

In the
Supreme Court of the United States

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SUPREME COURT, U. S.

NORVAL GOSS, et al.,

Appellants

V

EILEEN LOPEZ, et al.,

Appellees.

No. 73-898

Washington , D.C.

Wednesday, October 16, 1974

Pages 1 thru 38

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NORVAL GOSS, et al.,

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v.

EILEEN LOPEZ, et al.,

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Wednesday, October 16, 1974

The above-entitled matter came on for argument
at 1:15 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS A. BUSTIN, Esq., Senior Assistant City
Attorney, 90 West Broad Street, Columbus,
Ohio 43215; for the Appellants.

PETER D. ROOS, Esq., Center for Law and Education,
Harvard University, 14 Appian Way, Larsen Hall,
Cambridge, Massachusetts 02138; for the Appellees.

C O N T E N T SORAL ARGUMENT OF:PAGE

Thomas A. Bustin, Esq.
For the Appellants

3

Peter D. Roos, Esq.
For the Appellees

27

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-898, Goss against Lopez.

Mr. Bustin, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS A. BUSTIN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. BUSTIN: Mr. Chief Justice, and may it please the Court:

This case originates as a direct appeal from the decision of a three-judge district court in Ohio.

During the early months of 1971 in the Columbus School District in Columbus, Ohio, several of the schools located in that district experienced a series of internal student disruptions of the type involving fighting among students, blocking of hallways and stairways, questions surrounding the setting of several fires in one of the school buildings. One of the schools had to be closed for a period of time trying to bring order back. Open defiance of the type characterized when a principal was speaking to one of the assembled classes and one of the students got up and told the principal that they were all done listening to him, that he would now listen to them, and they were going to tell him how it was going to be run.

From that pattern of internal disruption there occurred a series of temporary suspensions anywhere from five

1 to ten days, arising under a statute, Section 3313.66 of the
2 Ohio Revised Code, which allowed a principal to temporarily
3 suspend for a period of one to ten days without holding a
4 formal hearing.

5 The statute required the principal or administrative
6 official to send a notification to the parents and to the
7 school department of the fact of the suspension. The statute
8 also contained a provision which, in the case of expulsion,
9 required that the parents, when expulsion was going to take
10 place, could appeal that action to the board of education,
11 and the question of whether or not the child should be
12 expelled would be heard by the Columbus Board of Education.

13 Following this pattern of temporary suspensions, a
14 1983 civil rights action was instituted in which the section
15 I have just discussed was challenged as being unconstitutional,
16 in violation of the 14th Amendment Due Process Clause, and it
17 was also alleged that it was vague and over-broad in its
18 provisions.

19 Following the conclusion of a trial, the three-judge
20 district court concluded in its opinion that the statutory
21 section and the regulations implementing the statute in the
22 school were in fact unconstitutional as being violative of the
23 Due Process Clause.

24 The court concluded that the statute was not vague
25 or over-broad in its provisions.

1 In Ohio in the structuring the school system, the
2 Ohio constitution directs that the legislature is to use
3 public funds to establish a common system of schools and also
4 gives the legislature power in the area of organization,
5 administration, and control of that particular school system
6 that is set up. And this particular statute, as I mentioned,
7 is one of that series of statutory schemes that sets up and
8 controls the common system of the schools in Ohio.

9 It is appellants' position in this particular case
10 in analyzing what is involved and in discussing the interest
11 of the school that what is really involved in this whole case
12 is not really the temporary suspensions themselves but really
13 a question of what power the states and local school districts
14 will have to structure their particular school systems. When
15 I use the term "structure", I mean make decisions with respect
16 to not only how the process will go on, who will be the
17 teachers, but how it will be managed and what form of academic
18 discipline will be utilized in the particular system.

19 It is our position that this is really the important
20 question here before this court.

21 In Ohio, academic discipline is reviewed by the Ohio
22 courts anyway as being part and parcel of the educational
23 process, and it has been so held in the Laucher case, which is
24 cited in the briefs.

25 It is our position that the legislature in this

1 particular case, given the type of area of concern that they
2 were involved with, i.e., the educational process, wherein
3 you are faced with entirely different types of interests
4 than you find in other common areas--and I say that from
5 this standpoint--when you are trying to structure a school
6 system, a very important question is the type of relationship
7 the state and, to carry it down further, the local school
8 districts would like to see established in their particular
9 district.

10 Q By that you mean between the teachers and the
11 students, I assume.

12 MR. BUSTIN: Yes. I mean the type of relationship
13 that will exist in the ongoing process between the teacher,
14 the student, and the principal.

15 Q Members of the school board, for example,
16 do not have anything directly to do with the students day by
17 day, do they?

18 MR. BUSTIN: Not on a day-by-day basis. But I think
19 this all works into the very process of formulating what type
20 of academic discipline is going to take place in the particular
21 school.

