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# Constitutional Law: Procedural Due Process in Secondary Schools

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# PROCEDURAL DUE PROCESS IN SECONDARY SCHOOLS

## INTRODUCTION

Thomas Jefferson believed that ignorance and freedom could not live together in a flourishing democracy. Today's mass education reflects the additional belief that education of the whole citizenry is crucial to the political ideal of equal opportunity. In terms of numbers at least, this dream of universal education has become a reality. The National Education Association reports that in the 1969-70 school year, for example, there were about 27,000 public secondary schools in the United States enrolling 17,500,000 youngsters.[1] Although until recently, school boards presiding over this burgeoning governmental undertaking had not been accountable for unconstitutional activity,[2] references to the need for a continuation of this policy of judicial noninterference[3] are overshadowed by the recognition that high school pupils are full fledged citizens[4] who have attained constitutional maturity. This article will deal with recent pronouncements on the meaning of procedural due process in the high school context as regards the need for a hearing before the imposition of discipline, the necessary procedural components of such a hearing, and the need for clarity and specificity in high school conduct codes.

Procedural due process in the school context involves discussion of the requirement of a hearing of timely and specific notice of charges, of supplying names and witnesses and a chance for cross-examination of each and of the right to the presence of counsel. In addition, it involves consideration of the void for vagueness doctrine as applicable to school regulations and applicable Fifth Amendment rights.

## THE REQUIREMENT OF A HEARING

The student's opportunity for a hearing is the most basic due process requirement when he is faced with serious discipline, particularly expulsion, and the federal courts dealing with both the college and high

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[1] 1971 *New York Times Encyclopedia Almanac* 519.

[2] *See* Barnette v. Board of Education, 319 U.S. 624, 637-38 (1943).

[3] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 507 (1969); Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[4] "Students in school as well as out of school are 'persons' under our Constitution." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969). "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *In re* Gault, 387 U.S. 1, 28 (1967). "The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

school levels appear to be unanimous in requiring the school to afford some opportunity for a hearing when dealing with expulsions.[5]

When the prospective discipline involved is a lengthy suspension, the necessity of a hearing is almost as well established. One court said it would treat a long or indefinite suspension as the equivalent of an expulsion and within the rule requiring a hearing.[6] Another court, considering the case of a twelfth grader suspended for picketing during school hours, ordered her reinstatement on the ground that failure to provide any hearing was a denial of due process.[7] A state court has similarly held the exclusion of a student tantamount to expulsion to be invalid when he is not provided the opportunity of presenting his side of the story.[8] It may, therefore, be generally said that an actual hearing will be required when students are either expelled or suspended for any substantial period of time.[9]

Thus far, however, a short suspension or imposition of other relatively minor penalties does not warrant a hearing. For example, when a ten-day suspension was imposed without specification of charges or hearing, a U.S. district court, saying it was not dealing with "drastic disciplinary action" but with temporary suspension, held that due process requirements had been met:

> If the temporary suspension of a high school student could not be accomplished without first preparing specification of charges, giving notice of hearing, and holding a hearing, or any combination of these procedures, the discipline and ordered conduct of the educational program and the moral atmosphere required by good educational standards, would be difficult to maintain.[10]

In another case, an eight-day suspension, again without a hearing or specification of charges, followed a student's overt, disruptive objections to the school dress code. The applicable section of the California Educational Code did not require a hearing, and the court was satisfied that under the circumstances, due process required no more than what had been done.[11] In another case a parental conference before a temporary

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[5] Knight v. Board of Education, 48 F.R.D. 108, 111 (E.D. N.Y. 1969); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969); Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969); Henderson v. Finch, 300 F. Supp. 753 (W.D. La. 1969).

[6] Madera v. Bd. of Educ., 386 F.2d 778, 784 (2d Cir. 1967).

[7] Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970); *see* Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970).

[8] Woody v. Burns, 188 So. 2d 56 (Fla. 1966).

