Goss v. Lopez as a Vehicle to Examine Due Process Protection Issues with Alternative Schools

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**GOSS V. LOPEZ AS A VEHICLE TO EXAMINE DUE PROCESS PROTECTION ISSUES WITH ALTERNATIVE SCHOOLS**

**Table of Contents**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>2092</td>
</tr>
<tr>
<td>I. BACKGROUND</td>
<td>2096</td>
</tr>
<tr>
<td>A. Recent Trends Toward Alternative Schools</td>
<td>2097</td>
</tr>
<tr>
<td>B. Disproportionate Social Harms</td>
<td>2099</td>
</tr>
<tr>
<td>II. THE CIRCUIT SPLIT</td>
<td>2103</td>
</tr>
<tr>
<td>A. Courts That Require Due Process for Alternative School Transfers</td>
<td>2104</td>
</tr>
<tr>
<td>B. Courts That Do Not Require Due Process for Alternative School Transfers</td>
<td>2106</td>
</tr>
<tr>
<td>III. GOSS V. LOPEZ AS A VEHICLE FOR GREATER PROCEDURAL PROTECTIONS</td>
<td>2107</td>
</tr>
<tr>
<td>A. Evaluating the Goss Holding in a Modern Education Context</td>
<td>2108</td>
</tr>
<tr>
<td>B. Mitigating the Disproportionate Impact of Alternative Schools</td>
<td>2110</td>
</tr>
<tr>
<td>IV. COUNTERARGUMENTS</td>
<td>2112</td>
</tr>
<tr>
<td>A. Alternative Schools Provide Similar Educational Opportunities</td>
<td>2112</td>
</tr>
<tr>
<td>B. Requiring Due Process Infringes on School Administrators’ Discretion</td>
<td>2114</td>
</tr>
<tr>
<td>C. Due Process Is Cost-Prohibitive for Schools</td>
<td>2115</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>2116</td>
</tr>
</tbody>
</table>
INTRODUCTION

J.R. was a sixteen-year-old eighth-grade student who attended Atlanta Public Schools.¹ After she spent a brief period in juvenile detention, Atlanta Public Schools forced J.R. to attend Forrest Hill Academy,² a taxpayer-funded disciplinary alternative school.³ Unlike traditional public schools, Forrest Hill Academy was privately operated by the for-profit corporation, Community Education Partners (CEP).⁴ CEP entered a contractual relationship with Atlanta Independent School System (AISS) in 2002, agreeing to run a disciplinary alternative school for middle and high school students, including J.R., who attend Atlanta Public Schools.⁵

When J.R. attempted to return to her traditional public school, the school threatened her with criminal trespassing and insisted J.R. attend Forrest Hill Academy.⁶ The school transferred J.R. to the disciplinary alternative school without notice or hearing.⁷ While enrolled in the alternative school, several students physically assaulted J.R.⁸ Because she was pregnant and could not defend herself from the assaults, J.R. requested placement in a different classroom away from her attackers.⁹ Forrest Hill Academy ignored her requests, so J.R. stopped attending the school out of fear for her

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² In April 2021, the Atlanta City School Board renamed Forrest Hill Academy to remove the school’s reference to Confederate General Nathan Bedford Forrest. Neil Vigdor, Hank Aaron’s Name Will Replace a Confederate General’s on an Atlanta School, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021104/13/us/hank-aaron-high-school-atlanta.html [https://perma.cc/HEZ7-7VC5]. The school is now named the Henry Louis “Hank” Aaron New Beginnings Academy. Id. However, for clarity, this Note refers to the school as it was named at the time of J.R.’s Complaint.
³ Complaint, supra note 1, at 2, 12, 30.
⁵ Id.
⁶ Complaint, supra note 1, at 12.
⁷ Id.
⁸ Id.
⁹ Id. at 13.
After the birth of her child, J.R. tried to return to her traditional school, but the school again referred J.R. to Forrest Hill Academy without any opportunity for a hearing. While attending the alternative school, Forrest Hill Academy subjected J.R. to daily searches, which included frisking underneath her shirt, around her bra, inside her waistband, and in her hair and mouth. J.R. is one of the hundreds of Atlanta students who are transferred to disciplinary alternative schools without due process or notice annually. These schools often feature strict zero-tolerance disciplinary standards and serve as a major step in the school-to-prison pipeline for students from low-income backgrounds, students with disabilities, and Black and Brown students. In 2008, the ACLU filed a class action lawsuit against Forrest Hill Academy on behalf of eight students; the case settled on December 14, 2009. The ACLU asserted that Forrest Hill Academy could hardly be described as a school—"[I]ts students are treated like criminals—it is nothing more than a warehouse largely for poor children of color."

The term “alternative school” is used to describe three types of public schools that differ from traditional institutions. These types are: (1) schools that offer individualized or accelerated class credit recovery on a full- or part-time basis; (2) schools designated for students with disruptive or challenging behaviors; and (3) schools designed for students with disabilities under the Individuals with

10. *Id.*
11. *Id.* at 12.
12. *Id.* at 13; *see also* Garver, supra note 4.
13. *See* Complaint, supra note 1, at 27 (“At any point in time, hundreds of students are enrolled at [Forrest Hill Academy] and the AISS-CEP Contract contemplates an enrollment of 750 students. The average enrollment at the School is 450 students.”).
17. *Id.*
18. *See* Johnson & Naughton, supra note 14, at 70.
Disabilities Education Act (IDEA). This Note focuses on the second category of alternative schools, also known as disciplinary alternative schools, where students are involuntarily transferred for a mandatory period of time as a form of punishment for their in-school behavior.

Disciplinary alternative schools lurk in the shadows of public systems nationwide. They are almost always located at a separate school facility, operated by a separate staff, and vary drastically from their traditional public school counterparts. Like traditional public schools, alternative schools are taxpayer funded. Some alternative schools remain publicly operated by the local school district, while others are privately operated by for-profit companies.

