DOCUMENT RESUME

ED 146 661 95 EA 009 345

AUTHOR Phay, Robert E.
TITLE The Law of Procedure in Student Suspensions and Expulsions. NOLPE Monograph Series. ERIC/CEM State-of-the-Knowledge Series, Number Thirty-four.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.; Oregon Univ., Eugene. ERIC Clearinghouse on Educational Management.
SPONS AGENCY National Inst. of Education (DHEW), Washington, D.C.
PUB DATE Sep 77
CONTRACT OEC-0-8-080353-3514
NOTE 64p.; For a related document, see ED 125 043; Not available in paper copy due to small print size of much of the document
AVAILABLE FROM National Organization on Legal Problems of Education, 5401 Southwest 7th Avenue, Topeka, Kansas 66606 ($4.95 prepaid; extra charge added for billing)

EDRS PRICE MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS Court Litigation; Discipline Policy; *Due Process; Elementary Secondary Education; *Expulsion; Hearings; Post Secondary Education; *School Law; School Policy; *Search and Seizure; State Legislation; State of the Art Reviews; *Student Rights; Student School Relationship; *Suspension

ABSTRACT

This state-of-the-knowledge paper, a companion to the author's 1975 monograph on a similar topic, examines the legal ramifications of student suspension, expulsion, and search and seizure of students' property. The author reviews relevant court litigation and state laws pertaining to specific rules on student conduct, the procedures to follow in suspension and expulsion cases (including the hearing, the student's right to counsel, inspection of evidence, impartiality of the hearing, witnesses, self-incrimination, mass hearings, hearing transcripts, appeal, and automatic review), and multiple and short-term suspensions, as well as the law relating to search and seizure. He concludes that although many may consider procedural due process requirements to constitute serious interference with internal school discipline, constitutional standards require only that students be treated fairly and granted the type of due process that school administrators would demand for themselves. (Author/DS)

# THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS

Robert E. Phay
Institute of Government
University of North Carolina
Chapel Hill

September/1977



Commissioned by
ERIC Clearinghouse on Educational Management
University of Oregon
Eugene, Oregon 97403

Published by
National Organization on Legal Problems of Education
5401 Southwest Seventh Avenue
Topeka, Kansas 66606

# DISCLAIMER

The material in this publication was prepared pursuant to a contract with the National Institute of Education, U.S. Department of Health, Education, and Welfare. Contractors undertaking such projects under government sponsorship are encouraged to express freely their judgment in professional and technical matters. Prior to publication, the manuscript was submitted to the National Organization on Legal Problems of Education for critical review and determination of professional competence. This publication has met such standards. Points of view or opinions, however, do not necessarily represent the official view or opinions of either the National Organization on Legal Problems of Education or the National Institute of Education.

ERIC/CEM State-of-the-Knowledge Series, Number Thirty-four
Clearinghouse Accession Number: EA 009 345

# NOLPE

The National Organization on Legal Problems of Education (NOLPE) was organized in 1954 to provide an avenue for the study of school law problems. NOLPE does not take official positions on any policy questions, does not lobby either for or against any position on school law questions, nor does it attempt in other ways to influence the direction of legislative policy with respect to public education. Rather it is a forum through which individuals interested in school law can study the legal issues involved in the operation of schools.

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

Other than the monograph series, NOLPE publications include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, NOLPE SCHOOL LAW JOURNAL, YEARBOOK OF SCHOOL LAW, YEARBOOK OF HIGHER EDUCATION LAW, and the ANNUAL CONVENTION ADDRESSES.

NOLPE provides services by way of REPRINTS OF CASES, CLEARINGHOUSE OF SCHOOL LAW, SURVEY PROJECTS, RESEARCH ASSISTANCE, SEMINARS and SPECIAL INTEREST WORKSHOPS.

National Organization on Legal Problems of Education
5401 Southwest Seventh Avenue
Topeka, Kansas 66606

# ERIC and ERIC/CEM

The Educational Resources Information Center (ERIC) is a national information system operated by the National Institute of Education. ERIC serves educators by disseminating research results and other resource information that can be used in developing more effective educational programs.

The ERIC Clearinghouse on Educational Management, one of sixteen such units in the system, was established at the University of Oregon in 1966. The Clearinghouse and its companion units process research reports and journal articles for announcement in ERIC's index and abstract bulletins.

Research reports are announced in *Resources in Education (RIE)*, available in many libraries and by subscription for $42.70 a year from the United States Government Printing Office, Washington, D.C. 20402.

Journal articles are announced in *Current Index to Journals in Education. CIJE* is also available in many libraries and can be ordered for $62 a year from Macmillan Information, 216R Brown Street, Riverside, New Jersey 08075.

Besides processing documents and journal articles, the Clearinghouse prepares bibliographies, literature reviews, monographs, and other interpretive research studies on topics in its educational area.

# FOREWORD

This monograph by Robert E. Phay was prepared through a cooperative arrangement between NOLPE and the ERIC Clearinghouse on Educational Management. Under this arrangement, the Clearinghouse provided the guidelines for the organization of the paper, commissioned the author, and edited the paper for style. NOLPE selected the topic for the paper and published it as part of a monograph series.

In *The Law of Suspension and Expulsion: An Examination of the Substantive Issues in Controlling Student Conduct*, published by NOLPE in 1975, Mr. Phay examined the issues involved in the school's authority to suspend or expel students. In this monograph, a companion to the earlier one, Mr. Phay expounds the standards of fairness and due process of law that school officials must accord students who are subject to suspension or expulsion.

Mr. Phay is professor of public law and government at the Institute of Government of the University of North Carolina at Chapel Hill. He received his bachelor's degree with honors from the University of Mississippi in 1960 and his law degree from Yale University in 1963.

Specializing in the legal aspects of public and higher education, Mr. Phay has authored a variety of publications in this area. He was editor of the 1973 *Yearbook of School Law* and authored *Suspension and Expulsion of Public School Students*, a monograph published by NOLPE in 1971. He serves as legal consultant for the North Carolina School Boards Association.

Philip K. Piele, Director
ERIC Clearinghouse on
Educational Management

Marion A. McGhehey
Executive Secretary
NOLPE

# TABLE OF CONTENTS

# THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS

by

ROBERT E. PHAY

## INTRODUCTION

Until recently, few procedural requirements were placed on the public school when it decided to suspend or expel a student. Education was considered a privilege, not a right, and school expulsions were generally not reviewed by the courts. Today education is considered a right that cannot be denied without proper reason and unless proper procedures are followed.[1] Courts now require that students be accorded minimum standards of fairness and due process of law in disciplinary procedures that may terminate in suspension[2] or expulsion.[3]

To determine the procedural requirements placed on a school when it contemplates a suspension or expulsion, one must first examine the statutes of the state. The statutes may require a conference before a school can suspend a student, as Minnesota's recently adopted Pupil Fair Dismissal Act does.[4] For the more serious penalty of expulsion, they may

1. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975). *See also* Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970) (public education is a right protected by the equal protection and due process guarantees that may not be denied arbitrarily); Crews v. Clones, 432 F.2d 1259, 1263 (7th Cir. 1970) (hair-length case in which the court said that the "state does not possess an absolute right arbitrarily to refuse opportunities such as education in public schools . . . .").

2. Goss v. Lopez, 419 U.S. 565, 579 (1975).

3. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Jordan v. School Dist. of Erie, C.A. No. 34-73 (W.D. Pa., Feb. 5, 1974) (order and consent decree); Graham v. Knutzen, 351 F. Supp. 642 (D.C. Neb. 1972); Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328, 1342-43 (S.D. Tex. 1969), *modified*, 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969).

An emerging, related issue is whether a suspended or expelled student has any continuing right to an education. Courts that have considered the issue have generally held that a student loses his rights to an education when he is suspended or expelled. *See, e.g.*, Turner v. Kowalski, 364 N.Y.S.2d 91, 80 Misc. 2d 597 (S.Ct. 1975). Some state statutes, however, require that alternative education be provided while the student is out of the classroom. *See, e.g.*, Pub. Act No. 75-609, §4(c) CONN. GEN. STAT. ANN. (1975). *See generally* McClung, *The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?* 3 J. LAW & EDUC. 491 (1974).

A few cases are being reported in which the judge has ordered home instruction or alternative instruction when the particular circumstances require it. *See* "J. D." v. Board of Educ. of the Borough of Hawthorne, 1975 N. J. School L. Dec.____; "E. H." v. Board of Educ. of the Town of Boonton, 1975 N. J. School L. Dec.____.

4. *E.g.*, MINN. GEN. STAT. § 127.30 (1974).

require a formal hearing (as in Massachusetts, New York, Pennsylvania, and Washington[5]) or some other procedural observance, such as New York's requirement of notice, representation by legal counsel, and right to question witnesses against the pupil.[6]

Once the requirements of the state statutes are known, the second step is to determine the requirements imposed by the state and federal constitutions. Since only a few states have adopted statutes setting out the procedures to be followed by a school administrator or school board before it suspends or expels a student, we are dealing almost exclusively with constitutional requirements. Of foremost importance is the requirement of the Fourteenth Amendment to the United States Constitution that no person shall be deprived of "life, liberty, or property, without due process of law." The next move, then, is to determine what due process means with respect to student suspensions and expulsions. Here we must examine the judicial opinions on the subject.

Before doing so, we must note that due process requirements do not impose any particular model on the school disciplinary procedure. Due process is a flexible concept; whether it is afforded in a particular case depends on the circumstances of that case.[7]

The exactness and formality required of the procedure used in student discipline are directly proportional to the seriousness of the sanction that may be imposed. Thus, if the only penalty that may be given is an extra assignment or a detention after class, no formal procedure is usually required.[8] Previously, only in cases that involved long-term suspension or expulsion was the school legally obliged to give the student such guarantees as a notice and a hearing and to take action only when the charges are supported by the evidence. In two recent opinions, however, the United States Supreme Court has extended the due process requirements

---

5. Washington has adopted an elaborate scheme to ensure that due process protections are afforded to students. WASH AD. CODE ch. 180-40 (1972). For an analysis of how the statutory system works, *see* Note, 50 WASH. L. REV 675 (1975).

6. Connecticut, for example, recently passed "An Act concerning exclusion from school for disciplinary purposes," CONN. GEN. STAT. ANN. § 4(c) (1975). The legislation provides that no student shall be expelled without a formal hearing comporting with due process. The statute also provides for "alternative educational opportunity" for any expelled student and annual notice of board policies governing student conduct to all students.

7. In Hannah v. Larche, 363 U.S. 420, 442 (1960), the Supreme Court, addressing the application of due process, stated:

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

8. *See* Sill v. Pennsylvania State Univ., 318 F. Supp. 608, 617 (M.D. Pa. 1970), *aff'd*. 462 F 2d 463 (3d Cir. 1972), in which the court held that "being placed on probation or being denied certain school privileges does not . . . rise to the level of the deprivation of a right secured by the Constitution requiring judicial relief." *But see* Warren v. National Ass'n of Secondary School Principals, 375 F. Supp. 1043 (N.D. Tex. 1974), which required a hearing before a student could be expelled from the National Honor Society; and

to all school suspensions regardless of duration[9] and to corporal punishment.[10] In addition, a federal district court in Pennsylvania recently ordered that full procedural safeguards apply whenever a student is to be transferred from one school to another.[11] Thus, the concept of due process continues to expand in the school setting.

Despite this expansion, an informal procedure, similar to those that most schools now use, is legally permissible in suspension and expulsion cases if the student is fully aware of his or her rights and voluntarily chooses the informal type of procedure.[12] Nor have the courts applied the more elaborate procedural requirements when the dismissal is based on academic failure.[13] Thus only when the issue is misconduct and the stu-

---

O'Conner v. Board of Educ., 65 Misc. 2d 40, 316 N.Y.S.2d 799 (Sup. Ct. 1970), in which a New York State court required at least an administrative, nonadversary hearing before a school could take away a student's athletic letter.

In Montana State Univ. v. Ransier, 536 P.2d 187, 189-90 (Mont. 1975), the Montana Supreme Court, citing *Goss v. Lopez*, held that due process applies to the issuance of parking tickets to students. Without specifying its reasons for this ruling, the court alluded to the protection of a property interest. The case involved traffic fines of four dollars.

One limitation that applies to all school punishments is the Eighth Amendment's prohibition against cruel and unusual punishment. This issue is often raised in corporal punishment cases, but it usually fails. *See e.g.*, Ingraham v. Wright, 498 F.2d 248 (1974), *aff'd en banc*, 525 F.2d 909 (5th Cir. 1976). The Supreme Court also rejected the argument in Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd mem.*, 423 U.S. 907 (1975).

9. Goss v. Lopez, 419 U.S. 565 (1975).

10. Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd mem.*, 423 U.S. 907 (1975).

11. Jordan v. School Dist. of Erie, C.A. 34-73 (W. D. Pa., Feb. 5, 1974).

12. The student also may be held to have waived his right to a hearing if he refuses to follow school procedures. *See* Grayson v. Malone, 311 F. Supp. 987 (D. Mass. 1970); and Hatter v. Los Angeles City High School Dist., 310 F. Supp. 1309 (C. D. Cal. 1970), *rev'd on other grounds and remanded*, 452 F.2d 673 (9th Cir. 1971). A hearing also may be held to be waived if the student, instead of confirming a tentative date proffered by school authorities, brings suit. Flaherty v. Connors, 319 F. Supp. 1284, 1288 (D. Mass. 1970). In addition, students over the maximum age of mandatory attendance who voluntarily stop coming to school may be dropped from the rolls without a hearing, since no suspension has occurred. George v. Fiore, 62 Misc. 2d 429, 308 N.Y.S.2d 744 (1970). *See also* Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1975), in which a teacher was held to have waived his right to a hearing when he refused to participate because the hearing was not open to the public as he demanded.

13. In Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975), the court held that due process before a student was terminated or suspended for academic deficiencies was met when the school in any way told the student about the deficiencies. Relying heavily on *Goss*, the court noted that a student need only be made aware of his failure or impending failure before he is terminated. *See also* Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Brookins v. Bonnell, 362 F. Supp. 379 (E.D. Pa. 1973); Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913). The courts have also refused to apply *Dixon* and its progeny to scholastic failings in cases involving college students. *See, e.g.*, Greenhill v. Bailey, 378 F. Supp. 632 (S.D. Iowa 1974); Fiorino v. New England School of Law, (unreported 1st Cir. opinion on March 3, 1971), *cert. denied*, 404 U.S. 851 (1971); Connelly v. University of Vermont, 244 F. Supp. 156 (D. Vt. 1965); Mustell v. Rose, 282 Ala. 358, 367, 211 So. 2d 489, 498, *cert. denied*, 393 U.S. 936 (1968); and Militana v. University of Miami, 236 So. 2d 152 (Fla. App. 1970), *cert. denied*, 401 U.S. 962 (1971). *But see* Greenville v. Bailey, 519 F.2d 5 (8th Cir. 1975), in which the court ordered a hearing for a medical student after a medical school sent a report to the National Association of Medical Schools stating that it had dismissed the student because he lacked "intellectual ability" and had not prepared his course work properly. The Eighth Circuit Court of Appeals said that

dent may be suspended or expelled is the school usually required to afford him the opportunity to have the more formal procedure.[14]

## EXPULSIONS AND LONG-TERM SUSPENSIONS

### Specific Rules on Student Conduct

In general, a school may expel a student for any conduct that either disrupts the educational process or endangers the health or safety of the student, his classmates, or school personnel.[15] Under these circumstances, the expulsion need not be pursuant to established school board regulations. As a federal district court in Florida noted, "Due process is not affronted when students are disciplined for violations of unwritten rules when misconduct challenges lawful school authority and undermines the orderly operation of the school."[16]

In most cases, however, disciplinary action is based on a breach of school regulations governing student conduct. Thus the language of such rules and regulations is significant. Indeed, an expulsion or suspension may be declared unconstitutional if the student could not reasonably have understood that his conduct was prohibited. If he did not understand, he did not have adequate notice of the impropriety of his action before he committed it, and a basic requirement of due process thereby had been denied him.[17]

---

this communication practically foreclosed the possibility of his attending another school and thus deprived him of a liberty right.

14. However, there are exceptions. For example, a New York lower court found a lack of due process when a school revoked a student athlete's letter: the school could take a letter away from an athlete for flagrantly violating the training rules against smoking and drinking, but, to do so, it had to use a "basically fair procedure." It seems probable that courts will increasingly extend procedural due process requirements to the less severe school penalties. O'Conner v. Board of Educ., 65 Misc. 2d 40, 316 N.Y.S. 2d 799, 802 (Sup. Ct. 1970) (minimal procedural fairness required when revoking athletic letter). *See also* Behagen v. Intercollegiate Conf., 346 F. Supp. 602 (D. Minn. 1972) (due process requires a hearing before college players could be suspended from participating in basketball practice).

15. *See* N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 602-3 (3d rev. ed. 1971).

16. Rhyne v. Childs, 359 F. Supp. 1085, 1090 (N.D. Fla. 1973), *aff'd sub nom.*, Sweet v. Childs, 507 F.2d 675 (5th Cir.), *rehearing denied*, 518 F.2d 320 (5th Cir. 1975) (*per curiam*). *See also* Richards v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970), in which the court said, "[W]e would not wish to see school officials unable to take appropriate action in facing a problem of discipline or distraction simply because there was no preexisting rule on the books." *Accord*, Pierce v. School Comm. of New Bedford, 322 F. Supp. 957, 961-62 (D. Mass. 1971); Hasson v. Boothby, 318 F. Supp. 1183, 1188 (D. Mass. 1970). In *Hasson*, the court said that in some cases a written rule might be required, depending on (1) whether the student knew beforehand that his conduct was wrong and whether public policy was clearly involved; (2) the possible chill on First Amendment rights inherent in the situation; and (3) the severity of the penalty imposed. The court held, however, that one year's probation for the offense of being on school property with alcohol on the breath does not require a prior published rule.

17. The Fifth Circuit has indicated that when a student claims not to have known that his conduct was prohibited, "inquiry should be made to determine whether the student knew or should have known that his conduct violated school rules or policies." The court then pointed out that published rules of conduct would eliminate most problems in the area. Ingraham v. Wright, 498 F.2d 248, 268 (5th Cir. 1974), *aff'd en banc*, 525 F.2d 909 (5th Cir. 1976). *See also* St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974).

A California case yields an example of a rule that was too vague and therefore unenforceable against the student. A student had been expelled for violating a rule prohibiting "extreme hair styles."[18] In overturning the expulsion, the court said that the regulation "totally lacks the specificity required of government regulations which limit the exercise of constitutional rights."[19] Similarly, a federal court in Wisconsin invalidated the expulsion of college students for "misconduct" because the word as used in a student regulation was vague and too broad for the students to know specifically what constituted prohibited behavior.[20] However, more recently the United States Supreme Court upheld both a court-martial conviction for "conduct unbecoming an officer and a gentleman"[21] and a Tennessee statute proscribing "crimes against nature."[22] A helpful state-

18. Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969). *Compare with* Burpee v. Burton, 45 Wis. 150 (1878), an old case in which a student's expulsion for "general bad conduct" was upheld. These two cases graphically show the change in the law.

Claims that the rules are too vague are common but not always justified. *See* Southern v. Board of Trustees, 318 F. Supp. 355 (N.D. Tex. 1970), *aff'd per curiam*, 461 F.2d 1267 (5th Cir. 1972); and State v. Zwicker, 41 Wis. 2d 497, 164 N.W.2d 512, *noted in* 32 A.L.R.3d 531, *appeal dismissed*, 396 U.S. 26 (1969). *See also* Dunmar v. Ailes, 348 F.2d 51 (D.C. Cir. 1965); Prichard v. Spring Branch Indep. School Dist., 308 F. Supp. 570, 579 (S.D. Tex. 1970); and Freeman v. Flake, 320 F. Supp. 531 (D. Utah 1970), *aff'd in part and rev'd in part and remanded*, 448 F.2d 258 (9th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972).

19. Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68, 75 (1969). *But see* Parker v. Fry, 323 F. Supp. 728 (E.D. Ark. 1970), in which the court held that a rule prohibiting "extreme hair styles" was not unconstitutionally vague, especially since the student with shoulder-length hair in fact had adequate notice of what was expected of him; the court finally held that the school rule was invalid for other reasons. *See also* Giangreco v. Center School Dist., 315 F. Supp. 776 (W.D. Mo. 1969). A similar rule was held to be unconstitutionally vague in Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970), even though the student had received advance warning that he was violating the rule.

