On the Upswing (Figure 1)

The number of K–12 public school discipline cases reaching appellate courts recently surpassed the surge of the early 1970s.

Note: Three-year moving averages.

Law and Disorder in the Classroom

Emphasis on student rights continues in classrooms even when the Court begins to think otherwise

Students will test the limits of acceptable behavior in myriad ways better known to school teachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special.

— Supreme Court Justice Stephen Breyer

In Morse v. Frederick, a 2007 First Amendment student free speech case, the Supreme Court held that a school official may restrict student speech at a school-supervised event when that speech is viewed as promoting illegal drug use. Filing a separate opinion, Justice Stephen Breyer echoed concerns expressed by his conservative colleagues that school authority was being undermined by legal challenges. Since the 1960s, courts have become increasingly involved in regulating U.S. schooling in general, but especially in the area of school discipline. Justice Breyer noted in his opinion, “Under these circumstances, the more detailed the Court’s supervision becomes, the more likely its law will engender further disputes among teachers and students.”

School discipline is a critical area for research, as student interaction with school institutional authority is one of the primary mechanisms whereby young people come into contact with and internalize societal norms, values, and rules. It is thus significant that the number of cases reaching state and federal appellate courts has surged back up to levels attained during the early 1970s when civil rights cases had a central place on the national

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political agenda (see Figure 1). Our research indicates that both educators and students understand the former’s authority to be more limited and the latter’s rights more expansive than has actually been established by case law.

School Discipline in Court
Until the late 1960s, parents and students rarely challenged the disciplinary actions of school authorities, viewing common schools as providing instruction, instilling virtue, and fostering the ideals of our nation. Then, as conceptions of youth rights began to shift, and as institutions that provided support for the expansion of these rights emerged, students and parents, with the support of public-interest lawyers, began to question and challenge school disciplinary practices in court.

Table 1 summarizes key school-related rulings from the Supreme Court over the last 40 years. From 1969 to 1975, amid increasing legal challenges to the regulation of student expression in school, the Court’s rulings largely confirmed students’ rights to various free expression and due process protections. The most important decision affecting how schools approach student discipline was *Goss v. Lopez*, decided by the Supreme Court in 1975. During a patriotic assembly at Central High School in Columbus, Ohio, in 1971, expressions of student unrest over the lack of African American curricula turned into a week of demonstrations and disturbances. Dozens of students were suspended for up to 10 days without formal hearings or notification of the specific charges against them. The Supreme Court case hinged on whether the disciplinary actions improperly denied students their rights to a public education. In ruling for the students, the Court granted “rudimentary” due process rights to those suspended from school for fewer than 10 days, as well as “more formal protections” for students facing longer exclusions.

In recent years, courts at all levels have dealt with cases challenging the enforcement of “zero-tolerance” policies that establish severe and nondiscretionary punishments for violations involving weapons, violence, drugs, or alcohol. At the same time, an increasing number of cases have appeared in lower courts that involve students and families suing schools for failing to provide adequate discipline within school facilities. These cases have alleged climates that permit bullying, sexual harassment, or other forms of school violence (including school shootings). Thus, in recent years, schools have been sued for both disciplining students and not disciplining them.

Since 1975, the Supreme Court has generally been less favorable toward students than it was during the early years of the civil rights movement. This shift in orientation occurred for diverse reasons, including growing public concern about the level of violence and disorder in public schools, the changed political climate following the end of the Vietnam era, and a pattern of increasingly conservative judicial appointments during the Nixon, Reagan, and Bush administrations. The Supreme Court’s 2007 decision in *Morse v. Frederick* continued the post-1975 pattern of sympathy with schools that are facing challenges to their disciplinary authority, but did not, as some of the media coverage implied, alter the general contours of student rights as previously established. Its June 2009 decision in *Safford United School District v. Redding*, in which eight justices agreed that a near strip-search of an 8th-grade girl suspected of concealing prescription-strength ibuprofen was unconstitutional, at first glance appears to be an exception—a sign that the courts will continue to watch over the shoulders of school officials to ensure that reasonableness and proportionality prevail. Yet a majority on the court ruled that the administrators who conducted the search could not be held personally liable because of the uncertainty of the law in this area.

