NOTES

GIDEON GOES TO SCHOOL: AN ARGUMENT FOR A RIGHT TO APPOINTED COUNSEL IN SCHOOL DISCIPLINARY PROCEEDINGS

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"Upon the subject of education . . . I can only say that I view it as the most important subject which we as a people can be engaged in."[1]

INTRODUCTION

Article XI, section 1 of the New York State Constitution requires the State to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[2] The State's mandate that all children of the State be educated within a system of public schools requires more than the State merely providing access to those schools.[3] This constitutional grant of power "has obligated [New York State] constitutionally to ensure the availability of a 'sound basic education' to all its children."[4] In 2015, the New York State Legislature adopted a concurrent resolution acknowledging the importance of a civil right to counsel, espousing that "it should be the policy of the state of New York, that every New Yorker in need have effective legal assistance in matters involving the essentials of life (housing, family matters, access to healthcare, *education* and subsistence income)."[5] While

* This Article is dedicated to all the teachers in my life, in school and out, who have challenged me, supported me, and provided me with a passion for learning that has been so instrumental in my life. I would like to extend a special thank you to Professor Donna Young, whose guidance has been of the utmost importance. Any errors contained herein are entirely the fault of the Author.

[1] ABRAHAM LINCOLN, 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 8 (Basler et al. eds., 1953).

[2] N.Y. CONST. art. XI, § 1.

[3] *See* Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

[4] Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 328 (N.Y. 2003) (quoting *Campaign for Fiscal Equity*, 655 N.E.2d at 664).

[5] S. Con. Res. C776, 2015 Leg., Reg. Sess. (N.Y. 2015) (emphasis added). The concurrent

purporting to support the ability of New Yorkers to access counsel in cases involving essential matters of life, like education, the State has shirked its responsibility of enacting protections to ensure a civil right to counsel in many situations.[6] The State Legislature promulgated the 2015 concurrent resolution but "leaves open the precise nature of the representation."[7] It ignores how the State will provide "effective legal assistance in matters involving the essentials of life" to "every New Yorker in need."[8]

There has, however, been a movement in recent years spearheaded by former Court of Appeals Chief Judge Jonathan Lippman and coinciding with the 2017 New York vote for a Constitutional Convention to create a "civil Gideon."[9] "[T]he idea would be to embed into the state constitution a civil right to counsel."[10] The movement to expand access to civil legal services has habitually failed to address educational issues, by ignoring them altogether in favor of providing counsel in other types of cases.[11] Students, primarily those from minority or lower socio-economic demographics, or those with disabilities,[12] are removed from schools at much higher rates than students from more privileged backgrounds.[13] Minority students and those with disabilities face systemic discrimination by being

resolution goes on to state that "for a significant percentage of those New Yorkers in need, effective legal assistance can have profound impact upon one's ability to . . . pursue[] an education." *Id.*

[6] *See id.*; Russell Engler, *And Justice For All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2069 (1999).

[7] *See* Joel Stahenko, Legislature's Resolution Supports Civil Gideon, N.Y.L.J., June 29, 2015.

[8] *See id.*; N.Y.S. Con. Res. C776.

[9] *See* Robert Gavin, *Call for Constitutional Convention and 'Civil Gideon' For Litigants' Lawyers*, TIMES UNION (Sept. 27, 2016), http://www.timesunion.com/local/article/Call-for-constitional-convention-and-civil-9302193.php.

[10] *See id*. New York State holds a vote to convene a constitutional convention every 20 years. *Id.* Former Chief Judge Lippman is using the possibility of an upcoming convention to transform his vision of a civil Gideon into an enshrined state constitutional right. *See id.*

[11] *See, e.g.*, Rebecca Davis O'Brien, *New York Officials Push Right to Counsel in Civil Cases*, WALL STREET J. (Apr. 5, 2015), http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/followingtheleadofcjlippman.aspx (discussing state funding to provide legal assistance for defendants facing eviction and other issues).

[12] For the purposes of this Article, the term disability is intended to encompass any "life-long neurobiological disorder that affects the manner in which individuals with potentially normal or above average intelligence select, retain and express information." *See Learning Disabilities Defined*, LEARNING DISABILITIES ASS'N OF N.Y. STATE, http://www.ldanys.org/index.php?s=2&b=4 (last visited Oct. 6, 2017).

[13] *See, e.g.*, Meredith May, *Blacks Likely to Lose Out in School Crackdown / Suspensions More Frequent Study Finds*, S.F. CHRON. (Dec. 18, 1999), http://www.sfgate.com/education/article/Blacks-Likely-to-Lose-Out-in-School-Crackdown-2888084.php (discussing various studies that demonstrate that African American students face school discipline at much higher rates than their white peers).

subjected to school discipline at much higher rates than their non-disabled and white colleagues.[14] In order to fulfill New York State's Constitutional mandate to provide a sound basic education to all, New York should enact a constitutional amendment creating a right to appointed civil representation when students are faced with school-disciplinary actions. Specifically, this amendment would address the needs of students who are faced with the loss of access to education.

Two terms will be used throughout the body of this Article which require defining. The first is one's education interest. An education interest is simultaneously an individual right as well as a societal right because it is the individual's receipt of an education which allows them to participate in civic society and because democracy, where citizens play a fundamental role in the fate of a nation, requires an informed citizenry. The second term, access to education, refers to the ability to capitalize on one's education interest; to take advantage of one's education interest is to gain the ability to fulfill one's responsibilities of citizenship by being an informed citizen with the skills and knowledge to participate in civil society. Accessing one's education is more than the ability to sit in a public school and to receive an education. It is the ability to receive classroom instruction, to have access to textbooks, to participate in afterschool programs and athletic activities, and to enjoy social interactions during school.

This Article will demonstrate that education is a fundamental right and that the dangers presented by the loss of education, even a temporary loss, are so great that New York must adopt a constitutional amendment providing for a right to appointed counsel when students face the loss of their education interest. Part One of this Article examines the origins of the civil Gideon movement. Part Two explores education and its position as a fundamental right. Part Three provides a general outline of how school discipline is structured. Part Four addresses the risks associated with the loss of education and the impacts it has on students who are taken out of the classroom. Finally, Part Five looks to some potential solutions, including the adoption of a state constitutional amendment.

