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LEGAL ASPECTS OF THE SCHOOL PRINCIPALSHIP

The University of North Carolina at Greensboro ED.D. 1981

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LEGAL ASPECTS OF THE SCHOOL PRINCIPALSHIP

by

Doris Henderson

A Dissertation submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

Greensboro
1981

Approved by

Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation Adviser Joseph E Bryson

Committee Members

March 25, 1981
Date of Acceptance by Committee

December 8, 1980
Date of Final Oral Examination

HENDERSON, DORIS J. Legal Aspects of the School Principalship. (1981)
Directed by: Dr. Joseph E. Bryson. Pp. 260.

The school principalship demands greater knowledge of legal issues concerning education than in the past. More and more courts are recognizing that students and teachers have constitutional rights which must be protected. Administrators are being challenged in court cases involving student rights, tort liability, and teacher rights.

This study provides principals with information concerning major court rulings in the areas viewed as most litigious, including student rights involved in freedom of expression, speech, or press, personal appearance, suspension and expulsion, corporal punishment, search and seizure, marriage and parenthood, and handicapped children; tort liability; and teacher rights involved in First Amendment rights, due process, and academic freedom.

Among the conclusions of this study are the following:

(1) First Amendment rights of students are upheld by the courts when student conduct does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," but conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not immunized by constitutional guarantees of freedom of speech.

(2) Circuit courts of appeal are divided in rulings as to personal appearance codes for students.

(3) The United States Supreme Court has outlined minimal

procedures for meeting requirements of due process in suspensions of ten days or less, providing that students must be given notice of charges, an explanation of evidence, and the opportunity to present the students' side of story. In expulsions and long-term suspensions, students must be given adequate notice, a fair hearing, and there must be substantial evidence to support suspension or expulsion.

(4) The United States Supreme Court holds that the state has a "countervailing interest" in maintenance of order sufficient to sustain the right of teachers and school officials to "administer reasonable punishment for disciplinary purposes," without requirement for prior notice and a hearing.

(5) Most courts have held that while the Fourth Amendment applies to school searches, the "in loco parentis" doctrine lowers standard applied to determine reasonableness of search to that of "reasonable suspicion." However, as searches become more intrusive, the standard rises.

(6) Courts have established the principle that students cannot be prohibited from school attendance on a permanent basis solely because of marriage; school board rules prohibiting school attendance by unwed mothers or pregnant, unwed girls have been invalidated; and courts have found school board rules barring participation of married students in extracurricular activities unconstitutional.

(7) Courts have extablished that among the rights belonging to handicapped children are the rights to equality of educational opportunity and due process.

(8) Section 1983 of the Civil Rights Act of 1871 and actions of the courts provide that school officials who deprive teachers and students of constitutional rights may be personally liable. Areas involved in tort litigation against principals include lack of supervision, improper or inadequate instruction, failure to exercise responsibilities properly, field trips, and accountability. Tests used in determining liability on the part of school administrators are the "reasonable and prudent" and "foreseeability" tests.

(9) The courts have ruled that public employment is a benefit which cannot be conditioned upon denial of constitutional rights. A plaintiff's claim under the First Amendment is not defeated by the fact that an employee does not have tenure. The courts have made it clear that personnel decisions must be free from constitutional violations. Due process claims in public employment are governed by "property" and "liberty" interests. Teachers' constitutional rights to freedom of speech have been recognized by the courts, although such rights may be limited due to the unique nature of a school.

Legal precedents and trends related to the above areas are identified, and principals are provided with recommended guidelines.

ACKNOWLEDGEMENTS

I wish to express special appreciation to Dr. Joseph E. Bryson for serving as Dissertation Advisor, for his encouragement and assistance during the process of this study, and for having inspired in me a deep interest in school law through his teaching and enthusiasm. Sincere appreciation is also extended to Dr. Dale Brubaker, Dr. William Noland, Dr. William Purkey, and Dr. Donald Russell for their encouragement and for their service as committee members.

I want to thank my husband, Worth, for his encouragement and for his faith in me.

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CHAPTER I

INTRODUCTION

Throughout the history of public education in America, judicial decisions have played an important role in shaping public schooling. However, during the past thirty years, court decisions have made major changes in the operation of the public schools, creating a necessity for principals to be aware of court rulings and legal implications of their actions. The importance of the role of the courts in educational policymaking cannot be over-emphasized.

Federal courts, in particular, have become more involved in education. It is likely that the judicial branch of the federal government is the greatest shaping agent in American education today. Moreover, since the 1954 Brown I decision,[1] the United States Supreme Court has shown considerable interest in protection of constitutional rights relating to education. Educators have come to recognize the wisdom of Alexis De Tocqueville, when he said, "Hardly any question arises in the United States that is not resolved sooner or later into a judicial question."[2]

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[1]Brown v. Board of Education of Topeka, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954).

[2]Walter F. Murphy and Herman Pritchett, Courts, Judges and Politics (New York: Random House, 1961), p. 33.

There are two separate court systems in the United States, federal and state, both of which are empowered to hear cases relating to education under certain conditions. The federal court system is made up of the Supreme Court, eleven circuit courts of appeal, and eighty-eight district courts.

The United States Supreme Court, a product of the Constitution, with restrictions and requirements imposed by Congress, is principally an appellate court (although it does have original jurisdiction in cases involving the states, ambassadors, public ministers, and consuls as parties). A Supreme Court review is usually sought through filing a petition for writ of certiorari from a state supreme court or federal court of appeals decision. The Court has authority to review all cases from lower federal courts and cases in state courts which involve the meaning or effect of a constitutional provision.

Below the United States Supreme Court are the eleven circuit courts of appeal, which review district court decisions, except when the law provides for direct review of the Supreme Court. The circuit courts of appeal relieve the Supreme Court from the obligation to hear all appeals from district courts.

The district courts, at least one of which is located in every state, function in line of authority just below the appellate courts. District courts serve as trial courts with general federal jurisdiction.

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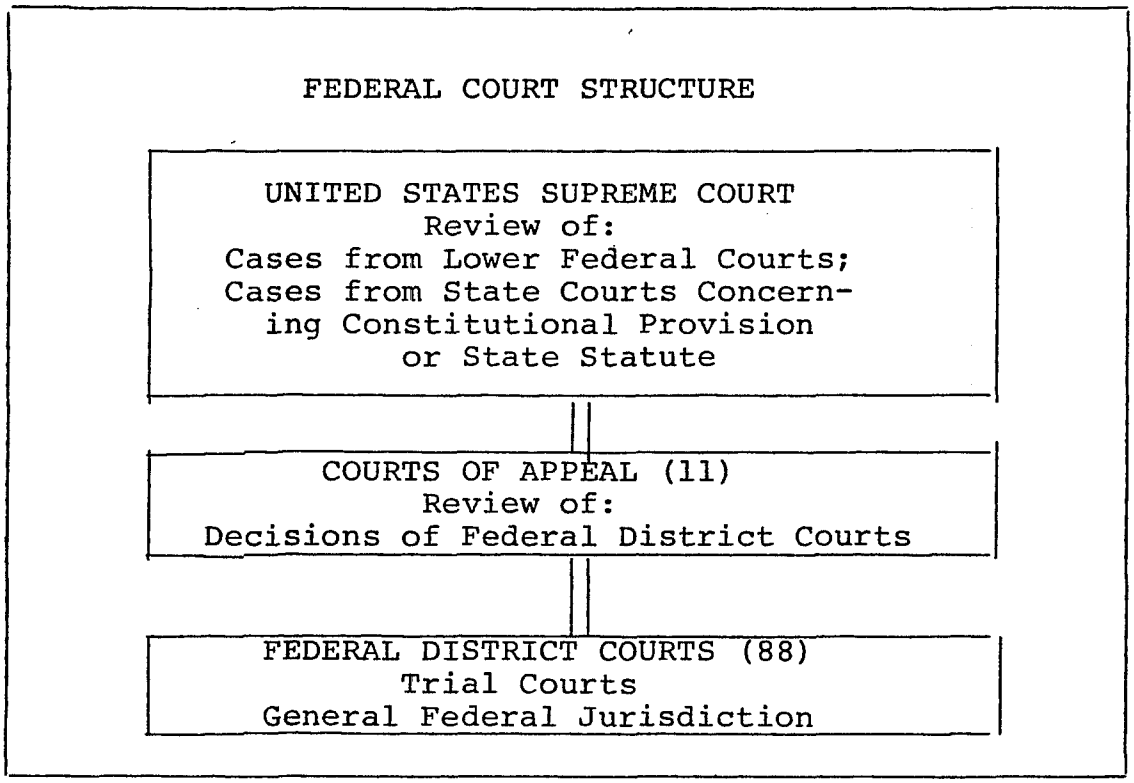
[3]Ibid., p. 31.

CHART I



E. Edmund Reutter compares the federal court system to the school system, indicating that the district court performs much like the teacher, with the court of appeals acting as principal, and dealing with what the district court (teacher) has done. Reutter views the United States Supreme Court as being on the level of the school superintendent, who approves or disapproves actions of the district court (teacher) and the circuit court of appeals (principal).[4]

Federal court jurisdiction for cases affecting education is recognized when cases question the validity of a state or federal statute under the United States Constitution or allege that an individual right, privilege, or immunity protected

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[4]E. Edmund Reutter, Workshop at NOLPE School Law Seminar, Williamsburg, Virginia (June 6, 1980).

under the Constitution has been violated. Many federal court cases have involved the First and Fourteenth Amendments to the Constitution.

The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[5]

This Amendment originally applied only to Congress.

In 1868, the Fourteenth Amendment made the provisions of the First Amendment applicable to the states. Section One of the Fourteenth Amendment follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[6]

A number of school cases involving the First Amendment have arisen: those involving use of public funds for the benefit of nonpublic schools or students; those related to school regulations which are objectionable on religious grounds; and those having to do with freedom of speech, press, and assembly.

The "due process" and "equal protection" clauses of the Fourteenth Amendment have had wide interpretation in public school cases. The Fourteenth Amendment has been invoked in

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[5]U. S. Const. amend. I.

[6]U. S. Const. amend XIV.

cases regarding flag salutes, parents' rights, racial segregation, teacher dismissal, student dismissal, uses of school funds, rights of the handicapped, and rights of married and pregnant students.

United States Supreme Court decisions establish precedent throughout the United States. Even the denial of review by the Supreme Court is important, because in denying review, the Court is in effect affirming the decision of the lower court.

In addition to the federal court system, each state has a separate state system of courts. Like the federal court system, the state courts are organized with different ranks, usually composed of the State Supreme Court, intermediate courts, trial courts, and magistrates or justices of the peace.

North Carolina's judicial system is described here as an example of a state judicial system. North Carolina has a Supreme Court, court of appeals, superior courts, and district courts.

The Supreme Court of North Carolina consists of the chief justice and six associate justices, who hear oral arguments on questions of law, including constitutional questions. The Supreme Court does not hear witnesses or have juries.

North Carolina has a court of appeals, made up of nine judges, who sit in panels of three. The court of appeals handles cases which have been appealed from lower courts, dealing only with questions of law.

The superior court is the court with general trial jurisdiction in North Carolina. The court sits in each county of the state at least twice yearly. There are forty-seven regular superior court judges, each elected for an eight-year term, and eight special judges appointed by the governor for four-year terms.

The superior courts try all felony cases (those involving major crimes). Misdemeanor cases (for which punishment cannot exceed two years' imprisonment) can be appealed to these courts from conviction in a district court. Civil cases involving an amount of more than five thousand dollars are handled in superior court.

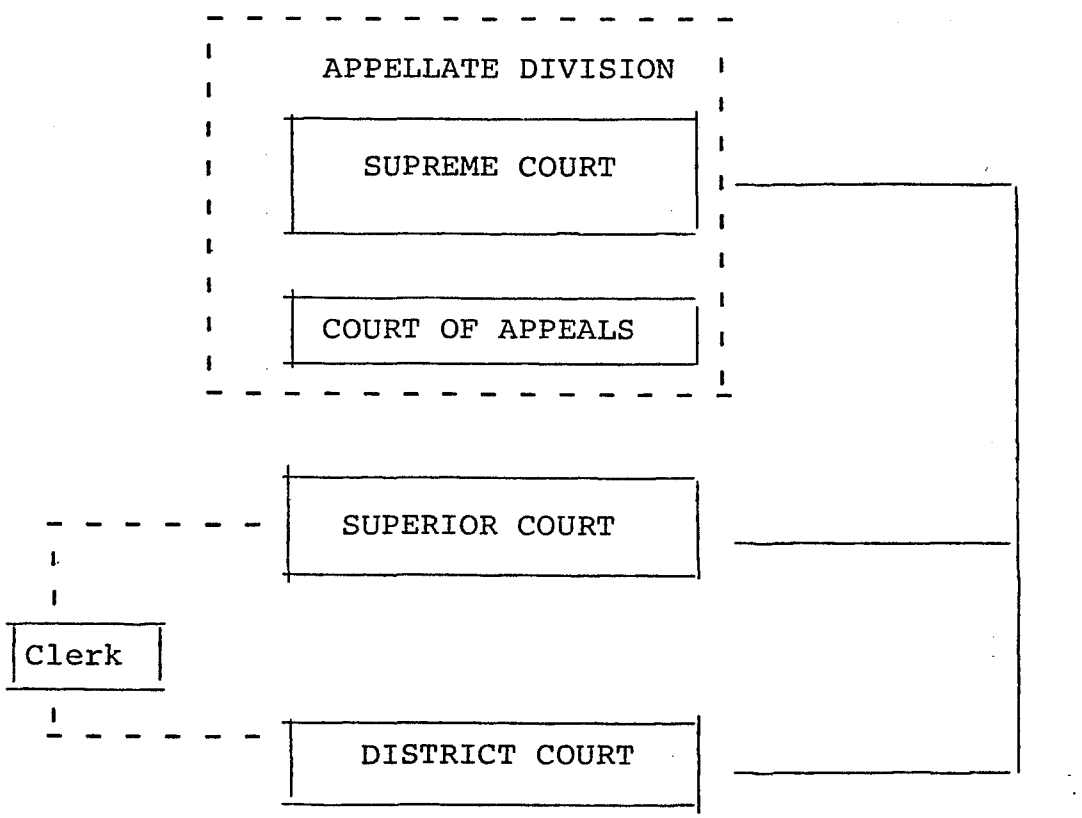
North Carolina has district courts, with two to eight district judges in each of the thirty judicial districts. A chief district judge is appointed by the chief justice of the Supreme Court. The district court's jurisdiction is as follows:

> Civil Cases: The district court tries cases where the amount of controversy is five thousand dollars or less, and domestic relations cases.
>
> Criminal Cases: Preliminary hearings are held in district court for felony cases, to determine probable cause for binding defendants over to the grand jury. Misdemeanor cases are also dealt with here.
>
> Juvenile Cases: The district court tries defendants under sixteen years of age, although cases of children charged with felonies may be tried in superior court.
>
> Magisterial Matters: The chief district court judge supervises magistrates, who are appointed by the senior resident superior court judge upon recommendation of the clerk of superior court. The magistrate's

> authority and discretion is limited to minor civil and criminal cases, and they may accept 'guilty' pleas for petty offenses.[7]

The various state courts must interpret state constitutional and statutory mandates and attempt to settle litigation. Appeal may be taken to a higher court if a person or agency is not satisfied with results obtained.

CHART II - ORGANIZATION OF NORTH CAROLINA COURTS SYSTEM



The purpose of this study is to review and analyze all major court cases which have implications for school principals. Cases will be reported in the areas of First Amendment rights of students (dealing mainly with wearing

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[7]League of Women Voters of North Carolina, North Carolina: Our State Government (Durham: League of Women Voters of North Carolina, 1976), pp. 48-51.

of insignia and emblems and with student publications); personal appearance of students; due process and suspension or expulsion of students; corporal punishment; search and seizure; rights of married and pregnant students; rights of handicapped children; tort liability; and teacher rights.

There is a need for an up-to-date analysis of the law in this area and for recommendations to aid the school principal in making decisions which comply with the law and current court rulings. The overall purpose of this study is to provide school principals with appropriate information regarding the legal aspects of school operation so that principals will be able to make decisions which are legally sound.

Statement of the Problem

There is a need for the establishment of guidelines to be used by the principal in making decisions which will be upheld by the courts. Judicial decisions in areas of conflict with which principals are confronted must be reviewed to determine trends and legal precedents which have been established. This study will attempt to do this.

Questions to be Answered

The purpose of this study, as already indicated, is the development of practical, legal guidelines for school principals to use in making decisions which may become litigious. Below are several questions which will be answered in order to develop

legal guidelines or recommendations for principals.

1. What are the areas most frequently involved in litigation concerning First Amendment rights of students, and what legal precedents have been established by the courts in these areas?

2. Since the Supreme Court has not spoken on the issue of constitutionality of hair and dress codes, how have the various circuit courts of appeal ruled on codes governing personal appearance of students?

3. What student rights are entitled to due process protection, and what procedures have been held by the courts to be required for suspension and expulsion?

4. What do landmark cases of the Supreme Court hold concerning corporal punishment in the schools?

5. How does the Fourth Amendment apply to search and seizure in the school setting?

6. What principles have been established by the courts on prohibition of school attendance for married students and unwed mothers or pregnant students, and what principles have been established dealing with denial of the right to participate in extracurricular activities by married students?

7. What rights have been upheld by the courts for handicapped children, and what protections for the handicapped have been provided by legislation?

8. What legal decisions have been made in tort liability actions having to do with lack of supervision, improper or inadequate instruction, failure to exercise responsibilities properly, field trips, and accountability, and what implications do these decisions have for the school principal?

9. What teacher rights are recognized by the courts in cases involving teacher dismissal for incompetency, immorality, insubordination, and neglect of duty; teacher tenure; First Amendment rights; due process; and academic freedom?

10. Based on the established precedents, what are acceptable guidelines for decisionmaking by principals in the above areas?

Scope of the Study

This is a study and analysis of court cases which have been instituted by students, parents, teachers, and other groups, challenging actions of school principals, teachers, school boards, and other educators. Research describes reasons for litigation, results of major court cases in the areas reported, and implications these cases have for principals and other school officials.

The major thrust of the research is directed toward reporting and analyzing major cases dealing with (1) student rights in the areas of freedom of expression, speech, or press, personal appearance, suspension and expulsion, corporal punishment, search and seizure, marriage and parenthood, and handicapped children; (2) tort liability; and (3) teacher rights in the areas of tenure, First Amendment rights, due process, and academic freedom. Legal precedents and trends related to the above areas are identified, and an effort is made to establish guidelines for the school principal to use in dealing with similar situations. Major court cases which establish precedent or indicate a trend are reported.

Methods, Procedures, and Sources of Information

The basic research technique of this historical research study was to examine and analyze the available references concerning the legal aspects of the school principalship. In

order to determine whether a need existed for such research, a search was made of Dissertation Abstracts for related topics. Journal articles related to the topic were located through use of such sources as Reader's Guide to Periodical Literature, Education Index, and the Index to Legal Periodicals.

General research summaries were found in the Encyclopedia of Educational Research, a number of books on school law, and in a review of related literature obtained through a computer search from the Educational Resources Information Center (ERIC).

Federal and state court cases related to the topic were located through use of the Corpus Juris Secundum, American Jurisprudence, the National Reporter System, and the American Digest System. Recent court cases were found by examining case summaries contained in the 1979 and 1980 issues of the NOLPE School Law Reporter. All of the cases were read and placed in categories according to the subject areas being reported.

Other information was received from attending a National Organization for Legal Problems in Education School Law Seminar, from Institute of Government materials, Phi Delta Kappa fastbacks, School Law Bulletins, Sports and the Courts quarterlies, and from Workshop Materials on the Impact of Current Legal Action on Educating Handicapped Children.

Definition of Terms

For purposes of this study, the following selected terms are defined:

Suspension: Generally an act of a professional member

of the school staff resulting in the temporary withdrawal of a student from school, usually for a short period of time.

Expulsion: An act of the school board, resulting in exclusion of a student from school permanently or for a long period of time, such as for the remainder of a term or for the remainder of the school year.

Procedural Due Process: The requirement that when persons are to be deprived of life, liberty, or property, they must be given notice of the proceedings against them, must be given the opportunity to defend themselves (a hearing), and the problem of the propriety of the deprivation under the circumstances presented must be resolved in a fair manner.[8]

Substantive Due Process: The constitutional guarantee that no person shall be deprived of life, liberty, or property for arbitrary reasons, with such deprivation to be constitutionally supportable only if conduct bringing about the deprivation is proscribed by reasonable legislation which has been reasonably applied and with laws operating equally.[9]

"In Loco Parentis:" Doctrine which holds that the relationship of educator to pupil is "in place of the parent" while the pupil is in school, and which was originally intended to be used in dealing with discipline of students.

Tort: A wrongful act, which results in injury to another's

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[8]E. C. Bolmeier, Legality of Student Disciplinary Practices (Charlottesville: The Michie Company, 1976), p. 38.

[9]Ibid., p. 39.

person, property, or reputation, and for which the injured party is entitled to be compensated.

Negligence: "The failure to act as a reasonable and prudent person would act in like circumstances."[10]

Significance of Study

Principals are frequently confronted with situations requiring decisionmaking which may result in litigation. They formulate rules and regulations governing student discipline and school personnel. When these rules and regulations are violated, school principals often resort to some form of punitive action. Frequently, rules and regulations and the way they are enforced cause parents, students, and teachers to challenge the propriety and legality of administrators' actions. Consequently, principals need a knowledge of basic educational law. This study is designed to aid school administrators in the understanding of the law as it relates to organization and governance of education.

Principals should find this study helpful in clarifying the law on given day-to-day administrative topics. It is also written for the purpose of helping school administrators to keep up to date with developments in school law. The emphasis is on current legal issues and court decisions with identification of legal principles growing out of recent court decisions. Older cases are also treated where they have precedential value.

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[10]Morris v. Ortiz, 437 P. 2d 652 (Ariz. 1968).

This study identifies guidelines of benefit to administrators. Principals' knowledge of current legal decisions will prevent litigation and lead to better administration. The significance of this study is that it enumerates and analyzes court cases and legal principles which serve as guidelines to the adoption of practices likely to be upheld in court.

Design of the Study

The remainder of the study is divided into three major parts. Chapter II contains a review of related literature, describing the evolution of the school principalship and demands made upon the school principal in the area of school law.

Chapter III includes a narrative discussion of the major legal principles which have been established concerning issues with which the principal is most likely to be involved.

Chapters IV, V and VI contain a general listing and discussion of recently litigated court cases which have reference to student rights, tort liability, and teacher rights.

The concluding chapter of the study contains a review and summary of the information obtained from the review of the literature and the analysis of selected court cases. Questions asked in the introductory part of the study are reviewed and answered in this chapter. Finally, recommendations are made as to guidelines for principals in each area covered.

CHAPTER II

REVIEW OF THE LITERATURE

OVERVIEW

The role of the school principal has evolved from that of head teacher to that of manager of a complex organization, whose duties and responsibilities have been and continue to be altered and shaped by litigation and legislation.[1]

Development of the School Principalship

The principalship in America began when one-room schools were displaced by multi-room schools, requiring someone to be in charge. Often, one of the teachers was simply designated "Head Teacher," and given certain authority over other teachers.[2] The chief duty of these head teachers was to teach, and administrative functions consisted of administering cruel, frequent floggings intended to serve as a stimulus to learning.[3] One school principal in the Latin grammar school was described as a "great schoolmaster...." who "taught and flogged and wrote."[4]

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[1]Richard A. King, "Litigation, Legislation, and the Principal," Paper presented at annual meeting of American Educational Association, San Francisco, April 8-12, 1979, p. 1.

[2]Harold Benjamin, American Education (New York: McGraw-Hill, 1960), p. 69.

[3]Forest C. Ensign, "Evolution of the High School Principalship," The School Review 31 (March, 1923): 179.

[4]Paul B. Jacobson, William C. Reavis, and James D. Logsdon, The Effective School Principal (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1963), p. 492.

The headmaster in the academy had little opportunity to practice administrative or supervisory skills, since the staff usually consisted of the headmaster (principal) and one or two assistants.[5]

The free public high school began to take the place of the academy shortly before the Civil War. Some of these schools used the title, "principal," for the head. Early in the high school movement, new administrative duties and responsibilities were required of principals. The principal or head teacher had to lighten his teaching load, usually retaining the more advanced subjects to be taught by himself. Scholarship, the traditional characteristic of the headmaster, along with organizing and leadership abilities, were demanded of the principal.[6]

As a result of the rapid growth of cities in the United States during the second half of the nineteenth century, school enrollments increased, making it necessary that more principals be named to perform such tasks as opening and closing school, scheduling classes, securing supplies and equipment, taking care of and managing the building, and communicating with parents and patrons.[7]

Early records in Cincinnati indicate that the duties

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[5]Ibid., pp. 492-493.

[6]Ensign, "Evolution of the High School Principalship," p. 188.

[7]Ivan B. Gluckman, "Legal Aspects of the Principal's Employment," The School Principal and the Law, Ralph D. Stern, Ed. (Topeka: National Organization on Legal Problems of Education, 1978), p. 1.

of the "principal teacher" were:

1. To function as the head of the school charged to his care;

2. To regulate the classes and course of instruction of all the pupils, whether they occupied his room or rooms of other teachers;

3. To discover any defects in school and apply remedies;

4. To make defects known to the visitor or trustee of ward or district, if he were unable to remedy conditions;

5. To give necessary instruction to his assistants;

6. To classify pupils;

7. To safeguard school houses and furniture;

8. To keep the school clean;

9. To instruct assistants;

10. To refrain from impairing the standing of assistants, especially in the eyes of their pupils;

11. To require the cooperation of assistants.[8]

By the middle of the nineteenth century, a teaching male principal was the controlling head of schools in large cities; female and primary departments had women principals under the direction of the male principal; and the principal had duties which consisted mainly of discipline, routine administrative acts, and grading of pupils. In order to carry out their duties, principals were sometimes released from teaching for a portion of the day.[9]

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[8]Jacobson, Reavis, and Logsdon, The Effective School Principal, pp. 493-494.

[9]Ibid., p. 494.

During the last half of the nineteenth century, principals took on new duties, including responsibility for organization and general management and control of students, grounds, and buildings. The prestige of the principalship was enhanced, with the principal acting as a mediary between the central office and teachers. Standards safeguarding the health and morals of students were enforced; janitors were rated and supervised; and educational and maintenance supplies and equipment were ordered by the principal, who was clearly recognized as the administrative head of the school.[10]

During the early years of the twentieth century, principals began to experiment with ways of breaking the "lockstep" of the graded system. They were provided with clerical assistants to relieve them of routine tasks so that they could give attention to professional duties. They were relieved of direct responsibility for the physical condition of the school plant, except for supervisory duties.[11]

Organization and supervision of extracurricular duties gained importance after 1920. The principal became responsible for improvement of instruction, as well as for management of the school. Standardized tests of ability and achievement came into use, and the principal was expected to use these in the supervisory program.[12] In 1923, Ensign described the principal

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[10]Ibid., p. 495.

[11]Ibid., pp. 496-497.

[12]Ibid.

as a "builder of curriculums," rather than the administrator of those already made.[13]

H. D. Fillers wrote in 1923 that the greater part of the principal's time was taken up with clerical matters and duties related to general school control, while supervision received only a small portion of the total day. Managerial duties of the principal were classified as curricular and extracurricular.[14]

Today, the successful principal, in addition to being an educational leader, must possess many of the same skills required for successful management in private industry. Personnel problems must be dealt with; considerable sums of money must be expended; safety of students and staff must be insured; parents must be dealt with; constitutional rights of students must be protected; order and discipline must be maintained; and most important, students must receive an education.[15]

In recent years, the role of the principal has become more distinct. State legislatures have taken action to differentiate the principal from teachers. A study of the National Association of Secondary School Principals, in November, 1976, indicated that twenty-four states and the District of Columbia have school codes providing the essentials of legal identity for

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[13]Ensign, "Evolution of the High School Principalship," p. 179.

[14]H. D. Fillers, "The Managerial Duties of the Principal," School Review XXXI, No. 1 (January, 1923): 48.

[15]Ralph D. Stern, The School Principal and the Law (Topeka: National Organization on Legal Problems of Education, 1978), Foreword.

the principalship, while only nine states have codes that cover the principal under the general term, "teacher," with little or no reference to the principalship as a separate entity. Other states mention the principal with regard to specific duties and responsibilities, although they fall short of clearly providing a separate legal identity for the principal.[16]

During the past decade, principals have been involved in learning to recognize and respond to the various rights movements (students' rights, civil rights, and women's rights) which have affected the schools.[17] Federal laws and court decisions have opened an entire new realm of knowledge needed by principals as federal influence and federal funds have entered the schools.[18]

The principal can no longer survive with a knowledge of the state school code on attendance requirements, mandated areas of study, teacher certification, and the required school calendar. Familiarity with civil law is also required.[19]

The school principalship has come to demand far more than in the past, especially in the area of school law. Findings

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[16]National Association of Secondary School Principals, "Concerning Statutory Protection for Principals, Part 1, Position and Status" (Reston, Virginia: NASSP, November, 1976), p. 1.

[17]Eugene T. Connors, "An Administrator's Legal Guide to Student Control," (Harrisonburg: James Madison University, 1978), p. 1.

[18]Gilbert R. Weldy, Principals: What They Do and Who They Are (Reston, Virginia: NASSP, 1979), p. 27.

[19]Ibid., p. 38.

of a Texas study by Mary Eren Johnson indicate that principals perceive a need for greater knowledge of school law and mastery of skills necessary for compliance with school law.[20]

During the 1970's, public education was greatly affected by judicial decisions and legislative mandates. With state legislatures and school boards no longer able to establish individual systems of public schools free from extensive federal involvement, administrators have had to respond to increased judicial and legislative interest in educational policymaking.[21]

Judicial Review and the School Principal

Until recent decades, school principals were seldom involved in court suits as litigants or defendants. If principals appeared in court, it was to serve as witnesses or complainants against defendants involved in theft, disorderly conduct, or similar charges. But times have changed. More and more, principals are challenged in court cases[22] involving freedom of expression and First Amendment rights, the constitutionality of dress and hair style codes, due process and suspension or expulsion, corporal punishment, constitutionality of search and seizure, rights of married or pregnant students,

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[20]Mary Eren Johnson, "A Study of Principals' Perceptions of Competencies in School Law Necessary in Texas" (Houston: University of Houston, 1976), p. 4746.

[21]King, "Litigation, Legislation, and the Principal," p. 3.

[22]Louis Panush, "The Principal in Court," NASSP Bulletin (January, 1978): 115.

[23]Connors, "An Administrator's Legal Guide to Student Control," p. 1.

rights of handicapped children,[24] tort liability,[25] and teachers' rights.[26]

In the last fifteen years, the United States Constitution has been applied in many areas where principals at one time exercised their own discretion and judgment. Principals now must be certain that students' First Amendment rights are protected. Gilbert R. Weldy states that principals can no longer exercise absolute control of student expression, petitioning, and publications; that school dress is no longer the responsibility of the school to regulate, nor is the length or style of students' hair.[27]

Prior to 1970, educators had almost complete control over discipline for students who were outspoken or who expressed unpopular beliefs.[28] The system of governance which the public schools inherited from the Puritan colonial structure had founded the beliefs that the authority of school administrators was virtually unlimited; that they were responsible for seeing that those below them behaved correctly in every respect; that those

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[24]Martha M. McCarthy and Stephen B. Thomas, "The Right to an Education: New Trends Emerging from Special Education Litigation," NOLPE School Law Journal 7, No. 1 (1977): 76.

[25]Warren F. Thomas, "Tort Liability of Teachers and Principals," NASSP Bulletin (February 1978): 49.

[26]Karen S. Boote, "The Public School Teacher's Right to Criticize the School Administration," NOLPE School Law Journal 5, No. 2 (1975): 129.

[27]Weldy, Principals: What They Do and Who They Are, p. 38.

[28]Connors, "An Administrator's Legal Guide to Student Control," p. 35.

at the bottom (students) had few rights; and that the school system must provide for intimidation, coercion, and as a last resort, removal of those at the bottom.[29]

During the 1970's, the Madisonian perspective of governance, stressing the rights of the individual, began to gain power through judicial rulings. It was recognized that everyone has important rights, including the rights to freedom of speech and press. The Supreme Court supported Madisonian principles by stating, "The Fourteenth Amendment, as now applied to the states, protects the citizens against the state itself and all of its creatures-- boards of education not excepted."[30]

Federal courts became concerned with the issue of regulating student speech and expression. They held, in almost all cases, that educators cannot enforce regulations that infringe upon the First Amendment rights of students,[31] as stated below:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[32]

The Fourteenth Amendment made this applicable to the states, and therefore, public school systems must abide by

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[29]David G. Carter, Sr., J. John Harris, III, and Frank Brown, "Student and Parent Rights: What Are Their Constitutional Guarantees?," NOLPE School Law Journal 6, No. 1 (1976): 46-47.

[30]Ibid., p. 47.

[31]Connors, "An Administrator's Legal Guide to Student Control," p. 35.

[32]U. S. Const. amend. I.

the stipulations of the First Amendment.

In 1969, the Supreme Court's decision in the Tinker case,[33] had a tremendous impact upon principals and their views of First Amendment rights of students. The Court held that First Amendment rights are available to teachers and students, neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[34]

The Court further stated:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained...[35]

Since 1968, the role of the school principalship has been further shaped by a procession of cases involving questions concerning the power of school administrators to control student publications. The courts have clearly held that any restraint must be tested against the First Amendment's protection of freedom of speech and press.[36] Decisions have been generally favorable to students, although unfavorable decisions

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[33]Tinker v. Des Moines Independent Community School Distrist, 393 U. S. 503, 89 S. Ct. 733 (1969).

[34]Ibid., p. 736.

[35]Ibid., p. 737.

