Washington University Law Review

Volume 87 | Issue 3

January 2010

Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions

Davin Rosborough

LEFT BEHIND, AND THEN PUSHED OUT: CHARTING A JURISPRUDENTIAL FRAMEWORK TO REMEDY ILLEGAL STUDENT EXCLUSIONS

"*We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests*."[1]

"*In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms*."[2]

I. INTRODUCTION

As the United States embarks on its first year with an African American President, African American and Latino students in many of our major cities still have less than a sixty percent chance of graduating from high school.[3] The "human cost" of these disparities on the nation as a whole and especially on these particular communities is immense, exacting a particular toll on the career and life prospects of those who do not graduate.[4] Along with disproportionately high dropout rates, schools

1. Plyler v. Doe, 457 U.S. 202, 221 (1982).

2. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

3. Of the student cohort scheduled to graduate during 2003–2004, only 57.8% of Latino students, 53.4% of Black students, and 49.3% of Native American students did, while only 45% of students graduated in New York and Los Angeles, approximately 35% in Baltimore and Cleveland, and 25% in Detroit. CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., CITIES IN CRISIS: A SPECIAL ANALYTIC REPORT ON HIGH SCHOOL GRADUATION 1, 9, (2008), *available at* http://www.edweek.org/media/citiesincrisis040108.pdf.

4. Because it appears that the majority of pushed out students are unlikely to finish their high school education, most share the fate of dropouts: they are far more likely to be unemployed and earn low salaries, depend upon public assistance, experience poor health, and end up in prison. *See* GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT AT HARVARD UNIV. ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 6 (2004), *available at* http://www.civilrightsproject.ucla.edu/research/dropouts/LosingOurFuture.pdf ("In 2001, the unemployment rate for dropouts 25 years old and over was almost 75 percent higher than for high school graduates—7.3 percent versus 4.2 percent. Approximately, two thirds of all state prison inmates have not completed high school."); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 2 (2002), *available at* http://www.census.gov/prod/2002pubs/p23-210.pdf ("Average earnings ranged from $18,900 for high school dropouts to $25,900 for high school graduates, $45,400 for college graduates, and $99,300 for workers with professional degrees."); Henry M. Levin, The Social Costs of Inadequate Education, Summary of Teachers College Symposium on Educational Equity 16 (2005), http://www.tc.columbia.edu/i/a/3082_socialcostsofinadequateEducation.pdf (citing evidence from Professor Peter Meunnig that dropouts will live on average nine-years fewer than high school graduates and "have higher rates of cardiovascular illnesses, diabetes and other ailments," and noting

across the country discipline and exclude African American and Latino students at rates far higher than white students, even in non-urban school districts.[5]

Hidden amongst students who drop-out and are expelled are a third often neglected category of students: those who have been illegally "pushed out" of school. These students were neither properly expelled according to laws and regulations, nor did they voluntarily choose to end their education. Rather, they are students improperly told or encouraged by administrators to leave school for illegitimate reasons, often in violation of the law.[6] Pushouts occur when administrators tell students that they either must or "should" leave school because they are too far behind in credits to graduate, their test scores are too low, or they have missed too much school, when in fact they are legally allowed to stay in school.[7] This "pushout syndrome"[8] is largely driven by administrators pressured by the No Child Left Behind Act and other test-based accountability measures to raise test scores, who exclude low-scoring and "problem" students rather than addressing their educational needs.[9]

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that a "65-year-old person with a high school diploma typically enjoys better health status than a 45-year-old who dropped out in 10th grade").

5. *See* Brooke Grona, *School Discipline: What Process Is Due? What Process Is Deserved?*, 27 AM. J. CRIM. L. 233, 241 (2000) (discussing a decade old study of Austin, Texas schools, which noted that even though 18% of the students were African-American and 37% were white, 36% of the African-American students had been suspended or expelled versus only 18% of white students); Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 19–22 (2006) (citing a study by the National Center for Education Statistics which found that in 1999, 35% of African American students in grades seven through twelve had been suspended or expelled at some point versus only 15% of white students); Howard Witt, *School Discipline Harder on Blacks*, CHI. TRIBUNE, Sept. 25, 2007, at C1; NAACP LEGAL DEFENSE AND EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, *available at* http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf ("[I]n 2000, African Americans represented only 17% of public school enrollment nationwide, but accounted for 34% of suspensions.").

6. ADVOCATES FOR CHILDREN OF NEW YORK, SCHOOL PUSHOUT: WHERE ARE WE NOW? (2008), http://www.advocatesforchildren.org/pubs/pushout_update_2008.pdf; Baltimore City Public Schools, Student Services, Alternative Options Program Frequently Asked Questions, http://www.baltimorecityschools.org/Departments/Student_Support/PDF/FAQ.pdf (last visited Sept. 15, 2009); Statement, Dignity in Schools, Children Are Being Pushed Out of School, Dignity in Schools Campaign (2008), http://www.dignityinschools.org/summary.php?index=158 [hereinafter Dignity in Schools Campaign].

7. ORFIELD ET AL., *supra* note 4, at 3 (describing ways students are pushed out); Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 277 (2008).

8. ORFIELD ET AL., *supra* note 4, at 3.

9. *See* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 969 (2004) (observing that the severe consequences for administrators whose schools fail to make "adequate yearly progress" under the No Child Left Behind Act make school leaders in struggling schools keenly aware that "[s]tudents who perform poorly on state tests obviously hurt

While dropouts are themselves a staggering problem, the pushout problem may be even more complex because students are usually pushed "out the back door"[10] and "under the radar of effective accountability."[11] Thus, this already invidious practice is furthered by its invisibility to the public.[12] Though the educational advocacy group Advocates for Children of New York (AFC) has recently had some success litigating against pushouts,[13] this practice largely goes unnoticed by the public and unchallenged in the courts. The lack of pushout litigation may result largely from difficulty in discovering the problems, and the potential obstacles to proving that students were "pushed out" rather than voluntarily dropping out.[14] This "pushout syndrome" certainly requires policy cures to address accountability measures gone awry, provide additional educational resources for struggling students, and create "more powerful incentives for schools to 'hold onto' students through graduation . . . ."[15] Regardless, litigation is needed to address the immediate effects of these devastating practices on "minority youth who are already graduating at rates that are far lower than their white counterparts,"[16] to deter the practice in the future, and hopefully to spur reform.[17]

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schools looking to make AYP." This creates a "temptation" to "push low performing students out. . . . This temptation [is] presumably . . . strongest at the high school level, both because students most typically drop out at this stage and because low-performing high school students are most likely to be farthest behind."); Maureen Carroll, Comment, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure That Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1929 (2008) ("By excluding low-scoring students, a school can improve its test scores without expending any additional resources.").

10. Rivkin, *supra* note 7, at 277.

11. ORFIELD ET AL., *supra* note 4, at 3.

12. Elisa Hyman, *School Push-Outs: An Urban Case Study*, 38 CLEARINGHOUSE REV. 684, 685 (2005) ("Exclusionary practices have also flourished . . . due to faulty and nonuniform pupil-accounting measures and a lack of standards of accountability for most alternative school programs.").

13. *Id.* at 688–89 (discussing New York City's settlement in two of three lawsuits filed by AFC, helping to reinstate improperly excluded students and address the problem in a variety of other ways).

14. Randee Waldman, a former senior attorney with AFC and co-counsel on the Franklin K. Lane High School pushout case, Ruiz v. Pedota, 321 F.2d 538 (E.D.N.Y. 2004), in response to the question of why more organizations have not taken up pushout litigation, said that in addition to some difficulties gathering evidence, pushout claims may often be hard to prove. Unlike the overwhelming evidence of blatantly illegal behavior available in the AFC pushout cases where students were given a "program card" noting their transfer to GED programs, other pushed out students may not have such strong objective evidence to make the case. Telephone Interview with Randee Waldman, Director, Barton Juvenile Defender Clinic, Emory Law School (Jan. 23, 2009).

15. ORFIELD ET AL., *supra* note 4, at 3.

16. Hyman, *supra* note 12, at 685.

17. *See* Alana Klein, *Judging As Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 399–402 (2008) (noting the success of school finance litigation in Kentucky in prompting the State to pass sweeping educational reform measures); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1077 (2004) (noting that public law

This Note addresses the pushout problem in the context of litigation, identifying different causes of action that courts should recognize as cognizable claims in pushout cases, as well as elements of effective remedies. Part II examines the pushout problem in greater depth, considering the history of the practice and its growth in recent years. Additionally, Part II looks at the root causes of pushouts, the reasons why the problem persists largely undetected, and the small amount of pushout litigation conducted thus far.[18] Part III examines several causes of action as used in previous educational rights litigation, and analyzes each one's potential application to pushouts. Part III focuses most heavily upon both procedural and substantive due process challenges to school discipline, and federal and state equal protection claims, especially those challenging the equality or adequacy of school financing.

Part IV recommends a legal framework under which courts considering pushout challenges should operate. In particular, it argues for a more expansive application of due process than is currently applied under *Goss v. Lopez*,[19] recommends recognition of substantive due process claims, and asserts that pushouts also violate the Fourteenth Amendment under the equal protection rationale of *Plyler v. Doe*.[20] Further, it suggests that due to the challenges inherent in public school litigation, courts should emphasize monitoring through the appointment of special masters, in addition to targeted injunctive remedies and compensatory measures. Part IV also addresses the problems of proving pushout claims and recommends student data reforms which are needed in order to better protect students from pushouts and to make such litigation more viable.

II. PUSHOUTS: A BRIEF HISTORY AND THE PRESENT PROBLEM

A. What is a Pushout? Changing Definitions, Similar Results

Though the meaning of the term "pushout" has changed somewhat from its origin in the late 1960s,[21] the effects of the practice remain the

litigation can, among other things, create publicity and focus attention on the problem, as well as motivating "new stakeholders" to participate in reform efforts).

18. This litigation includes one case from the late 1960s and the "trilogy" of cases litigated by AFC. *See* RV v. N.Y. City Dep't of Educ., 321 F. Supp. 2d 538 (E.D.N.Y. 2004); Knight v. Bd. of Educ. of N.Y., 48 F.R.D. 108 (E.D.N.Y. 1969).

19. 419 U.S. 565 (1975).

20. 457 U.S. 202 (1982).

21. In the 1960s and 1970s, the term "pushout" was used to refer to disciplinary procedures targeted at removing African-American students from recently integrated schools, as a form of resistance to school integration. *See* Antoine M. Garibaldi, *Pushouts, African-American Students as*, *in*

same: primarily students of color are unfairly and often illegally denied their right to an education.[22] The term "pushout" has been imbued with racial overtones since its origin, when in the early 1970s African American students in recently integrated schools were targeted by white administrators for minor offenses and repeatedly suspended or expelled.[23] These pushed-out students may have appeared "in the statistics as drop outs, expulsions or suspensions," but were actually "victims of discriminatory discipline procedures in public schools."[24]

Students and parents successfully attacked this pushout practice in the Dallas school system in 1972 by filing a federal class action lawsuit challenging Dallas' suspension procedures on the basis of racial discrimination and the denial of equal protection as well as substantive and procedural due process.[25] The court found that "existing racism" was the "chief cause of the disproportionate number of Blacks being suspended," and directed the school district to "review its present program and to put

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ENCYCLOPEDIA OF AFRICAN-AMERICAN EDUCATION 374, 374–76 (Faustine C. Jones-Wilson et al. eds., 1996); Transcript of *Options on Education, Pushouts: New Outcasts from Public School* (NPR radio broadcast Sept. 9, 1974), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/37/f7/88.pdf [hereinafter *Pushouts: New Outcasts from Public School*]. While disciplinary measures are sometimes still used as a tool to push students out, the range of techniques is wider, and the reasons are different, as the schools themselves often are made up primarily of African American or Latino students. More recently, pushouts have been classified as affecting students who are "at-risk, or who will need extra years to graduate" or are low performing, who are "encouraged" to leave regular high schools or counseled-out, discharged illegally, or prevented from attending schools at all. *See* PUB. ADVOCATE FOR THE CITY OF N.Y. & ADVOCATES FOR CHILDREN, PUSHING OUT AT-RISK STUDENTS: AN ANALYSIS OF HIGH SCHOOL DISCHARGE FIGURES 5–6 (2002), *available at* http://www.advocatesforchildren.org/pubs/2005/discharge.pdf [hereinafter Office of the Public Advocate].