I. ORIGINS OF THE CIVIL GIDEON MOVEMENT

The Supreme Court's landmark 1963 decision in *Gideon v.*

[14] *See infra* Part IV.

Wainwright[15] provided that, in all criminal proceedings the accused shall enjoy the right to counsel and that the government must provide counsel for those who are unable to afford it.[16] While this decision guaranteed the right to counsel in criminal cases, it did not broach the issue concerning civil matters. Nearly twenty years after *Gideon*, the Supreme Court expressly declined to extend the right to counsel[17] to civil cases.[18] Despite the fact that the Supreme Court failed to create a civil right to counsel under the federal constitution,[19] New York State is entitled by America's system of federalism to go further than the federal government in protecting the rights of its citizens in navigating complex civil issues such as school discipline.[20]

Over a decade after the Supreme Court's *Gideon* decision, the New York Court of Appeals heard the case *In re Smiley*,[21] where the Court

[15] Gideon v. Wainwright, 372 U.S. 335 (1963).

[16] *Id.* at 339 (citing U.S. CONST. art. VI).

[17] While the Supreme Court failed to recognize a right to civil counsel, the right to civil counsel is not foreign to the common law. *See* 11 Hen. 7, c. 12 (Eng.), *reprinted in* 2 STATUTES OF THE REALM 578 (1816) [hereinafter 11 Hen. 7, c. 12]. In 1495, King Henry VII built on the Magna Carta's proclamation that "[t]o no one will we sell, to no one deny or delay, right or justice" by enacting An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis. Magna Carta c. 40 (1215), *reprinted in English Translation of Magna Carta*, BRITISH LIB. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation; 11 Hen. 7, c. 12. The statute King Henry enacted provided that: "[T]he Justices . . . shall assign to the same poor person or persons Counsel, . . . which shall give their Counsel, nothing taken for the same; . . . and likewise the Justices shall appoint attorney and attorneys for the same poor person and persons." 11 Hen. 7, c. 12. King Henry's insistence that all his subjects, regardless of their economic status have equal justice prompted the Parliament to enact the Act, creating "a statutory right to counsel—and a waiver of court fees—for indigent civil plaintiffs." Scott F. Llewellyn & Brian Hawkins, *Taking the English Right to Counsel Seriously in American "Civil Gideon" Litigation*, 45 MICH. J. L. REFORM 635, 641–42 (2012). The right to assigned counsel, extended only to plaintiffs by the language of the statute, was through the common law applied to civil defendants as well. *Id.* at 643. The right to counsel created in England by "the 1700s and 1800s . . . was seemingly as well developed as the Sixth Amendment right to criminal counsel in America today." *Id.* at 641. History of the right to civil counsel in England far predates the 1495 statute; courts in England "received petitions for appointed counsel as early as 1292," suggesting that the right to appointed counsel was a part of the early common law. *Id.* at 642. Additionally, in the 1800s, "a number of English judges opined that 11 Hen. 7, c. 12 was 'confirmatory of the common law.'" *Id.* When New York State and the fledgling United States obtained independence, the states received and adopted the common law of England into American jurisprudence. *See* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 393, 401 (1968). While New York State specifically retained all aspects of the common law which were not "repugnant to [the state] constitution," New York did not retain the common law right to civil counsel in its emerging jurisprudence. *See* N.Y. CONST. art. I, § 14.

[18] Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 25, 26 (1981) ("[S]uch a right [to counsel] has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. . . . [A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.").

[19] *See* U.S. CONST. amend. VI.

[20] *See Lassiter*, 452 U.S. at 33.

[21] *In re* Smiley, 330 N.E.2d 53 (1975).

held that no right to counsel "applies to private litigation."[22] *In re Smiley* addressed the issue of whether indigent litigants in divorce actions have a constitutional right to have provided counsel or a constitutional right to be compensated for the cost of retained counsel.[23] The Court reasoned that "[t]he underlying principle" for providing counsel in criminal matters is that the government is "proceed[ing] against the individual with risk of loss of liberty or grievous forfeiture."[24] The foundation for the Court of Appeals' reasoning, that appointed counsel is necessary when the state moves against an individual where there is a risk of grievous forfeiture, is at odds with the refusal to appoint counsel when the loss of education is at issue.[25] The state legislature has acknowledged that education is essential to life.[26] Additionally, public schools are an arm of the state.[27] The Court's reasoning combined with the essential status of education would call on the state to provide counsel when it moves to revoke a student's access to education.

Former Court of Appeals Chief Judge Jonathan Lippman has championed increased access to civil legal services and a civil right to counsel in New York and took steps while he was Chief Judge to enlarge access to civil representation.[28] While still on the Court, Judge Lippman created the Task Force to Expand Access to Civil Legal Services in New York ("Task Force"), as "the centerpiece of his efforts to establish a comprehensive approach to providing counsel to low-income New Yorkers in civil cases."[29] The Task Force, while aiming to "focus on equal access to justice and to highlight the need to expand access to civil legal services to those most vulnerable in" New York, directed its attention to civil representation in "areas such as housing, personal and family safety and employment" but did not include access to education within its scope.[30] In 2015, the Task

[22] *Id.* at 55.

[23] *Id.* ("The mandatory direction to provide counsel to defendants in criminal cases derives from the Federal and State cases applying Federal and state constitutional provisions . . . . No similar constitutional or statutory provision applies to private litigation.").

[24] *Id.*

[25] *See id.*; Julie K. Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field*, 46 SETON HALL L. REV. 471, 482–83 (2016).

[26] *See* S. Con. Res. C776, 2015 Leg., Reg. Sess. (N.Y. 2015).

[27] *See* N.Y. CONST. art. XI, § 1.

[28] Jonathan Lippman, *New York's Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13, 13 (2013).

[29] Press Release, N.Y. State Unified Court System, Task Force to Support Chief Judge's Efforts to Ensure Adequate Legal Representation in Civil Proceedings Involving Fundamental Human Needs (June 9, 2010), https://www.nycourts.gov/press/pr2010_09.shtml.

