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AN ANALYSIS OF ADMINISTRATIVE DISCRETION
IN SELECTED STUDENTS' RIGHTS DECISIONS
OF THE UNITED STATES SUPREME COURT

A Dissertation
Presented for the
Doctor of Education
Degree
The University of Tennessee, Knoxville

Thomas E. Biggs

December, 1993

DEDICATION

To Elizabeth and Everett -- creators

To Donna -- sustainer

To Jeremy, Jessica, and Hannah -- uplifters

ACKNOWLEDGEMENTS

I would like to offer special gratitude to William J. Coffield, who first supported some of the ideas in this project. To Malcolm McInnis, Jr., whose class and stimulating ideas always raised my level of thinking. To Robert K. Roney, who helped me to begin, exhorted me, and remained to see me through. To John W. Lounsbury, a friend of many years who has always strengthened my spirit. Most of all I wish to thank Mary Jane Connelly, who took on a project that was beginning to flounder, helped me to give it new life and a more directed focus, and provided invaluable criticism in the final stages as we brought it to completion.

Lori Shropshire willingly aided me in preparing the manuscript.

ABSTRACT

AN ANALYSIS OF ADMINISTRATIVE DISCRETION
IN SELECTED STUDENTS' RIGHTS DECISIONS
OF THE UNITED STATES SUPREME COURT

by

Thomas E. Biggs

This legal research study selected nine Supreme Court cases which dealt with student control issues, beginning with the Tinker (1969) decision and ending with the Hazelwood (1988) ruling. The purpose of this study was to identify aspects of each case which involved the discretionary decisions of school administrators in their capacity of dealing with student management and disciplinary action. Principles used by the Supreme Court in structuring the discretionary relationship between school administrators and students were identified and described. Guidelines were provided for school administrators in exercising discretion in school discipline situations.

Principles, concepts, and doctrines which served to guide the Supreme Court's regulation by judicial review of administrative discretion in these student management cases are summarized in the following statements:

1) Reasonableness in rules, procedures, and punishment was a

central concept in the Supreme Court's review of discretionary acts of discipline. 2) The standard of reasonableness increased as a discipline matter impinged on a constitutional right or interest. 3) Administrative action often received a greater "reasonableness" endorsement when supported by federal, state, or local procedures, by clearly-defined educational interests, and by involvement of students at different levels in the processes. 4) Consistent rules and procedures, and supporting factual evidence helped substantiate a reasonableness review. 5) In reviewing the interaction between student and administrator in a disciplinary situation, the Supreme Court carefully considered the following factors: uniqueness of the school environment; students as minors; flexibility needed for certain actions of misconduct; authority and abuse of authority issues; student versus other students' and the school's interests; and a type of cost/benefit analysis in adding or withholding additional protections or procedures. 6) A qualified immunity was provided by the Court for certain discretionary acts involving the violation of students' civil rights. 7) A lawsuit against an administrator for monetary damages was determined to require proof of injury and an actual monetary amount, similar to other tort liability claims.

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CHAPTER I

INTRODUCTION

Beginning with the Tinker v. Des Moines Independent School District¹ decision over twenty years ago, the United States Supreme Court demonstrated a greater willingness to hear the grievance issues of public school students. For over 175 years the Constitution's protection of freedom of speech did not appear to apply to students in the school environment,² nor did it seem that "students were deserving of Constitutional protection"³ The Tinker ruling marked the first time in history the United States Supreme Court dealt with a student discipline matter that did not involve religion.⁴

The decision itself signalled a crucial turning point in expanding the rights of students in school. A surge of students' rights cases came before all levels of the courts, which in turn became more willing to review a variety of

¹393 U.S. 503 (1969).

²David Schimmel, "Students and Freedom of Expression," in Current Issues in School Law 13 (W. Camp, J. Underwood, & M.J. Connelly, eds. 1989).

³Gail P. Sorenson, "Freedom of Speech for Students and Teachers," in Critical Issues in Educational Law: The Role of the Federal Judiciary in Shaping Public Education 1 (NOLPE 1988).

⁴Chester A. Nolte, School Law in Action: 101 Key Decisions With Guidelines for School Administrators 113 (1971).

student complaints. The lawsuits included such issues as First Amendment rights, regulations concerning student grooming, due process in suspensions, rules concerning student searches, guidelines for corporal punishment, and participation of students in extracurricular activities. Although more than two decades have passed since the Tinker decision, many of these student issues continue to come before the courts. Three more recent United States Supreme Court decisions, New Jersey v. T.L.O.,⁵ Bethel School District No. 403 v. Fraser,⁶ and Hazelwood School District v. Kuhlmeier,⁷ have reviewed issues which were litigated in Tinker, now in the garb of a new generation. That these cases continue to generate complicated and difficult-to-resolve problems is supported by the fact that in all three cases, the United States Supreme Court overturned lower court rulings. In two of the three cases, T.L.O. and Hazelwood, courts of appeal had already reversed the decision of lower courts.

An important thread that has woven its way through many of the student cases since Tinker, regardless of the specific Constitutional problem raised, has been the attempt to confront the problem of administrative discretion. A dilemma with which the courts have wrestled and continue to

⁵469 U.S. 325 (1985).

⁶478 U.S. 675 (1986).

⁷484 U.S. 260 (1988).

struggle is whether to defer to reasonable administrative judgment in a particular situation or whether to limit certain discretionary acts through additional legal processes or procedures. Justice White, writing the majority opinion in Goss v. Lopez,⁸ illustrated this quandary when he emphasized the potential danger involved if a public school student was disciplined without an opportunity to present his/her side of the story. An informal hearing prior to suspension, involving the student and the school administrator, would allow the student "the opportunity to characterize his conduct and put it in what he deems the proper context."⁹ This established a minimum procedural right school officials must utilize in protecting a student's property and liberty interest in education guaranteed by the Fourteenth Amendment. He noted that in following this informal process, a school official's "discretion will be more informed and we think the risk of error substantially reduced."¹⁰ The key issue of discretion is an important thread not only in the Goss case, but also in other landmark United States Supreme Court rulings which deal with students' rights, from Tinker to the more recent Hazelwood decision.

The term "discretion" is an elusive concept due to the

⁸419 U.S. 565 (1975).

⁹Id. at 585.

¹⁰Id.

range of behavior it encompasses and the distinctive situations in which it can be applied. Shumavon and Hibbeln describe discretion as a fundamental component of administrative behavior.¹¹ Fletcher refers to discretion as that aspect of an administrator's decision which includes the personal, subjective, creative contribution, in contrast to decisions which are bound by rules or strict guidelines.¹² In legal terminology "ministerial" acts are contrasted with "discretionary" acts. Ministerial acts describe duties which are prescribed by law and which must be performed, leaving no choice as to which action to take or whether to take action at all. In contrast, Dimock describes discretionary acts as those conferred on an administrator by legislation, but which are not mandatory and allow for "a choice between alternatives or even no action at all"¹³

Integral to a consideration of what discretion is, are the contrasting functions of rules, rights, and legal responsibilities as they affect administrative decision making. Decisions, actions, and policies which are bound by rules and procedural safeguards, allowing for little

¹¹Douglas H. Shumavon and H. Kenneth Hibbeln, eds., Administrative Discretion and Policy Implementation 2 (1986).

¹²George P. Fletcher, "Some Unwise Reflections About Discretion," 47 Law & Contemp. Probs. 274 (1984).

¹³Marshall E. Dimock, "The Role of Discretion in Modern Administration," in The Frontiers of Public Administration 51, 52 (J. Gaus, et al., eds., 1936).

individual input, involve minimal discretion. In contrast, when special facts or circumstances can be adapted to particular situations, permitting individualization, judgment, and flexibility--choice rather than rules--a significant amount of discretion exists.¹⁴

A central issue then becomes degrees of discretion or a continuum of discretion. The degree of discretion depends on the authority given or delegated to an administrator.¹⁵ Although unlimited discretion is often condemned as leading to arbitrariness, and discretion which is too confined as being mechanistic, the pivotal issue is its use. It is the use or abuse of discretion by an administrator that has led to problems, resulting in litigation in the courts.

An equally important point in examining discretion centers around the methods used to check discretion and prevent its exercise from being arbitrary and unjust. Bryner noted that the main challenge to discretion is the rule of law, which attempts to limit power, especially arbitrary power. Ideally, clear, specific laws and procedures can be applied to everyone and can be enforced in a nondiscretionary manner.¹⁶ The existence of individual rights also helps limit discretion and keeps it from playing

¹⁴Joel Handler, The Conditions of Discretion: Autonomy, Community, Bureaucracy 3 (1986).

¹⁵Kenneth C. Davis, Discretionary Justice 3 (1971).

¹⁶Gary C. Bryner, Bureaucratic Discretion: Law and Policy in Federal Regulatory Agencies 8 (1987).

a role in some administrative decisions.¹⁷ In addition, Shapiro listed in descending order of severity, the possible restraints on discretion, including substantive and procedural rules created by law, agency rules and procedures, and the requirement that agencies follow precedents and give reasons for decisions.¹⁸ Though discretion is an important ingredient in providing justice to the individual, Handler characterized the contrast between discretion and rules: discretion is subjective justice; rules are formal justice.¹⁹

The court plays a significant role in dealing with administrative discretion, especially the protection of individuals from arbitrary and unreasonable discretionary action. The court often views discretion as an issue of control.²⁰ As Elliott pertinently indicated, there is a tension which naturally arises "between the ideal of administrative discretion on one hand and judicial review on the other The question is not whether courts can review administrative decisions without interfering with administrative discretion, but whether they can review

¹⁷Fletcher, *supra* note 12, at 273.

¹⁸Martin Shapiro, "Administrative Discretion: The Next Stage," 92 Yale L. J. 1500 (1983).

¹⁹Handler, *supra* note 14, at 169.

²⁰*Id.* at 45.

without interfering unduly with discretion"21 This natural tension between discretion in administrative decision making and what Elliott referred to as "judge-made law" can result in resentment by officials that their discretion becomes too limited through substantive or procedural guidelines forced upon an agency. The complaint is that administrator expertise is restricted by expanding legal protections available to employees at the expense of a manager's discretion.²²

A court's review of discretion often centers around what is referred to as an abuse of discretion. The legal terminology applied to an administrator's or agency's action is whether a decision or action was arbitrary, capricious, or an abuse of discretion. The legal standard states that discretion has been abused when an action occurs or fails to occur "that no conscientious person acting reasonably could perform or refuse to perform."²³ Auerbach added to this the idea that court review of administrative discretion is more likely to occur "when serious claims are made that the action violates Constitutional rights or clearly violates a statutory provision or is ultra vires"--beyond the scope of

²¹Donald E. Elliott, Jr., "The Dis-Integration of Administrative Law: A Comment on Shapiro," 92 Yale L. J. 1526 (1983).

²²Phillip J. Cooper, "Conflict or Constructive Tension: The Changing Relationship of Judges and Administrators," 45 Pub. Admin. Rev. 645, 647 (Special Issue) (1985).

²³Black's Law Dictionary 469 (6th ed. 1990).

delegated power.²⁴ Shapiro described four types of contentions in claims of abuse of discretion involving an agency or individual: an agency or individual 1) considered an irrelevant factor, 2) failed to consider a relevant factor, 3) gave improper weight to a relevant factor, or 4) decided an issue without sufficient evidence.²⁵

Proceeding from an attempt to understand the different contexts in which discretion is used and some of the legal ramifications surrounding the term, it is helpful to review both earlier and more current definitions of the term itself. One of the earliest definitions, cited previously, is that of Dimock, describing the discretionary act of an official as "one wherein jurisdiction has been conferred upon the officer by legislation, but the particular act in controversy has not been made mandatory; rather, a choice between alternatives or even no action at all will be upheld as coming within the officer's right."²⁶ Friedrich, in his analysis of authority, supplemented Dimock's definition by reiterating that discretion involves the notion of choice between alternatives and added that the resulting decision is reviewable. The choice is not, or should not be, arbitrary, but "in accordance with the requirements of the

²⁴Carl A. Auerbach, "Discretion," The Guide to American Law 133 (1984).

²⁵Shapiro, *supra* note 18, at 1490.

²⁶Dimock, *supra* note 13, at 51, 52.

situation."²⁷ This aspect of reviewability suggests the term "accountability," a consideration Pepinsky introduced in his discussion of discretion.²⁸ Accountability in the use of discretion obviously becomes the focal point of a court of law in examining the reasonableness of an administrative action.

Kenneth Culp Davis' seminal work on Discretionary Justice included the second part of Dimock's definition in describing the discretionary action of an official in the context of an organization. He noted in describing the actions of a police officer, paralleling those of a manager in an organization, except in a more prescribed manner, that the officer finds facts, applies the law to these facts, and then determines the desirable action in the situation. Determining the desirable action is the "exercise of discretion."²⁹ He proceeded to define discretion in terms of a domain of action of an individual: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."³⁰ Elliott described discretion similarly to Davis' perspective of power, from a more

²⁷Carl J. Friedrich, "Authority, Reason, and Discretion," in Authority 40, 44 (C. Friedrich, ed. 1958).

²⁸Harold E. Pepinsky, "Better Living Through Police Discretion," 47 Law & Contemp. Probs. 249 (1984).

²⁹Davis, *supra* note 15, at 4.

³⁰*Id.*

narrowly legalistic perspective: "the power to decide according to principles foreign to judge-made law."³¹

Joel Handler transposed the administrative formulations of discretion into the arenas of social service and special education, examining especially the legalistic procedures involved in the M-team process of education. Using the term "discretionary," Handler recommended that the substantive relationship between individuals who participated in special education, multi-disciplinary team hearings--parents of special education children, administrators, teachers, and other professionals--should not be governed by rules.³² In Handler's terminology, discretion referred to a certain quality of official interaction which allowed for being judgmental, professional, flexible, and experimental.³³ Suggesting that an adversarial arrangement increased conflict, Handler advocated a procedural system that facilitated relationships and cooperation.³⁴ This formulation would include discretionary decision making.

Manley-Casimir further applied the concept of discretion to education in his examination of disciplinary procedures in school. Manley-Casimir drew his model of discretionary justice from concepts of Davis in

³¹Elliott, *supra* note 21, at 1525.

³²Handler, *supra* note 14, at 3.

³³*Id.*

³⁴*Id.* at 7.

administrative law. Citing the importance of discretion in the administrative process, he emphasized the flexibility and responsiveness allowable in discretionary decision making, "where the precedents of experience together with existing policy and rules are inadequate or inappropriate guides to action."³⁵ Paralleling Dimock and Davis, Manley-Casimir defined the exercise of discretion as "the use of judgment in making a choice among alternative courses of action."³⁶ By applying his model of discretionary justice to student conduct, he attempted to link the administrative need for flexibility with the desirable outcome of individualized justice for the student. Procedurally this was done by giving due consideration to the rights and interests of students, constructing procedures that are fair at each step at which significant action is taken, and providing defensible reasons for the exercise of discretion.³⁷

Rossow's focus on institutional fairness in the discretionary actions of school administrators dealt directly with student suspensions. He questioned whether school administrators were able to "recognize the elements of fundamental fairness," and proceeded to outline these elements of substantive due process as they appeared in

³⁵Michael Manley-Casimir, "School Governance As Discretionary Justice," 82 School Review 348 (1974).

³⁶Id.

³⁷Id. at 348.

specific legal cases. Reasonableness in rules, regulations, and consequences topped the list as school authorities exercised their discretion in suspension. Proportionality was a second quality of fairness: did the punishment fit the behavior? A third element in substantive due process was fair warning, emphasizing the importance of students knowing in advance that certain behaviors could lead to certain consequences. Equal application constituted a fourth component cited by Rossow in maintaining fundamental fairness, an attribute which meant that certain individuals or classes of individuals could not be singled out for differential treatment. Rossow observed that "when an administrator exercises his discretion in student suspension, he always leaves open the door for a legal challenge that big decisions are arbitrary."³⁸ Closely related to equal application is the familiar element of equal protection. In student suspension this meant that no students because of their race, gender, or social class should be unfairly singled out for certain punishment. Statistical analyses are often cited to examine this standard within schools, across school systems, or even within states. All of these decisions involving official action in student suspension include extensive administrator discretion, and all can, and in many cases have, involved

³⁸Lawrence F. Rossow, "Administrative Discretion and Student Suspension: A Lion in Waiting," 13 J. L. & Ed. 428 (1984).

review by the courts. The "Janus-like character of discretion" can allow it to "be used benevolently or malevolently, reasonably or unreasonably, justly or unjustly."³⁹

In this investigation of selected United States Supreme Court cases dealing with students' rights and student discipline, "discretion" encompasses the aspect of administrative choice in important decisions involving student discipline matters, frequently cited by other writers on discretion.⁴⁰ This concept of choice is combined with the legal definition of discretion found in Black's Law Dictionary, applied in an educational setting. Thus in joining the definition with the action of school administrators,

discretion is the power or right held by school administrators in performing their official actions which allows them to carry out certain of their responsibilities "according to the dictates of their own judgment and conscience"⁴¹ ✓

These administrative actions should be carried out in a manner "which appears just and proper under the circumstances."⁴² Discretionary acts involving decisions about student conduct, while guided by specific rules,

³⁹Manley-Casimir, *supra* note 35, at 349.

⁴⁰See Dimock, *supra* note 13; Friedrich, *supra* note 27; Davis, *supra* note 15; Manley-Casimir, *supra* note 35; Handler, *supra* note 14.

⁴¹Black's Law Dictionary, *supra* note 23, at 466.

⁴²*Id.* at 467.

statutes, or procedures, permit flexibility and responsiveness due to the varied situations necessitating distinct administrative reaction. Finally, underscoring the aspect of accountability involved in the exercise of discretion, the decision arrived at by school administrators is subject to examination by the courts concerning the constitutionality and reasonableness of the decision.⁴³

Despite the fact that certain constitutional issues become the focus of the legal arguments in a particular case, freedom of speech and expression in Tinker, Fraser, and Hazelwood; liability of school administrators in Wood v. Strickland;⁴⁴ search and seizure in New Jersey v. T.L.O.; and corporal punishment in Ingraham v. Wright,⁴⁵ the issue of administrative discretion has been a recurring theme. Certain rights are interpreted in each case based on the applicable federal or state constitutional or statutory laws. The effect of these Supreme Court decisions, in regard to administrative discretion, is to expand or limit it. This limiting is often accompanied by the imposition of a new or enlarged set of procedures. For example, one of the important implications of Tinker was that school officials did not have "unfettered discretion to control



⁴³Manley-Casimir, *supra* note 35, at 350.

⁴⁴420 U.S. 308 (1975).

⁴⁵430 U.S. 651 (1977).

student conduct."⁴⁶ More recently, however, in the Fraser and Hazelwood decisions, the United States Supreme Court seems to be giving "greater deference to administrative discretion . . . in school-sponsored activities."⁴⁷

In many United States Supreme Court cases involving students' rights and the management of student behavior, a tension often seems to exist in balancing administrative discretion with students' rights. Another issue which goes beyond the tension of expanding or limiting administrative discretion is, to echo Justice White's words, how can discretion be better informed? In a school context, focusing on students' rights and the possibility of disciplinary consequences, the question becomes: what guiding principles will an administrator use to inform his/her discretion?

However complicated the dilemma, the importance of the issue cannot be minimized. The day-to-day effort by administrators of carrying out the mission of education, however that mission is defined, implies choices, decisions, and sacrifices in order for certain objectives to be realized. What has often occurred in lawsuits between schools and students that have reached the United States Supreme Court level, is that schools have argued for one standard, whereas the Court has opted for another. Some

⁴⁶Mark G. Yudof et al., Educational Policy and the Law 254, 3d ed. (1992).

⁴⁷Schimmel, *supra* note 2, at 19.

fragmentation and disjointedness occur when schools attempt to balance these conflicting interests: an aggregate versus an individualist standard,⁴⁸ the rights of a student in society versus those same rights in a school setting, adult status versus minor status of pupils, and freedom versus control in student management. The extent and balance of discretionary authority to run the school program is significantly influenced by the outcome of these Court decisions.

Since the Tinker decision, the United States Supreme Court, in weighing the behavior of students against the discretionary authority of administrators, has continued to wrestle with the problem of whether a legal solution or procedure should be imposed or whether to defer to the reasonable, professional judgment of administrators. Sometimes these perplexities have been overt and obvious in a particular case; at other times the dilemma remains beneath the surface of other arguable constitutional issues. It is important to examine these conflicts with the reemergence of these long-standing issues through recent United States Supreme Court decisions. These students' rights cases have been a pivotal arena in struggling with certain discretionary issues. The outcome of these and future cases will significantly shape the relationship

⁴⁸Ann Swidler, "The Culture of Policy: Aggregate Versus Individualist Thinking About the Regulation of Education," in School Days, Rule Days, (D. Kirp, D. Jensen eds., 1986).

between administrators and students, and the controlling institutional procedures and processes.

Problem

The student cases decided by the United States Supreme Court over the last two decades have often raised the problem of the appropriate exercise of administrative discretion in dealing with sensitive student issues. The school's and the court's priorities in these conflicts have influenced the various outcomes, which in turn have altered administrator-student relationships in the struggle over how much authority is necessary to run the school program.

Discretionary action, fundamental to administrative decisions, becomes a dilemma when new or additional school procedures are necessary to guard against the possibility of infringing on certain rights of students. These quasi-legal procedures, in turn, continue to structure the type of authority relied upon in resolving certain conflicts or attempting to prevent them. The concepts, doctrines and principles identified by the United States Supreme Court in regulating how much or how little discretionary authority can be allowed, does not invite obvious solutions. However, it must be addressed in weighing the advantages and disadvantages of court action in school discipline practices and student rights.

Purposes

In examining the students' rights and discipline cases of the United States Supreme Court, since and including the Tinker decision (see section on Delimitations), the purposes of this study include the following:

1. To identify and describe aspects of each case which involve the discretionary decisions of school administrators pertaining to student management and disciplinary action;
2. To identify and describe the guiding principles used by the United States Supreme Court in structuring the discretionary relationship between school administrators and students in student management situations;
3. To identify and describe the concepts, doctrines, and principles of law governing discretion to provide guidelines for school administrators in exercising discretion in school discipline matters.

Questions

This study will attempt to answer the following questions pertaining to these school law issues:

1. What discretionary issues have been identified by the United States Supreme Court in cases which focus on the disciplinary action of school administrators?
2. What are the controlling principles of the United States Supreme Court which guide the actions of school administrators and students in pupil conduct situations?
3. What are the guidelines for school administrators in exercising discretion in discipline situations?

Importance

United States Supreme Court decisions that address a major problem area, for example, the rights of students in educational settings, sometimes contain patterns which reveal a struggle over norms and values. Schools, for instance, frequently stress the impact certain student behavior can have on the group, whereas courts may attempt to protect the freedom of the individual within the group. The manner in which the courts and the schools approach the solution to a student control problem can be more significant than the effect a particular legal case may have. This is because the way a problem is defined influences the processes used in reaching a solution, i.e. "conceptualization shapes response."⁴⁹ In his own analysis of differing policy alternatives pursued by the United States and Great Britain in the area of special education, Kirp noted that the link between definition and solution delimits the scope of an issue, with scope being how narrowly or broadly an issue is defined. The framework of an issue also predisposes the possible solutions considered. For example, the framework can be whether the solution to a particular problem is best decided by utilizing professional expertise or by relying on legal solutions. A subcomponent

⁴⁹David L. Kirp, "Professionalization as a Policy Choice: British Special Education in Comparative Perspective," 34 World Politics 137 (1982).

of legal solutions is the decisions of courts.⁵⁰

The regulation of student conduct, a focus of this investigation, occurs both through the application of rules and the exercise of discretionary authority by school administrators. School officials may want greater discretion in controlling student conduct, whereas the courts may want to allow less. The outcome of these struggles influences many important educational and organizational processes in a manner that could enable the inverse of Kirp's "conceptualization shapes response" presumption to become true, i.e. resolution shapes conceptualization. That is, the resolution of an issue in a particular way, especially if it occurs repeatedly, would tend to circumscribe both the framework and scope of the problem in the future. It is reminiscent of the point Strahan and Turner observed, that the new legal demands have shaped greater conformity on the part of schools and administrators.⁵¹ The importance of this investigation lies not only in examining the United States Supreme Court's perception of discretion in student discipline cases, but also in examining the alternatives evident in these court decisions to determine how "discretion is more informed." The outcome of these court decisions will shape the manner

⁵⁰Id. at 137, 138.

⁵¹Richard D. Strahan and L. Charles Turner, The Courts and the Schools: The School Administrator and Legal Risk Management Today xiii (1987).

in which the challenge is met which Manley-Casimir outlines for public education: "to define a new model of norms with supporting values which are within judicially defined perimeters and which provide the type of student control appropriate for the attainment of society's goals for public education."⁵²

Assumptions

This study is based on the following assumptions:

1. The opinions of the United States Supreme Court furnish adequate and valid information for the purposes delineated in this study;
2. The cases selected for analysis which deal with student control issues, provide sufficient information to investigate administrative discretionary authority and the principal legal approaches by the United States Supreme Court in examining these discretionary matters;
3. The United States Supreme Court cases illustrate similar issues which have been litigated in other federal and state courts.

Delimitations

There were five cases prior to the Tinker decision which reached the United States Supreme Court and involved student disciplinary action. These cases focused primarily on religious issues similar to the West Virginia State Board

⁵²Manley-Casimir, *supra* note 35, at 347.

of Education v. Barnette⁵³ decision. In this suit, students who were members of the Jehovah's Witnesses sect were excluded from school for refusing to salute the flag and recite the pledge of allegiance each day. Due to the specialized nature of these cases involving religious questions, and the fact that these cases occurred before the United States Supreme Court's Tinker decision, resulting in a shift in both expanding and protecting student rights in the educational setting, they have not been included for analysis.

Similarly other religion-focused cases since Tinker have not been included due to their specialized nature. The separation of the topic of religion from other student issues is commonly practiced in school law texts, which treat "students and the law" or "students' rights" separately from issues involving religion. Religious topics are independently discussed in sections titled "schools and the state"⁵⁴ or "religion and the schools."⁵⁵

Two additional areas that are equally specialized and examined separately in school law literature are those topics concerning equal educational opportunity--race/gender

⁵³319 U.S. 624 (1943).

⁵⁴See for example E. Edmund Reutter, Jr., The Law of Public Education (1985) and Mark Yudof et al., Educational Policy and the Law (1992).

⁵⁵See Martha W. McCarthy and Nelda H. Cambron-McCabe, Public School Law (1992) and Richard D. Strahan and L. Charles Turner, The Courts and the Schools: The School Administrator and Legal Risk Management Today (1987).

relations and desegregation, and the category of special education. Similar to the practice described above, most school law texts treat these issues discretely from student management and student discipline.⁵⁶ This is not to say that discretionary issues are not contained in lawsuits in both of these specialty areas, nor that student conduct is not a key element.⁵⁷ There can be assertions of discrimination in student disciplinary cases and likewise there can be violations of due process in the disciplinary consequences meted out to special education students. The exclusion of these areas for analysis is both a way of limiting the scope of the study and a recognition that these topics of discrimination and special education often involve specific federal and state statutes. Both areas of school law generate unique problems.

