DOCUMENT RESUME

ED 117 845 EA 007 909

AUTHOR Ackerly, Robert L.; Gluckman, Ivan B.
TITLE The Reasonable Exercise of Authority, II.
INSTITUTION National Association of Secondary School Principals, Reston, Va.
PUB DATE 76
NOTE 40p.; A related document is ED 040 490
AVAILABLE FROM National Association of Secondary School Principals, 1904 Association Drive, Reston, VA 22091 ($3.00; orders of $10.00 or less must be accompanied by payment)

EDRS PRICE MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS *Civil Liberties; Civil Rights; Cocurricular Activities; Corporal Punishment; *Court Litigation; *Discipline; *Due Process; Principals; Secondary Education; Self Expression; Student Behavior; Student Publications; Student Records; *Student Rights

ABSTRACT

This document was prepared in order to provide principals and other administrators with information and guidance on their duties and powers as determined by constitutional and statutory interpretation in the hopes that such information will help them stay out of the courts. More specifically, the document considers the basic and general legal principles of due process and suggests acceptable approaches to the necessary and reasonable exercise of authority by school officials. After a lengthy discussion of due process, a number of related topics are discussed individually. The topics are freedom of expression, student publications, personal appearance, religion and patriotism, civil rights, codes of behavior, student property, weapons and drugs, extracurricular activities, discipline, corporal punishment, student participation in school governance, the right to petition, and student records. (Author/IRT)

The Reasonable Exercise of Authority, II

Robert L. Ackerly

Ivan B. Gluckman

ISBN 0-88210-070-X

Contents

About the Authors

ROBERT L ACKERLY, former legal advisor to the National Association of Secondary School Principals, is a member of the Washington law firm of Sellers, Conner & Cuneo He received his legal training at The George Washington University and is licensed to practice in Maryland and in the District of Columbia.

IVAN B GLUCKMAN is Legal and Legislative Counsel for the National Association of Secondary School Principals. A graduate of the University of Michigan and the Harvard Law School, he is a member of the bar of the State of Ohio and of the Supreme Court of the United States.

Foreword

EVEN in the most civilized of organized societies, disputes are bound to arise When they do, if that society is to remain orderly, some agent or agency must be responsible for a just settlement of the disagreement Our courts have been assigned that role in America's governmental structure

It is incumbent on all school and collegiate administrators to have more than a passing knowledge of the constitutional and statutory framework in which these institutions operate Recognizing that the courts adapt to changing conditions, it is imperative that these same administrators be kept up to date on the law as it evolves through the judicial process While continuity is the basic nature of this process, changes in direction do occur, sometimes under pressure of events, rather rapidly

This has been the case with the law governing the regulation of student conduct and associated issues such as codes of behavior, appearance, freedom of expression, right of petition, and other sensitive areas It is the purpose of this booklet to highlight these issues as well as the positions and conclusions reached by the courts, or the direction they seem to be moving

The author of this document, which was originally published in 1969, was Robert L Ackerly, then chief counsel to the NASSP His basic work has now been updated and revised by our current counsel, Ivan B Gluckman We are

indebted to both of them for their delineation of the legal issues and principles in a clear and concise manner.

Owen B Kiernan
NASSP Executive Secretary

Introduction

IN presenting this brief outline of the law governing the relative rights and responsibilities of secondary school students and school administrators, we acknowledge that the facts and comments presented here are neither unique nor new, for the essence of this paper is a distillation of writings on the subject. But legal reports and commentaries are not always close at hand for the principal, and, further, he rarely is practiced in interpreting court actions or opinions.

In light of these considerations, this digest may be useful and supportive. We hope it will help minimize disruptions of the educational process, in actually enhancing and rationalizing administrative control, and, in the event of judicial challenge, enabling the principal to demonstrate the reasonableness of his actions.

Robert L. Ackerly
Ivan B. Gluckman
January 1976

The Concept of Due Process

BEGINNING in the early 1960s, militant student protests took place in university settings throughout the world. The United States experienced such disruption that national attention was focused on the various ways students expressed their dissent in colleges and universities all over the country. Student demonstrations of dissent—be they lengthy sit-ins, teach-ins, boycotts, walkouts, walk-ins, or full-scale riots—concentrated attention on the prerogatives of students, especially their right to be heard. As a result of these active demands and through several large and extremely effective student organizations, students on the college and university level began to wield a significant political power.

Manifestations of student unrest spread to senior high schools and to a lesser degree junior high schools. It is not surprising that the symptoms of radical change infected the secondary schools, for younger students are fully aware of impressive protective gains made by school teachers and university professors through their large and influential professional organizations and lobbies. They are equally aware of the influence college students have exercised through similar organizational activity.

Because the principal of a secondary school is a highly visible and influential figure in the administrative structure of the school, he characteristically finds himself at the point

where the often conflicting wishes and ambitions of students, teachers, and parents collide with overall school administration policy. It is the principal above all others who must undertake to make these divergent interests compatible so that the school can be what it is intended to be, a place where learning can occur. But the efforts of school officials to cope with real or anticipated disruptions have resulted in a considerable number of court cases in which the authority of the school (in effect, the principal) to control student conduct is challenged. From these court proceedings are coming more explicit statements than were heretofore available regarding the constitutional limits of the school's powers over the student as an individual.