[30] *Id.* The announcement contains no reference to the access to representation in cases concerning one's education interest. *See id.*

Force became the Permanent Commission on Access to Justice to continue the "Task Force's significant contributions towards increasing the availability of civil legal services, while acknowledging the work that remains to further remove barriers to justice for all New Yorkers."[31] The Permanent Commission's 2015 report to the Chief Judge emphasized the importance of civil representation for indigent persons in landlord-tenant law,[32] employment law,[33] for victims of domestic violence,[34] accommodation of the disabled,[35] bankruptcy,[36] veterans' rights,[37] immigration issues,[38] and health care,[39] but educational issues were generally left out of the report.[40] The State cannot, consistent with its claim that education is an essential aspect of life, continue to address other issues in the civil Gideon movement while simultaneously ignoring education.

II. EDUCATION AS A FUNDAMENTAL RIGHT

New York State has recognized the importance of education by deeming the receipt of an education one of the "essentials of life."[41] While today the State recognizes the importance of education, in 1894, New York State together with New Jersey and Delaware "[were] the only states which to-day [sic] have not a similar analogous provision in their *fundamental* laws" guaranteeing a public education.[42] The lack of a provision providing for public education in

[31] *Permanent Commission on Access to Justice*, N.Y. STATE UNIFIED CT. SYS., http://www.nycourts.gov/accesstojusticecommission/index.shtml (last visited Oct. 11, 2017).

[32] *See* PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 32–33 (2015), http://nylawyer.nylj.com/adgifs/decisions15/122915report.pdf.

[33] *See id.* at 3, 8 (recommending that funding continue for civil legal services in matters involving subsistence income).

[34] *See id.* at 3, 13 (emphasizing how funding has provided civil legal assistance for victims of domestic violence).

[35] *See id.* at 13–14 (providing testimony on how funding for civil legal services has aided the disabled).

[36] *See id.* at 18 (providing testimony of indigent person that received civil representation for bankruptcy issue).

[37] *See id.* at 16.

[38] *See id.* at 14, 26 (discussing initiatives providing civil legal services for low-income immigrants).

[39] *See id.* at 19 (providing testimony of indigent person that received civil representation for health care issue).

[40] *See id.* at 8, 23. Other than referencing the language of the State Legislature's 2015 Concurrent Resolution which listed education as an essential of life, the report does not substantively address the impact that a lack of civil counsel has in educational matters. *See id.*

[41] S. Con. Res. C776, 2015 Leg., Reg. Sess. (N.Y. 2015).

[42] CHARLES Z. LINCOLN, 3 THE CONSTITUTIONAL HISTORY OF NEW YORK: FROM THE BEGINNING OF THE COLONIAL PERIOD TO THE YEAR 1905, SHOWING THE ORIGIN, DEVELOPMENT, AND JUDICIAL CONSTRUCTION OF THE CONSTITUTION 555–56 (1906) [hereinafter THE

New York led to the 1894 Constitutional Convention's creation of the modern Article XI, Section 1 provision.[43] Indeed, the 1894 Constitutional Convention's Committee on Education issued a report that "no imagination can picture this state refusing to provide education for its children."[44] In a statement in support of a constitutional provision "provid[ing] for the maintenance and support of a system of free common schools," the Committee on Education noted that "it is a significant fact that . . . no other state of the Union has considered it superfluous or unwise to make such an affirmation in its *fundamental* law."[45] Decades before the 1894 Constitutional Convention, in an 1822 speech delivered by Governor De Witt Clinton on education, the governor noted that "the first duty of a state is to render its citizens virtuous by intellectual instruction."[46] The statements of the 1894 Convention's Committee on Education and of Governor De Witt Clinton demonstrate that in New York, education has been of such fundamental importance to the State that there is historical support for deeming the right to education as fundamental.[47]

However, the federal government, as well as the State of New York, have been reticent to deem access to education a fundamental right,[48] despite its essential status. For the State to properly protect education, it must first recognize that access to education is a right that is "of the very essence of a scheme of ordered liberty. . . . a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[49] In two separate cases, the United States Supreme Court and the New York Court of Appeals both held that education is not a fundamental right, denying elevated protections in the education context.[50]

San Antonio Independent School District v. Rodriguez involved a class action challenge brought by parents of Mexican-American

CONSTITUTIONAL HISTORY OF NEW YORK].

[43] *See id.* at 554–55; N.Y. CONST. art. XI, § 1.

[44] THE CONSTITUTIONAL HISTORY OF NEW YORK, *supra* note 42, at 554.

[45] *Id.* at 554, 555 (emphasis added).

[46] *Id.* at 566.

[47] *See id.* at 555, 566.

[48] Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 L. & INEQ. 239, 264, 270–71 (1999).

[49] Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); citing Brown v. Mississippi, 297 U.S. 278, 285 (1936); Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

[50] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Bd. of Educ. v. Nyquist, 57 N.E.2d 359, 369–70 (N.Y. 1982).

students against the State of Texas alleging that Texas' school finance system of having low property tax base school districts violated the Fourteenth Amendment's Equal Protection Clause.[51] The Supreme Court, reversing the lower court, held that Texas' system of school finance was not unconstitutional under the Equal Protection Clause.[52] Refusing to apply heightened scrutiny to the plaintiffs challenge, the Supreme Court declined to classify education as a fundamental right because "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution."[53] The Court's decision here, was in less than a decade adopted by the New York Court of Appeals when it too refused to recognize education as a fundamental right.[54]

While the Due Process Clause of the Federal Constitution necessitates at a minimum "rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school,"[55] the Supreme Court explicitly "stop[ped] short of construing the Due Process Clause to require, countrywide, that hearings . . . must afford the student the opportunity to secure counsel."[56] *Goss v. Lopez* involved a challenge by nine Ohioan high school students to their school suspensions, claiming that they "were denied due process of law" via the Fourteenth Amendment because the students faced suspension "without a hearing either prior to suspension or within a reasonable time thereafter."[57] The Court, while noting that suspension is preferable to expulsion,[58] also called upon the *Brown v. Board of Education* Court and proclaimed that "education is perhaps the most important function of state and local governments."[59] Furthermore, while abstaining from creating a right to counsel in education cases, the Court classified "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

[51] *Rodriguez*, 411 U.S. at 4–6.

