

# **Limitations Upon Legitimate Authority to Suspend and Expel K-12 Public School Students: A Moral Analysis**

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The topic of morally legitimate disciplinary authority in K-12 public schools, despite its immense importance, has received little, if any, focused attention from moral philosophers and philosophers of education. This is understandable given nearly universal agreement that disciplinary authority of staff in any school, at a primary, middle, or high school level, must be extensive and strong to assure a school environment in which learning can take place.<sup>1</sup> Morally legitimate disciplinary authority in K-12 public schools, however, has limitations. Disagreements over whether a disciplinary action in a particular case exceeds them can be intense, angry, and embittering.

This paper presents a moral analysis of the limitations upon legitimate authority to suspend and expel students in K-12 public schools. The analysis, I hope, will benefit educators, parents, and the general public in helping to identify, clarify their understanding of, and gain insight into principles, which, I believe underlie any morally justifiable policy concerning K-12 public school suspensions and expulsions.

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The paper has four sections. The first presents two case vignettes that pose difficult moral issues concerning suspensions and expulsions in K-12 public schools. The second section develops an analysis of the moral bases of a child's right to receive a K-12 public education. Section three extends the analysis in section two, relating it specifically to limitations upon morally legitimate authority to suspend and expel students in K-12 public schools. The fourth section returns to the two case vignettes and discusses the moral issues they pose from the standpoint of the analysis developed in sections two and three.

## **I. Two Case Vignettes**

### **James M.**

On May 02, 2000 James M, then fifteen years old, caused an explosion by placing a quarter stick of dynamite in a toilet at his school.<sup>2</sup> On May 06, 2000 the school district expelled him for two years, with no provision for receiving alternative educational services. In late December of 2000 James M's mother requested a special education due process hearing on the ground that the expulsion of James violated his rights under the federal Individuals with Disabilities Education Act (IDEA).<sup>3</sup> For relief she requested annulment of the expulsion and James' reinstatement as a student in good standing. She also requested an order directing the school district to develop an appropriate Individualized Educational Program (IEP) for him.<sup>4</sup> In addition, James' mother asked for the issuance of orders directing the school district (a) to provide additional education and related services as compensation for the period of time James was not educated under an

appropriate IEP, and (b) to pay the full costs of placement for him in an appropriate out-of-district residential school.

The following three items of background information are essential to understand the key legal issues in the James M. case. First, the federal Individuals With Disabilities Education Act (IDEA) places stringent requirements upon school districts, that do not apply with respect to regular education students, when taking disciplinary action in the case of a child who receives special education and related services.<sup>5</sup> Second, at the time of his expulsion James M had not been evaluated and found eligible to receive special education. For this reason he was designated as a regular education student by the school district. Third, the above mentioned requirements relative to disciplinary sanctions imposed upon special education students also apply under the IDEA with respect to a student who has not been designated as eligible for special education if the school district “had knowledge,” as defined in terms of conditions set forth in the IDEA, that he or she “was a child with a disability.”<sup>6</sup>

The hearing officer in the James M. case arrived at the following two conclusions, based upon the testimony and evidence the parties presented. First, James M. clearly qualified for special education at the time of his expulsion under the eligibility category of emotional disturbance.<sup>7</sup> Second, the statutory conditions, under the IDEA, for determining whether a school district had knowledge of a child’s disability, applied clearly in the circumstances of the case. Accordingly, the hearing officer ruled in favor of James M., and granted all the above mentioned relief James’ mother had requested.

Although clear-cut legally, the James M. case poses a troubling question. As noted above, the IDEA regulations set forth explicit conditions for establishing that a student

who received a disciplinary sanction was a child with a disability, even if, at the time of the sanction, the student had not yet been determined eligible to receive special education. What if the facts of the James M. case had been different in such a way that the above mentioned explicit statutory conditions were not satisfied? The hearing officer then would not have had any legal basis to issue an order annulling James' expulsion.

It is one thing for a hearing officer to rule in favor of a school district concerning a suspension or expulsion about which he disagrees personally, and yet believe not only that it comports with pertinent legal standards, but also falls within the limits of the school district's morally legitimate authority to discipline students. It is another thing, however, for a hearing officer to conclude that in rendering a decision he has no alternative but to uphold the legality of a suspension or expulsion that, in his judgment, vastly exceeds the limitations upon a school district's morally legitimate disciplinary authority over any public school student. Did expelling James M. for two years, without providing any alternative education, violate not only his legal rights under federal special education law but also a moral right he possessed, along with every other child in the United States, to receive a K-12 public education? If so, why? If not, why not?

### **Decatur (IL)**

On September 17, 1999 a fight broke out in the stands during a football game at Eisenhower High School in Decatur, Illinois. The fight disrupted the game. About half of the nearby spectators scattered to avoid getting hurt. The fight, however, involved no weapons and resulted in no serious injuries to anyone. Six students who had taken part in the fight (which had been recorded on videotape by a spectator), all African-American, received immediate suspensions. Upon further investigation, school authorities learned

the fight was gang related. The students belonged to rival notorious gangs, the Vice Lords and the Gangster Disciples, based in Chicago, which had spread throughout the State to smaller cities, such as Decatur, located 175 miles south of Chicago.

In late October of 1999 the School Board voted, with only one dissent, from the sole African-American board member, to expel the six students for two years, with no provision for alternative education. The School Board's decision generated immense controversy. Reverend Jesse Jackson, and other members of the Push/Rainbow Coalition, which he led, came to Decatur to take up the students' cause. In early November the Governor of Illinois and the State Superintendent of Education met with the school board and Jesse Jackson in an effort to defuse the situation. The Education Superintendent proposed that the students be given an opportunity to receive alternative schooling at a regional educational center while expelled. He suggested also that the school board allow the students to apply for readmission at the end of the fall semester contingent upon satisfactory academic work and conduct in the alternative school setting. On behalf of the students and their families, Jesse Jackson indicated that he considered the Education Superintendent's suggestions fair and reasonable. The school board, however, rejected the proposals, but, owing to intense persuasive efforts by the Governor of Illinois reduced the expulsion order to the remainder of the 1999-2000 school year, with provision of alternative schooling. Push/Rainbow Coalition attorneys filed a lawsuit in federal court protesting the expulsion of the six students.

On January 12, 2000 the U.S. District Court for the Central District of Illinois issued a decision that upheld the school board's action.<sup>8</sup> The video recording taken by one of the spectators, presented as evidence at the trial, established to the court's satisfaction that

the fight at the football game was a serious altercation, and that all six expelled students took part in it. The district court concluded that the Decatur School District clearly acted within the limits of its disciplinary authority under the Illinois School Code. Also, based upon a review of federal judicial decisions, the district court rejected as legally insufficient arguments the Push/Rainbow Coalition attorneys presented for considering the expulsions unconstitutional and racially discriminatory.

As with the James M. matter, the Decatur case, although legally straightforward, raises a troubling moral issue. Even if the Decatur School Board's decision was found to be in accord with Illinois law, and withstood legal challenges based upon the U.S. Constitution and federal civil rights laws, did the decision, nonetheless, violate the students' moral right to receive a K-12 public education? The answer to this question is far from straightforwardly apparent.

## **II. A Child's Right to a K-12 Public Education**

If a disciplinary decision involving a student falls within the scope of a school district's morally legitimate authority then although reasonable people may disagree with the decision, nonetheless, those in disagreement (morally) must defer to it.<sup>9</sup> Deference, in the relevant sense, has two key aspects, dealing respectively with action and belief. The first is simply accepting a decision. The second involves a belief that the decision maker holds a position such that the fact of her holding it constitutes (within limits) a morally decisive reason to accept the decision, apart completely from consideration of its merits. In the case of a K-12 public school disciplinary decision relative to a student, acceptance by the student's parents thus amounts roughly to the following. Even if the

parents consider the decision morally unjustified (e.g. excessively severe), nonetheless, they try to help their child get it behind her, and move forward educationally, which requires that the parents maintain efforts to cooperate with school district personnel.

By contrast, the concept of deference, understood in the immediately preceding way, cannot apply when parents believe a disciplinary decision against their child severely exceeded critical limitations upon the school district's morally legitimate authority. Parents, in such a situation may choose not to initiate legal proceedings, but, if so then their choice indicates "acceptance" of the decision only in a minimal sense of declining to undertake a usually prolonged, expensive struggle, fraught with stress, and offering only slight prospects of a successful outcome.<sup>10</sup> Rather than expressing deference, such a choice reflects an alienating and embittering awareness that they have no realistic alternative to acquiescence in the unjust treatment of their child.

