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ABSTRACT

This booklet reviews twelve areas in which, in light of recent court cases, teachers should be made aware of changes in the status of student rights. These areas include (a) the right to an education, (b) due process, (c) "in loco parentis," (d) personal appearance, (e) marriage, (f) corporal punishment, (g) grades and diplomas, (h) punishment for off-campus activity, (i) law enforcement, (j) discrimination, (k) school records, and (l) freedom of expression. Two distinctions have been made in this list between those areas in which state courts have the ultimate decision and those which reach the federal level. The areas which deal with more fundamental rights such as the right to an education, due process, and freedom of expression fall under national jurisdiction. Personal appearance, marriage, and law enforcement are examples of areas that are left up to the states. Extensive bibliographies and a list of other National Education Association materials that pertain to student rights are included. (MK)

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Contents

Introduction

Most of the booklets on students rights that I have read are designed primarily to help students better understand their rights. In that respect, this book is different. It is designed to help classroom teachers better understand student rights in the light of recent court decisions. The idea for such a book for teachers came from a group of high school students, officers of the former NEA Student Action Committee, who served as advisers to the Student Project authorized by the NEA Board of Directors in 1973.

While the outline for the content of this book was developed by an NEA staff work team — F. J. Johnson, manager; and Dale Robinson, Boyd Bosma, Alice Cummings, Fred Droz, Mary Faber, Joe Gewirtz, Earl Jones, and Kate Kirkham — the content was prepared by Eve Cary, an attorney who with Diane Divoky assisted Alan Levine in writing the 1973 American Civil Liberties Handbook, *The Rights of Students.*

The reader should keep in mind that this book is by no means either inclusive or conclusive, and that it is primarily a treatment of student rights in court cases. A subsequent document soon to be released will set forth NEA's beliefs about student rights as expressed in official policy statements and resolutions. Those persons needing extensive information about student rights should find the bibliography at the end of the book valuable as a research tool. Please keep in mind that the law is not static. New decisions come down periodically. No doubt some new decisions will come down even before this book is in print.* Therefore, it is not the last word. One thing is clear, however. The courts seem to be underscoring the fact that citizenship in the United States is granted by birth or naturalization as stated in the Constitution, not by a person suddenly becoming 18 or 21 years of age.

We, therefore, believe that new court decisions will add to, rather than take away from, the list of rights enumerated in this document.

—Samuel B. Ethridge, Director
Teacher Rights, National Education Association

* For example: When this book went to press, federal regulations were released, defining prohibitions against sex bias in education under Title IX of the Education Amendments Act of 1972.

The Right to an Education

Because education today not only provides personal fulfillment but is also virtually the only means of gaining economic and social status, the most basic "student right" is the right to a free education. All children in every state except Mississippi have not only the obligation but the corresponding right to go to a public school for about 10 years. Courts have held the right to an education to be one of those fundamental rights that cannot be denied to any child except for the most serious wrongdoing and then only with strict safe-guards against arbitrariness and unfairness. Although a child may be compelled to go to school until he or she is approximately 16 (state law differs), students have the right to attend school until they are 21.

The right to an education is not just guaranteed to "normal" children. Mentally and physically handicapped children must also be provided with an education appropriate to their needs. If a child is unable to go to regular school, the state has a duty to provide a special education in some manner, whether through supportive services in regular schools, special schools, or tuition grants to enable handicapped children to attend private schools. Lack of sufficient funds is not a legitimate excuse for failure to provide special services for handicapped students. In the words of one federal court:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.[1]

The right to an education has been held by various courts to prohibit the charging of fees by public schools for books, school supplies, transcripts, graduation exercises, and materials used in extra-curricular activities. Most courts have agreed that

1. *Mills* v. *Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972).

fees may not be charged for anything that is "an integral fundamental part of the elementary and secondary education."[2] Some courts have held that this applies only to such items as textbooks, while others have recognized the part that extra-curricular activities today play in students' lives and have held that these, too, must be provided free of charge.

Finally, courts recently have been recognizing that the right to an education means not the right just to sit in school all day, but the right to learn something. Several law suits have been filed attacking the inadequate education provided in various school districts. In particular, courts have begun to require bi-lingual classes for children who do not speak English.[3]

2. *Bond* v. *Ann Arbor School District*, 383 Mich. 693, 178 N.W. 2d 484 (1970)

3. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Serna* v. *Portales Municipal Schools*, 351 F.Supp 1279 (D.N Mex. 1972), *aff'd* 499 F.2d 1147 (10th Cir. 1974).

Due Process

The right to due process of law is guaranteed by the Fourteenth Amendment to the Constitution, not only in criminal cases, but any time the government proposes to deprive a person of an important right or privilege to which he or she is entitled by law.