[52] *Id.* at 54–55, 59.

[53] *Id.* at 28–29, 35. The standard applied by the Supreme Court to determine whether or not any given right is entitled to be deemed fundamental, or to receive heightened was not whether the right was fundamental to a free society but merely "whether there is a right to education explicitly or implicitly guaranteed by the Constitution." *Id.* at 33–34 (citations omitted).

[54] *See Nyquist*, 439 N.E.2d at 369–70.

[55] Goss v. Lopez, 419 U.S. 565, 581 (1975).

[56] *Id.* at 583.

[57] *Id.* at 567, 568.

[58] *Id.* at 576.

[59] *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

Clause."[60] Much like the New York Legislature, the Court emphasized the importance of education, but left access to education defenseless by failing to provide for a right to counsel when students are in jeopardy of losing their access to the right.[61]

While the Federal Constitution neither explicitly *nor* implicitly refers to education as a fundamental right, the New York State Constitution's Education Article[62] provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[63] Although the Constitutional mandate does not explicitly state that education is a fundamental right in New York, it denotes the importance of education and the State's role in providing it.[64] Education's enshrinement in the State Constitution, combined with the importance placed on education by the 1894 Constitutional Convention support the conclusion that New York State should change course and deem education as a fundamental right.

Despite the fact that both the Federal Government and the State of New York have failed to explicitly recognize education as a fundamental right, there are international parallels which support classifying education as a fundamental right. Examples of legal systems which have elevated education to the status of a fundamental right can be found in Europe and India.[65] Should New York convene a constitutional convention and denote education as a fundamental right, the State would not be on an island, it would be

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[60] *Goss*, 419 U.S. at 574.

[61] *See id.* at 576, 583; S. Con. Res. C776, 2015 Leg., Reg. Sess. (N.Y. 2015) (proclaiming the importance of the right to education as an essential of life, but failing to take further action to protect).

[62] N.Y. CONST. art. XI, § 1.

[63] *Id.*

[64] *See id.*

[65] *See* KLAUS DIETER BEITER, 82 THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW 8, 23, 24 (2006). The two international cases following this footnote come from Scotland and India. *See* Case of Campbell & Cosans v. The United Kingdom, 48 Eur. Ct. H.R. (1982); Mohini Jain v. State of Karnataka, (1992) 3 SCR 658 (India). Scottish law developed as an amalgamation of "Roman, canon and the common law of Scotland." YASMIN MORAIS, SCOTTISH LEGAL HISTORY: A RESEARCH GUIDE (2008), http://www.nyulawglobal.org/globalex/Scottish_Legal_History.html#ScottishLegalHistory. Indian law is derived from the English common law. *See Brief History of Law in India*, BAR COUNSEL OF INDIA, http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom (last visited Oct. 13, 2017). As both of these legal systems have a basis in the common law from which American jurisprudence has evolved, they are apt comparators for the development of American law. The use of these two example cases are to demonstrate that although American law has yet to have announced a fundamental right to education, there is precedent in other legal systems that have developed from the common law for creating such a right in a common law system.

joining other nations recognizing the crucial importance of education.

In Europe, the European Convention on Human Rights in its first Protocol, enacted by the Council of Europe in 1952, proclaims that "[n]o person shall be denied the right to education."[66] The European Court of Human Rights, in *Campbell and Cosans v. United Kingdom*, interpreted the language of Article 2 of the European Convention on Human Rights to "set out . . . the fundamental right to education."[67] In that case, Jeffery Cosans was "to receive corporal punishment for having tried to take a prohibited short cut through a cemetery on his way home from school."[68] After reporting to the Assistant Headmaster's office for his punishment, Jeffery "refused to accept the punishment" and was then "immediately suspended from school until such time as he was willing to accept the punishment."[69] The Court of Human Rights held that Jeffery Cosans' suspension violated his fundamental right to education under Article 2 of the Convention.[70]

India, a country which adheres to the common law,[71] addressed the question of whether there is a right to education guaranteed to all Indians under their constitution in *Mohini Jain v. State of Karnataka*.[72] The plaintiff in *Mohini Jain* challenged that the practice of "permitting the Private Medical Colleges in the State of Karnataka to charge exorbitant tuition fees from the students" violated the Indian constitution.[73] Ultimately, the Supreme Court of India held that "[t]he 'right to education', [sic] therefore, is concomitant to the *fundamental rights* enshrined" in the Indian constitution.[74]

By recognizing and elevating education to its rightful place as a fundamental right, New York State, therefore, must then protect that right. In order to properly protect the right of all children of New York to access education, the State must adopt procedures to ensure that the state cannot revoke that right at will. New York State can join other countries in elevating education to be a fundamental right. No longer can New York nominally speak of the importance of

[66] European Court of Human Rights, European Convention on Human Rights, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262, art. 2.

[67] *Case of Campbell & Cosans*, 48 Eur. Ct. H.R. ¶ 40.

[68] *Id.* ¶ 10.

[69] *Id.*

[70] *Id.* ¶ 41.

[71] *Brief History of Law in India*, *supra* note 68. The Indian legal system inherited the common law from England, much like the United States did. *See Id.*

[72] Mohini Jain v. State of Karnataka, (1992) 3 SCR 658, 659 (India).

[73] *Id.* at 664.

[74] *Id.* at 660 (emphasis added).

education, call education an essential of life, but not protect students when they lose access to education. A constitutional convention will allow the state of New York to enshrine education as a fundamental right and give education the protection ensured to other fundamental rights. Citizens must be adequately protected from the revocation of a fundamental right and the revocation of a fundamental right, regardless of the duration, requires protecting the individual's interest.