Appellate Case Patterns
While Supreme Court decisions are important because every school in the nation must adhere in principle to its rulings, these few landmark cases do not encompass the universe of legal challenges regarding school discipline and related policies. To discern the larger contours of the legal climate facing schools, we analyzed all appellate-level federal and state court cases in which school efforts to discipline and control students have been
# Landmark Cases in School Discipline

(Table 1)

Supreme Court shift toward the schools began after 1975

<table>
<thead>
<tr>
<th>Case</th>
<th>Issue</th>
<th>Ruling and Import</th>
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| **1967**  
*In re Gault* | Juvenile court sent 15-year-old to detention home without legal representation. | For juvenile defendant. Court granted due process rights to youth in juvenile courts. |
| **1969**  
*Tinker v. Des Moines Independent Community School District* | Three Iowa students were disciplined for black armbands as a sign of protest to the “hostilities in Vietnam.” | For the students. In the first major school discipline case to reach the Supreme Court, the Court said that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the school house gate.” |
| **1975**  
*Goss v. Lopez* | Following protest about absence of African American history curriculum, students were suspended without formal administrative process. | For the students. Court granted “rudimentary” due process rights to students facing short term suspensions and “more formal protections” for students facing longer exclusions from school. |
| **1975**  
*Wood v. Strickland* | Two Arkansas 10th graders were expelled without due process for spiking the punch at an extra-curricular activity. | For the students. Ruling established that a public school educator knowingly violating students' constitutional rights is subject to the risk of personal liability and damages. |
| **1977**  
*Ingraham v. Wright* | Two junior high school students were paddled for infractions. | For the district. Court ruled that corporal punishment is not “cruel and unusual” under the Constitution. |
| **1985**  
*New Jersey v. T.L.O.* | A principal searched the purse of a student suspected of drug possession. | For the district. Court ruled that school officials with reasonable suspicion may search students without a warrant. |
| **1986**  
*Bethel School District v. Fraser* | Student faced two-day suspension for delivering a lewd speech at school assembly. | For the district. Court ruled that schools may prohibit vulgar and offensive student speech. |
| **1995**  
*Vernonia School District v. Wayne Acton* | District’s drug and urinalysis testing policy violated Fourth Amendment protections. | For the district. Court deemed drug testing policy reasonable in light of the district’s demonstrated drug problems. |
| **2002**  
*Board of Education of Independent School District No. 92 of Pottawatomie County v. Lindsay Earls et. al* | District’s urinalysis testing policy violated constitutional protections against unreasonable searches. | For the district. Court declared that suspicion of specific individual was not required to justify testing. |
| **2007**  
*Morse v. Frederick* | Principal suspended student for refusing to take down “Bong Hits for Jesus” banner at a school-sponsored event. | For the district. Court said that student free speech rights do not include advocacy of illegal activity such as drug use. |
| **2009**  
*Safford Unified School District v. Redding* | School officials conducted a strip search of an 8th-grade girl suspected of possessing prescription-strength ibuprofen. | For the student. Court ruled that student searches must not be “excessively intrusive in light of the age and sex of the student and the nature of the infraction.” Implicated school officials were not personally liable because this standard had not been clearly established in the 1985 *New Jersey v. T.L.O.* decision. |
Excluded cases in which students allege that school authorities have breached their duty to maintain safety in the school and to protect students from harm.

Of course, we did not include the vast majority of litigation, which was either settled before hearing or never reached state and federal appellate courts. Still, our methods provide a way to gauge the general character and broad trends in legal challenges that contemporary educators face. Appellate-level court cases define case law, generate media coverage, influence public perceptions, and can be tracked over time as an empirical indicator of the broad parameters of court climate toward school discipline. We found that not only has the frequency of legal challenges greatly varied over time, but the content and direction of outcomes has shifted as well.