22 Viewed in that context, I think the states must
23 retain a certain degree of discretion, if you will, to
24 decide for themselves whether or not they will have academic
25 discipline and what the form of that academic discipline will

1 be. It is our position that based on a much similar analogy
2 as was contained in the Linwood case, a legislature that
3 legislates as it has done in this particular case, which is
4 in a restrictive sense, restricting the authority of the
5 principal really from having what I would class as a carte
6 blanche authority to discipline, cutting down his authority
7 to a period from one to ten days without requiring a hearing
8 while at the same time requiring one or utilizing one where
9 the situation is an expulsion, that a legislature does act
10 within the framework of the type of discretionary authority
11 that I think this Court has talked about in repeated cases
12 where there has been mention that local school authorities
13 should retain a great deal of latitude and discretion in the
14 daily management of their particular internal affairs of the
15 school districts.

16 Q Did the district court issue an injunction
17 here?

18 MR. BUSTIN: No injunction was issued in this
19 particular case. The district court in its opinion found the
20 statute and the regulations unconstitutional, and directed
21 the board of education--

22 Q And you are appealing?

23 MR. BUSTIN: We are appealing.

24 Q Do we have jurisdiction in that appeal?

25 MR. BUSTIN: I believe you do.

1 Q We voted probable jurisdiction, did we not,
2 in this case?

3 MR. BUSTIN: Yes, you did.

4 Q But my Brother White has certainly raised--

5 Q No injunction denial.

6 MR. BUSTIN: No injunction--

7 Q You won on the injunction issue.

8 MR. BUSTIN: No, there was really no other hearing
9 on an injunction at any point.

10 Q Is this not a direct appeal?

11 MR. BUSTIN: It is a direct appeal.

12 Q Does not our jurisdiction depend on the grant
13 or denial of an injunction in a lower court?

14 MR. BUSTIN: I don't think so.

15 Q I think it does.

16 MR. BUSTIN: Both a temporary and a permanent
17 injunction was--

18 Q That injunction was denied. But you were the
19 winner on that issue.

20 MR. BUSTIN: Yes; there was no mention of it in the
21 opinion the court handed down.

22 Q You opposed the injunction?

23 MR. BUSTIN: We opposed the injunction.

24 Q And you won on it, on the injunction part of it.
25 You lost on the invalidity.

1 MR. BUSTIN: If the court said--from the standpoint
2 that the court did not--

3 Q Was there not an injunction requiring the
4 cancellation of the records, of the suspension records?

5 MR. BUSTIN: The court required us to expunge
6 from the records--

7 Q Is that not an injunction? You lost on that,
8 did you not?

9 MR. BUSTIN: Yes, that is what I was getting to.
10 Apart from finding the statute invalid, the court directed
11 us to expunge from the records of the pupils involved in this
12 particular class action--

13 Q That is an injunction, however it was labeled,
14 is it not?

15 MR. BUSTIN: What I was trying to say was that the
16 court did not specifically label it an injunction. But they
17 did require us to expunge from the records of these people
18 involved in this class action.

19 Q Did the court require the school to adopt this
20 system that they outlined?

21 MR. BUSTIN: Yes, they set up the system that they
22 found would be a proper type of system to utilize where a
23 temporary suspension was going to take place.

24 Q A little while ago you stated flatly, I thought,
25 that no injunction was issued, that no injunction was denied.

1 Now I take it that you do feel there was at least an
2 injunction under whatever label or guise it possessed, so
3 that you are changing your position a little bit. You have
4 to, do you not, in order to--

5 MR. BUSTIN: What I am saying is that there is not
6 a label attached to it. But the court did mandate us in a
7 sense to expunge from the records of these people involved
8 any reference to suspension arising out of this period of time.

9 Q You have to take this position to be here.

10 MR. BUSTIN: I wholeheartedly agree. And in that
11 sense I view it as a mandate to the board of education and
12 the principals involved.

13 Q At page 19 of the judgment before us, the
14 next to the last paragraph is: "It is ordered that the
15 defendants delete all reference to the suspension and
16 disciplinary transfers of plaintiffs from the records of the
17 Columbus public schools."

18 Is that an injunction?

19 MR. BUSTIN: I would view that as an injunctive
20 type--

21 Q For the purpose of our jurisdiction.

22 MR. BUSTIN: For the purposes of your jurisdiction.

23 Q By inference, the court has restricted the
24 freedom of the school district to handle suspensions the way
25 they formerly handled them by imposing affirmative

1 requirements.

2 MR. BUSTIN: Yes, Mr. Chief Justice, the district
3 court set up a formula, if you will, of how we were supposed
4 to handle temporary suspensions, saying in part that we
5 could temporarily suspend without a hearing for a period of
6 three days. But after that, we had a procedure that we had to
7 go through.

8 So, in that sense they did restrict--I think place
9 a restriction on this relationship that I am talking about,
10 that I think the Columbus school district sought to foster
11 in its system, and that is one of discipline being part and
12 parcel of the educational process.

13 Q Mr. Bustin, would you tell us a little bit
14 about the purpose for which these records are maintained. Are
15 they made available, for example, to some future potential
16 employer, or are they maintained only for internal use of the
17 school system?