Recent court decisions have tended in the direction of restraining the school from exercising many forms of control over student conduct that the community formerly accepted as normal and proper. But whatever the reasons for these legal actions may be and whatever their outcomes are, the impact of court decisions relating to the control of student behavior is felt more immediately and heavily by the building principal than by anyone else in the administrative or teaching hierarchy.

We come, then, to the commanding reason for preparing this document—to provide principals and other administrators with information and guidance on their duties and powers as determined by constitutional and statutory interpretation in the hope that such information will help them stay out of the courts More specifically, we propose to consider the basic and general legal principles of *due process* and to suggest acceptable approaches to the necessary and *reasonable exercise of authority* by school officials.

Because due process will be mentioned explicitly or implicitly in much that we shall have to say, a few comments about it are in order.

It is due process that assures the preservation of private rights against government encroachment. So a principal, representing authority in the school, must be careful to ensure due process to students just as he himself expects to be protected from arbitrary tactics on the part of the police or the law courts, representing authority in the larger society.

The classic statement that is still frequently quoted by the courts as the basis for judging student-school relations was made by the U.S. Supreme Court in 1943:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes [1]

Every discussion of the limits of authority or the exercise of personal rights and privileges has inherent in it the problem of procedure. procedure in bringing the subject up for discussion, procedure in airing the views of the people involved, whether they prove to be similar or conflicting, and procedure in reaching a decision as to the action to be taken The underlying concept, understood by almost every

[1] *West Virginia State Board of Education v Barnette*, 319 U S 624

American, is one of fairness. a *fair* hearing, a *fair* trial, a *fair* judgment. Every citizen needs to know that the government is not permitted to be arbitrary or repressive, and that he will have a fair opportunity to have his side of the controversy openly considered. Hence, every citizen is guaranteed the constitutional protection of a fair trial. This is the minimum for due process of law. Due process may be defined as a course of legal proceedings in accordance with the rules and principles established for the enforcement and protection of individual rights.

The concept of due process applies to any dispute between two parties As a legal concept, enforceable in the courts, it derives its validity from the presence of a court of competent jurisdiction, which has a duty to see that the individual's rights are protected. This means that a man must have personal knowledge of any charges against him that endanger his freedom, his status, or his property. He must have an opportunity to be heard and to controvert the evidence or the witnesses against him. He must also have an opportunity to show that the rules or laws being applied to him are demonstrably unreasonable, arbitrary, capricious, discriminatory, or too vague to be understood, and, therefore, unenforceable. These considerations are as necessary to administrative proceedings in schools as they are to more formal trials in courts of law.

But the requirements of due process differ in varying contexts What is required to satisfy due process in a school proceeding would never meet the standards of a criminal court. Conversely, because the interests affected are so much more limited, the elements of due process required in a school disciplinary hearing can be expected to be fewer

and more informal in nature Nevertheless, many school decisions, correct in substance, have been overturned on appeal to higher authority simply on the ground that due process or fairness was not observed

Before going on, we must emphasize that only statements of general principles are possible here, and those for the most part will be based on decisions of federal courts The variations among the myriad of state and local laws and decisions of state courts are too extensive to be treated adequately here, detailed explanations of these widely varying requirements must be sought in other sources But an additional reason for relating the following analysis principally to the judicial opinion of federal courts is that it is mainly the U.S Supreme Court that is making clear by its decisions the obligation school officials have to afford the protection of the Bill of Rights and of the Fourteenth Amendment to all with whom they deal, regardless of age. To quote the now famous Gault decision, "Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone "[2]

Although courts, particularly state courts, historically have been reluctant to interfere with the principal's control of students in secondary schools, they have interceded often enough to persuade us that we should not base our generalizations only on judicial decisions already rendered Particularly in recent years, judicial reluctance to interfere with the principal's authority has lessened. The larger and more impersonal our schools become, the less often courts see the *in loco parentis* concept as a barrier to applying legal

[2] *In re Gault* 387 U S 1, 13 (1967)

principles to the administration-student-faculty relationship. And since a trend in our society is to subject the exercise of power and authority to legal norms, there is every reason to believe that the courts have only begun to apply the body of law to secondary school student activities.

This leads us, then, to what we consider a first principle in administrative conduct. *The principal must recognize the difference between civil disobedience and acts of violence.* Civil disobedience, limited by definition to non-violent activity, is usually within the control of the administration. Acts of violence may call for outside assistance since principals and teachers are not expected to be police officers.

Freedom of speech and expression have been protected by the courts for secondary school students. This right is not unrestricted (Justice Holmes provided the classic example yelling "fire" in a crowded theater), but the limitations must be based on reason and need. The courts have affirmed that disruptions of the school program cannot be permitted ("no interference with work" in the classroom and "no disorder"), yet school administrators know that school control without outside force is most important and that calling the police often makes matters worse.