[36]E. Edmund Reutter, Jr., The Courts and Student Conduct (Topeka: National Organization on Legal Problems of Education, 1975), p. 18.

have sometimes been made when publications advocated breaking of school rules, showed a high degree of disrespect and contempt, were vulgar and profane, or disrupted the educational process.[37] The Fifth Circuit court in Shanley[38] made it clear to school authorities that the burden of proof for justifying a regulation falls upon the school board.

Legal issues related to dress and appearance of students have given rise to numerous court challenges by parents and students of school officials' rights to regulate dress and appearance.[39] During the 1970's, hair and dress codes were a major area of conflict in the courts.[40] While the Supreme Court has not ruled specifically on this issue, cases have been decided at the United States Circuit Court of Appeals level, with wide geographical differences in the interpretation of the law.[41] The principal must be aware of the circuit in which his or her school is located and rulings in that circuit. Circuits, states included in them, and recent rulings reported

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[37]Carter, Harris, and Brown, "Student and Parent Rights: What Are Their Constitutional Guarantees?," p. 57.

[38]Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F. 2d 960 (1972).

[39]E. Edmund Reutter, Jr., "Student Discipline," The School Principal and the Law, Ralph D. Stern, Ed. (Topeka: National Organization on Legal Problems of Education, 1978): p. 89.

[40]David E. Shelton, "A Study of the Opinions of the Federal and State Courts on the Length of Male Students' Hair in the Public Schools" (Ed. D. dissertation, University of North Carolina, Greensboro, 1979), p. 1.

[41]Eugene T. Connors, Student Discipline and the Law (Bloomington, Indiana: Phi Delta Kappa Educational Foundation, 1979), p. 43.

by Eugene T. Connors[42] as to hair and dress codes which have influenced the role of the principal are shown in Chapter IV.

In considering the changing role of the principal in regard to the law, L. Brooks Patterson, prosecuting attorney for Oakland County, Pontiac, Michigan, indicates that the Supreme Court decision in Brown v. Board of Education[43] can be pinpointed as the time when the balance between the administrators' traditional rights and responsibilities and those of students in general began to shift. Patterson states that prior to 1954, education was viewed as a privilege and that the decision in Brown ruled that education is a right,[44] which must be extended to all equally.

Brown v. Board of Education states:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life who is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[45]

If school attendance today were not viewed as a right, "hair length could be dictated, arm bands forbidden, school newspapers censored, demonstrations controlled, and the authority of a principal to run his school with an iron

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[42]Ibid., p. 43.

[43]Brown v. Board of Education, 347 U. S. 483, 98 L. Ed. 873 (1954).

[44]L. Brooks Patterson, "The Principal, the Student, and the Law: A Prosecuting Attorney's View," Paper presented at the National Association of Secondary School Principals, Washington, D. C., February 13-18, 1976, p. 6.

[45]Brown v. Board of Education, 347 U. S. 483, 98 L. Ed. 873 (1954).

hand virtually unchallenged."[46]

Evolving from the Brown decision came the idea of rights in litigation which affected the school principalship. Education became a valid, enforceable property right, protected under the Fifth and Fourteenth Amendments of the Constitution.[47]

The Fifth Amendment states: "....nor shall any person be....deprived of life, liberty, or property without due process of law.... ."[48]

The Fourteenth Amendment sets out the requirements of due process again:

> No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;....[49]

The Tinker case stated that

> Students in school, as well as out of school, are persons under our Constitution....possessed of fundamental rights which the state must respect....[50]

The United States Supreme Court helped to establish guidelines for principals in meeting due process requirements in short-term suspensions from school in Goss v. Lopez.[51]

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[46]Patterson, "The Principal, the Student, and the Law: A Prosecuting Attorney's View," p. 7.

[47]Ibid.

[48]U. S. Const. amend. V.

[49]U. S. Const. amend. XIV.

[50]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 89 S. Ct. 733 (1969).

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

The Court ruled that students must be given some type of minimal due process hearing.[52] C. A. Hollister states, "The courts have come a long way from an 1890 ruling that allowed a school board to expel a student for 'general bad conduct.'"[53]

While no single court has provided guidelines for administering long-term suspensions, the principal can glean basic requirements from various courts' decisions concerning such suspensions.[54]

It has come to be generally accepted that the principal does not have authority to expel students. Courts seem to hold this action to be a school board prerogative.[55]

As a result of the rights of students guaranteed by the Constitution and rulings in Brown and Tinker, due process has become an issue in litigation. School principals are often held to be government officials, to whom the due process restriction applies in the performance of their duties. No longer can the principal deprive a student of liberty or property rights without due process of law.[56] Due process rights must be protected by fair play. Courts

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[52]Connors, "An Administrator's Legal Guide to Student Control," p. 19.

[53]C. A. Hollister, "Why the Courts Will Allow School Officials to Treat Students Unfairly - Up to a Point," American School Board Journal 160 (July 1973): 38.

[54]Connors, "An Administrator's Legal Guide to Student Control," p. 19.

[55]Ibid., p. 20.

[56]Patterson, "The Principal, the Student, and the Law: A Prosecuting Attorney's View," p. 10.

require that students be accorded minimum standards of fairness and due process of law in disciplinary actions which may result in suspension or expulsion.[57]

The Supreme Court upheld the right of educators to administer corporal punishment in Ingraham v. Wright,[58] stating that corporal punishment does not violate the Eighth Amendment and does not require a formal due process hearing. An informal investigation of facts was encouraged, however.

While no formal due process hearing was required in Ingraham v. Wright, minimal due process requirements were outlined in Baker v. Owen,[59] when the Supreme Court affirmed a federal district court decision in North Carolina which upheld the right of educators to administer corporal punishment over parental objections.

State laws and regulations have also influenced the principal's right to administer corporal punishment. Massachusetts and New Jersey prohibit corporal punishment by state statute, and Maryland's state school board prohibits use of corporal punishment. Some local school boards have also restricted or banned its use.[60]

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[57]Robert E. Phay, The Law of Procedure in Student Suspensions and Expulsions (Topeka: National Organization on Legal Problems of Education, 1977), p. 1.

[58]Ingraham v. Wright, 430 U. S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977).

[59]Baker v. Owen, 395 F. Supp. 294 (1975), aff'd. 423 U. S. 907 (1976).

[60]Connors, Student Discipline and the Law, p. 11.

Until recent years, principals' right to search students or their lockers was little questioned. The Fourth Amendment prohibition against unreasonable search and seizure had been viewed as inapplicable to the schools. Now, however, courts have begun to recognize that the Fourth Amendment's prohibition against unreasonable search and seizure applies to searches by school officials who are viewed as government employees.[61]

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but for probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized.[62]

The Fourth Amendment prohibition is not applied to school searches in the same way as to police searches, because school officials are operating in loco parentis, even though they are government employees. Fourth Amendment prohibition applies except where there is consent; probable cause and warrant issued; probable cause and circumstances such that taking time to obtain a warrant would frustrate the purpose; and when a valid arrest has been made and the search is incident to the arrest.[63]

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[61]Robert E. Phay, Speech at NOLPE School Law Seminar, Williamsburg, Virginia, June 7, 1980.

[62]U. S. Const. amend. IV.

[63]Phay, Speech.

While courts have found that a student has no reasonable expectation of privacy in a school locker, these same courts have concluded that "this reasoning has no application and is unpersuasive with respect to a student's person."[64] Searches of clothing and body have been held subject to at least minimum safeguards, because they are greater intrusions into the student's privacy.[65]

The law regarding search and seizure is in a state of flux. Robert Phay suggests that principals should see that students' privacy is protected and that strip searches are never made without a search warrant.[66]

Another area where change has occurred in the principal's authority has to do with rights of married or pregnant students. Prior to the 1960's, educators had much control over married or pregnant students. Usually, if a student became pregnant or married, the school rule provided for exclusion from school. Reasons given by principals for expulsion of married or pregnant students were that the presence of married students contributed to "moral pollution;" that if married students were not allowed to attend school, early marriages would be discouraged; and that unwed mothers or

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[64]State v. D, 34 N. Y. 2d 483, 358 N. Y. S. 2d 403, 407, 315 N. E. 2d 466, 469 (1974).

[65]Robert E. Phay and George T. Rogister, Jr., "Searches of Students and the Fourth Amendment," Paper presented at NOLPE School Law Seminar, Williamsburg, Virginia, June 7, 1980.

[66]Phay, Speech.

pregnant students were an embarrassment to the school.[67]

Educators were usually given a free hand in dealing with pregnant or married students until the 1960's, when federal and state courts began to change their rulings and take a more humanistic view of such issues. Between 1964 and 1972, a number of cases were decided which dealt with the rights of these students.[68] The courts have established the right of married or pregnant students to attend school, and have ruled that schools have no right to punish students by expelling them for marriage or pregnancy. They also have the right not to attend school.[69]

Prior to the past few years, the attitude of the courts toward marriage as a reason for exclusion from extracurricular activities had been quite different from their attitude toward exclusion from school because of marriage. All decisions prior to 1972 upheld the right of school boards to limit participation in extracurricular activities. Since that time, a number of decisions have resulted in invalidation of regulations barring married students from extracurricular activities.[70]

Tremendous changes have occurred in the realm of handicapped children's rights. These have brought about a great

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[67]Connors, Student Discipline and the Law, p. 28.

[68]Ibid., p. 29.

[69]Ibid., p. 33.

[70]Reutter, The Courts and Student Conduct, pp. 77-81.

need on the part of the principal for knowledge of legislation and court rulings concerning handicapped students. Since the United States Supreme Court ruling in Brown[71] that once a state elects to provide public education, "it is a right which must be made available to all on equal terms," the rights of the handicapped have received more and more attention.

Current educational rights of handicapped school children were formed in two major lawsuits, Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania,[72] and Mills v. Board of Education,[73] which exposed ten basic wrongs that required righting for handicapped children.[74] These wrongs consisted of:

1. Exclusion of handicapped from instruction;

2. Failure to identify special needs of handicapped, to evaluate, and provide for programming;

3. Failure to allow handicapped to remain in appropriate programs;

4. Inadequate, limited evaluations;

5. Placement in programs without specific goals and no review of progress;

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[71]Brown v. Board of Education, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954).

[72]Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (E. D. Pa. 1971).

[73]Mills v. Board of Education, 348 F. Supp. 866 (D. D. C. 1972).

[74]Reed Martin, The Impact of Current Legal Action on Educating Handicapped Children, Workshop Materials (Champaign, Illinois: Research Press Company, 1980), p. 3.

6. Segregation from nonhandicapped;

7. Inadequate provision of "related services;"

8. Failure to notify parents of changes in programs;

9. Failure to provide parents with access to records; and

10. Failure to provide due process hearings.[75]

Two pieces of legislation have been passed to protect the rights of handicapped persons. While many have heralded the "Education for All Handicapped Children Act," Public Law 94-142,[76] as the most important piece of legislation to affect the handicapped student, it has been upstaged by Section 504 of Public Law 93-112,[77] the "Rehabilitation Act of 1973," which is the first civil rights law to protect the rights of all handicapped persons.[78]

Both Acts stipulate that all handicapped children within a jurisdiction must be located, identified, and provided with a free, appropriate public education in the least restrictive environment; that they must be educated with nonhandicapped students to the maximum extent possible; that evaluations must

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[75]Ibid., pp. 3-5.

[76]U. S. Department of HEW, "Education of Handicapped Children and Incentive Grants Program: Assistance to States," 41 Fed. Reg. 46966-46998 (1976).

[77]U. S. Department of HEW, "Nondiscrimination on Basis of Handicap: Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 42 Fed. Reg. 22676-22702 (1977).

[78]Lynn Erb and Cecil D. Mercer, "Legislation for the Handicapped: In Brief," NOLPE School Law Journal 7, No. 2 (1977): 194.

be performed by trained personnel, assessing relevant educational areas, measuring students' aptitude and achievement levels, and must provide more than just an intelligence quotient; that testing may not be the only means of determining appropriate placement; that placement decisions must be made by a group of persons knowledgeable about the student; that procedural safeguards must be provided for handicapped and their parents; and that handicapped students must be provided with equal opportunity to receive nonacademic and extracurricular services.[79]

There are three important differences between the two laws regarding their application to the public school:

1. Public Law 94-142 makes money available to states which participate in the funding program.

2. Section 504 adds two new categories of handicapping conditions which are to be served by the public school: drug addicts and alcoholics.

3. Section 504 does not provide that an Individual Educational Program must be provided for each child, while Public Law 94-142 does have such a provision.[80]

Placement and provision of special services for the handicapped require much knowledge of the law on the part of school principals.

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[79]Ibid., pp. 195-196.

[80]Ibid., pp. 196-197.

Court rulings and legislation described above have dealt with students' rights, an area which offers much concern to today's principals. Since the Tinker decision,[81] it is evident that a new breed of student has been produced by the social and political movement toward increased human rights in the school setting. Administrators are now faced with questioning students whose legal actions have gradually eroded the sovereign authority formerly possessed by the school principal. Legal actions are being instituted more frequently against school officials, and there is reason to believe that in the future, the pressure will increase. The American Civil Liberties Union is much busier in the field of school law than ten years ago; there are many anti-poverty legal service organizations seeking to fight for what they believe to be the rights of children; and there are research and service centers working with anti-poverty lawyers, seeking to broaden the legal rights of public school students.[82]

Students have the rights of access to education; to freedom of association; to take part in institutional government; to have an effect upon organized learning activities; to freedom of inquiry and expression; to establish standards for dealing with discipline and grievances; and to have standards

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[81]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 89 S. Ct. 733 (1969).

[82]Carter, Harris, and Brown, "Student and Parent Rights: What Are Their Constitutional Guarantees?," pp. 59-60.

enforced justly.[83] It is up to the principal to see that they receive these rights.

Following are some preventive educational principles which have been offered in the "Code of Student Rights and Responsibilities of the NEA Task Force on Student Involvement:"

> 1. Policies governing the appearance and conduct of students should be developed by parents, teachers, students, administrators, and board members cooperatively.
>
> 2. Policies must be reasonable and understandable. Vague and ambiguous statements create misunderstandings.
>
> 3. Policies must be administered in a reasonable manner. Fairness and consistency are important.
>
> 4. Policies should be re-evaluated regularly and changes made only when conditions warrant change.
>
> 5. Students want to assume responsibility for their own behavior and should be given every opportunity to participate fully in student governance.
>
> 6. Substantive and procedural due process must be accorded students. School authorities must orient students concerning their rights.
>
> 7. Students have responsibilities to the overall educational enterprise so that the welfare of the group has priority over individual rights when these conflict. Students need help in understanding this.
>
> 8. School authorities should constantly seek ways to enhance school experiences for students. How can school programs be improved?
>
> 9. Litigation is a part of the democratic process, and the threat of a suit should in no way deter a school administrator from the proper administration of the school.[84]

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[83] Ibid., p. 58

[84] Ibid., pp. 57-58.

The principal is also vulnerable to being sued for civil damages. School administrators must be cognizant of both legal and monetary consequences of actions in school-related duties, because statutory and constitutional violations of any individual's civil rights may result in legal action.[85] Until approximately 1960, almost all school districts were immune from liability for torts (civil wrongs against a person, his property, or reputation, not related to contracts) which arose from performance of governmental functions. Recently, however, the doctrine of sovereign immunity has been modified through legislative and judicial action. Courts have ruled that employees of the school district are not protected against liability arising from their personal negligence toward students.[86] In Crabbe and Lovitt,[87] the court held that the fact that a person is performing a governmental function for the school board does not mean that such employee is exempt from liability for negligence in performance of such duties.

Principals are particularly susceptible to being sued because of their supervisory duties over teachers. If it

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[85]E. Wayne Trogdon, "The Civil Rights Law of 1871 and Its Effect on Teacher Dismissal" (Ed. D. dissertation, University of North Carolina, Greensboro, 1979), p. 1.

[86]Ralph D. Stern, "The Principal and Tort Liability," The School Principal and the Law, Ralph D. Stern, Ed. (Topeka: National Organization on Legal Problems of Education, 1978), p. 206.

[87]Crabbe v. County School of Northumberland County, 164 S. E. 2d 639 (1968) and Lovitt v. Concord School District et al, 228 N. W. 2d 479 (1975).

can be established that the principal did not take measures to protect the safety or constitutional rights of children, he or she may be held negligent.[88] In recent years, actions have been brought seeking monetary damages against principals for negligence resulting in student injury in gym classes, shop classes, on the playground, in the school building or on school grounds, at athletic events, at school outings, and even en route to or from school.[89]

More and more lawsuits are being filed against public school officials under Section 1983 of Title 42 of the United States Code, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[90]

The United States Supreme Court in Wood v. Strickland[91] held as follows:

> In the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or

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[88]Thomas, "Tort Liability of Teachers and Principals," p. 52.

[89]Floyd G. Delon, "Tort Liability," The Yearbook of School Law 1977 (Topeka: National Organization on Legal Problems of Education, 1977): 71-79.

[90]U. S. Code, Chapter 42, Section 1983 (1866).

[91]Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975).

> if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law' (citations omitted). A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

While the foregoing refers only to school board members, the reasoning is applicable to any school official who exercises discretionary authority. Since lower courts are sure to apply the same standard to school principals in matters involving constitutional rights of students, the principal should not act without deliberate thought in student discipline or freedom of expression matters.[92]

M. A. McGhehey states that those who voluntarily assume supervision of students are charged with knowledge of the basic, unquestioned constitutional rights of students, and that Wood v. Strickland[93] would apply with equal force to administrators and teachers.[94]

In Carey v. Piphus,[95] a suit for damages for violation of the student's procedural due process rights, the Supreme Court held that violation of due process, even though ultimately considered proper, could not be tolerated, and that therefore,

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[92]Stern, "The Principal and Tort Liability," p. 220.

[93]Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975).

[94]M. A. McGhehey, Speech presented at NOLPE School Law Seminar, Williamsburg, Virginia, June 9, 1980.

[95]Carey v. Piphus, 435 U. S. 247, 98 S. Ct. 1042, 55 L. Ed. 252 (1978).

the courts would have to entertain the suit. However, if school action turned out to be proper, students must show some actual damage caused by violation of their rights in order to be compensated. Since no damage was done in Carey, plaintiffs were entitled to only nominal damages in the amount of one dollar.[96]

While there has been no litigation concerning it,[97] the Family Educational Rights and Privacy Act of 1974, as amended, sets out standards to which principals of federally assisted schools must adhere.[98] This Act, known as the Buckley Amendment, is aimed at protecting students and their families from record-keeping abuses.[99] Failure to comply with the law may result in withholding of federal funds from schools not in compliance.[100]

The issue involved in the Buckley Amendment is respect for the privacy of the individual versus the public's need to know matters of record.[101] Prior to 1890, no English or American court had ruled in a case expressly upon the invasion of a "right to privacy." However, in 1890, an article was published by Samuel D. Warren and Louis D. Brandeis, entitled, "The Right to Privacy," in which a number of cases were reviewed.

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[96]Reutter, Speech.

[97]Ibid.

[98]August W. Steinhilber and Michael A. Resnick, "Student Records," The School Principal and the Law, Ralph D. Stern, Ed. (Topeka: National Organization on Legal Problems of Education, 1978), p. 187.

[99]Ronald N. Kilpatrick, "The Buckley/Pell Amendment: Its Implications," Current Legal Issues in Education, M. A. McGhehey, Ed. (Topeka: National Organization on Legal Problems of Education, 1977), p. 81.

[100]Ibid., p. 81.

[101]Ibid., p. 80.

Relief had been afforded in these cases on the basis of defamation, breach of confidence, or of an implied contract, in the publication of letters and similar items. The article held that those cases were actually founded upon the right of a private individual to be let alone in his essentially private affairs.[102]

Although the right of privacy is not mentioned in the United States Constitution, the Court has recognized in a series of cases that guarantee of certain areas of privacy is constitutionally protected.[103] In Griswold,[104] the United States Supreme Court held that there is a right to privacy, which is derived from the "penumbra" of rights guaranteed by the First, Third, Fourth, and Ninth Amendments.[105]

Student records dealt with by the federal law are those which are personally identifiable. It is quite clear under the common law that any student records which do not identify students (such as test scores) have to be made available to the public.[106]

The fundamental rule governing access to students' school records is that school systems shall provide parents of students or eligible students with the right to access,

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[102]Ibid., p. 83.

[103]Ibid., p. 84.

[104]Griswold v. Connecticut, 381 U. S. 479 (1965).

[105]Kilpatrick, "The Buckley/Pell Amendment, Its Implications," p. 84.

[106]Reutter, Speech.

including the following:

> a. The right to be provided a list of the types of education records which are maintained by the institution and are directly related to students;
>
> b. The right to inspect and review the contents of those records;
>
> c. The right to obtain copies of those records, which may be at the expense of the parent of the eligible student (but not to exceed the actual cost to the educational institution of reproducing such copies);
>
> d. The right to a response from the institution to reasonable requests for explanations and interpretations of those records;
>
> e. The right to an opportunity for a hearing to challenge the contents of those records; and
>
> f. If any material or document in the education record of a student includes information on more than one student, the right to inspect and review only such part of such material or documents as relates to such student or to be informed of the specific information contained in such part of such material.[107]

Rules governing release of records generally prohibit school officials from giving third persons access to student education records or "personally identifiable information contained therein" without written consent of parents of the student.[108] Exceptions are provided which include certain information to be provided for the following: a directory; dealing with emergency situations; school officials and state, federal, or local officials having been determined to have legitimate educational or other interests; in connection with financial aid for a student; organizations conducting educational studies under particular guidelines; accrediting

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[107]Steinhilber and Resnick, "Student Records," p. 189.

[108]Ibid., p. 195.

organizations; parents or a dependent student of such parents, as defined in Section 152 of Title 26; and in compliance with a judicial order or lawfully issued subpoena, upon certain conditions.[109]

Student privacy amendments were intended to establish minimum standards and not to preempt existing state law. Therefore, school principals should review state and local requirements in order to see that appropriate provisions are made for those obligations which go beyond federal law. Forty-seven states have public record statutes, which vary from state to state. Court cases concerning student records are few, and are usually litigated in those states which have student record statutes.[110]

Ronald N. Kilpatrick states that the primary concern of the Family Educational Rights and Privacy Act of 1974, as amended, is to see that invasions of privacy and denial of parent access be curtailed. He recommends that educational institutions develop written procedures to see that the Act is fully implemented.[111]

Not only has the principal had to keep abreast of court and legislative holdings concerning student rights, but also those regarding the rights of teachers. During recent years, fewer restrictions have been placed upon teachers, with courts holding that even nontenured teachers are entitled

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[109]Ibid., p. 197.

[110]Kilpatrick, "The Buckley/Pell Amendment, Its Implications," p. 87.

[111]Ibid., p. 97.

to due process under certain conditions, and that teachers have the right to freedom of expression.

The public has always been more restrictive in expectations for teacher conduct than for conduct of others. Rigid moral and religious standards were evoked for teachers, particularly during the first half of the nineteenth century. Teachers were reprimanded, dismissed, fined, and imprisoned for real or imagined violations of public standards.

By 1900, state statutes contained provisions which prescribed personal attributes required for teacher certification. In the 1920's, stress was placed upon legislative bills forbidding teachers to teach evolution.

A 1939 study indicated that teacher dismissal in most states was on a personal rather than a professional basis, with courts tending to affirm dismissals of women for marriage, upholding dismissals for 'immorality,' and invalidating dismissals for 'anticipated' causes.[112]

The popular conception that nontenured teachers had no rights to future employment and served at the will of the employer was challenged by Roth[113] and Sindermann,[114] when the United States Supreme Court indicated that under certain

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[112]Floyd G. Delon, Legal Controls on Teacher Conduct: Teacher Discipline (Topeka: National Organization on Legal Problems of Education, 1977), p. 2.

[113]Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

[114]Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

circumstances, due process is required.[115] A gradual shift has occurred in the courts concerning employment which must prevail in order for due process to be required for a non-tenured employee facing nonrenewal of a contract.[116]

The Fourteenth Amendment requires due process when a governmental entity seeks to deprive a person of life, liberty, or property. Courts are interpreting what constitutes a "liberty" interest more liberally than in the past. Principals need to understand two basic concepts of what constitutes a liberty interest for teachers as defined by the United States Supreme Court in relation to the Fourteenth Amendment. First, reasons given for teacher renewal or dismissal must seriously damage standing, reputation or associations in the community; and second, publicity given such nonrenewal or dismissal must foreclose future employment opportunities.[117] Since teaching has not been held to be a "property" right, and therefore, not a contract which comes under protection of the due process clause, one has only the "privilege" of being employed. Joseph E. Bryson states that "although no person has the constitutional right to be a teacher, there must be a reasonable basis for depriving an

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[115]Larry L. French, "Teacher Employment, Evaluation and Dismissal," The School Principal and the Law, Robert D. Stern, Ed. (Topeka: National Organization on Legal Problems of Education, 1978), p. 36.

[116]Richard H. Lampshire, "Due Process for Non-Tenured Teachers," Current Legal Issues in Education (Topeka: National Organization on Legal Problems of Education, 1977), p. 52.

[117]Jane K. Carrigan, "The Legal Aspects of Stigmatizing Teachers in Nonrenewal and Dismissal" (Ed. D. dissertation, University of North Carolina, Greensboro, 1979), pp. 141-142.

individual of the privilege of teaching.[118] The doctrine of "privilege" has been altered in recent court decisions, so that substantive due process may apply when continued employment by a governmental entity is threatened.[119]

The nontenured employee must be able to establish a legitimate claim to public employment under the laws of the state. Whether a particular teacher has a right to a hearing on renewal of a contract hinges on a question of state law.[120]

When teachers are tenured, the courts have consistently recognized the existence of a property right which affords constitutional protection. The question has been raised most often as to the extent to which due process protection is due the nontenured teacher.[121]

In Sindermann,[122] the United States Supreme Court stated:

> A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Although courts have ruled that no property interests are acquired with annual contracts, they have raised the argu-

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[118]Joseph E. Bryson, "Academic Freedom and Due Process for Public School Teachers," Educational Horizons 54, No. 1 (Fall 1975), p. 47.

[119]Lampshire, "Due Process for Non-Tenured Teachers," p. 53.

[120]Ibid., p. 54.

[121]Ibid.

[122]Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

ment that longevity on the job creates an expectancy of re-employment. The Fourth Circuit stated in Johnson[123] that "the continuous employment of a teacher over a significant period of time can amount to the equivalent of tenure, and when it does, dissolution of relationship requires prior notice and an opportunity to be heard, or else due process is wanting."

If no legitimate claim of property interest can be shown, the courts have been consistent in holding that due process rights do not pertain.[124]

Claims of Fourteenth Amendment liberty interests must be heard in the federal courts, since deprivation of a liberty interest results from a governmental action which infringes upon one's liberty rights.[125] The courts have defined the "liberty" interest as applying when a person's name, reputation, honor or integrity is at stake; when one's standing in the community is damaged "by charging him with an unsavory character trait such as dishonesty or immorality;" and when the government's action affects one's ability to obtain new employment.[126] The courts have held that when "liberty" interests are threatened, due process is required.[127]

Teachers have gained First Amendment protection from the courts for speech and expression within the classroom.

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[123]Johnson v. Fraley, 470 F. 2d 179 (4th Cir. 1972).

[124]Lampshire, "Due Process for Non-Tenured Teachers," p. 56.

[125]Ibid.

[126]Ibid., pp. 56-57.

[127]Ibid., p. 58.

Since the late 1960's, the courts have protected teachers for engaging in questionable speech and expression, provided such speech or expression was not inappropriate for the age and maturity of students involved, was relevant to the class, and was such that it did not "materially and substantially"[128] disrupt or threaten to disrupt school discipline.[129]

The traditional view of the teacher as an employee of the state, subject to arbitrary restrictions of freedom of speech and expression, was overruled in Epperson in 1968.[130] In 1969, Tinker held that teachers and students have First Amendment rights in the classroom, although they are limited in some instances because of the "special characteristics of the school environment."[131] The balancing test applied by the court stated that school officials could only justify taking action to limit First Amendment rights when the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[132]

Teacher speech and expression in the public schools can take many different forms which have been tested in court

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[128]Burnside v. Byars, 363 F. 2d 744 (1966).

[129]Edwin H. Sponseller, Jr., "Freedom of Expression for Teachers in the Public School Classroom," Current Legal Issues in Education (Topeka: National Organization on Legal Problems of Education, 1977), p. 44.

[130]Epperson v. Arkansas, 393 U. S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968).

[131]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 89 S. Ct. 733 (1969).

[132]Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966).

to ascertain protection under the First Amendment. Among these are utterances, dress and appearance, wearing of badges, and refusal to salute the flag. While teachers have gained First Amendment protection in all these areas, circumstances of the particular case often determine the amount of protection.[133]

Courts have established in Pickering[134] and cases that followed it that teachers have the same right to free speech as other citizens, and that teachers' speech can only have limitations imposed by the government for good reasons, ones that do not conflict with the policy of encouraging an informed public.[135]

The principalship of today requires much knowledge of the law and its interpretation by the courts as it relates to schools, students, and teachers. An important role of the principal is that of seeing that the school is administered within the boundaries and guidelines of the law.

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[133]Sponseller, "Freedom of Expression for Teachers in the Public School Classroom," p. 45.

[134]Pickering v. Board of Education, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

[135]Boote, "The Public School Teacher's Right to Criticize the School Administration," p. 143.

CHAPTER III

LEGAL ASPECTS OF THE SCHOOL PRINCIPALSHIP

The majority of court cases arising from actions of the principal are the result of claims by plaintiffs that they have been denied rights guaranteed by the Constitution of the United States. Many issues once considered to be solely educational questions have recently become legal concerns.

Generally, actions brought against principals and others in the school system allege that certain practices of the principal or school system have resulted in a denial to plaintiffs of constitutional rights to freedom of speech, freedom of the press, equal protection of the laws, and other privileges, or that certain practices depriving plaintiffs of their constitutional rights have been implemented without appropriate due process procedures.

It is important for principals to remember that each decision of a court relates only to the specific issues of that particular case. However, as indicated earlier, some decisions establish legal precedents more than others. Decisions from a circuit court of appeals tend to establish legal precedent more than do district court decisions, while

United States Supreme Court rulings are binding across the country.

Decisions have been handed down by various courts regarding a number of constitutional questions related to First Amendment rights, personal appearance of students, suspension and expulsion of students, corporal punishment, search and seizure, rights of married and pregnant students and unwed mothers, rights of handicapped children, tort liability, and teacher rights. As a result of these decisions, certain legal principles have evolved. These will be enumerated and discussed in this chapter.

First Amendment Rights

Courts have established the principle that the Fourteenth Amendment protects the First Amendment rights of students against unreasonable rules and regulations imposed by school authorities, and that this right cannot be infringed upon, unless student exercise of such right materially and substantially interferes with the requirements of appropriate discipline in the school operation. In Tinker,[1] the United States Supreme Court held that First Amendment rights of freedom of speech expression are available to teachers and students, neither of whom sheds such rights at the schoolhouse gate. The Court further stated that where there was no finding or showing that engaging in of the forbidden conduct would

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[1]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969).

"materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition could not be sustained."[2]

Tinker resulted in what has come to be known as the "Tinker Test," which provides that educators must not seek to regulate student speech or expression unless they can prove that it will lead to "material and substantial disruption" of the educational process. (However, a 1980 ruling by the United States Court of Appeals for the Fourth Circuit viewed disruption of school activities as being only one justification for restraining distribution of a publication. The court upheld a school regulation allowing restraint of distribution of publications which encouraged actions to endanger student health or safety.)[3]

Personal Appearance of Students

No encompassing legal principle has been established as to personal appearance of students. Since the Supreme Court did not specify in Tinker what constitutes "free expression," it has not been determined whether students' ways of dressing and wearing hair can be recognized as a means of self-expression.

Suspension and Expulsion

The legal principle has been firmly established that school authorities have the right to suspend or expel from

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[2]Ibid., p. 739.

[3]Williams v. Spencer, 622 F. 2d 1200 (1980).

school a student who disobeys a reasonable rule or regulation. However, the United States Supreme Court has also established the legal principle that students have two interests which are entitled to due process protection, the "property" interest in a public education and the "liberty" interest in reputation.[4]

In Goss v. Lopez,[5] the United States Supreme Court extended due process requirements to all school suspensions, whether short-term or long-term.

Corporal Punishment

In Baker v. Owen,[6] the United States Supreme Court, in affirming the ruling of a three-judge federal district court, established the legal principle that "the state has a countervailing interest in the maintenance of order in the schools sufficient to sustain the right of teachers and school officials to administer reasonable punishment for disciplinary purposes."

The legal principle has also been established by the Supreme Court, in Ingraham v. Wright,[7] that the Eighth Amendment concerning "cruel and unusual punishment" does not apply to corporal punishment in the schools.

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[4]Goss v. Lopez, 419 U. S. 565 (1975), 42 L. Ed. 2d 725, 95 S. Ct. 725, 735.

[5]Ibid.

[6]Baker v. Owen, 395 F. Supp. 294 (1975), aff'd., 423 U. S. 907 (1976).

[7]Ingraham v. Wright, 430 U. S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977).

Search and Seizure

The Fourth Amendment to the United States Constitution provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[8]

Courts have recently held that public school officials are government officials operating "in loco parentis."[9] They have found that a less stringent standard than probable cause is required under the Fourth Amendment to determine reasonableness of search when the search is conducted primarily by school officials for furtherance of school purposes, such as disciplinary rules.

This "reasonable suspicion" standard, used when school officials are acting alone, protects students' rights by requiring school officials to establish at least reasonable grounds for their suspicions that an unlawful act is being committed, before justifying a student search.[10]

Where school officials and law enforcement officers conduct joint searches, for the primary purpose of discovering evidence of a crime, courts have tended to hold that search and seizure standards applicable in criminal cases must be

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[8]U. S. Const. amend. IV.

[9]Picha v. Wielgos, 410 F. Supp. 1214 (1976).