Although every person is entitled to due process under the law, the stringency of procedural requirements often depends on the seriousness of the loss or punishment that could be imposed as a result of the proceeding. Thus, for example, in criminal cases, in which a guilty verdict could result in a jail sentence, the defendant is entitled to full due process rights, including a written statement of charges, the right to representation by counsel, to summon and cross-examine witnesses, and to appeal an adverse decision.

The law has been well-established for some years that the right to an education is a property right that cannot be arbitrarily withheld. Courts have disagreed, however, on the degree of due process to which a student is entitled before he or she is suspended from school. Recently, the Supreme Court issued its first opinion in the area of students' due process rights which settles at least some of the disagreement.

Goss v. *Lopez*, 95 S.Ct. 729 (1975), involved the suspension of several high school students for up to 10 days without a prior hearing. The Supreme Court held that the damage to a student's educational opportunities and reputation caused by a ten-day suspension was severe enough to require due process before it could be imposed. The Court said:

> The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his defalcation and to let him tell his side of the story in order to make sure that an injustice is not done. [F]airness can rarely be obtained by secret, one-sided determination of the facts decisive of rights . . . Secrecy is not congenial to truth-seeking and self-righteous-

ness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

The Court went on to hold that before a student may be suspended for up to 10 days, he or she is entitled to oral or written notice of the charges and, if denied them, an explanation of the evidence in the possession of the authorities and an opportunity to present his or her side of the story. Except where the student's presence in the school presents a clear and present danger, the notice and hearing should preceed the suspension.

The Court stressed that its decision was addressed "to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures . . . [and] in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required."

With respect to the appropriate remedy for students denied constitutional rights, the Supreme Court in *Wood* v. *Strickland*, 95, S. Ct. 992 (1975), held that school officials who discipline students unfairly cannot defend themselves against civil rights suits by claiming ignorance of pupils' basic constitutional rights. By a 5-4 vote, the Court further ruled that a school board member may be personally liable for damages "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student effected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."

What Does *in loco parentis* Mean Today?

The concept of the school standing in place of the parent in relation to the pupil arose in a day when parents turned their children over to a tutor who supervised not only their academic education but their moral development as well. The tutor usually lived with the family and virtually took over the job of raising the child.

In the context of modern education, courts are becoming increasingly skeptical of the argument that school officials who have only a limited acquaintance with their students are empowered to act *in loco parentis*.

This modern view has been clearly expressed by the Ohio Department of Education:

> . . . To stand in loco parentis, one must assume the full duties, responsibilities and obligations of a parent toward a minor. School teachers and administrators obviously do not support the children in their care, nor do they provide most of the tangible and intangible necessities and securities that the child finds in his home. In fact, school authorities stand in loco parentis only to the extent that they may act somewhat like a parent does only some of the time for the purpose of maintaining order in the educational system. No one would saddle school authorities with the full duties of parents to care for their children until the end of minority. Thus it is misleading to term one narrow function of the school — that is, the disciplinary function — as being a function totally representative of the in loco parentis concept. In loco parentis should not, then, be the basis for defining parent-school relationships.[1]

Teachers can feel safe, therefore, in adopting the position of the New York State Department of Education that "the school and all its officers and employees stand *in loco parentis* only for the purpose of educating the child."[2] Thus, anything

[1] *Rights and Responsibilities: Administrative Guidelines*, Division of Urban Education, Ohio Department of Education Columbus, Ohio 1971.

[2] Formal Opinion of Counsel No. 91, 1 Education Department Reports 800 (1939).

that is necessary to the process of education is in the power of the teacher, while other matters, such as supervising the student's social life, personal appearance, manners, etc. except as they directly relate to the educational process cannot be justified by the *in loco parentis* doctrine.[3]

[3] See generally, *Wesley* v. *Rossi*, 305 F. Supp. 706 (D. Minn. 1969): "Regulation of conduct by school authorities must bear a reasonable basis to the ordinary conduct of the school curriculum or to carrying out the responsibility of the school."

Personal Appearance

Hair

Whether school officials may require male students to get haircuts is the single most litigated student rights issue and the one over which courts disagree most. Federal courts in every circuit have issued rulings in long-hair cases and although half have found such regulations to be unconstitutional, the other half have upheld them. The Supreme Court has declined to hear a long-hair case.

The answer to the question whether school officials may require hair cuts, therefore, is that it depends what state you are in.