22. *See* Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 514–15 (2009).

> Whether meted out discipline at a disproportionate rate, assigned to failing schools, banished to disciplinary alternative schools, over-identified as special needs, denied educational services when accurately identified as special needs, subjected to high-stakes testing, or placed under zero-tolerance policies that criminalize minor infractions, students of color are pushed out of public schools . . . at an alarming rate.

Id.; *see also* ORFIELD ET AL., *supra* note 4, at 26 n.8 (showing schools and students affected by pushouts are mostly African American); Lupe S. Salinas & Robert H. Kimball, *The Equal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools*, 14 GEO. J. ON POVERTY L. & POL'Y 215, 230 (2007); New York City Department of Education, Franklin K. Lane High School Register (Oct. 23, 2009), http://schools.nyc.gov/SchoolPortals/19/k420/AboutUs/statistics/register.

23. *See Pushouts: New Outcasts from Public School*, *supra* note 21, at 3 (summarizing findings in a report by the Robert F. Kennedy Memorial that "in school systems that are under desegregation orders or have recently attempted desegregation there seems to be a dramatic rise in the suspension of black students"); *see also* S. REG'L COUNCIL & ROBERT F. KENNEDY MEM'L, THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION (1974).

24. *See Pushouts: New Outcasts from Public School*, *supra* note 21, at 1.

25. Hawkins v. Coleman, 376 F. Supp. 1330, 1331 (N.D. Tex. 1974).

into effect an affirmative program aimed at materially lessening 'white institutional racism' in the [Dallas Independent School District]."[26] While current pushouts may result less from a targeted racist animus and instead from a more passive form of racism, educational neglect, the result of this practice is largely the same: "[s]everal years from now the non-graduates may show up on welfare roles, in unemployment offices, or in jail."[27]

A 1969 case from New York City better reflects a current understanding of pushouts, though the term was not then used. In that case, students and their parents challenged an expulsion *en masse* from Franklin K. Lane High School.[28] The plaintiffs claimed the school was improperly trying to relieve overcrowding when it expelled hundreds of students from its rolls by claiming they "were absent 30 days or more during the present school year and . . . had maintained an unsatisfactory academic record in the Autumn [sic], 1968 semester."[29] Several named plaintiffs disputed that they met this criteria, and the class as a whole claimed a violation of due process and equal protection by the expulsions.[30] Judge Weinstein found a violation of due process and issued a preliminary injunction, ordering the school to reenroll the expelled students, and provide make-up classes and resources. He also ordered the creation of a special "Masters Committee"[31] to further address the situation.[32]

The current conception of pushouts shares some similarities with these examples from several decades ago. Notably, the practice still primarily affects students of color and results in their exclusion from school.[33] As in

26. *Id.* at 1337–38.

27. *Pushouts: New Outcasts from Public School*, *supra* note 21, at 1.

28. Knight v. Bd. of Educ. of N.Y., 48 F.R.D. 108, 110 (E.D.N.Y. 1969).

29. *Id.*

30. *Id.* at 109.

31. The "Masters Committee of Educational Experts" was composed of three members: Chairman Dr. Richard Trent, Associate Professor of Education at Brooklyn College; a member appointed by plaintiffs, Dr. Mabel Smythe, High School Coordinator, New Lincoln School; and a member appointed by the defendants, Dr. Irving Anker, Assistant Superintendent of Schools, Board of Education of the City of New York. The committee was charged with hearing any complaints by members of the plaintiff class regarding non-compliance with the injunction. Knight v. Bd. of Educ., 48 F.R.D. 115, 117–18 (E.D.N.Y. 1969).

32. *Knight*, 48 F.R.D. at 117–18. Interestingly, Judge Jack Weinstein, who heard this case, is the same judge who in 2004 heard lawsuits filed by AFC alleging that students were pushed out of three New York City schools. *See* Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 29 (2008) (referring to the students in the *Knight* case as "pushed out of high schools because their teachers thought them too difficult to deal with").

33. *See supra* note 22 and accompanying text. Judge Weinstein also aptly noted in his approval of class certification and settlement in the most recent New York City pushout case in 2008:

the Dallas case, disciplinary exclusions are still the justification used for some pushouts.[34] Most similarly, pressures on school administrators are still the root cause of their wrongful conduct, though these pressures are now likely caused more by high-stakes testing and the pressure on struggling schools to meet state and federal standards, than by a primarily racist animus.[35] Thus, as desperate administrators react poorly to these pressures, the same urban students of color long "left behind" educationally face yet another crisis: the reality of pushouts.

B. A Growing National Problem

While school administrators push students out using an array of academic and disciplinary explanations, or constructively push students out by limiting educational services and activities to which they are entitled,[36] pushouts have several common components. First, the students affected do not leave school of their own full volition. Rather, they are formally or informally told to leave or are "counseled" that they would be better served in another educational setting such as a General Equivalency Degree (GED) program.[37] Second, regardless of the stated purpose, the administrator's reasons and methods for excluding the students are illegitimate and usually illegal.[38] Finally, the discharged students and their

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"Defendants had to be aware of what all could literally see—that their practices and policies of exclusion primarily adversely affected African-Americans and Latinos." D.S. *ex. rel.* S.S. v. New York City Dep't of Educ., 255 F.R.D. 59, 64 (E.D.N.Y. 2008).

34. *See, e.g.*, Tamar Lewin & Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES, July 31, 2003, at A1 (describing a student who was told she could no longer attend school because "[s]he had been in one too many fights, and missed one too many classes"); ADVOCATES FOR CHILDREN OF NEW YORK, *supra* note 6, at 1 ("School pushout can also occur when a school chooses to punish a student by repeatedly suspending him or her instead of attempting to address the problematic behavior . . . .").

35. *See* Hyman, *supra* note 12, at 684–85 (describing how pressures from No Child Left Behind's accountability measures and the New York State Board of Regents "fuel" the pushout problem). Some argue that institutionalized racism has a role in the pushout and dropout trends. *See* Lindsay Perez Huber et al., *Naming Racism: A Conceptual Look at Internalized Racism in U.S. Schools*, 26 CHICANA/O-LATINA/O L. REV. 183, 201 (2006) (arguing that many students who appear to drop out of school are really pushed out, as they "internalize the racism connected to teachers, curriculum and resources, which lead to the disengagement and alienation," causing these students to "consciously or unconsciously believe that because of their racial background they will not be able to succeed in school and, as a result, do not continue their education").

36. *See infra* note 73 and accompanying text (students assigned shortened schedules, noncredit classes and warehoused in the school auditorium for much of the day).

37. *See* Hyman, *supra* note 12, at 684 (describing students who are told they cannot stay in school because they are too old, did not have enough credits, or were not on track to earn a diploma in four years); Rivkin, *supra* note 7, at 277 ("For example, a school administrator tells a student that her best option is to drop out and take the GED because she is behind in credits for graduation.").

38. ADVOCATES FOR CHILDREN, *supra* note 6, at 1–2; Office of the Public Advocate, *supra* note

parents are often unaware of their educational rights and thus are left "stranded in an educational no-man's land."[39] These pushouts are often motivated by a common underlying factor as well: "test-based accountability for schools . . . provide[s] an incentive to push out low-performing students."[40]

1. Why Do Pushouts Occur?

Recent school accountability measures, namely the federal No Child Left Behind Act (NCLB), have put increased pressure on schools to meet certain testing goals and make "Adequate Yearly Progress" (AYP).[41] Failure to meet these AYP targets invokes severe consequences for the school and the administrators.[42] Because students struggling academically will likely score poorly on high-stakes tests and drag down the scores of the school, some desperate administrators resort to pushing these students out.[43] The relationship between graduation rates and high-stakes tests for

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21, at 5–7; *see also* Dignity in Schools Campaign, *supra* note 6 ("Pushout happens when youth are removed (or remove themselves) from a regular school setting as a result of policies and practices that discourage them from remaining in classrooms and on track to receive a regular diploma." These practices include "[e]ncouragement of low-performing, overage or under-credited students to transfer to a GED program or other alternative setting."). A prime example is the New York City students aged eighteen or younger and legally allowed to remain in school until age twenty-one, who are told they must leave school because they were behind academically. Hyman, *supra* note 12, at 684.

39. ORFIELD ET AL., *supra* note 4, at 3; *see also* ADVOCATES FOR CHILDREN, *supra* note 6, at 3 (finding that out of 113 students who were told to leave school and did, 62 did not know they could remain in school until age 21); Dignity in Schools Campaign, *supra* note 6 (noting "[t]he exclusion of students and parents from the development and implementation of local school policies and disciplinary processes, as well as due process violations" as a practice encouraging pushouts).

40. Ryan, *supra* note 9, at 970.

41. NCLB was passed in 2001 as a renewal of the Elementary and Secondary Education Act of 1965. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6304, 6311 (2006). NCLB set a benchmark for achieving one hundred percent student proficiency in math and reading by 2014, whereby states must create a plan to require each school to show "adequate yearly progress"(AYP), mainly through standardized tests developed by the State. 20 U.S.C. § 6311(b)(2) (2006).

42. Schools that fail to make AYP for two consecutive years are placed on "school improvement" status, opening up transfer and supplemental education service options to students. 20 U.S.C. § 6316(b)(1)(A) (2006). The schools that still fail to make AYP for the next two years require "corrective action," which may include replacement of the administration, takeover by the district, or organizational "restructuring," and schools that fail to make AYP in the fifth year may face closure or state takeover. 20 U.S.C. § 6316(b)(7)-(8) (2006); *see also* Carroll, *supra* note 9, at 1927 (describing this process).

43. ORFIELD ET AL., *supra* note 4, at 11 ("The overwhelming focus of many states and school districts aiming to avoid test-driven accountability sanctions has led to increased reports across the nation of schools that "push out" low achieving students in order to help raise their overall test scores."); Carroll, *supra* note 9, at 1929 ("By excluding low-scoring students, a school can improve its test scores without expending any additional resources."); Cheryl George, *Non-Education in America: Gateway to Subsistence Living*, 14 TEX. WESLEYAN L. REV. 243, 244 (2008) ("Rather than being termed a 'failing' school due to low standardized test scores, many schools have enacted

accountability purposes contributes directly to this perverse incentive structure.[44]

Until recently, NCLB regulations required the inclusion of graduation rates as an "academic indicator" in determining a school's AYP, but allowed states to set their own graduation rate goals and did not require improvement in graduation rates to meet AYP.[45] Because NCLB regulations did not allow high graduation rates to compensate for low test scores, but failure to meet graduation rate targets harmed a school's ability to make AYP, the policy incentivized states to set fairly low graduation rate goals rather than be subject to penalties for failing to meet high goals.[46] These low goals made it easier for schools to push students out with impunity because even if pushed-out students were counted as dropouts, this had little effect on AYP. The Department of Education has recently changed the policy to help create incentives for schools to focus more on graduation rates and demand more accountability, providing hope that one incentive to push students out may be minimized.[47]

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administrative provisions to push students out of school rather than retain them and have to report their low test scores."); Hyman, *supra* note 12, at 684–85; Ryan, *supra* note 9, at 969 ("One less student performing below the proficiency level increases the overall percentage of students who have hit that benchmark.").