The newfound willingness to challenge school authority became evident in the surge of litigation during the late 1960s. In part because of increased institutional support from public-interest legal advocacy groups and the legal services program of the Office of Economic Opportunity, from 1968 to 1975 an average of 39.1 public school K–12 cases per year reached the appellate level. After important legal precedents were set and institutional support waned, the average number of cases declined but then took a sharp upturn from 1993 on, with a peak of 76 cases in 2000 and a total of 65 in 2007. We present here the overall number of cases rather than a relative measure accounting for public school enrollment, given that media coverage and individual understandings reflect the former indicator. Nevertheless, a measure of state and federal court cases calculated per enrolled student would demonstrate similar upward trends, more than doubling from the years 1976–1992 to the 2003–2007 period.

The substance of the cases brought before the courts has also varied over time, with protest and free expression cases decreasing markedly through 1992 (see Figure 2a). Recently, courts have witnessed a reemergence of these issues. Cases involving alcohol and drugs rose during the intermediate time periods that coincided with national attention to the “War on Drugs” and then diminished. Those involving weapons and violence have increased to nearly 40 percent of all K–12 public
school discipline cases since 1993. In addition, school discipline court cases increasingly have involved student disability. From 2003 to 2007, 18 percent of cases included discussion of student disability status. Since the 1970s, legal entitlements and protections have grown for students classified as disabled because of learning, physical, or behavioral handicaps (including psychological disorders that are associated with the manifestation of student misbehavior). Special education students thus gained additional protections related to school discipline, particularly in cases in which infractions could be attributed to the individual’s disability.

Over time, we found that courts in general have become less favorable to student claims across these areas of litigation (see Figure 2b). However, since the number of court challenges has increased in recent decades, the likelihood of a school facing a legal environment in which a student has recently been successful in a court challenge over school discipline has not significantly diminished.

Socioeconomic Disparities

Many of the early school discipline cases were brought to ensure that the rights of less-advantaged students were protected. New evidence suggests, however, that litigation is increasingly used strategically and instrumentally by families from relatively privileged origins to promote the interests of their children. Research (by Irene Beattie, Josipa Roksa, and Richard Arum) that examined appellate court cases from 2000 to 2002 found that, on average, those cases emerged from secondary schools with 29 percent nonwhite students compared to 37 percent nonwhite students in the national population of secondary schools (the latter weighted for enrollment size to be comparable to the court case data); appellate cases also emanated from schools with more educational resources per student (student/teacher ratios of 16.3 compared to 17.5 nationally).

National surveys of teachers and administrators reveal a similar middle-class bias in legal challenges. A reanalysis of a Harris survey of teachers and administrators conducted by Melissa Velez and Richard Arum for Common Good in 2003 examined the proportion of public school educators (a combined sample of teachers and administrators) who reported that either they or someone they knew personally had been sued by a student or parent. Educators in suburban schools with less than 70 percent nonwhite students had a 47 percent probability of having experienced contact with an adversarial legal challenge compared to a 40 percent chance for educators in all other schools. Although much of the development of student rights originally emerged from concern about nonwhite students in urban areas, educators in those settings had only a 41 percent probability of contact with a legal challenge.

In collaboration with colleagues working on the School Rights Project (Lauren Edelman, Calvin Morrill, and Karolyn Tyson), we conducted a national telephone survey of 600 high school teachers and administrators and site-based surveys of 5,490 students and 368 educators on perceptions and experiences of the law in schools. In our site-based work, which included in-depth interviews and ethnographic fieldwork, we examined 24 high schools with varying legal environments situated across three states (New York, North Carolina, and California), stratified by school type (traditional public, charter, and Catholic) as well as by student socioeconomic composition. We found that 15 percent of public school teachers and 55 percent of public school administrators have been threatened with a legal suit over school-related matters. For administrators with more than 15 years of experience in the position, the figure rose to 73 percent. Administrators’ actual experience with being sued for school-related matters occurs at a lower rate (14 percent), but is still the source of considerable professional anxiety, given that these cases—following Wood v. Strickland (1975)—include vulnerability to personal liability claims. We again found that legal challenges are concentrated in schools with more-privileged students. When we looked solely at administrators working in urban public schools with more than half of students eligible for free lunch, we found—albeit with a sample of only 16 cases—not a single report of administrators being sued for a school-related matter.