In the following states, long-hair rules have been declared unconstitutional (even if promulgated or adopted by the student body) unless school officials can show a rational relationship between the rules and a legitimate educational purpose:

Arkansas
Connecticut
Delaware
Idaho
Illinois
Indiana
Iowa
Maine
Massachusetts
Minnesota
Missouri
Nebraska
New Hampshire
New Jersey
New York
North Dakota
Pennsylvania
Rhode Island
South Carolina
South Dakota
Vermont
Virginia
West Virginia
Wisconsin

See, *Richards* v. *Thurston*, 304 F. Supp. 449 (D. Mass. 1969), *aff'd* 424 F.2d 1281 (1st Cir. 1970).

School officials are permitted (although certainly not required) to regulate the length of students' hair in:

Alabama
Alaska
Arizona
California
Colorado
Florida
Georgia
Hawaii
Kansas
Kentucky
Louisiana
Michigan
Mississippi
Montana
Nevada
New Mexico
Ohio
Oklahoma
Oregon
Tennessee
Texas
Utah
Washington
Wyoming

Dress

The rulings controlling long hair also govern student dress codes, although some courts have indicated that in their opinion forcing a male student to cut his hair is a greater infringement of his liberty than requiring him to change his clothes.

Athletics and Extra-Curricular Activities

Again, where courts have struck down dress and hair-length regulations as requirements for school attendance, they have also refused to uphold them as requirements for participation on athletic teams or in extra-curricular activities, unless the school can prove that the hair or dress interfered with the student's ability to play the sport or perform the activity. See, *Long* v. *Zopp*, 476 F.2d 180 (4th Circuit, 1973).

Marriage

The right to marry has for many years been held to be a fundamental right which may not be abridged unless there is a compelling state interest in doing so. Therefore, students may not be prohibited from attending school or from participating in extra-curricular activities simply because they are married, for this would place on them the unconstitutional burden of having to choose between two fundamental constitutional rights — the right to an education and the right to marry.[1]

Although there are cases upholding a school's right to expel pregnant students (usually on the grounds that the sight of a pregnant girl — especially if she is unmarried — will be a corrupting influence on other students) the modern judicial trend is in the opposite direction, regardless of whether the student is married.

An example of this view was the decision of a Massachusetts federal court which ordered the reinstatement of a pregnant student on finding that the school officials had not met their burden of showing a "likelihood that her presence would cause any disruption of or interference with school activities or pose a threat to others."[2] This reasoning would also support the right of a pregnant student to participate in extra-curricular activities.

Similarly, students (married or not) with children may not be prohibited from attending school[3] or participating in extra-curricular activities.[4]

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[1] *Anderson* v. *Canyon Ind. School District*, 412 S.W.2d 387 (Tex. Ct. Civ. App. 1967).

[2] *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971).

[3] *Perry* v. *Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss. 1972).

[4] *Holt* v. *Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972).

Corporal Punishment

The use of excessive physical force by school officials on students is illegal, and both state and federal courts have held that a student can sue for money damages a teacher who injures him or her in the course of administering corporal punishment, even though the use of some physical force is legal in that state.[1]

Although many states have laws prohibiting it, no federal court has yet held that corporal punishment is cruel and unusual *per se* if it is "moderate" and administered with some sort of due process procedures to make sure that the student is in fact guilty of misbehavior.[2] Some courts have held that school officials may not use corporal punishment on a student if the child's parents notify the school that they do not wish it, as this would interfere with the parents' right to raise their child as they see fit.[3]

[1] *City of Macomb* v. *Gould*, 299 N E 2d 634, 109 Ill App 2d 361 (1969); *Patton* v. *Bennett*, 304 F. Supp. 297 (E.D. Tenn. 1969).

[2] *Ingraham* v *Wright*, 498 F 2d 248 (5th Cir. 1974).

[3] *Glaser* v. *Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972).

Grades and Diplomas

While courts will not review whether a student deserved a particular grade for her or his work based on its quality, they have held that grades may not be lowered or diplomas denied for non-academic reasons. Grades may measure only academic and not social performance.[1]

[1] *Woody* v. *Burns*, 188 So.2d 56 (Dist. Ct. App. Fla. 1966).

Punishment for Off-Campus Activity

The law is relatively clear that school officials have no power to punish students for off-campus behavior except in cases of serious criminal acts. Federal courts have, however, upheld a school policy of expelling students for the "using, selling or possessing of dangerous drugs."[1] Since an arrest is only an accusation and not a conviction, however, some Commissioners of Education have ruled that suspension on the basis of an arrest alone is illegal.[2]

[1] *Caldwell* v. *Cannady*, 340 F.Supp. 835 (N.D. Texas, 1972).

[2] *Matter of Rodriguez*, 8 N.Y.S. Ed. Dept. Rept. 214 (1969).