The courts have said that giving prior notice of changes in rules of conduct and in penalties for infractions is some evidence of a school's sensitivity to individual freedom. But certainly, merely meeting such a "prior notice" criterion is not sufficient.

The Supreme Court has also made clear that a student threatened with suspension from school, even for a few days, must be given notice of the specific charges against him and an opportunity to give "his side of the story," at

least informally Should he deny the charges, school authorities must offer some explanation of the evidence supporting the charges [3]

School boards, central office administrators, and building principals can do much to minimize, or perhaps avert, confrontations with students and to stay out of court by ensuring student participation—to the maximum extent feasible—in the development of rules of conduct and of related disciplinary procedures A substantial body of evidence is accumulating that proves not only that such participation is feasible, but also that the products of such collaboration can be judged reasonable and effective by both adult and adolescent criteria

Whether or not students participate in the rule-making process, school rules should meet the following standards, as stated by E Edmund Reutter,[4] a noted school law authority

- The rules must be known to students (not necessarily written) If the act for which the student is to be punished is obviously destructive or disruptive, no rule is necessary
- The rules must have a proper educational purpose connected to learning itself
- The rules must be reasonably clear in meaning
- The rules must be narrow to avoid trespassing on some protected right

[3] Goss v Lopez 95 S C 729 (1975)

[4] *The Adolescent Other Citizens and Their High Schools* the Report of Task Force 74, established by the Charles F Kettering Foundation, (McGraw-Hill Book Co 1975) p 47

Positions on Specific Issues

Freedom of Expression Generally

We are now ready to recommend what we consider defensible positions or guides to action on issues that, sooner or later, may arise in every secondary school community We believe, further, that these guides will be useful not only to principals but also to students as they participate in decision-making activities in their schools

The basic position is *Freedom of expression cannot legally be restricted unless its exercise can reasonably be expected to interfere with the orderly conduct of classes and school work.*

Students may freely express their points of view provided they do not seek to coerce others to join in their mode of expression and provided also that they do not otherwise intrude upon the rights of others during school hours Buttons or other insignia expressing a point of view can be worn, but only if the rights of those not sharing that opinion are equally protected Wearing provocative buttons or distributing controversial literature during regular school hours cannot be permitted to disrupt the work of the school The following principles should be observed.

- Buttons and other insignia may be worn to express a point of view unless doing so results in a direct interference with the school program
- Buttons or other insignia may not be worn or displayed if the message is intended to mock, ridicule, or otherwise deliberately demean or provoke others because of race, religion, national origin, or individual views.
- No student may pass out buttons or other literature during regular school hours either in class or in the halls between classes
- Students distributing buttons or other literature before or after regular school hours will be responsible for removing litter that may result from their activities
- Failure to observe these rules can result in confiscation of the material, curtailment of the privilege, or, when necessary, disciplinary action, including suspension.

Free expression has always been carefully guarded by the courts Restrictions on wearing buttons and arm bands and the distribution of literature have been upheld *only where the practice threatened material and substantial disruption of the school*

Two cases decided on the same day by the United States Court of Appeals for the Fifth Circuit illustrate this point In *Burnside v Byars*, 363 F 2d 744 (1966) the court held that wearing buttons bearing the words "One Man One Vote" and "SNCC," and apparently not hampering the school from carrying out its regularly scheduled activities, was protected as a right of free expression under the First Amendment

In the second case, *Blackwell v Issaquena County Board of Education*, 363 F 2d 749 (1966), the same court found that a prin-

cipal's decision to forbid the wearing of buttons that showed a black hand and a white hand joined together and the word "SNCC" was reasonable because the wearing of the buttons created an unusual degree of commotion, boisterous conduct, and undermining of school authority. As stated by the court:

> It is always within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine This is not only proper in our opinion but is necessary

The threat of such disruption must be one, however, which reasonable men may agree upon and recognize. This was the major point in the famous *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), which came before the U.S. Supreme Court three years later. In ruling in favor of the student, the Court did not overrule the *Blackwell* case, nor abandon the principles that it enunciated. It stated only.

> This case does not concern speech or action that intrudes upon or disrupts the work of the schools or the rights of other students There were no threats or acts of violence on the school premises, although outside the classrooms a few students made hostile remarks to the children wearing armbands
>
> Any departure from absolute regimentation in school may cause trouble, but undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression Any deviation from the majority's opinion may inspire fear or cause a disturbance, but our Constitution says we must take this risk
>
> To justify prohibition of a particular expression of opinion in the schools there must be something more than a mere desire to avoid the discomfort and unpleasantness that accompanies an unpopular viewpoint. Where there is no finding or showing that engaging in the forbidden conduct would materially and

substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained

Requiring prior approval of a specific button or piece of literature is probably impractical and, in all likelihood, would be ruled too restrictive. In severe cases, however, where a concerted effort is being made to harass the school administration, the right to wear buttons and distribute literature on school grounds may be suspended *in toto* if class routine and the orderly changing of classes is disrupted. This must be done on a case-by-case basis, and limitations can be imposed only to the extent necessary to maintain reasonably good order and discipline, prevent fights, or protect those who do not wish to join in wearing the button or other insignia or to receive the literature.