44. *See* Carroll, *supra* note 9, at 1912–13 (noting that NCLB creates an incentive structure rooted in "an accountability system that rewards schools for engaging in exclusionary practices").

45. *See* Daniel J. Losen, *Graduation Rate Accountability under the No Child Left Behind Act and the Disparate Impact on Students of Color*, *in* DROPOUTS IN AMERICA 41, 45 (Gary Orfield ed., 2004) ("[T]he administration's regulations made it so that yearly progress is required only on test scores. . . . [S]chools and districts need only set a fixed goal for graduation rates, and that goal . . . can be whatever it wants it to be . . . .")

46. *See* Ryan, *supra* note 9, at 970.

47. The changes make graduation rate goals more stringent in a couple of ways. First, they demand more accountability of states in setting the goals, requiring that in its "Consolidated State Application Accountability Workbook" submitted to the Department of Education for approval, it must provide "[a]n explanation of how the State's graduation rate goal represents the rate the State expects all high schools in the State to meet and how the State's targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal." Improving the Academic Achievement of the Disadvantaged, 73 Fed. Reg. 64,436, 64,509 (Oct. 29, 2008) (to be codified at 34 C.F.R. § 200.19). Thus, the Secretary of Education is requiring more information in the approval process for the state rate. Second, while states formerly had greater latitude to determine how to calculate their state's graduation rate, the new rules require the state to move to a standardized "four-year adjusted cohort graduation rate" by the 2010–11 school year, which is calculated by taking the "number of students who graduate in four years with a regular high school diploma divided by the number of students who form the adjusted cohort for that graduating class." *Id.* at 64,508–09. Additionally, the new regulations require graduation rates to be disaggregated by subgroup (including racial groups), presumably helping create a disincentive to push-out students of color. *Id.* at 64,509. Previously, schools needed "to be responsible for minority groups only on test scores, not for whether most black or Latino students in a school actually drop out." Losen, *supra* note 45, at 46; *see also* Kathleen Kingsbury, *No Dropouts Left Behind: New Rules on Grad Rates*, TIME, Oct. 30, 2008, *available at* http://www.time.com/time/nation/article/0,8599,1854758,00.html ("[I]n 2005, all 50 states

Further, the reporting requirements of the NCLB regulations provide an additional exclusionary incentive, as they require that schools not count students who were not enrolled for a "full academic year" for AYP purposes.[48] Schools can thereby avoid including low performing students in AYP statistics by pushing them out before the end of the academic year.[49] These pushout incentives also disproportionately affect students of color, as NCLB requires AYP to be met for certain "subgroups" including racial groups, and African American or Latino students statistically score disproportionately lower on these tests and are thus more pressured to leave.[50] While the recent graduation rate changes by the Department of Education[51] may help to discourage pushouts, other "faulty and nonuniform pupil-accounting measures and a lack of standards of accountability" continue to obscure pushouts and enable their existence.[52]

2. How Pushouts Go Unnoticed

Part of the reason why pushouts are tolerated and escape widespread attention is that many school systems have reporting procedures that enable pushouts to be hidden, and accountability measures that fail to prevent the practice. The New York City Public Advocate found that in the 2000–2001 school year alone over 55,000 New York City students were "discharged," though the data was not broken down by type of discharge.[53] These figures, along with a large increase of school-aged

agreed to enact a uniform graduation rate, but only 16 eventually did. Now officials will require states to spell out how they will implement key elements of the federal law, formal plans that the Department of Education must approve.").

48. *See* 34 C.F.R. § 200.20(e)(2) (2008) ("In determining the AYP of a school, the State may not include students who were not enrolled in that school for a full academic year, as defined by the State.").

49. These requirements may result in "nefarious activities" such as pushouts, because "non-reporting occurs for 'push-out students' as well as those sent to alternative schools . . . ." Philip T.K. Daniel, *No Child Left Behind: The Balm of Gilead Has Arrived in American Education*, 206 ED. LAW. REP. 791, 808–09 (2006). Daniel further notes that African American and Hispanic students are suspended and expelled at much greater levels than whites. *Id.* at 809.

50. See 34 C.F.R. § 200.13(b)(7)(ii) (2008); Losen, *supra* note 45, at 41, 44 ("It is well established that students in these groups [racial and ethnic minorities, economically disadvantaged students, students with disabilities, and students with limited English proficiency] are disproportionately low achieving. . . . [Thus] students in these groups may be pressured to leave when test scores alone determine whether schools and districts are sanctioned.").

51. *See supra* note 47 and accompanying text.

52. Hyman, *supra* note 12, at 685.

53. Office of the Public Advocate, *supra* note 21 ("'[D]ischarges' are defined as students who left the public school system in New York City to enroll in another educational program or who outgrew the system at the age of 21."). Jonathan Kozol also explains how "[t]housands of low-performing students who had left school, or been pushed out of their schools, had been improperly

students reported in GED programs, and additional anecdotal evidence, suggest that many of these "discharges" were actually pushouts.[54] In Los Angeles, the school system appears to lose track of many students completely.[55] A *Los Angeles Times* investigation of one high school there found that a number of students classified as transfers to other high schools had really just left their schools, and several of these students reported that they were asked to leave.[56] The structure of this system provides an incentive for administrators to push students out, because even if the "discharged" students enter GED programs in lieu of earning actual high school diplomas, schools are not forced to count these students as dropouts.[57]

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excluded from the dropout figures." JONATHAN KOZOL, THE SHAME OF THE NATION 208 (2005). Kozol notes that school officials had "concealed" the numbers of these students by "labeling these pupils 'discharged students,' which implied they had transferred to another school or else enrolled in an 'equivalency program' even when there was no evidence for these assumptions." *Id.*

54. *See* Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 292 (2004) ("[E]xperts who have examined the statistics and administrators of high school equivalency programs say that the number of 'pushouts' seems to be growing, with students shunted out at ever-younger ages.") (internal quotations omitted); Office of the Public Advocate, *supra* note 21, at 6–7; Hyman, *supra* note 12, at 685. Many of these students were coded as "transferred to another educational setting," a vague determination that might mean they were pushed into an alternative education setting such as a GED program. Lewin & Medina, *supra* note 34.

55. *See* Mitchell Landsberg, *Back to Basics: Why Does High School Fail So Many?*, L.A. TIMES, Jan. 29, 2006, *available at* http://www.latimes.com/news/printedition/la-me-dropout29jan29,0,4040539.story (noting attempts by the Los Angeles Times to track students at one Los Angeles high school, Birmingham High). The newspaper was able to determine that "at least 53% of the students who began at Birmingham in ninth grade [in the Fall of 2001] graduated four years later," and that "[a]t least 9% were continuing their education [elsewhere]," and that "[a]t least 12% were not in school of any kind." *Id.* That leaves 16% of the student body who "couldn't be found, although extensive inquiries at area schools suggested most were not active students." *Id.* In real numbers, this means 281 students at one high school alone whose status was unknown. *Id.*

56. At least three students were reported as transferring to nearby schools but the new schools said they either never showed up, or had no record of the student at all. Two students were reported as transferring to schools in Utah and Texas, but neither school listed exists, and both students were still in the Los Angeles area, one of whom explicitly said she had no intention to moving to Utah. *Id.* One attendance counselor at the school, when asked about one of these students replied, "I'm trying to save kids here . . . I can't save this kid." *Id.*

57. *See* Hyman, *supra* note 12, at 685; Landsberg, *supra* note 55 (noting that the students at Birmingham High who were noted as transfers but had actually dropped-out or were pushed-out did not count toward the school's dropout rate because they were listed as "transfers."). Jonathan Kozol describes similar evidence in Houston, where high school graduation rates gains "appear to have been overstated or outrightly false." KOZOL, *supra* note 53, at 207. Kozol notes a study by the *New York Times* that "'more than half the students' who had disappeared from 16 middle schools and high schools . . . should have been identified as dropouts, 'but were not.'" *Id.* This includes one high school that claimed that zero students had dropped out, "even though 460 students had disappeared from the enrollment of the school that year." *Id.* This practice has been documented in Florida as well, where students referred to GED programs do not count as dropouts toward graduation rate calculations, even though there is no system in place to ensure the students actually enroll in a GED program. *NewsHour*

Further, New York law "prohibits almost all involuntary discharges and transfers without due process,"[58] yet the evidence of pushouts at multiple schools suggests that these statutes are not supported by adequate oversight. In Los Angeles, evidence suggesting the improper use of "opportunity transfers" also implies a lack of proper oversight.[59] In other situations, pushouts may go unnoticed because the pushed-out students are counted as dropouts or voluntary transfers when in fact they were coerced into making such decisions.[60]

3. The Evidence: Where Pushouts Occur

The most widespread public attention afforded pushouts came in New York City after the city's Public Advocate and the group Advocates for

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with Jim Lehrer: Disappearing Dropouts (PBS television broadcast Nov. 30, 2004) (transcript *available at* http://www.pbs.org/newshour/bb/education/july-dec04/dropouts_11-30.html). At Evans High School in Orlando, 440 students were "transferred" into the GED program over two years, but only fourteen actually enrolled. *Id.*

58. Office of the Public Advocate, *supra* note 21, at 6. The process due to a student removed for truancy includes the following requirements: the student must have been absent twenty consecutive school days, the principal must notify the student and parent and schedule an "informal conference," where the principal "shall determine both the reasons for the pupil's absence and whether reasonable changes in the pupil's educational program would encourage and facilitate his or her re-entry or continuance of study." *Id.* at 22 n.19. The student and parents must also "be informed orally and in writing of the pupil's right to re-enroll at any time . . . if otherwise qualified . . . ." N.Y. EDUC. LAW § 3202(1-a) (McKinney 2009). New York law also maintains due process protections for suspensions and expulsions, including that:

> No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his or her behalf.

N.Y. EDUC. LAW § 3214(3)(c)(1) (McKinney 2008).

59. "Opportunity Transfer" (OT) is a process by which school officials in the Los Angeles Unified School District (LAUSD) can transfer a student from one school to another: "1) to promote the positive social and/or academic adjustment of a particular student and 2) to promote school safety for all students." Bulletin from Deputy Superintendent, Operations and Support Servs., L.A. Unified School Dist. to All Schools and Offices, Bulletin No. Z-58: Opportunity Transfers 1 (Apr. 20, 1999), *available at* http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/STUDENT_HEALTH_HUMAN_SERVICES/BULLETIN%20Z-58%2C%20OT%20REV_0.PDF [hereinafter LAUSD Bulletin]. OTs are explicitly forbidden for "tardiness, or other attendance-related issues" as well as "as a remedy for low academic achievement." *Id.* at 7. Despite this policy, there is evidence OTs were improperly used as a pushout mechanism. *See 'Opportunity Transfers' Used to Expel Poor students, Claim Protesters*, TIDINGS, Jan. 6, 2006, *available at* http://www.the-tidings.com/2006/0106/expelled.htm [hereinafter TIDINGS].

60. *See, e.g.*, ORFIELD ET AL., *supra* note 4, at 25 (describing students in Alabama who were told they needed to withdraw and handed forms labeled "withdrawal. Reason: Lack of Interest."); Lewin & Medina, *supra* note 34 (describing students coded as "transferred to another educational setting," when this could mean they were pushed out and told to enroll in an "alternative education setting" such as a GED program).