[10]People v. Jackson, 65 Misc. 2d 209, 319 N. Y. S. 2d 731, 726 (1971), aff'd. 30 N. Y. 2d 734, 333, N. Y. S. 2d 167, 285 N. E. 2d 153 (1972).

met.[11]

The nature of the place searched may be the determining factor in courts' decisions as to whether a person had a reasonable expectation of privacy. In 1979, the Second Circuit Court of Appeals stated that "as the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context".[12]

Marriage and Parenthood

Courts have established the legal principle that students cannot be prohibited from school attendance on a permanent basis solely because of marriage.[13] It has also been determined that married students cannot be compelled to attend school.[14] Courts have likewise held that unwed mothers cannot be refused readmission to school.[15]

Since 1972, courts have ruled that students cannot be prohibited from participating in extracurricular activities because of marriage, and that such prohibition is a denial of equal protection under the Fourteenth Amendment.

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[11]Robert E. Phay, "Search and Seizure in the Schools," The Law of Procedure in Student Suspensions and Expulsions (Topeka: National Organization on Legal Problems of Education, September, 1977), p. 44.

[12]M. M. v. Anker, 607 F. 2d 589 (1979).

[13]McLeod v. State, 154 Miss. 468, 122 So. 737 (1929); Alvin Independent School District v. Cooper, 404 S. W. 2d 76 (1966).

[14]State v. Priest, 210 La. 389, 27 S. 2d 173 (1946); In re State in Interest of Goodwin, 214 La. 1062, 39 S. 2d 731 (1949).

[15]Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (1969); Ordway v. Hargraves, 323 F. Supp. 1155 (1971).

Rights of Handicapped Children

Courts have established the right to equality of educational opportunity for handicapped children.[16] It has been held that before a disruptive, handicapped student is expelled from school, it must be determined whether the child's handicap causes the propensity to be disruptive.[17] The Supreme Court of Iowa also held that expulsion procedures for handicapped children must include re-evaluation of the child by a diagnostic-educational team, a report and recommendation by that team, and after full hearing, determination by the school board as to whether an alternative placement will meet the needs of the child and the district, with expulsion to be resorted to only when no reasonable alternative placement is available.[18]

The principle has also been established by the courts that individuals are entitled to minimal due process procedures before they can be stigmatized.[19] This principle has been applied to identification and placement of students into special education classes.

Numerous legal challenges have been made in recent years by parents who are concerned with educational practices,

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[16]Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (1972).

[17]Doe v. Koger, 480 F. Supp. 224 (1979).

[18]Southeast Warren Community School District v. Department of Public Instruction, 285 N. W. 2d 173 (1979).

[19]Wisconsin v. Constantineau, 400 U. S. 433 (1971).

with the result that more courts appear to be requiring school systems to prove a direct educational relationship between educational practices such as ability grouping and the ability to learn. In Hobson,[20] the federal district court for the District of Columbia ruled that ability grouping as practiced in that school system violated students' constitutional rights to equal educational opportunities. In general, Hobson holds that if an ability grouping plan is to be constitutionally acceptable, it must ensure equal educational opportunities for every student and must bring students into the mainstream of public education without isolating them. The school system must be able to show whether such placement meets the child's specific educational needs and whether a less extreme alternative is available.[21]

Courts have generally upheld the right to least restrictive placement for handicapped children.[22] Public Law 94-142[23] and Section 504 of Public Law 93-112[24] have provided that handicapped children cannot be excluded from any federally funded school program. Other important provisions of these laws will be discussed in Chapter IV.

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[20]Hobson v. Hansen, 269 F. Supp. 401, 408 F. 2d 175 (1969).

[21]Ibid., p. 516

[22]H. Rutherford Turnbull, III, "The Past and Future Impact of Court Decisions in Special Education," Phi Delta Kappa (April, 1978): 525.

[23]U. S. Department of HEW, "Education of Handicapped Children and Incentive Grants Program: Assistance to States," 41 Fed. Reg. 46966-46998 (1976).

[24]U. S. Department of HEW, "Nondiscrimination on Basis of Handicap: Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 42 Fed. Reg. 22676-22702 (1977).

Tort Liability

Numerous court actions seeking damages for common law torts, constitutional torts, and learning torts have been filed against principals and school officials.

Common Law Torts

Most common law torts allege negligence on the part of defendants. The legal principle has been recognized that "before liability may be imposed for an act or failure to act, prevision of a reasonable person must be able to recognize danger of harm to plaintiff or one in plaintiff's situation."[25] The courts have made it known that a principal has a duty to take action in a situation in which a reasonably prudent person would foresee the possibility of injury to a student, and that the principal must see that proper supervision occurs, both by the principal and the teachers. Courts have held that principals and other employees of the school district are not protected by governmental immunity of the school district against liability arising from their personal negligence toward students.

Litigation against principals and teachers in tort liability cases most often involves lack of supervision, improper or inadequate instruction, failure to exercise responsibilities properly, and field trips. Numerous cases have been instituted concerning inadequate instruction in performance of an activity and failure to instruct in safety

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[25]Morris v. Ortiz, 437 P. 2d 652 (1968).

rules. Courts have ruled in favor of students when instruction was inadequate and students were not instructed as to reasonable safety precautions.[26]

Failure to exercise responsibilities properly is another allegation made against principals and school officials. Verdicts have been rendered in favor of plaintiffs against principals, teachers, and school personnel, when evidence indicated that dangerous conditions existed in the schools and were not corrected.[27] Herb Appenzeller states that "the court clearly tends to favor the injured pupil in cases where school officials know that dangerous equipment or unsafe facilities exist and still fail to remedy them."[28]

The same principles of tort law apply on field trips as at school. Provisions for proper supervision must be made.

Constitutional Torts

The Civil Rights Act of 1871, Section 1983, was rediscovered in the mid-1960's and has resulted in a change in status of board members and school administrators. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at

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[26]Armlin v. Board of Education, 320 N. Y. S. 2d 402 (1971); LaValley v. Stanford, 70 N. Y. S. 2d 460 (1947); Gardner v. State, 22 N. E. 2d 344 (1939); Darrow v. West Genesee Central School District, 342 N. Y. S. 2d 611 (1973).

[27]Bush v. Oscoda Area Schools, 275 N. W. 2d 268 (1979); Webb v. Hennessey, 257 S. E. 2d 315 (1979).

[28]Herb Appenzeller, From the Gym to the Jury (Charlottesville: The Michie Company, 1970), p. 115.

> law, suit in equity or other proper proceeding for redress.[29]

This Act imposes civil liability on every "person" who deprives another of his federally protected rights.[30] The United States Supreme Court has ruled that:

> ....a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student; and that a compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[31]

The United States Supreme Court has also ruled that:

> In the absence of proof of actual injury, public school students who were suspended from school without procedural due process and who bring actions under 42 USCS § 1983 against school officials are entitled to recover only nominal damages; if it is determined that the suspensions were justified, the students nevertheless are entitled to recover nominal damages not to exceed one dollar from the officials.[32]

Learning Torts

Recently, lawsuits have been instituted by students seeking damages for failure to learn. It is not certain what courts will do in the future, but in a 1976 case, the court stated:

> Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of

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[29]U. S. C., Section 1983 (1871).

[30]Monell v. Department of Social Services of the City of New York, 436 U. S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

[31]Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975.

[32]Carey v. Piphus, 435 U. S. 247, 55 L. Ed. 2d 252, 253, 98 S. Ct. 1042 (1978).

its ministers.[33]

Teacher Rights

The principal must be knowledgeable of the legal implications regarding teacher tenure and the applicability of due process and other constitutional principles as they have been interpreted by the courts, as well as state laws respecting employment of personnel. While statutes vary in stipulating dismissal causes, among the most frequent causes are incompetency, immorality, insubordination, and neglect of duty.

In cases alleging incompetency on the part of a teacher as grounds for dismissal, detailed documentation concerning the teacher's performance is looked upon with favor by the courts.[34] The principal's position is viewed as stronger when the teacher has been given warning and opportunity to correct ineffective performance. When procedural requirements are met, courts usually consider proven deficiencies and a failure to correct them sufficient cause for termination.

In immorality cases, courts have considered the impact of behavior upon the school rather than some pre-existing societal norm. They question whether alleged immoral conduct has adversely affected teacher's performance in the classroom.

Courts have established the principle that teachers' chronic refusal to comply with reasonable administrative obligations "can have a disruptive effect on students, fellow

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[33]Peter W. v. San Francisco Unified School District, 121 Cal. R. 854 (1976).

[34]Canty v. Board of Education, City of New York, 312 F. Supp. 254 (1970); Schmidt v. Fremont County School District No. 25, State of Wyoming, 558 F. 2d 982 (1977).

teachers, and administrators alike, and consequently poses a threat to an optimum learning environment,"[35] and therefore, tend to rule in favor of school administrators and systems in such instances.

While courts have made it clear that they will protect the exercise of federal constitutional and statutory rights, it is apparent that they will not ignore substantial neglect of duty on the part of school personnel.

Courts have established the principle that personnel decisions must be free from constitutional violations.[36] The Supreme Court also has held that where a teacher alleges that free speech activity is a substantial or motivating factor in nonrenewal of a contract, the teacher must establish this fact. The burden is then on the school board to prove that it would have reached the same decision not to renew the contract in the absence of the protected behavior.[37]

Courts have established the legal principle that public employment is a benefit which cannot be conditioned upon denial of constitutional rights.[38] A claim under the First Amendment was not defeated by lack of tenure.[39]

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[35]Simard v. Board of Education of Town of Groton, 473 F. 2d 988, 995 (1973).

[36]Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

[37]Mt. Healthy School District v. Doyle, 429 U. S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

[38]Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Keyishian v. Board of Regents, 385 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); Wieman v. Updegraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952).

[39]Barbre v. Garland Independent School District, 474 F. Supp. 687, 696 (1979).

Courts have ruled that in order to have a property interest protected by due process, a person must have a legitimate claim of entitlement to continued employment arising from state law. Generally, it has been recognized that a property interest exists if, by statute, rule, or contract, express or implied, an employee can be fired only for "cause."[40]

Courts have also ruled that a person is entitled to due process for protection of the liberty interest when a "person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,"[41] and when the government employer has imposed a "stigma or other disability that foreclosed the employee's freedom to take advantage of other employment opportunities."[42]

As stated earlier, teachers' constitutional rights to freedom of speech and expression were recognized in Tinker,[43] although the court cautioned that rights of speech and association may be limited because of the unique nature of a school. This right cannot be exercised to the extent that

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[40]Bishop v. Wood, 426 U. S. 341, 343-47, 96 S. Ct. 2074, 48 L. Ed. 2d 15 (1974).

[41]Board of Regents v. Roth, 408 U. S. 573, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

[42]Ibid., p. 2707.

[43]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 731 (1969).

it creates disruptions. Teaching of controversial, irrelevant materials has resulted in the dismissal of teachers.[44]

It is evident that the school principal needs a knowledge of school law and legal precedents which have been established in the areas discussed above.

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[44]Cooley v. Board of Education, 327 F. Supp. 454 (1971); Burns v. Rovaldi, 477 F. Supp. 270 (1979); Knarr v. Board of School Trustees, 317 F. Supp. 832 (1970), Aff'd. 452 F. 2d 649 (1971); Pyle v. Washington County School Board, 238 So. 2d 121 (1970).

CHAPTER IV

THE PRINCIPAL AND STUDENT RIGHTS

Since 1969, the role of the school principalship has been changed by a procession of cases dealing with student rights in the areas of First Amendment rights, personal appearance of students, suspension and expulsion, corporal punishment, search and seizure, marriage and parenthood, and rights of the handicapped. As the review of cases will indicate, principals no longer have unlimited power to control student behavior without recognition of students' constitutional rights.

First Amendment Rights of Students

During the 1970's, the courts began to look carefully at the issue of regulating the speech, expression, and publications of students and to rule that educators are not empowered to enforce regulations which infringe upon students' First Amendment rights. As stated previously, the First Amendment, which was made applicable to the states by the Fourteenth Amendment, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

> or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[1]

Courts generally hold that the Fourteenth Amendment protects the First Amendment rights of students against unreasonable rules and regulations imposed by school authorities, and that school officials cannot infringe upon these rights, unless student exercise of such rights materially and substantially interferes with the requirements of appropriate discipline in the school operation. Federal courts have ruled in many First Amendment cases dealing with student wearing of insignia or emblems and control of student publications.

Insignia and Emblems

Two cases dealing with First Amendment rights of students to freedom of expression through insignia and emblems were tried in the United States Court of Appeals for the Fifth District on July 21, 1966. These cases clearly illustrate what has become court policy with regard to student expression. In Burnside v. Byars,[2] the Court of Appeals held that a high school regulation prohibiting students from wearing "freedom buttons" was "arbitrary and unreasonable, and an unnecessary infringement on students' protected rights of expression." There was no evidence in this case that the school was hampered from carrying on its regular schedule of activities. Affidavits and testimony revealed no interference with educational activity.

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[1]U. S. Const. amend. I.

[2]Burnside v. Byars, 363 F. 2d 744 (1966).

For this reason, the Fifth Circuit Court of Appeals reversed the order of the district court for the southern district of Mississippi, which had denied preliminary injunction.[3]

In the second case, Blackwell v. Issaquena,[4] evidence indicated that the wearing of "freedom buttons" caused an "unusual degree of commotion, boisterous conduct, collision with rights of others, and undermining of authority".[5] For this reason, the same court held that the regulation of school authorities prohibiting students from wearing "freedom buttons" was reasonable and affirmed the district court's order denying injunction.[6]

The United States Supreme Court's landmark decision on the issue of students' First Amendment rights was Tinker v. Des Moines[7] in 1969. In this case, students were suspended for wearing black armbands in protest of hostilities in Vietnam and in support of a truce.

Students, through their fathers, filed a complaint in the federal district court for the southern district of Iowa, seeking an injunction restraining school authorities from disciplining students and nominal damages. The district court dismissed the complaint and upheld the constitutionality

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[3]Ibid., p. 744.

[4]Blackwell v. Issaquena County Board of Education, 363 F. 2d 749 (1966).

[5]Ibid., p. 749.

[6]Ibid., p. 750.

[7]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969).

of school officials' action. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed without opinion. On certiorari, the case was reversed and remanded by the United States Supreme Court.

The United States Supreme Court held that the wearing of armbands in Tinker was "entirely divorced from actually or potentially disruptive conduct," and as such, was closely akin to "pure speech" protected under the First Amendment.[8] The Court quoted from both the Burnside and Blackwell cases in its opinion.

The United States Supreme Court stated that:

> First Amendment rights of freedom of speech expression, applied in light of the special characteristics of the school environment, are available to teachers and students, and neither students nor teachers shed such rights at the schoolhouse gate.[9]

The Court stated that a regulation prohibiting students' wearing of the black armbands violated their constitutional rights to free speech where there was no evidence that the authorities had reason to anticipate that the wearing of such armbands would substantially interfere with the work of the school or impinge upon other students' rights, "or that the prohibition was necessary to avoid material and substantial interference with school work or discipline..."[10]

In agreement with the Burnside decision, the Supreme Court held:

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[8]Ibid., p. 733.

[9]Ibid.

[10]Ibid., p. 734.

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in of the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.[11]

The Court also pointed out, however, that conduct by a student which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[12]

The principle set out in the Tinker decision has become the standard for later federal court decisions dealing with First Amendment rights and for school administrators in the organization and governance of public schools.[13] The Tinker decision has brought a new awareness to high school students of First Amendment rights.[14] Courts must weigh the issue of infringement of personal rights of expression against the concept of whether the exercise of such rights would "materially and substantially interfere with the requirements

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[11]Ibid., p. 739.

[12]Ibid., p. 741.

[13]Neil C. Chamelin and Kae B. Trunzo, "Due Process and Conduct in Schools," Journal of Research and Development in Education 11 (Winter 1978): 75.

[14]David Emerson Hoffman, "Legal Aspects of Student Newspapers and the Virginia Secondary Schools" (Ed. D. dissertation, University of North Carolina, Greensboro, 1979), p. 1.

of appropriate discipline in the operation of the school."[15]

From Tinker has come the "Tinker Test," which provides that educators must not seek to regulate student speech or expression unless it can be proven that such activity will lead to "material and substantial disruption" of the educational process.[16] Later cases have sought to clarify what is meant by "material and substantial disruption."

The United States Court of Appeals for the Sixth Circuit affirmed the district court's action in dismissing complaint in Guzick v. Drebus,[17] and the United States Supreme Court denied certiorari. This was an action brought by a high school student for injunctive relief from school authorities' refusal to permit him to wear a button soliciting participation in an anti-war demonstration, from refusal to reinstate him, for declaratory judgment that rule proscribing wearing of buttons was unconstitutional, and for damages. The court found that the high school rule prohibiting wearing of any buttons or insignia was of long standing; that the rule had been universally applied; and that an incendiary situation existed at the school in question, which had undergone change of racial composition from all white to 70 percent black. Evidence showed that the wearing of buttons, pins, and other emblems had

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[15]Connors, Student Discipline and the Law, p. 36.

[16]Ibid., p. 38.

[17]Guzick v. Drebus, 431 F. 2d 594 (1970).

caused disruption in the past; that students had attempted to wear buttons and badges expressing inflammatory messages, which would lead to racial disorders at the school; that polarization of students had resulted; and that in at least one instance, a fight had occurred. The court found that under the existing circumstances, the rule prohibiting buttons or insignia did not deny right of free speech.

In Hill v. Lewis,[18] a district court for the eastern district of North Carolina denied preliminary injunction sought by plaintiffs to restrain a high school principal from suspending plaintiffs for wearing armbands in protest of the Vietnam War. The court found that more than one-third of students in the school were children of military personnel, who held diverse views as to war and nonwar related issues; that a tense situation had developed; that at least twenty-five to fifty students with antagonistic views were involved; and that there had been advance advertisement of demonstration, active group participation, marching in hallways, recruitment of other children to join several groups, chanting, belligerent and disrespectful attitude toward teachers, incidents of flag disrespect, and threats of violence.[19] The court held that in balancing of First Amendment rights, the duty of the state to operate a public school system for benefit of all children must be protected, even if governmental regulations incidentally

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[18]Hill v. Lewis, 323 F. Supp. 55 (1971).

[19]Ibid., p. 55.

limit "untrammeled exercise of speech, symbolic or otherwise, by those who would impede education of those who desire to learn".[20]

Another case involving symbols was decided in favor of school authorities by the United States district court in Colorado on August 18, 1970.[21] Suspended high school students of Mexican descent sought a declaration that constitutional rights were violated by school suspension of students for wearing black berets maintained to be symbols of Mexican culture, of Mexican unity and respect, and of dissatisfaction with society's treatment of Mexican race and desire to improve treatment. The court dismissed the complaint.

Evidence in Hernandez[22] indicated that principal had granted students permission to wear black berets until disruption of the school became so great that students were told to remove berets or be suspended. Evidence was without dispute that beret had come to be used by plaintiffs as a symbol of power which was used to disrupt the school and to exercise control over other students; that plaintiffs had talked in loud voices in halls, shouting, "Chicano power;" that students had blocked the halls, preventing free passage; had refused to obey teachers; had caused a disturbance in the lunchroom; had told other students not to listen to "that old bag - the

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[20]Ibid., p. 56.

[21]Hernandez v. School District Number One, Denver, Colorado, 315 F. Supp. 289 (1970).

[22]Ibid., p. 291.

berets will take care of her," when a teacher had attempted to supervise hallways and give students directions; that one plaintiff had taken a paper away from a teacher; and that plaintiffs had attempted to induce students to leave classrooms and join students in the hallways.

A Pennsylvania case, Wise v. Sauers,[23] also resulted in a decision favorable to school authorities. The action arose during a period of extreme unrest in American schools, as a result of the involvement of American and Vietnamese troops in Cambodia and the killing of four students at Kent State University. There were strong feelings at the school in question on both sides of the issues involved. Because of this, the principal asked students wearing armbands containing the words, "Strike," and "Rally," to desist from wearing such armbands, in the interests of keeping calm and peace in the school. Students were informed that they could wear armbands of any color, provided such armbands did not contain words which were likely to cause disruption of the school. Plaintiff continued to wear the forbidden armbands and was suspended from school. The court held that the principal's restrictions were reasonable and necessary under the existing conditions, and that the suspension of plaintiff was proper.

In a 1972 case,[24] the United States Court of Appeals for the Sixth Circuit affirmed judgment of the district court

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[23]Wise v. Sauers, 345 F. Supp. 90 (1972).

[24]Melton v. Young, 465 F. 2d 1332 (1972).

for the eastern district of Tennessee which was adverse to plaintiffs. Plaintiff-minor had been suspended from school for wearing an emblem depicting a Confederate flag on the sleeve of his jacket, in violation of the school's code of conduct. Evidence indicated that the school had formerly been an all-white school with the Confederate flag as school flag and "Dixie" as the school song; that school was attended by both white and black students at time of action; that student body had become racially polarized as a result of controversy over use of Confederate flag and song, "Dixie," at various school functions; that class disruption had occurred; that various disturbances had taken place in the city, culminating in a citywide curfew in October, 1969; that it had become necessary to close the school to restore order and calm tensions in the Spring of 1970; that a committee of citizens had studied difficulties and had sought to correct them through recommendations which were adopted as official policy by the school board in July, 1970; that one of the corrective measures had been to recommend the discontinuance of use of Confederate flag as a school symbol and the song, "Dixie" as school song; and that each principal had been asked to develop and disseminate a "code of conduct" in keeping with the policy. It was this "code of conduct" which gave rise to the lawsuit.[25] The court concluded that under all the circumstances presented, appellant's suspension was not violative of First and Fourteenth Amendment

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[25]Ibid., p. 1333.

rights and that judgment of the district court was proper.

The case of Aguirre v. Tahoka[26] was decided against school authorities by the district court for the northern division of Texas in 1970, when the court concluded that evidence did not establish that wearing of brown armbands by students (in violation of school district regulation prohibiting wearing of "apparel decoration that is disruptive, distracting, or provocative") was a disruption in and of itself.

In Butts v. Dallas Independent School District,[27] the Fifth Circuit Court of Appeals reversed district court's denial of temporary injunction and remanded the cause with direction to the district court to grant an injunction enjoining defendants from interfering with plaintiffs in exercise of First Amendment rights by wearing black armbands to school to protest the Vietnam War. Evidence indicated that wearing of black armbands by high school students had caused no substantial disruption of the educational process.

Publications

Since 1968, a number of cases have been tried in federal courts concerning power of school officials to control both school-sponsored and underground publications. Attempts at regulation have been tested against First Amendment protection of freedom of speech and

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[26]Aguirre v. Tahoka Independent School District, 311 F. Supp. 664 (1970).

[27]Butts v. Dallas Independent School District, 436 F. 2d 728 (1971).

Judicial decisions insist that school authorities have the right to control "time, place, and manner" of expressive activity.[28] Grayned states:

> Our cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted.[29]

In Fujishima v. Board of Education,[30] the Seventh Circuit Court of Appeals indicated that school officials have the right to promulgate "reasonable specific regulations setting forth the time, manner, and place in which distribution of written materials may occur," although the court pointed out that this did not mean that students are required "to obtain administrative approval of the time, manner, and place of the particular distribution" proposed. Instead, the court held that school officials have the burden of telling students when, how, and where materials might be distributed.

Several cases have arisen where school officials have attempted to exercise prior restraint on publications to be distributed on school premises. Among the reasons given by school administrators for requiring that materials be submitted for approval prior to distribution are the following:

1. To prevent distribution of libelous or obscene materials.

2. To prevent distribution of publications advocating illegal actions; and

3. To prevent distribution of publications which are insulting to any group or individual.[31]

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[28]Grayned v. City of Rockford, 408 U. S. 104, 33 L. Ed. 222, 92 S. Ct. 2294 (1972).

[29]Ibid., pp. 231-232.

[30]Fujishima v. Board of Education, 460 F. 2d 1355 (1972).

[31]Baughman v. Freienmuth, 478 F. 2d 1345, 1346 (1973).

It has been held that school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can reasonably "forecast substantial disruption of or material interference with school activities" on account of such printed material.[32]

In 1971, the Second Circuit Court of Appeals held that a school board policy requiring prior approval of distribution of printed or written material on school grounds was constitutionally deficient in that it did not prescribe a definite, brief period within which review of submitted material would be completed and did not specify to whom and how material might be submitted for clearance. The Stamford Board of Education had adopted a policy providing that no person should distribute any printed or written matter on the grounds of any school without prior approval of the school administrator. The policy stated that in granting or denying approval, the following guidelines must apply:

> No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.[33]

The Court of Appeals applied the Tinker test and held

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[32]Eisner v. Stamford Board of Education, 440 F. 2d 803, 807 (1971).

[33]Ibid., pp. 804-805.

that the policy was clearly directed at behavior which would be disruptive, even though the phrase, "material or substantial disruption" was not used.[34] However, the court stated:

> The policy as presently written is wholly deficient.... for it prescribes no period of time in which school officials must decide whether or not to permit distribution. To be valid, the regulation must prescribe a definite brief period within which review of submitted material will be completed.
>
> The policy is also deficient in failing to specify to whom and how material may be submitted for clearance. Absent such specifications, students are unreasonably proscribed by the terms of the policy statement from distributing any written material on school property, since the statement leaves them ignorant of clearance procedures. Nor does it provide that the prohibition against distribution without prior approval is to be inoperative until each school has established a screening procedure.[35]

The court also found that the proscription against "distributing" written or printed material without prior consent was unconstitutionally vague and did not indicate that the board would require prior submission only when there is a substantial distribution of written material, which the court assumed to be the case.[36]

Actually, the Eisner decision directed certain procedural formalities to be followed by school officials who seek to exercise the right of prior approval of publications for dis-

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[34]Ibid., p. 808.

[35]Ibid., p. 811.

[36]Ibid.

tribution on school grounds. The essential elements in a procedure for submission of material according to this ruling are:

> 1. Adequate definition must be given to the term, 'distribution,' to make clear that policy is directed at substantial distribution and not the passing of a note from one student to another or the exchange of copies of Time or Life.
>
> 2. A definite person must be established to whom the material is to be submitted for approval and how the submission is to be accomplished.
>
> 3. A definite, brief period must be set within which the review will take place and be completed.
>
> 4. There must be a provision that the policy will not operate until each school has established its review procedure and informed its students.[37]

The need for establishing definite procedures in school rules for prior restraintwas again recognized in Quarterman.[38] In this case, the Fourth Circuit Court of Appeals held that a school rule prohibiting distribution of printed material without express permission of the principal was invalid on its face as an improper prior restraint, in that it failed to contain any criteria to be followed by school authorities to determine whether to grant or deny permission, and failed to contain procedural safeguards for review of school authorities' decision.

In Baughman,[39] the Fourth Circuit Court of Appeals held that a regulation lacked "procedural safeguards of a specified

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[37]T. Page Johnson, "Eisner v. Stamford: Prior Restraint on Distribution of Literature in High Schools," NOLPE School Law Journal 2

[38]Quarterman v. Byrd, 453 F. 2d 54 (1971).

[39]Baughman v. Freienmuth, 478 F. 2d 1345 (1976).

and reasonably short period of time in which principal had to act and that it failed to provide for contingency of the principal's failure to act within a specified, brief time." The court pointed out that the regulation was rendered invalid by absence of any criteria to be followed by school authorities in determining whether to grant or deny permission, and of any procedural safeguards in the form of an "expeditious review procedure" of the decision made by school officials.[40] As in Eisner, the proscription against distribution was viewed as being unconstitutionally vague.

The court indicated that the decision was predicated upon the following propositions of law:

> 1. Secondary school children are within the protection of the First Amendment, although their rights are not coextensive with those of adults.
>
> 2. Secondary school authorities may exercise reasonable prior restraint upon the exercise of students' First Amendment rights.
>
> 3. Such prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write.
>
> 4. A prior restraint system, even though precisely defining what may not be written, is nevertheless invalid unless it provides for:
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> a. A definition of 'distribution' and its application to different kinds of materials;
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> b. Prompt approval or disapproval of what is submitted;
>
> c. Specification of the effect of failure to act promptly; and

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[40]Ibid., p. 1348; also Hall v. Board of School Commissioners of Mobile County, Alabama, 496 F. Supp. 697 (1980).

d. An adequate and prompt appeals procedure.[41]

A district court ruling that a school board did not have general power to regulate a newspaper which was established as a public forum was affirmed by the Fourth Circuit Court of Appeals in 1977.[42] The Farm News, a student newspaper, was established as a public forum, even though the paper was funded and sponsored by the school board, and according to the court ruling, was therefore, subject to First Amendment protection. The court concluded that it could not be viewed as part of the curriculum, and that the board did not have the right to ban publication of an article about birth control.

The Second Circuit Court of Appeals held in Trachtman[43] that a school prohibition of distribution of sex questionnaire to ninth through twelfth grade students was constitutional, in that there was a substantial basis for authorities' belief that distribution of the questionnaire would result in significant emotional harm to a number of students in the school population.

In a New York case, a federal district court upheld the right of high school students to publish in the school newspaper a paid advertisement opposing the war in Vietnam.[44] The court stated that the school's prohibition of advertising on political matters was not in keeping with its having permitted

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[41]Baughman v. Freienmuth, 478 F. 2d 1345, 1351 (1976).

[42]Gambino v. Fairfax County School Board, 429 F. Supp. 731 (1977), aff'd. 564 F. 2d 157 (4th Cir. 1977).

[43]Trachtman v. Anker, 563 F. 2d 512 (1977).

[44]Zucker v. Panitz, 299 F. Supp. 102 (1969).

publication of articles on war and the draft; that the newspaper was a forum for dissemination of ideas; and that it was open to free expression of ideas.

Obscenity and Vulgarity

Several cases have been concerned with obscenity and vulgarity in publications. School authorities have the right to ban obscene materials from school premises.[45] Obscenity is not within the area of protected speech or press.[46] The power of a state to control conduct of children reaches beyond the scope of its authority over adults, even when there is an invasion of constitutionally protected freedoms; the state has constitutional power to regulate the wellbeing of its children.[47] A federal district court in Michigan ruled that a school regulation, providing that any student found with obscene literature in his possession would be suspended from school, did not violate the free speech provision of the First Amendment.[48]

Questions exist as to what is obscene as a matter of law.[49]

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[45]Reutter, The Courts and Student Conduct, p. 24.

[46]Roth v. United States, 354 U. S. 476, 485, 1 L. Ed. 2d 1498, 1507, 77 S. Ct. 1304 (1957).

[47]Ginsberg v. State of New York, 390 U. S. 629, 20 L. Ed. 2d 195, 197, 88 S. Ct. 1274 (1967).

[48]Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (1969).

[49]Reutter, The Courts and Student Conduct, p. 24.

The United States district court for the eastern district of Michigan stated that the area of the law on obscenity "is about as well-defined as the course of a tornado."[50]

Ginsberg v. State of New York is viewed as having mandated that the courts "more broadly construe the traditional definition of obscenity when applied to cases involving.... minors."[51] Ginsberg held that:

> Freedom of expression constitutionally secured to minors is not invaded by a state statute making it a misdemeanor knowingly to sell a minor material 'harmful to minors' and defining this phrase as meaning that quality of any description or representation of nudity, sexual conduct, sexual excitement or sado-masochistic abuse, when it (1) Predominately appeals to the prurient interest of minors; (2) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (3) Is utterly without redeeming social importance for minors.[52]

In Baker,[53] a federal district court in California upheld a ten-day suspension and removal of plaintiffs from office as student body and senior class presidents for use of profanity or vulgarity appearing in an off-campus newspaper published and distributed by them just outside the main campus gate. The court stated that "When the bounds of decency are violated in publications distributed to high school students, whether on campus or off campus, the offenders become subject

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[50]Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1396 (1969).

[51]Koppell v. Levine, 347 F. Supp. 456, 459 (1972).

[52]Ginsberg v. State of New York, 390 U. S. 629, 20 L. Ed. 2d 195, 197, 88 S. Ct. 1274 (1967).

[53]Baker v. Downey City Board of Education, 307 F. Supp. 417 (1969).

to discipline," and that "neither 'pornography' nor 'obscenity,' as defined by law, need be established to constitute a violation of the rules against profanity or vulgarity."[54]

In 1973, the district court for the southern district of Indiana ruled, and the Seventh Circuit Court of Appeals affirmed, that "school board provisos pertaining to distribution of literature were invalid and that occasional presence of 'earthy' words in unofficial student newspaper did not render the newspaper obscene."[55] The court stated that issues of the Corn Cob Curtain in the record were far from obscene in the legal sense, containing no material which "is in any significant way erotic, sexually explicit, or which could plausibly be said to appeal to the prurient interest of adult or minor."[56] The court further pointed out that the newspaper issues did not even approach fulfillment of the Miller definition of obscenity set out by the Supreme Court, namely:

> 'Works which depict or describe sexual conduct' and 'which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.'[57]

On certiorari, however, the United States Supreme Court vacated judgment of the Court of Appeals and remanded with instructions that the district court be ordered to vacate its judgment and dismiss the complaint. The Supreme Court

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[54]Ibid., p. 526.

[55]Jacobs v. Board of School Commissioners, 490 F. 2d 601 (1973).

[56]Cohen v. California, 403 U. S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

[57]Jacobs v. Board of School Commissioners, 490 F. 2d 601, 610 (1973).

found that since the plaintiffs had graduated from school while the case was pending in the Supreme Court, there was no longer a case or controversy between plaintiffs and school officials, and that the case had become moot.[58]

In Koppell v. Levine,[59] a federal district court concluded that a school literary magazine, Streams of Conscience, was not obscene for the following reasons:

> The magazine contained no extended narrative tending to excite sexual desires or constituting a predominant appeal to prurient interest. The dialogue was the kind heard repeatedly by those who walk the streets of our cities, use public conveyances and deal with youth in an open manner. It was not patently offensive to adult community standards for minors as evidenced by comparable material appearing in respected national periodicals and literature contained in the high school library.[60]

As stated above, while it seems apparent that school authorities have the right to ban obscene or profane material from publication or distribution on school property, the difficulty comes from attempting to define "obscene" and "profane." There are no definite answers to the problem, since opinions of the circuit courts often conflict. However, it is agreed that school authorities can suppress materials from children which could not be banned from the general public.[61]

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[58]Board of School Commissioners of the City of Indianapolis v. Jacobs, 420 U. S. 128, 43 L. Ed. 2d 74, 95 S. Ct. 848 (1975).

