaneous hearing and notice that was discussed in *Goss*.[280] In sum, the Connecticut statute limits suspensions to no more than ten

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[275] CONN. GEN. STAT. tit. 10, § 233c (2000).
[276] *See id.* § 233c (a).
[277] *See id.* § 233a (d).
[278] *See id.* § 233c (a).
[279] *See id.*
[280] *Goss*, 419 U.S. 565, 582, (1975).

days, which the *Goss* Court, implied was a minimal invasion of the student's property right in an education.[281] The minimal invasion, in accordance with the *Goss* Court, allows for minimal due process rights.

As to student expulsion, Connecticut has promulgated title 10, section 233d of the Connecticut General Statutes, which requires that an expulsion exceeds ten days, but be no longer than one school year in duration.[282] The language of what qualifies as conduct requiring an expulsion is identical to that of a suspension: violation of a stated school policy or seriously disruptive of the educational process.[283] There is specific language in the statute regarding mandatory expulsion hearings for possession of a firearm and for drug related infractions.[284] Although it is not explicitly stated, the structure and content of the policies indicate that an expulsion is just a longer and more formal suspension. The statute further requires that any pupil under sixteen years of age shall be offered an alternative educational opportunity by the State.[285] The pupil is required to attend the alternative educational opportunity, unless their parent or guardian chooses not to have them do so.[286] If the pupil is between sixteen and eighteen years of age and they wish to be provided an alternative educational opportunity, they can be offered one, provided that this is their first expulsion.[287] In the event, it is not their first expulsion, it is at the discretion of the local Board of Education as to whether to provide an alternative educational program.[288]

The due process requirements for expulsion, contained in title 4, section 177 of the Connecticut General Statutes, are that the pupil must have a formal hearing.[289] The requirements call for formal notice, in writing, of the date and time of the hearing, the legal authority under which the hearing is held, the reason for the expulsion and the evidence to be presented.[290] Additionally, the statute requires that a transcript of the proceeding must be maintained.[291] In addition, Hartford Public High School policies indicate that the pupil has the right to be represented by

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[281] *See id.* at 576.
[282] Tit. 10, § 233a (e).
[283] *See id.* § 233d (a).
[284] *See id.* § 233d (a)(2).
[285] *See id.* § 233d (d).
[286] *See id.*
[287] *See id.*
[288] *See id.*
[289] *See id.* § 233d (a)(3).
[290] Tit. 4, § 177 (b)(d).
[291] *See id.* § 177 (d).

counsel and can cross-examine witnesses.[292] The Connecticut statute on expulsions provides greater due process protections than does the equivalent statute on suspensions. It appears that the legislatures, and apparently the state courts, based on their reading of *Goss*, believe that a loss of education for more than ten days no longer involves a minimal loss of rights. When the ten-day threshold is passed, full due process rights are required.

The Connecticut statute on expulsions further reflects the idea that Connecticut considers education a fundamental right guaranteed by the state's Constitution, by requiring an alternative education be provided.[293] It is interesting to note that Massachusetts does not consider education a fundamental right guaranteed by its state constitution.[294] Accordingly, Massachusetts does not require that students who have been expelled from school be provided an alternative education.[295] The Connecticut statute on expulsion appears to do a good job of balancing the interests of the State with the rights of the student. "[W]hen the state infringes upon a fundamental right, it must demonstrate that there is a compelling government interest behind that infringement and that the classification is 'precisely tailored' to serve that interest."[296] The State is permitted to expel a student to allow the State to meet its compelling government interest in maintaining control in the school environment.[297] At the same time the student, although expelled from their school, is allowed to continue their state-sponsored education in a different environment. By providing an alternative education, the statute is tailored narrowly enough to withstand a strict scrutiny test of constitutionality.

VI. CONCLUSION

We now return to the two hypothetical clients, Jermaine and Conchita. What advice or course of action would be best for each of them?

Jermaine at fifteen years old and Conchita at fourteen years old are both minors. It would be prudent to insist that their parent or guardian accompany each of them, because children are legally

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[292] Hartford Public High School, School Policies §5131, 8 (3)
[293] Tit. 10, § 233d (d).
[294] Amy E. Mulligan, Note, *Alternative Education In Massachusetts: Giving Every Student A Chance To Succeed,* 6 B.U. PUB. INT. L.J. 629, 634 (1997).
[295] *See id.*
[296] Reed, *supra* note 236, at 615.
[297] *See id.* at 616.

considered to be in the custody of their parents. The law under *Meyer* and *Pierce* considers children dependent and immature, and therefore, in need of guidance from their care-takers.

Connecticut has a statute that requires that all of its children attend school. The State has the legal right to control the curriculum of all its schools, both public and private. Connecticut's interest in educating and training its children to be tomorrow's citizens allows it to exert a level of control that the State would not be able to exert over adults.

The legal issue confronting both of these clients is exclusion from school. The Supreme Court decisions in *TLO*, *Ingraham*, *Goss*, *Tinker*, *Bethel* and *Hazelwood* recognized that students retain their constitutional rights in the school. Each of those decisions, however, indicates that children have reduced constitutional rights in the school environment. Their rights are diminished by the compelling State interest in maintaining discipline and order in the school environment. The State's goal is to provide a safe environment for its children as well as an environment where the majority of children can learn effectively. This has led to a balancing test, weighing the State's interest against the rights of the student. The legal decisions have consistently held that the rights of an individual student can be subordinated when those rights conflict with the State's interest in educating its children, because the interest in educating a majority is higher than protecting the rights of one.