Forrest Hill Academy is one of many publicly funded, privately operated disciplinary alternative schools that plague inner cities across the nation. Atlanta paid almost seven million dollars annually to run the alternative school, yet it was "among the most dangerous and lowest performing schools in Georgia." During AISS-CEP’s partnership with Atlanta Public Schools, Georgia taxpayers paid the for-profit corporation a whopping $36,570,941. Public school students were forced into the alternative school without procedural protections such as notice or opportunities for hearings. "[T]he placement process is often arbitrary and students who do not belong at AISS-CEP are given few meaningful opportunities to challenge compulsory assignment to the school."

CEP boasts a similarly poor educational record in its alternative schools in Houston, Philadelphia, Richmond, Orlando, and Florida’s Pinnellas and Bay districts, yet in 2005 alone, CEP accrued an

19. Id.
20. See id.
21. See id. at 93.
22. See id. at 76.
23. See id.
25. See ACLU, Harris, supra note 15.
26. See id. This partnership started in 2002 and ended in 2009 under the pressure of the ACLU’s lawsuit, which forced AISS to begin acting as the sole administrator of the alternative school program. See Garver, supra note 4.
27. See Complaint, supra note 1, at 59.
28. ACLU, Harris, supra note 15.
annual revenue of $70 million. In these alternative schools, violence runs rampant, the quality of education is low, and students are often subjected to daily stop-and-frisk policies. The schools act as a funnel into the school-to-prison pipeline for students from low-income backgrounds, students with disabilities, and Black and Brown students. For example, within the entire Atlanta Public Schools system, Forrest Hill Academy accounted for over 67 percent of all reported batteries, 46 percent of all reported vandalisms, and 20 percent of all reported incidents of gun possession.

The high rates of juvenile and criminal justice referrals often work in tandem with the underperforming and under-resourced alternative school curriculum. In the 2007-08 school year, 93 percent of students at Forrest Hill Academy did not meet grade-level competency in math, and 95 percent did not meet grade-level competency in science. Less than 23 percent of students met or exceeded state standards in all subjects. In 2006, not a single student made it to senior year. This underperformance may be attributed to the lack of resources, functional curriculum, and teacher experience. In 2006-07, “teachers at [Forrest Hill Academy] averaged only 0.94 years of experience compared to teachers in other local alternative schools, who averaged 19.07 years and 10.58 years, respectively.” Furthermore, unlike its public school counterparts, the disciplinary alternative school assigns no homework and offers no library, cafeteria, or gym.

29. See id.
30. See, e.g., Complaint, supra note 1, at 4, 13-14, 36, 42 (“Police officers posted to the School and under Defendants’ supervision have hit at least one child on the leg with a police baton and threw another against a wall. Another student was struck on the back of the neck and dragged across the floor by a teacher. Upon information and belief, none of the staff involved in these incidents was investigated, disciplined, subjected to future monitoring, or given training on how to avoid physical confrontations with students.”).
31. See Imoukhuede, supra note 24, at 69; Johnson & Naughton, supra note 14, at 74.
32. ACLU, Press Release, supra note 16.
33. Complaint, supra note 1, at 4. “[N]o functional curriculum exists at the school and teachers spend little time instructing students. Rather, students spend most of the day filling out worksheets, for which they receive no feedback.” ACLU, Press Release, supra note 16.
34. ACLU, Press Release, supra note 16.
35. Id.
36. Id.
37. Id.
Circuits are split on whether students are entitled to procedural protections before school officials may force them into alternative schools. This Note argues that students facing an involuntary transfer to a disciplinary alternative school are entitled to procedural protections under the Due Process Clause of the Fourteenth Amendment. Part I explains the trend toward the use of disciplinary alternative schools and the social and educational harms that these schools exacerbate. Part II explores the current circuit split around the procedural due process rights of students facing involuntary transfer to an alternative school. Part III argues that courts should expand the Supreme Court’s holding in *Goss v. Lopez* to ensure students receive due process protections before being involuntarily transferred to disciplinary alternative schools. Part IV addresses counterarguments and concludes that, by extending procedural protections to students facing involuntary alternative school transfers, courts can protect those most vulnerable from harmful disciplinary actions.

I. BACKGROUND

The evolution of alternative schools has resulted in low-quality facilities with low disciplinary thresholds and zero-tolerance standards. Modern alternative schools serve a punitive goal, rather than providing the student opportunities for rehabilitation, and their disproportionate effect on certain student groups exacerbates this harm. Black and Brown, poor, and disabled students constitute a significant portion of the student body at alternative schools and remain at greater risk of transfer after minor disciplinary

38. Compare Langley v. Monroe Cnty. Sch. Dist., 264 F. App’x 366, 368 (5th Cir. 2008), Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26-27 (5th Cir. 1997), Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981), and Buchanan v. City of Bolivar, 99 F.3d 1352, 1359 (6th Cir. 1998) (holding that students are not entitled to due process before facing an involuntarily transfer to a disciplinary alternative school), with Betts v. Bd. of Educ., 466 F.2d 629, 633 (7th Cir. 1972), and Everett v. Marcase, 426 F. Supp. 397, 400 (E.D. Pa. 1977) (holding that students are entitled to procedural protections because transferring a student to disciplinary alternative school is comparable to suspension or expulsion).


40. See id. at 434-35.
infractions. Once transferred to an alternative school, students' odds of becoming involved in the criminal justice or juvenile justice systems increase. Section A of this Part discusses the history and evolution of disciplinary alternative schools. Section B explores the disproportionate harm that alternative schools inflict on students from low-income backgrounds, students with disabilities, and Black and Brown students.

A. Recent Trends Toward Alternative Schools

The U.S. Department of Education defines an alternative school as "[a] public elementary/secondary school that (1) addresses needs of students that typically cannot be met in a regular school, (2) provides nontraditional education, (3) serves as an adjunct to a regular school, or (4) falls outside the categories of regular, special education, or vocational education." The movement toward alternative schools started in the 1960s as a genuine effort to help students at risk of failing or dropping out of school. Originally, alternative schools provided academic support in an insulated environment to encourage student success. Alternative schools continued gaining traction in the 1980s during the War on Drugs and the advent of zero-tolerance disciplinary policies in schools.