[59]Koppell v. Levine, 347 F. Supp. 456, 459 (1972).

[60]Ibid., p. 459.

[61]Chamelin and Trunzo, "Due Process and Conduct in the Schools," p. 78.

Off-Campus Distribution of Publications

Thomas v. Board of Education[62] deals with the right of school authorities to bring their power to bear on the publication and distribution of a newspaper off the school grounds. This case, recently decided by the United States Court of Appeals for the Second Circuit, holds that the First Amendment forbids public school administrators from regulating material to which children are exposed after they leave school each afternoon. The court stated:

> Although states can appropriately legislate statewide variable standard of obscenity with respect to children and may, in some circumstances, suppress expression that is suitable for adults because of its potential effect on children, this power is denied to public school officials when they seek to punish off-campus expression simply because they reasonably foresee that in-school distribution may result.[63]

In this case, several students had printed a publication called Hard Times outside the school; no copies were sold on school grounds; and any activity within the school was de minimis, consisting of the typing of a few articles on school typewriters and the storing of the product in a teacher's closet. The court ruled that school administrators could not punish students for their publication of the allegedly "morally offensive, indecent, and obscene" tabloid,[64] since Hard Times was conceived, executed and

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[62]Thomas v. Board of Education, Granville Central School District, 607 F. 2d 1043 (1979).

[63]Ibid., p. 1044.

[64]Ibid., p. 1043

distributed outside the school.

In a case heard in 1972, the United States Court of Appeals for the Fifth Circuit, in a sharply worded decision, condemned a school board for assuming "suzerainty" of students before and after school, off school grounds, and with regard to their expression of thoughts.[65] Five students were suspended from school for having distributed an underground newspaper entitled Awakening. Evidence indicated that the newspaper was written entirely by the students, during out-of-school hours, and without using any materials or facilities belonging to the school system. The students distributed the papers one afternoon after school hours and one morning before school hours, outside school premises on the sidewalk of an adjoining street, which was separated from the school by a parking lot. No disruption of classes nor disturbances whatsoever occurred. The students passed out the newspapers in a polite, orderly manner. The court found that Awakening contained absolutely no material which could remotely be considered libelous, obscene, or inflammatory.[66] The students' suspension was for violation of school board policy which prohibited distribution of petitions or printed documents of any kind without specific approval of the school principal. The court held that this policy was unconstitutionally applied to students, to prohibit and punish

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[65]Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F. 2d 960 (1972).

[66]Ibid., p. 964.

protected First Amendment expression which took place entirely off campus and without substantial and material disruption of school activities.[67]

In making rules or punishing students in matters concerning the constitutional guarantee of freedom of speech, it is important that the principal consider the Tinker doctrine carefully. In an interesting case tried recently by the Fourth District Court of Appeals, however, the court held that disruption of school activities is only one justification for school authorities to restrain distribution of a publication; it is not the sole justification.[68] The court stated that First Amendment rights of high school students must yield to the superior interest of the school in seeing that materials which encourage actions that endanger the health or safety of students are not distributed on school property. In this case, a school regulation permitting the principal to halt distribution on school premises of any publication which encouraged actions to endanger health or safety of students was found not to prohibit constitutionally protected conduct and not to be unconstitutional on its face.[69]

Miscellaneous

Student freedom to express views of homosexuality was upheld in a 1980 case,[70] when the court ruled that a male

[67]Ibid., p. 961.

[68]Williams v. Spencer, 622 F. 2d 1200, 1201 (1980).

[69]Ibid.

[70]Fricke v. Lynch, 491 F. Supp. 381 (1980).

student must be permitted the right to bring another male student to the high school senior prom. The court indicated that a student's rights do not embrace merely the classroom hours, and that even though the homosexuality issue might arouse strong feelings, this freedom of expression must be protected.

Personal Appearance of Students

Although hair and dress codes were a major area of conflict during the 1970's,[71] litigation concerning personal appearance has dwindled in recent years. The United States Supreme Court in Tinker [72] held that educators cannot violate students' right to free speech and free expression, but the Court did not specify what constitutes "free expression." The question most often considered in regard to dress and hair codes appears to be whether students' ways of dressing and wearing hair is a means of self-expression. If so, dress and hair codes are unconstitutional invasions of students' First Amendment rights. If not, such codes can be instituted as a means of regulating student dress.[73]

The United States Supreme Court has not spoken specifically about the issue of dress and hair codes, and most cases have been decided at the Circuit Court of Appeals level. Be-

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[71]David E. Shelton, "A Study of the Opinions of the Federal and State Courts on the Length of Male Students' Hair in the Public Schools" (Ed. D. dissertation, University of North Carolina, Greensboro, 1979), p. 1.

[72]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 2 L. Ed. 2d 731, 89 S. Ct. 733 (1969).

[73]Connors, Student Discipline and the Law, pp. 42-43.

cause of differences in court rulings in the eleven federal circuit courts, there are wide geographical differences in the interpretation of the law.[74]

There appears to be little difference between a dress code and a hair style code. As a rule, wherever a dress code can be enforced, a hair style code can be enforced, and vice versa. Legally, there is no distinction between the two types of codes.[75]

For several years, the eleven federal circuit courts have been divided on the question of constitutional protection of students' right to wear hair as they choose.[76] Some view hair and dress codes as violations of students' constitutional rights, while others consider such codes to be permissible and not unconstitutional. This is illustrated by Chart III, covering the eleven circuits, the states each circuit includes, rulings as to hair and dress codes, and pertinent cases.

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[74]Ibid., p. 43.

[75]Ibid., p. 42.

[76]Allen J. Peterson, "Student Rights: A Changing Emphasis," North Carolina Education 8, No. 5 (January, 1978): 10.

CHART III - RULINGS BY U. S. CIRCUIT COURTS OF APPEAL ON HAIR AND DRESS CODES

Circuit	States Encompassed	Ruling	Pertinent Cases
First	Maine, New Hampshire, Massachusetts, Rhode Island, Territory of Puerto Rico	Dress and hair codes unconstitutional with some exceptions. Right of students to determine personal appearance is "implicit" in "liberty" assurance of due process clause.	Richards v. Thurston, 424 F. 2d 1281 (1970)
Second	Vermont, New York, and Connecticut	May be constitutional. (See later discussion.)	
Third	Pennsylvania, New Jersey, Delaware, Territory of Virgin Islands	No consistent pattern.	
Fourth	Maryland, West Virginia, Virginia, North Carolina, South Carolina	Dress codes violate students' First Amendment rights. (There are some exceptions.)	Massie v. Henry, 455 F. 2d 779 (1972)
Fifth	Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Canal Zone	Constitutionally protected means of self-expression, but school officials can infringe on right if there is compelling reason to do so.	Ferrell v. Dallas Independent School District, 392 F. 2d 697 (1969)
Sixth	Michigan, Ohio, Kentucky, Tennessee	Disruption and distraction factors too great to uphold constitutional rights of students (1970); hair style regulation struck down more recently.	Jackson v. Dorrier, 424 F. 2d 213 (1970)
Seventh	Wisconsin, Illinois, Indiana	Long hair "may" disrupt school, but "may" is not sufficient reason to infringe on consti-	Breen v. Kahl, 419 F. 2d 1034 (1969)

CHART III (Cont'd)

		tutional right. Student's right to govern style and length of hair is a personal freedom protected under Ninth Amendment and due process clause of Fourteenth Amendment. Codes unconstitutional.	Crews v. Cloncs, 432 F. 2d 1259 (1972)
Eighth	North Dakota, South Dakota, Nebraska, Minnesota, Missouri, Arkansas, Iowa	Long hair is acceptable means of free expression; cannot be infringed upon unless compelling interest can be shown.	Bishop v. Colaw, 450 F. 2d 1069 (1971)
Ninth	Alaska, Guam, Hawaii, Washington, Oregon, Idaho, Montana, California, Nevada, Arizona	School regulation concerning dress and hair does not represent any "substantial constitutional right being infringed upon."	King v. Saddleback Junior College District, 445 F. 2d 932 (1971)
Tenth	Wyoming, Utah, Colorado, Kansas, New Mexico, Oklahoma	Problems of students' dress and hair too inconsequential to take up time of U. S. Circuit Court of Appeals.	
Eleventh	District of Columbia	Inconsistent.	

While the Second Circuit has not ruled upon the issue of dress codes for students, it did rule that reasonable dress codes for teachers were not in violation of any constitutional rights, and by inference, it can probably be assumed that dress codes may be constitutional for students in the Second Circuit.[77]

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[77]Connors, Student Discipline and the Law, pp. 43-44.

Dress and hair codes are unconstitutional in the First Circuit, where the United States Court of Appeals ruled that regulations limiting the length of hair are invalid.[78] The First Circuit court ruled that a student's hair style is a personal right and liberty protected by the due process clause of the Fourteenth Amendment and can be limited only where the hair style causes extreme disruptions. A district court in the First Circuit also held that prohibition in dress code against wearing of dungarees was unconstitutional in absence of evidence that wearing of dungarees inhibited or tended to inhibit the educational process.[79]

Legal research did not reveal any cases concerning student dress and hair codes tried by the Second Circuit Court of Appeals. However, the Tinker decision is, of course, valid in this circuit, since it was a Supreme Court decision. The Second Circuit Court of Appeals has ruled that reasonable dress codes for teachers are not in violation of constitutional rights, so it can probably be assumed that dress codes may be constitutional in this circuit.[80]

However, a lower court in the Second Circuit held that an athletic grooming code requiring males to wear hair in a particular way was unconstitutional when evidence showed that

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[78]Richards v. Thurston, 424 F. 2d 1281 (1970).

[79]Bannister v. Paradis, 316 F. Supp. 185 (1970).

[80]Connors, Student Discipline and the Law, p. 44; East Hartford Education Association v. Board of Education of the Town of East Hartford, 564 F. 2d 838 (1977).

there was no reasonable relation between the regulatory classification created by the dress code and the permissible objectives of a high school tennis program.[81] The Supreme Court of Nassau County, New York, also in the Second Circuit, held that a dress regulation prohibiting girls from wearing slacks except when warranted by cold weather was invalid as beyond the power of the board.[82]

While several dress codes have been ruled upon in the Third Circuit, there does not appear to be any pattern or consistent reasoning in this circuit, and no standard policy seems to exist.[83]

The Fourth Circuit Court of Appeals found it constitutionally impermissible for public schools to impose hair codes on their students in Massie v. Henry.[84] The Massie doctrine is equally applicable to all school-controlled activities, extending to school athletic programs as well as to school academic programs.[85] The Fourth Circuit Court of Appeals ruled in Long[86] that a student's football "letter" could not be withheld from him because he allowed his hair to grow long after the football season, contrary to the rules of the coach.

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[81]Dunham v. Pulsifer, 312 F. Supp. 411, 420 (1970).

[82]Scott v. Board of Education, Union Free School District No. 17, Hicksville, New York, 305 N. Y. S. 2d 601 (1969).

[83]Connors, Student Discipline and the Law, p. 44.

[84]Massie v. Henry, 455 F. 2d 779 (1972).

[85]Long v. Zopp, 476 F. 2d 180 (1973).

[86]Ibid., p. 181.

The Fifth Circuit, in Burnside,[87] ruled in favor of students. However, in 1969, the court changed its stand, holding that a regulation banning long hair was not violative of state constitution or statutes, the Fourteenth Amendment to the federal Constitution, or Civil Rights statutes.[88] Testimony in the later case indicated that various problems had arisen in the school due to the wearing of long hair by students.[89] In 1972, the Fifth Circuit Court of Appeals again ruled in favor of school authorities, holding that "there is no constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer."[90] The court further stated that a regulation restricting length of hair in public high school does not restrict privacy and is not an invasion of a constitutional right of privacy.[91]

In 1970, the Sixth Circuit Court of Appeals followed the example of the Fifth Circuit, when it found that wearing of excessively long hair by male students "disrupted classroom atmosphere and decorum, caused disturbances and distractions among other students, and interfered with the educational process.[92]

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[87]Burnside v. Byars, 363 F. 2d 744 (1966).

[88]Ferrell v. Dallas Independent School District, 392 F. 2d 697 (1968).

[89]Ibid., p. 700.

[90]Karr v. Schmidt, 460 F. 2d 609 (1972).

[91]Ibid., p. 214.

[92]Jackson v. Dorrier, 424 F. 2d 213 (1970).

The court held that the principal's enforcement of the long hair regulation did not violate the constitutional right of privacy of students.[93] Again in 1971, the Sixth Circuit Court of Appeals ruled that the hair length provision of the high school dress code did not deprive the student, who was suspended for nonconformance with said rule, of any constitutional rights, was not unreasonable, arbitrary or capricious, and that there was a rational basis for its provision when considered in light of functions and purposes of the school.[94]

A district court in the Sixth Circuit held that suspension of a student for violation of a code violated his First Amendment rights where the student was "symbolically expressing political viewpoint by wearing his hair long and no danger of violence or other impediment of school activities occurred."[95] The court made it clear that the case did not fall in the category of Jackson v. Dorrier.[96] Evidence indicated that plaintiff grew hair long to express his convictions regarding intolerance for dissent regarding the Vietnam War. The court found that there was clear communicative intent, which distinguished the case from others decided by the Sixth Circuit Court of Appeals, and placed it within the "ambits of the

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[93]Ibid., p. 214.

[94]Gfell v. Rickelman, 441 F. 2d 444 (1971).

[95]Church v. Board of Education of Saline Area School District of Washtenaw County, Michigan, 339 F. Supp. 438 (1972).

[96]Jackson v. Dorrier, 424 F. 2d 213 (1970).

First Amendment as considered by Tinker."[97]

The Seventh Circuit Court of Appeals was the first appeals court to rule against school authorities in hair or dress cases.[98] It held that "absent showing of any justification therefor, school board could not properly expel students and/or threaten to expel them for failing to conform to (hair) regulation." The court ruled that "the right to wear one's hair at any length and in any desired manner is an ingredient of personal freedom protected by United States Constitution... ."[99] The Seventh Circuit has spoken repeatedly and forcefully on the issue of hair codes.[100] In this circuit, the burden is now on the school board to establish substantial burden of justification for hair and dress codes.

In 1971, the Eighth Circuit Court of Appeals held that a public high school dress code providing for regulation of hair length and style of male students was invalid and unenforceable where the regulation was not necessary to carry out the institutional mission of the high school.[101] The court found virtually no evidence to support the school board's contention that hair regulations were necessary to prevent dis-

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[97]Ibid., p. 542.

[98]Breen v. Kahl, 419 F. 2d 1034, 1038 (1969).

[99]Ibid., p. 1035.

[100]Crews v. Cloncs, 432 F. 2d 1259 (1970); Arnold v. Carpenter, 459 F. 2d 939 (1972).

[101]Bishop v. Colaw, 450 F. 2d 1069 (1971).

ruptions at St. Charles High School.[102] The court indicated that the common theme underlying decisions striking down hairstyle regulations is that the Constitution guarantees rights not specifically enumerated, and that the right to govern personal appearance is one of these guaranteed rights. The court stated:

> We believe that, among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance. As a freedom which ranks high on the spectrum of our societal values, it commands the protection of the Fourteenth Amendment Due Process Clause.[103]

The Ninth Circuit Court of Appeals held that no substantial constitutional rights had been infringed upon by enforcement of hair length codes in a high school district and junior college district in California.[104] In King v. Saddleback and Olff v. East Side, the court stated that in the absence of clear violation of constitutional right, the burden is upon those "who assail school regulations" to prove the invalidity of such regulations.[105]

In three cases (from Utah, New Mexico, and Colorado) which were consolidated for trial, the Tenth Circuit Court of Appeals stated that "the United States Constitution and Statutes do not impose on federal courts duty and responsibility of regulating hair styles of male students in state

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[102]Ibid., p. 1076.

[103]Ibid., p. 1075.

[104]King v. Saddleback Junior College District and Olff v. East Side Union High School District, 445 F. 2d 932 (1971).

[105]Ibid., p. 933.

public schools, and problem, if any, is one for states and should be handled through state procedures."[106] The court pointed out that the federal circuits are sharply divided on the constitutionality of hair regulations. It stated further:

> Recognition of the principle that neither students nor teachers 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' (393 U. S. at 506, 89 S. Ct. at 736) does not mean that the First Amendment contains an express command that the hair style of a male student in the public schools lies within the protected area.[107]

The court indicated that complaints based on school regulations of the length of a male student's hair do not "directly and sharply implicate basic constitutional values" and are not cognizable in federal courts. For this reason, the court stated that the complaints should have been dismissed for failure to state a claim on which relief could be granted. The judgments of dismissal in the Utah and Colorado cases were affirmed, and the judgment in the New Mexico case was reversed and the case remanded with directions to dismiss.[108]

In a subsequent case, the Tenth Circuit Court of Appeals refused to hold that regulation prohibiting hair styles extending beyond shirt collar violated Pawnee Indian students' guarantees of freedom of speech, free exercise of religion,

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[106] Freeman v. Flake; White v. Board of Education of Hobbs Municipal School District No. 16; and Cranson v. East Otero School, District R-1, 448 F. 2d 258 (1971).

[107] Ibid., p. 261.

[108] Ibid., p. 262.

equal protection and due process.[109] The court held that the Indian students did not present a substantial constitutional question where the regulation bore a rational relationship to state objective of instilling pride and initiative in students; where the regulation was not drafted or enforced in such a way as to discriminate against Pawnee Indian students who wished to wear hair in long braids because of pride in their ancestry; and where it was not shown that the regulation was otherwise inherently suspect. Therefore, the court affirmed action of the district court in dismissing the complaint.[110]

The Eleventh Circuit Court of Appeals for the District of Columbia has been inconsistent in rulings concerning this issue, and therefore, no guidelines can be provided for schools within this circuit.[111]

As indicated above, states located in the First, Fourth, Seventh, and Eighth Circuits are prohibited from regulating dress and hair styles among students; those in the Fifth, Sixth, and Ninth Circuits may regulate them; and states in the Second and Tenth Circuits have no precedents except Tinker[112] to rely upon. Rulings within the Third and Eleventh Circuit Courts of Appeal have been inconsistent.[113]

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[109]New Rider v. Board of Education of Independent School District No. 1, Pawnee County, Oklahoma, 480 F. 2d 693 (1973).

[110]Ibid., p. 694.

[111]Connors, Student Discipline and the Law, p. 46.

[112]Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 2 L. Ed. 2d 731, 89 S. Ct. 733 (1969).

[113]Connors, Student Discipline and the Law, pp. 46-47.

While the issue of the constitutionality of dress and hair codes is still undecided, through court action over the past ten years, a more liberal view is being taken by the courts, with more courts accepting the idea that a student's dress is a means of personal expression. In most cases where courts have upheld school regulations on dress and hair, school administrators have clearly demonstrated a compelling reason for the regulations.[114]

Suspension and Expulsion

The legal principle is firmly established that school authorities have the right to suspend or expel from school any pupil who disobeys a reasonable rule or regulation. "Suspension" refers to the act of a professional member of the school staff in sending a student home, usually for a short period of time, or until the pupil conforms to a rule or regulation. "Expulsion" is an act of the school board, resulting in permanent or substantially permanent discharge of a student.[115]

The law has been established for some years that the right to an education is a property right which cannot be taken from a student without due process of law, as provided in the Fifth and Fourteenth Amendments to the United States

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[114] Ibid., p. 47.

[115] Edward C. Bolmeier, The School in the Legal Structure (Cincinnati: The W. H. Anderson Company, 1973), p. 278.

Constitution. The Fifth Amendment provides in part, "...nor shall any person be....deprived of life, liberty, or property without due process of law."[116]

The Fourteenth Amendment follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[117]

There are two types of due process, "procedural due process" and "substantive due process." Procedural due process makes it necessary that when one is to be deprived of life, liberty, or property, that person must be given notice of the proceedings against him or her, must be given an opportunity to defend himself or herself (a hearing), and the propriety of the deprivation, under the circumstances presented, must be resolved fairly.[118]

Substantive due process may be defined as the "constitutional guaranty that no person shall be deprived of his life, liberty, or property for arbitrary reasons."[119] Substantive due process involves a standard of reasonableness.

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[116] U. S. Const. amend. V.

[117] U. S. Const. amend. XIV.

[118] E. L. Bolmeier, Legality of Student Disciplinary Practices, pp. 37-38.

[119] Ibid., p. 39.

Such a deprivation must involve behavior which is forbidden by reasonable legislation which is reasonably applied, with laws operating equally.[120]

Early court cases invoking due process in student discipline dealt mainly with substantive due process. However, since In re Gault[121] was decided in 1967, procedural due process has come into sharper focus.[122] Although the main thrust of Gault was on limitations of juvenile courts, it established that the Fourteenth Amendment and Bill of Rights are applicable to all, regardless of age or status.[123] Courts require minimum standards of fairness and due process of law for students where suspension or expulsion from school is to be a punishment.

When suspension or expulsion is anticipated, school authorities should first examine state statutes for state requirements, and then determine requirements imposed by state and federal constitutions. Since most states have not adopted statutes setting procedures to be followed for suspension or expulsion of students, of most importance is the requirement of the Fourteenth Amendment to the United States Constitution that no person shall be deprived of "life,

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[120] Ibid.

[121] In re Gault, 387 U. S. 1 (1967).

[122] Bolmeier, Legality of Student Disciplinary Practices, p. 41.

[123] Ibid., pp. 44-46.

liberty, or property, without due process of law."[124]

The United States Supreme Court has extended due process requirements to all school suspensions, whether short-term or long-term.[125] Prior to 1975, immediate suspension for up to ten days could be rendered without any process at all.[126] In Goss v. Lopez,[127] however, the United States Supreme Court set up certain minimal procedures which must be followed before a student can be removed from school for even a short-term suspension.

The Supreme Court ruled that students have two interests which are entitled to due process protection. The first of these is the "property" interest in a public education. When a state chooses to provide a free public education for children and requires children to attend school, students acquire a property right which is protected by the Fourteenth Amendment. This property right cannot be taken away for misconduct without following minimum procedures required by the due process clause.[128]

The second interest held by students and protected by the Fourteenth Amendment is the "liberty" interest. The United States Supreme Court concluded that suspensions of up

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[124]Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 1.

[125]Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

[126]Farrell v. Joel, 437 F. 2d 160 (1971).

[127]Goss v. Lopez, 419 U. S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 725 (1975).

[128]Ibid., p. 727.

to ten days could seriously damage students' standing with other pupils and teachers, and interfere with opportunities for higher education and employment, thereby doing serious damage to their "liberty," which required minimum due process protections.[129]

Short-Term Suspensions

The Supreme Court has held that even suspensions of up to ten days are not so insubstantial that they should not be protected. The Court concluded:

> Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that a student's suspension from a public school may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.[130]

The Goss case[131] involved students who were suspended from school for misconduct for up to ten days without a hearing. One student alleged that he was an innocent bystander and was suspended without having an opportunity to tell his story. Suspension was made under an Ohio statute. The United States Supreme Court affirmed action of a three-judge district court which had declared the Ohio statute unconstitutional in that it permitted up to ten days' suspension without notice or hearing, either before or after suspension, and violated the due process clause, and found each suspension invalid.

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[129] Ibid., p. 735.

[130] Ibid., p. 728.

[131] Ibid., p. 730.

The Court outlined the following minimum procedures required by the Constitution's due process clause when public school students are to be suspended for ten days or less:

> 1. The student must be given oral or written notice of the charges against him.
>
> 2. If the student denies the charges, he must be given an explanation of the evidence against him.
>
> 3. The student must be given an opportunity to present his side of the story.[132]

The Court concluded that:

> 1. There need be no delay between the time notice is given and the time of the hearing.
>
> 2. In the great majority of cases, the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred.
>
> 3. In being given an opportunity to explain his version of the facts at this discussion, the student first must be told what he is accused of doing and what the basis of the accusation is.
>
> 4. Since the hearing may occur almost immediately following the misconduct, notice and hearing should, as a general rule, precede the removal of the student from the school.
>
> 5. However, there are recurring situations in which prior notice and hearing cannot be insisted upon.
>
> 6. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school.
>
> 7. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.[133]

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[132] Ibid., p. 729.

[133] Ibid.

Goss, therefore, determined that students have the right to a procedural due process hearing in suspensions of ten days or less, although the hearing may be informal and conducted quickly. The Court does not require a formal hearing with legal counsel and witnesses for short-term suspensions, but merely an informal give and take prior to suspension.[134]

The exception described in "5" above was applied by the Fifth Circuit Court of Appeals in a case where students were suspended from school by a radio announcement.[135] The Fifth Circuit Court pointed out that the educational process had been significantly disturbed when students left the school after staging a sit-down strike and disrupting classes; that since they did not return to school, hearings on the day of suspensions could not be held; that post-suspension conferences were held on Monday after suspension on Thursday; that these conferences sufficed as informal sessions where students could air their views; and that no violation of procedural due process took place.[136]

As indicated above, the United States Supreme Court has set up universally acceptable standards for short-term suspensions, which can be met in a matter of a few minutes in simple situations.[137]

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[134]Connors, Student Discipline and the Law, p. 16.

[135]Sweet v. Childs, 507 F. 2d 675 (1975).

[136]Ibid., p. 676.

[137]Connors, Student Discipline and the Law, p. 16.

Expulsions and Long-Term Suspensions

In general, students may be suspended or expelled for conduct which disrupts the educational process or endangers the health or safety of the student, classmates, or school personnel.[138] While the expulsion is not necessarily made pursuant to established school board regulations, most disciplinary actions are based on a breach of school regulations governing student conduct.

Since school regulations are usually involved in court cases, their language is significant. Several courts have found school regulations to be "unconstitutionally vague."[139] Courts have reached the conclusion that:

> A legislative act or statute which is so vague, indefinite and uncertain that courts are unable, by accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended, or which is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed, will be declared inoperative and void.[140]

A federal district court in Texas stated that while school rules probably do not need to be as narrow as criminal statutes, if school officials contemplate severe punishment, they must exercise such punishment on the basis of a rule which is drawn so as to reasonably inform the student what specific conduct is proscribed.[141]

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[138] Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 4.

[139] Eisner v. Stamford Board of Education, 440 F. 2d 803 (1971) and Baughman v. Freienmuth, 478 F. 2d 1345 (1973).

[140] Whitfield v. Simpson, 312 F. Supp. 889, 891 (1970).

[141] Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1330 (1969).

Requirements of minimal due process in school expulsion and long-term suspension cases involve three main concerns: notice which is adequate, a fair hearing, and substantial evidence to support disciplinary action.[142]

Notice

According to Robert E. Phay, the procedural due process requirement of proper notice obligates the school in several ways:

> 1. The school must forewarn the student of the type of conduct which will subject him to expulsion.
>
> 2. The school must give the accused student and his parents notice of the charges against him and the nature of the evidence supporting those charges.
>
> 3. The school must tell the accused student where and when the hearing will occur.
>
> 4. The school must inform the student of his procedural rights before a hearing.[143]

A federal district court in Illinois held that a duty imposed by statute must be prescribed in terms definite enough to serve as guide for those who must comply with it.[144] The student must understand the statute or regulation which sets out the conduct which will be subject to expulsion.

According to ruling of a federal district court in Ohio, the school must furnish immediate written notice to student and parents of the reason for a student's removal

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[142]Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 27.

[143]Ibid., pp. 7-9.

[144]Whitfield v. Simpson, 312 F. Supp. 889, 891 (1970).

from school and any proposed suspension, within twenty-four hours.[145] In Keller,[146] a district court also stated that a "student facing expulsion is entitled to timely and adequate notice of charges against him so as to allow him meaningful opportunity to be heard, even where student at hearing unequivocally admits conduct charged." In DeJesus,[147] a Connecticut court found that a student was denied due process when he was expelled on the basis of a charge of which he had neither notice nor opportunity to defend against.

The United States Court of Appeals for the Eighth Circuit ruled that when suspended high school students were told that they could attend a board meeting, but were not given notice of the time or place of the meeting, procedural due process was denied.[148]

Although several courts have held that a high school student must be given a minimum of five days' notice before a hearing on his expulsion, a Florida court ruled that due process was not offended where a university student was given only two days' notice that the president of the university would review case.[149]

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[145]Lopez v. Williams, 372 F. Supp. 1279, 1280 (1973).

[146]Keller v. Fochs, 385 F. Supp. 262 (1974).

[147]DeJesus v. Penberthy, 344 F. Supp. 70 (1972).

[148]Strickland v. Inlow, 519 F. 2d 744 (1975).

[149]Center for Participant Education v. Marshall, 337 F. Supp. 126, 127 (1972).

A Connecticut court suggested that school boards might "wish to consider the practice in use at many schools and colleges of giving accused students a brief written statement of all their rights at the same time they are notified of the charges against them."[150]

Hearing

While the "relationship between parents, pupils, and school officials need not be conducted in an adversary atmosphere with the procedural rules applicable in a court of law,"[151] the right to a fair hearing is the most fundamental aspect of procedural due process, and must be conducted in accordance with the basic principles of due process.[152]

Procedural requirements for a fair hearing were set out in a case concerning the expulsion of a college student in Alabama.[153] These requirements apply generally to secondary schools.[154] Requirements, according to Dixon,[155] include providing the student with names of witnesses, a report of facts to which each witness testifies, opportunity to present defense against charges, and the right to produce either oral testimony or written affidavits of witnesses.

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[150]DeJesus v. Penberthy, 344 F. Supp. 70, 77 (1972).

[151]Jackson v. Dorrier, 424 F. 2d 213 (1970).

[152]Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 10.

[153]Dixon v. Alabama State Board of Education, 294 F. 2d 150, cert. denied, 368 U. S. 930 (1961).

[154]Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 10.

[155]Dixon v. Alabama State Board of Education, 294 F. 2d 150, cert. denied, 368 U. S. 930 (1961).

In some instances, courts have held that the student may waive the right to a hearing. For example, a federal district court held that refusal of a student and his father to contact the superintendent following the student's dismissal constituted a waiver of right to any hearing with regard to subsequent dismissal.[156] Courts have also held that an absence or deficiency of an initial hearing may be cured by a later valid hearing. A district court in Texas ruled that:

> Any lack of due process in hearing held before principal was fully cured by hearing before board of trustees at which due process requirements were met.[157]

A Florida district court also stated that:

> District court cured any deficiencies which might have existed in prior administrative or quasi-judicial proceedings in relation to suspension of student from university by court's conducting a trial de novo in review of the suspension.[158]

However, a New York case held that when a suspended student had not responded to a school notice to contact the superintendent within five days to arrange the hearing, the school could not assume that student had waived right to a hearing.[159]

Courts are divided over whether the school must provide a transcript of the hearing upon student request,[160] and there

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[156]Grayson v. Malone, 311 F. Supp. 987 (1970).

[157]Greene v. Moore, 373 F. Supp. 1194, 1195 (1974).

[158]Center for Participant Education v. Marshall, 337 F. Supp. 126 (1972).

[159]MacDonald v. Tompkins, 323 N.Y.S. 2d 1002, 1003 (1971).

is a question as to whether students are entitled to have counsel at the hearing. Courts are divided as to whether due process requires students to have counsel. However, it is probable that few courts would find that a student has no constitutional right to legal counsel when a hearing could result in expulsion. Many school regulations and state statutes now provide for student representation by counsel at expulsion hearings. Robert E. Phay recommends that the school permit the student to have counsel if student feels strongly that only legal counsel can represent interests properly.[160]

A Texas district court ruled that "fundamental to the requirements of due process is the opportunity to be heard before a fair and impartial tribunal of some nature, composed of neutral and detached persons."[161] The court held that a student member of a high school honor society was denied procedural due process when the accusing witness who brought charges was a member of the council and sat as a judge in dismissal hearings.

While the student may call witnesses in a school disciplinary hearing, courts disagree over the rights to confront and cross-examine witnesses and to compel witnesses to attend the hearing. The Fifth Circuit held that the right to cross-

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[160]Phay, The Law of Procedure in Student Suspensions and Expulsions, pp. 12-15.

[161]Warren v. National Association of Secondary School Principals, 375 F. Supp. 1043, 1044 (1974).

examine witnesses is not required,[162] but a more recent case in North Carolina held that the right to confront and examine witnesses is a basic requirement of due process.[163]

A federal district court in California held that a comment by counsel on students' refusal to testify at expulsion hearing and arguments that guilt could be inferred from such refusal was a violation of students' Fifth Amendment rights.[164] The court stated that a high school student's expulsion might well bring about more injury than conviction of a criminal offense.

Evidence

Disciplinary action must be taken only if the charges are supported by "substantial evidence."[165] The following definition of "substantial evidence" was adopted by a federal court in Pennsylvania:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.... Accordingly, it 'must do more than create a suspicion of the established....it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury....' The substantiality of evidence must take into account whatever in the record fairly detracts from its weight....Congress has merely made it clear that a reviewing court is not barred from setting aside a board decision when it cannot conscientously find that the evidence supporting that

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[162]Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.), cert. denied, 368 U. S. 930 (1961).

[163]Givens v. Poe, 346 F. Supp. 202 (1972).

[164]Gonzales v. McEuen, 435 F. Supp. 460 (1977).

[165]Slaughter v. Brigham Young University, 514 F. 2d 622, 625 (1975).

> decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.[166]

Students who feel that disciplinary action was improper have the right of appeal. Most state statutes provide for expulsion by the school board or review by the board of such expulsion. In most states, an appeal can be made from a final administrative decision to a state court if students think they have been denied statutory or constitutional rights or that the administrator or school board has acted arbitrarily or capriciously. However, most actions arise in the federal courts under section 1983 of the Civil Rights Act of 1871.[167]

Corporal Punishment

It has been held by the courts that when pupils are in school, the "in loco parentis" concept applies. This doctrine holds that school authorities stand in the place of parents while the child is in school, and may inflict reasonable corporal punishment on the pupil to enforce discipline.[168] In Indiana State Personnel Board v. Jackson,[169] the court stated, "Teacher stands in loco parentis to child,

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[166]Still v. Pennsylvania State University, 318 F. Supp. 608 (M. D. Pa. 1970), aff'd., 315 F. Supp. 125 (M. D. Pa.), aff'd., 462 F. 2d 463 (3rd Cir. 1972).

[167]Phay, The Law of Procedure in Student Suspensions and Expulsions, pp. 31-32.

[168]Guerrieri v. Tyson, 24 A. 2d 468 (1942).

[169]Indiana State Personnel Board v. Jackson, 192 N. E. 2d 740 (1963).

and his authority is no more subject to question than is authority of parent."[170]

According to Bolmeier, legal principles derived from court cases indicate that any corporal punishment administered should:

1. Be in conformance with statutory enactment;

2. Be for the purpose of correction without malice;

3. Not be so cruel or excessive as to leave permanent marks or injuries; and

4. Be suited to the age and sex of the pupil.[171]

The most important cases tried in recent years concerning corporal punishment are Baker v. Owen (1975)[172] and Ingraham v. Wright (1977).[173] These two cases dealt with issues having to do with use of corporal punishment, and whether corporal punishment constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The Baker case was instituted in North Carolina by a sixth grade student and his mother against a school principal and others, claiming that constitutional rights had been

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[170]Ibid.

[171]Edward C. Bolmeier, The School in the Legal Structure (Cincinnati: The W. H. Anderson Company, 1973), p. 277.

[172]Baker v. Owen, 395 F. Supp. 294 (1975), aff'd., 423 U. S. 907 (1976).

[173]Ingraham v. Wright, 430 U. S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977).

violated when plaintiff student was given two licks by a teacher, after request by mother that school officials not impose corporal punishment on student. A three-judge federal district court held that while the Fourteenth Amendment liberty embraces the right of parents generally to control the means of discipline for children, "the state has a countervailing interest in the maintenance of order in the schools sufficient to sustain the right of teachers and school officials to administer reasonable punishment for disciplinary purposes....and that the spanking of the student in question did not amount to cruel and unusual punishment."[174]

As to due process, the court held that "teachers and school officials must accord students minimal procedural due process in the course of inflicting such punishment," as follows:

> Except for those acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience, corporal punishment may never be used unless student is informed beforehand that specific misbehavior will occasion its use and, subject to same exception, it should never be employed as first line of punishment for misbehavior, but should be used only after attempt has been made to modify behavior by some other means.
>
> Teacher or principal must punish corporally in presence of second school official, who must be informed beforehand and in student's presence of reason for punishment; student need not be afforded formal opportunity to present his side to second official.
>
> School official who has administered corporal punishment to student must provide child's parents,

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[174] Baker v. Owen, 395 F. Supp. 294 (1975), aff'd., 423 U. S. 907 (1976).

upon request, written explanation of his reasons and name of second official who was present.[175]

District court rulings were affirmed without comment by the Supreme Court in 1976. This case applied only to North Carolina.

On April 19, 1977, the Supreme Court affirmed the judgment of a Florida district court and a panel of the Fifth Circuit Court of Appeals, in Ingraham v. Wright,[176] holding that disciplinary paddling of public school students did not constitute cruel and unusual punishment in violation of the Eighth Amendment and that the due process clause did not require prior notice and a hearing before corporal punishment was administered.

The Eighth Amendment provides: "Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted."[177]

Plaintiffs' action was instituted to seek damages and injunctive and declaratory relief, and alleged that pursuant to a Florida law, students had been subjected to paddlings, without prior notice and a hearing, which were so severe as to keep one plaintiff out of school for eleven days and to deprive the other plaintiff of full use of his arm for a week; and that said paddlings were administered in violation of

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[175]Ibid., p. 296.

[176]Ingraham v. Wright, 430 U. S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977).

[177]U. S. Const. amend. VIII.

constitutional rights.[178]

The United States Supreme Court stated that the Eighth Amendment was designed to protect those convicted of crime and did not apply to disciplinary corporal punishment of public school children. The Court indicated that extension of the cruel and unusual punishment clause to corporal punishment of school children was not justified, because public schools are open to public scrutiny, are supervised by the community, and school officials are subject to legal constraints of the common law, so that excessive punishment could result in both civil and criminal liability for school officials under state law.[179]

The Court's reasoning for holding that the due process clause did not require prior notice and a hearing before the disciplinary paddling of students was that common law remedies preserved under state law were adequate to afford due process, and that requiring such advance procedural safeguards would burden the use of corporal punishment and intrude into the area of educational responsibility.[180]

The Fourth Circuit Court of Appeals recently decided a case which held that under certain circumstances, infliction of corporal punishment can violate a student's substantive due process rights.[181] This ruling is significant, because

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[178]Ingraham v. Wright, 430 U. S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977).

[179]Ibid., pp. 711-712.

[180]Ibid., p. 712.

[181]Hall v. Tawney, 621 F. 2d 607 (1980).

a student, in the proper kind of case, can recover damages under 42 U. S. C., Section 1983. In this case, the court stated that:

> ....the substantive due process inquiry in school punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.[182]

Allegations in the complaint indicated that student was struck with a rubber paddle across left hip and thigh; that she was shoved into a desk and had arm twisted by teacher; that student was paddled again by teacher with permission and in the presence of the principal; that student was hospitalized for ten days for treatment of injuries to hip, thigh, and buttock; and that student was receiving treatment of specialists for possible permanent injuries to lower back and spine. The court held that the complaint stated a cause of action against teacher and principal.[183]

While the Supreme Court has upheld the right of school officials to use corporal punishment, several states have banned the use of corporal punishment either through state statute or school board policy. In those states, the use of

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[182]Ibid., p. 614.

[183]Ibid., p. 607.

corporal punishment is illegal. Some local school boards have also banned or restricted the use of corporal punishment.[184] In Ingraham,[185] the Supreme Court indicated that excessive corporal punishment may violate state statutes, and that school officials could be liable for civil damages as well.

Search and Seizure

School administrators are often called upon to search students and property, principally in connection with drugs. These searches have prompted courts to seek to settle the issue of applicability of the Fourth Amendment to the school setting. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[186]

The basic purpose of the Fourth Amendment, as recognized in many decisions of the United States Supreme Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.[187]

Since the Amendment does not define what constitutes a

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[184]Connors, Student Discipline and the Law, p. 11.

[185]Ingraham v. Wright, 430 U. S. 651, 51 L. Ed. 2d 711, 712, 97 S. Ct. 1401 (1977).

[186]U. S. Const. amend. IV.

[187]Camara v. Municipal Court of the City and County of San Francisco, 387 U. S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967).

legal search nor what constitutes an unreasonable one, the courts have been asked to clarify these two questions.

Until the last few years, school officials' searches of students and lockers were rarely challenged on constitutional grounds. Most courts which had considered the question held that school personnel were considered private persons, not constrained by Fourth Amendment prohibitions against unreasonable searches and seizures by government officials.[188] An example of these holdings can be found in the 1970 ruling of the Court of Civil Appeals of Texas, as follows:

> Unreasonable seizure forbidden by Fourth Amendment is that taken through governmental actions, and security afforded by Amendment is not invaded by acts of individuals in which government has no part.
>
> Principal of high school who demanded that juvenile student disclose contents of his pockets was acting in loco parentis, and not for arm of government, thus discovery of marijuana upon such demand and upon threat to call student's father was not violation of juvenile's Fourth Amendment rights.[189]

During the 1970's, however, the courts began to hold that "activities of a principal cum parent must be considered as the activities of a state official giving rise to constraints which flow from the Bill of Rights."[190] Public school officials are now recognized as government officials

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[188]Allen J. Peterson, "Student Rights: A Changing Emphasis," N. C. Education 8, No. 5 (January 1978): 11.

[189]Mercer v. State, 450 S. W. 2d 715 (1970).

[190]Picha v. Wielgos, 410 F. Supp. 1214 (1976).

operating "in loco parentis."[191]

The Wisconsin Court of Appeals found that the Fourth Amendment applies, but that the doctrine of "in loco parentis" lowers the standard applied to determine reasonableness of search when the search is conducted primarily by school officials to further school purposes.[192] In developing this less stringent, "reasonable suspicion" standard, the courts place more weight on the "in loco parentis" doctrine and statutory responsibilities of school officials to protect the welfare and safety of students.[193] One court concluded that the "reasonable suspicion" standard protects students' rights by requiring school officials to show at least reasonable grounds for suspicions that an unlawful act is being committed, before justifying a student search when the school official is acting "in loco parentis."[194]

In analyzing a search to determine reasonableness, "the court must weigh the danger of the conduct, evidence of which is being sought, against the students' right of privacy and the need to protect them from the humiliation and psychological harms associated with such a search."[195] In making an analysis

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[191]Phay, Speech.

[192]L. L. v. Circuit Court of Washington County, 280 N.W. 2d 343 (1979).

[193]Robert E. Phay and George T. Rogister, Jr., "Searches of Students and the Fourth Amendment," Journal of Law-Education 5 (1976): 60.

[194]People v. Jackson, 65 Misc. 2d 209, 319 N.Y.S. 2d 731, 736 (1971), aff'd. 30 N.Y. 2d 734, 333, N.Y.S. 2d 167, 285 N.E. 2d 153 (1952).

[195]People v. D., 34 N.Y. 2d 483, 358 N.Y.S. 2d 403, 315 N.E. 2d 466 (1974).

as to reasonableness, some factors which warrant consideration are: student's age, student's history, and student's school record, seriousness and prevalence of problem to which search is directed and exigency requiring that an immediate, warrantless search be made.[196]

The Fourth Amendment prohibition against unreasonable searches has usually been interpreted as permitting a search only when:

1. The person whose interests are involved consents to the search; or

2. There is probable cause to search and a warrant has been issued to authorize such search; or

3. There is probable cause and exigent circumstances exist such that taking the time to obtain a warrant would frustrate the purpose for which the search is to be made; or

4. A valid arrest has been made and the search is incident to the arrest.[197]

When searches are made which do not comply with the above requirements, possible results are:

1. A criminal prosecution for violation of privacy;

2. A civil suit for violation of privacy;

3. Declaring of evidence inadmissible in a school proceeding;

4. Declaring of evidence inadmissible in a criminal proceeding.[198]

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[196]Bellnier v. Lund, 438 F. Supp. 47 (1977).

[197]Phay, Speech.

[198]Phay and Rogister, "Searches of Students and the Fourth Amendment," p. 58.

Research did not reveal any cases where school officials were criminally prosecuted. However, there are a growing number of cases where students are bringing civil suits against school officials, seeking damages for alleged deprivation of constitutional right to be free from unreasonable searches and seizures. Such an action was brought by eight high school students against school officials and the police, where students were subjected to a strip search after a ring had been taken. The court held that even though police made the search, if it could be shown that school officials participated with police in making statements and taking action coercing students to submit to search, school officials could be held personally liable.[199] It has been made clear by the United States Supreme Court that school officials are not immune from personal liability in such suits.[200]

Research did not reveal any cases involving school searches made by school administrators on school grounds where evidence was held not to be admissible in school disciplinary proceedings in elementary and secondary schools. In considering whether evidence is admissible in criminal proceedings, the courts consider the following questions:

1. Did the school official act alone or in concert with police?

2. Why was the search instituted? (Was the need to enforce school discipline or to discover evidence for criminal prosecution?)

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[199]Potts v. Wright, 357 F. Supp. 215 (1973).

[200]Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975).

3. What was the place searched?[201]

Searches by School Officials Acting Alone

Where school officials were acting alone and a search was made for the purpose of enforcing student conduct rules, the courts have held that the Fourth Amendment requires less stringent standards, and that contraband seized by school officials may be used in a court trial, provided the school can show "reasonable suspicion" or reasonable grounds. Evidence can be used in an expulsion from school or by the prosecutor in court.[202]

A New York court held that where a high school dean of boys received information from student informers concerning student defendants, had them come into his office and empty their pockets which contained narcotics, and where there was no basis for belief that the dean was acting for police, such evidence was admissible.[203]

The Supreme Court of Georgia held that:

> Searches of students by public school officials acting in their proper capacity without the involvement of law enforcement personnel for purpose of maintaining educational atmosphere are reasonable under Fourth Amendment on less than probable cause.[204]

The court held that search of a high school student by

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[201]Phay, Speech.

[202]Ibid.

[203]People v. Stewart, 63 Misc. 2d 601, 303 N.Y.S. 2d 142 (1970).

[204]State v. Young, 216 S. E. 2d 586 (1975).

an assistant principal, who observed furtive gestures on the part of the student and companions did not violate Fourth Amendment; and that the exclusionary rule did not require suppression of marijuana found on the student, regardless of whether search violated the student's constitutional rights, stating:

> Although public school officials are governmental officers subject to some Fourth Amendment limitations in searching their students, even if they violate those limitations, exclusionary rule is not available to students to exclude from evidence items illegally seized, but students are relegated to other remedies law affords them, whether by actions based upon claimed violation of their civil rights by state officers or by tort claim seeking damages.[205]

School officials must be able to show "reasonable suspicion," although the facts held to justify reasonable suspicion have varied from case to case. In Bellnier,[206] a district court stated:

> Where there were no facts which allowed school officials to particularize with respect to which pupil might have possessed allegedly stolen $3, search of entire fifth grade class was invalid under Fourth Amendment....
>
> For purpose of determining reasonableness of school officials' strip search of fifth grade pupils, court would determine search to be unreasonable unless there was demonstrated existence of some articulable facts which together provided reasonable grounds to search pupils and unless search was in furtherance of legitimate purpose with respect to which school officials were empowered to act, such as maintenance of discipline or the detection and punishment of misconduct.[207]

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[205]Ibid., pp. 586-587.

[206]Bellnier v. Lund, 438 F. Supp. 42 (1977).

[207]Ibid., pp. 47-48.

A 1979 case tried in a district court in New York held that an initial search of the book bag of a female high school student by a teacher, who had no information that the student had stolen the property in her possession, was invalid, as was a subsequent body search. The court concluded that the teacher's actions could not be defended on grounds that they were undertaken in good faith.[208]

In a 1974 case, the New York Court of Appeals ruled that the fact that a high school student was observed twice within an hour entering the toilet with a fellow student and exiting within five to ten seconds; that the student had been under observation for six months for possible dealing in drugs; and that the student had been observed having lunch with another student under suspicion did not justify the student's search by a teacher. The court held that the drugs taken from the student's wallet during the strip search were obtained illegally and should have been suppressed.[209]

Joint Searches by School Officials and Law Enforcement Officers

If a search is initiated by police and conducted jointly by school officials and police for the primary purpose of discovering evidence of a crime, courts have tended to hold that search and seizure standards applicable in criminal cases must be met.[210]

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[208]M. M. v. Anker, 477 F. Supp. 837 (1979).

[209]People v. Scott D., 315 N. E. 2d 466 (1974).

[210]Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 44.

In a civil action for damages against school officials, a United States district court in Illinois held that even where school officials had initiated the search and called on police before conducting it, when the search was at least partly a quest for illegal items, civil rights violation could be found by jury if police proximately caused any student to be searched without probable cause to believe student was breaking the law by possessing an illegal substance on person. The court stated that:

> School officials cannot claim immunity when they violate the well-settled rights of their students.... No case can be found contradicting the notion that when a government official works with the police to conduct a search which is, at least in part, in the nature of a criminal investigation, and which occasions such an invasion of privacy as in the present case, that search is subject to the reasonableness of the Fourth Amendment.[211]

In a case involving a warrantless search of two college students' dormitory rooms, the Fifth Circuit Court of Appeals stated that where a warrantless search of dormitory rooms had been conducted by university officials and police narcotics agents (after law enforcement agents had informed the university that they had information that drugs were in the rooms of several students and asked permission to search the rooms), the drugs recovered were inadmissible as evidence in court because they were the fruit of an unreasonable search. The court held that the university did not have the right to consent to a search

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[211]Picha v. Wielgos, 410 F. Supp. 1214, 1215 (1976).

for evidence "for the primary purpose of a criminal prosecution."[212]

The search of a high school student by a school security guard, employed by the board of education to maintain school safety and control student crime and disturbances, was held to be unlawful, and the marijuana seized was held inadmissible as evidence in a criminal charge. The guard stopped a student in the school corridor because he was wearing a coat fitting the description of a coat worn by a person who had stolen a watch, and not because he suspected the defendant of possessing drugs. The guard asked defendant student to empty his pockets when he saw a brown envelope protruding from the pocket of defendant's pants. The envelope contained marijuana. The court found that the security guard was acting as an agent of the city government, cloaked with police powers; that he acted on the "skimpiest of hunches;" and that the "case involved neither probable cause for a lawful arrest nor consent nor abandonment nor exigent circumstances."[213]

When school officials, in seeking to maintain order and to determine whether a school regulation or criminal statute has been violated, have asked for police assistance in conducting a search, the lesser "reasonable suspicion" standard has usually been applied. Courts have concluded that police

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[212]Piazzola v. Watkins, 442 F. 2d 284 (1971).

[213]People v. Bowers, 339 N. Y. S. 2d 783 (1973).

may conduct the search based on the reasonable suspicion of school officials.[214] However, as pointed out above, Picha[215] is an exception to this rule.

The Supreme Court of Illinois held that officers who searched a student and removed a gun from the student's pants pocket could reasonably search the student immediately after having been informed by school officials that school had anonymous information that student had a gun. The gun was found to be admissible as evidence at student's delinquency hearing.[216] A New York court held that when a patrolman was summoned after narcotics were found on a student, the narcotics were admissible as evidence.[217]

As indicated earlier, however, the court in Picha[218] held that a jury could find civil rights violation if police proximately caused a student to be searched without probable cause to believe that the student was breaking the law by possessing an illegal substance.

Nature of Place Searched

In determining the applicability of the Fourth Amendment to school searches and the standards to be applied, the courts have looked closely at the nature of the place to be searched.

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[214]Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 44.

[215]Picha v. Wielgos, 410 F. Supp. 1214 (1976).

[216]People v. Boykin, 237 N. E. 2d 460 (1968).

[217]People v. Stewart, 63 Misc. 2d 601, 313 N. Y. S. 2d 253 (1970).

[218]Picha v. Wielgos, 410 F. Supp. 1214 (1976).

The nature of the place searched may determine whether the person had a reasonable expectation of privacy in that place.[219] Cases in elementary and high schools have dealt mainly with searches of student lockers and searches of students' persons.

Searches of Student Lockers

Two cases which reached the United States Supreme Court give help in determining how far a school administrator may go in searching school lockers. In People v. Overton,[220] the facts indicated that three police detectives presented a search warrant to a high school vice-principal which appeared to authorize search of two students and lockers. When nothing was found in search of students, the vice-principal opened the school locker of one student, and found four marijuana cigarettes. Although the warrant as to school lockers was later declared defective, the court denied motion of Overton to suppress the contents of the search, on the grounds that the vice-principal had voluntarily consented to search, and that he had the right to do so.

Overton's conviction was reversed by the Appellate Term of the Supreme Court, where the court held that since consent for search was induced by search warrant, it was not freely

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[219]Phay, The Law of Procedure in Student Suspensions and Expulsions, p. 46.

[220]People v. Overton, 20 N. Y. 2d 360, 283 N. Y. S. 2d 22, 229 N. E. 2d 596, vacated and remanded, 393 U. S. 85 (1968), original judgment aff'd. at 24 N. Y. 2d 522, 301 N. Y. S. 2d 479, 249 N. E. 2d 366 (1969).

given. The New York Court of Appeals reversed the decision of the Supreme Court Appellate Term and reinstated the original conviction. The court stated:

> It is doubtful if a school would be properly discharging its duty of supervision over the students if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, he was obligated to inspect the locker. This interest, together with the nonexclusive nature of the locker, empowered him to consent to the search by the officers.[221]

The case was then appealed to the United States Supreme Court, which vacated the judgment of the New York Court of Appeals and remanded the case back to the New York courts for further consideration in light of the Supreme Court decision in Bumper v. North Carolina.[222]

Bumper[223] held that a search could not be justified as lawful when consent to search was given only after the official conducting the search had asserted that he possessed a search warrant. In a rehearing of the Overton case by the New York Court of Appeals, the court reaffirmed the previous conclusion, holding that the Bumper decision was not relevant, because the vice-principal had consented to the search without coercion by the search warrant.[224]

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[221] Ibid., pp. 362-363.

[222] Bumper v. North Carolina 391 U. S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (1968).

[223] Ibid.

[224] People v. Overton, 20 N. Y. 2d 360, 283 N. Y. S. 2d 22, 229 N. E. 2d 596, vacated and remanded, 393 U. S. 85 (1968), original judgment aff'd. 24 N. Y. 2d 522, 301 N. Y. S. 2d 479, 249 N. E. 2d 366 (1969).

A more recent decision in Kansas held that school authorities have the right to search a student's locker without a search warrant upon reasonable belief that a locker contains something which is prohibited. In Stein,[225] the Kansas Supreme Court upheld a burglary conviction based on the discovery of stolen goods in a bus station locker, which was opened with a key recovered from defendant's school locker. The defendant had consented that the principal open the school locker in the presence of police. The court upheld the search on the basis of the consent and the nature of the school locker. The court concluded that while the student could control the locker as opposed to other students, possession was not exclusive against school and its officials. The court pointed out that the principal had a master list of all lock combinations and a key to open all school lockers. The court considered the right of inspection of lockers inherent in the authority vested in school administrators to manage schools and protect students.[226]

Based upon these cases, it appears that evidence which has been seized by school officials from a student's locker without warrant or the student's permission may be introduced in a criminal trial, when school officials had reasonable grounds for search. Also, school officials may authorize a police search when they have reasonable grounds to believe that

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[225]State v. Stein, 203 Kan. 638, 456 P. 2d 1 (1969), cert. denied 397 U. S. 947 (1970).

[226]Ibid.

a crime has been committed and that evidence of the crime may be within the locker.[227]

However, even if warrants are not required for searches of lockers by school officials, such a search cannot be classified as administrative unless it is a general search of all lockers for the purpose of enforcing school regulations of health, safety or order (general searches for rotting food, missing library books, etc.). The searches approved in the cases above involved searches focusing on individual students, seeking evidence of violations of school regulations and criminal statutes.[228]

Search of a Student's Person

Most courts have upheld the "reasonable suspicion" standard in testing the legality of a search of the student's person. However, the Second Circuit Court of Appeals, while upholding the "reasonable suspicion" standard in a 1979 case, stated that as the intrusiveness of the search intensifies, the

> standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context. Thus, when a teacher conducts a highly intrusive invasion such as the strip search in this case, it is reasonable to require that probable cause be present.[229]

In M. M. v. Anker,[230] a fifteen-year-old student sued school administrators for violation of Fourth Amendment rights against an unreasonable search. The girl had been discovered

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[227]Phay and Rogister, "Searches of Students and the Fourth Amendment," p. 66.

[228]Ibid., pp. 66-67.

[229]M. M. v. Anker, 607 F. 2d 589 (1979).

[230]Ibid.

after a fire drill, crouched behind a door with another student's pocketbook. She had also taken down some classroom posters to give to her sister. The student gave the pocketbook up when another student claimed it. Although no theft had been reported, the dean searched the student, stating that the reason for search was the desire to clear the student in the event she was accused of stealing. Upon request, the student dumped the contents of the bookbag onto the table. When the dean reached for a bus pass holder, the student grabbed it. The dean stated that she saw what appeared to be a marijuana pipe in holder. M. M. refused to surrender the holder and threw it onto a table, from which it fell to the floor and was retrieved by the student. When the student made a tucking motion at the waistband of her jeans as she handed the holder back, the dean had a search of the room made for the pipe, which was not found. Female security guards then searched the student down to her underwear. The search produced nothing.

A jury returned a verdict for the school administrators, finding that reasonable grounds for search existed, and that it was not unreasonably intrusive. The judge reversed the jury and directed a verdict against defendants, stating that the information upon which the search was made did not even come up to the lower "reasonable suspicion" standard. The judge stated:

> To justify searching a high school child for a possible stolen object, it is indispensable that there be a reliable report that something is missing, and not a

> report, however reliable, that the suspected student had an opportunity to steal.[231]

In another 1979 case,[232] an Indiana district court held that a nude search of a student solely upon continued alert of a trained drug-detecting canine was unreasonable. In Doe, school administrators had a canine drug-detection team brought into junior and senior high schools in Highland, Indiana, and asked for assistance of police after the problem of illicit drug use had become more and more acute. School administrators made it clear to police that criminal investigations were not to be made as a result of any evidence recovered. School officials did intend, however, to bring necessary disciplinary actions against students possessing drugs or drug paraphernalia. During the inspection by the canine team, body searches were conducted with respect to eleven students, because the dog continued to alert to them. As a result of body searches and emptying of pockets or purses, seventeen students were found in possession of drugs.

However, plaintiff, who was one of the students on whom a body search was conducted, informed officials that she had never used marijuana, and no drugs were found on her, although the dog had alerted to her approximately fifty times. It was later discovered that plaintiff had been playing with a dog themorning of the search, and that the dog had been in heat.

The court held that the presence of the marijuana-sniffing dog and its trainer in the school classrooms for the purpose of aiding school administrators in observation for

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[231] M. M. v. Anker, 477 F. Supp. 837, 839 (1979).

[232] Doe v. Renfrow, 475 F. Supp. 1012 (1979).

drug abuse was not, of itself, a "search;" that the walking up aisles and sniffing by the dog were not violations of students' constitutionally protected rights, where school officials had independent evidence indicating drug abuse within the school and evidence from students of refusal to speak out against drug users for fear of reprisals; that search of student's pockets was an invasion of the sphere of privacy protected by the Fourth Amendment, but that the alert by the marijuana-sniffing dog constituted reasonable cause to believe that student was concealing narcotics, and thus, there was no violation of student's Fourth Amendment rights; but that the conducting of nude search solely on the continued alert of a trained drug-detecting canine, without existence of other facts which would reasonably lead school officials to believe a student possessed drugs, was unreasonable even under the lesser "reasonable cause to believe" standard applicable to school searches.[233]

In a 1980 case,[234] a United States district court in Texas held that public school officials' subjection of students and automobiles to a blanket "sniff-search" by a dog trained to detect illegal drugs constitutes unreasonable search prohibited by the Fourth Amendment. The court viewed the dog's inspection as being virtually equivalent to a physical entry into students' pockets and personal possessions. The

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[233]Ibid., p. 1013.

[234]Jones v. Latexo Independent School District, 49 U.S.L.W. 2232 (1980).

court further stated that the announcement by school officials that individual rights were about to be infringed through surprise inspections by the dog could not justify the subsequent infringement. The court was critical of the approval of blanket sniff-search in Doe.[235]

A strip search of a fifth grade class where school officials had no facts to particularize with respect to which pupil might have possessed stolen money, was found to be invalid under the Fourth Amendment.[236]

Although most courts have upheld the "reasonable suspicion" standard, as searches become more intrusive, involving strip searches, it is evident that the standard rises.[237]

The United States Supreme Court has not decided any cases governing Fourth Amendment rights of public school students. The law relating to balancing of students' constitutional rights and the interests of the state in maintaining order and discipline in the public school is one of the most rapidly changing areas of school law. Although recognizing Fourth Amendment protection of students from "unreasonable" searches by school officials, courts in defining reasonableness have usually struck the balance in favor of order and discipline in the schools.[238]

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[235]Doe v. Renfrow, 475 F. Supp. 1012 (1979).

[236]Bellnier v. Lund, 438 F. Supp. 47 (1977).

[237]Phay, Speech.

[238]Phay and Rogister, "Searches of Students and the Fourth Amendment," p. 72.

Marriage and Parenthood

A number of cases have been tried concerning rules and regulations dealing with married students, pregnant students, and students who have become parents. Courts have attempted to determine the extent to which school authorities can deny or restrict the right to attend the public schools and to participate in extracurricular activities.

School Attendance

The courts have established that students cannot be prohibited from school attendance on a permanent basis solely because of marriage.[239] A Texas court held that a school board rule excluding married students from school, upon grounds that when a student married, he or she became an adult and could no longer be considered a youth, was void.[240]

It has also been judicially determined that a school board cannot compel school attendance of married students.[241] In a Louisiana case, the court held that a married, fourteen-year-old girl could not be compelled to attend school, because she had been "irrevocably emancipated."[242]

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[239] McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

[240] Alvin Independent School District v. Cooper, 404 S. W. 2d 76 (1966).

[241] State v. Priest, 210 La. 389, 27 S. 2d 173 (1946).

[242] In re State in Interest of Goodwin, 214 La. 1062, 39 S. 2d 731 (1949).

In recent years, courts have invalidated school board rules prohibiting school attendance by unwed mothers or pregnant, unwed girls. The position of the courts seems to be that such girls should be given the opportunity for rehabilitation and a future education.

In Perry v. Grenada,[243] two unwed mothers had been refused readmission to school, pursuant to a school board ruling. The court stated that "any rule which fastens on one wrong, and never permits a person to change his position or condition is indeed on tenuous grounds." The court ruled that the plaintiffs were entitled to readmission, unless on a fair hearing, they were found to be so lacking in moral character that their presence would taint the education of other students. The court made the following statement:

> But the fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman, undeserving of any chance for rehabilitation or the opportunity for future education.[244]

An action was brought by a fifteen-year-old mother in Georgia, challenging school officials' denial of her readmission as a regular, daytime student. The school had offered her the opportunity to attend night school. The court held that the school policy requiring students who marry or become parents to attend a fully accredited night school did not penalize plaintiff nor deprive her of any entitlement. However,

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[243]Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (1969).

[244]Ibid.

the court stated that the defendants' policy of requiring the plaintiff to pay night school tuition and to provide her own textbooks was unconstitutional, and defendants were permanently enjoined from taking such action.[245]

An unmarried, pregnant student in a Massachusetts high school was told by the principal that she must stop attending regular classes in the school. The student was given permission to use school facilities after school hours, to seek help from teachers after school, to receive free tutoring, and to be tested by teachers. The student brought action against the principal and school committee, seeking an injunction which would require school officials to allow her to attend school on a full-time, regular class hour basis. The court ordered school authorities to readmit plaintiff to regular attendance.[246]

Extracurricular Activities

Until 1972, courts had upheld the power of school boards to limit participation of married students in extracurricular activities. Since 1972, however, an opposite judicial view has predominated.[247]

The Michigan Supreme Court affirmed by a divided court in 1960 that a school district had not violated the statute

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[245]Houston v. Prosser, 361 F. Supp. 295 (1973).

[246]Ordway v. Hargraves, 323 F. Supp. 1155 (1971).

[247]E. Edmund Reutter, Jr., and Robert R. Hamilton, The Law of Public Education (Mineola, New York: The Foundation Press, Inc., 1976), p. 2.

guaranteeing all students an equal right to public educational facilities by excluding married high school students from participation in co-curricular activities.[248]

A rule precluding married high school students from participating in extracurricular activities was held to be valid in preventing a married student from playing basketball in an Ohio high school in 1962.[249]

In 1967, it was held by the Iowa Supreme Court that a school board rule barring participation in extracurricular activities by married students was based on reasonable grounds and did not deny a student equal protection.[250]

A change in judicial thinking became apparent in 1972, when a United States district court in Houston, Texas, rendered judgment in favor of a student, enjoining school authorities from enforcing a regulation pertaining to married students' exclusion from extracurricular activities. In this action, brought by a married, sixteen-year-old girl, the student had been excluded from participation in the chess club, on-stage participation in drama and choir, and eligibility for membership in the National Honor Society. The court made the following statement:

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[248]Cochrane v. Board of Education of the Mesick Consolidated School District, 103 N. W. 2d 569 (1960).

[249]State of Ohio ex rel. Baker v. Stevenson, 189 N. E. 2d 181 (1962).

[250]Board of Directors of the Independent School District of Waterloo v. Green, 147 N. W. 2d 854 (1967).

> Any and all extracurricular activities cannot rationally or legally be disassociated from school courses proper where they do or may form an element in future collegiate eligibility or honors as here. Such a practice is not only discriminatory on its face, but is fundamentally inconsistent with the state's promise of a public education for its youth upon an equal basis.[251]

Another case heard in 1972 concluded with a similar finding when the court held that a regulation prohibiting married students from participating in extracurricular activities infringed upon married students' fundamental right to marry.[252]

In Davis v. Meek,[253] an Ohio district court entered judgment that a school board rule excluding married students from extracurricular activities was an improper invasion of marital privacy, and issued an injunction against the school board.

An injunction was granted against the school district in Moran v. School District,[254] restraining it from enforcing a rule concerning prohibition of married students' participation in extracurricular activities against plaintiff student. A Texas district court ruled that a school district's policy of excluding married students from engaging in interscholastic league athletic activities was unconstitutional.[255]

In 1974, the Texas Court of Civil Appeals held that a regulation prohibiting married high school students from

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[251]Romans v. Crenshaw, 354 F. Supp. 868 (1972).

[252]Holt v. Shelton, 341 F. Supp. 821 (1972).

[253]Davis v. Meek, 344 F. Supp. 298 (1972).

[254]Moran v. School District No. 7, Yellowstone County, 350 F. Supp. 1180 (1972).

[255]Hollon v. Mathis Independent School District, 358 F. Supp. 1269 (1973).

participating in extracurricular activities was violative of the equal protection clause.[256]

In 1977, it was ruled by the Colorado Court of Appeals that school board policy prohibiting married students from participating in extracurricular activities was invalid as a denial of equal protection under the Fourteenth Amendment. The court held that students had a fundamental right to enter the marriage relationship, and the reasons given by the school board for the policy did not establish a compelling state interest to justify violation of this right.[257]

It is evident from court rulings that students cannot be excluded from extracurricular activities solely because they are married.