18 MR. BUSTIN: In the record of this cause, in the
19 deposition of the superintendent of schools that was taken,
20 it was explained that these records are not made generally
21 available to everyone and that when an employer calls in, for
22 example, and wants information about the student, he is given
23 basic information pertaining to his grades and whether or not
24 he graduated from the school. But the records are not open
25 for ready examination.

1 It was also explained in the testimony of the
2 superintendent that the focus of the information they try to
3 provide was graduation and grades and also tests, where they
4 have taken psychological tests and things of that nature.

5 Q Suppose the people had been suspended for, say,
6 three days when he was a freshman in high school and he later
7 applied to a college and his high school transcript was sent
8 to a college, would that three-day suspension appear on the
9 record?

10 MR. BUSTIN: In this particular record in looking
11 at the transcripts it could show, yes. If that whole folder,
12 if you will, that they utilize was sent to the college.

13 Q Do you know what they do send, as a matter of
14 fact?

15 MR. BUSTIN: I believe the superintendent's
16 testimony was it was more in the nature of trying to provide
17 grades from the schooling process and all grades in
18 psychological testing, that type of information.

19 Q Does that appear in the appendix?

20 MR. BUSTIN: Yes, it appears in the appendix, the
21 testimony of Superintendent Ellis.

22 Q Would that be binding on the new superintendent?
23 Is this a rule or regulation or just a policy?

24 MR. BUSTIN: This was the policy of the Columbus
25 School District.

1 Q I thought it was the policy of that superin-
2 tendent.

3 MR. BUSTIN: No, it was not explined as being the
4 policy of that superintendent. It was the policy of the
5 district.

6 Q Where is it in the rules and regulations of the
7 district?

8 MR. BUSTIN: It is not written down.

9 Q Is there any prohibition in any document that
10 prevents anybody from circulating that record with this material
11 on it?

12 MR. BUSTIN: The regulations explained to the
13 principals and the teachers, the process was that the records
14 would not be circulated and would not be opened for ready
15 examination.

16 Q You used the word "regulation". Where is that
17 regulation?

18 MR. BUSTIN: The only regulation I can point to is
19 the administrative guide, so to speak, when they talk about--

20 Q Where is that in the record?

21 MR. BUSTIN: I believe that is in volume three,
22 around page 280, is where this administrative guide is
23 discussed, that and the superintendent's testimony.

24 Q Where is it that it says that it shall not be
25 circulated?

1 MR. BUSTIN: I cannot say that this record candidly
2 says in writing that it will not be circulated. All I can say
3 is that the principal explained that at the beginning of the
4 school year and in the operation of the school, each principal
5 and other administrative official is directed not to release
6 this type of information. That is the type of testimony that
7 appears in the record.

8 Q That applies as long as he is there. Could he
9 change it tomorrow morning?

10 MR. BUSTIN: No. I think the Columbus Board of
11 Education would have to do that.

12 Q Where is the Columbus Board of Education
13 regulation that says that?

14 MR. BUSTIN: Not in writing in this particular
15 record.

16 Q Is there anything other than in writing that is
17 going to help us? Is there anything you can point to in
18 writing that says that this material will not be made available
19 at any time?

20 MR. BUSTIN: No, Your Honor, not in the posture of
21 the record as it appears before this Court.

22 However, I fail to see the significance of the record
23 showing the three-day suspension, if you will. We view the
24 three-day suspension as being part and parcel of the education
25 process. It is really no different when the school official

1 is looking at that particular person's record, if you will,
2 and they see on that record the fact that the person has
3 flunked mathematics. I think that the college or employer
4 looking at that particular record is going to be as much
5 influenced by the grade that that individual received in
6 mathematics, for example, as he is by--

7 Q What experience do you have in evaluating school
8 records?

9 MR. BUSTIN: I have no individual experience.

10 Q I did not think so.

11 Q Is there anything in the court's opinion that
12 says yea or nay about what may be done with the transcript of
13 the student's record now under the holding of the three-judge
14 court?

15 MR. BUSTIN: No, Your Honor. The three-judge court,
16 all they did was require us or mandate us to expunge these
17 references to the disciplinary transfers and suspensions from
18 their records.

19 Q But the school may suspend for three days
20 without a hearing in the future?

21 MR. BUSTIN: That is right.

22 Q And if that is placed on the record, it will go
23 in whatever manner it has previously gone; is that a fair
24 assumption?

25 MR. BUSTIN: If, as Mr. Justice Marshall said, the

1 record is made readily available to any employer and he does
2 in fact see that, yes, it would be there.

3 Q In other words, the opinion of the three-judge
4 court did not touch upon that issue one way or the other?

5 MR. BUSTIN: No, Your Honor.

6 Q Mr. Bustin, under the existing statute, what
7 if a principal wanted to suspend a student for 15 days?

8 MR. BUSTIN: Under the statute, before it was
9 declared unconstitutional, he would not have that authority.

10 Q It is an odd statute. Apparently he has no
11 authority with or without a hearing to suspend a student
12 longer than ten days. Is not that it?

13 MR. BUSTIN: I view the statute as a restrictive
14 statute, and it has been so viewed in Ohio as a restrictive
15 statute. His authority to act as principal could not be an
16 action beyond one to ten days.