III. HOW SCHOOL DISCIPLINE IS STRUCTURED

Before delving into the risks associated with the loss of one's access to education and potential solutions that the State can adopt, there must first be a general overview of the steps and phases of a school disciplinary hearing. The New York Civil Liberties Union has created a Palm Card to help inform students and their parents of their rights to aid in the navigation of school disciplinary proceedings.[75] The Palm Card addresses two types of suspensions, short-term suspensions which the pamphlet classifies as suspensions for periods of one to five days and long-term suspensions ranging from six to 180 days.[76] Students facing long-term suspensions are entitled to a hearing, while those students who are faced with a one to five day suspension are not.[77] Students facing either form of suspension are entitled to notice, either one day prior to a hearing or before the suspension.[78] When faced with the prospect of a long-term suspension, students are entitled to a hearing and have the right to request a change in the length of suspension, to bring a representative – either an adult, or, if they can afford one, an attorney – question witnesses, present their own version of the events, and to remain silent.[79] If the suspension stands after a hearing, students have the right to appeal their suspension by "asking a higher level authority (usually [the] school board) to reconsider."[80]

Disciplinary proceedings are, generally, intended to be "an informal, free-flowing discussion" concerning the disciplinary issue.[81]

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[75] N.Y. CIVIL LIBERTIES UNION, KNOW YOUR RIGHTS WHEN FACING A SUSPENSION (2015), https://www.nyclu.org/sites/default/files/publications/kyr_suspensions_2015.pdf.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Anna Stolley Persky, *A Painful Case: Do Parents Need Lawyers for School Disciplinary*

However, these proceedings "have tremendous ramifications" as a student's access to education can be curtailed.[82] When students are faced with losing their access to education, students who are unrepresented can be prejudiced in proceedings where the school districts intimidate students and parents in order to achieve what the school envisions as a desired result.[83] The presence of an attorney during these proceedings "help[s] parents ensure that the disciplinary proceeding is being conducted impartially, and that a complete and accurate administrative record is established in case the student has to go to court."[84]

IV. RISKS ASSOCIATED WITH THE LOSS OF ACESS TO EDUCATION AND THE IMPORTANCE OF A CIVIL RIGHT TO COUNSEL

In New York State, all citizens are constitutionally guaranteed the right to a "sound basic education."[85] The Court of Appeals declared that the State Constitution provided this educational right in 1995, in *Campaign for Fiscal Equity, Inc.*.[86] In the years since the *Campaign for Fiscal Equity, Inc.* case there has been much debate over what constitutes a sound basic education.[87] Regardless of what constitutes a sound basic education, whether teachers are properly compensated, what textbooks are provided to students, the subjects taught to students, the availability of musical instructions or school sports, as well as various other issues, one aspect of this debate is clear—no student in New York State can have their constitutional educational rights vindicated if they are not in the classroom.[88]

Nationwide, the public-school system has used suspensions[89] "as a means of reprimanding unruly elementary and secondary school

Hearings?, A.B.A. J., (July 1, 2011), http://www.abajournal.com/magazine/article/a_painful_case_do_parents_need_lawyers_for_school_disciplinary_hearings/.

[82] *Id.*

[83] *See id.*

[84] *Id.*

[85] Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 328 (N.Y. 2003) (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 664 (N.Y. 1995)).

[86] *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 664.

[87] *See, e.g.*, Casey Quinlan, *New York Teachers March to State Capital to Demand More Funding for Public Schools*, THINKPROGRESS (Oct. 3, 2016), https://thinkprogress.org/new-york-teachers-march-to-state-capital-to-demand-more-funding-for-public-schools-de3945c728#.sxcdny99a.

[88] Goss v. Lopez, 419 U.S. 565, 576 (1975) ("[E]xclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child.").

[89] The term suspension for purposes of this Article refers to the removal of students from the classroom, whether through any in-school or out-of-school disciplinary procedure where a student is, for a period of time, barred from attending regular school activities. This Article uses the term expulsion to refer to the complete removal of a student from school.

students."[90] However, this system as a whole, disproportionately subjects to discipline minorities and students with disabilities, "often compounding preexisting issues with diminished opportunities to excel in the classroom."[91] A United States Department of Education Study found that in the 2011 to 2012 school year, 3.5 million students received in-school suspension, 3.45 million students were disciplined with out-of-school suspension, and 130,000 students received expulsion.[92] However, in interpreting these figures, it is important to note that black students were disciplined at a rate three times that of white students,[93] and students with disabilities were disciplined at a rate twice that of non-disabled students.[94] The same data found that while black students made up only sixteen percent of the scholastic population, they represented between thirty two and forty two percent of suspensions and expulsions.[95] In New York City, while the number of suspensions issued at public schools decreased by approximately 16 percent from 2015 to 2016, "Black students were suspended at 3.61 times the rate of White students."[96] In the same 2015 to 2016 school year, "although students with disabilities comprised about 18.7% of the student population, they comprised 38.6% of the total number of suspensions—up from 38.2% in the prior year."[97] Out of a given cohort, minority and disabled students overwhelmingly bear the brunt of school discipline.[98] For the State to fulfill its mandate to provide a sound education to the children of New York, more must be done to protect students' access to education.

Minority students and those with disabilities facing increased rates of school discipline face another problem, the "school-to-prison pipeline."[99] As Chief Justice Earl Warren noted in *Brown v. Board of*

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[90] Edward Graham, *School Suspensions and the Racial Discipline Gap*, JSTOR DAILY (Sept. 2, 2015), https://daily.jstor.org/school-suspensions-racial-discipline-gap/.

[91] *Id.*

[92] *School Climate and Discipline: Know the Data*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/gen/guid/school-discipline/data.html (last modified July 11, 2016).

[93] *Id.*

[94] *Id.*

[95] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ISSUE BRIEF NO. 1, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf [hereinafter DATA SNAPSHOT: SCHOOL DISCIPLINE].

[96] *AFC Urges the City to Formulate a Strategic Plan to Tackle Significant Disparities by Race and Disability in Students Suspended*, ADVOC. FOR CHILD. OF N.Y. (Oct. 31, 2016), http://www.advocatesforchildren.org/node/1061.

