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THE PARAMETERS OF STUDENT LEGAL RESPONSIBILITY AS DELINEATED IN OR DEVELOPED FROM REPORTED FEDERAL COURT DECISIONS RENDERED BETWEEN FEBRUARY, 1969, AND JANUARY, 1983

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The parameters of student legal responsibility as delineated in or developed from reported federal court decisions rendered between February, 1969, and January, 1983

by

Larry Dean Bartlett

A Dissertation Submitted to the
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Iowa State University
Ames, Iowa

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CHAPTER I. INTRODUCTION

On February 24, 1969, the United States Supreme Court handed down its decision in Tinker v. Des Moines Independent Community School District (1). Not since the landmark desegregation decision in Brown v. Board of Education (2) had the court issued a ruling which had such a significant impact on public education. Students, parents and lawyers were quick to recognize the importance of the Tinker decision and turned with increased frequency to the federal court system in attempting to obtain clearer determinations of student rights in the public school setting. By the end of 1982, the Tinker decision had been referred to and cited in subsequent court decisions well over one thousand times (3).

The news media and professional publications have been generous in their coverage of cases involving student rights issues, especially those won by students and parents. Apparently, many writers in the news media and professional publications felt the public needed to learn about court-imposed limitations on the authority of school officials.

However, while the expansion of student rights has become better publicized, little media and professional coverage has been devoted to the other side of the student rights coin. Although students and parents have lost numerous decisions in state and federal courts in the thirteen years since Tinker was issued, little media and professional attention has been devoted to the area of student responsibilities.

It was the purpose of this study to review federal court decisions regarding student rights issues decided and reported between the handing

down of the Tinker decision in February, 1969, and the beginning of 1983, and attempt through special attention given to those decisions lost by students and parents to determine expressly stated and inferential delineations of legal responsibilities of students in the public school setting. Specifically, federal court decisions in the area of student rights issues were reviewed in an effort to ascertain the parameters of student legal responsibilities established by the federal courts. A review and analysis of those court decisions was expected to suggest to public school officials specifically, and the public generally, guidelines as to what the federal courts expect from public school students in terms of legal responsibilities.

This chapter relates to the nature of the problem and the need for the study. The remainder of the chapter includes a discussion of procedures and techniques used in the study, delimitations, and the order in which the study is presented.

Statement of the Problem

The federal court system has been repeatedly turned to by students and parents attempting to obtain a clearer delineation of student rights in the elementary and secondary public school setting. While the parameters of student rights have become better defined and publicized, little attention has been devoted to the area of student responsibilities.

The problem was, therefore, to determine the extent to which reported decisions of the federal courts issued from February, 1969, through 1982 have developed or delineated, expressly or impliedly, the parameters of student legal responsibility.

Need for the Study

Since the United States Supreme Court issued its decision in Tinker, a considerable amount of publicity in the news media and professional publications has been given to the rights of students. Little attention has been given to issues of student responsibility. Even when a publication in its title purports to discuss both student rights and responsibility, seldom is any mention of responsibilities made.

At least one result from this one-sided publicity coverage of the student rights and responsibility dichotomy among educators has been a litigation paranoia. Often, when the public opinion polls show that the public desires more discipline exerted in schools, school officials yield in the face of expressed or implied threat of lawsuit. One author recently summarized the situation as follows:

> Teachers and administrators are clearly receiving garbled messages about education law. Increased litigation in all areas--including desegregation cases, those dealing with the handicapped, and even those involving the financing of education and educational malpractice--are contributing to the feeling on the part of isolated practitioners that the risk of lawsuit has substantially increased. Some of these fears, but only some of them, are accurately held. These feelings have real implications for the way educators actually behave in the classrooms and corridors of our public schools. In the coming decade, school personnel will be responding increasingly to these perceived dangers. They will be more reluctant to discipline students, and for some individuals, the perceived loss of freedom in dealing with their immediate environments may cause them to leave the profession altogether. (4, p. 18)

Apparently, educators need to know and understand that merely because a student or a parent files a lawsuit, it does not mean that the educator will automatically lose. Educators need reinforcement in the

fact that they frequently win lawsuits brought against them, and that with even a rudimentary knowledge of the legal principles at issue, they can exhibit much greater fortitude in the face of threatened lawsuits. They need to be reminded that students and parents frequently lose lawsuits, and that often student and parent losses on student rights issues reflect the parameters of student responsibilities.

The literature reviewed on this subject indicated the lack of any comprehensive study, or even a compilation of federal court decisions which were lost by students and parents on student rights issues or which contained inferences of students exceeding their legally-protected rights. A review of Comprehensive Dissertation Abstracts Database, 1861 to January, 1983, a computerized research tool indexing Dissertation Abstracts International, American Doctoral Dissertations, and Comprehensive Dissertation Index, indicated no record of a study which appears to research the legal aspects of student responsibility as delineated in federal court decisions. A search of E.R.I.C., a computerized data bank of educational materials, also revealed no titles or materials which appear to deal directly with legal aspects of student responsibilities. The Education Index, The Index to Legal Periodicals and Current Law Index list numerous articles that provided helpful background and lead information, but only a few of them focused at all on the legal aspects of student responsibilities.

An article by Elwood M. Clayton and Gene S. Jacobson identified 158 federal and state court decisions involving student rights issues (5). The decisions were divided into topical areas and the number of decisions

in each topical area favoring school officials and those favoring students was provided. According to the article, one hundred twenty-one of the decisions were rendered between 1969 and 1971. Fifty-two were resolved favorably toward students and sixty-nine resolved favorably toward school officials. Of the ninety-seven decisions rendered by the federal court in the period 1960-1971, forty were found to be favorable toward students and fifty-seven were favorable toward school officials. Sixty-nine of the decisions were concerned with student dress codes. One of the conclusions reached by the authors of the article was that an increase in the number of school related court cases in the future was unlikely because precedent setting cases had already been decided which would result in most school cases being settled out of court (5, p. 52).

The article did little more than give the number of decisions rendered in each topical area. A substantial number of the decisions involved in the study were decided before the Tinker decision and many involved state court decisions. There was no indication in the article as to how court decisions which decided some issues in favor of school officials and some issues in favor of students were tabulated in the numerical counts.

In another article, the author compiled a series of brief statements regarding public school authority and responsibility to establish and enforce rules (6). The article cited numerous supportive state court decisions but did not purport to be the result of a formal study.

An article by J. Patrick Mahon was especially refreshing in that it quoted language from several federal court decisions that the author

considered supportive of the authority of school officials to maintain discipline (7). The article, however, did not purport to be the result of a formal study and was far from exhaustive in its coverage. In his conclusion, Mr. Mahon stated what may be the theme of this current study:

> Today, students are quick to remind educators of student constitutional rights. Educators should be just as quick to remind students of student responsibilities. (7, p. 72)

This study was intended to provide a comprehensive review of reported federal court decisions rendered between February 1969, and January, 1983, regarding student responsibilities. Special emphasis was placed on those decisions won by school officials and those decisions which have established express or inferential parameters of student responsibilities. The study was undertaken with the desire that the information collected would prove useful to school officials and employees in their dealings with student rights and responsibilities issues. For the purpose of this study, various expressly stated and inferential parameters of student legal responsibilities, as discussed by the federal courts, were categorized by the legal issues raised by the litigants.

Procedures and Techniques Used in this Study

The research referred to in this study has been almost entirely limited to primary source data. Those data consist of federal court decisions contained in the National Reporter System. The National Reporter System is published by the West Publishing Company and contains complete reported decisions from all federal courts with jurisdiction in the United States. Location of appropriate court decisions published in

the National Reporter System has been achieved through use of The Federal Practice Digest, 2d, The American Law Reports, The Shepard Citation to Court Cases and Statutes, The Corpus Juris Secundum, and The American Jurisprudence, 2d. Secondary sources of information include journals and publications of the education profession, law reviews and journals and other publications offering commentary regarding student responsibilities.

The primary method utilized for locating relevant court decisions for review has been the Federal Practices Digest, 2d which contained brief summary statements of points of law discussed in each reported court decision. Each point of law was indexed through West Publishing Company's copyrighted "key" numbering system. Once relevant portions of decisions were located, additional decisions were found through use of the "key" numbering system and The Shepard Citation to Court Cases and Statutes.

Delimitations

Due to the fact that federal courts at the district, court of appeals and supreme court levels review and decide many different types of education law issues, this study was limited to the following:

a. Reported federal court decisions involving public elementary and secondary school students.

b. Reported federal court decisions involving public postsecondary students which contain important implications for the exercise of legal rights and responsibilities by public elementary and secondary students.

c. Reported federal court decisions issued from February, 1969 through 1982.

d. Reported federal court decisions whose principles affect student legal rights and responsibilities.

e. Reported federal court decisions which address only questions of student legal responsibilities.

f. Reported federal court decisions from which inferences can be drawn regarding questions of student responsibilities.

It was the purpose of this study to attempt to capture the essence of relevant federal court decisions which aid in the delineation of parameters of student responsibilities. While a thorough review of relevant federal court decisions was undertaken, not necessarily all relevant court decisions have been reviewed or reported in this study.

Definition of Terms

The term "student rights" was used in this study to refer to those aspects of student conduct and discipline over which the power and authority of public school officials is greatly limited by constitutional constraints on their exercise of power and authority.

The term "student responsibilities" was used in this study to refer to those aspects of student conduct and discipline over which the power and authority of public school officials are not greatly limited by constitutional constraints. Because courts seldom delineate student responsibilities in express terms, it has been an important aspect of this study to attempt to draw inferences of student responsibilities from federal court application of points of law to specific factual circumstances. For the purposes of this study, unless it was otherwise clear from the facts of the decision, when students or parents lost a lawsuit involving

student conduct against public school officials on substantive issues of law, rather than technical and procedural issues, it has been inferred that the students involved have breached their legal responsibilities as students.

The term "parameter" was used in this study to refer to scope, limits, extent and dimensions. When used in the context of student rights and responsibilities, it included flexible, indefinite and discernible lines of delineation of student rights and responsibilities.

The term "federal court" refers to all United States district courts, courts of appeals and the supreme court. Each state and territory in the United States is divided into one or more districts presided over by a federal district court. All of the district courts are divided into judicial areas called circuits and are presided over by a court of appeals. The court of appeals for each circuit is superior in power and authority to all the district courts within the circuit. There are currently thirteen circuit courts of appeals with jurisdiction over states, territories and the District of Columbia. During most of the time period covered by this study there were eleven courts of appeal (see Appendix). All district courts and circuit courts of appeals are under the power and authority of the United States Supreme Court. Its rulings are "the law of the land." Litigation in the federal courts usually begins at the district court level. If one or more of the parties to the lawsuit in district court are not satisfied with the decision rendered, they may appeal to the circuit court of appeals with jurisdiction over that district court. Litigants dissatisfied with circuit court decisions may

appeal to the supreme court. The supreme court has discretion and authority, in most cases, to decide whether or not it will accept and review an appeal from a decision of a circuit court. If an appeal from a circuit court decision is not made or is not accepted by the supreme court and if a district court decision is not appealed to a circuit court, the last decision rendered is the final decision in the matter.

Organization of the Study

This study is organized into chapters related to the following topics:

Chapter I. Introduction

Chapter II. The Tinker Decision

Chapter III. Speech and Expression

Chapter IV. Press and Distributions

Chapter V. Procedural Due Process

Chapter VI. Validity of School Rules

Chapter VII. Search and Seizure

Chapter VIII. Dress Codes

Chapter IX. Corporal Punishment

Chapter X. Other Issues

Chapter XI. Summary and Conclusions

Except for Chapters I, II, and XI, each chapter deals with specific areas of the law reviewed by federal courts. This study was divided in such a manner because of the various differing legal principles involved and because of the varying degrees of express and inferential student

responsibility found in each of the areas. Many chapters contain brief statements of the current status of student rights on the specific issues considered. This was to create a better perspective for comparing and contrasting student rights and responsibilities. The largest portion of each chapter was normally devoted to a discussion of those federal court decisions which had ramifications for the determination of student responsibilities.

CHAPTER II. THE TINKER DECISION

This chapter contains a discussion of the United States Supreme Court decision entitled Tinker v. Des Moines Independent Community School District (1). Tinker has been, and continues to be, one of the most important and influential court decisions regarding public education. While the United States Supreme Court had previously ruled in a number of decisions that actions of public school officials are controlled by the provisions of the constitution, Tinker was the first decision in which constitutional rights of students collided directly with public school officials' authority to maintain school discipline. Because of that importance in broadening federal court focus on student rights issues, this entire chapter has been devoted to a discussion of the Tinker decision.

Many persons familiar with the Tinker decision remember what the decision said about student rights, but few remember the Tinker decision for what it also said about student responsibilities. It is the purpose of this chapter to review and underscore the importance of the Tinker decision in the delineation of legal parameters of student responsibilities.

Tinker

The Tinker decision involved several students in the Des Moines, Iowa, public school system, aged eight to 16 years, and their parents. They alleged that the Des Moines school authorities infringed upon the

students' constitutional rights because they would not allow the students to wear black armbands to school as a form of symbolic protest. The factual basis on which the court decision was made arose in early December, 1965, when a group of parents and their children met in a private home in Des Moines and decided to publicize their objections to the conflict then raging in Vietnam and their support for a military truce. It was determined, by those present at the meeting, that they would make their opinions known by wearing two-inch wide black strips of cloth on the upper part of one arm during the forthcoming holiday season and by fasting for two days during the holiday season.

Des Moines school principals became aware of the students' plans to wear black armbands to school and at a meeting on December 14, they adopted a rule prohibiting the wearing of armbands to school. Under the policy, students wearing armbands would first be asked to remove them, and if the request was refused, the student would be suspended from school until he or she agreed to return to school without the armband. The three students involved as plaintiffs in the lawsuit were aware of the rule.

On December 16, two of the student plaintiffs wore black armbands to school in violation of the recently promulgated rule, and the next day the third did likewise. They were all suspended from school and their return was conditioned upon their returning to school without the armbands. The students did not return to school until after New Year's Day, the expiration date of their planned period for wearing the armbands.

The student's parents filed a lawsuit in the United States District Court for the Southern District of Iowa under the provisions of 42 United States Code, Section 1983, alleging that Des Moines school officials, by their actions, violated the constitutional rights of the students involved. In the lawsuit, the parents sought nominal damages and an order from the court which would restrain Des Moines school officials from disciplining the students. After an evidentiary hearing, the district court dismissed the lawsuit. The court found that the school officials' actions were reasonable in order to prevent disorder and interruption of school discipline (8).

The students and their parents appealed the district court decision to the court of appeals for the eighth circuit where, because of the importance of the case, arguments were heard and considered by all eight judges in that circuit rather than the customary three judge panel which normally heard appeals. The appeals court was equally divided on the legal issues before it and the division had the result of affirming the district court's decision. No written opinion was issued (9).

The United States Supreme Court agreed to review the case (10) and oral arguments were heard by the justices on November 12, 1968. A decision was rendered on February 24, 1969. The majority of the justices voted to reverse the district court decision and ruled in favor of the students. Two justices wrote dissenting opinions.

The supreme court majority ruled that the Des Moines students involved in expressing their views on the Vietnam conflict did not forfeit the right of expression merely because they were minors under the

authority of public school officials. The court found the students were engaged in the expression of views in a manner involving ". . . direct, primary First Amendment rights akin to 'pure speech'" (1, p. 508, 89 S. Ct. at 737). As such, public school officials could not, in the absence of a material and substantial disruption of the operation of the school, prohibit or interfere with their expression of views. As the court stated in its often quoted language:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights of freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. (1, p. 506, 89 S. Ct. at 736)

The result of the majority holding was that students in the nation's public schools could not thereafter be disciplined for or prohibited from engaging in speech and actions of expression protected by the first amendment, unless material and substantial interference with the educational process occurred or could reasonably be predicted by school officials. No interference with nondisruptive student protest would be allowed merely because student actions were considered controversial by the school authorities. There were, in the court's opinion, facts which led it to believe that the Des Moines school officials were attempting to prohibit the expression of one particular opinion, and it stated conclusively, that in the absence of material and substantial interruption of the school environment, it was not constitutionally permissible to do so.

The earliest outcry as to the potential adverse effects of the

Tinker decision on school discipline was immediate in the form of a stinging dissent to the majority decision written by Justice Hugo Black. His remarks were sometimes sarcastic, sometimes philosophical, sometimes biting, but seldom moderate. He wrote sarcastically:

> The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enable them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach. (1, p. 522, 89 S. Ct. at 745)

He wrote more philosophically:

> We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens--to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not have to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able and willing to defy their teachers on practically all orders. (1, pp. 524-25, 89 S. Ct. at 746)

In reading his concluding remarks, one can almost imagine heated ink flowing from his pen:

> Students engaged in such activities [violent protests] are apparently confident that they know far more about how to operate public school systems than do their parents, teachers and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon

> believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States, I wish therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent. (1, pp. 525-26, 89 S. Ct. at 746)

The fears expressed by Black in his dissent apparently had some effect on the final language approved by the majority when it issued its decision in Tinker. Writing for the majority, Justice Abe Fortas obviously took great pain in his drafting to allay the concerns raised in Black's dissent. He underscored the court's longstanding position of affirming the comprehensive authority of school officials to prescribe and control student conduct within the school within constitutional constraints (1, p. 507, 89 S. Ct. at 737) and repeatedly distinguished the facts in the case from one in which actual disruption of the school environment had occurred.

Justice Fortas repeatedly stated that the record in the case before the district court was devoid of any indication of significant disruption occurring in the educational environment as a result of students wearing black armbands to school. He clearly implied that had violence or substantial disruption actually occurred, the result of the decision would have been different. Justice Fortas noted no less than four times in the opinion the absence of disruptive conduct and even the absence of

potential for disruptive conduct by those student participating in the protest. The majority opinion reads as follows:

> As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. (1, p. 505, 89 S. Ct. at 736)

It also reads as follows:

> The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.
>
> Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises. (Emphasis added.) (1, p. 508, 89 S. Ct. at 736)

And:

> 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 was no finding and no showing that engaging in 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. (Citation omitted.)
>
> In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. (Emphasis added.) (1, p. 509, 89 S. Ct. at 738)

It certainly appears from the language quoted above that the majority on the court attempted to highlight a delineation between student conduct deemed to be acceptable when exercising constitutionally-protected rights, and the point at which students go too far in that exercise and in fact infringe upon the rights of others. Even the concluding remarks of Fortas' opinion for the majority emphasizes the point. The opinion reads as follows:

> As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and by their example, to influence others to adopt them. <u>They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others</u>. They caused discussion outside of the classrooms, but not interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. (Emphasis added.)
> (1, p. 514, 89 S. Ct. at 740)

It is obvious that the majority in <u>Tinker</u> drew a clear delineation between student exercise of protected rights and student conduct which exceeded constitutional protection. Under <u>Tinker</u>, students exercising constitutionally-protected first amendment rights may do so without interference from or discipline imposed by public school officials, only so long as the acts of the students do not create disorder which materially and substantially disrupts the school environment. Actions by students resulting in serious disruption to the school environment do not

carry consitutional protections.

Thus, while the Tinker decision permits unfettered the nondisruptive expression of opinions by students, such as the "silent witness" of black armbands, it does not follow that a student may, as a matter of right, voice his or her opinion on the Vietnam War, or any subject in the middle of a mathematics class. Such an act clearly infringes upon the rights of other students and teachers to exist in an environment conducive to educational pursuits. As a result of the Tinker decision, students, even when exercising constitutionally-protected rights, have the responsibility of not infringing upon the rights of others. The Tinker majority expressly stated as much:

> conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--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. (1, p. 513, 89 S. Ct. at 740)

This view of a delineation between disruptive and nondisruptive conduct of students exercising constitutionally-protected rights is reinforced by action taken by the supreme court about two weeks after the rendering of the Tinker decision. On March 10, 1969, the court refused to hear an appeal by students in the case of Barker v. Hardway (11). The facts in Barker involved a violent student demonstration which resulted in damage to property and personal injury on a college campus. While there is nothing unusual in the court's denial to hear an appeal, it is unusual for one of the justices to make written comment about the denial. Justice Fortas, however, felt the necessity to clearly delineate a

factual distinction between Tinker and Barker. That distinction being between students disciplined for expressing their opinions as opposed to students disciplined for their disruptive behavior. Justice Fortas stated in Barker as follows:

> I agree that certiorari should be denied. The petitioners were suspended from college not for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others. An adequate hearing was afforded them on the issue of suspension. The petitioners contend that their conduct was protected by the First Amendment, but the findings of the District Court, which were accepted by the Court of Appeals, establish that the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful nondisruptive expression such as was involved in Tinker v. Des Moines Independent Community School District [citation omitted]. The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments. (12)

Summary

It is quite clear the opinion of the majority in Tinker, perhaps as a result of having to defend itself in light of Justice Black's sharp dissent, drew a relatively distinct line of demarkation between student rights and student responsibilities. Clearly, at the point student exercise of first amendment rights exceed that which is protected, a responsibility arises to not infringe upon the right of others to the enjoyment of a peaceful educational environment. When students exceed their constitutionally-protected rights through the infringement of the rights of others, they can expect to be subject to punishment imposed by school authorities and school officials can expect the federal courts not to interfere in the carrying out of their duty to maintain order in the schools.

While the Tinker decision did not clearly delineate facts which would enable a person to determine when students exceed their constitutionally-protected activity in all circumstances, it did establish the parameters of protected and unprotected student conduct. It left the further development of the delineation in specific given circumstances to subsequent court decisions. Many of those subsequent decisions which have given greater clarity to the issue are the subject of the remaining chapters in this study.

CHAPTER III. SPEECH AND EXPRESSION

This chapter is a review of federal court decisions involving issues of free speech and expression in the public school setting. Only a few of the court decisions won by students are discussed. Emphasis here has been given to those court decisions in which students and parents have sued school officials for alleged violation of constitutionally-protected rights of free speech and expression and have lost or in which the courts have established express or implied parameters of student responsibilities.

Student Rights

The First Amendment to the Constitution of the United States, in part, prohibits government interference in the area of "freedom of speech." Courts have by definition broadened the term "speech" to include the use of symbolic speech and actions which form a protected freedom of expression. This was discussed somewhat in the Tinker decision and resulted in a decision by the supreme court in that case that the students' wearing of black armbands as a symbolic protest to American involvement in the Vietnamese conflict was "akin to 'pure speech'" (1, pp. 505-506, 89 S. Ct. at 736-37).

Clearly the most important federal court decision involving speech and expression of rights of students in the public schools is Tinker. That decision stated very clearly that minor age public school students do not lose their constitutional protections merely because they are in

the school environment. The court ruled, as was discussed in Chapter II, that unless school officials can establish that a material and substantial disruption of the school environment actually occurred or could reasonably be predicted, the rights of students to speak freely and express their opinions cannot be abridged.

The position taken by the court in Tinker has been expressly followed in many subsequent federal court decisions. For instance, a result similar to that in Tinker occurred in Aguirre v. Tahuka Independent School District (13), where a school rule against wearing "apparel decoration that is disruptive, distracting, or provocative," was held unconstitutional by the court. The Aguirre case involved students of Mexican descent who wore brown armbands as expression and support for their view that educational policies, unspecified by the court, were unfair and should be corrected. The court found that disruption alleged by school officials to have resulted from the armbands was not supported by the evidence and ruled that the students' conduct was protected by the constitution. The court rejected the school officials' argument that the wearing of the armbands in and of itself was disruptive.

In Aguirre, the court's decision was based in large part on the determination that because the rule had been promulgated the day after the students first began wearing the armbands, the rule had been developed specifically to address the practice. Such restraint, in the absence of a showing of material and substantial disruption, was clearly prohibited by the First Amendment as interpreted in Tinker.

Another armband decision which found in favor of the students

involved was Butts v. Dallas Independent School District (14). The Butts case involved a school regulation interpreted by school officials as prohibiting the wearing of black armbands to school in support of the "Vietnam Moratorium of October 15, 1969." School officials felt the wearing of armbands would be disruptive to the school environment and contrary to a long-standing school rule. While the district court agreed that the school officials had reasonably predicted a potential disruption of the school environment, and upheld the actions of school officials, the court of appeals for the fifth court ruled that as a result of Tinker a high standard of protection for student expression is required and reversed the district court. The court of appeals ruled that the record did not disclose any substantial facts that indicated to it that protesting students would cause a serious disruption. The school officials' primary fear was that nonprotesting students would start fights with protesting students. The court of appeals ordered the school officials involved to refrain from interfering with the students' exercise of free expression.

An unusual argument of protected expression was also upheld by a federal court in Fricke v. Lynch (15). In the Fricke case, a male student argued that his attendance at the high school prom with a male escort was a statement favoring equal rights for homosexuals. School officials argued that allowing the boy to take a male date to the prom would predictably result in violence and disruption. They established in testimony that another male student's request to take a male date to the prom the previous year had resulted in his being physically attacked and

injured while at school and that the boy currently requesting permission to bring a male escort was actually attacked and beaten while at school the day after he filed the lawsuit.

The court acknowledged that the likelihood for violence existed but raised the question of whether the school should prohibit the speech, or protect the speaker. It decided that since the assignment of a principal to accompany the boys while in school had previously ended the attacks upon both of them, school officials had established that they were in a good position to take appropriate measures to control the risk of harm. Since protecting the student was less restrictive than stopping the student's act of expression, the court said that the school was obligated to seek the least restrictive alternative.

It is possible that the decision in Fricke was based, in part, on the fact that the prom was an optional school social event and had no direct effect on the educational environment. Had the issue been more closely tied to the learning environment, a different result might have occurred.

Student Responsibilities

The obvious--violence

From a reading of the Tinker decision, it is fairly obvious that conduct in the school setting that is inhibiting, loud, boisterous and violent in nature is not protected by the constitutional safeguards of the First Amendment. Nevertheless, as obvious as that may be to some persons, others involved in such conduct are not precluded from at least alleging that their rights have been violated.

Such was the case of Rhyne v. Childs (16). The facts in Rhyne showed that a general melee between blacks and whites had erupted in the school. One of the students bringing the lawsuit had refused to stop fighting when ordered to do so by a school official, and after being forcefully restrained, continued to provoke the other combatants into renewing the fighting. Another student plaintiff threatened a school official with a wooden stool after the official had intervened in another fight. Three of the students blocked one teacher's reentry to the school building from the school's parking lot and threatened the teacher with physical injury. Some of the students involved left their classrooms, blocked hallways and went into other classrooms attempting to persuade nonparticipating students to leave their classes. A number of the students involved in the violent conduct were suspended with readmittance conditioned upon a conference between the students, parents and school officials. At least one student was disrespectful and uncooperative at the conference.

The federal courts involved with Rhyne had little difficulty in ruling on the facts of the case that the students had exceeded the conduct which is protected by the First Amendment. The discipline imposed by the school officials was upheld.

Similar results occurred in Murray v. West Baton Rouge Parish (17), and Esteban v. Central Missouri State College (18). The former case involved a demonstration against racial discrimination at a high school which became violent and disruptive and the latter involved college students suspended for being involved in mass demonstrations which resulted

in property damage and participants being disrespectful toward school officials.

Student demonstrations do not necessarily have to be violent and destructive to be a material and substantial disruption of the educational environment, however. In Haynes v. Dallas County Junior College District (19), several students were standing in the lobby of the school administration building discussing grievances they believed they had toward the administration of the college. Other students both supportive of and opposed to administration policy gathered until a crowd of at least 200 noisy and impassioned students had congregated. The mass of students was not destructive or violent, but it did block access to the college bookstore, and stairways to classrooms. The dean of students approached the group and asked its members to either disperse or continue the discussion in fewer numbers in his office. The students refused to leave immediately but did disperse shortly after the dean left the scene. A number of the students were suspended from school for their conduct and challenged their suspensions in federal court. The district court upheld the suspensions and noted that the students were not punished for expressing their views but were instead punished for causing a disturbance.

Other armband cases

No one should understand the Tinker decision to say that the wearing of armbands in all circumstances is protected expression. The ruling in Tinker, as in any other court decision, must be considered in its total

factual context. A very clear inference was created in Tinker by Justice Fortas' repeated reference to the absence of disruptive acts or a reasonable prediction of disruptive acts in that case. Actions of expression by students in the school setting are not protected when material and substantial disruption occurs or is reasonably predictable.

Just such a situation of reasonable prediction of disruption occurred in a case of Hill v. Lewis (20), which was rendered almost exactly two years after Tinker. The facts in Hill and Tinker are somewhat similar in that public school students were suspended from school for refusing to remove armbands they wore to protest the Vietnamese conflict. After that, however, the facts are clearly distinguishable. The North Carolina high school involved in Hill was located only four miles from the Fort Bragg Military Reservation and was within eight miles of Pope Air Force Base. The high school had an enrollment of 1,653 students, and thirty-eight percent of the students had a parent on active military duty and an additional sixteen percent had a parent who was a federal employee. When some students proposed to wear black armbands to school in support of the "National Moratorium," other students threatened to wear red, white, and blue armbands as a protest against the protestors. Some of the teachers felt that a confrontation between the groups was possible. On the day before the moratorium, some students distributed leaflets soliciting support for the moratorium and the wearing of black armbands to school the next day.

On the day of the moratorium, between twenty-five and fifty students wore armbands to school. Some wore black armbands, some wore red, white

and blue, and a third group of students wore black gloves or black scarves. Some students received armbands from their fellow students after they entered the school building.

The school's teachers were notified by administrators to refuse admittance to class to any student wearing an armband of any color, and to send to the office anyone who refused to remove an armband. Most protesting students complied with teachers' requests to remove the armbands, but there were examples of refusals to comply and some disrespect and belligerency was shown toward teachers and other school officials.

As the beginning of the school day approached, tension ran high. Several groups of students partially blocked hallways, and some moved noisily down the halls. Some students chanted. Protesting students solicited others to join their ranks. The situation was later described by witnesses as "volatile," "explosive," and "very tense."

Some of the students disciplined by school officials challenged their actions in federal district court and the court found on the record before it that the school officials, in taking the actions they did, acted with a reasonable apprehension of disruption and violence. There was, according to the court, substantial evidence to reasonably lead school officials to forecast material and substantial disruption of the school's activities and acts infringing upon the rights of other students. The school officials, therefore, were found not to have violated the rights of the protesting students. In effect, the court in Hill found that the protesting students, through exercise of their right of expression in a noisy, belligerent manner, were interfering with the rights of the

nonprotesting students. The court's discussion of the point reads as follows:

> The educational opportunities thus proved are free of charge to all children who desire an education. Fortunately, the vast majority of children attend school for that purpose. Surely, their constitutional right to an education under school conditions conducive to that end must be paramount to any rights of those who would disrupt the process. In the balancing of First Amendment rights the duty of the State to operate its public school system for the benefit of all its children must be protected even if governmental regulations incidentally limit the untrammeled exercise of speech, symbolic or otherwise, by those who would impede the education of those who desire to learn. The interest of the State is superior to the rights of the protestants. (20, p. 59)

A similar result occurred in a Pennsylvania case. In Wise v. Sauers (21), an eleventh-grade student was disciplined for refusing to remove an armband. The events involved in the Wise decision occurred a few days after the May 4, 1972, killing of four persons by National Guard on the Kent State University campus. There was a tense and uneasy atmosphere in the Wise boy's school when he was called into the principal's office on May 7 for wearing an armband with the word "strike" on it. He was told that he and the other students could not wear armbands with the words "strike" or "rally" on them. He was told that the two terms advocated disruption and violation of the state's laws on compulsory attendance. He was informed that students could wear plain armbands of any color or armbands with only a peace symbol. Armbands with other wording on them were prohibited. The Wise boy complied with the principal's request to remove his armband with the word "strike" on it.

A few days later, however, the boy wore another armband to school with the phrase "stop the killing" printed on it. This time when the

principal asked him to remove the armband, he refused and was suspended from school. In upholding the principal's actions, the court summed up its reasoning as follows:

> The temporary restriction by the school against the wearing of the armbands with the words "strike," "rally" and "stop the killing" was not related to the suppression of "pure speech" or to the popularity or unpopularity of the ideas sought to be expressed thereby, or the administrator's view of the same. The restriction was related to the potentially disruptive situation at the school at that time. . . . The refusal of a student to obey the reasonable requests in this case was insubordinate and unprotected activity. (21, p. 93)

One armband decision which found against school officials on the facts of the case still reinforced the concept of a special environment found in the educational setting. The court in Butts v. Dallas Independent School District (14) found on the facts before it that no substantial disruption actually occurred or could have reasonably been predicted as a result of students wearing black armband to school but stated as follows:

> Therefore, even in the school environment, where no doubt restraints are necessary that the First Amendment would not tolerate on the street, something more is required to establish that they would cause "disruption" than the ex cathedra pronouncement of the Superintendent.
>
> As to the existence of such circumstances, they [school officials] are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But, there must be some inquiry, and establishment of substantial fact, to buttress the determination. (14, p. 732)

The right to the enjoyment of a peaceful and calm school environment for nonprotesting students is not the only right which may be protected from protesters wearing armbands. In the case of Williams v. Eaton (22), black players on the University of Wyoming football team were dismissed

from the team for their efforts to wear black armbands during a football game with Brigham Young University. The black players wanted to protest the anti-black admission policies of Brigham Young and the Morman Church which supports Brigham Young.

When challenged for their actions, Wyoming University officials, like the black athletes, defended their actions on first amendment grounds. They argued that their acts were in furtherance of the established first amendment policy of religious neutrality on the part of government institutions. They argued that allowing the football team members of a state supported school to wear black armbands to protest a policy of the opposing school based upon religious belief was a hostile expression by its team members toward the beliefs of a religious group, and that such action was constitutionally prohibited. In weighing the students' rights of expression and the school's responsibility to maintain religious neutrality, the court found in favor of the school officials.