Children released a report documenting the issue in November of 2002.[61] Examining the large number of "discharged" students, the report speculated that these statistics, "[c]oupled with anecdotal information," suggest that "students who are at-risk, or who will need extra years to graduate, may be encouraged to leave regular high schools or be 'pushed out.'"[62] Local and national media began to cover the pushouts, including articles in the *New York Post*,[63] the *Village Voice*,[64] and a series of in-depth articles published in the *New York Times*.[65] While a spokesman for New York City schools first denied the practices occurred,[66] New York City Schools Chancellor Joel Klein subsequently acknowledged that pushouts were "not just a few instances, [but] a real issue,"[67] calling them "a disservice to our students and ourselves."[68]

In response to these practices at three schools, AFC filed lawsuits on behalf of the pushed-out students and their parents.[69] The students asserted that the pushouts violated their rights of Due Process under the Fourteenth Amendment, constitutional rights under 42 U.S.C. § 1983, New York state education law provisions, and New York City Chancellor's Regulations.[70]

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61. Office of the Public Advocate, *supra* note 21. The report revealed that in 2001 alone, "more than 55,015 students were discharged, compared with 14,549 who dropped out from the same group of schools." *Id.* at 2. Though not all of these "discharges" were pushouts and many were likely valid transfers or age-outs, the report also notes that while this discharge "figure is very large, it does not represent the true number of citywide discharges, since many schools and programs did not produce discharge numbers." *Id.* at 9. Conversely, the graduating class of 2001 in New York City totaled only 33,520 students. *Id.* at 5. At many schools, discharges constituted over twenty-five percent of the school's peak enrollment, including a staggering forty-one percent at Taft High in the Bronx. *Id.* at 11–14.

62. *Id.* at 5.

63. Carl Campanile, *Shocker of Booted Students*, N.Y. POST, Nov. 9, 2002, at 9.

64. Nat Hentoff, *Testing to Create Dropouts?*, VILLAGE VOICE, Sept. 23, 2003, at 24.

65. Lewin & Medina, *supra* note 34; Jennifer Medina & Tamar Lewin, *High School Under Scrutiny for Giving Up on Its Students*, N.Y. TIMES, Aug. 1, 2003, at A1.

66. Campanile, *supra* note 63 (quoting Department of Education spokesman Kevin Ortiz and asserting that he claimed, in the words of the article author, that "high schools are not illegally tossing kids out").

67. Medina & Lewis, *supra* note 65.

68. Lewin & Medina, *supra* note 34.

69. *See* Complaint, Ruiz v. Pedota, 321 F. Supp. 2d (E.D.N.Y. 2004) (Civ. No. 03-0502); Complaint, RV v. N.Y. City Dep't of Educ., 321 F. Supp. 2d 538 (E.D.N.Y. 2004) (Civ. No. 03-5649); Complaint, S.G. v. N.Y. City Dep't of Educ., 321 F. Supp. 2d (E.D.N.Y. 2004) (Civ. No. 03-5152), *available at* http://www.advocatesforchildren.org/litigation/litdocs/pushoutdocs (explaining some of the basic facts alleged at Franklin K. Lane, Martin Luther King Jr., and Bushwick High School).

70. Complaint, *Ruiz*, *supra* note 69, ¶¶ 135–40; Complaint, *RV*, *supra* note 69, ¶¶ 77–80, Complaint, *S.G.*, *supra* note 69, ¶¶ 72–76; Additionally, in Ruiz, learning-disabled plaintiffs claimed violations of the IDEA and English-language learner plaintiffs claimed violations under Title III of the No Child Left Behind Act. Complaint, *Ruiz*, *supra* note 69, ¶¶ 137–38. In S.G., plaintiffs claimed a violation of Title IX of the Education Amendments of 1972 by discriminating against a student "on the basis of her status as a pregnant student." Complaint, *S.G.*, *supra* note 69, ¶ 74.

Though the city took steps to change the policies directed at discharging and transferring students after AFC filed the first suit,[71] AFC was unsatisfied and filed the second and third suits.[72] Eventually, two of the cases were settled, allowing readmission to the classes of plaintiffs, supplemental remedial services, new programs to address the problems, and additional training for some administrators and counselors.[73] Despite this significant settlement, pushout practices appear to continue in New York.[74]

Unfortunately, documentation of pushouts is not limited to New York City. In Alabama, school leaders admitted that they withdrew 522 students without their consent in the spring of 2000.[75] The practice allegedly continued in 2002 due to new testing pressures from the Alabama High School Graduation Exam.[76] In Houston, a former school administrator described techniques that the Houston Independent School District (HISD) used to directly push students out,[77] as well as other techniques designed to manipulate test scores that constructively pushed-out students retained for multiple years in the same grade.[78] School district leaders in both Denver and Chicago acknowledged the practice as well,[79] while not

71. Hyman, *supra* note 12, at 687 (mentioning the decision to "hastily issue[] new citywide policies for discharging and transferring students to incorporate a pre[-]discharge conference and notice of rights to students"); Tamar Lewin, *City to Track Why Students Leave School: Moving to End Practice That Pushed Some Aside*, N.Y. TIMES, Sept. 15, 2003, at B1.

72. Hyman, *supra* note 12, at 687.

73. RV, 321 F. Supp. 2d at 543–59; Hyman, *supra* note 12, at 688 (describing the terms of the settlement).

74. *See also* Complaint, D.S. v. N.Y. City Dep't of Educ. 255 F.R.D. 60 (E.D.N.Y. 2008) (Civ. No. 05-4787); Yoav Gonen, *City $chooled on Pushing Kids Out*, N.Y. POST, Oct. 14, 2008, *available at* http://www.nypost.com/seven/10142008/news/regionalnews/city_chooled_on_pushing_kids_out_133569.htm (describing how students were "assigned shortened schedules and noncredit-bearing classes or else warehoused in the auditorium," and the preliminary approval of a settlement in the ensuing lawsuit); Carrie Melago, *City Students Illegally Pushed Out of School Because of Age, Survey Shows*, N.Y. DAILY NEWS, Feb. 21, 2008, *available at* http://www.nydailynews.com/ny_local/education/2008/02/22/2008-02-22_city_students_illegally_pushed_out_of_sc-1.html; ADVOCATES FOR CHILDREN, *supra* note 6.

75. ORFIELD ET AL., *supra* note 4, at 25–26 (describing students pushed out in Birmingham, some of whom were handed withdrawal forms already filled out for them. School administrators explained that "students were withdrawn to remove low-achieving (i.e., low-scoring) students in order to raise Stanford Achievement Test . . . scores.").

76. *Id.* at 26. The article further notes that, "[t]o this day, students continue to be 'withdrawn' from school for lack of interest, academic failure, and poor attendance," and "withdrawn . . . students are often not assigned to any alternative educational forum." *Id.*

77. *See* Robert H. Kimball, *How Hispanics are Pushed Out of Public Education*, EDUC. EQUITY, POLITICS & POLICY IN TEXAS, Feb. 15, 2005, http://texasedequity.blogspot.com/2005/02/how-hispanics-are-pushed-out-of-public.html (describing practices in the HISD that constructively pushed out students).

78. *Id.*; Salinas & Kimball, *supra* note 22, at 230.

79. Karen Rouse, *Push Comes to Shove for Dropouts*, DENVER POST, Aug. 19, 2006, *available at*

discussing specific examples. A Native American leader in South Dakota also alleged that schools there pushed out children through "discriminatory use of attendance and discipline policies."[80]

In Los Angeles, a community group, Community Asset Development Re-defining Education (CADRE), identified several ways the Los Angeles Unified School District (LAUSD) used disciplinary rationales, including improperly applied "opportunity transfers,"[81] to push students out.[82] Another activist group claimed that such transfers were improperly used as "an opportunity to kick out low-performing students."[83] CADRE provided

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http://www.denverpost.com/news/ci_4206746. Cindy Stevenson, superintendent of the Jefferson County School District offered that, "I think we all know that historically . . . kids have subtly been given the suggestion that they go someplace else," and "Brad Jupp, senior academic policy adviser for Denver Public Schools, said officials recognize schools 'have histories of pushing kids out.'" *Id.*; Shiri Klima, Note, *The Children We Leave Behind: Effects of High-Stakes Testing on Dropout Rates*, 17 S. CAL. REV. L. & SOC. JUST. 3, 20 (2007) (citing the statements of Superintendent of Chicago Schools Robert Schiller).

80. *See* Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1029 (D.S.D. 2004).

> According to the former director of education for the Rosebud Sioux Tribe, Sherry Red Owl-Neiss, Indian children are being "pushed out" of school in Tripp County through the discriminatory use of attendance and discipline policies, a phenomenon that she attributes to racism: "It comes from the cultural conflict and the underlying racism that exists not just in the school, but in the community there." As support for this position, Red Owl-Neiss cited the district's refusal to bus Indian children to school and the school board's refusal to meet privately with the Rosebud Sioux Tribal Education Committee to discuss the effect of discipline policies on Indian children.

Id. at 1029–30 (citations omitted).

81. See LAUSD Bulletin, *supra* note 59, at 1 (describing opportunity transfers). The LAUSD notes that opportunity transfers may be made without parental approval for "progressive discipline" purposes and for a "single, serious act." *Id.* at 2–3. These transfers are specifically prohibited for the following reasons: "truancy, tardiness, or other attendance-related issues," "to preclude the provision of special education or Section 504 services, or to replace the IEP or 504 review process. *Nor may O.T.s be used as a remedy for low academic achievement . . . .*" *Id.* at 7 (emphasis added).

82. *See* Community Asset Development Re-Defining Education (CADRE), *A Call to Action to Stop the Pushout Crisis in South Los Angelesi*, June 14, 2006, at 2, *available at* http://www.cadre-la.org/media/docs/2184_MoreEdLessSusp_Report060806FINAL.pdf [*hereinafter* CADRE] (describing push-outs as beginning with "a series of classroom and school removals" which cumulatively over time "dismantl[e] educational access," and move to the "next level," through the "enthusiastic use of 'opportunity transfers,' despite the fact that they are banned in other large school districts and were recently removed from state law").

83. TIDINGS, *supra* note 59. The article, citing L.A. VOICE, describes the transfer policy as a way to move around "'struggling students' to other locations, knowing full well that they may never re-enroll," and notes that such students are not counted toward the dropout rate. *Id.* Lisa Milton, the group's executive director, claims that "[t]hese opportunity transfers are nothing more than an opportunity to kick out low-performing students." *Id.* Milton adds that many students drop-out as a result because the new school is too far, or the paperwork gets misplaced, causing the student to have no school to go to. *Id.* Such was the situation of "David," a student who was given an opportunity transfer based on an untrue accusation of bad behavior, whose new school said it had no paperwork, and whose old school would not take him back. *Id.* As a result, David had already missed two months of school. *Id.*

additional support for this assertion through surveys that affirmed the prevalence of pushouts in the LAUSD.[84] Other than the lawsuits filed by AFC in New York City, pushout litigation remains sparse.

III. USING PAST LESSONS: PREVIOUS EDUCATIONAL RIGHTS LITIGATION AND ITS APPLICABILITY TO PUSHOUTS

While pushout litigation has so far been limited, the Civil Rights Movement and subsequent legal developments unleashed a flurry of other educational rights litigation, some of which may have application in the pushout context.[85] First, the Supreme Court extended limited procedural due process protections to school disciplinary proceedings, a context that also involves school exclusions.[86] Second, litigants have also claimed violations of substantive due process in this context, though their success has been limited.[87] Third, advocates for school-funding equity unsuccessfully pursued federal equal protection claims, but subsequently succeeded in state courts, using state education clauses and equal protection clauses.[88] While the recent litigation brought by AFC is a helpful guide for potential claims, all of AFC's pushout lawsuits have settled,[89] thereby making it difficult to predict the likely outcomes for the different causes of action. The only relevant pushout case that reached a judgment was the *Knight* case in 1969, when Judge Weinstein found a due process but not equal protection violation in the school's conduct.[90] Thus, each track of previous educational rights litigation provides some insight into the way courts may treat pushout claims.

