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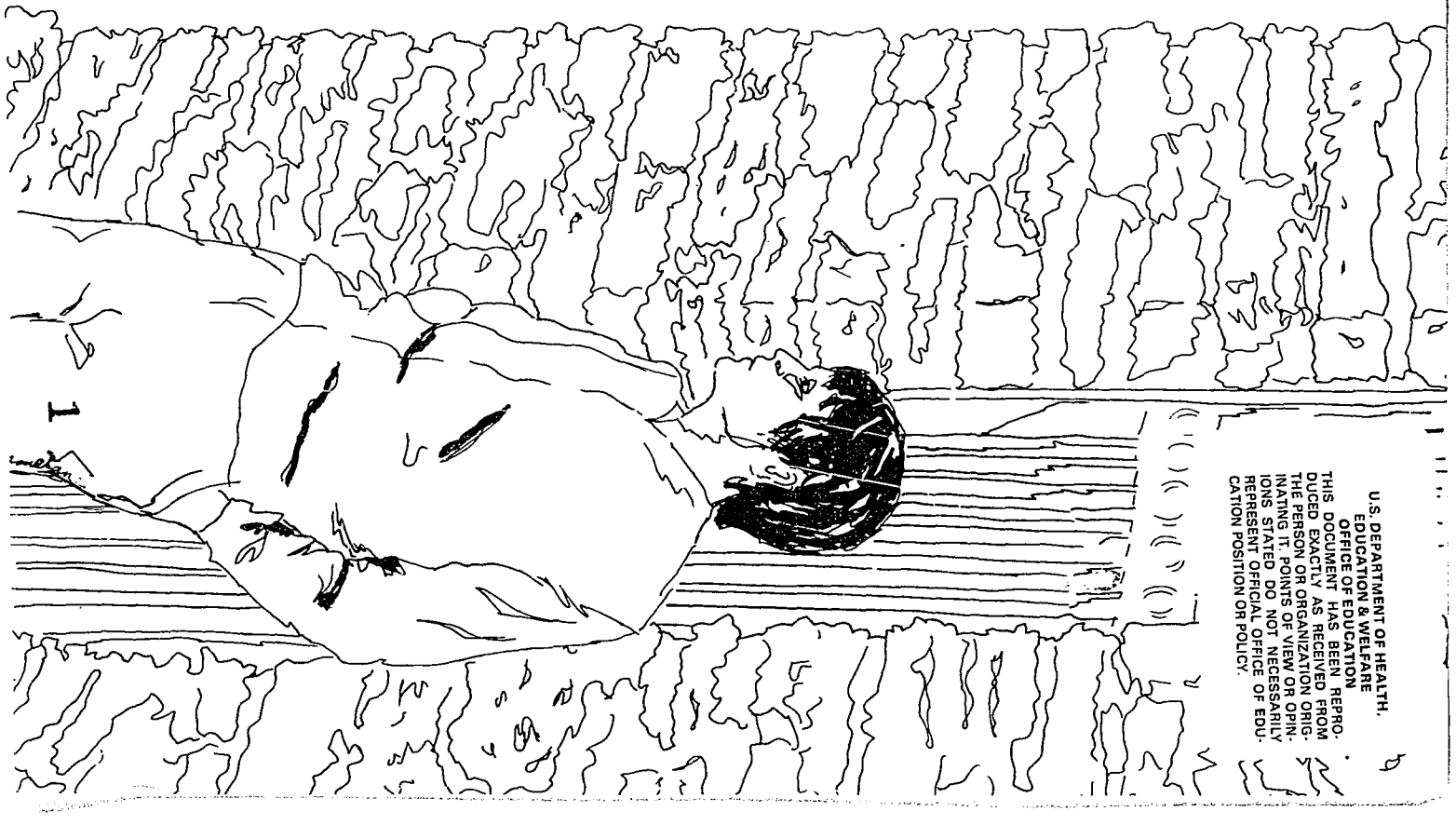
ABSTRACT

This monograph reviews and analyzes decisions dealing with suspension or expulsion of students by public school authorities. The report focuses on recent court cases that reaffirm, amplify, or extend entrenched constitutional and common law principles undergirding the public educational system in the United States. The author considers the traditional elements of procedural due process and concludes that to comply with the minimum requirements of procedural due process administrators must (1) give the student adequate notice of the grounds of the charges and the nature of evidence against him, (2) conduct a hearing (unless the student waives it), and (3) take action only if it is warranted by the evidence. The author recommends that administrators develop written policies on student conduct, outline procedures for handling discipline cases, provide grievance procedures for students and faculty, and detail emergency plans to deal with school disorders. (Author/JF)

Suspension and Expulsion of Public School Students

Robert E. Phay

No. 3 in the NOLPE MONOGRAPH SERIES



Suspension and Expulsion of Public School Students

ROBERT E. PHAY

1971

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ERIC/CEM State-of-the-Knowledge Series, Number Ten
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FOREWORD

This Monograph by Robert E. Phay is one of a series of state-of-the-knowledge papers* dealing with the general topic of student control and student rights in the public schools. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

Mr. Phay specifies the types of student conduct for which a school may legally suspend or expel the student. He also discusses the procedures of due process that the school must observe when it imposes those penalties. He concludes with several recommendations for schools to follow in partial fulfillment of due process requirements.

Phay is an associate professor of public law and government and assistant director of the Institute of Government at the University of North Carolina. He received his bachelor's degree with honors from the University of Mississippi in 1960 and his law degree from Yale University in 1963 where he served on the editorial board of the *Yale Law Journal*.

Specializing in the legal aspects of education, Mr. Phay has authored a variety of publications in this area. He is a member of the NOLPE Board of Directors and the Executive Committee of the Council of School Board Attorneys of the National School Boards Association. He also is the legal consultant to the North Carolina School Boards Association.

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*The other four papers are: (1) *Legal Aspects of Control of Student Activities by Public School Authorities*, by E. Edmund Reutter, Jr., professor of education, Columbia University; (2) *Rights and Freedoms of Public School Students*, by Dale Gaddy, director, Microform Project, American Association of Junior Colleges, Washington, D.C.; (3) *Crime Investigation and Prevention in the Public Schools*, by William G. Buss, professor of law, University of Iowa; and (4) *Student Records*, by Henry E. Butler, Jr., professor of educational administration, University of Arizona.

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The membership of NOLPE represents a wide variety of viewpoints—school board attorneys, professors of educational administration, professors of law, state officials, local school administrators, and executives and legal counsel for a wide variety of education-related organizations.

Other publications of NOLPE include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, and the NOLPE SCHOOL LAW JOURNAL.

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SUSPENSION AND EXPULSION OF PUBLIC SCHOOL STUDENTS

By ROBERT E. PHAY*

INTRODUCTION

Today almost constant crisis attends our public schools. Demonstrations, serious vandalism, and drug addiction are as much a part of the school today as pep rallies, wall marking, and cigarette smoking were a few years ago. Just as smoking pot and dropping out are now customary ways for young adults to reject parental and societal standards, protest and group activism have become familiar ways for students to indicate opposition to school and governmental policies.

Two recent studies document the growing crisis in the nation's schools. From a study of school disruptions during a four-month period of the 1968-69 school year, the United States Office of Education found that three out of five high school principals reported student protests in their schools.[1] In the most comprehensive survey completed to date on this subject, the House Subcommittee on General Education surveyed all twenty-nine thousand of the nation's public and nonpublic high schools. Eighteen percent of the schools reported experiencing a *serious* student protest in 1968-69. Serious protest was defined as student activity involving use of strikes, boycotts, sit-ins, underground newspapers, or riots.[2]

Student protest and misconduct have frequently resulted in suspensions or expulsions. The purpose of this monograph is to examine the legal bases for student suspensions and expulsions and to determine the procedure that school officials must follow when they suspend or expel a student.

Although an extensive analysis of the causes of student unrest cannot be attempted here, some understanding and appreciation of why students rebel and protest are essential to a constructive ap-

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[1] U.S. OFFICE OF EDUCATION, REPORT OF SUBCOMMITTEE ON EASING TENSIONS IN EDUCATION (1969).

[2] A study released in 1969 by the National Association of Secondary School Principals reported that fifty-nine percent of the one thousand high schools studied had experienced some kind of protest or activism. This higher figure reflects a broader definition of student protest. The NASSP study considered almost any activity that was "out of the ordinary" as protest. *See* EDUCATION USA (March 1970).

proach to the problem. Understanding is probably more important to good judgment in the application of the law than is mere knowledge of the school's authority and the requirements of the law.

Anyone aware of the school scene knows that the causes of unrest in high schools are many. As a recent study of student activism revealed, dissent has focused on a wide variety of concerns that differ from school to school. The report listed thirty-seven issues that have resulted in protest. The issues ranged from those over which the school has little or no control—such as Vietnam, the draft, and rising costs—to those that are basically school matters—such as dress and hair regulations, smoking rules, and curriculum.[3]

The USOE report cited earlier lists the following major issues with which students are typically concerned: (1) dehumanization of institutional life, (2) inequities in society, (3) educational irrelevancies, and (4) racial and cultural discrimination. These concerns have produced a discontent that a single spark can discharge. Incidents that have furnished such a spark were found by the study to fall into five general categories: (1) racial conflicts, (2) political protests, (3) resentment of dress regulations, (4) objections to disciplinary actions, and (5) educational policy issues.

Most of these incidents happened suddenly and spontaneously, touched off, for example, by the election of cheerleaders all of one race, the suspension of a student, or a scuffle between two students. Most college disorders, on the other hand, tend to be planned, structured, and deliberate acts of protest. The spontaneous nature of the high school disruption makes responsible action more difficult for the teacher, principal, superintendent, and school board because they must react immediately to keep the incident from reaching crisis proportions. Such situations require delicate judgment.

AUTHORITY TO SUSPEND OR EXPEL STUDENTS

The school board has responsibility for operating and maintaining the public schools in its school district. To carry out this responsibility, it may occasionally need to suspend or expel a student.[4]

Until recently, the school board and its employees occupied a sanctified position with respect to judicial review; their decisions to suspend or expel were largely unquestioned by the courts. To be

[3]N.J. Federation of District Boards of Education, Student Activism and Involvement in the Educational Program (1970).

[4]As the court said in Blackwell v. Issaquena Co. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), it is not only proper but also necessary for school authorities to prohibit and punish acts calculated to undermine school operation.

sure, the courts in some cases overturned a school action or rule: in 1902, for example, a teacher in Missouri was found liable for severely flogging a child,[5] and in 1885 a Wisconsin court held unreasonable a school rule that required children to bring a piece of firewood into the school whenever they passed the woodpile.[6]

Most challenges to school operations, however, have had a cold reception by the courts. For example, in 1890 a Wisconsin high school student was expelled for "general bad conduct." No specific reason was given for the expulsion and none was required by the court, which was reluctant to substitute its judgment for that of the school board.[7] In an Illinois case in 1913, a student was expelled for allegedly violating a rule forbidding anyone to belong to a fraternity. Despite his denial of membership, his request for a hearing was denied: the court said that under no circumstances—except when fraud, corruption, oppression, or gross injustice is palpably shown —is a court of law authorized to review the decision of the board of education and to substitute its judgment for that of the board.[8]

Underlying the courts' reluctance to review school decisions is the legal concept *in loco parentis*. According to this doctrine, the student is considered a child under the jurisdiction of the school, which stands in place of the parent: the school is thus given almost the same authority over the pupil while he is at school as the parent has over him at home.[9] Courts were reluctant to question school actions with respect to the child except in extreme cases such as those involving serious bodily injury or malicious discipline, as in the Missouri and Wisconsin cases just noted.

The assumption that school regulations are properly adopted and lawfully and reasonably implemented is not always valid. As the importance of education increased in our society, courts began to

[5]Haycraft v. Griggsby, 94 Mo. App. 74, 67 S.W. 965 (1902).

[6]State *ex rel.* Bowe v. Board of Educ., 63 Wis. 234, 23 N.W. 102 (1885).

[7]State *ex rel.* Crain v. Hamilton, 42 Mo. App. 24 (1890). Recently a federal district court gave the same reason, saying that school administrators rather than the courts should judge whether a regulation prohibiting mustaches and beards is reasonable. Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd* 426 F.2d 1154 (5th Cir. 1970).