**Tinker v. Des Moines** (1969) ruled for students who were disciplined for wearing black armbands as a sign of protest against the Vietnam War. The court stated that students and teachers do not “shed their constitutional rights to freedom of speech at the school house gate.”
That legal mobilization is dependent on economic resources needed to pursue such challenges is in general not surprising. We documented evidence of this association, however, to illustrate that regardless of the institutional and political origins of student rights, today legal mobilization in schools largely reflects patterns of socioeconomic inequalities. In the School Rights Project, we found that white students were nearly twice as likely as nonwhite students to report having pursued a formal legal remedy for a perceived rights violation.

Legal Understandings and School Practices
Legal mobilization is a relatively rare occurrence, a small tip of a much larger legal-dispute pyramid. School discipline today is profoundly shaped by legal understandings that are only partially and indirectly related to formal regulation and case law. We highlight here the extent to which both students and educators have developed an expansive definition of legal rights of students, the relationship between this sense of legal entitlement and school disciplinary practices, and perceptions of the fairness and legitimacy of various school disciplinary practices.

The institutionalization of student due process protections goes well beyond appellate case law, having been enshrined in extensive state statutes and administrative regulations. The accompanying sidebar (page 65) provides a sense of the extent to which law has come to permeate school practices by highlighting codified disciplinary procedures in New York City. While discipline policies vary across schools, districts, and states—and as the nation’s largest school district the New York City public schools are likely more bureaucratized and formalized in matters of school discipline than smaller districts—the scale, scope, and level of complexity of the legal regulations affecting day-to-day school practices appear quite formidable.

Generally speaking, educators and students have developed a set of legal understandings that assumes a broad and expansive definition of student legal entitlements. Following the Goss decision, students have been granted rudimentary due process protections when facing minor discipline and more formal due process protections when facing more serious forms of discipline (such as long-term expulsion or suspension). The Goss decision delineated procedural safeguards, stating that “the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” More formal due process protections may include the right of students to “summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he (the disciplinarian) may permit counsel.”

We are interested in individuals’ perceptions of such protections, since students’ and educators’ beliefs about rights likely have real consequences for school authority and disciplinary procedures. In the School Rights Project, we specifically asked students and teachers which due process protections were required when students faced various disciplinary sanctions. We found that while expectations of formal due process protections were required when students faced various disciplinary actions, many of them had also come to expect these legal entitlements when facing minor day-to-day discipline. For example, 62 percent of public school students in our sample believed that, if faced with long-term suspension or expulsion, they were legally entitled to at least one of the following: a formal disciplinary hearing, opportunity to be represented by legal counsel, opportunity to confront and cross-examine witnesses bringing the charges, or opportunity to call witnesses to provide alternative versions of the incident. Approximately one-third of students also believed that they were legally entitled to some form of formal due process protection when they had their grades lowered for disciplinary reasons (33 percent), were suspended from extracurricular activities (36 percent), or faced in-school suspension (35 percent).

We found that students’ sense of legal entitlement was expansive, and that teacher and administrator expectations of required student due process protections were even more so. For example, when asked about lowering student grades for...
Due Process in the Big Apple

At the start of each school year, parents of public school students in New York City receive a 28-page pamphlet titled Citywide Standards of Discipline and Intervention Measures: The Discipline Code and Bill of Student Rights and Responsibilities, K-12. Schools require parents and students to return a signed form acknowledging that they are familiar with the guidelines specified in this document. The brochure lists 112 different infractions and specifies the range of possible disciplinary responses and guidance interventions associated with each type of incident. “The Right to Freedom of Expression and Person” is a topic specified in detail, and the section on “The Right to Due Process” notes 10 specific components of students’ rights:

1. be provided with the Discipline Code and rules and regulations of the school;
2. know what is appropriate behavior and what behaviors may result in disciplinary actions;
3. be counseled by members of the professional staff in matters related to their behavior as it affects their education and welfare within the school;
4. know possible dispositions and outcomes for specific offenses;
5. receive written notice of the reasons for disciplinary action taken against them in a timely fashion;
6. due process of law in instances of disciplinary action for alleged violations of school regulations for which they may be suspended or removed from class by their teachers;
7. know the procedures for appealing the actions and decisions of school officials with respect to their rights and responsibilities as set forth in this document;
8. be accompanied by a parent/adult in parental relationship and/or representative at conferences and hearings;
9. the presence of school staff in situations where there may be police involvement;
10. challenge and explain in writing any material entered in their student records.