Student Publications

School-sponsored publications should be free from policy restrictions outside of the normal rules for responsible journalism These publications should be as free as other newspapers in the community to report the news and to editorialize

Students who are not on the newspaper staff should also have access to its pages Conditions governing such access should be established and be available in writing, and material submitted should be subject to evaluation by the editorial board and, if need be, a faculty review board These same general principles apply to access to other school publications

Non-school-sponsored papers and other publications, including an "underground press," should not be prohi-

bited, assuming that they, too, observe the normal rules for responsible journalism Distribution may be restricted to before and after school hours, and restrictions may also be placed on distribution points.

Requirements of prior approval of content, however, have run into constant difficulty in the courts because of the long-standing and well-grounded abhorrence for censorship in both our political and legal systems.

A case that presented most of the issues usually involved in student efforts to distribute non-school-sponsored literature at school went before the U.S. Supreme Court in the 1974-75 term This was the case of *Board of School Commissioners of Indianapolis v. Jacobs*, 420 U.S 128 (1975). The Seventh Circuit Court of Appeals had invalidated the school board's rules governing such distribution as "overbroad," and held that the use of occasional "earthy words" in an unofficial student paper was not obscene After hearing oral argument, the Supreme Court decided, however, that the case was moot, or no longer involving a live issue, because the students involved had all graduated and the newspaper itself was no longer in existence

The result of the decision was to leave the school board rules undisturbed, but clearly in the Seventh Circuit they might again be overturned if challenged [5]

Attempts to set any kind of rules that involve prior review have also encountered strong judicial resistance in the Fourth and Fifth Circuits [See *Baughman v. Freienmuth*, 478 F2d 1345, (1973) [4th Circ.] and *Shanley v. Northeast Independent School District*, 462. F2d 1960. (1972) [5th Circ.]. The Second Circuit has taken a more permissive attitude toward efforts of school officials to require prior submission of student materials for review prior to publication. [*Eisner v. Stamford Board of Education* 440 F2d 803 (1971)] The

Personal Appearance

The courts have clearly warned that freedom of speech or expression is essential to the preservation of democracy and that this right can be exercised in ways other than talking or writing From this generalization, some courts have concluded that there should be no restriction on a student's hair style or his manner of dressing unless they present a "clear and present" danger to the student's health and safety, cause an interference with work, create classroom or school disorder, or damage school property.

A reasonable regulation concerning dress, hair style, and cleanliness will stress that such regulation is vital not only to the individual student but also to those with whom he shares a classroom or locker. Students should not wear clothing or hair styles that can be hazardous to them in their school activities such as shop, lab work, physical education, or art. Grooming and dress that prevent the student from doing his best work because of blocked vision or restricted movement should be discouraged as should be dress styles that create, or are likely to create, a disruption of classroom order Articles of clothing that cause excessive maintenance problems—for example, cleats on boots, shoes that scratch floors, and trousers with metal rivets that scratch furniture—can be ruled unacceptable.

Of course, standards for defining what is reasonable change, and the courts take judicial notice of these changes. Early decisions tended to affirm broad control of students in the school authorities Expulsion of an 18-year-old girl

First Circuit has not ruled clearly on the issue, but at least one of its federal district courts has followed the Second Circuit approach (*Vail v Bd of Education* 354 F Supp 592, 1973 N H)

who insisted on wearing talcum powder on her face was upheld in *Pugsley v. Sellmeyer*, 158 Ark. 247; 250 S.W. 538 (1923), where the school had adopted a rule forbidding students to wear clothing tending toward immodesty or to use face paint or cosmetics. A Massachusetts pupil was expelled because of head lice and this action was found to be within the powers of the school authorities in *Carr v. Dighton*, 229 Mass. 604; 118 N.E. 525 (1918). Exclusion of a student who insisted upon wearing metal heel plates on his shoes in violation of a regulation was approved in *Stromberg v. French*, 60 N Dak. 750; 236 N.W. 477 (1931).

More recent decisions have carefully considered the application of constitutional rights to students and have examined cases in these terms. The results, of course, have not been consistent. A school regulation forbidding extreme haircuts was held to be valid and within the school board's jurisdiction in *Leonard v. School Committee in Attleboro*, 349 Mass. 704; 212 N.E.2d 468 (1965).

Similarly, a federal court in New Orleans upheld a school regulation that required hair to be clean and neat, and proscribed exceptionally long shaggy hair and/or exaggerated sideburns. [*Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967)] A California case held, to the contrary, that hair styles are a form of self-expression and protected under the First Amendment. The court explained the basis for its ruling:

> The limits within which regulations can be made by the school are that there be some reasonable connection to school matters, deportment, discipline, etc., or to the health and safety of the students . . . . The Court has too high a regard for the school system . . . to think that they are aiming at uniformity or blind

conformity as a means of achieving their stated goal in educating for responsible citizenship . . . [If there are to be some regulations, they] *must reasonably pertain to the health and safety of the students or to the orderly conduct of school business.* [Emphasis supplied.] In this regard, consideration should be given to what is really health and safety and what is merely personal preference. Certainly, the school would be the first to concede that in a society as advanced as that in which we live there is room for many personal preferences and great care should be exercised insuring that what are mere personal preferences of one are not forced upon another for mere convenience since absolute uniformity among our citizens should be our last desire. [*Myers v. Arcata Union High School District* (Super. Ct. Cal. 1966)].