Other symbolic expression

Federal courts have dealt with issues of symbolic expression in areas other than armbands. In the Colorado case of Hernandez v. School District Number One (23), the issue revolved around the wearing of black berets. At the beginning of the school year, a group of students of Mexican descent requested and received permission from the principal to wear berets and long hair while in school. They argued the berets and long hair would serve as symbols of Mexican culture, unity among Mexican-Americans, dissatisfaction with society's treatment of their race and

their desire to improve that treatment. The principal, who was himself of Mexican descent, permitted the wearing of black berets and long hair on a trial basis, and for a time, no problems arose.

Many of the same students later requested that they be allowed to leave classes on September 16 to participate in a Mexican Independence Day parade and demonstration. Even though there had been problems of disruption and violence at another high school in the city the previous September, the principal approved the students' request. In conjunction with the September 16 celebration, the school sponsored special programs on Mexican heritage and culture.

After September 16, the peaceful environment of the school rapidly deteriorated. Students wearing the berets became arrogant and boisterous and tried to run the affairs of the school. The black beret became a symbol of the students' power to disrupt the conduct of the school and the exercise of control over the student body.

Many students wearing black berets became engaged in disruptive activities. They walked down the halls of the school during class time shouting "Chicano power," blocked hallways, refused to identify themselves to teachers or explain why they were in the halls during class time. They showed disrespect for teachers, tried to persuade other students to leave the classroom to join them in the halls and caused disturbances in the cafeteria. In general, the students wearing the black berets created an atmosphere of apprehension, tension and disruption in the school

In an effort to call attention to the growing problem, nonprotesting

students threatened to form vigilante groups. School officials tried with a mixed result to persuade the protesting students to refrain from disrupting the school. Finally, because the beret had become a symbol of disruption, students were ordered to refrain from wearing the berets in school. Those who refused to comply with the order were suspended.

When the suspended students challenged school officials' actions in court, the court hearing the case did not have a difficult time deciding on the facts that the students wearing the berets had exceeded their constitutionally-protected right of expression. The court reemphasized the proposition that disruptive conduct is not protected by the constitution.

Not enough emphasis can be placed on the point that the specific facts of each case of exercise of constitutional rights plays a large part in the final outcome. In Hernandez, black berets and long hair in themselves did not produce disruption of the educational environment. It was the acts of the students associated with the berets and long hair which caused the disruption.

In some situations, however, it is the symbol itself which may be the root of the problem. In the decision in Melton v. Young (24), the provocative symbol was a replica of the Confederate flag worn as a shoulder patch on a jacket.

The facts in Melton arose in Chattanooga, Tennessee, a city that had been racked during 1969 by racial violence. Previously all-white schools in the community had been forced to desegregate. The specific school at issue in the case had been all white, had "Rebels" as the school

nickname, the Confederate flag as the school symbol and "Dixie" as the school pep song.

During the 1969-70 school year, the school had blacks enrolled for the first time, and the school had to be closed twice due to racial disturbances. Much of the protest within the school was directed toward the school's symbol, pep song and nickname. In September and October, 1969, black students walked out of pep assemblies protesting the use of the Confederate flag and the playing of "Dixie." At the half-time of one of the football games, black students tried to burn a Confederate flag on the field. Altercations broke out within the school with increasing frequency. By October, 1969, school officials decided to drop the Confederate flag and "Dixie," and 1000 white students staged a walkout in protest.

Considerable racial tension continued in the school and the town throughout the year. The police were called to school several times to maintain order.

In September, 1970, the school opened peacefully and calmly. One student threatened the peace and calm, however, by wearing a jacket to school with a shoulder patch consisting of a replica of the Confederate flag. School officials reminded him of the existence of a school regulation forbidding the wearing of "provocative symbols" upon student clothing and ordered him to either remove the patch, not wear the jacket to school, or to leave the school campus. He left and was suspended by school officials.

The student challenged the action of school officials in federal

court. The court ruled that the school regulation against "provocative symbols" was too broad in scope and too vaguely worded to be used to control activities of speech and expression and struck down the rule as being unconstitutional. The court did, however, uphold the school officials' right, under the circumstances, to prohibit the wearing of the shoulder patch. The court pointed out that the right of free speech and expression is not absolute and may be controlled where there is a "clear and present danger" of disruption. The school officials were not required to wait for disruptions to actually occur in the second year. The court reiterated the point that limitations on the conduct of speech and expression must be narrowly construed, but that school officials have considerable leeway in controlling the when, where and how of speech and expression. The court in Melton said as follows:

> no thoughtful person would suggest that a student should be permitted to stand and sing "Dixie" in a classroom as the mood might strike him, nor even to recite the Oath of Allegiance in so unregulated a manner. Reasonable and non-discriminatory regulations of time, place and manner are always permissible restrictions upon expression. (24, p. 96)

In Melton and Hernandez, the symbols of protest, the Confederate flag and the black beret, were directly related to actual disruption or reasonably predicted disruption. The case of Guzick v. Debus (25) is somewhat different in that it involved a symbol not at all directly related to the predicted disruption. The federal courts upheld school officials' actions in restricting the symbolic expression anyway.

The facts in Guzick involved an Ohio high school which was extremely tense due to racial unrest. School officials, cognizant of serious

disruptions at nearby schools, worked diligently at keeping order at the high school. The school had a long-standing rule, consistently enforced, forbidding the wearing of buttons, badges, scarves and other means of expressing support for a cause or messages unrelated to education. There had been a history of inflammatory buttons in the racially mixed school. For instance, one student had been forced shortly after the assassination of Dr. Martin Luther King, Jr. near Easter, to remove a button which read "Happy Easter Dr. King."

The difficult aspect of this case to understand is that the button at issue had nothing directly to do with racial tension. The button at issue supported a forthcoming anti-war demonstration which was to take place in Chicago.

When a student refused to remove the anti-war button, he was suspended and brought suit. The district court hearing the case reasoned that the rule against buttons and other insignia not related to school activities was a significant factor in preserving order in an already tense racial situation and dismissed the student's lawsuit. The school officials were determined by the court to be correct in their argument that allowing students to wear buttons would result in a substantial disruption of the school environment. The court found that the potential for eminent disruption in the school supported a no-symbol rule.

On the issue of the anti-war button not being related to the specific potential cause of disruption, the court still found that the general rule was valid. It reasoned that students would be unable to understand the subtle distinction between the wearing of buttons which might cause

disruption and those which would not. The court also noted that a regulation which distinguished between different buttons would be virtually impossible to administer.

On review of the district court decision in Guzick, the court of appeals for the sixth circuit affirmed the district court's ruling (26). In ruling in favor of the school officials, the circuit court expressly affirmed the right of teachers and students to a peaceful educational environment. The court of appeals said as follows:

> Denying Shaw High School the right to enforce this small disciplinary rule could, and most likely would impair the rights of its students to an education and the rights of its teachers to fulfill their responsibilities.
>
> The buttons are claimed to be a form of free speech. Unless they have some relevance to what is being considered or taught, a school classroom is no place for the untrammeled exercise of such rights. (Emphasis added.) (26, p. 600)

Sit-ins and walkouts

One of the most interesting and helpful federal court decisions for delineating student responsibilities was that handed down by the United States District Court in Pennsylvania in the case of Gebert v. Hoffman (27). In that case, several students sought an order from the court that would prohibit school officials from disciplining students engaged in sit-in demonstrations during and after school. The court found evidence that the sit-in disrupted the normal operation of the school in five different ways and then made a determination as to whether each was "material and substantial" or whether it was protected activity. The five causes of disruption were: The protesting students skipped classes

and encouraged other students to skip classes; the sit-ins forced some classes to be moved from their scheduled locations; students participating in the demonstrations moved through the halls noisily during class time; the demonstrators attracted nonparticipating students; and the school administrators supervising the protesting students were unable to attend to their regular duties.

The court in Gebert concluded that only the last two of the five were protected activity. It refused to use the reactions of nonparticipating students and administrators as the basis for a determination that the conduct of the participants was not protected. The other three activities were not protected, however, and the court ruled that the participating students could be disciplined. The court said as follows:

> "Appropriate discipline in the operation of the school" certainly requires students to attend their scheduled classes and to refrain from preventing other students from attending classes in their scheduled location. School officials may act to prevent demonstrating students from disrupting classes by moving noisily through the halls. One of the "special characteristics of the school environment" is the need to maintain order and discipline to promote the educational program. We find that the actions of the students disrupted the educational program of the school and therefore that the action of the school officials in terminating the sit-in by suspending the students did not violate the First Amendment rights of the students. (27, p. 697)

Several other federal court decisions have also affirmed the responsibility of students to be in class, even when weighed against their first amendment rights of speech and expression. In Hobson v. Bailey (28), a seventeen-year-old black student challenged disciplinary action taken against her after she skipped school and encouraged others to skip school. She was truant on four consecutive Mondays and participated in

a walkout at the school as part of a community-wide protest in a non-school related racial issue. While on suspension for those activities, she participated in picketing the school and encouraging other students to refrain from entering the school building. She was then expelled from school, but eventually allowed to return to school at another attendance center. She challenged her reassignment to another school on first amendment grounds.

The court did not agree with the student's arguments that her conduct was protected. The court said as follows:

> It is the opinion of this Court that the defendant McCormick and other administrative personnel of the Board of Education were charged with the duty of offering public education to the students of the City of Memphis and that their education could not be adequately offered unless the students were in school and relieved from disruptive interferences. While this Court does not find that any and all absences from school in furtherance of a racial protest require disciplinary action, regular and repeated absences which cause interference with the educational processes must not go unchecked. (Emphasis added.) (28, p. 1400)

A similar result occurred in the case of Press v. Pasadena Independent School District (29), when an eighth-grade girl challenged her suspension from school for participation in a walkout demonstration protesting a school rule prohibiting girls from wearing pantsuits to school. In ruling that the walkout was not constitutionally protected, the court said as follows:

> It occurred upon school property and at a time when plaintiff and other demonstrators should have been engaged in classwork. Its occurrence interrupted the pedagogical regimen of the day. It is well settled that demonstrative activity such as this in secondary schools, which is disruptive of the educational process or is calculated to undermine the school routine, forfeits the shield of the First Amendment. (29, p. 536)

When federal courts are as sensitive to the disruptive nature of the lack of regular attendance as evidenced in the Hobson and Press decisions, it is axiomatic that when walkouts are accompanied by disruptive assemblies and demonstrations they are not protected activity. Such was the result in Dunn v. Tyler Independent School District (30) and Tate v. Board of Education (31).

Pure speech

Although the freedom to speak our minds is one of the most fundamental and staunchly protected rights under the constitution, not all spoken words are protected, especially when uttered in the educational setting. In the case of Dillon v. Pulaski County School District (32), a student challenged his being disciplined for violation of a school rule against kissing in school and his defiant and disrespectful attitude toward a teacher. After the teacher had twice told the boy to stop kissing, the student replied in a disrespectful tone, "What a drag." The boy challenged being disciplined on the basis that his remark was free speech protected by the First Amendment. The court rejected his claim and found that disciplinary action for showing lack of respect toward a teacher and violating the school rule against kissing was valid because both were within the power of the school officials to regulate. In the court's view, both had the potential for disruption of the school environment. In upholding the actions of the school officials, the court stated as follows:

> Democracy at work requires that citizens learn to question the decisions of those in authority, but these citizens

> must also learn to voice their objections in a reasonable and effective manner. One goal of the educational process, therefore, should be to instill in students a respect for authority. Not only is this an important lesson to be learned by students, it also is necessary for the effective functioning of the education system. (32, p. 56)

The court in Dillon overturned the school's discipline, however, because it found that the school officials had not provided the boy with appropriate procedural due process.

Another student learned that all speech is not protected in the case of Fenton v. Stear (33). The facts in Fenton involved a group of male high school students sitting in a car in a shopping center parking lot on a Sunday evening. The parking lot was located a few miles from the town where their school was located. When a teacher named Stear from their school drove by, one of the boys shouted, "There's Stear." Another replied, "He's a prick."

On the next day, the second boy was met at the school door by an administrator and asked about his participation in the incident of the previous evening. The boy admitted his role in the incident and was given a three-day in-school suspension and not allowed to participate in the senior class trip to Philadelphia. He was later placed on "restriction" for seven days. Restriction meant that he had to sit at a designated table in the cafeteria at lunch time, could not talk to other students in the hallway between classes, could not participate in extracurricular activities and had to obtain permission whenever he left the school grounds during school hours. The disciplined student challenged the school administrator's authority alleging that his right to free speech had been abridged. The argument did not carry much weight with the

court, however. The court noted in its decision that not all speech is protected by the constitution and listed fighting words, lewd and obscene words and profane and libelous words as not being protected. The court then affirmed the actions of the school officials with the following statement:

> It is our opinion that when a high school student refers to a high school teacher in a public place on a Sunday by a lewd and obscene name in such a loud voice that the teacher and others may hear the insult it may be deemed a matter for discipline in the discretion of the school authorities. To countenance such student conduct even in a public place without imposing sanctions could lead to devastating consequences in the school. (33, p. 772)

While it is difficult to determine how much of the court's decision was based on the fact that the punishment given the student was relatively minor, the court did make note of the fact that actions taken by school officials did not deprive the student of an in-school education or graduation.

Miscellaneous speech and expression issues

Over the years, the federal courts have expanded the first amendment protection of free speech and expression into many areas. As a result, a number of activities merely related to speech and expression have become first amendment issues. One of the most interesting and potentially important as precedent for future litigation is that of Trachtman v. Anker (34).

Trachtman involved staff members of a high school newspaper who wanted to distribute a questionnaire on student sex attitudes, knowledge and experience to students in grades 9-12. School officials refused

to allow distribution of the questionnaire on the grounds that the newspaper staff was inexperienced in handling research and that the project had the potential of inflicting psychological harm and damage on the students responding to the questions. Some of the newspaper staff members and their parents brought suit against the school officials alleging violation of the staff members' right of free speech and expression. At the trial, school officials were able to establish, through expert testimony, that psychological harm might predictibly come to some students as a result of participation in the survey.

The district court ruled that school officials could prohibit the distribution to younger-aged children in grades nine and ten, but could not prohibit distribution to students in grades eleven and twelve. The court of appeals for the second circuit overturned the latter aspect of the ruling and upheld the school officials' total prohibition of the distribution. The court of appeals had the following to say about the authority of school officials:

> We believe that the school authorities are sufficiently experienced and knowledgeable concerning these matters, which have been entrusted to them by the community; a federal court ought not impose its own views in such matters where there is a rational basis for the decisions and actions of the school authorities. (34, p. 519)

It also said as follows:

> Consequently where school authorities have reason to believe that harmful consequences might result to students, while they are on the school premises, from solicitation of answers to questions, then prohibition of such solicitation is not a violation of any constitutional rights of those who seek to solicit. (34, p. 520)

Another interesting issue with implications for future litigation

arose in Buckel v. Prentice (35). In Buckel, a group of parents alleged that their rights of speech and expression were violated when school officials refused to send material prepared by them home with students of elementary age. The parents desired to have the students take home to their parents material opposed to official school policy regarding decentralization of the district's authority over individual schools. The parents argued that because the school sends materials about safety, music instrument rental, school lunch menus and musical and other programs home with students, that the school had created a public forum to which nonschool persons could not be denied access.

The district court did not agree with the parents' argument and stated that distribution of school-related and safety information was a proper extension of the educational function of schools. When schools do so, it does not necessarily give rise to any right of access to student distribution by parents or other citizens.

The court did note, however, that a different result might occur if parents request to have something sent home with students which was meant to provide rebuttal to something which had previously been distributed to students by the school. The district court's ruling was upheld by the court of appeals (36).

In Seyfried v. Walton (37), students attempted to force school officials to produce a play by alleging that the refusal to do so was a violation of their constitutional rights of free speech and expression. The school faculty sponsor had decided to produce the successful Broadway musical "Pippin," but felt that some portions of the script were

inappropriate for a high school production. She edited out those portions she felt were inappropriate.

A complaint about the forthcoming production reached the superintendent, who determined that due to an emphasis in the play on and references to sexual activities, the musical, even as modified, was inappropriate as a high school production. His position not to produce the play was supported by the school board.

The court ruled that the production of school plays was an integral part of the curriculum and as such, decisions on whether or not to produce a specific play should be left to the school officials involved. As long as the school officials did not attempt to censor ideas or perspectives and as long as scripts for the play were available and not banned by school authorities, the court could find no violation of the students' first amendment rights.

Even though the school officials in the final analysis lost the case of Vought v. Van Buren Public Schools (38), it does hold some interesting insights for school discipline. The case involved a sixteen-year-old boy who was in possession of an admittedly obscene publication entitled "White Panther Statement." He was suspended from the school until a conference could be held with his parents, and at the conference he was warned not to again be found in possession of "obscene literature" in violation of school policy.

At some later time, the boy was determined to be in possession of an issue of Argus magazine and suspended from school pending a school board meeting to consider his expulsion. The issue of Argus as a whole

was not determined by school officials to be obscene, but some specific words in it were. The school board expelled the boy, and he challenged its action as a violation of his first amendment rights.

The district court did not at first accept his argument. It found that the facts involved a situation where the operation of the school and the rights of other students to be protected from obscene materials were involved and held that the right of school officials to control possession of obscene materials on school property did not violate the student's first amendment rights.

The court did find, however, that the boy's right to procedural due process had been violated and directed a new hearing before the school board on the issue of expulsion. At the hearing, the boy's attorney was able to establish that the "obscene" words in the boy's possession in alleged violation of the school rules were also available in books and magazines in the school library.

When the school board expelled the boy a second time, the court overturned its action pointing out that the material in the school library was inconsistent with and caused confusion in light of the school rule on obscene literature. The rule was therefore determined to be unenforceable.

Summary

While the establishment of student rights in the area of speech and expression in Tinker has been carried on, expanded and better defined in subsequent federal court decisions, so too have limitations on the

exercise of those rights been better defined. It has become quite clear that even when students are engaged in constitutionally-protected activities of speech and expression, they may not infringe upon the rights of their fellow students, teachers and school officials to a nondisruptive educational environment. It can also be noted from court decisions that disruption of the school environment does not have to be violent to exceed the limitation of "material and substantial disruption" (Gebert, Dillon and Hobson). From decisions, it can also be determined that actual disruption need not take place but rather only a reasonable prediction of such disruption must be present (Melton, Guzick and Wise). The school environment is indeed viewed as special by the federal courts.

While the decision in every case is based on established principles of law within the context of the facts presented, parameters of student responsibilities in some areas can be gleaned from a review of federal court decisions involving allegations of abridgment of free speech and expression by public school officials. Within the factual limitations of each case, it is reasonably clear to assume that students in public schools, even when exercising their rights of speech and expression, cannot engage in acts of disrespect and insubordination (Rhyne, Esteban, Haynes, Hill, Hernandez, Wise and Dillon), noise in the hallways during class time (Hernandez and Gebert), blocking access to class (Haynes, Hill and Hernandez), skipping classes (Gebert, Hernandez and Press), encouraging others to skip class (Hernandez, Gebert and Rhyne), disruptive sit-in demonstrations (Gebert), psychological harm to fellow students (Trachtman), issuing fighting and obscene words (Fenton), property

damage (Esteban), and infringement of other persons' religious beliefs (Williams). Even when the federal courts rule against school officials, in student rights cases, they often narrow their findings to the facts of the case and expressly reiterate the point from Tinker that student rights do have limitations.

CHAPTER IV. STUDENT PRESS AND DISTRIBUTIONS

The purpose of this chapter is to review federal court decisions applying the first amendment freedom of press concept to student publications and distributions in the public school setting. The first segment of the chapter contains a brief discussion of federal court decisions which have limited public school officials' authority over student publications and distributions, and the latter segment contains a more detailed discussion of decisions which, in whole or in part, help establish express or implied parameters of student responsibility.

Student Rights

No area of student rights litigation has constrained the authority and actions of public school officials more than that of student press and distribution.

The First Amendment to the Constitution of the United States, in part, prohibits government from ". . . abridging the freedom of speech, or the press; . . . ." Because public schools are by their very nature government, the federal courts have had little difficulty applying first amendment constraints to situations involving student publications and distributions. An argument that an officially-sponsored school newspaper is not a newspaper in the usual sense, but instead a beneficial educational tool developed as a part of the curriculum and best left to discretionary decisions of school officials has not been sufficiently convincing to foreclose federal court interference (39).

Neither has suspension of publication of an official school newspaper successfully ended a legal challenge by the students. In the case of Reineke v. Cobb County School District (40), a high school principal suspended further publication of the official school newspaper when students brought a lawsuit against the school for alleged censorship. The relevant facts in the case centered around two issues of the paper. In the first issue, the faculty advisor to the paper had, without discussion with the students, deleted a paragraph which dealt with new teachers' attitude toward homosexual teachers and had substituted the word "darn" for the word "damn" in a quote. While the students involved were somewhat upset by the changes made without their consultation, they took no specific action. When distribution of that issue of the paper was later halted by the principal and remaining copies confiscated, however, the students became very upset.

Again, no immediate action was taken by the students. But, when two articles in the next edition of the paper were deleted, some of the journalism students brought suit. School officials immediately suspended publication of the paper.

The principal defended his actions on several grounds. He said that photographs in the paper had been borrowed from other publications without permission or copyright release; an article on Vietnam was in poor taste and possibly libelous; an article on football game tickets contained erroneous information; an article concerning the student body president was a personal attack upon the student; a quoted ten-year-old-segregationist statement by a current school board member might result in adverse

racial relationships; a letter to the editor would be falsely attributed to the wrong person; and the publications contained many spelling and grammatical errors.

The court in Reineke analyzed the facts before it in light of the Tinker decision and narrowed the legal issue down to whether or not the school officials could demonstrate a reasonable belief that the prohibited expression in the paper would have engendered a material and substantial disruption of school activities or interferred with rights of other students. With the exception of the copyright and libel issues, the court found that none of the censored articles could be prohibited by school officials. The court stated that mere controversy and minor errors in spelling and grammar were not sufficient grounds for abridging students' first amendment rights.

On the issues of copyright and libel, the court ruled that while they were valid reasons to delay distribution while seeking legal advice, the reasons given by the principal were not good enough reasons for total suppression of the newspaper. The court ordered the release of the censored articles and ordered the school to reinstate publication of the newspaper.

First amendment restrictions on the authority of school officials are not limited to official school newspapers, however. In Thomas v. Board of Education (41), four students successfully challenged minor disciplinary action taken against them for their participation in writing and distributing a thirteen-page sexual satire, that had been prepared for the most part off school grounds and had been distributed entirely

off school grounds. The literary work at issue was entitled "Hard Times" and contained articles satirizing school lunches, cheerleaders, classmates and teachers. It also contained an editorial on masturbation, and articles on sodomy, prostitution and castration. A banner printed on the front cover warned "uncensored, vulgar, immoral."

The court in Thomas reiterated the point often made by federal courts that school officials, because of the special nature of the school environment, must be given latitude in prohibiting ordinarily protected first amendment rights of students. But, in the final analysis, it held that because most of the acts related to "Hard Times" occurred off school property, and no disruption of the school environment actually occurred or was reasonably predicted, the students could not be punished for their acts.

A similar result occurred in Shanley v. Northeast Independent School District (42). In that case, the court made it very clear how it felt about attempted school control of first amendment rights of students when committed off school grounds. The court began its decision with the following language:

> It should have come as a shock to the parents of five high school seniors in the Northeast Independent School District of San Antonio, Texas, that their elected school board members had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust it will come as no shock whatsoever to the school board that their assumption of the authority is an unconstitutional usurpation of the First Amendment. (42, p. 964)

A number of school officials have learned as a result of cases taken into the federal courts that what they may have felt was in their

authority to control within the school setting must yield where provisions of the first amendment relating to free press are concerned. Such was the situation in no less a forum than the United States Supreme Court in the case of Papish v. Board of Curators (43).

In Papish, a graduate student at the University of Missouri School of Journalism was expelled for distributing an unofficial newspaper on campus which contained "indecent speech." The publishers of the paper reproduced a political cartoon on the front cover showing policemen raping the Statue of Liberty and the Goddess of Justice. The cartoon's caption read ". . . With Liberty and Justice for All." Inside, the paper contained an article entitled "Motherfucker Acquitted" that discussed a New York city youth who was a member of an organization known as "Up Against the Wall, Motherfucker" and who had been on trial and acquitted on an assault charge. The supreme court ruled that neither the cartoon nor the story at issue could be labeled as constitutionally obscene or otherwise unprotected. The school's expulsion of the student was overturned.

Another example of school officials being unable to exercise authority in an area historically open to them was found in the case of Bayer v. Kinzler (44). In Bayer, a school principal ordered that distribution of a school-sponsored newspaper cease and seized undistributed copies. His objection was based solely on a four-page supplement containing sex information which the students had placed in each copy of the paper. The supplement was composed of articles dealing primarily with contraception and abortion. The articles were serious in nature and intended to convey

information. They were not alleged to be obscene.

The court ruled that there was no likelihood that distribution of the supplement would cause material and substantial disruption or interference with school work and discipline. It, therefore, ordered the school officials involved to refrain from interfering with distribution of the newspaper containing the supplement.

In reviewing cases involving student press and distribution, it is obvious that the federal courts do not generally like any prior restraint placed on the printed word. The court of appeals for the seventh circuit has even held that any school rule requiring prior review or approval of student publications is unconstitutional (45).

While not all federal court decisions have been as restrictive on the issue of prior restraint as those in the seventh circuit, most are nearly so. In a court review of a school rule which required all non-school sponsored publications be submitted to the principal prior to distribution, the court of appeals of the fourth circuit showed clearly in Baughman v. Freienmuth (46), that the burden of proof for justification of a prior restraint rule lies with the school. The court said as follows:

> In the secondary school setting, first amendment rights are not co-extensive with those of adults, and while such rules of prior restraint may be valid, they nevertheless come to this court with a presumption against their constitutionality. (46, p. 1348)

Frustration of school officials attempting to draft school rules authorizing administrative review prior to distribution by students was epitomized in the case of Nitzberg v. Parks (47). That case involved

a school rule on prior restraint which a federal district court determined to be unconstitutional. School officials submitted a redrafted rule to the court three times before the judge concluded that the language drafted would pass constitutional scrutiny. On appeal, however, the court of appeals for the fourth circuit disagreed and found the rule constitutionally deficient in no less than six respects. Clearly, the federal courts do not look with favor on school rules of prior restraint on student publications.

Student Responsibilities

Prior restraint

While the court of appeals for the seventh circuit has ruled that any school requirement of submission of publications in advance of their distribution is unconstitutional, the courts of appeal in the second, fourth, fifth and ninth circuits have approved the concept of prior restraint in narrowly-defined circumstances. In Eisner v. Stamford Board of Education (48), the court of appeals for the second circuit found that a school board rule requiring prior review by the administration was valid, but that it was constitutionally defective in that it lacked proper procedures for submission of the student publications for review by administrators.

Even though the court of appeals for the fifth circuit ruled in Shanley v. Northeast Independent School District (42) that students responsible for publication and distribution of underground newspapers could not be punished by school officials under the then existing rule,

it did establish a limited prior restraint authority for school officials. The court in Shanley concluded that expression by students may be reasonably regulated in manner, place and time, and may be subjected to prior screening under clear and reasonable regulations. Expression by high school students may be prohibited in advance of distribution only if it materially and substantially interferes with school activities, with the rights of teachers or other students, or is reasonably predicted to do so. But, the court in Shanley also concluded that expression by high school students can not be prohibited or controlled solely because other persons disagree with its content.

Comparing the lengthy, detailed, legally-phrased language of the school rule successfully challenged in Shanley with the court's four-page written disection of the rule, it is hard to imagine how a satisfactory prior restraint rule can actually be drafted in the fifth circuit. But, the decision does not leave school officials without some hope. The court in Shanley wrote the following about student rights:

> Tinker's dam to school board absolutism does not leave dry the fields of school discipline. This court has gone a considerable distance with the school boards to uphold its disciplinary fiats where reasonable. [Citations omitted.] Tinker simply irrigates, rather than floods, the fields of school discipline. It sets canals and channels through which school discipline might flow with the least possible damage to the nation's priceless topsoil of the First Amendment. (42, p. 978)

Regardless of the court's poetic offering of hope in Shanley that a rule requiring prior submission of student publications can be constitutionally defended, it remains little more than theoretical in some federal court jurisdictions. The fourth circuit, for instance, has upheld

the concept of prior restraint rules in three separate decisions, but in all three, the specific rule challenged was determined to be constitutionally defective (46, 47, and 49).

In the ninth circuit, however, an oral prior restraint rule has been upheld in an unusual context. The decision in Nicholson v. Board of Education (50), involved a teacher who alleged that his employment contract was not renewed for, among other things, actions he took as the school's student newspaper advisor. After a number of controversial articles appeared in the student newspaper, the principal directed that articles on specific limited subjects be submitted to him in advance of publication for the purpose of ensuring their accuracy. The teacher alleged that his contract was not renewed, in part, for his refusal on several occasions to comply with the directive. When articles were submitted, the principal often expressed his disapproval of the content but never censored or denied publication of a submitted piece.

When the teacher challenged the nonrenewal of his employment contract on the basis that the principal could not constitutionally direct prior review as he had done, the court did not agree. The court wrote as follows:

> Writers on a high school newspaper do not have an unfettered constitutional right to be free from prepublication review. In fact, the special characteristics of the high school environment, particularly one involving students in a journalism class that produces a school newspaper, call for supervision and review by school faculty and administrators. Under the precise circumstances of this case administrative review of a small number of sensitive articles for accuracy rather than for possible censorship or official imprimatur does not implicate first amendment rights. (Emphasis added.) (50, p. 863)

A federal court in New York also upheld prior restraint of distribution of a school newspaper in the absence of a written school rule authorizing such action. In Frasca v. Andrews (51), the court was faced with a situation where a high school principal prevented distribution of the school newspaper on the last day of school in the spring semester and confiscated all the copies of the paper. The principal felt at the time of his actions, and later verified, that an uncomplimentary letter to the sports editor, purportedly speaking on behalf of the entire lacross team, was the work of only a few members of the team. He was also concerned that some of the language, such as ". . . we will kick your greasy ass" and "pissed off" appearing in the letter and the sports editor's response was vulgar and obscene and that the letter and response appearing in print might provoke a confrontation between the newspaper staff and the members of the lacrosse team.

He also felt, and later verified, that a letter appearing in the paper which contained derogatory personal statements about a named student leader was largely inaccurate. Because the paper was to be distributed on the last day of school, the named student would not have an adequate opportunity to properly defend himself to readers of the paper and the result would have devastating personal consequences for him.

In first speaking to the issue of the absence of a rule authorizing prior restraint, the court in Frasca concluded than an express rule was not required when circumstances clearly justified the action taken, and the court found that the circumstances in the case did justify the principal's actions. The key circumstances, in the eyes of the court,

were a prompt investigation and verification of the falsity of several important aspects of the publication and an inadequate opportunity to rebut, explain or correct errors.

The court also felt that the principal was reasonably justified in his fear of a disruption occurring between newspaper staff members and members of the lacrosse team. The court, however, did not agree with the principal's actions on the basis of his obscenity argument. The language the principal objected to was considered by the court to be vulgar, but not obscene in the constitutional sense.

In an area of conflicting first amendment rights, the federal district court in Nebraska upheld a portion of an Omaha School rule on prior restraint. In the case of Hernandez v. Hanson (52), the rule at issue provided that student distributions had to have the prior approval of the high school principal and that distributions by students could be prohibited by school officials when the content was "commercial in nature," "sectarian," or involved nonschool-related literature.

The court in Hernandez upheld the concept of requiring prior approval of written distributions so long as appropriate procedural safeguards are provided. But, it struck down the specific provisions regarding commercial and nonschool-related literature. The court reasoned that distribution of such material was not shown to be a sufficiently disruptive influence on the school environment.

The court upheld the portion of the school rule involving the distribution of sectarian literature. It reasoned that if students were permitted by school officials to distribute religious literature, it might be

misinterpreted by some students and parents as an official government stamp of approval on the material. Such an appearance of school officials' approval of religious material in the school setting would violate the first amendment mandate of separation of church and state.

Justification for subsequent discipline

While the federal courts have been reluctant to uphold school officials' actions with regard to prior restraint of student publications, they have not been as reluctant to uphold school officials' discipline of students after the fact. It can be concluded that school officials have more latitude in holding students responsible for their actions related to student press and distribution than in prohibiting the acts in the first place. In neither situation, however, can students be disciplined solely for the ideas they express.

In Dodd v. Rambis (53), school officials successfully defended their action in suspending, and later expelling, several students who attempted to incite a student walkout. In the facts of the case, a walkout involving 54 students protesting the school's enforcement of school rules dealing with student smoking and student attendance was staged on a Wednesday. The participating students gathered directly across the street from the high school within the sight and hearing of many students and faculty members. Many students remaining in class had to be restrained from viewing or joining the protesters. Students who participated in the walkout were suspended from school for one to three days.

On the evening of the same day, several students met at a private home and drafted a leaflet which read as follows:

Let's Support Our Rights
School Walkout: Friday
Time--9:00 a.m.
Place--Parking lot across from Eagles
Stay off school property
Meeting: For High School Students
6:30 p.m. parking lot behind Kentucky
Fried Chicken. tonight
Support better Discipline Rules!!!
(53, p. 25)

One hundred and twenty-five copies of the leaflet were printed for distribution to fellow students on the next day.

On the morning of the next day, less than 24 hours after the walkout of the day before, each of the five students involved as plaintiffs in the lawsuit engaged in distribution of the leaflets. Most of the distribution occurred in the school halls prior to class and during passing periods between classes.

After investigation by the principal, two of the five plaintiffs involved in the lawsuit were determined to be involved in the distribution and were suspended for three school days pending a subsequent hearing to consider their expulsion. After hearing of the suspension of their comrades, the other students involved came forward, admitted their involvement and were also suspended.