[8]Smith v. Board of Educ., 182 Ill. App. 342 (1913). A recent Tennessee decision that upheld a school regulation against long hair is in accord: "Unless the regulation was arbitrary, capricious, unreasonable, or discriminatory, it must stand. Courts presume the validity of regulations adopted by public bodies acting within their authority upon an adequate showing of reasonable necessity for the regulations." Brownlee v. Bradley City Board, 311 F. Supp. 1360 (E.D. Tenn. 1970).

[9]For a historical discussion of the *in loco parentis* doctrine and how it has been distorted, *see* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 377-384 (1969). *See also* K. D. Moran, An Historical Development of the Doctrine In Loco Parentis with Court Interpretations in the United States, 1967 (Ed.D. Diss. University of Kansas).

consider education a right that could not be denied without proper reason and unless proper procedures were followed. Over time, the *in loco parentis* doctrine was substantially modified, particularly as applied to secondary school pupils, and the courts became more willing to examine school actions and to overturn those found arbitrary or unreasonable.[10]

The main assault against school limitations on student conduct has come from the application of the due process clause of the Fourteenth Amendment. Not many years ago courts did not consider due process standards applicable to school actions.[11] Today courts apply these standards to school actions and procedures without hesitancy.[12] The courts have begun not only to place limitations on the type of controls that a school system may exercise over a student, but also to define minimum standards and procedures that a school must observe in disciplining students if it wishes to avoid constitutional infringement.[13]

In determining whether school officials, in suspending or expelling a student, have infringed upon his constitutional rights, the court must balance the interests of the school against those of the student. On one side is the student's constitutional right to remain in school. In evaluating this right, the court must consider the type of misconduct and whether it is a basis for expulsion; marking on a wall, for example, will seldom justify expulsion. The court must also consider whether the conduct found objectionable by school authorities is conduct the school can prohibit; some types of demonstrations, for example, are protected by the First Amendment guarantee of freedom of speech. Another matter the court must con-

[10]*See, e.g.*, Breen v. Kahl, 419 F.2d 1034, 1037 (1969). *See also* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378, 385—88 (1969), for a discussion of the *in loco parentis* concept in the local schools.

[11]State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, *cert. denied*, 319 U.S. 748 (1942).

[12]In the related area of juvenile court proceedings, the U.S. Supreme Court has required its procedure to "measure up to the essentials of due process and fair treatment." *In re* Gault, 387 U.S. 1 (1967). *See also* Kent v. U.S., 383 U.S. 541 (1966).

[13]This is not to suggest, however, that the *in loco parentis* concept and limitations placed on the child because of his age and maturity no longer are applicable to secondary school children. As Justice Stewart observed in a concurring opinion, the rights of children are not coextensive with those of adults. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 515 (1969). Elsewhere he noted: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, 390 U.S. 629, 649—50 (1968).

For an interesting analysis of changing judicial standards, *see* Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612 (1970). Goldstein sees the current judicial scrutiny and skepticism of school actions as a return to the late nineteenth century and early part of this century, when courts did not hesitate to declare school board actions invalid if they appeared to go beyond the scope of board power.

sider is the type of process the student must be granted before his right to attend school can be denied.

On the other side of the balance is the school's duty to protect children and school property from injury and to see that the right of *all* students to obtain an education is not unduly jeopardized nor the educational process disrupted.

These interests will first be considered in a review of the types of student conduct that a school may or may not forbid upon penalty of suspension or expulsion. In the next chapter, I will discuss the procedures that the school must observe when it imposes those penalties.

Demonstrations—Disruption of School Operations

Student demonstrations have raised the question of students' rights of freedom of speech and assembly. From a multitude of recent court rulings, it is clear that the student does not leave his constitutional rights at the schoolhouse door: he may not be expelled for exercising First Amendment rights of speech, press, or assembly.[14]

At the same time, however, the rights of speech and assembly are not absolute. They can be curtailed, as the California Supreme Court pointed out in a case arising from the Berkeley filthy-speech movement:

> An individual cannot escape from social constraint merely by asserting that he is engaged in political talk or action. Thus, reasonable restrictions on the freedoms of speech and assembly are recognized in relation to public agencies that have a valid interest in maintaining good order and proper decorum.[15]

An example of a ruling in which a court upheld a restriction on speech and demonstrations in a public school is *Blackwell v. Issa-*

[14]West Virginia v. Barnette, 319 U.S. 624 (1943). Several old cases placed limitations on speech that today would be considered unconstitutional. In Wooster v. Sunderland, 27 Cal. App. 51, 148 P. 959 (1919), the court upheld the expulsion of a student who had made a speech criticizing the school board, and in *State ex rel. Dresser v. District Bd. of School Dist.* No. 1, 135 Wis. 619, 116 N.W. 232 (1908), the court upheld the expulsion of a student who published a satirical poem on school rules in a local newspaper. The recent U.S. Supreme Court decisions of Pickering v. Board of Educ., 391 U.S. 563 (1968), and New York Times v. Sullivan, 376 U.S. 254 (1964), make such restrictions on student criticism clearly an unconstitutional abridgment of free speech. For an early case permitting student criticism of school officials, see Murphy v. Board of Directors of Independent Dist. of Marengo, 30 Iowa 429 (1870).

[15]Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rpts. 463, 471 (1967). *See also* American Civil Liberties Union v. Board of Educ. of Los Angeles, 55 Cal. 2d 167, 359 P.2d 45 (1961).

quena County Board of Education.[16] In this case students were wearing and distributing "freedom buttons," accompanied by an "unusual degree of commotion, boisterous conduct, collision with the rights of others, and undermining of authority. . . ."[17] The court ruled that the student expulsions were necessary to maintain order and discipline in the school.

In another case, a court sustained the suspensions of high school students who wore black armbands to school when a "real possibility" of disruption existed.[18] Similarly, students may not deny ingress and egress to public buildings, conduct sit-in demonstrations in school buildings, or otherwise obstruct the normal operations or functions of the school by use of violence, force, coercion, or threat.[19] Thus, if school operations are disrupted or seriously threatened with disruption, school officials can take those actions necessary to eliminate the problem. Such actions may include suspending or expelling students from school.

The difficulty school officials face in dealing with student demonstrations is knowing which student conduct is protected as an exercise of a First Amendment right and which can be restricted by the school. Two cases helpful in answering this question are *Burnside v. Byars*[20] and *Tinker v. Des Moines Independent Community School District.*[21] *Burnside* is another freedom-button case, decided by the same court and on the same day as *Blackwell.* Unlike *Blackwell,* however, *Burnside* resulted in a reversal of the student expulsions. The facts in these two cases are strikingly similar. The main difference is that in *Blackwell,* in which the court sustained the expulsions, there was evidence of disruption. Students had been accosted, classes had been interrupted, and general turmoil existed in the school. No such evidence was presented in *Burnside,* hence the reversal.[22] The court found the expulsions to be "arbi-

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[16]363 F.2d 744 (5th Cir. 1966). *Accord,* Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970).

[17]Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966).

[18]Butts v. Dallas Independent School Dist., 306 F. Supp. 488 (N.D Tex. 1969).

[19]*See In re* Bacon, 240 Cal. App. 2d 34. 49 Cal. Rptr. 322 (Dist. Ct App. 1966).

[20]363 F.2d 744 (5th Cir. 1966).

[21]393 U.S. 503 (1969).

[22]*See* Aguirre v. Tahoka Independent School Dist., 311 F. Supp. 664 (N.D. Tex. 1970), in which the court found protest against school policies and practices by the wearing of brown armbands in the absence of school disruption to be protected by the First Amendment. *But see* the bizarre case of Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970), holding that if the University of Wyoming had permitted student football players to wear black armbands to protest alleged racial discrimination by Brigham Young University, a private sectarian institution, the University of Wyoming would have violated the establishment of religion clause of the First Amendment.

trary and unreasonable and an unnecessary infringement on students' protected right of free expression."[23]

Three years after these cases the United States Supreme Court accepted *certiorari* in *Tinker*,[24] the only secondary school disruption case it has ever decided. The case involved junior and senior high school students who wore black armbands to school to protest the Vietnam War. The school adopted a policy requiring any student wearing an armband at school to remove it; if he refused, he would be suspended until he returned without the armband. When John and Mary Tinker and some of their friends wore armbands to school, they were suspended in accordance with this policy. No class disruption was evident, nor were any threats or acts of violence, though a few hostile remarks were made to the armbanded children.

The Court concluded that the school regulation was an attempt to avoid controversy that might result from opposition to the Vietnam War shown by wearing armbands. The schools are not a place where controversy can be eliminated, the Court said, and in the absence of evidence that the wearing of armbands would "materially and substantially disrupt the work and discipline of the school,"[25] the school cannot prohibit such protest. Armbands, according to the Court, are symbolic speech protected by the First Amendment. Thus, in the absence of disruption, students can wear freedom buttons, German Iron Crosses, or George Wallace hats. Unless the student's conduct involves substantial disorder or invasion of the rights of others, he is protected by the constitutional guarantee of freedom of speech. But he may not, in the name of free speech, block passageways, abuse school property, or obstruct normal school operations.[26]

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[23]Burnside v. Byars, 363 F.2d 744, 748—49 (5th Cir. 1966).

[24]393 U.S. 503 (1969). *Accord*, Aguirre v. Tahoka Independent School Dist., 311 F. Supp. 664 (N.D. Tex. 1970).

[25]393 U.S. 503, 513 (1969). The test that the prohibited act must threaten to "materially and substantially disrupt" was taken from Burnside v. Byars, 363 F.2d 744 (1966), in which the Fifth Circuit Court threw out a school regulation prohibiting freedom buttons because there was no showing that the prohibited act would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 749.

[26]Two weeks after the *Tinker* decision, the Supreme Court denied certiorari in a case involving the suspension of college students for disruptive activities. Justice Fortas, who had written the majority opinion in *Tinker*, made the following statement:

> 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

Distribution of Literature and Underground Newspapers

Another student activity that has at times resulted in suspensions or expulsions is the distribution of leaflets or underground newspapers. Since such distribution falls within the First Amendment area of free speech, the question posed in similar to that in *Tinker:* Under what circumstances can the school restrict the exercise of speech in the interest of maintaining school operations?

A recent case involving the distribution of an underground newspaper illustrates the problem.[27] A New York high school student was suspended when he refused to surrender copies of an underground newspaper and advised another student not to hand over his copies. He had previously been told not to distribute the newspaper on school grounds. During the suspension he came to class without permission.

The court held that the student's total conduct went beyond the right to disseminate a subterranean paper and that for his open and flagrant disrespect for school officials he could be expelled. The court hinted that the First Amendment might have protected the paper's distribution if that had been the only issue.

A California case that upheld the ten-day suspensions of students for distributing an off-campus newspaper containing "profanity and vulgarity" is in accord.[28]

Other cases have upheld the suspensions of college students for distributing literature. In one case, students had distributed on campus literature urging other students to "assault the bastions of administrative tyranny" and "to stand up and fight" the administrator-despots. After being given notice and a hearing, the students responsible for the distribution were suspended. The university administrators justified the suspensions on the basis that serious consequences might have resulted from the distribution of the inflammatory material. The court upheld the suspensions. It ruled that the literature, which had exhorted students to disorderly and

[*Tinker*]. The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments. [Barker v. Hardway, 394 U.S. 905 (1969).]

[27]Schwartz v. Schuker, 298 F. Supp. 238 (E.D. N.Y. 1969). Possession of literature considered obscene raises a related free-speech issue. In Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969), a federal court held unconstitutional the expulsion of a student for violating a school policy prohibiting the possession of obscene literature. In this case the words objected to were in Salinger's *The Catcher in the Rye*, an assigned novel in an English course. Although the court found the board regulations to be in an area of speech that the board could attempt to regulate, it found the burden of defining what is obscene to be on the school, rather than on the student. The court itself felt incapable of defining obscenity, considering the murkiness of this area of the law.

[28]Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969).

destructive activities, was not privileged under the First Amendment.[29]

Several other decisions have held to the contrary and have reinstated students suspended for distributing literature. In one case, the expulsion of two students for distributing a "literary journal" that criticized the school administration and urged other students to disregard school rules was found to be unconstitutional.[30] The absence of any evidence of actual disruption was crucial to the court's decision in this case. The appellate court said that a school board must be able to show that the publication's writing and distribution could reasonably lead to substantial disruption of school activities before the board can prohibit the publication's distribution.