The pamphlet notes that “students with disabilities are entitled to additional due process protections described in Chancellor’s Regulation A-443” and “when a student is believed to have committed a crime, the police must be summoned and parents must be contacted (see Chancellor’s Regulation A-412).” Ten other specific Chancellor’s Regulations are referenced in the document (A-420, A-421, A-449, A-450, A-750, A-801, A-820, A-830, A-831, A-832) in addition to the acknowledgment that all procedures must also comply with relevant “State Education Law and Federal Laws.” While school officials “must consult the Disciplinary Code when determining which disciplinary measure to impose,” they also are required to consider “the student’s age, maturity, and previous disciplinary record...the circumstances surrounding the incident leading to the discipline; and the student’s IEP, BIP and 504 Accommodation Plan.”

...disciplinary reasons, approximately half of public school teachers and administrators responded that this action was prohibited; among the educators who did think such disciplinary actions were permissible, 32 percent reported that students subject to such disciplinary sanctions were entitled to formal due process protections.

In the School Rights Project, we found that increased perceptions of student legal entitlements correlate with decreased reports of the fairness of school discipline. This conclusion mirrors James Coleman’s finding that Catholic school students in the 1980s were significantly more likely to perceive school discipline to be fair than public school students, who possessed far greater formal legal protections. Educators and students have developed a generalized sense of legal entitlements, while school practices have, in many settings, become increasingly authoritarian, with student misbehavior often subject to criminalization and formal legal sanction. These internal contradictions enhance students’ sense of the unfairness of school discipline. Longitudinal research has demonstrated that students who perceive school discipline as unfair are more likely to disobey teachers, disrupt classroom instruction, and in general fail to develop behaviors conducive to educational success and related positive outcomes.

Also, in recent decades schools have moved away from disciplinary practices that rely on the judgment, discretion, and action of professional educators and have turned instead to reliance on school security guards, uniformed police, technical surveillance, security apparatus, and zero-tolerance policies. The latter techniques are ill suited to the pedagogical task of enhancing the moral authority of educators to support the socialization of youth, that is, the internalization of norms, values, and rules.
Conclusion
Citizens, legislators, judges, and policymakers have begun to recognize and question legal interventions in situations involving school discipline and authority. We add to this discussion our findings that the legal understandings underlying school discipline policies depart in significant ways from the case law on which they are assumed to be based, according expansive rights and protections to students, even as the courts have tended to side with school authorities. We also document that although public-interest lawyers were initially motivated to expand student legal rights as part of a larger strategy to reduce social inequality, legal challenges to school disciplinary actions are disproportionately the province of white and higher-income students and their families.

The expansion of student legal entitlements has been accompanied by the increasing formalization and institutionalization of school discipline. As educators’ discretionary authority over school discipline has been challenged and undermined, counterproductive authoritarian measures such as zero-tolerance policies have been implemented in its place. But to be educationally effective, school discipline requires that educators have moral authority and students perceive their actions as legitimate and fair. Ironically, the expansion of student legal rights, rather than enhancing youth outcomes, has increased the extent to which schools have relied on authoritarian measures, decreased the moral authority of educators, and diminished the capacity of schools to socialize young people effectively.

As various social and political actors consider legal regulatory reforms, it is important to recognize that the expansion of students’ legal entitlements has also increased the potential for student dissent in U.S. schools, whether of a political, religious, or ideological character. At the same time, individual students and families with sufficient resources are able to contest what they perceive as unfair disciplinary sanctions or rights violations. These gains have come at a pedagogical and societal cost, as the resolution of school disciplinary matters has increasingly moved—as Justice Breyer feared—from the schoolhouse to the courthouse.

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