The infraction confronting both of these clients is disruptive behavior within the classroom. In essence, both clients are preventing teachers from teaching. Yet, neither client presents a danger to the students or teachers. The decisions in *TLO* and *Ingraham* indicate that the State's interest in maintaining discipline and order in the school environment is highest when safety is at issue. The State's interest is lower when danger is not present and only order is threatened. It is possible a student's rights could prevail if the State's interest is lower.

Both Jermaine and Conchita are residents of Connecticut. Connecticut, by including a clause in its Constitution, has chosen to guarantee an education to all of its children. In addition, the Supreme Court of Connecticut has held education to be a fundamental right in Connecticut.

If a lawsuit were necessary for either client, the selection of the proper forum would be very important. The choice is between bringing a lawsuit in Federal court or in State court. An education is not a fundamental right under the Federal Constitution. A federal court, in accordance with *Rodriguez* and *Goss*, would only apply a rational basis

of review. It is highly unlikely that a Federal court would overturn a disciplinary decision by a school administrator. Even though *Plyler* appeared to use a heightened level of review, it would still not suffice for a successful review of Jermaine's or Conchita's claims.

Therefore, it appears that bringing a suit in State court would be the better choice for both clients. The Supreme Court of Connecticut, in *Horton* and *Scheff*, held that education was a fundamental right and that strict scrutiny was the required level of review. Following those precedents, a State court would be required to ensure the action by the State was the least restrictive or most narrowly tailored option possible.

Bringing a suit, even in State court, however, is not likely to meet with success. The major cases on education, both at the Federal level and the State level, have paved a pretty clear path— the courts are reluctant to interfere with school administrators in the running of schools. The courts have held it is for the legislature to decide if changes in education are required. Even though the standard of review will be higher in a State court claim, it is likely that the court will find that the State has a sufficiently compelling interest in educating its student population to find the disciplinary measure narrowly tailored to a sufficient degree. Since Connecticut's statutes require an alternative education be provided, it is hard for claimants to argue they have been denied an education. The best a claimant could argue is that a different education was provided. The Court has held in both *Rodriguez* and *Goss* that it would consider deprivation of an education much more rigorously than it would consider providing a non-uniform education. A loss of an education raises the issue from *Plyler* of creating a discrete underclass. The issue of deprivation may be the reason behind the higher standard of review in *Plyler*. Given Connecticut's provision of an alternative education, neither Jermaine, nor Conchita, are exposed to a loss of an education.

As to Jermaine's five-day suspension, the primary legal advice would be to ensure he received the due process requirements called for in *Goss*. Specifically, was Jermaine apprised of the reason for his suspension and did he have an opportunity to be heard. If these minimal due process requirements were met, then Jermaine appears to have little recourse. As education is a fundamental right in Connecticut, Jermaine can ask that he continue to receive an education while he is on his five-day suspension. He would be entitled to receive his class work and homework assignments while he is suspended. The best advice to Jermaine, unless he reveals information significantly different from the above fact pattern, would be to behave himself as much as possible. It

should be explained to Jermaine that he has rights as a student. If he continues to be disruptive, however, in spite of those rights, the balance in any dispute will be tilted toward the school administrators. If Jermaine does not feel he can control his disruptions, then he should be encouraged to seek assistance in dealing with the underlying reasons.

As to Conchita's possible three-month expulsion, she needs to be advised to be well prepared for her expulsion hearing. As called for in *Goss*, an expulsion warrants greater due process protections than does a suspension. Under Connecticut statute, Conchita would be entitled to a formal hearing. She would also be entitled to be represented at the hearing. The risk of Conchita being expelled, due to her prior suspensions, is high. It is possible if Conchita is expelled, she may become one of those HPHS students who drop-out. A copy of the notice paperwork the school is required to provide her is necessary to start her defense. The notice will indicate the reason for the expulsion and the evidence to be presented. A strategy session will need to be scheduled with Conchita to weaken the school's case. A list of the school's possible witnesses and the plan of cross-examination questions will be important components of Conchita's case. Any potential witnesses planned to be called in Conchita's defense will need to be prepared. A decision will also have to be made whether Conchita wants to testify. If she elects to testify, a plan of what questions to ask her will need to be prepared. Conchita will also need to be prepared for any potential questions that may be asked by the counsel for the school.

Conchita and her mother also need to be prepared, in the event she is unsuccessful at her hearing, that she will be expelled. In that event, the school is required to provide her with an alternative education. Preparations should include any options that may exist for that alternative education. Both Conchita and her mother should be counseled on the importance of Conchita attending the alternative education opportunity. As with Jermaine, you should encourage Conchita to seek assistance in dealing with the underlying reasons for her outbursts in school.

The importance of preparing our youth to be tomorrow's citizens is a critical issue for society. As a society, we view this responsibility as shared between parents and the schools. If a significant portion of the youth we are trying to prepare for citizenship do not attend schools, the outlook for our society is gloomy. Therefore, we need to examine the reasons why students drop out of school. Concerted efforts to reduce the dropout rate will aid in developing a better functioning society. In meting out discipline, school administrators, and the courts, may want to view

the rights of students in a new light. To the extent that the infraction does not represent a safety issue, the school may want to take a more lenient view of the infraction. It appears, at least at Hartford Public High School, that suspensions and expulsions occur too frequently, and the danger of creating a discrete underclass of future Americans is considerable. If the result of these suspensions and expulsions is a permanent loss of these students, then we need to question whether Connecticut's compelling interest in educating and training its children for tomorrow, is tailored narrowly enough.