On Friday, the day of the planned walkout, only four students at the school walked out of their classes. A few days later, the boys involved in the distribution of the leaflets were expelled for the remainder of the semester for violation of the following school rule:

> Any conduct which causes or which creates a reasonable likelihood that it will cause a disruption or material interference with any school function, activity, or purpose, or that interferes or a reasonable likelihood that it will interfere with the health, safety, or well-being or the rights

of other students is prohibited. (53, p. 26)

The following is an example contained in the rule of the type of conduct which could lead to suspension or expulsion:

> D. Interfering with school purposes or with the orderly operation of the school by using, threatening to use or counseling other persons to use violence, force, coercion, threats, intimidation, fear, or disruptive means. (53, p. 26)

The court in Dodd (53) was faced squarely with a challenge to school officials' authority in disciplining students for distribution of leaflets which advocated a "walkout" from classes in violation of a school rule. It found that distribution of the leaflets by the students is the type of conduct protected by the First Amendment, but that under the ruling in the Tinker decision, the school officials were confronted by circumstances which reasonably prompted them to forecast a serious disruption of the school environment. The fact that no serious disruption actually resulted from the actions of the disciplined students did not, in itself, invalidate the actions of the school officials. The actual walkout of students the day before, and a reasonable apprehension that a larger walkout would occur, as called for in the leaflets, resulted in the court ruling that the school officials had acted in a reasonable manner. The court concluded that the school officials could properly discipline the students, even by expulsion. It stated that a wide degree of discretion in determining appropriate punishment should be allowed school officials once a reasonable forecast of material disruption with the school's work is made.

A similar result occurred in Baker v. Downey City Board of Education

(54), where two students were suspended for ten days for use of "profanity" and "vulgarity" in an underground newspaper. The court in Baker found that although the papers were distributed just off school grounds while students were on their way to school, they were distributed in such a way that it could be reasonably predicted that they would end up on school grounds. The court also found that the papers caused disruption of the school environment. Between twenty and thirty teachers reported disruption to their classes caused by students reading and talking about the issues of "Oink" circulating in school.

While some of the articles in the issue of "Oink" in question were critical of school staff members, the court noted that the students had not previously been disciplined for similar statements appearing in earlier issues of the paper. The court concluded that the new factors which brought about discipline for distribution of the current issue were the disruption resulting from the paper and the students' use of profane and vulgar terms. The court concluded that the students were not disciplined for what they said, but for the profane and vulgar manner in which they expressed their views.

The court distinguished the situation before it from that in Tinker by noting that the students in Tinker did not express their views in similar vulgar and profane terms. The court concluded as follows:

> The right to criticize and to dissent is protected to high school students but they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults. The education process must be protected and educational programs properly administered. (54, p. 527)

Similar results in discipline imposed after publication and

distribution occurred in two other federal court decisions as a result of incidents on postsecondary campuses. In Speake v. Grantham (55), a group of college students were disciplined for possession of leaflets containing false and misleading information and for falsely denying having any knowledge of the leaflets.

A few days after several students were killed in demonstrations at nearby Jackson State College, a number of students at the school involved in the case requested that the dean of students suspend classes for two days. Noting that only two days of classes remained before final examinations were scheduled, the dean replied in the negative. About two o'clock the next morning, several hundred leaflets containing false information that classes would be suspended on the last two days of school before final examinations, were discovered scattered about the campus. School officials conducted an immediate investigation and spotted several students in the early moring hours in and around a van parked near a dormitory entrance. School officials and law enforcement officers approached the van and questioned the students present. They denied any knowledge of the leaflets but refused permission to search the van.

As the van with several students inside left the scene, it failed to stop at a stop sign and the law enforcement officers arrested the driver for failing to stop. One of the arresting officers looked through the window of the van and saw a stack of several hundred copies of the leaflets at issue. The students involved were later disciplined by school officials and challenged their discipline on the basis that their

acts were protected by the First Amendment. School officials testified at the trial regarding the importance of the last two school days before final exams and how the acts of the students in distributing the leaflets would have resulted in academic chaos.

The court ruled that the students were not punished for exercising their first amendment rights but for promoting or attempting to promote unrest and a threat of serious disruption of normal educational activities. It found that the school officials acted in an effort to control and regulate conduct which would have obstructed the educational functions of the school and interfered with the rights of all the school's students. The court concluded as follows:

> First Amendment rights are not a license to trample upon the rights of others. They must be exercised responsibly and without depriving others of their rights, the enjoyment of which is equally precious. (55, p. 1278)

In the second case involving postsecondary students, the court of appeals for the sixth circuit upheld discipline resulting from distribution of leaflets which contained false and inflammatory information (56). The court felt that the leaflets contained requisite language sufficient to justify the discipline imposed.

An interesting set of facts involving competing student interests was addressed in the case of Williams v. Spencer (57). In the Williams decision, the court of appeals for the fourth circuit, the same court which had previously determined in three decisions that prior restraint rules were invalid, had before it a situation in which a principal had halted the distribution of an underground newspaper after distribution

had begun and had banned further distribution of the paper on school property. The school rule involved did not require prior review of printed materials, but it did expressly authorize the principal to halt distribution of student publications once distribution had begun and to discipline students involved in the publication and distribution of any material which "encourages actions which endanger the health and safety of students."

The basis for the principal's actions was the inclusion in the publication of an advertisement for the Earthworks Headshop, a store that specialized in the sale of drug paraphernalia. The advertisement primarily promoted the sale of a waterpipe used to smoke marijuana and hashish, but it also advertised paraphernalia for cocaine usage.

The court found that the advertisement encouraged the use of drugs and therefore did, in fact, endanger the health and safety of students. The court, also, found that an argument that the Tinker ruling required a finding of substantial disruption before first amendment rights could be interfered with was without merit. The court ruled that disruption is merely one justification for school authorites to restrain distribution of a publication, not the only one.

The court in Williams expressly distinguished its ruling from the three previous prior restraint cases in that circuit. It strongly implied that prior restraint by school officials requires greater court scrutiny than discipline imposed after distribution of student publications has occurred. It was also noted that commercial speech, although protected, is not entitled to the same high degree of protection as other

types of speech.

The court in Williams also ruled that the procedure involved in the halting of the distribution was valid. Under the school rule, the principal had to state in writing within two school days his reasons for halting a student distribution. Aggrieved students then had the right to appeal the principal's decision to the area superintendent, who was to render a written decision within ten school days. If the students requested a hearing before the area superintendent, the area superintendent was required to hold the hearing within ten school days of the request and had to render a decision within five school days of the hearing. If the students remained dissatisfied, they could appeal to the superintendent who had to respond within five school days. The superintendent's decision was final. The court concluded that the procedure was "adequate and prompt."

Another decision upholding school officials' protection of other students was that of Katz v. McAulay (58). Involved in the case was a 47-year-old school rule against "soliciting funds from the pupils in the public schools."

A few students in the school wanted to distribute leaflets soliciting funds from fellow students for the legal defense of eight persons on trial for anti-Vietnam War demonstrations. School officials successfully defended the school rule on the basis that it was promulgated to protect school children from the annoyance of solicitors.

The court found that the rule was not aimed at free speech and press but at nonexpressive features of student conduct, namely,

pressures upon students of multiple solictations. The court noted that students are on the school premises because they are required to be there in order to obtain a formal education and solicitors seeking out a captive school audience would be in competition for the time, attention and interest of students and school staff. The obvious effects of solicitation were considered harmful to the operation of the school. The court distinguished the facts before it from those in Tinker on the basis that the school officials in Katz based their actions upon a demonstrable harm to students rather than an unsubstantiated fear of disturbance. The court detailed its reasoning as follows:

> and it is foreseeable that pressure groups within the student body are likely to use more than polite requests to get contributions, even from those who are in disagreement with the particular cause or who are, in truth, too poor to afford a donation. The Board's regulation appears to be reasonable and proper and has a rational relationship to the orderly operation of the school system. (58, p. 1061)

Many of the court decisions discussed earlier, which found in favor of students on issues of prior restraint and improper procedures, strongly implied that student distribution was not totally beyond the control of school authorities. In Baughman v. Freienmuth (46), the court ruled that a school rule had insufficiently defined "obscene" and "libelous" material for the purpose of prior restraint, but that such material clearly can be banned and punishment imposed after distribution by students. The court distinguished normal student conduct rules from prior restraint constraints which must be narrow, objective and reasonable so as not to inhibit printed words. Under the Baughman decision, school officials can apparently ban obscene and unprivileged libel and

discipline students under rules prohibiting such materials, as long as it is not in the context of prior restraint.

In another fourth circuit case, Quarterman v. Byrd (49), the court of appeals noted that the following language at issue in the case was inflammatory and potentially disruptive:

> . . . WE HAVE TO BE PREPARED TO FIGHT IN THE HALLS AND IN THE CLASSROOMS, OUT IN THE STREETS BECAUSE THE SCHOOLS BELONG TO THE PEOPLE. IF WE HAVE TO--WE'LL BURN THE BUILDINGS OF OUR SCHOOLS DOWN TO SHOW THESE PIGS THAT WE WANT AN EDUCATION THAT WON'T BRAINWASH US INTO BEING RACIST. AND THAT WE WANT AN EDUCATION THAT WILL TEACH US TO KNOW THE REAL TRUTH ABOUT THINGS WE NEED TO KNOW, SO WE CAN BETTER SERVE THE PEOPLE!!! (49, pp. 55-56)

But, because the student was punished by school officials for violation of an unconstitutional prior restraint rule instead of distributing inflammatory and potentially disruptive language, the court found that he could not be punished.

Even in the seventh circuit decision of Fujishima v. Board of Education (45), which held that all prior restraint rules are unconstitutional, the court said that schools may reasonably control the time, manner and place of distribution. It expressly stated that a school might promulgate a rule prohibiting distribution of literature during a fire drill, as occurred in the case, as a regulation of time and place.

Conduct and publications

At least three federal court decisions have upheld school officials' discipline of students involved with distribution of student publications when serious improper conduct on the part of the students was also involved. In Sullivan v. Houston Independent School District (59), a

high school principal had several less than positive episodes with a student. The situation began when the principal purchased an underground newspaper from the student and scanned its contents. He noted several instances of coarse language and informed the student he was selling papers in violation of a school rule which required prior permission to distribute materials. The principal asked him to stop. The student disregarded the request and the principal decided to suspend the boy for failure to comply with the prior submission rule and his request to stop selling the papers.

Upon being informed in the principal's office that he was suspended, the boy walked out, slammed the door and shouted so that several persons overheard, "I don't want to go to this goddamn school anyway." During the period of his suspension, he returned to the school campus several times and each time was reminded that suspended students were not to be present on school premises.

On the day the student and his parents were to meet with the principal to discuss his return to school, the boy again sold underground newspapers to students on their way to school. The principal approached the boy, showed him a copy of the school's prior submission rule and told him that if he did not stop selling the paper, he would call the police. In response, the boy referred to the principal in "the common Anglo-Saxon vulgarism for sexual intercourse."

The principal notified the boy's parents that he was again temporarily suspending their son for violation of the prior submission rule and the use of profanity. Later, a hearing was held and the boy was

suspended for the rest of the semester.

The student and his parents challenged the suspension in federal court. The trial court ruled that the boy's rights had been violated and ordered him reinstated in school with credit allowed for work missed.

On appeal to the court of appeals, the trial court was overruled. The circuit court felt that the boy's conduct in persisting to sell papers, returning to campus after being told not do so, and twice shouting profanity at the principal outweighed his claim to first amendment protection and gave school officials sufficient grounds for disciplining him. The circuit court brushed over the issue of the validity of the prior restraint rule and concluded as follows:

> We hasten to point out that by thus limiting our review in this case we do not invite school boards to promulgate patently unconstitutional regulations governing student distribution of offcampus literature. Nor, needless to say, do we encourage school authorities to use otherwise valid regulations as a pretext for disregarding the rights of students. Today we merely recognize the right of school authorities to punish students for the flagrant disregard of established school regulations; we ask only that the student seeking equitable relief from allegedly unconstitutional actions by school officials come into court with clean hands. (59, pp. 1076-77)

A similar result occurred in Schwartz v. Schuker (60), when a senior student was suspended for refusing to surrender to a school official copies of an underground newspaper he was distributing in violation of a school rule and advising another student to refuse surrender of his copies. While under suspension, he continued to come on school grounds in defiance of school officials' orders. After an administrative hearing, it was determined that the boy would be required to graduate early, effective two weeks previously or transfer to another school.

The boy challenged the administrative ruling in federal court and the court upheld the ruling. In doing so, the court noted that it was hard for it to tell whether the boy was disciplined for first amendment actions or flagrant and defiant disobedience of school authorities. The court concluded as follows:

> While there is a certain aura of sacredness attached to the First Amendment, nevertheless those First Amendment rights must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner to protect the rights not of a few but of all the students in the school system. The line of reason must be drawn somewhere in this area of ever expanding permissibility. (60, p. 242)

Like the courts in Sullivan and Schwartz, the court in Graham v. Houston Independent School District (61), had before it a group of students who flaunted the authority of the local school officials by publishing and distributing an underground newspaper in violation of a school rule to the contrary. There was testimony on the part of the students that a major purpose behind distribution of the underground newspaper was to flaunt the school rule. When students participating in the distribution were told to cease distribution of the paper immediately or leave school until they would comply with school rules, they left the school.

In analyzing the case before it, the court in Graham noted that the students involved were actually disciplined more for disobedience than for the actual distribution of protected material. The court also noted that this was in accord with the views expressed by the court in Schwartz. The court in Graham did distinguish the two situations, however, by saying that the activity resulting in discipline in Schwartz

was more flagrant than that in the case before it. It found, however, that the distinction was not controlling. Instead, the court felt that such judgments should be left to school officials. The court stated its view as follows:

> this court will not begin to intimate the extent to which a student may be disobedient before disciplinary measures are properly taken. That determination is within the province of the school administrators. (61, p. 1167)

Summary

From a review of federal court decisions lost by students and parents in the area of student press and distribution, and inferences drawn from other cases, it is quite clear that the federal courts judiciously guard student rights to publish their own ideas and words almost as strongly as they protect the private press. Federal courts are especially reluctant to allow prior restraint rules to have a "chilling effect" on the printed words of students.

In the area of discipline imposed after the fact, however, the federal courts seem to rely on much the same criteria as they did in the area of speech and expression. While the decision in each case is based upon established principles of law within the context of the facts presented, some parameters of student responsibility can be obtained from a review of federal court decisions involving allegations of abridgment of free press and distribution rights by public school officials. While students cannot be disciplined for the ideas they print, they apparently can be held accountable by school officials for insubordination (Sullivan, Schwartz and Graham), use of profanity, vulgarity and obscenity (Baker

and Baughman), use of libelous words (Baughman), potential disruption (Frasca, Dodd, Speake, Katz and Quarterman), substantial disruption (Shanley and Baker), accuracy (Nicholson, Frasca, Speake and Norton), failure to uphold the mandate of separation of church and state (Hernandez) endangering health and safety (Williams and Fujishima), and failing to follow school rules that reasonably establish place and time for distribution of student publications (Shanley and Fujishima).

CHAPTER V. PROCEDURAL DUE PROCESS

It is the purpose of this chapter to review federal court decisions involving issues related to procedural due process in the public school setting. This chapter includes a brief discussion of decisions which have established student rights in the area of procedural due process; however, primary emphasis will be given to those federal court decisions which were won by school officials or in which the courts have established express or implied parameters of student responsibilities. Consideration will also be given to federal court decisions that indicate that defects in procedural due process may be cured by subsequent action and that monetary damages awarded for mere procedural due process violations will be nominal.

Student Rights

The Fourteenth Amendment to the Constitution of the United States states in relevant part, ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . . . That language does not mean that states cannot take away the life, liberty or property of persons, only that when it does so, the state must provide "due process of law."

Probably no other language in the Constitution has engendered more court decisions and discussion than the phrase "due process of law." Yet with all the discourse and all the decisions, the exact meaning of the phrase remains elusive.

The legal concept of due process actually includes two separate elements. "Substantive" due process deals primarily with the basic fairness or lack of fairness with which government treats its subjects. Relatively few federal courts have addressed the substantive due process concept in the context of discipline in the public schools (see Chapter X).

The other due process concept, "procedural" due process, has been the subject of numerous federal court decisions involving student discipline. It is with the latter that this chapter is solely concerned.

Procedural due process is, by its very nature, a very flexible legal concept. It attempts to balance the government's responsibility to provide procedural due process with the particular life, liberty or property interest of the person involved. The federal district court in Nebraska in the case of Graham v. Knutzen (62) described the concept of procedural due process in the context of school discipline as follows:

> "Due process" is an elusive concept. Its requirements vary with the particular situation involved. At the heart of due process lies a balancing test wherein the loss of a particular right (here, the right to attend school) is weighed against the interest of the governmental authority (maintaining order and discipline in the schools). As the significance of the lost right increases, the governmental authority is held to a stricter standard of procedural safeguards. (62, p. 883)

Whatever else procedural due process is, it remains little more than a process. It does not go to the merits or the wisdom of the decision. Its purpose is merely to aid in achieving a proper result. This important point was described in another Nebraska federal district court decision in Fielder v. Board of Education (63). In a footnote to the decision,

Chief Judge Warren Urbom outlined his concept of the minimal procedural due process which should be granted to students being expelled from school and concluded that procedural due process has its limitations:

> I grant that failure to follow such procedures does not result inevitably in the making of a wrong decision. Neither does the following of them guarantee a right decision. Rules cannot make a decision-maker wise, but they can help him become knowledgeable and deliberate. (63, p. 731, n. 7)

The primary purpose of procedural due process is, therefore, to require the decision-maker to make available an appropriate procedure which better enables the decision-maker to make a fair and just decision.

The most important federal court decision concerning procedural due process in the context of discipline of public school students is that of the United States Supreme Court in Goss v. Lopez (64). That decision concerned a case in which a number of Columbus, Ohio, public school students were suspended from school under a state statute that authorized school administrators to impose suspensions from school for up to ten days. Allegations against the students included refusing to follow a principal's order to leave a school auditorium, attacking a police officer who attempted to remove a student from the school auditorium, participating in a disturbance in a school lunchroom, and being present at a demonstration at a school other than the one designated for attendance. None of the students were given a due process hearing of any kind, either before or after they were suspended. For the first time, the supreme court was faced with the question of whether the Due Process Clause of the Fourteenth Amendment required school officials to provide students a hearing before they could be suspended from school for ten days or less.

The supreme court first analyzed the circumstances to determine whether protected "liberty" or "property" interests were present. Since No life-threatening situation existed, there was no issue regarding "life" interests. The court determined that in a situation where students were being suspended from school for even ten days or less, both liberty and property interests were present which required the protections of due process procedures.

The court reasoned that because the state of Ohio, through its statutes, required local authorities to provide a free public education to residents between five and 21 years of age and required students to attend under compulsory education provisions, it had created in students a reasonable expectation of receiving an education. This reasonable expectation translated into a "property right." The court also concluded that the acts upon which the suspension were based would be placed in the students' school records and interfere with future opportunities for postsecondary education and employment. The court ruled that such interference with a person's reputation, honor or integrity translated into a protected "liberty right." The court also concluded that because education is so important in the modern world, even suspension from school for as few as ten days is not so minor a penalty that fourteenth amendment due process protections could be ignored.

After concluding that procedural due process was required in the circumstances of a short-term suspension, the court addressed the problem of determining what specific elements of due process were required. It determined that unless it could be shown that a student posed a

continuing threat of danger to himself or others or an ongoing threat of substantial disruption of the school environment, an opportunity for a hearing had to be provided to students prior to suspensions being imposed. Students whose presence posed such dangers or threats could be removed immediately without a prior hearing, but opportunity for an appropriate hearing must follow as soon as practical.

The court also concluded, as a minimum, that students who are the subject of potential suspension from school for ten days or less must be given oral or written notice of the allegations against them. In the event that a student denies the allegations, school officials must advise the student of the evidence against the student and give the student a meaningful opportunity to present his or her side of the situation. Notice and hearing may occur immediately following the alleged misconduct, and no delay between the notice and hearing is necessary.

What the court imposed on school officials in the Goss decision was little more than what most school administrators would have done anyway. All that was expressly required was that school officials engage in a dialogue with the student in order to give the student an opportunity to explain his or her side of the story. Even if the school official had personally witnessed the conduct, notice and the rudimentary hearing were still required to allow the student the opportunity to present mitigating factors or present the facts in what the student considered the proper context.

The court in Goss expressly ruled that a student in danger of being suspended for ten days or less did not necessarily have the right to an

attorney, confront and cross-examine witnesses or call witnesses on his or her own behalf. The court felt that creating too much of an adversarial situation out of the suspension process might destroy its effectiveness as a disciplinary tool.

The court noted the possibility, however, that in unspecified "unusual situations," involving short-term suspensions, more than the rudimentary procedures outlined might be required. Generally, the court left to school officials the discretion to determine whether to allow the student to present witnesses on his or her own behalf, cross-examine witnesses substantiating the allegations, question the accuser further, or in more difficult cases, secure the presence of legal counsel.

In Goss, the supreme court did not expressly address the requirements of procedural due process in the context of more stringent discipline than short-term suspensions. It did strongly imply, however, that suspensions longer than ten days and expulsions would require more formal procedures than those it expressly required for short-term suspensions (64, p. 584, 95 S. Ct. at 741).

The Goss decision was rendered by the supreme court, the ultimate interpreter of the constitution. It must not be forgotten that any contrary court decision rendered prior to Goss being rendered in January, 1975, has little or no precedential or practical value after that date. For instance, court decisions such as Banks v. Board of Public Instruction (65), rendered in 1970 which held that no hearing was required prior to imposition of a suspension from school, and portions of rulings such as Linwood v. Board of Education (66), where a suspension of seven

days or less was considered to be so minor a disciplinary penalty that it could be imposed without providing any due process procedures, must be considered of no value for the purpose of this study.

While Goss stands as the leading case in procedural due process issues, numerous other federal court decisions have defined and delineated public school students' rights to procedural due process. Some federal courts have ruled that the burden of providing appropriate due process procedures is on school officials and students cannot be expected to request them (63, 67). Hearings involving the possibility of long-term suspensions or expulsion have been found to require written notice of the time, place and date of the hearing and an explanation of the charges against the student sufficiently detailed to enable the student to prepare a defense (63, 67, 68, 69); the right to cross-examine witnesses against them (32, 63, 67); the opportunity for students to present their own views (63, 70); the decision be made by an impartial decision-maker (71, 72); the right to legal counsel (63, 67); the right to make a verbatim record of the hearing (63); a decision based only on the evidence introduced at the hearing (73); and a written finding of facts substantiating the decision (63, 73).

At least two federal courts have ruled that when school officials follow one short-term suspension immediately with another, each suspension must be preceded by a hearing. The subsequent hearings must address the primary question of whether the student presents a substantial danger to himself, other persons or property if readmitted (74, 75).

Numerous federal court decisions have extended procedural due

process requirements to areas other than suspension and expulsion situations and have required that procedural due process be provided to students in a variety of disciplinary circumstances. Some federal courts have ruled that involuntary student transfers to other attendance centers for disciplinary reasons (72, 76), suspensions of indefinite length where reentry to school is conditioned upon the occurrence of an event such as a parent conference (77), long-term suspensions (62), corporal punishment (78), and three-day suspensions (79, 80) require due process procedures. Although several other federal courts have ruled to the contrary, at least one federal court has ruled that due process procedures must be afforded prior to a disciplinary removal from participation in athletics (81).

Student Responsibilities

Due to the inherent flexible nature of procedural due process in differing factual circumstances and the unsettled nature of some due process issues among the various federal court jurisdictions, it is difficult on a national scale to accurately predict federal court application of specific elements of procedural due process in specific factual circumstances. More than any other area of student responsibilities contained in this study, procedural due process is dependent upon the totality of circumstances and the federal court jurisdiction involved.

The United States Supreme Court decision in Goss v. Lopez (64) clearly established the rights of public school students to procedural due process for short-term suspensions, established a minimum

rudimentary hearing procedure that meets the requirements of due process, and strongly implied that greater due process is required when students are threatened with long-term suspension or expulsion. But, the decision also recognized the flexible nature of the application of procedural due process. A review of federal court decisions on procedural due process issues, both prior and subsequent to Goss, reveals a number of areas of express and implied flexibility remaining open to school officials in the area.

Suspension

In Goss, the supreme court expressly ruled that in the vast majority of student discipline cases where the potential penalty was a suspension of ten days or less, school officials were not required to allow the student to be represented by an attorney, to call witnesses on his or her own behalf or to cross-examine witnesses against the student. The supreme court was concerned with the potential negative effect the imposition of formal adversary proceedings would have on the maintenance of school discipline. The court stated its concern as follows:

> We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process. (64, p. 584, 95 S. Ct. at 740-41)

Several subsequent federal court decisions have applied this aspect of Goss to specific circumstances. In Reinman v. Valley View Community School District (82), a federal district court in Illinois had before it a situation where a student was suspended for ten days for possession of a knife in school. The principal involved met with the boy and discussed the situation before imposing the suspension. There was no formal hearing held before the suspension was imposed.

The boy's parents requested and received a hearing before the local board about one week after the boy's suspension began. At the hearing before the board, only a written report of the dean of students was presented to the board. No witnesses testified and there was no cross-examination. After the board affirmed the principal's decision of a ten-day suspension, the boy and his parents brought suit alleging a violation of the boy's rights to procedural due process on the grounds that he had not been allowed to confront witnesses against him, had no opportunity to cross-examine witnesses, and had not been allowed to make a verbatim recording of the hearing. The court in Reinman noted that the Goss decision had expressly declined to require full-scale hearings when suspensions of ten days or less are involved and ruled that because Goss required no more than a rudimentary hearing, and those requirements had been met by both the principal and the board, appropriate procedural due process had been afforded the boy.

In Everett v. Marcase (72), students threatened with being transferred involuntarily to other attendance centers brought a lawsuit to require additional procedural due process in such transfers. The court

upheld the students' argument that Goss requirements should be applied to involuntary transfers between attendance centers but declined to go further. In response to the students' argument that they should be entitled to have their attorneys present, and even paid by the school, the court concluded that under the circumstances there was no practical advantage to having an attorney present. The court followed Goss and left the question of presence of an attorney to the discretion of school officials. It also denied the students' request that the school be required to pay their attorney fees. In response to the students' request for an expressed right to an appeal to a higher authority from a principal's decision on transfers, the court determined that under the circumstances of an involuntary transfer for disciplinary reasons, the school could provide an appeal process, but no legal right to an appeal existed.

In Boynton v. Casey (83), the federal district court in Maine was faced with the suspension and subsequent expulsion of a student who admitted the use of marijuana on school property in violation of a school rule. In challenging the suspension portion of the discipline, the student and his parents alleged that the boy was denied procedural due process because he was denied permission by the principal to leave school at the time he was being questioned by the principal about the incident, he was not informed of his right to remain silent, he was not notified that he could have his parents present during questioning, and his parents were not notified at the time of the questioning. In light of the decision in Goss, the court in Boynton found no legal basis in the

allegations and upheld the due process procedures used by the principal.

In addition to federal court decisions following Goss, some have had to fill in or expand on what the supreme court said in that decision. In Sweet v. Childs (84), the court of appeals for the fifth circuit was faced with a situation which involved serious violence in a Florida school occurring after court-ordered desegregation. In that case, the court upheld the due process procedures involved in the expulsion of five students and the short-term suspension of many others. Dissatisfied with the result, the students requested a rehearing before the court on the issue of whether the notice and hearing given the suspended students was appropriate in light of the requirement in Goss that students generally be given notice and hearing before being suspended.

The students involved had been engaged in violent disruptions and sit-ins and many had left school before administrators had an opportunity to provide them with notice and a hearing. Notice of the suspensions from school was announced to the students over a local radio station.

School officials argued they had no opportunity to give the suspended students a hearing prior to the suspension. The disturbances and suspensions occurred on a Thursday. On Friday, most of the suspended students engaged in marches and protests outside the school setting and on Monday, school officials began meeting with parents and students in postsuspension conferences which lead to reinstatement of the suspended students.

In considering the request for rehearing, the court noted that Goss did not require prior notice and hearings in all situations of student

suspensions. It recognized an exception for those students whose presence on school grounds posed a continuing threat to the academic enviromment or to the safety of persons or property. The court concluded that because the students comprised a serious threat to the school environment on the Thursday they were suspended, engaged in public demonstrations away from school on Friday and had postsuspension hearings beginning the following Monday, the school officials had not violated the students' right to procedural due process (84).

In Hillman v. Elliott (79), a high school student was charged with being disrespectful to a teacher and using abusive language toward other students. The student's parents were notified that he was suspended and a meeting was arranged a few days later with the boy, his mother and the principal present. At the meeting the boy admitted using abusive language toward another student.

School officials later became concerned that their own school rules had not been followed in suspending the student and started the disciplinary process over. The parents were then provided a written notice of the charges and information that the hearing would be held in the principal's office. After the hearing, the principal suspended the boy for three days and the boy and his parents brought suit in federal court.

The boy and his parents alleged, in part, that because of the principal's involvement in the earlier suspension proceeding and because the principal was an employee of the school, the principal was not an unbiased finder of fact to sit as an impartial decision-maker at the subsequent proceeding. The court rejected the arguments noting that

there was no real evidence showing that the principal was actually biased. The court refused to disqualify the principal from being the hearing officer on the mere basis that he was personally familiar with the circumstances. In rejecting the argument that the hearing had to be conducted by someone not employed by the school, the court noted that the argument had no legal basis.

In Coffman v. Kuehler (80), a federal district court in Texas had before it an issue of sufficiency of hearing procedures before the imposition of a suspension of three days for an absence from school without reasonable cause. The court ruled that a principal's discussion of the offense with the boy adequately met the requirements of a rudimentary hearing required by the Goss decision.

The interesting aspect of the case dealt with the boy's father's intervention in the matter. Within two hours of the suspension, the boy's father met and visited with the principal about the suspension. The charges against the boy were explained and discussed. The father had a good grasp of the situation from information his son had provided him. The court found that had there been any procedural defect with the first hearing provided the boy, it was effectively cured by what it considered a second hearing with the boy's father.

Expulsions and long-term suspensions

The supreme court has not rendered any decision which expressly outlines minimum procedural due process requirements for suspensions from school for longer than ten days or for expulsions. It did strongly imply in the Goss decision, however, that long-term suspensions and expulsions

require more formal procedures than are required for situations of suspensions of ten days or less (64, p. 584, 95 S. Ct. at 741).

In the absence of a supreme court decision giving direction to the lower federal courts, federal court decisions in the area of procedural due process rights for long-term suspensions and expulsions are sometimes confusing and misleading. It is important in reviewing lower federal court decisions to remember that different and sometimes conflicting results are possible. Any planning or rule development by school officials based on federal court decisions must take into account the underlying facts of each case, the jurisdiction in which the case was decided, and if it preceded the Goss decision, whether it has been modified by it. Those federal court decisions which preceded Goss and which, in whole or in part, are in direct conflict with its terms, have to the extent they are in conflict, been excluded from this review.

Expulsion--notice requirements

The minimum amount of time required by due process to be given to students and parents between notification of the time, place and date of the hearing and the hearing itself varies depending on the circumstances. A complicated factual situation with numerous witnesses might reasonably take several weeks preparation. A single issue with few disputed facts might require only a few days. In any event, reasonable consideration should always be given to granting requests for extensions of time for preparation. Unless there is a request for an extension of time, any amount of time given in a notice of a hearing is likely adequate.

In the decision in Whitfield v. Simpson (70), a federal court in Illinois ruled that a two-day notice of a pending expulsion hearing was adequate time to obtain legal counsel and prepare for the hearing. The court noted that while a longer period of time between the notice and hearing would have been desirable, there had been no request made for additional time for preparation. The court ruled that in the absence of such a request before the hearing began, the student and parents would not be allowed to complain later about inadequate preparation time.

One of the most frequently contested aspects of procedural due process has been the adequacy of the charges against the student listed in the notice. This is especially important because the scope of the hearing is usually limited to the statement of the charges provided the student in advance of the hearing. It is from the statement of charges that a student must prepare a defense to contested allegations. When a student admits or does not contest the allegations of misconduct, the adequacy of the statement of charges is not as important as when they are disputed. The primary purpose of a disciplinary hearing is, after all, to make a factual determination of culpability.

In a 1982 decision in McClain v. Lafayette County Board of Education (85), the court of appeals for the fifth circuit ruled that notice of the charges given a 14-year-old student and his parents prior to an expulsion hearing was deficient. The boy had admitted bringing the knife to school but had claimed that he inadvertently forgot that it was in his pocket when he left home. The court concluded that since the boy had admitted having a switchblade knife in his pocket in violation of school

rules, nothing unfair had occurred in the context of procedural due process.

A similar result occurred in the decision in Long v. Thornton Township High School District (86), decided by a federal district court in Illinois. In the Long decision, a student challenged his expulsion, in part, on the ground that he had not been notified of the charges against him with sufficient specificity. The notice to him and his parents stated that he was charged with assaulting another student but did not name the other student involved. The court ruled that since the boy admitted striking another student, the alleged victim's name missing from notice of the charges did not deprive the student of procedural due process.

Even when a student contests the facts surrounding allegations in hearings, the federal courts do not require that the charges of misconduct be stated as clearly and distinctly as they would be in a criminal proceeding. A federal district court in Louisiana expressly stated as much in its decision in Whiteside v. Kay (87). The court in Whiteside also expressly ruled that school officials did not have to include in the notice a list of potential witnesses against the student and a summary of their anticipated testimony. The position that procedural due process does not require providing a list of witnesses and a summary of their testimony was also taken by federal courts in Linwood v. Board of Education (66), and Keller v. Fochs (68).

There have been relatively few federal court decisions which have ruled against the student on the issue of inadequate specificity of

detailed notice of charges. One of those was the decision in Pierce v. School Committee (88). That decision involved allegations of inadequate notice of charges by a boy who was expelled, in the end, for provoking his classmates by blowing his nose on a replica of the American flag. In the preceding two years, the boy had been disciplined with 13 detentions and 14 suspensions for acts such as engaging in disrespectful behavior, fighting and insubordination.