17 Q He could suspend a student for 11 days with or
18 without a hearing, apparently.

19 MR. BUSTIN: As I read the statute and interpret it,
20 yes. If he did so, he would be acting what I would classify
21 ultra vires, outside of his authority. And the superintendent
22 testified--

23 Q He has had no choice except between a suspension
24 of ten days or less and expulsion?

25 MR. BUSTIN: Under that statute.

1 Q Do you think there is any power other than the
2 statute?

3 MR. BUSTIN: No. I view the statute as a restrictive
4 statute in which I think the legislature sought to draw down
5 his authority. There is another statute which talks about the
6 management and the control of the schools in Section 33--I think
7 it is 4720. They are both cited in the brief. But it talks in
8 very general terms. And I think here the legislature sought
9 to further restrict that authority.

10 Q As perhaps you know, in the next case, as I
11 remember, at least the suspension was until the end of the
12 school year, and there would be no power to do that in Ohio?
13 That would be expulsion. Is expulsion defined anywhere?

14 MR. BUSTIN: Expulsion is not defined as a definition
15 in the code that sets up the kind of school system.

16 Q I suppose you could have expulsion for 20 days,
17 could you?

18 MR. BUSTIN: I think a legislature could categorize
19 expulsion.

20 Q It has not defined expulsion at all, has it?

21 MR. BUSTIN: That I can find in this particular--

22 Q How do you understand the meaning of the word
23 "expulsion"? Does it mean permanently out of school forever?

24 MR. BUSTIN: Even in the sense of the Ohio situation,
25 I don't even think they view expulsion as being permanently

1 out of the school forever.

2 Q What does it mean?

3 MR. BUSTIN: Because the way the statute reads, it
4 is a removal from the school for the remainder of the school
5 term, which may even be 30 days.

6 Q Has there been any annotations on this
7 discussion?

8 MR. BUSTIN: I have searched high and wide and been
9 unable to find any Ohio cases which have directly taken up this
10 particular statute. And the closest thing I could come to it in
11 any sense was a case in State ex rel. Fleetwood in 20 Ohio
12 Appellate 2nd. But that was not to the constitutional nature
13 of the statute itself. It just has not been treated in that
14 context by Ohio courts.

15 Q Would it be correct or incorrect to say that
16 the difference between the three-judge federal court and the
17 Ohio statute is the difference between ten days and three days
18 on this suspension?

19 MR. BUSTIN: They seem to be going off, as I view it--
20 the only way I can view it in a difference between three and
21 ten days, they seem to make three days okay and the period of
22 ten days as violating due process.

23 Q Would you make the same argument if it were a
24 hundred?

25 MR. BUSTIN: Were a hundred?

1 Q A hundred days. A hundred-day suspension.

2 MR. BUSTIN: Under my analysis, this particular case,
3 as I have set forth in my brief, while expulsion is not
4 involved in this case, I would have to say that a right of
5 liberty of property would not be involved where the person--

6 Q But it would be in the expulsion?

7 MR. BUSTIN: No, Your Honor, I do not believe so.

8 Q And so it would not have been involved in a
9 hundred days either?

10 MR. BUSTIN: No, Your Honor.

11 Q You feel that you have to take that position?

12 MR. BUSTIN: I feel that the position, in light of the
13 Roth case, for example, and also the Cafeteria Workers case
14 follows, that the student who is removed from the process, and
15 you used for a hundred days, is in no worse position than the
16 non-tenure teacher who is only told that he is non-renewed.
17 Where the district does not say to every other district in Ohio,
18 for example, "Don't bother with this child" or closes every door
19 to him, then I see the student in your hundred-day situation
20 being in much the same posture.

21 Q On your basis then, I gather, it just would not
22 be a question of a pre-suspension hearing; it would be a hearing
23 at all. You would think that he could be terminated or
24 expelled for a hundred or a thousand days without any hearing
25 at any time, before or after.

1 MR. BUSTIN: As I analyze the Constitution in this
2 sense, I believe that I would have to answer yes to that.

3 Q Yes, and what if you are wrong about that, that
4 there has to be a hearing at some time?

5 MR. BUSTIN: Then it seems to me that--

6 Q What about this case then?

7 MR. BUSTIN: It seems to me that we are down to a net
8 posture of drawing lines, and it is really a question of where
9 will we stop, and I can come back to my situation of do we go
10 to a hearing process with the a person who is receiving a grade
11 or something of that similar nature.

12 Q If you were trying to defend a 100-day statute,
13 you would have some additional problems of showing that that
14 did not totally disrupt the students' school progress for that
15 year, would you not? I am now talking about practical
16 problems, whether they are constitutional or not. This is
17 another question.

18 MR. BUSTIN: Yes, I might have--

19 Q Suspension for a hundred days is certainly going
20 to pretty well cut him out for the school year unless some
21 substitute teaching is provided; is that not so?