[9] Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), speaking not of the requirement of a hearing, but of constitutional guarantees in general, has held that the point at which disciplinary actions should be subject to constitutional scrutiny is when the action involves suspension "for any period of time substantial enough to prevent one from obtaining credit for a particular term." *Id.*, at 988.

[10] Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 522 (C.D. Cal. 1969).

[11] Hatter v. Los Angeles City High School Dist., 310 F. Supp. 1309, 1312 (C.D. Cal. 1970).

suspension was held to have "amply satisfied the applicable principles of due process. . . ."[12]

It is probably erroneous to conclude, in these instances when a full hearing is not technically necessary, that due process requires nothing. A student seemingly should have a chance to deny or explain his conduct even when sanctions are not so drastic as to necessitate a full hearing. The courts are not likely to consider indelible notations of misconduct on the student's record or other real injuries implied with discipline as insignificant. Thus, in some state court cases we find the suggestion, by implication[13] or by analogy,[14] that due process requires at least an administrative consultation before any future discipline is imposed, so that the student can have the opportunity to persuade the authority of a situation of mistaken identity or that there is some other compelling reason not to take action. Although a prediction of judicial interference in the school's handling of trivial matters is not intended, it is suggested that caution be exercised to assure consistent fair treatment at all stages of both major and minor discipline.

> Due process unlike some legal rules is not a technical conception with a fixed content, unrelated to time, place and circumstances. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by these whom the Constitution entrusted the unfolding of its process.[15]

Thus, at disciplinary hearings:

> Minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.[16]

Well before the Constitution became generally recognized as a necessary guide in a school's treatment of pupils, a Pennsylvania court gave generous content to the meaning of the statutory phrase "after a proper hearing", in discussing the expulsion of students:

> A proper hearing can only be one held after an accused has had due and reasonable notice of the nature of the offense charged, the names of his accusers, the time and place where he may if

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[12] Schwartz v. Schuker, 298 F. Supp. 238, 241 (E.D. N.Y. 1969).

[13] R.R. v. Board of Education, 263 A.2d 180, where the court in a temporary suspension case suggested, at 186, the propriety of a preliminary hearing even though a full hearing was subsequently held; Banks v. Board of Pub. Instr., 314 F. Supp. 285 (S.D. Fla. 1970) where the court, at 294, implicitly approved the reported practice of a preliminary informal discussion with the student and his parents, although again the penalty was not minor and a full hearing was held after the suspension.

[14] Kelly v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968) where the court required some form of hearing before the Board could suspend all students from interscholastic athletic competition for one year.

[15] Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 162-3 (1951), (concurring opinion of Frankfurter, J.).

[16] Hobson v. Bailey, 309 F. Supp. 1393, 1402 (W.D. Tenn. 1970); *see also,* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Zanders v. Board of Education, 281 F. Supp. 747 (W.D. La. 1968); Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967).

> he desires appear before a tribunal having jurisdiction of the matter in question, and there be given opportunity to face his accusers, to hear their testimony, examine any and all witnesses testifying against him, have the right to offer testimony in his own behalf by himself and his witnesses if he so desires, and to be represented by counsel if he so elects.[17]
>
> The federal courts have not seen fit to implement such an elaborate list of procedures. It has become generally accepted that a trial, identical to that in a court of law, need not be provided at expulsion hearing.[18]

At the same time, the hearing is to be more than an informal interview, and, as the cases disclose, should have the character of an adversary proceeding.[19]

The college case of *Dixon v. Alabama State Board of Education*[20] is the landmark on student's procedural rights and remains an excellent reference point. The case involved an ex parte expulsion of students without notice of charges or opportunity to appear. The federal court set aside the school's action as unconstitutoinal and, in so doing, delineated the meaning of due process in expulsion cases. As will be detailed later, the role in the *Dixon* case can be considered generally applicable to secondary level expulsions. *Dixon* required:

(1) That accused students should have notice of the charges against them and opportunity to be heard in their own defense. More specifically, "the notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion" under appropriate regulations.[21]

(2) That the required hearing must afford the authorities "an opportunity to hear both sides in considerable detail. . . . This does not imply that . . . the right to cross-examine witnesses is required." However, under some circumstances the accused 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".[22]

(3) That a student's right to defend himself should include the opportunity to "produce either oral testimony or written affiidavits of witnesses in his behalf."[23]

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[17] Geiger v. Milford Independent School Dist., 51 Pa. D. & C. 647, 6 Mon. Leg. R. 73 (1944).

