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INTRODUCTION

On my first day as a teacher I was assigned to supervise a seventh- and eighth-grade study hall which met over the lunch period. One half of the seventh- and eighth-graders went to the cafeteria during the first twenty-five minutes of the period while the remainder were in my study hall. During the last twenty-five minutes of the period, the students who had just eaten lunch came to my study hall while the students who had been in the study hall went to the cafeteria. There were about 120 students in each section, but attendance varied considerably because of individual music, reading, and therapy sessions scheduled during this period. So it was impossible to know what students were supposed to be in my study hall on any particular day, let alone prepare a seating chart. To compound matters, on Monday, Wednesday, and Friday, the study hall met in a double classroom containing fifteen rows of desks with eight desks in each row. If you can picture that, you can understand that it was a severe test of my peripheral vision. On Tuesday and Thursday, the study hall met in the school auditorium with metal, theatre-type, seats set on a floor sloping toward the stage. A marble dropped on the floor in one of the top rows would make a disturbing clatter bouncing off the metal seats as it rolled down toward the stage.

Whoever arranged a study hall like this must have been a sadist. Not only were the facilities inappropriate to maintaining order, but the timing made study impossible. The periods just before or just after lunch are the most difficult for study, even for the best students. Moreover, few students were willing to take time out of their short lunch period to return their books
to their lockers before getting in the cafeteria line, or to pick up their books before coming to the study hall. Consequently, few students brought books to the study hall. And even if they did, twenty-five minutes was hardly long enough to get any studying done.

It was a disaster! All my efforts to maintain order were unsuccessful. I was a nervous wreck each day at the end of the study hall. In fact, eight years later, I still have nightmares based on this experience.

I relate this story lest I be accused of having no concept of the difficulties of maintaining order in a modern high school, or that I have no sympathy for overburdened teachers and principals. My speeches and articles frequently provoke this response. This demonstrates, to some degree, the communication problem in the area of student rights. No one, it seems, is qualified to comment on student rights. Students, it is said, lack the experience to analyze the issues maturely. Teachers and administrators are said to lack the necessary objectivity. The comments of lawyers and other laymen are dismissed because they are said to have no sense of what is required to maintain an educational atmosphere in today's schools. Moreover, any discussion of student rights takes place in an age when the general public rates "lack of discipline" as the number one problem in American education today.

It is with some trepidation, therefore, that I have approached this subject. I have endeavored to balance what I understand to be legal and educational rights of students against the need for administrators to maintain a modicum of control over student behavior in order for learning to occur in the schools. If the result has some deficiencies from the vantage point of one or more interested groups, I accept that as inevitable when discussing such a sensitive issue. This is not a student rights handbook, nor is it a guide to school officials in drafting student disciplinary codes. It is intended to be a discussion for the interested reader, whether engaged in education or not. Hopefully I have presented the issues in a way that will enable the reader to understand the many developments in the area of student rights over the past decade.
DISCRIMINATION IN EDUCATION

Discrimination in education occurs whenever a person is treated differently merely for possessing characteristics having no bearing on his or her ability to learn. Discrimination is to be abhorred wherever it exists; but when it occurs in the field of education the results are particularly devastating. If discrimination occurs in housing or employment, it is deplorable, but the effects are rarely permanent. Discrimination in education, however, hits a person in the impressionable and formative years. It can thwart one's ability to create a meaningful life as well as the desire to do so. It is only with great effort that one can overcome the effects of educational discrimination. It is perhaps for this reason that Congress and the courts have been particularly active, although not always successful, in attempting to combat discrimination in the schools.

Any discussion of discrimination in education must cover two topics: discriminatory classifications and discriminatory practices. The first deals with the characteristics people possess, such as their race, for which it is illegal to treat a person differently. The second covers policies in education which commonly have discriminatory effects.

Among discriminatory classifications, the one that has been the subject of the most intense legal action is, of course, race. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution has been interpreted to prohibit racial discrimination by public school officials. Likewise, Title VI of the Civil Rights Act of 1964 makes it illegal for any institution receiving federal financial assistance to discriminate against any person on the basis of race, color, or national origin. Inasmuch as almost every school system in the nation receives some fed-
eral funds, the coverage of Title VI is broad. In addition, many states have statutes prohibiting racial discrimination in the schools. It is important to note that racial discrimination has traditionally been viewed as the most invidious type of discrimination primarily because there are no valid justifications for treating anyone differently because of race.

Numerous educational practices have been invalidated for being racially discriminatory. Of course, it is a violation of the Equal Protection Clause and Title VI to intentionally segregate students on the basis of race. With some exceptions the effort to desegregate former dual school systems in the South is progressing well, and segregative student assignment patterns are being successfully challenged in the North. But recent years have witnessed the uncovering of a multitude of subtle, but devastatingly effective, means for racially discriminating in the schools. For example, it is quite common to find racial minorities disproportionately represented in special classes for the emotionally disturbed and the mentally retarded. Insofar as psychologists tell us that children with emotional and mental deficiencies are randomly represented in our society, any placement procedure which tends more frequently to identify members of one race as needing special help is immediately suspect. Racially discriminatory classification is not limited to special education classes, but appears to pertain frequently in the lower levels of the track systems. That is, racial minorities tend to be overrepresented in the lower tracks, such as office skills and general education, and severely underrepresented in the upper tracks, such as college preparatory and the skilled vocations. Both the special education and tracking classification situations have developed, many suspect, not only from the racial prejudice—often latent—of the people managing the programs, but from the racial biases present in the testing devices used to place children. It is now almost axiomatic in education that most standardized exams test the skills, facts, and experiences acquired in white, middle-class society. Yet these instruments are still used with great frequency, and despite efforts to ameliorate their effects by incorporating other data into the placement decision, classification still tends to be a discriminatory practice which will come under increasing educational and legal scrutiny in the years ahead.
Increasing attention has also been recently focused on the racially discriminatory effects of the suspension and expulsion practices in many school districts. Again, statistics reveal that racial minorities are disproportionately represented among suspended and expelled students. Several other interesting trends have surfaced in the suspension and expulsion data. The Southern Regional Council, in a 1974 publication, *The Student Pushout*, reported an apparent upswing in the proportion of black students suspended as the schools became increasingly desegregated in the South. The explanation for this was that white teachers and administrators, unable or unwilling to understand the black students many were facing for the first time, responded by excluding a much higher percentage of blacks from the school through suspension or expulsion.

Another disturbing trend shows that there is a much higher percentage of black students suspended for violation of the relatively subjective school rules, such as insubordination or defiance, than for the violation of the more objective rules such as tardiness or smoking. These data suggest widespread patterns of racial discrimination which will not go unnoticed by persons sensitive to the rights of students.

Sexual classifications in education have recently been the subject of considerable controversy. Some courts have held that certain educational practices based on sex, such as excluding girls from extracurricular athletic activities, violate the Equal Protection Clause. Of potentially greater significance, however, is Title IX of the Education Amendments of 1972 which prohibits sexual discrimination by educational institutions receiving federal financial assistance. The proposed regulations implementing Title IX were announced by the U.S. Department of Health, Education, and Welfare in the spring of 1974. These regulations attempted to prevent sexual discrimination in employment, admissions, course offerings, and athletics. The proposals provoked intense criticism both from those feeling the regulations went too far and from those feeling the opposite. HEW is currently studying the comments received regarding the proposed regulations and is scheduled to release the final regulations in the summer of 1975. Notwithstanding the absence of the final Title IX regulations, sexual discrimination in education is illegal.
and HEW is presently investigating complaints in this area. The principal remedy provided by Title IX is termination of federal financial assistance to the school district, following notice and an opportunity for hearing.