In challenging the adequacy of his notice of charges, the student in Pierce argued that language in the notice of charges such as ". . . constant disruptions and disrespectful manner and behavior," and ". . . insolent, defiant, disrespectful, insubordinate and persistent in his general misconduct over an extended period of time," was too vague to give him adequate notice of the specific charges against him. The court disagreed and ruled that in light of the student's extensive discipline record, the statement of charges given was adequate.

In the decision in Alex v. Allen (89), a student challenged his removal from school partially on the basis that notice of the specific incidents involved were not provided at the same time he received notice of the hearing and that when he later received notice of the charges, they did not specifically state the school regulations he was alleged to have violated. The court ruled that while notice of specific charges had to be provided in advance of the hearing in time to prepare a defense, they did not have to be provided at the same time as notice of the time, place and date of the hearing and that school officials did not have to list the specific rules alleged to have been violated, if the charges

were otherwise clear from the notice.

Expulsion--confrontation and cross-examination

A number of procedural due process issues have arisen with regard to the extent to which a student may compel the attendance of witnesses and confront and cross-examine witnesses. Not all federal court decisions in the area have been found in favor of the student.

In Greene v. Moore (90), a student expelled for throwing coffee on a band director and then throwing the empty cup at him argued that procedural due process required that when requested to do so, school officials must require the presence of teachers to testify on the student's behalf regarding the student's good conduct in their classes. The court did not agree. Neither did the court of appeals for the seventh circuit in Linwood v. Board of Education (66) when a student argued that procedural due process required the ability for students charged with misconduct to compel the attendance of witnesses through such means as subpoenas.

Two federal court decisions which preceded the Goss decision stated quite clearly that procedural due process did not require confrontation and cross-examination of witnesses. In Boykins v. Fairfield Board of Education (91), the court of appeals for the fifth circuit had before it a situation where the evidence against a student at an expulsion hearing before the school board consisted of the principal's limited testimony from first-hand knowledge, and mostly his reading and paraphrasing statements made by teachers responding to his investigation inquiries. The court ruled that "hearsay" evidence of the principal's conversations with

teachers was admissible at an expulsion hearing. It went on to distinguish between teachers actually testifying against a student and those who were merely present or available. The court stated that the right to cross-examine applied to the former, not the latter.

In Whitfield v. Simpson (70), a federal district court in Illinois ruled that testimony through the use of affidavits did not violate procedural due process requirements when there was other substantial evidence in the hearing record to sustain the decision. The court noted that strict court rules of evidence regarding hearsay evidence are inapplicable to an administrative hearing involving student discipline.

Similar results have also occurred in two decisions handed down subsequent to the Goss decision. In Whiteside v. Kay (87), a student contested his expulsion from school which resulted from an altercation with a coach. After discussing the incident with the student in the manner outlined in Goss, the principal suspended the boy for five days and notified his parents that he would recommend to the superintendent that the boy be expelled for the remainder of the year.

The boy's mother requested and received a hearing before a school disciplinary committee. At the hearing, the principal testified and read written statements prepared by the coach involved and another teacher who witnessed the incident. The coach and witness did not personally give testimony. The disciplinary committee upheld the principal's recommendation to expel the boy, and the boy's mother appealed to the school board. The boy was represented by legal counsel before the board and was given an opportunity to tell his version of the story again. Without hearing

other witnesses and basing its decision on the record made before the disciplinary committee, the board voted to affirm the decision of the disciplinary committee.

In reviewing the procedural due process issues before it, the court in Whiteside recognized the balancing process necessary for a determination of appropriate procedural due process and explained the competing interests as follows:

> The question of due process essentially is a question of interest analysis. The student has an interest in avoiding unfair or mistaken exclusion from the educational process, while the educational authorities have an interest in maintaining order and discipline in the school system. (87, p. 720)

In its analysis of the competing interests, the court ruled that procedural due process, in the context of expulsion from school, did not require the right to cross-examine witnesses testifying through written statements.

This view was also followed in a 1982 decision rendered by the court of appeals for the fifth circuit in McClain v. Lafayette County Board of Education (85) where the student involved did not actually deny a charge of bringing a switchblade knife to school in violation of a school rule. Since the boy did not deny the facts, and there was never any doubt of guilt, there arose no right to cross-examine student witnesses whose tape-recorded statements were played at the hearing. Because cross-examination of witnesses is directly related to the establishment of fact, when the facts are not contested, the right to cross-examine witnesses does not arise.

A particularly difficult issue of confrontation of witnesses occurs when the primary witnesses against a student are the student's peers. While many school officials are reluctant to have student accusers face the accused, unless there is some clear indication of the likelihood of retaliation against student witnesses, school officials should strongly consider using their testimony.

While this study has not discovered any federal court decisions directly concerned with the issue of confrontation of student witnesses, several cases were found which implied that student witnesses could be treated differently than adult witnesses. In Dillon v. Pulaski County Special School District (32), the court overturned the expulsion of a student on the ground that the student was not allowed to cross-examine a teacher who was the primary witness against him. In doing so, however, the court recognized a limit on the right to confront witnesses in school disciplinary proceedings. It stated that in some situations where student accusers might be the victims of reprisals, ostracism, or psychological trauma, anonymity might be appropriate. This view was also voiced in Graham v. Knutzen (77) in the context of long-term suspensions.

In the case of DeJesus v. Penberthy (73), the court ruled that student witnesses could not submit crucial testimony in the form of written statements at an expulsion hearing. The court noted, however, that in the case of some student witnesses, confrontation and cross-examination might inhibit rather than improve the likelihood that a board would hear the truth and stated that such student testimony could be taken before

the board out of the presence of the accused. The accused would have to be given a summarized statement of the testimony and the board would have the burden of establishing that the student testimony involved would have been inhibited had it not been heard out of the presence of the accused.

Expulsion--right to representation

While several federal court decisions have ruled that long-term suspensions and expulsions require the right to be represented by legal counsel, none were found which indicate that school officials have a responsibility to pay for or provide legal counsel for a student. Two decisions were reviewed which expressly ruled that public school officials are not required to provide legal counsel for students threatened with long-term suspensions or expulsion. They were Linwood v. Board of Education (66), and Boykins v. Fairfield Board of Education (91).

In Graham v. Knutzen (62), the issue was not whether students had a right to be represented by legal counsel, but whether students had a right to be represented by someone who was not an attorney. The right to representation by legal counsel was provided for in school rules. The court said that it could not find any legal authority which stated that procedural due process included the right to be represented by a non-lawyer and denied the students' request for an express statement of right to lay representation.

Expulsion--impartial decision-maker

An area of frequent legal challenge to disciplinary decisions in the educational setting is the allegation that the student was precluded from receiving a fair hearing because the decision-maker, whether it is the school board, administrator or hearing officer, was biased against the student. While a few courts have ruled in favor of the student on the specific facts before them, most courts reviewing the issue have ruled in favor of school officials on the legal issue. This is largely due to a presumption of honesty and integrity which courts have accorded school officials sitting as finders of fact in disciplinary hearings.

The leading decision on the point is that of Hortonville Joint School District v. Hortonville Education Association (92). In Hortonville, the United States Supreme Court had before it an appeal from a decision of the Wisconsin Supreme Court which had ruled that a local school board was not sufficiently impartial when it voted to terminate the employment of teachers who were on strike in violation of state law. The Wisconsin court based its decision on the animosity existing between the public employer and employees in a collective bargaining breakdown and an ensuing illegal strike and refusal to return to duties. The sole issue before the United States Supreme Court was whether the procedural due process requirement of an unbiased decision-maker precluded the local school board from making the decision to terminate the striking teachers. The court ruled that it did not. In doing so, it noted that a presumption of honesty and integrity exists in local boards with decision-making power that mere familiarity with the facts, taking a position in public

or prior involvement in the matter were insufficient to overcome.

In Long v. Thornton Township High School District (86), a student challenged his expulsion partially on the ground that school board members were prejudiced by their prior involvement in the matter. The court ruled that mere prior involvement in an issue before a local school board did not disclose a sufficient prejudice to overcome a presumption of unbias.

In Jenkins v. Louisiana State Board of Education (93), six students challenged their removal from Grambling College on the basis of a prejudiced decision-maker. The school's disciplinary hearing board had previously held a hearing and imposed a penalty on the students. A court ordered a rehearing before the disciplinary hearing board and when it again disciplined the students, they alleged the board was prejudiced by the earlier proceedings and by the fact that the college president, who had appointed the board members, was one of the witnesses against the students.

The court in Jenkins ruled that it could not conclude that the hearing board members were biased without a clear showing of actual prejudice. Mere alleged prejudice was not enough; it had to be clearly shown on the facts of the case.

In Pierce v. School Committee (88), a student challenged his expulsion, in part, by arguing that one of the members of the school committee voting to expel him was biased because the boy had referred to the committee member in writing as a "fascist pig." The court ruled that making the remark did not in itself establish actual prejudice and

refused to overturn the decision to expel the student.

Mere exposure to some of the facts in advance of the hearing does not necessarily mean that the decision-maker is improperly prejudiced. In Gonzales v. McEuen (67), a federal court in California overturned the expulsion of several students on procedural due process grounds but expressly upheld the concept that mere exposure to evidence before a hearing is insufficient grounds on which to question the fairness of the decision-maker. The court concluded as follows on the point:

> A school board would be amiss in its duties if it did not make some inquiry to know what was going on in the district for which it was responsible. Some familiarity with the facts of the case gained by an agency in the performance of its statutory role does not disqualify a decision maker. (67, p. 464)

On some occasions, an attorney for a student involved in a disciplinary hearing may attempt to determine at the beginning of the hearing whether individual school board members are prejudiced against the student. The attorney sometimes requests permission to ask individual board members questions about their prior involvement and knowledge of the facts similar to what an attorney does in the selection of jurors in a trial. The practice is called voir dire examination and has apparently not often been an issue raised in federal courts reviewing student disciplinary proceedings. In the decision of Chamberlain v. Wichita Falls Independent School District (94), the court of appeals for the fifth circuit ruled that a teacher not permitted to conduct a voir dire examination of individual board members at her termination hearing was not denied procedural due process. Conceptually, the result would likely be the same in a student disciplinary proceeding.

A subissue of the impartial decision-maker issue is that of the role played by the attorney for the decision-maker. In Alex v. Allen (89), a district court in Pennsylvania heard a challenge to a thirty-day suspension from school based, in part, on an allegation of improper participation by the school board attorney. In the hearing before the board, the attorney acted as the prosecutor, ruled on objections raised by the student's attorney and advised the board in its deliberations. The court in Alex found that because the boy was represented by an attorney, given full opportunity to present his side of the story and otherwise given a fair hearing, the multiple role played by the board's attorney did not violate the student's right to procedural due process. Because there are several other court decisions to the contrary on the issue of board attorneys' multiple roles in disciplinary proceedings, the decision in Alex should be considered valid only in its factual context, especially that it involved only a thirty-day suspension from school.

Expulsion--other issues

The foregoing issues of procedural due process represent those which are commonly at issue in federal court reviews of procedural due process issues. Several other issues of procedural due process have been reviewed by federal courts which have resulted in rulings against arguments put forth by students and parents. In a previously mentioned decision by the court of appeals for the seventh circuit in Linwood v. Board of Education (66), several issues of alleged procedural due process violations not previously discussed were rejected out-of-hand by the

court. The court in its pre-Goss ruling stated that procedural due process in student expulsion situations did not require that student disciplinary hearings be open to the public, charges be proven beyond a reasonable doubt, a unanimous decision be rendered, or a written opinion be issued outlining the finding of facts on which the decision is based. The court's ruling in Linwood on the issue of a requirement of a written decision was expressly followed in a later decision in Long v. Thornton Township High School District (86).

The ruling in Linwood on the lack of a requirement of an open public hearing was in agreement with an earlier ruling by a district court in Massachusetts in the case of Pierce v. School Committee (88). Pierce also ruled that procedural due process in the context of student expulsions does not require that a verbatim record be made of the hearing.

Other types of discipline

While some federal court decisions have extended the requirements of procedural due process to other areas of student discipline, such as involuntary transfer between attendance centers and participation in athletics, others have declined to do so. One decision that refused to extend the right of procedural due process to interscholastic competition was Dallam v. Cumberland Valley School District (95). In that case, a 15-year-old boy was declared ineligible for one year under a rule which made students ineligible for transferring between schools without a like change of residence of his parents. The boy was allowed to continue to practice and be instructed, but he could not play in interscholastic competition. The court ruled that there was no property interest

in interscholastic competition which gave rise to a right to procedural due process. The court explained its rationale that each school activity does not in itself give rise to a protected right as follows:

> It seems to us that the property interest in education created by the state is participation in the entire process. The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights each cognizable under the Constitution. Otherwise, removal from a particular class, dismissal from an athletic team, a club or any activity, would each require ultimate satisfaction of procedural due process. (95, p. 361)

Several subsequent court decisions have arrived at the same conclusion. They include the courts of appeals for the tenth circuit in Albach v. Odle (96), the sixth circuit in Hamilton v. Tennessee Secondary School Athletic Association (97), and the first circuit in Herbert v. Ventetuolo (98).

In the decision entitled Fowler v. Williamson (99), a student challenged his being barred from graduation ceremonies for wearing blue jeans to the ceremonies. The court in Fowler ruled that there is no property right in participation in graduation ceremonies and, therefore, procedural due process was not required.

A somewhat different issue of extension of procedural due process rights to areas other than suspension or expulsion was the subject of Pegram v. Nelson (100). In that case, a 14-year-old ninth-grade boy was accused, along with two other boys, of participating in the theft of a billfold. The boys were observed near the scene of the theft and the billfold was found in a restroom known to have been used by the boys. The two other boys involved admitted their guilt and implicated the third boy in written statements. The third boy denied the charge, but declined

to give school officials the names of persons who could support his innocence. The boy's father was telephoned and asked to come to school where the matter was discussed with the boy in his presence.

After a full discussion, the principal suspended the boy from school for ten days and placed him on probation for the rest of the school year, four months. Probation included exclusion from all after-school activities. The boy's father later talked to the principal and gave him the names of other students who had knowledge of the incident. The principal talked to the named students but later informed the father that he would not alter his previous decision.

The court in Pegram ruled that the principal's actions clearly met the Goss decision's requirement for procedural due process for suspensions but it also considered the issue of whether the rudimentary due process procedures required in Goss were adequate when a ten-day suspension was accompanied by a four-month probation. The court noted that while denial of one or several extracurricular activities does not give rise to a right to procedural due process, a total exclusion from extracurricular activities does. The court ruled, however, that the appropriate due process for probations was the same as that required for short-term suspensions. Since the boy had clearly received the type of procedural due process required in Goss, he was not entitled to more. The court also rejected the argument that allegations of theft against the boy created a greater liberty interest which required greater due process.

Subsequent Due Process Proceedings

Many school officials have learned after the fact that a particular student may not have been afforded appropriate procedural due process. Some have proceeded in a "let the chips fall where they may" attitude. Others have attempted to take constructive approaches to the problem. One potential constructive approach is the holding of a second hearing which includes appropriate due process requirements. This may be accomplished in at least two ways. One way would be to have a higher authority hear the matter on appeal.

In Sullivan v. Houston Independent School District (59), the court of appeals for the fifth circuit was faced with a situation in which a student had twice used profanity toward the principal. After a hearing before the principal, the principal determined that the boy should be disciplined. The student appealed to an assistant superintendent who held a second hearing in which all the evidence previously heard was again considered. The court said that the principal's sitting as the decision-maker in the first hearing was inappropriate because he had been the victim of the student's alleged misconduct. However, since before the discipline was carried out, the matter was reviewed in its entirety a second time by an assistant superintendent, the boy's right to procedural due process was not violated. The concept that a procedural defect in a hearing might be cured by providing appropriate due process procedures in an appeal hearing was also approved in Greene v. Moore (90).

Another approach would be to remove all mention of the previous

faulty hearing and discipline from the student's record and hold a second hearing at the same level of authority. This approach was expressly approved by the court of appeals for the eighth circuit in Strickland v. Inlow (69). In Strickland, a local school board had suspended three girls for allegedly spiking the punch at an extracurricular event. The problem centered around inadequate notice of the time, place and date of the hearing. The school officials involved argued that they had held a second hearing two weeks after the first which cured prior procedural defects. The court expressly stated that a defect in due process afforded in the first hearing could be cured by a second hearing, but on the facts before the court, it was not. Because the school board had prepared a written statement of its findings of facts before the second hearing began and distributed the findings during the hearing, the court ruled that the second hearing was nothing more than a sham and mere ratification of the earlier decision. There was nothing in the record that showed that the board actually considered the issue anew and the court found that the second hearing had not, in fact, cured the procedural defect in the first hearing.

The view that school officials can hold a second hearing to cure a due process defect in the original hearing was part of the court's decision in Williams v. Vermilian Parish School Board (101). The court in Williams also stated that the amount of time lapse between the first hearing and the curative hearing was not important.

Damages

School officials who may have inadvertently violated the procedural due process rights of students, and who for one reason or another have not seen fit to provide for a subsequent hearing, can take some strength in knowing that monetary damages awarded to the students receiving inadequate due process may be nominal. Such was the result in the United States Supreme Court decision in Carey v. Piphus (102).

The Carey decision involved several elementary and secondary students in Illinois who had been suspended from school for 20 days and who had not been provided adequate procedural due process. The district court did not award any damages to the students. It said that the students had not shown any specific monetary injury resulting from being out of school for 20 days. The court of appeals for the seventh circuit overruled the district court and held that the students were entitled to damages regardless of proof of actual injury (103).

The supreme court disagreed with both lower courts and ruled that in the absence of proof of actual injury, students whose procedural due process rights were violated, but whose suspensions were justified on the facts, are entitled to recover only nominal damages not to exceed one dollar. Of course, if a student can show that his procedural due process rights were violated and if he had been provided an opportunity for a fair hearing, he would not have been found guilty and punished, the student will be given an opportunity to prove actual damages in excess of the nominal damages.

An award of one dollar as nominal damages actually occurred in Darby v. Schoo (104) and in Dillon v. Pulaski County Special School District (32). Dillon was a case where the school officials refused to allow a student to cross-examine a teacher who had allegedly been the victim of the student's insubordinate behavior and Darby involved an indefinite suspension.

Summary

While students and their parents have lost a significant number of federal court decisions on procedural due process issues and federal courts have expressly and impliedly placed limitations on the extent of student rights in the area, it remains difficult to establish well-defined lines between student rights and student responsibilities in the area. Due in part to the inherent flexibility of procedural due process requirements based upon specific factual circumstances and in part to sometimes conflicting court decisions among the various federal court jurisdictions, it is not feasible to establish parameters of student responsibility on a national level. However, each locality should be able to establish parameters of student responsibility in the procedural due process area by reviewing court decisions from both a national and local federal court jurisdictional perspective.

Due to the supreme court decision in Goss v. Lopez, the parameters of student responsibility for short-term suspensions of ten days or less are more easily determined than those for long-term suspensions and expulsions. In the areas of short-term suspensions, school officials are

generally not required to provide students with the right to confront or cross-examine witnesses (Goss and Reinman), call upon the accused student's witnesses for testimony (Goss), allow legal counsel (Goss and Everett), or provide a presuspension hearing if the student poses a serious danger or threat to the school environment (Goss and Sweet). Some courts have plainly refused to extend the Goss requirements of a rudimentary hearing to such things as warning the student of the right to remain silent (Boynton), having the student's parents present (Boynton), making a verbatim record (Reinman), and having the hearing conducted by someone not employed by the school (Hillman).

Due to the absence of a supreme court ruling on the procedures required for long-term suspensions and expulsions, many conflicts of interpretation have arisen as to the specific requirements of procedural due process for long-term suspensions and expulsions. Nevertheless, a review of federal court decisions has revealed a significant number of federal court decisions that show that student rights in the area of procedural due process are not unlimited. Federal courts have found that students facing possible long-term suspensions or expulsion are not entitled to a notice of charges that is as specific and detailed as that required for criminal charges (Whiteside), as specific a notice of charges when the facts are admitted as when they are contested (McClain and Long), a more specific notice of allegations when in the context of the circumstances the notice is sufficiently clear (Pierce and Alex), a longer time to prepare a defense in the absence of a request for additional time (Whitfield), a list of witnesses and their expected testimony

(Linwood and Keller), the right to cross-examine all witnesses against the student (Boykins, Whitfield, Whiteside and McClain; contra., Dillon, Fielder and Gonzales), cross-examine student witnesses (Dillon, Graham and DeJesus), compel the attendance of witnesses (Greene and Linwood), representation by an attorney paid for by the school (Boykins and Linwood), lay representation (Graham), make a verbatim record of the hearing (Pierce; contra., Fielder), a written decision outlining the finding of facts (Linwood and Long; contra., DeJesus and Fielder), proof of guilt beyond a reasonable doubt (Linwood), a hearing open to the public (Linwood and Pierce), and a unanimous decision on the part of a multiple-member finder of fact (Linwood). While the courts are split on the issue of an impartial decision-maker, the differing results have occurred largely on the specific facts involved. Most courts agree that a presumption exists that the decision-maker is unbiased (Hortonville, Long, Jenkins, Pierce, Gonzales and Chamberlain).

Not all types of student discipline involve a sufficient legal interest to require imposition of procedural due process. For instance, participation in school activities such as, graduation ceremonies (Fowler) and athletic participation (Dallam, Albach, Hamilton and Herbert; contra., Davis) has been ruled not to be of sufficient interest to warrant the requirements of procedural due process.

In the event that school officials do not provide a student with appropriate procedural due process, the school officials may cure procedural defects through subsequent hearings. This may be accomplished on appeal before the removal from school is imposed (Sullivan and Greene),

or by removing the earlier hearing results from the student's record and holding a second hearing (Strickland and Williams).

Should procedural due process not be afforded a student, the monetary damages awarded may not be great. If a defect in procedural due process did not make any difference in finding a student guilty of misconduct, only nominal monetary damages may be awarded the student (Carey, Dillon and Darby).

CHAPTER VI. VALIDITY OF SCHOOL RULES

In this chapter, the purpose is to review federal court decisions involving issues related to the validity of rules of behavior promulgated and enforced by public school officials. This chapter contains a brief description of student rights in the area of legal challenges to the validity of school rules; however, primary emphasis has been given to those federal court decisions which were won by school officials or in which the courts have established express or implied parameters of student responsibilities. Due to the jurisdictional geographic influence on the result of decisions involving student dress codes, as discussed in Chapter VIII, decisions involving school rules related to hair styles and attire have been excluded from this chapter.

Student Rights

It is quite clear from a review of federal court decisions that students must obey valid school rules. The key issue is, of course, the determination of whether a school rule is "valid." Federal courts faced with issues of validity of school rules and, thus, their enforceability, have focused their review primarily on four different but related legal issues. Those four included whether a rule is reasonable, whether students had or should have had notice of the proscribed conduct, whether the rule was drafted in clear and unambiguous language and whether the rule did not infringe upon constitutionally-protected rights. When any of these four questions are answered in the negative, the courts are

likely to invalidate the enforceability of a school rule.

The first criterion of a valid school rule is that of reasonableness. A school rule must be reasonable in terms of common sense, and it must be related to a legitimate educational purpose. The rule must pertain to conduct which relates to and affects school management. Reasonable school rules include those designed for the purpose of maintaining order, discipline and decorum in the school environment (31).

A school rule that proposes to discipline a student who starts a fight would be reasonable because fighting disrupts the school environment and directly affects the management of schools. A school rule that proposes to discipline students for speeding on a public highway, when no school event or activity is involved, would be difficult for school officials to defend on the basis of reasonableness. Because school officials are vested with authority over educational matters only, not law enforcement, the necessary school nexus is lacking in the latter rule.

There are many areas of student conduct in which the direct effect on school management is not easily determinable. Those areas, such as conduct of students toward teachers away from the school premises, create difficulty for reviewing courts. The issue becomes one of fact-finding. Did the out-of-school conduct of the student prohibited by the school rule have a sufficient relationship to good school management? If it did, the student may be punished; if not, punishment is not appropriate (33).

Except for a few federal court decisions overturning student dress codes on the ground that they were not reasonably related to the

purposes of education, only one decision has been found in this study which overturned a school rule on the ground of being unreasonable (105). This dearth of case law could have several causes. However, due to the significant number of rules which have been upheld by the federal courts as being reasonable, it can be assumed that the vast majority of courts reviewing the issue of reasonableness have resolved the issue in favor of school officials. The courts tend to work from a presumption of legality of school rules (106, p. 488).

The second criterion of a valid school rule is notice. Whenever an educational institution establishes a standard of student conduct where a violation may result in disciplinary action against students, the institution must provide a warning of the proscribed conduct to the students in a form and manner which is likely to give students adequate advance notice of the proscribed behavior. The notice may be given orally, in writing or a combination of the two. The important thing is that students have the opportunity to know what conduct is forbidden to them before they are held accountable by school officials for misconduct (55).

The third criterion of a valid school rule is that it not be written in vague terminology or cover too broad an area so that it infringes upon constitutional rights. Much of the time, there is little dispute as to the type of conduct which is meant to be covered by a school rule. Sometimes, however, words used in drafting rules do not convey a sufficiently precise message about the proscribed conduct. This especially becomes a problem when students' actions involve constitutionally-protected rights.

A leading decision on the issue of vagueness and overbreadth is one issued by the court of appeals for the seventh circuit in Soglin v. Kauffman (107). In Soglin, the court was presented with a challenge to a University of Wisconsin student conduct code which warned students that they were subject to discipline for engaging in "misconduct."

The district court ruled that the word "misconduct" did not by itself give students a sufficient standard against which to measure their actions and was, therefore, too vague to be enforceable. It also found that because the term "misconduct" included many degrees of student offenses which schools could not prohibit in the context of protection of constitutional rights, that the term was unconstitutionally overbroad in its scope.

On appeal, the court of appeals in Soglin noted that school rules containing standards of discipline for students must be properly promulgated and must be expressed in reasonably clear terminology. The court concluded, as did the district court, that "misconduct" is not an adequate standard to assist students, school officials or judges in determining whether a specific act by a student fits its prohibition. The district court decision was affirmed.

In Sullivan v. Houston Independent School District (108), a school district, by rule, delegated the establishment of attendance center rules to principals. The only standard in the district rule was that rules of a school play a necessary role in "promoting its best interests." When two students challenged their being disciplined for publishing and distributing an underground newspaper, school officials attempted to defend

their actions based on their authority to promote the school's best interest. There were no express rules prohibiting the type of student conduct involved.

The court in Sullivan ruled that the phrase "promoting its best interests" was too vague to provide students and school officials with objective standards by which to measure student behavior. In finding the phrase vague, the court concluded that times are changing and "generalities can no longer serve as standards of behavior when the right to obtain an education hangs in the balance" (108, p. 1346).

The fourth criterion of a valid school rule is that it can not infringe upon constitutionally-protected rights. Most decisions on the issue of infringement of constitutional rights by rules are related to issues of vagueness discussed immediately above. When a rule comes close to infringing on constitutional rights, especially those contained in the First Amendment, school officials must take great care to see that the rule does not unduly infringe upon those rights (107, 108, 109).

However, it is also true that no rule promulgated by school officials may infringe directly upon the constitutional rights of students. In Tinker v. Des Moines Independent Community School District (1), a rule promulgated by district principals forbidding the wearing of black armbands as "silent protest" was ruled a violation of the students' constitutional rights. Neither could a rule subject all students to a search at the mere whim of school officials. Reasonable cause must exist for a school search. (See Chapter VIII.) And, neither can schools, in usual circumstances, prohibit the distribution of any and

all published materials (109), nor ban all student demonstrations on a college campus (110).

Student Responsibilities

Reasonableness

In reviewing challenges to school rules, the federal courts invariably begin from the position that the school rule is reasonable, and the person challenging the rule must carry the burden of showing that it is not. The courts usually recognize the limitations of their expertise in educational matters and defer issues of reasonableness to the judgment of the educators involved. This position and the philosophy behind it were well-stated in Speake v. Grantham (55). The decision in Speake involved the discipline of university students, but the philosophy expressed is equally applicable to elementary and secondary students, if not more so. The court said as follows:

> Unless university and college officials have authority to keep order, they have no power to guarantee education. The power of the authorities to oversee, to formulate rules and regulations, and to rule is a necessary element in order to provide and promote education. Consequently, the judiciary must exercise restraint in questioning the wisdom of specific rules and the manner of their application, since such matters are ordinarily the product of school administrators rather than the courts. In formulating regulations, including those pertaining to the discipline of school children, school officials must be reasonable. It is not for the courts to consider whether such rules are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the school authority. Regulations which are essential in maintaining order and discipline on school property are reasonable; that is, if they are necessary for the orderly presentation of classroom activities or contribute to the maintenance of order and decorum within the educational system or contribute to the proper operation of public school systems,

> which is one of the highest and most fundamental responsibilities of the state, they are necessary and reasonable. (55, p. 1272)

This view has also been expressed by numerous other courts (18, 32, 38, 110, 111).

More important than the philosophical outlook of the courts is their actual application of that philosophy to factual situations before them. The following is a partial listing of school rules which have been approved by federal courts as being reasonable: Prohibition of students' show of affection and kissing in the school hallway (32); Prohibition against defiant attitude and show of disrespect toward teachers (32, 89); Prohibition against distribution of publications which encourage "actions which endanger the health and safety of students; (57); Prohibition against the solicitation of funds from students (58); Prohibition against older student participation in contact sports (112); Prohibition against loitering in areas of heavy hallway traffic (89); Prohibition against rowdy behavior and running in the school building (89); Prohibition against possession of dangerous drugs (113, 114); Prohibition against skipping classes and skipping detention (63); Prohibition against wearing message buttons in tense circumstances (26); Prohibition against demonstrations in school buildings (110); Prohibition against participation in mass gatherings which are unruly or unlawful (18); Prohibition against possession of obscene materials on school property (38); Prohibition against bringing knives and other weapons to school (111); Prohibition against outsiders visiting school buildings without permission (109); Prohibition against the use of vulgar speech

and simulated drinking on the school stage (115); Prohibition against taking cans and bottles into a school building (116); Prohibition against creation of disturbances in school assembly (31); and Prohibition of the granting of official school recognition to groups which refuse to affirm in advance that they are willing to adhere to reasonable school rules (117).

Notice

Clearly, the preferable way to give notice of proscribed conduct to students is to reduce properly promulgated rules to writing and make copies available to students (55, 118). In McClain v. Lafayette County Board (85), a school rule prohibiting the possession of a switchblade knife was contained in a student handbook which was given and read to students on the first day of school. Even the student's mother admitted reading the rule in the handbook. As a result, there was no issue in the case of lack of notice. Neither was there an issue of lack of notice in Sword v. Fox (110) where a student handbook contained rules regulating student conduct as well as definitions of uncommonly-used language found in the school rules.

In Zamora v. Pomeroy (114), school rules expressly prohibited the possession of marijuana on school property and contained a provision that stated that student lockers remained the property of the school and could be searched at any time by school officials. The rules were contained in a student handbook which was given to and read by the student involved. When the student later challenged his discipline for possession of marijuana found as a result of a locker search, the court

determined that the school rule had placed the student on notice that the locker was in the joint control of both him and school officials. The student, therefore, was unable to contend successfully that he had a reasonable expectation of privacy in the locker which was protected by the Fourth Amendment.

Two court decisions have reviewed issues involving notice of the proscribed acts being published in college newspapers. In Gardenhire v. Chalmers (119), a federal district court in Kansas upheld a University of Kansas rule published in the school newspaper which prohibited the carrying of firearms on campus. In Center for Participant Education v. Marshall (120), a Florida court upheld enforcement of a Florida State University president's executive order published in the school newspaper. In the latter decision, the student verified his having read the notice by his informing school officials that he did not intend to comply with the order. University officials then gave the student an oral warning to not violate the president's order.

While providing written rules to students normally negates contentions of lack of proper notice, rules announced orally are equally valid. In Graham v. Houston Independent School District (61), the school principal had announced to the student body on two occasions that students were not to distribute unauthorized material on school grounds. Students challenging the rule admitted that they knew of the prohibition at the time they distributed unauthorized material and the court upheld enforcement of the rule.

In Hill v. Lewis (20), a principal faced with a quickly developing

situation of threatened serious disruption was forced to promulgate a new rule to prevent the disruption from occurring. On the morning of the anticipated disruption, teachers were instructed by the principal to ask students to remove armbands before allowing them to go into the classroom and to send anyone refusing compliance to the office. In the office, students were again requested to remove the armbands. Those who refused were suspended. In Hill, the notice of prohibition against the wearing of armbands came in the form of directives from teachers and the principal to remove the armbands. When challenged, the newly promulgated oral directive was upheld.

There are situations, however, where student discipline has been upheld in the absence of notice of a rule and in some situations, even in the absence of a rule. Such situations often involve facts where the students were reasonably expected to have known that their conduct was inappropriate. This has usually involved serious disruption and violence. There seems to be a negative correlation between the presence of violence and disruption and the requirement of express notice given by school rules.

In Rhyne v. Childs (16), school officials disciplined a large number of students involved in a general melee between blacks and whites, destruction of property, and a walkout by students. When the students challenged their being disciplined on the basis of the absence of written rules, the court did not agree. The court said the following about a requirement of written rules in the context of student violence:

> Due Process is not affronted when students are disciplined for violations of unwritten rules when misconduct

> challenges lawful school authority and undermines the orderly operation of the school. (16, p. 1090)

In Dunn v. Tyler Independent School District (30), the court was faced with a situation involving violent disruption of a newly integrated high school and a walkout by nearly 300 students. When students challenged being disciplined for their acts in the federal district court, the court ruled that because the school had no express rule prohibiting the conduct engaged in by the students, they could not be disciplined. On appeal, the court of appeals noted that there are "grey areas" of student conduct where rules are necessary, but stated that attendance is not one of them, and overruled the district court decision. The court of appeals concluded that no student needs to be told by a rule that students are expected to attend class and that school officials can discipline students involved in a mass refusal to attend class.