[18] Madera v. Board of Education, 386 F.2d 778, 786 (2d Cir. 1967); Zanders v. Board of Education, 281 F. Supp. 747, 749 (W.D. La. 1967); Due v. Florida A & M University, 233 F. Supp. 396 (N.D. Fla. 1963); Dixon v. Alabama State Bd. of Educ., 194 F.2d 150, 159 (5th Cir. 1961).

[19] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[20] *Id.*

[21] 294 F.2d at 158.

[22] *Id.* at 159.

[23] *Id.*

(4) That if the hearing is not a tete-a-tete with authorities, "the results and findings of the hearing should be presented in a report open to the student's inspection.[24]

Reference to the above listing provides a convenient method of analyzing existing authority and projecting the possible development of the law.

### Specific Notice of Charges

As announced in *Dixon,* the rudiments of constitutional fairness require that a student be formally and specifically informed as to his alleged misconduct. This enables him, if the charge is not true, to prepare to demonstrate its fallacious character or, if it is true, to explain any mitigating circumstances involved.

As to the notice itself, a formal recitation of specific charges of the grounds for expulsion has been required as a matter of course in college cases.[25] At least one high school case suggests that this will be the requirement in secondary school expulsions.[26]

As to the timing of this notice, the trend is toward furnishing the same at a reasonable time before the hearing, although this view has not been unanimous. Two federal courts in Tennessee have indicated that being advised of the charges for the first time upon appearing before school authorities is not a violation of procedural due process.[27] It seems obvious, however, that if prior notice is not given, the student is not afforded a period in which to gather either his wits or his evidence before appearing in front of the board. Specification of some standard fairly requires "timely" notice of the charges. One court, dealing with a college student, has suggested that the student be furnished with a written statement of charges at least ten days before the hearing.[28] Another, involving a high school pupil, has found a two-day notice to be adequate.[29]

### Fact Finding at the Hearing

#### A. The Names and Cross-Examination of Witnesses

A series of school cases both on the college and secondary level have followed *Dixon's lead* in requiring the disclosure of the names of witnesses and the facts which they supply.[30] Although no high school expul-

[24] *Id.*

[25] Scott v. Alabama State Bd. of Educ., 300 F. Supp. 163 (M.D. Ala. 1969); Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1968). Dixon v. Alabama State Bd. of Educ., *supra* note 19.

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

[27] Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970); Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd* 407 F.2d 834 (6th Cir. 1969), *cert. granted* 396 U.S. 817 (1970), *but dismissed,* 397 U.S. 31 (1970).

[28] Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1967).

[29] Whitfield v. Simpson, 312 F. Supp. 889 (E.D. Ill. 1970).

[30] Esteban v. Central Missouri State College, *supra* note 25: Hobson v. Bailey, *supra* note 27; Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Jones v. State Bd. of Educ., *supra* note 27; Zanders v. Board of Education, *supra* note 16.

sion case can be found setting aside an expulsion for refusal to supply the names of witnesses, that result is foreseeable on the basis of the *Dixon* precedent.

The confrontation and cross-examination of these witnesses has been treated differently by the courts. Unquestionably, an evidentiary hearing with the availability of cross-examination affords the opportunity of asking "probing questions" [which] "often uncover inconsistencies, lapses of recollection and bias."[31] Some courts, influenced by arguments to this effect, guarantee cross-examination as a matter of right.[32] But the majority of courts thus far have chosen to support the rule not requiring the opportunity of confrontation and cross-examination of witnesses.[33]

On the high school level there arguably is wisdom in such a rule, particularly where the "informer" is a fellow student. In 1942, a state court expressed its opposition to exposing such students to derision, and said that although:

> The student should be informed . . . of the . . . names of at least principal witness against him when requested . . . He cannot claim the privilege of cross-examination as a matter of right. . . . As to the right to meet his accusers face to face in an investigation of wrongdoing, we cannot fail to note that honorable students do not like to be known as snoopers and informers against their fellows. . . . In these circumstances they should not be subjected to a cross-examination, and, as is often seen in a trial court, to their displeasure if not their public humiliation. It would be subversive to the best interests of the school, as well as harmful to the community.[34]

The majority of courts are likely to continue to deny the existence of the right of confrontation and cross-examination in furtherance of the judicial goal of an orderly administration of the school system.