[97] *Id.*

[98] *See id.*

[99] *See* Carla Amurao, *Fact Sheet: How Bad Is the School-to-Prison Pipeline?*, PBS (Mar. 28, 2013), http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipe

Education, "[i]n 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."[100]

Justice Warren's statement is clearly reflected in the school-to-prison pipeline, a phenomenon where students who are removed from schools are "sent back to the origin of their angst and unhappiness–their home environments or their neighborhoods . . . [where they] become hardened, confused, embittered" and are, as a byproduct of socio-economic forces, further disenfranchised from their communities and often commit further crimes.[101] In the school-to-prison pipeline:

> [S]tudents are suspended, expelled or even arrested for minor offenses that leave visits to the principal's office a thing of the past. . . . Students who . . . are forced out for smaller offenses become hardened, confused, embittered. Those who are unnecessarily forced out of school become stigmatized and fall behind in their studies; many decide to drop out of school altogether, and many others commit crimes in their communities.[102]

The disproportionate disciplining of students with disabilities and minorities in school discipline combines with "policing practices, high-stakes testing and the prison industry [to] contribute to the pipeline."[103] The systemic mishandling of minority students combined with the lack of counsel when these pupils face the possibility of losing their access to education exposes that the public education system in New York and throughout the United States is not doing enough to provide for those who require assistance. When students are removed from the classroom, they face the loss of essential instructional hours, the stigma of being labeled as trouble-makers and often lose self-esteem.[104] This is evident in the fact that students who already have a host of forces working against their educational success cannot afford to have counsel represent them and

line-fact-sheet/; *Ending the School-to-Prison Pipeline*, URB. YOUTH COLLABORATIVE, http://www.urbanyouthcollaborative.org/ending-school-to-prison-pipeline/ (last visited Oct. 13, 2017) ("The School-to-Prison Pipeline is the direct and indirect push out of young people from the school system and into the juvenile justice and criminal justice systems.").

[100] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[101] Amurao, *supra* note 103.

[102] *Id.*

[103] *School to Prison Pipeline*, N.Y. CIV. LIBERTIES UNION, https://www.nyclu.org/en/issues/racial-justice/school-prison-pipeline (last visited Oct. 12, 2017).

[104] *See* Judith A.M. Scully, *Examining and Dismantling the School-To-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 987 (2016).

protect them from the deprivation of their right to secure an education.

Students are often placed into the pipeline at a young age.[105] In 2014, the Office of Civil Rights Data Collection of the United States Department of Education issued data on school discipline for preschool students for the first time.[106] The survey, which took data from school districts which offered preschool programs, found that out of the surveyed programs which suspended students, Black and Latino students made up forty seven percent of the preschool population but received sixty seven percent of first-time out-of-school suspensions.[107] To contrast, white students represented forty three percent of the preschool population while receiving only twenty eight percent of suspensions.[108]

The effects of the school-to-prison pipeline, which begin to effect preschool aged children, continue to impact students into middle and high school.[109] The policies and extrinsic forces that have created the school-to-prison pipeline begin to take effect at "the formative and highly important early childhood years . . . to our public kindergaden-12 schools."[110] The ideal of the American Dream is unachievable for many children, it is impossible to achieve the American Dream "when a student born into poverty faces overwhelming obstacles in achieving a decent education, and, therefore, never stands a chance at bettering his or her life."[111]

The immense impact of removing students' access to education, which is disproportionately felt by minority communities, is compounded by the fact that in general access to the legal system is more difficult for minorities.[112] There are two major bars to minority communities' access to justice, first, "discrimination and other institutional barriers to wealth and income equality" and second,

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[105] *See* DATA SNAPSHOT: SCHOOL DISCIPLINE, *supra* note 99, at 1. This phenomenon has also been referred to as the "cradle-to-prison" pipeline. Katherine Dunn, Symposium, *School-to Prison Pipeline Panel*, 5 FAULKNER L. REV. 115, 115 (2013).

[106] DATA SNAPSHOT: SCHOOL DISCIPLINE, *supra* note 99, at 7.

[107] *Id.* at 7. African American students comprised eighteen percent of the preschool population and received forty-two percent of suspensions. *Id.* Latino students were twenty-nine percent of the population and received twenty-five percent of suspensions. *Id.*

[108] *Id.*

[109] *See* Dunn, *supra* note 110, at 122, 126.

[110] *Id.* at 115.

[111] *Id.* at 116.

[112] *See* COLUM. LAW SCHOOL HUMAN RIGHTS INST. & NE. UNIV. SCHOOL OF LAW PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECON., EQUAL ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS 1 (2014), http://www. http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf.

"although racial minorities and women are over-represented among people who qualify for civil legal assistance, state-level studies on access to justice indicate that such groups make up a disproportionate number of litigants without representation."[113] While there are numerous legal services organizations which provide reduced-cost or free legal services to indigent clients, the demand for low-cost or free legal services far outweighs the supply.[114] Existing scholarship on access to justice demonstrates that "[a] growing body of research indicates that outcomes for unrepresented litigants are often less favorable than those for represented litigants."[115] That represented parties find more success in the court system should be evident – attorneys, with their knowledge of the law can better assist their clients than pro se litigants, who at best may "receive[] advice or written information about how to [navigate the legal system] from a legal aid program" but are not provided with representation.[116] School disciplinary proceedings, which are quasi-administrative proceedings,[117] present similar difficulties to unrepresented students.[118] Additionally, a school disciplinary proceeding "often triggers a parallel proceeding in delinquency court."[119] In a system where parents and students are unaware of their rights in a disciplinary hearing or where they cannot afford or do not have access to an attorney for those proceedings, they are equally unprepared for parallel legal proceedings stemming from the same incidents. The issues inherent in access to justice issues and the school-to-prison pipeline manifest themselves in students who face a loss of access to education attempting to navigate a system which they are wholly unprepared to navigate.

In addition to the problems outlined above and depending on the

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[113] *Id.* at 3, 4.

[114] *See id.* at 2; LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1–2 (2009), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf ("Studies show that the vast majority of people who appear without representation are unable to afford an attorney, and a large percentage of them are low-income people who qualify for legal aid.") [hereinafter DOCUMENTING THE JUSTICE GAP].