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84. *See* CADRE, *supra* note 82, at 2, 8 (finding that out of 120 young adults who left regular high school, 49% were asked to leave. The reasons cited for being asked to leave were: 36% behavior problems, 17% suspensions, 10% opportunity transfers. Of those asked to leave, 33% say they were "told they *had to leave*," and 51% who left school "were out of school from months to years before receiving alternative education."). The group launched a campaign which ultimately led to significant changes in the LAUSD disciplinary policy, notably, in making a "positive behavioral support" model its foundation. Press Release, Maisie Chin, CADRE, CADRE Parents Win Districtwide Policy Victory! Year-Long Campaign Results in New LAUSD Discipline Policy (Mar. 1, 2007), http://www.cadre-la.org/article/9.

85. Sabel & Simon, *supra* note 17, at 1022 (describing "three successive waves of public law litigation concerning schools" in light of the end to overt "massive resistance" to school integration).

86. *See* Goss v. Lopez, 419 U.S. 565 (1975).

87. *See infra* note 121 and accompanying text.

88. *See, e.g.*, Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582 (1996) (discussing state courts' analysis of equal protection and state constitutional education rights to suspended and expelled students).

89. *See* Hyman, *supra* note 12, at 688–89; Gonen, *supra* note 74.

90. Knight v. Bd. of Educ. of N.Y., 48 F.R.D. 115, 117 (E.D.N.Y. 1969).

A. School Discipline and the Process Due for Exclusionary Practices

The seminal case regarding the due process rights of students facing school discipline and exclusion is *Goss v. Lopez*.[91] In *Goss*, students suspended from a public high school in Columbus, Ohio, for nearly ten days without a hearing sued the school, claiming a violation of their right to procedural due process under the Fourteenth Amendment.[92] The Court held that students have property interests in their education, as well as liberty interests in protecting their "reputation" or "honor" against government action,[93] such that exclusions for "more than a trivial period" require due process.[94] In asking what process was due, the Court held that suspended students at a minimum are entitled to "*some* kind of notice and [must be] afforded *some* kind of hearing."[95] Beyond this broadly worded mandate, the Court provided little other guidance except as to timing[96] and the type of notice,[97] in effect requiring only a discussion between the student and administrator before the suspension is issued.[98]

Importantly, however, the Court noted that suspensions of more than ten days or expulsions "may require more formal procedures" than it outlined.[99] The Supreme Court itself has not addressed what process may be due for these longer exclusions, but has deferred to lower courts' application of the three-part balancing test from *Mathews v. Eldridge*.[100]

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91. 419 U.S. 565 (1975).

92. *Id.* at 568–69.

93. *Id.* at 574.

94. *Id.* at 576 ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.").

95. *Id.* at 579.

96. *Id.* at 582 ("There need be no delay between the time 'notice' is given and the time of the hearing.")

97. *Id.* ("[I]n being given an opportunity to explain his version of the facts . . . the student first [must] be told what he is accused of doing and what the basis of the accusation is.").

98. *See* MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 58 (3d ed., West 2009) ("Essentially, the 'hearing' required in *Goss* is a conversation between the student and the disciplinarian.").

99. Goss v. Lopez, 419 U.S. 565, 584 (1975) ("We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days.")

100. 424 U.S. 319 (1976); *see also* Larry Bartlett & James McCullagh, *Exclusion From the Educational Process in the Public Schools: What Process is Now Due*, 1993 BYU EDUC. & L.J. 1, 6 (1993) (noting that "[s]ince the 1970s," the Court has settled on the *Mathews* balancing test to determine what "process is due and the form in which it is to be applied."); Brent M. Pattison, *Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings*, 18 TEMP. POL. & CIV. RTS. L. REV. 49, 51 (2008) ("Although the Supreme Court has not further defined the contours of procedural due process in the context of long-term suspensions or expulsions, it has given lower courts the tool to do so with the *Mathews* test.").

The test examines what process is due by balancing the interest of the litigant, the possibility of deprivation of such an interest by the current procedures and the value of additional protections, along with the governmental interest.[101] Lower courts have applied the *Mathews* test to determine the process due to students facing more significant exclusions than ten-day suspensions, with varying results. Some courts have interpreted due process protections for extended suspensions or expulsions to include, in addition to notice and a pre-exclusion hearing, the right to counsel, an impartial arbiter, and the presentation of witnesses and evidence.[102] Other courts have found that even in an expulsion hearing, students do not have the due process right to cross-examine witnesses or be present during closed deliberations where the principal and superintendent can.[103]

Additionally, in the case of *Board of Curators of the University of Missouri v. Horowitz,*[104] the Court distinguished disciplinary actions from situations where the school removes the student for academic reasons.[105] In reasoning that dismissals for academic reasons do not generally require hearings,[106] the Court noted its concerns about "[j]udicial interposition in the operation of the public school system."[107] Justice Marshall, concurring with the propriety of the student's dismissal,[108] offered a dissenting vision

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101. The test to determine "what process is due" looks at:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of any additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

102. *See* Pattison, *supra* note 100, at 52 (listing cases that granted these due process rights). These cited cases include *Black Coal. v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (pre-*Goss* case finding that "expulsion procedures were unconstitutional for failing to provide a hearing at which the student could be represented by counsel and, through counsel, present witnesses on his own behalf, and crossexamine adverse witnesses.") and *Gonzales v. McEuen*, 435 F. Supp. 460, 464–65 (C.D. Cal. 1977) (right to an impartial tribunal).

103. *See, e.g.*, Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 924 (6th Cir. 1988) (holding that the expelled student was "not denied due process by not being permitted to cross-examine . . . his student accusers, . . . [or] the school principal and superintendent, and by not being permitted to be present at the school board's closed deliberations even though the school principal and superintendent were allowed to attend").

104. 435 U.S. 78 (1978). The student expelled in *Horowitz* was a medical student who had been given notice several times of her poor performance and put on probationary status. *Id.*

105. *Horowitz*, 435 U.S. at 86 ("[T]he significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct . . . calls for far less stringent procedural requirements in the case of academic dismissal.").

106. *Id.* at 87.

107. *Id.* at 91.

108. *Id.* at 99 (Marshall, J., concurring in part and dissenting in part).

of the process due to students excluded for academic or disciplinary reasons, arguing that the Court should employ the *Mathews* balancing test rather than the "lower level of protection involved in *Goss*."[109]

A federal due process claim for a disciplinary exclusion provides the most factually analogous cause of action for many pushout cases. First, *Knight* recognized this as a valid claim in the pushout context, noting that "[e]ven if the criteria for expulsion were valid, lack of procedural due process" made the expulsion invalid.[110] Additionally, there are close factual similarities between pushouts and disciplinary exclusions: both involve school authorities exerting their power to remove students from a learning environment. Due process claims also allow the court to rule against a school's lack of procedural protections without venturing into the murkier waters of substantive educational policy.[111] Further, *Goss* itself suggested that for exclusions greater than ten-day suspensions, greater process may be due,[112] which subsequent lower courts have allowed.[113] Pushouts fit in this latter category without any stretch, as the complete denial of a student's ability to pursue a diploma is tantamount to an expulsion. Even if school officials try to circumvent due process protections by asserting an academic justification for the pushout,[114] school districts are governed by state laws guaranteeing an education to students up until a certain age and thus do not have the same "academic freedom" as universities to dismiss otherwise eligible students solely on academic grounds.[115] Thus, the procedural protections of notice and a

109. *See id.* at 99–101.

110. Knight v. Bd. of Educ. of N.Y., 48 F.R.D. 108, 111 (E.D.N.Y. 1969).

111. The Supreme Court has expressed a reluctance to involve itself in "difficult questions of educational policy." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973). The Court reasoned that "this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." *Id.* It went on to say that "[t]he very complexity of . . . managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them," and thus "the legislature's efforts . . . should be entitled to respect." *Id.* (internal quotations omitted).

112. Goss v. Lopez, 419 U.S. 419, 584 (1975) (noting that longer suspensions or expulsions "may require more formal procedures").

113. *See supra* note 102 and accompanying text.

114. *See Horowitz*, 435 U.S at 86. Evidence shows that many administrators do use academic rationales for pushing students out, even if these reasons do not comport with state law. *See* Rivkin, *supra* note 7, at 277. This is particularly true for students referred to as "overage and under-credited." *See* Hyman, *supra* note 12, at 684.

115. *Compare* N.Y. EDUC. LAW § 3202 (McKinney 2009) ("A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools . . . ."), *and* MO. CONST. art. IX, § 1(a) (amended 1976) (Vernon 2008) ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law."), *with*

hearing offered by *Goss* for disciplinary actions should at a minimum be available in the pushout context,[116] and likely more extensive and formalized due process protections as well, depending on the court's application of the *Mathews* test to the particular pushout claim.

B. Substantive Due Process Claims in Education

Litigants have also raised substantive due process claims in the context of educational rights, usually in cases challenging school discipline. The Constitution provides no explicit right to an education, and the Supreme Court has held that it is not a "fundamental right."[117] Therefore, in order for a school's conduct to violate a student's substantive due process rights, it must transgress the "'outer limit' of legitimate governmental action," and be "arbitrary, conscience-shocking, or oppressive," but not merely "incorrect or ill-advised."[118] The Supreme Court has expressed a great hesitation to overturn the disciplinary decisions of school administrators, especially if a decision is merely "lacking a basis in wisdom or compassion."[119] Additionally, the Court has been heavily reluctant to extend substantive due process protections to any but the most egregious abuses and arbitrary administration of government power.[120] In light of this, the vast majority of substantive due process challenges to school disciplinary measures have failed, as not rising to the sufficient level of "conscience-shocking" behavior in the constitutional sense.[121] However,

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Horowitz, 435 U.S at 90 (suggesting a limitation to higher education by noting, "[l]ike the decision of an individual professor as to the proper grade for a student in his course," a dismissal for academic reasons "is not readily adapted to the procedural tools of judicial or administrative decisionmaking").

116. *Goss*, 419 U.S. at 579.

117. *Rodriguez*, 411 U.S. at 35.

118. Cohn v. New Paltz Cent. Sch. Dist., 363 F. Supp. 2d 421, 434 (N.D.N.Y. 2005); *see also* Bell v. Ohio State Univ., 351 F.3d 240, 250 (6th Cir. 2003) ("Interests protected by substantive due process . . . include those protected by specific constitutional guarantees . . . freedom from government actions that 'shock the conscience,' . . . and certain interests that the Supreme Court has found . . . to be fundamental.").

119. Wood v. Strickland, 420 U.S. 308, 326 (1975) (The Court further recognized that while "students do have substantive and procedural rights while at school . . . . [section] 1983 was not intended to be a vehicle for federal-court corrections of [school administration's discretionary errors] which do not rise to the level of violations of specific constitutional guarantees.").

120. *See* County of Sacramento v. Lewis, 523 U.S. 833, 842 846 (1998). The Court noted that it has "always been reluctant to expand the concept of substantive due process . . . ." (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)). It went on to say that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" which means that the "cognizable level of executive abuse of power [is] that which shocks the conscience." *Id.* at 846.