B. The Right to Counsel

Related to tthe question of confrontation and cross-examination is the question of the right to have an attorney present at the hearing as a capable questioner, or as a counselor. A Florida court interpreted the *Dixon* ruling, which omitted mention of any right to counsel, as denying the existence of any such right:

> A fair reading of the *Dixon* case shows that it is not necessary to due process requirements that a full-scale judicial trial be conducted by a university discipline committee with qualified attorneys either present or waived.[35]

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[31] Greene v. McElroy, 360 U.S. 474, 497-98 (1959).
[32] Esteban v. Central Missouri State College, *supra* note 25; Buttny v. Smiley, *supra* note 30.
[33] Memorandum on Judicial Standards in Review of Student Discipline, 45 F.R.D. 133 (W.D. Mo. 1968).
[34] State *ex rel* Sherman v. Hyman, 171 S.W.2d 822, 826 (Tenn. 1942) *cert. denied* 319 U.S. 748 (1943).
[35] Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963).

The Supreme Court has made it clear that there is no attendant constitutional right to counsel when an administrative body performs a merely investigatorial function.[36] However, a committee empowered to expel or suggest the expulsion of a student based upon its findings is improperly characterized as having merely investigatorial functions. Perhaps for this reason, cases can be found requiring, or permitting at least, the passive presence of counsel.[37]

With the recent *Gault*[38] and *Kent*[39] decisions, the Supreme Court has twice in as many years insisted on a juvenile's right to counsel, reasoning that:

> The juvenile needs the assistance of counsel to cope with the problems of the law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain where he has a defense and to prepare and submit it.[40]

Implicit in these rulings is the suggestion that the less able a person is to express his position, the more important his right to be properly heard through counsel becomes. Therefore, although a college student may be capable of effectively presenting his side at a disciplinary proceeding,[41] the student of high school age may be less articulate and less able to handle his own defense.

One consideration relevant to the necessity of councel's presence is the severity of the penalties involved. The scar of an expulsion or even a suspension on an academic record, substantially limiting professional and educational opportunities, is a deep one. One District Court in *Madera v. Board of Education*,[42] focused on the ramifications of the hearing and commented that the process

> can ultimately result in loss of personal liberty to a child or in suspension which is the functional equivalent of his expulsion from the public schools or in the withdrawal of his right to attend public schools.[43]

In a New York state court, a high school senior was held to have a right to counsel in order to face a charge of cheating, a statutory misdemeanor, where consequences could have been denial of a diploma.

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[36] Hannah v. Larche, 363 U.S. 420 (1960); Greene v. McElroy, *supra* note 31; *In re* Groban, 352 U.S. 330 (1957); *In re* Oliver, 333 U.S. 257 (1948); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd* 399 F.2d 638 (4th Cir. 1968), *cert. den.* 394 U.S. 905 (1959).

[37] Esteban v. Central Missouri State College, *supra* note 25; Jones v. State Bd. of Educ., *supra* note 27; Zanders v. Board of Education, *supra* note 18; Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D. N.Y. 1968); Scott v. Alabama State Bd. of Educ., *supra* note 25.

[38] *In re* Gault, 387 U.S. 1 (1967).

[39] Kent v. U.S., 388 U.S. 541 (1966).

[40] *In re* Gault, *supra* note 38.

[41] Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

[42] 267 F. Supp. 356 (S.D. N.Y. 1967), *rev'd* 386 F.2d 778 (2d Cir. 1967), *cert. den.* 390 U.S. 1028 (1968).