22 MR. BUSTIN: Yes.

23 Q The difference between ten days and three days
24 is merely a matter of judgment in drawing the line?

25 MR. BUSTIN: I believe it fits into the doctrine

1 that inculcating self-discipline and respect for authority is
2 part and parcel of the process. I think a legislature that
3 does this, as it has done here with this statute--

4 Q You seem to make an argument along these lines
5 negatively by pointing out, as I recall it, that all of these
6 students did just as well or better after they came back to
7 school. Is that correct? Did I read your brief correctly?

8 MR. BUSTIN: Yes, as I read the record and have
9 analyzed the record, I believe that the record does not
10 disclose the particular suspensions involved in this case
11 really had any effect on the outcome of their proceeding through
12 the process.

13 Q Why make them go 180 days; why not let them go
14 170?

15 MR. BUSTIN: I believe that should be a question for
16 the state legislature to decide.

17 Q Do you think the children wasted their time for
18 those ten days?

19 MR. BUSTIN: No, they could very well use their time
20 in some other pursuit. For example, they might have received
21 training in a vocational endeavor maybe working with somebody
22 on the outside.

23 It need not be wasted. That is up to the individual
24 how he utilizes that additional time.

25 Q Perhaps the parents might require them to stay

1 home and study.

2 MR. BUSTIN: They could very well do that.

3 Q Those are things we cannot really speculate
4 about, are they?

5 MR. BUSTIN: No, I do not think you can engage in that
6 kind of speculation.

7 Q Could you live with the three-day rule?

8 MR. BUSTIN: No, Your Honor, I cannot. I believe that--

9 Q How would it disrupt the school system, the three-
10 day as compared to a ten-day.

11 MR. BUSTIN: I believe it disrupts--

12 Q Did I understand you to say they are only
13 allowed between three and ten?

14 MR. BUSTIN: I believe it disrupts the very process I
15 have been talking about and the relationship I have been talking
16 about that the school system seeks to foster.

17 I believe if you say a three-day rule and go beyond
18 that there must be a hearing, that right away you have inter-
19 jected into the relationship at least a quasi-judicial type of
20 adversary relationship.

21 Q Does not the present rule say that if you give
22 them 11 days, you have to give them a hearing?

23 MR. BUSTIN: No, it does not.

24 Q What does it say?

25 MR. BUSTIN: It says you cannot go beyond the ten days.

1 Q Without a hearing.

2 Q All that statute says, Mr. Bustin, is that the
3 superintendent cannot suspend for more than ten days. It does
4 not limit the school board's power, does it?

5 MR. BUSTIN: No, it does not limit the--the school
6 board in Ohio is a political subdivision, if you will. It has
7 not taken the power away from them.

8 Q Maybe a suspension beyond ten days becomes an
9 expulsion. I am talking now about the very last sentence of
10 the statute. It says no pupil shall be expended or expelled
11 from any school beyond the current semester, which implies--at
12 least there is a negative inference that an expulsion could
13 be for a period beyond ten days but never beyond the end of
14 the current semester.

15 MR. BUSTIN: To me an expulsion characterizes
16 something where the district or school says to a pupil in
17 essence, "We want to remove you from the school on a permanent
18 type basis."

19 Q Except the last sentence of the statute certainly
20 does not imply a permanent basis. It is a maximum beyond the
21 current semester.

22 Q You cannot do it more than ten days.

23 MR. BUSTIN: No, not more than ten days.

24 Q And the seven days is so important to you, and
25 I am asking why.

1 MR. BUSTIN: I think it is important to the system
2 and the relationship that the district tries to establish in
3 that system. And it is important that the--

4 Q But specifically why is the seven days so
5 necessary in order to maintain discipline?

6 MR. BUSTIN: Specifically because I think--

7 Q You like it.

8 MR. BUSTIN: Pardon?

9 Q You like it.

10 MR. BUSTIN: Not because I like it. I think it is
11 because the legislature wants to have the principal in his
12 relationship with the student have a broad range of authority
13 here, limited authority, to protect not only the individual but
14 the entire school district.

15 Q What about five days? And you know where I am
16 going to end up, nine.

17 MR. BUSTIN: I think it is this type of line drawing
18 that you are engaging in that gets us into this type of
19 problem. I think that is a line that should be drawn by the
20 legislative body if they still have any kind of discretionary
21 authority

22 Q Mr. Bustin, in a number of the states they have
23 statutes which limit the right to strike except after ten days
24 notice. They call it colloquially at least a cooling-off
25 period. Would it be your view that there is some cooling-off

1 process involved in the ten days that would not be provided in
2 a three-day period, or at least that that was the judgment of
3 the legislature?

4 MR. BUSTIN: You could look at it from the face of
5 this record and say that in a sense, because here the
6 principal, as portrayed in the testimony of Principal Fulton,
7 when he handed out these suspensions, was trying to restore
8 order so that the vast bulk of students could get on with the
9 process of day-to-day learning. So, I think you could
10 characterize it in a sense as a cooling-off period. And also
11 from this sense--the principal tries to, during this period--
12 and it is portrayed in his testimony also--meet with the
13 student and his parents and discuss the students entire school
14 record, with the emphasis on trying to find out what the
15 student's problem is and how they can get that student
16 progressing again. So, in that sense, you could characterize
17 it as a cooling-off period.