Suspensions and expulsions are disciplinary measures that involve withholding provision of educational services to children. The idea, however, that governments, acting in the name of civil society, have a moral responsibility to provide educational services to children, and that, correlatively, children have a moral right to receive them, is central to the moral justification of public K-12 education understood by the vast majority of Americans.<sup>11</sup> A *prima facie* tension exists between using suspensions and expulsions as disciplinary measures and the principle that every child in the United States has a moral right to a K-12 public education.<sup>12</sup> The key issues, accordingly, as to the limits of a school district's morally legitimate authority to suspend or expel students are the following:

- What are the relevant considerations for deciding in specific cases whether or not withholding provision of educational services from a suspended or expelled student violates his or her right to a public K-12 education?
- In the case of each such consideration, why?
- Are there rules for attaching weights to the relevant considerations? If so what are their bases? If not, then what procedure should one follow to arrive at a decision, and why?

To address these issues requires first considering questions, to be discussed in the following two sub-sections, about the idea of a child's right to a public K-12 education, relating respectively to the moral bases and the contents of the right.

**Moral bases of a child's right to a K-12 public education:**

As noted above, the idea that every child in the U.S.A. has a moral right to an education is central to views about the moral justification of K-12 public schools shared by the vast majority of Americans. Consider, in this regard, the following words of philosopher Stephen Nathanson:

While many people support a free market model, and say that the distribution of goods should be determined by the market, and not by government intervention, it is remarkable that ... this view has almost no support in the area of education. Education is widely perceived ... [as] a resource that people [morally] should have a legal right to and the government [morally] should distribute to people whether or not those people are capable of paying for it. ... Even people who advocate a voucher system that fully funded education would make education a [right] in the same sense a publicly funded school system does. The distinction would be at the level of implementation rather than [moral] principle.<sup>13</sup>

The idea that K-12 public schools have as their essential purpose to provide all children the education due them as a matter of moral right likewise is crucial to moral justification of the IDEA. In this regard, states receive financial support, under the IDEA, for special education programs, provided they assure every child eligible for



services receives a free appropriate public education (FAPE). A plausible analysis to justify in moral terms the IDEA's commitment of substantial public funding for the above purpose, in my judgment, must derive the right to a FAPE for children with educational disabilities from a broader right to a FAPE, for every child in the USA. Under such an analysis, given the large expenditures often necessary to educate children with severe cognitive disabilities at even a minimal level of adequacy, increased public funding is needed to provide them a free appropriate public education, to which, like all other children, they have a right.<sup>14</sup>

The moral judgment that every child in the USA has a right to a K-12 public education accords with a world-wide consensus of a universal right to an education of all children expressed in Article 26 of the United Nations Declaration of Human Rights.<sup>15</sup> Major writings in philosophy, from Aristotle's Nichomachean Ethics and Politics through John Rawls' A Theory of Justice provide persuasive moral grounding of the notion of a universal human right to an education on the basis of diverse lines of argument, emphasizing different morally relevant factors.<sup>16</sup> Relative to the more specific idea of a right of every child in the U.S.A. to a K-12 public education, however, the following two considerations are perceived widely to have special pertinence:

1. preparation for exercising rights and fulfilling responsibilities of membership in the American democratic body politic;<sup>17</sup>
2. provision of opportunities critical for individuals to realize the basic good of self-fulfillment

Each of the above two considerations has important, deep, and complex facets analyzed in countless writing from diverse disciplinary perspectives and viewpoints. The discussion that follows immediately below makes no attempt to survey this immense

body of writings, but instead tries to place in the foreground elements of each consideration central to the moral bases of the idea of a child's right to a public K-12 education as understood widely in the United States at this time.

### **1. Democratic deliberation:**

An outlook influential among contemporary political theorists, most prominently, Amy Gutmann and Dennis Thompson, places the concept of democratic deliberation at the moral core of American democracy.<sup>18</sup> Democratic deliberation, as conceived of under this outlook, occupies a conceptual space between bargaining, on the one hand, and proselytizing, on the other hand.<sup>19</sup> Bargaining, in the clearest cases, is an activity that precedes voluntary exchange in which parties motivated by the desire to further their respective interests try to gain as much as possible while giving up as little as they can. Democratic deliberation, again in the clearest cases, has a far different focus. It involves differences of opinion over matters for public decision, and, for that reason, implicates principles and ideals of social-political morality related to concerns such as the general welfare, justice, freedom, and morally legitimate democratic authority. In democratic deliberation a party seeks to persuade others to accept his application or interpretation of such principles and ideals relative to a specific matter at issue.

Seeking to persuade, in the context of democratic deliberation, however, needs to be distinguished from proselytizing. A proselytizer attempts to convert other individuals so that their most important ethical principles and ideals relative to public matters come to coincide exactly with his own. In contrast, the idea of persuasion relevant to democratic deliberation does not aim at causing people to undergo a profound transformation leading them to renounce their deeply held convictions about social-political morality, and

embrace entirely new ones. Instead, it seeks to produce a change in how people think about a particular matter for public discussion through logical argument and rhetorical appeals grounded in a common framework of shared principles and ideals.

From the standpoint of the deliberative conception, K-12 public education is central to the functioning of American democracy. Exercising rights and fulfilling responsibilities as a member of the American democratic body politic does not require an expert grasp of public issues, but instead has the following four requirements:

- knowledge concerning fundamental aspects of the constitutional structure of American government, and basic facts of American history;
- understanding of the reasons that justify the strong right of free expression essential to democratic deliberation;
- ability to follow logical arguments on questions concerning public affairs, and, especially, to recognize logical inconsistencies;
- ability to recognize when factual evidence supports, or fails to support, a particular conclusion, and readiness to exercise this ability regardless of the factual conclusions that may ensue<sup>20</sup>

The knowledge, understanding, and abilities embodied in the above four requirements seldom, if ever, emerge naturally in the cognitive and social development of individuals. To the contrary, they require cultivation, for which, in most cases, K-12 education is indispensable. Without K-12 public education most people would lack the opportunity to acquire the knowledge and understanding, and to develop the abilities, necessary to exercise the rights and fulfill the responsibilities of membership in the American democratic body politic in a meaningful way.

## **2. Self Fulfillment:**

‘Self fulfillment,’ in the relevant sense of the term from the standpoint of the idea of a child’s right to a public K-12 education, denotes a basic human good. Philosopher Joel Feinberg writes in this regard:

There is no unanimity among philosophers, of course about that in which a human’s own good consists, but a majority view that seems to me highly plausible would identify a person’s good ultimately with his self fulfillment – a notion that is not identical with that of autonomy or the right of self determination. Self-fulfillment is variously described, but it surely involves as necessary elements the development of one’s chief aptitudes into genuine talents in a life that gives them scope, an unfolding of all basic tendencies and inclinations, both those that are common to the species and those that are peculiar to the individual, and an active realization of the universal propensities to plan, design, and make order.<sup>21</sup>

The concepts of self fulfillment and autonomy, although, as Feinberg notes, not the same, nonetheless, have a close relationship. Given that self fulfillment involves “active realization of the universal human propensities to plan, design, and make order,” it requires wide scope for choice in matters of significance to an individual throughout his or her life. The importance of choice to self fulfillment, in turn, makes evident the critical relationship between self fulfillment and education. Education not only tends to broaden the scope of realistic possibilities from which to choose, but also helps a person make choices she ultimately considers to have contributed significantly in her case to the aforementioned aspects of a human life which Feinberg identifies as necessary elements of self-fulfillment.

The idea of entitlement to education, grounded in the relationship of education to self-fulfillment, is reflected strongly in the following words that open Shakespeare’s play

All's Well that Ends Well. The speaker, a young man named Orlando, voices bitter complaint against his brother Oliver for denying him educational opportunity.