The commissioner of education in New Jersey[31] took a similar position in ruling on a recent case that involved school regulations prohibiting the distribution of all leaflets, handbills, and similar items on school premises. The commissioner held that leafleteering need not be totally prohibited to establish necessary controls: "To the extent that the contested regulation constitutes an outright interdiction of any distribution of printed material, it is suppressive. It is, therefore, an improper encroachment upon freedom of expression, and as such, it cannot be sustained." He stated, however, that some controls on literature distribution are necessary and permissible:

> It is beyond argument, however, that so called "hate literature" which scurrilously attacks ethnic, religious and racial groups, other irresponsible publications aimed at creating hostility and violence, hard-core pornography, and similar materials are not suitable for distribution in the schools. Such materials can be banned without restricting other kinds of leaflets by the application of carefully designed criteria for making such judgments.

A Texas case is in accord, upholding the constitutional right of students to distribute on school grounds an underground newspaper

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[29]Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 26 L. Ed. 2d 562 (1970). *See also* Jones v. State Bd. of Educ., 407 F.2d 834 (6th Cir. 1969), *writ of certiorari dismissed as improvidently granted*, 25 L. Ed. 2d 27 (1970). Wright, *The Constitution on the Campus*, 22 VAND L. REV. 1027, 1057 (1969), criticizes the result in the *Jones* case.

[30]Scoville v. Board of Educ. of Joliet, 425 F.2d 10 (7th Cir.), *cert. denied*, 276 L. Ed.2d 55 (1970). See the discussion of the case in 11 NOLPE SCHOOL LAW REPR. 1 (Sept. 1970).

[31]Goodman v. South Orange-Maplewood Board of Educ., N.J. Comm'r of Educ. (June 18, 1969). *See also* Smith v. Tammany Parish School Bd., 316 F. Supp. 1174 (E.D. La. 1970), in which the court-ordered desegregation plan prohibited a school from displaying a Confederate flag. The court held that the school had no constitutional right to display this or other such symbols when they are an affront to others.

extremely critical of the school principal so long as the distribution did not interfere with proper school activities.[32]

And in Connecticut, a federal district court forbade the suspension of high school students who refused to comply with a school regulation that the students' privately printed newspaper be submitted to school administrators for school approval before it could be distributed. The regulation was held to violate the students' First Amendment rights of speech and press. The court recognized, however, that students could be required to conform to reasonable regulations as to time, exact place in the school, and manner of distribution of the newspaper. The court also noted that speech and press could be regulated upon a showing by the school of a constitutionally valid reason to regulate.[33]

As with the armband and freedom-button cases, the critical factor in whether the suspensions or expulsions for distribution of literature were upheld was the presence or absence of "substantial and material interference" with school activities. A dissent rendered in one literature-distribution case illustrates the difficulty of determining what is "substantial and material" interference. By a split vote the court upheld the suspensions of students for having distributed literature. The dissenting judge claimed there was insufficient evidence to justify the majority's conclusion that the pamphleteering "created a probable or actual material and substantial interference with any of the normal activities of the University."[34]

Determining what constitutes substantial and material disruption is a difficult task. It permits different conclusions depending on the weight one gives to the various considerations necessary to the decision. For this reason, school officials need guidelines to help them gauge better what courts will consider to be a substantial and material interference with school activities. Clearly, school officials' disapproval of the literature's content or their desire to avoid a controversy is not adequate basis for excluding the literature. Rather, to justify exclusion, officials must show that the literature intrudes "upon the work of the school or the rights of other students" in such a way that the work of the school or class is disrupted.

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[32]Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969).

[33]Eisner v. Stamford, 39 U.S.L.W. 2037 (July 21, 1970).

The right of teachers to distribute literature has also been upheld. *See* Los Angeles Teachers Union v. Los Angeles City Bd. of Educ., 455 P.2d 827, 78 Cal. Rptr. 723 (1969), and Friedman v. Union Free School Dist. No. 1, 314 F. Supp. 223 (E.D.N.Y. 1970).

[34]Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195, 209 (6th Cir. 1969).

Control of Student Publications

School control over official school publications, such as the student newspaper or yearbook, falls into an unclear area of student constitutional rights. Most problems that have arisen in this area have not resulted in student suspensions or expulsions. *Dickey v. Alabama State Board of Education,*[35] a college case involving the student editor at Troy State University, represents an exception. The student was expelled for printing "censored" over the space where an editorial he had been told not to publish would have appeared. The editorial praised the University of Alabama president for supporting academic freedom for university students and criticized the governor. The dismissal was held to be an unconstitutional limitation of the editor's First Amendment rights.

Nevertheless, the question of the type of censorship school officials may exert over student publications has not been precisely clarified by the courts. School officials can require student editors to comply with state laws respecting libel or obscenity, but cannot prohibit editorials on controversial subjects unless they threaten to "materially and substantially" interfere with school operations or otherwise endanger the health or safety of the students or staff.[36] However, if a publication is part of the journalistic laboratory, the types of permissible controls are considerably greater than the mere requirement that libel and obscenity laws be observed.[37] For example, published material could be limited to student work and the student work limited to assigned topics.

In several recent cases, courts have upheld the right of students to print controversial articles in school publications used to communicate general information.[38] These cases help to clarify the de-

[35]273 F. Supp. 613 (M.D. Ala. 1967). This action was later dismissed when the issue became moot because Dickey had transferred to another college and was no longer interested in returning to Troy State University. Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

[36]The American Civil Liberties Union makes the following recommendation on student publications:

> Neither the faculty advisors nor the principal should prohibit the publication or distribution of material except when such publication or distribution would clearly endanger the health or safety of the students, or clearly and imminently threaten to disrupt the educational process, or might be of a libelous nature. [AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM IN THE SECONDARY SCHOOLS 11 (1968).]

[37]*See* Abbott, *The Student Press: Some First Impressions,* 16 WAYNE L. REV. 1, 22 (1969).

[38]Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

In the interesting case of Panarella v. Birenbaum, 60 Misc. 2d 95, 302 N.Y.S.2d 427 (Sup. Ct. 1969), the court prohibited the publication of "derogatory" and "vilifying" attacks on the Catholic Church by a state institution on the basis that publication of the article would violate the absolute neutrality toward religion required by the First and Fourteenth Amendments.

gree of control that a school may exercise over the printing of controversial matters in such publications.

One case concerned the constitutionality of a requirement that material for a state college newspaper be submitted to an advisory board prior to publication. The court ruled that the requirement violated First Amendment free-press rights. Although the court agreed that individual rights must yield "when they are incompatible with the school's obligation to maintain order and discipline necessary for the success of the educational process,"[39] it held that the school had no right to editorial control of the campus newspaper; the fact the paper was primarily financed by college funds did not justify the procedure. The court stated, "[H]aving fostered a campus newspaper, the state may not impose arbitrary restrictions on the matter to be communicated."[40]

A recent high school case upheld the right of students to buy space in their student newspaper to express opposition to the war in Southeast Asia, an unpopular political position in the school.[41] The principal had prohibited the advertisement on the basis that it was not on a school-related activity. The court declared that the First Amendment guarantees the students' right to publish their paid advertisement in the school paper and noted that earlier issues of the paper had contained articles on the war and other non-school-related activities. From this case it would seem that when a student publication is used to communicate general information and concerns of the student body, the school cannot censor what is printed on the basis that the subject is controversial or not a concern of the school.[42]

Whatever the school's rights to control school publications, suspension or expulsion of a student for violating a rule on publications seems unreasonable except in extreme cases. If the school has authority to discipline a student for violating such a rule, removal of the offending student from a position or class that has responsibility for the student publication would seem to be a more effective and appropriate form of control.

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[39]Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass. 1970). *Accord,* American Civil Liberties Union of Va. v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970).

[40]Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970).

[41]Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

[42]*See also* Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969), a college case holding that a campus newspaper that accepts commercial advertisements cannot reject editorial advertisements. To do so would constitute censorship in violation of the First and Fourteenth Amendments. *See* Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).

Personal Appearance

Schools have always regulated student dress and appearance and will undoubtedly continue to do so to some degree. However, the day has passed when public schools can require a uniform for class attendance or prohibit, as one school did, "the wearing of transparent hosiery, low-necked dresses or any style of clothing tending toward immodesty of dress or the use of face paint or cosmetics."[43]

Schools can properly prohibit dress that is obscene or clearly inappropriate for school. For example, pupils may be forbidden to wear spike heels or metal heel plates when they create unnecessary noise and damage the floor.[44] A student may be prohibited from wearing a hat in the classroom,[45] dress that is evidence of membership in a secret society,[46] or a bikini. On the other hand, a student may be required to wear a hairnet while serving food or a helmet while playing football. These requirements are related to the health, safety, or proper conduct of students in the school and can be imposed as a condition for attendance.

Historically, schools have been able to exercise strict control in matters of student dress. In recent years this control has been substantially reduced, as students and their parents increasingly have challenged school dress codes in courts and been granted relief. The courts have knocked down codes that seemed out of touch with the latitude our society now grants in the matter of personal appearance.

For example, a New York lower court recently nullified a school dress regulation that prohibited girls from wearing slacks except when permitted by the principal upon petition by the student council. The court observed that school dress regulations are valid only to the extent they protect the safety of the wearer or prevent disturbances that interfere with school operations. The antislack provision failed to qualify under either of these reasons, the court said.[47] As this decision indicates, unless a school can show good

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[43]Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).
[44]Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).
[45]Matter of Jimenez, 9 Ed. Dept. Rep.——, N.Y. Comm'r Decision No. 8130. *See also* Hernandez v. School Dist. No. 1, Denver, 315 F. Supp. 289 (D. Colo. 1970).
[46]Antell v. Stokes, 287 Mass. 103, 191 N.E. 407 (1934).
[47]Scott v. Board of Educ., 61 Misc. 2d 333, 305 N.Y.S.2d 701 (Sup. Ct. 1969); *accord*, Bannister v. Paradis, 316 F. Supp. 185 (D. N.H. 1970), which held a prohibition against wearing dungarees to be unconstitutional, and Matter of Downey, 9 Ed. Dept. Rep.——, N.Y. Comm'r Decision. *But see* Matheson v. Brady, 202 Ga. 500, 43 S.E.2d 703 (1947), an older case which upheld a school regulation forbidding girls to wear slacks.

reason for a dress regulation, courts are increasingly likely to over-

turn the regulation as arbitrary and an improper infringement of student freedom.[48]

Recently, most cases in the area of personal appearance have involved the prohibition of long hair on males. Judicial opinion has been divided, with some courts upholding suspensions for long hair and others holding that the right to wear long hair is constitutionally protected. In *Ferrell v. Dallas Independent School District*,[49] the court sustained a high school regulation that prohibited Beatle-type haircuts on males. The school board introduced testimony that the hairstyles had caused problems in the school: obscene language had been used, the boys with the long hair had been challenged to fight, and they had been told that the "girls' restroom is right down the hall." The court upheld the regulation as reasonably calculated to maintain school discipline and prevent disruptions of the educational process.

Many of the cases decided in the same year or in years immediately preceding the *Ferrell* decision reached a similar result.[50]

After the *Tinker* black-armband decision in 1969, however, the courts began granting relief to many students who challenged hair regulations.[51] When the "material and substantial disruption" test

[48]*See* Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962), approving modification of a school rule that had required a girl student to wear gym clothes that she objected to because she considered them immodest and in violation of her religious beliefs. The court held, however, that the girl could be required to attend class in more conservative dress of her own choosing.

[49]392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968).

[50]*See*, e.g., Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965); Marshall v. Oliver, No. B-2932, Richmond, Va. Cir. Ct. (1965), *cert. denied* by Va. Sup. Ct. of App. and by U.S. Supreme Court at 385 U.S. 945 (1966); Davis v. Firment, 260 F. Supp. 524 (E.D. La. 1967), *aff'd per curiam*, 408 F.2d 1085 (5th Cir. 1969); Akin v. Board of Educ. of Riverside Unified School Dist., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557, *cert. denied*, 393 U.S. 1041 (1968); and Contreras v. Merced Union High School Dist., Civil No. F-245 (E.D. Cal. 1968).

In a few cases decided during this period, the courts granted students relief from school regulations prohibiting long hair. *See*, e.g., Zachary v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967), in which the court reinstated the student because it found that his suspension was based on a school administrator's prejudice against long hair and not on disruption of the school; Pelletreau v. Board of Educ. of New Milford, 1967 N. J. School Law Decision 45, in which the state board reversed a ruling by the commissioner of education and held that the hair regulation had no legitimate purpose; and Bertin v. Boyle, 1968 N.J. School Law Decision 24.