121. *See, e.g.*, C.B. *ex rel* Breeding v. Driscoll, 82 F.3d 383 (11th Cir. 1996) (finding no violation of substantive due process violation in the school disciplinary context); *Cohn*, 363 F. Supp. 2d 421; *see also* Dunn v. Fairfield Cmty. High Sch. Dist. No. 225, 158 F.3d 962, 965 (7th Cir. 1998) (denying

litigants in Indiana succeeded on a substantive due process claim, with the court finding that a rule requiring a grade reduction in classes for each day a student was suspended was "unreasonable and arbitrary on its face."[122]

Pursuing substantive due process claims in the pushout context offers uncertain results. On one hand, educational substantive due process claims rarely succeed under the current framework.[123] This is because courts are deferential to the judgment of local educational authorities, and because the requirement that the school officials' conduct be "arbitrary, conscience-shocking, or oppressive" is not easily met.[124] On the other hand, some judges may reasonably regard pushouts such as the ones documented in New York as "conscience-shocking."[125] Because pushouts violate the academic policies of the school districts and states themselves, courts may find no rational relationship at all between a pushout and the school's asserted goals, and are unlikely to accept any rationale for illegal conduct as a "legitimate" interest. Further, because pushouts contain an element of arbitrariness, where some struggling students are spared but others sacrificed, a court may well find that this is the type of abuse of executive power substantive due process is meant to protect. However, because courts will likely be able to find violations on procedural due process or state law grounds, they may be reluctant to wade into the waters of substantive due process.[126]

C. A Fundamental Right? Equal Protection, School Finance, and the Move to State Courts

Litigation concerning the equality and adequacy of school financing schemes presents a useful foundation for pushouts. Though these claims

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substantive due process claim of two high school students based on a comparison to the *Lewis* case, finding that "if a police officer's 'precipitate recklessness,' which caused the deprivation of someone's life, was not sufficiently shocking to satisfy substantive due process standards, then it would be nearly absurd to say that a school principal's decision effectively to give two students an 'F' in Band class did").

122. Smith v. Sch. City of Hobart, 811 F. Supp. 391, 398–99 (N.D. Ind. 1993) ("To warrant an academic sanction, a student's misconduct must be directly related to the student's academic performance, and there is no indication in this record that such is the case.").

123. *See supra* note 121 and accompanying text.

124. *Cohn*, 363 F. Supp. 2d at 434.

125. *See supra* Part II.B.3. The examples noted have a devastating effect—many students were kept out of school for illegal reasons and bad motives and may never recover from such effects.

126. *See* County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.") (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994)).

do not concern action against individual students, interpreting courts have considered educational rights in the context of federal equal protection,[127] and under the educational rights provided by state constitutions.[128] As such, they provide a roadmap for the current status of litigating educational rights claims under these principles.

1. Federal Equal Protection Claims

Stemming from school desegregation litigation, litigants began to bring claims addressing the unequal "distribution of educational resources"[129] by claiming that disparities in finances between school districts were correlated to race or income and violated the federal Constitution's Equal Protection Clause.[130] While this claim was successful in California,[131] the U.S. Supreme Court found otherwise two years later. In *San Antonio Independent School District v. Rodriguez*,[132] the Court examined Texas' school funding plan in light of a challenge by Mexican-American parents who alleged that the funding disparities between their school district, which allocated $356 per pupil, and a more affluent and majority white district nearby, which allocated $594 per pupil, constituted an equal protection violation.[133] The Court reversed the district court,[134] holding that the unequal distribution of educational funding in Texas did not violate the Equal Protection Clause because no particular "suspect class" was discriminated against[135] and because education is not a protected "fundamental right" under the U.S. Constitution.[136] The Court applied

127. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Plyler v. Doe, 457 U.S. 202 (1982).

128. Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995) (describing the use of equal protection and education clauses in state constitutions as part of the "third wave" of school finance litigation.).

129. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 258–59 (1999).

130. *See* Heise, *supra* note 128, at 1153–54.

131. *See* Serrano v. Priest, 487 P.2d 1241, 1252–53, 1258, 1263 (Cal. 1971), *cert. denied*, 432 U.S. 907 (1977) (holding the California school funding scheme unconstitutional after finding that this financing system implicated a suspect class of individuals as well as a fundamental right, and that because the funding scheme was "not necessary to the attainment of any compelling state interest," the State did not meet the burden of strict scrutiny).

132. 411 U.S. 1 (1973).

133. *Id.* at 4, 12–13.

134. The district court had held that the Texas system discriminated on the basis of wealth, which it considered a suspect classification, and because a suspect class was implicated and because it held education to be a fundamental right, the court applied strict scrutiny and found the defendants did not provide a compelling state interest for the financing scheme, or even a rational basis, to justify the classifications. *See id.* at 16.

135. *Id.* at 24–25; *see also* Heise, *supra* note 128, at 1156.

136. *Rodriguez*, 411 U.S. at 35; Heise, *supra* note 128, at 1156.

rational basis review and found that "giving substance to the presumption of validity" to the Texas system, the financing scheme "abundantly" met the standard of rationally furthering a legitimate state interest.[137]

Despite this holding, the Court left room for finding an equal protection violation in the instance of "an absolute denial of educational opportunities."[138] Nine years later, the Court dealt with such an issue in *Plyler v. Doe*, where school-aged Mexican-American children not legally in the U.S. challenged a Texas law which withheld funds from school districts for students not "legally admitted" into the U.S., and which allowed local school districts to deny enrollment to such children.[139] While recognizing that the children could not constitute a "suspect class" because of their illegal status, and that education is not a "fundamental right," the Court took account of the law's "costs to the Nation and to the innocent children who are its victims" in determining the "rationality" of the law.[140] As such, it imposed a standard greater than the deferential rational basis test, and required the state to show a "substantial" rather than just "legitimate" interest in denying the children of undocumented immigrants the right to attend school.[141] Applying this standard, the Court found that the State had no substantial interest by which it could justify the law's rationality.[142]

2. "Equity" and "Adequacy" Claims in State Courts

Following the failure of school finance litigation in federal court, litigants brought their struggle to state courts, challenging per-pupil spending discrepancies under state equal protection and state constitution educational clauses.[143] These "second wave" school finance cases challenged school financing based on its inequity among different student groups,[144] with mixed results.[145] More successful were the "third wave" of

137. *Rodriguez*, 411 U.S at 55.
138. *Id.* at 37.
139. Plyler v. Doe, 457 U.S. 202, 205–06 (1982).
140. *Id.* at 223–24.
141. *Id.* at 224 ("[T]he discrimination contained in [the Texas law] can hardly be considered rational unless it furthers some substantial goal of the State."); *see also id.* at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.").
142. *Id.* at 230.
143. *See* Ryan, *supra* note 129, at 266.
144. Heise, *supra* note 128, at 1157–58.
145. Ryan, *supra* note 129, at 267 ("Of the twenty challenges [seeking to equalize per-pupil funding] resolved by state supreme courts, thirteen were rejected and seven were successful.").

school finance cases, where advocates instead argued that state constitutions' education provisions (often along with the state equal protection clause) guaranteed the right to an "adequate" education which was denied by insufficient funding.[146] In both types of school finance litigation, state courts not only reached different outcomes, but also applied different theories regarding the equal protection and education clauses of state constitutions.[147] In one notable case, *Robinson v. Cahill*,[148] the New Jersey Supreme Court relied exclusively on the state constitution's education clause in ruling the school financing system unconstitutional.[149] More recently, in the adequacy context, New York's highest court interpreted the state's education clause broadly, requiring "the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants."[150] In a number of other finance cases, state supreme courts used education clauses as the basis for finding violations of the state's equal protection clause.[151]

Though the incident-based nature of pushout claims is quite different from the broader policy concerns of school finance, educational adequacy cases have provided an opportunity for state supreme courts to define whether an "adequate" education is a right.[152] In states like New York, New Jersey, California, and Texas, where such a right has been recognized,[153] bringing a pushout claim under a state constitution's

146. *Id.* at 268 ("[T]hird wave cases . . . are for the most part characterized by a strict focus on state education clauses and an emphasis on adequacy rather than equity."); *see also* Michael Heise, *Litigated Learning, Law's Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1447 (2007) ("The shift from school finance equity to adequacy theory coincided with and contributed to . . . an increase in the number and rate of successful challenges to state school finance systems.").

147. *See* Reed, *supra* note 88, at 594 (explaining that courts have differed in determining what kind of rights state education clauses provide, with some finding that they are the source of a fundamental right to an education for the purposes of equal protection analysis, and some that the clauses are independent of equal protection rights).

148. 303 A.2d 273 (N.J. 1973)

149. *See id.* at 292 ("The obligation being the State's to maintain and support a thorough and efficient system of free public schools, the State must meet that obligation . . . ."); *id.* at 294 ("A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it."); *see also* Reed, *supra* note 88, at 596.

150. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 332 (N.Y. 2003); Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1503 (2007) (describing the court's holding).

151. *See* Reed, *supra* note 88, at 596–98 (describing holdings in cases in Kentucky, Pennsylvania, Connecticut, Alabama, and California that "education is a fundamental right requiring strict scrutiny equal protection analysis").

152. *See id.*

153. N.Y. Civil Liberties Union v. State, 824 N.E.2d 947, 949 (N.Y. 2005) (finding a cause of action under the Education Article of the State Constitution when "the State fails its obligation to meet minimum constitutional standards of educational equity." The claim requires two elements:

education clause may well prove successful. Illegally excluding a student from school and causing her to miss valuable educational time may not only deprive her of an "adequate" education, but of any further education, likely violating state education clauses.[154]

States that have found that disproportionate school spending requires strict (or greater than rational basis) scrutiny under the state's equal protection clause present an especially promising opportunity.[155] Though states that require a "suspect classification" may create difficulties for some plaintiffs in defining an identifiable and suspect class,[156] even states that will not apply strict scrutiny to funding cases may nonetheless do so if an education is completely denied by a pushout.[157] Pushout claims brought under state constitutional education provisions may fit well because the state has defined the parameters of the education it must provide,[158] and thus its judiciary will be more comfortable in fashioning appropriate equitable relief.[159] However, some states have not interpreted their

"deprivation of a sound basic education, and causes attributable to the State."); *Campaign for Fiscal Equity*, 801 N.E.2d at 332 (noting that the question to be resolved in a school finance case is "whether the State affords . . . schoolchildren the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants").

154. *See, e.g.*, *Campaign for Fiscal Equity*, 801 N.E.2d at 332; *Robinson*, 303 A.2d at 292, 294 (noting that the New Jersey Constitution requires a "thorough and efficient" education, an obligation that the state must meet).

155. *See* Reed, *supra* note 88, at 597–600; Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) ("[T]he state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of 'strict judicial scrutiny' as to its constitutionality."); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 208 (Ky. 1989) ("Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional."); Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n. 667 A.2d 5, 9 (Pa. 1995) ("[P]ublic education in Pennsylvania is a fundamental right.").

156. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951–53 (Cal. 1976) (finding a fundamental right to an education and applying strict scrutiny, but also requiring the existence of a suspect classification; wealth, in this case).

157. Reed, *supra* note 88, at 599–600. Virginia and Wisconsin have both recognized fundamental education rights, but held that it did not apply to equality of funding. *Id.* However, the Wisconsin court noted that this was because a "complete denial of educational opportunity" was not involved. Kukor v. Grover, 436 N.W.2d 568, 579–80 (Wis. 1989).

158. *See Rose*, 790 S.W.2d at 212–13 (defining "essential, and minimal, characteristics of an 'efficient' system of common schools" including that they be "substantially uniform," "provide equal educational opportunities," and recognizing that there is a "constitutional right to an *adequate* education") (emphasis added); *Campaign For Fiscal Equity*, 303 A.2d at 292.

159. In fact, past challenges on this basis have been beneficial in stirring necessary policy reforms. This is especially true for states that have been willing to define what constitutes an "adequate education." *See* Heise, *supra* note 146, at 1447 (noting that as a consequence of funding adequacy cases and "re-emergence of urban school districts" in challenging financing formulas, "per pupil spending in many urban public school districts has improved"); Klein, *supra* note 17, at 401–02 (claiming that the *Rose* case in Kentucky prompted sweeping educational reform measures).

education clauses expansively to require a right to an "adequate education" that may be violated by a pushout.[160]

IV. RECOMMENDATIONS FOR AN IDEAL LEGAL FRAMEWORK FOR PUSHOUTS

While applying previously used educational rights strategies to the pushout context is a useful tool in evaluating their likely effectiveness, pushouts require a jurisprudence that considers their unique context and far-reaching consequences. This section discusses how courts should apply previous educational rights jurisprudence to pushouts.