A regulation requiring "modesty, appropriateness, and neatness in clothing and personal appearance" and stating that a student is "not appropriately dressed if he is a disturbing influence in class or school because of his mode of dress" served as a sufficient basis for the suspension of two long-haired male students when the students involved were aware of what was expected of them and deliberately chose not to comply. Jackson v. Dorrier, 424 F.2d 213, 218 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1971). *See also* Corley v. Daunhauser, 312 F. Supp. 811 (E.D. Ark. 1970); Crews v. Cloncs, 303 F. Supp. 13 [illegible] D. Ind. 1969), *rev'd*, 432 F.2d 1259 (7th Cir. 1970).

20. Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). "Gross disobedience" and "misconduct" were not found to be unconstitutionally vague terms in Linwood v. Board of Educ., 463 F.2d 763 (1972), *cert. denied*, 409 U.S. 1027 (1972), or in Whitfield v. Simpson, 312 F. Supp. 889 (E.D. Ill. 1970). A test of vagueness less strict than that used in criminal cases was applied in Sill v. Pennsylvania State Univ., 318 F. Supp. 608 (M.D. Pa. 1970), *aff'd*, 462 F.2d 463 (3d Cir. 1972). Another court refused to invalidate for vagueness a suspension rule based in part on "behavior which is inimicable to the welfare, safety or morals of other pupils." *In re* K.P., 182 Colo. 409, 514 P.2d 1131, 1132 (1973). Still another court refused to vacate on grounds of vagueness the expulsion of a university student for behavior not "compatible with good citizenship." Stewart v. Reng, 321 F. Supp. 618 (E.D. Ark. 1970). *But see* Veasey v. Board of Pub. Instr., 247 So. 2d 80 (Fla. Ct. App. 1971), which held that a finding of "guilty of misconduct as charged" was unconstitutional because the standard for punishment was too vague.

21. Parker v. Levy, 417 U.S. 733 (1974).

22. Rose v. Locke, 423 U.S. 48 (1975).

ment of what specificity is required in school regulations is provided by a Texas case:

> School rules probably do not need to be as narrow as criminal statutes but if school officials contemplate severe punishment, they must do so on the basis of a rule which is drawn so as to reasonably inform the student what specific conduct is prescribed [*sic*]. Basic notions of justice and fair play require that no person shall be made to suffer for a breach unless standards of behavior have first been announced, for who is to decide what has been breached?[23]

A regulation also may be declared unconstitutionally vague if it is likely to trap an innocent student or encourages arbitrary and discriminatory enforcement.[24] But the fact that a rule under which a student is punished is found to be invalid does not always mean that he cannot be punished for his conduct. If his misconduct is flagrant, punishment may follow.[25]

It should be noted that a school regulation merely repeating the language of the standards approved in judicial opinions will not always satisfy the requirement that the prohibited behavior be clearly and specifically stated.[26] This point is illustrated by a federal district court decision in which the court declared unconstitutional a section of the National Defense Education Student Loan Act that provided for a two-year suspension of loan benefits to any recipient of NDEA funds who had been convicted of any crime "of a serious nature" that contributed to a "substantial disruption of the administration of the institution."[27] The court found that this language, which basically restated the Supreme

---

23. Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328, 1344-45 (S.D. Tex. 1969), *modified*, 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973). For cases emphasizing that school regulations need not be drawn with the specificity required of criminal statutes, *see* Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (9th Cir. 1973); Sword v. Fox, 446 F.2d 1091, 1099 (4th Cir. 1971). *See also* Beahm v. Grile, Civ. No. 70 F. 15 (N.D. Ind., Aug. 30. 1971); Banks v. Board of Pub. Instr., 314 F. Supp. 285 (S.D. Fla. 1970), *vacated and remanded*, 401 U.S. 988 (1971). *But see* Marin v. University of Puerto Rico, 377 F. Supp. 613 (D. Puerto Rico 1974), which held college regulations to the same standards as criminal legislation.

24. Grayned v. City of Rockford, 408 U.S. 104 (1972).

25. Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973). In Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969), the court held that "gross disobedience of school rules" or "gross disrespect" toward school authorities will justify disciplinary action regardless of the constitutionality of the school rules or the conduct of school activities. *See* Haskell, *Student Expression in the Public Schools*, 59 GEO. L. J. 37 (1970).

26. *See* Jacobs v. Board of School Comm'rs, 490 F.2d 601, 605 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975), in which a school regulation prohibiting the distribution of literature likely to produce a significant disruption was found to be unconstitutionally vague despite its similarity to the language of *Tinker*. The United States Supreme Court vacated as moot the judgment of the Seventh Circuit because the students had graduated. For a complete discussion of the issues involved in student distribution of literature, see T. King, Freedom and Control of Student Publications in the American High School, June, 1974 (unpublished Ph.D. dissertation in Kent State University Library), and R. PHAY, THE LAW OF SUSPENSION AND EXPULSION 12-32 (Topeka, Kansas: NOLPE, 1975).

27. Rasche v. Board of Trustees, 353 F. Supp 973 (N.D. Ill. 1972). *Compare with In re* K. P., 182 Colo. 409, 514 P.2d 1131, 1132 (1973), in which the state court did not find "unconstitutionally vague" a statutory provision that "behavior inimical to the welfare, safety, and morals of other pupils" was grounds for suspension or expulsion.

Court's standard of disruption in *Tinker v. Des Moines School District*,[28] did not give the student "fair warning" of what was forbidden. Despite the essential reiteration, the phrase was found to be vague and overbroad and thus to violate due process.

Moreover, courts are particularly firm in requiring specificity when First Amendment freedoms are involved. For example, a regulation requiring a student to "conduct himself as a lady or a gentleman" is too vague to serve as a basis for restricting student conduct that may involve speech.[29] When the conduct does not involve the expression of First Amendment freedoms, however, less strict requirements may be imposed. For example, a Pennsylvania court found school regulations prohibiting students from "flagrant disregard of teachers," "loitering in areas of heavy traffic," and "rowdy behavior in the area of heavy traffic" to be adequate. When students who had been suspended for thirty days under these rules complained that they were too vague, the court rejected their claim.[30]

An obvious corollary to the requirement of specificity in school disciplinary rules is the requirement that they be written. Oral statements of school board policies are often too vague and too easy to misinterpret. This point was illustrated in an unreported Texas case in which a federal court ordered reinstatement of two students who had been suspended under an alleged oral board policy that provided for automatic suspension of any student caught two times in a drug-related offense. The court held the punishment to be unconstitutional because the policy was too vague.[31]

Thus it is important that the school board adopt written regulations on student conduct and that these regulations be stated as clearly and with as much detail as possible. It is also important that the written conduct code be drafted in accordance with state statutes that govern school discipline. A recent Kentucky decision invalidated a school regulation that conflicted with state suspension statutes.[32] For an unexcused absence, the school had reduced a student's grade as an additional punishment for conduct that might lead to suspension. The court found that the rule was unlawful because the state statute authorizing suspension preempted the right of school officials to promulgate disciplinary regulations imposing additional punishment.

Finally, school rules should be publicized so that they reach all affected parties—students, parents, and the community that the school serves.

## Notice

The procedural due process requirement of proper notice obligates the school in several ways. First, the school must forewarn the student of the

28. 393 U.S. 503 (1969).

29. *See, e.g.*, Jacobs v. Board of School Comm'rs, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975) ("likely to cause significant disruption" is too vague); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973) ("obscene" is too vague).

30. Alex. v. Allen, 409 F. Supp. 379 (W.D. Pa. 1976). *Accord*, Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (9th Cir. 1973).

31. Taylor v. Grisham, No. A-75-CA-13 (W.D. Tex., Feb. 24, 1975).

32. Dorsey v. Bale, 521 S.E.2d 76, 77 (Ky. Ct. App. 1975).

type of conduct that, if engaged in, will subject him to expulsion. This aspect of notice was discussed in the preceding section.

Second, it must give the student accused of a violation and his parents notice of the charges against him and the nature of the evidence supporting those charges. Although some courts have held that notice may be given by telephone or other appropriate method,[33] a written statement is preferable and often required.[34] Besides reciting the factual allegations against the student, the statement should refer to the specific rule or regulation that has been violated and state when and where a hearing on the charges is to be held.[35] But charges in the notice need not be drawn with the specificity of criminal charges. The notice need only be detailed enough to give the student a fair opportunity to present a defense at his hearing.[36] Such notice is recommended even when the student fully admits to the conduct with which he is charged. At least one circuit, the

---

33. Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963) (charges may be read to students at beginning of the disciplinary hearing); Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970) (a timely telephone conversation between the principal and the student's mother was sufficient notice); Charles S. v. Board of Educ., 20 Cal. App. 3d 83, 97 Cal. Rptr. 422 (1971), *appeal dismissed*, 405 U.S. 1005 (1972) (lack of federal question).

34. The leading case in the area is Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975), in which the Eighth Circuit Court of Appeals, hearing the case on remand from the Supreme Court, held that the failure to adequately inform students and their parents of a school board meeting convened to discipline the plaintiffs violated their rights to procedural due process. As to the content of such notice, the Fifth Circuit, in Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961), has said: "The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education." *Accord*, Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328, 1343 (S.D. Tex. 1969), *modified*, 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973) (written notice required); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969) (written notice required); Tibbs v. Board, 114 N.J. Super. 287, 276 A.2d 165 (App. Div. 1971); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline, 45 F.R.D. 133, 147 (W.D. Mo. 1967). *See also* Alex v. Allen, 409 F. Supp. 379, 386-87 (W.D. Pa. 1976), in which the court said that "so long as adequate notice of the suspension hearing itself is provided, the court sees no constitutional issue involved in whether notice of each charge brought by a teacher be given at the exact time of the incident in question or at a subsequent date *before* the suspension hearing."

35. An example of insufficient specificity can be seen in Keller v. Fochs, 385 F. Supp. 262 (E.D. Wis. 1974). The parents were notified by letter that their son was being suspended on general grounds: "[He] continues to conduct himself in an irresponsible and disruptive manner . . . he continues to be defiant of reasonable requests . . . by teachers. His continued contempt for reasonable authority is evident in some way almost every day. . . ." The letter alluded to three recent incidents without being more specific...The court held the notice insufficient to inform the student of the charges against him without at least approximate dates and sufficient detail to identify the alleged misconduct. *Id.* at 265-66. But in Pierce v. School Comm. of New Bedford, 322 F. Supp. 957, 962 (D. Mass. 1971), a reference in a statement of charges that denial of readmission was based on the student's "constant disruptions and disrespectful manner and behavior" and on the fact that he was "insolent, defiant, disrespectful, insubordinate, and persistent in his general misconduct over an extended period of time" was adequate notice that his expulsion was keyed to his entire school career. *See also* Betts v. Board of Educ. of Chicago, 466 F.2d 629 (7th Cir. 1972); Linwood v. Board of Educ., 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972).

36. Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975).

Fifth, maintains that even when procedural protections serve only the limited function of ensuring a fair and reliable determination of the factual question of guilt, it will still examine the proceeding to be sure that adequate notice of the charges and a sufficient opportunity to prepare for the hearing were provided.[37] In this case the court said that the record clearly showed that the students understood the nature of the charges against them and therefore the notice was sufficient.

Moreover, although prior notice of the hearing is an absolute requisite for due process, the school discharges its responsibility if it honestly tries to reach the student and his parents by telephoning him and sending a registered letter to his home. If the student cannot be reached because he has changed his address or deliberately avoids notification, he cannot later complain that he did not receive notice.[38]

Third, the school must tell the accused student where and when the hearing will take place[39] and give him some reasonable time to prepare for it by scheduling it for several days after he has been notified of the charges against him. Two school days would probably be a minimum time between the notice and the hearing unless the student agrees to an immediate hearing.[40] Several courts, however, have held that a high school student must be given a minimum of five days' notice before a hearing on his expulsion.[41]

Fourth, the school must inform the student of his procedural rights before a hearing.[42] This requirement can be accomplished by sending

37. *Id.* at 1000.

38. Wright v. Southern Texas Univ., 277 F. Supp. 110, 113 (S.D. Tex. 1967), *aff'd*, 392 F.2d 728 (5th Cir. 1968). ("[W]ith respect to . ... these students . . . the constitutional umbrella should afford no protection to those who choose to go out in the rain bare-headed.")

39. It was the failure to inform the students of the time and place of the school board hearing that the Eighth Circuit Court of Appeals found a denial of procedural due process in the celebrated case of Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975).

40. Center for Participant Educ. v. Marshall, 337 F. Supp. 126 (N.D. Fla. 1972) (two days); Whitfield v. Simpson, 312 F. Supp. 889 (E.D. Ill. 1970) (two days).

41. Linwood v. Board of Educ., 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); and Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969). *See also* Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328, 1345 (S.D. Tex. 1969), *modified*, 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973), in which the court required, in a high school case imposing severe discipline, that the student and his parents be given "ample time before the hearing to examine the charges, prepare a defense and gather evidence and witnesses." A federal district court in Ohio held valid a statute providing that suspended college students be given five days' notice plus a reasonable continuance not to exceed ten days. Kister v. Ohio Bd. of Regents, 365 F. Supp. 27 (S.D. Ohio 1973), *aff'd*, 414 U.S. 1117 (1973). In Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975), college students were informed by letter that they had been suspended pending a hearing. The letter was sent five days after the disturbance and eight days before the hearing. Two days before the hearing, official notice was sent that included a statement of the charges. Only at the hearing were the students informed of the specific school regulations that they were alleged to have violated. The district court found the notice inadequate and ordered a new hearing.

42. *See* Graham v. Knutzen, 362 F. Supp. 881 (D. Neb. 1973), *aff'g on rehearing*, 351 F. Supp. 642 (D. Neb. 1972), in which the court observed that ignorance of required procedures and rights of students deprive the students and parents of an adequate hearing. *But see* Alex v. Allen, 409 F. Supp. 379, 387 (W.D. Pa. 1976).

him, when he is notified of the charges, a printed statement outlining the procedure. It is good practice for the school to include a complete disciplinary and procedural code in its student handbook. If this is done, sending the student a copy of the handbook should satisfy this aspect of notice.[43]

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

## The Hearing

The most fundamental aspect of procedural due process is the right to a fair hearing. Although the hearing need not adhere to the technical rules of a court of law, it must be conducted in accordance with the basic principles of due process.[44] These principles were spelled out as follows in *Dixon v. Alabama State Board of Education:*[45]

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

Although the *Dixon* case concerned the expulsion of a college student, the procedural requirements enunciated by the court apply generally to secondary schools as well. Indeed, courts in Florida,[46] Michigan,[47] New York,[48] North Carolina,[49] Nebraska,[50] Texas,[51] Kentucky,[52] Puerto

43. A federal district court in Connecticut suggested that schools adopt a policy "in use at many schools and colleges of giving accused students a brief written statement of all their rights at the same time they are notified of the charges against them." DeJesus v. Penberthy, 344 F. Supp. 70, 77 (D. Conn. 1972).

44. *See* Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1971); Southern v. Board of Trustees, 318 F. Supp. 355 (N.D. Tex. 1970), *aff'd per curiam*, 461 F.2d 1267 (5th Cir. 1972); Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970); and Perlman v. Shasta Joint Junior College, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970), for court decisions that did not require formal judicial-style hearings of discipline cases involving suspension or expulsion from school.

45. 294 F.2d 150, 158-59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

46. Black Students *ex rel.* Shoemaker v. Williams, 317 F. Supp. 1211 (M.D. Fla. 1970), *rev'd on other grounds and remanded*, 443 F.2d 1351 (5th Cir. 1971), *aff'd mem. on rehearing*, 335 F. Supp. 820 (M.D. Fla.), *aff'd per curiam*, 470 F.2d 957 (5th Cir. 1972); and Conyers v. Glenn, 243 So.2d 204 (Fla. Dist. Ct. App. 1971).

47. Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969).

48. Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y. 1967), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

49. Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

50. Graham v. Knutzen, 351 F. Supp. 642 (D. Neb. 1972), *aff'd on rehearing*, 362 F. Supp. 881 (D. Neb. 1973). Fielder v. Board of Educ. 346 F. Supp. 722 (D. Neb. 1972).

51. Greene v. Moore, 373 F. Supp. 1194 (N.D. Tex. 1974).

52. Lowery v. Adams, 344 F. Supp. 446 (W.D. Ky. 1972).

Rico,[53] and Vermont[54] have held that a minimum standard of judicial fairness requires that a student facing expulsion be given an opportunity to present his case before an impartial tribunal.

Although a hearing is a basic requirement of procedural due process, the student may waive this right. In fact, several recent decisions have dealt with what constitutes a waiver. For example, in a Massachusetts case in which a high school student was suspended and warned that another suspension would mean dismissal, a federal district court found that the refusal of the student and his father to go to the superintendent for reinstatement after the instant suspension amounted to a waiver of any hearing with respect to subsequent dismissal.[55] But in a New York case that involved a suspended student who had not responded to a school notice that he should contact the superintendent within five days to arrange the hearing, the court held that if the statutes provide a right to a hearing, the school could not assume that the student had waived it. It also said that the hearing should be scheduled and the parent and pupil advised of the date and their appropriate rights.[56] On a related issue, a federal district court in Texas held that when parents had received prompt notice of their son's suspension and their right to request a hearing, their failure to make a request made them responsible for the delay in the hearing. The court also added that in any event "the absence or deficiency of an initial hearing may be cured by a valid subsequent hearing."[57]

Another change in the right to a hearing is the extension of the right to disciplinary action other than suspension or expulsion. The first major case to make this extension was *Mills v. Board of Education of the District of Columbia*.[58] This landmark decision held that if a handicapped child and his parents object to his placement or nonplacement in or transfer to or from a program of special education, they have a constitu-

---

53. Cintron v. State Bd. of Educ., 384 F. Supp. 674 (D.P.R. 1974).

54. Nzuve v. Castleton State College, 335 A.2d 321 (Vt. 1975).

55. Grayson v. Malone, 311 F. Supp. 987 (D. Mass. 1970). *See also* Flaherty v. Conners, 319 F. Supp. 1284 (D. Mass. 1970).

56. MacDonald v. Tompkins, 323 N.Y.S.2d 1002 (N.Y. Sup. Ct. 1971).

57. Pervis v. LaMarque Indep. School Dist., 328 F. Supp. 638, 645 (S.D. Tex. 1971); *rev'd and remanded*, 466 F.2d 1054 (5th Cir. 1972). *Accord*, Greene v. Moore, 373 F. Supp. 1194 (N.D. Tex. 1974); Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 137 (N.D. Fla. 1972); Bistrick v. University of South Carolina, 324 F. Supp. 942 (D.S.C. 1971). Standards for waiver of other rights have been laid down by the Supreme Court and must be strictly observed. In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the Court defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (requirements for waiver of Fourth Amendment rights); Singer v. United States, 380 U.S. 24 (1965) (requirements for waiver of trial by jury); Henry v. Mississippi, 379 U.S. 443 (1965) (waiver of objection to illegal evidence). The implication from these cases is that mere silence on the student's part should not indicate a waiver of his rights. At a minimum, some type of return of notice by the student should be used.

58. Mills v. Board of Educ., 348 F. Supp. 866, 880-883 (D.D.C. 1972). *See also* Betts v. Board of Educ., 466 F.2d 629 (7th Cir. 1972); and Board of Educ. v. Scott, C.A. No. 176-814 (Cir. Ct. of Wayne County, Mich., Jan. 12, 1972).

tional right to a hearing before the action is taken.[59] A more recent decision by a Pennsylvania federal district court has ordered that a student be given a hearing before he can be transferred from one school to another because such transfers often cause at least as much harm to the student as a long-term suspension.[60] Additionally, the Eighth Circuit Court of Appeals held that a hearing was required before a professional association could be notified that a student was dismissed for "lack of intellectual ability or insufficient preparation."[61] It ruled that a medical school had imposed a stigma on the student when it notified the Association of American Medical Colleges of his academic dismissal and thus had unconstitutionally deprived him of a liberty interest.[62] A right to a hearing has also been upheld before a school can expel a student from the National Honor Society,[63] before an intercollegiate conference can deny students the right to play intercollegiate basketball,[64] and before a high school student can be transferred to a high school equivalency class that meets at night.[65]

## Right to Counsel

This section raises two questions: First, does procedural due process require the school to permit a student to have legal counsel in a school disciplinary proceeding that might lead to a long-term suspension or expulsion? Second, should the school permit legal counsel when a student thinks that only a lawyer can protect his interests?