In Frasca v. Andrews (51), a principal had halted the distribution of an official school newspaper because it posed a substantial threat of altercation between two segments of the student population and contained false information which would cause a student irreparable injury. The students challenging the principal's action argued that the absence of an express written rule authorizing the principal to act as he did left the principal without power to restrain school publications. The court did not agree and said the following regarding unwritten rules in the circumstance:

> the power of school officials in a proper case to prevent distribution within the school of material which is libelous, obscene, disruptive of school activities, or likely to create substantial disorder, or which invades the rights of

> others, does not disappear merely because the school board has failed to adopt written policies requiring review in advance of distribution. Written policies and guidelines undoubtedly have a pedagogical value; they probably help to avoid problems such as have arisen in this case, by offering to students a clearer indication of what is permitted and what is proscribed. In addition, when a prior restraint is actually imposed they enhance a sense of fairness and provide an opportunity for discussion, negotiation, and compromise in order to accommodate competing interests. All of that may be desirable, but is not required by the constitution. (51, p. 1050)

A similar result occurred in a decision involving a university publication in Norton v. Discipline Committee (56).

One especially interesting decision upholding the discipline of students in the absence of an express rule or notice was that entitled Hasson v. Boothby (118). The decision in Hasson is representative of cases at the far end of the spectrum of decisions upholding discipline by school officials in the absence of express rules. The case involved three students who drank beer off school premises and then proceeded to go to a school-sponsored dance. A teacher at the dance detected the odor of beer, and two of the students admitted to him that they had been drinking beer. There were no disturbances, the students were not drunk, and they were not excluded from the dance.

The next week, however, the boys were temporarily removed from athletic participation by their respective athletic team coaches and when the principal learned of the incident, he directed that the boys be placed on probation for one year, subject to periodic review. Probation meant exclusion from all school activities and other minor punishments. There were no established rules which expressly prohibited student involvement with alcohol.

The record in the case showed that coaches regularly disciplined athletic team members who consumed alcohol, and that the principal had an established practice of placing students involved with alcohol on probation for a year. The boys involved in the case knew of the former aspect of school custom and practice, but the latter was not known to them or the general public.

The students challenged their discipline by the principal on the basis that their rights were violated through the enforcement of an unpublished rule. In analyzing the students' arguments, the court recognized the desirability of written school rules but noted that students may be punished in some circumstances in the absence of published rules. The court concluded that because the boys were generally aware that involvement with alcohol was wrong and could at least be the subject of punishment by coaches, the proper function of notice of a school rule was met under the circumstances.

Vagueness

Federal courts have frequently ruled that statutes enforced by criminal penalties must be written in clear, narrow language in order to provide persons with notice of the prohibited conduct. The federal courts do not usually apply the same concept to school rules, however. With one exception (121), all federal court decisions reviewed in this study, which discussed the issue, stated that school rules are not required to meet the same rigorous tests of clarity and narrowness that are required of criminal statutes (56, 66, 89, 107, 122).

A leading decision on the issue of vagueness of school rules is that of the eighth circuit in Esteban v. Cenral Missouri State College (18). The students involved in the case had been disciplined for their participation in aggressive and violent demonstrations. School rules prohibited student participation in mass gatherings which were "unruly" or "unlawful." The court in Esteban discarded the students' argument that an analogy should be drawn between school rules and criminal statutes and ruled that the terms "unlawful," and "unruly" were not vague or too broad in the context of the facts in the case. The court concluded that the students should have known that their violent conduct was prohibited by the rule.

Many other courts have concluded that challenged language used in school rules has not been so vague or overbroad as to make the rule unenforceable. Some of the words and phrases found not to be vague in the factual context of specific decisions include the following: "[B]oycott, sit-in, stand-in, and walkout" in the context of mass student demonstrations (30); "Obstruction or disruption of . . . university activities" in the context of distribution of false and inflammatory literature (55); "[P]rofanity or vulgarity" in the context of an underground newspaper (54); "Encourages actions which endanger the health or safety of students" in the context of an advertisement for drug paraphernalia in a high school newspaper (57); "[D]angerous drug" in the context of marijuana possession (113); "[D]angerous drug" in the context of a student who overdosed on a drug while in school (123); "[M]aterial of a false, seditious and inflammatory nature" in the context of distribution of literature intended

to cause disruption of school activities (56); "[G]ross disobedience" and "misconduct" in the context of twice pulling false fire alarms (76); "Assaults" in the context of an altercation (124); and "Conduct unbecoming an athlete" in the context of an unprovoked assault on a fellow basketball-team member resulting in a broken jaw (81).

It is sometimes obvious that federal courts make an effort to find meaning in school rules which are ambiguous on their face. They have sometimes made sense of ambiguous school rules by upholding rules when adequate definitions are located elsewhere within school rules (122, 123), reading two or more rules together to give meaning to otherwise ambiguous individual rules (125), and reading state statutes together with school rules when neither is sufficiently clear by itself (66, 73).

Federal courts, however, may no longer have to stretch the imagination to uphold a school rule against a challenge on the ground of vagueness. A recent decision by the United States Supreme Court entitled Board of Education v. McCluskey (126) should result in substantially fewer court reviews of school rules on the issue of vagueness. In McCluskey, the supreme court had before it a factual situation which involved a high school student who left the school grounds after his first-period class and consumed alcoholic beverages until he became intoxicated. Later the same day, the boy returned to school to go on a band trip, was apprehended by the principal and suspended from school. He was later expelled for the rest of the semester by board action. The student did not deny drinking alcoholic beverages.

There were three school rules involved in the case, with the third

one being at the center of controversy. The record in the case did not show clearly which of the rules had been applied by the board to the situation. The first rule authorized suspension from school for good cause and the second defined good cause to include "sale, use or possession of alcoholic beverages or illegal drugs." The third rule provided that students would be expelled if they had on school property or at school functions ". . . used, sold, been under the influence or, been in possession of narcotics, or other hallucinogenics, drugs or controlled substances classified as such by Act 590 of 1971, as amended." Act 590 was a state law which expressly excluded alcohol from its coverage.

In McCluskey, the district court had ruled that because Act 590 expressly excluded alcohol from its coverage and because alcohol was not generally considered in common understanding to be a drug, alcohol could not be considered a "drug" under the third rule. School officials, therefore, could not discipline the student for being under the influence of alcohol. The district court concluded that punishment of the boy violated his right to substantive due process and ordered him reinstated in school with all reference to the incident removed from his school records. The court of appeals affirmed the district court decision. The United States Supreme Court reversed the district court and the court of appeals and ruled that its previous decision in Wood v. Strickland (127) precluded federal courts from interpreting school rules differently than a local school board construes its own rules.

In Wood, the court of appeals for the eighth circuit had interpreted

a local school rule involving "intoxicating liquor" differently than the local school board and overturned the local board's expulsion of three students. The students involved admitted knowing that their actions were wrong. The supreme court said as follows in Wood:

> In light of this evidence, the Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement.
>
> Given the fact that there was evidence supporting the charge against the [students], the contrary judgment of the Court of Appeals is improvident. It is not the role of the Federal Courts to set aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion. (127, pp. 325-26, 95 S. Ct. at 1002-3)

The supreme court noted in McCluskey that an interpretation of a school rule by a promulgating board may be so unusual or extreme that it could violate students' substantive due process rights, but that was not the case on the facts before it.

Infringement of protected rights

Obviously, the federal courts do not approve of school rules which are worded so ambiguously that they infringe upon the constitutional rights of students. Neither do they approve of rules which directly infringe upon students' rights. It should not be forgotten, however, that no right is absolute and on occasion constitutional rights of students must yield to the interests of the school community at large. This point was evident in the decision entitled Tate v. Board of Education (31). In Tate, a group of black students were disciplined for violating a school rule which stated that "it is strictly against the rules

to create a disturbance in assembly." The black students involved created a disturbance by noisily walking out of a pep assembly in the middle of the program when the pep band played "Dixie." The court upheld the discipline of the students on the basis that the rule was reasonably designed for the purpose of maintaining order and discipline in the school environment.

In Sword v. Fox (110), college students disciplined for staging a demonstration in a school administration building challenged the validity of a school rule which required students to file a request to hold demonstrations and prohibited the holding of demonstrations in school buildings. The purpose of demonstrations was never asked and permission had never been refused. Several had been required to move to other locations.

The court upheld the school rule in Sword on the basis that it was nondiscriminatory and was reasonably related to the purposes of education. The court noted that a ban on all demonstrations would be invalid, but a rule which required mere registration and denied the right to demonstrate in specific places was valid. The right of students to express themselves through demonstrations had to yield to the rights of the school community as a whole to a peaceful educational environment.

Similar results of noninfringement have occurred in other federal court decisions. In other cases, students' rights have not been infringed upon by school rules which authorized locker searches (114), authorized searches of elementary-age students (125), prohibited solicitations (58), prohibited the wearing of message buttons in tense school situations (26), required submission of written materials prior to

distribution (42) and prohibited demonstrations which resulted in disruption of the school environment (30).

Mandatory punishment

Several court decisions have dealt with the constitutionality of school rules which contain mandatory punishments. Most have ruled that punishments in school rules stated in mandatory terms are not to be taken literally. In Mitchell v. Board of Trustees (111), a student challenged a school rule which stated that any student who brings a knife or other weapon on school grounds "shall" be expelled. The court ruled that even though the rule mandated expulsion, the board had inherent authority to impose a lesser penalty if it desired. This view was also taken in Dunn v. Tyler Independent School District (30) and Fisher v. Burkburnett Independent School District (123).

Summary

The federal courts have consistently upheld the legal validity and enforceability of school rules when four criteria are met. School rules have been upheld when they have been reasonable in common sense terminology and reasonably related to the purposes of education (Speake); when they have provided notice of the proscribed conduct (McClain, Zamora, Graham and Hill), have been established by custom and practice (Hasson) or have involved inherently improper conduct (Dunn, Rhyne, Frasca and Norton); when they have not been written in vague or overbroad terminology (Esteban); and when they have not infringed upon the

constitutional rights of students (Tate and Sword). Federal courts give deference to the interpretation of school rules given by the school officials responsible for their promulgation and enforcement (Wood and McCluskey).

CHAPTER VII. SEARCH AND SEIZURE

It is the purpose of this chapter to review federal court decisions involving issues related to search and seizure in the public school setting. This chapter begins with a discussion of decisions which have established student rights in the area of search and seizure; however, primary emphasis is given to those federal court decisions which were won by school officials or in which the courts have established express or implied parameters of student responsibilities.

Student Rights

The issue of search of students and lockers in the public school setting is one which is commonly misunderstood by public school officials. For this reason, an effort has been made in this chapter to review issues of student rights in more detail than in some of the other chapters contained in this study.

Consent

If a student is of an age and ability level to understand the consequences of his or her actions and provides school officials with informed consent to search the student's person, locker or possessions, no question about the legality of the search arises. To be valid, however, consent must be given freely and voluntarily. Coercion of any kind invalidates consent. In a decision rendered by a federal district court in Texas in Jones v. Latexo Independent School District (128), the court ruled that school officials' threats of a forced search and threats to

call the students' mother negated consent to be searched given by three siblings.

Several federal courts have ruled that college students cannot by contract or rule give college officials express or implied consent to search their dormitory rooms (129, 130). This is especially true when college officials are joined by police in a search for evidence of criminal activity (131).

Neither can college officials condition attendance or privileges on a waiver of the right to be free from unreasonable searches (129). This includes the right to be free from unreasonable and arbitrary searches as a condition of entrance into a rock concert performed in a college facility; especially when there have been no signs posted or other notice given that entrance to the event is conditioned upon implied consent to be searched (116).

Reasonableness of the search

The Fourth Amendment to the Constitution of the United States reads in relevant part as follows:

> The rights of 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, . . .

The Fourth Amendment does not prohibit all searches, only "unreasonable" searches. That is an important distinction upon which most federal courts addressing questions involving the search of students in the public school setting have focused their attention. Reasonableness fits into the middle of a spectrum reflecting the amount of evidence needed

to justify a search. On the one end of the spectrum is "mere suspicion" and on the other is "probable cause." Suspicion is not adequate to justify a search and probable cause is such a high degree of certainty that its presence will justify the issuance of a search warrant.

In a decision arising in New York entitled Bellnier v. Lund (132), a federal district court had occasion to discuss the difference. The facts involved a fifth-grade student who shortly after arriving at school one day informed the teacher that three dollars was missing from his coat pocket. Noting that no persons had left the room, the teacher concluded that the missing money was still in the room. Assisted by a student teacher, the teacher conducted a thorough inspection of coats hanging in the coatroom, books, desks, and students' pockets and shoes. When the money was not found, the teacher and other school officials took the boys and girls to their respective restrooms and ordered them to strip down their underclothes. The students were thoroughly searched. The strip search lasted about fifteen minutes and the entire search lasted about two hours. The missing money was not found.

The court stated in the Bellnier decision that a search in the public school setting does not require a showing of probable cause. All that is normally required to search students is the existence of facts which provide reasonable grounds for the search. Reasonable cause, however, must be particularized with respect to the individual students suspected of being guilty. Because there was no reason to suspect that each student in the fifth-grade class possessed the missing money or evidence of its theft, the search was invalid under the Fourth Amendment.

A similar result occurred in M. M. v. Anker (133). In that case, another federal district court in New York had before it a case involving the search of a fifteen-year-old female. School officials attempted to justify their search on the basis that the girl was found alone in a classroom during a fire drill, had another student's bookbag in her possession, which she returned when requested by the other student, had a history of being in theft-suspicious situations, refused at first to identify herself and admitted taking posters off the classroom wall as presents for her sister. Nothing was known to be missing from the room.

A school official took the girl into her office and ordered her to empty her bookbag. When the girl complied, the school official thought she saw the girl secrete something that looked like drug paraphernalia into her jeans. The school official contacted another school official and they had the student disrobed and searched. Nothing improper was found.

In M. M., the court recognized that since the girl admitted taking the posters school officials had adequate grounds for disciplining her, but ruled that the information acted upon for the initial search did not constitute sufficient justification for a search. The court said as follows about the lack of evidence that something was actually missing:

> 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. (133, p. 839)

On appeal, the district court decision in M. M. was affirmed (134). In its decision, the court of appeals for the second circuit noted in a

brief decision that although a search of students in schools can be based on less than probable cause, as the search becomes more intrusive, the standard required for a search changes from "reasonable cause" to "probable cause." The court of appeals concluded that when a school official conducts a highly intrusive search, such as a strip search, the standard of probable cause must be met.

The issue of reasonableness of a search involving trained dogs was reviewed by a federal district court in Texas in Jones v. Latexo Independent School District (128). The court ruled that a dog trained to sniff out and detect contraband and alert its trainer to the presence of contraband did not provide school officials with adequate reason to justify a search of a student's person, locker or vehicle. The court ruled that the dog's sniffing was itself a search and when those subjected to sniffing are mere students rather than students believed to be in possession of contraband, the search was illegal. The court alluded to general searches of the students as "fishing expeditions" and concluded that they were not permitted under the Fourth Amendment. The court noted that reasonable cause to search must apply to a specific person or persons.

A federal district court in Indiana ruled in Doe v. Renfrow (135) that the "alert" of a sniffing dog to the presence of contraband, for the purpose of a strip search, does not by itself create sufficient reasonable cause to believe that a student is in possession of contraband. That portion of the decision was affirmed on appeal to the court of appeals for the seventh circuit (136).

Intent of the search

While most federal courts have used a test of reasonableness to determine whether a search by school officials was valid in other than strip search cases, they have generally done so to the exclusion of the higher standard of "probable cause." However, when the function of education is entangled with that of law enforcement, the degree of evidence needed to legally justify a search of a student goes up markedly.

In the decision entitled Picha v. Wielgos (137), a high school principal received a telephone call alleging that three students in his school possessed illegal drugs. Upon advice of his superintendent, he called the police. When the police arrived, the students were strip searched. No drugs were found. The court ruled that police involvement in the search raised the standard needed for the search from "reasonable cause" to "probable cause."

A similar result occurred in Piazzola v. Watkins (131) when two prisoners in jail successfully challenged their convictions for possession of marijuana. The court ruled that college authorities had the right to enter college dormitory rooms under their control for reasonable searches only so long as the search furthered the school's educational purpose. When a search is conducted by school officials in conjunction with law enforcement authorities, as was the situation in the case, probable cause is required for the search. That meant that the warrantless search involved in Piazzola was not legally justified.

Evidence at administrative hearings

For many years, the only penalty imposed against law enforcement officers by the federal courts for an illegal search was the exclusion from trial of any evidence obtained. This court-imposed penalty is called the "exclusionary rule." Several federal courts have applied the exclusionary rule to evidence of student misconduct obtained through searches later determined to be illegal under the Fourth Amendment.

In Smyth v. Lubbers (129), a federal district court in Michigan ruled that no disciplinary action could be taken against a college student on the basis of evidence seized during an illegal search of the student's dormitory room. College officials were ordered to provide the student with a new hearing which excluded the improperly obtained evidence or dismiss the charges.

In a Texas district court decision in Caldwell v. Cannaday (113), a school board was directed by a court not to consider evidence at a student expulsion hearing which was obtained illegally by law enforcement officers. The law enforcement officers had acted on a tip from an informant that the students' car contained drugs, stopped the car along the highway and searched it. Even though the police had sufficient time to obtain a warrant to search the automobile, they decided against it.

In Jones v. Latexo Independent School District (128), another Texas district court ruled that evidence obtained as a result of an illegal search involving dogs trained to sniff out contraband could not be used in a school disciplinary proceeding. Because school officials had no other evidence of violation of school rules, the suspension and other

penalties imposed upon the students were ruled improper.

Liability for illegal searches

For many years, the exclusionary rule was the only penalty imposed by the federal courts for illegal searches. Only recently have the courts considered monetary damages for searches violating the Fourth Amendment. It was only natural that potential liability for illegal searches also be extended to apply to school officials. In Pica v. Wielgos (137), actions of school officials were so intertwined with the actions of law enforcement officials that the court ruled that school officials could be held liable for damages if they were responsible for the illegal search. An identical result occurred in Potts v. Wright (138).

In Doe v. Renfrow (135), a district court ruled that a strip search of a student as a result of a dog sniffing program at school violated the student's rights under the Fourth Amendment. On the issue of liability, however, the court ruled that the school officials acted in good faith with regard to the welfare of the students and were, therefore, immune from liability.

On appeal to the court of appeals, the district court ruling in Doe was upheld, except on the issue of liability. The court of appeals left no doubt that it felt the girl involved had been severely wronged when it said as follows:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that; it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude

> search was not only unlawful but outrageous under "settled indisputable principles of law." (420 U.S. at 321 95 S. Ct. at 1000)
>
> Wood v. Strickland, supra, accords immunity to school officials who act in good faith and within the bounds of reason. We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles. It is not enough for us to declare that the little girl involved was indeed deprived of her constitutional and basic human rights. We must also permit her to seek damages from those who caused this humiliation. . . . (135, pp. 92-93)

The case was remanded back to the district court for a determination of appropriate damages.

Strip searches of students

In the course of this study, five federal court decisions were discovered which involved strip searches of students in the public school setting (132, 133, 135, 137, 138). School officials did not win any of the five. Clearly, the federal courts do not condone strip searches of students in the public school setting in situations involving anything less than extreme emergencies or the presence of a search warrant.

Student Responsibilities

Consent and other exceptions to a warrant

As stated previously, not all searches are prohibited by the Fourth Amendment. If someone with the proper authority over the premises grants permission for a search, the search is not illegal. Differing factual circumstances, of course, can give rise to issues of consent, such as whether the person giving permission for a search had the authority to do so, and whether the consent was improperly coerced. Both of

these issues were present in a decision of a New York federal district court in Overton v. Rieger (139). The decision in Overton is interesting for several reasons. For one thing, the situation involved in the case evolved into a lengthy legal history including a New York Supreme Court decision which was struck down by the United States Supreme Court in 1968 and sent back for reconsideration (140). On reconsideration, the New York Supreme Court reaffirmed its earlier decision that the search of the student was justified on the facts presented.

The facts in the case involved a vice-principal who opened a student's locker for police when they appeared at school with a search warrant. The police found drugs in the locker and began criminal prosecution of the student. Legal problems with the prosecution developed when it was discovered that the search warrant was invalid.

It was the vice-principal's testimony at the trial that saved the day for the prosecution. He testified in the state court proceedings that he would have searched the student's locker on the basis of any report that illegal items were in the locker, whether or not the information was accompanied by a search warrant or whether or not the warrant was valid. He was obviously not coerced into opening the locker and his primary concern was getting contraband out of the school environment. The state supreme court ruled that not only did the vice-principal have the authority to open and inspect a locker when he believed something improper was contained in it, under the circumstances, he also had a duty to inspect the locker.

The federal district court in Overton upheld the previous state

court rulings as being proper. In effect, the court affirmed the state court decisions which found that a high school vice-principal, given responsibility for supervision of student conduct and school facilities, could give consent for the search of a student locker.

The right of school officials to search a locker or to give consent for a search is often dependent upon the expectation of privacy which students may have in their lockers. In the decision entitled Zamora v. Pomeroy (114), the court of appeals for the tenth circuit found that a school had diminished students' reasonable expectations of privacy through a written notice to them at the beginning of the school year informing them that the lockers remained the property of the school and were subject to search by school officials. The court ruled that the school had created a joint control over the lockers which negated a student's contention that a school locker was the private domain of the student.

Consent and warrants are not the only justifications for searches in the educational environment. Courts have developed a number of situations justifying searches in the criminal law area which may, on occasion, have application to the school setting. Several were applicable on the facts in Speake v. Grantham (55). In Speake, students involved in the distribution of leaflets designed to create disruption on a Mississippi campus denied the presence of any leaflets in their van and refused consent for school officials to search the vehicle. When the van was later stopped by school security officers for failing to stop at a stop sign, several hundred of the leaflets were observed by the officers through the window. When the students later challenged their being disciplined

by school officials on the ground that evidence of the leaflets in the van should have been excluded from consideration, the court noted that the "search" of the van fit several exceptions to the requirement of a search warrant. The court stated that warrantless searches are permitted when the search is contemporaneous with a lawful arrest, including a traffic ticket, and when evidence of improper activity is in "plain view." The discipline imposed against the students was upheld.

Reasonableness of the search

As stated previously, the federal courts often use two criteria in determining the legality of school searches. The first is whether under the circumstances the search was reasonable. Nearly every federal court decision which has discussed school searches, even those lost by school officials, have clearly indicated that the special nature of the school environment requires that school officials not be held to the "probable cause" standard for a search but to the lesser "reasonable cause" standard (128, 132, 133).

In the decision in M. v. Board of Education (141), a student informant approached an assistant principal and told him that he had witnessed another student involved in the exchange of what he thought to be drugs and that the other student appeared to possess a large sum of money. The named student was taken aside by the assistant principal and ordered to empty his pockets. The boy had marijuana in his pocket and was immediately suspended and later expelled for possession of a dangerous substance. When the boy challenged the validity of the assistant principal's action forcing him to empty his pockets, the court found that

the information provided by the student informant gave the assistant principal sufficient reason to conduct a search of the student.

Information provided by student informants was also held to be reasonable cause to justify a search of a girl's purse in Bahr v. Jenkins (142). In the Bahr decision, several students involved in setting off a small type of legal firecracker called "party poppers" in school were caught by school authorities. When they implicated another girl, school officials approached her and demanded that she open her purse for their inspection. She refused and was suspended from school for five days. The purse was never opened, but the lawsuit was conducted as though it had been.

The court involved in the Bahr decision originally issued its decision orally. As a result, much of the legal discussion often present in written decisions was replaced by folksy philosophy. In regard to searches of students for disciplinary purposes, the court said as follows:

> And I think the following consideration is also dictated by common sense and practical experience. If you have 95 calm, orderly kids who are willing to learn something, and you have 5 kids who want to entertain themselves by causing a disturbance, you better do something about the 5 kids and do it quickly or you are going to have 100 kids who are causing a disturbance and nothing is going to be learned that day.
>
> I think in light of these considerations, it stands to reason that if a few kids are setting off firecrackers, throwing paperwads, squirting squirt-guns, setting off stink-bombs and all the other things that kids would like to do in school rather than learn their lessons, the teachers, in order to do their jobs, accomplish the goals of the institution, and do what the taxpayers expect them to do, have to impose some swift, firm discipline. I don't think they can stop to obtain a warrant, go down to the courthouse before a neutral and detached

> magistrate, or consult a lawyer as to whether exigent circumstances exist in that kind of situation--that is, a situation that involves a petty disciplinary problem that just has to be corrected and be dealt with so the school can get on with the business of the day.
>
> The teachers have to find out who has the firecrackers, the squirt-guns, the bean-shooters, the slingshots, the stink-bombs, confiscate them quickly, impose some kind of appropriate punishment and get the situation under control before they have a major confrontation on their hands, and get on with trying to teach the kids something that day so the taxpayers can get their money's worth out of what they established the school for. If the teachers have to have a federal case made out of every petty disciplinary incident, the whole purpose of having any discipline at all and any rules of conduct would be defeated. (142, p. 487)

In regard to community expectations, the court said as follows:

> Although the court does not adopt the doctrine of in loco parentis across the board, as has been suggested, my own philosophy is that most parents send their children to school to learn something, and they know they are going to have to have some discipline if they are going to learn something. I know my parents sent me someplace where they hoped I would have some discipline. I sent my children someplace where I hoped they would have some discipline. I think teachers and administrators have a tough time trying to fulfill the responsibility that is delegated to them by the parents. I think teachers and administrators are essential to our society and civilization, and the fact that they have some disciplinary authority is absolutely essential to their getting the job done. If it hadn't been for the teachers who imposed discipline on me that I didn't like at the time, I don't think I would be sitting up here right now. I am the first to admit it. (142, p. 489)

Several court decisions reviewing the use of dogs to sniff out contraband have upheld the use of the dogs to establish the necessary reasonableness for a valid search. In Doe v. Renfrow (135), a dog brought into an Indiana classroom indicated to its trainer that a certain student had contraband in her possession. The girl denied any wrongdoing and a search of her pockets failed to yield any evidence of drugs. The girl

was taken into a restroom and forced to submit to a strip search. No drugs were found. It was later determined that the dog's signal to its trainer had been misinterpreted. Earlier in the day, the girl had played with her own dog which was in heat.

The district court in Doe found that a trained dog's signal to its handler that drugs may be concealed on a student's person was sufficient legal reason to justify a school official's search of the girl's pockets. But, the court said that the dog's actions were not adequate grounds to justify a strip search. Strip searches were held to require the standard of probable cause sufficient to obtain a search warrant.

In Zamora v. Pomeroy (114), a dog trained to sniff out drugs was used in a New Mexico school to locate contraband in student lockers. The dog was paraded by student lockers located in the hallway of the school. When the dog signaled that a locker contained contraband, the locker was marked. If the dog signaled that contraband was present in any one locker on three passes, it was opened by school officials and searched.

The search of one locker revealed marijuana, a leather belt and nothing else. The student who was assigned the locker denied that the marijuana was his and argued that he had not personally used the locker for several months. The court ruled that on the basis of the dog's sniffing, the school officials had adequate reason to search the locker.

In the decision in Stern v. New Haven Community Schools (143), the issue of reasonableness of a search centered around the use of a false mirror in the boys' restroom. Through the false mirror, an employee of the school observed a student purchase marijuana from another student.

The employee notified the principal who called the student into his office. He told the boy that if he cooperated he would not call the police. The boy handed the marijuana over to the principal and was suspended from school for the rest of the semester. The court ruled that the report of the employee who had observed the drug transaction through the false mirror gave the principal reasonable cause to believe that the student had marijuana on his person and that on the basis of the report, the principal was justified in requiring the boy to empty his pockets.

Intent of the search

While federal courts generally recognize the special nature of the school environment and generally uphold searches of students based upon reasonable belief that the particular student involved possessed something which violated school rules or which would have a disruptive influence on the educational environment, they also review the purpose of the search. Searches for educational purposes are usually upheld as valid. Searches for the purpose of law enforcement are usually held to be invalid. Whenever school officials concern themselves with seeking out evidence of criminal conduct rather than violations of school rules, or when law enforcement officers are involved in a search of students, the federal courts take a close look at the facts to see that the educators involved have not forgotten their proper function as educators.

In a federal district court decision arising in Oregon entitled Bilbrey v. Brown (125) a group of parents challenged the legality of a school rule which allowed elementary-age students to be searched when

"probable cause" existed that a student violated a school rule. The court upheld the rule's validity and noted that the rule's "probable cause" test was a higher standard than is actually required before a student may be searched. The court explained that the distinction resulted from special consideration given the school environment and explained the distinction as follows:

> The law recognizes that elementary school students have not yet achieved the maturity of adults. For this reason, school officials are charged not only with furthering the education of students but also with protecting the health and safety of students while they are at school. These responsibilities obligate school officials to control students' behavior and the items they are allowed to possess on the premises. Such objects may range from the relatively innocuous--a water pistol used to disrupt the class--to the deadly--a handgun which endangers the safety of others.
>
> The students' interest in privacy must be balanced against the necessity of school officials to be able to maintain order and discipline in the school and to fulfill their duties under the in loco parentis doctrine to protect the health and safety of their students. To require school officials to obtain a warrant before ever searching a student would unduly hamper their effectiveness in performing their duties.
>
> So long as a school is pursuing its legitimate interest in maintaining the order, discipline, safety, supervision and education of students, the Fourth Amendment does not require that a warrant be obtained before searching a student. Such searches are reasonable under the first clause of the Fourth Amendment. (125, p. 28)

In Bellnier v. Lund (132), a New York case in which the strip search of an entire class of fifth-grade students was found to be illegal, the court ruled that two criteria had to be met for a search to be valid. The court expressly stated that in order for a search of students to be valid, the search must include reasonable grounds to search the specific

students searched and the search must be in furtherance of a legitimate educational purpose, such as the maintenance of discipline and punishment of misconduct.

In the district court decision in Doe v. Renfrow (135), the court upheld the search of students which had been subjected to sniffing by a dog, but only when a strip search was not involved. There were many law enforcement officers present and the dogs used were owned by various law enforcement agencies. In upholding the validity of the search, the court took great care to point out that the law enforcement people involved had agreed that no arrests or criminal prosecutions would result from the search. The court found under the circumstances that the involvement of law enforcement officers did not alter the basic educational function of the actions of the school officials involved.

In the factual context in Doe, the law enforcement personnel and their dogs were considered aides to school officials in carrying out their educational duty of maintaining discipline. The court made it very clear that its ruling would have been different had there been evidence of law enforcement involvement for other than educational purposes:

> In conducting the pocket search, as well as the other searches in question, the school officials clearly were not concerned with the discovery of evidence to be used in criminal prosecutions, but rather were concerned solely with the elimination of drug trafficking within the schools. It cannot be disputed that the school's interest in maintaining the safety, health and education of its students justified its grappling with the grave, even lethal, threat of drug abuse. The pocket search was conducted in furtherance of the school's legitimate interest in eliminating drug trafficking within the school.

It should be noted at this point that had the role of

> the police been different, this court's reasoning and conclusion may well have been different. If the search had been conducted for the purpose of discovering evidence to be used in a criminal prosecution, the school may well have had to satisfy a standard of probable cause to believe. Picha v. Wielgos, supra. Furthermore, this court is not here ruling whether any evidence obtained in the search could have been used in a criminal prosecution. This court is ruling that so long as a school is pursuing those legitimate interests which are the source of its in loco parentis status, "maintaining the order, discipline, safety, supervision, and education of the students within the school." (Picha v. Wielgos, supra, 410 F. Supp. at 1221), it is the general rule that the Fourth Amendment allows a warrantless intrusion into the student's sphere of privacy, if and only if the school has reasonable cause to believe that the student has violated or is violating school policies. (135, p. 1024)

In Zamora v. Pomeroy (114), a search resulting from a dog sniffing student lockers was upheld even though law enforcement officers and members of the district attorney's staff were present. The court noted that the district attorney had guaranteed school officials that his involvement would not be considered to be in his official capacity and that no charges or arrests would result from the search.

In M. v. Board of Education (141), the court upheld a principal's search of a student based on information provided by a student informant. The court noted that the facts involved were distinguishable from those in court cases involving student searches ruled invalid because of police involvement. In M., the court ruled that where school officials are acting without the aid of law enforcement personnel, the lesser standard of "reasonable cause" should be applied to student searches.

In the decision in Keene v. Rogers (144), the dismissal of a student from the Maine Maritime Academy, a state and federally-funded quasi-military academy, was upheld on the basis that evidence obtained through

a search of the student's vehicle was obtained legally. Security officers at the academy observed American flags draped in the windows of the student's van in the school parking lot and suggested that they be removed. The student removed two of the flags, but left two others. The commandant of midshipmen directed the security officers to search the van for evidence of a stolen flag and desecration of an American flag.

At the insistence of the security officers, the student opened his van. The security officers found a can of beer, marijuana and frayed American flags. On the basis of the evidence found in the van, the student was determined to be in violation of the academy's rules of student conduct and was dismissed only a few weeks before his planned graduation.

The student challenged his dismissal from the academy on the ground that the search of his van violated the Fourth Amendment. The court ruled that the intent of the search was for the purpose of enforcing the school's disciplinary code and insuring proper conduct by students. The court noted that no outside law enforcement personnel participated in the search and no criminal prosecution was likely. The search of the van was ruled to be in the reasonable exercise of authority of the school officials and did not infringe upon the student's constitutional rights.

In United States v. Coles (145), the search of the luggage of a job corps student in a special training program was ruled valid in a subsequent criminal prosecution. The court noted that the search of the student's luggage by job corps officials was for the purpose of ensuring

a proper disciplinary atmosphere at the job corps center. Law enforcement officers were not directly involved in the search. They were notified after the search revealed the presence of marijuana.

Sniffing dogs

In the course of this study, four federal court decisions were found which involved the use of dogs to sniff out contraband in the public schools. The results of the decisions were not in agreement.

