

BOE v Board
of Ed.

JOSEPH BOE; LUIS DOE, a minor, by his mother,
ROSA DOE; BETTY MOE, a minor, by her mother,
LAURA MOE; SAM NOE, a minor, by his father,
VINCENT NOE; ANN POE, a minor by her mother,
ANN POE, on behalf of themselves and all
other persons similarly situated,

Plaintiffs,

STIPULATION
OF SETTLEMENT

-against-

80 Civ 2829 (HFH)

BOARD OF EDUCATION OF THE CITY OF NEW YORK;
JOSEPH G. BARKAN, individually and as
President of the New York City Board of
Education; JAMES R. REGAN, MIGUEL O.
MARTINEZ, AMELIA ASHE, ROBERT J. CHRISTEN,
IRENE IMPELLIZZERI, MARJORIE LEWIS, in-
dividually and as members of the New York
City Public Schools; FRANK MACCHIAROLA,
individually and as Chancellor of the New
York City Public Schools; NATHAN QUINONES,
individually and as Executive Director of
the Division of High Schools; PHILLIP
GROSSER, CHARLES SCHONHAUT, LOUISE LATTY,
AARON MALOFF, JAMES BOFFMAN, individually
and as superintendents of the New York
City high schools; FRANK VIVONA, MARTIN
FALKOFF, GERALD BEIRNE, individually and
as hearing officers of the Division of
High Schools,

Defendants.

WHEREAS, plaintiffs commenced this class action claiming,
inter alia, that defendants' procedures concerning suspension of
students from high school by superintendents denied them their rights
guaranteed by the Fourteenth Amendment of the United States Constitution
and by the New York State Education Law; and

WHEREAS, defendants deny all liability with respect to the facts and claims alleged or which might or could have been alleged in the complaint herein; and

WHEREAS, settlement negotiations have taken place between the parties and a settlement agreement has been reached;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, and subject to approval by the Court, that the above-entitled action and the claims raised in this action shall be settled and compromised to the extent, in the manner, and upon the terms and conditions hereinafter set forth.

1. The plaintiff class, which was conditionally certified on May 16, 1980 by order of the Hon. Whitman Knapp, shall be amended. Pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, the plaintiff class shall consist of all high school students not classified as having a handicapping condition at the time of their suspension who, since September, 1978 have been, are currently, or will be suspended by superintendents; a) without being given an explanation of the charges by the principal and an opportunity to explain their version prior to suspension; or b) without being afforded an opportunity for a due process hearing before the sixth school day following the suspension or without being readmitted to the same school program or, with the consent of the parent,* to an equivalent program by the sixth

* Whenever in this stipulation the term "parent" is used, the term shall include the student's parent or guardian, or any person in a parental or custodial relationship to the student, or the student if he is an emancipated minor or has reached the age of majority.

school day following the suspension pending a due process hearing; or c) were given a hearing that did not comport with the mandates of the Due Process Clause of the Fourteenth Amendment of the United States Constitution or the New York Education Law or City Board of Education regulations; or d) were excluded from school and were not informed of the decision of the superintendent for more than two days following a hearing.

2. (a) Upon the entry of an order approving this stipulation, defendants shall promulgate new regulations governing the procedures for suspensions of high school students by superintendents which shall be consistent with New York Education Law §3214 and this stipulation.

(b) School changes based on a history of disruptive behavior, as recorded in a student's anecdotal record, are involuntary transfers which must be accomplished in accordance with the provisions of New York Education Law §3214(5), and regulations of the Chancellor promulgated thereunder and issued upon the entry of an order approving this stipulation.