Some states have enacted statutes banning sexual discrimination in the schools. An example is Massachusetts, which passed an act in 1971 prohibiting discrimination in the schools based on race, sex, color, national origin, or religion. This law provides an interesting remedy. The parent, guardian, or custodian of any child against whom discrimination has been practiced in the schools may recover money damages in court against the municipality where the school is located. This remedy may lead to more rapid results than the administrative proceedings (which are subject to judicial review) under Title IX. On the other hand, the remedy available in the state law relies on private litigation, with resulting attorneys' fees and court costs.

Other discriminatory classifications which have received less publicity than racial and sexual discrimination nonetheless have important consequences. One such class consists of national origin minority children with English language deficiencies. Recently, the Supreme Court in *Lau v. Nichols* (1974) held that an HEW regulation based on Title VI of the Civil Rights Act requires school systems to provide instruction in the native language of children who cannot understand English. One should not read too much into this decision because it was based on the unique fact pattern of the insular Chinese community in San Francisco. But the case can be cited for another proposition potentially significant in the area of student rights—a case against a school district based on Title VI and related HEW regulations can be brought directly in court without first pursuing HEW administrative proceedings. This is significant because, although Title VI has been held to be coextensive with the Equal Protection Clause, courts might more readily enforce a specific HEW regulation covering a particular student rights issue than apply the Constitution to the question.

Discrimination based on age is another area which may be more visible in coming years. Currently, older students who have never graduated from high school usually are prohibited from obtaining diplomas at conventional high schools. Rather,
they are relegated to one of a variety of inferior programs such as home study, vocational schools, or proprietary schools which advertise on matchbooks. The reasons for this policy are not clear, but appear to stem from a fear that older students will corrupt the morals of high school pupils. Actually, the reverse may be true. But putting aside that largely illusory issue, both the older and younger students may have much to learn from each other. Older students can bring experience and maturity to the classroom, while at the same time gaining an understanding of the concerns of their younger classmates. However, the policies and laws which exclude older students from our secondary school show little sign of strain. It seems unlikely that a court could be persuaded that these policies are devoid of rationality. However, as we move into an era that deemphasizes degree-oriented terminal educational programs in favor of concepts of lifelong education, legislatures and school boards may come to reject notions of rigid age homogeniety in the schools.

Another discriminatory classification, which overlaps discrimination based on race, age, and English language deficiency, stems from economic class. If it can be demonstrated that a particular student policy has an adverse and disproportionate impact on the lower economic strata, one could frame an argument under the Equal Protection Clause that such a policy is unconstitutional. Chances of success, however, are slim; particularly in light of San Antonio v. Rodriguez (1973) in which the Supreme Court rejected a related claim of students who received an arguably inferior (i.e., less costly) education because they lived in communities with small per pupil tax bases. The Court held that education was not a "fundamental interest" for equal protection purposes and found that the plaintiffs had defined the adversely affected economic class with insufficient clarity. Accordingly, the Court was compelled under its earlier rulings to uphold the school finance law if a rational basis could be found for its support. Likewise, any equal protection attack on a school rule adversely affecting economically poor students would be subject to the same test. And unless it could be demonstrated that the policy was devoid of rationality, the policy would be upheld.
STUDENT RECORDS

Controversy has surrounded the issue of student records in recent years. At the heart of the issue is the question of who should have access to student records. Many school systems have denied students and parents access to their own files. Simultaneously, these same school systems disclosed the contents of student records to a wide variety of persons inside and outside the school. It was demonstrated in a number of instances that incorrect and irrelevant personal information would enter the file. Because the student or his parent had no access to the file, there was no way to detect and correct this objectionable material. When the material was disseminated to colleges, prospective employers, police, military recruiters, and others, it sometimes had devastating effects. An example is the person who found his third-grade teacher had recorded “homosexual tendencies” in his file. He discovered this entry in his file by court order after determining that he was rejected by every prospective employer who saw his school record. Yet despite the reporting of a number of similar experiences, courts and legislatures were not anxious to enter the murky area of student records. Thus as late as mid-1974, the prospects of meaningful reform in the area of student records were bleak.

Swiftly and unexpectedly in the late summer of 1974, Congress resolved much of the controversy about student records. The Family Educational Rights and Privacy Act, popularly known as the “Buckley Amendment,” was added as a rider to the Education Amendments of 1974, which were signed into law by President Ford on August 21, 1974. Virtually no debate was devoted to the Buckley Amendment on the floor or in the commit-
tees of either chamber of Congress. As a result it attracted little attention. But as November 19, 1974—the effective date of the Buckley Amendment—approached, concern grew among school and college officials. The Buckley Amendment provided that federal funds would not be available to any school system, college, or university which failed to allow parents and students of 18 to see the student’s record. Many colleges and universities, in particular, were in a quandary about whether to allow students to see confidential letters of recommendation and parents’ confidential financial statements contained in the files.

Harvard’s reaction typifies the confusion immediately preceding November 19, 1974. The university first proposed to send all confidential letters of recommendation back to the authors to ask them if the letters could be released to the student. If the author objected to releasing the letter, it was to be destroyed. This was abandoned when some students threatened to obtain a court injunction against the destruction of any records. Next the university proposed to pull all confidential materials from the files before granting students access to the files. Some students then went to court to require the university to grant them access to all materials in their respective files. By this time there was considerable activity in Congress directed at revising the law to clear up the mounting confusion regarding confidential materials. Accordingly, the U.S. District Court in Massachusetts held that Harvard could withhold, but not destroy, confidential materials from students pending clarification of this issue by Congress.

Senators Pell and Buckley sponsored revisions to the Buckley Amendment which were quickly adopted by Congress and signed by President Ford on December 31, 1974. Before reviewing in detail the provisions of the law, several basic principles should be stated. First, all rights regarding a student’s records are exercised by that student’s parents until the student becomes 18 years of age, after which the student exercises all rights regarding the records. Second, a student or his parents have the right only to see his own records, not the records of any other student. Third, the penalty for any school system which violates the law regarding records is loss of federal funds, after notice and hearing.
Keeping these basic principles in mind, the significant elements of the law are these:

— A student (or his parents) must be given access to his records within forty-five days from the time a request is made.
— A student (or his parents) must be granted a hearing by the institution upon request to determine the validity of any document in the student's file.
— Confidential letters or statements placed in the file prior to January 1, 1975, need not be disclosed under the law.
— A student may waive his right of access to confidential letters regarding admissions, honors, or employment.
— An educational institution cannot, with certain exceptions, release personally identifiable information about students.
— Educational institutions must notify students and parents of their rights under the law.

HEW published proposed regulations based on this law on January 6, 1975. Besides establishing procedures for terminating the federal funds of any educational institution failing to comply with the law, the proposed rules attempted to clear up at least two questions raised by the revised act. First, although the law states that parents shall exercise the rights regarding records until the student is 18, the proposed rules note that there is nothing to prohibit the school from affording students the same rights as their parents. HEW argues that this interpretation is needed to allow schools to release grades and other information directly to students without the parents' consent. Second, HEW notes that the legislative history of the law does not preclude the destruction of records by an educational institution, if the student or parents are allowed to see the records before destruction.