Law Enforcement

Questioning by Police

Students have the same right to remain silent in school as they have out of school and may not be required to answer questions by the police. There have been no court cases on the subject of whether school officials may permit such questioning to take place in school, and few states have laws or an official policy governing the situation. The New York State Department of Education has issued a ruling stating that

> police authorities have no power to interview children in the school building or to use school facilities in connection with police department work, and the board has no right to make children available for such purposes.[1] Police who wish to speak to a student must take the matter up directly with the student's parents.

The Delaware Department of Public Instruction did the next best thing to prohibiting police interviews by establishing guidelines to govern them. These are:

> a. The parents should be notified of the request before the questioning whenever possible;
>
> b. The student should be apprised of the reasons for the questioning and of her/his legal rights;
>
> c. The principal or her/his designated representative should be present during the questioning session;
>
> d. The procedural aspect of due process should be observed.[2]

Searches

Although an increasing number of cases will no doubt be brought to challenge searches of students' desks and lockers, the few courts that have considered the question have held that school officials may search students' desks and lockers and may

[1] Formal Opinion of Counsel No 67, 1 New York State Educational Department Reports 706 (1952).

[2] Delaware State Police Guide for School Administrators, approved November 17, 1972.

permit the police to do so. The reasoning behind these decisions has been that a school retains control over desks and lockers and simply lends them to the students, who have no reasonable expectation that these are private places. The National Association of Secondary School Principals, however, has cautioned its members against

> any such searchings [of a student's person, desk or locker] except under extreme circumstances, unless permission to do so has been freely given by the student, the student is present, and other competent witnesses are on hand.[3]

An Ohio school administrator's guideline to student rights suggested that locker searches be made without a warrant or student consent only in cases of "imminent danger or harm."[4]

The right of school officials to search students' persons is more limited than their right to search desks and lockers, although no court that has considered the issue has yet been willing to hold that a student's Fourth Amendment right to be free of unlawful search and seizure in school is as broad as that of a member of the general public in the street. In determining whether a search was lawful (and concluding that it was not), the New York State Court of Appeals stated:

> Among the factors to be considered in determining the sufficiency of cause to search a student are the child's age, history and record in the school, the prevalence and seriousness of the problem in the school to which the search was directed and, of course, the exigency to make the search without delay.
>
> Quite material would be observation of the student to be searched over a sufficient period, whether hours, days or longer, which suggests, at least, more than an equivocal suspicion that he is engaged in dangerous activities.[5]

The Court went on to stress that school officials should take great care to protect a student's rights when deciding to search him, first because a search could lead to a criminal prosecution and second because "psychological damage . . . would be risked on sensitive children by random search insufficiently justified. . . ."

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[3] Ackerly, *The Reasonable Exercise of Authority*, National Association of Secondary School Principals (1969).

[4] *Rights and Responsibilities Administrative Guidelines*, Division of Urban Education, Ohio Department of Education, Columbus, Ohio (1971).

[5] *People* v. *Duka*, July 10, 1974 New York State Court of Appeals.

Still more limited is the use that can be made of off-campus searches of students. In a case involving the warrentless search of two high school boys off campus, which resulted in their expulsion from school for possession of marijuana, a Texas federal court held that students are entitled to Fourth Amendment rights off campus. The court ruled that because the search had been illegal, the marijuana that had been found could not be used as evidence against the students in a school disciplinary proceeding any more than it could be in a criminal prosecution.[6]

[6] *Caldwell* v. *Cannady*, 340 F Supp. 835 (N.D. Texas, 1972).

Discrimination

Race Discrimination

Race discrimination has been prohibited in public schools since 1954 when the Supreme Court ruled in *Brown* v. *Board of Education** that separate schools for children of different races were by definition unequal.

Since then, hundreds of cases challenging different aspects of race discrimination in school—de facto segregation, racial imbalance, busing, freedom of choice, token integration, housing patterns, use of public moneys, tracking and classification—have gone to the courts and most decisions have clarified or extended the right of students to integrated schooling. A detailed discussion of these cases, however, is beyond the scope of this section.

It should be pointed out that Title VI of the Civil Rights Act of 1964 prohibits discrimination against students on the ground of race, color, or national origin in federally assisted programs. The U.S. Department of Health, Education and Welfare's Office for Civil Rights enforces Title VI compliance.

Sex Discrimination

Title IX of the Education Amendments of 1972, 200 S.C. Sections 1681-1686, prohibits discrimination in education on the basis of sex in programs or activities receiving federal assistance. The Department of Health, Education, and Welfare has drafted regulations outlining precisely which practices will be considered discriminatory. Title IX is administered by the Office for Civil Rights of the Department of Health, Education and Welfare.