(c) These Chancellor's regulations on suspensions and involuntary transfer may be amended and modified in conformance with state and federal law provided the regulations remain consistent with this stipulation. The Chancellor's regulations may also be modified in a manner inconsistent with this stipulation, but only in the event and in conformance with a change in state statutory provisions applicable to the suspension or involuntary transfer of high school students. Notice

of any modification or amendment of the regulations based upon a change in applicable state statutory provision shall be served upon counsel for the plaintiff class and filed with the Court at least thirty days prior to the proposed change.* Upon a challenge by plaintiffs to the proposed change in regulations, the defendants shall be required to demonstrate that the proposed regulations are in conformance with a change in state statutory provision applicable to the suspension or involuntary transfer of high school students. Plaintiffs do not hereby waive their rights to challenge any amendments or modifications on any grounds, nor does any party waive its right to seek modification of this stipulation, as approved by the Court, pursuant to the Federal Rules of Civil Procedure.

3. Upon the entry of an order approving this stipulation, defendants and their employees, agents and successors shall conduct superintendent suspensions of high school students in conformity with this stipulation.

4. Principals seeking a superintendent's suspension of a student shall, prior to requesting the suspension, inform the student of the charges against him.** The principal shall give the student an explanation of the evidence and an opportunity to present his side of the story, unless it is not feasible to do so.

* Counsel for the plaintiff class shall notify counsel for defendants and file with the Court any change in their addresses or in their status as counsel for the plaintiff class.

** The use of masculine pronouns in this stipulation shall include the feminine as well.

5. A superintendent's suspension should be authorized on the day of the alleged misbehavior, whenever possible, or within a reasonable time of the alleged misbehavior or offense. If in school when the suspension is authorized, the student shall remain there, under supervision, until either the arrival of the parent, or until the close of the student's school day.

6. The superintendent, or in his absence, his designee, may authorize the suspension of a student only if he is provided with sufficient details of the student's alleged misbehavior, and has been assured either that the principal has conducted the preliminary investigation described in paragraph four above, or has been provided with an explanation of why it was not feasible to do so.

7. Students suspended by a superintendent shall be afforded an opportunity for a hearing by the fifth school day after the suspension. If the student is not afforded such an opportunity, or if the hearing is continued or postponed at the request of an employee of the Board of Education or the hearing office, the student shall be reinstated on the sixth school day to his school program or, with the consent of the parent, he may be transferred to an equivalent instructional program pending the hearing and decision of the superintendent.

8. If the parent requests an adjournment, the student shall be afforded an opportunity for a hearing by the fifth school day after the adjournment is requested, unless the parent requests a longer period or the adjournment is granted pursuant to paragraph sixteen below. When

the parent's request for an adjournment is granted, the student's right to reinstatement pending the hearing, as provided in paragraph seven above, is waived.

9. To the extent required by state law, a suspended student shall be provided with alternate instruction, such as classwork and homework assignments, during the suspension period and shall be permitted to take any city-wide or state examinations which are administered during the suspension period for which no make-up examination is permitted by the testing authority, as well as to make up school examinations, such as finals, which may affect his academic record. An academic penalty, such as reduction of a grade, may be imposed as a disciplinary measure only if the student's misconduct is directly related to his academic performance in a particular course.

10. On the day the superintendent's suspension is authorized, all reasonable efforts shall be made to give notice of the suspension to the student's parent (for example, by telephone or telegram). In addition, written notice shall be sent to the parent on the day the superintendent's suspension is authorized.

11. Such written notice shall include:

- a) the fact that the student was suspended and should not return to school during the suspension period;
- b) the right, in most cases, to alternate instruction, such as classwork and homework assignments;
- c) the specific reasons for the suspension;
- c) the date, time, and place of the hearing;

e) the right to, and the advisability of, representation by counsel or advisor, and a list of community agencies offering free or low cost legal assistance;

f) a list of names of adult witnesses and the student complaining witnesses, if any, who may be called to testify on behalf of the school, and a statement that this list shall not be binding on the school;

g) the right of the student to question witnesses and present witnesses on his behalf and to obtain subpoenas from the hearing officer;

h) the student's right to be reinstated to his former school program or to be transferred with the consent of his parent to an equivalent instructional program on the sixth school day following the suspension if the hearing is not originally scheduled to be held within five school days, or is continued or postponed at the request of an employee of the Board of Education or hearing office;

i) a statement that the student's records, including written statements, may be introduced into evidence at the hearing; that the parent or representative* may, prior to the date of the hearing, view and obtain a copy from the school of the student's records, including the anecdotal, permanent and guidance records, and statements related to the incident which precipitated the suspension;**

* As used in this stipulation, the term "representative" shall include, but is not limited to, attorneys, advisors, and lay advocates.