[51]*See*, *e.g.*, Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Richard v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Calbillo v. San Jacinto Junior College, 305 F. Supp. 857 (S.D. Tex. 1969); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969); Boyle v. Scapple, 38 U.S.L.W. 2614 (April 20, 1970); Peckham v. Komadina, No. 115283, Ariz. Super. Ct. 1969; Yoo v. Moynihan, 28 Conn. Sup. 375, 262 A.2d 814 (1969); Olff v. East Side Union High School Dist., 305 F. Supp. 557 (N.D. Cal. 1969); Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969); Cirker v. Yohe, No. 2108 (C.P. Chester Co., Pa. 1969); Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Nebr. 1970); Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Calif.

was applied to the hair cases, most courts sustained student attacks on hair regulations in the absence of clear evidence that long hair disrupted school operations.* This direction in the hair cases is best represented by *Breen v. Kahl*.[52] In *Breen*, a Wisconsin board of education expelled two high school students for violating the following regulation:

> Hair should be washed, combed, and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out.[53]

The Appellate court in affirming the trial court, declared that the regulation was unconstitutional on the basis "that the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution."[54] In reaching this result, the court specifically rejected the school's argument that discipline alone justifies this type of regulation. The court found instead that the regulation was arbitrary and unneces-

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1970); Cordova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970); Cash v. Hoch, 309 F. Supp. 346 (W.D. Wis. 1970); Black v. Cothren, 316 F. Supp. 468 (D. Nebr. 1970); and Lovelace v. Leechburg Area School Dist., 310 F. Supp. 579 (W.D. Penn. 1970). In *Lovelace* the court overturned a student's suspension not because the regulation was unreasonable but because its application to this student was arbitrary.

There have also been cases since *Tinker* that have upheld school regulations prohibiting long hair. *See, e.g.*, Stevenson v. Wheeler County Bd. of Educ., 426 F.2d 1154 (5th Cir. 1970), in which the court ruled that public school authorities rather than courts should be judges in matters governing proper conduct of students; Crews v. Clones, 303 F. Supp. 1370 (S.D. Ind. 1969), in which school authorities showed that classroom disruption would have resulted if the regulation were not upheld; and Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970), involving a regulation that required male athletes to be clean shaven and to have hair out of their eyes and trimmed above ears and collar. *But see* Dunham v. Pulsifer, 312 F. Supp. 411 (D. Ver. 1970), in which a grooming code for athletes was held unconstitutional. *See also* Brick v. Board of Educ., 305 F. Supp. 1316 (D. Colo. 1969), in which the court held that length and style of hair are not within the protection of the First Amendment; Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970); Farrell v. Smith, 310 F. Supp. 732 (D. Me. 1970); Pritchard v. Spring Branch School Dist., 308 F. Supp. 570 (S.D. Tex. 1970); Wood v. Alamo Heights School Dist., 308 F. Supp. 551 (W.D. Tex. 1970); Shows v. Freeman, 230 So. 2d 63 (1969); Schwartz v. Galveston School Dist., 309 F. Supp. 1034 (S.D. Tex. 1970); Casey v. Henry, —F. Supp.— (W.D.N.C. 1970); Corley v. Daunhauer, 312 F. Supp. 811 (E.D. Ark. 1970); Gfell v. Rickelman, 313 F. Supp. 364 (N.D. Ohio 1970); Giangreco v. Center School Dist., 313 F. Supp. 776 (W.D. Mo. 1969); Livingston v. Swanquist, 314 F. Supp. 1 (N.D. Ill. 1970); Bishop v. Colaw, 316 F. Supp. 445 (E.D. Mo. 1970); Singh v. Stepping, —F. Supp.— (N.D. Ill. 1970).

In several cases the courts have rejected school regulations requiring male teachers to be clean shaven and to have short hair. *See, e.g.*, Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969), and Braxton v. Board of Pub. Instruction, 303 F. Supp. 958 (M.D. Fla. 1969).

[52] 419 F.2d 1034 (7th Cir.), *cert. denied*, 25 L. Ed. 2d 268 (1970).

[53] 419 F.2d 1034, 1035 (7th Cir. 1970).

[54] *Id.* at 1036.

*[NOTE—Since writing this discussion on prohibiting long hair on male students, recent litigation on this issue has resulted in more judgments for school boards than for students. School boards have won more hair cases recently because they have been able to introduce evidence that long hair on males disrupted school operations.]

sary. The United States Supreme Court unanimously turned down the school board's request for *certiorari*.[55]

Although the cases are divided, it is increasingly clear that blanket prohibitions on long hair are unlikely to be sustained. In a publication issued three years ago, the American Civil Liberties Union summarized the extent of school control over student appearance that today's courts are likely to sanction:

> Education is too important to be granted or denied on the basis of standards of personal appearance. As long as a student's appearance does not, in fact, disrupt the educational process, or constitute a threat to safety, it should be no concern of the school.
>
> Dress and personal adornment are forms of self-expression; the freedom of personal preference should be guaranteed along with other liberties.[56]

Damage or Destruction of School Property

The maintenance and preservation of school property are legal duties of all school boards. In carrying out this responsibility the school board may adopt regulations prohibiting misuse of and damage to school property; suspension or expulsion is a permitted sanction in extreme violations of these regulations.

The type of discipline a school may impose for damage to school property depends on the circumstances. Damage or destruction that is accidental is not basis for suspension or expulsion. Even damage caused by a student's carelessness or negligence does not justify depriving him of school attendance.[57] Similarly, such minor injuries to property as carving on a desk top, writing on a wall, or even ripping a page out of a school book do not warrant suspension or expulsion; thus the school would have no authority to impose

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[55]26 L. Ed. 2d 268 (1970). *But see* Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 27 L. Ed. 2d 88 (1970). *Jackson v. Dorrier* is the most recent action by the U.S. Supreme Court on a hair case. The Court denied certiorari, thereby sustaining the Sixth Circuit Court, which had upheld a school regulation prohibiting male students from wearing long hair. Evidence was introduced at the trial court to show that "the wearing of excessively long hair by male students . . . did disrupt classroom atmosphere and decorum, caused disturbances and distractions among other students, and interfered with the educational process." From this evidence the trial court concluded that the regulation had "a real and reasonable connection with successful operation of the educational system and the maintenance of school discipline" and was not a denial of constitutional rights.

[56]American Civil Liberties Union, *op. cit. supra*, note 36 at 19. *See also* Comment, *Public Secondary Education: Judicial Protection of Student Individuality*, 42 S. Cal. L. Rev. 126 (1969) and Comment, *School Student Dress and Appearance Regulations*, 18 Clev.-Mar. L. Rev. 143 (1969); *Comment, Personal Appearance of Students—The Abuse of a Protected Freedom*, 20 Ala. L. Rev. 104 (1967), and Comment, *A Student's Right to Govern His Personal Appearance*, 17 J. Pub. L. 151 (1968).

[57]Holman v. School Trustees of Avon, 77 Mich. 605, 43 N.W. 996 (1889). *Accord*, Perkins v. Independent School Dist. of West Des Moines, 56 Iowa 476, 9 N.W. 356 (1880); and State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888).

these sanctions for such offenses. However, if a student willfully destroys school property, he may be expelled under certain circumstances.[58] When the destruction is serious and premeditated, as in arson or major vandalism, the school board may suspend or expel the student or even swear out a warrant for his arrest.

Parental responsibility laws are another device for dealing with vandalism of school property. These statutes make parents liable for willful or malicious property destruction committed by their children[59] and apply whether the damage is done during or after school.[60] Most of them were passed in the late 1950s as a deterrent to school vandalism.[61] Courts have interpreted these statutes strictly,[62] on the basis that they are contrary to the common law. However, courts have upheld the statutes.[63]

Weapons on School Grounds

School boards, in discharging their responsibility to maintain orderly school operations, may forbid students to bring onto school grounds weapons or instruments that might be dangerous to the possessor or other students. A regulation on this subject recently recommended for adoption by school boards provides:

> A student shall not knowingly possess, handle, or transmit any object that can reasonably be considered a weapon (1) on the school grounds during and immediately before or immediately after school hours, (2) on the school grounds at any other time when the school is being used by a school group, or (3) off the school grounds at any school activity, function, or event.
>
> This rule does not apply to normal school supplies like pencils or compasses but does apply to any firearm, any explosive including firecrackers, any knife other than a small penknife, and other dangerous objects of no reasonable use to the pupil at school.[64]

A student who knowingly violates this rule may be suspended or expelled if the situation justifies such severe measures.

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[58]Palmyra Board of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959).

[59]*See*, e.g., N.C. GEN. STAT. § 1-538.1 (1963), and N.J. REV. STAT. § 18A:37-3 (does not require property destruction to be willful or malicious).

[60]Palmyra Board of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959).

[61]Colmey and Valentine, *Stop Vandalism with Parent Responsibility Laws*, 145 AM. SCH. BD. J. 9 (1960).

[62]*See*, *e.g.*, Lamro Independent Consol. School Dist. v. Cawthorne, 76 S.D. 106, 73 N.W. 2d 337 (1955). *See also* Allen v. Chacon, 449 S.W.2d 289 (Tex. Civ. App. 1969), in which the court enjoined a suspension based on a board regulation requiring payment in full of damages to school property before readmission to school. The court found that the school had not followed its own policy of taking parents' financial conditions into account.

[63]General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

[64]R. PHAY & J. CUMMINGS, STUDENT SUSPENSIONS AND EXPULSIONS: PROPOSED SCHOOL BOARD CODES 21 (1970).

If a teacher or other school official finds a student with a dangerous object, he can require the student to surrender the object and if necessary can use force to disarm him. In a case involving a student who refused to surrender a pistol, a Texas court noted that a teacher has not only a right to remove dangerous objects from a student but also a duty to do so when the safety of students or school personnel might be threatened.[65]

Other Types of Misconduct

Many other types of misconduct may warrant discipline of a student and in extreme cases suspension or expulsion. Belonging to a prohibited secret society,[66] fighting with fellow students,[67] assaulting a teacher,[68] and persisting in disobedience and insubordination[69] are examples of student conduct that have resulted in suspension or expulsion. Certain activities engaged in off the school grounds, such as possession and sale of narcotic drugs,[70] may have such a direct influence on school welfare that a student could be punished, even expelled, for his out-of-school conduct.[71] In all such cases, however, the circumstances of the particular act will determine whether suspension or expulsion is justified.

PROCEDURAL REQUIREMENTS IN DISCIPLINARY PROCEEDINGS

The history of liberty has largely been the history of observance of procedural safeguards.[72]

Until recently, few procedural requirements were placed upon the school when it decided to suspend or expel a student. Educa-

[65]Metcalf v. State, 21 Tex. App. 174, 17 S.W. 142 (1886).
[66]Coggins v. Board of Educ., 223 N.C. 763, 28 S.E.2d 527 (1943).
[67]Deskins v. Gose, 85 Mo. 485, 55 Am. Reports 387 (1885).
[68]Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1885).
[69]*See* Antell v. Stokes, 287 Mass. 103, 191 N.E. 407 (1934).
[70]In Howard v. Clark, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (Sup. Ct. 1969), the court prohibited the suspension of high school students who had been arrested and charged with criminal possession of hypodermic instruments. The school had suspended the students on the basis that the criminal charge was evidence that the students were "insubordinate or disorderly" or that their "physical or mental condition endangers the health, safety, or morals of himself or of other minors." The burden on the school in suspending students for off-campus activities is to show evidence that the crime, which was still unproved in the *Howard* case, directly endangers other students or school operations. *Accord*, Matter of Rodriguez, N.Y. Comm'r Decision No. 8015, 8 Ed. Dept. Rep. 214 (1969).
[71]*See* Palmyra Bd. of Educ. v. Hansen, 56 N.J. Super. 567, 153 A.2d 393 (1959).
[72]Felix Frankfurter in McNabb v. U.S., 318 U.S. 332, 347 (1943). Two years later Frankfurter said: "The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure." Malinski v. New York, 324 U.S. 401, 413-14 (1945).

tion was considered a privilege, not a right, and school expulsions were generally not reviewed by the court.

Today education is considered a right that cannot be denied without proper reason and unless proper procedures are followed.[73] Courts now require that students be accorded minimum standards of fairness and due process of law in disciplinary procedures that may terminate in expulsion. Minimum standards in cases of severe discipline of students are generally thought to include (1) an adequate notice of the charges against the student and the nature of the evidence to support those charges, (2) a hearing, and (3) an action that is supported by the evidence.[74]

To determine the procedural requirements on the school when it contemplates a lengthy suspension or expulsion, one begins with the state statutes. Before the school can expel a child, the statutes may require a hearing (as they do in Massachusetts, New York, and Pennsylvania) or some other procedural observance, such as New York's requirement of notice, representation by legal counsel, and right to question witnesses against the pupil.