[115] *See* DOCUMENTING THE JUSTICE GAP, *supra* note 119, at 2.

[116] *Id.* at 24 n.33.

[117] *See* Goss v. Lopez, 419 U.S. 565, 581 (1975)

[118] *See* Persky, *supra* note 85 ("'In any of these [disciplinary] hearings, there are supposed to be procedural protections to help ensure fairness. In addition, the school discipline decisions can't be arbitrary or capricious . . . . But often, schools are either unaware of specific due process requirements or they are aware and just failed to do them. And how can parents and students enforce those rights when often they aren't even aware of them?'").

[119] *Id.*

age and conduct for which a student is being disciplined, there can be other consequences.[120] When students apply to attend college, "[m]ost colleges are considering applicants' high school disciplinary records."[121] A study conducted by the Center for Community Alternatives found that "[a]lmost three-quarters of colleges and universities collect high school disciplinary information . . . [and] [o]f those that collect the information, 89 percent report that they use the information in admissions decisions."[122] The executive director of the American Association of Collegiate Registrars and Admissions Officers, noting the interplay between pre-undergraduate student discipline and its disproportionate impact on racial minorities, stated that "[t]here does not appear to be evidence that screening students via their [pre-undergraduate] disciplinary records has made campuses safer."[123] Students who have navigated a school disciplinary system without representation, who then go on to apply to college, therefore, face a further barrier. The current school disciplinary system, which as previously noted has a disparate impact on minority students as well as those with disabilities, then continues to haunt those students as they attempt to further their education.[124] Students who have had adverse college admissions decisions made against them are then placed back into the school-to-prison pipeline.[125] At a time when an undergraduate degree has the same value that a high school diploma had twenty years ago, school discipline has a greater impact than just taking a student out of the classroom or school activities for a period of time, it can set the tone for the rest of that student's life.[126]

By ensuring the right to counsel in criminal cases, the Federal Government and the State of New York acknowledged the importance of the liberty issue at stake and the severe potential for prejudice against the accused.[127] Consequently, by failing to imbed a constitutional right to counsel in education matters in the state

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[120] *See* Scott Jaschik, *Haunted by High School*, SLATE, (May 29, 2015) http://www.slate.com/articles/life/inside_higher_ed/2015/05/college_admissions_offices_use_high_school_disciplinary_records_to_make.html.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *See id.*; *School to Prison Pipeline*, *supra* note 108.

[125] *See School to Prison Pipeline*, *supra* note 108.

[126] *See* Robert Farrington, *A College Degree Is the New High School Diploma*, FORBES (Sept. 29, 2014), https://www.forbes.com/sites/robertfarrington/2014/09/29/a-college-degree-is-the-new-high-school-diploma/#6b81e62b4b44.

[127] *See* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) *In re* Smiley, 330 N.E.2d 53, 55 (N.Y. 1975).

constitution, New York lawmakers have ignored the fundamental importance of education and the prejudice that those who are deprived of it face.

V. POTENTIAL SOLUTIONS

Given the dangers associated with a loss of education and the fundamental status of education, there are two solutions to this problem within the power of the State of New York to address. First, the State can create a constitutional right to court appointed counsel for students faced with suspension or expulsion.[128] Second, the State could create statutory protections which could address different situations than those covered by a constitutional amendment.[129] Although presently either proposed solution is unlikely to be adopted by the state,[130] the state could alternatively require the appointment of expert advocates who, although not attorneys, would enable students facing suspension and expulsion to better navigate the school disciplinary system.[131]

Should the state choose to adopt a constitutional amendment providing a right to appointed counsel in education cases, its formulation can be modeled after existing statutes providing such a right, as well as other resources created by legal associations. In New York, the state already provides a statutory right to counsel for indigents in family court proceedings, a statute from which the State

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[128] *See* N.Y. CONST. art. XIX, § 1; Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REVIEW J. POVERTY L. & POL'Y, July–Aug. 2006, at 245, 245.

[129] *See* N.Y. CONST. art. I, § 6; Abel & Rettig, *supra* note 133, at 245, 247.

[130] Note, however, that currently two states have statewide offices which provide for a right to counsel both in criminal and civil matters. Abel & Rettig, *supra* note 133, at 251. In Alaska, the state's Office of Public Advocacy provides representation to indigent Alaskans in adult guardianship matters. OFFICE OF PUB. ADVOCACY, ALASKA DEP'T OF ADMIN., *Types of Civil Representation*, http://doa.alaska.gov/opa/attorn_respondent.html (last visited Oct. 14, 2017). To take advantage of the Office of Public Advocacy's services, a putative client "files a petition with the court to appoint a guardian for an individual, the individual (the 'respondent') is entitled to court-appointed counsel in the case if he or she cannot afford to hire an attorney." *Id.* In Montana, as a result of a lawsuit against the state's governor, the state "created a statewide public defender's office to represent low-income people in both civil and criminal matters." Abel & Rettig, *supra* note 133, at 251; *see* White v. Martz, No. CDV-2002-133, 2006 Mont. Dist. LEXIS 136, *2 (Mont. Dist. Ct. Jan. 25, 2006). The mission of the Montana Office of the State Public Defender "is to provide effective assistance of counsel to indigent persons accused of crime and other persons in civil cases who are entitled by law to the assistance of counsel at public expense." MONT. PUB. DEFENDER OFFICE, MISSION 1, http://publicdefender.mt.gov/Portals/61/About/mission.pdf.