[43] 267 F. Supp. at 369.

Under these circumstances, the court concluded that denial of active participation by counsel was arbitrary.[44]

It is true that expulsion hearings are not exclusively punitive actions nor criminal proceedings. Clearly such hearings will not be allowed to become full-blown trials. Nevertheless, even though the strict rules of evidence will not govern the proceeding,[45] where there is a dispute of fact it is to be of an adversary nature.[46]

Projection of the considerations outlined above suggests the increased acceptance of a rule permitting, and, under some circumstances, requiring the presence of counsel.

C. The Right Against Self-Incrimination

The right against self-incrimination is generally associated with criminal, not administrative matters. Nevertheless, students are faced with two potential situations where Fifth Amendment rights may be operative. The first is under circumstances where a student's pre-hearing statements are used against him although he was not apprised of their potentially incriminating character. A New York state court in *Goldwyn*[47] equivocated when faced with the problem, giving assurance that a citizen may not be deprived of Fifth Amendment rights in an administrative proceeding,[48] including a disciplinary hearing, but explaining that certainly the *Miranda* warning is not required.[49]

The second potential situation involves a student charged with a crime who finds himself on the school disciplinary carpet before the disposition of the criminal matter. The student thus risks expulsion if he remains silent and risks prejudicing his chances of success in any subsequent criminal proceedings if he speaks. A New York state court rejected Fifth Amendment claims under similar circumstances. The court said it would not countenance the absurdity of a rule which would give a child charged with a crime a constitutional right to remain in school and not be subject to a school hearing until disposition of the criminal matter, but which would subject a child charged with mere

[44] Goldwyn v. Allen, 281 N.Y.S.2d 899, 54 Misc. 2d 94 (Sup. Ct. 1967). The *Goldwyn* case has been cited via dictum as authority for right to counsel in situations with severe discipline as a potentiality: People *ex rel* Granelley v. Krueger, 310 N.Y.S.2d 429, 432 (1970). Other state jurisdictions can be found holding that fundamental fairness requires the appearance of counsel for secondary school students at serious misconduct hearings. Morrison v. City of St. Lawrence, 186 Mass. 456, 72 N.E. 91 (1904); Hollenbach v. Elizabethtown School Dist., 18 Pa. D. & C. 2d 196 (Lancaster County Ct. 1958); Mande v. Wesleyville School Dist., 81 Pa. D. & C. 125 (Erie County Ct. 1952); Geiger v. Milford Indep. School Dist., 51 Pa. D. & C. 647 (Monroe County Ct. 1944).

[45] Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Reptr. 463 (1967); Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967).

[46] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[47] Goldwyn v. Allen, *supra* note 44.

[48] *Citing* Garrity v. New Jersey, 385 U.S. 493 (1966); Spevack v. Klein, 385 U.S. 511 (1966); Slochower v. Board of Education, 350 U.S. 551 (1955).

[49] Goldwyn v. Allen, *supra* note 44.

misconduct, to which the right against self-incrimination does not apply, to immediate disciplinary action.[50]

> New York precedent on Fifth Amendment student rights must be understood in the context of the somewhat typical situation of legislative integration of school and juvenile law. There is no reason to believe, however, that the courts would not be willing to adopt Fifth Amendment rights against self-incrimination as appropriate in light of the genuine and serious injury suggested by an expulsion or lengthy suspension.

ADEQUATE NOTICE OF PROHIBITED CONDUCT

Another procedural due process consideration is that of notice to the student that specific behavior was prohibited and would subject him to discipline. The Constitution requires that particularly criminal statutes be definite, that is, not in terms so vague that men of common intelligence must guess at their meaning.[51] As to school rules, the void for vagueness doctrine is generally accepted and the standard of fair notice is similar:

> The criterion for judging whether a regulation or statute is too vague is that of fair notice to those governed by the regulation.[52]

While the vagueness test is well established, the federal courts in the relatively new school area have marked out two distinguishable lines of constitutional reasoning as to precision or even publication thereby required of regulatory standards. One line of reasoning can be found in the en banc *General Order of Student Discipline* emphasizing the comprehensive authority of school officials in the matter of regulation:

> Outstanding educational authorities . . . believe on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed. . . . The legal doctrine that a prohibitive statute is void if it is overly broad or unconstitutionally broad does not in the absence of special educational circumstances, apply to the standards of student conduct . . . [which] ordinarily should be determined by recognized educational standards.[53]

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[50] People *ex rel* Granelle v. Kreuger, 310 N.Y.S.2d 429 (1970).