Many of these policies followed the "broken windows" theory of criminal justice. This theory insists that crime is a disorder that leads to more frequent and more serious crime later in life if not

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41. See id. at 435 ("Frequently, alternative education programs are used as 'dumping grounds' and 'warehouses' for difficult students, teachers, or administrators, creating 'second-class citizens' in the education community." (quoting Margaret Haddeman, Alternative Schools, TRENDS & ISSUES 6 (2002))).
42. See id. at 431.
44. See Johnson & Naughton, supra note 14, at 70.
46. See Johnson & Naughton, supra note 14, at 71.
stopped early. These policies encouraged schools to “crack[] down on” minor disciplinary infractions in order to prevent serious crimes, such as rapes, robberies, and homicides, from occurring in the future. Lawmakers theorized that behavior would decrease with aggressive policing both inside and outside of schools. In the 1990s, the Department of Justice began supporting the presence of law enforcement officers in schools. Moreover, Congress passed the Gun-Free Schools Act of 1994 and the Safe and Drug-Free Schools and Communities Act of 1994, both of which imposed harsh zero-tolerance policies in school zones.

By the 1996-97 school year, over 78 percent of schools surveyed had expanded zero-tolerance drug policies to include tobacco and alcohol on school campuses. Today, some schools arbitrarily take zero-tolerance policies to the extreme. For example, schools have considered “butter knives and toy swords” as weapons, “tobacco and over-the-counter medications like Aspirin or Midol” as drugs, and “minor scuffles” as fighting. Although each state varies in its approach to zero-tolerance policies, disciplinary alternative schools grew in popularity as a way to manage the problematic behavior of students in increasingly strict schools. Strict disciplinary policies detrimentally impact the lifelong trajectory of students. The number of students suspended from public schools nearly doubled from 1.7 million in 1994 to 3.1 million by 1997. Similarly, alternative school placements increased threefold

48. See id.
49. Id.
50. See Johnson & Naughton, supra note 14, at 71.
51. Id.
52. See id. at 71-72 (“Under the current Gun-Free Schools Act, every state that receives federal funds must have a state-level policy that requires local education agencies to expel a student for not less than a year if the student is determined to have possessed a firearm at school. While this law allows for the chief administering officer of the local educational agency to modify the expulsion requirement, a one-year expulsion represents the default minimum sanction for a student.” (footnotes omitted)).
53. Id. at 72.
54. See Maxime, supra note 47.
55. Id.
57. Johnson & Naughton, supra note 14, at 72.
between the 1997-98 and 2000-01 school years, with 10,900 alternative schools disciplining 612,900 students in the 2000-01 school year alone. 58 Twenty-nine of the thirty-nine state education departments that participated in a 2016 ProPublica survey stated that school districts are granted the authority and discretion to involuntarily transfer students to disciplinary alternative schools. 59

However, school districts and administrators should not bear the blame alone for over-used disciplinary alternative schools. “[M]any of the marginalization policies are not created at the school level, but are instead the result of federal and state policies that follow the trend toward a zero tolerance approach to education. Perceptions about minority achievement and underclass culture affect all teachers, regardless of race.” 60 An additional layer of procedural due process protections would combat the systemic racism, implicit bias, and abuse of discretion that fuel the modern-day school discipline crisis.

B. Disproportionate Social Harms

Strict disciplinary standards and zero-tolerance policies do not impact students equally. Students from low-income backgrounds, students with disabilities, and Black and Brown students are increasingly vulnerable to harsh disciplinary sentences for minor behavioral infractions compared to their affluent, able-bodied, and white counterparts. 61 Much of this discrepancy can be attributed to the high levels of discretion school administrators have over student discipline. 62 Although alternative schools may appear enticing to teachers desperate to rid their classrooms of misbehaving students,

58. Id.
60. Geronimo, supra note 39, at 451-52 (footnote omitted).
61. See id. at 435-36.
a disciplinary transfer can serve as a funnel into the juvenile and criminal justice systems.\textsuperscript{63}

A 2019 Harvard study of the Charlotte-Mecklenburg School District in North Carolina showed that 23 percent of middle school students are suspended each year in the district, with suspensions concentrated heavily among Black and Brown students and students with disabilities.\textsuperscript{64} As the study observed, schools were redistricted in 2002, and about 50 percent of all students were reassigned to a new school.\textsuperscript{65} From this reassignment, “[s]tudents assigned to a school with a one standard deviation higher suspension rate [were] 15-20\% more likely to be arrested and incarcerated as adults and were also less likely to attend a four-year college.”\textsuperscript{66} This outcome was most concentrated in male students of color and indicated negative long-term outcomes in the potential for arrests and incarcerations.\textsuperscript{67}

Similarly, a survey of Kentucky’s Jefferson County School District during the 1997-98 school year found that the district transferred over 13 percent of Black third-grade students to disciplinary alternative schools but transferred only 3.8 percent of white third-grade students.\textsuperscript{68} Law enforcement subsequently detained 50 percent of the district’s Black students placed in a disciplinary alternative school, compared to only 32 percent of white students.\textsuperscript{69}

Both studies focused on ethnically diverse urban school districts, which are among the largest contributors to their respective state juvenile incarceration rates. Although the two studies analyze data from different decades, states, and age groups, the results indicate that the disproportionate effect on Black and Brown, disabled, and low-income youth remains consistent. In fact, low-income students account for 46 percent of the entire traditional public high school population in America, yet they account for 71 percent of students

\textsuperscript{63}. See Geronimo, supra note 39, at 431.
\textsuperscript{64}. Boudreau, supra note 56 (studying “the relationship between suspensions, achievement, and incarceration” at high-suspension public schools).
\textsuperscript{65}. Id.
\textsuperscript{66}. Id.
\textsuperscript{67}. See id. (“[T]here are large negative impacts on later life outcomes, related to attending a school with a high suspension rate. That suggests there are not overwhelmingly positive benefits of removing disruptive peers from the classroom.”).
\textsuperscript{68}. Johnson & Naughton, supra note 14, at 74-75.
\textsuperscript{69}. Id. at 75.
in alternative schools.\textsuperscript{70} Scholars have described the current state of alternative schools as “nothing less than a state of crisis.”\textsuperscript{71}