There is little doubt in my mind that the revised Buckley Amendment was long overdue. The changes wrought by the law are significant. Perhaps more significant is the willingness of Congress to legislate on a subject traditionally thought to be within the exclusive purview of local boards of education or, at most, state legislatures. Moreover, the law was written by a conservative legislator disturbed by the incursions into personal privacy caused by the records policies of schools and colleges.
He was quickly joined by liberals also sensitive to the rights of individuals in an age of large institutions.

The Buckley Amendment will not satisfy all students; few laws could. There will undoubtedly be complaints that the waiver of access to confidential materials will be abused. There will be complaints that institutions are using the forty-five-day grace period to cull through files and conceal certain material before disclosing the records to the students. Others will complain that the exceptions to the provision banning release of students' records are too broad and ill-defined. Valid as these complaints may be, students should rejoice that Congress has at last acted decisively and positively on a student rights issue.
STUDENT SEARCHES

When I was a teacher, the school administration would conduct frequent surprise searches of student lockers. At a time pre-arranged with the teachers, the principal would ring the school bell, and all students were instructed to file into the hallway and stand by their lockers. Teachers were assigned to a small row of lockers. Students were not allowed to open the locker until the teacher assigned to that locker so instructed. Each locker was then thoroughly searched. Any suspicious items such as squirt guns, girlie magazines, cigarettes, etc., were confiscated and never returned (the teachers would read the magazines and smoke the cigarettes). Items of a more serious nature such as liquor or a stolen library book could lead to suspension or referral to juvenile authorities.

This and similar practices are not uncommon. An urban principal once told me that he would occasionally open all student lockers in the evening or on a weekend to search for contraband. He had another reason: bag lunches long forgotten in the bottom of lockers would attract rats.

An interesting fact about this issue is that while student rights were advancing in almost all other areas, the legal rights of students with regard to searches of their lockers were, if anything, slipping. The usual reason given for this is that because of the “drug scare” in the schools judges have been particularly lenient in allowing administrators and law enforcement officers to search student lockers. The issue in these cases usually is whether the material found during a warrantless locker search is admissible in juvenile or criminal proceedings against a student. Counsel for the students usually argue that such searches violate
the Fourth Amendment ban against unreasonable searches and seizures.

Courts have rejected this argument on a variety of grounds. First, the courts have noted that students do not have any property interest in their lockers in the same sense that people have property interests in their homes or apartments. Schools own the lockers, and therefore have greater license to conduct searches of them. Second, the administrative searches of lockers have not been found by courts to be "unreasonable." That is, most administrators conducted searches based on a reasonable suspicion that contraband was being secreted in lockers. Finally, some courts have found that because school administrators legally stand in loco parentis (in the place of parents), the Fourth Amendment does not bar them from conducting warrantless searches of students' lockers.

While students have been unsuccessful in specific cases in suppressing evidence obtained in warrantless searches, this should not prevent the enactment of more enlightened policies by school boards. Specifically, warrantless searches of a student’s person, possessions, or locker should not occur unless the administrator has a reasonable basis for believing the locker contains illegal material or unless the student has freely consented in writing to such a search. Consent should not be procured through threats, nor should blanket consents be obtained from large groups of students. Rather, if a reasonable basis for a search does not exist, consent must be obtained from individual students for each search. This policy should provide adequate authority to administrators to keep dangerous items out of the school while at the same time giving students a small place of privacy which ought to be the right of every citizen in our society.
RELIGION IN THE SCHOOLS

The First Amendment to the United States Constitution states, in part: "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof." In the last fifteen years, the Supreme Court has struck down a number of religious activities in the schools, such as weekly sectarian instruction by clergy, oral Bible reading, and prayer recitation, on the ground that these practices violate the "Establishment" language of the First Amendment. These decisions have prompted the charge that in being so vigilant in preventing the "establishment" of religion, the Court has directly curtailed the "free exercise" thereof. This apparent conflict between the two parts of the so-called "Freedom of Religion" clause in the First Amendment is most evident when students press their rights to religious freedom. Take, for example, a student who has an objection, based on religion, to pledging his allegiance to the flag. If the school administration eliminates the Pledge of Allegiance, it could be argued that this action was an "establishment" of religion, in the sense that the objecting student's religious preferences were now at least partially established as policy by the school. On the other hand, if the pledge is continued, the objecting student will assert that his participation in the pledge (or even the embarrassment of leaving the room) inhibits the free exercise of his religious beliefs. Thus schools may face some difficulty fashioning policies of religious freedom which do not violate either the "Establishment" or the "Free Exercise" clauses.

The need to develop these policies is greatest with regard to those religious or quasi-religious school activities which the Supreme Court did not address in its landmark decisions of the
early 1960s mentioned above. Those cases involved patently religious activities: prayer, Bible reading, and religious instruction. There are a variety of other activities which are not as purely religious as these, but which nonetheless pose difficult problems of the relationship of church and school. One such activity is the traditional Christmas program. Although these programs certainly have religious implications, there are a variety of other purposes, as well. Such programs are often the occasion for dramatic and musical presentations, for example, which have an educational and secular purpose. Moreover, these programs reflect seasonal attitudes which pervade our society. In determining policy with regard to Christmas programs, it is necessary to balance the educational and cultural value of the activities with the religious rights of individual students. It is clear that no student should be required to attend any seasonal program which offends his religious beliefs. But the crucial issue is whether all such programs should be prohibited on the ground that by not attending such programs, a student is singled out for ridicule merely for exercising his religious preferences.

In balancing the competing values here, the soundest policy is to allow seasonal programs but to insure to the greatest extent possible that students who choose not to attend are not subjected to any penalty or criticism for discharging their rights. This policy is consistent with the famous case of *West Virginia State Board of Education v. Barnette* (1943), in which the Supreme Court held that children of the Jehovah Witness faith could not be required to salute the flag. The flag salute ceremony was not banned; protesting children were merely given the right not to participate. Although there were freedom of speech implications to the *Barnette* decision, the case applies and is sound with regard to religious activities which have a significant secular purpose. It is also consistent with *Zorach v. Clausen* (1952), in which the Supreme Court sustained a released-time religious instruction program where students declining to participate were required to stay in regular classrooms “‘continuing significant educational work.” Both *Zorach* and *Barnette* provide authority for the position that religiously oriented programs do not have to be eliminated merely because some students refuse, on religious grounds, to participate.
An important distinction, however, must be drawn between religious activities which have a significant educational and secular purpose and those activities which do not. The Supreme Court has made clear that activities in the latter category are unconstitutional even if the objecting student is excused from the room. This is true if the activity is religious instruction by clergymen in the school (McCollum v. Bd. of Education, 1948); recitation of a prescribed nondenominational prayer (Engel v. Vitale, 1962); or oral reading from the Bible at the beginning of the school day (Abington v. Schempp, 1963). It is often difficult, of course, to clearly distinguish between activities which are prohibited outright and those activities which may continue if objecting students are allowed to leave the room. The key question to ask is: Does the activity have a significant nonreligious purpose? For example, reading the Bible in literature class has certain religious overtones, but if the book is taught as a literary work it should be allowable, provided of course that a protesting student is allowed to leave without harassment or ridicule.