While several suits have already been brought alleging sex discrimination in education under the Fourteenth Amendment, the specific prohibitions of Title IX may obviate the need for female students to go to court to achieve equity in the schools. The regulations specify prohibited practices in admissions to professional, public undergraduate, graduate, and vocational schools; treatment of students at all levels; and employment. Schools and colleges must conduct an "institutional self-review" of existing programs and take steps to remedy the effects of sex bias. Among prohibited practices are offering single-sex classes,

*347 U.S. 483 (1954).

except for physical education activities involving physical contact and sex education; discriminating in counseling materials and providing sex-restrictive vocational education; having inequities in financial aid and in facilities, such as housing; treating pregnant students differentially. More complete information is available from NEA Teacher Rights.

One-Sex Schools. Although no court has yet held that all-male or all-female schools are *per se* unconstitutional, at least one court has held that if a school offers a curriculum that may not be obtained elsewhere, it must admit members of both sexes. The fact that an institution may be a technical school, and that more males than females have in the past become engineers, is not a legally acceptable reason for excluding women or for taking a higher proportion of male applicants than female.[1]

Quotas. One federal court has held that public schools may not set fixed quotas of male and female students. Rather, all applicants must be measured against each other regardless of sex and those with the highest qualifications be taken.[2]

Sex-Segregated Courses. Several federal courts have ruled that courses in public schools (*e.g.*, shop and home economics) cannot be limited to one sex and many states have laws prohibiting one-sex classes.[3]

Athletics. Failure of public schools to provide equal athletic programs for girls has been the most-litigated sex-discrimination issue in the field of education.

The question that has been most frequently raised is whether qualified girls may compete on boys' athletic teams. The answers given by various courts have depended largely on whether the sport was a contact sport and whether the school had a girls' team for the same sport. In either case courts have found the exclusion of girls from boys' teams to be constitutionally permissible. However, where no girls' team has existed to play a non-contact sport, courts have held that qualified girls must be permitted to play against boys rather than be totally prevented from playing at all.[4] Whether boys who do not make the boys'

1. *Kirstein* v. *Rector and Visitors of University of Virginia*, 309 F.Supp. 184 (E.D. Va. 1970).

2. *Bray* v. *Lee*, 337 F.Supp 934 (D. Mass. 1972).

3. *Sanchez* v. *Baron*, Civ. No. 69 C 1615 (E.D.N.Y., March 22, 1973)

4. *Brenden* v. *Ind. School Dist.* 477 F.2d 1292 (8th Cir. 1973).

team can then demand to play on the girls' team has not yet been litigated.

Another important question is whether a public school may spend more money on boys' sports than on girls'. The answer to this will no doubt be provided by Title IX which will probably require equality of facilities, instruction, etc., for girls. A case brought under the Fourteenth Amendment raising this issue is now pending before a New York federal court.[5]

5. *Purdy* v *Lane*, 73 Civ. 257 (N D.N.Y.)

School Records

Until passage by Congress of the so-called Buckley Amendment (P.L. 93-380 as amended by P.L. 93-568) effective November 19, 1974, the law regarding the privacy of student records was extremely unclear. The new law has hopefully ended the confusion by requiring educational agencies and institutions which receive federal funds through the U.S. Office of Education to comply with the new privacy requirements or face loss of those funds. The law provides, in part, as follows:

General Provisions:

1. No funds shall be made available under any applicable program unless the recipient of such funds informs the parents of students, or the students, if they are 18 years of age or older, of the rights accorded them by the statute.

2. For the purposes of the statute, whenever a student has attained 18 years of age or is attending an institution of post-secondary education, the permission or consent required of the parent shall thereafter only be required of and accorded to the student.

Right of Access and to a Hearing:

1. No funds shall be made available to any educational institution which has a policy of denying, or which effectively prevents the parents of students under 18 from exercising, the right to inspect and review official school records, files, and data directly related to their children, with some minor exceptions, such as certain law enforcement records. Each school must establish procedures for the granting of a request by parents for access to their child's school records within a reasonable period of time, but in no case more than 45 days after the request has been made.

2. Parents shall have an opportunity for a hearing to challenge the content of their child's school records, to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein.

Conditions for the Release of Personal Data:

(1) No funds shall be made available to any school which has a policy of permitting the release of records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organization, other than the following:

(a) other local school officials, including teachers within the educational institution or local educational agency who have legitimate educational interests;

(b) to officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.