Although more and more schools permit a student to have legal counsel at a school disciplinary proceeding,[66] when the request has been denied the cases are divided on whether legal counsel is a requirement of procedural due process.[67] Still, probably few courts today would find that

---

59. Mills v. Board of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972).

60. Jordan v. School District of Erie, C.A. No. 34-73 (W.D. Pa.. Feb. 5, 1974).

61. Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975). *See also* Horowitz v. Board of Curators of Univ. of Mo., 538 F.2d 1317 (6th Cir. 1976).

62. 519 F.2d at 8.

63. Warren v. National Ass'n of Secondary School Principals, 375 F. Supp. 1043 (N.D. Tex. 1974).

64. Behagen v. Intercollegiate Conf. of Faculty Rep., 346 F. Supp. 602 (D. Minn. 1972). *See also* Kelley v. Metropolitan Cty. Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968). which upheld the right to a hearing before an athletic conference can prevent a high school from participating in interscholastic athletic competition because of student misbehavior at a basketball tournament.

65. Quintinella v. Carey, No. 75-C-829 (N.D. Ill., March 31, 1975).

66. *See, e.g.*, Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); and Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973). *aff'd sub nom.*, Sweet v. Childs, 507 F.2d 675 (5th Cir. 1975), *aff'd on rehearing*, 518 F.2d 320 (5th Cir. 1975).

67. For a discussion of the right to counsel in the public school proceeding, *see* Johnson, *Due Process Requirements in the Suspension or Dismissal of Students from Public Educational Institutions*, 5 CAPITAL L. REV. 1, 31 (1976). Comment, *Due Process in the Public Schools—An Analysis of the Procedural Requirements and a Proposal for Implementing Them*, 54 N.C.L. REV. 641, 651 (1976).

The case most often cited to support the conclusion that procedural due process does not require that a student be allowed legal counsel in an expulsion proceeding is Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). To

the student has no constitutional right to legal counsel in a hearing that might result in expulsion.[68] Indeed, many recently adopted state statutes and school regulations permit student representation by counsel at expulsion hearings.[69] Whether or not the student is permitted legal counsel, he has a constitutional right to parental representation—or representation by another adult if his parents cannot advise and assist him properly. If the parent's interests are shown to be hostile to his, the student has the right to determine who will accompany him to the hearing.[70] Further, if the school attorney is present at the hearing to assist in the school's case, clearly the student cannot be denied the right to have an attorney.[71] Otherwise, the proceeding will be unfairly stacked against the student and thus constitute a denial of due process.

Much of the student expulsion litigation has come from the colleges. In most of the decisions of record, the students have not been denied legal counsel,[72] and therefore the right to counsel usually has not been an

---

interpret *Madera* as holding that legal counsel is not required in an expulsion proceeding is an error. *Madera* involved a guidance conference to discuss a student's prior suspension rather that an expulsion proceeding, and regardless of the outcome of the conference, the school had no authority to expel.

For cases that have upheld the school's right to prohibit a student from being represented by legal counsel, *see* Linwood v. Board of Educ., 463 F.2d 263, 770 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); Haynes v. Dallas Cty. Junior College Dist., 386 F. Supp. 208 (N.D. Tex. 1974); "R.R." v. Board of Educ., 109 N.J. Super. 337, 263 A.2d 180 (1970); Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), *aff'd mem.*, 281 N.Y.S.2d 970 (1967). *See generally* Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970); 33 A.L.R.3d 229 (1970).

But for decisions that have recognized the student's constitutional right to legal counsel, *see* Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973) (expulsion procedures); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (expulsion hearing); Mills v. District of Columbia Bd. of Educ., 348 F. Supp. 866, 881 (D.D.C. 1972) (expulsion hearing), Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967) (disqualification from Regents examination program). *But see* Note, *Constitutional Law—Due Process Does Not Require That a Student Be Afforded the Right to Counsel at a Public School Suspension Hearing*, 22 RUTGERS L. REV. 342 (1968). However, if parents know that they have a right to be represented by counsel and do not exercise it, they have not been denied due process. *See In re* Giles, 9 N.Y. Ed. Dept. Rep. 62 (1969).

68. The seminal case upholding the right to counsel in an administrative procedure is Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (right of welfare recipients to a pretermination hearing and to be represented by counsel before their benefits were discontinued). Since that decision, procedural due process has been expanded greatly to cover a large variety of administrative actions.

69. *See, e.g.*, Lee v. Macon City Bd. of Educ., 490 F.2d 458 (5th Cir. 1974); McDonald v. Board of Trustees, 375 F. Supp. 95 (N.D. Ill.), *aff'd per curiam*, 503 F.2d 105 (7th Cir. 1974); Linwood v. Board of Educ., 463 F.2d 763 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); Greene v. Moore, 373 F. Supp. 1194 (N.D. Tex. 1974); Graham v. Knutzen, 362 F. Supp. 881 (D. Neb. 1973), *aff'g on rehearing*, 351 F. Supp. 642 (D. Neb. 1972).

70. *See* Wagstaff v. Superior Ct., Family Ct. Div., 535 P.2d 1220, 1227 (Alas. 1975), in which a juvenile court upheld the child's right to select the attorney of his choice.

71. *See* French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 881 (1970); and Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

72. *See, e.g.*, Jones v. State Bd. of Educ., 279 F. Supp. 190, 194 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31, *rehearing denied*, 397 U.S. 1018 (1970). Buttny v. Smiley, 281 F. Supp. 280, 288 (D. Colo. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); *In re* Carter, 262 N.C. 260, 137 S.E.2d 150, 151 (1964).

issue. The trend in college rules governing disciplinary procedures is explicitly to permit students to have legal counsel in expulsion cases.[73] Nevertheless, when the college has denied legal counsel and the point has been litigated, most courts have ruled against the existence of such a right.[74] However, as college disciplinary hearings become increasingly formal, courts likely will require colleges to permit legal counsel when the student requests it as a matter of due process.[75]

As the due process concept is expanded, the courts probably will impose the same requirement on the public schools. Indeed, it can be argued that if the right to be represented by legal counsel is an emerging requirement of procedural due process at the college level, the need for an attorney is even greater at the secondary school level. The supporting argument is that a public secondary education is more necessary than a college education, that expulsion from public secondary school is more drastic than expulsion from college since educational opportunities are more seriously affected, and that the secondary school student's relative immaturity and unsophistication make him less capable than a college student of presenting his own defense in a disciplinary hearing.[76]

There are, however, several objections to granting a student's request to have legal counsel. The primary reason for the school's objection is the

---

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

74. *See, e.g.*, Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Forshman v. Pennsylvania State Univ., 395 F. Supp. 912, 921 (M.D. Pa. 1975); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 137 (N.D. Fla. 1972); Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W.Va. 1968), *aff'd per curiam*, 299 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Hutt v. Brooklyn College, 68 Civ. 691 (E.D.N.Y. July 30, 1968); Perlman v. Shasta Joint Junior College Bd. of Trustees, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563, 567 (1970); and General Order on Judicial Standards, 45 F.R.D. 133, 147 (W.D. Mo. 1968). *See also* four federal court decisions in which the right to counsel was denied in expulsion hearings from military academies. "Unlike the welfare recipient who lacks the training and education needed to understand his rights and express himself, the cadet should be capable of doing so." Hagopian v. Knowlton, 470 F.2d 201, 211-12 (2d Cir. 1972). *Accord*, Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Brown v. Knowlton, 370 F. Supp. 1119 (S.D.N.Y.), *aff'd*, 505 F.2d 727 (2d Cir. 1974); White v. Knowlton, 361 F. Supp. 445 (S.D.N.Y. 1975), *aff'd*, 509 F.2d 898 (2d Cir. 1975).

Other cases, however, have required legal counsel. *See, e.g.*, Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970), holding that a lawyer could advise a student but could not cross-examine or conduct defense. *Accord*, French v. Bashful, 303 F. Supp. 1333, 1337-38 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir. 1970), in which the court permitted a student to have legal counsel when a college uses a senior law student to prosecute, and Spells v. Brumfield, ____F. Supp. ____(N.D. Ind. 1972), in which the court invalidated Purdue University's regulation prohibiting students from having an attorney at disciplinary hearings.

75. In 1969 Professor Charles Alan Wright thought that a right to legal counsel in college disciplinary hearings already existed. *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1076 (1969).

76. *See* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RESERVE L. REV. 378, 397 (1969). The Ninth Circuit Court has held that the right to counsel at an expulsion hearing is a requirement of due process at the secondary level. *See* Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973).

fear that the presence of the student's attorney will change the nature of the hearing. School authorities fear that the hearing will become less like a conference and more like a judicial proceeding, a change they want to avoid.[77]

The presence of counsel also increases the time, cost, and workload of the disciplinary proceeding. If the student has legal counsel, the school authorities will think it necessary to bring in the school board attorney, to whom they probably will turn over much of the basic handling of the school's case. This development further adds to the judicial nature of the hearing. The school also may feel that it must provide a disinterested lawyer or jurist as the presiding officer. The result is a longer and more expensive proceeding. Furthermore, if the student is permitted to have counsel, the next step, some argue, is to provide indigent students with counsel at public expense—in the interest of fairness if not as a legal requirement.[78] This additional step poses problems of cost, of finding lawyers trained to handle juvenile problems, and of dealing with people who are trained in adversary proceedings and often fail to recognize the rehabilitative aspects of the school proceeding.[79]

These proper concerns of school authorities must be considered in conjunction with the student's need to have his interests protected by an adult at the expulsion hearing. In most cases, the student's parents or some other nonlawyer adult of his choosing, such as a social worker, guidance counselor, or minister, would probably satisfy the need to see that a fair hearing is conducted.[80] However, if the student (or his parents) thinks that only legal counsel can properly represent him in an expulsion proceeding, I strongly recommend that the school permit him to have counsel. A refusal may appear to be an admission by the school that its case is weak. By refusing a student's request for an attorney in an expulsion case, the school may lose far more in the eyes of the community than it gains.

---

77. *See* Hagopian v. Knowlton, 470 F.2d 201, 211 (2d Cir. 1972). Murray State University tried another procedure, which was the issue of litigation in Lowery v. Adams, 344 F. Supp. 446 (W.D. Ky. 1972). In a suspension hearing before the faculty disciplinary committee the school allowed the students' attorney to attend the hearing, make motions, advise his clients, and make a final summation, but did not permit him to participate otherwise in the proceeding. It limited its own attorney to the same role. The students appealed the decision to the Board of Regents; in the appeal the attorneys were permitted to make an opening statement, cross-examine witnesses, and present testimony on behalf of their clients. Apparently the court approved this procedure, but the de novo hearing available at trial precluded the issue.

78. In Bartley v. Kremens, 402 F. Supp. 1039, 1051 (E.D. Pa. 1975), *prob. juris. noted*, 44 U.S.L.W. 3531 (U.S. March 22, 1976), a federal district court ruled that states must provide hearings with free counsel for any mentally handicapped child who is committed to a state institution and cannot afford an attorney.

79. *See* 42 N.Y.U.L. REV. 961, 965 (1967). *See generally* Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501 (1963).

80. *But see* Graham v. Knutzen, 362 F. Supp. 881, 884 (D. Neb. 1973), *aff'd on rehearing*, 351 F. Supp. 642 (D. Neb. 1972). The suspended student's parents demanded the right to be represented at a hearing by a person of their own choosing. The court refused the request, holding that the school administrative procedures that allowed legal representation clearly met the requirements of due process and that the school was not required to alter them.

## Inspection of Evidence

As I observed in the section on notice, the student must be told the nature of the evidence against him. A concomitant to this fundamental requirement of due process is that the student be permitted to inspect any affidavits or exhibits that the school plans to introduce at the hearing before the hearing is held. The school should have no objection to this disclosure since its primary goal at the hearing is to determine the facts and minimize the possibility of making a mistake about the student. The student's full inspection of the documents concerning his charged misconduct usually promotes this aim. Schools may, however, be obligated to protect faculty evaluations of other students' performances and behavior from inspection.[81] Such records are usually considered confidential.[82] A collateral issue concerning prior inspection of evidence is whether this right extends to the list of witnesses and to copies of their statements. It is now generally agreed that the accused student must be told who the principal witnesses against him are, unless doing so would physically endanger a witness.[83]

## Trier of Fact—Impartiality of the Hearing

A fair hearing presupposes that the accused student will have an opportunity to present his case before an impartial trier of fact.[84] The

---

81. The Family Educational Rights and Privacy Act. 20 U.S.C.A. § 1232g (Supp. IV. 1974). governs access to student records by parents. students. and other persons. The penalty for failure to comply with the act is loss of federal education funds. *See also* 40 Fed. Reg. 1208 (Jan. 6. 1975) and 41 Fed. Reg. 24662-24675 (June 17. 1976) for the HEW regulations implementing this act. For a discussion of the requirements of this act, see J. Brannon. *Student Records: Proposed School Board Policy to Comply with New Regulations*. VIII SCHOOL LAW BULL. 1 (Jan. 1977).

82. In Wasson v. Trowbridge. 382 F.2d 807. 813 (2d Cir. 1967). the court excluded faculty evaluations of students from records that could be inspected. *See also* Brown v. Knowlton. 370 F. Supp. 1119. 1123 (S.D.N.Y.). *aff'd*. 505 F.2d 727 (2d Cir. 1974). in which the court refused to allow inspection of a student's file of confidential faculty appraisals to see whether it contains any adverse opinions.

83. In Graham v. Knutzen. 362 F. Supp. 881 (D.Neb. 1973). a court compelled disclosure of any evidence. especially the names of school officials who knew the disciplinary situation. "at the earliest possible stage of the proceedings" to allow a more effective presentation by the student. *Accord*. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150. 158-59 (5th Cir. 1961). *cert. denied*. 368 U.S. 930 (1961); Center for Participant Educ. v. Marshall. 337 F. Supp. 126. 136 (N.D. Fla. 1972); Hobson v. Bailey. 309 F. Supp. 1393. 1402 (W.D. Tenn. 1970); Smith v. Miller. 514 P.2d 377. 384 (Kan. 1973); "R.K." v. Board of Educ., 1973 N.J. School L. Dec. 343; "T.T." v. Board of Educ., 1971 N.J. School L. Dec. 670. *But see* Keller v. Fochs. 385 F. Supp. 262. 265 (E.D. Wis. 1974). in which the court rejected a student's claim that the school board's failure to provide him with the names of witnesses against him and their testimony violated due process.

84. *See* Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir.). *cert. denied*. 414 U.S. 1032. 1077 (1973); and Leonard v. School Comm. of Attleboro. 349 Mass. 704. 212 N.E.2d 468. 473 (1965). In Perlman v. Shasta Joint Junior College Dist. Bd. of Trustees, 9 Cal. App. 3d 873. 88 Cal. Rptr. 563. 569-70 (1970). a California court held that administrative bias and prejudice denied the student a fair hearing and thus violated due process of law. *See also* Warren v. National Ass'n of Secondary School Principals. 375 F. Supp. 1043. 1047 (N.D. Tex. 1974). in which the court found a violation of due process when the complaining witness also sat on the hearings board.

When the hearings are regulatory rather than adjudicative. to use Kenneth Culp Davis'

question is: What constitutes an impartial trier of fact? Clearly, the Sixth Amendment's requirement of a trial by an impartial jury of one's peers is not required in student disciplinary cases. The Sixth Amendment applies only to criminal prosecutions. Since a disciplinary hearing is a civil proceeding, reviewable in a court of law, the Sixth Amendment right to a jury trial does not apply.

Nor is a hearing board or tribunal necessarily required, though I strongly recommend that the school consider using a hearing panel for expulsion cases. Usually in such cases the principal is the trier of fact, though most states require the superintendent or the school board to approve expulsions and long-term suspensions. Generally the principal will have prior knowledge, if not direct involvement, with the case. In fact, he is often the primary school official present when the infraction of school rules occurs, and his testimony will determine whether the student will be suspended or expelled.

Although I seriously question the soundness of the principal's being the trier of fact in an expulsion case in his school and strongly object to his assuming this role when he has had direct involvement in the case, the commingling of the decision-making and prosecutorial functions usually does not make the hearing invalid.[85] Unless it can be shown that the principal's involvement has prejudiced him so that he cannot impartially and fairly consider the evidence, courts are unlikely to overturn an expulsion because he has also been the trier of fact.[86]

---

nomenclature, the standard for impartiality may be different. The Supreme Court recently held that a school board's prior involvement in collective bargaining did not disqualify it from dismissing teachers who engaged in a strike in violation of state law. Finding no evidence of a conflict of interest or personal animosity between the school board and the teachers, the Court ruled that the mere fact that an agency has become very knowledgeable about a case while performing in its statutory role does not disqualify it from making a decision. Hortonville Joint School Dist. No 1 v. Hortonville Educ. Ass'n. 423 U.S. 1301 (1976).

85. *See, e.g.*, Jones v. Snead. 431 F.2d 1115. 1117 (8th Cir. 1970); Center for Participant Educ. v. Marshall. 337 F. Supp. 126. 136 (N.D. Fla. 1972); Student Ass'n of State Univ. of N.Y. v. Toll. 332 F. Supp. 455, 459 (E.D.N.Y. 1971). *But see* Caldwell v. Cannady, 340 F. Supp. 835, 839 (N.D. Tex. 1972); Board of Educ. v. Scott, C.A. No. 176-814 (Cir. Ct. Wayne Cty., Mich., Jan. 12, 1972) (suspension set aside because principal served as both accuser and judge at hearing).

86. Two cases that illustrate prior involvement by the principal in a discipline case that makes it improper for him to be the hearing officer are Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir. 1973), *cert. denied*, 414 U.S. 1032 (1974); and Matter of Jean Dishaw, 10 N.Y. Ed. Dept. Rep. 34 (1970). *See also* Hagopian v. Knowlton, 346 F. Supp. 29 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2nd Cir. 1972), in which a West Point company officer, who had issued over half of a cadet's demerits, was disqualified from reviewing those demerits to determine whether they were correctly imposed. *Id.* at 32.

In several college discipline cases that have considered the matter of combining decision-making and prosecutorial functions in an expulsion procedure, courts have permitted the functions to be combined. They have reasoned that it is difficult and burdensome, and sometimes impossible, to obtain a panel whose members have had no previous contact with the case. *See, e.g.*, Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972); Jones v. State Bd. of Educ., 279 F. Supp. 190, 200 (M.D. Tenn. 1968), 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970), *rehearing denied*, 397 U.S. 1018 (1970); Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967); Wright v. Texas So. Univ., 277 F. Supp 110 (S.D. Tex. 1967), *aff'd*, 392 F.2d 728 (5th Cir. 1968).

Similar results were reached in a case that involved the dismissal of school employees.

A Fifth Circuit decision illustrated this point by refusing to establish a per se rule disqualifying an administrative hearing body from deciding such internal school matters as suspension solely because some of the members participated in the initial investigation of the matter.[87] The court held that a charge of "prejudice in hearing bodies must be based on more than mere speculation and tenuous inferences" and applied a standard previously established for impartiality: "[A] tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges."[88] But a federal district court decision from Texas shows the exception: "If the facts demonstrate 'that a school official's involvement in an incident is such as to preclude his affording the student an impartial hearing,' someone other than the principal should be designated to make a decision."[89] Thus, the student is entitled to have a different trier of fact, or a different member of a panel, if he can show that the trier has bias, malice, or personal interest in the outcome of the case.[90] If the hearing procedures provide an opportunity to prove bias, the constitutional requirement for an impartial trier of fact will have been met.[91]

---

In Saterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567 (4th Cir. 1975), plaintiff contested his dismissal as a high school band director on the grounds that his posttermination hearing did not comport with due process requirements. In addition to his complaint that the hearings should have been open to the public, plaintiff alleged that the school board was disqualified as an impartial decision-maker because it had earlier approved the superintendent's recommendation not to renew his contract. In denying the plaintiff's claim, the court ruled that he had failed to meet his obligation to raise the issue of impartiality "at the earliest moment after knowledge of the facts." But even if he had raised the issue at the proper time, the board would not have been disqualified solely because it approved the superintendent's recommendation. *Id.* at 574.