** This stipulation does not address whether the Board of Education may charge a reasonable fee for copying these records.

j) an explanation of how the anecdotal records may be used at the hearing;

k) the procedures for appealing the suspension;

l) the range of possible dispositions if the charges are upheld;

m) the right to obtain from the school a full written description of a suspended student's rights (this may consist either of a copy of the Chancellor's regulations on suspension or of some other document which contains a complete explanation of a suspended student's rights).

12. Notice of the suspension shall be sent either in English or in Spanish, as appropriate. The notice shall also contain an insert written in languages spoken by substantial numbers of people in New York City which shall call attention to the importance of the enclosed materials.

13. The suspension hearing shall be presided over by a hearing officer who shall have such authority as may be conferred by state law, including the authority to issue subpoenas and administer oaths.

14. a) The presiding hearing officer shall conduct the hearing fairly and shall not have participated in or have knowledge of the events under review. He shall refrain from acting as an advocate for the parent, the student, or school officials.

b) The hearing officer may inform the parent of the option to admit the charges but he shall not request that the parent do so. If a parent who appears for a suspension hearing chooses to admit

the charges, the admission shall be made on the record. The hearing officer shall explain on the record the consequences of an admission: that a hearing is waived, that the suspension will be upheld and shall remain in the student's permanent record, and that the possible dispositions include that student will be returned to his school either immediately or after a longer period of suspension, or that the student will be transferred.

15. All parties shall be afforded a full opportunity to present such testimony and evidence as may be material and relevant to the issues involved. It shall be the burden of the school to prove by direct or circumstantial evidence the student's involvement in the incident charged. No finding that the student committed the act or acts charged shall be based on hearsay evidence exclusively.

16. (a) The school and the parent, or their representatives, shall be entitled to present witnesses and cross-examine adverse witnesses. School personnel wishing to testify on behalf of the student shall be permitted to do so.

(b) If the hearing officer subpoenas or requests on behalf of a student that a Board of Education employee attend the hearing and that employee fails to appear, the hearing officer shall determine whether the employee's presence can be obtained after a short recess. If it cannot be, the parent shall be given the opportunity to request an adjournment, which shall not exceed two days unless the student is reinstated. A request for an adjournment shall be granted, and the hearing shall not proceed, unless the hearing officer finds that

the missing witness' testimony would be immaterial or irrelevant. Such a finding and the reasons therefor shall be stated on the record. Prior to requesting an adjournment, the parent shall be informed whether the student will be reinstated pending the hearing and decision of the superintendent. In exercising his discretion whether to so reinstate the student, the hearing officer shall take into account such factors, among others, as the nature of the charges against the student and the reason for the unavailability of the witness.

(c) Notwithstanding the provisions of subparagraph (b) above, if the hearing officer determines that it is not possible to obtain the witness' attendance after a two day adjournment, the hearing shall proceed as originally scheduled unless the student is reinstated or the parent requests an adjournment; in either case the hearing shall be held within two weeks. The hearing officer shall advise the parent that, in the event the suspension is upheld, the parent will be advised in writing when and if the witness becomes available, and that the parent may have the hearing reopened and witnesses recalled. The superintendent's decision after the initial hearing, as well as the decision after a reconvened hearing, may be administratively appealed.

17. (a) A copy of the student's permanent, cumulative guidance, and anecdotal records, as well as all other written material that may be considered by the hearing officer shall be made available to the parent or representative prior to the date of the hearing. A student's records are available when copies of such records are provided upon request made by a parent or representative in person at the school.

(b) At the beginning of the hearing, the parent or representative shall be provided with a complete set of the student's records for review or comparison with records previously obtained from the school and advised that records not made available may not be offered into evidence by the school on that date. If the school requests an adjournment, and the student is returned to school as provided for in paragraph seven above, and the records are provided to the parent prior to the adjourned date, the records may be offered into evidence on the adjourned date.