The decision of a district court in Texas in Jones v. Latexo Independent School District (128) went the farthest in limiting school officials' use of dogs in searches. The court in Jones ruled that it was a violation of the Fourth Amendment to use dogs to sniff out contraband on the person of students or in students' lockers or vehicles. The court of appeals for the fifth circuit, in which Texas is located, has apparently indirectly modified the Jones decision.

In Horton v. Goose Creek Independent School District (146), the fifth circuit ruled that dogs sniffing inanimate objects in public places, such as student lockers in hallways and student vehicles in school parking lots, did not constitute a search in violation of the Fourth Amendment. The fifth circuit in Horton did, however, follow Jones in ruling that in the absence of a specific reason to believe a student possessed contraband, a dog's sniffing of the students' persons constituted a search in violation of the Fourth Amendment.

The search of student lockers in a school hallway as a result of sniffing by dogs was also upheld in Zamora v. Pomeroy (114). It must be cautioned that the Zamora decision involved only the involuntary transfer

of a student to another attendance center. It did not involve suspension, expulsion or loss of grades or credits toward graduation.

The decision of a district court in Indiana in Doe v. Renfrow (135), upheld by the court of appeals for the seventh circuit (136), is in conflict with the holdings in Jones and Horton on the issue of the use of dogs to search students. In Doe, the district court ruled that a dog's sniffing of students for the purpose of searching pockets and purses did not violate the Fourth Amendment. More intrusive searches of the student's person, such as a strip search, however, required a more substantial justification than a dog's indication to its trainer that contraband was present.

Use of evidence obtained in school searches

Obviously, evidence of violations of school rules obtained through valid searches can be used in disciplinary hearings (114, 141, 142, 144) and even in criminal prosecutions (139, 145). However, the federal courts are split on the issue of whether or not evidence obtained through an invalid or illegal search may be presented at a school disciplinary hearing. In Morale v. Griegel (130), the district court in New Hampshire ruled that a search of a college dormitory room for a stolen stereo resulting in the finding of marijuana was an illegal search. The search was determined by the court to be for law enforcement purposes, even though no law enforcement personnel was present. The court reviewed various court decisions involving the "exclusionary rule," and found that it did not apply to school disciplinary hearings. The court ruled even though evidence of drugs in the dormitory room was obtained illegally,

it could be used as evidence in a school disciplinary proceeding.

Liability for illegal searches

The federal courts are also split on the issue of liability for illegal searches by school officials. While several courts have ruled that school officials may be liable for illegal searches of students, a New York court ruled in Bellnier v. Lund (132) that school officials involved in the strip search of an entire fifth-grade class were not liable for monetary damages because they were engaged in the good faith fulfillment of their educational responsibilities. Because the court found the law on student searches to be "unsettled" it did not consider it appropriate to hold the school officials involved liable for infringement of student rights. The court felt that liability should be imposed only if the school officials should reasonably have known beforehand that their acts would violate the constitutional rights of students.

Summary

The federal courts have been consistent in upholding the validity of searches in the public school setting when two important criteria have been met. The search must be based on a reasonable belief that a particular student has violated school rules or is a threat to the education environment and the search must be for an educational purpose and not for the purpose of law enforcement. Satisfactory reasons for a search by school officials have involved reliable informants (M. and Bahr), sniffing dogs (Doe and Zamora; contra., Jones and Horton), and a two-way mirror (Stern). Appropriate educational intent has been found when law

enforcement officials have not been involved in the search (Bibrey, Bellnier, Keene and Coles), and when they have been present only for the purpose of aiding the educators involved (Doe, M. and Zamora).

The use of dogs to sniff for contraband in school has been upheld for the purpose of searching student lockers (Horton and Zamora; contra., Jones), vehicles on school property (Horton; contra., Jones), and the students themselves (Doe; contra., Horton and Jones). School officials in control of facilities have been found to be authorized to give consent for searches (Overton; contra., Piazzola, Smyth and Moral).

Evidence obtained through valid searches of students has been used against students in school disciplinary proceedings (Zamora, Speake, M., Bahr, Stern and Keene) and in criminal proceedings (Overton and Coles). Even when evidence has been found in an illegal search, its use as evidence has been upheld in a disciplinary proceeding (Morale; contra., Smyth, Caldwell and Jones). School officials involved in searches of students in violation of the Fourth Amendment have been held not to be liable for their actions (Bellnier; contra., Picha, Doe and M. M.). No federal courts have upheld the legality of strip searches of students in the absence of a search warrant (Potts, Picha, Bellnier, M. M., and Doe).

CHAPTER VIII. DRESS CODES

It is the purpose of this chapter to review federal court decisions involving legal issues related to student dress codes established and enforced by public school officials. More than any other area of the law related to the public school setting contained in this study, the issue of student dress codes is controlled by the geographic location of the federal court faced with the issue. The courts of appeals in the first, fourth, seventh and eighth circuits have ruled that dress codes violate various legal rights of students. The courts of appeals in the fifth, sixth, ninth and tenth circuits have ruled that dress codes are within the valid exercise of authority of public school officials. The courts of appeals for the second and Washington, D.C. Circuits have apparently not expressly ruled on the issue, and the Court of Appeals for the Third Circuit has issued three different and conflicting decisions on the issue (see Appendix).

No less than nine appeals were made from circuit court decisions to the supreme court between 1968 and 1975 on the issue of student dress codes. The supreme court declined to hear all nine. The surprising and perplexing aspect of the denial of the appeals is that the nine decisions were not in agreement. Seven upheld public school authority for promulgating and enforcing dress codes and two favored student's rights. Normally, when two or more circuits disagree on a legal issue, the supreme court accepts an appeal and decides the issue. Such action resolves the matter nationally and restores consistency to federal court handling of

identical issues.

Perhaps the supreme court was attempting to tell people that the issue was not worth its time. Maybe the justices were concerned that they could not themselves resolve the issue with any clarity. Whatever the reason was for denial of the appeals, the fact remains that had the supreme court accepted an appeal on the issue in the late 1960s, a considerable amount of litigation expense and court time would have been saved by the issuance of a definitive decision. By mid-1974, state and federal court decisions involving student hair codes numbered over 150. The majority of those decisions were rendered by federal courts (147).

Because the issue of dress codes is one which fairly evenly divides the federal court jurisdictions, this chapter will be divided into two relatively equal segments of student rights and student responsibilities. Since the courts of appeal for most circuits have ruled on the issue, emphasis in this review will be placed on decisions of the courts of appeal.

The phrase "dress code" may be something of a misnomer in the context of the decisions reviewed in this chapter. The vast majority of the federal court decisions found in this study deal exclusively with issues of facial and cranial hair. It may have been more appropriate from a topical standpoint to entitle the chapter "appearance code," but because the prevailing terminology in the decisions and the educational community remains "dress code," this study will yield to the weight of past usage.

With only a few exceptions, the student dress codes considered were very similar. Most required boys' hair to be clean and neat, trimmed

around the ears and back of the neck and no longer in back than the top of the shirt collar. Eyebrows could not be covered and little or no part of the ear covered. Boys had to be clean shaven and sideburns were not to extend below the bottom of the ear lobe.

Student Rights

The courts of appeal for four circuits have, for a variety of reasons and in a variety of factual circumstances, upheld allegations of violation of student rights resulting from the promulgation and enforcement of student dress codes. The court of appeals for the first circuit has ruled in favor of student rights in Richards v. Thurston (148); the fourth circuit in Massie v. Henry (149); the seventh circuit in Breen v. Kahl (150); Crews v. Cloncs (151); Arnold v. Carpenter (152) and Holsapple v. Woods (153); and the eighth circuit in Bishop v. Colaw (154).

School rationale rejected

One of the most interesting aspects of the federal court decisions regarding student dress codes is the rationale which school officials have commonly given to federal courts in an effort to justify imposition of dress codes and which courts have rejected. The list is lengthy but informative. It tends to give insight into the differing views of significance attached by judges and school officials to the situations. A list of reasons includes the following: Boys' long hair takes too long to dry after physical-education showers (151, 155); Long hair on boys presents an added safety hazard around bunsen burners in science class,

welding equipment, power shop equipment and trampolines (149, 151, 154, 155, 156); Boys with long hair tend to be rowdy and disruptive (153, 154, 156, 157); Boys with long hair have a poor attitude toward school (153, 154, 156); The local community objects to long hair on boys (154, 156, 157); Long hair on boys makes it difficult to distinguish boys from girls in the supervision of restrooms and locker rooms (154, 155); Long hair on boys tends to polarize the boys in school into long hair versus short hair confrontations (154, 156, 157); Boys with long hair depart from the norm and distract fellow students (149, 150, 151, 156, 157); Boys with long hair perform lower academically (150, 153, 156, 157); Dress codes teach discipline (106, 150); And, schools enacting dress codes are acting in the place of parents (150, 156). Also interesting are some of the more unique reasons given to justify school dress codes, but which have also been rejected by courts. A partial list of those reasons include the following: Allowing high school students to wear long facial and cranial hair adds psychological pressure to emulate the older students to junior high students attending school in the same building (155); Long hair creates disadvantages with teachers who do not like long hair for boys (155); Long hair on boys adds to sanitation problems with swimming pool filters (154); The teacher cannot see the student's eye motion during typing class (106); And, the rule was developed by a committee of students, teachers and administrators (152).

For one reason or another, all of the above reasons given as justification for a school dress code were rejected by federal courts holding that students' interest in personal grooming outweighs the state's

interest in controlling personal grooming. Some arguments for justification were found not to be well-based on the facts, others were considered illogical and for others it was determined that the school's objective could be served by less onerous alternatives to enforcement of dress codes. For whatever reasons articulated by courts rejecting attempts to justify student dress codes in the public courts, the underlying view that comes from a reading of the court decisions is a doubt that student dress codes are really reasonable. The fourth circuit made the point subtly in Massie v. Henry:

> Unquestionably, the issue is current because there is abroad a trend for the male to dress himself more extravagantly both in the nature, cut and color of his clothing and the quantity and mode of his facial and tonsorial adornment. The shift in fashion has been more warmly embraced by the young, but even some of the members of this court, our male law clerks and counsel who appear before us have not been impervious to it. With respect to hair, this is no more than a harkening back to the fashion of earlier years. For example, many of the founding fathers, as well as General Grant and General Lee, wore their hair (either real or false) in a style comparable to that adopted by plaintiffs. Although there exists no depiction of Jesus Christ, either reputedly or historically accurate, He has always been shown with hair at least the length of that of plaintiffs. If the validity and enforcement of the regulation in issue is sustained, it follows that none of these persons would have been permitted to attend Tuscola Senior High School. (149, p. 780)

In the eighth circuit decision in Bishop v. Colaw (154), two of the judges impliedly raised the issue of reasonableness of such school rules. In his concurring opinion, Judge Aldrich made the following observations:

> A recent law review has concluded, after summarizing the cases,
>
> "What is disturbing is the inescapable feeling that long hair is simply not a source of significant distraction, and that school officials are often acting on the

> basis of personal distaste amplified by an overzealous belief in the need for regulations." (84 Harv. L. Rev. 1702 at 1715 (1971). The connection between long hair and the immemorial problems of misdirected student activism and negativism, whether in behavior or in learning, is difficult to see. No evidence has been presented that hair is the cause, as distinguished from a possible peripheral consequence, of undesirable traits, or that the school board, Delilah-like, can lop off these characteristics with the locks. Accepting as true the testimony that in St. Charles, Missouri, the longer the student's hair, the lower his grade in mathematics, it does not lead me to believe that shortening the one will add to the other. Indeed, the very fact that such evidence is offered would seem to support the periodical's conclusion.
>
> The area of judicial notice is circumscribed, but I cannot help but observe that the city employee who collects my rubbish has shoulder-length hair. So do a number of our nationally famous Boston Bruins. Barrel tossing and puck chasing are honorable pursuits, not to be associated with effeteness on the one hand, or aimlessness or indolence on the other. If these activities be thought not of high intellectual calibre, I turn to the recent successful candidates for Rhodes Scholarships from my neighboring institution. A number of these, according to their photographs, wear hair that outdoes even the hocky players. It is proverbial that these young men are chosen not only for their scholastic attainments, but for their outstanding character and accomplishments. What particularly impresses me in their case is that they feel strongly enough about their chosen appearance to risk the displeasure of a scholarship committee doubtless including establishmentarians who may be expected to find it personally distasteful.
>
> It is bromidic to say that times change, but perhaps this is a case where a bromide is in order. (154, pp. 1077-78)

In his concurring opinion in Bishop, Judge Lay stated his opposition to dress codes with less subtlety and expressly laid the issue at the doorstep of school officials. His remarks state clearly the tone often received through inferences and innuendos when reading other court decisions on the issue of student dress codes. Judge Lay wrote as follows:

> The question confronting us is whether there exists any real educational purpose or societal interest to be served in the discipline the school has adopted. After due consideration I fail to find any rational connection between the health, discipline or achievement of a particular child wearing a hair style which touches his ears or curls around his neck, and the child who does not. The gamut of rationalizations for justifying this restriction fails in light of reasoned analysis. When school authorities complain variously that such hair styles are inspired by a communist conspiracy, that they make boys look like girls, that they promote confusion as to the use of restrooms and that they destroy the students' moral fiber, then it is little wonder even moderate students complain of "getting up tight." In final analysis, I am satisfied a comprehensive school restriction on male student hair styles accomplishes little more than to project the prejudices and personal distastes of certain adults in authority on to the impressionable young student. (154, p. 1078)

Legal basis for decisions overturning dress codes

Students and parents challenging the legality of student dress codes for public school students have not been at a loss for constitutional language alleged to support their views. At various times and frequently in the same case, students and parents have alleged that promulgation and enforcement of student dress codes violated the student's constitutional rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments.

The students and parents, however, have had a difficult time establishing the specific language of the constitution which gives them the relief they seek. This is reflected in the difficulty the federal courts have had in singling out and expressing specific constitutional language which establishes the right of students to dress as they deem appropriate. Regardless of the specific constitutional provision determined by the

courts to be relevant, seldom is there a lengthy legal analysis present in decisions and little actual difference lies among them. This is especially true of those decisions involving the Ninth and Fourteenth Amendments (158).

The courts of appeals for the first, third and fourth circuits have found the Fourteenth Amendment to be the basis for protecting student rights in the area of student dress codes. In Richards v. Thurston (148), the court of appeals for the first circuit determined that the right to be free from intrusions into personal grooming was a substantive right protected by the "liberty" provision of the Due Process Clause. This view was expressly followed by the third circuit in the decision of Stull v. School Board (158). The court in the Stull decision sounded almost haphazard in its legal analysis of where the right to personal grooming was actually rooted. The court said as follows:

> We agree that the differences in the above mentioned conceptual approaches to the problem are in considerable measure semantic and that there is indeed a common theme in all of these cases. However, it is our view that the First Circuit's approach was correct; we therefore prefer to follow it and hold that the governance of the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment. (158, p. 347)

This view was also followed by the fourth circuit in Massie v. Henry (149).

The court of appeals for the eighth circuit in Bishop v. Colaw (154) solved the problem of determining the source of the right to personal grooming by combining them under the Fourteenth Amendment. The court explained itself not too clearly with the following language:

> Some have referred to the right as "fundamental," others as "substantial," others as "basic," and still others as simply a "right." The source of this right has been found within the Ninth Amendment, the Due Process Clause of the Fourteenth Amendment, and the privacy penumbra of the Bill of Rights. A close reading of these cases reveals, however, that the differences in approach are more semantic than real. The common theme underlying decisions striking down hairstyle regulations is that the Constitution guarantees rights other than those specifically enumerated and that the right to govern one's personal appearance is one of those guaranteed rights.
>
> * * * * *
>
> 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. (154, p. 1075)

The combining of obscure and undefined rights to wear one's hair as students see fit and grouping them under the Fourteenth Amendment also occurred in the seventh circuit decisions in Breen v. Kahl (150) and Crews v. Cloncs (151).

While no decision has apparently been rendered by the court of appeals for the second circuit on the issue of student dress codes, the federal district court in Connecticut, one of the three states in the second circuit, has ruled in favor of a student on the issue. The Connecticut court expressly held in Crossen v. Fatsi (159) that school boards have the legal authority to adopt a standard of personal grooming for students, but a lack of design in the dress code to avoid disruption and distraction and its failure to clearly define grooming standards invaded a student's right to privacy under the Ninth Amendment.

Several federal court decisions have indicated that student dress codes violate the Fourteenth Amendment provisions requiring that states afford their citizens "equal protection of the laws." The court of appeals for the fourth circuit in Massie v. Henry (149) found that student dress codes violated the Fourteenth Amendment and "have overlapping equal protection clause considerations." There was no explanation given of what was meant.

In a later decision in Crews v. Cloncs (151), the fourth circuit again raised the equal protection issue. The court ruled that dress codes justified on the grounds of safety of boys in school activities such as shop, gym and chemistry, which do not require girls in the same classes to cut their hair, violate the boys' right to equal protection under the law.

The federal district court for Vermont ruled that distinguishing student athletes with long hair from student athletes with short hair and not allowing the former to participate in athletics violated the long-haired students' right to equal protection of the law. The decision was entitled Dunham v. Pulsifer (160).

Dress codes for student activities

Several federal courts, faced with the legal issues of student dress codes in the context of student extracurricular activities, have found that dress codes, even in the context of activities, are not enforceable. The highest court to rule on the issue was the court of appeals for the fourth circuit. In its decision in Long v. Zopp (161),

the court of appeals for the fourth circuit reviewed a haircut rule imposed by a football coach. The coach's rule prescribed a "hair code" during the football season and throughout the year. The student involved in the case observed the coach's rule during the football season but allowed his hair to grow longer than the prescribed length after the season ended. Because of his off-season noncompliance, the boy was denied an earned football letter at year's end. The coach's actions were later supported by higher school officials.

The court in Long applied the fourth circuit's decision in Massie v. Henry (149) striking down student dress codes in the academic setting to all school activities. It found that any valid reason for a haircut rule during football season, such as cleanliness, ended when the football season ended and determined that the boy was entitled to receive his letter for football.

An earlier decision in the federal district court in Vermont went a little farther than the court in Long and ruled that school officials were not able to justify a hair-length code during the athletic season. In Dunham v. Pulsifer (160), the Vermont court had before it three students who had been removed from the tennis team by the coach for violation of an athletic grooming code. There was no dress code for the general student body or other student activities, only athletics. The three boys involved were ranked one, two and three on the tennis team and were among six of eight team members disciplined under the rule. The three boys were also school class and academic leaders. There had been no problems of discipline or adverse public reaction resulting from

their hair styles.

The court overturned the athletic grooming code in Dunham on the basis that it violated the students' rights to equal protection. The court reasoned that the classification of athletes into two groups, those with long hair and those with short hair, and denying athletic participation to the former and not the latter was arbitrary, unreasonable and unjustified. The court noted that a number of professional athletes wore long hair and would be unable to participate under such a rule. The court concluded that student rights did not end at the conclusion of the academic day:

> Putting the question in a rhetorical sense, what is the nature of the right threatened by the hair code? Before this unnamed right is labeled and in an effort to comb this problem into a neater part, it should be observed that the Constitution does not stop at the public school doors like a puppy waiting for its master, but instead follows the student through the corridors, into the classroom and onto the athletic field. (160, p. 417)

The federal district court in North Dakota, following the court of appeals for the eighth circuit in Bishop v. Colaw (154), ruled that a school grooming code prohibiting a boy from participating in athletics, Future Farmers of America and band was a violation of the boy's constitutional rights. The court in Dostert v. Berhold Public School District No. 54 (162) did not accept the arguments of school officials that participation in athletics is a privilege, not a right, that contest judges in band and F.F.A. activities would give lower marks in competition to boys with long hair, that long hair interferes with vision during athletic competition and that such rules contribute to team discipline, dedication and unity.

Female hair case

Special attention should be given to the case of Sims v. Colfax Community School District (106). It appears to be the only girl's haircut case in the nation. In Sims, the court was faced with a nonsexist rule which required both boys and girls to keep their hair length to no longer than one finger width above the eyebrow. Apparently the female student involved in Sims preferred another hair style. She was suspended from school for violation of the grooming rule.

The court found in Sims that the student's Fourteenth Amendment rights were involved and the school rule, therefore, did not enjoy the usual presumption of constitutionality given most school rules. In weighing the girl's rights against the school's justification for the rule, the court found school officials' arguments lacking and ruled that the grooming code was unconstitutional.

The court noted that the case was the nation's first student haircut case involving a female and could not resist a little humor. The court said as follows:

> The Court well knows that the field of female coiffure is one of shifting sand trodden only by the most resolute of men. The Court thus undertakes this journey with some trepidation. Since time immemorial attempts to impose standards of appearance upon the fairer sex have been fraught with peril. Arbiters of hirsute fashion, perhaps understanding the chameleon nature of the subject matter, have approached the problem with more innovation than insight. Against this delicate social milieu and ever mindful of the equal protection clause, this Court undertakes to comb the tangled roots of this hairy issue. (106, p. 486)

Second circuit decisions

The court of appeals for the Washington, D.C. and second circuits appear to be the only circuit courts which have not addressed the legal issues of student dress codes. Court decisions within both jurisdictions, however, reflect what a likely result would be. The second circuit is made up of the states of New York, Connecticut and Vermont and the federal district courts in those states have addressed the same or similar issues.

The federal district court for Vermont ruled in Dunham v. Pulsifer (160) that students engaged in participation in a high school tennis team have a constitutionally-protected right to personal grooming which cannot be taken away in the absence of a compelling state interest. No compelling state interest was found to exist in the case. It is logical to assume that an extension of the rationale used in Dunham would apply to an issue of student dress codes in the academic setting as well.

In Crossen v. Fatsi (159), the federal district court in Connecticut ruled that school boards have the authority to adopt standards of personal grooming for students, but the rule must be designed to prevent disruption of the school environment and it must clearly define the standards by which grooming is to be judged. The court found that the following rule, as applied to a student with a full beard and mustache, was unduly vague and uncertain and left too broad a discretionary authority to the "arbitrary whim" of the school administrators.

> Students are to be neatly dressed and groomed, maintaining standards of modesty, and good taste conducive to an educational atmosphere. It is expected that clothing and

grooming not be of an extreme style or fashion. (159, p. 115)

Strange as it may seem, no New York federal court decision on the issue of student dress codes was found in this study. The decision in Harris v. Kaine (163), however, provides some guidance as to how a federal court in New York might rule on the issue. In Harris, the court ruled that an army reservist had a right to wear his hair in any style he chose. The court found that the army was unable to justify its grooming restrictions. It is logical to assume that if the army could not justify grooming restrictions for its reservists, a school would have a difficult time justifying a student dress code.

The court of appeals for the second circuit has ruled on the issue of dress codes but not in the public school setting. In Dwen v. Barry (164), the court had before it a case involving a policeman's challenge of a municipal employer's dress code. The district court dismissed the policeman's lawsuit on the basis that it did not present a sufficient legal question for federal courts to resolve. The court of appeals reversed the dismissal and expressly followed the first, fourth, seventh and eighth circuit student dress code decisions and ruled that the constitution limits the right of states to interfere with the personal appearance of its citizens. The court of appeals remanded the lawsuit to the district court for a determination of whether the police dress code could be justified by the municipal employer.

It appears from the second circuit's decision in Dwen and the district court decisions in that circuit that a student dress code issue

arising in that circuit would likely result in a decision against school officials. But, there is no certainty on the point. The court of appeals ruled in East Hartford Education Association v. Board of Education (165), with all the judges of the circuit participating, that a public school teacher's rights were not violated by a school rule which required male teachers to wear a necktie to class. The judges felt that the teacher dress code resulted in the teachers becoming better role models for students and improved classroom decorum.

Student Responsibilities

The courts of appeal for four circuits have denied the arguments of students and parents that student dress codes violate the rights of students. The court of appeals has ruled in favor of school officials on the issue of dress codes in the fifth circuit in Ferrell v. Dallas Independent School District (166), Stevenson v. Board of Education (167), and Karr v. Schmidt (168); the sixth circuit in Jackson v. Dorrier (169), and Gfell v. Rickelman (170); the ninth circuit in King v. Saddleback Junior College District (171); and the tenth circuit in Freeman v. Flake (172).

Fifth circuit cases

The court of appeals for the fifth circuit was the earliest court of appeals to review the legal issues of student dress codes, and the one which has most strongly closed the issue to future litigation. The first decision by the fifth circuit involving student dress codes was the

1968 decision of Ferrell v. Dallas Independent School District (166). Although that decision preceded Tinker v. Des Moines Independent Community School District (1) by about ten months, it had a great influence on subsequent decisions in the fifth and other circuits.

In Ferrell, the court was faced with a situation in which three students were denied enrollment in a public high school because they wore "Beatle"-type haircuts. They alleged that as members of a musical group called "Sounds Unlimited," they had to maintain hair styles in common usage in the entertainment field.

In district court, school officials had provided testimony which they alleged showed a serious disruption to the educational environment resulting from long hair. There were instances of a group of boys holding a boy with long hair down and cutting his hair with scissors, harassment and obscene language directed toward boys with long hair, and a danger of fights breaking out between boys with long hair and boys with short hair. The district court concluded that school officials had acted reasonably in establishing a student dress code and in refusing to admit the boys to school.

The court of appeals agreed. It found that the instances of disruption were sufficient to justify the actions of school officials in barring the entrance of the boys to school and that such actions did not unduly infringe upon the students' fourteenth amendment rights. The court also declined to accept the students' argument that their hair length was a mode of expression protected by the First Amendment. Without expressly ruling on the first amendment question, the court noted

that no rights are absolute and that the school's interest in maintaining a disruption-free environment overrode any interest the students had in wearing long hair.

While it would be interesting to speculate whether the result in Ferrell, based upon the disruption caused by long hair, would have been the same had it been decided after Tinker rather than before it, it is clear that subsequent cases in the fifth circuit were generally faithful to the ruling in Ferrell. There were two deviations, however.

In Griffin v. Tatum (173), the fifth circuit had before it a situation where a district court in Alabama had not followed the Ferrell decision and had struck down a student dress code. The student involved met the dress code requirements in every respect except that his hair was cut "block" style in the back rather than the required "tapered" cut. The court of appeals in Griffin overturned the district court's action in striking down the entire dress code but agreed with the district court that it was unreasonable for school rules to distinguish between block and tapered hair styles.

The second, and apparently greater, deviation from Ferrell arose in a district court decision in Dawson v. Hillsborough County, Florida School Board (157). In that decision, the district court overturned a student dress code as applied to two brothers. The brothers had not had any previous disciplinary problems and wore their long hair in a neat, clean fashion. The court ruled that there had been no disruptions of the school environment as had occurred in Ferrell and there was no reliable evidence to show that the hair code was necessary. On the basis of the

record before the district court, the fifth circuit affirmed the decision (174).

The somewhat inconsistent decisions in the fifth circuit came to a conclusion with the decision in Karr v. Schmidt (168). In that case, a district court in Texas had ordered the enforcement of a dress code to cease. There had been testimony to the effect that some minor disturbances had occurred as a result of long hair, but nothing serious had happened.

While an appeal to the fifth circuit was pending, the fifth circuit ordered the district court's order stopping enforcement of the dress code to be temporarily set aside. That action allowed the school to continue enforcing its dress code. The student involved then appealed to Justice Hugo Black of the supreme court to intervene as the circuit justice for the fifth circuit and vacate the fifth circuit's action. Justice Black, in his reply, made it very clear that he did not think the legal issue of student dress codes was important enough for the federal courts to review. He wrote in part as follows:

> The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of greater importance--the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thouught of that States are more capable of deciding than the length of the hair of schoolboys. There can, of course, be honest

> differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear. (175, p. 144, 91 S. Ct. at 593)

The fifth circuit followed Justice Black's position in its decision in Karr, and rejected the student's arguments that his rights under the First, Eighth, Ninth, Tenth and Fourteenth Amendments had been violated. The court ruled that because there was no legal basis upon which students could support a claim against dress codes, they should no longer be allowed to bring such claims in any of the federal courts in the circuit:

> Given the very minimal standard of judicial review to which these regulations are properly subject in the federal forum, we think it proper to announce a per se rule that such regulations are constitutionally valid. Henceforth, district courts need not hold an evidentiary hearing in cases of this nature. Where a complaint merely alleges the constitutional invalidity of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted. (168, pp. 617-18)

Dichotomy of case law favoring school officials

The long line of cases in the fifth circuit, especially the first and last previously discussed, represent very well the dichotomy of federal court decisions upholding the promulgation and enforcement of student dress codes. In Ferrell v. Dallas Independent School District (166), the court of appeals determined that enforcement of a dress code did not

infringe upon the rights of students, because the school officials involved had been able to establish that disruptions to the school environment had resulted from boys wearing long hair. That was likely the reason the court of appeals affirmed the district court decision in Dawson v. Hillsborough County, Florida School Board (174), overturning a dress code after the district court Judge had found no disruption of the school environment had occurred in the case.

The case of Karr v. Schmidt (168) was an entirely different matter. In that case the court said, in effect, that the issue of student dress codes was not one of sufficient constiutional significance with which the federal courts need deal.

The courts in the other circuits upholding the legality of student dress codes have taken one or the other approach. Either they have found evidence of reasonableness to justify a student dress code on the facts before them, or they have simply said that the issue was a matter for local discretion and not worth their time.

Two decisions out of the sixth circuit fall into the former category. In Jackson v. Dorrier (169), the district court had found several specific instances of disruption of school activities related to long hair on boys and noted that the students involved in the case had created problems of school discipline by deliberately flouting the well-publicized school dress code. In Gfell v. Rickelman (170), the court ruled that a reasonable relationship between the dress code adopted by school authorities and the general purposes of education existed. There was evidence of only minor actual disturbances, but the court considered

them sufficient to justify a student dress code.

In the first case on the issue of student dress code to come before the third circuit, the facts made it relatively easy for the court to follow the line of cases based on the reasonableness of actions of school officials. The student involved in Gere v. Stanley (176) had shoulder-length hair and a goatee. The record showed that the educational environment ment was disrupted because other students refused to sit near the boy in class and the school cafeteria. They did so in class because his hair was dirty and in the cafeteria because he had a habit of allowing his hair to fall into his food and then throwing his hair back over his shoulders sending food particles flying. The court ruled under the circumstances that the hair-length rule was justified.

The court of appeals for the ninth, tenth and third circuits on the other hand have ruled that the issue of student dress codes is not one of sufficient substance for federal courts to review. In King v. Saddleback Junior College District (171), the court of appeals for the ninth circuit joined a case dealing with a student dress code at a junior college together with one dealing with a high school dress code. In both cases, the respective district courts had ruled that student rights were violated by the dress codes and ordered the schools to cease enforcement of the dress codes. The court of appeals reviewed the constitutional issues raised by the students, found them all lacking in substance and ruled that such decisions should thereafter be left to the professional judgment of the educators involved. Both cases were appealed to the supreme court, but the supreme court declined to hear

the appeals.

From the very beginning of the decision in Freeman v. Flake (172), the court of appeals for the tenth circuit made it clear that it did not feel that the issue of student dress codes was one for resolution by federal courts. It began its decision as follows:

> Regulation of hair styles of male students in state public schools is becoming a matter of major concern to federal courts if one is to judge by the ever-increasing litigation on the subject or by the days of court time expended, and the lengthy briefs presented, in the cases now before us. We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states and should be handled through state procedures. (172, p. 259)

The court in its decision, briefly skimmed over allegations of violation of the First, Fourth, Eighth, Ninth, Tenth and Fourteenth Amendments and noted that:

> The hodgepodge reference to many provisions of the Bill of Rights and the Fourteenth Amendment shows uncertainty as to the existence of any federally protected right. (172, p. 260)

The court ordered the three cases from Utah, New Mexico and Colorado, which had been combined for decision, to be dismissed for failure to state a legal basis on which a federal court could grant relief.

The tenth circuit has even rejected arguments of Indian parents that school hair-cut rules infringe upon their religious and cultural values. In Hatch v. Goerke (177), the court upheld a school rule which required a student of Indian descent to cut his hair braided in traditional Indian style.

The court of appeals for the third circuit, with all judges

participating, voted four to four, with one judge concurring in part and dissenting in part, in Zeller v. Donegal School District (178), to affirm a district court decision to dismiss a complaint involving a high school soccer player's noncompliance with an athletic dress code as lacking in a legal issue which the federal courts could address. The court expressly followed the views expressed by the tenth circuit in Freeman v. Flake (172).

Health and safety issues

In those decisions which have upheld the legality of student dress codes, the courts have often taken issues of health and safety into their consideration of whether school officials were justified in their actions. This was most obvious in Gere v. Stanley (176), where students refused to sit by a student with dirty hair which was occasionally dipped in the student's cafeteria food. It was also present in cases like Gfell v. Rickelman (170), where school officials merely alleged safety problems around bunsen burners in science classes and near power machinery in industrial arts classes. But, even many of the courts which have ruled that student dress codes are illegal have expressly or impliedly stated that health and safety reasons would justify limitations on student appearance.

In the fourth circuit decision in Massie v. Henry (149), the court implied limitations would be appropriate under certain circumstances when it said that a student can exercise a personal right to grooming, ". . . so long as he does not run afoul of considerations of safety,

cleanliness and decency" (149, p. 728). In Breen v. Kahl (150), the court of appeals for the seventh circuit, in overturning a student dress code, noted that the record did not suggest that the length of the hair involved ". . . constituted a health problem or a physical obstruction or danger to any person. . . ." (150, p. 1037). The reasonable inference to be received is that elements of health, safety and decency are important considerations in cases involving student dress codes.

Several courts have expressly stated that health and safety issues are important. In a dissenting opinion to a supreme court refusal to hear an appeal of a student dress code decision, Justice William Douglas argued that hair styles are a personal matter and should be left to individual preference. He expressly noted, however, that an epidemic of head lice would justify a requirement to wear hair short (179). A federal district court in Iowa in Turley v. Adel Community School District (156), noted that disruption arising out of hostile acts of students toward students with long hair was not the type of disruption to the educational setting that would justify a dress code. The court stated that such disruptions ". . . must flow from the hair itself, namely health problems, safety problems, distraction of other students in their academic pursuits or actual disruption by the long haired student himself" (156, p. 409). The federal district court in New Hampshire ruled in Bannister v. Paradis (180) that schools can prohibit students from wearing dirty and unsanitary clothing and clothing which is immodest or obscene.