Once the requirements of the state statutes are known, the next step is to determine the additional requirements imposed by the state and federal constitutions. Since most state statutes say nothing about the procedure to be followed by a school administrator or school board before it expels a student, we are dealing almost exclusively with constitutional requirements—primarily the Fourteenth Amendment to the United States Constitution, which provides that no person shall be deprived of "life, liberty, or property, without due process of law." The third step, then, is to determine what due process means with respect to student suspensions and

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[73] *See, e.g.*, Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970), which held that public education is a legal right protected by the equal protection and due process guarantees and that, at a minimum, denial of public education not be arbitrary.

[74] *See* Dixon v. Alabama State Bd. of Educ. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); and GENERAL ORDER ON JUDICIAL STANDARDS OF PROCEDURE AND SUBSTANCE IN REVIEW OF STUDENT DISCIPLINE IN TAX SUPPORTED INSTITUTIONS OF HIGHER EDUCATION, 45 F.R.D. 133, 147 (W.D. Mo. 1968). Both the cases and the GENERAL ORDER concerned the procedural rights of university students. Most of the cases concerning procedure and requirements of due process have involved college students. Although some aspects of these cases are not transferable to the public school setting, many of them are. On the question of what procedures are absolutely necessary before the student can be expelled, there is little basis to think that the fundamental requirements of notice, hearing, and sufficient evidence do not apply equally to public school expulsions. *See* Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969), which applied the *Dixon* procedural requirements directly to a high school expulsion case. *See also* Van Alstyne in STUDENT PROTEST AND THE LAW 207 (G. Holmes ed. 1969).

expulsions. Here one must examine the judicial opinions on the subject.

Before examining these opinions, I should note that due process requirements do not impose any particular model on the school disciplinary procedure. Due process is a flexible concept; whether it is afforded in a particular case depends on the circumstances of that case. "The touchstones in this area are fairness and reasonableness."[75]

In cases of student discipline, the exactness and formality of the procedure are directly proportional to the seriousness of the sanction that may be imposed. Thus, if the only penalty that may be given is a spanking or a detention after class, no formal procedure is required. Only in serious discipline cases involving long-term suspensions and expulsions is the school legally obligated to provide the student with such guarantees as a notice and a hearing and to take only actions supported by the evidence.

An informal procedure, similar to those most schools now employ, is legally permissible in cases of long suspensions and expulsions if the student is fully aware of his rights and voluntarily chooses the informal type of procedure.[76] The courts also have not applied the more elaborate procedural requirements when the dismissal is based on academic or scholastic failings.[77] Thus only when the issue is misconduct and not academic failing, and when the possible consequence is a long-term suspension or expulsion, must the school

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[75]Due v. Florida A. and M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963). Speaking about the application of due process, the Supreme Court has said:

> Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. Hannah v. Larche, 363 U.S. 420, 442 (1960).

See also Wright, *op. cit. supra* note 29, at 1060.

[76]The student also may be held to have waived his right to a hearing if he refuses to follow school procedures. *See* Grayson v. Malone. 311 F. Supp. 987 (D. Mass. 1970). For a discussion of informal proceedings at the college level, see Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368, 381-83 (1963), and Wright, *op. cit. supra* note 29, at 1070 and 1084.

[77]*See, e.g.*, Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913). In cases involving college students, the courts have also refused to apply *Dixon* and its progeny to scholastic failings. *See, e.g.*, Mustell v. Rose, 282 Ala. 358, 367, 211 So. 2d 489, 498 (1968); and Connelly v. University of Vermont, 244 F. Supp. 156 (D. Vt. 1965). *See also Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1139 (1968), and Jacobson, *The Expulsion of Students and Due Process of Law*, 34 J. OF HIGHER EDUC. 250, 252 (1963).

provide the student with the opportunity to have the more elaborate and formal procedure.

Specific Rules on Student Conduct

As a general rule, a school may expel a child for any conduct that would disrupt the educational process or endanger the health or safety of the pupils in the school system. From a legal standpoint, the expulsion need not be pursuant to a regulation adopted by the school board.[78] However, an expulsion or suspension may be declared unconstitutional if the student could not reasonably have understood that his conduct was prohibited. In such a situation, he would not have been given adequate notice of the impropriety of his action before he committed it, and, consequently, a basic requirement of due process would have been denied him.

A recent California case yields an example of a rule that was too vague and therefore unenforceable. A student had been expelled for violating a rule prohibiting "extreme hair styles."[79] In overturning the expulsion, the court said that the regulation "totally lacks the specificity required of government regulations which limit the exercise of constitutional rights."[80] Similarly, a federal court in Wisconsin invalidated the expulsion of college students for "misconduct" because the phrase was vague and too broad.[81]

When First Amendment freedoms are involved, courts are particularly demanding in requiring specificity in a rule. For example, a regulation requiring a student to "conduct himself as a lady or a gentleman" is insufficient basis for many restrictions on student conduct, especially conduct that may involve expression of First Amendment freedoms.

Thus it is important that the school board adopt written regulations on student conduct and that these regulations be stated with as much clarity and detail as possible. School rules also should be

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[78]N. Edwards, The Courts and the Public Schools 602-3 (1954).

[79]Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969). *Compare with* Burpee v. Burton, 45 Wis. 150 (1878), an old case in which a student expulsion for "general bad conduct" was upheld. These two cases graphically show the change in the law. Claims that the rules are too vague are common and not always justified. *See* State v. Zwicker, 41 Wis. 2d 497, 164 N.W.2d 512 (1969), and Dunmar v. Ailes, 348 F.2d 51 (D.C. Cir. 1965).

[80]Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68, 75 (1969).

[81]Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

publicized so that they reach all affected parties—students, parents, and the community the school serves.[82]

Notice

Proper notice in procedural due process places several requirements on the school. First, the school must forewarn the student of the type of conduct that, if engaged in, will subject him to expulsion. This aspect of notice was discussed in the preceding section.

Second, the school must present to the student accused of a violation and his parents a written statement specifying the charges against him and the nature of the evidence to support the charges on which the disciplinary proceeding is based.[83] Besides reciting the factual allegations against the student, the statement should refer to a specific rule or regulation that has been violated and state when and where the hearing is to be held.[84]

Although prior notice of the hearing is an absolute requisite for due process, the school discharges its responsibility if it honestly attempts to reach the student and his parents by telephoning him and sending a registered letter to his home. If the student cannot be reached because he has changed his address or is deliberately avoiding notification, he cannot later complain that he did not receive notice.[85]

Third, the school should allow the accused student some time to

[82]Professor Charles Wright, in his recently published Holmes Lecture, comments: "I think it no overstatement to say that the single most important principle in applying the Constitution on the campus should be that discipline cannot be administered on the basis of vague and impreeise rules." Wright, *op. cit. supra* note 29, at 1065.

[83]*In Dixon* v. *Alabama* State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961), the leading case in the area of procedural due process, the Fifth Circuit Court of Appeals said: "The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education." State v. Mizner, 50 Iowa 145 (1878), an old case requiring that a student be informed of the offense for which he is being punished, is in accord. For more recent cases requiring notice, *see* State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942); Madera v. Board of Educ., 267 F. Supp. 356, *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967); and Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969). *Compare with* Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1885) and Vermillion v. State *ex rel.* Englehardt, 78 Neb. 107, 110 N.W. 736 (1907), authorizing expulsion without notice. These old cases demonstrate the change in what is required of school boards in expulsion proceedings.

[84]*See* Burpee v. Burton, 45 Wis. 150 (1878), an old case upholding the expulsion of a student for "general bad conduct" with no further specification of the student's wrongdoing. This result has been effectively overruled by recent cases.

[85]*See* Wright v. Southern Texas Univ., 392 F.2d 728 (5th Cir. 1968), a college case in which students deliberately avoided being served notice. The court held that after deliberately frustrating the notice and hearing process, the students could not later object to their expulsion on the grounds of denial of due process.

prepare for the hearing by scheduling it to take place several days after the student has been notified of the charges against him. Two days would probably be a minimum time between a notice and a hearing unless the student agreed to an immediate hearing.[86] One court recently held that a high school student be given a minimum of five days' notice before a hearing on his expulsion.[87]

Fourth, the school must inform the student of his procedural rights before a hearing. This requirement can be accomplished by sending him, at the time he is notified of the charges, a printed statement outlining the procedure. It is good practice for the school to include in its student handbook a complete disciplinary and procedural code. Sending the student a copy of the handbook should satisfy this aspect of notice.

Since some if not most students will prefer a more informal procedure, a form on which the student can waive the formal process should accompany the statement of charges. If the student chooses the informal procedure, the school need not hold a formal hearing. However, the student should be given a reasonable period of time to consider whether he will waive the hearing, and his decision should be made only after consulting with his parents or guardians.

Hearing

The most fundamental aspect of procedural due process is the right to a fair hearing. Although the hearing need not adhere to the technical rules of a court of law, it must be conducted in accordance with the basic principles of due process of law.[88] These principles were spelled out as follows in *Dixon v. Alabama State Board of Education*,[89] the leading case in the area of student expulsion:

> The nature of the hearing should vary depending upon the circumstances of the particular case. . . . [But] a hearing which gives the . . . administra-

[86] *But see* a recent high school case, Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970), permitting a school to advise a student for the first time of the charges against him when he appears before the discipline committee. This procedure clearly is unfair and runs counter to most of the courts that have discussed the issue.

[87] Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969). Several college cases have discussed the question, but they have not been consistent in the minimum time that should be given to prepare a defense.

In Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), the court required ten days, while two days' notice of the hearing was found adequate in a Tennessee State University expulsion. Jones v. State Bd. of Educ., 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 25 L. Ed. 2d 27 (1970).

[88] *See* Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970), and Perlman v. Shasta Joint Junior College, 88 Cal. Rptr. 563 (1970), for recent court decisions that did not require formal judicial-style hearings for discipline cases involving suspension or expulsion from school.

[89] 294 F.2d 150, 158-59 (5th Cir. 1961).

tive authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. . . . [T]he rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. . . . [T]he student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.

Although the *Dixon* case concerned the expulsion of a college student, the procedural requirements enunciated by the court apply generally to secondary schools as well. Courts in Massachusetts,[90] Michigan,[91] and New York[92] have recently held that the opportunity of a student facing expulsion to present his case before an impartial tribunal is a minimum requirement of judicial fairness. Basic decency requires no less.[93]

Right to Counsel

Although some schools have permitted students to have legal counsel at school disciplinary proceedings,[94] most have not. This section raises two questions: First, does procedural due process require the school to permit the student to have legal counsel in a school disciplinary proceeding that might lead to serious sanctions? And second, should the school permit legal counsel when the student thinks only a lawyer can protect his interests?

The cases are divided as to whether legal counsel is a requirement of procedural due process.[95] It is probably safe to say, how-

[90]Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965).

[91]Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969). *See also* Godsey v. Roseville Pub. Schools, —F. Supp.— (E.D. Mich. 1970).

[92]Madera v. Board of Educ., 267 F. Supp. 356, *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967).

[93]Until recently, most courts ruling on the question of the student's right to a hearing before he could be expelled found that no right existed unless a statute required it. *See, e.g.*, Vermillion v. State *ex rel.* Englehardt, 78 Neb. 107, 110 N.W. 736 (1907); Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926); and State v. Hamilton, 42 Mo. App. 24 (1890). *See also* PETERSON, ROSSMILLER, & VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 411 (1968), and Annot., 58 A.L.R.2d 903, 916 (1958).

One early case to the contrary is a 1723 English decision from the Kings Bench, The King v. Chancellor of the Univ. of Cambridge, 92 Eng. Rep. 370 (K.B. 1723). The court held that it was contrary to natural justice to deprive a man of his academic degrees without notice or a hearing.

[94]*See* Morrison v. City of Lawrence, 186 Mass. 456, 72 N.E. 91 (1904), and R.R. v. Board of Educ., 109 N.J. Super. 337, 263 A.2d 180, 187 (1970).

New York has recently amended its statutes to provide that before a pupil is suspended for over five days, he shall be given a hearing "at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil." N.Y. EDUC. LAW § 3214 (1969).