The public school discipline crisis is not limited to alternative school transfers. During the 2016-17 school year, Virginia issued over 127,800 out-of-school suspensions to over seventy-three thousand students.\textsuperscript{72} The suspension rate for Black students was 4.5 times higher than the rate for Hispanic and white students.\textsuperscript{73} This rate increased from 3.8 times higher in the 2015-16 school year.\textsuperscript{74} The Legal Aid Justice Center compared suspension rates of students and found that Black male students with disabilities were more than twenty times more likely to be suspended than able-bodied white female students.\textsuperscript{75} School suspensions and expulsions can lead to a decreased likelihood of high school graduation and post-secondary education enrollment, as well as a greater risk of entering the criminal justice or juvenile justice systems.\textsuperscript{76} In 2015, Virginia claimed the highest rate in the United States for referring students to law enforcement.\textsuperscript{77} Although Virginia continues to use exclusionary discipline practices, including disciplinary alternative schools, the state does not release information on how many or which students are transferred to these alternative schools; this makes tracking, managing, and regulating the alternative school crisis difficult.\textsuperscript{78}

\textsuperscript{70} Id. at 74.

\textsuperscript{71} Id. at 75 (quoting Judi Vanderhaar, Marco Munoz & Joseph Petroske, Reconsidering the Alternatives: The Relationship Between Suspension, Disciplinary Alternative School Placement, Subsequent Juvenile Detention, and the Salience of Race, 5 J. APPLIED RscH. ON CHILD. 1, 10 (2014)).

\textsuperscript{72} AMY WOOLARD, MARIO SALAS & RACHAEL DEANE, LEGAL AID JUST. CTR., SUSPENDED PROGRESS 2018: AN UPDATE ON THE STATE OF EXCLUSIONARY DISCIPLINE & ALTERNATIVE EDUCATION IN VIRGINIA’S PUBLIC SCHOOLS 1 (2018).

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} Id. (arguing that Virginia should implement a plan to eliminate the disparities in the use of school exclusion against Black and disabled students).

\textsuperscript{76} See Johnson & Naughton, supra note 14, at 73.


\textsuperscript{78} See WOOLARD ET AL., supra note 72, at 10 (“As a Commonwealth, we know almost nothing about which or how many students are being placed into disciplinary alternative
Research shows that “educator perspectives and practices have consistently emerged as significant predictors of rates of referral and disproportionality in suspension.” Factors such as implicit bias in classroom management and differential administrative processing result in Black students being referred more often for discipline and more likely to receive harsher consequences than their white counterparts for the same infractions. School administrators wield massive amounts of discretion in effectuating school discipline. This discretion, paired with teachers’ implicit biases against Black and Brown students and fears that they cannot control their classes, leads to high levels of disparity among how and which students are disciplined in schools.

Teachers and administrators may justify the overuse of disciplinary alternative schools as an option to relieve the classroom of difficult students and uphold the zero-tolerance expectations of both the disciplinary and criminal justice systems. Over-utilizing alternative schools reduces the number of students in class, improves the student-to-teacher ratio, and may artificially boost standardized test scores. Educators’ careers “may depend upon meeting these standards, and a curriculum that depends too much on testing and accountability may create a culture where test success becomes paramount to educating students. Pushing low-performing students out may ensure that the school will receive increased funding and/or increase administrators’ job security.”

education programs, how they perform—academically and behaviorally—after they enter the program, and what happens to them after they leave (if they ever transfer back into their home school, or even if they graduate).”

79. Johnson & Naughton, supra note 14, at 73 (quoting Russell J. Skiba, Mariella I. Arredondo, Chrysal Gray & M. Karega Rausch, What Do We Know About Discipline Disparities? New and Emerging Research, in INEQUALITY IN SCHOOL DISCIPLINE: RESEARCH AND PRACTICE TO REDUCE DISPARITIES 22-24 (Russell J. Skiba et al. eds., 2016)); see also Sparks & Klein, supra note 62 (“Anytime you have high levels of fear and high levels of discretion, you’re going to end up with high levels of disparity.”).

80. Johnson & Naughton, supra note 14, at 73.

81. See id.

82. See Geronimo, supra note 39, at 445-46 (explaining that the remaining students in typical classrooms “receive a better education” with the use of alternative schools because of lower student-to-teacher ratios and teachers managing lighter loads).

83. See id.

84. Id. at 446 (footnote omitted).
However, these perceived benefits are an illusion created as a result of funneling at-risk students away from better-performing schools with adequate resources and into alternative schools. Once in these facilities, students are isolated from their mainstream peers and burdened with punitive policies and zero-tolerance standards. The low-quality and inadequate education that alternative schools offer students often leads to higher dropout rates. Students who drop out of high school in turn face higher risks of arrest and recidivism. Thus alternative schools serve as “gateway programs that support the mass incarceration of poor, [Black, and Brown] youth.” With this background in mind, Part II considers the circuit split on what due process protections students are entitled to before being transferred to a disciplinary alternative school.

II. The Circuit Split

In the seminal 1969 case Tinker v. Des Moines Independent Community School District, the Supreme Court held that students do not “shed their constitutional rights ... at the schoolhouse gate.” Although the Constitution does not guarantee a federally protected right to education, once a state grants its students a property right and a liberty interest in education, this right is protected by the Fourteenth Amendment and cannot be revoked without due process. These property and liberty interests prohibit schools from depriving a student of education through suspension or expulsion without due process procedures, including giving notice of charges and an opportunity for a hearing. When students are suspended or expelled, they suffer reputational harm, face risks of impaired education and employment opportunities, and lose valuable instruction time in the classroom, all of which may adversely affect

85. See id. at 457-58.
86. Id. at 436-37.
87. Id. at 452.
88. Id.
92. See id.
the students’ long-term educational trajectory. This Part explains the current circuit split over whether students facing an involuntary transfer to a disciplinary alternative school are entitled to similar due process procedural protections as those required before suspensions and expulsions.