My brother Jaques he [Oliver] keeps at school, and report speaks goldenly of his profit. For my part he keeps me rustically at home, or to speak more properly, stays me here at home unkept, for call you that keeping for a gentleman of my birth that differs not from the stalling of an ox? ... That is it ... that grieves me, and the spirit of my father, which I think is within me begins to mutiny against this servitude.<sup>22</sup>

The above passage suggests that Orlando regards being “kept at school” as an entitlement due him in virtue of being, in Orlando’s words, a “gentleman of my birth.” If one replaces this phrase, however, with the term ‘human being’ then the above passage expresses not only the critical relationship of education to the basic human good of self-fulfillment, but also the idea that, in virtue of this relationship, every human being has a right to an education.

### **The Minimum Content of a Child’s Right to a K-12 Public Education**

An account of a child’s right to receive a K-12 public education must meet two conditions of adequacy. First it has to provide a clear and plausible explanation of how K-12 public education fosters knowledge, understanding abilities, and capabilities intrinsic to meaningful participation as a member of the American democratic body politic, and essential for individuals to realize the good of self-fulfillment. Second, an adequate account must set forth a systematic framework of moral analysis for guidance in controversies about how the child’s right to receive a K-12 public education applies over a wide range of diverse circumstances. Such a framework should suffice to assist in identifying important moral issues, morally relevant factors with regard to the issues, and

crucial questions to consider in evaluating the relevant factors to arrive at morally justified decisions.

Providing an account that satisfies the above two conditions of adequacy presents challenging tasks, well beyond the scope of this paper. A child's right to receive a K-12 public education entails correlative responsibilities that concerns primarily (1) payment of costs for providing K-12 public education, (2) development and implementation of educational programs, and (3) attentive concern for the educational progress of students from both individual and aggregative standpoints. Issues of justice concerning the content of each of the above responsibilities – what is, and what is not, included – and about who has the responsibility for doing or providing what – as between civil society and parents of K-12 aged school children – are often intensely controversial. Disagreements over such issues, reflecting deeply divergent moral judgments and ideological viewpoints, underlie, in large part, many, if not most, major controversies in K-12 education over matters such as curriculum, teaching methods, evaluation standards, and fairness in the distribution of educational resources.<sup>23</sup>

Preoccupation with the frequency, intensity, and depth of disagreements over vital issues concerning K-12 public education, however, should not cause one to forget a previously noted crucial observation. The idea that every child in the U.S.A. has a moral right to receive a K-12 education is shared, I believe, by the vast majority of Americans. The fact of such a consensus, in turn, reflects agreement on a few key points which, adapting H.L.A. Hart's terminology, comprise the minimum content of a child's right to a K-12 public education.<sup>24</sup> The immediately following discussion concerns elements of this minimum content, reflecting widespread agreement on objectives, development,

implementation, and distributive concerns in regard to educational programs. The discussion lays the foundation for a framework, to be developed in section three, which, I believe, is useful for identification and analysis of critical aspects of the limitations upon morally legitimate authority regarding K-12 public school suspensions and expulsions.

The minimum content of a child's moral right to a K-12 public education, in my opinion, consists of the following two principles:

1. The Right to a Reasonable Educational Program: Every child has a right to a K-12 public educational program with reasonable objectives, planned and implemented in a reasonable manner for the purpose of achieving them.
2. The Right to Equal Educational Concern: Every child who receives a K-12 public education has a right to equal educational concern on the part of the public educational agencies responsible for providing educational services for the child.

The above principles each contain a key word or phrase that stands out as in need of further elucidation – specifically, ‘reasonable’ in the first principle, and ‘equal educational concern’ in the second. Taking these matters in order, ‘reasonable,’ in the context of a child's right to a reasonable educational program, denotes something stronger than the default justification of mere non-arbitrariness, and weaker than the strong standard of preponderance of rational considerations. Reasonable educational objectives, planning, and implementation all have plausible justifications grounded in points that merit careful attention, and shift the burden of persuasion to the other side(s) of the question, at least to the extent of deserving considered responses. A justification can be plausible even if it neither identifies every relevant factor nor treats in depth every significant issue in connection with the factors it does identify. Plausible justifications simply are those a substantial number of reasonable persons could find persuasive.

In regard to a child's right to equal educational concern, the phrase 'educational concern' relates to efforts of public schools to identify and address specific areas of educational need and benefit for students. Such efforts encompass not only working with individual students but also developing policies and programmatic initiatives. Ideally a school district exemplifies equal educational concern in diverse ways such as the following:

- high degree of responsiveness to expressed concerns of all students and parents;
- individualized attention to student educational needs to the maximum feasible extent for every student;
- on-going observation (including data collection), analysis, and communication with all students to facilitate awareness of areas where educational needs can be addressed more effectively.

The above account of equal educational concern is an ideal interpretation, ranging well beyond the minimum content of a child's right to a K-12 public education. In contrast, from a minimum content standpoint, only significant failures, on the part of public schools to express concern through their actions, policies, and programs violate the requirement of equal educational concern.. Three clear examples are:

- unresponsiveness: e.g. failure to respond in a reasonable and timely way to parents' reasonable questions or meeting requests;
- indifference: e.g. failure to give heightened attention and to provide significant assistance to students in danger of failing courses;
- neglect: e.g. failure to address high drop-out rates among certain categories of students through collecting and analyzing data, and developing programs to try and address the problem.

As noted earlier, a minimum content interpretation consisting of the rights to a reasonable educational program and to equal educational concern is not enough to ground an adequate account of a child's right to a K-12 public education, also relevant to a wide



array of major concerns of educators, parents, and the general public. These two rights, however, I believe, provide the basis of a useful framework, developed in the section that follows, for identifying and elucidating the most important limitations upon morally legitimate authority to suspend and expel students in K-12 public schools.

### **III. What Does the Minimum Content of a Child’s Right to a K-12 Education Mean in the Case of Suspensions and Expulsions?**

Insofar as suspensions and expulsions necessitate withholding educational services, one cannot justify using them on the basis of their educational benefit for suspended or expelled students, other than for “teaching the students a lesson” – that adverse consequences they want to avoid result from unacceptable conduct at school. Considered solely as an educational approach, such “teaching,” it is apparent, often fails to achieve its intended purpose. Nonetheless, most educators, I believe, even those who decry what they consider widespread excessive reliance upon suspensions and expulsions, would say that no public school can accomplish its fundamental purposes without authority to suspend or expel. Educators would point, in this regard, to considerations such as maintenance of an environment in which learning can proceed, provision of basic safety and security for students, and affirmation of respect for indispensable rules of school conduct by communicating an unmistakable message that certain kinds of violations are forbidden completely. Under what circumstances, however, do the preceding kinds of considerations provide a sufficient moral justification for withholding educational services? The discussion that follows focuses upon four relevant factors for deciding

whether or not a suspension or expulsion violates a student's right to a K-12 public education.

**1. Adherence to mandated procedures under the IDEA concerning discipline of children with disabilities:**

As noted earlier, the IDEA places stringent requirements upon school districts that do not apply to non-disabled students when imposing disciplinary sanctions on children with disabilities.<sup>25</sup> In such cases the most prominent disability category is 'emotional disturbance,' defined by the IDEA's associated federal regulations as a condition exhibiting one or more of the following five characteristics over a long period of time to a marked degree that adversely affects a student's educational performance:

- (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) Inappropriate types of behaviors or feelings under normal circumstances;
- (d) A general pervasive mood of unhappiness or depression;
- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.<sup>26</sup>

Each of the above five characteristics has numerous differences of degree.

Differentiations in this regard often require nuanced, subtle, and, to a great extent, unavoidably subjective judgments. The responsibility for deciding whether the IDEA definition of 'emotional disturbance' applies in a particular case rests with a "team of qualified professionals and parents of the child."<sup>27</sup> Predictably there are frequent close calls.

Though often difficult to apply, nonetheless, the IDEA definition of ‘emotional disturbance’ has a plausible rationale. The first of the above five characteristics involves, by explicit wording, an “inability to learn.” As for the other four, without question each can have a significantly adverse effect upon a child’s capability of benefitting from educational efforts on his or her behalf. If any one of the five characteristics persists to a marked degree, for a long period of time, a child has serious problems that a school district must identify and address to fulfill its responsibilities correlative with a child’s rights to a reasonable educational program and to equal educational concern.