Rights of Handicapped Children

Since 1954 when the United States Supreme Court established the principle that all children must be guaranteed equal educational opportunity,[258] courts have been active in deciding cases regarding the right to equality of educational opportunity for handicapped children. They have established that right.

Where selected students have been excluded from school under discriminatory practices, courts have strictly scrutinized the decisions of educators. The United States Supreme Court has implied that any attempt by a state to deny completely

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[256]Bell v. Lone Oak Independent School District, 507 S. W. 2d 636 (1974).

[257]Beeson v. Kiowa County School District, 567 P. 2d 801 (1977).

[258]Brown v. Board of Education of Topeka, 347 U. S. 483 98 L. Ed. 873, 74 S. Ct. 686 (1954).

a public education to selected children would be seen as impairing a fundamental right of liberty.[259]

Lower courts have focused on rulings relating to total exclusion of certain children from public schools. A class action was instituted in Pennsylvania under the Civil Rights Act of 1871, on behalf of all retarded persons between the ages of six and twenty-one who were excluded from public education. A three-judge panel of the federal district court for the eastern district of Pennsylvania held in a consent judgment that no child in Pennsylvania could be denied admission to a public school program or have educational status changed without procedural due process of law. The state was declared obligated to place each "mentally retarded child in a free, public program of education and training appropriate to his capacity."[260] This was the first case in what has become a national movement to establish the principle that all handicapped children have a constitutional right to a public education.[261]

The principle established in the Pennsylvania consent order was followed in Mills v. Board of Education,[262] a Washington, D. C., case which expanded the right to an appropriate public education beyond the mentally retarded to all children labeled as behavioral problems, mentally retarded,

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[259]San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973).

[260]Pennsylvania Association for Retarded Children v. Commonwealth, 343 F. Supp. 279 (1972).

[261]Martin, The Impact of Current Legal Action on Educating Handicapped Children, p. 11.

[262]Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (1972).

emotionally disturbed, or hyperactive. The district court held that the conduct of the District of Columbia board of education in denying children labeled as behavioral problems, mentally retarded, emotionally disturbed, or hyperactive and their class, a publicly supported education while providing such education to other children violated the due process clause.[263] Since this ruling was made on a constitutional issue, it established stronger legal precedent than the consent order issued in the Pennsylvania case.[264] The court further ruled that due process of law required a hearing before children who had been labeled behavioral problems, mentally retarded, emotionally disturbed, or hyperactive, were suspended or expelled from regular schooling in publicly supported schools or reassigned for specialized instruction.[265]

In Mills, the judgment stated that:

> No child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative.[266]

The court adamantly stressed that no student could be excluded from publicly supported education on the basis of

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[263]Ibid., p. 867.

[264]McCarthy and Thomas, "The Right to an Education: New Trends Emerging from Special Education Litigation," p. 78.

[265]Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (1972).

[266]Ibid., p. 878.

a claim of insufficient resources and that inadequacies of the District of Columbia public school system, whether occasioned by insufficient funding or administrative inefficiency, could not be permitted to bear more heavily on the exceptional or handicapped child than on normal children.[267]

Since the P.A.R.C. and Mills cases, forty-six cases have been instituted in twenty-eight states concerning the right to an education for handicapped children.[268] Recent years have brought about a judicial trend toward mandating full educational services for the "special" child. Courts have ordered states to provide individually designed instructional programs which are appropriate to the unique needs of the handicapped and other "special" children.[269]

The subject of expulsion of a disruptive, handicapped student was dealt with by a Connecticut court in Stuart v. Nappi,[270] when the court clearly implied that expulsion cannot be used by administrators to handle handicapped children's discipline problems. An Indiana district court in Doe v. Koger,[271] a 1979 case, held that before a disruptive, handicapped student can be expelled, it must be determined whether

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[267]Ibid., p. 867.

[268]Martin, The Impact of Current Legal Action on Educating Handicapped Children, p. 12.

[269]McCarthy and Thomas, "The Right to an Education: New Trends Emerging from Special Education Litigation," p. 86.

[270]Stuart v. Nappi, 443 F. Supp. 1235 (1978).

[271]Doe v. Koger, 480 F. Supp. 224 (1979).

the child's handicap is the cause of the propensity to disrupt. The court stated that expulsion of a handicapped child from school did not deny equal protection so long as the handicapped student was subjected only to the same disciplinary sanctions as other students.

In another 1979 case, the Iowa Supreme Court ruled as follows:

> Statutory power for school districts to expel any scholar from school includes power to expel a special education student, but in such cases, expulsion procedures must include re-evaluation of the child by diagnostic-educational team, a report, and recommendation by that team to school board, and after full hearing, determination by school board whether an alternative placement will meet needs of the child and the district; expulsion should be resorted to only when no reasonable alternative placement is available.[272]

The right to nondiscriminatory evaluation in assigning children to special education classes was asserted in Hobson v. Hansen,[273] where the use of test scores for placing students in various ability tracks was attacked as unconstitutional. The court entered a decree enjoining defendants from operating the track system in the District of Columbia public schools.

A ruling concerning IQ scores was made in Larry P. v. Riles,[274] when the court ordered that the San Francisco Unified School District be restrained from placing black students in classes for the educable mentally retarded on the basis of criteria which placed primary reliance on the results of I. Q. tests, if the consequence is racial imbalance in the composition of such classes.[275]

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[272]Southeast Warren Community School District v. Department of Public Instruction, 285 N. W. 2d 173 (1979).

[273]Hobson v. Hansen, 269 F. Supp. 401, 408 F. 2d 175 (1969).

[274]Larry P. v. Riles, 343 F. Supp. 1306 (1972).

[275]United States v. Texas, 342 F. Supp. 24 (1971).

The right to appropriate programs of instruction was provided through a court ruling that discrimination exists when bilingual educational programs are not provided for non-English-speaking students.[276]

Courts have generally upheld the right to least restrictive placement for handicapped children, indicating that they are to be included in a regular educational program in preference to a special program, and in the regular school environment rather than in the special school.[277]

The right to procedural due process has been established in the P.A.R.C., Mills, and LeBanks cases.[278] The handicapped child and his/her parents have rights to notification before the school takes action with respect to a child's educational claims, to a hearing before an impartial tribunal, to have case presented by counsel and expert witnesses, to confront and cross-examine witnesses, to have access to school records, to have the tribunal's decision based on evidence presented, and to appeal.[279]

A recent landmark in the history of education for the handicapped is Public Law 94-142, the federal "Education for All Handicapped Children" Act,[280] which was signed into

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[276]H. Rutherford Turnbull, III, "The Past and Future Impact of Court Decisions in Special Education," Phi Delta Kappa (April 1978): 525.

[277]Ibid.

[278]Ibid.

[279]Ibid.

[280]U. S. Department of HEW, "Education of Handicapped Children and Incentive Grants Program: Assistance of States," 41 Fed. Reg. 46966-46998 (1976).

law on November 29, 1975, and which became effective October 1, 1977. The law expands, improves, and diversifies special education opportunities for handicapped children.[281] Its four major purposes are said to be to:

> 1. Guarantee the availability of special education programming to handicapped children and youth who require it.
>
> 2. Assure fairness and appropriateness in decision-making with regard to providing special education to handicapped children and youth.
>
> 3. Establish clear management and auditing requirements and procedures regarding special education at all levels of government.
>
> 4. Financially assist the efforts of state and local government through the use of federal funds.[282]

Operating in conjunction with P. L. 94-142 is Section 504 of P. L. 93-112 (the "Rehabilitation Act of 1973"),[283] a basic civil rights provision with respect to terminating discrimination against America's handicapped citizens, which reads:

> No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[284]

Both P. L. 94-142 and Section 504 assure handicapped

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[281] Pennsylvania School Journal, "Education for the Handicapped," Education Digest XLIII, No. 7 (March, 1978): 12.

[282] Joseph Ballard and Jeffrey Zettel, "Public Law 94-142 and Section 504: What They Say About Rights and Protections," Exceptional Children 44, No. 3 (November, 1977): 177-178.

[283] U. S. Department of HEW, "Nondiscrimination on Basis of Handicap: Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 42 Fed. Reg. 22676-22702 (1977).

[284] Ibid.

children that they may not be excluded from any federally funded school program. P. L. 94-142 requires that each eligible handicapped child receive an education designed to meet unique learning needs at no cost to the parents.[285] It also provides for placement of a child in the least restrictive environment, insures procedural safeguards of due process and confidentiality of reports and records pertinent to handicapped child's education, and requires that inservice training be provided to regular and special educators.[286]

The law requires that an Individualized Educational Program (IEP) be devised for each child in special education. Contents of the IEP include the following:

1. A statement of the child's present level of educational performance.

2. Annual goals and short-term instructional objectives contributing to the annual goals.

3. A statement of the extent to which the child will be able to participate in a regular education program.

4. A statement of the specific educational services to be provided.

5. A statement of appropriate criteria, evaluation procedures, and schedules.

6. The projected date for initiation of services and anticipated duration of such services.[287]

In a 1980 case, the Fifth Circuit Court of Appeals ruled

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[285]Josephine Hayes and Scottie Torres Higgins, "Issues Regarding the IEP: Teachers on the Front Line," Exceptional Children 44, No. 4 (January, 1978): 267.

[286]Ibid., pp. 268-269.

[287]Pennsylvania School Journal, "Education for the Handicapped," pp. 14-15.

in a case dealing with the IEP for a handicapped child who suffered from a neurogenic bladder which prevented her from being able to empty her bladder voluntarily. Parents brought action against the school district for alleged violation of the Education for All Handicapped Children Act of 1975, for failure to include the scheduling of clean instrument catherization in the child's IEP. The court held that clean instrument catherization was a "supportive service" required to assist this handicapped child to benefit from special education for purpose of Education for All Handicapped Children Act of 1975, and that failure to include in her IEP a plan for clean instrument catherization violated provision of Rehabilitation Act of 1973, which mandated that "no otherwise qualified individual shall be excluded from participation in or be subjected to discrimination under any program or activity receiving federal financial assistance by reason of his handicap."[288]

It appears that the rights of handicapped children to an equal education are receiving much attention in the courts and as the result of recent laws. Only those cases in which principals might be involved in some way have been discussed here. Cases concerning payment of educational costs for handicapped children, those dealing with provision of year-round instruction, and other cases where school board provision of services is in litigation were not reported.

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[288]Tatro v. State of Texas, 625 F. 2d 557 (1980).

CHAPTER V

THE PRINCIPAL AND TORT LIABILITY

Numerous court actions seeking damages for tort liability have been filed against principals and other school personnel. These are cases which involve civil wrongs not related to contracts. Damages are sought by the injured party (plaintiff) from the person who allegedly committed the tort or caused the injury (defendant).

Categories of Torts

There are two major categories of torts: Intentional torts and negligence. Intentional torts grow out of a person's invading the rights of another. Assault and battery and defamation would fall into this category. Since most cases involving the principal allege negligence, the emphasis of this chapter will be on that category.

Negligence has been defined in Morris v. Ortiz[1] as "failure to act as a reasonable and prudent person would act in like circumstances." This case also stated that "Before liability may be imposed for an act or failure to act, prevision of a reasonable person must be able to recognize danger of harm to plaintiff or one in plaintiff's situation."

Negligence under one situation may not be negligence

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[1]Morris v. Ortiz, 437 P. 2d 652 (1968).

in another. Each case must be decided on the basis of the situation against a general set of criteria.

Criteria Applicable to Tort Actions

Criteria applicable to tort actions typically include the following four questions:

> 1. Within the given situation, did one owe a standard of care, a duty, to another? That is, was the individual expected to supervise, maintain a safe environment, or give proper instruction?
>
> 2. Did one fail to exercise that standard of care or duty? That is, was the individual derelict in supervising, maintaining a safe environment, or giving instructions?
>
> 3. Was there an accident in which a person was injured? Did one actually suffer some kind of loss or injury?
>
> 4. Was the failure to exercise due care the proximate (direct) cause of the injury? The cause of the injury must first be established, then it must be shown that there was some connection between it and one's failure to exercise due care.[2]

There are two tests which are usually applied in determining liability on the part of school administrators. The first is the "reasonable and prudent" test. When one's actions fall below the standard of care expected of any "reasonable and prudent" person, resulting in an injury, negligence is established. However, according to McGhehey,[3]

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[2]H. C. Hudgins, Jr. and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions (Charlottesville: The Michie Company, 1979), p. 72.

[3]McGhehey, Speech.

the test in a school situation is viewed somewhat differently from that in other cases. Here the court will be asking, "What would the average teacher or principal have done? What standard of care should be exercised by the teacher or principal in that particular circumstance to protect the children?" There seems to be a somewhat higher standard of duty.

This is illustrated in Kersey,[4] where the court found that school officials, knowing of the quarrelsome propensities of a student, were obliged to exercise supervision of students and to take appropriate measures to prevent injury. In this case, a student received fatal injuries after horseplay in the gymnasium, when the student fell or was dropped on the floor.

Again, in Eversole,[5] a court ruled that a special relationship exists between a student and the school district, requiring the school district to protect the student and to exercise reasonable care for the student's safety.

The second test is that of "foreseeability." School officials and teachers are expected to take reasonable care to avoid acts or omissions which they could reasonably foresee would be likely to cause injury. The educator is expected to foresee possible consequences of an action or condition and to take measures to remedy them. The question is, "Could the defendant reasonably have foreseen that this could have taken

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[4]Kersey v. Harbin, 591 S. W. 2d 745 (1979).

[5]Eversole v. Wasson, 398 N. E. 2d 1246 (1980).

place in the school situation?" This question was answered in the affirmative in Brahatcek,[6] when the Supreme Court of Nebraska found that "....school district instructors should have foreseen the intervening negligent act of a student who fatally struck classmate with golf club during physical education class... ." In this instance, a fourteen-year-old boy was killed, when he was accidentally struck on the head by another student who was attempting to show him how to grip and swing a golf club in a physical education class. The student who was killed had been absent when the class had been instructed in safety rules.

An action against a school for injuries sustained when a student was struck by a pebble thrown by another student during recess on a playing field resulted in a court ruling that in order to recover damages for loss of an eye, it was necessary only to prove that a general danger was foreseeable and that supervision would have prevented the accident; it was not necessary to prove that the particular accident which occurred was foreseeable. Evidence indicated that pebbles had been thrown at student for several minutes by other students during recess, and that the teacher had returned to the school building and was not supervising children at the time of the accident. The Minnesota Supreme Court affirmed action of the

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[6]Brahatcek v. Millard School District, School District No. 17, 273 N. W. 2d 680 (1979).

district court, where the student had received an award of $50,000.[7]

The Arizona Court of Appeals stated in Chavez[8] that "not every danger of harm must be recognized by reasonable man, and if harm which results is caused by intervention of factors or forces which form no part of recognizable risk, actor is ordinarily not liable." In this case, a ten-year-old student had left school without permission to take a neighbor's dog home. The student was abducted outside the school grounds and murdered. The court held that school personnel could not reasonably have foreseen that the student would leave the elementary school grounds without permission and thereafter be abducted and slain, and that therefore, the district and school personnel were not liable for death of child.

Among the defenses to tort actions are:

1. School district immunity, where the district is sued.

2. Contributory negligence, where the individual directly and fully contributed to the injury received, so that no one else is to blame.

3. Comparative negligence, where both plaintiff and defendant are held responsible and the court settlement

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[7]Sheehan v. St. Peter's Catholic School, 188 N. W. 2d 868 (1971).

[8]Chavez v. Tolleson Elementary School District, 595 P. 2d 1017 (1979).

adjusts damages to the degree of negligent responsibility for each party.

4. Assumption of risk, where an individual understands, appreciates, and agrees that in undertaking an activity, the individual is subjecting himself or herself to a possible injury.[9]

Governmental Immunity

It has long been held in the common law that a school district is immune from liability by reason of torts committed by itself or its employees, since it is an instrument of the state, which is supposedly sovereign and cannot be sued without its consent. However, in recent years, this doctrine has been modified through legislative and judicial action.

In a 1978 decision,[10] the United States Supreme Court held municipalities and other units of local government, which would include school boards, to be "persons" subject to liability under Section 1983 of the Civil Rights Act of 1871. In an important 5-4 decision,[11] the United States Supreme Court indicated that Section 1983 creates a species of tort liability which on its face allows no immunities. The issue raised in Owen was specifically whether a municipality should be immune from liability for damages because its officials had acted in

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[9]Hudgins and Vacca, Law and Education: Contemporary Issues and Court Decisions, p. 72.

[10]Monell v. Department of Social Services of the City of New York, 436 U. S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

[11]Owen v. City of Independence, Missouri, 63 L. Ed. 2d 673, 676, 100 S. Ct. 1398 (1980).

good faith.

While principals, teachers, and other school officials have sought to use governmental immunity as a defense in court, most courts have ruled that employees of the school district are not protected by governmental immunity of the school district, where such exists, against liability arising from personal negligence toward students. In Kersey,[12] the Missouri Court of Appeals stated that "supervisory public school employees and teachers are not immune from tort liability for inadequate supervision of their students.... ." In Crabbe[13] and Lovitt,[14] the courts held that the fact that a teacher is performing a governmental function for employer school board does not mean that a teacher is exempt from liability for his or her own negligence in performance of such duties. In Cook v. Bennett,[15] the Michigan Court of Appeals found that a principal would be liable for injuries suffered by student while playing "kill" game during recess if the principal had negligently performed supervisory powers. The court stated:

> Even though the supervisory powers of the school principal are incident to her public function, she has a duty to reasonably exercise these powers in such a way as to minimize injury to students in her charge. Where the principal negligently performs this duty, government immunity does not operate to insulate her from all liability.[16]

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[12]Kersey v. Harbin, 591 S. W. 2d 745 (1979).

[13]Crabbe v. County School of Northumberland County, 164 S. E. 2d 639 (1968).

[14]Lovitt v. Concord School District, 228 N. W. 2d 479 (1975).

[15]Cook v. Bennett and Caine, 288 N. W. 2d 609 (1980).

[16]Ibid.

However, in Hennessy v. Webb,[17] the Georgia Supreme Court ruled that a principal was entitled to governmental immunity in the absence of allegations that the principal acted willfully, wantonly, or outside scope of his authority. The negligence alleged in Hennessy was that the principal had allowed a rug and mat to be placed at the school door, when he knew or should have known of its danger.

Court actions seeking damages have been filed against principals for common law, constitutional, and learning torts.

Common Law Torts

Litigation against principals in common law torts most often involves lack of supervision, improper or inadequate instruction, failure to exercise responsibilities properly, and field trips.

Lack of Supervision

Administrators and teachers are expected to supervise students. It is generally agreed by educators that most school accidents could be prevented with proper supervision.[18]

Principals are also expected to supervise teachers. Such supervision involves assignment of qualified teachers to direct activities; making known general expectations to the teacher; making periodic visits to ascertain whether the teacher is meeting conditions set; determining if the teacher

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[17]Hennessy v. Webb, 264 S. E. 2d 878 (1979).

[18]Herb Appenzeller, Athletics and the Law (Charlottesville: The Michie Co., 1975), p. 190.

needs expert help; and periodic inspection of buildings, grounds, and facilities to determine whether hazards exist, and if they do, to see that they are corrected.[19]

The Supreme Court of Minnesota recently upheld a jury finding of negligence on the part of a school principal on the ground that he had not fulfilled responsibility to develop, administer, and supervise a physical education program properly. In this case, an eighth grade student broke his neck during an attempt to perform a gymnastic exercise in a physical education class. The accident occurred a short time after a new, first-year teacher had taken over the class. The court noted that the principal did nothing to administer or supervise the physical education curriculum or to supervise the new teacher except to furnish the teacher with a curriculum bulletin. The court stressed the fact that the inexperienced teacher should have received closer supervision. The court found that the principal never had a meeting with the new teacher to agree upon details concerning the subjects to be taught. The principal had made no effort to see how the curriculum bulletin was being used.[20] This case could be of great significance to principals.

The Minnesota Supreme Court upheld the finding of a jury that negligent supervision and organization of students

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[19]Hudgins and Vacca, Law and Education: Contemporary Issues and Court Decisions, p. 79.

[20]Larson v. Independent School District No. 314, Braham, 289 N. W. 2d 112 (1980).

at a required, school-sponsored showing of a documentary film caused plaintiff's injuries, when a white student had her wrist slashed and her purse stolen by black students. Evidence indicated that the school district was aware of racial tension, and that there was a lack of supervision.[21]

The California Supreme Court held that the school district could be held liable for a ten-year-old, truant student's injuries received from being struck by a motorcycle, after leaving school grounds without permission, if plaintiffs could prove that the injuries were proximately caused by negligent supervision of student while on school premises.[22] The court stated:

> A school district's duty to supervise students while on school premises during school day includes responsibility for assuring that students remain on school premises during school days, since duty to supervise includes duty to enforce those rules and regulations necessary for student's protection, such as regulation that a student may not leave school premises at recess, or at any other time before regular hour for closing school, except in case of emergency, or with approval of principal of school.[23]

In discussing the need for supervision, the Minnesota Supreme Court in Sheehan[24] quoted from a dissent in Ohman:[25]

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[21]Raleigh v. Independent School District No. 625, 275 N. W. 2d 572 (1978).

[22]Hoyem v. Manhattan Beach City School, 585 P. 2d 851 (1978).

[23]Ibid., p. 851.

[24]Sheehan v. St. Peter's Catholic School, 188 N. W. 2d 868 (1971).

[25]Ohman v. Board of Education of City of New York, 90 N. E. 2d 478 (1948).

> Children have a known proclivity to act impulsively without thought of the possibilities of danger. It is precisely this lack of mature judgment which makes supervision so vital. The mere presence of the hand of authority and discipline normally is effective to curb this youthful exuberance and to protect the children from their own folly.

In Ogando v. Carquinez,[26] the California Supreme Court found that "failure to supervise the conduct and play of the children on the occasion mentioned....amounted to negligence, and that such negligence was the proximate cause of the child's injury and death." A ten-year-old student, playing with other children without teacher supervision, accidentally pushed her outstretched arm through a glass door. The student ran, screaming with fright, while other students sought to find teachers. The student was finally taken by students to office of the nurse, but died that night because of the loss of blood. The court held that the trial court was

> ....justified in drawing the inference that the presence of a teacher in or near the court while the game was being played would likely have resulted in saving the child's life, because she would have taken charge of the injured child at once and either arrested the flow of blood herself or instantly summoned the school nurse.

The Minnesota Supreme Court ruled that conduct of a school district in failing to properly supervise and enforce the wearing of protective safety goggles in an industrial arts class constituted negligence per se and that an award of $60,000 for permanent injury to student's eye was not excessive.[27]

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[26]Ogando v. Carquinez Grammar School District of Contra Costa County, 75 P. 2d 641 (1938).

[27]Scott v. Independent School District No. 709, Duluth, 146 N. W. 2d 485 (1977).

In California, a court found that a principal had failed to exercise proper supervision when he had known for several years that students in physical education classes regularly ran from the gymnasium to the playing field and that trucks often came onto the school grounds. A judgment for the plaintiff student was upheld, and the court criticized school authorities for failure to take precautions to minimize the danger of injury to students. In rejecting defendant's contentions that plaintiff was herself negligent and was not entitled to recover damages, the court made it clear that the duty of care to be exercised by plaintiff and the precautions required of school administrators vary with the age and understanding of the student. The court stated:

> Plaintiff is bound only to that duty of care which a normal child of the same age would be expected to exercise in such a situation....The question is not whether plaintiff must be viewed as an adult or as a child, but simply whether the plaintiff as a fifteen-year-old girl in a physical education class on the grounds of a high school, used mainly for school activities and not as a thoroughfare for automobiles, exercised proper caution in running across the courtyard toward the athletic field without being on the alert for the sudden appearance of a motor vehicle.[28]

The courts have made it clear that a principal has a duty to take action when a situation is encountered in which a reasonably prudent person would foresee the possibility of injury to a student. The principal must see that proper supervision takes place, both on the principal's part and on the part of teachers.

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[28]Taylor v. Oakland Scavenger Company, 110 P. 2d 1044 (1941).

Improper or Inadequate Instruction

One of the most frequent allegations of negligence concerns inadequate instruction in the performance of an activity. Another act of negligence complained of is failure to instruct in safety rules.

In a New York case,[29] evidence indicated that a fifth grade girl was injured while performing on rings, when she stood up in the rings and fell backward in jumping out. Evidence indicated that the teacher had never demonstrated stunts and had never instructed "spotters" in how to break a fall in case of mishap. The New York Supreme Court's Appellate Division affirmed judgment of the lower court in favor of plaintiffs.

In LaValley,[30] the New York Supreme Court's Appellate Division ruled that reasonable care must be taken to prevent injuries to pupils, and "pupils should be warned before being permitted to engage in a dangerous and hazardous exercise." Evidence indicated that the teacher sat in the bleachers and watched while untrained students fought until plaintiff received a blow to the temple, resulting in a cerebral hemorrhage. The court stated that the two boys should have been warned of the danger and should have been taught the principles of defense, if it were indeed a reasonable thing to permit a "slugging match" of the type indicated. The court affirmed

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[29]Armlin v. Board of Education of Middleburgh Central School District, 20 N. Y. S. 2d 402 (1971).

[30]LaValley v. Stanford, 70 N. Y. S. 2d 460 (1947).

judgment of the lower court in favor of plaintiff.

The New York Court of Appeals found that failure to instruct claimant pursuant to the customary method was the proximate cause of plaintiff's injuries in Gardner v. State.[31]

The New York Supreme Court, Appellate Division, held that school authorities have an affirmative duty "to instruct students in physical education classes on reasonable safety precautions to be observed while engaging in class activities."[32] Testimony in the case against the school district for damages sustained by a ten-year-old boy while playing soccer indicated that reasonable care required demonstration and explanation of the game. The judgment of the Onondaga Trial Court dismissing the case was reversed, and a new trial was ordered by the Supreme Court Appellate Division.

Failure to Exercise Responsibilities Properly

School authorities have the responsibility for inspecting buildings, equipment, and grounds, and for reporting hazardous conditions for correction. If the hazard is not corrected immediately, school officials have the responsibility of seeing that students are protected from the danger.

An action was instituted in Michigan against a school district and its superintendent, principal, and a classroom teacher as individual defendants, for injuries sustained by a

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[31]Gardner v. State, 22 N. E. 2d 344 (1939).

[32]Darrow v. West Genesee Central School District, 342 N. Y. S. 2d 611 (1973).

fourteen-year-old student when a jug of wood alcohol exploded during a physical science class, on grounds that improper design of the classroom and absence of safety devices rendered it unsafe, dangerous, and defective and the cause of plaintiff's injuries.[33] The Michigan Supreme Court held that the complaint was sufficient to stake a claim for relief against the superintendent, principal, and classroom teacher as individual defendants.

Field Trips

The same principles of tort law apply on field trips as they do at school. Provisions for proper supervision must be made before taking children on field trips away from school. In Morris v. Douglas County School District No. 9,[34] an action seeking damages for injuries received by a child on a school outing to the beach, the Oregon Appellate Court stated that whether the kind of harm received was reasonably foreseeable and whether supervision was adequate were fact questions.

The New York Supreme Court, Appellate Division, affirmed judgment of the New York Supreme Court in favor of plaintiff and finding inadequate supervision by teachers in Williamson.[35] Plaintiff was injured when he was struck by a student motorcyclist at a public park to which the class had gone for the purpose of taking pictures under supervision of two teachers.

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[33]Bush v. Oscoda Area Schools, 275 N. W. 2d 268 (1979).

[34]Morris v. Douglas County School District No. 9, 403 P. 2d 775 (1965).

[35]Williamson v. Board of Education of Berne-Knox Junior Senior High School, 375 N. Y. S. 2d 221 (1975).

On a field trip to a museum in Illinois, a twelve-year-old student was assaulted by a group of youths not connected with the school. Plaintiff brought action through his father against the school district, two teachers, and the museum for injuries sustained in the assault. The circuit court dismissed suit, and plaintiff appealed. The appellate court held that an assault in the museum was not reasonably foreseeable and affirmed the decision of the lower court.[36]

Liability release forms signed by parents for children prior to field trips cannot diminish the responsibility of the school district and its employees. The principal purposes served by such forms are the giving of permission for the trip and the informing of parents.

The Kentucky Court of Appeals affirmed judgment of the circuit court that where a high school principal gave appropriate instructions and specified certain conditions under which students were to go on an outing, he was not negligent with respect to drowning of a high school student.[37]

Constitutional Torts

The Civil Rights Act of 1871, Section 1983, was rediscovered in the mid-1960's, thereby changing the status of individual board members and school administrators. Section 1983 provides:

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[36]Mancha v. Field Museum of Natural History, 283 N. E. 2d 899 (1972).

[37]Cox v. Barnes, 469 S. W. 2d 61 (1971).

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.[38]

This Act provides that school board members and school administrators who deprive employees of their constitutional rights may be personally liable. This liability under Section 1983 was extended to students by a 1975 decision of the Supreme Court. In Wood,[39] the Court held that:

> ....a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student; and that a compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

The Court recognized that school officials have some degree of immunity for their acts under Section 1983, so that they may make a mistake for which they are not liable. The Court indicated that if school officials are acting sincerely and with a belief that they are doing right, officials will be protected by qualified good-faith immunity under Section 1983. The Supreme Court stated that action taken "in the good-faith fulfillment of their responsibilities and within the bounds

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[38]42 U. S. C., Section 1983 (1871).

[39]Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975).

of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity."[40]

Wood[41] involved a suit against members of the school board and two administrators in Arkansas, based on 42 U. S. C., Section 1983, and claiming damages and injunctive and declaratory relief. Plaintiff students, who were expelled from school for violating a school regulation prohibiting use or possession of intoxicating beverages at school or school activities, alleged that their federal constitutional rights to due process were infringed by their expulsions.

The United States Supreme Court has ruled that student plaintiffs in actions brought under Section 1983 are entitled to receive only nominal damages unless there is proof of actual injury. The Court indicated that:

> In the absence of proof of actual injury, public school students who were suspended from school without procedural due process and who bring actions under 42 U. S. C. S. § 1983 against school officials are entitled to recover only nominal damages; if it is determined that the suspensions were justified, the students nevertheless are entitled to recover nominal damages not to exceed one dollar from the officials.[42]

Learning Torts

Recently, students have begun to sue school districts for their failure to learn, causing increased pressure upon

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[40]Ibid., p. 321.

[41]Ibid.

[42]Carey v. Piphus, 435 U. S. 247, 55 L. Ed. 2d 252, 253, 98 S. Ct. 1042 (1978).

school administrators who supervise teachers and evaluate performance.

In California, a high school graduate sued a school district, alleging that he had received an inadequate education.[43] Plaintiff averred that the school district was negligent in teaching, promoting, and graduating him, and that the district had falsely represented to his mother that he was performing at or near grade level. The appellate court was not certain that plaintiff had suffered injury within the meaning of the law concerning negligence. The court stated:

> On occasions when the Supreme Court has opened or sanctioned new areas of tort liability, it has noted that the wrongs and injuries involved were both comprehensible and assessible within the existing judicial framework....This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught and any layman might- and commonly does- have his own emphatic views on the subject. The "injury" claimed here is the plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers.[44]

In a New York case,[45] a former student brought an action against the school district, alleging negligence, breach of statutory duty, and educational malpractice in issuing a

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[43]Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854 (1976).

[44]Ibid., pp. 860-61.

[45]Donohue v. Copiague Union Free School District, 408 N. Y. S. 2d 584 (1977).

high school graduation certificate notwithstanding the student's deficiencies in reading and math. In dismissing the case, the Suffolk County Supreme Court held that the cause of action sounding in breach of statutory duty did not state a claim upon which relief could be granted, and plaintiff did not state facts sufficient to constitute a cause of action for negligence or educational malpractice.

While claims for damages based on educational negligence have been defeated by the courts in the three major cases, the idea is gaining acceptance, as can be seen from the most recent of these cases, Hoffman v. Board of Education.[46] In this case, both the trial and appellate courts found in favor of the complaining student, and the ultimate reversal by the New York Appellate Division was by a closely divided (4-3) court. Plaintiff had been found to have an I. Q. of ninety a few months prior to enrollment in school. After enrollment in kindergarten, an I. Q. test indicated an I. Q. of seventy-four. (A score of seventy-five would have entitled student to be placed in a normal classroom.) The test administered was verbal, even though student had a serious speech defect, which made evaluation difficult. Upon the basis of this test and recommendation of the psychologist who administered it, student was assigned to a class for the mentally retarded, where he remained, without further testing for twelve years. The psychologist had recommended that his intelligence be

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[46]Hoffman v. Board of Education of City of New York, 424 N. Y. S. 2d 376 (1979).

re-evaluated within two years. Plaintiff was retested after his eighteenth birthday, when he was found to have an I. Q. of ninety-four.

There is uncertainty as to what legal trends may develop on the matter of accountability. In a 1974 case, a teacher's dismissal was upheld because students had scored low on standardized achievement tests when improvement of test scores was an objective of the school system.[47] Destin Shann Tracy indicates that it is increasingly probable that educational negligence will become a viable basis for legal actions within the next few years.[48]

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[47]Scheelhaase v. Woodbury Community Central School District, 488 F. 2d 237 (8th Cir. 1973), cert. denied, 417 U. S. 969 (1974).

[48]Destin Shann Tracy, "Educational Negligence Suits," School Law Bulletin XI, No. 3 (July, 1980): 9.

CHAPTER VI

THE PRINCIPAL AND TEACHER RIGHTS

The principalship requires knowledge of the legal implications regarding teacher tenure and the applicability of due process and other constitutional principles as they have been interpreted by the courts, as well as knowledge of state laws with respect to employment of personnel.