A. Courts That Require Due Process for Alternative School Transfers

Lower courts disagree on whether students that face an involuntary transfer to an alternative school are entitled to due process protections. The Seventh Circuit and U.S. District Court for the Eastern District of Pennsylvania consider an alternative school transfer as serious as suspension and expulsion, thereby entitling the student to at least a minimum level of procedural due process protections.

In the Seventh Circuit case, Betts v. Board of Education, Goldie Betts, a former Chicago high school student, alleged that the disciplinary proceeding for her involuntary transfer to the local alternative school violated the Due Process Clause of the Fourteenth Amendment. Goldie, along with two other students, pulled three fire alarms and caused the evacuation of the school. Police brought Betts to the station for questioning but did not file charges. Instead, the school immediately transferred Goldie to an alternative school to attend classes once a week.

The Seventh Circuit held that “it is beyond question that the plaintiff’s interest in continuing her high school education is within the purview of the Fourteenth Amendment’s due process protection.” The school was required to give the plaintiff and her parents

93. See id. at 574-76.
95. 466 F.2d at 630-31.
96. Id. at 631.
97. Id.
98. Id.
99. Id. at 633 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972)). The court considered it important that Goldie had admitted to her misconduct, but held that due process protections still apply when contemplating “the question of what discipline is warranted by
an opportunity to “present a mitigative argument” on the issue of what discipline was appropriate.\textsuperscript{100} Goldie and her mother were on notice of the charges and the severity of the potential discipline because of the police involvement.\textsuperscript{101} The student and her mother received notice from the school about the upcoming discipline conference, and they were allowed to contest the transfer at this conference.\textsuperscript{102} These measures, although minimal, sufficed to satisfy Goldie’s due process protections.\textsuperscript{103}

Similarly, in \textit{Everett v. Marcase}, the U.S. District Court for the Eastern District of Pennsylvania determined that schools must provide students with notice and a fair and impartial hearing before invoking an involuntary disciplinary transfer.\textsuperscript{104} The court compared this case to \textit{Goss v. Lopez}, which required a school to provide procedural due process protections before even temporarily suspending a student.\textsuperscript{105} Like suspensions, disciplinary transfers are disruptive and serious events in the course of a child’s education, and any educational disruption results in a loss of educational opportunities.\textsuperscript{106} If anything, an involuntary transfer to a different school, which may be further from home or offer poorer educational facilities, is more disruptive than a short suspension from school.\textsuperscript{107} Therefore, the court held that the student could continue attending his or her school until the school provided notice and conducted a fair and impartial hearing authorizing the student’s disciplinary transfer.\textsuperscript{108}

\textsuperscript{100} Id. (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
\textsuperscript{101} Id. (labeling her involuntary transfer to an alternative school as “tantamount to expulsion” and “discretionary rather than prescribed”).
\textsuperscript{102} Id. at 633-34.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 634.
\textsuperscript{106} Id. at 400.
\textsuperscript{107} See id.
\textsuperscript{108} Id. at 403-04 (“A transfer prior to final hearing, where there exists no emergency situation, would appear to violate the due process prescribed in \textit{Goss} type suspensions. This is particularly so, since in a true emergency such as potential danger of physical harm to other classmates, suspension procedures remain available. Consequently, no transfer shall become effective until final determination by the hearing officer that the recommendation to transfer be approved.”).
B. Courts That Do Not Require Due Process for Alternative School Transfers

The Seventh Circuit and Eastern District of Pennsylvania remain in the minority by granting procedural protections to students facing involuntary transfers. The Fifth, Sixth, and Tenth Circuits fail to extend due process protections for disciplinary alternative schools. These circuits contend that schools do not endanger constitutionally protected property or liberty interests by involuntarily transferring a student to an alternative school. The circuits distinguish alternative school transfers from suspensions or expulsions by arguing that, with a suspension or expulsion, students are pushed out of the classroom and deprived of instructional time and education for the duration of the discipline. These courts maintain that students transferred to an alternative school never miss instruction or coursework.

The Tenth Circuit held that for this reason, transferring a student to an alternative school, even for the entire school year, is less severe than expulsion, and therefore students are not entitled to due process before the transfer. Similarly, the Sixth Circuit held that a student is not entitled to procedural protections when involuntarily transferred to an alternative school unless the student shows the alternative school’s education program “is significantly different from or inferior to that received at his regular public school.” The court did not define what is considered “significantly

111. See, e.g., Nevares, 111 F.3d at 26 (“Timothy Nevares is not being denied access to public education, not even temporarily. He was only to be transferred from one school program to another program with stricter discipline. This alternative program is maintained by Texas schools for those students whose violations of the law or the school’s code of conduct fall short of triggering suspension or expulsion, but who for reasons of safety and order must be removed from the regular classroom.”).
112. E.g., id. This rationale assumes that the student will receive similar instruction, coursework, and education regardless of whether the student attends an alternative school or a traditional school. See id.
113. Zamora, 639 F.2d at 670.
114. Buchanan, 99 F.3d at 1359.
different from or inferior to” and left this issue up for later judicial interpretation in lower courts.\textsuperscript{116}

III. \textit{GOSS \textit{v.} LOPEZ} AS A VEHICLE FOR GREATER PROCEDURAL PROTECTIONS

In \textit{Goss \textit{v.} Lopez}, the Supreme Court determined that, while students are not entitled to the full spectrum of due process protections in matters of school discipline, they do possess a constitutionally protected property right and liberty interest in their education.\textsuperscript{116} In this case, nine students each alleged that the school administrators violated their right to due process by suspending them from their Ohio public high school for up to ten days without a hearing.\textsuperscript{117} The Court developed a two-part test to determine whether due process applies to the students’ discipline infractions.\textsuperscript{118} First, a court must look at the nature of the interest deprived.\textsuperscript{119} If the nature of the interest is a constitutionally protected one, then due process protections apply.\textsuperscript{120} Second, a court must consider the weight of the protected interests to determine how much and what process is appropriate.\textsuperscript{121} This determination involves balancing the school’s interest in efficiency and disciplinary autonomy against the student’s interest in their education.\textsuperscript{122}