(2) No funds shall be made available to any school which has a policy or practice of furnishing, in any form, any information contained in personal school records, to any persons other than those listed above, unless

(a) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(b) the information is furnished in compliance with judicial order, or pursuant to subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) In any case in which the Secretary of Health, Education, and Welfare or an administrative head of an educational agency is authorized to request any state or local educational agency to submit to a third party any data from personal statistics or records of students, such data shall not include the names of students or their parents, except

(a) in connection with a student's application for financial aid;

(b) in compliance with any court order, or pursuant to any lawfully issued subpoena, if the parents and students are notified of any such order in advance of compliance.

(4) All persons, agencies or organizations desiring access to the records of a student shall be required to sign a written form

which shall be kept permanently with the file of the student, but only for inspection by the parents or student, indicating specifically the legitimate educational or other interest that each person, agency, or organization has in seeking this information. Such form shall be available to parents and to the school official responsible for record maintenance as a means of auditing the operation of the system.

Personal information shall only be transferred to a third party on the condition that such party will not permit anyone else to have access to it without the written consent of the parents of the student.

Protection of Personal Data:

The Secretary of HEW shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities.

Freedom of Expression

The most important statement of the right of students to free expression was made by the Supreme Court in 1969 in the case of *Tinker* v. *Des Moines Independent School District*.[1] The case specifically upheld the right of students to wear anti-war armbands in school, but the reasoning behind the decision may be applied to every form of student expression, and to other areas of student rights as well. In *Tinker*, the Court held that "[t]he Constitution does not stop at the public school doors like a puppy waiting for his master, but instead it follows the student through the corridors into the classroom, and onto the athletic field." The Court went on to outline the guidelines for determining whether a particular form of expression is permissible in school. The standard the Court laid down generally guarantees that all student expression is protected as long as it does not "materially and substantially" disrupt the process of education. The Court further held that prohibition of a particular form of expression is not justified by the mere "undifferentiated fear" of disruption, but only by specific evidence in a particular situation which would cause a reasonable person to believe that disruption will be likely to occur. The Court pointed out:

> in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take the risk.

Thus, students have a right to express their views even if those views are offensive and cause others to become angry and disruptive.

Armbands and Insignia. The Supreme Court's ruling in *Tinker* protects the right of students to wear armbands, buttons, and other insignia to school, even if such insignia are controversial. There are exceptions, but these are rare. In one case, a court upheld a ban on buttons because students had been wear-

1. 393 U.S. 503 (1969).

ing racially inflammatory buttons that had caused tensions and disruptions in the school.[2] However, buttons rarely disrupt any legitimate school activities[3] and must be permitted even though others might find the message offensive, unless there is some unusual situation in the school, such as a recent racial disturbance, that makes the possibility of disruption caused by the button likely and not simply possible.

- *School Newspapers: Content.* Even if a school pays for a student newspaper, it may not censor its contents if the newspaper has in the past been a forum for the expression of student views unless it can be proven that the paper will cause material and substantial disruption. School officials may not prevent the publication of an article because it criticises school policies or officials or faculty, or is too controversial. Courts have disagreed on whether an article may be censored if it advises students to engage in illegal activity or to disobey a school rule. The rule, once again, is whether school officials can produce concrete evidence that a given article is likely "materially and substantially" to disrupt the school. It should be stressed that such evidence is not easy to produce. The standard is very strict and, just as in non-school situations, it is very rare that the extreme remedy of censorship is justified.

Following are some examples of how courts have applied the *Tinker* test to school newspapers. In one case a court held that a student publication containing an article saying that the dean had a "sick mind" could not be censored. The court found the remark "disrespectful and tasteless" but held it did not justify suppression.[4] The article went on to urge students to throw away some materials given them by the school staff to take to their parents. The court held, however, that the article still could not be suppressed because the students were not rallying their classmates and preparing them for immediate action to disrupt the school. Another court found unconstitutional a school board policy prohibiting distribution of any publication that advocated illegal actions, or was grossly insulting to any group or individual.[5]

School officials are often overly concerned about the problems of libel and obscenity in school publications. (Clearly, a

2. *Guzick* v. *Drebus*, 431 F.2d 594 (6th Cir 1970) cert den 401 U.S. 948.

3. *Burnside* v. *Byars*, 363 F 2d 744 (5th Cir. 1966).

4 *Scoville* v. *Board of Education of Joliet Township*, 425 F.2d 10 (7th Cir. 1970).

5. *Baughman* v. *Freienmuth*, 478 F.2d 1345 (4th Cir. 1973).

school cannot be held responsible for anything written in a student publication that is not sponsored by the school.) The concern is misplaced because to be libelous or obscene a paper must meet various very strict legal tests, which it is highly unlikely any student paper could do.