[95]The case most often cited to support the conclusion that procedural due process does not require that a secondary student be allowed legal counsel in an expulsion proceeding

ever, that most courts today would not find that the student has an absolute constitutional right to legal counsel in a hearing that might result in expulsion. This conclusion assumes, however, that the hearing maintains a conference-like atmosphere with emphasis on finding the facts and not on prosecuting the student. It further assumes that the student is permitted to bring his parents (or other adult representatives if his parents are unable to properly advise and assist him) and that the school does not use a lawyer to present its case. Several cases have indicated that if the school uses a lawyer, the student must be permitted to have one also.[96] Otherwise the proceeding would be unfairly stacked against the student, and a denial of due process.

Most of the litigation on student expulsions has come from the colleges. In most of these cases the colleges have permitted students to have legal counsel:[97] thus the question of the right to counsel has not usually been an issue. The trend in college rules governing disciplinary procedures is to permit students in expulsion cases to have legal counsel.[98] Nevertheless, when the right to counsel has been denied by the college and the point litigated, most courts have ruled against a legal right to counsel.[99] However, as college disciplinary hearings become increasingly formal, courts

is Madera v. Board of Educ., 267 F. Supp. 356, *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). To interpret *Madera* as holding that legal counsel is not required in an expulsion proceeding is an error. *Madera* involved a guidance conference rather than an expulsion proceeding and regardless of its outcome the school had no authority to expel. For cases denying a student's request for legal counsel, see Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), *aff'd mem.*, 381 N.Y.S.2d 970 (1967), and cases cited at note 99 *infra*. *See generally* Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970).

But see Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967), in which the court ordered the school to permit the student to have legal counsel in a secondary school expulsion hearing as a requirement of due process. *See* Comment, *Due Process Does Not Require that a Student be Afforded the Right to Counsel at Public School Suspension Hearing*, 22 RUTGERS L. REV. 342 (1968).

[96]*See* French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969), and Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

[97]See, e.g., Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); and Jones v. State Bd. of Educ., 279 F. Supp. 190, *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 25 L. Ed. 2d 27 (1970). *In re* Carter, 262 N.C. 260, 137 S.E.2d 150 (1964).

[98]See, e.g., BERKLEY CAMPUS REGULATIONS IMPLEMENTING UNIVERSITYWIDE POLICIES 15 (1969); ABA'S LAW STUDENT DIVISION, MODEL CODE FOR STUDENT RIGHTS, RESPONSIBILITIES AND CONDUCT, § 48 (1969); and YALE UNIVERSITY LAW SCHOOL DISCIPLINARY CODE, Rule 10 (1970).

[99]*See, e.g.*, Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd per curiam*, 299 F.2d 683 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Hutt v. Brooklyn College, 68 Civ. 691 (E.D.N.Y. July 30, 1968); Perlman v. Shasta Joint Junior College, 88 Cal. Rptr. 563 (1970); and GENERAL ORDER ON JUDICIAL STANDARDS, *supra* note 74, at 147. Other cases, however, have required legal counsel. *See, e.g.*, Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969), holding that a lawyer could advise a student but could not cross-examine or conduct defense; and French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969), permitting a lawyer when a college uses a senior law student to prosecute.

likely will require colleges to permit legal counsel when the student requests it as a requirement of due process.[100]

As the due process concept is expanded, the courts likely will impose the same requirement on the public schools. The argument can be made that if the right to be represented by legal counsel is an emerging requirement of procedural due process at the college level, the need for an attorney is even greater at the secondary school level. In support of this argument, it can be noted that a public secondary education is more essential than a college education, that expulsion from public secondary school is more drastic than expulsion from college since educational opportunities are more seriously affected, and that the relative immaturity and unsophistication of the secondary school student make him less capable than a college student of presenting his own defense in a disciplinary hearing.[101]

The primary reason that schools object to granting a student's request to have legal counsel is the fear that his attorney will change the nature of the hearing. School authorities fear that the hearing will become less like a conference and more like a judicial proceeding, a change they want to avoid.

The presence of counsel also increases the time, cost, and work load of the disciplinary proceeding. If the student has legal counsel, the school authorities will think it necessary to bring in the school board attorney, to whom they probably will turn over much of the basic handling of the school's case. This development further adds to the judicial nature of the case. The school also may feel that it must obtain a disinterested lawyer or jurist to act as the presiding officer. The result is a more expensive and longer proceeding. Furthermore, if the student is permitted to have counsel, the next step is to provide indigent students with counsel, in the interest of fairness if not as a legal requirement. This additional step poses problems of cost, of finding lawyers trained to handle juvenile problems, and of dealing with people who are trained in adversary proceedings and often fail to recognize the rehabilitative aspects of the guidance conference.[102]

These legitimate concerns of school authorities must be considered in conjunction with the student's need to have his interests pro-

[100]Professor Wright thinks that there probably is a right to legal counsel in college disciplinary hearings at the present time. *See* Wright, *op. cit., supra* note 29, at 1076.

[101]*See* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378, 397 (1969).

[102]*See* 42 N.Y.U.L. REV. 961 (1967). *See also* Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501 (1963).

fected by an adult at the expulsion hearing. In most cases, the student's parents or some other nonlawyer adult of his choosing, such as a social worker, guidance counselor, or minister, would probably satisfy the need to see that a fair hearing is conducted. However, if the student thinks that only legal counsel can properly represent him in an expulsion proceeding, I strongly recommend that the school permit him to be so represented. A refusal may appear to many as an admission by the school that its case is weak. By refusing a student's request for an attorney in an expulsion case, the school often stands to lose far more in the eyes of the community than it gains.

Inspection of Evidence

I know of no high school expulsion case in which the right to inspect the evidence against the student was in issue. As discussed earlier under the topic of notice, the student must be informed of the nature of the evidence against him. But as a concomitant to this fundamental requirement of due process, it seems only fair to permit the student to inspect before the hearing any affidavits or exhibits that the school plans to introduce at the hearing. The inspection privilege should extend not only to the evidence to be used against the student at the hearing, but also to the list of witnesses and copies of their statements.[103] The school's primary interest at the hearing is to determine the facts and to minimize the possibility of making a mistake about the student. Full inspection by the student of the documents concerning his charged misconduct promotes these aims. Schools may, however, be obligated to protect faculty evaluations of other student's performances and behavior from inspection. Such records are usually considered confidential.[104]

Trier of Fact

A fair hearing presupposes that the accused student will have an opportunity to present his case before an impartial trier of

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[103]In two college cases in which the question of inspection was raised, both courts permitted it. The courts applied the traditional concepts of discovery in the practice of law and found discovery workable. *See* Esteban v. Central Missouri State College, 277 F. Supp. 649 (1969), and Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).

[104]In Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967), the court excluded faculty evaluations of students from records that could be inspected. *See also* Holloway in STUDENT PROTEST AND THE LAW 92 (G. Holmes ed. 1969). For an examination of the ethical and legal aspects in the handling of school records, *see* RUSSELL SAGE FOUNDATION, GUIDELINES FOR THE COLLECTION & DISSEMINATION OF PUPIL RECORDS (1969).

fact.[105] The question is, What constitutes an impartial trier of fact? Clearly, the Sixth Amendment's requirement of a trial by an impartial jury, which is construed to mean a jury of one's peers, is not required in student disciplinary cases. The Sixth Amendment applies only to criminal prosecutions. Since a disciplinary hearing is a civil proceeding, reviewable in a court of law, the constitutional requirement of a jury trial has no application.

Nor need there be a hearing board or tribunal, though I strongly recommend that the school consider using a hearing panel for expulsion and suspension cases. Usually in these cases the principal has been the trier of fact, though most states require the superintendent or school board to approve expulsions and long-term suspensions. Generally the principal will have prior knowledge and contact, if not direct involvement, with the case. Not infrequently he will be the primary school official present when the infraction of school rules occurs, and it will be his testimony that determines whether the student is suspended or expelled.

Although I seriously question the soundness of the principal's being the trier of fact in any suspension or expulsion case in his school and strongly object to his assuming this role in expulsion cases in which he has had direct involvement, the commingling of the decisional and prosecutorial functions does not on its face make the hearing invalid. Unless it can be shown that the principal's involvement has prejudiced him so that he cannot impartially and fairly consider the evidence, courts are unlikely to overturn the expulsion.[106] However, the student should be entitled to have a different trier of fact, or member of a panel, if he can show that the trier has bias, malice, or personal interest in the outcome of the case. The opportunity to prove bias satisfies the constitutional requirement for an impartial trier of fact.

Cases will arise in which the principal is so closely connected

[105]Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965). In Perlman v. Shasta Joint Junior College, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970), a California court held that a showing of bias and prejudice on the part of the administrative body denied the student a fair hearing and thus violated due process of law.

[106]In several college discipline cases that have considered the matter of combining decisional and prosecutorial functions in an expulsion procedure, courts have permitted the functions to be combined. They have reasoned that it is difficult and burdensome, and sometimes impossible, to obtain a panel whose members have had no previous contact with the case. *See, e.g.*, Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967); Wright v. Texas Southern Univ., 277 F. Supp. 110 (S.D. Texas 1967); Jones v. State Bd. of Educ., 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 25 L. Ed. 2d 27 (1970).

An important difference between college and high school expulsions is that at the college level a panel rather than one individual is usually the trier of fact. The argument that obtaining a trier of fact with no previous contact with the case is difficult is even more persuasive in speaking of a panel than of a single individual.

with the student hearing that he should not, in my opinion, serve on the tribunal. A student expulsion case on the college level is an example of such a case. Students at Oshkosh State University faced expulsion on charges of breaking into the president's office, threatening him, and holding him prisoner. Under the university's rules, the president considers appeals from student discipline cases and makes recommendations to the board of regents. In this case, however, the regents wisely excused the president from participation in the hearing and obtained the services of a former state supreme court justice to conduct the hearings and make recommendations.[107] This procedure represents a fair and easy way to eliminate conflicts of interest. Even if the president in this situation could have been fair in his judgment, the school avoided the likely accusation that it had not provided an impartial tribunal.[108]

The same considerations apply to public school expulsions. Although not required by law, the best procedure in expulsion cases in which the principal has been a direct participant in the actions that are the basis for the expulsion is to have a member of the school's faculty or, preferably, a panel consisting of a teacher, parent, and student to serve as trier of fact.

Witnesses—Cross-Examination, Confrontation, and Compulsory Production

In criminal prosecutions and in most administrative proceedings, the defendant may confront and cross-examine witnesses testifying against him, call his own witnesses, and compel witnesses to attend the trial or hearing. In a student disciplinary hearing, the student certainly may call his own witnesses. The procedure would be a charade if the student did not have this right.[109] However, there is considerable question over the student's rights to confront and cross-examine witnesses and to compel his own witnesses to attend the hearing.

Compelling the attendance of witnesses may be beyond the power of the school, though some states grant general subpoena power to

[107]Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968).

[108]*But see* Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), in which the court said that it is necessary that all evidence be before the president of the college, since he is the one with the authority to expel or suspend a student.

[109]In Morrison v. City of Lawrence, 186 Mass. 456, 460, 72 N.E. 91, 92 (1904), the court noted: "The hearing afforded may be of no value if relevant evidence, when offered, is refused admission, or those who otherwise would testify in behalf of the excluded pupil are prevented by action of the [school]." *See also* Scher v. Board of Educ., 1968 School Law Dec. 92, in which the local board of education was required to give the student full opportunity to present evidence to support his decision.

school boards.[110] Legally, schools are not required to subpoena witnesses for students in expulsion cases.[111] However, if the school has subpoena powers, any witnesses whose testimony seems necessary to a proper investigation of the matter, including those requested by the student, should be compelled to attend.

Considerable controversy attends the question whether confrontation and cross-examination are rights that must be extended to the student. In the several high school expulsion cases that have commented on the student's right to cross-examine witnesses, courts have said that the school need not grant this right.[112] Courts ruling on this question in college expulsion cases also have found the right not to be a requirement of due process. However, many colleges and some public schools do permit confrontation and cross-examination in student disciplinary cases. In the classic *Dixon* case, the United States Court of Appeals for the Fifth Circuit held that a full-dress judicial hearing with the right to cross-examine witnesses is not required because (1) it was impractical to carry out, and (2) the attending publicity and disturbance of university activities may be detrimental to the educational atmosphere.[113] This is the position most generally taken by the courts in cases in which the issue has been raised.

Speaking of these cases and the university setting, Professor Wright suggests that the reasons given for limiting or denying confrontation and cross-examination are not "wholly persuasive."[114] I believe they are equally unpersuasive in a secondary school expulsion proceeding. Since there is no right to a public hearing in a student disciplinary proceeding, there is little reason to think the hearing will create undue publicity and disturbance.[115] The argument that cross-examination is impractical to carry out perhaps has

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[110]*See* N.C. GEN. STAT. § 115-32, which grants subpoena power to school boards for "all matters which may lawfully come within the powers of the board. . . . " Compare N.Y. EDUCATION LAW § 2215(12) (McKinney 1953), granting district superintendents subpoena power for obtaining testimony in a case or proceeding heard by the Commissioner of Education.