After implementing this balancing test, the Court created a bright-line rule for disciplinary matters involving suspension or expulsion.\textsuperscript{123} With a suspension of ten days or less, the student must at least receive oral or written notice of the charges against him or her, an explanation of the evidence that the authorities have, and

\textsuperscript{115.} See \textit{id.}
\textsuperscript{116.} See 419 U.S. 565, 579 (1975); see also \textit{San Antonio Indep. Sch. Dist. v. Rodriguez}, 411 U.S. 1, 35 (1973) (holding that students do not have a fundamental constitutional right to an education but that state constitutions and statutes have provided students with a protectable property and liberty interest in attending school, which the Court seeks to minimally protect).
\textsuperscript{117.} \textit{Goss}, 419 U.S. at 568.
\textsuperscript{118.} \textit{See id.} at 575-78.
\textsuperscript{119.} \textit{Id.} at 575-76.
\textsuperscript{120.} \textit{See id.}
\textsuperscript{121.} \textit{See id.} at 577-78.
\textsuperscript{122.} \textit{See id.} at 577-82. Due process protections may span anywhere from notice and an informal hearing to a formal hearing with an impartial third party. \textit{See id.} at 579, 581-82.
\textsuperscript{123.} \textit{See id.} at 584.
an opportunity to informally present his or her side of the story. 124 Longer suspensions may receive more formal procedures. 125 Due process protections do not shield a student from properly imposed suspensions; however, unwarranted suspensions disserve both the state’s and student’s interests. 126

This Part argues that the Court should extend the reasoning in Goss to alternative school transfers to protect students’ property interest in their education and liberty interest in their reputation. The first Section uses the history of alternative schools to demonstrate that when the Court first issued the Goss holding, the landscape of disciplinary alternative schools appeared much different. Given the current popularity of alternative schools, the Court should expand this holding beyond suspensions and expulsions to accomplish the Court’s original goal. The second Section argues that extending the Goss holding provides students with greater due process protections and could mitigate the social disparities and disproportionate impact of alternative schools.

A. Evaluating the Goss Holding in a Modern Education Context

The Court decided Goss in 1975. 127 At that time, school districts used alternative schools in a rehabilitative manner to help students at risk of failing or dropping out of school. 128 Districts did not start using alternative schools for punishment or behavior management until the War on Drugs and the Gun-Free Schools Act gained traction in the late twentieth century, fostering a movement of zero-tolerance disciplinary standards. 129 Thus, when the Court first evaluated the constitutionally protected due process rights of students in disciplinary proceedings, the issue and dangers of disciplinary alternative schools were not yet relevant. The Court

124. Id. at 581.
125. See id. at 584.
126. Id. at 579.
127. Id. at 565.
129. See Johnson & Naughton, supra note 14, at 71-72; Tex. Educ. Agency, supra note 128, at 1-2; Geronimo, supra note 39, at 434.
focused on suspensions and expulsions because those were the punishments most often administered by school officials.\textsuperscript{130}

The \textit{Goss} Court's reasoning and two-part analysis should apply to the modern use of alternative schools. To extend its holding to alternative schools, the Court would first consider the nature of the interest deprived.\textsuperscript{131} While some circuits hold that students' educational and liberty interests are not implicated in alternative school transfers,\textsuperscript{132} these courts ignore the fundamental differences between traditional public schools and alternative schools. Alternative school transfers endanger students' property interest in their education and liberty interest in their reputation.

As previously discussed, there is a staggering difference in students' educational experiences and trajectories between traditional schools and alternative schools.\textsuperscript{133} Unlike traditional schools, alternative schools typically do not assign homework or offer libraries, cafeterias, gyms, sports, or clubs.\textsuperscript{134} At J.R.'s alternative school, over 90 percent of students fell below grade-level competency in math, and not a single student made it to senior year.\textsuperscript{135} The teachers responsible for her education "averaged only 0.94 years of experience compared to teachers in other local alternative schools, who averaged 19.07 years and 10.58 years, respectively."\textsuperscript{136}

It is impossible to reconcile these statistics with the notion that students receive a similar educational experience, whether in a traditional school or an alternative school. Disciplinary alternative schools provide lower quality education and fewer resources to students, resulting in significantly lower test scores and graduation rates than their other public school counterparts.\textsuperscript{137} The Court must consider the effects of school discipline holistically and acknowledge that, like suspensions and expulsions, alternative schools implicate

\begin{itemize}
\item 130. \textit{See Goss}, 419 U.S. at 567 n.1.
\item 131. \textit{See id.} at 575-76.
\item 133. \textit{See supra} Part I.B.
\item 134. \textit{See ACLU, Press Release, supra} note 16.
\item 135. \textit{Id.}
\item 136. \textit{Id.}
\item 137. \textit{See Geronimo, supra} note 39, at 452.
\end{itemize}
students’ educational property and reputational liberty interests, thereby requiring procedural due process protections.