Libel is printing something one knows, or should know, is not true in an attempt to injure a person's reputation. Nothing that is true can be libelous, nor can one be sued for libel if he has good reason to believe what he prints, even if it can't be proven and later turns out to be false. A person libeled can sue for monetary damages. Simply saying something unkind about another person is not libel.

The law of obscenity is the same for school papers as for any other literature to which minors have access.

Under recent Supreme Court decisions, "obscenity" (when dealing with minors) refers to literature about sex that:

(1) predominantly appeals to prurient shameful interests of minors; and

(2) patently offends community standards regarding suitable sexual materials for minors; and

(3) taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

The mere use of dirty words is not obscenity. This standard was outlined by a federal court in New York in a case involving the censorship of a student publication because a story contained "four letter words as part of the vocabulary of an adolescent and . . . a description of a movie scene where a couple 'fell into bed'." The court found that the dialogue was the kind "heard repeatedly by those who walk the streets of our cities, use public conveyances, and deal with youth in an open manner," and thus held that the publication could not be banned because "constitutionally permissible censorship based on obscenity must be premised on a rational finding of harmfulness to the group [to whom the material is directed or withheld]."[6]

In short, if an article in a student paper is similar to literature to which students have access elsewhere, it cannot be banned, even if offensive to some people. Nor can "controversial" literature be censored under normal circumstances, even if all sides of the controversy are banned equally."[7]

6. *Koppell* v. *Levine*, 347 F.Supp. 456 (E.D.N.Y. 1972).

7. *Sanders* v. *Martin*, 72 Civil 1398 (E.D.N.Y. November 21, 1972).

School Newspapers: Prior Restraint

Since the courts are agreed that student publications may be banned if there is proof that they are likely to cause "material and substantial disruption" the next question courts have had to deal with is when that determination may be made. Two federal appellate courts have held that no prior restraint is permissible and that school officials may not require students to show them their publications before distributing them.[8]

Other courts have allowed school officials to review student publications before they are distributed as long as there are clear procedural rules stating precisely what must be submitted and to whom, and setting a very short limit on the length of time the school official may take to reach his decision (e.g., one day).[9] This issue is now pending before the Supreme Court.

Student Newspapers: Distribution

The law is clear in school, as it is out of school, that the state may establish reasonable regulations concerning the time, place, and manner of distribution of literature. What regulations are reasonable depends on the situation. In a school context, once again, the test is whether distribution of literature materially and substantially disrupts school activities. Minor disruptions accompanying distribution of literature (including student newspapers, underground newspapers, and leaflets) must be tolerated and if more major disruptions occur, the problem must be remedied by a change in the distribution procedure and not by banning or confiscating the literature.

How literature may be distributed varies from school to school depending on the size of the plant, the schedule of classes, etc., but not only has a blanket rule against distributing literature anywhere in a school been held illegal,[10] so has a rule restricting distribution to a time and place that would prevent most students from getting the literature. As one court said:

> [B]y excluding the period when the vast majority of the desired audience will be present and available for communication, the restraint is in effect a prohibition. The

8. *Riseman* v. *School Committee of Quincy*, 439 F.2d 148 (1st Cir. 1971); *Fujishima* v. *Board of Education*, 460 F.2d 1355 (7th Cir. 1972).

9. *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2nd Cir. 1971).

10. *Riseman* v. *School Committee of Quincy, supra.*

First Amendment includes the right to receive as well as to disseminate information.[11]

Similarly, distribution of leaflets may not be prohibited because students are dropping leaflets on the floor, although the students distributing them may be required to clean up afterwards.

Student Newspapers: Outside Publications; Sale

The fact that money is charged for a publication does not deprive it of First Amendment protection. In two cases in which courts upheld the right of students to distribute underground newspapers on school property, the papers were either sold or contributions were solicited.[12]

Use of School Facilities

A school does not have to permit students to use its facilities (e.g., loudspeakers, mimeograph machines, school assemblies) to express their views (although the best rule is probably to apply the material and substantial disruption test to use of such facilities). However, if school facilities are made availabe to one group, they must be made available to others.[13]

After-School Clubs

Students have the right to form after-school clubs under the First Amendment guarantee of free association. School officials may not prohibit students from forming clubs with dissident points of view or deny them the rights or privileges given to other school clubs. Likewise, such a club may not be prohibited from inviting a particular speaker because his or her views are controversial unless "clear and convincing evidence" can be presented that the speech is likely to create disorder in the school.[14]

11. *Rowe v. Campbell Union High School District*, Civil No 51060 (N.D. Cal. September 9, 1970)(three-judge court).

12. *Scoville v Board of Education of Joliet Township*, 425 F.2d 10 (7th Cir. 1970).