A final delimiting factor is the analysis of student cases which have reached the United States Supreme Court level. Many of the issues described would be equally present in certain federal and state cases whose decisions were not appealed to the United States Supreme Court. Once again a management limitation prevents their inclusion. Lufler records that between 1969 and 1987, student cases involving suspension or expulsion which were appealed to

⁵⁶Id.; see Reutter, *supra* note 54, and Yudof et al., *supra* note 54.

⁵⁷See Honig v. Doe, 484 U.S. 305 (1988).

either state or federal courts of appeal totalled 207.⁵⁸

Definitions

The term discretion encompasses the legal definition found in Black's Law Dictionary, applied in the educational setting. Thus, in merging the definition with the performance by school administrators, discretion is the power or right held by administrators in performing their official actions which allow them to carry out certain of their responsibilities "according to the dictates of their own judgment and conscience"⁵⁹ These administrative actions should be carried out in a manner "which appears just and proper under the circumstances."⁶⁰ Manley-Casimir emphasizes that "choice" and "judgment" are integral parts in discretionary decisions.⁶¹

For purposes of this study a student grievance refers to a legal action initiated on behalf of a student claiming that a constitutional right has been violated, a procedure has not been correctly followed, or an unreasonable school action has been taken.

⁵⁸Henry Lufler, Jr., "The School Litigation Explosion: A Specious Generalization," 5 (1988) (paper presented at the annual convention, National Organization on Legal Problems of Education).

⁵⁹Black's Law Dictionary, supra note 23, at 466.

⁶⁰Id. at 467.

⁶¹Manley-Casimir, supra note 35, at 350.

Students' rights refer to those constitutional rights and procedural privileges which have been guaranteed to pupils in the educational setting. These rights, such as freedom of speech, freedom from unreasonable searches, due process guarantees, usually originate in the Constitution, but can include rights provided by federal and state statutes as well as administrative regulations established by state boards and departments of education. A variety of topics can be included in the broad area of students' rights, including ability grouping, competency testing, discipline, freedom of speech, dress codes, student searches, discrimination and others.

In studies of educational law, the category of students' rights is treated separately from, for example, that of teachers' rights, although there are parallels. Also students' rights are treated separately from other broad topics in educational law, such as church-state relationships, school finance issues, and desegregation. In this study the focus is primarily on those students' rights involved in the management of student conduct and the assignment of student consequences. Such classifications as competency testing and ability grouping are not included, since they do not involve the likelihood of disciplinary action.

Methodology

Procedure

The purpose of this study, as noted earlier, is to examine the students' rights cases decided by the United States Supreme Court since and including the Tinker ruling. The primary source material for this investigation is the majority and minority opinions of the United States Supreme Court found in United States Reports. This includes the following decisions:

Tinker v. Des Moines Independent School District

(1969)

Goss v. Lopez (1975)

Wood v. Strickland (1975)

Ingraham v. Wright (1977)

Carey v. Piphus (1978)⁶²

Board of Education of Rogers, Arkansas v.

McCluskey (1982)⁶³

New Jersey v. T.L.O. (1985)

Bethel School District No. 403 v. Fraser (1986)

Hazelwood School District v. Kuhlmeier (1988)

This investigation concentrated on identifying the discretionary issues pertaining to the authority of school

⁶²435 U.S. 247 (1978).

⁶³458 U.S. 966 (1982).

administrators to enforce school rules and assign disciplinary consequences. These discretionary issues include those specifically noted and referred to in the United States Supreme Court decisions.

The following primary sources were used:

1. United States Reports. This is the official edition of cases decided by the United States Supreme Court. It covers the time period from 1790 to the present. After 1874, the citation only need include the volume number, page, and year of the case.

2. Federal Reporter and Federal Supplement. The Federal Reporter contains decisions of federal district and circuit courts since 1880. The Federal Supplement includes selected U.S. District Court decisions since 1931.

3. West's Education Law Reporter. Since 1982 this bi-weekly publication has been one of the most comprehensive publications available for education law. It contains case highlights, synopses, complete texts, indexing, and limited commentary.

The following secondary sources were used:

1. American Law Reports. This source is an annotated reporter containing selected state and federal decisions. Legal subjects can be explored by referring to case name, legal concept, or word index.

2. American Jurisprudence. This encyclopedia is a source of articles containing numerous footnotes which provide references to the cases cited in American Law

Reports.

3. Corpus Juris Secundum. This national encyclopedia is similar in scope to American Jurisprudence. It contains articles of case law with footnotes citing decisions covering those included in the West digests.

Selected secondary sources which address the concept of administrative discretion were utilized, as well as sources which included this concept in their analyses and explications of the cases. This concept served as a framework in analyzing the United States Supreme Court decisions on those selected students' rights cases chosen for examination.

Secondary sources utilized in this study can be further categorized in several main areas. First of all there were textbooks and casebooks, especially those dealing with students' rights issues, including case summaries and case citations, explicating the court's review of certain school practices or lack of them. Another useful source of secondary materials were specialized periodicals and law review journals. The Journal of Law and Education contained articles related to cases or issues in school law. Law review journals included some articles pertaining to these topics.

Another helpful secondary source available for this study was the looseleaf services provided by the National Organization on Legal Problems of Education, especially the NOLPE School Law Reporter. NOLPE also publishes annually

the School Law Yearbook and Current Issues in School Law, both containing practical commentary and summary of recent trends.

Additional secondary sources included those law-related topics focusing on administrative discretion, especially the writings of Davis⁶⁴ and others,⁶⁵ which addressed either the legal concept or the educational practice of administrative discretion.

Design

The second chapter contains a review of the literature. Selected school law texts with sections on students' rights and student management are briefly examined. References pertaining to the administrative and legal aspects of discretion are discussed. Certain secondary sources with perspectives on discretion and students' rights, student management and student discipline, and relevant topics from the analysis of selected Supreme Court cases are reviewed.

Chapter three presents aspects of discretion in the Supreme Court cases chosen for analysis. The cases are reviewed essentially in chronological order. Important concepts, doctrines, and principles are examined.

Chapter four identifies and describes the principles

⁶⁴See Davis, *supra* note 15.

⁶⁵See Manley-Casimir, *supra* note 35; Rossow, *supra* note 38.

from the United States Supreme Court decisions that structure the discretionary relationship between students and school administrators in student management situations. Similarities and dissimilarities, as well as changes and shifts, are noted in the Court's decisions.

Chapter five summarizes guidelines identified by the Court across cases. Concepts, doctrines, and principles of law which may serve as a guide for the discretionary actions of school administrators are reviewed. The recommendations for the use of discretion by school administrators are indicated.

CHAPTER II

REVIEW OF LITERATURE

Student Control Issues: An Overview

A number of educational and legal writers have examined the influence courts have had on schools. Few investigations into an area of school law such as students' rights could begin without a reference to general school law textbooks, written for administrators, teachers, school attorneys, and students of educational law. The amount and frequency of education litigation has kept the demand constant for new and updated volumes. These works help provide an overview of primary topics in education law, with case citations illustrating important rights or procedures which have been the basis of lawsuits. Several of these major texts present the dynamic interplay between the schools and the courts and provide a backdrop against which the issue of students' rights and administrative discretion can be scrutinized.

Reutter and Hamilton in the preface to their first edition of The Law of Public Education put forward the hope "that readers will concern themselves ultimately not only with what the law is, but with what it should be."⁶⁶ The

⁶⁶Reutter, supra note 54, at vii.

authors cautioned that, "Intelligent decisions concerning the latter, however, are dependent on a knowledge of the former."⁶⁷ This knowledge of what the law is, especially pertaining to student conduct, has been illuminated in the analyses of important concepts, principles, and processes which have developed over a long period of time. This development has occurred both in the ongoing procedures instituted and the actions taken by school administrators as they manage and discipline students in the school setting. It has also occurred in principles established by the United States Supreme Court, as significant decisions have been rendered affecting students' rights and administrative discretion. These decisions, in turn, have further regulated subsequent administrator reaction and behavior, in the attempt to comply and then reorganize school policy and administrative conduct. Imber and van Geel have suggested that, "The network of education law is woven of constitutional provisions, statutes, regulations, policies, and common law . . . ," and they have pointed out that from a legal perspective, "school officials serve many masters."⁶⁸ These administrative duties, particularly ones involving student management and discipline, "include tasks which in society at large are the province of legislators,

⁶⁷Id.

⁶⁸Michael Imber & Tyll van Geel, Education Law 1 (1993).

police, courts, and penal systems."⁶⁹

From a historical perspective, students with constitutional rights in the school setting is still a recent phenomenon. Fischer, Schimmel, and Kelly in their examination of Teachers and the Law stated that, "During the first half of this century, the Bill of Rights was rarely referred to when teachers or students challenged the constitutionality of school rules."⁷⁰ Courts allowed school boards and administrators broad discretionary power in carrying out the educational mission of schools.

The judicial doctrine of in loco parentis has been an important component governing the interaction between student and administrator, especially in school discipline situations. For over two hundred years this doctrine of acting "in place of the parent" has allowed a teacher or school administrator the prerogative of making unilateral decisions on behalf of students. In the early nineteenth century, the in loco parentis doctrine "was applied to give a presumption of reasonableness to all rules and regulations instituted by boards of education and enforced by teachers."⁷¹ In addition, this doctrine governing the relationship of teacher to child "is an essential element in

⁶⁹Id. at 197.

⁷⁰Louis Fischer et al., Teachers and the Law 121 (3d ed. 1991).

⁷¹Strahan & Turner, *supra* note 51, at 129.

establishing the standard of reasonableness in regard to punishment."⁷² Blackstone's Commentaries in 1770 contained the statement frequently cited as the guiding principle in student discipline, noting that parental authority could be transferred to a child's teacher which would allow "restraint and correction, as may be necessary to answer the purposes for which he is employed."⁷³ Several assumptions operated in this doctrine to keep it viable for such a long period of time.

First of all, the doctrine recognized that the teacher-student relationship should be parallel to the parent-child relationship, with ultimate authority residing in the "schoolmaster," especially in matters of discipline. Second, implicit in the doctrine was the assumption that the teacher, in the role of one who guides and nurtures, would oversee the best interest of the child, similar to a parent. Third, as Zirkel and Reichner pointed out, some minimal restraints were alluded to in the doctrine itself.⁷⁴ The statement is made that a parent "may" delegate, not "must" delegate, implying a choice and stressing the importance of parental agreement in the transfer of certain authority. Further limitation on authority is present in the careful

⁷²Reutter, *supra* note 54, at 694.

⁷³1 William Blackstone, Commentaries *413.

⁷⁴Perry A. Zirkel & Henry F. Reichner, "Is the In Loco Parentis Doctrine Dead?" 15 J. of L. & Educ. 271 (1986).

phrasing which allows the teacher "such portion" of a parent's power "as may be necessary to answer the purposes for which he is employed."⁷⁵ The qualifiers "such," "may," and "purposes for which he is employed" are important delimitations in the phraseology.

Numerous differences have developed from a time when children were tutored by a schoolmaster selected by a parent committee. States, through their constitutions and statutes, began providing education, with teachers as employees of the local board of education subject to state regulations. More importantly, children were required to attend school up to a designated age. A parent no longer had control over whether his/her child attended school. In loco parentis changed from "may delegate" to a required transfer of parental authority to the school.

Reflective of much that was going on in other segments of society, this doctrine of unchallenged administrative control changed significantly in the late 1960s and the 1970s. LaMorte described it as a period in which "students often were successful in challenging school policies and procedures and in which many school officials perceived an erosion of their authority."⁷⁶ The increasing numbers of students' rights cases not only led to "substantial changes

⁷⁵Blackstone, *supra* note 73, at *453.

⁷⁶Michael W. LaMorte, School Law: Cases and Concepts 87 (4th ed. 1993).

in the roles of the school administrator . . . ,"⁷⁷ but also to a restriction of the discretionary authority by channeling "school decisions through new grids of legal rules and procedures."⁷⁸ Strahan and Turner characterized the end result of this period as having a paralytic effect on schools: "School principals despaired of controlling violence and other forms of criminal behavior as they saw disciplinary actions unraveled by decisions from the federal bench."⁷⁹

Courts provide three important coinciding functions to school personnel, as Imber and van Geel explained:

1. Courts attempt to settle specific disputes by relying on constitutional provisions, legislation, and certain regulations;
2. Courts interpret the validity of various statutes, policies, and actions of school personnel; and
3. Courts decide the legal interpretation of federal and state constitutions, state regulations, and common law.⁸⁰

The courts' view of administrative discretion in school discipline practices is an especially precarious matter, both for school officials and the students they manage. The legal authority to control and manage students resides with

⁷⁷Robert C. O'Reilly & Edward T. Green, School Law For the 1990s 109 (2d ed. 1992).

⁷⁸William D. Valente, Education Law: Public and Private 3 (1985).

⁷⁹Strahan & Turner, *supra* note 51, at xiii.

⁸⁰Imber & van Geel, *supra* note 68, at 5.

school officials. School rules and procedures are usually devised and interpreted by school administrators. Consequences for infractions are established and executed by school staff. Other relationships within the school reinforce this imbalance of authority. The inherent inequalities in the relationship of teacher-student, adult-minor, and paid state employee-child/recipient of service, weave their way throughout the interactions of students and school personnel. Added to this is the doctrine of in loco parentis and the fact that students must attend school until a certain age. As Imber and van Geel suggested, broad discretion can lead to "inequitable application of standards and punishment on the basis of race, sex, social class, because of personal dislike, or against students who have negative reputations."⁸¹ In contrast, a reliance on rules and procedure as a primary means of student management can lead to what Yudof described as "legalization," a preference for methodically following set procedures, resulting in "a diminution or channeling of official discretion to make decisions affecting teachers and students."⁸²

The structuring and confining of administrative discretion rarely occurs more decisively than in the formulation of school rules, the investigation of student misconduct, and the assignment of consequences. It is here

⁸¹Id. at 198.

⁸²Yudof et al., *supra* note 46, at 333.

the confrontation between legalization and discretion occurs, generating the dilemma: "For courts and policy-makers, the ultimate question is one of balance between rule and discretion, formality and informality, trusting and adversarial relationships."⁸³

With respect to student behavior, McCarthy and Cambron-McCabe suggested that, "One of the most persistent and troublesome problems confronting educators is student misconduct."⁸⁴ The law demands several seemingly conflicting standards on the part of administrators and school staff. On the one hand, the law emphasizes and reinforces the need for an orderly school environment and stresses that school rules and other student control mechanisms be in place to protect children in ways which would not be permitted in society at large, except by a parent. On the other hand, the law requires vigilance on the part of school personnel so that students' rights will be protected in accordance with the Constitution, federal and state statutes, and through school board policy. As Imber and van Geel warned, "Many of the most difficult questions in education law concern the conflict between individual rights of students and the corporate needs of the school."⁸⁵

⁸³Id.

⁸⁴McCarthy & Cambron-McCabe, *supra* note 55, at 199.

⁸⁵Imber & van Geel, *supra* note 68, at 197.

In the development of school rules, school authorities have usually been delegated the power to construct and enforce reasonable rules of student conduct. Reasonableness, as Reutter advised, is not decided in the abstract, but in the day-to-day application of student discipline in actual situations.⁸⁶ Alexander and Alexander asserted that, "Rules are usually held to be reasonable if they materially contribute to the maintenance and advancement of the educational process."⁸⁷ Courts of law require that the complaining party, which is most frequently a student or a parent, carry the burden of proving unreasonableness on the part of school rules or certain discipline actions taken. The closer a rule or administrative action impinges on a constitutional right, the greater the justification that is necessary on the part of school personnel. If an actual right is infringed, such as curtailment of speech, or search of a student, the burden of proof shifts to school authorities to defend the need for the rule or action involved.⁸⁸ The legal challenge of a particular school rule usually involves the charge of vagueness or overbreadth.

Student rules of conduct accentuate a need for order

⁸⁶Reutter, *supra* note 54, at 677.

⁸⁷Kern Alexander & David Alexander, American Public School Law 279 (3d ed. 1992).

⁸⁸Reutter, *supra* note 54, at 677.

and control in the daily practices of most schools. Respect for authority and the rights of teachers to teach and students to learn are paramount concerns. Whenever a serious rule violation occurs, administrators consider both the appropriate consequences for the individual student as well as the effect these consequences will have as a deterrent to the larger student body. There emerges a delicate balance between rules and discretion which administrators seek to maintain in carrying out certain disciplinary actions. When a specific rule or action is challenged, and the end result is a case tried in a court of law, the issues are often difficult to resolve. This is "because cases involving school law often do not address simple conflicts of right against wrong but complex issues encompassing the conflicting interests of teachers, parents, administrators, and students."⁸⁹

Student discipline issues that result in lawsuits can have several deleterious effects, especially those which are appealed and end up in higher courts, including the United States Supreme Court. An adversarial relationship can arise between administrators and students, "with students and school officials behaving like opposing lawyers seeking strategic advantage through the exploitation of loopholes."⁹⁰ School administrators perceive themselves as

⁸⁹Fischer et al., supra note 70, at xxix.

⁹⁰Imber & van Geel, supra note 68, at 198.

being more vulnerable than they once were to personal liability lawsuits as they carry out their official responsibilities. Such fear leads to a tendency to rely on written policies and procedures, with detailed rules and consequences that read more like a legal document than a student handbook. In addition, there are financial and emotional costs in defending lawsuits. The expense of defending lawsuits can be exorbitant, especially if a case winds its way through one or more appeals' levels. An intangible cost can be the demoralizing effect a lawsuit can have on school personnel. As Price, Levine, and Cary maintained:

On the one hand, the Supreme Court has stated repeatedly that students do not shed their constitutional rights at the schoolhouse gate. On the other hand, the same court has repeatedly emphasized that public education depends on the discretion and judgment of local school administrators and that courts should not set aside their decisions lightly.⁹¹

These school law texts highlight many of the dominant themes and issues in the division of education law known as "students' rights" and illustrate the different "variations in judicial resolution of legal controversies."⁹² Like most introductions to school law, which are primarily efforts to inform and update administrators, students, or

⁹¹Janet R. Price et al., The Rights of Students xiii (3d ed. 1988).

⁹²Julius Menacker, School Law: Theoretical and Case Perspectives xvii (1987).

practitioners of school law, these texts provide a valuable contribution in examining "the interplay of law and policy, legal decision and educational practice."⁹³

Student Rights and Student Discipline

In addition to these general overviews contained in school law texts, other legal writers have examined aspects of student rights and student discipline that pertain to the topic of administrative discretion. Kern Alexander's discussion of administrative prerogative in student discipline situations set forth a comparison of "natural justice" in Great Britain with "due process" in the United States.⁹⁴ He extensively reviewed British legal precedents which dealt with the concepts of equity and fairness, and the subsequent procedures developed to ensure their protection. Guidelines were offered in dealing with bias and fairness in overseeing administrative action toward students in discipline matters. He noted that administrative discretion is limited "by laying down guidelines or standards to ensure due regard for fundamental fairness."⁹⁵

⁹³Yudof et al., *supra* note 46, at xi.

⁹⁴Kern Alexander, "Administrative Prerogative: Restraints of Natural Justice on Student Discipline," 7 J.L. & Educ. 331 (1978).

⁹⁵*Id.* at 331.

Duke, Donmeyer, and Farman narrowed the discipline focus to legal issues involved in classroom management.⁹⁶ Referencing the courts' view of schools as rule-governed organizations, the authors noted the double bind in which teachers are placed: "They are losing some of the discretionary powers that once helped them to control misbehaving students, while the public steps up its insistence that they be held accountable for classroom order."⁹⁷ The authors noted the difficulties involved when courts and schools maintain conflicting views of students' rights and the professional responsibilities of staff.

Lufler's two-year study of school discipline involving 1500 students in six junior and senior high schools in Wisconsin challenged the appropriateness of using "similar language to describe both criminal defendants and school rule breakers"⁹⁸ The study addressed the level of agreement of teachers and students on school rules and consequences, the degree to which students violating the rules were treated the same, and whether United States Supreme Court decisions involving discipline (Goss, Ingraham) were understood and followed. Lufler concluded there was disagreement concerning rules and consequences.

⁹⁶Daniel L. Duke et al., "Emerging Legal Issues Related to Classroom Management," 8 J.L. & Ed. 495 (1979).

⁹⁷Id. at 505.

⁹⁸Henry S. Lufler, "Debating With Untested Assumptions," 11 Ed. & Urb. Soc'y 462 (1979).

He established that patterns of discrimination existed among certain classes of students and that the Supreme Court decisions involving discipline were poorly understood by teachers and students.

Zirkel and Reichner utilized a longitudinal sample of educational decisions to determine the current status of the in loco parentis doctrine in school settings.⁹⁹ They concluded that in certain contexts, such as the application of school rules, the doctrine was relied upon. On the other hand, in areas such as student searches, more recent legal doctrines governed the practice.

Frels and Horner narrowed their attention on student discipline to the significant difference between minor and serious disciplinary action.¹⁰⁰ They described the general investigative and due process procedures used in serious disciplinary action, concluding that "the courts are most concerned about the fair application of rules rather than the result."¹⁰¹

Students' rights is a topic that is parallel to student discipline and has also received significant treatment in school law texts and periodicals. Mawdsley discussed students' rights in school involving personal appearance,

⁹⁹Zirkel & Reichner, *supra* note 74, at 271.

¹⁰⁰Kelly Frels & Jeffrey J. Horner, "Student Discipline in the Public Schools," 15 Current Municipal Problems 107 (1988).

¹⁰¹*Id.* at 113.

student publications, pregnancy and marriage, and locker searches.¹⁰² He noted that court involvement in these areas resulted in "a loosening of the school's influence over the decision and conduct of its students" ¹⁰³ Davis' and Schwartz's Children's Rights and the Law discussed United States Supreme Court decisions affecting children's rights over a period of sixty years, from 1923 to 1982.¹⁰⁴ Their book was "a study of the very delicate relationship between the family and the state in modern society."¹⁰⁵ In addition, the authors presented various court decisions involving a student's right to an education, including aspects of race, wealth, sex, residence, national origin, intelligence, and religion.

Friedman's discussion of student's rights centered on the court's limiting the power of teachers and school boards.¹⁰⁶ Describing "judicialization" as a process of transforming dispute situations into court cases, Friedman

¹⁰²Ralph D. Mawdsley, "Constitutional Rights of Students," in The Courts and Education (C. Hooker, ed. 1978).

¹⁰³Id. at 162.

¹⁰⁴Samuel M. Davis & Mortimer D. Schwartz, Children's Rights and the Law (1987).

¹⁰⁵Id. at xi.

¹⁰⁶Lawrence M. Friedman, "Limited Monarchy: The Rise and Fall of Student Rights," in School Days, Rule Days (D. Kirp & D. Jensen, eds. 1986).

outlined three stages in the evolution of student's rights.¹⁰⁷ The first stage he referred to as pre-judicialization, a period prior to 1965, when decisions of teachers and board members were beyond questioning. The second period highlighted the explosion of students' rights issues in the late 1960s in which there were constant challenges, hence Friedman's term "judicialization." The third stage he described as "absorption," when various institutions reacted to court decisions and attempted to accommodate the different court doctrines within their own institutional policies and procedures. Friedman cited and discussed several of these student rights cases, especially the length-of-hair cases of the 1960s and early 1970s, which underscored the issues of "individual rights, personal lifestyle, and freedom from authority."¹⁰⁸ Friedman suggested that the trend of judicialization was part of a larger phenomenon of "legalization," involving "the stiffening of informal norms into networks of rules and regulations, and informal procedures that look more or less like those of courts."¹⁰⁹

¹⁰⁷Id. at 239.

¹⁰⁸Id. at 246.

¹⁰⁹Id. at 251.

Court Involvement in Education

Court involvement in matters pertaining to education and the effects from this involvement have often been a topic of discussion in school law. Court decisions, especially those of the United States Supreme Court, have shaped the laws and practices in education, which in turn have guided the practice of school administrators toward students. Rist's and Anson's Education, Social Science, and the Judicial Process presented a variety of essays identifying the advantages and limitations of judicial decision making as opposed to the administrative or political processes.¹¹⁰ The authors noted the decision making authority assumed by courts, which has had an impact on every aspect of education, "from the daily classroom procedures of teachers through the exercise of authority by principals and administrators."¹¹¹ The relationship of constitutional rights and the social sciences, the use of social science evidence in court cases, and an in-depth analysis of selected cases highlighted the authors' theoretically-oriented approach to court impact.

In Critical Issues in Education Law: The Role of the Federal Judiciary in Shaping Public Education, a NOLPE

¹¹⁰Ray C. Rist & Ronald J. Anson, eds., Education, Social Science, and the Judicial Process (1977).

¹¹¹Id. at ix.

publication edited by Gail Sorenson, twelve brief chapters detailed federal court involvement in a variety of current education concerns, such as students and disease, child abuse, and drug testing.¹¹² Zirkel's "Overview" in this collection raised the legitimacy and capacity issues sometimes discussed in weighing court intervention in education.¹¹³ This issue addresses the question of whether the courts should actually be involved in certain problems, and then the capacity of the court effectively to resolve key points in question, a topic raised also by Rist and Anson.

The role of the United States Supreme Court and the impact of its decisions on schools and school officials has been both a recurring topic in the literature of school law and one that bears directly on an analysis of administrative discretion in Supreme Court decisions. Author Raoul Berger examined the role of the Supreme Court, identifying the resentment created by increasing Court involvement in a variety of public matters, including the administration of schools.¹¹⁴

Reutter's work on the Supreme Court's impact offered "an analysis and synthesis of the opinions of the Supreme

¹¹²G. Sorenson, *supra* note 3.

¹¹³Perry A. Zirkel, "Overview," in Critical Issues in School Law 4, 5 (NOLPE 1988).

¹¹⁴Raoul Berger, "The Role of the Supreme Court," in School Law for a New Decade (M. McGhehey, ed. 1981).

Court,"¹¹⁵ organized thematically around such topics as finance, religion, liability, federal legislation, and a separate chapter on student rights. He presented cases chronologically, including cases which have had an impact on education that were initiated by litigants outside the field of education.

Lufler's analysis of Supreme Court impact focused more precisely on the Goss v. Lopez case and its repercussions in two Wisconsin school districts.¹¹⁶ Utilizing questionnaires of students and teachers, interviews, and anthropological observation, the author attempted to determine impact on three levels: the litigants themselves, people working in the schools, and the unintended impact that was not anticipated. Lufler also examined more theoretically the issue of the court and compliance, changes in schools as a result of court cases, and other questions the compliance literature raises.

Patterns in Education Litigation

One aspect of the topic of court impact has been the sheer number of cases in education, the analysis of which

¹¹⁵E. Edmund Reutter, Jr., The Supreme Court's Impact on Public Education (1982).

¹¹⁶Henry S. Lufler, "Unintended Impact of Supreme Court School Discipline Decisions," in Contemporary Legal Issues in Education (M. McGhehey, ed. 1979).

has been treated in several books and articles. Hogan included in his book The Schools, the Courts, and the Public Interest a table of the number of state and federal cases pertaining to the organization and administration of school programs from 1789 until 1984.¹¹⁷ Likewise Tyack, James, and Benavot included in their book-length work a section presenting the average annual rate of litigation per million population, noting a rate of .83 cases per million beginning in 1836 and concluding in 1976 with a rate of 5.09.¹¹⁸ In addition, they presented a ten-category table from 1810-1981 basically in ten-year intervals estimating the number of state and federal appellate level cases involving what is labelled as the "Bureaucratization and Centralization of Public Schools."¹¹⁹ The authors included a section in the appendix which explained in detail how they determined the volume and change in education litigation and introduced further tables highlighting the following information: percent distribution of appellate cases according to nine major legal categories; percent distribution of these cases by plaintiff and defendant, covering the same period; and a table presenting an estimated number of appellate cases dealing with the issues of race, language, ethnicity, and

¹¹⁷John C. Hogan, The Schools, the Courts, and the Public Interest (2d ed. 1985).