18 Q Where do you find the three-day business,
19 Mr. Bustin? Everybody seems to agree it is there, and I assume
20 it is--the opinion is in the appendix to the jurisdictional
21 statement, as you know.

22 MR. BUSTIN: It gets down to, I believe, Your Honor,
23 it gets down around starting with page--from 60 over to 64
24 in the back. And on page 63 it gets into it in more detail.

25 Q Mr. Justice Blackmun had a question he was

1 trying to propound to you, counsel.

2 MR. JUSTICE BLACKMUN: I think the time is passing,
3 Mr. Chief Justice. We will let it go.

4 Q I have one further question, if I may. Assuming
5 there is a three-day holding here. There was no cross-appeal.
6 Would the appellees in this case be free to argue that there
7 should be hearing of some kind before any suspension, even for
8 one day or two days, in your view?

9 MR. BUSTIN: I view this entire decision as being
10 open to review by this Court. So, I think they probably could
11 argue that the District Court was wrong in even drawing its
12 line to three days. Possibly it should be one or even less
13 than that.

14 Q Could I acknowledge equal red light time for
15 this side of the bench?

16 Has there been some new rules and regulations
17 promulgated, and are they effective?

18 MR. BUSTIN: There is a new procedure--new guidelines,
19 if you will--that the board set down. It is contained on page
20 25 of the jurisdictional statement.

21 Q Are they effective now?

22 MR. BUSTIN: They are in effect.

23 When I say guidelines, it is an operational
24 procedure that the principals are told how they will operate
25 under the particular statute.

1 Q Would those have passed muster under the
2 District Court's opinion?

3 MR. BUSTIN: I am not at all sure. The District
4 Court in its opinion sluffed them all off.

5 Q So, you just do not know whether they would have
6 satisfied the District Court or not.

7 MR. BUSTIN: I cannot really say. It sluffed them off
8 in a footnote.

9 Q Thank you.

10 MR. CHIEF JUSTICE BURGER: Mr. Roos.

11 ORAL ARGUMENT OF PETER D. ROOS, ESQ.

12 ON BEHALF OF THE APPELLEES

13 MR. ROOS: Mr. Chief Justice, and may it please the
14 Court:

15 I think that a misunderstanding of the lower court's
16 opinion has developed in the questioning of Mr. Bustin. I
17 think that a close reading of that opinion would show that
18 what the court did was say that a prior hearing is required
19 whenever there is a suspension, except when there is an
20 emergency situation. And when there is an emergency situation,
21 the school district can suspend a student for up to 72 hours
22 but must provide a subsequent hearing.

23 This was the position that was urged by us at the
24 lower court, and we believe that this is the gist of the
25 decision of the lower court, and this in fact is the common

1 accommodation in plans that are voluntarily adopted.

2 Q In other words, you do not read the opinion to
3 say that a suspension without a hearing for three days is
4 constitutionally valid?

5 MR. ROOS: That is correct, Your Honor. The court
6 did not engage in the line drawing that seemed to appear in
7 Mr. Bustin's argument. It was really rather a prior hearing
8 as required, but there may be circumstances when there is
9 intense disruption of the school or when the student is a
10 danger to himself or to others, that would justify doing away
11 with the prior hearing. But in that instance, a hearing must
12 be provided within 72 hours thereafter.

13 Q But that means that the discretion in the first
14 instance rests with the principal under this opinion for
15 72 hours.

16 MR. ROOS: That is correct, Your Honor.

17 Q What if we decided to slice it a little differently
18 and say six days, not ten days as the statute prescribed, not
19 three as the District Court, but six? Do you think there would
20 be any basis for that?

21 MR. ROOS: Your Honor, as I understand the lower
22 court's opinion--and this would be certainly the position that
23 we would urge--it is not saying that a principal has absolute
24 discretion to suspend a student for three days. What it is
25 saying is that there may be emergency situations which may

1 justify doing away with the prior hearing. It is not saying
2 that a principal has an absolute carte blanche to throw a kid
3 out.

4 Q Who is going to determine that, when, and with
5 what consequences?

6 MR. ROOS: Your Honor, obviously there has to be
7 great reliance upon the good faith of school administrators.
8 At some point or other, it does boil down to that.

9 I might add, however, that various other school systems
10 that have voluntarily adopted plans have built in mechanisms
11 for assuring that this is not a massive loophole.

12 For example, we are informed that in Seattle, for
13 example, that at the subsequent hearing--there is a hearing
14 ultimately--at the subsequent hearing one of the issues might
15 be whether the emergency suspension procedure was properly
16 utilized. There are institutional mechanisms for assuring that
17 this loophole, if you will, just does not open the gates to
18 absolute discretion, but ultimately some confidence has to be
19 accorded to the principal in the belief that they will not make
20 of this emergency situation a giant loophole and call every
21 suspension an emergency.