While state requirements vary, most provide for a probationary period for professional personnel, during which the principal observes and evaluates an employee's performance in order to determine whether to recommend tenure. An employee who receives tenure is construed to have the right of employment for a continuing or indefinite period of time, subject to removal only for a cause prescribed by state law. Definition of cause is a matter left for the courts to determine. Courts seek to ensure that tenured employees are dismissed for cause only and that they are not dismissed for reasons which may be violative of their constitutional rights guaranteed under the United States Constitution.[1] While statutes vary considerably in stipulating causes for

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[1]Hudgins and Vacca, Law and Education: Contemporary Issues and Court Decisions, pp. 150-151.

dismissal of teachers, among the most frequently mentioned causes are incompetency, immorality, insubordination, and neglect of duty.[2]

Incompetency

If a principal seeks to have a tenured teacher dismissed, chances of success are heightened when detailed documentation concerning the teacher's performance has been made. In a New York case,[3] a United States district court rejected a teacher's claim that dismissal was arbitrary, capricious, and in violation of right to due process, when the principal had documented a number of episodes (including parent complaints of student abuse and holding after class; a student's corroborated report that he had been pushed and injured by teacher; principal's observations of the complete disorder of teacher's room; and principal's observation of teacher's sleeping in teachers' lounge).

In spite of allegations of a high school principal that termination was for constitutionally impermissible reasons, based on statements principal had made about the board of education, the United States Court of Appeals for the Tenth Circuit found that no constitutional violations were involved, in view of a long list of job-related reasons for not renewing contract.[4]

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[2]Bolmeier, The School in the Legal Structure, p. 195.

[3]Canty v. Board of Education, City of New York, 312 F. Supp. 254 (1970).

[4]Schmidt v. Fremont County School District No. 25, State of Wyoming, 558 F. 2d 982 (1977).

Evidence supporting dismissal of a teacher for incompetency seems to carry more weight when teacher is given ample warning and adequate opportunity to correct ineffective performance. Some state statutes require notice of deficiencies and a time period for correcting them before a teacher may be dismissed for incompetency.[5] In one case, a teacher was ordered reinstated, because the school board had not complied with the letter of the statute regarding proper notice.[6] However, in a South Carolina case, where statute provided for dismissal of teachers without giving time to correct alleged deficiencies, the South Carolina Supreme Court held that a teacher was not entitled to a reasonable time to correct deficiencies.[7]

Where procedural requirements are met, the courts usually consider substantiated deficiencies and a failure to correct them sufficient cause for termination.[8] However, evidence that a particular duty was not competently performed by a teacher on a certain occasion or evidence of an occasional neglect of some duty, does not, in itself, ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination of a tenured teacher. Incompetency or neglect of duty are not measured in a vacuum nor against a standard

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[5]Delon, Legal Controls on Teacher Conduct: Teacher Discipline, p. 31.

[6]Blue Springs Reorganized District v. Landuyt, 499 S. W. 2d 33 (1973).

[7]McWhorter v. Cherokee County School District No. 1, 261 S. E. 2d 157 (1979).

[8]Delon, Legal Controls on Teacher Conduct: Teacher Discipline, p. 32.

of perfection, but instead, must be measured against the standard required of others who perform the same or similar duties.[9] The Nebraska Supreme Court held evidence insufficient to establish neglect of duty or incompetency on the part of a tenured teacher when there was no evidence that her performance of duties was below the standard of performance required of other teachers in the school.[10]

Immorality

When used as a basis for dismissal, the term, "immorality," formerly encompassed almost any conduct offensive to the standards of the community. However, recent decisions indicate that courts are moving toward a more restricted definition of the term, almost equating it with sexual misconduct.[11]

Courts have tended to decide recent cases on the basis of impact on the school rather than some pre-existing societal norm. Teachers' private lives are generally protected from employer interference unless an adverse impact on the school can be shown.

Factors to be considered in determining whether immoral conduct rendered a teacher unfit to teach were identified by a United States district court in California as follows:

> ....(A)ge and maturity of the students, likelihood that the teacher's conduct would adversely affect students or other teachers, degree of anticipated

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[9]Sanders v. Board of Education of South Sioux City Community School District No. 11, 263 N. W. 2d 461 (1978).

[10]Ibid.

[11]Delon, Legal Controls on Teacher Conduct: Teacher Discipline, p. 56.

> adversity, proximity or remoteness in time of conduct, extenuating or aggravating circumstances, likelihood that the conduct would be repeated, motives underlying the conduct and whether the conduct would have a chilling effect on the rights of the teacher involved or of other teachers.[12]

In Thompson,[13] a teacher had been suspended for engaging in immoral conduct by living with a man for several months prior to their marriage. The court concluded that there was no evidence of ineffective teaching or disciplinary problems in the teacher's classroom; that there was no indication that the teacher had dicussed her conduct with students or that teacher had tried to persuade students or other teachers of propriety of teacher's conduct; that there was no evidence that teacher had ever advocated any conduct which would be detrimental to a moral scholastic environment; and that most people in the community were unaware of teacher's actions. The court ordered that defendants were to be restrained from suspending plaintiff or terminating her employment on the basis of immoral conduct charged without further order of the court.

The California Supreme Court held that a male teacher who engaged in limited homosexual relationship in his apartment was not subject to disciplinary action for immoral conduct, in absence of evidence that such conduct indicated teacher's unfitness to teach.[14] Discharge of a certified teacher

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[12]Thompson v. Southwest School District, 483 F. Supp. 1170 (1980).

[13]Ibid., pp. 1184-1185.

[14]Morrison v. State Board of Education, 461 P. 2d 375 (1969).

due to the fact that she was pregnant and unmarried was held to be arbitrary, unreasonable, and not supported by substantial evidence by the New Mexico Supreme Court.[15] An Illinois appellate court affirmed trial court ruling that a charge of immorality, where a teacher was married one month and was eight and one-half months pregnant, was a cause for dismissal only if it could be shown that the teacher's conduct produced harm to pupils, faculty, or the school.[16]

However, on the basis of evidence indicating that a teacher had joined the "swingers" club, engaged in sexual intercourse and oral copulation with men other than her husband, and had appeared on television programs while facially disguised and discussed unconventional sexual behavior, the California Supreme Court affirmed the conclusion of the board of education and trial court that teacher's actions disclosed her unfitness to teach in the public elementary schools.[17] In a case involving possession of drugs, a Georgia appellate court held that the proven fact of a tenured teacher's possession of three dangerous drugs was evidence from which "immorality" could be inferred.[18]

Insubordination

Insubordination, defined as "unwillingness to submit

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[15]New Mexico State Board of Education v. Stoudt, 571 P. 2d 1186 (1977).

[16]Reinhardt v. Board of Education of Alton Community School District, 19 Ill. App. 3d 481, 311 N. E. 2d 710 (1974).

[17]Pettit v. State Board of Education, 512 P. 2d 889(1973).

[18]Dominy v. Mays, 257 S. E. 2d 317 (1979).

to authority," has become the most frequently cited reason for removing teachers.[19] In upholding a teacher dismissal for insubordination, the Second Circuit Court stated:

> A school system may justifiably demand more from its teachers than competent classroom instruction. A chronic refusal to comply with reasonable administrative obligations can have a disruptive effect on students, fellow teachers, and administrators alike, and consequently, poses a threat to an optimum learning environment.[20]

The Eighth Circuit Court of Appeals affirmed a district court decision holding that the hearing afforded a teacher, who had been discharged for insubordination by reason of failure to comply with principal's instructions regarding restoration of order and proper curriculum in teacher's classes, was entirely adequate.[21] Facts indicated that teacher was clearly aware of charges resulting in suspension; that the superintendent had notified the teacher in advance of a proposed board of education hearing; that the teacher was represented by counsel at the hearing; that the teacher was permitted to testify; and that the teacher's counsel was permitted to cross-examine the principal.

In a recent Massachusetts case,[22] an appellate court held that where a tenured teacher, as an act of retaliation, for a decision of the school committee, refused to sign a

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[19]Delon, Legal Controls on Teacher Conduct: Teacher Discipline, p. 36.

[20]Simard v. Board of Education of Town of Groton, 473 F. 2d 988, 995 (1973).

[21]Ahern v. Board of Education of the School District of Grand Island, 456 F. 2d 399 (1972).

[22]Lower v. North Middlesex Regional School Committee, 395 N. E. 2d 1310 (1979).

contract for services as band director and there was no practical way of dividing functions of band director and music teacher without a detrimental effect on the music education of students, the teacher's conduct constituted insubordination, and there was ample justification for the school committee's decision to dismiss teacher.

Neglect of Duty

Since neglect of duty can usually be proven without much difficulty, if the teacher's duties are well defined and adequate personnel records are kept, the courts are not likely to reverse dismissals unless legally incorrect or inadequate procedures are followed.[23] A Second Circuit court established that a teacher cannot be discharged for neglect of duty where such action deprives teacher of privileges secured by United States laws. In this instance, jury duty had resulted in teacher's absence from classroom from March 7th through April 14th. The teacher was dismissed upon recommendation of principal. The court stated that refusal to permit a person to serve on jury denied an interest protected by statute.[24]

As evidenced in Bomar,[25] the courts will protect the exercise of federal constitutional and statutory rights. However, it is apparent that they will not ignore substantial

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[23]Delon, Legal Controls on Teacher Conduct: Teacher Discipline, p. 33.

[24]Bomar v. Keyes, 162 F. 2d 136 (1947).

[25]Ibid.

neglect of duty or the abuse of position. A Georgia court upheld dismissal of a principal, when evidence indicated that the principal failed to hold fire drills, to secure buildings, to attend school meetings, to cooperate in giving achievement tests, and to follow school regulations concerning use of state-adopted textbooks.[26]

Teachers have brought actions in court in a number of cases concerning teacher tenure, First Amendment rights, due process, and academic freedom.

Teacher Tenure

Recent court decisions concerning teacher tenure have dealt with substantive and procedural due process as guaranteed by the Fourteenth Amendment. United States Supreme Court holdings in Board of Regents v. Roth[27] and Perry v. Sindermann[28] have been applied consistently to matters of teacher personnel. These cases and those following them have added a second dimension to teachers' job security, requiring that personnel decisions be free from constitutional violations.[29]

In Roth,[30] a state university teacher in Wisconsin was hired under a one-year contract and was not rehired.

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[26]Glover v. Daniel, 318 F. Supp. 1070 (1969).

[27]Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

[28]Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 1693, 33 L. Ed. 2d 470 (1972).

[29]Hudgins and Vacca, Law and Education: Contemporary Issues and Court Decisions, p. 147.

University officials were responsible for deciding whether to rehire nontenured teachers. Roth contended that the reason for his not being rehired was the fact that he had made remarks which were critical of the school administration, and that, therefore, the failure of university officials to rehire him constituted violation of constitutional right to freedom of speech. Roth also alleged that constitutional rights were violated because no hearing was held and no statement of reasons was given for failure to rehire. The United States Supreme Court held that no hearing is required unless such failure to rehire would seriously damage Roth's standing and associations in the community, impose a stigma which would foreclose future opportunities to practice the teaching profession, or directly violate constitutional rights to freedom of speech. The court did not find that any of these conditions existed in the Roth case.

In Perry v. Sindermann,[30] tried by the Supreme Court on the same day as Roth, similar allegations were made by an untenured college professor who had been employed for four successive years under a series of one-year contracts. The Court found that the Board of Regents had issued a press release which charged that Sindermann was being released because of insubordination; that the nonrenewal of his contract may have been due to exercise of free speech rights,

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[30]Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

although the evidence was not clear; and that Sindermann had achieved de facto tenure under which he had more than a "mere subjective expectancy for re-employment," even though the school had no tenure system. In view of the evidence, the Court decided that Sindermann was entitled to notice of the charges against him and a hearing in which he would have opportunity to refute charges.

Another teacher dismissal case was decided by the United States Supreme Court in 1977. In this case, Mt. Healthy School District v. Doyle,[31] the teacher had been employed by the district for five years, during which period he had been involved in a number of altercations, including an argument with cafeteria employees and another teacher, swearing, and using obscene gestures toward students. In 1971, after the principal of school had distributed a teachers' dress code, this teacher telephoned a local radio station and announced the dress code as an item of news. A month later, he was among ten teachers whom the school board decided not to rehire. The United States Supreme Court accepted the district court finding that the call to the radio station was constitutionally protected, but held that the district court should have determined whether Doyle would have been re-employed but for the call to radio station. The court suggested a two-step procedure for cases similar to Mt. Healthy, indicating

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[31]Mt. Healthy School District v. Doyle, 429 U. S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

that the teacher must establish that the free speech activity was a substantial or motivating factor in the board's decision not to rehire and that if this proof is produced, the school board must prove that it would have reached the same decision in the absence of the protected behavior.

First Amendment Rights

The courts have made it clear that public employment is a benefit which cannot be conditioned upon denial of constitutional rights.[32] A Texas district court held in Barbre[33] that plaintiff's claim under the First Amendment was not defeated by the fact that plaintiff did not have tenure. Citing Roth,[34] Perry,[35] and Mt. Healthy,[36] the court stated:

> Even though she could have been discharged for no reason whatever and had no constitutional right to a hearing prior to the decision not to rehire her,.... she may nonetheless establish a claim to reinstatement if the decision not to rehire her was made by reason of her exercise of constitutionally protected First Amendment freedoms.[37]

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[32]Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Keyishian v. Board of Regents, 385 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); Wieman v. Updegraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952).

[33]Barbre v. Garland Independent School District, 474 F. Supp. 687 (1979).

[34]Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

[35]Perry V. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

[36]Mt. Healthy School District v. Doyle, 429 U. S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

[37]Barbre v. Garland Independent School District, 474 F. Supp. 687 (1979).

In Pickering,[38] the Supreme Court stated that the First Amendment requires striking a balance between interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting efficiency of its services through its employees. The Court held that:

> A public school teacher's substantially correct comments on matters of public concern, although critical of school officials, may not, consistently with the constitutional guarantee of free speech, furnish grounds for dismissal, where such comments do not interfere with the maintaining of discipline by immediate superiors or harmony among coworkers and the teacher's employment relationships with such officials are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.[39]

The Court further stated that under the free speech clause of the First Amendment, a teacher's exercise of the right to speak on issues of public importance cannot furnish the basis for the teacher's dismissal from public employment, in the absence of proof of false statements knowingly or recklessly made by the teacher.

Facts in the Pickering case indicated that Pickering had written a letter to the editor of a local newspaper a few days after defeat of a proposal to increase school taxes. The letter was critical of the way the board of education and the superintendent of schools had handled past proposals

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[38]Pickering v. Board of Education, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

[39]Ibid., p. 813.

to raise new revenue for the schools. The board of education had decided that publication of the letter was detrimental to the efficient operation and administration of the district's schools and that the interests of the schools required the teacher's dismissal. The Illinois Supreme Court affirmed the circuit court judgment upholding the dismissal, but the United States Supreme Court reversed, holding that in the absence of proof of false statements knowingly or recklessly made by Pickering, his right to speak on issues of public importance could not furnish basis for dismissal, and that such dismissal violated constitutional right to free speech.

The Fifth Circuit Court of Appeals held in 1974 that:

> In order for the government to constitutionally remove an employee from government service for exercising the right of free speech, it is incumbent upon it to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment.[40]

The United States Supreme Court reaffirmed the Pickering test in Givhan,[41] and expanded the factors that may be balanced against the exercise of First Amendment freedoms when a government employee confronts an immediate superior. In this case, the district court concluded that the main reason for the teacher's dismissal was criticism of school district policies,

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[40]Smith v. United States, 502 F. 2d 512 (1974).

[41]Givhan v. Western Line Consolidated School District, 439 U. S. 410, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979).

and, therefore, ordered reinstatement. The Fifth District Court of Appeals reversed, concluding that because the teacher had spoken privately with the principal, teacher's expression was not protected by the First Amendment, and that there was no constitutional right to press even good ideas on an unwilling recipient. The United States Supreme Court vacated and remanded, expressing the unanimous view that the teacher's criticism was subject to the protection of the First Amendment, for the following reasons:

> 1. Such private expression of views is not beyond constitutional protection; and
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> 2. The 'captive audience' theory was inapplicable in view of the principal's having opened his door to the teacher.[42]

Establishing that a particular expression is protected by the First Amendment is not the only element needed to obtain relief. As stated earlier, the United States Supreme Court also requires a showing that constitutionally protected conduct is a motivating or substantial factor in school district decision not to rehire.[43] The initial burden is on the plaintiff to show that conduct was constitutionally protected and was a motivating factor in decision not to rehire or to dismiss. After plaintiff carries this burden, the court must decide whether the board has shown by a preponderance of the

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[42] Ibid.

[43] Mt. Healthy School District v. Doyle, 429 U. S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

evidence that it would have reached the same decision even in the absence of the protected conduct.[44]

In Barbre,[45] a Texas district court held that the claim of a former untenured teacher's aide that employment was not renewed by school district because of protected First Amendment speech was not defeated by the fact that the aide did not have tenure, because the aide could establish a claim to reinstatement if a decision not to rehire was made by reason of exercise of constitutionally protected First Amendment rights. The court, found, however, that even though the aide's speech at a school board meeting was a motivating factor in nonrenewal, her insubordination, subsequent to the board meeting, was a valid and separate explanation for non-renewal, apart from any of prior expressions.

A high school teacher's remarks to an unauthorized assembly of students on school property during school hours, which encouraged students to disobey directions given by the principal and superintendent to return to classes, were held to be outside the protection of the First Amendment by a Sixth Circuit Court of Appeals.[46]

A United States district court in Arkansas ruled that an elementary teacher who was dismissed for allowing one of

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[44] Ibid.

[45] Barbre v. Garland Independent School District, 474 F. Supp. 687 (1979).

[46] Whitsel v. Southeast Local School District, 484 F. 2d 1222 (1973).

her students to write a letter to the cafeteria supervisor requesting raw carrots; for showing the principal cartoons (made two or three weeks after a water fountain in the room broke), which showed pupils lying down asking for water, wilted flowers, etc.,; and for voicing concern with regard to an open incinerator in the center of the playground, was denied substantive due process, and First Amendment rights were violated.[47]

After a Delaware district court found that consideration of activities protected by the First Amendment played a substantial or motivating role in the decision to terminate a teacher's employment and that the decision would not have been made without reference to protected activities, the court ordered that plaintiff was entitled to reinstatement with full seniority and experience credit, to have record expunged, and to damages for lost salary and private piano lesson income, and for emotional distress and humiliation. The court further stated that the school district, board of education, board members in official capacities, and certain board members in individual capacities were jointly and severally liable to plaintiff for damages.[48]

As conduct becomes less and less like "pure speech," the showing of governmental interest required for its regulation is progressively lessened. In East Hartford,[49] the

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[47]Downs v. Conway School District, 328 F. Supp. 338 (1971).

[48]Eckerd v. Indian River School District, 475 F. Supp. 1350 (1979).

[49]East Hartford Education Association v. Board of Education of the Town of East Hartford, 562 F. 2d 838 (1977).

case of a teacher who claimed that requirements imposed by dress code precluded close rapport with students and interfered with ability to teach was found by a Second Circuit Court of Appeals not to implicate the First Amendment.

A retaliatory transfer of a teacher for constitutionally protected speech can trigger First Amendment rights, even when the teacher is not discharged, because the test is whether adverse action taken by the board of education is likely to chill the exercise of constitutionally protected speech, and such chilling effect can be accomplished through an unwanted transfer as well as through outright discharge.[50]

Due Process

Two concepts which govern due process claims in public employment have to do with "property" and "liberty" interests.

Property Interest

To have a property interest that is protected by due process, a plaintiff must have a legitimate claim of entitlement to continued employment arising from state law. A unilateral expectation will not suffice.[51] Rules or mutually explicit understandings that support the claim of entitlement must exist.[52] A claim of entitlement is not established

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[50]McGill v. Board of Education of Pekin Elementary School District No. 108 of Tazewell County, Illinois, 602 F. 2d 774 (1979).

[51]Board of Regents v. Roth, 408 U. S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

[52]Perry v. Sindermann, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972).

solely by express statutory or contractural terms, but also by agreements which may be implied from the "promisor's words and conduct in the light of the surrounding "circumstances...." and "relating them to the usage of the past."[53] Generally, courts have recognized that a property interest exists if, by statute, rule, or contract, express or implied, an employee can be fired only for "cause."[54]

Courts have not found a property interest when an employee serves at the pleasure of the public employer,[55] as indicated by the Fifth Circuit Court of Appeals in Ball v. Board of Trustees.[56] In this case, the court stated that having no right to reemployment, an untenured high school teacher who was discharged for refusal to shave no due process right to a hearing as to reasons for dismissal. The Colorado Court of Appeals ruled similarly in Willis,[57] when it stated that nontenured teachers had no property interest in renewal of contracts, and that the school board was not required to afford a hearing or state reasons for nonrenewal.

Liberty Interest

The protected liberty interest can take two forms. The first form is where "a person's good name, reputation,

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[53]Ibid., p. 602.

[54]Arnett v. Kennedy, 416 U. S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974).

[55]Bishop v. Wood, 426 U. S. 341, 96 S. Ct. 1633, 40 L. Ed. 2d 15 (1974).

[56]Ball v. Board of Trustees of the Kerville Independent School District, 584 F. 2d 684 (1978).

[57]Willis v. Widefield School District No. 3, 603 P. 2d 962 (1979).

honor or integrity is at stake because of what the government is doing to him." In such a case, the discharged employee is entitled to due process.[58] To trigger due process, charges must be publicly disclosed by the governmental entity.[59]

The second form has been determined when the government employer imposed a "stigma or other disability that foreclosed the employee's freedom to take advantage of other employment opportunities," thereby entitling the employee to due process.[60] To amount to foreclosure of future job offers, the effect of the stigma must be more than simply to make the employee "somewhat less attractive to some other employers."[61]

The North Carolina Court of Appeals held that when a school cafeteria manager alleged discharge from employment by virtue of public false accusations that she brought liquor into the public school and dispensed it to other employees, allegations sufficiently involved employee's reputation, honor or integrity, that she was entitled as a matter of due process to hearing before discharge.[62]

The Seventh Circuit Court of Appeals held that plaintiffs were deprived of a constitutionally protected liberty

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[58]Board of Regents v. Roth, 408 U. S. 573, 92 S. Ct. 1707 (1972).

[59]Bishop v. Wood, 426 U. S. 341, 348, 96 S. Ct. 2074 (1974); Gentile v. Wallen, 562 F. 2d 193, 197 (1977).

[60]Board of Regents v. Roth, 408 U. S. 573, 92 S. Ct. 2707 (1972).

[61]Ibid.

[62]Presnell v. Pell, 251 S. E. 2d 692 (1979).

interest, upon discharge (without notice or opportunity to be heard) by the governor of Illinois, who then issued a press release, stating that plaintiffs had abused official positions in attempting to force a company under their supervision to drop criminal charges against an employee. The court indicated that infliction of a stigma to reputation accompanied by failure to rehire or, a fortiori, by a discharge, stated claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment. The court further ruled that this combination of stigma plus failure to rehire/discharge stated a claim even if the failure to rehire or the discharge of itself deprived the plaintiff of any property interest within the meaning of the Fourteenth Amendment.[63]

Academic Freedom

The concept of academic freedom in America grew from the influence of German college and university philosophy that scholars should be free to search for and teach the truth, free of constraints of immediate superordinates or the government. This philosophy has had a considerable impact on institutions of higher learning, but has had a more limited influence on elementary and secondary schools.[64] Healy[65] stated that "the college classroom with its surrounding

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[63]Colaizzi v. Walker, 542 F. 2d 969 (1976).

[64]Hudgins and Vacca, Law and Education: Contemporary Issues and Court Decisions, p. 167.

[65]Healy v. James, 408 U. S. 169, 180, 92 S. Ct. 2338, 2346, 33 L. Ed. 2d 266 (1972).

environs is the 'marketplace of ideas.'"

A Connecticut district court stated the following:

> Both age and the extent of education of the students must be considered in determining whether the students have attained that degree of maturity which would enable them to evaluate the merits of communism versus capitalism. Even a most expansive concept of a 'marketplace of ideas' would not be extended to include a class of fifth graders to discuss what is wrong with the world and how it can be put right.[66]

Academic freedom has two dimensions. The first is that of substantive freedom of a teacher to determine, within reasonable bounds, content and methodology which will serve an educationally defensible purpose. The second dimension is that of procedure which protects the teacher from dismissal except for violation of a law, policy, or regulation which is clearly known.

The United States Supreme Court showed an interest in academic freedom in 1923, when it declared that a state law forbidding teaching of any language other than English to elementary school students was unconstitutional.[67] The Court asserted that this legislation constituted an arbitrary interference with liberty of parents to control and educate their children and with liberty of teachers to pursue lawful calling.

In 1952, the United States Supreme Court held that a teacher had a choice of teaching or exercising rights as a

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[66]Burns v. Rovaldi, 477 F. Supp. 270 (1979).

[67]Adler v. Board of Education, 342 U. S. 485, 492, 72 S. Ct. 380, 96 L. Ed. 2d 517 (1952).

citizen, stating:

> It is clear that such persons have the right under law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work in a school system on their own terms. They may work for the school system under reasonable terms laid down by proper authorities....if they do not choose to work under such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the state thus deprived them of any right to free speech and assembly? We think not.[68]

In recent years, however, teachers have asserted rights of academic freedom under the First and Fourteenth Amendments and have received protection of the courts for rights to academic freedom. Teachers' constitutional rights to freedom of speech and expression were recognized in Tinker,[69] although the court cautioned that rights of speech and association may be limited because of the unique nature of a school. This right cannot be exercised to the extent that it creates disruptions, nor can it be limited because of a desire to avoid unpleasantness that accompanies an unpopular viewpoint.

The teaching of controversial, irrelevant material can result in dismissal of teachers. When a minister-teacher persisted in carrying civil rights activities into the classroom and disrupted the instructional program after having been warned by the school administration, his dismissal was

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[68] Ibid.

[69] Tinker v. Des Moines Independent School District, 393 U. S. 503, 89 S. Ct. 723, 21 L. Ed. 2d 731 (1969).

upheld.[70]

When evidence indicated that a tenured fifth grade teacher had instituted a "pen pal" program,as a part of which students received letters from teacher's fiancee espousing communism, the court held that the interest of the board in prohibiting sectarian or partisan instruction at fifth grade level outweighed teacher's interest in First Amendment protection. The court stated:

> The plaintiff's contention that the contents of the pen pal letters from his fiancee to his fifth grade students was permissible as within an exercise of academic freedom is a travesty on the concept of a "free trade in ideas." It is equally absurd to contend that a fifth grade classroom is a public forum traditionally devoted to speech and assembly.[71]

The dismissal of a high school social studies teacher was upheld upon evidence that teacher had used the classroom for discussion of questionable topics such as teacher's personal opinions about union activities, approval of polygamy, criticism of marriage, castigation of fellow teachers, and proselytizing of students.[72]

When a high school band director was dismissed for remarks in class concerning sex, virginity, and premarital relations, a Florida court stated:

> ....(W)e are still of the opinion that instructors in our schools should not be permitted to so risquely

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[70]Cooley v. Board of Education, 327 F. Supp. 454 (1971).

[71]Burns v. Rovaldi, 477 F. Supp. 270 (1979).

[72]Knarr v. Board of School Trustees, 317 F. Supp. 832 (1970), aff'd. 452 F. 2d 649 (7th Cir. 1971).

> discuss sex problems in our teenage mixed classes as to cause embarrassment to the children or to invoke in them other feelings not incident to the courses of study being pursued.[73]

Courses on sex education often create volatile reactions on the part of parents. Courts have tended to uphold legality of sex education courses when such courses are optional. The Hawaii Supreme Court ruled in 1970 that constitutional rights of students were not violated by sex education courses when parents had the option of not permitting children to attend.[74] A New Jersey case held that a school board violated the constitutional rights of students when it required attendance of children at a course entitled, "Human Sexuality." The court ruled that the course could be offered, but attendance could not be required.[75]

The major emphasis of this chapter has been on litigation concerning teacher rights with which the principal is most likely to be involved. No attention has been given to cases regarding reduction in force, collective bargaining, and teacher strikes, since these are not usually the result of actions of the principal.

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[73]Pyle v. Washington County School Board, 238 So. 2d 121 (1970).

[74]Madeiros v. Kijosaki, 478 P. 2d 314 (1970).

[75]Valent v. New Jersey State Board of Education, 274 A. 2d 832 (1971).

CHAPTER VI

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

This study was designed to review court cases of importance to school principals and to establish guidelines or recommendations which may be of benefit to school administrators. Definite rules to fit every case cannot be established, since each decision relates only to the specific issues of a particular case and is subject to change. However, certain decisions establish legal precedent, and these cases will be used to recommend guidelines.

Judicial Philosophies

Most actions against principals are the result of alleged denial of constitutional rights. Based upon court rulings, it appears that the following judicial philosophies tend to control in court decisions:

1. Each human being, whether child or adult, is important and has certain rights which must be protected. Prior to the late 1960's, this philosophy was not predominant in legal decisions, and the importance of children's rights was not recognized by the courts. However, in 1969, the United States Supreme Court recognized that students are

persons under the United States Constitution, who possess fundamental rights which must be respected by the state.

2. Education is a right which must be made available to all on equal terms once a state chooses to provide an education for its citizens. Each person, whether child or adult, handicapped or gifted, married or unmarried, rich or poor, healthy or ill, is entitled to the opportunity to develop and grow as a human being.

3. The individual is more important than the state, as is provided in the Fourteenth Amendment.

4. Each person is entitled to maintain personal dignity. Clothing and body searches of students have been held subject to at least minimum safeguards to prevent intrusion into students' privacy.

Court rulings reported are those of the type which may involve actions of school administrators in the areas of First Amendment rights of students, personal appearance of students, suspension and expulsion, corporal punishment, search and seizure, rights of married and pregnant students or unwed mothers, rights of handicapped children, tort liability, and teacher rights. Research questions identified in Chapter I will be answered, findings summarized, and recommendations made in each of these areas.

First Amendment Rights of Students

Questions to be answered concerning First Amendment rights of students follow:

What are the areas most frequently involved in litigation concerning First Amendment rights of students, and what legal precedents have been established by the courts in these areas?

Among the most frequently litigated cases pertaining to principals are those concerned with student wearing of insignia or emblems and the control of student publications. Court action has also been taken recently on the issue of freedom of expression of homosexuality views.

Insignia and Emblems

Legal precedents established by the courts were discussed in detail in the section on "First Amendment Rights of Students."

Summary

1. Where there was no evidence that student wearing of insignia or emblems materially and substantially interfered with requirements of appropriate discipline in operation of the school and where student action was entirely divorced from actually or potentially disruptive conduct, courts upheld the rights of students to wear armbands or other insignia and emblems.

2. When there was evidence that student conduct materially disrupted classwork or involved substantial disorder or invasion of the rights of others, courts held that such conduct was not immunized by the constitutional guarantee of freedom of speech.

Conclusions

Courts will weigh the issue of infringement of personal

rights of expression against the concept of whether the exercise of such rights will materially and substantially interfere with requirements of appropriate discipline in operation of the school.

Recommendations

1. School authorities must not censure student wearing of insignia or emblems solely because of a desire to avoid unpleasantness which may arise as the result of expression of an unpopular viewpoint. If it does not appear that the wearing of insignia will substantially interfere with the work of the school or impinge on the rights of other students, the principal would probably be wise to ignore such student expression.

2. If student wearing of insignia or emblems is to be censured, school administrators must be prepared to show a compelling reason for infringing upon First Amendment guarantees. There must be evidence that student expression materially and substantially interferes with or disrupts the school's educational environment.

3. In addition to establishing a compelling reason for such censure, school administrators must establish fair procedures for implementing control action, and students must know of these procedures before they are applied.

Publications

Another area frequently involved in litigation concerning First Amendment rights is that relating to publications. Legal precedents established in this area are discussed

below.

Summary

1. Courts have ruled that school authorities have the right to control the time, place, and manner of expressive activity, but the burden is upon school officials to tell students when, how, and where materials may be distributed, rather than requiring students to obtain administrative approval of time, manner, and place of particular distribution.

2. It has been concluded by the courts that school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can reasonably "forecast substantial disruption of or material interference with school activities" on account of such printed material. However, when prior approval of distribution is required, certain guidelines must be followed:

a. A definite brief period of time must be specified within which review of submitted material will be completed.

b. The policy must state to whom and how material is to be submitted for clearance.

c. The policy must be clear as to what is meant by "distribution" of written material.

d. There must be a provision that the policy will not operate until the school has established

and informed students of its review procedure.

e. Criteria must be established to be followed by school authorities in determining whether to grant or deny permission for distribution, providing for prompt approval or disapproval of material submitted and providing for procedural safeguards in the form of an expeditious review procedure of school officials' decision.

3. When there is a substantial basis for the belief that distribution of a publication will result in significant emotional harm to students, a school prohibition of distribution has been held to be constitutional.

4. School authorities have the unquestioned right to ban obscene materials from school premises. However, the difficulty arises when one seeks a definition of "obscene" or "profane." Court definitions change often. Courts agree that school authorities can suppress materials from children which cannot be banned from the general public.

5. Courts have held that the First Amendment forbids public school administrators from regulating material distributed off school grounds to which children are exposed prior to or after school.

6. A school regulation permitting the halting of distribution on school premises of publications which encouraged actions to endanger health or safety of students was found not

to prohibit constitutionally protected conduct and not to be unconstitutional.

Conclusions

When school administrators have attempted to control publication and distribution of printed materials, the courts will be looking for evidence of substantial disruption or material interference with school activities, evidence of obscenity, a basis for belief that distribution of a publication will cause significant emotional harm to students, or evidence that such distribution will encourage actions to endanger health or safety of students.

Recommendations

1. The principal must exercise responsibility for seeing that students are aware of policies and required procedures prior to application within the school. (Policies concerning distribution of publications are usually established by school boards.) The principal should furnish students and parents with copies of board policies and explain policies to students.

2. When it appears that a compelling reason has been established for implementing recommended control actions, the principal should consult with the school board attorney to be sure anticipated action is in keeping with board policy and constitutional requirements.