A. Why Litigation?

While the most substantial solutions to the pushout problem likely require greater policy changes than litigation alone can provide, pursuing litigation is vital for several reasons. First, advocates must act with urgency in addressing this issue. As Judge Weinstein aptly remarked in a 1969 pushout case, "Education is a necessary and vital aspect of modern life, and delay in protecting the rights of these students can be personally disastrous to them."[161] Second, litigation helps focus the public on the problem, as evidenced by the *New York Times*' coverage of the AFC litigation in 2003 and 2004.[162] Finally, as the settlement agreements in the cases brought by AFC show, litigation can itself produce some of the significant policy changes necessary to solving the problem.[163] Though some scholars have suggested that litigation may not be the right strategy for remediation because of the potential of lawsuits to hamper collaboration on future reform efforts,[164] these concerns can be addressed

160. *See* Reed, *supra* note 88, at 601 (explaining that Maryland and Massachusetts have not found a "fundamental" right to education in their state constitutions).

161. Knight v. Bd. of Educ. of N.Y., 48 F.R.D. 108, 112 (E.D.N.Y. 1969).

162. *See* Lewin & Medina, *supra* note 34; Tamar Lewin, *City Settles Suit and Will Take Back Students*, N.Y. TIMES, Jan. 8, 2004 at B3; Medina & Lewin, *supra* note 65.

163. *See RV*, 321 F. Supp. 2d at 543–59; Hyman, *supra* note 12, at 688–89 (discussing the terms of the settlement in two of the AFC cases, which included parental notification and reenrollment of excluded students, creation of a "Young Adult Success Center," greater training for counselors and administrators, and creation of an Office of Multiple Pathways to Graduation); D.S. *ex rel* S.S. v. N.Y. City Dep't of Educ., 255 F.R.D. 59, 68–69 (E.D.N.Y. 2008) (providing an overview of the settlement in the Boys and Girls High School pushout litigation, which included programs aimed at remedying the exclusions and called for monitoring as well); *see also* Rebell, *supra* note 150, at 1467 (noting the policy changes spurred by litigation in three states, including the "redesign and reform of the entire education system" in Kentucky).

164. *See* Heise, *supra* note 146, at 1459 (noting that litigation's "adversarial structure" may "jeopardize collaboration among educators, lawyers, researchers, and parents" due to the risk of an

through a willingness of adversaries to embrace remedies that allow for continued collaboration and some flexibility.[165]

B. Establishing Causes of Action: How Courts Should Recognize Pushout Claims

The following causes of actions are discussed here with some generality, but undoubtedly the viability of each one will depend on the factual circumstances and the nature of the lawsuit. Thus, while greater procedural protections will likely be necessary in most or all pushout cases, substantive due process claims may be more difficult to make in some cases than others, and equal protection claims may be best suited to class actions or lawsuits with multiple plaintiffs.

1. The Need for Better Process: Visibility and Voice for Pushed-Out Students

Though courts should, at a minimum, find due process violations under *Goss* when students are pushed out, the severity of the deprivation of students' property right to an education, coupled with a startling lack of process, requires greater protection.[166] First, the *Goss* decision itself set aside the question of what process is due for suspensions longer than ten days or expulsions, and implied that in such situations, greater process may be due.[167] Many lower courts have considered longer suspensions, expulsions, and other unusual situations and have produced conflicting results.[168] Courts considering pushouts should trend to the weightier

"inherently adversarial posture" spilling over "into non-legal interactions" and continuing after the lawsuit ends).

165. *See* Sabel & Simon, *supra* note 17, at 1067–73 (describing how public law remedies with an "experimentalist tendency" rather than a "command-and-control" orientation provide a promising approach by promoting "stakeholder negotiation" and "transparency," along with greater flexibility in adapting specific remedial policies based on the needs on the ground).

166. When a state provides a right to education, it may not take away that right even on legitimate grounds without "fundamentally fair procedures." Goss v. Lopez, 419 U.S. 565, 574 (1975). *Goss* notes that the "State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . . ." *Id.* Because a pushout denies a student that property interest without process, at a minimum *Goss* is implicated.

167. *See id.* at 584 ("Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations . . . something more than the rudimentary procedures will be requires.").

168. *Compare* Carey v. Me. Sch. Admin. Dist. # 17, 754 F. Supp. 906, 918–19 (D. Me. 1990) (applying the *Mathews* balancing test to an expulsion for weapons possession and finding that "seven minimum requirements . . . must be observed in student disciplinary hearings." These requirements are: notice of the charges and the nature of evidence against the student, an opportunity for the student

extremes of student protection, and view pushouts as constructive expulsion without process.[169] This means of course that courts should first apply the *Mathews* test, and should do so even if their asserted justification for the pushout is academic, as suggested for all school exclusions by Justice Marshall's concurrence and dissent in *Horowitz*.[170] The *Mathews* test offers the possibility of more expansive due process protection as its balancing test affords more flexibility in deciding what process is due given the unique context.[171]

In performing the balancing required by *Mathews*, courts should recognize that a student's "interest in the continuation of his public school education is great," as it is the "very foundation of good citizenship," and that the deprivation of one's education is a "very serious matter which require[s] significant procedural safeguards."[172] Unlike a disciplinary expulsion, a pushout furthers no legitimate governmental interest, as it denies students their educational rights required by state law. In terms of what process is actually due, courts *should* apply a full range of procedural protections, bordering on a full trial-like hearing. This is in many ways unrealistic, however, because the illegal and subversive nature of the pushout itself may undermine the student's ability to receive a full pre-exclusion hearing. Instead, courts should concentrate on providing the elements of procedural due process most likely to bring visibility to the exclusion and allow the student to tell their story, even if after the exclusion itself. These elements include, at a minimum, access to an impartial arbiter, a recorded hearing, and the right to confront present witnesses.

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to speak in his own defense, protection from punishment without "substantial evidence," the "assistance of a lawyer in major disciplinary hearings," the right to confront and cross-examine witnesses, and an "impartial tribunal."), *with* Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 924–26 (6th Cir. 1988) (applying the *Mathews* test and finding that a student accused of selling drugs is not entitled by due process the right to cross-examine accusing students or school officials, or to attend pre-expulsion deliberations which were "closed."). *See also* Bartlett & McCullagh, *supra* note 100, at 38–43 (describing the range of rulings from different district and circuit courts).

169. Many pushouts are *de facto* expulsions, yet the student is not accused of violating the school system's disciplinary code but merely asked or told to leave for reasons themselves illegal or illegitimate. From a due process perspective, then, pushouts should require the maximum procedural protections as required by an expulsion.

170. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 99–101 (1978) (Marshall, J., concurring in part and dissenting in part) (arguing for the application of the *Mathews* test, and finding that "respondent was entitled to more procedural protection than is provided by 'informal give-and-take' before the school could dismiss her.").

171. *Id.* at 100 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

172. *Carey*, 754 F. Supp. at 918 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–36 (1973), and Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

2. Recognizing Violations of Substantive Due Process

Many pushout cases require an even greater recognition of the deprivation of student rights than procedural due process alone can provide, namely in situations where legitimate disciplinary concerns are not at issue.[173] Procedural due process in the pushout context becomes largely a reactive measure, and fails to address the wrongfulness not only of the process but of the school's substantive conduct toward the student.[174] For this, courts should turn to substantive due process, a doctrine better suited to protect against the utter arbitrariness at the core of pushouts.[175] Though the "shocks the conscience test" is a high barrier, the complete denial of an education for entirely illegitimate reasons should readily be viewed by courts as conscience-shocking in light of the Supreme Court's recognition that denying children an education "foreclose[s] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[176] Though the Supreme Court has expressed reluctance to extend § 1983 substantive due process claims in the context of education, its rationale centers on the desire not to provide "the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings."[177] Because pushed-out students were never afforded a "disciplinary proceeding" and their exclusion is not supported by any legitimate assertion of school policy or law, this concern appears less applicable here.[178] Courts should view the

173. Because many "academic" pushout cases involve no legitimate state interest in maintaining safe schools and a code of discipline, a pushout goes beyond a lack of process to the denial of a substantive right *per se*.

174. Jessica Falk, Note, *Overcoming a Lawyer's Dogma: Examining Due Process for the "Disruptive Student,"* 36 U. MICH. J.L. REFORM 457, 465 (2003) ("The attainment of procedures, which is a one-time battle fought in the courts, has too often come to be thought of as an end in itself. Instead, processes and procedures need to be thought of as means to the end . . . .").

175. Substantive due process is violated "only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." Cohn v. New Paltz Cent. Sch. Dist., 562 F. Supp. 2d 421, 434 (N.D.N.Y. 2005) (quoting Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494, 505 (2d Cir. 2001)). Pushouts fit this characterization, extending beyond mere procedural violations by violating the substantive education laws of the state, serving no legitimate governmental purpose, and harming the liberty and property interests of the students affected.

176. Plyler v. Doe, 457 U.S. 202, 223 (1982).

177. Wood v. Strickland, 420 U.S. 308, 326 (1975).

178. In addition to the applying the "shocks the conscience test" to find a violation of substantive due process in an educational setting, one author has proposed extending substantive due process rights recognized for a patient confined by civil commitment patient to require a certain minimal level of education. *See* Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process,* 120 HARV. L. REV. 1323, 1340–41 (2007) (applying, from Youngberg v. Romeo, 457 U.S. 307 (1982), the idea of corresponding responsibility, that the State's restriction of a person's liberty carries with it an obligation related to the purpose of that restraint). In *Youngberg*, this meant a

practice of pushouts as exactly the type of abuse of executive power that substantive due process seeks to protect, as it is an unlawful decision that serves only the personal interest of the administrator and not of the student, the school, or the state.

3. Applying Greater than Rational Basis Scrutiny to Pushout Equal Protection Claims

First, one must acknowledge that equal protection challenges are likely a better fit for class action pushout lawsuits than individual student challenges to the practice. However, for those claims in which courts can readily compare a group of plaintiff students to their peers, equal protection claims are highly relevant. Because most pushouts constitute a complete denial of educational opportunities otherwise required by law, courts should apply greater than the mere rationality review applied in *Rodriguez*.[179] Instead, courts should require that defendants show a substantial governmental interest in distinguishing pushed-out students from other similarly situated students as the Court did in *Plyler*.[180] Though the Supreme Court in *Rodriguez* did not recognize education as a fundamental right worthy of strict scrutiny,[181] it reserved judgment on a situation where there was an "absolute denial" of education.[182] Later, the Court held in *Plyler*, where a Texas law allowed school districts to completely deny children of undocumented immigrants an education, that such a deprivation required the state to show a "substantial goal" in making such a distinction, thus elevating the level of scrutiny above mere rationality review.[183] These statements by the Court, along with its reasoning in *Plyler* that education is more than "merely some governmental 'benefit' indistinguishable from other forms of social

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minimal amount of training for a severely mentally impaired individual. *Youngberg*, 457 U.S. at 319. The author argues that in the education context, because a student's liberty interests are restricted by compulsory education laws, the State has a duty to provide a "minimal level of education." Note, *supra*, at 1337. Though this model is analogous to pushouts because the state has undertaken the responsibility of educating its students, and then denied that right completely by pushing students out, its application to pushouts may not be possible as most pushed-out students have reached the legal age for choosing to drop out and thus have no further restriction of their "liberty interest" by compulsory school attendance.

179. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S 1, 40 (1973).

180. *Plyler*, 457 U.S. at 230.

181. *Rodriguez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

182. *Id.* at 37.

183. Plyler, 457 U.S at 224.

welfare legislation,"[184] has led some scholars to argue that "whether the U.S. Constitution ensures a minimal amount of educational services remains the subject of continued debate."[185]

Though students pushed out of school are not as easily definable a group as the more definite group of undocumented Mexican-American children, the Court in *Plyler* raised the level of scrutiny without finding that this group was a "suspect class" for equal protection purposes.[186] Most persuasively, the Court's rationale in *Plyler*, that the denial of an education must be distinguished from other governmental "benefits," applies to most pushout scenarios, where children with the legal right to complete their education are unfairly denied such an opportunity.[187] Even if a school district could escape the extremely deferential level of rational basis scrutiny by asserting a rationale based on disciplining unruly students and concentrating on the academic achievement of more focused students,[188] it is unlikely the school district can prove that the pushouts serve some "substantial" goal of the State. Each state, in undertaking the responsibility to provide an education to its students, has an interest in seeing those students graduate. While it may not further state interests to graduate students that have not met state standards, forcing out students who have not yet had their full measure of opportunity to complete their education serves no substantial interest of any party concerned.

4. State Constitutions: Education as Fundamental Right and State-based Reform

While state pushout jurisprudence will necessarily vary depending on state constitutions, most rulings should be fairly direct: pushouts violate a student's right to an "adequate" education. In states where courts have

184. *Id*. at 221. The Court further reasoned that "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221–22.

185. *Heise*, *supra* note 128, at 1156. Heise also cites Justice White's comment in *Papasan v. Allain* that "this Court has not yet definitively decided whether a minimally adequate education is a fundamental right . . . ." *Id.* at 1157 (quoting *Papasan*, 478 U.S. 265, 285 (1986)).

186. *See Plyler*, 457 U.S at 223 ("Undocumented aliens cannot be treated as a suspect class . . . . Nor is education a fundamental right . . . .). *But see id.* at 224 (noting that in spite of these considerations, the discrimination in the Texas law "can hardly be considered rational unless it furthers some substantial goal of the State").

187. *See supra* note 37 and accompanying text.

188. Even under rational basis scrutiny, this assertion may fail, because if the plaintiffs can prove that a pushout occurred, a court may find that a school district's violation of state law and/or its own policies cannot advance any legitimate interest of the state.

held that certain school financing schemes violate students' right to an adequate education,[189] their courts should hold similarly for pushouts. This is because pushouts represent not only the denial of an adequate education, but of an education altogether. Even for states that do not recognize education as a "fundamental right" or require strict scrutiny, most state constitutions still require that the state provide an education.[190] Therefore, the complete denial of an education should trigger a cause of action under a state constitution, regardless of its stance on adequacy or the status of education as a fundamental right.

C. Overcoming Problems of Proof

Randee Waldman, a former senior attorney with AFC and the co-counsel for its lawsuit against Franklin K. Lane High School, speculates that a major reason why more pushout lawsuits are not filed may be due to problems of proof.[191] AFC filed their trilogy of pushout lawsuits as well as the lawsuit against Boys & Girls High after receiving numerous calls to their hotline offering similar stories of pushouts at certain high schools, which were further corroborated by "program cards" showing that the students were "transferred" to GED programs.[192] However, without the objective proof of program cards or written orders, school districts may claim that students left voluntarily and were not actually "pushed" out.

From the perspective of litigators, the best way to overcome such an argument may be in sheer volume of evidence, which—when presented to the court and to the public—has the effect of embarrassing the district into either admitting wrongdoing or seeking settlement. One successful approach to evidence-gathering was the hotline set up by AFC, which allowed easy reporting even for those parents and students who may be less politically connected, in conjunction with targeted workshops and surveys distributed by other community organizations.[193] For students who cannot produce such tangible evidence or those who were "encouraged" rather than directed to leave school, litigators might also consider arguing

189. *See supra* notes 155–59 and accompanying text.

190. *See* Reed, *supra* note 88, at 582 ("Every state constitution has an education clause. The highest courts of many states have held that their state constitutions' education clauses afford individuals an enforceable right to education.").

191. *See supra* note 14 and accompanying text.

192. *See supra* note 14 and accompanying text. The pushouts in Birmingham, Alabama were similarly blatant because of the school system's use of pre-prepared withdrawal forms which were handed to students. ORFIELD ET AL., *supra* note 4, at 25–26.

193. *See* Hyman, *supra* note 12, at 685–86.

that the students were "constructively" discharged, as courts have recognized similar claims in the employment law context.[194] This defense should be even more persuasive in the educational context, where school attendance is required until a certain age and administrators have greater authority over students than employers over employees.

D. Crafting Effective Remedies

Though local and state educational schemes are often complex and courts are often reluctant to order or enforce far-reaching educational remedies,[195] in light of the continued failure of New York City schools to adequately remedy the pushout problem, [196] any court-ordered or approved remedies must be more targeted and include better remedial oversight. The settlement of the litigation involving Boys and Girls High offers some promising solutions.[197] In addition to injunctive relief directing procedural protections for future students, the settlement includes provisions for monitoring by both the plaintiffs' counsel and by an outside monitor, and compensatory provisions to provide supplemental and remedial services and extended public education eligibility for the pushed-out students.[198] Thus, the substantive component of remedies and settlements should

194. In suits for wrongful discharge in violation of public policy, constructive discharge acts "as a defense against an employer's contention that the employee quit voluntarily." Strozinsky v. Sch. Dist. of Brown Deer, 2000 WI 97, ¶ 69, 237 Wis. 2d 19, ¶ 69, 614 N.W.2d 443, ¶ 69. The Supreme Court has also recognized constructive discharge in the context of National Labor Relations Act violations. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984). Federal courts have also recognized this defense in discrimination actions under Title VII of the Civil Rights Act of 1964. *Strozinsky*, 2000 WI 97, ¶ 70. Though the standard here would need to be different than in the employment context, which requires showing that the employer "purposefully creates working conditions so intolerable that the employee has no option but to resign," *Sure-Tan*, 467 U.S. at 894, the same idea of coercive behavior by authority figures seeking to avoid liability by portraying the employee or student as acting of their own full volition applies.

195. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (noting that the Court's "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels," and because of the "very complexity of the problems of financing and managing a statewide public school system . . . 'the legislature's efforts to tackle the problems' should be entitled to respect.").

196. *See supra* note 74 and accompanying text; *see also* Jake Mooney, *A Second Chance for Students Left Behind*, N.Y. TIMES, Nov. 28, 2008, at CY1, *available at* http://www.nytimes.com/2008/11/30/nyregion/thecity/30disp.html?_r=1 (describing the story of one student, Darrius Spann, who after being suspended, returned to school to find his schedule had been reduced to five periods. After that, it was reduced to three periods, before Darius "was assigned to sit in an auditorium with about 100 other students from 7:30 to 10:30 each morning, filling out school worksheets before going home." After this he was transferred to an alternative education center and after being refused re-admittance to Boys & Girls, he dropped out.).

197. *See* D.S. *ex rel* S.S. v. N.Y. City Dep't of Educ., 255 F.R.D. 59, 68–70 (E.D.N.Y. 2008).

198. *Id.*

include extensive compensatory opportunities for the actual excluded students, supplemental education services for the under-credited and overage students that are most vulnerable to future pushouts, and monitored procedural protections targeted at the underlying failures of due process and oversight. The monitoring component is particularly important, as lack of oversight is a large source of the pushout problem in the first place. Thus, either court-ordered remedies or settlements should include the appointment of a special master or other monitor.[199] Beyond their monitoring role, the special master likely will have expertise into the relevant educational issues and thus can serve as a qualified independent advisor.[200] Further, appointing special masters allows courts to consider and enforce detailed and even "experimentalist remedies" while avoiding "comprehensive sets of regulatory instructions," or "judicial micromanagement."[201]

E. Improving Data Compilation to Account for Pushouts

In addition to the legal strategies noted, solving the pushout problem requires accurate data. The problem itself is primarily a function of inconsistent data collection methods across school districts and states, and methods that are not reliable in tracking what happens to students who leave the regular educational setting.[202] Lawsuits against pushouts cannot succeed without the documentation of their occurrence. Better documentation in itself should serve as an effective oversight technique, and discourage the practice. The Education Trust and other experts recommend taking this on at a federal level, by amending NCLB to require each state to establish "longitudinal data systems" that would include a "unique, statewide student identifier," and maintain "[s]tudent-level enrollment, demographic, and program participation information," among other things.[203] A centrally administered data system as described would

199. "Nowhere is the need for special masters more obvious, though, than in the context of institutional reform litigation, specifically during its remedial stages." James S. DeGraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 801 (1991). The type of remedy that would need enforcement and oversight in a class-based school pushout case would certainly involve some "institutional reform" of the relevant school system.

200. For example, the independent monitor appointed in the Boys and Girls High School case is John M. Verre, who as Co-Director of the Harvard Institute on Critical Issues in Urban Special Education, is a well-qualified expert in the relevant areas. *See D.S.*, 255 F.R.D. at 69.

201. *See* Sabel & Simon, *supra* note 17, at 1025.

202. *See supra* notes 53–57 and accompanying test (describing the confused student data reporting procedures in New York and Los Angeles which cause students to be misclassified and lost in the system.).

203. Policy Memorandum, The Educ. Trust, Education Trust Recommendations for No Child Left

make it more difficult for administrators to push students out by "losing them in the system" like the students described in Los Angeles,[204] or writing them into a vague category drawn up by a particular school system as in New York.[205] Further, school districts must not only delineate procedures that make excluding or exiting a student from the path to graduation difficult, it must provide training to administrators in its implementation, and provide oversight to ensure that the procedures are actually being followed. As the recent pushout update released by AFC shows,[206] even when a school district has agreed to procedural changes, they will not be effective without real oversight.

V. CONCLUSION

The importance of pursuing pushout litigation cannot be overstated. While the ultimate solutions to this syndrome in public education must come from all angles, including national, state and local policy changes, litigation can provide more immediate remedies for excluded students as well as garnering public attention and spurring policy-makers to action. As Judge Weinstein noted in 2004, "[w]hile the instant litigations' total impact is relatively small in a City public school student body of some one million students, its principles—acknowledged by the City—set a standard for the entire system."[207]

Davin Rosborough[*]

Behind Reauthorization 1, *available at* http://www2.edtrust.org/NR/rdonlyres/5A150FED-85FD-4535-8DF6-737A536EB0FB/0/EdTrustNCLBRecommendations41607.pdf; *see also* Losen, *supra* note 45, at 53 (recommending that states "institute a common identifier system that would follow students throughout their schooling").

204. *See* TIDINGS, *supra* note 59 (describing LAUSD's transfer policy as a way to move around "'struggling students' to other locations, knowing full well that they may never re-enroll").

205. *See supra* text accompanying note 53–54 (describing New York City's use of the "discharge" category which hid students who had actually dropped out or were pushed out by not counting them as such).

206. *See* ADVOCATES FOR CHILDREN, *supra* note 6 (detailing continuing exclusions in New York City); *see also* Melago, *supra* note 74.

207. RV v. N.Y. City Dep't of Educ., 321 F. Supp. 2d 538, 540 (E.D.N.Y. 2004).

* J.D. Candidate (2010), Washington University School of Law; B.A. African-American Studies, History (2003), University of Virginia. The author thanks his family and friends, particularly his parents and grandparents, for their support. Additionally, the author thanks the following people for valuable insight and comments: Aditi Kothekar, Professor Kim Norwood, Alex Elson, Samar Katnani, Professor Randee Waldman, and the editors of the *Washington University Law Review*.