¹¹⁸David Tyack et al., Law and the Shaping of Public Education, 1785-1954 118 (1987).

¹¹⁹Id. at 119, 120.

religion from 1810-1981.¹²⁰

Imber's and Gayler's statistical study was an attempt to present the changes in education litigation which have occurred after 1960.¹²¹ Utilizing rate of change as a predictor, they concluded that rates of litigation grew significantly during the years 1960-1977, with a gradual decline since that time. Lufler's analysis centered on cases involving the suspension and expulsion of students, from 1965-1987, reported in federal courts and state courts of appeal.¹²² He examined the volume of cases, separated them into substantive and procedural areas, and classified them according to whether the student or the school prevailed. He concluded from an analysis of twenty-three years of cases involving suspension and expulsion, that there had been no litigation explosion. He noted certain trends in which students tended to prevail in areas of dress and appearance, whereas schools were more successful in cases involving alcohol and drugs and assigning serious consequences for school disruption.

Zirkel and Richardson also contributed to this ongoing

¹²⁰Id. at 213-218.

¹²¹Michael Imber & David E. Gaylor, "A Statistical Analysis of Trends in Education-Related Litigation," 24 Educ. Adm. Q. 55 (1988).

¹²²Lufler, *supra* note 58.

analysis of education litigation.¹²³ Their study included a review and summary of these previous studies in addition to their own statistical investigation. They first examined education litigation in state courts, beginning in the 1940s over a period of five decades, according to five separate categories in education. With the exception of special education cases, which more than doubled in the 1980s, the four other categories showed a downturn or a levelling off.¹²⁴ Federal court litigation displayed a similar pattern, with a "mini-explosion" of over fifteenfold in special education. The authors presented four tables outlining Supreme Court patterns, two of which dealt with the volume of cases, one dividing cases by category and showing the proportion of each category, and one detailing outcome percentages on which party prevailed. In the category of student rights, school authorities prevailed in slightly more than half of the Supreme Court cases in the 1980s. A similar percentage emerged for all students rights cases that have reached the Supreme Court.¹²⁵

¹²³Perry A. Zirkel & Sharon N. Richardson, "The 'Explosion' in Education Litigation," 53 Educ. Law Rep. 767 (1989).

¹²⁴Id. at 778, 779.

¹²⁵Id. at 788.

Litigation and Education Policy Making

A final broad-based area pertaining to court involvement in education which has had an impact on administrative discretion is the topic of educational policy as it is influenced by court intervention. Framing educational questions within legalistic parameters has influenced many areas of education, including the authority of administrators to control student-related issues. Hazard attempted to explore this "practice of casting educational problems into a legal form".¹²⁶ Following the Tinker, Goss, and Wood decisions, Hazard questioned whether schools were able to "achieve both the community expectations or social outcomes and the constitutional safeguards demanded in the larger society."¹²⁷ This theme was echoed in Thurston's analysis of the "relationship between the legal process and educational quality."¹²⁸ He identified the interconnection of social objectives emerging from the actions of courts and school legislation as they affected the quality of schools. He noted the difficulty of school's achieving these social objectives and maintaining standards

¹²⁶William R. Hazard, "The Law and Schooling: Some Observations and Questions," in Conflicts and Tensions in the Public Schools 47 (E. Wolf, ed. (1977)).

¹²⁷Id. at 63.

¹²⁸Paul W. Thurston, "Is Good Law Good Education?" in Review of Research in Education 298 (D. Berliner, ed. (1980)).

they are committed to upholding.

In contrast Nystrand and Staub denied that courts were taking away administrative authority on policy-making decisions.¹²⁹ They asserted that the courts have generally been supportive of state and local action when constitutional guarantees have been followed. Fischer's summative essay reviewed the expanding role of the courts in their influence on educational policy, concluding that legislation has been more influential than court activism.¹³⁰

Court intervention in any area, especially in school practice, has often led to the activist/restraint analysis undertaken by commentators on school law. Glazer's often-cited description of an imperial judiciary emphasized the activist point of view and the negative effects as the courts "reach into the lives of the people, against the will of the people"¹³¹ Glazer identified two noted busing decisions and Goss, among other non-education decisions, as examples of cases which drew the judiciary into arenas that were far-reaching and exemplary of an

¹²⁹Raphael O. Nystrand & W. Frederick Staub, "The Courts as Educational Policy Makers," in The Courts and Education (C. Hooker, ed. 1978).

¹³⁰Louis Fischer, "The Courts and Educational Policy," in Policy Making in Education (A. Lieberman & M. McLaughlin, eds. 1982).

¹³¹Nathan Glazer, "Towards an Imperial Judiciary," 41 Pub. Interest 104 (1975).

activist phase difficult to curb.

Conversely, Rebell's and Block's book-length study of educational policy making reached a different conclusion in viewing the activist/restraint continuum.¹³² Selecting 65 cases between 1970-1977, the authors performed small-scale studies to determine what the claims were, whose interests were represented, and what the level of compliance was by those affected. In addition, the authors studied in detail two significant cases in New York and Colorado. They concluded that the courts could play a valuable role in shaping educational policy without overstepping the judicial boundary.

Fischer's more recent analysis focused directly on court activism in education.¹³³ He applied Shick's four elements of activism and Canon's six dimensions of activism to major education cases in the previous twenty-five years and determined that courts were continuing to create school policy. To Fischer, there was a more critical question: Are the actions which the court is taking appropriate or are they a "usurpation of power?"¹³⁴ He concluded that most current cases originated in connection with legislative and

¹³²Michael A. Rebell & Arthur R. Block, Educational Policy Making and the Courts: An Empirical Study of Judicial Activism (1982).

¹³³Louis Fischer, "When Courts Play School Board: Judicial Activism in Education," 51 Educ. Law Rep. 693 (1989).

¹³⁴Id. at 702.

administrative regulation rather than "activist impulses on the part of the judiciary."¹³⁵

Administrative Discretion

As noted earlier, the literature available on discretion has rarely focused on educational practice. The discretion of judges in overseeing trials, of policemen in the line of duty, and most commonly, the discretion of public officials in large governmental agencies comprised the usual forum for the discussion of discretion. Administrative discretion in public agencies has provided the most abundant secondary source material. Much of the pertinent information on discretion has been reviewed in Chapter 1 by examining various uses and definitions of the word.¹³⁶ Four of these works stand out for further reference, along with selected administrative law texts which include valuable discussions of discretionary action.

The first is Kenneth C. Davis' definitive book on Discretionary Justice.¹³⁷ Numerous writers, especially those in the field of law, have alluded to Davis, and subsequent articles on discretion have used his work as a

¹³⁵Id. at 703, 704.

¹³⁶See discussion *supra* pp. 3-15.

¹³⁷Davis, *supra* note 15.

springboard from which to diverge.¹³⁸ Davis defined and attempted to set the parameters of administrative discretion, especially as it applied to governmental regulatory agencies. Though Davis made no specific reference to the exercise of discretion in a school setting, his work assumed a position of authority from which others, whose topics varied from his, departed.

Davis reiterated in his Administrative Law Text that "informal discretionary action is the lifeblood of the administrative process."¹³⁹ Noting that discretion includes both interim and final choices, as well as procedural and substantive choices, Davis suggested that discretion included a plethora of factors such as "methods, forms, timing, degrees of emphasis, and many other subsidiary factors."¹⁴⁰ Davis alluded to the shortage of literature which focused on justice in individual cases, stressing that, "Discretion is essential for individualized justice, for creative justice"¹⁴¹

Galligan suggested that in the areas of administrative law, an important question that is often missed is "how

¹³⁸See Robert Baldwin & Keith Hawkins, "Discretionary Justice: Davis Reconsidered," Pub. Law 570 (1984); see also Fletcher, *supra* note 12; Shapiro, *supra* note 18; Pepinsky, *supra* note 28; Manley-Casimir, *supra* note 35.

¹³⁹Kenneth C. Davis, Administrative Law Text 91 (1972).

¹⁴⁰*Id.*

¹⁴¹*Id.* at 92.

administrative powers do get exercised and what constraints they are subject to."¹⁴² The tension is present between the positive aspects of discretionary powers, allowing more freedom on the part of administrative officials, and a complex set of rules which "are always present in constituting, defining, and constraining discretion."¹⁴³ Galligan's study of discretionary power attempted to examine the different meanings of discretion, the problem of officials in exercising discretionary actions, and the "relationship between discretionary powers and concepts like arbitrariness, rights, and personal liberty."¹⁴⁴ A second significant facet of Galligan's inquiry was an investigation into the legal control of discretion, as developed by the courts. This probe included an examination of constitutional assumptions which underlie judicial review of discretion.

Court review of administrative action is an important aspect of discretionary decision making. Not only does judicial review attempt to protect the rights of the individual who could be harmed through the decision of a particular agency, it also attempts to promote decision making that is reasoned, factually supported, and rationally

¹⁴²D.J. Galligan, Discretionary Powers: A Legal Study of Official Discretion vii, viii (1990).

¹⁴³Id. at 3.

¹⁴⁴Id.

explained.¹⁴⁵ Gellhorn and Levin stated that in most agency practice, "an agency starts by interpreting the law (sic) it is supposed to implement; it finds facts about the situation it will address; and it uses discretion in applying the law to the factual situation it has found to exist."¹⁴⁶ The authors noted that court review of these actions moves from more intensive to less intensive in reviewing these three aspects of agency practice.¹⁴⁷

The distinction between law and fact also has a bearing on court review. A significant role of agencies can be to make findings of fact in particular situations with which they deal, whereas courts take primary responsibility in ruling on matters of law.¹⁴⁸ The ideal agency action in a particular matter is to apply a proper legal standard to a set of acknowledged facts. Aman and Mayton pointed out that in such a case the result is usually "a form of reasonableness review by the courts that usually results in deference to the agency judgment"¹⁴⁹ This deference is primarily due to the fact that the agency "is most likely to have the expertise and experience necessary

¹⁴⁵Ernest Gellhorn & Ronald M. Levin, Administrative Law and Process in a Nutshell 73 (3d ed. 1990).

¹⁴⁶Id. at 77.

¹⁴⁷Id.

¹⁴⁸Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 439, 440 (1993).

¹⁴⁹Id. at 442.

to apply the law to the facts in a manner that achieves uniformity in the large number of similar cases that are likely to come before it, and more importantly, in a manner that best advances the policy goals of the agency."¹⁵⁰

In contrast to Davis, who proposed ways of limiting discretion, Joel Handler took the concept of discretion into the domain of special education and proposed expanding it.¹⁵¹ Suggesting that "the system of rights and procedural remedies developed over the last several decades has not worked . . ." for many of the citizenry it was targeted to help, Handler sought "to preserve and enhance our core ideals of autonomy, responsibility, humaneness, and progress in the modern bureaucratic state."¹⁵² He found one way of achieving this would be the inclusion of discretion in certain client/agency relationships where the structure of the legal system could be at odds with client needs.¹⁵³ Handler sought to answer the question, "What are 'the conditions necessary for a normatively appropriate discretionary decision?'"¹⁵⁴ In a situation in which the relationships are continuous, such as exists in schools, and are present in the ongoing interaction among school

¹⁵⁰Id.

¹⁵¹Handler, *supra* note 14.

¹⁵²Id. at 2.

¹⁵³Id. at 4.

¹⁵⁴Id. at 7.

personnel, special education students, and their parents, Handler found the adversary system to be counterproductive to constructive decision making. He maintained that the interaction between parents and school officials that often occurred in multidisciplinary meetings, involving discussions of student evaluation and educational programs, needed to culminate not only in decisions which were judgmental and professional, but also which could be interpretive and flexible, rather than rule-bound.

Two other works on discretion have had a more direct bearing on education and student discipline. Manley-Casimir applied Davis' suppositions to the school setting by advancing the use of discretionary justice as a model for school governance.¹⁵⁵ In his application of the model, he selected the regulation of student conduct and the classification of students for instruction as examples to demonstrate the model's utility. Rossow further narrowed his study of the administrative exercise of discretion to the suspension of students.¹⁵⁶ He asked whether school officials were able to identify the various principles of fairness in school discipline. His analysis focused on the components of reasonableness, proportionality, fair warning, equal application, and equal protection in carrying out student discipline. Rossow included court cases which dealt

¹⁵⁵Manley-Casimir, *supra* note 35.

¹⁵⁶Rossow, *supra* note 38.

with each of these elements to demonstrate the potential pitfalls awaiting school administrators.

Discretion and Authority

Just as discretion, involving the capacity to choose among a variety of options, is an important component in administrative decisions, the interconnection of discretion and authority is equally a key issue. The question of legal authority to control the school program and the variety of controlling points from the federal level down to the classroom teacher, was the subject of van Geel's examination in Authority to Control the School Program.¹⁵⁷ He presented an overview of how this authority has been used and more recent trends which have resulted in shifts in authority.

Two analyses of authority concentrating on a classroom perspective were the legal and theoretical perspectives described by Muir and Elmore. Muir highlighted the classroom effects which occur when noneducators place regulations on schools, noting particularly the authority relationship between teachers and students.¹⁵⁸ Elmore's

¹⁵⁷Tyll van Geel, Authority to Control the School Program (1976).

¹⁵⁸William K. Muir, "Teachers Regulation of the Classroom," in School Days, Rule Days (D. Kirp & D. Jensen, eds. 1986).

study denoted not only how authority is structured in schools, but also how this structure affected outside attempts to reform schools.¹⁵⁹

Historical Perspective

No examination of education and court-related materials pertinent to this study would be complete without referencing certain overviews which place the current understanding of court activity in education in a historical perspective. Koenig's brief review set forth the distinction among statutory, judicial, and administrative controls in assessing governmental influences in education.¹⁶⁰ In the same volume, Hughes and Gordon characterized three stages in the evolution of court involvement in education.¹⁶¹ The first began in 1785 with the disassociation of the federal courts from educational concerns until the early 1900s. The second stage covered the period through World War II, with education primarily the concern of local and state governments. The final phase they described as the period of court activity in which many

¹⁵⁹Richard F. Elmore, "Reform and the Culture of Authority in Schools," 23 Educ. Adm. Q. 60 (1987).

¹⁶⁰Robert A. Koenig, "The Law and Education in Historical Perspective," in The Courts and Education (C. Hooker, ed. 1978).

¹⁶¹Larry Hughes & William A. Gordon, "Frontiers of the Law," in The Courts and Education (C. Hooker, ed. 1978).

social reforms were achieved through court action.

Tyack's, James', and Benavot's historical work Law and the Shaping of Public Education, 1785-1954 asserted that "Americans have always used law to shape public education."¹⁶² The authors examined how the three parts of the legal system have influenced public schools: state constitutions, state statutes and administrative law, and appellate decisions. Their analysis outlined the historical phenomenon in which society's institutions helped organize the collective life of its people and then modified the behavior of its citizens.¹⁶³ Despite the fact that their work did not deal in any significant way with the more recent cases in this study, the authors laid a valuable foundation by illustrating how law in general and courts in particular have helped chart the course of education:

The strains on the public schools have been formidable as people have struggled with the creative tension between common purpose and respect for diversity, majority rule, and minority rights. Seen in historical perspective, the conflicts of the last thirty years show how law has been employed to remedy injustices condoned or even created by the use of law in the past.¹⁶⁴

This synopsis of selected source material focusing on students' rights from the field of educational law, illustrates the influence court decisions, especially those

¹⁶²Tyack et al., supra note 118.

¹⁶³Id. at 7.

¹⁶⁴Id. at 27.

at the Supreme Court level, can have on educational practice and administrative behavior. Beginning with a period in which parents could choose to transfer authority to a schoolmaster, who acted in loco parentis in overseeing the educational and social development of children in their care, public education has moved to a point in which state law mandates children to attend school. A transfer of parental authority to the school is required. Classroom teachers and school administrators are considered agents of the state, considerably limited by laws, statutes, and policies in their application of the in loco parentis doctrine. For school administrators to operate in such a milieu recalls a statement from Hazard rephrased in the form of a question: Can schools achieve the academic and social outcomes which the community expects and protect carefully the constitutional rights which the courts expect?

Such a question in turn directs attention to the counterparts referred to in this analysis: student discipline versus student rights, court activism versus court restraint, and administrative discretion versus confinement of discretion. These challenges to attain a proper balance between rules and administrative discretion have proceeded from a time prior to the 1960s when school authorities had complete control, to a period in the 1970s when administrators felt they were losing control. Recent court decisions indicate that these struggles are continuing

to occur, with the emergence of contrasting philosophies in how schools should be governed: legalization and bureaucratization, representing greater restraint on discretion, versus professionalization, characterized by greater freedom in exercising discretion. The courts through their decisions have entered into this debate. The outcomes of their decisions, especially those of the United States Supreme Court, further contribute to the vigorous interplay between courts and schools, as law continues to shape the future of education.

CHAPTER III

DISCRETION IN SUPREME COURT CASES

Since the Tinker¹⁶⁵ ruling, court decisions at all levels affecting school discipline and students' rights have had a significant impact on the formulation and implementation of educational policy.¹⁶⁶ Cases reaching the United States Supreme Court have already passed through two levels of state or federal courts, and the decisions rendered often contain issues which are both significant and "far-reaching in their scope and implications."¹⁶⁷ The rulings of the Supreme Court are not only binding on all lower courts, but also serve as signposts for predicting future direction and subsequent decisions.

Supreme Court decisions involving students' rights have usually contained lengthy and fervent opinions by the Justices on both sides of the issue. Few areas in public school administration impinge on the relationship between students and school personnel than the issue of student discipline. This is partly due to the discretionary authority which administrators have in managing students, as

¹⁶⁵Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

¹⁶⁶LaMorte, *supra* note 71, at 19.

¹⁶⁷Reutter, Jr., *supra* note 110, at 3.

well as the constitutional questions raised when administrative actions limit constitutional freedoms. Traditionally an administrator's prerogative in a discipline incident has included a determination of guilt, a decision whether to assign consequences, and apportioning punishment appropriate to the situation. The adage "judge, jury, and executioner," though pejorative in connotation, approximates the potential an administrator holds for using or abusing discretion. Fairness and justice are among the substantial outcomes of the encounter between administrator and student, in weighing the student's "interest as balanced against corresponding and sometimes contrary school interests."¹⁶⁸

School administrators have struggled with the concept of administrative discretion. The Tinker decision in 1969 initiated some of the important discretionary issues that continued to emerge in subsequent Supreme Court cases. From a school administrator's perspective, Tinker dealt with the authority to prescribe and enforce student conduct at school. The Des Moines school district, fearing the type of disruption that had occurred in schools in other parts of the country over the Vietnam War, instituted a school regulation banning armbands as a form of protest. When some students violated this regulation, they were suspended from school.

Prior to Tinker, administrators and school boards

¹⁶⁸K. Alexander, *supra* note 87, at 355.

possessed practically unlimited authority to make and enforce regulations controlling student behavior. The Tinker ruling established that school officials, while needing broad discretionary powers, did not possess absolute authority.¹⁶⁹ School regulations had to conform to constitutional principles. Limits were imposed on the discretionary powers of school officials in devising school regulations.

The Supreme Court ruling in Tinker, in addition to dealing with limited versus unlimited school authority, created its own set of discretionary issues. School officials could no longer prevent the First Amendment speech of students unless there was a danger of substantial disruption.¹⁷⁰ While the discretion to determine this disruption resided with the school building administrator, both majority and minority opinions of the Supreme Court illustrated that there could be differing interpretations of school disruption. In a 7-2 decision, the Tinker case concluded that the wearing of black armbands was a silent form of protest and protected free speech.¹⁷¹ Substantial disruption thus became the benchmark both for First Amendment speech as well as certain other school regulations, and the interpretation of "substantial" was

¹⁶⁹Tinker, 393 U.S. at 511.

¹⁷⁰Id. at 506, 509.

¹⁷¹Id. at 505.

left to local administrators to construe.

Perhaps no student rights' case decided by the United States Supreme Court dealt as directly with administrative discretion in school discipline practice as did Goss v. Lopez.¹⁷² The Tinker ruling six years earlier had addressed discipline only indirectly through the pivotal issue of First Amendment rights for students in school. In many ways, Goss became a discipline case about the freedom of a school administrator to exercise professional discretion within a broad boundary, versus the legal restraint of this discretion by the constitutionally-guided principles of due process.

The case involved students in the Columbus, Ohio, public schools who brought a class action lawsuit against the school system. The suit was initiated as a result of their being suspended from school without an opportunity to present their side of the story prior to or soon after the suspension. The students were enrolled in three different schools, and the circumstances resulting in the disciplinary action, one of which involved the suspensions of seventy-five pupils in a lunchroom incident, occurred during a time of student unrest.¹⁷³ Ohio law required parent notification within twenty-four hours of a suspension, and an appeal to the Board of Education was available in the case of

¹⁷²Goss v. Lopez, 419 U.S. 565 (1975).

¹⁷³Id. at 569.

expulsion. The law provided no such appeal for students as a result of suspension. The students claimed that such a law was unconstitutional because it took away their right to attend school without any type of hearing.¹⁷⁴

Many legal aspects of school discipline, such as administrative discretion to take disciplinary action, the process and fairness of punishment, the nature of the relationship and interaction between student and disciplinarian, the need for control and respect for authority in schools, and the concern for the individual versus concern for the group were addressed in the Goss decision. Central to the case was the question of administrative discretion in the process of assigning a significant punishment, the suspension of students from school for misconduct. In Goss, concern over administrative discretion, its role in upholding authority in schools, and the impact certain school discipline procedures had on the relationship between student and administrator emerged as paramount issues.

Prior to the Supreme Court decision in Goss, a school administrator could suspend students from school simply by sending the individual home and informing the parents of the action. There was no obligation to discuss with the student beforehand the incident resulting in the disciplinary action. The school administrator had complete discretion to

¹⁷⁴Id.

reach a conclusion about the disciplinary situation and the appropriate consequences, including suspension from school for up to ten days. Usually, as illustrated by the policies of the Columbus Public Schools, the appellants in the Goss case, there would be an opportunity to discuss or appeal the specific school action at a later time only if expulsion was involved.¹⁷⁵ Some of the facts surrounding the suspensions of nine students from the Columbus Public Schools led the Justices to conclude that unreasonable authority was available to the school administrator without some counterbalances for students.

In Goss, like Tinker, student rights had been violated in the educational setting through unchecked administrative discretion. Words such as "untrammelled power," "injustice," "unfair," "mistaken findings," and "arbitrary exclusion" stressed the potential for administrative abuse or error.¹⁷⁶ To alleviate certain aspects of this unfairness, the Supreme Court sought to structure the student/administrator relationship in such a way that certain legal protections would be available to students which were not there before. These protections were intended to lessen the possibility for abusive situations. A minimum of formality was required for the protection of a student right. This ensured better balance in a situation

¹⁷⁵Id. at 567.

¹⁷⁶Id. at 579-581.

which seemed to allow too much discretion.

In Wood v. Strickland,¹⁷⁷ decided the same year as Goss, the Supreme Court let school administrators know what could happen if they ignored the newly-acquired rights of students provided in Tinker and Goss. Two important issues of administrative discretion were raised. One dealt with the discipline matter in the case itself. The other concerned the liability an administrator could be subjected to in making discretionary decisions.

In the discipline matter before the Supreme Court, two high school girls had been suspended for the remainder of a semester for spiking the punch of students and parents at an extracurricular activity. The court of appeals had determined that the school board's erroneous interpretation of its own regulation had violated the girls' substantive due process rights. The particular rule forbade the use or possession of intoxicating beverages at a school-sponsored activity. The court of appeals ruled that this regulation was inapplicable to the incident, because the malt liquor used by the girls did not satisfy the Arkansas statute's definition of "intoxicating."

The Supreme Court threw out this argument by the court of appeals. The Justices reasoned that when the school board's rule was implemented eight years earlier, it was not meant to strictly coincide with the state's definition of

¹⁷⁷Wood v. Strickland, 420 U.S. 308 (1975).

intoxicating. The Justices in an often-quoted statement from the case, determined that school boards should retain significant discretion in interpreting the policies they themselves have adopted:

the Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement. . . . 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.¹⁷⁸

The Court noted the importance of the "discretion and judgment of school administrators and school board members . . ." and refused to allow the federal courts to become "a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."¹⁷⁹

Another issue addressed by the Supreme Court in Wood v. Strickland was the liability, if any, school officials had in carrying out their official duties. Administrators had previously thought they were protected in conducting certain discretionary duties, especially those related to discipline. In Wood, two administrators and the school board were sued for damages due to their alleged violation of students' due process rights. The district court had found that the school officials were immune from damages unless proof of malice was substantiated. The Supreme Court

¹⁷⁸Id. at 325, 326.

¹⁷⁹Id. at 326.

narrowed this protection to a qualified immunity. School officials were protected unless they knowingly violated the constitutional rights of students. The Court observed that school officials are constantly determining whether school rules have been broken and assigning consequences for these actions. Not to allow some type of qualified immunity "would unfairly impose upon the school decisionmaker the burden of mistakes made in the course of exercising his discretion. . . ." ¹⁸⁰ On the other hand absolute immunity would be inappropriate "since it would not increase the ability of school officials to exercise their discretion in a forthright manner. . . ." ¹⁸¹ The degree of immunity "must be such that public officials understand that the action taken in good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." ¹⁸²

Despite strong statements in support of exercising administrative discretion, the effect of the decision in Wood was to subject school administrators and boards of education to greater liability than they had encountered before. Both Tinker and Goss made significant changes in the use of administrative discretion. Wood seemed to

¹⁸⁰Id. at 319.

¹⁸¹Id. at 320.

¹⁸²Id. at 321.

caution that in carrying out discretionary responsibilities, school officials had better proceed carefully or they could be held personally liable.

Both aspects of the Wood decision, the liability to which school administrators were subjected and the warning to federal courts about substituting their judgment for that of school officials, appeared in two later disciplinary cases reviewed by the Supreme Court. Carey v. Piphus¹⁸³ occurred three years after Wood in 1978, and Board of Education of Rogers, Arkansas v. McCluskey¹⁸⁴ was handed down in 1982.

In Carey v. Piphus two cases involving the lengthy suspensions (twenty days) of two students for violating school rules were consolidated. Both plaintiffs alleged due process violations on the part of school officials and sued for damages. The specific school regulations, one involving alcohol and the other involving a male student wearing an earring, did not seem to be at issue in the case. What was at issue was the disciplinary action taken and the degree of due process provided to the students, especially considering rights granted in the Goss decision three years earlier.

The district court first hearing the case referenced the Wood decision that school officials "should have known

¹⁸³Carey v. Piphus, 435 U.S. at 247 (1978).

¹⁸⁴Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966 (1982).

that a lengthy suspension without any adjudicative hearing of any type would violate procedural due process".¹⁸⁵ The important issue in Carey was not whether school officials had erred in denying due process. That seemed self-evident. The significant argument before the Supreme Court was the extent of liability and how damages would be determined.