[51] Connally v. General Constr. Co., 269 U.S. 385 (1926).

[52] Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368, 370 (E.D. Cal. 1970); *see also* American Comm. Ass'n, CIO v. Douds, 339 U.S. 382 (1951); *but see* Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969) and Banks v. Board of Public Inst., 314 F. Supp. 285 (S.D. Fla. 1970), explaining the general law that such rules need not be drawn as tightly as criminal statutes.

[53] 45 F.R.D. 133, 146-47 (W.D. Mo. 1968), indicates that the court in the context of its statement could have substituted "vague" for the term "overly broad."

The cases generally support the position that school administrators properly have wide latitude in formulating rules and guidelines of student conduct. Eisner v. Stamford Bd. of Educ., 314 F. Supp. 832 (D. Conn. 1970); Farrell v. Smith, 310 F. Supp. 732 (S.D. Me. 1970); Jeffers v. Yuba City Unified School Dist., *supra* note 52; Bouse v. Hipes, 319 F. Supp. 515 (S.D. Ind. 1970); Jones v. State Bd. of Educ., *supra* note 27. The United States Supreme Court has consistently prescribed this attitude of deference: "The Court has

This judicial approach, which recognizes minimal notice as constitutionally edequate, leads to decisions such as *Buttny v. Smiley,*[54] where the court upheld a regulation which required students to "conduct themselves in such a manner that reflects credit upon the university." Similarly, an Illinois statute which warned of discipline for "gross disobedience or misconduct" has been upheld as not unconstitutionally vague.[55] One court has allowed a suspension not exceeding one school term based upon violation of a Texas statute which provided that penalty for "incorrigible conduct."[56]

A second line of cases is exemplified by *Soglin v. Kauffman.*[57] The district court explicitly took issue with the view expressed in the *General Order of Student Discipline*:

> The constitutional doctrines of vagueness and overbreadth are applicable in some measure to the standard or standards to be applied . . . in disciplining students and that [sic] a regime in which the term 'misconduct" serves as the sole standard violates the due process clause of the Fourteenth Amendment by reason of vagueness . . .[58]

Upon similar reasoning, one court in a well-written opinion has decided that "generalities can no longer serve as standards of behavior when an education hangs in the balance"[59] Thus, a second group of courts appears quite ready to set aside expulsions based upon indefinite or uncertain regulations, and will require precise and narrowly drawn rules.

Just as there are at least two dissimilar interpretations of the appropriate vagueness standard applicable to school regulations, the courts differ on the adequacy of even necessity of publication of the disciplinary rule before students may be severely punished. The appellate court in *Soglin,* for example, required a published rule to satisfy notice requirements

> Pursuant to appropriate rule or regulation, the University has the power to maintain order by suspension or expulsion of disruptive students. . . . We only hold that expulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of "misconduct" without reference to any pre-existing rule which supplies an adequate guide.[60]

repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 507 (1969).

[54] 281 F. Supp. 280 (D. Colo. 1968).

[55] Whitfield v. Simpson, *supra* note 29.

[56] Southern v. Board of Trustees, 318 F. Supp. 355 (N.D. Tex. 1970).

[57] 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd,* 418 F.2d 163 (7th Cir. 1969).

[58] 295 F. Supp. at 990.

[59] Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328, 1346 (S.D. Tex. 1969); *see also,* Brownlee v. Board of Education, 311 F. Supp. 1360 (E.D. Tenn. 1970).

[60] Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969); *see also* Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967).