87. Duke v. North Tex. State Univ., 469 F.2d 829 (5th Cir. 1972).

88. *Id.* at 833. In the *Duke* case the contention was made that an administrator's direct involvement in an incident was analogous to a judge's contempt power. Keying on the standard of "apparent impartiality," the dissent argued that the competency of hearing tribunals must be monitored carefully.

> Judicial bodies have the benefit of established principles and traditions, and knowledge of their proper application, to guide them in situations where they have interests adverse to the litigants and must determine whether disqualification may be required. . . . The usual institutional hearing body will possess neither these traditional criteria nor specialized knowledge of their applicability. [*Id.* at 842.]

In addition, courts have the benefit of history and status, which engender public confidence in their decisions. School hearing tribunals have no such trappings. In arguing for disqualifications in verbal-abuse cases, the dissent relied particularly on the contempt doctrine as it was established in Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (a trial judge reviled by a contemner must, if he waits until the end of the trial to mete out contempt punishment, defer to another judge).

89. Hawkins v. Coleman, 376 F. Supp. 1330, 1332 (N.D. Tex. 1974), quoting Sullivan v. Houston Indep. School Dist., 475 F. Supp. 1071, 1077 (5th Cir. 1973).

90. *Id.*

91. In Greene v. Moore, 373 F. Supp. 1194, 1198 (N.D. Tex. 1974), the school board granted a full hearing to a student whom the principal had summarily suspended for assaulting a teacher. The court found sufficient evidence that the school board used its independent judgment regarding the penalty imposed and did not act as a rubber stamp in merely confirming the principal's judgment. If the student himself advances evidence at a hearing that may prejudice the school board against him (such as showing that he once distributed literature labeling a member a "fascist pig"), the board should not be disquali-

A more recent Texas case underscores the same point. A student was expelled from the National Honor Society for drinking.[92] One of his teachers had seen him drinking in violation of both the state's criminal laws and the Honor Society's code. The student was given a full hearing, but the same teacher was on the committee that voted for expulsion. In overturning the expulsion, the district court noted that the element of impartiality or neutrality was totally lacking in the tribunal because the accusing witness also sat as a judge in the dismissal hearing. This was so even though the committee had not been asked to decide whether the charge was accurate. The court ruled that the severity of the punishment warranted the decision being made by an impartial group.[93]

A federal district court decision in Vermont[94] provides another statement of the impartiality standard. It held that neither the principal nor the superintendent satisfied the requirements for an impartial decision-maker in a particular suspension case and ordered the school board to preside at the hearing.

> While ordinarily the school principal or superintendent of schools is a satisfactory decision-maker in a student suspension or expulsion case, on the particular and somewhat unique facts of this case . . . the official directly involved in gathering facts and making recommendations cannot always have complete objectivity in evaluating them. Thus, without impugning the motives or good faith of the principal and superintendent involved in this case, we believe the proper course on the facts before us here is to relieve these officials from any decision making role in view of their prior direct involvement with plaintiff's case and the strong likelihood that they may be witnesses at the hearing.[95]

---

fied. Pierce v. School Comm. of New Bedford, 322 F. Supp. 957, 962 (D. Mass. 1971). *See also* Lee v. Macon City Bd. of Educ., 490 F.2d 458 (5th Cir. 1974), in which the court, while not specifically finding bias, held that the school board had erred in merely accepting a principal's request for two expulsions without reaching its own judgment. The court found that the board's formalistic acceptance of the principal's request without making an independent investigation violated due process. *Id.* at 460.

92. Warren v. National Ass'n of Secondary School Principals, 375 F. Supp. 1043, 1047-48 (N.D. Tex. 1974). *Accord*, Betts v. Board of Educ. of Chicago, 466 F.2d 629, 633 (7th Cir. 1972); Ector Cty. Indep. School Dist. v. Hopkins, 518 S.W.2d 576, 582 (Tex. Civ. App. 1974).

93. In Stevenson v. Board of Regents, 393 F. Supp. 812 (D.C. Tex. 1975), a student claimed that his discontinuance from a doctoral program was unlawful because the committee members who voted on his performance were prejudiced against him because of his extracurricular commercial activities. The court noted:

> . . . [W]hile the purely academic question of "whether the plaintiff should . . . have received a passing grade [is] . . . a matter wholly within the jurisdiction of the school authorities . . . to the extent that plaintiff has alleged his dismissal was for reasons other than the quality of his [academic] work . . . he has stated a cause of action." [*Id.* at 817.]

*See also* Connelly v. University of Vermont and State Agricultural College, 244 F. Supp. 156 (D. Vt. 1965).

*But see* the recent case of Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975). The suspension hearing board was appointed by the president of the college, who was a main witness against the students. The students claimed that the board was predisposed against them because the witness-president had hired many of them. The court found no evidence of any bias or prejudice and upheld the suspensions.

94. Gratton v. Winooski School Dist., C.A. 74-86 (D. Vt., April 10, 1974).

95. *Id.* at 4.

A Wisconsin case provides an example of appropriate dealing with a situation in which the school administrator was so closely connected with the student misconduct that he should not have been the trier of fact. It involved students at Oshkosh State University who faced expulsion on charges of breaking into the president's office, threatening him, and holding him prisoner. Under the university's rules, the president considers appeals from student discipline cases and makes recommendations to the board of regents. In this case, however, the regents wisely excused the president from participation in the hearings and asked a former state supreme court justice to conduct the hearings and make recommendations.[96] This procedure represents a fair and easy way to eliminate conflicts of interest. However fair the president could have been in this situation, the school avoided the likely accusation that it had not provided an impartial tribunal.

The same considerations apply to public school expulsions. Although not required by law, the best procedure in expulsion cases in which the principal has been a direct participant in the actions that are the basis for the expulsion is to have a member of the school's faculty or, preferably, a panel consisting of a teacher, a parent, and a student serve as trier of fact.[97]

## The Role of the School Attorney

Recent litigation has challenged the school board attorney's role in school expulsion cases. The results have been mixed. A lower Pennsylvania state court held that the requirements of due process demand that a school attorney assume either an adversary or judicial role: he may not assume both. Thus the court found that the school attorney's dual function as both prosecutor and adviser to the school board at a pre-suspension hearing violated due process.[98]

A federal district court in Pennsylvania more recently disagreed. It held that due process was not violated when a school solicitor acted both as judge and prosecutor at a student dismissal hearing.[99] The court was concerned with the cost and general undesirability of overly formal dis-

---

96. Marzette v. McPhee, 294 F. Supp. 562, 566 (W.D. Wis. 1968).

97. In Haynes v. Dallas Cty. Junior College Dist., 386 F. Supp. 208. 212 (N.D. Tex. 1974), the court approved a system whereby the suspension hearing committee was chosen from the faculty by alphabetical order and from the student body by the student senate.

In Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321, 324 (1975), a student claimed a right to random selection of the hearing committee members who would decide his case. The court rejected this right in all but trials by jury and held that a hearing is not like a jury trial. It also summarily dismissed the student's alleged right to challenge and replace disqualified members. Another court found that it is not necessary to obtain an impartial hearing officer from outside the administrative personnel of the school system. Graham v. Knutzen, 351 F. Supp. 642, 669 (D. Neb. 1972).

98. Appeal of Feldman, 346 A.2d 895, 896 (Pa. Comm. Ct. 1975). In English v. North East Bd. of Educ., 348 A.2d 494 (Pa. Comm. Ct. 1975), the court held that a school attorney could not serve as prosecutor and judge at a hearing for a discharged school employee at which the attorney presented testimony justifying the plaintiff's unsatisfactory ratings.

99. Alex v. Allen, 409 F. Supp. 379, 387 (W.D. Pa. 1976).

ciplinary procedures and found that "[a]s long as the student is given a formal hearing by the school board and is represented by counsel, . . . it is reasonable for the school solicitor to prosecute the case against him or her, rule on evidentiary questions, and advise the board as to probable action."[100] Nevertheless, it is wise to separate the functions for the same reasons that prosecutional and adjudicatory functions of administrators should be separated.[101] I suggest that the principal and/or superintendent present the case against the student. The school's attorney should help the administrator prepare the school's case, but at the hearing he should serve as a law officer, answering questions and giving advice to the board of education and others, rather than making the case against the student.

## Witnesses—Confrontation, Cross-Examination, and Compulsory Production

In criminal prosecutions and most administrative proceedings, the defendant may confront and cross-examine witnesses testifying against him, call his own witnesses, and compel witnesses to attend the trial or hearing. In a student disciplinary hearing, the student certainly may call his own witnesses. The procedure would be a charade if he did not have this right.[102] However, the court decisions conflict over the student's rights to confront and cross-examine witnesses and to compel witnesses to attend the hearing. Most school boards have no power to compel the attendance of witnesses by subpoena, but if the school does have subpoena powers,[103] any witness whose testimony seems necessary to a proper investigation of the matter, including those requested by the student, should be compelled to attend.[104]

A few public schools and colleges still do not permit students to confront and cross-examine witnesses. When the right has been denied and the issue litigated, the courts have disagreed whether the right is required as a matter of procedural due process. In the *Dixon v. Board of Education* case, the Fifth Circuit held that a full-dress judicial hearing with

---

100. *Id.* at 388.

101. See text accompanying note 85 *supra*.

102. In Morrison v. City of Lawrence, 186 Mass. 456, 460, 72 N.E. 91, 92 (1904), the court noted: "The hearing afforded may be of no value if relevant evidence, when offered, is refused admission, or those who otherwise would testify in behalf of the excluded pupil are prevented by action of the [school]."

103. *See, e.g.*, N.C. GEN. STAT. § 115-32 (1975), which grants subpoena and contempt powers to school boards for "all matters which may lawfully come within the powers of the board . . ." *Compare N.Y. Education Law* § 2215(12) (McKinney 1953), which grants district superintendents subpoena power for obtaining testimony in a case or proceeding heard by the commissioner of education.

104. *See* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 376, 395 (1969), in which the author argues for the student's right to compel the attendance of witnesses. *But see* Greene v. Moore, 373 F. Supp. 1194, 1198 (N.D. Tex. 1974), in which a federal district court ruled that the school board and the school administrators had no duty to produce witnesses requested by the student's attorney. The court noted, however, that the requested character witnesses (four teachers) would not have affected the outcome of the hearing, perhaps implying that essential witnesses under school control might at times be compelled to appear.

the right to cross-examine witnesses is not required because (1) it is impractical to carry out, and (2) the attending publicity and disturbance may be detrimental to the educational atmosphere.[105] This is the position most generally taken by the courts in the years immediately following *Dixon*, and the Fifth Circuit has recently reaffirmed its adherence to this view in *Boykins v. Fairfield Board of Education*.[106]

Most recent cases, however, take the opposite view. A federal district court in North Carolina observed that it considered the right to confront and examine witnesses to be a basic requirement of due process.[107] A Kansas court noted that "[t]he right to cross-examine adverse witnesses on disputed questions of fact can scarcely be overemphasized."[108] The court acknowledged problems with cross-examination in the school setting, but held that cross-examination must be allowed at least when the outcome is dependent on the credibility of witnesses whose statements conflict. The court suggested that when cross-examination is required by the circumstances, the school's interest could be protected by holding the hearing in private and by "limiting the scope of cross-examination to prevent the student or his lawyer from badgering witnesses."

In another recent decision, the federal district court in Connecticut said that granting cross-examination is within the discretion of the school board.[109] The test suggested in this decision for allowing cross-examination is whether cross-examination would inhibit the search for the truth. While the court acknowledged that under certain circum-

---

105. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *Accord*, Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972); Goldberg v. Regents of Univ. of Calif., 248 Cal. App. 867, 57 Cal. Rptr. 463, 473 (1967), and State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942).

106. 492 F.2d 697, 701 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *See also* Hobson v. Bailey, 309 F. Supp. 1393, 1401 (W.D. Tenn. 1970); Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217, 1227 (E.D. Mich. 1970); and Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970).

107. Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972). *Accord*, Nitzberg v. Parks, 525 F.2d 378, 384 (4th Cir. 1975).

108. Smith v. Miller, 514 P.2d 377, 386 (Kan. 1973). In this case a strong dissent argued that the right to cross-examine was futile without the concomitant right to subpoena witnesses, and whether the school board is given subpoena power is a matter of legislative concern. The dissenting judges feared that a skillful trial lawyer could take over the proceeding and reasoned that a lay board of school officials could not be expected to control the nature or extent of a cross-examination competently. This is particularly true since school officials have no contempt powers. In a separate dissenting opinion, another justice feared that this opinion would open the door to making the disciplinary hearing comply with the same procedural due process requirements of a full-blown adversary criminal trial. *See also* Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973), which flatly declared that the right to cross-examine adverse witnesses in a disciplinary proceeding is a part of due process. *Accord*, Fielder v. Board of Educ., 346 F. Supp. 722 (D. Neb. 1972); Mitchell v. Long Island Univ., 62 Misc. 2d 733, 309 N.Y.S.2d 538, 540 (1970); and Tibbs v. Board of Educ., 114 N.J. Super. 287, 276 A.2d 165, 166 (1971), in which the court set aside an expulsion for failure to produce the accusing witnesses for testimony and cross-examination even though the principal said that student witnesses were afraid to testify because of fear of reprisal. In Greene v. Moore, 375 F. Supp. 1194, 1197 (W.D. Tex. 1974), a student was allowed a full right of cross-examination without comment by the court.

109. DeJesus v. Penberthy, 344 F. Supp. 70, 76 (D. Conn. 1972).

stances cross-examination of witnesses might not be proper, it said that in expulsion cases adverse testimony normally should be taken in the presence of the student and that the witness should be subject to cross-examination. The court ruled that only in "extreme cases" should cross-examination be omitted, and then, the court cautioned, the "responsibility for probing the accusing testimony will . . . rest with the Board." Under these "extreme" circumstances, such as a student's fear of reprisal if he gave adverse testimony, the expelled student would be entitled to a transcript of the testimony taken out of his presence.

Concerning the line of cases that deny confrontation and cross-examination as a constitutional right, one commentator suggests that the reasons given for limiting or denying confrontation and cross-examination are not "wholly persuasive" in the university context.[110] In my view, they are equally unpersuasive in the secondary school expulsion proceeding. Since the expulsion hearing need not be public, the sch should be able to prevent the hearing from creating undue disturbanc lthough both disturbance and undue publicity *can* result—two reasons the Fifth Circuit gave in *Dixon* for denying the student the rights of confrontation and cross-examination—neither seems likely to result simply because these privileges are permitted. Indeed, it seems more likely that undue publicity and disruption will result from denying these rights than from granting them.

The further argument that cross-examination is impractical to carry out perhaps has more substance, particularly if the examination is not conducted by legal counsel or someone trained in the technique. However, the right to ask questions of adverse witnesses should not be denied merely because the student is inept at cross-examination.

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

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

---

110. Wright, *The Constitution on the Campus*. 22 VAND L. REV. 1027, 1076 (1969). *See also* Buss. *Procedural Due Process for School Discipline: Probing the Constitutional Outline*. 119 U. PENN. L. REV. 545. 595 (1971).

Professor Clark Byse of the Harvard Law School has suggested an alternative to complete rejection or full granting of confrontation and cross-examination rights in student disciplinary hearings. He proposed that confrontation and cross-examination be required not routinely but only when they are "the conditions of enlightened action."[111] Thus if the expulsion proceeding hinges on the credibility of testimony received, confrontation and cross-examination would be "conditions of enlightened action." When so justified, both confrontation and cross-examination should be required both as a matter of good school policy and constitutional due process.

Another way to deal with the problems of cross-examination is to distinguish between student and teacher adverse witnesses. A federal district court in Nebraska made such a distinction when it held that the student had a right to confront and cross-examine an adverse teacher witness, but not necessarily to confront and cross-examine adverse student witnesses. This solution would eliminate at least some of the concern caused by cross-examination, since, presumably, a teacher would be less subject to fear of reprisal for testifying against a student than would another student.[112]

## Evidence

Another troublesome issue that often arises in expulsion hearings is whether technical rules of evidence are to be applied. Since the expulsion hearing is an administrative proceeding rather than a judicial or quasi-judicial trial, the common-law rules of evidence do not apply.[113] In fact, the Fifth Circuit Court in *Boykins v. Fairfield Board of Education*[114] pointed out the fallacy of trying to apply the technical rules of evidence in an administrative hearing conducted by laymen. The court said that "basic fairness and integrity of the fact-finding process" are the criteria for judging the constitutional adequacy of the disciplinary hearing, and it declined to place the duty of applying the technical rules of evidence on a board of laymen.[115] Thus the hearing board must be

---

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

112. Graham v. Knutzen, 351 F. Supp. 642, 665 (D. Neb. 1972), *aff'd on rehearing*, 362 F. Supp. 881 (D. Neb. 1973). The problem of disclosing informants was an issue in a recent Fourth Circuit decision. In McNeill v. Butz, 480 F.2d 314, 323 (4th Cir. 1973), a case involving dismissal of federal employees, the court held that unless the government had "good cause" to protect its confidential informant with a cloak of absolute secrecy, procedural due process requires that it provide an opportunity to confront and cross-examine adverse witnesses.

113. Betts v. Board of Educ. of Chicago, 466 F.2d 629, 633 (7th Cir. 1972); Ford v. Jones, 372 F. Supp. 1187, 1189 (E.D. Ky. 1974) (refusal to renew teacher's employment contract).

114. 492 F.2d 697, 700-01 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). The court allowed hearsay testimony of school administrators charged with the duty to investigate the incident. *But see* DeJesus v. Penberthy, 344 F. Supp. 70, 75 (D. Conn. 1972), in which the court overturned an expulsion in which the hearing board relied on hearsay testimony on a critical factual issue. The court held that due process requires that readily available testimony be presented to the fact-finders in person.

115. Boykins v. Board of Educ., 492 F.2d 697, 701 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

reasonably free to determine what evidence should be considered and the weight it should be given.[116] Although the board should not uncritically admit as fact testimony of questionable veracity,[117] I recommend that the board be liberal in allowing evidence. It should not, for example, exclude evidence simply because it is hearsay.[118] Indeed, when there are factors establishing the reliability and probative value of the evidence, hearsay testimony alone may constitute substantial evidence.[119] As the Fifth Circuit said in the *Boykins* case, a fair determination of the issue can be based on the hearsay evidence of school administrators charged with the duty to investigate school disruption.[120] Also, evidence of a student's good character should be allowed because of the gravity of the punishment.

Another occasional issue is the extent to which a student's record may be used as evidence in a disciplinary proceeding. Several New York cases have held that a student's anecdotal record is relevant in proportion to the degree of severity of the punishment to be administered after guilt has been determined. To admit evidence from the record that does not relate directly to the conduct in question constitutes error on the basis of which reversal may be sought. Even when a student's record is being properly considered, the student and his counsel must be told what it contains so that he will have an opportunity to challenge its validity and accuracy.[121]

In the only case found in which a student was denied permission to present evidence he thought would be helpful to his position, the appellate board ordered a new hearing at which the student was to be permitted to present the evidence he claimed he was prevented from introducing.[122]

## Self-Incrimination

At both the high school and university levels, school disciplinary proceedings have generally been viewed as administrative proceedings that

---

116. When the testimony conflicts, it is the school officials who determine the witnesses' credibility since they are the ones who hear the testimony and observe the demeano.. Furthermore, it is improper for a reviewing court to substitute its judgment as to the weight that should be given if the testimony of the school record adequately substantiates the school's finding. *See* Bullock v. White Plains Bd. of Educ., 13 N.Y. Ed. Dept. Rep. 240 (1974).

117. Strickland v. Inlow, 519 F.2d 744, 746-47 (8th Cir. 1975).

118. *See* the proposed school board rule on admissibility of evidence in a school board hearing in R. PHAY, TEACHER DISMISSAL AND NONRENEWAL OF TEACHER CONTRACTS: PROPOSED SCHOOL BOARD REGULATIONS 28 (1972).

119. School Board v. H.E.W., 525 F.2d 900, 906 (5th Cir. 1976). The court listed several circumstances that support the probative value of the evidence. They include statements made by out-of-court declarants who are not biased or have no interest in the outcome, the unavailability of direct evidence, and uncontradicted or unchallenged hearsay evidence. *But cf.* Canady v. Butz, 480 F.2d 314, 322-25 (4th Cir. 1973), in which the dismissal of a government employee, based on investigative reports that related hearsay statements of nameless informers whom the employee could not confront or cross-examine, was held to violate procedural due process.