Next, in determining the appropriate due process needed for an alternative school transfer, the Court would evaluate the weight of the student’s interest in their education and reputation against the school’s interest. 138 Because students’ property and liberty interests are implicated in a manner similar to suspensions and expulsions, 139 the Court should hold that students are entitled to minimum due process protections comparable to those required for suspensions and expulsions. Providing students with oral or written notice of the charges against them, an explanation of the evidence that the authorities have, and the opportunity to informally present their side of the story would shield students from unreasonable, inappropriate, and unwarranted alternative school transfers. 140 Just as the Court held for suspensions and expulsions, longer transfers to alternative schools may require additional procedures. 141

B. Mitigating the Disproportionate Impact of Alternative Schools

In Goss, the Court attempted to prevent schools from temporarily depriving students of their educational property and liberty interests without due process procedures. 142 By failing to extend this holding to dangerous and low-performing disciplinary alternative schools, the Court abandons the central principles of Goss and leaves students vulnerable to unfair disciplinary standards. 143 Disciplinary alternative schools are not comparable to their public school counterparts in quality, opportunity, or safety. 144 Statistics show that students who attend alternative schools receive a subpar educational experience and suffer a greater risk of criminal justice or juvenile court involvement. 145

139. See id.
140. See id. at 581.
141. See id. at 584.
142. See id. at 579-81.
143. See Geronimo, supra note 39, at 430-31.
144. See id. at 434-36.
145. See id. at 430, 436-38.
Furthermore, like the Court considered in Goss, an alternative school transfer may damage students' reputations and interfere with their future educational and employment opportunities.\textsuperscript{146} When public schools transfer students to an alternative school, administrators document these transfers in the students' permanent school records.\textsuperscript{147} As a part of the permanent record, alternative school involvement is reported to all future community colleges, universities, or military programs that students pursue.\textsuperscript{148} Like records of suspensions and expulsions, alternative school notations follow students into adulthood and damage their reputations in future endeavors.\textsuperscript{149}

The Goss Court granted students due process protections for their education to prevent unwarranted discipline and harm to their reputation.\textsuperscript{150} The Court's considerations and concerns directly apply to involuntary transfers to disciplinary alternative schools. By failing to update the Goss holding to extend beyond suspensions and expulsions, the Court ignores the holding's overarching goal of unwarranted discipline and leaves students' constitutionally protected interests vulnerable.

Moreover, the reality of unwarranted discipline does not endanger all students equally. Black and Brown students, students with disabilities, and students from low-income backgrounds disproportionately suffer from unwarranted and unfair discipline.\textsuperscript{151} By expanding due process to encompass involuntary transfers to disciplinary alternative schools, the Court would provide a layer of procedural protections to those students most vulnerable to entering the school-to-prison pipeline. For example, if the Court expanded the Goss holding to apply to alternative school transfers, Atlanta Public Schools would have had to provide prior notice and an informal hearing before involuntarily transferring J.R. to Forrest

\textsuperscript{146} See Goss, 419 U.S. at 574-75.
\textsuperscript{149} See id.
\textsuperscript{150} See Goss, 419 U.S. at 579.
\textsuperscript{151} See Geronimo, supra note 39, at 435.
Hill Academy.\textsuperscript{152} This notice and hearing would not prevent a fair and justified discipline sentence to an alternative school.\textsuperscript{153} However, the procedural protections would offer J.R., and the hundreds of other students in a similar situation, a layer of protection that forces schools to thoughtfully consider and support their decision to transfer a student.

IV. COUNTERARGUMENTS

While expanding due process protections to alternative school transfers would provide a vital layer of procedural protection to students, the Fifth, Sixth, and Tenth Circuits hold that the protections are unnecessary because such transfers do not deprive students of their access to a public education.\textsuperscript{154} Other critics argue that expanding due process protections places a financial burden on struggling school districts.\textsuperscript{155} Finally, some school advocates argue that requiring due process procedures infringes on school administrators' discretion in disciplinary matters.\textsuperscript{156} However, current data on alternative schools refutes these arguments and suggests that the Court should adopt expanded due process protections, such as those employed by the Seventh Circuit and the U.S. District Court for the Eastern District of Pennsylvania.

A. Alternative Schools Provide Similar Educational Opportunities

Circuits that refuse to provide procedural protections to students facing involuntary disciplinary transfers fail to acknowledge the extensive data that demonstrates the vast difference between disciplinary alternative schools and traditional public schools. Students from low-income backgrounds, students with disabilities, and Black

\textsuperscript{152} See Goss, 419 U.S. at 581 (granting minimum due process protections to all students facing suspension or expulsion).

\textsuperscript{153} Cf. id. at 579.


\textsuperscript{155} See Goss, 419 U.S. at 583.

\textsuperscript{156} See id. at 585 (Powell, J., dissenting).
and Brown students remain extremely vulnerable to alternative school transfers, and parents are left with no assurance of due process to protect their students' constitutional interests. The Fifth, Sixth, and Tenth Circuits reason that students are not deprived of "access to public education, not even temporarily," when transferred from traditional public school to an alternative school with harsher discipline standards. This reasoning fails to acknowledge the extent and severity of such increased discipline.

Students transferred to disciplinary alternative schools face lower graduation rates and higher involvement with the juvenile and criminal justice systems. A transfer to a disciplinary alternative school removes students from their familiar and less restrictive school environment and places them in a harsher environment with fewer resources. This educational, social, and environmental change monumentally shifts the trajectory of students most vulnerable to dropping out of school or entering the criminal justice system.

The disproportionate and dangerous effect of alternative schools on vulnerable students hardly accomplishes the Supreme Court's due process goals in education as expressed in Goss. The Court's reasoning that unwarranted suspensions and expulsions harm both the student's and state's interests directly translates to the harm that occurs from unwarranted alternative school transfers. Therefore, the Court must apply similar due process protections to prevent frivolous and unwarranted transfers that will inevitably endanger a student's property and liberty interests.

157. See WOOLARD ET AL., supra note 72, at 1.
158. See Nevares, 111 F.3d at 26; Langley, 264 F. App’x at 368; Zamora, 639 F.2d at 670; Buchanan, 99 F.3d at 1359.
159. See Geronimo, supra note 39, at 431.
160. See Vogell, supra note 59 ("There is an enormous change in the quality of education that the student has a shot at when they’re moved from regular school to alternative school.").
161. See id.
162. See id.; Goss v. Lopez, 419 U.S. 565, 579 (1975) (seeking to provide a layer of protection to students that acknowledges their constitutional rights and prevents unwarranted suspensions and expulsions).
163. See Goss, 419 U.S. at 579.
164. See Meredith S. Simons, Note, Giving Vulnerable Students Their Due: Implementing Due Process Protections for Students Referred from Schools to the Justice System, 66 DUKEL.J. 943, 969 (2017) (applying a similar argument to students facing referrals to the criminal justice system without due process).
B. Requiring Due Process Infringes on School Administrators’ Discretion

Courts value providing school administrators with discretion in disciplinary decisions. In his Goss dissent, Justice Powell argued that requiring due process protections limits the disciplinary discretion that school administrators may employ on a case-by-case basis and that this constraint will “affect adversely the quality of education.” The judiciary serves a limited role in the supervision of public schools, and increasing due process protections could be perceived as a judicial overreach.