At present the Federal Circuit Courts of Appeal are split equally on whether boys' hair styles can be regulated by the school, and the U.S. Supreme Court has refused to consider the issue.

As in the case of other rules concerning student conduct, we recommend that all actions relating to school dress and grooming codes be taken only after full participation in the decision-making process by students and other concerned parties.

Religion and Patriotism

In addition to protecting the rights of Americans to free speech and press, peaceable assembly, and the petition of grievances, the First Amendment to our country's Constitution forbids any governmental authority to take actions that either aid the "establishment of religion" or "prohibit the free exercise thereof." Trying to define the narrow line that must be drawn between these two requirements in the public school setting has been the source of continuing litigation for several decades. While disputes will undoubt-

edly continue (particularly concerning the degree to which public funds can benefit children in religiously-affiliated schools), principals and other administrators of public schools can be more assured in most areas that directly affect them.

Most importantly, the law seems settled that no kind of prayer can be prepared, distributed, or read in school for religious purposes. Such materials can, of course, be used as part of appropriate curriculum. Only silent and unspecified meditation would seem to pass judicial muster as a contemplative school activity.

Patriotic rituals, too, though not referred to in the Bill of Rights, have been viewed critically by the courts, particularly if participation is required of all students. The key decision was *Barnette* (see footnote, p. 3). A student who refused to participate in saluting the flag and reciting the Pledge of Allegiance was expelled from school. The Court concluded that a rule compelling salute to the flag and recitation of the Pledge transcends constitutional limitations on the power of local authorities, and is precluded by the First Amendment to the Constitution.

Current judicial attitudes would appear to forbid school authorities to require pupils to pledge allegiance to the flag, to sing the national anthem, or even to stand while either was being rendered. This does not mean, of course, that anyone has the right to act in a manner that interferes with the right of others to take part in such patriotic observances.

Civil Rights

The first 10 amendments to the U.S. Constitution specif-

ically provide for the protection of certain rights of all citizens Since adoption of the Bill of Rights, other rights have also been recognized by the law of the United States, either through legislative action or through court decisions.

Some of these rights have come into question in school cases, particularly in public school where interference with an individual's civil rights has been regarded as an act of the state in violation of the Fourteenth Amendment to the Constitution. Most of these cases have involved allegations of unlawful discrimination, first on the basis of race or color, but more recently on the basis of religion, sex (gender), or marital status.

Generally speaking, there are now very few circumstances in which distinctions between school pupils on the basis of sex or marital status will be sustained by the courts. The burden of justifying such distinctions rests with the school and is a difficult one to satisfy. Evidence that the distinction is necessary for the protection of health, safety, or welfare of the pupils or for preventing disruption of the educational process usually will be sufficient to be sustained.

While it has not been clearly defined to be a constitutionally protected classification, pregnancy has also been widely regarded in recent years as an inappropriate basis upon which to make distinctions among students, except for those situations in which it is reasonable to assume that the health of mother or child might be endangered.

Many of the rights of females developed in court actions over the past decade have now been codified in Title IX of the Federal Education Act of 1972 and its administrative regulations But the penalties attached to violations of this law are limited to educational agencies and institutions

which are the recipients of federal funds. No personal rights of action are granted to persons claiming discrimination, nor can any action be taken under this law against individual educators.

Actions may be brought against individuals, however, by persons who believe they have been deprived of their civil rights by the actions of others "acting under color of law," that is, in a public capacity. Under the Civil Rights Act of 1871[6] such persons have been held to include all public educational employees as well as members of the school board itself.

Even if the deprivation was not malicious but was the result of action that the educator or board member knew or reasonably should have known would violate the student's constitutional rights, the persons taking such action may be held personally liable for money damages.[7]

It is not yet clear what test the courts will apply in deciding whether a principal or other administrator "reasonably should have known" that his action would abridge a student's constitutional rights, but there are strong indications in the *Wood* opinion that the Supreme Court did not intend this proscription to be regarded as an open invitation to judicial interference in the normal process of administering public schools.

In the words of Justice White:

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. But Section 1983 does not extend the right to relitigate in federal court

[6] Title 42, U.S. Code, Sec. 1983

[7] *Wood v. Strickland*, 95 S.C. 992 (1975)

evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and Section 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees

Codes of Behavior

The authority of school officials to comprehensively prescribe and control conduct in the schools has been affirmed repeatedly by the courts. The rules, however, must be concerned with speech or actions that disrupt the work of the school or the rights of other students. Therefore, rules regulating behavior in the school should reflect the school authorities' obligation to respect the constitutional rights of students and to require a mature sense of responsibility on the part of students toward others and toward the school. It should be noted in this connection that many conflicts between school authorities and students have been the consequence of students' breaking school rules which, students allege, limit their freedom of expression.