120. Boykins v. Board of Educ., 492 F.2d 697, 701 (5th Cir. 1974).

121. *In re* Lee, 13 N.Y. Ed. Dept. Rep. 231 (1974); *In re* Keiling, 11 N.Y. Ed. Dept. Rep. 260 (1972); *In re* Watson, 10 N.Y. Ed. Dept. Rep. 90 (1971).

122. Scher v. Board of Educ., 1968 N.J. School L. Dec. 92, 97.

are not sufficiently criminal in nature to require the Fifth Amendment's protection against self-incrimination. This view distinguishes school disciplinary proceedings from juvenile court proceedings, in which the United States Supreme Court has held the protection against self-incrimination to be a requirement of due process.[123]

The question of self-incrimination usually arises when a student's conduct results in his being charged with both a school offense and the violation of a criminal law. When both criminal and disciplinary proceedings are pending, students have maintained that they cannot be compelled to testify in the disciplinary hearing because the testimony, or leads from it, may be used to incriminate them at the later criminal proceeding. This objection, based on the Fifth Amendment's protection against self-incrimination, has been raised unsuccessfully in several college cases. In a California case,[124] students sought to enjoin expulsion hearings until criminal actions arising out of the same activities had been completed. They argued that to avoid expulsion they would be forced to incriminate themselves, and their testimony would then be offered against them in the criminal proceedings. In denying their request, the court held that the students could object at the criminal trial to incriminating statements made at the expulsion hearings, and no Fifth Amendment right would have been jeopardized.[125] The court based its ruling on *Garrity v. New Jersey*,[126] a case in which compulsory testimony at a state investigation was held inadmissible in a subsequent criminal prosecution arising from the investigation.[127]

This decision represents the consensus of courts today,[128] though courts in at least three cases have suggested that the privilege against self-incrimination is available at a hearing on expulsion.[129]

Another issue that occasionally arises is whether a student may postpone a suspension or expulsion hearing pending a criminal proceeding that stems from the same conduct. Courts have consistently held that a delay need not be granted. In a recent case from Vermont, a student who

---

123. *In re* Gault, 387 U.S. 1, 47 (1967).
124. Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969).
125. *Id.* at 1165.
126. 385 U.S. 493 (1967).
127. *Id.* at 565-66.
128. *See, e.g.*, Madera v. Board of Educ., 386 F.2d 778, 780 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). *See also* Johnson v. Board, 62 Misc. 2d 929, 310 N.Y.S.2d 429 (Sup. Ct. 1970); and *In re* Manigaulte, 63 Misc. 2d 765, 313 N.Y.S.2d 322 (Sup. Ct. 1970), two cases in which the court refused to prohibit the school board from conducting disciplinary hearings while the student was under criminal charges based on the same conduct even though he might have to testify to defend himself. For cases at the college level, *see* Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); General Order on Judicial Standards, 45 F.R.D. 133, 147 (W.D. Mo. 1968); and Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 550-51 (S.D.N.Y. 1968).
129. Caldwell v. Cannady, 340 F. Supp. 835, 841 (N.D. Tex. 1972), in which a district court held that a student cannot be denied his Fifth Amendment right against self-incrimination at a school board hearing, nor can a student's silence under any circumstances be used against him. *Accord*, Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (Sup. Ct. 1967); and State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942).

faced criminal charges of burglary, attempted rape, and simple assault alleged a violation of due process when the college refused to await the criminal proceeding before initiating its own trial.[130] The student claimed that the college hearing would substantially prejudice the pending criminal trial. The court rejected the claim by saying that educational institutions have both a need and a right to formulate their own standards and enforce them independently of the criminal law. Furthermore, requiring the college to wait assumes that civil remedies must, as a matter of law, await the outcome of related criminal charges. Finally, such delay might allow a student to complete his education and earn his degree, thus "effectively completing an 'end run' around the disciplinary rules and procedures of the college."[131]

A *Miranda* type of warning also does not apply to a school investigation of alleged misconduct.[132]

## Sufficiency of Evidence

The third requirement of minimal due process in school expulsion cases, in addition to adequate notice and a fair hearing, is that disciplinary action be taken only if the charges are supported by "substantial evidence."[133] The term *substantial evidence* has special meaning. In an expulsion case against students who had disrupted Pennsylvania State University, a federal district court[134] adopted the definition developed by the United States Supreme Court for its review of National Labor Relations Board decisions:

> [S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . .

---

130. Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975). In Pierce v. School Comm. of New Bedford, 322 F. Supp. 957 (D. Mass. 1971), the board denied a student's request for a continuance until the criminal action was completed on the ground that the court proceeding might take years. *Accord*, Jones v. Snead, 431 F.2d 1115 (8th Cir. 1970); Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). *See also* KALAIDJIAN, PROBLEMS OF DUAL JURISDICTION OF CAMPUS AND COMMUNITY, STUDENT PROTEST AND THE LAW 136-39 (G. Holmes ed. 1969).

131. Nzuve v. Castleton State College, 335 A.2d 321, 325 (Vt. 1975).

132. A *Miranda* warning is a reminder to suspects of crime that they may refuse to make self-incriminating answers to questions and may have a lawyer's help in answering questions. Miranda v. Arizona, 384 U.S. 436 (1966). *See* Betts v. Board of Educ. of Chicago, 466 F.2d 629 (7th Cir. 1972); Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968); and Goldwyn v. Allen, 54 Misc. 2d 94, 291 N.Y.S.2d 899 (Sup. Ct. 1967), all of which rejected the claim that *Miranda* applies to expulsions in secondary and higher education.

133. Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972); Bullock v. White Plains Bd. of Educ., 13 N.Y. Ed. Dept. Rep. 240 (1974); State v. Wingerd, 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974); and Black Students *ex rel.* Shoemaker v. Williams, 317 F. Supp. 1211, 1216 (M.D. Fla. 1970), *rev'd on other grounds and remanded*, 443 F.2d 1350 (5th Cir. 1971), *aff'd on rehearing*, 335 F. Supp. 820 (M.D. Fla.), *aff'd per curiam*, 470 F.2d 57 (5th Cir. 1972). *Accord*, Green v. Dumke, 480 F.2d 624, 630 (9th Cir. 1973) (federal student aid could not be refused without showing that students intended to disrupt activities of the institution). *See also* Linwood v. Board of Educ., 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972), which held that proof beyond a reasonable doubt was not required.

134. Still v. Pennsylvania State Univ., 318 F. Supp. 608 (M.D. Pa. 1970), *aff'g*, 315 F. Supp. 125 (M.D. Pa.), *aff'd*, 462 F.2d 463 (3d Cir. 1972).

> Accordingly, it "must do more than create a suspicion of the established . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury . . ." The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . . Congress has merely made it clear that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.[135]

An example of evidence insufficient to justify expulsion occurred in a case in which a university expelled students on the basis of a police list of students arrested at a protest rally.[136] The court held that the list furnished no basis for the university to take disciplinary action against the students for disruption of the school because the list contained only their names and no statement of their particular conduct.[137] Thus a school cannot expel a student without enough evidence to prove the charge it makes against him. To do so would be arbitrary and capricious and therefore unlawful.[138]

A federal district court in Michigan[139] recently rejected the "substantial evidence" standard in a college expulsion when the alleged student conduct was also a crime—the only court I know of that has done so. It held that due process requires that "some articulated and coherent standard of proof be formally adopted and applied at the college hearing which determines the student's guilt or innocence of the charge."[140] The court found that, without some specific standard, the rest of the safeguards were jeopardized. It then rejected "substantial evidence" as the appropriate standard to be applied under the circumstances.[141] It

---

135. *Id.* at 621, quoting Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (citations omitted).

136. Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). *Accord*, Jacobs v. Templeton, 130 Kan. 248, 285 P. 541 (1930); Ryan v. Board of Educ., 124 Kan. 89, 257 P. 945 (1927); State v. Hipp, 213 N.W. 2d 610 (Minn. Sup. Ct. 1973). *See also* Dause v. Bates, 369 F. Supp. 159 (W.D. Ky. 1973), *rev'd*, 502 F.2d 865 (6th Cir. 1974), in which the court permitted teachers to show that the minutes of a school board meeting contained no factual basis to support their demotion. *But see* Edwards v. Board of Regents of Northwest Missouri State Univ., 397 F Supp. 822 (W.D. Mo. 1975); Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973).

137. Wong v. Hayakawa, 464 F.2d 1282, 1283-84 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973).

138. Most states have an administrative procedure act that sets out the requirements for judicial review of final administrative decisions. If the decision—in our case, a school expulsion—is unsupported by competent, material, and substantial evidence, the decision will be reversed. In a Florida case, an expulsion was vacated when the board gave as its reason for expulsion no more than the statement that the student was "guilty of the misconduct as charged." This phrase provided an insufficient basis for review and consequently violated due process and the state administrative procedure act. Veasey v. Board of Pub. Instr., 247 So. 2d 80, 81 (Fla. Ct. App. 1971). *See also* McDonald v. Board of Trustees, 375 F. Supp. 95 (N.D. Ill. 1974), *aff'd per curiam*, 505 F.2d 105 (7th Cir. 1974), in which the court held that reviewing courts are to apply the "same evidence" standard as the school uses in student expulsion cases.

139. Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).

140. *Id.* at 797.

141. *Id.*

reasoned that the college's rule setting out this standard required only that the college present a certain amount of evidence (substantial) of guilt and the campus tribunal could then convict, regardless of other evidence. Without dictating a specific standard, the court then stated that any standard lower than a "preponderance of evidence" would have the effect of requiring the accused to prove his innocence, and it suggested that the higher standard of "clear and convincing evidence" may be required.[142]

## Mass Hearings

At times, school authorities have found it desirable or necessary to conduct expulsion hearings in which charges were considered simultaneously against many students. This procedure was upheld when the University of Colorado tried sixty-five students who had locked arms to deny access to University buildings.[143] The students admitted acting as a group, and the court held that they could be tried as a group. Commenting on the constitutionality of this procedure, one writer made the following observation:

> There certainly is no legal impropriety in holding a joint trial. I don't believe that even with the assistance of counsel the student could constitutionally insist upon a separate trial, despite the possibility that a kind of prejudice may occur because of testimony in one part of the trial that relates to another student.[144]

This position finds support in a New York case [145] in which students challenged a three-day suspension on the ground that the disciplinary board was arbitrary in its selection of those to be charged with misconduct. Seventeen were suspended out of an estimated 200 to 250 students who participated in a protest sit-in. The commission ruled that since the charges against them were based on personal identification, the disciplining of these seventeen when many more students might have engaged in the same misconduct did not constitute arbitrariness or harassment.

## Double Jeopardy

Students have argued that the Fifth Amendment's prohibition against double jeopardy prohibits the application of both criminal and administrative sanctions against the same person for a single offense. This claim

---

142. *Id.* at 794.

143. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968). *See also* McDonald v. Board of Trustees, 375 F. Supp. 95 (N.D. Ill.), *aff'd per curiam*, 503 F.2d 105 (7th Cir. 1974), in which three students were given a joint hearing for cheating, but each case was given individual attention. The court upheld the procedure.

144. VAN ALSTYNE, STUDENT PROTEST AND THE LAW 206 (G. Holmes ed. 1969). For recent cases involving mass hearings and suspensions, *see* Sweet v. Childs, 507 F.2d 675 (5th Cir.), *aff'd on rehearing*, 518 F.2d 320 (5th Cir. 1975); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Haynes v. Dallas Cty. Junior College Dist., 386 F. Supp. 208 (N.D. Tex. 1974).

145. *In re* Gressler, 14 N.Y. Ed. Dept. Rep. 414 (1975). *Accord*, Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 137-38 (N.D. Fla. 1972).

has no legal basis:[146] the double-jeopardy principle applies only in criminal cases.[147] Thus a student who is expelled from school and later tried in criminal court for the same offense has no more been subjected to double jeopardy than a person who is convicted of drunken driving in an automobile accident and later is sued for negligence. The state may impose both a criminal and a civil penalty for the same offense.[148]

Nor is a school required to suspend its proceedings pending the outcome of criminal charges. Furthermore, it can suspend a student even after he is found innocent of the same offense in juvenile court. A New Jersey commissioner decision noted, in upholding a school suspension against a student for an "atrocious assault and battery" on another student, that the "not guilty" verdict in criminal court for this alleged act was based on a different quantum of proof. In the criminal court the state had to establish guilt beyond a reasonable doubt, while in the school disciplinary proceeding the school need only establish the truth of the charge by a preponderance of the believable evidence.[149]

A student may also be punished twice for the same offense. In an Ohio case, the principal suspended a student for ten days and when he returned to class after the suspension, the superintendent expelled him for the rest of the semester. The Ohio appellate court found no question of double jeopardy in the case, observing that suspension and expulsion are separate punishments. Suspension is an immediate response by the principal to the misconduct, whereas expulsion is a sanction reserved to the superintendent after he reviews the offense.[150]

## Public Hearing

Only a few secondary school cases have ruled on a student's right to a public hearing. Two courts have held that a student had no right to an open hearing if state law authorized the school committee to go into executive session whenever matters to be discussed, if made public,

---

146. Professor Charles Alan Wright notes that student claims of double jeopardy ". . . are not uncommon, but are utterly without merit." Wright, *op. cit. supra* note 110, at 1073; General Order on Judicial Standards, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968). *See generally* McKay, *The Student As Private Citizen*, 45 DENVER L. J. 558 (1968).

In Paine v. Board of Regents, 335 F. Supp. 199, 203 (W.D. Tex. 1972), *aff'd per curiam*, 474 F.2d 1397 (5th Cir. 1973), the district court explained the difference between the two punishments: ". . . state laws defining criminal conduct . . . are intended to vindicate public justice in regard to the individual offender while [the school code] mandating automatic suspension . . . is intended to protect the university community and the educational goals of the institution. . . ."

147. Courts have uniformly held that a former jeopardy argument applies only to criminal trials. *See* Dunn v. California Dept. of Corrections, 401 F.2d 340 (9th Cir. 1968); Filmon Process Corp. v. Spell-Right Corp., 404 F.2d 1351 (D.C. Cir. 1968).

148. *See* U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537, 549 (1943); and Helvering v. Mitchell, 303 U.S. 391, 398 (1938).

149. "S.T." v. Board of Educ., 1972 N.J. School L. Dec. 555, 558. *Accord*, Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975). *See* text at note 133-42 *supra*, for a discussion of the school's burden of proof in discipline hearings.

150. State *ex rel.* Fleetwood v. Board of Educ., 20 Ohio App. 2d 154, 252 N.E.2d 318 (1969). *Accord*, *In re* Bullock, 13 N.Y. Ed. Dept. Rep. 240 (1974) (superintendent added two days to the suspension because of additional evidence).

might adversely affect any person's reputation.[151] In 1973, however, the Florida Supreme Court held that the state's "Sunshine Law" requiring open hearings by administrative bodies applies to the school board, and therefore students were entitled to a public disciplinary hearing.[152]

At the college level, however, the student's right to a public hearing has been litigated several times. Courts uniformly have held that procedural due process[153] does not require a hearing in open court. Thus the proceeding need not be open to the public.

## Transcript of Hearing

The courts are divided over whether the school must provide a transcript of the hearing when the student requests one. Still, it is clear that if an appeal is to be taken, a transcript must be available unless the appeal is to be *de novo*.[154] The proceeding can easily be tape-recorded and transcribed if an appeal is taken.[155]

## Appeal

Most state statutes either require that expulsions be made by the school board or permit an expelled student to have his expulsion reviewed by the board.[156] Most states also have an administrative procedure act that permits an appeal from a final administrative decision to a state court. Thus

---

151. Linwood v. Board of Educ., 463 F.2d 763, 770 (1972), *cert. denied*, 409 U.S. 1027 (1972). Pierce v. School Comm., 322 F. Supp. 957, 961 (D. Mass. 1971). *See also* Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567, 572 (4th Cir. 1975), in which a teacher was denied an open hearing on a dismissal.

152. Canney v. Board of Pub. Instr., 278 So. 2d 260, 263 (Fla. 1973). *See also* "M.W." v. Board of Educ., 1975 N.J. School L. Dec.____, which held that an expulsion may be made only at a public meeting of the school board.

153. *See* Montana State Univ. v. Ransier, 536 P.2d 187, 189-90 (Mont. 1975); Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968); General Order on Judicial Standards, 45 F.R.D. 133, 147 (W.D. Mo. 1968); "M.W." v. Board of Educ. of the Freehold Regional High School Dist., Monmouth Cty., 1975 N.J. School L. Dec.____ (final vote on expulsion must be made in public session). *See also* Wright, *op. cit. supra* note 110, at 1079-80.

154. For cases holding that a transcript should be provided when requested by either party, *see* Mills v. Board of Educ., 348 F. Supp. 866, 881 (D.C.D. 1972); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967), *cert. denied*, 398 U.S. 965 (1969); Goldberg v. Regents of the Univ. of California, 248 Cal. App. 867, 57 Cal. Rptr. 463 (1967). *Contra* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963). *See also* Smith v. Johnson, 105 Neb. 61, 178 N.W. 835, 837 (1920), in which the court held that since no statute provided otherwise, the lack of a formal record of a district board meeting to expel a pupil will not impair the board's action.

155. In Pierce v. School Comm., 322 F. Supp. 957, 961 (D. Mass. 1971), the court held that the student's constitutional rights had not been violated by refusing to allow him to make either a stenographic or mechanical recording of the hearing. The New York Commissioner of Education ruled in *In re* Cousins, 10 N.Y. Ed. Dept. Rep. 231 (1971), that a taped transcript of the hearing was adequate because the student did not object when it was made.

156. *See, e.g.*, N.C. GEN. STAT. § 115-54 (1975).

if the student thinks that he has been denied a statutory or constitutional right or that the administrator or school board has acted arbitrarily or capriciously, he may appeal the decision to a state court.[157] Most challenges to student discipline actions, however, have arisen in the federal courts under section 1983 of the Civil Rights Act of 1871,[158] thus greatly reducing the significance of a right to appeal to a state court.

### Automatic Review

Courts frequently have ruled that an expulsion cannot be extended into the next school year. I suggest that the cases of expelled students be reviewed at the end of the semester in which they are expelled (assuming that at least a month has passed) to see whether reinstatement is in order.

### Multiple Suspensions

What about the chronic offender who is frequently suspended for misconduct? I recommend that if a student is suspended for more than ten days during a semester, any later suspension be followed by a review of the student's record by a hearing board. In any event, repeated short-term suspensions should not be continued indefinitely.

## SHORT-TERM SUSPENSIONS

The procedural requirements just reviewed apply only to expulsions and long-term suspensions. Until 1975, immediate suspension for up to ten days generally was permitted without any process at all.[159] In *Goss v. Lopez*,[160] however, the United States Supreme Court changed the law by requiring certain minimal procedures before a student can be removed from school.[161] Since the law of short-term suspensions is now contained within the Supreme Court's decision in *Goss*, that case deserves careful examination.

*Goss* involved nine students who were suspended for ten days from the public schools in Columbus, Ohio, without a hearing. The suspended students challenged the constitutionality of the Ohio statutes that

157. *See, e.g.*, N.C. GEN. STAT. § 150A-43 (Supp. 1974).

158. 42 U.S.C. § 1983 (1970). *See* 28 U.S.C. § 1343(3) for the federal courts' jurisdiction of these actions.

159. *See, e.g.*, Munay v. West Baton Rouge Parish School Bd., 472 F.2d 438 (5th Cir. 1973); Pervis v. LaMarque Indep. School Dist., 466 F.2d 1054 (5th Cir. 1972), *rev'g*, 328 F. Supp. 638 (S.D. Tex. 1971); Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971). *See* T. Flygare, *Short-term Student Suspensions and the Requirements of Due Process* 5 J. LAW AND ED. 529 (1974).

160. 419 U.S. 565 (1975). *See* Note, *Procedural Due Process and Short Suspensions from the Public Schools: Prologue to Goss v. Lopez*, 50 N.C.L.REV. 364 (1974). For a discussion of procedural due process after *Goss v. Lopez*, *see* Note, 1976 DUKE L.J. 409.