These principles will not satisfy all involved in the controversies about church/school relations. There are many who argue that no religiously oriented activity, even if it has a secular purpose, should be allowed in the schools. Others believe there is no harm in conducting daily worship exercises in the schools, just so no one is forced to participate. No doubt the wisest course lies somewhere between these positions. I have attempted to articulate a policy which balances the values represented by these positions and which is consistent with the principles set down in this sensitive area by the Supreme Court.
FREEDOM OF SPEECH AND ASSEMBLY

Whenever the rights of students to free expression are discussed, the landmark case of *Tinker v. Des Moines Independent School District* (1969) becomes germane. In *Tinker*, the Supreme Court held that the nondisruptive wearing of black armbands by students in school could not be punished by suspension. The case, however, is widely misunderstood by students, teachers, administrators, parents, lawyers, laymen, and, it seems, by lower court judges. *Tinker* did not, as some students believe, give ironclad constitutional protection to all forms of student speech in the schools. It had an important proviso:

... conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the Constitutional guarantee of freedom of speech.

This proviso should not be interpreted, however, to authorize the suppression of speech every time an administrator feels that student expression "might result" in a disturbance. As Mr. Justice Fortas wrote for the majority: "... undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Thus, *Tinker* has been interpreted, with some exceptions, to place the burden on the school system to come forward with concrete evidence of disruption or "... facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. . . ."

It is within these *Tinker* principles that sound policies on student expression must be developed. Because students have a right to express themselves, school officials have a responsibility
to protect and foster that right. This cannot be altogether accomplished by promulgating written rules, although that is desirable. Much will have to be done on an ad hoc basis.

An essential element in a sensible approach to freedom of speech in the schools is a commitment on the part of school officials not to suppress speech merely because the speech provokes opposition. Students, like adults, are often intolerant of the views of others. They may ridicule a student who wishes to discuss political issues. Officials cannot be allowed to instinctively yield to the so-called “heckler’s veto.” Rather, if punishment is to be meted out, both the values of free speech and good order in the schools can often be better served by punishing the heckler instead of the student addressing issues. Some may ask: “But isn’t the heckler exercising his freedom of speech? Why punish him?” My response is practical. If someone has to be removed from the scene to protect free speech, it is preferable from all angles to remove the heckler. The problem arises frequently in connection with emblems or symbols which arouse strong racial or ethnic emotions. Examples are the swastika, the confederate flag, and the clenched black fist. Even though we may feel the ideals behind them are abhorrent, these symbols are not to be accorded less protection. Of course, courts have and will sustain the suppression of symbols such as these on the ground that it was reasonable for the school administration to forecast disruptive behavior as a result of displaying the symbol.

*Tinker* covers many kinds of speech. The facts in the case itself involved “symbolic” speech: a protest of the Vietnam war by wearing black armbands. But the significance of the case is not limited to those facts. The *Tinker* principles apply to actual speech, literature (discussed in greater detail in the next section), and to the extent they can be characterized as symbolic speech, dress and grooming. In each case, unless school officials can show actual disruption or a reasonable forecast of disruption, the speech elements of these activities cannot be curtailed.

Freedom of speech has an important corollary in the right to refrain from speaking. The issue most often arises in connection with participation in “patriotic” observances, such as the Pledge of Allegiance. As mentioned in the Freedom of Religion section,
the case of West Virginia State Board of Education v. Barnette (1943) can be interpreted to rule out forced participation in "patriotic" observances, even when the grounds for objection are political and not religious. This principle should apply to all programs and activities with patriotic or political implications. In addition to the familiar Pledge of Allegiance, it should cover various veteran and victory day observances, speeches by candidates, and any local or state political programs. This is not to suggest that these activities in the schools be discontinued, only that students who object not be forced to participate. This is identical to the suggested (and legally mandated) policy regarding religious activities.

Another important element of the freedom of speech is the right of students to hear a balanced presentation of political and social issues by outside speakers. Typically, school officials control the outside speakers who are invited to the schools. Students in some parts of the country have complained that this procedure often leads to a one-sided presentation of public issues, representing the views held by the school administration. Several courts have held that if school officials allow persons from outside the school system to address students within the school, they may not deny this right to other speakers with differing points of view on similar topics. Stated differently, school officials have a responsibility to provide balance in the outside speakers invited to the schools. This is highly relevant during political campaigns, particularly now that many high school students have the right to vote.

The principle of balanced presentation should apply also to other media controlled by the school administration. This includes intercom and loud-speaker systems, closed circuit television, assembly programs, bulletin boards, newspapers, and bulletins. At the outset, the rule should be that if school officials want to touch on issues that could reasonably be expected to be controversial, they must present all sides of the issue. A good way of implementing the rule is to allow students access to school-controlled media for the purpose of expressing their views on any issues. This policy should not be difficult to carry out with respect to the written media such as bulletins and newspapers. Students could be required to conform to reasonable
school rules regarding the length of articles and the use of profane language. More difficult issues arise, however, in allowing students unlimited access to visual and audio media. One problem here might be the length of time it would take to accommodate all students who wanted to be heard or seen on one of these media. Moreover, it is very difficult for other students to avoid exposure to broadcasts over school-controlled visual and audio media. Thus there is a quasi-compulsory aspect to these media not existing with regard to written media (which can easily be discarded or ignored). In formulating policies regarding the visual and audio media, school officials must balance these considerations. Perhaps the best policy is to impose strict standards of balance on school officials using media and discourage all reference to controversial issues. Use of these visual and audio media would then be restricted to routine announcements and educational purposes. If these guidelines are strictly followed, there would be no need for free student access. Of course, there is likely to be disagreement about whether a particular message broadcast by school officials over school-controlled visual or audio media is a routine administrative announcement or a political harangue. These disputes are inevitable, and must be solved on an ad hoc basis with sensitivity to the rights at stake in such a controversy.

Closely related to the freedom of speech is, of course, the freedom of assembly. It is clear that students do not waive their assembly rights when they enter the school. However, the famous Tinker proviso, quoted above, would be applicable. That is, students may not exercise their freedom to assemble if it would substantially disrupt classroom instruction or interfere with the rights of others. Several other considerations bear on this issue. The students’ right to assemble in the schools must yield to reasonable rules regarding appropriate use of facilities and closing hours. Students have no right to demand that a school building be left open well beyond regular closing hours merely to accommodate a desire to assemble. However, if students conform to reasonable rules regarding the time and place of meeting, school officials have an obligation to assure that the students can meet in privacy. Thus a requirement that all student groups meeting on school property be accompanied by a faculty ad-
visor would be unreasonable. Although an administrator may suspect that students are assembling on school property to plan disruptive or even criminal activity, Tinker teaches that First Amendment rights may not be curtailed in the absence of a strong factual basis for anticipating disruptive acts.
PUBLICATION, DISTRIBUTION, AND POSSESSION
OF LITERATURE

Considerable controversy has existed with regard to student literature. The controversy involves a variety of publications: school-sponsored student newspapers; papers and pamphlets published off-campus by students; and various forms of literature published off-campus by nonstudents. And, as the title of this section suggests, the issues involve possession of this literature, as well as its publication and distribution.

Again, the Tinker case provides the constitutional principles by which the issues should be analyzed. Tinker held that students could not be punished for wearing armbands, provided there was no material disruption and that the administration could not reasonably forecast such disruption. It is the Tinker proviso, quoted in the preceding section on freedom of speech and assembly, which has been the source of much of the legal confusion in the area of student literature. Courts are sharply divided on the application of the Tinker proviso to student literature. Moreover, the issue in most of these cases is whether school officials have the power to suppress student literature or punish its distributors. Thus it would serve no useful purpose to review the numerous cases in this area. Rather, what follows is an attempt to sketch the guidelines by which sound and legally acceptable rules on student literature can be drafted.