Rules requiring quiet in the library and in study halls are held to be reasonable With respect to smoking by students in school buildings, the courts have held that a no-smoking rule is reasonable and fair. This is not surprising since the hazards to health caused by smoking have been thoroughly documented by the Surgeon General of the United States, and the "clear and present" danger to the safety of the school building and its occupants if smoking is permitted is evident.

Other restrictions on student behavior may be justified if they are required to protect students, especially those whose individual rights are threatened because of some form of minority status—race, religion, individual beliefs, or other distinguishing characteristics

To generalize, behavior controls should be flexible and take into account local conditions

Student Property

The general rule is that a *student's locker and desk should not be opened for inspection except when approved by the principal because he has reasonable cause to believe that prohibited articles are stored therein. If inspection takes place the student should be present if possible.* As in the case of other rules affecting students' constitutional rights, prior notice of the rules governing searches should be given to all students, ideally in a written code or other statement

The conditions under which the school can or must permit the police to search students' lockers are still not clearly spelled out, with some courts taking a more restrictive view of the rights of school authorities than others. A central issue is whether principals and other school officials should be regarded as officers of the state. If so, they would be required to secure a search warrant in the same manner as the police are required to do

Many legal specialists believe that the strictures in the Fourth Amendment against search and seizure probably are not applicable to searching a student's person or his desk or locker. Because of the widespread problems relating to use of drugs and weapons by young people, the courts

have been sympathetic to efforts by school officials to control these dangers

If possible, where drugs or weapons are suspected, the police should be contacted and the search conducted in keeping with accepted police procedures and with the principal or a designated faculty member present A complete report on such an incident should be prepared promptly, checked with witnesses and the student or students involved, and a copy filed with the superintendent of schools and the board of education

Weapons and Drugs

The possession or use of certain weapons or drugs is a serious violation of law and punishable by fine and/or imprisonment A student is required to obey the same laws on school grounds as off Some people have a distorted notion that a school or college is a sanctuary These institutions are a part of society and are subject to the same laws as the rest of society Accordingly the school authorities have the same responsibility as every other citizen to report violations of law *Students possessing or using on school premises weapons or drugs prohibited by law should be reported promptly to the appropriate law enforcement officials* School discipline should be imposed independent of court action Students may, as determined by local ordinance or school board ruling, be subject to immediate suspension or expulsion for possession or use of illegal weapons or drugs, but the suspension or expulsion must allow for hearing and review in the same manner as suspension or expulsion for any other reason

The police power of the state cannot be diminished or compromised by school officials for a student The principal

must, of course, use discretion and judgment in a situation that may involve a violation of federal, state, or local law. Where such activity is suspected, we advise that the student not be interviewed or questioned in any manner. Rather, the principal should communicate all available information promptly to the police and offer full cooperation of the administration and faculty to a police investigation

Whenever a principal has reason to know or suspect that a student is engaged in criminal actions—for example, a violation of the drug control laws—he would be well advised to protect both himself and the school by taking action with deliberate caution not the caution of refusing to act, but the care of having a reliable witness to each step he takes, keeping an accurate record of what he says and does, and reporting every action to those who have a right to know, such as the superintendent and the school board, colleagues in the school, and especially parents Violations of law should always be reported to the community's law enforcement agents, if the district has no regulation requiring principals to do so, it would be sensible to get one adopted

Extracurricular Activities

In every American secondary school, students are encouraged to form clubs and other groups that will enrich and extend their educational experiences. Most schools have formalized and published procedures governing the creation and operation of such organizations, but we recommend that these procedures be reviewed to make certain that they include regulations such as these.

- Before it can be recognized as a school group and be given use of school time and facilities, the club must be

approved, in accordance with established criteria, by the principal or some other designated school official.

- Membership must be open to *all* students except where the purpose of the club requires qualifications (a French club, for instance).
- The club must have a faculty sponsor or adviser selected and approved according to agreed-upon procedures, and club activities will not be permitted until a faculty sponsor has been selected.
- Clearly improper purposes and activities are not permitted and if persisted in will be cause for withdrawing official approval of the group.
- School groups, either continuing or *ad hoc*, are not permitted to use the school name in participating in public demonstrations or other activities outside the school unless prior permission has been granted by the designated school official.

Although a principal may rightly feel little concern over the activities of a science club or a glee club but worry a great deal about activities built around more controversial purposes or activities, he ought in all cases to apply the rule of clear and present danger before taking or permitting drastic action in consequence of a club's program. The interests of the group must be weighed against the good of the total student body and the community Interference with school discipline, if demonstrated or can reasonably be anticipated, is, of course, an acceptable reason for limiting an organization's activities When it appears necessary to ban a previously approved organization for failure to abide by the terms under which it was approved or because its activities present a clear threat to health or safety of

members of the school, the banning should be done, if at all, only after the group has had a full hearing on its right to continue to exist

We have pointed out previously that our courts have ruled that there are innumerable forms for expressing oneself, and that basic to the democratic concept of government is the right to free speech. The right of students to choose to express their opinions, desires, or ideas collectively in and through their organizations and to disseminate their ideas is protected by the Constitution.