A different interpretation of the publication requirement is expressed in *Speake v. Grantham*,[61] another college case, indicating a preference for but not necessity of publication:

> . . . an institution may establish appropriate standards of conduct, both scholastic and behavioral, in any form and manner reasonably calculated to give adequate notice to the scholastic attainments and behavior expected of the student. The notice of these standards may be written or oral, or partly written and partly oral, but preferably written and may be positive or negative in form.[62]

Apparently some courts are willing, however, under some circumstances, to uphold disciplinary action despite the lack of a published rule. For example, one court upheld a one-year probation and suspension of social and athletic privileges of high school students who had been drinking beer, although use of alcohol was not explicitly prohibited. The court permitted punishment without a prior rule upon consideration of prior knowledge of wrongfulness of the conduct and of the severity of the penalty imposed.[63] Were the penalty more severe or the censure more of a surprise, the court might well have decided differently.

There is general agreement then that, especially when serious penalties are involved, the vagueness standard is in some manner operative so as to guarantee the student adequate notice of behavioral standards.

Although clearly school rules need not be as narrowly drawn as criminal statutes,[64] and although there remains a question as to the applicability of any vagueness standard where less seriousness penalties are involved,[65] there is a discernable trend toward requiring the school to formulate objective and precise definitions of conduct which may lead to serious disciplinary action.

> When faced with such drastic consequences, a high school student has no less a right to clear, specific normative statement

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[61] 317 F. Supp. 1253 (S.D. Miss. 1970).

[62] *Id.*, at 1270. Other college cases supporting the rule that a school administration under its inherent authority may severely punish students without a prior published rule are: Norton v. Discipline Committee, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970); Esteban v. Central Missouri State College, *supra* note 25; Jones v. State Board of Education, *supra* note 27; Barker v. Hardway, *supra* note 36. The First Circuit in dictum indicated that it was inclined to this view in Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

[63] Hasson v. Boothby, 318 F. Supp. 1183 (D. Mass. 1970).

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

[65] The District Court in *Soglin* left unresolved the problem of whether the vagueness doctrine should apply at school proceedings 'in which the range of possible sanctions is mild, such as the denial of social privileges or a minor loss of academic credits or perhaps expulsion from a specific course or perhaps a brief suspension." 295 F. Supp. at 991. In addition, one should recognize that the principles of *Soglin* and other college cases arguably have a more limited application in a high school situation, where even greater discretion is properly lodged in school officials and where flexibility in school administration may be even more desirable.

> . . . than does a university student or possibly the accused in a criminal case.[66]

## CONCLUSION

In 1971, we find ourselves in the pioneer period of school constitutional law. Procedural due process is the newly recognized but clearly applicable guarantee of fundamental fairness to students subject to school discipline. With the prospect of serious discipline, the sine qua non of fair treatment is the opportunity of a hearing. What remains less well-defined is the description or even the necessity of other constitutional safeguards. However, projection of existing constitutional and school law suggests a future law which will stabilize somewhat beyond the experimental borders drawn in the initial test cases. To the degree that courts become impressed with the relative severity and implications of student discipline, one can anticipate expansion of procedural requirement to include guarantees of the right to the active or passive assistance of counsel and the right to some form of Fifth Amendment warning. More rigid description of the applicable vagueness standard is correspondingly likely. On the other hand, with a view toward the orderly administration of the school system and with confidence that judicial lines will be drawn in the area of ever-expanding permissibility, the required prior notice of charges is not expected to become an approximation of a detailed criminal complaint, nor does it seem that a full evidentiary hearing will come to mean the opportunity of confronting and cross-examining witnesses.

Whatever the development, it will mean judicial insistence upon procedural due process when the student is subject to disciplinary injury. Due process is the guarantee of subjective justice. The facts and circumstances of each case call for application not simply of a codified set of procedures, but of basic yet flexible guidelines so as to assure overall fairness. The challenge in the representation of schools and students then lies not only in the understanding of constitutional precedent, but in the evaluation of individual problems.

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[66] Sullivan v. Houston Indep. School Dist., *supra* note 64, at 1344.