The first step is to recognize that, subject to certain constitutionally valid rules, students have the right to possess and distribute literature, including but not limited to newspapers, books, magazines, leaflets, and pamphlets, on school grounds and in school buildings. The next step is to define the rules to which this right should be subjected. There are at least three areas
which deserve analysis in formulating these rules: 1) prior review; 2) grounds for suppression, i.e., disruption and obscenity; and 3) time, place, and manner of distribution.

The question of prior review is difficult. The issue is whether students should be required to submit literature to school officials for approval prior to distribution in the school building or on school grounds. Students have complained (and many courts have found) that prior review of student literature is an unreasonable burden on the freedoms of speech and press. Typically, students have been required to submit to the principal the paper proposed for distribution. Distribution is forbidden until the principal approves the literature. This procedure often leads to lengthy delays. The principal may not be in his office or in the building, or if he is in, he may be unavailable for the purpose of approving the literature. Moreover, even if he is available, he may want to take several days to review the literature before approving it. Insofar as one of the crucial elements of free expression is timeliness, this procedure is clearly unacceptable.

Therefore, the best way to handle review of student literature is to require the student to submit the literature at the time he begins distributing it in the school building or on school grounds. The required submission should not be to a specified person, whose unavailability may indefinitely delay distribution. Rather submission should occur at a designated place, such as the principal's mailbox or a secretary's desk. Once the student has made a good faith effort to submit the literature, the burden then shifts to the principal to expeditiously review the material to determine if any reason exists to suppress distribution. Within our constitutional framework, it is preferable to place the burden on those who may wish to suppress free expression rather than on those who seek to exercise that right. One possible modification to the rule suggested in this paragraph is to allow a short but definite period of time (perhaps one hour) after submission of the literature before distribution could commence. Even though in-hand submission should still not be required, it would give the principal time to be notified of the submission and some time to review or to delegate review of the submitted literature.

Once submission of the literature has occurred, it is time to consider the rules setting out the grounds for suppressing a par-
ticular piece of student literature. Again, by reference to Tinker, it is clear that distribution can be halted if there is material disruption of classroom instruction, interference with the rights of others, or a reasonable forecast of substantial disruption. It will be recalled that Tinker stated that undifferentiated fear or apprehension of disruption was not enough to justify suppression of speech. It should be emphasized that these standards do not permit school officials to place a blanket prohibition on all issues of a particular publication, such as a specific “underground” student newspaper, or on all literature written by a particular author. Rather, each piece of literature must be individually reviewed to determine whether a factual basis exists for its suppression.

There has, however, been another basis for censoring student literature lurking in the background for many years: the alleged obscenity of some student publications. Probably because the law with regard to obscenity has been in flux in recent years, few clear principles have emerged. Further clouding the picture is the question of whether school systems can enforce different obscenity standards in the schools than are enforced in the society-at-large. The Supreme Court has apparently rejected the notion that state universities can apply harsher obscenity standards than civil authorities, although that position has been argued vigorously by dissenting justices.

Both the disruption and obscenity issues with regard to student literature were heard by the Supreme Court on December 11, 1974, in Board of School Commissioners v. Jacob. This case involved a challenge by students to an Indianapolis school code provision that allowed suppression of literature which is “productive of, or likely to produce a significant disruption of the normal educational processes . . .” or is “obscene to minors. . . .” This case is on appeal from the United States Court of Appeals for the Seventh Circuit which held for the students on the grounds that the disruption provision was unconstitutionally vague and that the student literature in this case, containing a “few earthy words relating to bodily functions and sexual intercourse,” was not obscene to minors.

Unfortunately, the Court chose not to decide the important issues presented by this case. In an unsigned per curiam deci-
sion, dated February 18, 1975, the Court noted that all the stu-
dents who had originally filed this suit were now graduated from
high school. Thus the issues in this case were moot as to these
students. Moreover, reasoned the Court, the original plaintiffs had
failed to adequately demonstrate that they represented a "class"
(used here in the legal, not the academic, meaning), some of
whose members would still be affected by a decision in this case.
Therefore, since the Court is prohibited from deciding cases which
do not present genuine controversies, the ex-students’ case was
dismissed.

In a strong dissent, Mr. Justice Douglas argued that the re-
quirements of a "class action" had been met in this case. And
he deplored the Court’s willingness, on narrow procedural
grounds, to leave the issues of this case unresolved. His dissent
deserves lengthy quotation:

The Court’s willingness to find this controversy moot is particularly
distressing in light of the issues at stake. . . . In remitting the
underlying issues of this case to the course of some future, more
expeditious lawsuit, however, we permit the Board to continue its
enforcement, for an indefinite period of time, of regulations which
have been held facially unconstitutional by both of the courts below.
In allowing the Board to reimpose its system of prior restraints on
student publications, we raise a very serious prospect of the precise
sort of chilling effect which has long been a central concern in our
First Amendment decisions. . . . Any student who desires to ex-
press his views in a manner which may be offensive to school au-
thorities is now put on notice that he faces not only a threat of
immediate suppression of his ideas, but also the prospect of a long
and arduous court battle if he is to vindicate his rights of free ex-
pression. . . .

I can only agree with Douglas that deferring a decision in this
case did not serve the public interest. Even though the named
plaintiffs in the case were now graduated from high school, the
issues they raised in this lawsuit are far from dead. The Court
could have easily avoided the mootness issue by recognizing that
the plaintiffs represented a genuine class of people, some of
whom are still in school. Indeed, as Douglas pointed out in his
dissent, the attorney for the school board conceded in oral argu-
ment before the Court that the plaintiffs represented a certified
class. Yet this was one of those unfortunate instances where the
Court preferred to avoid a decision on the merits by citing a
technicality. Resolution of these important issues must therefore await a later date and a different lawsuit.

Another important consideration in formulating rules governing student literature is the problem of time, place, and manner of distribution. It is clear that school officials have the legal authority to prescribe reasonable rules for the time, place, and manner of distribution. But this does not empower school officials to relegate distribution of student literature to times and places which clearly and unreasonably limit the scope of the expression. As Mr. Justice Fortas stated in *Tinker*, free speech should not be confined "to a telephone booth. . . ." Accordingly, any such rules must not inhibit distribution at times or places for which no factual basis exists to conclude that any interference with school activities would occur. That is, the burden is on school officials to sustain the validity of any restrictions on distribution. Moreover, any such restrictions must be specific so as not to leave the student uncertain about the proscribed times and places. Vagueness and ambiguity in the definition of restricted areas and hours can have just as chilling an effect on expression as an outright ban. Finally, it is essential that the rules of distribution not inhibit any person's right to accept or reject any literature distributed in accordance with the rules. Thus it is essential that the rules not prohibit possession of any publication which may be legally distributed in or near the school.