The student's argument centered around the assertion that actual damages did not have to be proven in order for the students to collect. There should be a presumption of damages if constitutional rights were violated. The Supreme Court, however, would not allow an award for substantial damages for the deprivation of a constitutional right unless the students could prove mental and emotional suffering due to the deprivation, similar to any other type of liability claim. The students were able to obtain nominal damages and deletions of the suspensions from their school records, a judgment made by the lower court and left standing.

Carey sent a message to school administrators in assessing the risks involved in making discretionary decisions erroneously. No small expense was involved in defending such suits and paying attorney's fees, regardless of whether mental or emotional damages could be proven. School systems losing these cases could be responsible for these large monetary sums. On the other hand, courts would have to fix the actual monetary damage to students based on

¹⁸⁵Carey, 435 U.S. at 251.

the principles of liability and compensation, not on an assumption of injury. This meant that students would have to substantiate mental and/or emotional harm and tie this injury to an actual amount of money.

When the discipline case Board of Education of Rogers, Arkansas v. McCluskey¹⁸⁶ reached the Supreme Court in 1982, it turned into a rehash of the Wood case seven years earlier. The issue involved the denial of substantive due process to a tenth-grade student because of suspension for an alcohol-related incident.

A lower court's ruling in a case similar to Wood indicated that the school board's policy regarding the use of alcohol had tied itself to a state statute that specifically exempted alcohol from its coverage. Thus for a school official to suspend a student based on this erroneous school policy was a violation of the student's substantive due process.

The key discretionary issue in the case involved the school board's authority to make, interpret, and apply its policy, which they had done for the past five years. What had occurred in the incident did not appear at issue in the case, nor was the right of the school board to suspend students related to this rule. The problem was in the interpretation of the rule and the application of it to what the student had done.

¹⁸⁶Board of Education, 458 U.S. 966 (1982).

The majority opinion drew heavily on the discipline situation and language in Wood v. Strickland to overturn both the district court and the court of appeals. The Supreme Court noted once again that both courts had made the judgment that the "Board had construed its regulations unreasonably."¹⁸⁷ The Supreme Court did concede that a school board could interpret its own rules so extremely that there could be a violation of due process.¹⁸⁸ Once again the term "reasonable" prevailed in describing the actions of the school administrator, based on the school board's rule.¹⁸⁹ Noting that the board had discretion to suspend students for drug use, and since alcohol was a drug, the Supreme Court concluded that "the Board's interpretation of its regulations controls under Wood v. Strickland."¹⁹⁰

The Supreme Court has dealt with a variety of discretionary acts on the part of administrators in handling discipline situations, including limits on the restraint of free speech, due process available to students who were suspended or expelled, and the liability of school officials in protecting students' constitutional rights. The Court faced a different kind of issue in the 1977 case of Ingraham

¹⁸⁷Id. at 969.

¹⁸⁸Id. at 970.

¹⁸⁹Id.

¹⁹⁰Id. at 971.

v. Wright.¹⁹¹ As in the Goss decision, a significant disciplinary procedure was the focus of the Court's scrutiny: the corporal punishment of children. The case occurred at a time when the Supreme Court's decisions involving discipline matters had placed greater restrictions on school officials. A case involving what seemed to be the excessive use of corporal punishment on two students in Dade County, Florida, provided an unusual opportunity for the Court to wrestle directly with one of the most controversial issues in education.

In a narrow 5-4 opinion, a plurality of Justices held that the Eighth Amendment's prohibition against cruel and unusual punishment did not apply to the corporal punishment of students in school. In refusing to make corporal punishment a constitutional issue by itself, the Supreme Court reviewed the case doctrine of court decisions applying the cruel and unusual punishment provision to criminals and analyzed the common law tradition of corporal punishment as it had been used, or not used as the case may be, in schools.¹⁹² Through the ruling in Ingraham, the Supreme Court continued to leave the decision of whether to use corporal punishment to state legislators, school boards, and educators.

What the Supreme Court did make clear, despite the

¹⁹¹Ingraham v. Wright, 430 U.S. 651 (1977).

¹⁹²Id. at 659-670.

seemingly excessive use of force in the particular situation before the Court, was that certain guidelines should be in place to govern its use. Other states may not provide exactly the same structure circumscribing the use of corporal punishment in schools, but the Justices seemed favorably impressed by these guidelines: Florida had a statute dealing with corporal punishment; Dade County had policies outlining its use; and sometimes individual schools had further parameters.¹⁹³ In addition, the Court made it clear that in evaluating corporal punishment consideration should be given to the "seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline."¹⁹⁴ The Court emphasized that, "The openness of the public schools and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner."¹⁹⁵ In rendering its decision the Supreme Court also refused to require more stringent due process procedures when corporal punishment was utilized than those granted to student suspension in Goss.

Thus in confronting one of the most controversial,

¹⁹³Id. at 676-678.

¹⁹⁴Id. at 662.

¹⁹⁵Id. at 670.

potentially abusive, and possibly psychologically damaging procedures used in schools, the Supreme Court refused to further limit the discretion of school officials in employing this punishment. The Supreme Court said that, "Assessment of the need for, and the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state law."¹⁹⁶ In allowing corporal punishment in conjunction with common-law principles, the Court reiterated one of the important themes articulated in Tinker and restated in Ingraham:

(T)he Court has 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.¹⁹⁷

In dealing with administrative discretion in students' rights and student discipline cases, the Supreme Court had wrestled with the First Amendment in Tinker, the Fourteenth Amendment in Goss, and the Eighth Amendment in Ingraham. In 1985, another momentous case reached the Supreme Court involving the application of the Fourth Amendment to students: the standard for search and seizure in a school setting, New Jersey v. T.L.O.¹⁹⁸ Numerous cases had been litigated in lower courts addressing this issue, but none had risen to the Supreme Court. On the other hand, many

¹⁹⁶Id. at 682.

¹⁹⁷Id.

¹⁹⁸New Jersey v. T.L.O., 469 U.S. 325 (1985).

non-school search and seizure cases had been decided by the Supreme Court prior to T.L.O.¹⁹⁹ Nor would this issue of search and seizure have been the focus of the Supreme Court's review had the Justices not asked for a reargument on that particular question. The original petition before the Court involved only whether evidence seized illegally by school officials could be used in juvenile delinquent proceedings.

The particular incident initiating the case was an assistant principal's search and seizure of drugs from a girl's purse following a smoking incident at school, resulting in juvenile charges being filed against her. Numerous technical issues extended throughout the case in considering how to apply the Fourth Amendment to schools: a student's expectation of privacy at school; the need to search versus the intrusiveness which a search creates; and the probable cause versus reasonableness standard in school searches.

The discretionary issues in T.L.O. were intertwined with aspects of the search and seizure standard in school. From a school official's perspective, drugs, weapons, and theft at school could all interfere with attempts to provide a safe and secure environment. T.L.O. dealt with the controversial standards of when a student's property and/or

¹⁹⁹See Mary Jane Connelly, Search and Seizure in Education (1982) (unpublished Ed.D. dissertation, Virginia Polytechnic Institute and State University, Blacksburg).

person should be searched. The decisions at each level were fraught with discretionary issues, including the following:

1. When should a school administrator make the decision to search a student or a student's property?
2. What information about the student and the situation should play a role in proceeding with the search?
3. How intrusive could the search be in view of the age and sex of the student and the seriousness of the offense?

These questions were not definitively answered by the Supreme Court. The most that was provided were guidelines, leaving more of the decision making to the discretion of school officials.

Referencing the Tinker, Goss, and an aspect of the Ingraham decision, the Supreme Court had little problem in finding that the Fourth Amendment unquestionably applied to schools and school officials. Citing Goss, the Justices noted that, "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action."²⁰⁰ Justice White, writing for the majority, went on to make a statement illustrating one of the Court's rationales in choosing a lesser standard for search and consequently allowing more administrative discretion in the decision:

²⁰⁰T.L.O., 469 at 339.

Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school discipline procedures, and we have respected the value of preserving the informality of the student-teacher relationship.²⁰¹

Justices Powell and O'Connor echoed this theme in their agreement with the majority on slightly different grounds, the "special characteristics of elementary and secondary schools."²⁰² Some of the factors which operated for the Court in the Ingraham decision resurfaced in T.L.O., including "familiar restraints in the school" and the "openness of the public school."²⁰³ Justices Powell and O'Connor went on to make a point about the student-teacher relationship, which they felt would be negatively influenced by a stricter standard:

The special relationship between teacher and student also distinguishes the setting within which school-children operate. . . . Rarely does this type of adversarial relationship exist between teachers and their pupils The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.²⁰⁴

As in Ingraham, the Supreme Court was facing a controversial issue with an opportunity to provide standards similar to that of a policeman and a suspect in conducting a search. The Court chose to allow a lesser standard and

²⁰¹Id. at 339, 340.

²⁰²Id. at 348.

²⁰³Id. at 351.

²⁰⁴Id. at 349, 350.

leave greater administrative discretion in the hands of school officials.

When the United States Supreme Court rendered two decisions in two years, Bethel School District v. Fraser²⁰⁵ in 1986 and Hazelwood School District v. Kuhlmeier²⁰⁶ in 1988, the Court seemed to have come full circle one year shy of two decades since the famous Tinker ruling in 1969. Both cases involved First Amendment issues, similar to Tinker, but reached different conclusions. Some of the same themes recurred that had been dealt with earlier, with greater deference to administrative discretion. Both Bethel and Hazelwood, and the T.L.O. ruling in 1985, illustrate the difficult and unsettled issues continuing to emerge. This is evidenced by the fact, as noted earlier, that in two of the three cases, the Supreme Court overturned appellate court rulings, which in turn had overruled the trial courts beneath them.

The Bethel decision, a 7-2 decision supporting administrative action, in contrast to the 7-2 student-supported ruling in Tinker, seemed to reinforce more strongly one of the themes from the earlier T.L.O. case, that the Supreme Court was prepared to defer to the actions of administrators if reasonable grounds could be

²⁰⁵Bethel School District v. Fraser, 478 U.S. 675 (1986).

²⁰⁶Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

substantiated. The case involved the suspension of a high school student for making a sexually suggestive speech in a school assembly in support of a student council candidate. The student claimed that the disciplinary action taken against him violated his First Amendment and due process rights.

The primary discretionary issue was whether the suggestive speech made to an assembly of 600 high school students and teachers warranted disciplinary action. The school had a disciplinary rule, seemingly modeled in language from the Tinker ruling. The guideline stated:

Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.²⁰⁷

Based on the written testimony of five teachers and Fraser's own admissions, there was little question about the content of the speech and the student's intentions. The conflict came in the consequences assigned, a suspension and removal of Fraser's name from a list of graduation speakers. The student lost an appeal to a hearing officer prior to filing suit in district court. The latter consequence, denial of the opportunity to speak at graduation, became a moot point, as a lower court injunction prevented the school from carrying out the consequence involving graduation.

Both the federal district court and the court of

²⁰⁷Bethel, 478 U.S. at 678.

appeals noted the comparison of the issue before them with the Tinker case. Neither court could find any significant difference between the symbolic speech in Tinker and the pure speech delivered in Bethel. Furthermore, the district court found the school's disruptive-conduct rule "unconstitutionally vague and overbroad."²⁰⁸ When the school district tried to make a distinction between Tinker and the type of speech delivered to a captive audience of young people, the court of appeals cited the school board's "'unbridled discretion' to determine what discourse is 'decent'. . . ."²⁰⁹

The Supreme Court referenced the increasingly familiar theme from T.L.O. that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."²¹⁰ This point particularly concerned a speech which might be allowed by an adult in public compared with a student in a school setting. The Supreme Court saw a distinct difference between the generally non-disruptive political message in Tinker and the sexually suggestive speech in a student assembly. In deferring to the judgment of school officials, the Court

²⁰⁸Id. at 679 (referencing the United States District Court for the Western District of Washington, unpublished case).

²⁰⁹Fraser v. Bethel School District, 755 F.2d 1363 (1985).

²¹⁰Bethel, 478 U.S. at 682.

took a position similar to that in Wood and Board of Education of Rogers, Arkansas that, "The determination of what manner of speech in the classroom or student assembly is inappropriate rests with the school board."²¹¹ School authorities had the discretion to make the rule and interpret the violation, as long as neither was unreasonable.

In addition, with reference to T.L.O., the majority of Justices noted the need for "flexibility in school disciplinary procedures," allowing an administrator the freedom to "impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process"²¹² The Court observed that the school discipline rules did not need to be as detailed as a criminal code, thus a two-day suspension for this violation did not necessitate more procedural due process steps than had been provided.

In a concurring opinion, Justice Brennan noted an important discretionary function which operated for the school in acting against the speech, "the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities"²¹³

²¹¹Id. at 683.

²¹²Id. at 686.

²¹³Id. at 687.

This pedagogical function seemed to allow greater regulation of student speech, a point argued unpersuasively by the minority in Tinker. The rationale given was that Tinker appeared to be censorship of a political point of view, whereas the action taken in Bethel was against an indecent speech, with no regard to point of view. Though the distinction was not a major one, the Supreme Court found in this situation a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms" and, referencing Tinker, that the "inculcation of these values is truly the 'work of the schools'". . . ."²¹⁴ The Court gave broader discretionary authority to school administrators in balancing First Amendment expression against the maturity level of other students, whose psychological and emotional needs deserved protection. These pedagogical and maturity concerns also emerged in the Hazelwood decision, handed down soon after Bethel.

Approximately a year and a half after the Bethel decision, the Supreme Court dealt with another students' rights case involving First Amendment speech. Unlike Bethel and the earlier cited cases, Hazelwood School District v. Kuhlmeier²¹⁵ did not involve disciplinary action by school officials. The case involved the principal's censorship of articles in a school newspaper that he felt were

²¹⁴Id. at 683.

²¹⁵Hazelwood, 484 U.S. 260 (1988).

inappropriate for a high school audience.

The pivotal administrative discretionary issue centered around the rationale of the principal in deleting two pages of the school newspaper, which contained articles he found objectionable. One article concerned the experiences of three female students with pregnancy. The other article dealt with the issue of divorce and its effect on students at the high school.

The principal's reason for removing two entire pages arose out of his judgment that there would not be enough time to revise the paper to exclude the specific articles in time for printing. In addition, he did not think sufficient time was available to change the objectionable parts of the articles themselves to make them acceptable. His basis for excluding the two articles included the following:

1. He thought students could be identified in the articles, though pseudonyms had been used;
2. He concluded that the article on pregnancy and sexual activity was too sensitive and personal for some of the younger and less mature students at school; and
3. He objected to the divorce article because one student made negative comments about her parents. He thought the parents should have an opportunity to respond to the statements.²¹⁶

In a ruling that went perhaps as far as any student right's decision since Tinker in support of administrative

²¹⁶Id. at 263, 264.

discretion, the Supreme Court ruled 5-3 in favor of the school. The Supreme Court referenced the Tinker decision no less than nine times, due to its First Amendment precedence and the obvious parallels between the two cases. The Court alluded again to aspects of the logic in T.L.O. and Bethel, resulting in a broader interpretation of administrative discretion. The Court noted the difference between student and adult rights, referred to the special environment of the school, and cited "student speech that is inconsistent with its 'basic educational mission.'"²¹⁷ Overruling the court of appeals, which had considered the student newspaper a public forum, the Supreme Court found significant the fact that the newspaper was published by a Journalism II class, under the control of the teacher and subject to the principal's review. As in Bethel, the content of the articles and the emotional maturity of the audience played a role in evaluating the principal's actions. Further distinguishing the circumstances of this case and those of Tinker, the Court found that "school officials were entitled to regulate the paper's content in any reasonable manner."²¹⁸ The school's involvement in the student newspaper, similar to its position in respect to the school assembly in Bethel, allowed school officials the right to exercise "editorial control over the style and content of

²¹⁷Id. at 266.

²¹⁸Id. at 270.

student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."²¹⁹

The Supreme Court articulated its own distinctions between Tinker and this case, in justifying greater administrative control. As in T.L.O. and Bethel, the theme of "reasonable behavior" became a dominant recitation. In a space of four paragraphs, Justice White, writing for the majority, included these statements stressing the appropriate action of Principal Reynolds:

. . . Principal Reynolds acted reasonably in requiring the deletion Reynolds therefore could reasonably have feared. . . . he could reasonably have been concerned It was not unreasonable for the principal to have concluded We agree . . . the decision . . . was reasonable given the circumstances of this case Finally, . . . the principal's decision to delete . . . was reasonable under the circumstances as he understood them.²²⁰

Hazelwood completed a trio of cases in the 1980's, including T.L.O. and Bethel, that involved significant constitutional issues and controversial interventions on the part of school administrators. In each case, there were complicated points in question and distinctions to be made, including reasonable suspicion, "lewd" speech, public forum, school-sponsored expressive activities, pedagogical concerns, and the protection of minors. Yet in each

²¹⁹Id. at 273.

²²⁰Id. at 274-276.

decision the Supreme Court explored the actions of a school administrator making spur-of-the-moment decisions, often resulting in disciplinary action. What the Court seemed more inclined to do than in the earlier Tinker, Goss, and Wood cases, was to assert the constitutional rights of students, but defer to the actions and interpretations of teachers, principals, and school boards in the individual situations, if their behavior was justified.

Parents of school children and the public at large have not been disinterested parties in school disciplinary procedures. Beginning with the Tinker decision in 1969 and extending until 1987, when the drug and alcohol problems of students in school became a primary concern, school discipline was the public's highest rated school problem in sixteen of those eighteen years.²²¹ The Tinker ruling ushered in a time in which the discretionary authority of school administrators in controlling students seemed greatly reduced. Tinker signified unrestricted protections, especially if the First Amendment action denoted a political point of view. The three more recent students' rights cases were decided in favor of the schools, seeming "to restrict the application of Tinker and to change the relationships between students and school personnel."²²² The T.L.O.,

²²¹George Gallup, "The Seventeenth Annual Gallup Poll of the Public's Attitudes Toward the Public Schools," 68 Phi Delta Kappan 347 (1986).

²²²A Legal Memorandum, NASSP 1 (April, 1988).

Bethel, and Hazelwood decisions signalled a shift away from controlling students' rights through additional restrictive protections, entrusting greater discretionary authority to school officials.

In addition to the specific constitutional issues involved in each of the Supreme Court decisions involving students' rights, significant questions can emerge which comprise a somewhat neglected area of legal research, categorized by Abel as "law and ultimate values."²²³ When legal decisions create additional rights, as the Tinker and some subsequent decisions did, it is important to evaluate not only who has benefitted from these judgments, but also what values are being emphasized in attempting to resolve the conflicts.²²⁴ Davis and Schwartz noted that, "The study of 'rights' is the study of power, control, and decision making."²²⁵ In the educational setting, whose interests are favored in the outcome of lawsuits, especially those cases reaching the Supreme Court level, significantly determine how the educational process itself will be conducted and whose interests will gain priority. From a perspective of power certain outcomes encourage the interests of parents, some the interests of the state, and

²²³Richard L. Abel, "Redirecting Social Studies of Law," 14 L. & Society Rev. 824 (1980).

²²⁴*Id.* at 824.

²²⁵Davis & Schwartz, *supra* note 104, at xi.

others foster the interests of the students themselves.²²⁶

The analysis of these outcomes can illustrate that "there are lessons to be learned about the impact of law on complex organizations and the balancing of all interests within those organizations."²²⁷

The purpose of this chapter has been to identify and describe certain aspects of each Supreme Court case, focusing on the discretionary decisions of school administrators as they made judgments about student management and disciplinary action. The next step involves undertaking to identify and describe the guiding principles used by the United States Supreme Court as they structured the discretionary relationship between school administrators and students in these various student management situations.

²²⁶Id.

²²⁷David Neal & David L. Kirp, "The Allure of Legalization Reconsidered: The Case of Special Education," in School Days, Rule Days 360 (D. Kirp & D. Jansen, eds. 1986).

CHAPTER IV

SUPREME COURT PRINCIPLES INVOLVING DISCRETION

In these students' rights and discipline cases that have reached the United States Supreme Court, many issues have been decided that have had a significant impact on school administrators, on students, and on school procedures. As previously noted, although certain issues (such as the First Amendment rights of students or the Eighth Amendment's restriction on cruel and unusual punishment) became the focal point of a particular case, the Court was frequently faced with the complicated problem of whether to accede to a school official's judgment in a particular discipline situation, or whether to restrict administrative authority by imposing additional legal-like procedures.

The purpose of this chapter is to attempt to identify those principles, concepts, and doctrines which serve to clarify the Supreme Court's regulation by judicial review of administrative discretion in student disciplinary cases. The following suppositions are offered:

1. Reasonableness was a central concept articulated by the Supreme Court in reviewing the discretionary decisions of school administrators in these cases involving student management. It was a standard applied to actions by administrators as well as to school policies and rules. Impinging on the concept of reasonableness was a

hierarchical level of concerns by the Court. These were a) constitutional issues, b) significant interests and relevant concerns of administrators and students, such as the uniqueness of the school environment, the need to maintain order in school, individual freedom versus the need to protect the group, and other interests, and c) the Court's perception of significant educational goals, objectives, or purposes. The closer a situation intruded on a constitutional issue, the higher the standard of reasonableness necessary to justify an action;

2. The relationship between student and administrator is a unique relationship, and this uniqueness was given special consideration by the Court in balancing the sometimes differing interests. Students as minors prompted special attention and protection by the Court. When there were institutional regulations, restrictions, and procedures which served to confine possible administrative abuse of discretion, the Court was more likely to defer to administrative judgment; and
3. School officials are partially immune from liability in carrying out certain discretionary acts related to discipline. Civil remedies are available to students and parents. In addition, a lawsuit can be initiated for constitutional infringement or violation of civil rights. However, any suit for damages must prove actual injury.

Before examining some guiding principles which the Court appeared to use in balancing the discretionary relationship between school administrators and students in disciplinary situations, it will be helpful to review briefly two related areas. The first involves some key themes customarily present in the judicial review of discretionary acts. The second concerns how these points in question impend on the judicial review of school discipline

matters.

Much of the literature on administrative discretion, as discussed earlier,²²⁸ did not concern education or educational practice. The subject of concentration has most often been public administration or governmental agencies. Galligan has explained that in a general sense there are two important questions in the legal regulation of discretion:

- 1) What legal restraints should there be on discretion? and
- 2) What institutional responsibility is there in devising and applying certain restraints?²²⁹

The former question would suggest those sources of authority that lie outside the institution itself. In schools these sources would include the U.S. Constitution, federal legislation and entitlements, state statutes and enactments, common law principles, and of special importance in this analysis, judicial review. The latter question concerns those policies, procedures, and standards which are developed within the institution itself. In school governance these most often include state boards and/or state departments of education, local boards of education, and the actual operating procedures of the central office and an individual school.

Education, since neither it nor schools themselves are referred to in the U.S. Constitution, is left to the control

²²⁸See discussion *supra* pp. 3-10.

²²⁹Galligan, *supra* note 142, at 220.

of the states. State constitutions and state statutes, in conjunction with state boards or state departments of education, oversee the public education of students. The states, with the exception of Hawaii, have chosen to delegate certain portions of this authority to local education agencies or school boards. These various organizational structures and agencies all contain rules, regulations, and procedures which serve to delimit the operation of schools within specified boundaries and provide certain restraints on administrative action.

At the school district level, there are boards of education which draft and oversee school policies within that district. These boards are responsible for seeing that the task of education, as delegated by the state, is carried out in compliance with state and federal laws. As Menacker distinguished, "Board members and administrative officers are assigned certain ministerial or mandatory duties by higher authorities, which often must be accomplished in prescribed ways."²³⁰ These duties include everything from establishing a calendar of days school will meet to the hiring and termination of school employees. In contrast to this, as Menacker further differentiated, "Boards and administrators also possess discretionary authority, provided to them for the necessary exercise of judgment in formulating policy related to mandatory authority and

²³⁰Menacker, *supra* note 92, at 18.

responsibility."²³¹ Unlike ministerial authority, discretionary authority cannot be delegated. Much of the control of student conduct and student discipline are part of this category of discretionary authority.

The purpose of this brief overview is to further emphasize that education in general and schools in particular are already regulated from many sources. Aside from court decisions, which can serve to expand or limit the discretion of school administrators, the various federal, state, and local hierarchies circumscribe the boundary in which school officials operate. O'Reilly and Green have suggested that, "Operating under legislative statutes, court cases, board policies, program regulations, and so on, there is no end to the part of the educator's professional task that calls for those persons to be on-the-spot rule enforcers"²³² These regulations significantly impact discretionary action and also serve as guideposts when the discretionary authority or action of an administrator is challenged in court.

The judicial review of discretionary acts can be principally categorized into three broad areas, each of which has many components. These three areas include the following: 1) procedural fairness, often associated with the term "due process"; 2) the reasoning process used in

²³¹Id.

²³²O'Reilly & Green, *supra* note 77, at ix.

reaching a certain decision or justifying a certain action; and 3) substantive fairness, which examines the deprivation of a certain right in terms of whether there are valid purposes for doing so, and whether the methods used are "reasonably calculated to achieve the objective."²³³

Procedural fairness is a broad legal concept used by the courts which originates out of the necessity to protect the individual and his/her interests from erroneous or unfair infringement by the government. In a criminal proceeding, it can refer to a presumption of innocence and the right to a fair and impartial trial. To concentrate narrowly on procedural fairness means, in a sense, to block out the results of a particular decision and ask the question: Was the person treated fairly in the process? The notion of individual rights and participation by the person are two key elements in procedural fairness. Participation suggests the opportunity to be knowledgeable, which includes, but is not limited to, a proper notice, the opportunity to present one's side, and the benefit of being provided reasons why certain actions were taken.²³⁴ Procedural fairness has often become synonymous with the term "due process."

In the school setting and in discipline matters, the term due process refers to the right of a student "not to be

²³³Alexander & Alexander, *supra* note 87, at 289.

²³⁴Galligan, *supra* note 142, at 323.

punished or deprived of their rights by the state without first being given a chance to tell their side of the story."²³⁵ The Goss v. Lopez case was an example in which the participation of a student prior to suspension was denied even by state statute. The Goss case provided a framework of the process that was due a student, and affirmed the important principle that more serious punishments, such as longer suspensions or expulsion from school, should include more extensive due process procedures. The minimum procedure for a student included a verbal or written notice to the student of the charges and the opportunity for a brief meeting to present one's side relative to the charges. More extensive procedures for longer suspensions could include the following: a formal hearing with adequate notice to prepare for it; the right to be represented by legal counsel; the right to cross examine witnesses; the chance to present and refute evidence; and the right to have a transcript of the proceeding. Since the Goss case, courts have examined more closely the procedural protections available to students and the procedures used in the disciplinary process.

A second concern of the court in the judicial review of discretionary acts is the reasoning process used by the agency or individual in arriving at the decision. This reasoning process embraces several important tenets,

²³⁵Imber & van Geel, *supra* note 68, at 225.

outlined by Galligan: 1) an individual was aware of or had some opportunity to know the standards, rules, or guidelines involved in a judgment; 2) the purposes for which an agency or institution exists have been properly delegated, and there is a relationship between these purposes and the discretionary decisions made; 3) the evidence available in the situation supports the facts of the case, forming a basis of the decision; and 4) reasons are provided for the decision, which contain a rationale relative to those items mentioned above, i.e., guidelines, purposes, and the evidence presented.²³⁶

These four elements have application in managing student conduct in schools. With the first standard, for example, the rules provided to enforce certain appropriate social behavior can become a matter of court review. These rules can arise from state statutes, school board policies, or individual codes of conduct in schools. An administrator or board member is under the requirement, as outlined in the Wood decision, to know the rights of students and not to knowingly violate them.