[111]*See* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378, 395 (1969), in which he argues for the student's right to compel the attendance of witnesses.

[112]*See, e.g.*, Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970); Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970); and Godsey v. Roseville Pub. Schools, —F. Supp.— (E.D. Mich. 1970). *But see* R. ACKERLY, THE REASONABLE EXERCISE OF AUTHORITY 15 (1969), who says that the accused must be allowed to cross-examine witnesses.

[113]Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961). *Accord*, State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942), and Wong v. Hayakawa, No. 50983 (N.D. Cal. 1969).

[114]Wright, *op. cit. supra* note 29, at 1076.

[115]See text at note 140, *infra*.

more substance, particularly if the examination is not conducted by legal counsel or someone trained in the technique.

The courts in *Dixon* and in other cases have contended further that cross-examination will make the hearing unnecessarily legalistic, moving it toward the full-dress judicial proceeding schools wish to avoid. The schools have good reasons for wanting to minimize the adversary aspects of the hearing and to keep it from becoming any more like a criminal prosecution than necessary. Ideally, the hearing should be a conference, the major objective being to find ways to help the student correct his conduct so that he can fully participate in the school program. Cross-examination may make retaining the rehabilitative aspects of the hearing more difficult. Moreover, many student and teacher witnesses will find the procedure upsetting.

Nevertheless, expulsion will in many cases hinge on the credibility of the testimony, making cross-examination essential to a fair hearing. Due process will then require questioning of witnesses. Beyond the strictly legal question, the school's interest in obtaining the most accurate account of the student's conduct before it takes action will be enhanced by giving both the student and the school the right to cross-examine any witness testifying at the hearing.

Professor Clark Byse of the Harvard Law School suggests an alternative to complete rejection or full granting of confrontation and cross-examination in student disciplinary hearings. He proposes that confrontation and cross-examination be required not routinely but only when they are "the conditions of enlightened action."[116] Thus if the expulsion proceeding hinges on the credibility of testimony received, confrontation and cross-examination would be "conditions of enlightened action." When so justified, both should be required as a matter of good school policy and as a condition of due process.

Self-Incrimination

School disciplinary proceedings, at both the high school and the university levels, have generally been viewed as administrative proceedings that are not sufficiently criminal in nature to require the Fifth Amendment's protection against self-incrimination. This view distinguishes school disciplinary proceedings from juvenile

[116]Byse, *The University and Due Process: A Somewhat Different View*, 54 AAUP BULL. 143, 145 (1968).

court proceedings, in which the United States Supreme Court has held the protection against self-incrimination to be a requirement of due process.[117]

The question of self-incrimination usually arises when a student's conduct may result in his being charged with both a school offense and the violation of a criminal law. In situations in which both criminal and disciplinary proceedings are pending, students have contended that they cannot be compelled to testify in the disciplinary hearing because the testimony, or leads from it, may be used to incriminate them at the later criminal proceeding. This objection, based on the Fifth Amendment's protection against self-incrimination, has been raised unsuccessfully in several college cases. In *Furutani v. Ewigleben,*[118] students sought to enjoin expulsion hearings until after criminal actions arising out of the same activities had been completed. They argued that they would be forced to incriminate themselves to avoid expulsion and that their testimony would then be offered against them in the subsequent criminal proceedings. In denying their request, the court held that the students could object at the criminal trial to incriminating statements made at the expulsion hearings and that no Fifth Amendment right had been jeopardized. The court based its ruling on *Garrity v. New Jersey,*[119] a case in which compulsory testimony at a state investigation was held inadmissible in a subsequent criminal prosecution arising from the investigation.

The *Furutani* decision represents the consensus of courts today.[120] (However, courts in at least two cases, one a high school case involving expulsion for cheating, have suggested that the privilege against self-incrimination would be available at a hearing on expulsion.[121]) Protection against self-incrimination clearly is not a basis for postponing expulsion hearings until criminal trials are completed.[122] However, some commentators have argued that the privilege against self-incrimination should be available in disci-

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117*In re* Gault, 387. U.S. 1, 47 (1967).
118297 F. Supp. 1163 (N.D. Cal. 1969).
119385 U.S. 493 (1967).
120*See* Madera v. Board of Educ., 386 F.2d 778, 780 (2d Cir. 1967), *cert. denied,* 390 U.S. 1028 (1968); and Board of Educ. v. Helston, 32 Ill. App. 300 (1890). For cases at the college level, *see* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); and GENERAL ORDER ON JUDICIAL STANDARDS, *op. cit. supra* note 74, at 147.
121Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (Sup. Ct. 1967), and State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942).
122*See* Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). *See also* Kalaidjian, *Problems of Dual Jurisdiction of Campus and Community,* in STUDENT PROTEST AND THE LAW 136-39 (G. Holmes ed. 1969).

plinary proceedings involving violation of criminal statutes, such as arson or occupying a school building.[123] They note that in no other state proceeding can persons be compelled to confess their guilt of a crime, and "there is no reason to think that the university [or secondary school?] disciplinary proceeding can be an exception."[124] Under existing case law, however, the school may proceed with a prior disciplinary proceeding and, under the majority of opinions, students may be compelled to testify. It is also clear that a *Miranda*-type of warning is not applicable to a school investigation of alleged misconduct.[125]

Searches of Students and Lockers

Until recently, the school's right to search a student's person or his locker has been little questioned. The Fourth Amendment's prohibition against unreasonable searches and seizures, as applied to the states and their instrumentalities through the Fourteenth Amendment, was generally thought inapplicable to school searches.[126] Several recent court opinions, however, clearly indicate that searches of a student and his locker are limited by the Fourth Amendment.

The Fourth Amendment's prohibition against illegal searches has generally been construed to permit a search only when (1) a warrant has been issued authorizing it (2) there is probable cause and circumstances are such that obtaining a warrant would frustrate the purpose of the search, or (3) a valid arrest has been made and the search is incident to the arrest. If a search is made that vio-

[123]Wright, *op. cit. supra* note 29, at 1077, and Lucas, *Student Rights and Responsibilities*, in THE CAMPUS CRISIS 17, 70-72 (1969).

[124]Wright, *op. cit. supra* note 29, at 1077.

[125]A *Miranda*-type warning is a reminder to suspects of crime that they may refuse to make self-incriminating answers to questions and may have the assistance of a lawyer in answering questions. *See* Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 889 (Sup. Ct. 1967), and Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968), both of which rejected the applicability of *Miranda* to expulsions in secondary and higher education.

[126]Only two early cases involving searches of public school students were found—both from Tennessee. One is Phillips v. Johns, 12 Tenn. App. 354 (1930), a civil action by a student seeking damages for trespass because of a search by a teacher. The teacher had searched the child by removing her clothes because she had been in a room from which money was missing. The court held that the teacher's *in loco parentis* authority extended only to her proper duties as a teacher and could not be used to recover money for a third person. It then reversed the directed verdict for the teacher and remanded the case for a new trial on the question of whether the search was made for the benefit of the teacher or for the ethical training of the child.

In *Marlar v. Bill*, 181 Tenn. 100, 178 S.W.2d 634 (1944), the Tennessee Supreme Court upheld a teacher's examination of a boy's pockets conducted after a dime was found to be missing from a room he had entered during recess, in violation of school regulations. The court said the teacher was attempting to clear the boy of suspicion of theft and, therefore, was acting in the child's best interest.

lates these requirements, several consequences may result. An individual making an illegal search may be sued in civil court for violation of the person's privacy[127] and, under certain circumstances, may be criminally prosecuted. Another result of an illegal search is that the evidence or contraband obtained may not be introduced in a criminal proceeding. The fourth possible consequence of an illegal search is that the evidence obtained may be inadmissible in a school disciplinary procedure. It is this last possible consequence that is relevant to this examination of student suspensions and expulsions.

Most of the litigation on alleged illegal searches has involved searches of students' lockers that have produced evidence later sought to be introduced in a criminal prosecution against the student. In *Overton v. New York*,[128] the United States Supreme Court ordered a new hearing of a narcotics prosecution in which the conviction of a student was based on the discovery of drugs in his locker by police who were without a valid warrant but had permission from the vice-principal to search the locker. The New York Court of Appeals had upheld the search on the theory that the vice-principal had not been coerced by the invalid warrant to consent to the search, but had acted under his independent duty to inspect a locker when suspicion arises as to its contents. A fact important to this decision is that the vice-principal had the combinations of all the locks and the students knew that they did not have exclusive possession of the lockers *vis-a-vis* the school authorities. On appeal the Supreme Court remanded the case to the New York Court of Appeals for determination of whether the vice-principal had acted under duress. The Court of Appeals essentially restated its earlier decision, finding that the vice-principal had exercised an independent "duty" to search, a duty claimed by the vice-principal and tacitly approved by the court.

In another case, the Kansas Supreme Court upheld a burglary conviction based on the discovery of stolen goods in a bus station locker that was entered by a key removed from the defendant's school locker.[129] The defendant had consented to the principal's

[127] *See, e.g.*, Phillips v. Johns, 12 Tenn. App. 354 (1930).

[128] 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *vacated and remanded*, 393 U.S. 85 (1968), *original judgment aff'd* at 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969). One law review article said of the original court of appeals decision: "In this entire discussion of the obligation and duty of school officials no mention is made of the Fourth Amendment and no case is cited. It appears the decision is one of pure policy in granting almost absolute power to those responsible for administering the schools. . . . Of all the opinions written by Judge Keating, *Overton* is the most disappointing." 36 BROOKLYN L. REV. 41, 55 (1969). *See also* 38 FORDHAM L. REV. 344 (1969).

[129] State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 90 S. Ct. 966 (1970).

opening of his school locker in the presence of the police. The court upheld the search on the bases of the defendant's uncoerced consent and the nature of the school locker. It said that although the student may control his school locker in reference to fellow students, his possession is not exclusive against the school and its officials. As in *Overton*, the fact that the principal had a master list of all lock combinations and a key that would open all school lockers was important to the court's decision. The court considered the right of inspection inherent in the authority vested in school administrators to manage schools and protect other students.[130]

From these and several related college dormitory search cases,[131] it appears that the school may search a student's locker without a warrant or the student's permission when it has reasonable grounds for the search. Also, the school may authorize the police to conduct a search when they have reasonable grounds to believe that a crime has been committed and that evidence in reference to the crime may be within the locker. As a federal district court said in *Moore v. Student Affairs Committee of Troy State University*[132] (a case upholding a search that was made without a warrant, under the student's protest, and not incidental to a legal arrest), the Fourth Amendment prohibition against unreasonable searches and seizures is not violated when there is "a reasonable belief on the part of the college authorities that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously inter-

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[130]*See In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969), in which a California court upheld a narcotics conviction based on evidence obtained from a search of a locker by a principal. The search was without a warrant and without the student's consent. With questionable logic, the court held that the principal was not a governmental official within the meaning of the Fourth Amendment. For Fourth Amendment purposes, the principal was considered to be a private citizen and not acting under the authority of the state. If the search had been a joint operation with police, however, the court agreed that it would have been tainted with state action and therefore illegal.

A similar holding in connection with a juvenile court proceeding is found in Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

[131]*See, e.g.*, Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968), and People v. Kelley, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961). *But see* People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Dist. Ct. 1968), a case concerning a search of a student's dormitory room at Hofstra University, in which the court noted: "Certainly, there can be no rational claim that a student will self-consciously waive his constitutional right to a lawful search and seizure. Finally, even if the doctrine of implied consent were important to this case, the consent is given, not to police officials, but to the university and the latter cannot fragmentize, share, or delegate it." 292 N.Y.S.2d 706, 709.

See Comment, *Public Universities and Due Process of Law: Students Protection against Unreasonable Search and Seizure*, 17 KAN. L. REV. 512 (1969); and Comment, *College Searches and Seizures: Privacy and Due Process Problems on Campus*, 3 GA. L. REV. 426 (1969).

[132]284 F. Supp. 725 (M.D. Ala. 1968).

fere with campus discipline."[133] Evidence obtained from such searches can be used to convict a student in a criminal prosecution. Clearly, the evidence also can be used in a noncriminal student expulsion proceeding.