Discipline

Despite the large number of court challenges to school disciplinary actions, there is no question that students may be disciplined by suspension or even permanent removal from school in almost all jurisdictions for serious breaches of school rules, or even an accumulation of minor violations

We recommend again, however, that rules governing in-school discipline be established only after full participation of students and other concerned parties. These rules should also be published from time to time and subjected to review at least annually. Minor infractions of school rules should be handled informally by faculty members Serious breaches of discipline leading to possible suspension or some other major penalty should be subject to a hearing, but suspension by the principal, pending the hearing, may be enforced where necessary to protect persons or prevent disorder In such cases hearings should, of course, be scheduled as promptly as possible

Because it is now well-established that students enjoy the protection of the Fourteenth Amendment to the U.S.

Constitution, a number of procedural matters must be considered in any school disciplinary proceeding In cases in which a student might be removed from school for more than a week, there is substantial agreement among lower federal and state courts on many of the elements of due process required

A notice of the time and place of the hearing and of the exact nature of the charge must be given to the student a reasonable time in advance The hearing might be held by a panel. For example, two students and two faculty members could be selected by lot, and a fifth member be appointed by the principal Student panelists selected by the school adminstration are not usually respected by the student body

Selecting a panel by lot approaches the jury system and should obviate charges of discrimination In all cases the accused must be allowed to be represented by someone of his own choosing The hearing may be informal, though it need not be open, and the accused should be allowed to present witnesses in his own behalf Most courts do not require that cross-examination be permitted. The student's parents or guardian may attend.

The panel should be instructed to make findings of fact and submit these together with its recommendations to the principal promptly after the close of the hearing. The principal and, subsequently, the board of education should be guided by the report and the practical recommendations of the panel. Also, if the accused believes he was not accorded a fair hearing, he must be allowed to appeal on this ground, any other plan of action may result in school authorities being brought into court.

Although the U.S. Supreme Court has never accepted a case involving the procedural requirements of due process in regard to long-term suspension, it has now spoken out on short-term suspensions.[8] In essence, the Court said that three elements are required *prior* to any suspension. the student must be told the nature of the charges, given an opportunity to respond, and if he denies the charges, a statement of the evidence supporting them. All this can be done informally, with the charges and supporting evidence delivered orally or in writing.

The Court further recognized as an exception to these rules emergency circumstances under which a student could be immediately suspended, but in such cases, the hearing should be scheduled as soon after the suspension as possible Emergency situations are defined by the Court to be those in which the continued presence of a student "poses a continuing danger to persons or property, or an ongoing threat of disrupting the academic process."

The principal must, in the final analysis, exercise the authority and assume responsibility for the proper applications of all rules The rule of law, not the rule of personality, should be his guide, and fairness his objective. This is the essence of good discipline and due process.

Corporal Punishment

While the primary disciplinary penalties relied upon at the secondary school level are suspension and expulsion, corporal punishment continues to be used in some school systems. It is often the subject of considerable debate in

[8] *Goss V. Lopez*, 95 S C 729 (1975)

these communities, and legal actions to enjoin the use of this form of punishment continue to arise.

Historically, corporal punishment was permitted and applied very generally by teachers as well as principals at all levels of school, but the twentieth century saw a severe reduction of its use as a result of new attitudes toward treatment of children in the home as well as in the school.

At present, New Jersey, Maryland, and Massachusetts completely prohibit the use of corporal punishment, as do a number of school districts in other states, including several large city districts. Others usually limit its use to certain circumstances or administrative officers. Where it is otherwise permissible, corporal punishment has been further limited by the courts to those kinds and amounts of treatment that seem reasonable in relation both to the offense and to the particular persons involved. Where the force used is regarded as excessive, or where it is applied in a manner that seems inappropriate as a means of discipline, a court may regard the incident as negligence or even assault and battery.

Continued attempts have been made by opponents of corporal punishment to have courts declare any use of this form of discipline in violation of the Eighth Amendment to the U.S. Constitution, which forbids cruel and unusual punishment. To date, however, while some courts have found individual instances excessive enough to offend the constitutional prohibition, no court of record has been willing to declare the use of corporal punishment to be unconstitutional per se.

This issue now seems to be settled by the U.S. Supreme Court's affirmation of a three-judge federal district court

decision in the case of *Baker v. Owen*, U.S.D.C., Middle District, N.C., April 23, 1975; affirmed by the U.S. Supreme Court, October 20, 1975. In addition to refusing the argument that corporal punishment is in violation of the Eighth Amendment per se, the lower court held that the use of corporal punishment was not an unconstitutional interference with the rights of parents to determine disciplinary measures for their children.