Concerning the second standard, a court might examine an administrative action taken in a specific situation, explore its effect, and hold both of these up to the purposes of the agency for review. In the Tinker decision, for example, part of the Supreme Court's analysis included

²³⁶Galligan, *supra* note 142, at 314.

an examination of certain educational purposes the school presented in curtailing a behavior. The Court found that the silent protest of wearing armbands, which did not disrupt the school, to be insufficiently related to these purposes in controlling student behavior. Later in the Bethel decision, the Court found a close enough relationship between the offense committed and the desire of the school to prohibit such behavior, to restrict certain speech.

Like any court trying a case, the court in a school discipline case will examine carefully the facts supporting a certain decision, the third element described above. In Board of Education of Rogers, Arkansas, for example, the facts presented by the school concerning the origin and application of a school rule caused the Supreme Court to overrule a lower court decision, which had declared the rule inconsistent with existing state law. Similarly the facts in Hazelwood, among them being the school system's written guidelines for a Journalism course, the instructor's supervision of the course and its content, and the principal's regular review of the school newspaper, played a decisive role in the Court's eventual judgment, abridging certain First Amendment rights.

A fourth tenet of the reasoning process involves a review of the rationalization for the decision, a brief inquiry into the logic which might substantiate one action taken over another. The three other tenets affect this,

taking into account agency guidelines, purposes, and evidence supporting the facts. The reasoning process requires that decisions be based on explanations which have a logical connection to a rule, an agency goal, and/or facts based on good evidence. The Supreme Court in Hazelwood looked especially closely at the reasoning process of a principal who deleted two entire pages of a school newspaper before publication, based on his objection to certain articles.

The third broad area of judicial review, in addition to procedural fairness and the reasoning process, is substantive fairness. Galligan has described substantive fairness in the following manner: "Fairness in a substantive sense concerns the principles upon which benefits and burdens are distributed amongst members of society."²³⁷ When a welfare application is accepted from one individual but rejected from another, when a fine is imposed on one industry but not on another, or when one application for a license is granted but another is turned down, the question of substantive fairness arises. In education, in addition to procedural due process, there is a process referred to as substantive due process. The Fourteenth Amendment protects an individual from being deprived of life, liberty, or property without due process of law. Substantive due process is implicated "if a state

²³⁷Id. at 152.

is going to deprive a person of his life, liberty, or property . . . ," and in order to do so "the state must have a valid objective and the means must be reasonably calculated to achieve the objective."²³⁸ As Alexander and Alexander have noted, these substantive protections in education have included not only life, liberty, and property, but also an individual's right to education, his/her appearance, and First Amendment guarantees.²³⁹

A student's substantive liberty interest was implicated in the Ingraham corporal punishment case, the right to be protected from unfair personal intrusions. Rossow, as described earlier,²⁴⁰ focused on substantive fairness in student discipline. He noted that substantive fairness involving student punishment is "highly discretionary," and involves the "spirit of the need for fair treatment of all people--including students."²⁴¹ Among the elements of substantive fairness was the concept of reasonableness, about which more will be said. Rossow also included the concept of proportionality, by which is meant "whether the punishment given a student for violation of a concededly reasonable rule was proportional to the transgression."²⁴²

²³⁸McCarthy & Cambron-McCabe, *supra* note 55, at 11.

²³⁹Alexander & Alexander, *supra* note 87, at 290.

²⁴⁰See discussion *supra* 11-12, 20.

²⁴¹Rossow, *supra* note 38, at 419.

²⁴²*Id.* at 420.

Fair warning was a third element of substantive fairness, which refers to whether a person knew of or was guided by standards or rules that "were specific enough that the ordinary person can do what is expected" ²⁴³ Equal application was a fourth component, a principle which "sets limits on the discretion of officials to single out an individual for treatment that is not applied to others." ²⁴⁴

While these three categories in the judicial review of discretionary acts do not by any means exhaust the numerous elements involved in an analysis of discretion, they can serve as guideposts in examining these Supreme Court cases. Aspects of procedural fairness, the reasoning process, and substantive fairness emerge in examining principles the Supreme Court applied to the discretionary acts in discipline. A helpful method to subsume these concepts to a more manageable approach is to formulate questions which might be asked by a particular court in reviewing a case, or by the Supreme Court in reviewing one of the cases presented here. These questions, involving the discretionary action of an administrator, could include the following: ²⁴⁵

1. What reasons were given for the action taken?
2. Did those reasons take into account various relevant matters and interests?

²⁴³Id. at 422.

²⁴⁴Id. at 427.

²⁴⁵See Galligan, *supra* note 142, at 324.

3. Did the student get an opportunity to present his/her side and have his/her position considered?
4. Does the empirical evidence support the action taken?
5. Is there a reasonable (rational) explanation why one course of action was selected over another?

An examination of the themes of reasonableness, administrator/student relationship, and liability in these student management cases often results in asking and attempting to analyze the Supreme Court's answer to each of the questions listed above. These questions serve as silent guides in examining the principles the Supreme Court applied in reviewing the discretionary acts of administrators.

Reasonableness

There are almost as many subsenses of the term "reasonable" or "reasonableness" in the judicial review of discretionary acts as there are actions or circumstances to which the term could be applied. Reasonableness can be as elusive a word to define as "discretion," and attempts to limit its meaning frequently result in a circular definition: reasonableness on the part of administrative actions means reasoned decision making, i.e., judgments based on reasons. Thus, one can be left with reasonableness as reasoned action based on reasons. Such a definition leads naturally to other questions: What is reasoned

decision making? What does it mean to say "judgments based on reasons?"

Schwartz has declared that "reasonableness has become the measuring rod for review of discretion."²⁴⁶ Fair, just, rational, suitable under the circumstances, fit and appropriate to the end in view, are words and phrases coined by Black's Law Dictionary in defining reasonableness.²⁴⁷ Reasonableness is often contrasted with unfair or arbitrary. Schwartz asked, "When is an agency finding unfair?" and answered it by stating "when the finding is not a reasonable one in light of the evidence in the whole record," or "in light of the case made by the agency."²⁴⁸ He categorized "arbitrariness" as a situation in which "there were no reasonable grounds for the exercise of judgment," a choice made which appears "wholly dependent upon the personal will of the administrator."²⁴⁹

Galligan's statement, illustrating the different areas on which reasonableness impinges, provides perhaps the most workable definition: "reasonableness appears in providing guidance as to whether an action is within purposes, whether a background factor is overridden, whether a matter is relevant and whether it has been adequately considered, and

²⁴⁶Bernard Schwartz, Administrative Law 606 (1976).

²⁴⁷Black's Law Dictionary, supra note 23, at 1265.

²⁴⁸Schwartz, supra note 246, at 595, 603.

²⁴⁹Id. at 604, 608.

whether there is evidential support for a finding or policy."²⁵⁰ Galligan notes the difficulty of applying the term in judging an action: "Reasonableness rightly and inevitably constitutes the basis for any practical judgment, whether the administrator's or the court's, so that the issue typically for judicial review is which of a number of possible reasonable positions is to be supported" ²⁵¹

In the school setting reasonableness has been called "the common law watchword of the teacher/student relationship."²⁵² In discipline matters reasonableness has a direct bearing on school rules, actions or procedures used, and punishment assigned. Concerning school rules, reasonableness refers to regulations which are specific enough to "provide students with adequate information as to what is expected of them and are so stated that persons of common intelligence are not required to guess at their meaning."²⁵³ School rules are often challenged on the constitutional basis of being vague or overbroad. In the discretionary actions of administrators, which includes investigating misconduct and determining the guilt or innocence of a student, the reasonableness standard outlined

²⁵⁰Galligan, *supra* note 142, at 322.

²⁵¹*Id.* at 320.

²⁵²Alexander & Alexander, *supra* note 87, at 281.

²⁵³*Id.* at 279.

by Galligan and Schwartz, described above, provides a workable standard. In the punishment of students, reasonableness refers most closely to the term Rossow used called "proportionality": was the punishment proportional to the offense.²⁵⁴ As Imber and van Geel have noted, "unless a punishment is blatantly excessive, courts generally have left it to the school to decide what is reasonable."²⁵⁵

When the Supreme Court began expanding students' constitutional rights in the school setting, the Court began examining more closely the reasonableness of administrative actions, rather than primarily their legality. This reasonableness, as it related to discipline, referred to rules, policies, state statutes, administrative procedures and actions, and even punishments themselves.

In the Tinker case, the reasonableness of a school rule devised by a group of high school principals fearing disruptions at school, a regulation forbidding students from wearing armbands, became a primary focus in that case. The district court first hearing the case found the rule to be "reasonable," because it would help to prevent disturbance in the school.²⁵⁶ The Supreme Court, however, stressed

²⁵⁴Rossow, *supra* note 38, at 420.

²⁵⁵Imber & van Geel, *supra* note 68, at 238.

²⁵⁶Tinker v. Des Moines Independent Community School District, 58 F. Supp. 971 (1966).

that the Constitution's First Amendment allowed "reasonable regulation of speech-connected activities in carefully restricted circumstances."²⁵⁷ Three aspects of the rule seemed to make it unreasonable to the Court: 1) School officials did not have rules preventing the wearing of other political or controversial symbols, such as the Nazi cross; 2) evidence submitted to the Court did "not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption";²⁵⁸ and 3) the regulation did not deal with a less important but perhaps legitimate rule, such as type of clothing or deportment, but "First Amendment rights akin to 'pure speech.'"²⁵⁹ The rule seemed to lack consistency in targeting one particular symbol. It seems evident that even if there had been disruption, the Court would have had difficulty accepting the legitimacy of the armband rule, considering its narrow scope and its constitutional implications.

In contrast to the specific school regulation in Tinker, the school rule in Fraser which became a controversial point in the case was worded in the following manner:

"Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane

²⁵⁷393 U.S. 503, 513 (1969).

²⁵⁸Id. at 514.

²⁵⁹Id. at 508.

language or gestures."²⁶⁰

When student Fraser was suspended for giving a sexually suggestive nominating speech in a student assembly, one of his contentions, in addition to infringement of his First Amendment rights, was that the school's disruptive conduct rule was vague and overbroad. A rule that was vague or overbroad would violate the Fourteenth Amendment's due process clause, because there would not be sufficient warning to the student of what is being forbidden. Fraser claimed "that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions."²⁶¹

The Supreme Court was straightforward in its own commentary on the content of Fraser's speech, its relationship to the First Amendment, and the distinction the Justices found between this situation and what had occurred in Tinker. Concerning the school rule, however, the Court stressed that the student's argument was "wholly without merit." The Court confirmed the school's need in being able to use disciplinary measures for "unanticipated conduct" and declared that "the school disciplinary rules need not be as detailed as a criminal code which imposes criminal

²⁶⁰478 U.S. 675, 678 (1986).

²⁶¹Id. at 686.

sanctions."²⁶² The rule itself, plus warnings that Fraser's teachers had given to him prior to his speech, were adequate notice that the behavior could result in school consequences. The Court did not use specifically the "reasonableness" terminology, but it was obvious that the majority of Justices found the rule reasonable and the enforcement of it on Fraser's speech to be a reasonable application of the rule.

Wood v. Strickland, a case containing the significant legal issue of the liability of school personnel in exercising certain administrative duties, and Board of Education of Rogers, Arkansas v. McCluskey each concerned the reasonableness of school rules that were contested on somewhat technical grounds. The two cases, seven years apart, both originated in the state of Arkansas and both were ultimately appealed to the Supreme Court.

In Wood the school rule prohibited the use or possession of intoxicating beverages at school or school activities. Three high school sophomores violated the rule by spiking punch with malt liquor at a school activity attended by parents and students. The court of appeals based its determination of the girls' guilt on a point of evidence which it claimed had never been proven. The appeals court maintained that the term "intoxicating" was a provable issue for which no evidence had been submitted.

²⁶²Id.

Basing their interpretation on the Arkansas statute's definition of intoxicating, an amount exceeding 5% alcohol by weight, the court of appeals determined that the 3.2% alcoholic content of the malt liquor mixed with punch failed to satisfy proof of the term intoxicating. The Supreme Court, employing a less meticulous interpretation of the school regulation, did not find the application of the rule to be unreasonable. The Supreme Court based its reasoning on the following relevant factors: 1) When the school rule was adopted some seven years earlier, the wording "intoxicating beverage" in the rule was not meant to be connected with the state law; 2) the rule had been previously applied, and in this current case the school had interpreted the regulation by stating "the girls had brought an 'alcoholic beverage' on to school premises";²⁶³ 3) the students admitted that they realized the wrongful act could result in school consequences. Since there was adequate evidence to support the violation by the girls, the Supreme Court stated that "the Court of Appeals was ill-advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement."²⁶⁴ Once again, while the Court did not specifically use the terminology "reasonable," their analysis demonstrated that they found the school rule

²⁶³420 U.S. 308, 325 (1975).

²⁶⁴Id.

applicable to this incident and to be reasonable in its wording. This was in part based on the school board's own consistent interpretation of the rule and the evidence available supporting what the girls had done.

Seven years later Board of Education of Rogers, Arkansas v. McCluskey involved the same type of incident, the same arguments, and the same Eighth Circuit Court of Appeals that reviewed Wood. Ironically not only did the district court and this same court of appeals repeat the mistake of over-interpreting the school rule, but they also referenced the Wood case in doing so. A student suspended for leaving campus without permission, drinking alcohol, and returning to school in an intoxicated state, filed suit alleging that his due process rights had been denied because of the way the school regulations had been applied. The appeals court determined that the specific school regulation which had been applied referenced a state statute exempting alcohol, thus "the Board had acted unreasonably by suspending respondent under § 11."²⁶⁵ The appeals court characterized the difference in this situation with what had occurred in Wood in this manner: "the school board in that case had construed its regulations reasonably while here the Board had construed its regulations unreasonably."²⁶⁶

The Justices responded succinctly to this

²⁶⁵458 U.S. 966, 968 (1982).

²⁶⁶Id. at 969.

interpretation: "Wood v. Strickland plainly requires that the Court of Appeals be reversed."²⁶⁷ The Board's interpretation of section 11 of its rules was reasonable, asserted the Court, and the "District Court and Court of Appeals plainly erred in replacing the Board's construction of § 11 with their own notions under the facts of this case."²⁶⁸ As in Wood, the Board's interpretation of its own rules, its previous record of suspending students under this section, its undisputed authority to suspend students for this type of behavior, and the unquestionable guilt of the student, warranted a reiteration of the rebuke in Wood:

§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations."²⁶⁹

In examining this "proper construction of school regulations," the issue for the Supreme Court became more than whether a school rule had been drafted properly. Reasonableness seemed to include the intent of the rule, the consistency of its application, and the circumstances and evidence surrounding the student infraction. As Alexander and Alexander have noted, "considerable judicial flexibility must be allowed in determining reasonable behavior

²⁶⁷Id.

²⁶⁸Id. at 971.

²⁶⁹Id. at 970 (quoting Wood v. Strickland, 420 U.S. 308, 326 (1975)).

. . . .²⁷⁰

Of equal importance to the Supreme Court was the reasonableness of the procedures used or actions taken by an administrator in response to student misbehavior. While the Supreme Court insisted that it was not "the role of federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion,"²⁷¹ the Court indicated that the procedures used in the disciplinary process should contain both participation by the student and communication with an administrator.

The most notable example of reasonableness applied to due process procedures was the Goss v. Lopez case. Goss highlighted some of the serious problems that could occur in applying discipline procedures. The school procedure was dictated by a state statute (later determined by the Supreme Court to be unconstitutional). An important aspect of reasonableness, as noted earlier, included the elements of disclosure and participation of the affected individual. To some degree both of these were violated in the Goss case.

Lopez and other students were suspended for violating school rules whose legitimacy was not at issue. What did become an issue was the lack of opportunity for the students to defend themselves prior to the disciplinary punishment.

²⁷⁰Alexander & Alexander, *supra* note 87, at 282.

²⁷¹Wood, 420 U.S. at 326.

Disclosure in this situation did not mean simply the advance warning of a rule. It meant the opportunity for the student to know what specifically the accusation was for which he/she was being disciplined. According to Ohio statute a hearing following the suspension was available if requested, which essentially left the student filing an appeal of an action that had already been taken. The Supreme Court noted the inadequacy of such a procedure because in effect the student would be prevented from attending school until the hearing--guilty until proven innocent. The Court found this "claimed right of the State to determine unilaterally and without process whether that misconduct had occurred immediately collides with the requirements of the Constitution."²⁷² Suspensions could not be "imposed by any procedure the school chooses no matter how arbitrary."²⁷³

Involvement of the student, an integral part of the hearing the Court sought for students prior to suspension, would help prevent "unfair or mistaken exclusion," an opportunity "permitting the student to give his version of the events."²⁷⁴ At the very least, if little dispute existed about the charges, a chance would be available for the student "to characterize his conduct and put it in what

²⁷²419 U.S. 565, 575 (1975).

²⁷³Id. at 576.

²⁷⁴Id. at 579.

he deems the proper context."²⁷⁵ The disciplinary process would seem fairer and provide an opportunity for the student to engage in an "informal give-and-take" with the disciplinarian. To know the allegation and to take part in a dialogue about it were reasonable conditions prior to disciplinary action. They were steps "a fair-minded school principal would impose upon himself" ²⁷⁶

The due process procedure required in Goss became a basis of the Ingraham corporal punishment case two years later. The Supreme Court determined that a liberty interest, i.e. being free from bodily restraint and punishment, was at stake for students in being subjected to corporal punishment. The Court determined, however, that the longstanding common law doctrine permitting teachers "to inflict reasonable corporal punishment" on students, plus traditional legal remedies available to students and their parents, reduced the need for further due process steps. In contrast to Goss, the Court found certain protections already in place which contributed toward a structuring of the discretion of school officials in carrying out corporal punishment. Florida's statutes first of all required a determination of "whether corporal punishment is reasonably necessary under the circumstances" ²⁷⁷ Secondly,

²⁷⁵Id. at 573-574.

²⁷⁶Id. at 583.

²⁷⁷430 U.S. 651, 676 (1977).

the Court found as evidence that in numerous other corporal punishment incidents in Dade County, Florida, there were few that were unusual. Thirdly, the Court noted the openness of the schools to public scrutiny, lessening the requirement for further procedures, which, for example, a prisoner might need in a confined environment. The Court found additionally that the benefits of implementing more procedures to protect students, was outweighed by what they perceived as the costs, an abridgment of time, staff, and focus on school. To impose additional administrative safeguards, which the Court found necessary in Goss prior to suspension, would "entail a significant intrusion into an area of primary educational responsibility."²⁷⁸

Due process steps emerged as a more structured attempt at implementing reasonableness in disciplinary procedures. The particular actions taken by an administrator in probing a disciplinary situation could also arouse significant reasonableness questions from the Court. This occurred both in New Jersey v. T.L.O., a case involving search and seizure, and Hazelwood v. Kuhlmeier, a non-disciplinary case. Aside from the more technically legal question which was addressed thoroughly in T.L.O., the reasonable suspicion versus probable cause standard, the reasonableness of the assistant principal's search played a prominent role in determining whether his actions were justified.

²⁷⁸Id. at 682.

Reasonableness in the context of a search took on a specific and definitive meaning: according to the Court, "whether the . . . action was justified at its inception," and whether the search "was reasonably related in scope to the circumstances which justified the interference in the first place."²⁷⁹

The Supreme Court, in overturning part of the New Jersey Supreme Court's decision, found the lower court's application of the search standard "a somewhat crabbed notion of reasonableness."²⁸⁰ In a step by step analysis of the assistant principal's behavior as he conducted what turned out to be two searches, the Supreme Court used some of the following language to describe aspects of his actions: "it cannot be said Mr. Choplick acted unreasonably when he examined T.L.O.'s purse"; "T.L.O. does not dispute the reasonableness of Mr. Choplick's belief"; "it was not unreasonable to extend the search"; "cannot conclude that the search for marijuana was unreasonable in any respect."²⁸¹ To the Supreme Court in analyzing the assistant principal's behavior, it was "common sense" to conclude that the presence of cigarettes in the student's purse would cast suspicion on her claim of no

²⁷⁹469 U.S. 325, 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

²⁸⁰Id. at 343.

²⁸¹Id. at 346-347.

smoking. Once other cigarette rolling papers were found in the initial search, it was equally logical for the assistant principal to infer that other drug items might be present, suggesting possible drug use or drug dealing. This justified a second, more thorough search. The Court concluded that his actions were based on the sort of "'common sense conclusio(n) about human behavior' upon which 'practical people'--including government officials--are entitled to rely."²⁸² In one sense reasonableness in this case described a more technical aspect of administrative behavior related to a standard for searches of students, patterned after the conditions of criminal law. In a broader sense, however, reasonable behavior in justifying and executing a search, involved certain logical conclusions in the steps an administrator might take in determining whether or not to conduct a search and how to proceed with it. These steps were confined by certain limiting variables which further structured the scope of the search. These factors, among others, included the application of certain measures that "are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."²⁸³

²⁸²Id. at 346 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

²⁸³Id. at 342.

In Hazelwood, a case dealing with First Amendment rights, the theme of reasonableness dominated the review as the Supreme Court examined the actions of a principal in deleting certain articles from a student newspaper. The Supreme Court made several distinctions in the case which impinged on the decision: there were similarities and distinctions made between this case and the previous First Amendment cases of Bethel and Tinker; there were differences described between a "public forum" and a high school newspaper published by journalism students as part of an academic curriculum; and there were censorship matters considered that involved distinguishing student expression from "school-sponsored publications, theatrical productions, and other activities . . . the public might reasonably perceive to bear the imprimatur of the school."²⁸⁴ In a space of five paragraphs analyzing the principal's decision to delete certain articles prior to their publication, an action that resulted in the cancelling of two full pages of the school newspaper, the Supreme Court used the term "reasonable" or the phrase "not unreasonable" nine times. The Court recognized how the principal's fear, his concern, his conclusions, and the particular circumstances "as he understood them" could have led to the action he took. The standard of reasonableness in his behavior was connected to several issues which were important to the Court. The

²⁸⁴484 U.S. 260, 271 (1988).

students and parents about whom the articles had been written deserved certain protections, and this could have been violated. Some students and perhaps other young non-students seeing the articles, deserved protection from certain accounts of sexual activity. As a class in journalism, the principal, overseeing the faculty sponsor, had legitimate pedagogical concerns about the students' "treatment of controversial issues and personal attacks" ²⁸⁵ Finally, the Court was able to accept the principal's testimony explaining why he did not think there was sufficient time to modify only the offending articles.

Reasonable rules, reasonable procedures, reasonable punishments: these were frequently what the Supreme Court examined in considering student behavior and administrative action against a backdrop of school policies, state statutes, and constitutional doctrines. Although First Amendment rights, Fourth Amendment protections from unreasonable searches, and due process and liberty protections arising out of the Fourteenth Amendment were all available to students in the school setting and deserved judicial support, these safeguards had to be held up to a standard of reasonableness which the Supreme Court continued to frame case by case. As Schwartz has differentiated,

Where a question of law is at issue, the court determines the rightness of the agency answer on its own independent judgment Where a

²⁸⁵Id. at 276.

question of fact is at issue, the court determines only the reasonableness of the agency answer. If the agency answer is reasonable, even though it is not necessarily the one which the court would have given had it sat as the trier of fact, the agency finding of fact should be upheld.²⁸⁶

Part of what made the reasonableness standard such an important principle in the judicial review of these discretionary acts was the special relationship the Supreme Court recognized between student and administrator, and the distinct environment in which both interacted.

Student/Administrator Special Relationship

The special relationship between administrator and student emerged as a second consideration in reviewing the discretionary situations of discipline. When imposing a further restriction on the school, when examining the action of a school official toward a student, or when weighing competing interests, the Supreme Court often made pointed references to various aspects of the student-administrator relationship. Usually the Court's deliberations of this matter had to do with the need for additional, yet perhaps fairer procedures, or, on the other hand, the decision not to impose more procedures or restrictions. Whatever the particular concern the Court articulated, based on the interaction that had occurred between administrator and

²⁸⁶Schwartz, *supra* note 246, at 596.

student in a specific situation, certain principles arose which served to frame this student--administrator relationship. Among these relevant factors were the following: 1) Students were required by compulsory attendance laws to be in school; 2) students had constitutional rights in the school setting; 3) the closer a school rule or administrative action impinged on a constitutional right, the greater scrutiny the Court would provide in its examination; 4) the Supreme Court had to balance different interests, which resulted in considering the rights of a variety of persons affected, as well as the weighing of costs versus benefits in adding or withholding supplementary, legal-like procedures.

In dealing with students and administrators over constitutional issues and discretionary actions, the Supreme Court frequently highlighted the special characteristics of the school environment. When Justice Fortas stated that oft-quoted line that neither students nor teachers "shed their constitutional rights . . . at the schoolhouse gate,"²⁸⁷ he prefaced this remark with the qualifier "in light of the special characteristics of the school environment" ²⁸⁸ Both of these statements were recounted as points of emphasis in the Supreme Court cases after Tinker, included in this analysis. Goss, T.L.O.,

²⁸⁷Tinker, 393 U.S. at 506.

²⁸⁸Id.

Bethel, and Hazelwood, all cases dealing with constitutional issues, reaffirmed this special environment theme in their examinations of the due process, search and seizure, and First Amendment issues.²⁸⁹ In addition, the Court identified property and liberty interests of students implicated through the Fourteenth Amendment in suspending students from school (Goss), and freedom from bodily restraint and punishment also within a liberty interest in applying corporal punishment in the school setting (Ingraham). In fact, when the Supreme Court asked for a rehearing on the Fourth Amendment search and seizure standard for schools, probable cause versus reasonable suspicion, the Court refused to accept the school system's reargument that the Amendment regulated "only searches and seizures carried out by law enforcement officers . . . ," and thus "creates no rights enforceable against them."²⁹⁰ Minimizing the plea by the school of the in loco parentis doctrine to this situation, the Court strongly affirmed "that the Fourth Amendment applies to searches conducted by school authorities" ²⁹¹ Having said that constitutional issues deserved protection, however, the Court did not expand this doctrine to all school discipline

²⁸⁹Goss, 419 U.S. at 574; T.L.O., 469 U.S. at 348; Bethel, 478 U.S. at 680; Hazelwood, 484 U.S. at 266.

²⁹⁰T.L.O., 469 U.S. at 334.

²⁹¹Id. at 327.

issues with which the Court might disagree. In both Wood and Board of Education of Rogers, Arkansas the Court chastised lower courts for reviewing certain exercises of administrative discretion "which do not rise to the level of violations of specific constitutional guarantees."²⁹²

The fact that many of these constitutional rights were present in the school setting and deserved careful consideration by administrators in carrying out certain discretionary acts did not keep the Court from frequently reemphasizing special characteristics of the school environment which served to circumscribe or limit the exercise of these rights. The reference in Tinker to special characteristics was repeated in T.L.O. and Hazelwood.²⁹³ Additionally in Tinker, which some school administrators feared would seriously limit their authority, the Court specified that since a child does not have "full capacity for individual choice . . . ," his/her First Amendment rights are not "co-extensive with those of adults."²⁹⁴ Both the Bethel and Hazelwood opinions stressed this limit on the First Amendment rights of school students as well.²⁹⁵ In the use of suspension, the Court

²⁹²Wood, 420 U.S. at 326; Board of Education of Rogers, Arkansas, 458 U.S. at 969, 970.