This criticism correctly identifies school administrators as the experts “in the daily operation of public schools.” However, by expanding the holding in Goss, the Court would not infringe on school administrators’ discretion or interest in order and discipline. Expanding the two-part test and holding from Goss merely extends minimal constitutional protections to students before their education, reputation, and future trajectory are negatively and irrevocably disrupted. The expanded due process protections do not limit the school administrators’ range of discipline options. Instead, administrators would simply have to provide oral or written notice of the charges brought against the student, an explanation of the evidence that the authorities have, and the opportunity for students to informally present their side. Following Goss, administrators

165. See Goss, 419 U.S. at 584 (Powell, J., dissenting) (noting that the disciplinarian’s “discretion will be more informed and we think the risk of error substantially reduced”).
166. Id. at 585 (“The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools.”).
167. See id. at 590 (“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.” (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).
168. See id. at 588-90.
169. See id. at 579 (majority opinion) (accomplishing this goal for suspensions and expulsions).
170. See id. at 583-84 (“[T]he disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel.”).
already provide students with these protections before suspending or expelling a student. 171

Creating a step that requires schools to explain the charges and evidence and allows the student to refute accusations would help prevent frivolous and unwarranted discipline that occurs as a result of a misunderstanding or extenuating circumstance. 172 Furthermore, requiring schools to articulate this information to students and parents keeps schools accountable for their disciplinary decisions. 173 As the majority reasoned in Goss, the protections serve both the student’s and the school’s interests in preventing unwarranted transfers to alternative schools. 174 This updated interpretation of Goss is consistent with the spirit and goal of the Court’s original holding and provides protection consistent with modern-day school discipline.

C. Due Process Is Cost-Prohibitive for Schools

Some critics argue that formalizing the discipline process will result in due process procedures that are too costly for schools to effectively implement. 175 The Court first addressed this concern forty-six years ago in Goss by weighing the potential burden on the school against the student’s constitutionally protected liberties. 176 As a result, the Court extended only minimal due process protections, including effective notice and an informal hearing, to students facing short suspensions. 177 The protections struck a balance, only mandating procedures that would protect the student’s constitutional rights without making the punishment too costly to serve as a “regular disciplinary tool.” 178 While greater disciplinary sentences may warrant a formal hearing, the Court held that effective notice and an informal hearing would “provide a meaningful hedge against

171. See id.
172. See id. at 579-80.
173. See id.
174. See id. at 579.
175. See, e.g., id. at 583.
176. See id.
177. See id. at 584.
178. Id. at 583.
erroneous action” in school discipline, thereby achieving the Court’s goal of protecting student liberties.\(^{179}\)

The considerations in *Goss* directly mirror those in cases involving transfers to disciplinary alternative schools. Providing students with oral or written notice, an explanation of evidence, and the opportunity for an informal hearing creates a layer of protection that requires schools to notify parents and justify their discipline decisions before transferring a student.\(^{180}\) Statistics show that once transferred, students face serious consequences, including reputational damage, lower-quality education, and lower disciplinary thresholds that directly lead to higher rates of involvement with the justice system.\(^{181}\) This indicates that the same constitutionally protected liberties in *Goss* that are endangered by unwarranted suspensions and expulsions are also endangered by unwarranted transfers to alternative schools.

Furthermore, public schools have successfully provided these procedural protections for the last forty-six years before suspending or expelling a student.\(^{182}\) The processes, infrastructure, and administrative support needed to provide due process in disciplinary matters already exist in public schools nationwide.\(^{183}\) Extending this requirement to protect students facing alternative school transfers would not create a significant burden or change in school administration.\(^{184}\)

**CONCLUSION**

The Supreme Court should resolve the circuit split by expanding its holding in *Goss v. Lopez* to protect students facing involuntary transfers to disciplinary alternative schools. The Court issued this holding to prevent schools from temporarily depriving students of their educational property and liberty interests by suspending or expelling students without the minimum due process procedures of notice and an informal hearing.

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179. *Id.*
180. *See id.*
181. *See supra* Part I.B.
183. *See id.* at 582-83 (mandating these protections in 1975).
184. *See id.*
Like suspensions and expulsions prior to *Goss*, modern-day alternative school transfers unjustly deprive students of their property and liberty interests in their education without due process protection. These transfers disproportionately affect students from low-income backgrounds, students with disabilities, and Black and Brown students. With involuntary alternative school transfers, students face similar or more severe reputational and educational harms as they do with suspensions and expulsions. Therefore, by failing to extend previously established constitutional protections to modern-day school discipline tactics, the Court fails to achieve its original goal as explained in *Goss*.

Students should have the same due process procedural protections before a school may deprive them of the property interest in their education. These protections include requiring schools to provide oral or written parental notice, an explanation of the evidence the authorities have, and an opportunity for the student to present his or her side before a school may involuntarily transfer the student to a disciplinary alternative school. Both the Seventh Circuit and the U.S. District Court for the Eastern District of Pennsylvania have successfully expanded these minimum due process procedural protections to include alternative school transfers. 185

Furthermore, this due process expansion utilizes disciplinary standards and procedures already in place in schools and required by *Goss* for suspensions and expulsions. The procedures balance both schools’ and students’ interests without encroaching on school administrators’ discretion over discipline. Thus, by extending the due process protections of *Goss v. Lopez* to disciplinary alternative school transfers, the Court would achieve its ultimate goal of

185. *See supra* note 94 and accompanying text.
preventing unwarranted school discipline in a modern-day context. This extension is a small but vital step toward diverting J.R., and the thousands of other marginalized youth nationwide, away from the school-to-prison pipeline and into a brighter future.

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