22 Q Mr. Roos, if the procedures, guidelines, whatever
23 they called it, pages 25 to 29, effective--as I understand it,
24 or so it says here, at least--July 10, 1973, had been
25 operative at the time this case arose, would you be here?

1 MR. ROOS: I think we would, Your Honor.

2 Your Honor, excuse me, there was testimony by the
3 chief witness for the district, Mr. Goss, as to how they
4 functioned. That testimony, Your Honor, starts at 164 and
5 runs to 171. It does cover more than how those newly adopted
6 procedures do operate. But there is testimony concerning--

7 Q And the gist of it is?

8 MR. ROOS: The gist of it is, Your Honor--they really
9 did not know what they meant--and the gist of it is that they
10 were leaving everything up to the principal to determine
11 whether there would be any sort of meaningful protection.

12 Q Because on the face of them, they do seem to
13 require prior notice of hearing, do they not?

14 MR. ROOS: Might I read it just to give you a sense
15 of how these things were adopted.

16 Q Where are you reading, sir?

17 MR. ROOS: Excuse me. From the appendix, at 171,
18 Your Honor.

19 Q Volume 2?

20 MR. ROOS: Volume 2.

21 "Q. Under this plan, Mr. Goss, do you contemplate
22 that the people will have the opportunity, except for his
23 own statements, to the principal, to call any witnesses
24 in his own defense? A. That would be the judgment of the
25 principal.

1 "Q. That's up to the principal and not the student;
2 is that it? A. That's right."

3 These guidelines really are nothing much more than
4 guidelines. They are not well thought out procedures designed
5 to provide any degree of procedural protection for the student.

6 Q I am sorry. I missed the earlier part. These
7 guidelines are something that has developed since the decision
8 in this case?

9 MR. ROOS: They were developed a week before the
10 decision, Your Honor, and presented to the court on the day
11 of the trial.

12 Q Mr. Roos, I am not quite clear yet as to your
13 position. Do I understand you to say that any suspension,
14 however brief, requires a prior hearing absent an emergency?

15 MR. ROOS: That is correct, Your Honor.

16 Q So, the principal, for example, could not send
17 a student home for the last hour of a day if the student had
18 misbehaved or had been disruptive?

19 MR. ROOS: Your Honor, a severance from the school
20 for the rest of the day might be something different from--it
21 might be in the nature, in fact, of a cooling-off period. We
22 would assume that that would be what it would be, so that it
23 might be something different from a severance for several days.

24 Q In my day it used to work the other way. You
25 had to stay a little longer in school, stay after school.

1 Q Mr. Roos, slicing that day up, you say a
2 suspension for one hour without any notice and for any reason
3 is appropriate.

4 Obviously then my next question, and I do not want
5 to as it, will be two hours, three hours, until we get your
6 point.

7 MR. ROOS: Your Honor, it is generally our position
8 that a severance from the school system, putting a child out of
9 the school system as opposed to punishments that might happen
10 internally within the school system or the one-hour, two-hour,
11 end-of-the-day sort of thing, something that is as final and
12 as abrupt as saying, "You shall not come back tomorrow or for
13 ten days," has the potential for creating serious disruptions
14 in the educational progress of the student and also has some
15 of the stigmatizing consequences that were alluded to before.

16 There certainly is some area of line drawing, and I
17 cannot deny that, Your Honor. But I think that the key is
18 severance. I think that the key is severance, Your Honor.

19 Q Mr. Roos, do you claim it is a denial of a
20 property interest or a liberty interest that your clients are
21 going to suffer.

22 MR. ROOS: Your Honor, it is our position that both a
23 property interest and a liberty interest are implicated.
24 Under this Court's rulings in Roth, Cinderman, Dow v. Person,
25 the statutory entitlement cases, this Court has held that a

1 well-established statutory entitlement creates a property
2 interest. We would submit that this court has probably
3 never considered historically or in the present such a well
4 established statutory entitlement as the right of a student to
5 receive public instruction in Ohio.

6 Q You say a student has a property right then to
7 continue in this school system?

8 MR. ROOS: Under this Court's decision, Your Honor,
9 I do not see how there can be any question of that.

10 Q Why did not the teacher in Roth then have a
11 property interest to continue as a teacher?

12 MR. ROOS: As I understand it, Your Honor, in
13 Roth the sense was if the teacher had had tenure under state
14 law, if there had in fact been a statutory entitlement to
15 continue in employment or something other than a statutory
16 entitlement, an understanding as in Cinderman, then there would
17 have been a protected interest. And if there had been an
18 invasion which obviously a firing would be--

19 Q Does Ohio law give the student the same sort of
20 a tenure right to attend school as the statute did in Roth
21 for tenured techers?

22 MR. ROOS: I do not think there is any question,
23 Your Honor. If I can refer to my brief, we have pretty well
24 set out the various constitutional and legislation provisions.

25 Q Do you not have a compulsory attendance law
on that, though?

1 MR. ROOS: We have a compulsory attendance law, Your
2 Honor; but, further than that, there is a constitutional
3 provision that requires that public schools be established.
4 There are several independent legislative requirements that
5 the local community set up schools, that free public schooling
6 be available for children between certain ages. It is a very
7 pervasive scheme of entitlement.