²⁹³T.L.O., 469 U.S. at 341-343; Hazelwood, 484 U.S. at 266.

²⁹⁴Tinker, 393 U.S. at 515 (Stewart, J., concurring).

²⁹⁵Bethel, 478 U.S. at 682; Hazelwood, 484 U.S. at 266.

in Goss stated, "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action."²⁹⁶ The Court in Bethel made a similar statement recognizing an administrator's "need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process"²⁹⁷ Thus constitutional questions such as free speech, due process, and search and seizure had to be weighed against the need for schools to maintain order and carry out discipline procedures.

Sometimes juxtaposing these two elements of constitutional rights which required protection and discipline situations requiring discretionary judgment and administrative action, the Court patterned a type of threshold limit. Wood, as noted earlier, made this point especially by insisting that certain matters must "rise to the level of violations of specific constitutional guarantees,"²⁹⁸ before federal courts intervened in certain discipline situations. In Tinker, also, First Amendment rights, especially political opinions, deserved protection unless there was substantial disruption and material interference with school activities.²⁹⁹ This standard was

²⁹⁶Goss, 419 U.S. at 580.

²⁹⁷Bethel, 478 U.S. at 686.

²⁹⁸Wood, 420 U.S. at 326.

²⁹⁹Tinker, 393 U.S. at 511.

more or less restricted in Bethel to offensive forms of expression,³⁰⁰ and in Hazelwood to the "'legal, moral, and ethical restrictions imposed upon journalists within (a) school community' that includes adolescent subjects and readers."³⁰¹ There was a threshold beyond which the Court was not willing to allow the First Amendment rights of students to extend.

Goss offered a similar kind of threshold in exempting an administrator from applying due process procedures: "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process"³⁰² Yet when the Columbus Public schools argued in Goss that a suspension of up to ten days was a minor and frequent occurrence, the Court responded that the property interest of attending school and the liberty interest in maintaining a good reputation and standing in the school was not de minimus, i.e., a small matter.³⁰³ In contrast, when dealing with the due process complaint of student Fraser in Bethel when he was suspended for delivering an objectionable speech, the Supreme Court countered that adequate process had been given, since, "Two days suspension from school does not rise to the level of

³⁰⁰Bethel, 478 U.S. at 682.

³⁰¹Hazelwood, 484 U.S. at 276.

³⁰²Goss, 419 U.S. at 582.

³⁰³Id. at 576.

. . . the full panoply of procedural due process protections
"³⁰⁴

In T.L.O. student behavior which met guidelines of reasonable suspicion decreased the expectation of privacy. In Ingraham not all student misconduct warranted corporal punishment, and when it was administered, it was important "that the force used was reasonable, in light of its purpose"³⁰⁵ These different situations demonstrate that student behavior which rose to a certain level nullified certain protections and allowed the administrator greater freedom to intervene. On the other hand, certain protections continued to apply: when conducting a search or paddling a student, the age, sex, and nature of the infraction would always provide restraints on the behavior of an administrator.

A paramount concern of the Supreme Court in struggling with discretionary acts of administrators in disciplining students was the authority which the school possessed, yet the potential for abuse contained in this authority. Even in Tinker the Court affirmed "the comprehensive authority of the school,"³⁰⁶ a theme restated in Ingraham. The authority of school officials to prescribe and control conduct, to act in loco parentis in order to protect

³⁰⁴Bethel, 478 U.S. at 686.

³⁰⁵Ingraham, 430 U.S. at 676.

³⁰⁶Tinker, 393 U.S. at 507; Ingraham, 430 U.S. at 682.

students from indecent speech,³⁰⁷ and to employ "permissible authority in imposing sanctions,"³⁰⁸ was a vital component of an administrator's responsibility. The Court established that these "actions taken in good-faith fulfillment of responsibilities and within bounds of reason under all circumstances will not be punished and they need not exercise their discretion with undue timidity."³⁰⁹

Yet school officials "do not have absolute authority,"³¹⁰ and this authority always "must be consistent with constitutional safeguards."³¹¹ Even in the Bethel and Hazelwood cases, when the Supreme Court supported the actions of the school administrators, the Court qualified the rulings. Reiterating in Bethel that the school's authority was not limitless, the Court restricted its holding by proclaiming that the ruling "concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."³¹² Similarly in Hazelwood the Court confined its ruling to "educators' authority over school-sponsored publications, theatrical

³⁰⁷Bethel, 478 U.S. at 684.

³⁰⁸Id. at 685.

³⁰⁹Wood, 420 U.S. at 321.

³¹⁰Tinker, 393 U.S. at 511.

³¹¹Goss, 419 U.S. at 574.

³¹²Bethel, 478 U.S. at 689 (Brennan, J., concurring).

productions, and other expressive activities."³¹³ Suspensions, the predominant discipline appearing in these cases and used frequently in schools, were not so "insubstantial" that they could "be imposed no matter how arbitrary." The Court was equally concerned about the authority and arbitrariness possible in search procedures and avowed that the reasonableness standard will not "authorize unrestrained intrusions upon the privacy of school children."³¹⁴ The authority to make rules, to enforce them, and to assign punishments, critical in the daily discretionary actions of all administrators, had a variety of restraints from the reasonableness doctrine to constitutional guidelines, all of which contributed toward keeping authority within limits and from being exercised arbitrarily.

An important concern of the Supreme Court in curbing or extending students' rights in the school setting was the rights of other students or individuals affected by the particular student action or behavior. The Court in Tinker included this point when it indicated that a student had First Amendment rights if there was not a substantially disrupting incident "and without colliding with the rights of others."³¹⁵ The Court noted that values which stress

³¹³Hazelwood, 484 U.S. at 271.

³¹⁴T.L.O., 469 U.S. at 343.

³¹⁵Tinker, 393 U.S. at 513.

"habits and manners of civility" should include "consideration of the sensibilities of . . . fellow students."³¹⁶ The student articles in the Hazelwood case failed to take into account the "sensibilities" of certain groups. The anonymity of students about whom the articles were written, was not adequately protected by the journalism students; the lack of consent and absence of the opportunity for a response failed to take into account "the privacy interests of the students' boyfriends and parents"; and "frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen"³¹⁷

Similarly due process rights could be waived for students "whose presence poses a continuing threat to persons or property or . . . the academic process"³¹⁸ The threat of danger a student with drugs or a weapon could be to a fellow student justified a lower standard of privacy and sometimes the necessity of a search conducted under the reasonable suspicion standard: "the school has the obligation to protect pupils from mistreatment by other children, and to protect teachers themselves from violence."³¹⁹ The Court recognized that in disciplinary situations an immediate response was sometimes

³¹⁶Bethel, 478 U.S. at 681.

³¹⁷Hazelwood, 484 U.S. at 274, 275.

³¹⁸Goss, 419 U.S. at 582.

³¹⁹T.L.O., 469 U.S. at 350.

necessary "to protect the very safety of students and school personnel."³²⁰

The balancing of student interests versus governmental interests or versus other student or adult interests, referred to above, was a common stance of the Court's in weighing many of the serious constitutional questions which were confronted. A student facing suspension had an interest in avoiding an "unfair or mistaken exclusion" or "a risk of error."³²¹ Due process steps, mandated by the Court, were intended to lessen these risks. In considering whether these same due process procedures should be used in instances of corporal punishment, the Supreme Court weighed the interests. They saw the private liberty interests at stake as well as the risk of "an erroneous deprivation of such interest."³²² Against that interest was the state's interest in maintaining order through a long-standing punishment and the freedom from having to follow burdensome procedures beyond those already used. The Court found Florida's "preservation of common-law constraints and remedies"³²³ sufficient to curtail the need for the Fourteenth Amendment's due process protections in corporal punishment.

³²⁰Id. at 353.

³²¹Goss, 419 U.S. at 579, 580.

³²²Ingraham, 430 U.S. at 675.

³²³Id. at 683.

As noted earlier, a similar "taking into account" occurred with student searches, which involved weighing measures that "are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."³²⁴ Unable to justify wholesale searches on the basis of the in loco parentis doctrine,³²⁵ the Supreme Court attempted in their reasoning to balance the privacy and personal security interests which were transgressed in a search, with the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."³²⁶ The Court found that in balancing the governmental interest and the private interest, the Fourth Amendment was "best served by a standard of reasonableness,"³²⁷ rather than the stricter standard of probable cause.

This balancing of interests was similarly present in the Bethel and Hazelwood First Amendment cases. The Court found the interest not insignificant "in protecting minors from exposure to vulgar and offensive spoken language."³²⁸ Had the student Fraser given his speech under different

³²⁴T.L.O., 469 U.S. at 342.

³²⁵Id. at 336.

³²⁶Id. at 339.

³²⁷Id. at 341.

³²⁸Bethel, 478 U.S. at 684.

conditions than a school assembly, "where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty,"³²⁹ the speech may have warranted First Amendment protection. The Court determined that allowing such a speech "would undermine the school's basic educational mission."³³⁰ The school's mission, the education and training of young people,³³¹ was an interest that deserved special attention by the Court. The Court had articulated this interest seventeen years earlier in Tinker when it referred to behavior that could substantially disrupt school activities,³³² and it remained a recurrent theme in the subsequent students' rights discipline cases. In Hazelwood the Court concluded that the school's censorship of certain First Amendment actions "do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns."³³³

The balancing of interests in these student management situations, governmental interests versus private interests, individual student interests versus those of other students or school personnel, sometimes involved a type of cost/benefit analysis, weighing the benefits or drawbacks of

³²⁹Id. at 689 (Brennan, J., concurring).

³³⁰Id. at 685.

³³¹T.L.O., 469 U.S. at 350.

³³²Tinker, 393 U.S. at 511.

³³³Hazelwood, 484 U.S. at 273.

certain additional procedures. This type of analysis emerged in the Goss case in two ways. By imposing elements of due process on the suspension procedure, the Court reflected that a brief hearing would help avoid possible mistakes, "if that may be done without prohibitive cost or interference with the educational process."³³⁴ On the other hand, elaborate hearings with trial-like procedures could "overwhelm administrative facilities in many places and . . . cost more than it would save in educational effectiveness."³³⁵ The Court concluded that a more formal hearing should be used in suspensions of longer than ten days, a point they reaffirmed in finding for the students in Carey v. Piphus.

This same evaluation of due process procedures was applied in determining what procedures might be appropriate in using corporal punishment on students. The Court admitted that even if their reasoning determined that certain mandatory procedures should be imposed in advance of spanking a child, a serious "question would remain whether the incremental benefit could justify the cost."³³⁶ The benefit, as the Court perceived it, was in furnishing additional protections for students being disciplined when their liberty interest was at stake; the cost was the "time,

³³⁴Goss, 419 U.S. at 580.

³³⁵Id. at 583.

³³⁶Ingraham, 430 U.S. at 680.

personnel, and a diversion of attention from normal school pursuits,"³³⁷ which could occur. Similarly in Ingraham the Eighth Amendment was ruled not to apply to the school setting partly because school and community constraints provided "substantial protection."

In T.L.O. this cost/benefit deliberation came, as noted earlier, in weighing certain privacy expectations students had with the school's need to maintain control of student behavior. The Court in T.L.O., referencing the Goss decision, observed that while due process had been granted to students, only a "rudimentary" process was due. Thus in T.L.O. in finding the student interest adequately protected by the standard of reasonableness in searches, the Court emphasized its own consistency in "balanc(ing) the interests of the student against the school officials' need to maintain discipline by recognizing qualitative differences between the constitutional remedies to which students and adults are entitled."³³⁸

The Supreme Court recognized many special circumstances involved in the administrator/student relationship: the special environment provided in the school; the rights of students versus the authority of administrators in maintaining control; the balancing of a variety of interests affected by certain student behavior, including the

³³⁷Id.

³³⁸Id.

protection of other students; and the effect, sometimes by a type of cost/benefit analysis, of additional procedures as opposed to the risk of mistake or arbitrary action. In reviewing these difficult concepts involved in reasonableness, the special characteristics in the school, and balancing of interests, the Court continually pointed to the unique interaction existing between student and disciplinarian. The Court was not merely a passive observer of this relationship, but played an active role in molding and preserving it. It was a "strange discipline system in an educational institution," characterized the Court, "if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction" ³³⁹ This interaction should allow for "at least an informal give-and-take between student and disciplinarian" ³⁴⁰ This aspect was picked up later by the Court in Carey v. Piphus in the observation that even if evidence indicated a student's guilt in violating school rules, the "purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly," ³⁴¹

Regardless of the offense by the student, as blatant as it might seem, or in spite of the significant constitutional

³³⁹Goss, 419 U.S. at 580.

³⁴⁰Id. at 584.

³⁴¹Carey, 435 U.S. at 262.

right which could be violated by school personnel, there had to be "flexibility in school disciplinary procedures."³⁴² Repeated in Goss, Ingraham, and T.L.O., the Court stated that, "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action."³⁴³ The Court in its deliberations attempted to show regard for "the value of preserving the informality of the student/teacher relationship."³⁴⁴ No where was this so clearly articulated as it was in T.L.O., a case which came perhaps the closest in comparing school officials to law enforcement officers in the role of conducting searches. The relationship was characterized in this way:

Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. . . . Rarely does this type of adversarial relationship exist between school authorities and pupils There is a commonality of interests between teachers and pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.³⁴⁵

³⁴²T.L.O., 469 U.S. at 340; Bethel, 478 U.S. at 686.

³⁴³Goss, 419 U.S. at 580; Ingraham, 430 U.S. at 681; T.L.O., 469 U.S. at 340.

³⁴⁴T.L.O., 469 U.S. at 340.

³⁴⁵Id. at 348-350.

Liability for Discretionary Acts of Discipline

The Supreme Court examined a variety of issues in applying legal principles to the discretionary actions of school administrators. School rules and how they were executed played an important role. The procedures which were used, whether a school official was conducting a search, administering corporal punishment, or carrying out a suspension, were of concern to the Court. Examining these actions in the context of a particular conduct situation, the Court often had to weigh the individual student's right against the school's requirement to maintain order and carry out its educational mission. Suppose an administrator failed to act properly in one of these situations involving discipline? The outcome could be a lawsuit for damages, the third theme in exploring administrative discretion.

In six of the nine cases reviewed in this study, a claim for monetary damages was filed, in addition to various injunctions and declaratory petitions. The suit was most often initiated against one or more of the following school officials: a particular administrator or administrators, the Superintendent of schools, and sometimes members of the Board of Education. Liability involved the degree of responsibility to which a school official could be held in using or abusing his/her discretionary power.

Although nominal damages were sought in the Tinker

case, it was an aspect with which the Supreme Court did not concern itself. It was not until Wood v. Strickland in 1975 that school administrators realized their vulnerability in carrying out discretionary actions involving discipline. Most administrators had been aware that they could be liable in civil and criminal courts for certain actions toward students which paralleled similar litigable actions in society. It was a category of law known as tort law, which sought to compensate an individual for an injury suffered. If unreasonable conduct occurred by one party toward another, a court could provide restitution to the injured party for the civil wrong. In the Ingraham corporal punishment case this point was reinforced, that an administrator could be liable through civil and even criminal action for any injuries suffered by a student in receiving corporal punishment. Imber and van Geel declared that, "The privilege of discipline allows parents and teachers to use reasonable force including corporal punishment for the discipline and control of children."³⁴⁶ However, if the force used was excessive, a criminal case could be filed for assault and battery, and a civil case for damages incurred. As Menacker has stated, the primary defense of "educators against intentional interference torts of assault, battery . . . is the in loco parentis disciplinary authority established in common-law and state

³⁴⁶Imber & van Geel, *supra* note 68, at 581.

statutes."³⁴⁷

The Civil Rights Act of 1871, now section 42 U.S.C. § 1983, was rarely used until the 1960s and 1970s. The Act provided that an individual who had his/her federal constitutional or statutory civil rights violated could instigate a lawsuit. The purpose of the lawsuit would be to obtain injunctive relief to stop the practice or procedure and/or seek monetary compensation from the person responsible for the injury. Prior to the Wood case in 1975 most school administrators had thought that in carrying out certain aspects of their duties involving discipline, they were protected from lawsuits in most states by the doctrine of sovereign immunity. This common law doctrine prevented governmental units from being sued in tort liability lawsuits, and as such, this "doctrine of sovereign tort immunity has been extended from the state itself to its municipalities and school districts."³⁴⁸ This was in fact what school officials as petitioners pleaded in the district court case which first heard Wood. The students sought compensatory and punitive damages. In addition, they requested injunctive relief from the punishments assigned, and declaratory relief from the invalidity of the school regulation used to suspend them. The court of appeals reversed and remanded for injunctive relief, with a new

³⁴⁷Menacker, *supra* note 92, at 296.

³⁴⁸Imber & van Geel, *supra* note 68, at 626.

trial to deal with the request for damages.³⁴⁹ School officials sought to be immune from damages unless proof were offered of malice or ill will toward the students who were expelled from school.³⁵⁰ The court found in their favor. The appeals court reversed this decision, and on petition the Supreme Court agreed to hear the case, addressing specifically the standard providing for immunity from liability under section 1983 of the Civil Rights Act.

The Supreme Court, citing three non-educational cases in which they dealt with governmental immunity from liability for damages under section 1983, expressed their concern "in light of the obvious need to avoid discouraging effective official action by public officers charged with a considerable range of responsibility and discretion"³⁵¹ Quoting from the third case, one the Court had decided a year prior to Wood, the Court restated that "a qualified immunity is available . . . dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action"³⁵² The Court emphasized the common-law tradition in previous decisions which led to

³⁴⁹Wood, 420 U.S. at 310.

³⁵⁰Strickland v. Inlow, 348 F. Supp. 244 (1972).

³⁵¹Wood, 420 U.S. at 317, 318.

³⁵²Id. at 318 (quoting Scheuer v. Rhodes, 416 U.S. 232, 247, 248 (1974)).

"1983 extending a qualified good-faith immunity to school board members from liability for damages under that section."³⁵³ The Court stressed that school officials sometimes act in the capacity of "legislators and adjudicators in the school disciplinary process," functions which by their nature involve "the exercise of discretion" ³⁵⁴

The Court's decision in Wood took a middle ground on the liability issue. The Court took note that an administrator's liability for any action, which could violate a student's constitutional rights, "would unfairly impose upon the school decision maker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties."³⁵⁵ What the Court framed in the context of school discipline was a qualified immunity which ceased to apply if a school official "knew or reasonably should have known that the action he took within his sphere of responsibility would violate the constitutional rights of the student affected,"³⁵⁶ or there was a malicious intent to deprive a student of constitutional rights. Compensation would be awarded only if the action carried out by the school

³⁵³Id.

³⁵⁴Id. at 319.

³⁵⁵Id.

³⁵⁶Id. at 322.

official could not "reasonably be characterized as being in good faith."³⁵⁷

The Supreme Court made two significant points regarding liability in the Wood decision. If a school official violated a "clearly established constitutional right" or "settled, indisputable law," such as the due process rights of a student being suspended, the concept of total liability would apply with little to defend against the charge. On the other hand, if a school employee, such as an administrator or board member, imposed a suspension or dealt in some manner with a student which did not involve a constitutional right, a different standard would operate. In this second situation, the Court would examine the motives of the school official to determine if he/she had acted in good faith.³⁵⁸ The Court delineated that acting "in good faith" meant "the official must himself be acting sincerely and with a belief that he is doing right"³⁵⁹

At first the Wood decision was "seen by many as subjecting educators to untenable exposure to liability for

³⁵⁷Id.

³⁵⁸G. Ross Smith, "Wood v. Strickland: An Analysis," in Student's Right to Due Process 56 (R. Anson & P. Kuriloff, eds. 1975).

³⁵⁹Wood, 420 U.S. at 321.

exercising their professional discretion."³⁶⁰ Though the Court's decision in Wood focused on liability in "the specific context of school discipline," it was clear that the application could extend to violations of the First Amendment, racial discrimination and other areas. As new rights became available or were clarified, such as sex and age bias and Fourth Amendment protections in the school setting, liability extended into these areas as well.

Damage suits for students' constitutional rights were subsequently filed in the Ingraham, Carey, Bethel, and Hazelwood cases, based in part on the Wood decision. In Ingraham the junior high school students filed a civil rights action based on the cruel and unusual punishment clause of the Eighth Amendment. The action was based on sections 1981-1988 of 42 U.S.C., and sought damages and injunctive and declaratory relief. The Supreme Court limited their review of the class action lawsuit to the cruel and unusual punishment and due process issues, thus the damages sought were never considered.

Three years after the Wood decision, the Supreme Court further clarified the issue of liability involving disciplinary action, and as in Wood, the Carey v. Piphus decision had repercussions for other non-disciplinary civil rights suits. In Carey students who alleged they had been

³⁶⁰Ronald J. Anson, "The Educator's Response to Goss and Wood," supra note 358 at 106.

suspended without benefit of the due process procedures provided under Goss, filed a lawsuit under 42 U.S.C. § 1983 against school officials. The petitioners sought declaratory and injunctive relief, and actual and punitive damages amounting to \$5,000.³⁶¹ Named in the legal action, the consolidation of two suits, were the principals, a Superintendent, and members of the Board of Education. The students claimed that Wood v. Strickland's qualified immunity standard did not apply, because school officials should have known that a suspension beyond ten days without a more formal procedure violated their procedural due process rights.³⁶² The district court upheld the due process claim but did not support the damage claim, since no proof of an actual amount of damages was established. The court of appeals reversed and remanded the case, providing a basis to consider monetary damages tied into days of school the students had missed due to suspension. More importantly, however, the appeals court said that in simply being denied due process, the plaintiff students were entitled to collect damages "even if . . . there is no proof of individualized injury to the plaintiff" ³⁶³ The Supreme Court reviewed the appeal to consider whether in a suit filed under the Civil Rights Act, a student had to

³⁶¹Carey, 435 U.S. at 251.

³⁶²Id.

³⁶³Piphus v. Carey, 545 F.2d 30, 31.

actually prove a specific injury before collecting nonpunitive damages.

The students' case was based on two contentions. First, they claimed that section 1983 implied a value in constitutional rights "in and of themselves . . . and to deter violations of constitutional rights."³⁶⁴ Secondly, the students maintained that any deprivation of a constitutional right, in this case due process, should result in a presumption of injury. Thus, unlike other cases in tort law, in which a plaintiff would have to prove an actual injury and substantiate a specific amount of compensation, the students asserted a presumption of injury "should relieve them from the necessity of proving that injury actually was caused."³⁶⁵

The Supreme Court made several key distinctions in deciding that the common-law tort principles of compensation should govern damage awards in this case. The Court referred to other possible civil rights violations, and stated "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another."³⁶⁶ As noted in the previous discussion, a

³⁶⁴Carey, 435 U.S. at 254.

³⁶⁵Id.

³⁶⁶Id. at 264, 265.

weighing of interests occurred, and this principle applied in reviewing monetary damages: "these issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question."³⁶⁷ The Supreme Court, requiring proof of actual "distress because of the denial of due process itself," ruled that while mental and emotional harm were recoverable under the Civil Rights Act, "the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused."³⁶⁸

Goss, Wood, and then Carey, a triad of cases involving due process in suspension, thus led to a determination by the Court of the extent of liability that should apply in such disciplinary situations. Goss extended the Tinker ruling that students had constitutional rights, by granting students due process rights in suspensions and expulsions. The Wood decision reinforced these two earlier decisions by requiring administrators to be held accountable, monetarily if necessary, for the unjustifiable infringement of these rights. Carey limited the liability principles granted in Wood by demanding actual proof of damages, in conjunction with common law tort principles.

The Bethel v. Fraser case, involving an alleged

³⁶⁷Id. at 265.

³⁶⁸Id. at 264.

violation of First Amendment rights, sought injunctive relief and compensatory damages under 42 U.S.C. § 1983. The student claimed that his due process rights were violated in one of the punishments assigned, his removal from a list of graduation speakers, and he challenged the vagueness of the school rule under which he was suspended. The district court, affirmed by the court of appeals, ruled in favor of the student. In accord with the Wood and Carey decisions, the student was awarded \$278 in provable damages and \$12,750 in costs and attorneys' fees.³⁶⁹ The school was enjoined from preventing Fraser the opportunity to speak at graduation. The Supreme Court overturned the decisions of the two lower courts, though the graduation restriction became an irrelevant point on appeal by the school, since it had already occurred.

Similarly in Hazelwood the respondent students initiated an action in district court seeking a declaratory judgment that their First Amendment rights had been violated, petitioning for an injunction, and asking for monetary damages. The district court found for the school and denied the injunction. The Eighth Circuit Court of Appeals reversed this decision, claiming that the censorship of the journalism articles should have occurred only if there was likelihood of tort liability to the school based

³⁶⁹Bethel, 478 U.S. at 679 (referencing the United States District Court for the Western District of Washington, unpublished case).

on libel or invasion of privacy.³⁷⁰ The Supreme Court reversed the reversal of the Eighth Circuit.

In Tinker, Bethel, and Hazelwood, all First Amendment cases, the Supreme Court first asserted a constitutional right for students, then placed certain limits on the right, based in part on the special environment of the school, the unique status of students, and the reasonableness of administrative action in exercising particular discretionary functions. Likewise, in Goss, the Court affirmed a new constitutional principle in the school setting, a more formalized procedure to guarantee students specific rights if suspended. However, in Ingraham, Board of Education of Rogers, Arkansas, T.L.O., and even Bethel, the Court either stopped short of extending due process into other areas (Ingraham), adopted a less restrictive standard or procedure (T.L.O.), or ruled the due process steps to be satisfactory in the context of the specific discipline situation (Board of Education of Rogers, Arkansas, Bethel). The process that was available to students was sometimes adequate or did not belong. Finally in dealing with the ultimate accountability weapon, the liability of an administrator for monetary damages, the Supreme Court once again appeared to take a step forward in Wood in broadening the personal liability of administrators, then limited "the nature and extent of the

³⁷⁰Fraser v. Bethel School District, 755 F.2d 1363, 1368 (1985).

damages that could be levied by the courts" in Carey.³⁷¹

The Court seemed to grant a certain right or expand a doctrine, and then draw back in subsequent cases to place limitations on what had been provided.

Guiding Principles

Justice Powell in his dissent in Wood v. Strickland made the following observation:

One need only look to the decisions of this Court --to our reversals, our recognition of evolving concepts, and our five to four splits--to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'"³⁷²

Trying to specify principles which embrace the Supreme Court's view of the discretionary acts of school administrators in disciplining students can be somewhat akin to "divining the law," as Justice Powell phrased it. In contending with concepts such as discretion, discipline, due process, and reasonableness, coupled with the Supreme Court's interpretation of First, Fourth, Eighth, and Fourteenth Amendment principles applied to public schools, it is difficult to provide specificity. With this caveat in mind, the following guidelines are offered to help summarize the Court's review of these discretionary acts:

³⁷¹Alexander & Alexander, *supra* note 87 at 488.

³⁷²Wood, 420 U.S. at 329 (Powell, J., dissenting).