(c) The student's permanent, cumulative guidance, and anecdotal records may be introduced into evidence for dispositional purposes only; for such purposes, the records may not contain material relating to the underlying incident unless such material has otherwise been admitted into evidence.

(d) Although written statements and affidavits are admissible, oral testimony on the same matter must be given greater weight unless the hearing officer determines, based on all the evidence adduced at the hearing, that the oral testimony is not entitled to such weight. If oral testimony is not given greater weight, the decision shall specify the reasons for this in the findings.

18. The hearing officer shall make a report which shall be based solely on the evidence produced at the hearing. The report shall state the reasons for the determination, indicate the evidence relied upon, and contain recommended findings of fact and a recommendation regarding disposition. The hearing officer shall submit this report to the superintendent who may adopt, modify, or reject it in whole or in part.

19. The superintendent's decision shall be based solely on the competent and substantial evidence produced at the hearing. His determination that the student engaged in conduct warranting suspension shall not be based solely upon hearsay. Decisions shall state the reasons for the determination, indicate the evidence relied upon, and contain findings of fact and a disposition.

20. A verbatim record of the hearing shall be kept by stenographic notes or tape recording. A copy of this record shall be sent to the parent upon request.*

21. The student's parent shall be notified either orally or by telegram of the superintendent's decision within two school days of the suspension hearing and the decision of the superintendent shall be effective as soon as feasible but no later than five school days after the hearing. The superintendent's decision shall be mailed to the student's parent within five school days of the hearing.

22. If the superintendent determines after the hearing that the suspension should not be upheld, he shall arrange for the student's immediate return to his school program. Any reference to the suspension and the underlying incident shall be expunged from the student's records.

23. If the superintendent determines after the hearing that the suspension should be upheld, he may:

- (a) return the student to the school from which he was suspended; or,

* This stipulation does not address whether the Board of Education may charge a reasonable fee for copying this record.

(b) transfer the student to another school; or,

(c) invoke any other lawful disposition.

24. (a) If the superintendent orders the student transferred to a full-time program at another school, he shall make every reasonable effort to ensure that the student's educational program at the school to which he is transferred is coordinated with the program at the original school. To the maximum extent practicable, the transfer should result in minimum disruption of the student's education and no loss of courses or academic credit.

b) A student may not be transferred to a program which leads to a general equivalency diploma unless he is over compulsory school age, as set by State law or Board of Education bylaw, whichever sets the older age.

25. Hearing officers, high school principals, and high school superintendents shall be trained in the requirements of due process, this stipulation, the regulations of the Chancellor, bylaws of the Board of Education, applicable statutes, the available programs within the Division of High Schools, the operation of the hearing office, their roles in the suspension process, and the rights and responsibilities of students and school personnel.

26. The relief described in paragraphs 27 through 31 shall be available to class members who were suspended in any school year commencing with the 1978-1979 school year to the date of entry of an order approving this stipulation, and whose suspensions occurred under one or more of the following circumstances:

(a) The superintendent's hearing was not originally scheduled to be held within five school days after the suspension and the student was not offered a choice of reinstatement or transfer to an equivalent school program on the sixth school day until the hearing was held.

(b) The parent requested an adjournment of the hearing, the adjourned date was not within five school days of the request, and the parent did not request a longer adjournment.

(c) The school or hearing officer requested an adjournment of the hearing until more than five days after the suspension and the student was not offered a choice of reinstatement or, with the parent's consent, transfer to an equivalent school program until the hearing was held.

(d) Before being suspended the student was not told the reason for the suspension by the principal or given an opportunity to explain his version, where feasible.

(e) The student's parents are Spanish-speaking, but the letter of suspension was written entirely in English.

(f) The suspension was upheld even though no witness testified against the student at the hearing and the student did not admit any of the charges.

(g) The student was not permitted to cross-examine the school's witnesses at the hearing.