8 Q Mr. Roos, under your submission, is the age of
9 the child or the grade of the pupil relevant in any situation?
10 Or, putting it differently, as I recall, the ages of these
11 appellees range from 13 to 19. Does the age make any difference?
12 Does it make any difference whether one is a senior in high
13 school or, say, a sixth grader?

14 MR. ROOS: In terms of the right to a prior hearing
15 or the right to a hearing, Your Honor?

16 Q Yes.

17 MR. ROOS: I don't think so. A child who is in
18 elementary school is just as needful of the protection as is
19 the child who is in high school. And we were talking about
20 severance from the school system. As a practical matter,
21 Your Honor, I have had quite a good deal of experience in
22 analyzing statistics and whatnot on suspensions and expulsions.
23 As a practical matter, they very rarely occur at the elementary
24 school level. It is primarily at the junior high and high
25 school level. But they could occur and under our analysis

1 there would be no particular reason that we could think of for
2 distinguishing between an elementary school system and a high
3 school system.

4 Q May I ask you this: Is it your view that or
5 does the record support the view that a one-day suspension of a
6 sixth grade child would adversely the affect the performance
7 of that child in that grade?

8 MR. ROOS: Your Honor, the record does support that
9 it could adversely affect a child.

10 Q Is that somebody's speculation, or is there
11 any demonstration of it?

12 MR. ROOS: There is ample, uncontroverted testimony
13 of the sorts of harms that can and do occur in a suspension.

14 Q For one day?

15 MR. ROOS: Any suspension, Your Honor. I would draw
16 this Court's attention especially to the testimony of Dr. Rie,
17 which starts at page 171. It is not long. It runs to 182.

18 Q Volume 2?

19 MR. ROOS: Yes, Volume 2 of the appendix.

20 The harms that he describes and which are uncontro-
21 verted all could occur or are substantially likely to occur
22 to any child, irrespective of age and irrespective of length.

23 It is true clearly that the longer an exclusion,
24 the likelihood of harm or the magnitude of the harm may
25 increase. We woulk not argue that that is not the case. But

1 we do argue and argue forcefully that even a short-term
2 suspension can have stigmatizing consequences, can have
3 educational consequences, and what not.

4 Q Are there not a good many areas in which
5 peremptory reaction is allowed which involve stigmatizing and
6 no prior hearing and no notice is given if there is probable
7 cause?

8 MR. ROOS: There may be some situations of that sort,
9 Your Honor, We would submit that there--

10 Q Arrests, for example.

11 MR. ROOS: Arrest. I know that this Court has
12 mentioned arrest. There is no reason whatsoever for not
13 holding a prior hearing in a school suspension case. In an
14 arrest situation, where an emergency may occur, there is
15 obviously need for quick action.

16 Q Very often people are arrested in situations
17 where there is no emergency.

18 MR. ROOS: That is so, Your Honor.

19 Q Sometimes with a warrant and sometimes without.
20 Usually with a warrant. There is no notice in advance, is
21 there?

22 MR. ROOS: I suppose that often is the case, Your
23 Honor. But we would submit that there is no reason whatsoever,
24 there is no reason advanced by our opponents and there is no
25 reason that we can conjure up for not holding some form of

1 protection to insure that the sorts of alarms that we have
2 set out in our brief and which are well documented in the
3 record will not occur.

4 Q What about the adverse effects on the other
5 students and their rights to a quiet classroom, to orderly
6 procedures, to all the things that teachers and parents
7 desire?

8 MR. ROOS: No question, Your Honor, that we believe
9 a disruptive classroom is not a desirable situation. That is
10 why we urge the lower court to adopt the emergency suspension
11 procedure; absent the sort of emergency that is provided for
12 by the lower court decision and which is commonly provided for
13 and adopted in regulations that are voluntarily adopted, the
14 sort of disruption that you envision is taken care of. So that
15 what we are dealing with, the sorts of situations that are not
16 emergencies, that are not in some way interfering substantially
17 with the rights of other students or with the learning process.

18 Q Your position is that the Constitution compels
19 every school board to adopt this sort of procedure.

20 MR. ROOS: That is correct, Your Honor. We believe
21 that there is certainly in Ohio a property interest. There
22 would appear to be a liberty interest involved. There in fact
23 may even be a liberty interest under the rule of Constantineau
24 and Joint Anti-Fascist. If one reads the record, one can get
25 a very clear picture of the sort of stigmatizing and harmful

1 consequences that can occur in a suspension, even a short-term
2 suspension. So, it is our position that there is a protected
3 interest. I do not think there is any question of an invasion
4 thereof. It is our position that some form of prior hearing is
5 appropriate.

6 That is all, Your Honor.

7 MR. CHIEF JUSTICE BURGER: Very well.

8 And I think your time is entirely consumed,
9 Mr. Bustin.

10 Thank you, gentlemen. The case is submitted.

11 [Whereupon, at 2:09 o'clock p.m. the case was
12 submitted.]

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