Searches of the student's person should be considered in a different category from locker searches, particularly when a criminal prosecution is possible. Unlike a locker or a dormitory room, which the student might expect to be inspected occasionally, things carried on his person he can reasonably expect to be free from search. Consequently, regular Fourth Amendment standards for the search are much more likely to be applied by the courts. Thus, if a search of a student's person might lead to a criminal prosecution, a school official should make the search only when there is (1) a warrant, (2) probable cause and circumstances that would frustrate the purpose for the search if a warrant were obtained, or (3) a valid arrest. By limiting searches of the student's person to these conditions, the school official protects both himself from possible suit and the evidence for admission at a possible criminal trial.

However, if the school conducts a search of either a locker or the student's person that does not satisfy the Fourth Amendment requirements, the question remains whether it can use the evidence as basis for suspending or expelling the student. At least one commentator on the subject of searches of high school students thinks that evidence obtained illegally under Fourth Amendment standards cannot be used against the student in a disciplinary proceeding that may lead to expulsion or suspension.[134] This conclusion is reached by analogizing the school's disciplinary procedure with a criminal procedure. To my knowledge, however, no court has held evidence inadmissible in a school expulsion hearing on the basis that the method of its procurement violates Fourth Amend-

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[133] *Id.* at 730. The requirement that the search be made when there is "reasonable belief" is less stringent than the normally required "probable cause" that a crime has been committed. Two primary reasons are given for the lower standard of reasonable belief. One is that the student cannot reasonably expect his room to be a place free of school inspection. The second reason is that the school, with some *in loco parentis* duty, must protect other students from a student suspected of unlawful activity. One precaution that school officials can draw from these cases if they wish to search lockers within the Fourth Amendment is that the school must publicize its locker policy, reserving the right to search a student's locker and stating that a student cannot expect his locker to be free from inspection when the school finds its inspection necessary to maintain school operation and to protect other students.

[134] Knowles, *Crime Investigation in the School: Its Constitutional Dimensions*, 4 J. OF FAMILY LAW 151, 159 (1964).

ment requirements; it seems unlikely that any court will soon do so.[135]

Nevertheless, in fairness to the student, and to avoid having students think that their privacy has been invaded, the school should always seek the student's permission before conducting a search and should obtain a warrant for a search of his body if circumstances permit. Only when it has "reasonable grounds" to think that a student possesses weapons or has committed a crime, and that the evidence or contraband is on the student's person or in his locker should the school conduct the search without the student's permission. Fishing expeditions for evidence of school violations are illegal and should be ruled out as a matter of school policy.[136]

Sufficiency of Evidence

Disciplinary action may not be taken if it is not supported by substantial evidence. This is one of three minimal due process requirements, along with notice and a hearing in cases of severe discipline.[137]

An example of insufficient evidence is illustrated by a case in which the school had accused a student of cheating by deliberately folding a sheet of information into her blotter for use in a closed-book history exam. The student denied that she intended to cheat, saying that the alleged crib sheet was study notes accidentally folded into her blotter. The court, in granting *mandamus*, directed the school to issue her diploma on the basis that the evidence was insufficient to prove cheating. Thus a school cannot expel a student without enough evidence to prove the charge it makes against him. To do so would be arbitrary and capricious and therefore unlawful.[138]

Mass Hearings

On the college level, school authorities have sometimes found it desirable or necessary to conduct expulsion hearings in which

[135]It should be pointed out, however, that the standards for school searches are contrary to several other decisions involving such administrative searches as fire and health inspections. *See, e.g.,* Camera v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967).

[136]Almost every rule has its exceptions. A general search of all lockers after a bomb threat or to reduce substantial traffic in narcotics are examples of when a general search should be upheld as a proper exercise of school responsibility.

[137]Ryan v. Board of Educ., 124 Kan. 89, 257 P. 945 (1927).

[138]Most states have an administrative procedure act that sets out the requirements for judicial review of final administrative decisions. If the decision—in our case, a school expulsion—is unsupported by competent, material, and substantial evidence, the decision will be reversed. *See, e.g.,* Judicial Review of Decisions of Certain Administrative Agencies, N.C. GEN. STAT. ch. 143, art. 33 (1953).

charges were considered simultaneously against large numbers of students. The same may be true in high schools when mass violations of school rules occur. This procedure was recently upheld when the University of Colorado tried sixty-five students who had locked arms to deny access to university buildings.[139] The students admitted acting as a group, and the court held that they could be tried as a group. One writer made the following observation on the constitutionality of this procedure:

> There certainly is no legal impropriety in holding a joint trial, and I don't believe that even with the assistance of counsel the student could constitutionally insist upon a separate trial, despite the possibility that a kind of prejudice may occur because of testimony in one part of the trial that relates to another student.[140]

Double Jeopardy

Students have argued that the Fifth Amendment's prohibition against double jeopardy prohibits the application of both criminal and administrative sanctions against the same individual for the same offense. This claim has no legal basis. As Profesor Wright notes, " . . . claims of 'double jeopardy' are not uncommon, but are utterly without merit."[141]

Nor is there basis for a double-jeopardy claim against punishing a student twice for the same offense. In a recent Ohio case, a student was suspended by the principal for ten days. When the boy returned to class following the ten-day suspension, he was expelled by the superintendent for the remainder of the semester. The Ohio Appellate Court found no question of double jeopardy involved in the case, observing that suspension and expulsion are separate punishments: suspension is an immediate response by the principal to the misconduct, whereas expulsion is a sanction reserved to the superintendent after he reviews the offense.[142]

Public Hearing

I know of no secondary school case that has ruled on the question of a student's right to a public hearing.[143] At the college level,

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[139]Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).

[140]Van Alstyne, *op. cit. supra* note 74, at 206.

[141]Wright, *op. cit.* supra note 29, at 1078. *See also* GENERAL ORDER ON JUDICIAL STANDARDS, *op. cit. supra* note 74, at 147-48.

[142]State *ex rel.* Fleetwood v. Board of Educ., 20 Ohio App. 2d 154, 252 N.E.2d 318 (1969).

[143]A recent North Carolina case, *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), upheld a juvenile court proceeding that denied a public hearing to minors charged with an unlawful demonstration on a public highway. If a public hearing is not required by due process in a proceeding that may result in a child's commitment, it should not be required in a school expulsion proceeding.

however, the question of the student's right to a public hearing has been litigated several times. Courts uniformly have held that a hearing in open court is not required for compliance with procedural due process.[144] Thus fairness does not require that the disciplinary proceeding be open to the public.

It should be noted that the Sixth Amendment provision for a public trial is not for the benefit of the public; it is for the protection of the accused. This constitutional safeguard is met if two or three neutral observers are allowed in the hearing room.[145] The school is not required to permit theatrical performances, like those in the "Chicago Seven" trial. A completely open session can be the quickest way to destroy the fair and orderly function of the hearing.[146]

Transcript of Hearing

In several college cases, courts have considered whether the school must provide a transcript of the hearing when the student requests one. Although the cases are divided, it is clear that if an appeal is to be taken, a transcript must be available unless the appeal is to be *de novo*, with all evidence presented again. The easiest way to handle this problem is to tape-record the proceeding. If an appeal is taken, the tape can be reduced to writing.

Appeal

Most state statutes either require the school board to expel the student or permit him to have his expulsion reviewed by the school board,[147] but he has no constitutional right to appeal to the school board. Most states also have an administrative procedure act that permits a judicial appeal from a final administrative decision. If the complainant thinks that he has been denied a statutory or constitutional right or that the administration or school board has acted arbitrarily or capriciously, he may appeal to a court.[148] Most courts have accepted student discipline appeals on the basis of an alleged denial of due process of law.

[144]*See* Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968); GENERAL ORDER ON JUDICIAL STANDARDS, *op. cit. supra* note 74, at 147; DeVeaux v. Tuskegee Institute, M.D. Ala. 758-E (April 25, 1968) (unreported).

[145]*See* Van Alstyne, *op. cit. supra* note 74, at 206-7. *See also* Wright, *op. cit. supra* note 29, at 1079-80.

[146]One problem recently encountered by the administration at Columbia University was the attempt by students to turn student disciplinary hearings into demonstrations. The administration solved this problem by scheduling hearings in very small rooms.

[147]*See, e.g.*, N.C. GEN. STAT. § 115-34 (1955).

[148]*See, e.g.*, N.C. GEN. STAT. § 143-307 (1953).

Immediate Suspension

One last point merits discussion. Occasionally a school administrator may contemplate suspending a student summarily pending a later hearing to consider imposing a long-term suspension or permanent expulsion from the school. Immediate suspension is seldom warranted, but it can be justified in those rare instances when it offers an effective means of both communicating to the student that his conduct was unacceptable and getting his parents immediately involved by way of a conference to recognize and accept a greater responsibility in helping the student meet school standards for acceptable conduct. The only other justifiable use of an immediate suspension is when the student's continued presence on the school grounds would endanger his safety or well-being, the safety or well-being of other members of the school community, or the proper functioning of the school. In any situation, the suspension should be as short as possible.

An immediate suspension is limited to a short period of time. If it were not so limited, a school could use the suspension power to effect an expulsion without giving the student a hearing and complying with other requirements of due process. In the cases involving immediate suspensions of high school students in which the actions were challenged for denial of procedural due process, courts have upheld ten-day suspensions that were imposed without specification of the charges or a hearing on the misconduct.[149]

In a college case in which students challenged the constitutionality of a suspension pending a hearing on expulsion, the court declared a thirteen-day suspension without a hearing to be too long a delay and therefore a denial of due process.[150] This case involved immediate suspensions of students for the violent disruption of the Madison campus of the University of Wisconsin. The university submitted numerous affidavits to show that the continued presence of the suspended students on the campus would endanger both persons and property. The court accepted this testimony, but held that there was no showing that it would have been impossible or unreasonably difficult for the regents, or an agent designated by them, to provide a preliminary hearing before the interim suspension order.

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[149]Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 522 (C.D. Cal. 1969); Banks v. Board of Pub. Inst. of Dade Co., 314 F. Supp. 285 (S.D. Fla. 1970); and Hernandez v. School Dist., 315 F. Supp. 289 (D. Colo. 1970).

[150]Stricklin v. Regents, 297 F. Supp. 416 (W.D. Wis. 1969), *appeal dismissed for mootness*, 420 F.2d 1257 (7th Cir. 1970).

Summary

The major aspects of procedural due process involving lengthy suspensions and expulsions have now been covered. Several issues, like the confidentiality of student records, have been mentioned only in passing because they are covered by other monographs in this series.

The three basic requirements in granting procedural due process merit repeating. When a school contemplates a lengthy suspension or an expulsion of a student, it must as a minimum (1) give the student adequate notice of the grounds of the charges and of the nature of the evidence against him, (2) conduct a hearing unless the student waives it, and (3) take action only when it is supported by the evidence.[151] If these three basic requirements are met, the procedure will usually satisfy the demands of due process required by the courts. In adopting such a procedure the school will have gone far in assuring that the student is treated fairly and that there will be a reliable determination of the issues.

CONCLUSION

The evolution of student rights and the judicial protection of these rights will be regarded by many at best as a mixed blessing and at worst as a serious interference with internal school discipline and affairs. It should be remembered, however, that the schools must have and do have plenary authority to regulate conduct calculated to cause disorder and interfere with educational functions. The primary concern of the courts is that students be treated fairly and accorded minimum standards of due process of law.

In light of the changing nature of due process in this area, the need to understand students, and the importance of avoiding disruption of school operations, I recommend that schools do these things:

1. Adopt a grievance procedure for students and faculty.

*2. Adopt written regulations on student conduct. These regulations should specify the potential penalty for a violation. They should be worked out in consultation with principals, who should have a checklist of things to do before they take action. When completed, the regulations should be made public and widely distributed.

[151] *See* note 74, *supra.*

*3. Adopt written procedures for handling discipline cases.

4. Develop an emergency plan to deal with school disorders.

Times change. The absolute control once exercised by school boards and school administrators over the operation of schools is gone. We have a new ball game, with part of the power once held by boards and administrators now held by teachers and students. We need to recognize this fact and then ask ourselves in what ways our relationships with students, parents, teachers, and administrators have changed, so that we are not fooled by our own rhetoric as we work with these groups to make our schools more responsive to community needs and to produce a graduate better trained to accept responsibility in today's society.

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*A proposed code governing serious misconduct by public school students and outlining procedures for hearing alleged violations of the code has recently been published by the Institute of Government at the University of North Carolina at Chapel Hill. A copy can be purchased for $3.00 from the Institute (North Carolina residents should add 3% sales tax).