Furthermore, as noted earlier also, the IDEA specifies conditions under which a school district is deemed to have had knowledge that a disciplined student was a child with a disability even if at the time of his infraction he had not been evaluated and found eligible to receive special education.<sup>28</sup> If a hearing officer finds that such conditions obtain, he has authority to annul the disciplinary action and issue an order directing the school district to adhere in the case of the student to the relevant procedures mandated by the IDEA. A child’s rights to a reasonable educational program and to equal educational concern thus dictate the following two requirements. First, school districts must undertake reasonable efforts both to identify and address disability conditions, defined by the IDEA, which could result in behavior warranting suspensions or expulsions under school district rules. Second, if a student engages in such behavior, the school district’s disciplinary decisions must adhere to the mandated procedures concerning discipline of children with disabilities.<sup>29</sup>

## **2. Heightened attention to at-risk students:**

Insofar as most suspended or expelled students do not fall within the disability categories enumerated in the IDEA, the Act's procedural protections relative to discipline of children with disabilities do not apply to them.<sup>30</sup> Under the minimum content interpretation of a child's right to a K-12 public education, however, a school district's responsibilities include also heightened attention in the case of any student whose disciplinary infractions appear at risk of escalating in frequency and/or seriousness. Heightened attention to every at-risk student, regardless of whether he or she qualifies for special procedural protections under the IDEA, responds to the complex, multi-dimensional realities of human development throughout the K-12 school years. At every stage - primary grades (including kindergarten), middle school, and high school, school staff must hold a child accountable for his or her behavior while simultaneously providing significant support to help the child develop in diverse ways – e.g. emotionally, socially, and academically – that foster educational progress. Doing so often calls for firmness, combined with sound judgment that reflects fairness, understanding of developmental stages in childhood, and empathy with the circumstances of the disciplined child.

Heightened attention to at-risk students may take a number of different forms. To respond effectively when a close causal relationship appears to exist between academic difficulties (cause) and unacceptable behavior (effect), some schools have a resource person on the staff to help a student's teacher develop a plan for additional academic support.<sup>31</sup> In cases where a student's problems relate to fighting with other students, either physically or verbally, an in-school suspension that includes components such as

anger management counseling or a restorative justice program, can help resolve conflicts and provide the student valuable learning experiences about ways to settle disagreements without fighting or to prevent them from escalating out of control.<sup>32</sup> If a student's behavior problems stem from low self-esteem, interventions can be directed to helping the student develop a more favorable perception of himself. For example, as an incentive to improve behavior, in one school a student received the opportunity to spend time during the day tutoring children in the classroom of a former teacher, with whom he had had a highly positive relationship.<sup>33</sup>

Under a minimum content interpretation, the right to a K-12 public education encompasses a child's right to a reasonable educational program and to equal educational concern. Both of these rights imply a responsibility of school districts to make reasonable efforts with regard to developing and implementing approaches aimed not only at placing, but also maintaining, students on a trajectory of educational success. The limitations upon morally legitimate disciplinary authority in K-12 public education thus include a requirement of heightened attention to at-risk students.

### **3. Keeping open the door to educational opportunity:**

Suspensions and expulsions, by their nature, involve withholding provision of educational services to children. Despite this, as noted earlier, most, if not all, K-12 public school educators, I believe, would say circumstances can arise in which suspension or expulsion of a student is unavoidable. Even in such circumstances, however, the action taken must keep the door to educational opportunity open for the student.

Such a requirement looms most large relative to long-term expulsions of a year or more. Given their immensely adverse effects upon academic progress and motivation to stay in school, long-term expulsions may be imposed justifiably only if a school district has compelling reasons to do so. The expelled student's infraction must be exceptionally severe, taking all relevant considerations into account. In addition, long term expulsion must be a final resort measure. Before imposing it, school authorities must consider with utmost thoroughness whether they can identify a significantly less severe sanction with equal, if not greater, justifying force.<sup>34</sup>

If school authorities conclude they have no reasonable alternative to imposing a long term expulsion the expelled student must be provided an opportunity to receive alternative education. A meaningful alternative education program must place substantial emphasis upon utilizing educational approaches to maintain, or help strengthen, a student's motivation to succeed and to increase his level of self understanding, especially concerning the aspects of his behavior and attitudes which led to the long term expulsion. The program must have sufficient academic content, taught competently, so that the students, who make reasonable effort can avoid falling hopelessly behind. In the case of some students, however, a meaningful alternative education program may focus upon other objectives than facilitating return to a regular public school placement. Such a program, for example, may provide academic preparation needed for obtaining a general education diploma (GED), combined with transition services reasonably calculated to help a student make intelligent choices concerning vocational direction, and to get off to a good start along his chosen path upon leaving the program.

As developed in section two, a child's moral right to receive a K-12 public education is grounded in the indispensable relationship that education bears, for most people, to two goods. These goods are: (i) meaningful participation as a member of the American democratic body politic, and (ii) attaining self fulfillment, which everyone has a basic human right to seek. From the standpoint of either of the above considerations, as well as from a purely cost-benefit public policy standpoint, one is hard pressed to think of a worse approach to school discipline than long term expulsion without meaningful alternative education. Such an approach makes it all but certain that expelled students will drop out of school, a consequence correlated strongly with a bleak future that includes unemployment, necessity to rely upon public assistance, substance abuse, and/or incarceration for criminal activity. A child's rights to a reasonable K-12 public school educational program and to equal education concern encompass a responsibility of school districts to provide meaningful alternative education for students upon whom long term expulsions are imposed.

#### **4. The internal morality of discipline and punishment:**

Morally legitimate disciplinary authority in K-12 public education must satisfy reasonable requirements concerning (i) notice, (ii) due process, (iii) impartiality, and (iv) proportionality. Such moral requirements apply, although in different ways, to any system of authority to impose discipline or to punish, as found, not only in K-12 public schools, but also, for example, in the criminal law, the military, the family, and the workplace. Moral requirements relating to notice, due process, impartiality, and proportionality are intrinsic to discipline and punishment in the following sense. Relevant requirements in the above four areas for a given disciplinary or penal system are

grounded in the defining purposes of the system, that is, the purposes which, in the words of Thomas Hobbes, differentiate discipline and punishment from mere expressions of “hostility.”<sup>35</sup> Adapting Lon L. Fuller’s terminology, one may refer to the above requirements as the internal morality of discipline and punishment.<sup>36</sup>

State school codes typically specify legal requirements for school districts concerning notice and due process. In regard to the latter, the U.S. Supreme Court’s decision in *Goss v. Lopez* sets out due process requirements for short-term suspensions (ten days or less), which the opinion of the Court grounded in the Fourteenth Amendment due process clause.<sup>37</sup> Questions about the adequacy of due process protections in the case of particular suspensions or expulsions can generate strong dispute. Widespread agreement exists, however, on two key general points. First, due process rights of K-12 public school students with respect to suspensions and expulsions must achieve a reasonable accommodation between assuring fair treatment to students and avoiding encroachment upon morally legitimate decision making authority of school personnel. Second, a system of due process rights far narrower than the full range of protections to which a defendant in a criminal trial is entitled can achieve such a reasonable accommodation.

Anyone duly authorized to impose discipline or punishment has a duty of impartiality. The duty requires that the actions of an authorized person concerning discipline and punishment with respect to a group subject to her authority must not be influenced by which individuals in the group will be harmed or benefitted.<sup>38</sup> Breaches of the authorized person’s duty of impartiality stemming from negative attitudes on her part towards a specific individual – e.g. imposing more severe discipline upon the individual than upon others in similar circumstances – constitute animus, while breaches reflecting positive



attitudes toward a specific individual – e.g. leniency toward the individual not accorded others – display favoritism. Animus and favoritism are discriminatory when an authorized person bases her action upon an attribute belonging to all members of a subgroup within the group over which her authority to discipline or punish extends. Discrimination, in the above sense, upon any basis violates the duty of impartiality that is a part of the internal morality of discipline and punishment.

As for proportionality, the critical question is: To what must suspensions and expulsions be proportional? The minimum content of a child's right to a K-12 public education suggests the following plausible answer. Suspensions and expulsions exemplify the attribute of proportionality to the extent they satisfy the following two conditions:

- (a) The suspension or expulsion at issue is reasonably considered necessary for giving effect to the two minimum content rights of the other students – i.e. their rights to a reasonable educational program and to equal educational concern;
- (b) The suspension or expulsion is implemented in a manner reasonably considered to give effect to a suspended or expelled student's two minimum content rights, taking into account the circumstances that resulted in the decision to suspend or expel the student.