Clothing

Even though the title of this chapter implies that issues involving the right to wear certain types of clothing are contained within, very few federal court decisions were found which dealt with the application of dress codes to wearing apparel. One of the only cases found which dealt directly with the issue of clothing was one decided by a district court in Arkansas in Wallace v. Ford (181). The students involved in the case challenged several aspects of a dress code involving clothing and hair styles. Because Arkansas is in the eighth circuit, and that circuit had ruled in Bishop v. Colaw (154) that student dress codes were unconstitutional as applied to hair style, the haircut provisions of the dress code were dealt with quickly. The various issues of the clothing portion of the dress code took more of the court's time and consideration, however.

It was the girls' clothing portion of the dress code that was primarily at issue. The dress code prohibited almost every kind of dress or skirt which did not hang within six inches above or below the knee, women's clothing not considered a dress, skirt, jeans or slacks, and exposed blouse bottoms which were not cut squarely on the bottom. Jeans and slacks were permitted for girls only if they had zippers on the side rather than in front.

School officials gave two reasons as justification for enforcement of the girls' dress code. They stated that the dress code was intended to encourage self-respect and to prohibit apparel which was revealing or seductive.

One of the girls challenging the rule was discovered by school officials wearing jeans with a zipper in the front. When she was directed to wear her blouse on the outside of her jeans to cover the zipper, it was discovered that her blouse bottom was rounded rather than straight. She was required to change blouses.

Another student involved was not allowed to wear several pieces of clothing her mother made for her to wear to school. One tall girl was prohibited from wearing a mini-dress because it was more than six inches above the knee. Another could not wear a "jumpsuit" or a "nickersuit." None of the clothing at issue was alleged to be unclean, tight or immodest.

In analyzing the situation before it, the court distinguished hair codes from clothing codes. It reasoned that schools had less right to control hair styles than clothing because hair is an integral part of one's body. Clothing, on the other hand, can be changed when school is not in session.

In reviewing the specific provisions of the dress code, the court in Wallace overturned the rule's prohibitions on jumpsuits, nickersuits, long dresses and skirts, frayed trousers and jeans with zipper to the front, exposed rounded shirttails (except in shop class), and tie-dyed clothing. The court upheld the provisions against short skirts more than six inches above the knee (but suggested exceptions for tall girls) and excessively tight skirts or slacks. The court found that it was appropriate for schools to prohibit suggestive or immodest clothing in school.

Another court of appeals, one which had overturned haircut rules, also distinguished haircut issues from clothing issues. In Richards v. Thurston (148), the first circuit recognized that rules governing skirt lengths require less justification by school officials than rules which require haircuts. The court's reasoning was similar to that in Wallace v. Ford (181), in that clothing can be changed, but requiring a haircut affects appearance at all times. This view was also noted in Stull v. School Board (158).

In Fowler v. Williamson (99), students preparing for graduation exercises were told by the principal not to wear jeans to the ceremoney. While waiting in line in preparation for the ceremony to begin, one boy wearing jeans was pulled out of the line by the principal and told he could not participate in the ceremony. He hurried home and changed, but returned to school too late to participate. The boy brought suit alleging $500,000.00 damages for violation of his fourteenth amendment rights.

In Fowler, the court found that there was no "property" or "liberty" right involved in participation in graduation ceremonies. Since the boy was therefore not deprived of any rights under the Fourteenth Amendment, he could not recover damages.

Another decision on the issue of wearing jeans had a different result. In Bannister v. Paradis (180), the federal district court in New Hampshire overturned a school rule prohibiting the wearing of jeans to school. The court concluded that there was no disturbance, safety or health factor involved and school officials had been unable to

justify the rule.

Third circuit cases

The court of appeals for the third circuit has issued three decisions involving the issue of student dress codes. All three conflict with each other in their rationale and result.

The first decision was in Gere v. Stanley (176), where students refused to sit next to a boy in class and in the cafeteria because of his dirty hair and habits. The court ruled that the school's hair length rule was legally justified. A second and conflicting decision was rendered only four months later in Stull v. School Board (158). In Stull, the court distinguished Gere on the facts and ruled that student dress codes infringe upon student's rights. In the third, Zeller v. Donegal School District (178), the entire court of appeals split four to four with one judge concurring with part of the decision and dissenting with part. The four judges in the majority, with the fifth judge's concurring opinion, stated that they no longer felt that student dress codes presented a significant legal issue for federal courts to resolve and dismissed the lawsuit brought by the students.

While it would appear, as a result of Zeller, that the third circuit is currently one of the circuits which would uphold the legality of a student dress code, that result is put into doubt as a result of a subsequent nonschool decision. In Syrek v. Pennsylvania Air National Guard (182), the court of appeals for the third circuit overturned a district court dismissal of a lawsuit brought by civilian employees of the air national guard challenging an employee dress code. The district

court had dismissed the lawsuit on the basis that the Zeller decision had foreclosed the issue of dress codes as a legal issue to be heard by federal courts in the circuit. The court of appeals in Syrek disagrred and said that the majority decision in Zeller actually held that government regulation of hair length could constitute an invasion of a citizen's "liberty" rights and sent the case back to the district court for a reconsideration of the case on the established facts.

It does not appear that the issue is yet finally resolved in the third circuit. The decisions in that circuit continue to support two viewpoints.

Washington, D.C. circuit

The court of appeals for the Washington, D.C. circuit has apparently not ruled in any case directly involving student dress codes. In one far-removed case, it did indicate that it possibly might rule against student rights on the issue. In a decision entitled Fagan v. National Cash Register Company (183), the court had before it a case involving alleged sex discrimination against a private employer arising out of a haircut rule. While the case itself revolved around federal statutes, the court reviewed Justice Black's ruling in Karr v. Schmidt (1975), noted that the supreme court had refused to hear nine appeals on the issue and concluded that the supreme court must not have seen any federal question in the issue (183, p. 1119). It can be concluded from Fagan that future issues of student dress codes arising in the Washington, D.C. circuit will be resolved in favor of school officials.

Summary

Unlike any other area of student rights and responsibilities contained in this study, the predictability of the outcome of a lawsuit on student dress codes in a federal court is dependent almost exclusively upon the geographic location of the events. Legal issues of student dress codes arising in the first, fourth, seventh and eighth circuits will likely be resolved against school officials. Issues of student dress codes arising in the fifth, sixth, ninth and tenth circuits will likely be found in favor of school officials. Because decisions involving dress codes rendered in the federal district courts have been decided against public officials, a decision in the second circuit would likely favor students. A result in the third circuit would be difficult, if not impossible, to predict without knowledge of the specific facts involved. A decision in the Washington, D.C. circuit would most likely favor school officials.

Even in those circuits whose decisions have generally opposed student dress codes, certain limited factual circumstances involving conditions of health, safety or distraction should result in a decision upholding a dress code. Also in those circuits where dress codes have not been favored, reasonable clothing restrictions may be easier to justify than haircut restrictions.

CHAPTER IX. CORPORAL PUNISHMENT

This chapter contains a review of federal court decisions which have dealt with issues of corporal punishment in the public school setting. Because most federal court decisions, especially those of the supreme court, have been favorable toward school officials, the organization of this chapter differs from that of many of the chapters contained in this study. Here, because the court decisions have been so one-sided in favor of school officials, the chapter will begin with a discussion of student responsibilities and will be followed by a brief discussion of student rights. Federal court decisions which were rendered both before and after supreme court decisions on identical legal issues have been excluded from this review insofar as they are controlled by the rulings of the supreme court.

Student Responsibilities

While over a dozen federal court decisions have been found which discuss legal issues raised in the context of corporal punishment of public school students, few court decisions have favored the students and parents involved. Those legal issues which have been most often considered by the federal courts include: A student's right to be free from "cruel and unusual punishments;" A student's right to procedural due process before being administered corporal punishment; A parent's right to substantive due process in determining appropriate methods of punishment for their children; And a student's right to substantive due

process. Procedural due process was discussed at length in Chapter V, and substantive due process was briefly discussed in Chapter V as a basic fairness, i.e., a right to be free from arbitrary and capricious action on the part of public officials. The Eighth Amendment to the Constitution of the United States has usually been applied in criminal law situations and states in its entirety as follows: "Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishments inflicted."

Of the four legal issues most frequently discussed in federal court decisions on corporal punishment, three have been resolved by the supreme court in favor of the school officials involved. The supreme court decision in Baker v. Owen (184) resolved the issue of parents' rights to determine the manner of their own children's discipline.

The facts involved in the case arose in North Carolina when Russel Baker, a sixth-grade student, was paddled twice on the buttocks with a wooden drawer divider for throwing a ball after the teacher had instructed the student not to do so. The drawer divider was a little longer and thicker than a foot-ruler. The boy testified that he felt a "stinging sensation" and claimed no lasting disability or injury from the paddling. The primary issue centered around the fact that Russel's mother had previously informed the boy's principal and teachers that she opposed corporal punishment on principle and directed that the boy was not to be corporally punished.

When the mother and boy brought suit to challenge the teacher's act in paddling the boy against the mother's expressed wishes, and other

issues, a three-judge panel was convened in federal district court to consider the constitutional issues involved. On the issue of parental rights, the court found that rights contained in the Fourteenth Amendment included the right of parents to determine the means of discipline of their children (78).

The district court then weighed the parents' right to determine the means of discipline against the state's interest in maintaining discipline in the public schools. It found that the school was furthering a legitimate state goal by utilizing corporal punishment as a means of maintaining order in the public schools and so long as the corporal punishment was reasonable under the circumstances, the state's interests outweighed the parents (78).

The district court in Baker also ruled on the issues of violation of procedural due process and the Eighth Amendment, but only the issue of parental rights was appealed. Because the issue was heard and decided by a three-judge panel on constitutional issues, the appeal went directly to the supreme court rather than the court of appeals.

The supreme court affirmed the district court ruling that parental rights to choose the manner of discipline for their children had to yield to the public school's interest in maintaining discipline in the schools (184). It did so in a memorandum opinion which contained no written explanation for its reasoning.

The issues of procedural due process and eighth amendment protection in corporal punishment situations were placed before the supreme court in a case originating in Florida. In that case, two junior high

school students in Dade County, Florida, challenged the legality of state statutes and school rules under which they had been corporally punished. They also challenged the legality of the specific acts of punishment imposed against them.

One boy alleged that he was subjected to corporal punishment because he was slow to respond to his teacher's instructions. The boy was taken to the principal's office where he was to receive five blows with a paddle. When he refused to assume the paddling position, the principal called upon two adult staff members to hold the boy in a prone position over a desk while he administered 20 blows with the paddle.

Upon returning home that afternoon, the boy complained to his mother about discomfort he felt as a result of the paddling and was taken to the hospital for treatment. He had suffered a bruise which required a prescription of cold compresses, a laxative, and sleeping and pain-killing pills. He was directed by the doctor to remain at home and rest for ten days. His discomfort lasted for a total of three weeks. During that time he visited a doctor two more times.

The other boy involved in the lawsuit refused to submit to paddling, and when he resisted punishment, he was struck with the paddle on the arm, back and across the neck. He was paddled on a subsequent occasion, about three weeks later, on the buttocks and on the wrist. For the second paddling, the boy visited a doctor and received medication for discomfort which lasted about a week.

The two boys, through their parents brought suit in federal court alleging that corporal punishment in the public school setting violated

the Eighth Amendment prohibition against "cruel and unusual punishments," the boys' right to procedural due process before being paddled, the boys' substantive due process rights and the parents' right to control the manner of punishment for their children. The district court dismissed the lawsuit.

On appeal to the court of appeals for the fifth circuit, the court ruled that while corporal punishment per se does not violate eighth amendment or procedural due process protections, in the circumstances of severe punishment, both procedural due process and eighth amendment could be involved. The court of appeals reversed the district court and remanded the case back to the district court to hear the facts in the case and issue a decision on the merits (185).

School officials filed a request for rehearing and the court of appeals agreed to rehear the matter before all the judges in the circuit (en banc). The judges voted by a margin of ten to five to overturn its previous ruling and affirm the previous district court dismissal. The court ruled on rehearing that the eighth amendment prohibition against "cruel and unusual punishments" had no application to corporal punishment in the public school, and that corporal punishment does not violate the substantive or procedural due process rights of students in danger of being corporally punished (186). The issue of parental rights was no longer an issue because it had been resolved in Baker v. Owen (184) in the intervening time period.

The United States Supreme Court agreed to accept an appeal in the case only on the two issues of a student's right to procedural due

process and the application of the Eighth Amendment to corporal punishment. The issue of substantive due process was not part of the appeal.

In its decision in the case entitled Ingraham v. Wright (187), the supreme court ruled that the Eighth Amendment was historically applied solely in the area of criminal misconduct and refused to apply it to corporal punishment in the public schools. On the issue of procedural due process, the court ruled that while students do have a "liberty" interest in the context of corporal punishment protected by procedural due process rights, that interest is adequately protected by traditional legal remedies and no hearing process is required.

The procedural due process portion of the decision is difficult to understand in light of the discussion of procedural due process in Chapter V. Basically, what the court said was that because the common-law in most states holds teachers and school administrators criminally and civilly liable for excessive corporal punishment, and many states have enacted the common-law into statutes, the common-law and statutory remedies available to students and parents were adequate to afford procedural due process protections to students in danger of being paddled. Stated another way, the court ruled that protections of potential civil or criminal prosecutions against teacher and school administrator abuses in the area of corporal punishment are sufficient protection for students' "liberty" interests in not being unjustly paddled. The result is that notice of alleged misconduct and a hearing prior to the imposition of corporal punishment are not required in those states where corporal punishment is recognized and controlled by common-law or

statutory protections.

The unusual ruling on the procedural due process issue was likely a result of a recognition of the interest of public school officials and teachers in having a swift method of punishment available as a disciplinary tool. The court's concern in this regard was evident in the following language:

> Such a universal constitutional requirement would significantly burden the use of corporal punishment as a disciplinary measure. Hearings--even--informal hearings--require time, personnel, and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements. Teachers, properly concerned with maintaining authority in the classroom, may well prefer to rely on other disciplinary measures --which they may view as less effective--rather than confront the possible disruption that prior notice and a hearing may entail. (187, pp. 680-681, 97 S. Ct. at 1417)

Student Rights

The supreme court in Baker v. Owen (184) and Ingraham v. Wright (187) resolved issues of procedural due process, parental rights to control the discipline of their children and eighth amendment protections in the context of corporal punishment in the public school setting in favor of public school officials. It has not yet spoken to the last of the major corporal punishment legal issues, that of substantive due process rights of students. While the court of appeals for the fifth circuit in its rehearing of Ingraham (186) ruled that students' substantive due process rights are not violated by corporal punishment, the issue was not expressly reviewed by the supreme court on appeal.

In addition to the fifth circuit in Ingraham, other federal courts in New Mexico in Sims v. Board of Education (188), Vermont in Gonyaw v. Gray (189), and Alabama in Jones v. Parmeter (190) have ruled that no issue of substantive due process arises in the context of corporal punishment in the public school setting.

The court of appeals for the fourth circuit has upset the unanimity, however. In Hall v. Tawney (191), the court had before it a case in which an elementary school student and her parents alleged that the student was paddled with a thick rubber paddle and shoved into objects such as desks. The student was alleged to have been hospitalized for ten days for treatment of her injuries and have possible permanent injury to the lower back and spine. There were also allegations that the person responsible for the paddling acted out of malice toward the student's family.

The fourth circuit ruled in Hall that corporal punishment in the school setting does not violate the substantive due process rights of public school children per se, but that certain factual circumstances may be present in a particular situation which give rise to such a right. Excessive corporal punishment inflicted with malicious intent was ruled to be one such circumstance. The court stated its position as follows:

> . . . the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need present, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted a brutal and inhumane abuse of official power literally shocking to the conscience. (191, p. 613)

While the language quoted clearly shows that the court's intent was to keep alive the possibility of a finding of a violation of a student's right to substantive due process in corporal punishment situations, it also clearly limited the circumstances in which such a finding can take place. The act has to be maliciously intended and the resulting injuries have to be severe in terms of the factual context. It can be inferred that mere carelessness or "excess of zeal" will not result in violations of the students' substantive due process.

The court in Hall had before it only an allegation of severe injury resulting from malicious intent. No factual record had been made before the district court. The circuit court, therefore, remanded the case to the district court for the purpose of making a factual determination of whether the student and parents could prove their allegations of serious injury and malicious motivation.

Summary

Federal courts which have reviewed the legal issues surrounding corporal punishment in the public school setting have usually ruled in favor of school officials. The supreme court has affirmed that public school students may be paddled in opposition to the wishes of the student's parents (Baker), that the eighth amendment prohibition against "cruel and unusual punishments" has no application to corporal punishment in public schools (Ingraham), and that public school officials do not have to provide a due process hearing prior to the administration of corporal punishment if the statutes or common-law of the state

provide for reasonable corporal punishment (Ingraham). While one federal court has ruled that the substantive due process rights of students may be violated by severe corporal punishment motivated by malicious intent, other federal courts have not recognized a right of students to substantive due process in the area of corporal punishment (Sims, Gonyaw and Jones).

CHAPTER X. OTHER ISSUES

It is the purpose of this chapter to review federal court decisions involving issues of student rights and responsibilities which have been raised by litigants and discussed by courts with less frequency than topics previously reviewed in this study. As with previous chapters, primary emphasis has been given to those federal court decisions which were won by school officials or in which the courts have established express or implied parameters of student responsibilities.

Due to the dearth of federal court decisions on some of the legal issues contained in this chapter, a relatively large number of the decisions reviewed involved students attending postsecondary institutions. While courts frequently distinguish between age levels of students regarding the degree of application of constitutional restraints on the power and authority of public school officials, the legal concepts involved here are not altered significantly by differences in age and maturity. The decisions involving postsecondary students reviewed in this chapter contain important and relevant implications for the exercise of legal rights and responsibilities by public elementary and secondary students.

Self-incrimination

The Fifth Amendment contains a provision protecting persons from self-incrimination. It states in relevant part that no person ". . . shall be compelled in any criminal case to be a witness against himself, . . ." At first glance, the provision against self-incrimination

appears to have relevance only in criminal investigations and prosecutions. That is the position that most, but not all, federal courts reviewing the issue of student self-incrimination have taken.

For the purpose of this study, the issue of self-incrimination has been broken into two areas. The first deals with protection against self-incrimination during an investigation of alleged wrongdoing by students, and the second deals with the issue of self-incrimination at disciplinary hearings.

In the criminal-law area, the federal courts have made it clear that persons, who are suspected of committing crimes and who are under arrest or in custody, must be informed of their right to remain silent, the possible use of what is said at trial, and the right to have an attorney present. This information required by the courts in criminal situations is commonly referred to as the Miranda warning. The federal courts have, however, been reluctant to apply the investigatory aspect of self-incrimination to the public school setting.

In Boynton v. Casey (83), the court reviewed a common school situation involving the interrogation of a student by a principal. The principal had called the boy into his office to question him regarding a violation of a school rule prohibiting the possession of marijuana and the boy confessed. In later challenging his being disciplined, the student and his parents argued that the interrogation in the principal's office was analogous to interrogations by police, and the boy had been entitled to be advised to remain silent. The court rejected the argument and said it was unable to find any legal authority which extended

Miranda warnings to interrogations by school officials.

A similar result occurred in Stern v. New Haven Community Schools (143). In Stern, a student had been observed purchasing marijuana through a two-way mirror in the school. He was called into the principal's office for questioning and advised that if he told the truth and turned the marijuana over to him, the school would handle the matter without police involvement. The boy cooperated, but another boy who sold him the marijuana did not, and the police were informed of the incident.

In challenging the discipline imposed against him by school officials, the student alleged he had been denied his right to be free from self-incrimination. The court did not agree and said the following about self-incrimination in the public schools:

> To hold that the Fifth Amendment was seriously implicated under the facts herein, would result in an unwarranted constitutionalization of nearly every activity that takes place in a principal's office; a situation the Supreme Court has long warned against. (143, p. 37)

At least two other federal court decisions are in agreement with the result in Boynton and Stern that fifth amendment protections against self-incrimination do not apply to investigations of student misconduct in the public schools (76, 114).

Resolution of the issue of self-incrimination in the context of school disciplinary hearings has not been as clear, however. Only two of the three court decisions found in this study which have ruled on the issue have ruled that the fifth amendment protection against self-incrimination is applicable to student disciplinary hearings.

In Gonzales v. McEuen (67), two students declined to testify at

their school disciplinary hearing on charges they were involved in acts which led to a riot in the school. The attorney prosecuting the matter before the school board argued that the students' refusal to testify raised an inference of guilt.

When the students challenged their being disciplined by school officials in court, school officials argued that the students' refusal to testify without expressly asserting fifth amendment protections amounted to a waiver of the privilege against self-incrimination. The court disagreed and ruled that an inference of guilt obtained from the students' silence denied them their right to be free from self-incrimination.

A similar result was reached in Caldwell v. Cannady (113). In Caldwell, the court held that a person cannot be denied his right to remain silent at a school disciplinary hearing merely because he is a student. Using students' silence at a school disciplinary hearing as evidence of guilt denied them the right to be free from self-incrimination.

A contrary result was reached in the decision in Moral v. Grigel (130). The facts in Moral involved a college student who refused to testify during his disciplinary hearing on a charge of possession of marijuana. His silence was obviously a factor in the decision to expel him from school.

When the student challenged his expulsion in federal court, the court ruled that an inference of guilt could legitimately be drawn from the circumstance. The court noted that such inferences are appropriate when they are not used in the context of alleged criminal conduct in

a criminal proceeding.

Double Jeopardy

The Fifth Amendment to the constitution also protects persons from double jeopardy. It reads in relevant part as follows: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, ..." That phrase has been interpreted to mean that no person can be tried twice in criminal court for allegations arising out of the same act. The type of conduct covered by the provision appears to be strictly criminal and has no direct application to administrative proceedings such as school disciplinary hearings.

The only federal court decision found in this study on the issue of double jeopardy clearly made the distinction between the criminal and civil aspects of the fifth amendment's prohibition. In the decision entitled Center for Participant Education v. Marshall (120), a university student challenged his expulsion from school for violation of a university president's directive. Florida State University had established a supplemental program of courses designed to enhance its general academic course offerings. At the beginning of one school term, several of the courses became the center of controversy when an issue arose as to their propriety. The university president ordered that instruction in all the special courses be delayed temporarily pending a review of course outlines. The student involved in the case had been scheduled to instruct one of the special courses entitled "How to Make a Revolution in the U.S.A." He notified university officials that he was going to defy the president's directive and begin the course as scheduled. He was

personally warned by school officials not to do so, but he ignored the warning.

He was later directed to appear before a preliminary hearing body to determine whether he had violated the president's order. He appeared, was found guilty and was placed on suspension. He requested and received a full hearing before the university honor court. Before the honor court, the student was acquitted of the charges. The university staff appealed the student's acquittal to the student supreme court which affirmed the honor court decision. The university staff then appealed to the university president, the ultimate reviewing authority. The president found the student guilty of violating the executive order and suspended him from the university.

When the student challenged his suspension in federal court, he alleged that his fifth amendment protection against double jeopardy had been violated. The court did not at all agree. The court clearly stated that the issue of double jeopardy applies solely to criminal prosecution and does not apply to civil proceedings. Because school disciplinary proceedings are purely civil in nature, and not criminal, the protection against double jeopardy is not applicable.

Equal Protection

The Fourteenth Amendment to the constitution provides in part that no state may ". . . deny to any person within its jurisdiction the equal protection of the laws." In areas of potentially invidious discrimination, such as sex and race, the federal courts have ruled repeatedly

that differing treatment of students must be based on an extremely compelling interest of the state in establishing different treatment. When the issue is not one involving an area of invidious discrimination, but merely discretionary decision-making, the courts are reluctant to intervene. This is especially true in the area of school discipline.

A good example is a decision entitled Center for Participant Education v. Marshall (120). In the decision, a student challenged his indefinite suspension from a state university, in part, with the argument that other persons committing the same act had not been punished in the same manner. The facts indicated that one student violating the same rule had only been suspended temporarily and then allowed to return to classes and another had not been caught by school officials. The student challenging the disciplinary action had been on probation for previous violations of school rules.

The court did not agree with the student's argument that he had been denied equal protection. The court reasoned that while all three students had committed the same offense, all three situations were not otherwise identical. One student had been on probation, one had no previous disciplinary problems and one had gone undetected. The court concluded that the decision of the school officials was reasonable and fair.

In two decisions rendered by the fifth circuit court of appeals on the issue of equal protection, black students alleged that discipline of students in their respective schools was disproportionate on the basis of race and therefore black students in those schools were denied

their right to equal protection. The students in both cases alleged that statistics proved that blacks were disciplined a disproportionately greater number of times than white students. Both decisions ruled that mere disproportionate discipline of one race more than another did not in itself establish denial of equal protection. Evidence of intent to discriminate also had to be shown.

In the earliest of the two decisions, Sweet v. Childs (84), the fifth circuit ruled that the black student plaintiffs had failed to show that suspensions imposed by school officials were arbitrarily imposed or that white students were disciplined less severely for similar conduct. The court stated that such a showing was necessary for it to find a denial of equal protection. The fifth circuit also declined to find a denial of equal protection in Tasby v. Estes (192). It noted that there are many legitimate nonracial reasons involved in student discipline that might account for a statistical showing that blacks are disciplined in disproportionately greater numbers than whites. The court expressly listed student disciplinary history, individual student needs, flagrancy of the offense and effect of the student's misconduct on other students as legitimate considerations that could be taken into account by school officials disciplining students for the same offense without necessarily denying them equal protection of the laws.

Substantive Due Process

Substantive due process is a vague legal concept usually considered to be related to the "liberty" provision of the Fourteenth Amendment. Because of its vagueness, it is easy to argue that it is applicable in many school situations. Courts are reluctant, however, to apply the concept unless they feel that a substantial injustice may be done if they do not.

When viewed most simply in its most basic elements, substantive due process is a concept of fairness and reasonableness. When persons have been treated in an unfair or arbitrary manner by public officials, the federal courts, in the absence of a clearer alternative constitutional provision on which to base a decision, will use the concept of substantive due process to justify its decision.

Thus, if a penalty imposed under a school rule is so grossly disproportionate to the offense that it has no rational basis or serves no legitimate school purpose, it may result in a denial of a student's substantive due process (193). In Cook v. Edwards (194), a district court in New Hampshire ruled that imposing an "indefinite expulsion" on a student for coming to school intoxicated, denied the girl substantive due process. The court reasoned that while it would have been proper to suspend or expel the student for a definite period of time, an "indefinite expulsion" was unreasonable. The indefinite expulsion did not serve to inform the girl whether or when she could expect to return to school.

Several court decisions have indicated that punishing students for violations of school rules in the absence of substantial evidence of the violation would deny students substantive due process. In one case there was no evidence confirming a punch served at a school function as "intoxicating" (195), and in another there was no verification that commonly-found items had actually been used as drug paraphernalia (128). In Griffin v. Tatum (173), a circuit court, strongly supportive of school grooming codes, found that a school rule requiring boy's hair to be cut in the back in a "tapered" style rather than a "block" style was unreasonable and denied students substantive due process.

All but a few federal courts faced with substantive due process issues in the public school setting reviewed for this study ruled in favor of school officials on the issue. In Mitchell v. Board of Trustees (112), a rule against bringing knives and other weapons to school was determined not to deny a student substantive due process when he was expelled for violation of the rule. The court found that a reasonable relationship existed between the rule and maintenance of a safe educational environment. In Dillon v. Pulasky County Special School District (32), rules against kissing and showing affection in the school hallway and showing disrespect for teachers were ruled to not deny a student substantive due process. The situations governed by the rules had the potential to disrupt the school environment. Even when a school district took the extreme measure of temporarily suspending entire school bus routes as punishment for student vandalism and misbehavior on bases, the acts of school officials did not deny students or parents substantive

due process (196).

In Petrey v. Flaugher (193), the sole issue before the court was whether a student was denied substantive due process when he was expelled for smoking marijuana on school grounds. The court ruled that smoking marijuana on school grounds was a grave offense, and violators could be subjected to harsh penalties. The court found that there was a rational basis between the problem of drug use on school grounds and the boy's expulsion from school.

A similar result occurred in Fisher v. Burkburnett Independent School District (123) when a high school girl expelled for possession of drugs when she overdosed on drugs while at school and nearly died, challenged her expulsion, in part, on the basis that the expulsion denied her substantive due process. She alleged that the punishment of expulsion with loss of credits was so grossly severe that it was unconstitutional. The court did not agree and ruled that the punishment was reasonably related to the school's interest in discouraging drug abuse in school.

In Debra P. v. Turlington (197), and Anderson v. Banks (198), students challenged the legality of schools using competency tests as criteria for awarding high school diplomas. Both decisions upheld the use of competency tests as a valid exercise of the schools' authority. Because the functional literacy tests bore a rational relationship to the purpose of academic improvement, they did not result in an infringement of students' substantive due process rights.

When Debra P. was appealed to the circuit court of appeals for the

fifth circuit, the court of appeals modified the district court decision on the issue of equal protection and remanded the case back to the district court for a further determination of facts. The circuit court concluded that equal protection could be denied by the use of high school exit examinations which tested matters not specifically contained in the schools' curriculum. It ordered the district court to make a determination of whether the high school exit examination actually tested what was taught in the schools (199).

Academic Standards, Evaluation and Discipline

In probably no other area of the law reviewed in this study are the federal court decisions as one-sided in favor of school officials as they are in the area of academic issues. For the purpose of this study, federal court review of legal issues regarding academic matters are divided into three areas: Standards of entrance, maintenance and exit in academic programs; Evaluation of students; And procedures required for dismissal of students from academic programs for failure to maintain standards.

On an issue regarding standards for entrance, a federal court in Doe v. New York University (200) was faced with a situation in which a student, who apparently met most of the qualifications for entrance into medical school, was considered a poor student risk by school officials because of her mental health history. When the prospective student challenged the school's denial of her enrollment, the court concluded that entrance qualifications should be left to educators, not the courts,

and dismissed the lawsuit.

The issue of maintenance of student status in an academic program was reviewed by a federal court in Hubbard v. John Tyler Community College (201). In Hubbard, the court was faced with a challenge to an academic requirement that prohibited continued enrollment of students who received a grade below "C" in courses in a nursing program. The court concluded that decisions regarding academic standards should be left to educators and found the minimum grade requirement appropriate.

Similar results were reached in issues involving exit requirements from academic programs in Mahavongsanan v. Hall (202) where successful completion of a comprehensive examination was upheld as a requirement for receipt of a master's degree and Morpurgo v. United States (203) where a comprehensive examination in a doctoral program was upheld against a challenge by a student who had failed ten times to successfully pass the examination. In Debra P. v. Turlington (197), a federal district court ruled that the use of a functional literacy test to determine minimum academic competency for high school graduation bore a rational relationship to a valid state interest and was therefore constitutional. A similar result occurred in Anderson v. Banks (198) where a federal court upheld the use of ninth-grade achievement levels as a minimum requirement for high school graduation.

An interesting decision on the issue of standards of exit from an academic program involved the retention of twenty-one second-grade students in one class. In Sandlin v. Johnson (204), four of twenty-one students in one second-grade class who were retained in second grade

challenged their school's use of a reading achievement level in the Ginn Reading Series as the basis for determination of promotion or retention. The students alleged that they could read as well as most students entering third grade, only that they could not read at the Ginn third-grade entry level. The court ruled that it was not unconstitutional to classify students according to their reading level and found in favor of the school officials involved. The court provided the following rationale for its decision:

> Decisions by educational authorities which turn on evaluation of the academic performance of a student as it relates to promotion are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context. (204, p. 1029)

Legal issues regarding evaluation of students are equally one-sided in result. A good example is the decision in Keys v. Sawyer (205). In Keys, a law student withdrew from school after receiving a failing grade in one class and a failing grade on a final examination in another class. He challenged the awarding of the two grades in court and asked the court to review them. The court declined to review the grades and expressed its reasoning as follows:

> The assignment of grades to a particular examination must be left to the discretion of the instructor. He should be given the unfettered opportunity to assess a student's performance and determine if it attains a standard of scholarship required by that professor as a satisfactory grade. The federal judiciary should not adjudicate the soundness of a professor's grading system, nor make a factual determination of the fairness of the individual grades. . . . It would be difficult to prove by reason, logic or common sense that the federal judiciary is either competent, or more competent, to make such an assessment. (205, p. 939)

A similar result occurred in Gaspar v. Bruton (206) where a student

at a vocational school challenged her removal for deficiencies from a practical nursing program when she had completed two-thirds of the program. While the main issue before the court centered around the procedural due process required in such situations, the court noted that evaluation of students is wholly within the discretion of educators qualified to make such determinations and courts should intervene only when the student can prove "ill will" or "bad motive."

In Rayman v. Alvord Independent School District (207), a student challenged a grade reduction of three points in an algebra class due to an unexcused absence in the class. At the time, the girl had the second highest grade-point average in her class, and her status remained unchanged as a result of the grading penalty. Her grade-point average dropped from 95.478 to 95.413.

Without discussing the legal issues involved, the district court ordered the girl's grade point reinstated. On review, the court of appeals noted that the girl's class rank remained unchanged by the penalty, that her grade-point average was lowered negligibly and determined that the entire issue did not raise a sufficiently substantial issue necessary for the federal courts to intervene. The court did not elaborate on how much of a grade reduction or harm to a student would be necessary in such situations to give rise to a federal question.

The third academic issue, that of procedures necessary for removing students from programs for failure to maintain minimum academic standards, has largely been resolved by the United States Supreme Court in a decision entitled Board of Curators v. Horowitz (208). In Horowitz, the

court of appeals of the eighth circuit had broken with a long line of case law which held that formal hearings are not required in cases of academic discipline. It ruled instead that Charlotte Horowitz had her procedural due process rights violated when she was dismissed from medical school during her final year of study for failure to meet the institution's academic standards without the school providing her a due process hearing.