161. It should be noted that the procedures required by *Goss* have been held not to apply to each of the components that make up the "educational process." Thus participation in athletic activity, like membership in school clubs and social groups, was held by the Tenth Circuit Court of Appeals not to constitute a "property right" requiring the protection of due process under the Fourteenth Amendment. Albach v. Odle, 531 F.2d 983 (10th Cir. 1976).

authorized principals to impose these suspensions without a hearing. A three-judge federal district court ruled that the students had been denied procedural due process when they were suspended without an opportunity to present their side of the story; the court declared the Ohio statute to be unconstitutional. The school system appealed to the Supreme Court.

The school made two principal arguments against the district court's decision. The first was that there is no constitutional right to a free public education and therefore no constitutional protection from suspension and expulsion. The Supreme Court rejected this argument. It noted that the Fourteenth Amendment protects citizens from state action depriving them of life, liberty, or property without due process of law. In the suspension situation, the Court observed that two interests of students are entitled to due process protection. The first is the "property" interest in a public education. Ohio is not constitutionally required to provide a free public education, but it has chosen to do so and has required its children to attend school. In this action by the state, the children of Ohio acquired a property right protected by the Fourteenth Amendment. This property right may not be taken away for misconduct without adherence to the minimum procedures required by the due process clause.

The second student interest entitled to constitutional protection is a "liberty" interest. Citing earlier decisions requiring due process protection "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the Court concluded that suspensions of up to ten days could "seriously damage the students' standing with fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." The possibility of such "serious damage" to the students' "liberty" required minimum due process protections.

The school officials' second argument was that even if the pupils had a constitutionally protected interest in education, the due process clause comes into play only when the deprivation of a protected interest causes "severe detriment or grievous loss." Suspensions of up to ten days, they said, were neither "severe" nor "grievous." The Supreme Court rejected this argument, pointing out that "as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." The Court concluded: "Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."

Having determined that procedural due process must be accorded a student before he is suspended, the Court faced the difficult problem of determining "what process is due." "At the very minimum . . . students facing suspension . . . must be given *some* kind of notice and afforded *some* kind of hearing." The Court attempted to balance the student's interest in avoiding "unfair and mistaken exclusion from the educational process" with the schools' recognized interest in using suspension as a means to maintain essential discipline and order. Noting the great con-

cern that elaborate hearing proceedings not be imposed in every suspension case, the Court nevertheless observed that "it would be a strange disciplinary system" that did not provide for communication between the disciplinarian and the student to ensure that "an injustice is not done." "We do not believe," the Court said, "that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency." It then outlined the minimum procedures required by the Constitution's due process clause when public school students are suspended for ten days or less:

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

The Court did not require any "delay between the time when notice is given and the time of the hearing." It pointed out that in most cases these requirements would be satisfied by an informal discussion immediately after the alleged misconduct occurs in which the student is told "what he is accused of doing and what the basis of the accusation is" and then has the opportunity to explain his "version of the facts." This procedure is necessary even when the disciplinarian witnessed the alleged misconduct.

The Court approved an exception to its general rule of notice and hearing before suspension: "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from the school." In these cases notice and hearing should follow "as soon as practicable."

The Court also noted that it had stopped short of requiring even "truncated trial type procedures," and such rights as representation by counsel, confrontation and cross-examination of witnesses, and calling of witnesses were specifically not required. Such procedures could overwhelm school administrators, be too costly as a regular disciplinary tool, and destroy the effectiveness of suspension as part of the teaching process. Thus the decision leaves to the disciplinarian's discretion whether the circumstances of a particular case call for more formal procedures.

The Court emphasized that its opinion applies only to short-term suspensions of ten days or less: "[L]onger suspensions or expulsions may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required."

Four justices dissented. Justice Powell, joined by the Chief Justice and Justices Blackman and Rehnquist, took strong exception to the result reached by the majority. He said that the majority decision marked a significant intrusion into the daily operation of the nation's state-operated public school systems. "No one can foresee the ultimate frontiers of the new 'thicket' the Court now enters. Today's ruling appears to sweep within the protected interest in education a magnitude of discretionary decisions in the educational process." Maintaining that the majority opinion calls into question such discretionary decisions as

grading a student's work, passing or failing a student, requiring completion of a core curriculum, transferring students to other schools, or placing students in "college-preparatory" or "vocational" tracks, the dissenters called on the majority to articulate "a rational and analytically sound distinction between the discretionary decision by school authorities to suspend a pupil for a brief period, and the types of discretionary school decisions described above," if such a distinction exists. If not, Justice Powell concluded, the "federal courts should prepare themselves for a vast new role in society."

The question of how specific the school official must be in describing the reasons for a contemplated suspension was the basis of two federal district court decisions in New Hampshire.[162] One case involved a four-day suspension of a student who was "informed generally of what was involved," but was not told specifically that he might be suspended, nor was he specifically told the four reasons the school used to justify the suspension. According to the court, the lack of specificity in the notice to the student constituted a failure to meet the due process requirements of *Goss*. It ordered the record of the suspension to be struck from the school's record.

The Fifth Circuit Court of Appeals recently applied the exception to the general rule of *Goss* that notice and hearing precede suspension in a case in which school administrators suspended students by a radio announcement.[163] The students were suspended on a Thursday. The following Monday, a conference was held with each student and his parents. Although all students were reinstated, several sued the school system. The students alleged that the failure to provide a hearing before the suspension—that is, an opportunity for the students to tell the school administrator their side of the story—violated the Supreme Court's requirements in *Goss*. The Fifth Circuit Court rejected this argument, noting that the facts of this case come within the *Goss* exception. It pointed out that the academic process had been significantly disturbed when the students left the school grounds after staging a sit-down strike and disrupting classes, and hearings on the day of suspensions could not be held because the students did not return to school.[164]

A Texas case recently raised a question about how long a suspension may be before it is considered to be an expulsion that would require an opportunity for a full hearing before the student could be expelled.[165] The case involved a student who was suspended from school by the principal for fighting in class and threatening a teacher. The principal, in compliance with the *Goss* requirements, told the student the reasons for

---

162. Kelley v. Johnson, No. 75-91 (D.N.H. Feb. 12, 1976). *See also* Jacques v. Shaw, No. 76-26 (D.N.H. Feb. 6, 1976).

163. Sweet v. Childs, 507 F.2d 675 (5th Cir.). *aff'd on rehearing*, 518 F.2d 320 (5th Cir. 1975).

164. Other possible examples of an exception to the presuspension hearing rule are provided in Dunn v. Tyler Indep. School Dist., 460 F.2d 137 (5th Cir. 1972). *But see* Stricklin v. Regents, 297 F. Supp. 416 (W.D. Wis. 1969). *appeal dismissed for mootness*, 420 F.2d 1257 (7th Cir. 1970).

165. In the Matter of J.L.D., 536 S.W. 685 (Tex. Ct. App. 1976).

the suspension and gave him an opportunity to explain his version of the facts. The student argued, however, that a complete expulsion-type of hearing should have been provided because the suspension lasted for twenty-three days. The school disagreed, pointing out that the length of the suspension was the fault of the student and his mother because they had not sought a conference with the school, a condition for readmittance required by the school that had been made known to the mother. The court agreed with the school, saying that the twenty-three day suspension without a full hearing did not violate the *Goss* requirements since the student could have been readmitted earlier if he and his mother had sought readmission.[166]

The Supreme Court's decision has now stated as a matter of constitutional law what most school systems have already been doing. As the Court's majority opinion noted, the minimum requirements it has imposed "are, if anything, less than a fair-minded school principal would impose on himself in order to avoid unfair suspensions." If this is true, then the Court is correct that these minimum requirements "will provide a meaningful hedge against erroneous action" without imposing unnecessary and burdensome formalities on school administrators.

## SEARCH AND SEIZURE IN THE SCHOOLS*

The law that applies when a search is made in the schools comes from the Fourth Amendment to the United States Constitution. It provides:

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

This section will consider how this provision has been applied to the search of students and their lockers, cars, and briefcases. The admissibility of seized evidence in a school disciplinary action or criminal prosecution is an important procedural issue in the law of student discipline.

Until recently, the school's right to search a student's person, his locker, or his car parked on school property has been little questioned.[167] The Fourth Amendment's prohibition against unreasonable searches and seizures, as applied to the states and their instrumentalities through the Fourteenth Amendment, has generally been thought to be inapplicable in school searches. The reason is that school officials have been considered private, not governmental, persons, whereas the Fourth Amendment's prohibition against unreasonable searches and seizures applies

---

166. *Id.* at 688.

*This section is based on an article entitled "Searches of Students and the Fourth Amendment" by the author and George T. Rogister. Rogister, a former assistant professor of Public Law and Government at the Institute of Government, is now in the private practice of law in Raleigh, North Carolina. The article was published in 5 J. OF LAW AND EDUC. 57 (1976), and is reprinted with permission of the Jefferson Law Book Company.

167. *See, e.g.*, Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974); Annot., 49 A.L.R.3d 978 (1973); Frels, *Search and Seizure in the Public Schools*, 11 HOUS. L. REV. 876 (1974).

only to searches by governmental officials.[168]. Obviously public school officials are government employees.[169] Some state courts have concluded, however, that school officials are not the type of government officials restrained by the Fourth Amendment, or that when the official searches a student, he is acting *in loco parentis* and therefore assumes the private role of the parent to the student.[170] Thus, the Fourth Amendment's usual requirements of probable cause and a search warrant have been held unnecessary for school searches and the exclusionary rule inapplicable to evidence discovered and seized by school officials during these searches. The evidence has been held admissible against the student in school disciplinary hearings and in criminal or juvenile court proceedings.

In recent years, however, courts have generally rejected the argument that school officials are private persons for Fourth Amendment purposes.[171] They have begun to recognize that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to searches by school officials. The prohibition has not been applied, however, in the same way that it is to police searches. This section will discuss how it has been applied and what actions school personnel should take before they search a student, his locker, or his personal property.

It should be noted that nearly all the case law in this area comes from state courts. The United States Supreme Court has never decided a case directly involving the Fourth Amendment rights of students,[172] and the lower federal court decisions have dealt primarily with college students. Thus the general principles drawn from these cases are not binding precedents in all states.

---

168. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465 (1920). For recent college search cases that recognized the private person exceptions, *see* People v. Haskins, 48 A.D.2d 480, 369 N.Y.S.2d 869 (1975); People v. Boettner, 80 Misc. 2d 3, 362 N.Y.2d 365 (1974); State v. Wingerd, 40 Ohio App 2d 236, 318 N.E.2d 866 (1974). *See also* Note, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 CORNELL L. REV. 507 (1971).

169. *See* State v. Ward, 62 Mich. App. 46, 233 N.W.2d 180 (1975), which said that a public high school principal acting in that capacity on school property during school hours is clearly a state official for purposes of the Fourth Amendment.

170. *See, e.g., In re* Donaldson, 269 Cal. App. 509, 75 Cal. Rptr. 220 (1969); People v. Stewart, 63 Misc. 2d 601 313 N.Y.S.2d 253 (1970); and Mercer v. State, 450 S.W.2d 715 (Tex. Ct. App. 1970).

171. *See, e.g.*, State v. Young, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975), People v. D. 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974). *But see* Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (1974). For a discussion of the classification of school officials as public or private persons in student search cases, see Note, 45 FORDHAM L. REV. 202, 209-15 (1976).

172. The Supreme Court recently refused a request for review and thereby let stand a Louisiana Supreme Court judgment that overturned the conviction of a high school student for possession of marijuana. This decision, which applies only to Louisiana, will require school officials when they search for evidence of criminal conduct to have students searched by police with valid search warrants. If they do not, the fruits of such student searches will be inadmissible in a criminal prosecution of the student searched. *See* State v. Mora, 307 So. 2d 317 (La.), *vacated and remanded*, 423 U.S. 809 (1975), 330 So. 2d 900 (La.), *cert denied*, 45 U.S.L.W. 3409 (U.S. Dec. 7, 1976). *See* case note, 36 LA. L. REV. 1067 (1976).

The Fourth Amendment's prohibition against unreasonable searches has generally been construed to permit a search only when (1) the person whose interests are involved consents voluntarily;[173] or (2) there is probable cause to search and a warrant has been issued authorizing it, or (3) there is probable cause and exigent circumstances are such that taking the time to obtain a warrant would frustrate the purpose of the search, or (4) a valid arrest has been made and the search is incident to the arrest. When a search is made that does not comply with these requirements, four consequences may result: (1) criminal prosecution may be brought for violation of privacy,[174] (2) civil suit may be brought for violation of privacy,[175] (3) the evidence may be declared inadmissible in a school proceeding, or (4) the evidence may be inadmissible in a criminal proceeding.

Of these possible consequences, only the fourth—inadmissibility of the evidence in a criminal proceeding—is usually an issue. For example, no case has been found in which school officials have been criminally prosecuted for violating a student's privacy because of a search. But civil liability has been found in a few cases.[176]

Recently a federal district court in Pennsylvania ruled that a civil suit against school and police officials brought by nine high school students seeking damages for deprivation of their Fourth Amendment rights should proceed to trial.[177] In this case, school officials looking for a ring reported missing by another student requested police assistance after no student in the class in which the ring was first discovered missing came forward with it. The police made a strip search of the nine female students in the class but found no ring. The court held that though the search had been conducted by police, if it could be shown that school officials participated with the police in making statements and taking actions that coerced the students into submitting to the search, they could be held personally liable. The court overruled the defendant school officials' motion to dismiss for failure to state a cause of action and ordered the case brought to trial. The same result was more recently

---

173. For a discussion of what constitutes voluntary consent, *see* Commonwealth v. Dixon, 226 Pa. Super. 569, 323 A.2d 55 (1974). The court found that a search of a college student by campus police was not voluntary. Consent, the court said, must be freely given to be effective. "This means there must be a total absence of duress or coercion, express or implied. . . ." *Id.* at 57. *But see* State v. Wingerd, 40 Ohio App.2d 236, 318 N.E.2d 866 (1974), in which consent to search a dorm room was found to be voluntary.

174. Criminal prosecutions for unlawful searches are rare, but not impossible under state and federal statutes. *See* 18 U.S.C. § 242, the criminal counterpart to § 1983.

175. The civil suit might be brought in state court and based on trespass or assault or a similar wrong, or it may be brought in federal court and based on the federal Civil Rights Act of 1871, 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 565 (1975), in which the Supreme Court held that school officials did not have absolute immunity from suit under § 1983. *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), holding that violation of the Fourth Amendment could give rise to an award of money damages in a tort action in federal courts.

176. *See* Philips v. Johns, 12 Tenn. App. 354 (1930); *but see* Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944).

177. Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973).

reached by an Illinois federal court that involved a strip search of three thirteen-year-old girls for drugs.[178]

In 1975 the Georgia Supreme Court ruled that the exclusionary rule applies only to wrongful searches by law enforcement personnel and not to school officials when they violate the Fourth Amendment.[179] It concluded, therefore, that civil suits seeking damages from school officials were the only remedies available to students seeking redress for violation of their constitutional right to be free from unreasonable searches.[180] Suits of this nature could be based on claims of violations of their civil rights by state officials or on state or federal tort claims. It is now clear that school officials are not immune from personal liability in such student suits.[181] However, it is only when school officials act in bad faith or with flagrant disregard for the constitutional rights of students that courts are likely to find them personally liable.[182]

Only one case has been found in which courts have held evidence inadmissible in an elementary or secondary school disciplinary proceeding on the basis that the method of its procurement violated the Fourth Amendment, and it involved an illegal search by police off school grounds.[183] The court found the search of an automobile by police who did not go to the trouble of obtaining a warrant to be an unreasonable search and forbade the product of the search (marijuana) to be admitted in a school hearing pertaining to whether students had violated school board policy providing for compulsory expulsion of students found in possession of narcotic drugs. Since this police search was unrelated to school activities, it is distinguishable from an illegal search conducted on school property.

In two other cases the courts, after considering the application of the exclusionary rule to school expulsion hearings, rejected its application, but in both cases the school search was found to be reasonable.[184] However, in a recent federal district court decision involving college students, the court found that the exclusionary rule applied to the college's disciplinary process.[185] The court reversed a student's suspension for possession of marijuana in a college dormitory because the evidence against him was seized by college officials in an unconstitutional warrantless search of his room.

Almost all the cases that involve searches by school officials have grown out of criminal cases in which the student tried to exclude evidence, primarily drugs, seized during a school search and sought to be intro-

178. Picha v. Wielgos. 410 F. Supp. 1214 (N.D. Ill. 1976).

179. State v. Young. 234 Ga. 488. 216 S.E. 2d 586. *cert. denied*. 423 U.S. 1039 (1975). For a case note criticizing State v. Young. see 41 MO. L. REV. 626 (1976).

180. *Id.* at 493-94. 216 S.E.2d at 591.

181. *See* Wood v. Strickland. 420 U.S. 565 (1975).

182. *See* Hogue. *Board Member and Administrator Liability Since Wood v. Strickland*. VII SCHOOL LAW BULL. 1 (Oct. 1976).

183. Caldwell v. Cannady. 340 F. Supp. 835 (N.D. Tex. 1972). For a discussion of the exclusionary rule in school expulsion hearings, see Frels. *Search and Seizure in the Public Schools*. 11 HOUS. L. REV. 876. 890-93 (1974).

184. Speake v. Grantham. 317 F. Supp. 1253. 1267 (S.D. Miss. 1970). *aff'd*. 440 F.2d. 1351 (5th Cir. 1971); and Keene v. Rogers. 316 F. Supp. 217. 219 (D. Me. 1970).

185. Smyth v. Lubbers. 398 F. Supp. 777 (W.D. Mich. 1975).

duced in a criminal proceeding. It is clear that the Fourth Amendment prohibits only "unreasonable" searches and seizures; but as the United States Supreme Court has recognized, "unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[186] The task of balancing the students' interests in privacy and the administrative needs of public school officials has fallen almost entirely on state courts.

The difficult question facing courts in school cases has been the standard that should apply to searches made by school officials. Is the entire law of search and seizure, as it applies in the criminal law incorporated into the school system, or are school officials limited by less stringent standards? In answering this question, the courts have considered several factors. Did the school officials act alone, or was the search in concert with the police? What was the nature of the place searched? Why was the search initiated? Was it made to enforce school discipline, to recover school property, or to discover evidence for criminal prosecution?

## Person Making the Search

### *Searches by School Officials Acting Alone*

The "reasonableness" of searches by school officials acting alone has been raised as an issue by students seeking to exclude the fruits of these searches from admission in criminal proceedings. The students have argued that unless circumstances invoke one of the well-defined exceptions to the stringent probable cause and warrant requirements of the Fourth Amendment, those restraints apply with full force to school searches. School officials answer that the school environment itself is a special circumstance justifying less stringent search limitations.

When searches have been conducted primarily by school officials in furtherance of school purposes, such as enforcement of disciplinary rules, courts have found that the Fourth Amendment requires a less stringent standard to justify school searches of students and their property. In most cases, school officials have not been required to obtain a search warrant or even show probable cause that an infraction has been committed to justify a search initiated for school purposes when it is conducted by school personnel. Balancing the right of students to be free from unreasonable searches and seizures with the compelling interest of the state in maintaining discipline and order in the public school system, most courts have concluded that contraband seized by school officials without a search warrant may be introduced in a criminal trial if the school official can show, at the time of the search, the existence of a "reasonable suspicion" that students were violating school regulations or state laws. "Reasonable suspicion" is the standard generally applied to stop-and-frisk searches that are made without a warrant and are based on less than probable cause. The lower standard was justified because of the reduced invasion to the person; it ordinarily is not applied to full searches.[187]

---

186. Camara v. Municipal Court, 387 U.S. 523, 536 (1967).
187. *See* Terry v. Ohio, 392 U.S. 1 (1968).

In developing the less stringent reasonable suspicion standard, the courts have placed great weight on the *in loco parentis* doctrine and the statutory responsibilities of school officials for the safety and welfare of their pupils. In most states, either expressly or implicitly, school officials are deemed to stand to a limited extent *in loco parentis* to the children entrusted to their care. Out of this relationship courts have found a justification for both the obligation to protect the students while in school from dangerous and harmful influences and the power to control and discipline students when it is necessary for school officials to perform their duties.