Two lingering problems in this area deserve discussion: littering and identification. As to the first, it is frequently asserted by school officials that on-campus distribution of student literature often leads to a litter problem. In other areas of the law, e.g., labor picketing and political campaigns, the litter argument has rarely been strong enough to override the claims of free speech. And it should not prevail in the schools. There is nothing, however, to prevent school officials from encouraging students to keep areas of distribution as free from litter as possible. The question of identification is more difficult. The issue is whether it is valid for school authorities to require that all student literature distributed on campus carry the name of a responsible student. The Supreme Court has struck down a similar rule regarding campaign literature. (*Talley v. California*, 1960.) Rules banning anonymous student literature have rarely been
tested. But as one respected commentator suggests, the *Talley* decision may not cover a situation where such a rule in the schools was directly linked to a specific problem stemming from anonymous literature. In the absence of more definitive law in this area, however, the values of free speech are better fostered without rules requiring identification on all student literature. Identification serves no valid purpose under the principles stated in this section, and may well have a “chilling effect” on legitimate student expression.
SUSPENSIONS, EXPULSIONS, AND INVOLUNTARY CLASSIFICATIONS

Suspensions and expulsions occur at an astounding rate in the public schools. Although accurate national statistics are not available, a number of recent studies have relied upon regional data to estimate the frequency of involuntary exclusions. Estimates run as high as 10 percent of all junior and senior high school students annually being suspended once or more. This could mean about 2 million student exclusions nationwide in a single school year.

These data are disturbing for a number of reasons. Foremost is the suspicion by many observers that suspensions and expulsions are self-defeating. That is, involuntary exclusion tends to exacerbate, rather than ameliorate, a student’s alleged behavior problem. If a student was behind academically before the exclusion, he will only be further behind when he returns. If he was alienated from his peers and teachers before, he will only be more so afterward. Thus what has been accomplished? By removing the student from the classroom temporarily, school officials have done much to guarantee that the student will get into trouble again—and perhaps soon!

In addition to being an inappropriate and perhaps irrational disciplinary measure, involuntary exclusion can have serious collateral effects. The student is labeled as a “troublemaker,” and becomes a prime suspect in any further disturbances at the school. His reputation is further tarnished by recording the suspension in the student’s permanent file. As noted elsewhere in this pamphlet, the recent “Buckley Amendment” corrected many of the abuses in this regard, but that law still allows access to the student’s file by teachers and law enforcement personnel.
School records are frequently used by juvenile judges in sentencing youthful offenders. Thus a suspension or an expulsion can have damaging consequences well beyond the school year. In addition, many school systems record "zeros" for all classes a student misses while under suspension. Also, many colleges, including Harvard, require an applicant to state any suspensions imposed on the student while in high school.

In addition to these tangible consequences of involuntary exclusions, there can be a number of subtle psychological and educational effects, particularly if the student is summarily excluded, i.e., without notice and hearing. Expert testimony at a recent trial suggested that a student suspended without a chance to defend himself develops suspicion and distrust for the school system. If no hearing is held, the student may not learn what in his behavior led to the suspension. Thus he may be unable to avoid the mistake the next time. More importantly, frequent reliance on suspensions and expulsions by school officials will teach students the dubious lesson that problems are better avoided than solved. Since exclusion is an easy way to avoid treating a student's alleged disciplinary problems, students may conclude that withdrawal from problems is the way adult society accepts its responsibilities.

The foregoing observations are intended to express my severe reservations about the wisdom of suspensions and expulsions as disciplinary measures in the schools. This is not to suggest that they should be eliminated altogether. On the contrary, there are situations in the schools which can be corrected only by the immediate removal of one or more students. Indeed, school officials would be derelict if they did not move swiftly to remove students who were endangering others or seriously disturbing the educational function of the school. But once the period of danger or potential disruption has passed, very little is to be gained—and much can be lost—by prolonged exclusion from school.

In my judgment, exclusions are used too frequently as disciplinary measures in our schools. There are myriad, less damaging, in-school disciplinary devices which ought to be used before an exclusion is imposed. Detention, loss of extracurricular privileges, extra assignments, and counseling are alternative approaches for punishing and correcting unacceptable student be-
havior. These measures have the advantage of keeping a student in school while corrective action is being taken. Frequently, a student will be having disciplinary problems with only one of his teachers. An exclusion robs the student of contact with all of his teachers, even those with whom he has no trouble. For these reasons, exclusion should be used as a last resort, only after all in-school disciplinary measures have failed.

These attitudes form the background for a more detailed examination of suspensions and expulsions. What follows is divided into two parts. The first part deals with procedures the courts require and, beyond that, with procedures that are desirable when suspending or expelling a student. The second part deals with a more difficult theme. Even if procedural due process is assiduously followed, what other legal and educational issues should be addressed when contemplating the suspension of a student? The two subsections shall be entitled “Procedural Issues” and “Substantive Issues” respectively.

Procedural Issues

Any discussion of the procedural aspects of suspensions and expulsions must begin with the case, *Goss v. Lopez*, decided by the Supreme Court on January 22, 1975. Plaintiffs in Goss were junior and senior high school students suspended from Columbus, Ohio, public schools for alleged participation in racial demonstrations at the school. In accordance with state law and school system regulation, the suspensions initially ranged up to ten days in length (some dragged on much longer) and were not preceded by any formal notice or hearing of any kind. The lower court held that both the state law and local regulation were unconstitutional inasmuch as they deprived plaintiffs of their rights to procedural due process. The court ordered that all references to suspensions and disciplinary transfers be expunged from the plaintiffs’ records.

The city of Columbus appealed the lower court’s decision to the U.S. Supreme Court. After hearing oral arguments, the Supreme Court on a 5-4 vote affirmed the decision and in the process laid down for the first time some guidelines pertinent to exclusions from public schools. As a first step, the Court had to determine whether student suspensions implicated an interest
which was protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution which reads: "nor shall any State deprive any person of life, liberty or property, without due process of law." That is, the Court had to determine whether "life, liberty, or property" was at stake in this case. On this question, the Court, Mr. Justice White for the majority, held that the state of Ohio had created a student "property" interest in school attendance by establishing and maintaining a public school system and by requiring students to attend. This "entitlement," as the Court called it, could not be deprived unless due process was observed. In addition, the Court held that "liberty" was implicated because a suspension "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfering with later opportunities for higher education and employment." And even though the suspensions in this case were relatively short, neither the "property" nor the "liberty" interest implicated were so insubstantial as to permit summary exclusions.

Having determined that some process was due to students in connection with suspensions, the Court turned to the difficult question of determining precisely what procedures are required. This step is traditionally called the "balancing process" because the Court must balance individuals' right to due process against the state's need to administer its programs in an efficient manner. In this case the Court noted that some "modicum of discipline and order is essential if the educational function is to be performed." Accordingly, it was reluctant to impose procedural requirements that would effectively eliminate the use of suspension both as a "disciplinary tool" and as an "educational device." The result was that the Court prescribed rather minimal procedural safeguards for a student facing suspension.

It works like this. Prior to any non-emergency suspension lasting up to ten calendar days, the student must be given oral or written notice of the charges, and if he denies them, an explanation of the evidence against him and an opportunity to present his side of the story. If the suspension stems from an emergency situation, i.e., when the student's presence "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," the informal hearing need not
precede the suspension but must occur "as soon as practicable." The Court specifically noted that the Constitution does not require that the student be allowed to cross-examine adverse witnesses, to call his own witnesses, or to be represented by counsel. However, the Court made it clear that school officials are not precluded from establishing more elaborate procedures including cross-examination and the presence of counsel if circumstances warrant. Likewise, the Court pointed out that expulsions for an entire semester or school year and suspensions lasting longer than ten days "may require more formal procedures."

The majority opinion provoked a strong opinion by Mr. Justice Powell for the four dissenting Justices. Powell characterized the majority opinion as an "unprecedented intrusion into the process of elementary and secondary education. . . ." He argued that the harm caused by a ten-day suspension "is too speculative, transitory, and insubstantial to justify imposition of a constitutional rule." Moreover, the psychological harm caused by a suspension is legally indistinguishable from that caused by a failing grade, exclusion from extracurricular activities, or placement into a lower track. Powell questioned whether the next step will be requiring hearings prior to these traditional educational decisions. But Powell was most disturbed by the effect this decision might have on school discipline in "an age when the home and church play a diminishing role in shaping the character and value judgments of the young. . . ."