Miscellaneous

Student freedom to express views of homosexuality has been upheld. It appears that the principal should permit

a male student to bring another male to school activities such as proms, if such an issue arises.

Personal Appearance of Students

The question to be answered concerning personal appearance of students is: "Since the Supreme Court has not spoken on the issue of constitutionality of hair and dress codes, how have the various circuit courts of appeal ruled on codes governing personal appearance of students?."

Summary

As stated earlier, the United States Supreme Court has made no specific ruling on the issue of dress and hair codes, and most cases have been decided by United States circuit courts of appeal. The courts are divided on the question of constitutional protection of students' right to wear hair and dress as they choose. For a summary of rulings in the various courts of appeal, principals are referred to the chart of circuit holdings shown on page 92 of this study.

Conclusions

Circuit courts of appeal are divided in opinions as to dress and hair codes. However, there is a general trend toward a more liberal view regarding student dress and hair, with more courts accepting the idea that dress and hair are means of personal expression.

Recommendations

It is recommended that unless there is a compelling

reason for a hair or dress code, the principal should not establish such codes. Often, rules seeking to prohibit long hair on males or jeans on females serve to stimulate the conduct they seek to prevent.

Suspension and Expulsion

The questions this study seeks to answer in the area of suspension and expulsion are:

> What student rights are entitled to due process protection, and what procedures have been held by the courts to be required for suspension and expulsion?.

Summary

The United States Supreme Court has held that students have two interests which are entitled to due process protection. The first of these is the "property" interest in a free education. When a state chooses to provide a free public education for children and requires them to attend school, children acquire a property interest protected by the Fourteenth Amendment, which cannot be taken away for misconduct without following minimum procedures required by the due process clause.

The second interest which requires due process protection is the "liberty" interest. The Supreme Court has concluded that suspensions of up to ten days could seriously damage students' standing with other pupils and teachers and interfere with opportunities for higher education and employment, thereby doing serious damage to students' "liberty."

Short-Term Suspensions

Minimum procedures outlined by the United States Supreme

Court for meeting requirements of due process in suspensions of ten days or less follow:

1. Student must be given oral or written notice of charges against him.

2. If student denies charges, he must be given explanation of evidence against him; and

3. Student must be given opportunity to present his side of the story.

According to United States Supreme Court ruling, it is not necessary that there be a delay between time notice is given and the hearing, so that in the majority of cases, the disciplinarian may discuss the alleged misconduct with the student informally within minutes after it has occurred. The student must be told what the accusation is and the basis of the accusation, and must be given the opportunity to explain his or her version of the facts. Since the hearing may occur almost immediately following misconduct, notice and hearing should preclude removal of student from school, although there are recurring situations in which prior notice and hearing cannot be insisted upon. Among these cases would be those where students' presence poses a continuing danger to persons or property or an ongoing threat of disruption of the academic process. In such instances, students may be removed from school immediately, with notice and rudimentary hearing to follow as soon as practicable.

Expulsions and Long-Term Suspensions

Students may be suspended or expelled for conduct which disrupts the educational process or endangers the health or safety of students, classmates, or school personnel. Most disciplinary actions are based on a breach of school regulations governing student conduct. Courts have ruled that school regulations must be drawn so that students will clearly understand what behavior is proscribed.

Requirements of minimal due process in school suspensions or expulsions involve three main concerns: notice which is adequate; a fair hearing; and substantial evidence to support the suspension or expulsion.

Due process requirement of proper notice requires that a student be forewarned of conduct which will subject him or her to expulsion; that student and parents be given notice of charges and nature of evidence supporting those charges; that a student be advised when and where hearing will occur; and that a student be advised of procedural rights by the school prior to a hearing.

Procedural requirements for a fair hearing include:

a. Providing student with names of witnesses against him;

b. Providing of report on facts to which each witness testifies;

c. Providing student with opportunity to present defense against charges; and

d. Allowing student right to produce either oral

testimony or written affidavits of witnesses in his or her behalf. Courts are divided as to whether the student must be provided with a transcript of hearing upon request and whether due process requires student to have counsel.

Disciplinary action should be taken only if charges are supported by "reasonable evidence." "Reasonable evidence" has been defined as such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Conclusions

In short-term suspensions, courts will require that a student be provided with notice, explanation of evidence, and opportunity to present his or her side of story. In expulsions and long-term suspensions, courts will require adequate notice, a fair hearing, and substantial evidence to support suspension or expulsion. Courts will ascertain whether regulations are drawn so that students understand what behavior is proscribed.

Recommendations

1. Prior to the need for disciplinary action, the principal should study the language of school regulations carefully, to be sure that the intent of such regulations is clear and specific as to prohibited behavior; that they are in keeping with state statutes governing school discipline; that regulations are in writing; that there has been adequate publicity concerning regulations; and that regulations are understood by students and parents.

2. In addition to determining requirements imposed by state and federal constitutions, the principal must examine state statutes prior to taking action to suspend or expel a student, in order to be certain that proper procedures are being followed.

3. The principal must consider the seriousness of action taken in determining whether procedures followed are adequate. The exactness and formality required by procedures in suspension or expulsion are directly proportional to the seriousness of the sanction imposed.

4. The principal must insure that students and parents receive notice of charges against students and the nature of evidence supporting charges, preferably in writing. Notice should refer to the specific rule violated and indicate when and where a hearing on the charges will be held. The student should be given a minimum of five days' notice before a hearing on expulsion.

5. The principal must see that student is informed of his procedural rights prior to hearing. This can be done by sending student a printed statement outlining the procedure along with notification of charges. If the school has a complete disciplinary and procedural code in its student handbook, sending student a copy of the handbook will satisfy this requirement.

6. The principal and others in authority must see that each student receives a fair hearing; that student is given the names of witnesses against him or her and a report of what they will testify, along with the opportunity to present a defense against charges and the right to produce oral testimony or written affidavits of witnesses in his or her behalf.

7. If student believes that only an attorney can properly represent him or her, it is recommended that the school permit the student to have counsel.

8. It is recommended that the school consider using a hearing panel for expulsion cases, consisting of a teacher, a parent, and a student.

Corporal Punishment

The question of concern dealing with corporal punishment is: "What do landmark cases of the Supreme Court hold concerning corporal punishment in the schools?."

Summary

The courts have held that the "in loco parentis" concept applies when pupils are in school. This doctrine provides that school authorities stand in place of parents while the child is in school, and may inflict reasonable corporal punishment on the pupil to enforce discipline.

Legal principles derived from court cases indicate that any corporal punishment administered should conform with

statutory enactment; be for the purpose of correction without malice; not be so cruel or excessive as to leave permanent marks or injuries; and be suited to the age and sex of pupil.

The United States Supreme Court has upheld the finding that the state has a "countervailing interest" in maintenance of order in the schools such that the right of teachers and school officials to administer reasonable punishment for disciplinary purposes is sustained.

The United States Supreme Court has affirmed judgment of a lower court that disciplinary paddling of public school students does not constitute cruel and unusual punishment in violation of the Eighth Amendment and that the due process clause does not require prior notice and a hearing before corporal punishment is administered.

In a recent decision, the Fourth Circuit Court of Appeals indicated that infliction of corporal punishment can violate a student's substantive due process rights, asserting that the substantive due process inquiry must be whether the force applied caused injury so severe, was so disproportionate to need, and was so inspired by malice or sadism that it amounted to a brutal and inhumane abuse of official power which shocks the conscience. This ruling is significant, because under its provisions, a student can recover damages under 42 U. S. C., Section 1983, in the proper kind of case.

While the United States Supreme Court has upheld the right of school officials to use corporal punishment, several

states have banned the use of corporal punishment through state statute or school board policy. In these states, its use is illegal. Some local school boards have also banned or restricted the use of corporal punishment.

Conclusions

The courts will uphold reasonable corporal punishment to enforce discipline, provided such punishment is permissible under state and local laws and policies.

Recommendations

1. The principal should become familiar with state statutes and state and local school board policies concerning corporal punishment, to be sure that any action taken conforms with state and local statutes and policies.

2. The principal must insure that all school personnel with authority to administer corporal punishment are advised of the proper guidelines to follow.

3. The principal must see that corporal punishment administered is consistent with statutory law and school board policies; is made for the purpose of correction; is not cruel or excessive; leaves no permanent or lasting injury; is appropriate to the age and sex of child; and involves use of an appropriate instrument.

Search and Seizure

In considering search and seizure in the public schools, the query is: "How does the Fourth Amendment apply to search

and seizure in the school setting?"

Summary

As stated previously, the Fourth Amendment provides that people have the right to be secure in persons, houses, papers, and effects against unreasonable searches and seizures. During the 1970's, courts came to view public school officials as government officials operating "in loco parentis." It has been determined that the Fourth Amendment applies, but that the doctrine of "in loco parentis" lowers the standard applied to determine reasonableness of search when the search is conducted primarily by school officials to further school purposes. In developing this less stringent, "reasonable suspicion" standard, courts place more weight on the "in loco parentis" doctrine and the statutory responsibilities of school officials to protect safety and welfare of students.

In analyzing a search to determine reasonableness, courts must weigh the danger of conduct against the student's right of privacy and the need to protect student from humiliation and psychological harms associated with the search. Some factors which warrant consideration are: child's age, history, and record in school; the seriousness and prevalence of the problem to which the search is directed; and the exigency requiring that an immediate, warrantless search be made.

The Fourth Amendment prohibition against unreasonable searches has usually been interpreted as permitting a search only when the person whose interests are involved consents, or there is probable cause to search and a warrant has been

issued to authorize the search, or there is probable cause and exigent circumstances such that taking time to obtain a warrant would frustrate the purpose of the search, or a valid arrest has been made and search is incident to arrest.

In considering whether evidence is admissible in criminal proceedings, the courts consider whether the school official acted alone or in concert with police, why the search was instituted, and what place was searched.

When school officials act alone and search is made for the purpose of enforcing student conduct rules, courts have held that the Fourth Amendment requires less stringent standards, and that contraband seized by school officials may be used in a court trial, provided the school can show "reasonable suspicion" or reasonable grounds.

If a search is initiated by police and conducted jointly by school officials and police for the primary purpose of discovering evidence of a crime, courts have tended to hold that search and seizure standards applicable in criminal cases must be met. However, when school officials, in seeking to maintain order and to determine whether a school regulation or criminal statute has been violated, have asked for police assistance in conducting a search, the lesser "reasonable suspicion" standard has usually been applied.

The nature of the place searched may determine whether the person had a reasonable expectation of privacy in that place. It appears that evidence seized by school officials from a student's locker without a warrant or the student's permission

may be introduced in a criminal trial, provided school officials had reasonable grounds for search. However, even if warrants are not required for locker searches by school officials, such searches cannot be classified as administrative unless the search is a general search of all lockers for the purpose of enforcing school regulations of health, safety, or order (searches for rotting food and missing library books, for example).

While most courts have upheld the "reasonable suspicion" standard in testing the legality of a search of the student's person, as searches become more intrusive, involving strip searches, it is evident that the standard rises. The Second Circuit Court of Appeals, while upholding the "reasonable suspicion" standard in a 1979 case, stated that as the intrusiveness of the search intensifies, the standard of Fourth Amendment "reasonableness" approaches probable cause, even in the school context.

An Indiana district court held that a nude search of a student solely upon continued alert of a trained, drug-detecting canine was unreasonable. A strip search of a class where school officials had no facts to particularize with respect to which pupil might have possessed stolen money, was found to be invalid under the Fourth Amendment.

The United States Supreme Court has not decided any cases governing Fourth Amendment rights of public school students. The law relating to balancing of students' constitutional rights and the interests of the state in maintaining order and disci-

pline in the public school is one of the most rapidly changing areas of school law.

Conclusions

When school searches are made, courts will weigh the danger of student conduct against student's right of privacy and need to protect student from humiliation and psychological harms associated with search. When school officials act alone and make search for the purpose of enforcing student conduct, upon reasonable suspicion or reasonable grounds, courts will likely hold that less stringent standards are required and that contraband seized may be used in a court trial. However, if school officials conduct search jointly with police for purpose of discovering evidence of a crime, it is probable that courts will require search and seizure standards applicable in criminal cases. As searches become more intrusive, involving strip searches, courts will require that probable cause be present.

Recommendations

The following recommendations have been suggested by Robert E. Phay:

1. Students should be made aware that lockers are subject to periodic searches for contraband and rule violation.

2. When a search focuses on a particular student because of a rule violation, school officials should record reasons for believing the search is justified, before the fact.

3. If possible, student's consent to the search should be obtained prior to search. School officials would be in a better position if they had asked and received consent than if they had searched without consent.

4. If a student's locker is being searched, the student should be present.

5. The searcher should have a witness present.

6. If a major reason for search is to provide information for criminal prosecution, information should be reported to law enforcement officers, with the request that they conduct the search subject to standards applicable to police search.

7. If police seek to search to obtain evidence for criminal prosecution, the principal should require a search warrant before search is made.

8. Under no condition should the principal approve a strip search without a search warrant.

Other recommendations follow:

1. The principal must be sure student conduct codes contain policies on grounds for suspension and expulsion; that policies are clear; that policies are specific as to categories of conduct for which disciplinary action will be carried out; that procedures for dealing with violation of rules of conduct are clear; that due process rights are enumerated; and that students and parents receive a copy of the student code.

2. The principal should take steps to see that students'

privacy is protected, making certain that teachers and other personnel are aware of rules concerning search of students and their property.

Marriage and Parenthood

In researching court cases dealing with marriage and parenthood, the investigator sought to answer the following questions:

> What principles have been established by the courts on prohibition of school attendance for married students and unwed mothers or pregnant students, and what principles have been established dealing with denial of the right to participate in extra-curricular activities by married student?.

Summary

Courts have established the principle that students cannot be prohibited from school attendance on a permanent basis solely because of marriage. It has also been judicially determined that a school board cannot compel school attendance of married students.

Courts have invalidated school board rules prohibiting school attendance by unwed mothers or pregnant, unwed girls. The position of the courts seems to be that such girls should be given the opportunity for rehabilitation and future education.

Since 1972, a number of courts have found school board rules barring participation of married students in extra-curricular activities to be unconstitutional.

Conclusions

Courts will not uphold the actions of principals or school boards in denying married students the opportunity to

attend school or to participate in extracurricular activities. Neither will courts uphold the right of schools to prohibit pregnant students or unwed mothers from school attendance.

Recommendations

Based upon court findings, it is recommended that principals see that married and pregnant students or unwed mothers are afforded the same right to school attendance as other students, and that students not be denied the right to participate in extracurricular activities because of marriage.

Rights of Handicapped Children

The questions under study concerning handicapped children are: "What rights have been upheld by the courts for handicapped children, and what protections for the handicapped have been provided by legislation?."

Summary

Courts have established the right of handicapped children to equality of educational opportunity. Courts have ordered states to provide individually designed instructional programs appropriate to needs of handicapped and other "special" children.

In 1972, the courts stated that due process of law requires a hearing before children labeled as behavioral problems, mentally retarded, emotionally disturbed, or hyperactive, are suspended or expelled from regular schooling in publicly supported schools or reassigned for specialized instruction.

Several courts have made rulings concerning expulsion of handicapped children, implying in one instance that expulsion cannot be used by administrators to handle handicapped children's problems; indicating in another that before a disruptive, handicapped child can be expelled, it must be determined whether the child's handicap caused the propensity to disrupt; and in a third, that expulsion procedures must include reevaluation of the child by a diagnostic-educational team, a report and recommendation from the team to the school board, and determination as to whether an alternative placement would meet the needs of the child.

The right to procedural due process has been established by the courts. According to Turnbull, the handicapped child and parents have the right to be notified in advance before the school takes action with respect to the child's educational claims, including the right to a hearing before an impartial tribunal, the right to have a case presented by counsel and expert witnesses, right to confront and cross-examine witnesses, right of access to school records, right to have the tribunal's decision based on evidence presented, and right of appeal.

A landmark in legislation concerning education for the handicapped is Public Law 94-142, the federal "Education for All Handicapped Children" act, which mandates that states provide a free public education for all handicapped children between the ages of three and eighteen years. This law has four major purposes, as follows:

1. To guarantee availability of special education programming to handicapped children and youth who require it.

2. To assure fairness and appropriateness in decision-making to provide special education to handicapped children and youth.

3. To establish clear management and auditing requirements and procedures for special education at all governmental levels.

4. To assist efforts of state and local governments through federal funds.

Penalty for failure to comply with this mandate is loss of current federal funding and loss of eligibility to receive future funding.

Public Law 94-142 requires that an individualized educational program (IEP) be devised for each child in special education, with contents to include:

1. Statement of child's level of educational performance.

2. Yearly goals and short-term instructional objectives which will contribute to annual goals.

3. A statement of amount of time child will be able to participate in a regular education program.

4. A statement of the educational services to be provided.

5. A statement of appropriate criteria, evaluation procedures, and schedules.

6. The date services will be initiated and the anticipated length of time such services will continue.

It has been ruled by a court of appeals that a plan for clean instrument catherization must be included in the IEP as a "supportive service" for a child suffering from a neurogenic bladder. The court stated that failure to include such a plan in the IEP violated provision of Rehabilitation Act of 1973, which mandated that no otherwise qualified individual should be excluded from participation in any program or activity receiving federal financial assistance by reason of handicap.

Public Law 94-142 also requires that handicapped children be placed in classes with nonhandicapped children to the maximum extent possible.

Conclusions

Courts will require that handicapped children be granted a hearing prior to suspension, expulsion, or reassignment for specialized instruction. School officials must be able to show that proper study has been provided by a qualified team to determine whether the child's needs will be met. The courts will require that provision be made for "supportive services" necessary to enable handicapped children to participate in school program.

Recommendations

1. The principal should supervise placement of handicapped students to insure protection of their constitutional rights; to see that actions are in compliance with federal and state laws; and to see that policies of the state and local boards of education are followed.

2. Administrative supervision should insure that temporal and procedural guidelines are followed in identification and placement of handicapped students in special programs.

3. Provision must be made for "supportive services" required by the handicapped to allow handicapped students to benefit from public education.

4. Parents must be involved in writing an IEP for the handicapped child and must be informed of rights (including right to procedural due process, right of access to information on child, and right to privacy for information on child).

5. Parents must receive written notice when the school acts or fails to act upon a child's placement.

6. The principal should assume responsibility for seeing that placement provided is beneficial for the child and at the same time, that it is in the least restrictive environment, as nearly like the regular program as possible and no more intensive than is needed.

7. The principal must see that an IEP is written for all children receiving special education services.

Tort Liability

In examining cases in the area of tort liability, the investigator sought to answer the following:

> What legal decisions have been made in tort liability actions having to do with lack of supervision, improper or inadequate instruction, failure to exercise responsibilties properly, field trips, and accountability, and what implications do these decisions have for the school principal?.

Summary

A summary of findings concerning legal decisions made in tort liability cases follows:

There are two major categories of torts, intentional and negligence. This study concentrates on negligence torts, since the principal is more likely to be involved in cases regarding negligence.

Negligence is defined as the "failure to act as a reasonable and prudent person would act under like circumstances." When actions fall below the standard of care expected of a "reasonable and prudent" person, resulting in an injury, negligence is established. School officials are expected to take reasonable care to avoid acts or omissions which they could reasonably foresee would be likely to cause injury.

In considering foreseeability, courts have held that it is necessary only to prove that a general danger was foreseeable, and not the particular accident which occurred. Courts have held that if harm which results is caused by intervention of factors which form no part of recognizable risk, defendants are not ordinarily liable.

It has long been held in the common law that a school district is immune from liability by reason of torts committed by itself or its employees, although this doctrine has been modified through legislative and judicial action in recent years. The United States Supreme Court, for example, has indicated that Section 1983 of the Civil Rights Act of 1871

creates a species of tort liability which on its face allows no immunities.

While principals and other school officials have sought to use governmental immunity as a defense in court, most courts have ruled that employees of the school district are not protected by governmental immunity of the school district against liability arising from personal negligence toward students.

Court actions seeking damages have been filed against principals and school officials for common law torts, constitutional torts, and learning torts.

Common Law Torts

Litigation against principals and teachers in common law torts most often involves lack of supervision, improper or inadequate instruction, failure to exercise responsibilities properly and field trips.

Lack of Supervision

Principals are expected to supervise teachers as well as students. In a case of significance to principals, the Minnesota Supreme Court upheld a jury finding of negligence on the part of a school principal when evidence indicated that principal had not fulfilled his responsibility to develop, administer, and supervise a physical education program properly. The court noted that principal took no action to administer or supervise physical education curriculum or to supervise a new teacher except to furnish teacher with a curriculum bulletin.

In several cases, the courts have found principal and teachers negligent when supervision of students has been inadequate or nonexistent. The courts have made it clear that the principal has a responsibility and duty to take action when a situation is encountered in which a reasonably prudent person would foresee possibility of injury to a student.

Improper or Inadequate Instruction

Judgments have been awarded by the courts against principals and teachers for negligence as the result of inadequate instruction in performance of an activity and failure to instruct in safety rules.

Failure to Exercise Responsibilities Properly

School principals are responsible for inspecting buildings, equipment, and grounds, and for reporting hazardous conditions for correction. Courts have held that when hazards are not corrected immediately, school officials are responsible for seeing that students are protected from danger.

Field Trips

Court decisions reveal that the principles of tort law which apply at school are also applicable to field trips. Both the "reasonable and prudent" test and the "foreseeability" test have been applied by the courts in actions for damages arising out of field trips.

Constitutional Torts

The Civil Rights Act of 1871, Section 1983, providing that school board members and school administrators who deprive employees and students of their constitutional rights may be personally liable, has been upheld by the United States Supreme Court. However, the Court has ruled that student plaintiffs in actions brought under Section 1983 are entitled to receive only nominal damages unless there is proof of actual injury.

Learning Torts

In recent years, actions have been brought by students, seeking damages for educational negligence. Claims for damages based on educational negligence have been defeated by the courts in the three major cases, with the courts indicating that there are no readily acceptable standards of care, cause, or injury in classroom methodology. It was also recognized that the achievement or failure of literacy is influenced by many factors outside the formal teaching process and beyond its control. However, the idea of holding schools accountable for educational negligence seems to be gaining acceptance.

Conclusions

It is likely that the courts will hold school administrators responsible for negligence when evidence is clear that the principal has failed to exercise responsibility to act to prevent the injury of a student where a reasonably prudent

person could have foreseen possibilities of injury. This is particularly true where there is lack of supervision, improper or inadequate instruction, and failure to exercise responsibilities properly. Principals who deprive employees or students of their constitutional rights are likely to be held personally liable. While it is unlikely that principals will be held responsible for student lack of learning at the present time, legal trends which will develop in the future are uncertain. It is quite possible that educational negligence will become a viable basis for litigation within the near future.

Recommendations

1. The principal should see that teachers are aware of the necessity for adequate supervision, instruction as to performance of activities, and instruction in safety rules.

2. The principal should work closely with new teachers in order to see that they recognize the danger in activities taught and to ascertain whether teachers know how to teach safety rules and safe performance of activities.

3. The principal must be constantly looking for areas or activities which may be dangerous to students. Safety rules should be adopted regulating areas of vehicular traffic on school grounds.

4. The principal should inspect buildings, equipment, and grounds regularly, with a view toward identifying and reporting hazardous conditions for correction. Records

should be kept of equipment and facility inspection, noting date and recommendations made for repair.

5. If there is a delay in eliminating hazards, the principal must advise students, teachers, and others of the danger and take action to protect them from injury.

6. The principal must see that adequate supervision is provided for all field trips and should instruct teachers to inform students of safety rules to be followed.

7. The principal should urge teachers to recommend testing and evaluation for students needing special services.

8. The principal should provide special help for students with academic deficiencies or weaknesses.

9. The principal should closely supervise the placement of children in special programs to insure that reevaluation occurs at yearly intervals, so that if they are misplaced, action can be taken to provide education in the best environment for each student.

10. The principal must take an active part in evaluating teachers and in providing help for weak teachers.

11. The principal must exercise the courage to see that unsatisfactory probationary teachers do not become tenured teachers.

12. The principal should document performance inadequacies of poor teachers and take action to replace them with qualified teachers.

13. The principal must take a more active role in

curriculum development and enactment to be sure students are receiving the skills they need.

Teacher Rights

In researching cases concerning teacher rights, this study sought to answer the following question:

> What teacher rights are recognized by the courts in cases involving teacher dismissal for incompetency, immorality, insubordination, and neglect of duty; teacher tenure; First Amendment rights; due process; and academic freedom?.

A summary of the findings follows:

Summary

Most state requirements provide for a probationary period for professional personnel, during which the employee is observed and evaluated to determine whether to recommend tenure. When tenure is granted, the employee is construed to have the right of employment for a continuing or indefinite period of time, subject to removal only for a cause prescribed by state law. Although statutes vary in stipulating causes for dismissal of teachers, among the most frequently mentioned causes are incompetency, immorality, insubordination, and neglect of duty.

Incompetency

Court decisions have indicated that when a principal seeks dismissal of a tenured teacher on grounds of incompetency, chances of success are greater if detailed documentation of performance difficulties has been made. Evidence

supporting dismissal for incompetency carries more weight when the teacher is afforded ample opportunity for correction of ineffective performance. Some state statutes require notice of deficiencies and a time period for correction before a teacher can be dismissed for incompetency.

When procedural requirements are met, courts usually consider substantiated deficiencies and failure to correct them sufficient cause for termination. However, incompetency is not measured in a vacuum nor against a standard of perfection, but against the standard required of others performing the same or similar tasks.

Immorality

Indications from recent decisions are that courts are moving toward a more restricted definition of "immorality" than in the past, almost equating immorality with sexual misconduct. Recent cases have been decided on the basis of impact on school rather than some pre-existing social norm. Teachers' private lives are usually protected from employer interference unless an adverse impact can be shown on the school.

Factors to be considered in determining whether immoral conduct renders a teacher unfit to teach were identified by a district court in California as age and maturity of students; likelihood of adverse effect upon students or other teachers; degree of anticipated adversity; time of conduct; circumstances; likelihood of repetition of conduct; motives underlying conduct; and whether the conduct would have a chilling effect on the rights of the teacher involved or other teachers.

Insubordination

Insubordination is the most frequently cited reason for removing teachers. Courts, in upholding teachers' dismissal for insubordination, have recognized that teachers' chronic refusal to comply with administrative obligations can have a disruptive effect on students, teacher, and administrators, and poses a threat to an optimum learning environment.

Neglect of Duty

When neglect of duty is alleged and proven, courts rarely reverse dismissals unless legally incorrect or inadequate procedures are followed. Courts will protect the exercise of federal constitutional and statutory rights, but it is evident that they will not ignore substantial neglect of duty or abuse of position.

Teachers have filed actions in court in a large number of cases concerning teacher tenure, First Amendment rights, due process, and academic freedom.

Teacher Tenure

The courts have made it known that personnel decisions must be free from constitutional violations. The United States Supreme Court found that no hearing was required for a non-tenured teacher unless failure to rehire would seriously damage the teacher's standing and associations in the community, impose a stigma upon the teacher which would foreclose future opportunities to practice the teaching profession; or directly violate constitutional rights to freedom of speech. The Supreme Court also ruled that an untenured teacher was entitled to notice

of charges and a hearing where the teacher would have the opportunity to refute charges, when he had achieved de facto tenure (through employment for four successive years under a series of one-year contracts), and when nonrenewal of teacher's contract may have been due to exercise of free speech rights.

A two-step procedure was suggested by the United States Supreme Court in Mt. Healthy, when the Court indicated that a teacher must show that free speech activity was a substantial or motivating factor in the board's decision not to rehire, and that if this proof is produced, the school board must establish that the board would have reached the same decision in the absence of the protected behavior.

First Amendment Rights

Public employment is a benefit which cannot be conditioned upon denial of constitutional rights. A plaintiff's claim under the First Amendment is not defeated by the fact that he or she does not have tenure. Even though an employee could be discharged for no reason and had no constitutional right to a hearing, that person may establish a claim to reinstatement if a decision not to rehire was made by reason of exercise of constitutionally protected First Amendment freedoms.

Under the free speech clause of the First Amendment, a teacher's exercise of the right to speak on issues of public importance cannot furnish the basis for a teacher's dismissal from public employment, in the absence of proof of false statements knowingly or recklessly made by the teacher.

Not only must evidence establish that a particular expression is protected by the First Amendment, but it must be proven that the constitutionally protected conduct was a motivating or substantial factor in the school district's decision not to rehire.

As conduct becomes less and less like "pure speech," the showing of governmental interest required for its regulation is progressively lessened.

Even when a teacher is not discharged, but is merely transferred to another school with no loss of pay, seniority, or other rights, a retaliatory transfer for constitutionally protected free speech can trigger First Amendment rights.

Due Process

"Property" and "liberty" interests are two concepts which govern due process claims in public employment. A plaintiff must have a legitimate claim of entitlement to continued employment arising from state law to have a property interest. A claim to entitlement may be established by express statutory or contractual terms or by agreements which may be implied from promisor's words and conduct as related to usage of the past. Generally, courts recognize that a property interest exists if, by statute, rule, or contract, express or implied, an employee can be fired only for "cause."

The protected liberty interest can take two forms. The first is where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." In such a case, the discharged teacher is entitled to due process. To trigger due process, charges must be made

publicly by the governmental entity.

The second form of liberty interest has been determined when the government employer imposed a stigma or disability which foreclosed an employee's freedom to take advantage of other employment opportunities, thereby entitling the employee to due process.

Academic Freedom

In recent years, teachers have asserted rights of academic freedom under the First and Fourteenth Amendments and have received protection of the courts for rights. Teachers' constitutional rights to freedom of speech and expression were recognized in Tinker, although the Court cautioned that such rights may be limited because of the unique nature of a school. Teaching of controversial, irrelevant material can result in dismissal of teachers.

When a teacher instituted a "pen pal" program through which his students received letters from his fiancée espousing communism, the court held that the interest of the board in prohibiting sectarian or partisan instruction at fifth grade level outweighed the teacher's interest in First Amendment rights. The court indicated that it would be ridiculous to contend that a fifth grade classroom is a public forum devoted to speech and assembly.

Courts have tended to uphold the legality of sex education courses when they are made optional. A New Jersey court held

that a school board violated constitutional rights of students when the board required attendance of children at a course on human sexuality, stating that the course could be offered, but not required.

Conclusions

When procedural requirements are met, courts will likely consider documented, substantiated deficiencies on the part of a teacher and failure to correct them sufficient cause for termination. In upholding teacher dismissals on the basis of immorality, courts will decide cases on the basis of whether there is an adverse impact upon the school. When insubordination or neglect of duty is alleged and proven, courts will uphold dismissals of teachers unless legally incorrect or inadequate procedures are followed.

Courts will not condone constitutional violations in personnel decisions. When property or liberty interests exist, courts will require due process for teachers.

Courts will uphold teachers' constitutional rights to freedom of speech and expression, although courts state that such rights are limited because of the unique nature of the school.

Recommendations

The following recommendations are made to principals for dealing with the rights of teachers:

1. The principal must be aware of state statutes and

policies of state and local boards of education.

2. If a teacher's performance is unsatisfactory, or if the teacher refuses to obey instructions, the principal must document the teacher's behavior in writing, taking the following steps:

a. The principal must confer with the teacher about inadequacies and establish specific expectations for the teacher to follow. These expectations should be in the form of instructions rather than recommendations. The principal should direct the teacher as to what is to be done. After discussion with the teacher, a letter should be written to the teacher, reviewing what was said.

b. The principal should provide help to the teacher through suggestions and all available resources, in an effort to facilitate improvement on the part of the teacher. The teacher should be afforded ample time for correction of problems. If state statutes set out a definite time period, statutory requirements should be followed.

c. The principal should make frequent visits to a teacher's classroom for observation and should involve other resource people in observation. Visits should be documented in writing, with follow-up conferences provided to discuss the visits and make sug-

gestions for improvement with the teacher. It would be advisable to have a witness present during conferences.

d. All help provided to teacher should be documented in writing.

e. Follow-up letters should be written to teacher reviewing problems identified during visits and observation, and setting out specific instructions to be followed by the teacher as a result of the report.

3. The principal should not attempt to take action seeking dismissal when a teacher has made a true statement protected by the First Amendment, even though the principal is offended by the statement.

4. The principal must be certain that the standard required of the teacher for whom dismissal is sought is the same as that required for other teachers in the school.

General Recommendations

If the principal wishes to avoid involvement in litigation, the general suggestions below may be of help:

1. The principal should work with teachers to provide an inviting school environment, where students feel that they are respected, worthwhile, and valuable persons.

2. The principal should work with the teaching staff to see that classroom instruction has meaning and relevance

for students and that learning is offered in a manner which will enhance each student's self-image.

3. The principal should work with teachers to see that there is adequate supervision of students at all times, particularly outside the classroom. Someone should be present to supervise in the hallways and in other places frequented by students.

4. The principal should work on developing a good relationship with teachers, through showing a genuine interest in them and through reinforcing their efforts at good teaching.

5. The principal should seek to let teachers and students know what is expected of them. Expectations should always be positive.

6. The principal should reinforce positive behavior on the part of students and teacher.

7. The principal should seek to be fair to everyone.

Recommendations for Further Study

It is recommended that studies of legal aspects of the school principalship be made for each state. Since state statutes and state court rulings differ, it would be beneficial for principals to have guidelines based upon state statutes and judicial decisions as well as those available from this study.

Research dealing with the rights of the principal as recognized by the courts would also be helpful. This study

has been concerned with student and teacher rights, which must be recognized by the principal, and with which the principal must know how to deal. However, the principal would also be interested in knowing more about the rights of principals concerning administrative tenure, dismissal, demotion, or transfer, First Amendment rights, due process rights, the right to file counter suits in tort liability cases, and other rights.

National, state, and local governments are taking action to cut spending which may eliminate principals' positions. For this reason, there is a need for greater awareness of legal rights.

In view of the rise of teacher militancy in recent years, a study of the role of the principal in collective bargaining might be of value.

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