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

13 *Bonner-Lyons v School Committee of Boston*, No 73-1150 (1st Cir. June 29, 1973).

14. *Molpus v. Fortune*, 432 F.2d 916 (5th Cir 1970).

Sit-ins and Demonstrations

Although the First Amendment protects peaceful assembly, most courts that have dealt with student sit-ins and demonstrations have prohibited them on the grounds that they disrupted the school. The clearest statement on the subject, however, was made by a Pennsylvania court which stated that a demonstration could be considered disruptive only based on the behavior of its participants and not simply because it was indoors or because other students gathered in the halls to watch or because school administrators had to be taken from their duties to watch.[15]

A South Carolina court held that a school campus was a proper place for students to assemble for "peaceful expression" of grievances against school policies and struck down a blanket rule banning all demonstrations without regard to how orderly and peaceful they were.[16]

Flag Salute

The Supreme Court in *West Virginia Board of Education* v. *Barnette*, 310 U.S. 624 (1943), upholding the right of Jehovah's Witnesses to refuse to salute the flag, said:

> No official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.

Although *Barnette* dealt with the right to refuse to salute the flag on religious grounds, later courts have applied the same reasoning to permit students to remain silently seated during the flag salute for political or other conscientious reasons, realizing that simply standing is a sign of respect that a student may not be forced to show.[17] As long as a student is not disruptive, he or she cannot be required to participate in the pledge or to stand or leave the room during it, nor can he or she be required to obtain parental permission in order to remain standing. This is true even if other students follow the dissident student's example for, in the words of the Supreme Court,

15. *Gebert* v. *Hoffman*, 336 F. Supp. 699 (E.D. Pa. 1972).

16. *Hammond* v. *So. Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967).

17. *Goetz* v. *Ansell*, 477 F.2d 636 (2d Cir. 1973).

"The First Amendment protects successful as well as ineffective protest."

Religious Exercises

The Supreme Court has held that school prayers and ritual Bible readings violate students' First Amendment right to freedom of religion, even if the prayers are non-denominational[18] and students are excused from attending them.[19] "Released time" programs which allow students to leave school during the day for religious instruction have been found constitutional as long as students are not pressured to participate and the educational program of non-participating students is not disrupted.[20]

18. *Engel* v. *Vitale*, 370 U.S. 421 (1962).
19. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963).
20. *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

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Code of Student Rights and Responsibilities. Book. Explores the rights and responsibilities of students and the causes of student unrest; develops a definitive statement on student rights and responsibilities; designs action programs to ensure that the basic rights of students are not jeopardized.

Compulsory Education Task Force Report. Urges exploration of the alternate and free school concepts as well as continuation of the compulsory education law.

Controlling Classroom Misbehavior. Color filmstrip with record narration and leader's guide that emphasizes that the best control device is the teacher's expertness — understanding of subject matter and adding interest and enthusiasm to learning.

Corporal Punishment Task Force Report. Discusses the use and effect of alternatives to and a model law regarding corporal punishment.

Discipline in the Classroom. Selected articles from *Today's Education,* the NEA journal.

Future Issues in Rights Enforcement. Cassette tape by former Attorney General Ramsey Clark.

How To Build Better Courts. Package of 20 leaflets containing advice from Chief Justice Warren E. Berger.

It's Your Right: The Law Says . . . Color filmstrip with record narration and leader's guide. Designed for classroom use, it considers the rights one has, what an arrest can do to those rights, and actions parents may take when their children are arrested.

Rebels and Causes in the School. Package of 30 pamphlets dealing with the causes of student unrest and what schools and parents can do.

Restoring Confidence in Justice. Package of 10 pamphlets containing excerpts from former Attorney General Elliot L. Richardson's address to the American Bar Association.

The Rights of Teachers. Book by David Rubin, deputy general counsel of NEA, that gives valuable insights into the extent of teachers' rights.

Student Displacement/Exclusion: Violations of Civil and Human Rights. Report of the Eleventh National Conference on Civil and Human Rights in Education.

What Teachers Should Know About Student Rights. Booklet that provides information concerning what the law says about the right to an education, *in loco parentis*, personal appearance, punishment, discrimination, school records, and due process. Based on the American Civil Liberties Handbook, *The Rights of Students.*

Your Child and the Law. Package of 30 booklets giving parents advice on how to help a child in trouble with the law, what to look for in a lawyer, and how to give proper emotional support. Includes a state-by-state summary of penalties for the possession of marijuana.

Youth and the Law. Cassette tape containing students-and-lawyer discussion about the concerns of today's young people (grades 7 through college) in relation to our legal system.