School officials across the nation must now examine their suspension procedures to determine whether they comport with Goss. In doing so, they should remember that Goss mandated the minimum protection to which every student is entitled; indeed the decision suggested that administrators may find it desirable to provide more elaborate procedures in some circumstances. For example, one element of fair procedure, advanced by the plaintiffs but apparently ignored by the Court, is an impartial fact finder to decide disputed suspension allegations. The appointment of such a fact finder would avoid the difficult problem created when the teacher or the principal, who may be the chief accuser, is also the person to resolve factual disputes. Another area deserving attention is a limit on the number of suspensions a student can have in a semester or a year before greater pro-
cedural protection would apply. A student who has sustained three or more ten-day suspensions in a semester may be dangerously close to suffering the same consequences as one who has been expelled for an entire semester. This may be one of those situations that the Goss Court referred to when it noted "the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required."

Expulsions are another problem. As Mr. Justice Powell stated in his Goss dissent: "Expulsion . . . is an incomparably more serious matter than the brief suspension . . ." Accordingly, there can be no doubt that more elaborate procedures must pertain. A number of courts have held that before or shortly after an expulsion has begun, the student is entitled to notice and a hearing before an impartial fact finder at which he may confront and cross-examine adverse witnesses, present his own witnesses, and be represented by counsel.

Wood v. Strickland, a case involving student expulsion, was argued before the Supreme Court on the same day as Goss. In Wood, three tenth-grade girls from Mena, Arkansas, admitted "spiking the punch" at an extracurricular school function. The punch consisted of five parts soft drink, nine parts water, and two parts of flavored malt beverage purchased at a tavern across the border in Oklahoma. The school board determined, solely on the basis of the girls' admission, that there had been a violation of a rule against the use of "intoxicating beverages" at school functions and suspended the girls for the remainder of the school year.

Two of the girls filed suit demanding among other things, reinstatement and money damages from the administrators and school board members. A U.S. district court found for the defendants. On appeal, the Eighth Circuit reversed the decision, principally because no evidence had been presented at the suspension hearing to establish that the liquid admittedly supplied by the girls was intoxicating. In the absence of such evidence, the suspensions violated due process and must be expunged from the girls' records. A new trial was ordered on the question of money damages because at the first trial the district court erroneously instructed the jury that in order to recover damages
from board members, the students would have to show that the suspensions were motivated by malice. The Eighth Circuit held that the students could recover if at the new trial they are able to show that, in light of all the circumstances, the board members failed to act in good faith. The court expressed no opinion on whether the facts showed a lack of good faith, but merely determined that this was the proper test for damages at the new trial. The board members appealed to the U.S. Supreme Court.

The Supreme Court handed down its opinion in Wood on February 25, 1975. In another 5-4 decision, the case was remanded to the Eighth Circuit Court of Appeals. On the question of damages, the Supreme Court held that a school board member could be sued for personal damages "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or to cause injury to the student." In dissent, Mr. Justice Powell argued that this standard unreasonably required locally elected school board members to be experts in the esoteric field of constitutional law, and accordingly would discourage many qualified persons from serving on these local boards.

On the issue of evidence, the Supreme Court said there was ample evidence to support the expulsions if the rule against "intoxicating" beverages is interpreted, as it was by the school board, to prohibit the use and possession of beverages containing alcohol. Accordingly, the Eighth Circuit "was ill-advised to supplant the interpretation of those officers who adopted it and are entrusted with its enforcement." The Court went on to state that it "is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."

There could be problems in applying the Court's ruling regarding the interpretation of school board regulations. In my judgment, what the Supreme Court did in this case was to rewrite the regulation involved. The actual regulation prohibited "intoxicating beverages." But the Supreme Court chose to read the regulation to prohibit beverages containing alcohol. If the school board had meant to prohibit beverages containing alcohol,
it could have enacted a clear rule to that effect. Students should
not be punished for violating rules the school board meant to
enact; they should be punished only on the basis of clearly
written rules. This decision appears to give courts the authority
to stretch school board rules just to find that the evidence sup-
ported a violation of an interpretation of a rule. Penalties as
serious as expulsions should not be administered unless the stu-
dent is clearly on notice that his action is a violation of the rules.

Expulsion procedures, with some modification, should be ap-
plied to involuntary classifications. Certainly the consequences
of classification into a special education class or into a "vocat-
tional track" are as great as being expelled for a semester. As
bad as it is, an expulsion is a temporary condition. Classification,
however, into a special education class or into a low track es-
tablishes expectations and behavioral patterns which may last
a lifetime, even if the original classification was not warranted.
Accordingly, the procedural safeguards should be just as strong,
if not stronger, prior to an involuntary classification. These pro-
cedures should provide that the student and his parents be fully
informed of the basic facts which led to the classification rec-
ommendation. If professional evaluations and tests were utilized
in the decision, as they should be, copies should be furnished to
the student and his parents. Whatever harm that may result from
the student and parent reading a candid professional evaluation
is more than outweighed by the harm that could be done to the
student by an unwarranted classification. Nor is any professional
privilege breached by the presentation of these evaluations and
test results to the student and his parents. Such privilege may bar
the disclosure of the information to third parties, but certainly
would not block disclosure to the student and to the parents if
the student is a minor. These procedures should also allow the
student to obtain an independent professional diagnosis, prefer-
ably at the expense of the school district, to determine whether
the classification decision is correct. All the evidence should then
be presented to an impartial fact finder at a hearing where the
school district's experts and the diagnosis are open to cross-
examination. These procedures will not insure that every class-
ification decision is correct, but they will significantly narrow the
margin for error.
Substantive Issues

The issues to be discussed in the following section are difficult to label, but generally cover the legal and educational challenges open to a student after he has been suspended, expelled, or classified following a full due process hearing. It has aptly been called "The Problem of the Due Process Exclusion." The issues in this area can roughly be reduced to three questions: 1) Does the punishment fit the alleged violation? 2) Does the school board have authority to order this type of punishment? 3) Are the rules being enforced and the penalties being administered consistent with principles of equal protection?

Application of the first question can best be demonstrated by an example: Would it be illegal for a school district to indefinitely expel a student for arriving at school intoxicated? A federal court in New Hampshire was faced with precisely this issue in the case of Cook v. Edwards (1972). The school system argued that the expulsion was necessary to avoid an adverse impact on the student body and on public opinion. The court rejected these arguments, noting that the harm to the student of an indefinite expulsion far outweighed the school system's need in using the expulsion to correct alcohol problems in the school, and noting further that public opinion could not be a persuasive factor in the court's decision. Again, the use of the "balancing process" can be seen. The courts have used this method to strike down "due process exclusions" for a variety of student "offenses," such as pregnancy, long hair, moustaches, smoking, and marriage. The legal theories underlying this challenge to exclusions are not yet well developed. Nonetheless, they are significant enough to cause modern school administrators to think twice before imposing long-range expulsions for student behavior which does not threaten physical safety or materially disrupt the educational function of the school.