[131] *See Our Services & How to Get Help*, STUDENT ADVOCACY, http://www.studentadvocacy.net/services.html#Professional (last visited Oct. 14, 2017).

can model a right to counsel in education cases.[132] Reviewing state statutes providing for a civil right to counsel, Laura Abel and Max Retting noted seven general guidelines for a state right to counsel system.[133] The guidelines are as follows:

- [A]ppointed counsel must have adequate experience and training,
- [A]ppointed counsel must fulfill particular duties,
- [A]ppointed counsel must be assigned only as many cases as they can competently handle,
- [A]ppointed counsel must be independent of the appointing authority,
- [C]ounsel must be adequately compensated,
- [C]ounsel must be appointed early enough in a particular proceeding, and
- [T]he appointment system must be uniform throughout a particular state.[134]

These guidelines, while requiring alteration to fit within the scheme of school disciplinary proceedings, provide a baseline on which New York could model its amendment. Students and parents faced with a school disciplinary hearing may require more time between the initiation of a proceeding and a hearing to meet with their assigned counsel to discuss the case, engage in fact-finding, and prepare a defense.[135] In New York's statute providing for appointed counsel for indigent family court litigants, the state provides that those with appointed counsel have "the right to have an adjournment to confer with counsel."[136] A right to counsel is toothless if appointed counsel does not receive an adequate opportunity to meet with their client to prepare for the case and present a defense.[137]

There are a number of potential alternative solutions to remedy the lack of counsel in school disciplinary proceedings. While a constitutional amendment to the state constitution would create the right to counsel in civil matters, there are various ways that the State could implement a civil *Gideon*. Potential solutions for providing access to counsel for individuals faced with the prospect of suspension or expulsion can be gleaned from preexisting solutions to other areas

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[132] *See* N.Y. FAM. CT. ACT § 262 (McKinney 2015).

[133] Abel & Rettig, *supra* note 133, at 248.

[134] *Id.*

[135] *See* N.Y. STATE BAR ASS'N, 2015 REVISED STANDARDS FOR PROVIDING MANDATED REPRESENTATION 10–12 (2015); Abel & Rettig, *supra* note 133, at 250.

[136] FAM. CT. ACT § 262(a).

[137] *See* Abel & Rettig, *supra* note 133, at 250.

of the law. For instance, two pilot programs in Housing Court in Brooklyn and Consumer Civil Debtor's Court in the Bronx use non-lawyer "navigators" to assist laypeople in navigating the legal system.[138] The navigators provide a wide range of assistance to individuals, including: "assist[ing] litigants in completing do-it-yourself forms, assembling documents, identifying possible sources of assistance funding, and in certain cases, accompany[ing] litigants and answer[ing] factual questions in the courtroom."[139] While navigators cannot provide the same legal assistance as members of the bar, "the help of a well-trained non-lawyer standing by a litigant's side is far preferable to no help at all."[140] In the context of school disciplinary hearings, navigators could assist the participants in negotiating the school disciplinary system so that they could better understand what is required of them and how they can best mount a defense.

In crafting a solution to protect the education interest of students, New York could create a system with both constitutional and statutory protections. While a constitutional amendment could guarantee a right to appointed counsel in serious school disciplinary cases, statutory protections could ensure that students are being protected in less serious instances. For example, a constitutional amendment could require state-appointed counsel when students are faced with suspension and expulsion, or in instances where a student's conduct will result in a parallel delinquency proceeding.[141] While on the other hand, statutory protections could be afforded for less severe disciplinary proceedings where a student will not be suspended or expelled, but will perhaps be unable to participate in additional school activities such as after-school programs or athletics.

While creating a state-appointed counsel system would provide the best protection to the right of education, there are some obstacles to implementing a program of this sort. Creating a state-wide appointed counsel program would certainly be cost-intensive. As an alternative, instituting a non-attorney navigator program presents a more cost-effective potential solution. In 2015, the most recent year for which there is data, there were over 2,500,000 students enrolled in New York State public schools between kindergarten and twelfth

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[138] JONATHAN LIPPMAN, ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY 9 (2015), http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf.

[139] *Id.*

[140] *Id.*

[141] *See* Julie K. Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field*, 46 SETON HALL L. REV. 471, 477 (2016).

grade.[142] Without the added costs of a formal legal education and licensing costs, training non-attorney navigators would be more cost effective. Any solution which calls for the provision of counsel where there previously was none will certainly be costly. While instituting this sort of program will incur costs for the state, the countervailing consideration is the fact that across New York, students are being deprived of time in the classroom, the opportunity to learn, to grown, and to be able to contribute to society. The policy consideration then shifts to which alternative is truly more expensive for the state; paying for counsel in school disciplinary cases or losing the future social and economic contributions to society from students who were deprived of the chance to learn.

CONCLUSION

Given the importance of education in sustaining a modern, informed, democratic society, the state of New York must do more to ensure that every child's right to a sound, basic education is protected. The current school disciplinary system harms both students and society as a whole.[143] Although the state of New York has failed to recognize access to education as a fundamental right, the government's commitment to education as an essential of life calls on the state to do more to protect its deprivation.[144] If a person is deprived of access to their home by the government for a day, certainly that deprivation is serious and warrants protection,[145] if a person's right to free speech is imposed on by the government, it warrants protection,[146] if a person's right to marry the person they choose is infringed upon, it is an infringement on their fundamental right.[147] Why, then, is a deprivation of access to education not a deprivation of a fundamental right, and deserving of protection? The phenomenon of the school-to-prison pipeline has real consequences and the students that are at the highest degree of risk for entering that pipeline are also at the highest risk for being deprived of their access to education. The risks are far too grave, and the benefits far

[142] *Public School Enrollment*, N.Y. STATE DEP'T OF EDUC., http://www.p12.nysed.gov/irs/statistics/enroll-n-staff/2015/SchoolDistrictEnrollment1994-95to2014-15StatewideTotals.pdf (follow link titled "School District Enrollment 1994-95 to 2014-15, Statewide Totals").

[143] *See* Waterstone, *supra* note 152, 473–77.

[144] *See* Con. Res. C776, 2015 Leg., Reg. Sess. (N.Y. 2015) (proclaiming the importance of the right to education as an essential of life, but failing to take further action to protect).

[145] *See* Vinson v. Greenburg Hous. Auth., 288 N.Y.S.2d 159, 163 (App. Div. 1968).

[146] *See* Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 506 (1969).

[147] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

too great for the state to continue not protecting access to education as a fundamental right. While currently a state-appointed counsel system in education cases may not be financially reasonable, in light of the possibility of an upcoming state constitutional convention, New Yorkers ought to consider the importance of access to education and the risks associated with its loss when they decide to vote for a state constitutional convention.