Weighing the Fourth Amendment rights of students against the state's interest in the school official who stands *in loco parentis*, one court concluded: "The in loco parentis doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including a search taken thereunder upon reasonable suspicion, should be accepted as necessary and reasonable."[188] The court found that school officials need greater flexibility in achieving the goals of public education than is allowed by the probable cause standard for reasonable searches by governmental officials in other situations.[189] Stressing that school systems are not "enclaves of totalitarianism," the court concluded that the "reasonable suspicion" standard protects the rights of students by requiring school officials to show at least "reasonable grounds for suspecting that something unlawful is being committed . . . before justifying a search of a student when the school official is acting in loco parentis."[190]

The courts have not been explicit in setting out what facts would justify a "reasonable suspicion." However, they have indicated that the state law and the doctrine of *in loco parentis* impose on school officials an affirmative duty to investigate any situation where they are suspicious that conduct is occurring or materials are being harbored that would be dangerous or harmful to the health and welfare of students. This affirmative obligation to investigate grows out of the reasonable expectations of parents that the school will protect their children from dangerous conditions such as the possession and sale of drugs on campus or the possession of dangerous weapons by other students.[191]

---

188. People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731, 736 (1971). *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 285 N.E.2d 153 (1972). *Accord*, Nelson v. State, 319 So. 2d 154 (Fla. App. 1975). It should be noted, however, that the school's power over the child is not the equivalent of the parents'. The *in loco parentis* doctrine gives the school only that parental authority necessary for school operation. It is questionable whether any parents would knowingly transfer to the school the right and privilege of deciding whether to suppress evidence against their child. See dissent in Mercer v. State, 450 S.W.2d 715, 721 (Tex. Civ. App. 1970). For a discussion of *in loco parentis* in relation to school searches, see Note, 45 FORDHAM L. REV. 202 (1976), and Note, 26 U. FLA. L. REV. 271, 285-87 (1974).

189. People v. Jackson, 319 N.Y.S.2d 731 at 736.

190. *Id. Accord*, People v. Ward, 62 Mich. App. 46, 233 N.W.2d 180 (1975); and In the Matter of Doe VIII, Doe IX, and Doe X v. State, 540 P.2d 827 (N.M. Ct. App. 1975).

191. *See* People v. Haskins, 48 A.D.2d 480, 369 N.Y.S.2d 869 (1975), for a decision that justified a reduced search standard because of the student's age and the "epidemic" drug problem in the schools.

The facts that have been held to justify a reasonable suspicion have varied from case to case. The Florida Supreme Court found "reasonable suspicion" when it allowed, in a criminal prosecution, the introduction of marijuana that had been seized by a school official who found a student smoking in violation of rules and required him to empty his pockets, resulting in a seizure of the marijuana.[192] The Georgia Supreme Court concluded that the furtive gesture of a student in quickly standing and placing something in his pocket as the assistant principal approached him, which the court considered to be "an obvious consciousness of guilt," was "adequate reason" for a search of the student.[193] Reasonable suspicion for the Georgia court is only a minimal standard:

> We conclude that in the good faith exercise of their public trust teachers and administrators must be allowed to search without hindrance or delay subject only to the most minimal restraints necessary to insure that students are not whimsically stripped of personal privacy and subjected to petty tyranny.[194]

In contrast, the New York Court of Appeals found that the unusual behavior surrounding two quick trips to the toilet of a student suspected of "dealing with drugs" did not satisfy even the reduced search standard applicable in the schools.[195] In the court's words, "the previous equivocal conduct of the [student] and the imprecise nature of the information allegedly provided by a 'confidential source' were insufficient to warrant the search and seizure."[196] The court set out some guidelines for school searches:

> 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.[197]

In approving a lesser standard of probable cause for searches by school officials, courts also have generally indicated that a search warrant is not constitutionally required for a school search and have given very little separate attention to the warrant requirement. The courts have seemed to assume that a reduced probable cause standard automatically suspends the necessity for a search warrant, but this has not been the automatic result in other nonschool search cases.[198]

The basic argument of school officials has been that warrant procedures have no place in the school environment. This argument is two-pronged. First, school officials point to their responsibility for the safety and welfare of all students, the need for prompt action in meeting these duties, and the administrative inconvenience of obtaining a search warrant.[199] Second, they argue that the warrant procedure will involve law enforcement officials in the school's internal disciplinary process,

---

192. Nelson v. State, 319 So. 2d 154 (Fla. App. 1975).
193. State v Young, 234 Ga 488, 216 S.E.2d 586, *cert denied*, 423 U.S 1039 (1975).
194. *Id* at 496, 216 S.E.2d 592-93.
195. People v. Scott D., 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974).
196. *Id*. 358 N.Y.S.2d at 405, 315 N.E.2d at 467.
197. *Id*. 358 N.Y.S.2d at 408, 315 N.E.2d at 420.
198. *See* Camara v. Municipal Court, 387 U.S 523 (1967) (administrative searches).
199. *See, e.g* , 398 F. Supp. 777 (W.D. Mich 1975).

disrupting the educational process and possibly exposing the student to unnecessary psychological trauma.[200] The courts seem to have accepted these arguments without comment in cases involving searches by school officials acting alone.

Given the reduced Fourth Amendment restraints on school officials, the courts have faced an additional problem in these cases. What happens when school officials fail to meet even these minimum standards and conduct an illegal search? The answer, either express or implicit in the decisions, seems to be that the exclusionary rule would apply if the state sought to introduce the illegally seized evidence in a criminal proceeding against the student searched.[201] However, one recent case has concluded that the exclusionary rule is not available to students when school officials have violated their constitutional right to privacy.[202] Under this decision, the state may use the illegally seized evidence in a criminal proceeding. The student's only remedy is in a separate civil or criminal proceeding against the school officials.[203]

The discussion above outlines what has been the unanimous answer of state courts in secondary school search cases until very recently. Now, however, one state supreme court has decided that the school environment does not justify a reduction of Fourth Amendment protection when the evidence seized is used in a criminal prosecution.[204] Without great elaboration, the Supreme Court of Louisiana found that

> a search on school grounds of a student's personal effects by a school official who suspects the presence or possession of some unlawful substance is not a "specifically established and well-delineated" exception to the warrant requirement and that the fruits of such a search may not be used by the State prosecutorial agency as the basis for criminal proceedings.[205]

Another recent decision, this one by a federal district court in Michigan, ruled that both the probable cause standard and the warrant requirement applied to a dormitory search by college officials.[206] Although the drugs seized were used as evidence only in the college's internal disciplinary proceedings and no criminal prosecution resulted, the court held that the penalty of suspension for a college term and its concomitant effects on the student's career were even more severe than the potential criminal penalties. Thus, the court ruled that the proceeding was essentially a criminal trial and the evidence seized in a warrantless search was inadmissible in the disciplinary hearing.

---

200. *See, e.g., In re* G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970).
201. *See, e.g.*, People v. D., 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974).
202. *See* State v. Young, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975). For a discussion of the case, see text accompanying Note 193, *supra*.
203. *Id.* at 494, 216 S.E.2d at 591.
204. State v. Mora, 307 So. 2d 317 (La.), *vacated and remanded*, 44 U.S.L.W. 3199 (U.S. Dec. 7, 1976). The United States Supreme Court vacated the judgment and remanded the case to the Supreme Court of Louisiana to consider whether its judgment was based on federal or state constitutional grounds or both. On remand, the Louisiana Supreme Court said that its decision was based on both the state and federal constitutions. 330 So. 2d 900, 901 (La. 1976).
205. State v. Mora, 307 So. 2d 317, 320 (La. 1975).
206. Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).

*Joint Searches by School Officials and Law Enforcement Agents*

When the search of a student or his property is conducted jointly by school officials and law enforcement agencies, the Fourth Amendment standards applicable usually depend on who initiated the search and the place searched. When school officials, seeking to maintain order and to determine whether a school regulation or criminal statute has been violated, have requested police assistance in conducting a search, the lesser reasonable suspicion standard has usually been applied.[207] The courts have concluded that in these circumstances the police may conduct the search based on the reasonable suspicion of school officials. However, allowing the police at the request of school officials to conduct a search that would normally be invalid under the Fourth Amendment requirements limiting police searches can lead to abuse and even personal liability of the school officials who permit or conduct the search.

In a recent civil suit by three thirteen-year-olds against three school officials who had participated in a strip search of the girls, an Illinois federal district court overruled the defendants' request for a directed verdict and ordered that the case go to the jury for a determination of the school officials' liability.[208] Although the search had been initiated by school officials, the court said that the police involvement before the search, the fact that the search was a quest for illegal items, and the total seizure of the person required the application of a regular Fourth Amendment standard of search and seizure. Thus the students had a constitutional right not to have the police make a search (female school employees actually made the search after the police had been summoned by the principal) in the absence of probable cause that the girls possessed an illegal material at the time of the search. In my opinion, this judicial response to combined school/police searches, even when the school official calls the police, is likely to become the rule rather than the exception when the search is for evidence of crime. Police have not been permitted less stringent search restraints in cases involving unusual circumstances,[209] and it appears that federal courts will seldom permit a double standard for police searches in the school.

When the search of a student or his property is initiated by the police and conducted jointly by school officials and law enforcement agents for the primary purpose of discovering evidence of a crime, the trend has been to hold that search and seizure standards applicable in criminal cases must be met. The Georgia Supreme Court, in approving minimal restraints for school searches by school officials, emphasized that

> . . . the standards announced here for action by school officials will pass constitutional muster only if those officials are acting in their proper capacity and the search is free of involvement by law enforcement personnel.[210]

---

207. *See, e.g., In re* Fred C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972), discussed in text at Note 228 *infra*; and *In re* Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968).
208. Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).
209. *See, e.g* , Corngold v. United States, 367 F.2d 1 (9th Cir. 1966).
210. State v. Young, 234 Ga. 488, 498, 216 S.E.2d 586, 594 (1975), *cert. denied*, 423 U.S. 1039 (1975).

In *Piazzola v. Watkins*,[211] the United States Court of Appeals for the Fifth Circuit reversed the convictions of two Troy State University students for possession of marijuana. A warrantless search of the two students' dormitory rooms had been conducted by university officials and police narcotics agents. The law enforcement agents had informed the university that they had information that drugs were in the dormitory rooms of several students and asked permission to search the rooms. The university consented to the search, relying on a university regulation reserving the right of school officials to enter students' rooms for "inspection purposes." The drugs discovered during the searches were presented as evidence in the trials of the two students over their objections that the evidence was inadmissible as the fruit of an "unreasonable" search.

In upholding the students' contentions that the search violated the Fourth Amendment, the Fifth Circuit stated that "clearly the University had no authority to consent to or join in a police search for evidence of crime." The court found that the university retained broad supervisory powers that permit it to adopt such a regulation, but the regulation must be limited in application "to further the University's function as an educational institution." The university regulation could not be construed to authorize the school officials to consent to a search for evidence "for the primary purpose of a criminal prosecution." The court found no exigent circumstances that would justify a warrantless police search and therefore held that the drugs seized from the dorm room were inadmissible as evidence against the students in a criminal trial.[212]

In a New York case,[213] the court applied the probable cause standard required by the criminal law to a search of a high school student by a school security guard employed by the board of education. Although the school security officer was not classified as a law enforcement officer under state law, his primary duties were to maintain school safety and to control student crime and disturbances. The court found that the security guard had the status of a policeman and therefore concluded that he could not act on suspicion alone in investigating possible possession of drugs by a student. The security officer, having stopped the student to question him about a stolen wristwatch, noticed a slight bulge in the student's pocket and the top of a brown envelope protruding from the same pocket. At the security officer's request, the student emptied his pockets, divulging three brown envelopes containing marijuana.

In the student's criminal trial for possession of drugs, the court affirmed the exclusion of this evidence as the fruits of an unlawful search. Despite the security officer's claim that his experience had taught him that students carried drugs in similar envelopes, the court found that the brown envelopes could have contained any number of noncontraband

---

211. 442 F.2d 284 (5th Cir. 1971).

212. *See also In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969), in which the court noted the rule that a search that is clearly part of a joint operation by police and a private individual is tainted with state action and consequently violates the Fourth Amendment's prohibition. In this case, however, the court found that there was no joint operation by police and the school officials.

213. People v. Bowers, 72 Misc. 2d 800, 339 N.Y.S.2d 783 (1973).

items and therefore the search had been conducted on the "skimpiest of hunches." These facts did not meet the probable cause standard the court required to justify a warrantless search by the security officer. Moreover, the court indicated that even if the reasonable suspicion standard had been applicable, a search based on such a "hunch" did not meet the requirements of that standard.[214]

## The Nature of the Place Searched

In determining whether the Fourth Amendment is applicable to school searches and what standards should be applied, the courts have looked closely at the nature of the place to be searched. Although it is clear that "the fourth amendment protects people, not places,"[215] the nature of a place may determine whether the person had a reasonable expectation of privacy in the place searched. The cases have dealt primarily with three types of searches: searches of student lockers, searches of students' persons, and searches of student dormitory rooms. It is helpful to look separately at each of these areas to determine what limitations the Fourth Amendment places on searches by school officials.

### *Search of a Student's Locker*

In a recent California decision, *In re W.*,[216] the California Court of Appeals applied a variation of the reasonable suspicion standard to a search of a student's locker by a high school vice-principal. The vice-principal had been told by four students that a particular locker contained a sack of marijuana. Using a master key, he opened the locker and found such a bag. The locker had been assigned to W. The marijuana was turned over to the police, and in a juvenile court proceeding W. was adjudicated a delinquent. He argued that the vice-principal's search violated the Fourth Amendment and the evidence obtained from it was therefore inadmissible in the juvenile court hearing. The court ruled that while the Fourth Amendment did place limits on school officials, the doctrine of *in loco parentis* expands their authority. Balancing the Fourth Amendment rights of students against the *in loco parentis* powers of the school, the court stated that the appropriate test for searches by high school officials is two-pronged: (1) the search must be within the scope of the school's duties, and (2) the search must be reasonable under the facts and circumstances. The court found that preventing the use of marijuana was clearly a school responsibility and that the search of the

---

214. A regular probable cause standard was also applied to a university security employee who searched containers and pocketbooks for alcoholic beverages and weapons before patrons entered pavilions and stadiums for university-sponsored events. The university argued that this type of search was comparable to airport searches and should be permitted without probable cause. The court rejected this argument and declared this type of search to violate the Fourth Amendment. Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex. 1976). *Accord,* Commonwealth v. Dixon, 226 Pa. Super. 569, 323 A.2d 55 (1974).

215. Katz v. United States, 389 U.S. 347, 351 (1967).

216. 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

student's locker, on the basis of specific information from four students, was reasonable.[217]

The balancing test used by the California court contrasts with the approach most often taken by the courts in cases involving school searches of student lockers. In other cases, the argument seems to have been that even if the Fourth Amendment applies with full force in other types of school searches, locker searches are different and never require such restraints. In *Overton v. New York*,[218] the United States Supreme Court ordered a new hearing of a narcotics prosecution in which the conviction of a student was based on the discovery of drugs in his locker by police who were without a valid warrant but had permission from the school's vice-principal to search the locker. The New York Court of Appeals had upheld the search on the theory that the vice-principal had not been coerced by the invalid warrant to consent to the search but had acted under an independent duty to inspect a locker when suspicion arises as to its contents. A fact important to this decision was that the vice-principal had the combinations of all the locks and the students knew that they did not have exclusive possession of the lockers vis-a-vis the school authorities. On appeal, the Supreme Court remanded the case to the New York Court of Appeals for determination of whether the vice-principal had acted under duress. The Court of Appeals essentially restated its earlier decision, finding that the vice-principal had exercised an independent "duty" to search, a duty claimed by him and tacitly approved by the court.

In another case, the Kansas Supreme Court upheld a burglary conviction based on the discovery of stolen goods in a bus station locker that was entered by a key removed from the defendant's school locker.[219] The defendant had consented to the principal's opening his school locker in the presence of the police. The court upheld the search on the basis of the defendant's uncoerced consent and the nature of the school locker. It said that although the student may control his locker in reference to fellow students, his possession is not exclusive against the school and its officials. As in *Overton*, the fact that the principal had a master list of all lock combinations and a key that would open all school lockers was important to the court's decision. The court considered the right of inspection inherent in the authority vested in school administrators to manage schools and protect other students.

From these cases, it appears that police may introduce in a criminal trial evidence that has been seized by school officials from a student's locker without a warrant or the student's permission when the school officials had reasonable grounds for the search. Also, these officials may

---

217. Although the court cited the earlier California decision, *In re* Donaldson, and the "private person" exception to the Fourth Amendment as a possible basis for its decision, it found that the Fourth Amendment was not totally inapplicable in the school situation and used the balancing test.

218. 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596, *vacated and remanded*, 393 U.S. 85 (1968), *original judgment aff'd* at 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

219. State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970).

authorize the police to conduct a search when they have reasonable ground to believe that a crime has been committed and that evidence of the crime may be within the locker. In upholding the reasonableness of school locker searches, the courts have relied on one or more of three basic theories: (1) the search was an administrative search subject to less stringent search limitations; (2) the student had waived his constitutional rights; or (3) the search was authorized by the consent of school officials who have joint and, possibly, superior control over the locker.

The United States Supreme Court has approved a lesser standard of probable cause to justify administrative searches or inspections to enforce city housing codes.[220] However, in doing so the Court placed significant weight on the fact that such "inspections are neither personal in nature nor aimed at the discovery of evidence of crime [and therefore] they involve a relatively limited invasion of . . . privacy."[221] In addition, the Court ruled that a warrant is necessary for an administrative search if consent for the search is denied. Even if warrants are not required for searches by school officials, a locker search cannot be classified as "administrative" unless it is a general search of all lockers for the purpose of enforcing school regulations of health, safety, or order.[222] The locker searches approved in the cases just reviewed all involved searches focusing on individual students and seeking evidence of violations of school regulations and criminal statutes. These searches are not "administrative" searches within the Supreme Court's definition. Thus, labeling all student locker searches as "administrative" does not dilute Fourth Amendment safeguards in itself.

Another argument made by school officials to justify locker searches has been that the student has waived the traditional Fourth Amendment protections from searches of his locker. In most cases, school officials have shown that when a student was assigned a locker, he was aware that the school officials retained extensive control over the lockers, including a list of locker assignments and combinations or a master key. Because the student accepted the locker with this knowledge, most courts have concluded that he has no expectation of privacy in his locker; consequently he has waived his constitutional rights. But how far should this waiver be extended? The student has not waived his expectation of privacy in his locker vis-a-vis other students or law enforcement officers. The waiver should therefore apply only to school officials.

School officials argue, however, that the students have no expectation of privacy in their lockers because the lockers are jointly controlled property. School officials not only may search student lockers but also may consent to locker searches by third parties, just as they could consent to a search of classrooms, school grounds, or other property in their possession and control. This argument has prevailed in nonschool search

---

220. *See* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

221. Camara v. Municipal Court, 387 U.S. 523 (1967).

222. For example, general searches for rotting food, missing library books, or overall cleanliness.

cases in which a parent's consent for the police to search the room of his minor child has been held to be a valid search in most cases.[223] It is argued, however, that these cases focus too much on concepts of property rights, whereas the Supreme Court has held the Fourth Amendment right to privacy to be a personal right not dependent on property ownership. Furthermore, the school official in the school locker situation seems more analogous in role to a landlord than to a parent,[224] despite the doctrine of *in loco parentis*. Thus, school officials may not validly consent to a search of student lockers by the police. Absent circumstances that abrogate the need for a warrant, the school should require law enforcement agents to obtain a search warrant.

*Search of a Student's Person*

Because of the greater intrusion into the student's privacy, searches of his clothing and his body have been subject to at least minimum safeguards.[225] Even those courts that have found that a student has no reasonable expectation of privacy in a school locker have concluded that "[t]his reasoning has no application and is unpersuasive with respect to a student's person."[226] The reasonable suspicion standard also has been used to test the legality of a search of the student's person. It has been accepted as the standard even when the evidence seized has been turned over to the police and introduced in a criminal or juvenile court proceeding.