1. Reasonableness in the application of rules, the use of procedures and the administering of punishment was a central concept articulated by the Supreme Court in its review of the discretionary acts of discipline;
2. The closer a discipline situation impinged on a constitutional right or interest, the greater the standard of reasonableness applied by the Court in justifying an action; in contrast, situations that did not involve a constitutional issue induced greater support from the Court for administrative discretion;
3. Administrative action stood a greater chance of receiving a "reasonableness" endorsement by the Court when supported by institutional procedures (school, local, state), by clearly explained educational interests, and by involvement of students in the procedures that affected them;
4. Consistency in the application of rules and procedures corroborated by significant factual evidence supporting an administrative response, helped substantiate a reasonableness review by the Court; however, the Court also framed reasonableness in terms of common sense actions and logical conclusions, based on the particular circumstances as an administrator understood them;
5. In expanding or limiting administrative discretion involving students' rights, the Supreme Court paid close attention to the relationship between student and administrator. This was demonstrated by the Court in their careful consideration and/or balancing of these factors:
 - A. The special characteristics of the school environment;
 - B. the status of the student as minor with rights not equal to those of adults in society;

- C. student behavior which could rise to a certain level of unacceptability, decreasing certain protection and justifying more flexible and immediate intervention;
 - D. the necessary authority of school officials versus the potential for abuse of authority and the need to provide some restraints;
 - E. the rights and interests of students weighed against those of other students, teachers, and administrators;
 - F. a type of cost/benefit analysis by the Court in balancing a variety of rights, interests, and needs.
6. In lawsuits for discretionary acts of discipline carried out by an administrator, a qualified immunity was provided by the Court for violations of students' civil rights; acts committed in good faith would normally be protected; intentional violations or disregard of civil rights would not be protected.
7. Collection of monetary damages by a student required proof of actual injury and substantiation of a specific amount, similar to other tort liability claims.

CHAPTER V

CONCLUSION

Up to this point this study has concentrated on two objectives in analyzing the concept of discretion as it has appeared in selected students' rights cases of the United States Supreme Court. The first was to identify the discretionary issues present in the cases, relying as much as possible on the language of the Court. The second purpose was to clarify concepts or principles utilized by the Supreme Court in reviewing these discretionary acts. This was accomplished by examining briefly the general standards which courts apply in reviewing acts of discretion in public organizations. The concepts identified and discussed in the Supreme Court decisions were reasonableness, the special relationship between student and administrator in the school setting, and the principle of administrator liability as it applied to these discretionary acts. Following a discussion of these concepts, seven principles were identified in an attempt to explain the Court's decisions.

In this concluding chapter, an attempt is made to construct guidelines for school administrators in carrying out discretionary acts related to discipline. In attempting to answer the question, "How does an administrator inform

his/her discretion?" it is necessary to take a more catholic approach than one that is prescriptive. While McCarthy and Cambron-McCabe were more imperative in setting up sixteen steps to follow in administering student discipline,³⁷³ or Menacker pronounced six questions for a school administrator to answer in applying due process steps to student--administrator interactions,³⁷⁴ such declarations are difficult to make in regard to discretion. Several factors contribute to this lack of specificity. First is the imprecision of discretionary acts, a reality courts have encountered in judicial review. A second factor is the diversity of issues involved in applying the First, Fourth, Eighth, and Fourteenth Amendments to the special environment of schools. Third is the multifaceted decision making and behavior that occurs when an administrator creates and applies school rules, investigates misconduct, attempts to follow certain legal-like procedures, and in some instances, assigns punishment.

These nine Supreme Court cases help illustrate the "thicket" in which an administrator operates in attempting to act on the basis of "informed discretion." This difficulty is partially highlighted in the different approaches to discretion evidenced in the majority and minority opinions of the Justices, and in the decisions

³⁷³McCarthy & Cambron-McCabe, *supra* note 55, at 229-230.

³⁷⁴Menacker, *supra* note 92, at 175-176.

rendered by lower courts, which have often ended up in reversals. Only the Goss case of the nine analyzed here involved two affirmative judgments of lower court decisions with no reversals. The appeals court in the Ingraham case first reversed the district court's decision, then later, on a hearing with a full court, affirmed the lower court decision. In the remaining seven cases, there were eight reversals of decisions and two judgments vacated on appeal. The Supreme Court reversed lower courts in six of these instances and in the Wood decision, vacated the judgment of the appeals court. This type of disparity has led Yudof, Kirp, and Levin to posit two different points of view that "have in mind different understandings of school governance."³⁷⁵ Additional reference will be made to this idea later in the chapter.

Prior to setting forth guidelines for administrators, a brief review will be presented of key processes and values emphasized in the school discipline process. Following this, a clarification of this divergence of values alluded to by Yudof, will be discussed. A third section in the chapter will be guidelines for administrators, with some recommendations for the continued professionalization of school administrators as they seek to exercise their discretionary judgment in a fair and equitable manner. Concluding the chapter will be suggestions for further

³⁷⁵Yudof et al., supra note 46, at 365.

research on the topic of discretion and school law. The Appendix summarizes issues of discretion that are currently being dealt with in recent opinions of lower courts.

Review of Values/Processes

Education has been one of the primary tools which society has used to accomplish the socialization of children, and as such, "struggles over schooling have been attempts to gain control of the socialization process or the values it transmits."³⁷⁶ Teachers and administrators, as professional educators, have a decisive stake in affecting both the content and the manner in which this socialization process takes place. Students as direct consumers have a crucial share in the substance of this process. Parents of students and other adults, former consumers themselves, have a significant investment in this socialization process. Finally, legislators, state officials, and local school boards, as legal entities created to carry out this process, have a responsibility, not to mention a personal concern, in establishing the boundaries within which this process takes place. Law, in reacting to the various demands of different groups in society, "provides a map of patterns of power," and frames "the ways in which people make claims on

³⁷⁶Stephen Arons, Compelling Belief: The Culture of American Schooling xi (1983).

government."³⁷⁷ Law has been used to shape public education. Tyack noted that law affords "one means of illuminating the interaction between institutions and belief systems."³⁷⁸

In exercising certain discretionary duties, school officials seek to advance specific educational and social objectives which are important to them. If, as Davis suggested, the exercise of discretion involves the freedom to choose among a variety of options, or as Galligan explained, discretion entails the "determination of standards according to which power to be exercised . . ."³⁷⁹ is primarily the purview of the administrator's, certain personal and institutional values inform the exercise of this discretion.

In the discipline process of schools, there are also values which instruct the actions of school personnel. There is an emphasis on structure and a need for order and control in certain of the routine daily practices. Respect for authority and for the rights of teachers and other students is a crucial value. When a serious rule violation occurs, administrators must consider not only the consequences as they apply to the individual student, but also the effect such consequences will have as a deterrent

³⁷⁷Tyack et al., supra note 118, at 4.

³⁷⁸Id. at 8.

³⁷⁹Galligan, supra note 142, at 1.

to the larger student body. Several aspects of discretionary decision making transpire in determining the action to take in a student conduct matter: the school rule which applies and the consequences prescribed or available; the seriousness of the offense and any other special circumstances surrounding the particular violation; and the unique characteristics of the individual student, including his/her previous disciplinary record, as well as the manner in which the student handles the situation. Hopefully a part of the administrator's considerations are the overriding moral concerns of fairness, consistency coupled with individualization, and an effort to make a just decision in conjunction with a capacity for mercy.

In these discipline situations there are also expectations on the part of students. Most students want the opportunity to explain their behavior and place it in some context and to feel this explanation has been heard and understood. To be treated individually and shown respect are important concerns. If punishment is involved, students expect the consequences for their actions will be in line with what is usually prescribed or assigned.

When there is a clear understanding on the part of the administrator and student concerning an infraction that has occurred, it is not difficult for many of the concerns discussed above to be satisfied in a reasonable manner. However, as these Supreme Court cases have illustrated in

their own majority and minority opinions, and in their reversals of other courts, discipline matters often involve serious disputes. On a smaller scale there are disagreements about the events themselves, confusion about the roles particular persons played in an incident, conflicting reports from students and teachers, and strong feelings about who is at fault. On a larger scale there are judgments to be made about what comprises substantial disruption, what due process procedures are sufficient, what constitutes reasonable suspicion and the extent to which a search should go, and what is a legitimate pedagogical concern.

The ideal outcome of a discipline incident from an administrator's perspective is for a student to take responsibility for his/her actions and hopefully to be able to express some regret or remorse for a wrongful action. The student would make a commitment to improve or behave in a more effective way and could accept the consequences for the action. The Latin stem of "discipline" means "to teach," expressing the hope in a particular situation that student learning would occur and that the possibility of understanding and some insight could take place, leading to a maturing from the experience. The student would emerge from an effectively-managed process, as indicated earlier, with a perception of having been dealt with confidentially, of having been understood, and of having been treated fairly

and with respect.

Unlike discipline in a family, discipline in school, as expressed in the Ingraham case, occurs in a more open environment. It is unconcealed in many respects to teachers, other students, and sometimes to parents in the community. Many students discuss their interactions and consequences with friends, at times reviewing how certain situations were handled, and making judgments about the consistency, severity, and fairness of the consequences. If the punishment assigned by a school administrator is consistently lenient, it is doubtful that the punishment itself will serve as a deterrent to certain prohibited actions. On the other hand, if school discipline is repeatedly harsh, neither students nor parents will perceive that the process is fair. Teachers may also have reservations of their own about working in a school with an unfair or inconsistent system of discipline.

Many of the factors in school discipline described above lay just below the surface in the Supreme Court cases analyzed in this study: administrative discretion to take disciplinary action; the procedures, process, and fairness of punishment; the nature of the relationship and interaction between student and disciplinarian; the need for control and respect for authority counterbalanced with a requirement to protect student rights and interests; and the concern for the individual student concomitant with a

concern for the student body. At the core of these cases was the persistent question of administrative discretion, its use or abuse in a particular situation. In an unexpected moment a school incident can become a microcosm of a criminal offense ending up in a trial: in the space of a few minutes a principal witnesses or receives a report of an incident (complaint); obtains information from the student, teacher, or others who have knowledge (statement and witness testimony); discusses the incident with the student involved (arraignment, trial); reflects on the student's previous record and the consequences assigned for other similar incidents at school (case law); and makes a decision (jury) about the action to be taken (sentence).

These Supreme Court cases illustrate the difficulty in ferreting out consistent practices and guidelines that provide an administrator with a blueprint for behavior. What did emerge is how disparate the points of view could be about the same behavior, and the differences which surfaced in whether further controls should be imposed or rejected. The views espoused often led to the sum and substance of how much or how little schools should be regulated.

Legalization and Politicization

Two contrasting philosophies emerged from these cases which suggest different approaches to school governance.³⁸⁰ From one perspective schools are a "marketplace of ideas," a mirror of society at large. Since students are learning how to live in a larger society, school practices and procedures should parallel those in society. The Goss case best represents this point of view, transposing a process used in criminal law to the school setting. The model, referred to as legalization,³⁸¹ emphasizes protection of the individual, participation by the student, and interchanges between students and administrators. It is a more democratic approach than the traditional authoritarian model of school governance that characterized school administration until the 1950s. In espousing "an individualistic means of protecting rights,"³⁸² the model downplays allegiance to authority, in fact is suspicious of authority as potentially arbitrary and leading to abuse.

In addition to the Goss decision, aspects of the Tinker

³⁸⁰See Yudof et al., *supra* note 46, at 365; Note, "Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance," 94 Harv. L. Rev. 1106 (1981); David L. Kirp, "Introduction: The Fourth R: Reading, Writing, 'Rithmetic--and Rules," in School Days, Rule Days (D. Kirp and D. Jensen, eds. 1986); D. Kirp, *supra* note 49.

³⁸¹See D. Kirp, *supra* note 49.

³⁸²See Note, *supra* note 380, at 1110.

and Wood rulings express this view. The Tinker ruling stressed that the authority of administrators is not absolute, and students' First Amendment rights need protection by school officials. Procedures must be implemented to protect students from possible mistakes or arbitrary action by administrators. In Wood this protection took the form of an increased standard of liability applied to school administrators.

In Ingraham this legalization viewpoint surfaced in the argument for Eighth Amendment protection of students from cruel and unusual punishment: "if a punishment is so barbaric and inhumane that it goes beyond the tolerance of civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity."³⁸³ This legalization approach to schools also arose in the T.L.O. opinion, arguing for the stricter standard of probable cause in searching students. Schools, as mini-societies, have personnel acting in capacities similar to police officers. Students need protection from this type of authority, which they would normally receive outside of the school environment.

The second model has been referred to as the political model, or politicization.³⁸⁴ It is most clearly articulated in certain aspects of the majority opinions in Ingraham,

³⁸³Ingraham, 430 U.S. at 690 (Stevens, J., dissenting).

³⁸⁴See Note, *supra* note 380; D. Kirp, *supra* note 49.

T.L.O., Fraser, and Hazelwood. The distinguishing characteristic is its source of legitimacy in the political forces at work in the community. The fact that the schools are open to community inspection and that boards of education are often elected by citizens, helps keep the schools responsive to community demands. As noted in Ingraham, "The openness of the public school and its supervision by the community afford significant safeguards" ³⁸⁵

In this model the more traditional view of administrative authority is emphasized, subject to controls inherent in political and community processes. The importance of rules and orderly conduct is stressed, as is respect for the rights of others. The idea of due process, stressed in Goss, is unnecessary in Ingraham because there are other remedies in society, plus the cost of additional procedures is too great to include them. The openness of the schools helps satisfy that due process will actually be at work. It is a shift from individualistic to communal processes. ³⁸⁶ Discretion, according to Goss, should be controlled with quasi-legal procedures: due process, the stricter standard of probable cause in searches, and substantial disruption in student speeches. In the political model the control of discretion occurs through

³⁸⁵Ingraham, 430 U.S. at 670.

³⁸⁶Note, supra note 380, at 1110.

openness, the legislative process, and common-law safeguards. Most discretionary actions administrators perform are visible to other students and the community. Dissatisfaction can be handled more effectively, not by imposing more protective procedures for students, but by complaint to the board of education, and if necessary, the election of different individuals to oversee the schools more in line with the community will: "Ingraham thus substitutes participation in community politics for participation in individual hearings."³⁸⁷

An intent would be presumptuous which would seek to describe many of the principles found in these nine cases as "settled indisputable law" or "unquestioned constitutional rights." A school administrator becomes aware of, or involved in, a student incident; indirectly or directly he/she weighs and/or applies the appropriate constitutional standards, state laws, district policies, and school rules to the facts of the situation; proper due process procedures are provided; and the administrator then decides on a justifiable course of action in the situation. The unspoken but implicit question a school official faces daily in making these discretionary decisions can at some point become a serious accountability question: How does one make an informed decision based on discretion that is reviewable by a court?

³⁸⁷Id. at 1115.

Guidelines for Administrators

It is difficult, as stated at the outset of this chapter, to be prescriptive about administrative behavior that derives from such a wide range of concerns and actions. Processes are involved that include listening, investigating, interviewing, interacting, cross-examining, weighing, punishing, and others which could be described. The incidents dealt with can be as small as dress code violations or misconduct in class, to the restriction of certain written or spoken speech, the bodily search of a student, or in certain instances the recommendation that a student be expelled from school. Guidelines can be formulated, as McCarthy and Cambron-McCabe have done, that deal with discrete areas of student management, such as school rules, searches, due process, and free speech. More challenging is to establish guidelines that cover a multitude of these situations. While there are threads of similarities which cross issues and cases, the directives which an administrator can follow are imprecise and approximate.

In these students' rights decisions, the Supreme Court has given the school administrator not only certain principles to follow, but also certain clues as to what issues will be important when a school matter becomes a legal issue. These principles and clues serve as aids in

informing an administrator's discretion. Beginning with Tinker the Supreme Court became more closely involved in school discipline. In Goss and Wood this more active role continued. With the Ingraham decision the Court seemed to pull back, leaving certain decisions to the discretion of school officials, with indications for structuring some discretionary actions. Although imprecise themselves, these guides are often contained in the interpretation and application of phrases such as these: "substantial disruption," "informal give-and-take," "intentional disregard for constitutional rights," "reasonableness involves a twofold inquiry," "school-sponsored educational program," and "legitimate pedagogical concerns." By becoming knowledgeable of these clues from Supreme Court decisions, an administrator can decrease the risk of legal intervention in these discretionary decisions.

The guidelines below contain brief explanatory information. It is important to keep in mind that courts of law provide a legal interpretation of actions or procedures, which is sometimes separate from the issue of educational desirability. A court proceeds from a more intensive analysis of interpreting laws to a less intensive scrutiny in applying the law to factual situations. In reviewing the discretionary acts of administrators, the Supreme Court, and other courts as well, seemed to be heavily governed by these factors:

1. Disclosure, fair warning, or prior notice are important aspects of court review, especially involving the enforcement of rules or standards which can be applied in a discretionary manner.

In discretionary acts which could lead to punishment or an abridgement of rights, it is important that students clearly comprehend that the behavior engaged in could result in disciplinary action. Often such information is contained in school rules or district policies, though some acts are viewed as inappropriate without prior guidelines. This was confirmed in Wood when the Supreme Court pointed out that the students knew they had violated a school rule in spiking punch, regardless of whether the school rule corresponded to state law. In T.L.O. the element of prior notice was present in the suspicion of T.L.O.'s violating the school rule of smoking. In Bethel, aside from the school's disruptive conduct rule, the student's conversations with teachers before delivering the speech put him on notice, according to the Court, that he should reconsider making the speech.

The importance of disclosure is highlighted in due process guarantees for students. At the same time, if a behavior is serious enough to threaten the safety of others, this prior notice requirement can be set aside in the interest of safety. Naturally in the judicial review of such an incident, the failure to provide minimum due process would have to be a matter substantiated by evidence on the

part of the school.

2. Discretionary acts will be closely reviewed in the context of currently applicable constitutional, state, school district, and individual school standards; judicial review is particularly exacting in the interpretation of standards; thus, rules or procedures that are clear, concise, and in accordance with any applicable laws, are more likely to pass review by a court.

Beginning with a constitutional principle, such as protection from unreasonable searches, courts feel more qualified to examine the interpretation and application of a federal, state, or local guideline. Sometimes new or novel interpretations emerge, as occurred in the Tinker and Goss cases when free speech and due process protections were applied to the school, or in a recent Alabama case when an appeals court applied the state's compulsory attendance law to the expulsion of a student.³⁸⁸ The interpretation of state immunity from liability laws is another example of courts applying state law to an administrative action in determining whether a lawsuit for damages will proceed or be dismissed. When courts see evidence that there are built-in restraints, such as appeals procedures or policies on searches, they are more likely to defer to administrative judgment if the policies meet legal standards and have been followed. The consistent enforcement of standards or consistency in actions taken can weigh favorably for

³⁸⁸C.L.S. v. Hoover Board of Education, 594 So.2d 138 (Ala. Civ. App. 1991).

schools. Although courts prefer to see rules and standards in place as an aid in forewarning students, they do not like to see enforcement so rigid that there is no effort to individualize the particular situation. The Supreme Court addressed specifically certain justifiable factors in the Hazelwood case that helped explain the principal's hasty decision to delete two complete pages from the school newspaper. However, the Court could not accept in Goss that even with a significant degree of disruption from groups of students, suspensions should be carried out absent minimal due process procedures.

3. Procedures set up in the disciplinary process should allow for participation and communication with students, involvement of parents, and steps for administrative appeals.

The courts consider one of their primary functions is to protect the rights of the individual. Such a command has two sides. On one hand, the student disciplined will receive careful consideration by the court in examining his or her understanding of a school rule, the procedures available to the student to help ensure fair treatment, and the punishment assigned in relation to the seriousness of the offense. While participation does not guarantee fairness, the courts view such opportunities as more likely to lead to a just outcome.

In addition, a student as minor in the special environment of the school summons certain protections by the

court. As often illustrated in school law litigation, an administrator, by the nature of his position and responsibility, places considerable emphasis on the enforcement of rules and the possible disruption behavior can cause. In situations in which an administrator has taken action based on a perception that substantial disruption, or disruptive conduct, or behavior harmful to others has occurred, the courts are likely to require a higher standard of evidence that this was true than simply the testimony of the administrator. On the other side of protection, however, when there is evidence that student behavior has had or could have had a harmful effect on others or would seriously interfere with the educational process, the courts are supportive of administrative intervention.

4. The interaction between student and administrator about a disciplinary matter should include procedures characterized by even-handedness and consideration of the rights of all parties at each step.

The Supreme Court often alluded to a distinct relationship between student and administrator in an environment that is unique, warranting a different kind of review than is given to a juvenile outside of the school setting. In order for this consideration to occur, courts must be convinced that actions taken by administrators are in the best interests of students. Obviously, there will not always be agreement about what is "in the best interest"

of the student. In the legal arena, however, the processes involved in dealing with a student become extremely significant. Goss was the prototype case illustrating this. Fairness in procedures includes the basic concepts previously discussed involving aspects of due process: notice to the student of the specific violation and action to be taken; opportunity for the student to discuss or disagree with the accusation; and an explanation of the evidence substantiating the accusations, especially if there is significant disagreement. The procedures for expulsion are more elaborate than these. As demonstrated in previous examples, courts can accept outcomes which, on the surface, appear harsh, if the processes involved include protective steps for the student. This was exemplified in the Ingraham corporal punishment case and in a recent search case. In Widener v. Frye³⁸⁹ certain precautionary steps were taken by the school in conducting an intrusive search of a student, though no evidence was obtained of any wrongdoing.

5. Administrators must provide facts or supply specific evidence in a discipline situation that the accusation or action taken toward a student is justified;

In addition to interpreting the law, a primary role of the courts in judging discretionary acts is to review and weigh the evidence. Most often this involves the testimony, statements, or depositions of witnesses, and the

³⁸⁹Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992).

presentation of factual information and evidence which clarifies the student action, the administrator response, and the procedures followed in that interaction. This evidence could include student handbooks, discipline codes, district-wide policies, and legislative statutes pertaining to education. It is customarily the burden of the student to prove the unreasonableness of a particular action taken. However, as a constitutional right or interest is implicated, the burden of proof shifts to the school system or to the administrator to substantiate that there is a compelling state interest which outweighs certain protections. In such an instance courts consider the context of the action and "the extent to which the intrusion is confined to the 'legitimate public interest to be served.'"³⁹⁰ In this respect, what a court would expect to find, in reviewing discretionary acts, is that the action of an administrator was based on decisions supported by factual evidence, and that those decisions serve the purposes of education in a manner that is understandable and reasonable. It is often at this point that a court must weigh the different interests of the student and the school. This balancing occurs in the next guideline as well.

6. The punishment of a student should comply with standards of fairness in a substantive sense. Punishment that is substantively fair is characterized by impartiality, consistency, and is commensurate with the

³⁹⁰Hogan, *supra* note 117, at 86.

offense committed, Rossow's term "proportionality." Punishment that is unfair appears arbitrary, inconsistent, discriminatory, or heavy-handed.

Transposing Aman's and Mayton's legal point to an educational setting, when an administrator interprets a standard, such as the rule invoked in Fraser's speech, provides facts, and establishes evidence of a violation, the third step is to apply the law to the factual situation.³⁹¹ Courts are normally less intrusive in this particular area of discipline, especially if certain procedures have been followed and no rule or law conflicts with the decision. Unless there appears to be no rational basis for the punishment assigned, or unless the punishment itself seems excessive in view of the offense and the circumstances surrounding it, courts will usually support the action taken. This emphasizes the usual theoretical position taken by a reviewing court that courts determine primarily the legality of a decision, avoiding the substitution of their judgment in determining an outcome. Within certain boundaries, courts allow more discretion in the consequences assigned to a student than in the procedures or the application of standards to the incident.

7. Central to all the steps above is the foremost principle that administrative acts involving discipline should be reasonable. This includes the formulation and application of rules, the probe of misconduct, and the appropriation of consequences.

³⁹¹Aman & Mayton, *supra* note 148, at 435-443.

As Galligan affirmed, "The most important element in discretion is the authority to settle upon reasons for a decision" ³⁹² Recapitulating some of the principles of reasonableness described earlier, these factors would include:

- A. Operating in accordance with sound educational purposes. Previous references to these aspects have included, for example, protecting the rights of all parties, conforming to legitimate pedagogical concerns, and preserving the safety and security of others;
- B. Taking into account any unique factors pertaining to the individual student or the situation at hand. These would influence the decision of assigning punishment and the level of consequences meted out;
- C. Validating the action taken with supportive evidence; and
- D. Disclosing reasons for the decision.

Ingraham cited the openness of the school to public inspection. Galligan has asserted the importance of "open processes of decision-making to external public scrutiny." ³⁹³ The criteria against which reasons for a decision are assessed, depend on the policies being sought. ³⁹⁴ The concept of discretion is often represented, as it is in the definition offered earlier by Davis, as having the authority to choose among several courses of

³⁹²Galligan, *supra* note 142, at 7.

³⁹³*Id.* at 6.

³⁹⁴*Id.* at 290-291.

actions--the paradigm X, or Y, or Z. As Galligan stressed, however, discretion also consists in selecting among "different courses of actions for good reasons."³⁹⁵ Action taken cannot be separated from the reasons for a particular choice of X or Y, and thus the standards on which the reasons are based. The selection of one course of action over another further emphasizes "that discretion pertains not just to final actions but also standards of decision-making."³⁹⁶

In society and certainly in schools there are significant efforts to provide official norms for behavior, "in the form of clear, specific, coherent, and rational 'rules'"³⁹⁷ The problem, as Allen stated, is that,

when we write rules to govern social interactions . . . the necessary simplicity of the rule clashes with the complexity of human experience As these cases come up we make modifications of our rule, but human experience is too complex to allow us to anticipate in advance all the necessary exceptions, and if we tried to do so the resultant rules would be too complex to be usable. Thus, there is an ongoing process of rule and rule modification (of various kinds) that allows for amelioration of the simplistic rigor of rules in the context of fact situations as they develop.³⁹⁸

This clash between the "simplicity of rules and the

³⁹⁵Id. at 7.

³⁹⁶Id.

³⁹⁷Ronald J. Allen, "Foreword: The Nature of Discretion," 47 Law & Contemp. Probs. 1, at 2 (1984).

³⁹⁸Id. at 3.

complexity of human experience" emerges as attempts are made to "articulate legal norms" through a variety of processes. The norms arrived at are hopefully those most closely reflective of the values society reveres. This articulation and refinement, as Allen noted, occurs in case law through the legal concept of precedent. In the legislative process this modification of norms takes place through legislative refinement or amendment. In the administrative process, this distillation occurs through discretion, subject to judicial review.³⁹⁹

Earlier reference was made to two contrasting views of school governance reflected in these and other cases, models which have been labelled legalization and politicization.⁴⁰⁰ Both of these models have relevance for the school administrator. Serving in a position that is regulated from many sources, in fact as a rule-devisor and rule-enforcer, the school official continually confronts the necessity of operating within appropriate legal boundaries. Likewise, the need is evident for school administrators to be responsive to community norms and values, and to encourage participation and openness in decision making.

There is, however, a third type of model which perhaps places more responsibility on the individual administrator and his/her discretionary actions: it has been called the

³⁹⁹Id.