(h) In suspending the student, the superintendent transferred him to a program which led to a general equivalency diploma even though the student was under seventeen years of age.

(i) The hearing officer requested school personnel to attend the hearing on the student's behalf but these witnesses failed to appear and the hearing was held.

(j) From the time the suspension began until the student received the superintendent's decision, the student was not given classwork or homework assignments.

(k) The student's final grades were affected by the suspension because the student was not allowed to make up tests that were given during the suspension, because his absence during the suspension was used to reduce his grades, or because an academic penalty was imposed for misbehavior which was not directly related to an academic activity.

(l) The student did not receive telephone or telegram notice of the superintendent's decision within one school day after the hearing.

(m) The student requested a copy of his records from the school before the day of the hearing, but did not receive them until the day of the hearing.

(n) The presiding hearing officer had knowledge of the events under review.

(o) The hearing officer did not conduct the hearing fairly.

(p) The decision of the superintendent was not based on competent and substantial evidence introduced at the hearing.

27. Class members who are eligible for relief as defined in paragraph 26 (hereafter, eligible class members) may apply to the

Chancellor for expungement of their suspension from their school records if no appeal from the superintendent's decision was previously taken. The standard upon which an expungement may be granted shall be the same as the standard used in appeals to the Chancellor involving suspensions. The Chancellor may also, in his sole discretion, consider whether the student's subsequent behavior and academic achievement, make expungement appropriate when judged against the seriousness of the incident underlying the suspension.

28. a) Eligible class members who were transferred as a result of their suspension may apply for transfer to another school or program, including the school or program in which they were enrolled at the time of their suspension. The superintendent shall set up a guidance conference to consider this application. The conference shall be attended by a member of the school staff familiar with the student, if any, the district supervisor of guidance or other district guidance personnel, and the student and his parent and representative, if any. This conference shall not be an adversarial proceeding. The application may be granted by the superintendent because of defects in the original suspension procedure, or because transfer is appropriate in light of the student's subsequent behavior or current academic needs when judged against the seriousness of the incident underlying the original suspension.

b) A superintendent's denial of an application under sub-division a) above may be appealed in writing to the Division of High Schools within twenty days of receipt of the superintendent's decision.

Such appeal shall be submitted to the Board of Education, Division of High Schools 110 Livingston Street, Brooklyn, New York 11201.

29. a) Eligible class members who are under twenty-one years of age and who discontinued attendance in a diploma-granting high school program shall be entitled to re-admittance to that program. These eligible class members may also apply for a transfer as set forth in paragraph 28 above.

b) Eligible class members who are twenty-one years of age or older at the time that they request re-admittance shall be eligible for admission to a high school equivalency diploma program and evening high school programs.

c) Eligible class members who decide to return to school shall be given the opportunity to meet with a guidance counselor for a determination of the number of credits needed and the courses that the student must take in order to graduate and in order to set up a school schedule, including but not limited to remedial assistance.

30. Eligible class members who suffered a loss of credits in the semester of their suspension shall be given every feasible opportunity to make up the lost credits and to graduate on schedule.

Such students shall:

- a) be given access to relevant night or summer school programs, current eligibility rules notwithstanding;
- b) be provided with necessary remedial help, if available,

including remedial classes at their school and peer tutoring in preparation for competency exams;

c) be given preference in admission to courses needed for timely graduation. Students shall be allowed flexibility in scheduling their programs, including enrollment in more than one course in the same subject.

d) not be required to make up one credit of physical education, lost during the semester of the suspension, if this is the only credit which the student is lacking toward graduation.

31. Eligible class members who have graduated from high school and have had mention of their suspension expunged from their school records shall be entitled to the following relief. They may attend during time periods selected by defendants:

a) College and Career counseling at the Bronx Center for Career and Occupational Services;

b) Personal Growth Lab interview training seminar offered by the Board of Education, Office of Cooperative Education.