Major differences of opinion can arise about how to apply conditions (a) and (b) above to circumstances surrounding particular suspension and expulsion decisions. Nonetheless, I believe the vast majority of disputants in such cases would acknowledge both conditions as essential to a common moral framework within which to discuss and debate their disagreements on reasonable terms. Apropos condition (b) specifically, all agree (insofar as they reasonably consider the issue) that a suspended or expelled student, like any other, has rights to a reasonable educational program and to equal educational concern.

What these rights mean, however, in light of the circumstances giving rise to a decision to suspend or expel is not readily apparent. In my opinion the principal elements of these rights relative to suspended or expelled students concern matters (1), (2), and (3) discussed above – that is, adherence to mandated procedures concerning discipline of children with disabilities under the IDEA, heightened attention to at-risk students, and keeping open the door to educational opportunity.

**Can one enunciate plausible rules or guidelines for attaching weights to the four relevant factors for deciding if a suspension or expulsion violates a child’s right to receive a K-12 public education?**

The four relevant facts referred to in the above question are:

1. adherence to mandated procedures under the IDEA concerning discipline of children with disabilities;
2. Heightened attention to at-risk students;
3. Keeping open the door to educational opportunity;
4. The internal morality of discipline and punishment.

Relevant factors 1, 2, and 3 all are direct corollaries of the minimum content of a child’s right to receive a K-12 public education – that is, the rights to a reasonable educational program and to equal educational concern. Relevant factor 4 concerns moral requirements intrinsic to any authority system for imposing discipline or punishment. Accordingly, if a suspension or expulsion is gravely deficient from the standpoint of one or more of relevant factors 1 through 4 then it violates a child’s right to receive a K-12 public education, and thereby exceeds a public school district’s morally legitimate disciplinary authority.

Development of guidelines for deciding when a suspension or expulsion is gravely deficient with respect to each relevant factor requires efforts to arrive at general conclusions based upon reflective consideration of numerous diverse specific cases. Toward this end section four, which follows immediately, revisits the James M. and the Decatur, Illinois cases, discussing them in terms of the analyses set forth both in this section and in section two that preceded it.

#### **IV. The James M. Case and The Decatur, Illinois Case Revisited**

##### **The James M. Case:**

At the time the school district expelled James M. it had not designated him as eligible to receive special education. Based upon evidence and testimony presented at the due process hearing in the James M. case, however, the hearing officer concluded that the IDEA's conditions for deeming a school district to have had knowledge that a student was a "child with a disability" applied clearly with respect to James. The expulsion of James M. thus was gravely deficient from the standpoint of the first of the four relevant factors identified and discussed in section three – adherence to mandated procedures for discipline of children with disabilities under the IDEA. The expulsion, however, had grave deficiencies as well in terms of the other three relevant factors, each of which is discussed immediately below:

##### **Heightened attention to at-risk students:**<sup>39</sup>

James' grades fluctuated between mediocre and failing throughout the 1999-2000 school year. After the mid-term grading period in the first term (of four) during the school year, James was placed in a class designed to provide academic support, including

help with homework and developing study skills. At the time of his expulsion, however, when his grades reached their lowest point (Two F's and a D+), it appears, for inexplicable reasons, that James no longer was enrolled in the program.

By May 06, 2000, when the school district expelled James, he had amassed nineteen disciplinary infractions throughout the school year. Early in the fall James' mother communicated her concerns that James was using drugs to the Assistant Principal with responsibility for dealing with disciplinary issues. At this time she inquired of him about the possibility of implementing for James a program she had heard about under which, with parental consent, a student is subjected to random drug testing in school. The Assistant Principal said he would investigate, but never got back to her about it. Later in the fall (December, 1999) a truant officer found James and a friend smoking marijuana in the friend's home during school hours, and returned them to school.

James was sent home from school in April of 2000 for shouting profanities in a school corridor. That evening he attempted suicide by ingesting twenty-six tablets of Ritalin, his prescribed medication for Attention Deficit Hyperactivity Disorder (ADHD). James' mother brought him to a hospital emergency room immediately. He was released the next day fortunately alive and unharmed. James' mother promptly informed the Assistant Principal of the attempted suicide, discussing it with him at school for approximately a half-hour.

The following two conclusions are readily apparent: (1) James M. was a seriously at-risk student; (2) The school district failed to meet its responsibility of heightened attention with respect to James.

Keeping open the door to educational opportunity:

In the case of a student who receives a long-term suspension or expulsion, keeping open the door to educational opportunity requires provision of meaningful alternative education. The expulsion imposed upon James M. utterly failed to satisfy this requirement. For the reasons developed in the preceding section, such failure can neither be reconciled with the principal considerations grounding a child's moral right to receive a K-12 public education nor justified even from a purely (non-moral) cost-benefit public policy standpoint.

The internal morality of discipline and punishment: proportionality:

One cannot reasonably minimize the seriousness of the disciplinary infraction resulting in James' expulsion, which could have caused grave injury to other students or himself. Under the 1994 Gun Free Schools Act in order to receive federal funding support for K-12 education States must assure that every school district has promulgated disciplinary rules mandating expulsion of no less than one year for students found possessing weapons or explosives at school.<sup>40</sup>

James explained his behavior as an intended prank, instigated by another student, to get them both sent home from school for the day. None of James' prior disciplinary infractions indicated either specific intention or desire to inflict harm upon other students. The IDEA's specified conditions for deeming a school district to have "had knowledge" that a student was a child with a disability are highly stringent.<sup>41</sup> For this reason the considerations indicated immediately above, even combined with the aforementioned failures concerning heightened at-risk attention to James M, would not have sufficed to support a legal conclusion that the Act's procedural protections relative to discipline of

children with disabilities applied to James. Additional facts in the case, however, to use Justice Oliver Wendell Homes' memorable simile, sufficed to "turn the color of legal litmus paper."<sup>42</sup> What if such additional facts had not been present? Even in such a (hypothetical) circumstance a two year expulsion would be completely unjustifiable. The disciplinary sanction called for, at most, would consist of a one-year expulsion, with availability of a meaningful alternative education program, designed to help James address his serious behavioral problems, avoid falling far off-track academically, and understand the dangerously irresponsible character of his behavior that resulted in expulsion.

#### **The Decatur, Illinois Case:**

Discussion of the Decatur, Illinois case still generates intense differences of opinion at this time (2011), nearly ten years after the events in controversy took place.<sup>43</sup> Despite the widespread media attention the case received, however, only limited information is available concerning a number of important matters apropos the analysis of relevant factors, developed in section three, for determining whether a suspension or expulsion violates a child's right to receive a K-12 public education. The analysis in section three, nonetheless, provides useful guidance for identifying the kinds of additional information one would need to make such a determination in the Decatur, Illinois case.

One point is indisputable at the outset. The Decatur School Board's initial decision to impose two-year expulsions, with no alternative education, violated the right of the expelled students to receive a K-12 public education.<sup>44</sup> The crucial issue requiring further analysis is whether the same conclusion applies to the Board's subsequently imposed one-year expulsions, with alternative education provided. No one can

reasonably deny that fighting in school is a very serious matter. One also needs to acknowledge the reality, however, that it occurs often, not only in “tough” schools, but also as well in many other kinds of K-12 public school environments. Expulsion of one-year (even with alternative education) for fighting in school when neither weapons were involved nor serious injury resulted, far exceeds the disciplinary norm under such circumstances.

One must recognize, however, conditions relative to a given situation could justify school authorities in concluding they needed to convey an especially strong message about the impermissibility of fighting – e.g. if they had specific well-founded concerns about dangerously violent gang conflict spilling over into a school. To my knowledge, however, the media coverage of the Decatur, Illinois case provides no information concerning whether school officials had good reason to believe such conditions existed when the fighting at the football game took place.

The one-year expulsion the Decatur School Board imposed upon the six students, reduced from two years after intense persuasive efforts by the Governor of Illinois, provided for the students to receive alternative education during the expulsion period. Press reports indicate in this regard that an alternative education center agreed to admit the six expelled students at the request of the State Superintendent of Education. As developed in section three, the kind of alternative education required for a long-term expulsion to avoid violating a child’s right to receive a K-12 public education must be meaningful. It must, for example, place substantial emphasis upon utilizing educational approaches to maintain, or help strengthen, a student’s motivation to succeed, and to increase his level of understanding, especially concerning the aspects of his behavior and

attitudes which led to the long-term expulsion. The program must have sufficient academic content, taught competently, so that students, who make the necessary effort, can avoid falling hopelessly behind. The press reports about the Decatur, Illinois controversy, insofar as I could determine, contain no specifics at all about the content of the alternative educational program made available to the six expelled students.