In a 1970 decision, *In re G.*,[227] a California court explained why a less stringent Fourth Amendment standard applied to school searches of a student's person. In this case a student had informed the dean of students that G. had taken a pill and was intoxicated. G. was brought to the principal's office and asked to empty his pockets. One of the items revealed was a film canister containing amphetamines. The court found the principal's action to have been proper, explaining that it would have been improper for the principal to ignore the information that G. had dangerous drugs in his possession. The court said that it was in the best interest of the student and the school system that such situations be handled informally among persons whom the student knew, rather than to subject him to the adverse emotional impact of a search warrant and a hearing before a magistrate. The court pointed out that the principal's action required no intervention by law enforcement officers and little or no disruption of the school. Finding that "even in the areas of protected freedoms, the power of the state to control conduct of children reaches

223. *See, e.g.*, State v. Kinderman, 136 N.W.2d 577 (Minn. 1965), State v. Carder, 9 Ohio St. 2d 1, 222 N.E.2d 620 (1966). *But see* Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).

224. *See* Chapman v. United States, 365 U.S. 610 (1961), holding that a landlord cannot validly consent to a police search of a tenant's house. This is so even though the landlord has reserved the right to enter the premises himself to inspect for waste.

225. *See* State v. Young, 234 Ga. 488, 496, 216 S.E.2d 586, 593, *cert. denied*, 423 U.S. 1039 (1975).

226. People v. D., 34 N.Y.2d 483, 487, 358 N.Y.S.2d 403, 407, 315 N.E.2d 466, 469 (1974).

227. 11 Cal. App. 3d 1193, 90 Cal. Rptr. 360 (1970).

beyond the scope of its authority over adults,' the court held that the principal's action was reasonable and not in violation of the Fourth Amendment.

In another California state court decision, *In re Fred C.*,[228] a search of a high school student's person conducted by school officials with the aid of a police officer was upheld as reasonable. In that case, school officials, after receiving a tip that C. was selling drugs, brought him to the vice-principal's office for questioning. When he resisted a search of his bulging pants pocket, the school officials requested the help of a police officer, who removed drugs from his pocket. The court, in upholding the admissibility of this evidence in a juvenile court proceeding, adjudicated C. a delinquent and noted that school officials have a duty to protect students from drugs being sold on campus. The court found that the school officials had "good cause" to search C., based on the tip they had received, the bulge in his pockets, his possession of $20 (in the court's view a large sum for a student), and his refusal to allow a search of his pockets. When the purpose of the school official's search is within the scope of his official duties, the court said, the justification for the search will not be measured by the rules authorizing a police search of an adult. The court found that there was no joint search by the school officials and the police, concluding that "the constitutional guarantee against unreasonable searches does not proscribe solicitation and use of professional assistance by school authorities in conducting an authorized search of a student for good cause." The mere fact that the professional assistance was from a policeman "did not render unreasonable that which was otherwise reasonable."[229]

In a recent New Jersey case, *In re G.C.*,[230] a state court also upheld the admissibility of evidence in a juvenile court hearing that was obtained in a school search of a female student's person. The school officials, acting on information that the student had been selling pills on campus that same morning, brought the girl to the principal's office. After she consented to a search of her person by a female school official, a bottle of amphetamines was found in her purse. Noting that there was insufficient evidence to determine whether her consent to the search was voluntary, the court considered whether school officials could constitutionally conduct such a search of a student without consent. It concluded that: "The privacy rights of public school children must give way to the overriding governmental interest in investigating reasonable suspicions of illegal drug use by such students even though there is an admitted incursion of constitutionally protected rights—rights no less precious because they are possessed by juveniles."[231] Finding that the school officials were "duty bound to investigate reasonable suspicions of student criminality," the court held that the school officials had acted responsibly

---

228. 26 Cal. App. 3d 320, 120 Cal. Rptr 682 (1972).
229. *But see* State v Young, 234 Ga. 488, 498, 216 S.E.2d 586, 594, *cert denied*, 423 U.S. 1039 (1975).
230. 121 N.J. Super. 108, 296 A.2d 102 (1972).
231. *Id.* at 106.

and diligently under the circumstances and would have been "derelict" to have acted otherwise.

In *People v. D.*[232] the New York Court of Appeals found that the search of a student, which included a strip search, had not been based on even a reasonable suspicion. Consequently, the search was constitutionally unreasonable and the evidence seized inadmissible in juvenile court proceedings. The court noted, however, that had there been sufficient basis to justify the initial search of the student's pockets, the resulting discovery of drugs in his wallet would have justified the indignity of a strip search to "make sure that [the student] did not possess a larger supply of drugs and to establish the role he played in carrying the drugs."[233] Furthermore, under these circumstances a strip search in the presence of witnesses, as occurred in this case, would be warranted to provide corroboration and to prevent claims that the evidence had been planted.

The search of a student's person has been upheld by state courts in Delaware,[234] Illinois,[235] and New York.[236] Although the vast majority of cases have permitted searches of students' bodies and their personal effects based on a lesser degree of cause, it should be noted that the Louisiana Supreme Court decision discussed earlier rejected anything less than probable cause and a search warrant for a search of a student's personal effects if the fruits of the search are to be introduced in a criminal proceeding.[237] An Illinois federal district court reached the same result in a case in which the police had been involved from the beginning and the object of the search was to produce evidence for a criminal prosecution.[238]

*Search of College Dormitory Room*

As in other areas of constitutional rights, it seems that college students usually have more protection than secondary and elementary students in the area of Fourth Amendment right to privacy. Most of the college cases have involved dorm searches. The leading case is *Piazzola v. Watkins*,[239]

---

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

233. *Id.* 358 N.Y.S.2d at 409, 315 N.E.2d at 471.

234. State v. Baccino, 282 A.2d 869 (Del. Super. 1971). The case involved the search of a student's coat after a tug-of-war over the coat between the student and a school official who was taking the jacket to ensure that the student stayed in class. Drugs were found in the jacket pockets.

235. *In re* Boykin, 39 Ill 2d 617, 237 N.E.2d 460 (1968). Here the search, made by police officers at the school officials' request, resulted in discovery of a gun on a student's person.

236. People v. Jackson, 65 Misc. 2d 909, 319 N.Y S.2d 731 (1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S 2d 167, 284 N.E.2d 153 (1972). The search of a student chased down by the school coordinator of discipline three blocks from the school was upheld by the court. The student, suspected by the school official of possessing drugs, had run out of the school while he was being taken to the principal's office for questioning. The court held that the *in loco parentis* powers of the school official did not in this case end at the school door.

237. State v. Mora, 330 So.2d 900 (La.), *vacated and remanded*, 45 U.S.L.W. 3409 (U.S. Dec. 7, 1976). See note 204, *supra*.

238. See text at note 208, *supra*.

239. 442 F.2d 284 (5th Cir. 1971). For a full discussion of the dormitory search, see Delgado, *College Searches and Seizures. Students, Privacy and the Fourth Amendment*, 26 HASTINGS L. J. 57 (1974) and Note, 1976 DUKE L. J. 770.

which was discussed above. In that case, the Fifth Circuit Court held that college students who occupy a college dormitory room enjoy the protections of the Fourth Amendment and that school officials have no right to consent to or join a police search for the primary purpose of obtaining evidence for criminal prosecutions. The court found that the search in this case, instigated and primarily executed by law enforcement agents, was subject to the full Fourth Amendment requirements of a regular criminal investigation. Because there was no warrant, no probable cause for searching without a warrant, and no waiver or consent, the court concluded that the search violated the Fourth Amendment's prohibition of unreasonable searches. Other cases in accord with *Piazzola* hold that for purposes of police searches, a dormitory room is analogous to an apartment or hotel room.[240]

In *Piazzola*, the Fifth Circuit made it clear that although the university cannot require as a condition of admission that students waive their Fourth Amendment right to be free from unreasonable searches and seizures, a university regulation that reserved the right to inspect student rooms is not per se unconstitutional.[241] If the regulation is construed and limited in application to furtherance of the university as an educational institution, a search made under the regulation is within university power.

In a federal district court decision arising from the same drug raid involved in *Piazzola*, the court upheld the expulsion of a student for possession of marijuana in a college dormitory. In *Moore v. Student Affairs Committee of Troy State University*,[242] the same district court judge who had originally reversed the *Piazzola* convictions upheld in a university disciplinary proceeding the admissibility of evidence seized in a joint school and police search. Stressing that the university has an affirmative obligation to promulgate and enforce reasonable regulations designed to protect campus order and discipline, the court pointed out that "the constitutional boundary line between the right of the school authorities to search and the right of a dormitory student to privacy must be based on a reasonable belief . . . that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline."[243] The court found this standard of "reasonable cause to believe" to be lower than the traditional probable cause standard

---

240. *See, e.g.*, People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Dist. Ct. 1968), *aff'd mem.*, 61 Misc. 2d 858, 306 N.Y.S 2d 788 (App. Ct. 1969); Commonwealth v. McCloskey, 217 Pa. Super. 423, 272 A.2d 271 (1970). *But see* People v. Boettner, 80 Misc. 2d 3, 362 N.Y.S.2d 365 (1974), holding that on a private college campus a search by school officials is outside the scope of the Fourth Amendment. *Accord*, People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (1961); State v. Wingerd, 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974).

241. The Troy State University rule stated: "The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary, the room may be searched, and the occupant required to open his personal baggage and other personal material which is sealed."

242. 284 F. Supp. 725 (M.D. Ala. 1968).

243. *Id.* at 730.

because the "special disciplinary proceedings are not criminal proceedings in the constitutional sense."

The Ohio Court of Appeals also upheld a lower standard for dorm searches when it found college officials to be private persons not subject to Fourth Amendment restrictions on searches and seizures.[244] However, a more recent federal district court decision, *Smyth v. Lubbers*,[245] concluded that the private-person concept and lower reasonable cause standard are no longer valid. In that case, the all-college judiciary committee had ordered a student suspended for one term on the basis of marijuana found in his room in a warrantless, midnight search by college officials. The federal court had issued a temporary restraining order prohibiting the college from executing any sentence or punishment pending adjudication of the student's constitutional claims. After trial, the court held that the Fourth Amendment requirements of probable cause and a search warrant fully applied to college officials seeking to enforce college regulations.

In reaching this decision, the court emphasized three factors. (1) The students involved were adults and "in general are entitled to the same rights of privacy as any other adult in our society." (2) A college student's dorm room is his home for all practical purposes, and he has the same expectations of privacy there as any adult has in his home. (3) The penalty imposed by the college—long-term suspension—was at least as severe as the criminal penalty the student would have received had the case been prosecuted in state or federal court. These factors led the court to find that the warrantless search of the dormitory room was unconstitutional and the evidence inadmissible in the college's disciplinary proceedings.

*Search of Other Places*

Searches conducted by school officials to discover student violations of school regulations have been upheld in other situations. In *People v. Lanthier*,[246] a college official searched a student's briefcase when his efforts to find an offensive odor permeating the entire library study hall led to the student's carrel. The odor came from packaged drugs discovered in the briefcase. In upholding the admissibility of the evidence in the student's criminal trial, the court noted that school officials periodically checked student carrels for overdue books, rotten food, and similar matters. In this case the discovery of drugs resulted from such a search based on complaints by students of an odor thought to come from rotting food. These facts, in the court's opinion, brought the search within the "emergency exception" to the warrant requirements of the Fourth Amendment.

Cars parked on school property are another common object of school searches, but surprisingly, only a few cases have arisen from this type of search. It would seem, however, that the standard for a car search would

244. State v. Wingerd. 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974).
245. 398 F. Supp. 777 (W.D Mich. 1975).
246. 5 Cal. App. 3d 751, 97 Cal. Rptr. 297, 488 P.2d (1971)

be closer to that of the person than to that of a locker because the owner's expectation of privacy is similar to that of his person. Nevertheless, a federal district court upheld the warrantless search by school officials of a student's car parked on the school campus.[247] The student, a cadet at the Marine Maritime Academy, was dismissed after a search of his automobile revealed drugs and alcohol; academy regulations forbid possession of either on campus. Seeking readmission to the academy, the student challenged the admissibility of this evidence in his expulsion hearing. The federal district court held that the school officials had reasonable cause to believe that school regulations were being violated and that the search of the car was a reasonable exercise of the academy's authority to maintain order and discipline on the campus. It should be noted that the academy is a quasi-military institution; the automobile was parked on campus in spaces provided by the school; and the contraband found was admitted in a school disciplinary hearing, not a criminal proceeding. Perhaps under other circumstances a search of a student's car by school officials would be subject to a higher constitutional standard, or at least the evidence would be inadmissible in a criminal trial.

There will be little question about the legality of a search if the object of the search can be seen by looking through the car's windows. If the object can be seen, it usually can be seized under the "plain view rule." This rule, a well-recognized exception to the warrant requirement of a search, was stated as follows by the United States Supreme Court: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[248] In a college search case that applied the plain-view rule, a federal district court rejected a student's request to disallow evidence that had been seized by a part-time employee of the campus security department in a hearing on the student's expulsion.[249] The employee saw leaflets containing false notices that classes would not meet sticking out from under the front seat of the student's car. The court ruled the leaflets were properly received in evidence by the board of trustees in the disciplinary proceeding.

### Purpose of Search

The reason for the search is another important factor in determining which standard applies to a search of a student—the regular Fourth Amendment standard of probable cause or the lower standard of reasonable suspicion that a crime has been committed. This issue was partly considered in the discussion of the type of person making the search. As

247. Keene v. Rodgers, 316 F. Supp. 217 (D. Me. 1970) *But see* Thomas v Seal, Civil No. 76-4-358 (Ala. Cir. Ct. 1976), in which a lower Alabama court granted a preliminary injunction reinstating a high school student who had been expelled after marijuana was found in his car. *Accord*, Caldwell v Cannady, 340 F Supp. 835 (N.D Tex 1972), in which marijuana illegally seized by police in a search of a car stopped at night on a highway could not be used in an expulsion hearing by the school.

248. Harris v. United States, 390 U.S. 234, 236 (1968).

249. Speake v Grantham, 317 F. Supp. 1253 (S.D. Miss 1970) See Frels, *Search and Seizure in the Public Schools*, 11 HOUS L. REV. 876, 883 (1974)

noted there, when the search is part of a criminal investigation or seeks evidence for a criminal prosecution, regular Fourth Amendment standards of probable cause usually apply. When, however, the purpose of the search is to maintain the orderly operation of the school but produces contraband that is then used to prosecute the student, the lower standard of reasonable suspicion is generally approved. This different result raises the question of when the search is seeking evidence for a criminal prosecution and when it is to maintain the orderly operation of the school.

Distinguishing between the two may be difficult because both reasons for the search may exist. It seems clear, however, that in school emergencies, such as a search for a bomb or a weapon, the lower Fourth Amendment standard will apply. Similarly, if a principal receives information that two student gangs are armed and a fight has been set up between them, school officials would be justified in searching any student suspected of being involved. The latter situation occurred several years ago soon after a predominantly black school and a predominantly white school had been combined. Several fights had occurred between whites and blacks during the first week of merger. The superintendent received several calls that students would be coming to school armed the next school day and a showdown would take place. The next day the principal lined up all the students and made them empty their pockets. Numerous weapons were discovered. In my judgment this search was not only proper but also necessary, and any of the weapons could have been introduced in a criminal prosecution of the students.

Nonemergency searches also may be justified under the lower search standard. For example, a search of parcels and briefcases for library books as students leave the library is permissible if everyone who leaves the library is searched on the same basis. Similarly, a general locker inspection for overdue library books, weapons, or narcotics is a justified search when all students understand that the school has the right and intention to search the locker for these items. Most jurisdictions would permit the introduction of contraband discovered in either kind of search in a criminal prosecution against the student.

Still another type of search that will be judged on the lower standard is a search by a school custodian or security officer to determine ownership. For example, a junior college student who left her purse in a classroom was unsuccessful in claiming an illegal search of her purse after a security officer, who opened the purse to determine its ownership, found illegally possessed amphetamines.[250]

The reasons why courts have permitted these types of searches are that (1) they were initiated by and were made by school officials rather than police officers; (2) the primary thrust of the search has been to promote orderly school operation rather than to discover evidence of crime; (3) the invasion of privacy has not been too great. When the search does not contain all three of these elements, it runs the risk of violating students' Fourth Amendment rights.

---

250. State v Johnson, 23 Ariz App 64, 530 P.2d 910 (1975).

A Texas case provides an example of a general type of inspection that was held to be an unconstitutional search.[251] The search was conducted by University of Houston security employees pursuant to a university policy that conditioned entrance to the campus pavilion and stadium on a search of any containers, packages, or bundles that could conceal alcoholic beverages or weapons. A student sued for violation of constitutional rights after a campus officer grabbed her purse when she laughingly objected to a search. He then seized her arm, searched her purse thoroughly, and threatened her with arrest for disorderly conduct. The court rejected the university's argument that this search was just like an airline luggage search. Airport searches, the court said, are applied indiscriminately to everyone who goes through the airplane departure gates whereas the university pavilion searches were made only of those the guard chose to search. Consequently, the university search constituted a greater intrusion of privacy. The court also questioned the efficacy of the search, pointing out that there was no history of disturbances or injuries caused by thrown cans or bottles before and after the pavilion search policy began. Thus the three basic requirements to make an exception to the warrant-based-on-probable-cause standard were lacking: No public necessity was shown, the likelihood that the search procedure would be effective in averting the potential harm was not demonstrated, and the degree of the intrusion was high.

## Summary

Neither the Supreme Court nor the federal courts of appeal have decided any cases directly governing the Fourth Amendment rights of public school students.[252] Most of the cases reviewed in this monograph come from state courts or federal district courts and are not controlling precedent in other jurisdictions. The law as it relates to the balancing of students' constitutional rights and the state's interest in maintaining order and discipline in the public schools has changed rapidly in recent years. The courts now recognize that the Fourth Amendment does protect students from "unreasonable" searches by school officials, but in defining reasonableness the courts usually have struck the balance in favor of order and discipline in the schools. Still, it is clear that students do not shed their constitutional rights at the schoolhouse gate. In developing regulations governing searches of students and their property, school officials should try to protect the students' right to privacy.

Where the regulations govern searches of jointly controlled property, such as lockers or carrels, students should be made aware that the property is subject to periodic general administrative searches for contraband and rule violations. When a search focuses on a particular student because of a suspected rule violation, school officials should, if time permits, record their reasons for believing a search is justified before

---

251. Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex. 1976).
252. The Fifth Circuit decision in Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971), involved college students and a dormitory search.

making the search. If possible, the student's consent to the search should be obtained and he should be present when the search is made. Whenever school officials conduct a search, a witness should be present.

If a major reason for a school search is to seek evidence of a criminal violation and if time permits, school officials should report their information to law enforcement officials and allow them to conduct the search subject to standards applicable to police searches. If the police seek permission from school authorities to search a student, his property, or his locker to obtain evidence for a criminal prosecution, the school officials should require the police to obtain a search warrant unless the search comes within one of the exceptions to the Fourth Amendment's search warrant requirements.

Only in exceptional cases would observing these safeguards interfere with the school officials' affirmative duty to maintain order and discipline in the schools and protect the health, safety, and welfare of students in their charge. Because an unlawful search may make evidence inadmissible in criminal or school proceedings and perhaps invoke civil or criminal liability for school officials, incorporating these safeguards in school policies would seem prudent. Moreover, for students the consequences of school searches may be very severe—criminal penalties, suspension, or expulsion. When the school discipline is severe, as in suspension and expulsion, courts have increasingly required that schools carefully observe procedural safeguards mandated by federal and state constitutions.

Although the law of search and seizure of students is in a state of flux, it seems likely that the federal courts in time will require high school searches to comply with the standards of search recommended above. By building these safeguards into school regulations, school officials can both teach students the value of respecting a citizen's fundamental constitutional rights and avoid future conflicts in the courts.

## CONCLUSION

"The history of liberty has largely been the history of observance of procedural safeguards."[253] The procedural issues reviewed in this monograph are primarily concerned with the student's liberty – his right not to be denied a public education unless accorded minimum standards of due process of law. Although many may consider these procedural requirements to constitute a serious interference with internal school discipline, constitutional standards require only that students be treated fairly and granted the type of procedure in expulsion cases that school administrators would demand for themselves if they were subject to a dismissal action. It should be emphasized that greater availability of procedural due process rights to students does not deny the schools full authority to regulate conduct calculated to cause disorder and interfere with educational functions. It only requires them to act fairly before they impose the severe penalty of expulsion.

253. Felix Frankfurter in McNabb v United States. 318 U S. 332. 347 (1943)