32. a) Defendants shall mail a notice to all students who were suspended from high school by a superintendent from September,

1978 until the date of entry of an order approving this stipulation. The notice shall explain that the student may be a member of the plaintiff class and may also be eligible for the relief described in paragraphs 27 through 31. The notice will be written in English and Spanish and will be mailed to each student at his last known address no later than one week from the entry of an order approving this stipulation. (A copy of the notice is attached.)

b) Enclosed with the notice will be a list in conformity with and derived from the categories set forth in paragraph 26. Students will be told that if one or more of the categories on the list fit their suspension, they are eligible to apply for the relief set forth in paragraphs 27 through 31. (A copy of the list is attached to this stipulation.) Students will be instructed to check the appropriate box for the category or categories which apply to their suspension.

c) Also enclosed with the notice will be a description of the relief described in paragraphs 27 through 31. Students will be instructed to indicate in the appropriate boxes the various remedies for which they wish to apply, and to return the checked off sheet together with the list described in subparagraph (b) above. (A copy of the descriptions is attached to this stipulation.) Students will be told to return their responses by a date no later than five weeks from the entry of an order approving this stipulation to the Board of Education, Division of High Schools, Room 820, 110 Livingston Street, Brooklyn, New York 11201.

d) No later than seven weeks from the entry of an order approving this stipulation, the Board of Education will mail to those students who return timely responses instructions regarding how to apply for the remedies checked in their responses. (A copy of these instructions is attached.)

e) A copy of the notice described in subdivision 32(a) and the list described in 32(b) will be provided to any person upon request made to the Board of Education, Division of High Schools. Receipt of either the notice or the list by mail shall not be a condition of eligibility for relief under paragraphs 27 through 31.

33. No later than one month after entry of an order approving this stipulation, defendants shall inform plaintiffs' attorneys of the date when mailing the notice to the class is complete, and provide a copy of the regulations relevant to the settlement of this lawsuit.

34. It is expressly understood that this stipulation and any proceeding in connection therewith are not and shall not be deemed or construed or invoked by any person as an admission by defendants of any liability or wrongdoing with respect of any of the allegations in the complaint, nor shall it be implied to mean that defendants, or their predecessors or successors, have in any way or manner violated plaintiffs' rights as contained in the constitutions, statutes, regulations, or bylaws of the United States, the State of New York, the City of New York or the Board of Education. In no event shall this stipulation be considered or used as evidence against the defendants or their successors in any judicial or administrative proceeding, except one to enforce this stipulation or any order or judgment entered thereon, and except any interview, conference or other meeting, hearing or proceeding arising from or related to suspensions by superintendents.

35. Upon approval of this stipulation by the Court, a judgment and order shall be entered:

(a) approving this stipulation and adjudging its terms to be fair, reasonable and adequate;

(b) providing that the terms and conditions of this stipulation shall be deemed and shall be enforceable as the order and judgment of this Court;

(c) reserving jurisdiction of this Court for the purpose of passing on appropriate applications by plaintiffs for reasonable attorneys fees, costs, and disbursements;

(d) dissolving the preliminary injunction entered on the 19th day of May 1980;

(e) settling and discontinuing this action, but reserving jurisdiction of this Court to enforce the terms of this stipulation as approved by order of the Court.

Dated: New York, New York
December 10, 1982

Advocates for Children, Inc.
Co-Counsel for Plaintiffs
24-16 Bridge Plaza South
Long Island City, New York 11101
(212) 729-8866

By:

Jane R. Stern
JANE R. STERN, ESQ.

James M. Morrissey, Esq.
Co-Counsel for Plaintiffs
The Door
618 Avenue of the Americas
New York, New York 10011
(212) 691-6161

By:

James M. Morrissey
JAMES M. MORRISSEY, ESQ.

Washington Square Legal
Services, Inc.
Co-Counsel for Plaintiffs
80 Fifth Avenue, Suite 1501
New York, New York 10011
(212) 924-3200

By: Paula Galowitz
PAULA GALOWITZ, ESQ.

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, 6-C-38
New York, New York 10007
(212) 566-2097

By: Robert Bergen
ROBERT BERGEN
Assistant Corporation Counsel