The press reports on the Decatur, Illinois case provided insufficient information as well on the following crucial questions. Were any of the six students clearly at risk of getting into serious trouble in school, warranting a long-term expulsion, prior to the fight at the football game? If so, did they receive reasonable heightened attention from school staff? In addition to the considerations set forth in section three, heightened attention to at-risk students is essential to avoid immense difficulties that arise under the following circumstances: (i) the school district expels a student; (ii) the student was at-risk prior to expulsion; (iii) the school district failed to meet its responsibility of heightened concern with respect to the student.

One can never say with certainty that heightened attention to an at-risk student would have prevented behavior resulting in his expulsion. Given that the student was at-risk, however, his right to receive a K-12 public education entailed a correlative school district responsibility of reasonable heightened attention that might have made the difference. When school district staff fail to meet the above responsibility, and an at-risk student then gets into serious trouble, the question of what to do next becomes very difficult to resolve. In such situations one often wishes it were possible to start all over again, which usually is not the case.



To bring the point of the preceding discussion into focus, the following three matters, about which it appears insufficient information is available, have great significance for analyzing the Decatur, Illinois case in terms of a school district's morally legitimate authority to suspend or expel students:

- i. Were there reasons why specific conditions at Eisenhower High School made it imperative to convey an especially strong message, through the disciplinary sanction imposed on the six expelled students, about the unacceptability of fighting in school, including school sponsored events?
- ii. Did the alternative education provided for the six expelled students include the essential features of a meaningful program?
- iii. Were any of the six expelled students at-risk prior to the expulsion, and, if so, did they receive reasonable heightened attention from school staff ?

After the Decatur School Board reduced the expulsion to one year, with alternative education, the controversy might have ended had the school district been able to provide reasonable answers to the above questions at the meeting with the Illinois Governor, the State Superintendent of Education, and Jesse Jackson.

The preceding discussion has emphasized the moral importance for the Decatur, Illinois case of two among the four relevant factors that the account in section three identifies – heightened attention to at-risk students and keeping open the door to educational opportunity. Many of the commentators who voiced opinions on the case at the time it drew widespread media attention took hard lines against the six expelled students, expressed in strong words, but without explicit articulation of the key moral premises underlying their respective stances. Most of the commentators, however, I believe would have objected to the emphasis in the preceding discussion on the two above mentioned relevant factors for both of the following two reasons. First, they would have said that the six expelled students forfeited their right to receive a K-12 public

education by their unacceptable conduct. Second, the commentators would have objected that if school districts became preoccupied with heightened attention to at-risk students and keeping open the door to educational opportunity their decisions concerning suspensions and expulsions thereby would be prone to excessive, and hence, morally unjustifiable, leniency.

The above two hypothesized reactions warrant the following considered responses. The first hypothesized reaction involves the claim that by their behavior the students forfeited their right to receive a K-12 public education. To consider such a viewpoint in a thoughtful manner requires that one first analyze closely the following general issue. What conditions must obtain in any case where one has reasonable grounds for concluding that a person has forfeited a moral right through morally unacceptable conduct? I regard the following two conditions as essential:

1. The person is aware fully, or should be aware fully, that his/her morally unacceptable behavior (e.g. intentional killing of a human being) could result in forfeiture of a moral right (e.g. the right to freedom).
2. It is morally justifiable for an authority system (e.g. the legal order of a given civil society) to mandate forfeiture of the moral right as a consequence of the person's morally unjustifiable conduct (e.g. laws specifying the punishment for homicide).

The next question in order of logical priority is how the above two conditions apply to the question of whether a student has forfeited through his conduct the right to receive a K-12 public education. In cases where disciplinary authority lies with public school districts (rather than elsewhere) the following two conclusions seem evident to me.<sup>45</sup>

First, it is unreasonable to regard condition 1. as applicable under any circumstances to students below the age of sixteen, given their lack of experience and maturity.<sup>46</sup> Second,

while condition 1. could apply in diverse cases involving some older students, for reasons developed immediately below, condition 2. never applies to K-12 students of any age.

In regard to the second of the above two conclusions, one needs to keep in mind that, from the standpoint of the right to receive a K-12 public education, the relationship between a student and a school district is not bilateral, as in a contractual relationship between two purely private parties. In contrast, school districts are public bodies established to serve public purposes of the utmost importance related to preparation for meaningful participation as a member of the American democratic body politic, and provision of education essential for self-fulfillment, which everyone as a basic human right to seek. The fact that a student has engaged in unacceptable conduct with full awareness that doing so could result in a disciplinary sanction tantamount to losing the right to receive a K-12 public education – e.g. a two-year expulsion – therefore does not suffice to justify imposing the sanction upon him. To the contrary the sanction is morally unjustifiable insofar as it lacks a reasonable basis from the standpoint of either of the two basic considerations grounding a child’s right to receive a K-12 public education.

I suggested above also a second reaction toward the analysis I presented of the Decatur, Illinois case that many who took a hard line against the six expelled students might have expressed. They would have disagreed, I said, with the idea that school districts must regard heightened attention to at-risk students and keeping open the door to educational opportunity as strong moral requirements with respect to the imposing of suspensions and expulsions. Such an attitude, in their view, I opined, would place school districts on a slippery slope downward toward a norm of excessive, and hence, morally

unjustifiable, leniency that fails to uphold the educational rights of all students within the scope of the school district's responsibility.

I regard the above concern as both mistaken and misguided. No one is infallible. In some instances conscientious efforts by school staff to focus heightened attention upon at-risk students and to keep open the door to educational opportunity for suspended and expelled students could go too far in the direction of leniency. Not according such factors significant concern, however, has far more grave consequences. The right to equal educational concern central to the minimum content of a child's right to receive a K-12 public education requires that one must interpret a suspended or expelled student's educational rights in such a way as not to infringe upon the educational rights of other students. No plausible interpretation, however, could support the view that upholding the educational rights of other students necessitates adopting a stance that students who commit serious disciplinary infractions thereby may lose their educational rights completely.

From a moral standpoint, heightened attention to at-risk students and keeping open the door to educational opportunity for suspended or expelled students are not discretionary measures for public school districts. Instead, for the reasons set forth in sections two and three, one must regard them as requirements grounded in the rights to a reasonable educational program and to equal educational concern that comprise the minimum content of a child's right to receive a K-12 public education.

### **Concluding Statement**

Imposing discipline upon a K-12 public school student is never enjoyable, and, often painfully difficult. The difficulty, for thoughtful individuals can include among its

aspects an uncomfortable gnawing sense of moral uncertainty that stems from the following realization. Hovering in the background of specific matters for decision in a school discipline case often are broad, deep, and fundamental, yet insufficiently analyzed issues about the limits of morally legitimate authority to discipline students in K-12 public schools. I hope the analysis developed in this article will benefit educators, parents, and the general public in helping to identify, clarify their understanding of, and gain insight into principles, which I believe underlie, any morally justifiable approach concerning K-12 public school suspensions and expulsions.