Exclusions for many of the "offenses" mentioned above have also been successfully challenged on the ground that the state legislature had neither explicitly nor implicitly authorized the school board to regulate that type of student behavior. Technically known as the ultra vires argument, it is based on the fact that a school board is the creation of the state legislature and has only that authority which the legislature has delegated
to it. Thus in order to support a particular disciplinary measure, such as expulsion, the school board must have some basis in state law for officially punishing a particular form of student behavior. Courts have traditionally given the schools wide latitude in controlling student behavior. But recently they have given greater scrutiny to the assertion by school boards that they have some inherent power to regulate all forms of student conduct. For example, a federal court in California found in Alexander v. Thompson (1970), that a state statute generally authorizing school boards to maintain discipline could not support an expulsion of a student for violating a school board rule regulating the length of student sideburns. In short, school administrators should not prescribe penalties for student conduct clearly beyond the scope of the authority delegated them by the legislature. Nor should they rely on broad provisions of state law which, in particular circumstances, may not support severe disciplinary measures. Of course, use of the *ultra vires* challenge by attorneys for students may ultimately be self-defeating insofar as several such court decisions in a state may prompt the legislature to grant school officials authority to control student behavior in terms which are specific enough to turn back any *ultra vires* argument.

Finally, "due process exclusions" are still open to challenge on the ground that they violate equal protection principles. That is, even if all procedural safeguards are observed, suspensions, expulsions, and classifications may be attacked if they fall most frequently on minority children. This issue was described in greater detail in the section of this pamphlet entitled discrimination in education. If minority students are disproportionately represented among those who are subject to disciplinary measures, the burden may shift to school officials to explain the validity of their rules and the methods of enforcement.
MISCELLANEOUS ISSUES IN STUDENT RIGHTS

Grooming Regulations and Dress Codes

An issue which has led to as much litigation as any is the wearing of long hair by male students. About two years ago, I counted 131 decisions on this subject, fifty-seven of which could be described as supporting the student's position and seventy-four in support of the school board. Almost all of these decisions had been rendered since 1969. These data are not only indicative of the frequency of recent litigation in this area, but also of the division of legal opinion provoked by this issue. Regulations governing the length of student hair have been successfully challenged on a number of grounds. One was mentioned earlier in the booklet, i.e., that such regulations curtail symbolic expression. The most frequent legal response to this argument is that if long hair is expression, it is certainly very inarticulate expression. Other grounds for challenge of long hair regulations stem from basic questions about the authority of the school board to control nondisruptive student behavior. Long hair regulations have also been challenged, but rarely successfully, because they are applied only to male students.

Cases involving long hair appear to be diminishing. It may sound contradictory, but the down-turn in these cases probably stems from both the increased acceptance and the decreased wearing of long hair. It is perhaps true of most dress and grooming fashions that by the time the style is widely accepted by adults it is no longer favored by the young. In any case, we may be nearing the end of fervent litigation over the authority of school boards to regulate the length of students' hair. In many respects, it was an unfortunate episode in American education.
It is no secret that I feel that school officials brought a great deal of unnecessary trouble on themselves by insisting on enforcing these regulations. It is difficult to see how long hair worn by males could have been a disruptive factor for long in the absence of the sometimes hysterical response by school officials. And any health or safety hazards presented by long hair on males could have been handled as they were with female students.

School officials make a mistake, in my judgment, when they attempt to enforce an unnatural and unwarranted conformity upon students. The world into which the students will graduate contains an incredible variety of human appearance. For any person to exist happily in adult society, he or she must learn to tolerate extremes in human dress and grooming styles. If students in school are not exposed to variations in human appearances among their peers while they are in school, how can they be expected to adjust properly to adult society? More disturbing, of course, is the prospect that if we fail to urge tolerance in the superficial area of human appearance, how can we hope to have an adult society which is tolerant of each other's actions and beliefs.

*Education for Excluded Students*

Disciplinary exclusions are intended primarily to remove a student whose continued presence poses a threat to physical safety or to the educational function of the school. A secondary purpose is to punish the student for behavior which violated a school rule and to deter others from doing the same. In short, the purposes are prevention, punishment, and deterrence. None of these purposes is served, in the long-run, by imposing collateral academic penalties on the student. For example, prevention, punishment, and deterrence are not strengthened by depriving an excluded student of his textbooks while he is out of school. Of course, one might argue that loss of all the privileges of school attendance including the use of textbooks, is the most effective deterrent. But whatever deterrent effect deprivation of textbooks might have, it would quickly be washed out when the student returned to school only to find that he was hopelessly behind in all his classes. Depriving an excluded student of his
textbooks can only serve to heighten the disciplinary problem which originally led to the exclusion.

My position is that exclusions should be used only as a last resort, and when they are used every effort should be made to reduce the academic consequences of an involuntary absence from school. A sound policy, designed to correct disciplinary problems rather than increase them, would be to furnish an excluded student with his textbooks, as well as all assignments, worksheets, study guides, and examinations. To be sure, there will be some excluded students, perhaps the majority, who will not wish to study while out of school. But that supposition should not serve as a justification for depriving all excluded students of the opportunity to progress academically while out of school. Most communities maintain a variety of educational alternatives, such as televised instruction, night school, tutoring, and correspondence courses, which may be utilized by an excluded student.

**Corporal Punishment**

One of the least important issues in student rights is corporal punishment. But because it raises such strong emotions it deserves some discussion here. Corporal punishment, for the laymen, is the infliction of physical pain to punish errant behavior. In the past, corporal punishment was widely used in American schools, but in recent years it has fallen from favor. It has been challenged in the courts with indifferent success; thus the diminishing use of corporal punishment is due largely to voluntary elimination by school boards. Where corporal punishment is still used, it is accompanied by a variety of procedural safeguards and paper work which render the actual punishment a little silly. I believe there is no persuasive rationale for the continued use of corporal punishment. Modern administrators are armed with a variety of other disciplinary devices which are at the same time more effective and more humane than the infliction of physical pain.
SOME FINAL THOUGHTS

Even a casual glance at the pages of this pamphlet will reveal that most of the changes in the area of student rights in recent years have been mandated by legal authorities, principally the courts. This often prompts the question: Why has the involvement of the courts in matters of student discipline been so heavy? A cynic might answer that school administrators ignored the rights of students and the courts were required to enter the picture and establish basic constitutional rights inside the classroom. I tend to think that this is a simplistic view. Few administrators in 1960 (just to pick an appropriate date) could have been expected to anticipate how the constitutional rights of students would evolve during the next fifteen years. Teachers and administrators have neither the training nor the time to foresee legal trends. This is not to say that professionals could not have avoided some of the litigation surrounding student rights. Certainly administrative intransigence and inflexibility contributed to the onslaught of lawsuits. But, on the whole, school personnel were doing their best to adapt to a situation for which they were largely unprepared.

In the future I believe there will be a decline in students’ rights litigation. Teachers and administrators have become and will continue to become more aware of legal principles in the schools. Courses in school law are rapidly becoming an established part of the curriculum in teacher and administrator training programs. And professional associations are doing a substantially better job than they used to in disseminating news about legal trends. All this will cause school personnel to become more sensitive to the rights of students. One consequence will be policies
and decisions regarding students which are consonant with prevailing legal principles. This will lead, in turn, to a diminishing reliance on litigation as a means of enforcing student rights.

This could all be wishful thinking. Perhaps nothing has changed in recent years with respect to administrative sensitivity to student rights. Perhaps the courts will continue to play a dominant role in administering the schools. But if we have learned anything in the last decade, I hope we have learned that sensible and tolerant policies regarding students are much better than lawsuits.
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