The supreme court disagreed and reversed the court of appeals. The court noted that the administration and staff of the school had fully informed the student of the school's dissatisfaction with her progress and deficiencies and warned her that they posed a threat to her continued enrollment and timely graduation. The final decision to dismiss the student had been made with care and deliberation. The supreme court ruled that those procedures were all that were required for academic discipline under the Fourteenth Amendment. The supreme court drew a clear distinction between school discipline for failure to meet academic standards and student violation of valid rules of conduct. It explained its reluctance to intrude in the former area as follows:

> Academic evaluations of a student, in contrast to disciplinary determination, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement. . . . The decision to dismiss respondent, . . . rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his

> course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making. (208, pp. 89-90, 98 S. Ct. at 955)

The decision in Horowitz was expressly followed in Aubachon v. Olsen (209). In Aubachon, the court reviewed a situation where a student was dropped from a student-teaching program due to serious deficiencies. His deficiencies were discussed with him on several occasions and the final decision to dismiss him was deliberative. The court ruled that on the basis of the existence of the due process as outlined in Horowitz, a school's decision to dismiss a student for academic reasons should not be disturbed by the courts.

While the due process required for academic discipline in the vast majority of situations is minimal, there may be some unusual circumstance which gives rise to more. In the decision entitled Greenhill v. Bailey (210), the court of appeals for the eighth circuit was faced with the dismissal of a medical student at the University of Iowa for academic reasons. What compounded the problem for school officials was the fact that the institution completed a form indicating that the student was changing his status at the school and sent it to a national medical school organization. On the form, a school official indicated that the student was dismissed from school on the basis of poor academic standing due to "[l]ack of intellectual ability or insufficient preparation."

The court in Greenhill noted that references on the form to the student's intellectual ability and preparation would have a serious impact on his ability to gain entrance to other medical schools. The

court concluded that the remarks made on the form created a stigma which deprived the student of his liberty interest in pursuing a career in the medical profession. The court ruled that although a full trial-type-hearing procedure was not required, the school should have at least provided him a type of hearing where he could personally appear to contest the allegations against him. It is unlikely that the unusual circumstances present in Greenhill will occur with regularity and the decision rendered in Horowitz will be applicable in most circumstances (209).

Summary

The federal courts have reviewed a number of legal issues related to student discipline and control on a less frequent basis than other issues discussed in this study. Like the more frequently reviewed issues, the federal courts have often resolved the competing issues in favor of school officials.

Federal courts have determined that students do not have constitutional protection against self-incrimination in investigations of violations of school rules (Boynton and Stern), or in school disciplinary hearings (Moral; contra., Gonzales and Caldwell). They have also determined that the legal issue of double jeopardy does not apply to student discipline (Center for Participant Education). The federal courts have frequently determined that students being disciplined have not been denied equal protection of the laws (Center for Participant Education, Sweet and Tasby), or their right to substantive due process (Mitchell, Dillon, Petrey and Fisher; contra., Cook and Griffin).

In academic issues presented before the federal courts, decisions have regularly favored school officials. This includes issues of standards of entrance into academic programs (Doe), maintenance in academic programs (Hubbard) and exit from academic programs (Mahavongsanan, Morpurgo, Debra P., Anderson and Sandlin). Decisions on evaluation issues are equally one-sided in favor of school officials (Keys, Gaspar and Rayman). Procedural due process required by the federal courts in instances of academic discipline are minimal (Horowitz and Aubachon).

CHAPTER XI. SUMMARY AND CONCLUSIONS

Need for the Study

After the United States Supreme Court issued its decision in Tinker v. Des Moines Independent Community School District (1), a considerable amount of attention was given by the news media and professional publications to issues of students' rights. Little attention was given, however, to court decisions won by school officials. This one-sided publicity resulted in a litigation paranoia among educators and some educators began to yield to student demands under threat of lawsuit, regardless of the reality of their legal position.

This study was intended, therefore, to provide a review of reported federal court decisions issued subsequent to the Tinker decision, with special emphasis placed upon decisions lost by students and parents, and decisions which contained expressed or inferential parameters of student legal responsibility so that school officials might become better acquainted with the true status of student legal rights and responsibilities. It was intended to reinforce educator fortitude against unreasonable demands of students on student rights issues by providing them with the knowledge that school officials frequently win lawsuits brought against them by students and parents.

Statement of the Problem

The federal courts have been turned to by students and parents to establish principles of student rights with increasing frequenty. Student and parent victories have been given considerable press and media coverage and are familiar to many educators. Less attention has been devoted to court decisions lost by students and parents. The problem was, therefore, to determine the real extent to which decisions of the federal courts issued and reported from February, 1969, through 1982, have developed or delineated express or inferential parameters of student legal responsibility.

Procedures and Techniques Used in the Study

The research conducted in this study almost exclusively utilized primary source data. These data consisted of federal court decisions contained in the National Reporter System. The National Reporter System is published by West Publishing Company and contains complete reported decisions from all federal courts with jurisdiction in the United States. The appropriateness of court decisions to be reviewed was established through use of commonly-accepted legal research sources, law reviews and journals and journals and publications of the education profession.

Limitations

The court decisions reviewed and analyzed in this study were those issued by the federal courts between February, 1969, and January, 1983, which involved public elementary, secondary and postsecondary students

and other court decisions whose principles were related to issues of student responsiblities.

Summary

A brief summary of the findings of this study will follow in the order in which they have previously been presented. Each subtopic of the summary represents the findings of each chapter. As was true of the chapters, the summary contains an emphasis on results of findings in court decisions which have been favorable to school officials.

The Tinker decision

The United States Supreme Court decision in Tinker is often remembered for establishing the concept of student rights to engage in expressive conduct which is free from control of school officials in the public school setting. But, it should be remembered that the decision in Tinker also established an implied responsibility on students exercising their rights not to infringe upon the rights of other persons. At the point that student exercise of constitutionally-protected rights creates a material and substantial disruption of the school environment, the students involved have exceeded their protected rights and have violated their responsibility not to infringe upon the rights of others. School officials may hold students accountable for such acts.

Speech and expression

Federal court decisions rendered subsequent to the Tinker decision have aided in the delineation of the parameters of student responsibilities in the area of student speech and expression. Those court decisions

rendered since Tinker have aided in a determination of the limits of "material and substantial disruption" which must occur or be reasonably predicted before students engaged in constitutionally-protected rights can be held accountable for their actions. Those decisions have shown that the standard of "material and substantial disruption" in the school setting is considerably less than what might be expected outside of the school setting. The courts' recognition of the special nature of the school environment means that students wishing to exercise constitutional rights have a responsibility to do so in a more limited fashion than they do outside the school environment.

Student press and distributions

The federal courts judiciously guard student rights to publish and distribute their own ideas and words. This is especially true when schools seek to impose restraints on student publications prior to distribution.

The federal courts have, however, not been as reluctant to uphold discipline of students for their actions after the distribution has occurred. Students can be held responsible by school officials for materials published and distributed by them which infringe upon the rights of other persons in the school community.

Procedural due process

Even though some minimal aspects of procedural due process have been required by the federal courts, a review of federal court decisions indicate a significant number of federal court decisions which establish that student rights in the area of procedural due process are not

unlimited. Many issues involving procedural due process have been resolved by the federal courts in favor of school officials.

Even when students are denied procedural due process, federal court decisions indicate that subsequent hearings, including appropriate procedural due process, can cure the defects of the earlier hearing. In the event that procedural due process defects are not cured, the federal courts have determined that damages for mere violation of procedural due process rights by school officials will result in only nominal damages.

Validity of school rules

A primary legal responsibility of students is to obey valid school rules. The validity of school rules is generally upheld when the rule is reasonable, gives notice of the proscribed conduct, is not stated in vague terminology and does not unduly infringe upon constitutionally-protected rights. Interpretations of school rules made by school officials responsible for their promulgation and enforcement are given deference by the federal courts.

Search and seizure

The federal courts have consistently upheld the validity of searches in the public school setting when two criteria are met. The search must be based on reasonable belief in the context of the underlying facts and the search must be for an educational rather than a law enforcement purpose. Strip searches of students must be accompanied by a greater certainty that a school rule has been violated than mere supposition that reasonable cause exists.

Dress codes

The predictability of the outcome of a lawsuit on student dress codes in federal courts is determined almost exclusively by the jurisdictional location of the events. The federal courts which have ruled on the issue are split nearly evenly as to whether student dress codes are generally enforceable.

Corporal punishment

Federal court decisions on legal issues arising in the context of corporal punishment in the public school setting have been generally resolved in favor of school officials. The United States Supreme Court has ruled that parents must yield to school officials on the advisability of administration of corporal punishment, the constitutional prohibition against cruel and unusual punishment is not applicable to corporal punishment of students and due process hearings are not required prior to the administration of corporal punishment in those states where the administration of corporal punishment is governed by statute or common-law.

Other issues

Numerous legal issues related to discipline of students such as self-incrimination, double jeopardy, equal protection and substantive due process have been reviewed by the federal courts but on a less frequent basis than other issues discussed at length in this study. The federal courts have frequently resolved those issues in favor of school officials.

Lawsuits in the area of academic issues have been resolved in favor

of school officials on a regular basis. Positions taken by school officials have been generally upheld on issues of academic standards, evaluation and due process required in academic discipline.

Conclusions

It was the purpose of this study to review reported federal court decisions on student rights and responsibilities rendered between the issuance of the Tinker decision and the end of 1982 in an effort to determine express and inferential delineations of legal responsibilities of students. As a result of this study, it has been determined conclusively that federal court decisions have delineated express and inferential legal responsibilities of public school students. Some of those legal responsibilities have been clearly and frequently stated by the courts. Others have been stated with less clarity and less frequency and still others find the federal courts in disagreement.

While the direction and emphasis of this study has focused upon those court decisions which were lost by students or which established express and inferential parameters of student legal responsibilities, two things cannot be overemphasized. First, and foremost, students attending the nations' public schools do have clearly established legal rights protected and secured by the constitution. It was not the purpose of this study to diminish recognition of that fact. It was the purpose of this study to provide a better balance of knowledge and awareness between student rights and student responsibilities.

The second important thing to remember is that the decisions

reviewed in this study were decided in the context of specific facts before the court, apparent applicable principles of law, specific court jurisdiction in which they were decided, and subtle distinctions not appearing in the record or decisions. Discussion of the decisions included in this study has been general and not detailed. It is therefore of the utmost importance that no one attempt to substitute in any specific factual context the information contained in this study for advice from competent legal counsel. The purpose of this study was merely to provide information, not give legal advice.

Keeping those two important points in mind, it is possible to review the legal responsibilities of students as delineated by the federal courts. A list of relatively clear and frequently stated elements of student legal responsibilities follows:

1. Students have a responsibility not to infringe upon the rights of other persons to a school environment conducive to academic pursuits. This is true even when they are exercising their own constitutional rights (e.g., 1, 18, 19, 20, 23, 27, 28, 29, 32, 76, 110).

2. Students have a responsibilitiy, even when engaged in the exercise of their rights, not to engage in violence and serious disruption of the educational environment (e.g., 1, 11, 16, 17, 18, 23, 30, 31, 53, 55).

3. Students have a responsibility not to engage in conduct which can reasonably be predicted to result in material and substantial disruption of the school environment (e.g., 1, 20, 21, 24, 26, 42, 51, 53, 55, 56).

4. School officials are not required to wait for actual disruption to occur before taking action when material and substantial disruption is reasonably predicted (e.g., 20, 21, 24, 26, 51, 53).

5. Students have a responsibility, even when engaging in the exercise of speech and expression, to attend classes and refrain from encouraging others to skip classes (e.g., 23, 27, 28, 29, 30, 63).

6. Students have a responsibility, even when engaged in constitutionally-protected activities, to refrain from the use of vulgar, profane and obscene words, and making libelous or slanderous statements about other persons (e.g., 33, 38, 46, 54).

7. Students have a responsibility, even when engaging in actions involving speech, press and expression, to refrain from engaging in acts of disrespect and insubordination (e.g., 16, 20, 23, 32, 33, 59, 60, 61, 89).

8. School officials may place reasonable restrictions on the time, place and manner of student distribution of printed materials (e.g., 42, 45, 46, 47, 49).

9. School officials may hold students accountable, after the fact, for distribution of materials which disrupt the school environment, are reasonably predicted to disrupt the school environment, contain profanity, vulgarity and obscenity or are a threat to student health and safety (e.g., 46, 49, 53, 54, 55, 57, 58).

10. School officials are not required in most situations of minor discipline, such as suspension from school for ten days or less, to allow students the presence of an attorney, the calling of witnesses or the cross-examination of witnesses (e.g., 64, 72, 82).

11. School officials are not required to provide students charged with misconduct a hearing prior to removal from school when the students' continued presence in school comprises a serious and immediate threat to the school environment (e.g., 64, 84).

12. School officials, in the absence of actual bias or prejudice, may sit as an impartial decision-maker at school disciplinary proceedings (e.g., 67, 79, 86, 88, 92, 93).

13. School officials involved in disciplinary proceedings involving long-term suspensions and expulsions are not required to:

    a. Provide notice of charges with the same degree of specificity required in a criminal proceeding (e.g., 70, 87).

    b. Provide as specific a notice of charges when the facts are not contested as when they are contested (e.g., 85, 87).

    c. Provide legal counsel or pay attorney fees for students (e.g., 66, 91).

14. School officials may, in most circumstances, cure defects in procedural due process by providing a subsequent hearing which provides appropriate procedural due process (e.g., 59, 69, 80, 90, 101).

15. School officials, who inadvertently deny students procedural due process when the facts are such that the holding of a proper hearing would not have resulted in a different decision, will be required to pay only nominal damages not to exceed one dollar (e.g., 32, 102, 104).

16. Students have a responsibility to obey valid school rules. School rules are valid if they are reasonably related to the purposes of education (e.g., 32, 89, 109, 111, 113, 117), provide adequate notice of the proscribed conduct (e.g., 20, 55, 61, 85, 114), are not written in vague or overbroad terminology (e.g., 18, 57, 81, 124), and do not infringe upon students' constitutionally-protected rights (e.g., 31, 58, 114, 125).

17. School officials are presumed to have correctly interpreted their own rules (e.g., 126, 127).

18. School officials' searches of students, except strip searches, are valid when the search is based upon reasonable grounds for the search (e.g., 141, 142, 143), and the search is for an educational purpose (e.g., 114, 125, 132, 135, 141, 144, 145).

19. School officials may use, in disciplinary proceedings, evidence of student misconduct obtained in valid searches of students, student lockers and student possessions (e.g., 55, 114, 141, 142, 143, 144).

20. School officials may promulgate and enforce student dress codes which are genuinely based on reasons of health, safety or disruption of the school environment (e.g., 149, 150, 156, 170, 176, 179, 180, 181).

21. School officials may administer reasonable corporal punishment to students, even against the expressed wishes of their parents (e.g., 184, 187).

22. School officials are not required to provide students with a procedural due process hearing prior to the administration of corporal punishment when the state's common-law or statutes govern the administration of corporal punishment (e.g., 187).

23. School officials investigating student misconduct are not controlled by the constitutional protection against self-incrimination (e.g., 76, 83, 114, 143).

24. School officials do not violate the equal protection rights of students merely because students found guilty of similar offenses are not disciplined identically (e.g., 84, 120, 192).

25. School officials may establish and enforce reasonable academic standards for entrance, maintenance and exit in academic programs (e.g., 197, 198, 200, 201, 202, 203, 204).

26. School officials removing students from academic programs are required only to inform students of deficiencies in their academic performance in order for them to have an opportunity to remediate the problem and to make a deliberative final decision in the matter (e.g., 208, 209).

A list of student legal responsibilities which are less clear than those listed above or which have been discussed less frequently by the federal courts follows:

1. Students have a responsibility not to engage in out-of-school conduct which has a significant negative effect on school operation and management (e.g., 34).

2. Students have a responsibility not to engage in conduct which will predictably result in psychological injury to others (e.g., 34).

3. School officials may make determinations of curriculum content so long as they do not attempt to censure ideas or perspectives (e.g., 37).

4. School officials involved in disciplinary proceedings involving long-term suspension and expulsion are not required to:

    a. Provide hearings which are open to the public (e.g., 66, 88).

    b. Provide an opportunity to question the decision-maker regarding the decision-maker's objectivity (e.g., 94).

    c. Provide students with a list of potential witnesses and a summary of their testimony (e.g., 66, 68, 87).

    d. Provide an opportunity for lay representation rather than legal representation (e.g., 62).

    e. Provide an opportunity to compel attendance of witnesses (e.g., 66, 90).

f. Provide an opportunity to confront and cross-examine a student witness when retaliation against the student witness is likely (e.g., 32, 73, 77).

g. Provide evidence of charges beyond a reasonable doubt (e.g., 66).

h. Provide for a unanimous decision by a multimember decision-making body (e.g., 66, 90).

5. School officials disciplining students are not constrained by the constitutional prohibition against double jeopardy (e.g., 120).

6. School officials may establish and evaluate attainment of standards of student academic performance (e.g., 205, 206).

A list of student legal responsibilities which have been expressly or inferentially raised in federal court decisions, but for which conflicting federal court decisions were also found follows:

1. School officials may require prior submission for review of student publications, for a determination of obscenity, libel and potential disruption of school activities (e.g., 40, 46, 47, 48, 49, 50; contra., 44, 45).

2. School officials involved with long-term suspension and expulsion hearings are not required to:

   a. Provide a more specifically detailed notice of charges against the student when the context of the charges provides such notice (e.g., 88, 89; contra., 63, 67, 68, 69).

   b. Provide an opportunity to cross-examine witnesses (e.g., 70, 85, 87, 91; contra., 32, 63, 67).

   c. Provide a written decision including a finding of facts (e.g., 66, 86; contra., 63, 73).

   d. Provide the opportunity to make a verbatim record of the proceeding (e.g., 82, 88; contra., 63).

3. School officials are not required to provide procedural due process for denial of participation in athletic competition (e.g., 95, 96, 97, 98; contra., 81, 100).

4. School officials' use of sniffing dogs can create sufficient reason to search students (e.g., 125; contra., 128, 146).

5. School officials use of sniffing dogs can create sufficient reason to search lockers and vehicles (e.g., 114, 146; contra., 128).

6. School officials may use in disciplinary hearings evidence of student misconduct obtained in illegal searches of students, student lockers and student possessions (e.g., 130; contra., 113, 128, 129).

7. School officials in some circuit court jurisdictions may promulgate and enforce student dress codes (e.g., 168, 169, 171, 172; contra., 148, 149, 150, 154).

8. School officials administering corporal punishment do not violate substantive due process rights of students (e.g., 185, 188, 189, 190; contra., 191).

9. School officials can require students to testify in disciplinary hearings and refusal of students to testify can give rise to an inference of guilt (e.g., 130; contra., 67, 113).

10. School officials enforcing reasonable school rules in a reasonable manner do not violate the substantive due process rights of students (e.g., 32, 112, 123, 193; contra., 173, 194).

After reviewing the three lists of elements of student responsibility found above, little doubt should remain that there are many aspects of student conduct and discipline over which the power and authority of public school officials have not been greatly diminished as a result of federal court decisions. It is likely that a similar review of state appellate court decisions would result in a similar conclusion. While it would be difficult and time consuming to locate and review the hundreds of state court decisions in the area of student rights and student responsibilities, it would be feasible to review the appellate court decisions of the most populous states, such as California and New York, or perhaps several states in a particular geographic region. Such an effort could result

in a verification of the findings contained in this study and could have positive results in strengthening the fortitude of public school officials in facing their responsibility to maintain an appropriate academic environment.

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175. Karr v. Schmidt, 401 U.S. 1201, 91 S. Ct. 592 (1971).

176. Gere v. Stanley, 453 F.2d 205 (3d Cir. 1971).

177. Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974).

178. Zeller v. Donegal School District, 517 F.2d 600 (3d Cir. 1975).

179. Olff v. East Side Union High School District, 404 U.S. 1042, 92 S. Ct. 703 (1972).

180. Bannister v. Paradis, 376 F. Supp. 185 (D. N.H. 1970).

181. Wallace v. Ford, 346 F. Supp. 156 (E.D. Ark. 1972).

182. Syrek v. Pennsylvania Air National Guard, 537 F.2d 66 (3d Cir. 1976).

183. Fagan v. National Cash Register Company, 481 F.2d 1115 (W.D.C. Cir. 1973).

184. Baker v. Owen, 423 U.S. 907, 96 S. Ct. 210 (1975).

185. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974).

186. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976).

187. Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401 (1977).

188. Sims v. Board of Education, 329 F. Supp. 678 (D. N.M. 1971).

189. Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973).

190. Jones v. Parmeter, 421 F. Supp. 738 (S.D. Ala. 1976).

191. Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

192. Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981).

193. Petrey v. Flaugher, 505 F. Supp. 1087 (E.D. Ky. 1981).

194. Cook v. Edwards, 341 F. Supp. 307 (D. N.H. 1972).

195. Strickland v. Inlow, 485 F.2d 186 (8th Cir. 1973), vacated and remanded, sub nom. Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992 (1975).

196. Rose v. Nashua Board of Education, 506 F. Supp. 1366 (D. N.H. 1981), aff'd., 697 F.2d 279 (1st Cir. 1982).

197. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979).

198. Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981).

199. Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

200. Doe v. New York University, 666 F.2d 761 (2d Cir. 1981).

201. Hubbard v. John Tyler Community College, 455 F. Supp. 753 (E.D. Va. 1978).

202. Mahavongsanan v. Hall, 524 F.2d 448 (5th Cir. 1976).

203. Morpurgo v. United States, 437 F. Supp. 1135 (S.D. N.Y. 1977).

204. Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981).

205. Keys v. Sawyer, 353 F. Supp. 936 (S.D. Tex. 1973).

206. Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975).

207. Rayman v. Alvord Independent School District, 639 F.2d 257 (5th Cir. 1981).

208. Board of Curators v. Horowitz, 435 U.S. 78, 98 S. Ct. 948 (1978).

209. Aubachon v. Olsen, 467 F. Supp. 568 (E.D. Mo. 1979).

210. Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975).

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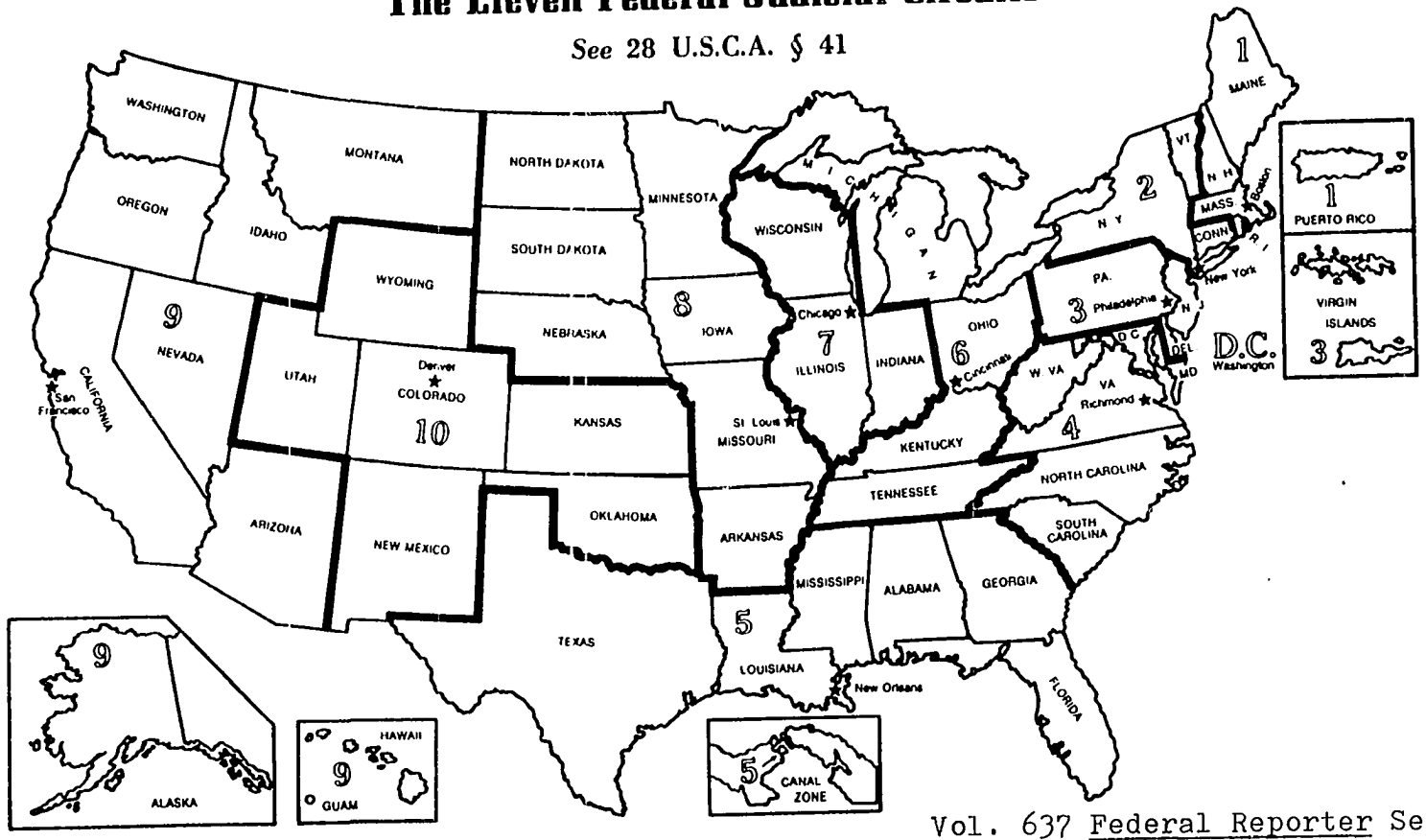
APPENDIX

The Eleven Federal Judicial Circuits

See 28 U.S.C.A. § 41



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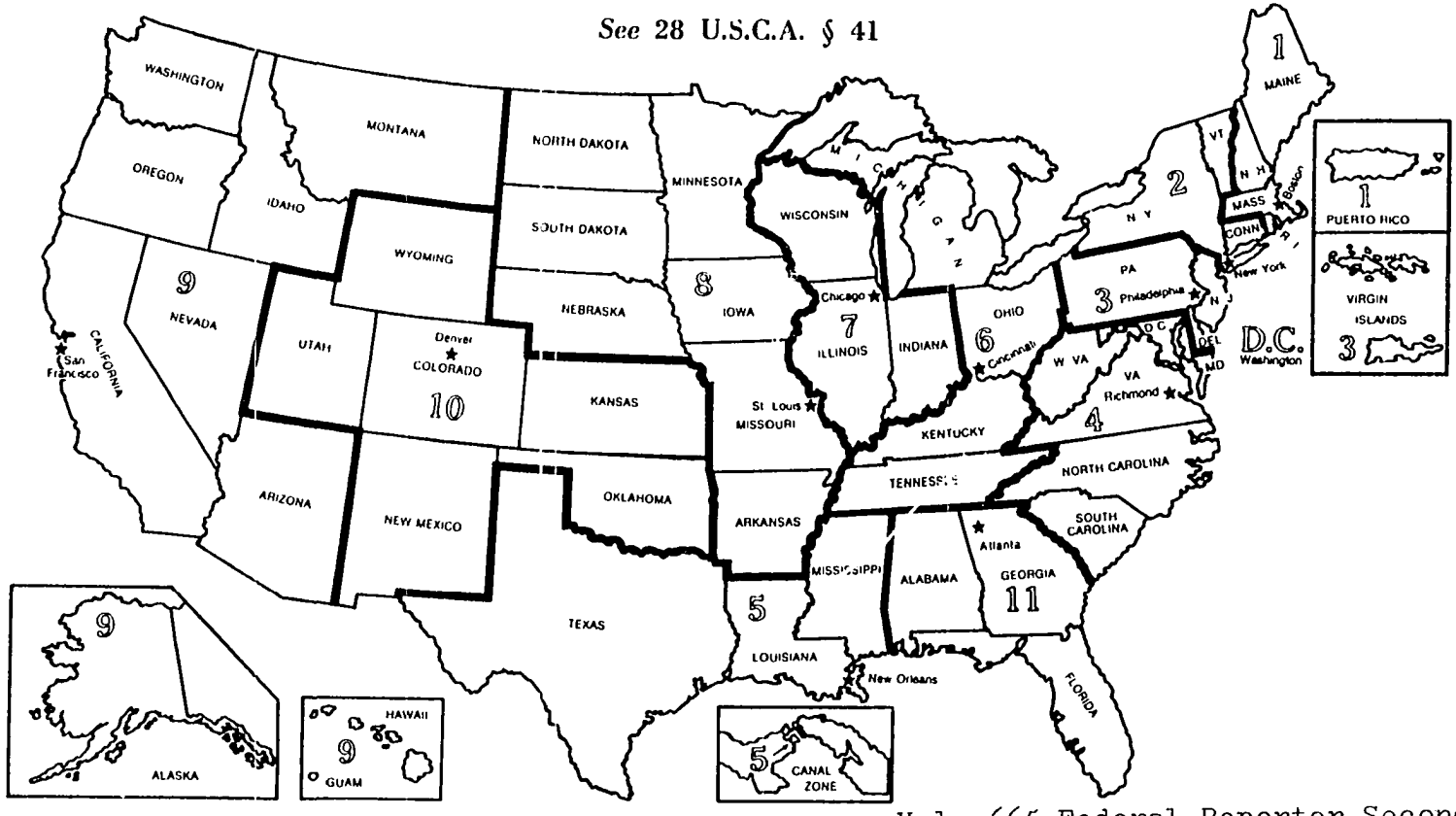
28 U.S.C. Sec. 41 was amended to provide for 12 circuit courts of appeals by P.L. 96-452 on October 14, 1980.

The Twelve Federal Judicial Circuits

See 28 U.S.C.A. § 41



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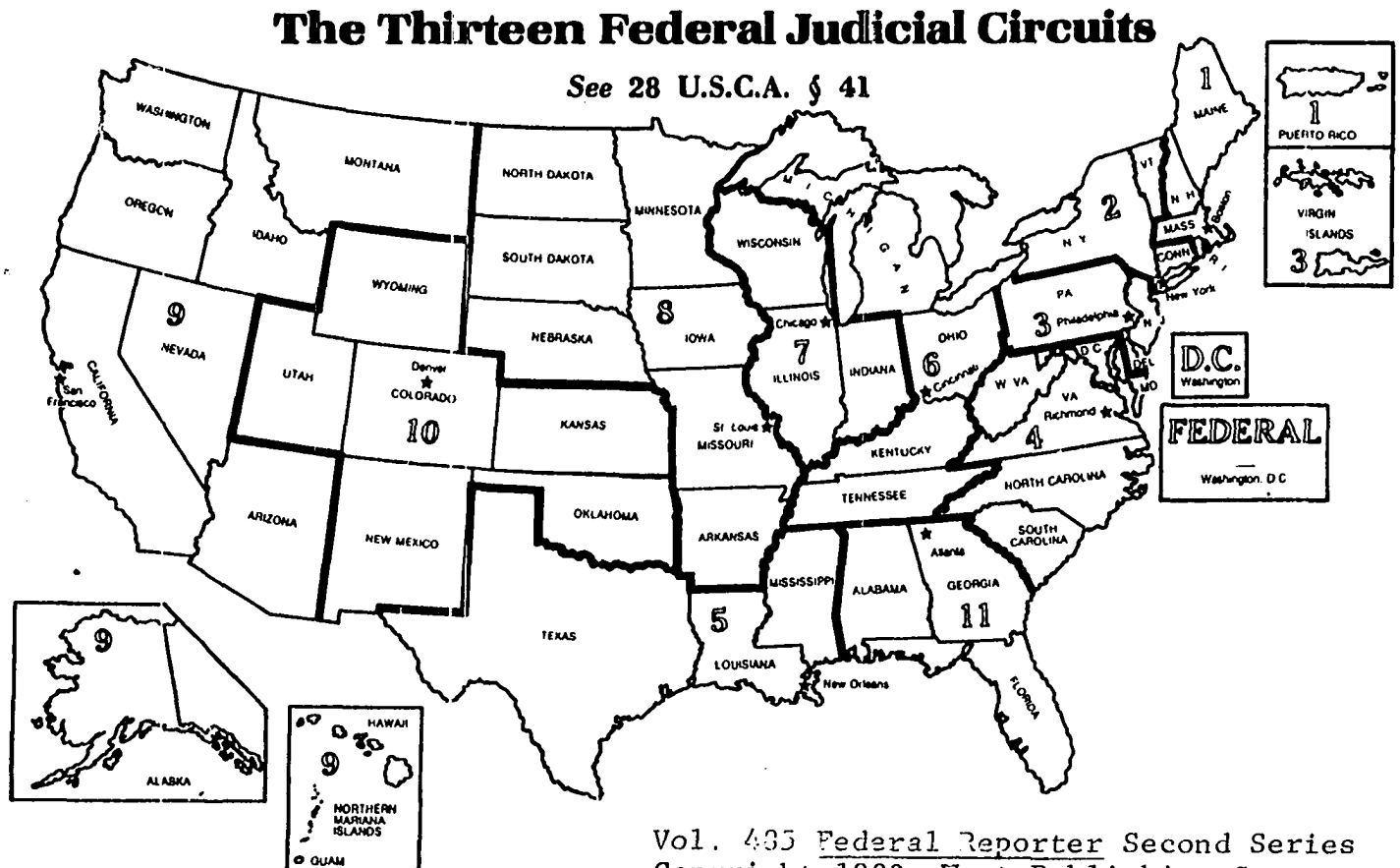
28 U.S.C. Sec. 41 was amended to provide for 13 circuit courts of appeals by P.L. 97-164, Title I, Part A, Sec. 101 on April 2, 1982.



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