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## **ENDNOTES**

<sup>1</sup> The following words of Justice Harry Blackmun express a highly prevalent view in this regard:

Maintaining order in the classroom can be a difficult task. A single teacher often must watch over a large number of students, and, as any parent knows, children at certain ages are inclined to test the outer boundaries of acceptable conduct and to initiate the misbehavior of a peer if that misbehavior is not dealt with quickly. ... Thus the Court has recognized.. [in *Goss v. Lopez* 419 U.S. 565,580 (1975)] that "[e]vents calling for discipline are frequent occurrences and sometimes require immediate effective action." *New Jersey v. T.L.O.* 469 U.S. 325, 352 (1984)

The sole source of principled dissent from the above view, of which I'm aware is found in the writings of anarchists, such as Tolstoy which, to understate the matter, most people consider immensely implausible – e.g. “Leave [children] alone and see how simply and naturally [conflict] will settle itself. ... I am convinced that ... the school has no right and ought not to reward and punish; that the best policy and administration of a school consist in giving full liberty to the pupils to study and settle their disputes as they

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know best.” (Leo Tolstoy, “The School at Yasnaya Polyana” in *Patterns of Anarchy* (ed.) Leonard I Krimmerman and Lewis Perry (Doubleday Anchor, 1966) pp. 476-77

<sup>2</sup> *Reed Custer CU School District 255* (2001) 35 IDELR 246

<sup>3</sup> Under the IDEA (renamed in 2004, The Individuals With Disabilities Improvement Act) states receive financial support for special education programs provided they assure that every eligible student receives a ‘free appropriate public education’ (FAPE), provided ‘to the maximum extent appropriate’ in the ‘least restrictive environment.’ (LRE) (20 USC (a) (I) (5)). The IDEA delineates extensive procedures that states accepting funds under the Act must assure are followed by school districts. In this regard, school districts must initiate ‘child find’ efforts to identify every child among those they serve who may have special education needs. Having identified such students, school districts must then decide in each case whether to conduct a full evaluation to determine a child’s eligibility for services. In the case of children who are evaluated and found eligible, school districts must provide individualized educational plans (IEPs), developed through conference meetings of teachers and school staff who will implement the student’s program. Under the IDEA, a student’s parents must be invited to participate in the IEP conference meeting.

The IDEA also provides a range of parent or guardian rights in regard to diagnostic evaluations of the student in connection with the conference meetings. Furthermore, under the IDEA the states that accept funds must set up a system of due process review, enabling a parent or guardian who dissents from the conference recommendations concerning the student’s educational program to challenge the recommendations before an impartial hearing officer in a proceeding referred to in the IDEA as an ‘impartial due process hearing (20 USC 1415 (f)). The IDEA gives parents or guardians and, school districts as well, a right of appeal to federal or state court from a hearing officer’s decision in a due process hearing.

<sup>4</sup> See note 2.

<sup>5</sup> 20 USC 1415 (k) Here are some of the most important responsibilities of public school districts in this regard. If a child with an educational disability has been suspended for up to ten days then before any further day of suspension may be imposed, a school district must conduct a special meeting to decide whether or not the infraction giving rise to the contemplated next (11<sup>th</sup>) day of suspension was a manifestation of the child’s disability. If so decided then a functional analysis (an inquiry into the circumstances tending to trigger the child’s unacceptable behavior) must be done, and a behavioral intervention plan put in place, in the event that such has not yet been done. When a child already has a behavioral intervention plan then the plan must be modified appropriately, or, if needed, an entirely new plan developed. If the child is deemed to present a danger to himself or others he may be placed in an interim educational setting for up to forty-five (45) days before returning to his educational placement or to a new placement decided upon for him. Parents who want to challenge a school district’s decision relative to any of the

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preceding matters have a right to a hearing presided over by an impartial hearing officer. The hearing officer's decisions may be appealed either to federal or state court.

<sup>6</sup> Under the IDEA a school district is considered to have had knowledge that a student is a child with a disability if before the behavior that precipitated a disciplinary action occurred: (a) the parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (b) the parent of the child has requested an evaluation of the child pursuant to [20 U.S.C.] sec. 1414(a)(1)(B); or (c) the teacher of the child, or other personnel or the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

An exception to the above rule applies, however, if the parent of the child has not allowed the School District to evaluate the child, has refused services, or if the child has been evaluated and it was determined that the child is not a child with a disability. 20 U.S.C. sec. 1415(k)(5) (Supp. 2004)

<sup>7</sup> See p. 18

<sup>8</sup> *Fuller v. Decatur Public School Board of Education School District 61* 78 F.Supp 812 (2000)

<sup>9</sup> In more formal terms, I understand morally legitimate authority as a relationship between an authority holder and a subject such that the authority holder has a moral right to deference of the subject, and, correlatively, the subject has a moral duty of deference to the authority holder. On the relationship between the concepts of authority and deference see Joseph Raz, *The Morality of Freedom* (Oxford, 1986) pp. 38-69

<sup>10</sup> Public School officials possess broad, powerful, and, for the most part, legally unfettered authority under state school codes, which courts, including the U.S. Supreme Court, have upheld consistently with few exceptions. For example, as noted in the preceding summary of the James M. case, the Illinois School Code authorizes school districts to expel students for up to two years, with no provision made for alternative education (105 ILCS 5/10-22.6 (d)). As for constitutional limitations upon the disciplinary authority of public schools, in *Ingraham v. Wright* 430 US 651 (1977) the Supreme Court held that the protection of the eighth amendment, with respect to the imposition of cruel and unusual punishment only applies to punishment under the criminal law, and not to school discipline. (The petitioner in *Ingraham v. Wright* complained that he was struck with a paddle twenty times while being held over a table in the principal's office. The paddling was so severe, he reported, that he suffered a hematoma requiring medical attention and keeping him out of school for 11 days.) The Supreme Court has held that students have fourth amendment rights to freedom from unreasonable searches and seizures (*New Jersey v. T.L.O.* 469 US 325 (1985)), but the

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Court interprets these rights narrowly. The Court ruled in *New Jersey v. T.L.O.*, for example, that a school search need only be based upon reasonable grounds to believe that the student has violated rules of the school. School district officials need not obtain search warrants and are not subject to the fourth amendment requirement of probable cause to believe that the subject of the search has violated the law. The Supreme Court also has held that public school students have a right, under the fourteenth amendment, to a disciplinary hearing upon suspension. Such a hearing, however, in the case of suspensions of ten days or less, need only afford “rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.” *Goss v. Lopez* 419 US 565, 582 (1975) The Court has not, as yet, considered the issue of whether the fourteenth amendment requires more stringent procedural safeguards relative to longer term suspensions and to expulsions.

<sup>11</sup> Throughout this brief discussion of the importance for American democracy of K-12 public education I make use of the terms ‘civil society,’ and ‘body politic,’ so here is what I understand them to mean. In this regard the following threefold distinction, denoted by the three phrases employed respectively in the special senses explained below, seems helpful to me.

Civil Society: a social order in which morally legitimate governmental authority exists. This means that some person(s) or other has (have) a moral right to govern, and, correlatively, every other member of the civil society has a moral duty to obey.

Government: The totality of institutions and practices through which morally legitimate governmental authority is exercised in a civil society;

Body Politic: the totality of persons - both natural (i.e. human beings) and artificial (i.e. formal organizations) - subject to the directives of the person(s) who possess morally legitimate governmental authority.

<sup>12</sup> I follow the conception of moral rights John Stuart Mill adopts in *Utilitarianism*. Under this conception moral rights are claims of such moral force as to (morally) require protection in the form of legal rights. Accordingly, moral rights provide a standard of justice running deeper than the law. That is to say, legal rules are unjust if they violate moral rights. In regard to the preceding points, Mill states:

When ... a law is thought to be unjust, it seems always to be regarded as being so in the same way in which a breach of law is unjust, namely by infringing somebody’s right, which, as it cannot in the case be a legal right, receives a different appellation and is called a moral right.

(ed. Oskar Piest (MacMillan, 1957) p.55

<sup>13</sup> “Are Special Education Programs Unfair to Non-Disabled Children? Justice, Equality, and the Distribution of Education,” *Boston University Journal of Education* 180, no. 2 (1998) pp. 25-26

<sup>14</sup> See Robert Ladenson, “The zero-reject policy in special education: A moral analysis,” *Theory and Research in Education* 3 (3) 2005 pp. 273-98



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<sup>15</sup> Article 26 states; Everyone has the right to an education. Education shall be free, at least in the elementary and fundamental stages. Education shall be directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms.

<sup>16</sup> *Nichomachean Ethics* ed, J.A.K. Thompson (Penguin, 1953), *Politics* ed. T.A. Sinclair (Penguin, 1962), *A Theory of Justice* (Harvard, 1971)

<sup>17</sup> For my understanding of the term ‘body politic’ see note 11.

<sup>18</sup> *Democracy and Disagreement*, (Harvard, 1996)

<sup>19</sup> The account of the distinction between democratic deliberation, bargaining, and proselytizing that follows is taken from my article, “The Educational Significance of the Ethics Bowl,” *Teaching Ethics* vol. 1, no. 1 2001 pp. 73-75; See also my article “Teaching Civility for Democratic Deliberation” in *Civility in Politics and Education* ed. Deborah Mower and Wade Robison (Routledge, *forthcoming*, September, 2011)

<sup>20</sup> I develop each of the above four requirements in more detail in “Teaching Civility for Democratic Deliberation,” cited at note 19.