While the Supreme Court issued no written opinion in the case, it would appear to have also supported the lower court's position that corporal punishment must be administered under the same general rules of due process as other means of school discipline. These were spelled out in some detail, including the requirements of notice, oral explanation of reasons for punishment prior to its administration, and a subsequent written explanation to parents if it is requested.

Student Participation in School Governance

The forms and functions of student representation in the administrative affairs of the school will vary with local conditions But whether it is called a student council, student senate, or some other name, *the scope of its powers, privileges, and responsibilities should be a matter of public record.* This means among other things, that there has to be a published charter or constitution. Such a charter or constitution ought to be the result of joint administration-faculty-student discussions, and should be a document that all groups (though not necessarily all individuals) find acceptable.

Eligibility rules for candidates and rules for conducting campaigns and elections should be published, widely

announced, and uniformly enforced. The activities or programs of student representation *within the framework of its charter* should not be subject to veto by the principal or the faculty. Qualifications for candidates should be as broad as local circumstances will permit.

The widest possible participation by students should be encouraged, and any real or anticipated disagreement with the administration should not hamper its activities. Yet, published rules should be observed, and the student representatives should not be permitted to act outside the scope of their authority as defined in their charter or constitution.

Although it may be viewed as gratuitous advice, we think it is important to remind school adults who are personally involved in the activities of a student representational organization, or who are influenced by its actions, of their obligation to respect that charter and to resist the temptation to take arbitrary and unilateral action whenever displeased by some action of that student organization.

The Right to Petition

Students should be allowed to present petitions to the administration at any time. However, it may be reasonable to limit the collecting of signatures on petitions to before and after school hours. No student should ever be subjected to disciplinary measures of any nature for signing a petition addressed to the administration—assuming that the petition is free of obscenities, libelous statements, personal attack, and is within the bounds of reasonable conduct.

The right to petition is guaranteed by the Constitution and must always be permitted. Students should be assured

that there will be no recrimination or retribution of any kind for signing a petition.

Student Records

Along with the development of interest in student rights generally, recent years have witnessed increased concern with the rights of privacy of all Americans. These concerns have come together to produce considerable initiative to protect students from the disclosure of materials contained in school records to persons outside the school, and conversely to assure students or their parents access to this material.

Much of this concern has taken the form of legislative action at both the state and federal level. The so-called Buckley Amendment[9] established detailed requirements for the protection and release of student records. While no private legal remedy is provided to persons who believe they have been harmed by the failure of a school system or school official to meet the requirements of the law, the school district is subject to loss of federal funds for such violations. Accordingly, most school districts will attempt to comply with the federal law. Many states are enacting similar laws on this matter as well. In either case, school districts should issue specific instructions governing the maintenance and release of school records to all school administrators.

Principals should also be aware, however, that they can be subject to personal liability should the release of information from a student's record cause him embarrassment,

[9] Family Educational Rights and Privacy Act of 1974.

loss of reputation, or other compensable loss. The guidelines provided in the federal law provide a good basis for protection against many legal actions by students for libel, defamation, or invasion of privacy.

References

NASSP Legal Memoranda:

The Age of Majority
Student Marriage and Pregnancy
Search and Seizure: Right to Privacy
Smoking in the Public Schools
Student Publications
The Confidentiality of Pupil School Records
The Regulation of Student Hair Styles
Student Discipline—Suspension and Expulsion

NASSP Bulletin Articles:

Brothers, W. Richard "Procedural Due Process: What is It?" January 1975, p. 1

Reho, F. Thorum "Codifying Student Rights and Responsibilities," January 1975, p. 9

Patterson, Jerry L. "And the Beat Goes On," January 1975, p. 36

Jacobsen, Gene S. "Analysis of Court Cases Concerned with Student Rights," February 1974, p. 49

Johnson, T. Page "Girls on the Boys Team," Oct. 1974, p. 55

Gottesman, Roberta "Principal, the Student and the Law," May 1974, p. 177

Jacob, George F. "Student Rights Require a Model for Change," February 1974, p. 50

Goldstein, Alan "Students and the Law. A Changing Relationship," October 1974, p. 50

Fins, Alice "Sex and the School Principal: A Long Look at Title IX," September 1974, p. 53

Johnson, T. Page "The Constitution, the Courts and Long Hair," April 1973, p. 24

Ferguson, James E. "Due Process is Now," February 1973, p. 95

Boettcher, Brian E. "Is Due Process Changing the Role of the Assistant Principal," October 1973, p. 75

Garrison, X.L. "The Principal and School Law," November 1973, p. 48

Triezenburg, George "Student Communication Rights," April 1973, p. 13

George, Thomas W. "Upheaval in School Law," May 1973, p 118

George, Thomas W. "The Law and Pupil School Records: Issues and Views;" September 1972, p. 132

Klahn, Paul "The Tinker Case: A Principal's View," February 1971, p. 69

Olson, Eric "Student Rights—Locker Searches," February 1971, p. 46

Triezenberg, George "How to Live with Due Process," February 1971, p. 28

Voelz, Stephen J. "Expulsion Laws Confront Due Process in Federal Courts," February 1971, p. 28