<sup>21</sup> “The Child’s Right to an Open Future,” in *Whose Child?* ed. William Aiken and Hugh LaFollette (Rowman and Littlefield, 1980) p. 143

<sup>22</sup> (Signet, 1963) pp. 3-4

<sup>23</sup> My use of the term ‘ideological’ here follows Bernard Gert. Gert counts as ideological disputes “about human nature or the nature of human society that cannot be resolved and that result in disagreement on public policy.” (*Morality*, Oxford, 2005) p. 238

<sup>24</sup> *The Concept of Law* 2<sup>nd</sup> ed. (Oxford, 1994) p.p.193-200

<sup>25</sup> See note 5

<sup>26</sup> 34 CFR 300.7(c)(4)(i)

<sup>27</sup> 20 U.S.C. 1414(b)(4)(A)

<sup>28</sup> See note 6

<sup>29</sup> By far the most problematic aspect of the IDEA’s rules and regulations relative to discipline of children with disabilities concerns the manifestation determination process, which comes into play after a child has been suspended for ten school days. (34 C.F.R. 300.530 (e)) The process requires school district staff to decide in the case of the next disciplinary infraction warranting suspension under school rules whether the student’s

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conduct was a manifestation of his disability, in which case extensive further requirements apply in regard to providing the student an appropriate educational placement. (34 C.F.R. 300.530 (f) (g)). The manifestation determination process has been criticized strongly for the following reason. Educators can (although often with difficulty) make determinations as to whether or not a student qualifies for services under the IDEA disability category of emotional disturbance. Neither educators, nor anyone else, however, can say if a student's identified emotional disability condition was a primary cause of unacceptable conduct at school in a specific circumstance. The question at the heart of the manifestation determination process thus raises a problem that parallels closely the fundamental difficulty besetting the insanity defense in criminal law – that the task of applying the relevant legal standard poses unanswerable questions.

I cannot see any way to avoid the above criticism of the manifestation determination process. Unfortunately, however, as with the insanity defense, it seems to me that abolishing the process would pose equally, if not more troubling issues. Similar to the insanity defense, there are essentially two alternatives to requiring that school districts determine whether the conduct precipitating a disabled student's 11<sup>th</sup> day of suspension was a manifestation of his disability. First, every student with a disability could be treated no differently from non-disabled students relative to discipline. Such an approach, however, has the unreasonable consequence of eliminating 'emotional disturbance' as a category of disability altogether, given that, under the IDEA, the indicators of emotional disturbance all are exemplified inherently through behavior often of a kind involving disciplinary infractions – e.g. truancy, disruption, insubordination, fighting, etc. Second, at the other extreme, students with disabilities could receive differential treatment from non-disabled students in every circumstance – that is, without undertaking a manifestation determination review. Apart from the justified resentment this approach would arouse from non-disabled students, it conflicts as well with a disabled student's right to receive a reasonable educational program for the following reason. The manifestation determination process, albeit unsuccessfully, attempts to address an educationally relevant issue – does a student possess the knowledge, understanding, and capability for self-control needed in order for the imposing of school discipline, at least under highly favorable circumstances, to be a learning experience for him or her? If so, then disciplinary sanctions predicated on the opposite premise deprive the student of an important educational experience, and therefore conflict with his right to receive a reasonable educational program.

<sup>30</sup> Under the IDEA the term 'child with a disability' means a child with respect to whom (i) and (ii) below both apply:

- (i) the child has one or more of the following conditions: mental retardation; hearing impairments (including deafness); speech or language impairments; visual impairments (including blindness); emotional disturbance; orthopedic impairments; autism; traumatic brain injury; other health impairments; specific learning disability.

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- (ii) By reason of having one or more of the conditions listed immediately above, the child needs special education and related services.  
20. U.S.C. sec, 1401 (3) (A)

<sup>31</sup> Interview with Carol Steiner, Principal, Parkwood-Upjohn Elementary School, Kalamazoo, MI (January 10, 2009)

<sup>32</sup> See Alan J. Borsuk, “A Circular Path to Peace” *Milwaukee Journal Sentinel* (March 17, 2009) p. 1B

<sup>33</sup> Interview with Edis Snyder, former principal, Chicago Public Schools (January 12, 2009)

<sup>34</sup> Interview with Carol Steiner, Principal, Parkwood-Upjohn Elementary School, Kalamazoo, MI (January 10, 2009)

<sup>35</sup> See *Leviathan* ed. Michael Oakeshott (Simon & Shuster, 1962) p. 230

<sup>36</sup> *The Morality of Law* (Yale University Press, 1963)

<sup>37</sup> 419 U.S. 565 (1975)

<sup>38</sup> For full development of the account of impartiality this analysis draws upon, See Bernard Gert *Morality* (Oxford University Press, 2005) pp. 131-55

<sup>39</sup> The additional information that follows concerning the James M. case consists of the hearing officer’s factual findings based upon his review of the evidence and testimony presented. See note 2. (I was the hearing officer in the James M. case.)

<sup>40</sup> 20 U.S.C. 8921 *et. seq.* The Gun Free Schools Act also contains the following two mandates: First, schools must refer students found in possession of weapons or explosives in school to the criminal justice or juvenile justice system. Second, the statute requires that state law “allow the chief administrating officer of [the] local educational agency to modify [the] expulsion requirement for a student on a case by case basis.” (20 U.S.C. 8921 (b)(1).

<sup>41</sup> See note 6

<sup>42</sup> *Abrams v. U.S.* 250 U.S. 616, 629 (1919). The additional facts are that (i) James’ mother had expressed concern in writing to school district officials about James, (ii) she had requested that the school district conduct an evaluation of James, and (iii) one of James’ teachers had expressed his concerns about James to the school district’s director of special education.

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<sup>43</sup> I use the case often in undergraduate courses with subject matter that includes ethical issues in K-12 public education. The case seldom fails to spark intense discussion with strongly expressed opposing viewpoints.

<sup>44</sup> At the time of the Decatur, Illinois case Jesse Jackson received severe criticism from some quarters for introducing an additional element of racial polarization into the controversy. Such criticism seems to me to have been quite unfair given the School Board's initial decision to expel the six students for two years, with no alternative education provided.

<sup>45</sup> My discussion does not consider cases where a student's unacceptable behavior in school amounts to a serious felony involving use of weapons or explosives. Such a case raises important issues concerning the child's right to receive an education paid for at public expense. Since, however, authority over the child passes to the juvenile justice, or in some instances, to the adult criminal justice system, the cases lie outside the scope of this article, which concerns the limits of morally legitimate disciplinary authority in K-12 public schools.

<sup>46</sup> Justice Clarence Thomas recommended in his concurring opinion in *Morse v. Frederick* 551 U.S. 393 (2007) that the Supreme Court adopt an exceptionally strong version of the *in loco parentis* doctrine. Justice Thomas' recommendation appears to authorize every kind of disciplinary action currently deemed unconstitutional in virtue of Supreme Court precedents relating to constitutional guarantees of free speech, protection from unreasonable searches and seizures, and procedural due process insofar as they apply to K-12 public schools. It may be worth commenting, however, that, in my opinion, even Justice Thomas' sweeping interpretation of the *in loco parentis* doctrine could not legally justify a two year K-12 public school expulsion for the following reason. Under *in loco parentis* the disciplinary authority of K-12 public schools can be no greater than that of parents. Parents, however, have responsibility to assure their children receive an education. Accordingly, schools districts lack *in loco parentis* authority to impose a disciplinary sanction, such as a two year expulsion, likely to result in the end of child's K-12 public education.

By way of counter-argument a supporter of Justice Thomas's strong interpretation of *in loco parentis* might respond that every parent has a choice in the first place of whether or not to send his/her child to a public school, rather than enrolling the child in a private school or home-schooling the child. Therefore, according to the counter-argument, by choosing to send his/her child to a public school a parent thereby authorizes all the school district's disciplinary decisions. Justice Thomas' Supreme Court colleague, Justice Samuel Alito, however, who is no less strongly associated with the conservative wing of the Court than Justice Thomas, in a concurring opinion, characterized the above counter-argument rightly as based upon a "dangerous fiction."

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