⁴⁰⁰See supra note 380.

professional model. In this approach the intuitive and subjective nature of decision making is emphasized, promoting informal rather than formal procedures in student/administrator interactions.⁴⁰¹ Cooperation rather than competition is stressed, with discretionary decisions allowing more opportunity for flexibility and choice. Authority of position and professional expertise in trained areas of judgment are integral elements, increasing rather than lessening opportunities for discretionary judgment. As Hoy and Miskel have indicated, a professional orientation is characterized by competence through extensive training, allegiance to professional norms which include "a service ideal, objectivity, impersonality, and impartiality"⁴⁰² The greater autonomy present in the professional model is based on self-imposed control, relying on extensive knowledge of one's area of expertise, one's responsibilities, and an understanding of the standards within which one must operate.⁴⁰³

If, as this study suggests, the Supreme Court has pulled back from its involvement in certain students' rights and student discipline issues and is allowing greater administrative discretion, this allows an increased emphasis

⁴⁰¹Handler, *supra* note 14, at 37.

⁴⁰²Wayne K. Hoy & Cecil G. Miskel, Educational Administration: Theory, Research, and Practice 150 (1987).

⁴⁰³*Id.*

on the professional model of educational administration. Such a model has implications for the training and selection of school administrators. Professional expertise must originate from an all-inclusive education program, careful training, and valued experience in the field of education. The professional administrator must be prepared to respond to a control structure that imposes national, state, and local standards. It is not likely that these standards will lessen despite current trends toward site-based school management. Nor does it seem evident that political pressures from the community will diminish, with an emphasis on school choice and increased accountability measures.

Professional administrators are capable of imposing on themselves the restraints necessary to curb arbitrary action and unfair decisions. Sensible discretionary decision making is difficult to teach. The term "discretion," which comes from the Latin word "discernere," means "to distinguish between, to separate, to decide," from which we get "discernment," meaning "judgment."⁴⁰⁴ In the term "to exercise discretion," the implication from the etymology is more than simply to exercise judgment. It is to employ "good judgment,"⁴⁰⁵ that is judgment which is purposive, rational, fair, and based on reasons.

If, as Kirp has suggested, "the very best decisions

⁴⁰⁴Fletcher, *supra* note 12, at 270.

⁴⁰⁵Galligan, *supra* note 142, at 8.

. . . rest on discretion,"⁴⁰⁶ they cannot be decisions which are willful, arbitrary, unaccountable, and closed to analysis. Community and judicial acceptance of a professional model are not likely to occur without putting in place certain legal guarantees, guidelines which promote fair decision making and designated protections for individual students. These provide "a firmer protection against arbitrariness"⁴⁰⁷ than a professional model or political model can offer. Fletcher's statement summarizes a merging of the models: "A correct account of decision-making under the law would take into consideration both the objective materials of the law as they influence and guide the decision, and the subjective, creative contribution of the decisionmaker."⁴⁰⁸

Discretionary decisions involving students help define a variety of values--society's, the school's, and certainly the administrator's. The school administrator utilizing the professional model, in contrast to the legal or political models, can exercise responsible discretion which conforms to legal boundaries and community scrutiny. They can apply self-imposed principles which include openness, flexibility, and accommodation, principles which instill understanding and trust.

⁴⁰⁶D. Kirp, "Introduction," *supra* note 380, at 6.

⁴⁰⁷D. Kirp, *supra* note 49, at 139.

⁴⁰⁸Fletcher, *supra* note 12, at 274.

Recommendations for Further Research

Discretion is not a common term in educational administration or in educational law. It is an established term in the study of public administration and in the study of law, especially in administrative law and in the domain referred to as "judicial discretion." Despite, and in fact partly because of the regulated and bureaucratic aspects of education, there is still a substantial segment of administrative behavior in schools that is discretionary. This discretionary behavior extends into many other areas besides the disciplinary functions analyzed in this study. Except for Handler's application of discretion to the special education, multi-disciplinary meeting and Manley-Casimir's brief analysis of discretionary justice applied to student conduct and the classification of students for instruction, the study of administrative discretion in education is an uncharted course of research. Three areas of investigation would seem worthwhile at this time.

One area includes further investigation into topics which are similar to those undertaken in this study. For example, the focus of this study has been Supreme Court cases. School officials must be cognizant of more recent decisions, such as those reviewed in the Appendix. This would include cases in state, district, and appeals courts. The purpose of such studies would be to further examine

court review of discretionary acts to determine current trends and to examine the manner in which these courts have ruled relative to the principles laid down by the Supreme Court. In addition, there is sufficient material to examine more limited areas in the study of discretion, such as due process procedures or suspension and expulsion cases.

In a second area, three recent developments in education suggest new domains for the discretionary action of school administrators. One is community-centered education, which has two different branches. One area involves freeing students from the school setting to become more involved in educational opportunities that exist in the community, including expanded vocational placements, as well as increased service opportunities which are voluntary or in some cases required. The other community-centered arena involves the enlarged role of the school in community life, such as before and after school daycare and adult classes in the evenings. A third development is the influence of technology on the schools. As computers and video recorders become more common teaching aids, the role of teachers and administrators is likely to change, as will many of the educational processes. Discretionary powers will change as these developments occur in the educational setting, and there will be different constraints and limits on discretionary authority. In legal challenges, new issues will emerge in governing student behavior and in

administering educational programs.

Involved in the applied matters of education, such as those discussed above, are matters of theoretical interest. Discretion as a concept in administrative behavior is yet to be explored in the education setting. This study has focused on administrative discretion in student discipline. There are numerous discretionary duties administrators perform related to other student concerns, to teacher supervision, and to general leadership responsibilities in the school. Legal principles which involved the structuring and confining of this discretion continue to be developed in court decisions. These areas are formative bases for further research. For example, as the purposes of education change to incorporate the trends of community-centered education and technological advances, the judicial review of these purposes will shape these endeavors. To the extent that legal values interact with educational purposes, these values will inform the processes of education. Regardless of the new areas into which education extends, there will continue to be an interplay of discretion with such concepts as reasonableness, fairness, students' rights, and the use or abuse of administrative authority. Research into these subjects will help provide the professional administrator with the knowledge to operate from the perspective of informed discretion.

BIBLIOGRAPHY

Legal Research Aids

American Jurisprudence. Rochester, New York: The Lawyer's Co-operative Publishing Company.

American Law Reports. Rochester, New York: The Lawyer's Co-operative Publishing Company.

Black's Law Dictionary. (Revised 6th ed.) Edited by Joseph R. Nolan and M.J. Connolly, St. Paul, Minnesota: West Publishing Company, 1990.

Corpus Juris Secundum. New York: The American Law Book Company.

West's Education Law Reporter. St. Paul, Minnesota: West Publishing Company, 1983.

Published Sources

Abel, Richard L. "Redirecting Social Studies of Law," Law and Society Review, 14 (1980): 805-830.

Alexander, Kern, "Administrative Prerogative: Restraints of Natural Justice on Student Discipline," Journal of Law and Education, 7 (1978): 331-359.

_____, and David Alexander. American Public School Law (3d ed.). St. Paul, Minnesota: West Publishing Company, 1992.

Allen, Ronald J., "Foreword: The Nature of Discretion," Law and Contemporary Problems, 47 (1984): 1-14.

Aman, Alfred C., Jr., and William T. Mayton. Administrative Law. St. Paul, Minnesota: West Publishing Company, 1993.

Anson, Ronald J., and Peter J. Kuriloff, eds. Students' Right to Due Process: Professional Discretion and Liability Under "Goss" and "Wood." Washington, D.C.: Capitol Publications, 1975.

Arons, Stephen. Compelling Belief: The Culture of American Schooling. New York: McGraw Hill Book Company, 1983.

Auerbach, Carl A. "Discretion," The Guide to American Law. 1984 ed. 133.

Baldwin, Robert, and Keith Hawkins, "Discretionary Justice: Davis Reconsidered," Public Law (1984): 570-600.

Berger, Raoul, "The Role of the Supreme Court," in M.A. McGhehey (ed.), School Law for a New Decade. Topeka, Kansas: National Organization on Legal Problems of Education, 1981: 1-10.

Blackstone, William. Commentaries. (1770) *453.

Bryner, Gary C. Bureaucratic Discretion: Law and Policy in Federal Regulatory Agencies. New York: Pergamon Press, 1987.

Camp, William E., Julie K. Underwood, Mary Jane Connelly, eds. Current Issues in School Law. Topeka, Kansas: National Organization on Legal Problems of Education, 1989.

____ et al. The Principal's Legal Handbook. Topeka, Kansas: National Organization on Legal Problems of Education, 1993.

Cohen, Morris L. How to Find the Law (9th ed.). St. Paul, Minnesota: West Publishing Company, 1989.

____. Legal Research in a Nutshell (5th ed.). St. Paul, Minnesota: West Publishing Company, 1992.

Connelly, Mary Jane. Search and Seizure in Education. Unpublished Ed.D. dissertation, Virginia Polytechnic Institute and State University, Blacksburg, 1982.

Cooper, Phillip J., "Conflict or Constructive Tension: The Changing Relationship of Judges and Administrators," Public Administration Review, 45 (1985) (Special Issue): 643-653.

Davis, Kenneth Culp. Discretionary Justice: A Preliminary Inquiry. Chicago: University of Illinois Press, 1971.

Davis, Samuel M, and Mortimer E. Schwartz. Children's Rights and the Law. Lexington, Massachusetts: Lexington Books, 1987.

Dimock, Marshall E., "The Role of Discretion in Modern Administration," in John M. Gaus, Leonard D. White, and Marshall E. Dimock (eds.), The Frontiers of Public Administration. Chicago: University of Chicago Press, 1936.

- Duke, Daniel L., Robert Donmoyer, and Greg Farman, "Emerging Legal Issues Related to Classroom Management," Journal of Law and Education, 8 (1979): 495-507.
- Elliott, Donald E., Jr., "The Dis-Integration of Administrative Law: A Comment on Shapiro," Yale Law Journal, 92 (1983): 1523-1537.
- Elmore, Richard F., "Reform and the Culture of Authority in Schools," Educational Administration Quarterly, 23 (1987): 60-78.
- Fischer, Louis, "The Courts and Educational Policy," in Ann Lieberman and Milbrey W. McLaughlin (eds.), Policy Making in Education. 2 vols. Eighty-first Yearbook of the National Society for the Study of Education. Chicago: University of Chicago Press, 1982. I: 56-80.
- _____, "When Courts Play School Board: Judicial Activism in Education," Education Law Reporter, 51 (1989): 693-710.
- _____, David Schimmel, and Cynthia Kelly. Teachers and the Law (3d ed.). New York: Longman Press, 1991.
- Fletcher, George P., "Some Unwise Reflections About Discretion," Law and Contemporary Problems, 47 (1984): 269-287.
- Frels, Kelly, and Jeffrey J. Horner, "Student Discipline in the Public Schools," Current Municipal Problems, 15 (1988): 107-114.
- Friedman, Lawrence M., "Limited Monarchy: The Rise and Fall of Student Rights," in David Kirp and Donald Jensen (eds.), School Days, Rule Days. Philadelphia: Falmer Press, 1986: 238-256.
- Friedrich, Carl J., "Authority, Reason, and Discretion," in Carl J. Friedrich (ed.), Authority. Cambridge: Harvard University Press, 1958: 28-49.
- Galligan, D.J. Discretionary Powers: A Legal Study of Official Discretion. New York: Oxford University Press, 1990.
- Gallup, George, "The Seventeenth Annual Gallup Poll of the Public's Attitudes Toward the Public Schools," Phi Delta Kappan, 68 (1986): 347-355.
- Gellhorn, Ernest, and Ronald M. Levin. Administrative Law and Process in a Nutshell (3d ed.). St. Paul, Minnesota: West Publishing Company, 1990.

Glazer, Nathan, "Towards an Imperial Judiciary," Public Interest, 41 (1975): 104-124.

Handler, Joel F. The Conditions of Discretion: Autonomy, Community, Bureaucracy. New York: Russell Sage Foundation, 1986.

Hazard, William R., "The Law and Schooling: Some Observations and Questions," in Eleanor P. Wolf (ed.), Conflicts and Tensions in the Public Schools. Beverly Hills, California: Sage Publications, 1977: 45-69.

Hogan, John C. The Schools, the Courts, and the Public Interest (2d ed.). Lexington, Massachusetts: Lexington Press, 1985.

Hoy, Wayne K., and Cecil G. Miskel. Educational Administration: Theory, Research, and Practice. New York: Random House, 1987.

Hughes, Larry, and William A. Gordon, "Frontiers of the Law," in Clifford P. Hooker (ed.), The Courts and Education. Seventy-seventh Yearbook of the National Society for the Study of Education. Chicago: University of Chicago Press, 1978: 337-345.

Imber, Michael, and David E. Gayler, "A Statistical Analysis of Trends in Education-Related Litigation," Educational Administration Quarterly, 24 (1988): 55-78.

_____, and Tyll van Geel. Education Law. McGraw Hill, 1993.

Kirp, David L., "The Fourth R: Reading, Writing, 'Rithmetic,--and Rules," in David Kirp and Donald Jensen (eds.), School Days, Rule Days. Philadelphia: Falmer Press, 1986: 1-22.

_____, "Professionalization as a Policy Choice: British Special Education in Comparative Perspective," World Politics, 34 (1982): 137-175.

Koenig, Robert A., "The Law and Education in Historical Perspective," in Clifford P. Hooker (ed.), The Courts and Education. Seventy-seventh Yearbook of the National Society for the Study of Education. Chicago: University of Chicago Press, 1978: 9-25.

LaMorte, Michael W. School Law: Cases and Concepts (4th ed.). Boston: Allyn and Bacon, 1993.

- Leys, Wayne A., "Ethics and Administrative Discretion," Public Administration Review, 3 (1943): 10-23.
- Lufler, Henry S., "Debating With Untested Assumptions," Education and Urban Society, 11 (1979): 450-464.
- _____, "Unintended Impact of Supreme Court School Discipline Decisions," in M.A. McGhehey (ed.), Contemporary Legal Issues in Education. Topeka, Kansas: National Organization on Legal Problems of Education, 1979: 102-111.
- Manley-Casimir, Michael, "School Governance as Discretionary Justice," School Review, 82 (1974): 347-363.
- Mawdsley, Ralph D., "Constitutional Rights of Students," in Clifford P. Hooker (ed.), The Courts and Education. Seventy-seventh Yearbook of the National Society for the Study of Education. Chicago: University of Chicago Press, 1978: 162-187.
- McCarthy, Martha W., and Nelda Cambron-McCabe. Public School Law: Teachers' and Students' Rights (3d ed.). Boston: Allyn and Bacon, 1992.
- Menacker, Julius. School Law: Theoretical and Case Perspectives. Englewood Cliffs, New Jersey: Prentice Hall, Inc., 1987.
- Muir, William K., Jr., "Teachers Regulation of the Classroom," in David Kirp and Donald Jensen (eds.), School Days, Rule Days. Philadelphia: Falmer Press, 1986: 109-124.
- Mashaw, Jerry L., "Conflict and Compromise Among Models of Administrative Justice," Duke Law Journal (1981): 181-213.
- Neal, David, and David L. Kirp, "The Allure of Legalization Reconsidered: The Case of Special Education," Law and Contemporary Problems, 48 (1985): 63-89.
- Nolte, Chester A. School Law in Action: 101 Key Decisions With Guidelines for School Administrators. West Nyack, New York: Parker Publishing Company, 1971.
- Note, "Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance," Harvard Law Review, 94 (1981): 1106-1127.

- Nystrand, Raphael O., and W. Frederick Staub, "The Courts As Educational Policy Makers" in Clifford P. Hooker (ed.), The Courts and Education. Seventy-seventh Yearbook of the National Society for the Study of Education. Chicago: University of Chicago Press, 1978.
- O'Neil, Robert M. Classrooms in the Crossfire. Bloomington, Indiana: Indiana University Press, 1981.
- O'Reilly, Robert C., and Edward T. Green. School Law for the 1990s (2d ed.). Westport, Connecticut: Greenwood Press, 1992.
- Pepinsky, Harold E., "Better Living Through Police Discretion," Law and Contemporary Problems, 97 (1984): 249-267.
- Price, Janet R., Alan H. Levin, and Eve Cary. The Rights of Students (3d ed.). Carbondale and Edwardsville: Southern Illinois University Press, 1988.
- Rebell, Michael A., and Arthur R. Block. Educational Policy Making and the Courts: An Empirical Study of Judicial Activism. Chicago: University of Chicago Press, 1982.
- Reutter, E. Edmund, Jr. The Law of Public Education (3d ed.). Mineola, New York: The Foundation Press, 1985.
- _____. The Supreme Court's Impact on Public Education. Phi Delta Kappa and National Organization on Legal Problems of Education, 1982.
- Rist, Ray C., and Ronald J. Anson, eds. Education, Social Science, and the Judicial Process. New York: Teachers College Press, 1977.
- Rossow, Lawrence F., "Administrative Discretion and Student Suspensions: A Lion in Waiting," Journal of Law and Education, 13 (1984): 417-441.
- Shapiro, Martin, "Administrative Discretion: The Next Stage," Yale Law Journal, 92 (1983): 1487-1522.
- Schwartz, Bernard. Administrative Law. Boston: Little Brown, 1976.
- Shumavon, Douglas H. and Kenneth H. Hibbeln, eds. Administrative Discretion and Public Policy Implementation New York: Praeger Publishers, 1986.

Sorenson, Gail P., ed. Critical Issues in Education Law: The Role of the Federal Judiciary in Shaping Public Education. Topeka, Kansas: National Organization on Legal Problems of Education, 1988.

Strahan, Richard D., and L. Charles Turner. The Courts and the Schools: The School Administrator and Legal Risk Management Today. New York: Longman, 1987.

Swidler, Ann. "The Culture of Policy: Aggregate Versus Individualist Thinking About the Regulation of Education," in David Kirp and Donald Jensen (eds.), School Days, Rule Days. Philadelphia: Falmer Press, 1986: 91-109.

Thurston, Paul W., "Is Good Law Good Education?" in David Berliner (ed.), Review of Research in Education. American Educational Research Association, 1980: 296-336.

Tyack, David, Thomas James, and Aaron Benavot. Law and the Shaping of Public Education, 1785-1954. Madison, Wisconsin: University of Wisconsin Press, 1987.

Valente, William D. Education Law; Public and Private. St. Paul: Minnesota, 1985.

van Geel, Tyll. Authority to Control the School Program. Lexington, Massachusetts: Lexington Books, 1976.

_____. The Courts and American Education Law. Buffalo, New York: Prometheus Books, 1987.

West, William F., "Structuring Administrative Discretion," American Journal of Political Science, 28 (1984): 340-361.

Yudof, Mark G., David L. Kirp, and Betsy Levin (3d ed.) Educational Policy and the Law. St. Paul, Minnesota: West Publishing Company, 1992.

Zirkel, Perry A., and Henry F. Reichner, "Is the In Loco Parentis Doctrine Dead?" Journal of Law and Education 15 (1986): 271-283.

_____, and Sharon N. Richardson, "The 'Explosion' in Education Litigation," Education Law Reporter, 53 (1989): 767-792.

Table of Cases

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966 (1982).

Carey v. Piphus, 435 U.S. 247 (1978).

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

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

Ingraham v. Wright, 430 U.S. 651 (1977).

New Jersey v. T.L.O., 469 U.S. 325 (1985).

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

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Kossman v. Conran, 572 NE.2d 728 (Ohio App. 1988).

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State v. Moore, 603 A.2d 513 (N.J. Super. A.D. 1992).

Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992).

APPENDIX

Analyses of these nine Supreme Court cases might lead one to believe that the high Court's decision resolves a particular issue, that one needs only to discern the principles involved in the judgment and appropriate administrative procedures can be created or modified. Examining these opinions of the Supreme Court can also lead to the question of relevance: What do these issues litigated in cases fifteen and twenty years ago have to do with current issues in school discipline? Do the First, Fourth, Eighth, and Fourteenth Amendment problems described earlier still have relevance in schools at the present time? Has the Supreme Court resolved some of these difficulties for administrators and students so that there are no longer significant points of opposition? Has the refinement which the Court has effected in Bethel and Hazelwood on First Amendment, in T.L.O. on search and seizure, in Carey on liability, and in Ingraham on punishment left these issues for schools to manage without the necessity of Court involvement? On the contrary, despite a slight decrease in school law litigation in the area of discipline, all of these issues are currently being litigated actively in state and federal courts. A review of selected current cases demonstrates that the terminology used by the Supreme Court in the cases previously analyzed, continues to reappear in current cases.

In a recent non-disciplinary First Amendment case, a

fifth grade student filed suit alleging violation of her rights.⁴⁰⁹ She sought an injunction because a teacher and principal would not permit her to distribute a survey as part of her class project. Because of certain religious questions, school personnel found parts of the survey objectionable. The court, noting that the rights of students are not equal to those of adults in the school setting, followed the reasoning in Hazelwood. The court accepted the position of school personnel that, among other concerns, the survey did not seem appropriate for some students, and its distribution could be viewed as an endorsement by the school. Reaffirming that these were legitimate pedagogical concerns, the school officials' actions were concluded to be reasonable and not violative of the student's rights.

Two recent high school T-shirt cases reached different conclusions in challenging First Amendment suppression by school officials. In Oklahoma students filed suit and sought a preliminary injunction when a superintendent and principal prevented students from wearing a specially designed T-shirt displaying a slogan from a Bacardi rum ad: "The best of the night's adventures are reserved for people with nothing planned."⁴¹⁰ Disciplinary action was

⁴⁰⁹Duran by and through Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991).

⁴¹⁰McIntire v. Bethel School, Independent School District No. 3, 804 F. Supp. 1415 (W.D. Okla. 1992).

threatened, including an arrest of possible protestors. Some students were subsequently suspended. The district court ruled that with a presumption of First Amendment protection applicable to the T-shirt's slogan, the school district's arguments did not carry a preponderance of the evidence. A "reasonable person" standard employed by the court concluded that most people would not infer the slogan as an advertisement for alcohol. In contrast, the suspension for one day of a Virginia middle school student who wore a T-shirt with the phrase "Drugs Suck!" led to a lawsuit, in conjunction with the ACLU.⁴¹¹ The student filed a civil rights lawsuit claiming violation of First Amendment and due process rights. The district court acknowledged that the discussion between the father and the principal, as well as proper notice to the student, satisfied due process guarantees. Concerning the First Amendment claim, the district court declared that it was reasonable for the principal to maintain that the word "suck" had sexual implications. Since such a word might be objectionable to some students and teachers, the special characteristics of the school allowed restriction on the use of such a word.

The Ingraham corporal punishment case was decided over fifteen years ago, when only two states had banned the use

⁴¹¹Broussard v. School Board of the City of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1992).

of corporal punishment in schools. Despite the fact that in 1991 twenty-one states had laws preventing its use, litigation continues to reach the courts. A Kentucky third-grader with bruises from three separate paddlings, filed suit in district court under the Civil Rights Act, 42 U.S.C. § 1983, claiming violation of due process rights due to the paddling.⁴¹² A social worker and a police investigator labelled the punishment inflicted excessive, whereas the Superintendent's investigation of the incident found the punishment carried out was in accordance with school procedures. The district court, in agreement with the Ingraham decision, dismissed the suit stating that a violation of state tort law does not necessarily rise to a level of constitutional magnitude, and that the student's injuries were not so severe as to shock the conscience. However, a seven-year-old hyperactive student was spanked over sixty times by a principal.⁴¹³ The principal was convicted by a jury of simple assault, a decision upheld by an appeals court. The principal's appeal hinged on the wording of a Pennsylvania statute which allowed a lower standard from "substantial pain" to "extreme pain" for adults who supervise minors. He maintained that the mother had signed the school's discipline form and that the state's

⁴¹²Brown v. Johnson, 710 F. Supp. 183 (E.D. Ky. 1989).

⁴¹³Commonwealth v. Douglass, 588 A.2d 53 (Pa. Super. 1991).

wording of "extreme pain" was unconstitutionally vague. The appeals court countered that the principal's paddling went beyond "reasonable discipline," and that he should have realized the corporal punishment inflicted was not in the child's best interest and violated the law. The principal's sentence of probation for twelve months, 150 hours of community service, and a suspended jail sentence, assigned by the lower court, stood unchanged.

More frequent than corporal punishment cases are those challenging suspension or expulsion. The terminology discussed in the previous chapters continues to surface in these cases as well. Reminiscent of the troublesome suspension statute in the Goss case which was overturned, an Ohio school ran afoul of its own state statute in a suspension case.⁴¹⁴ The school district delayed enforcing the suspension of a student for striking another student until all appeals had run out in the school district and the trial court. When the school year ended and the district attempted to enforce the actual suspension the following school year, an appeals court ruled that Ohio law clearly stipulated that a suspension for an incident could not be carried over into the next year. In a similar fashion, an Alabama school ran up against the state's compulsory

⁴¹⁴Kossman v. Conran, 572 NE.2d 728 (Ohio App. 1988).

attendance law in an unusual way.⁴¹⁵ A civil appeals court overturned a lower court's decision to permanently expel a thirteen-year-old student who brought a handgun and ammunition to school. Citing the state's compulsory attendance law that had not been adequately considered, the court questioned whether the expulsion was reasonable in proportion to the offense, the age of the student, and the law requiring school attendance until the age of sixteen. An Illinois law became entangled in the expulsion of two students for fighting near school grounds on the way home from school.⁴¹⁶ A trial court enjoined the board of education for expelling the students, though Illinois law permitted expulsion for gross disobedience or misconduct, whether the incident occurred at school or en route to and from school. An appeals court, acknowledging the broad discretion of school officials in discipline matters, ruled the punishment too severe and an abuse of discretion.

With an increase in drug involvement of students in the late 1980s and the presence of weapons at school, there has been an increase in litigation challenging an administrator's search of students. Court decisions in this area still show evidence of disagreement. A New Jersey case, where T.L.O. originated, involved an assistant

⁴¹⁵C.L.S. v. Hoover Board of Education, 594 So.2d 138 (Ala. Civ. App. 1991).

⁴¹⁶Robinson v. Oak Park and River Forest High School, 571 NE.2d 931 (Ill. App. 1st Dist. 1991).

principal's search of a student's book bag and confiscation of fifteen vials of cocaine, based on information received from a guidance counselor.⁴¹⁷ Though the student denied the bag was his, juvenile charges were filed. The court ruled the evidence was obtained unconstitutionally and should therefore be suppressed. A New Jersey Superior Court reversed the lower court decision, declaring that the search had satisfied the guidelines of reasonable suspicion: the search was justified at the inception because of the guidance counselor's information and the principal's knowledge of a previous marijuana incident; the search was reasonably related in scope to the situation creating the search, because the principal did not proceed with a search of the student's book bag until the suspicious behavior occurred on the part of the student in denying the bag was his. In a more intrusive search, an Ohio student, arousing suspicion due to an odor of marijuana and physical symptoms of dilated pupils and sluggishness, agreed to the search of his bag and jacket.⁴¹⁸ Finding no drugs, school officials subsequently proceeded with a pat-down search and then asked the student to disrobe to his shorts. The search produced no evidence of drug use or possession, and the student sued for violation of his Fourth Amendment rights. The district court conducted an analysis parallel to the one above with

⁴¹⁷State v. Moore, 603 A.2d 513 (N.J. Super. A.D. 1992).

⁴¹⁸Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992).

these results: the smell and appearance of the student provided school officials with reasonable grounds to suspect a violation of school rules; concerning the search being reasonably related in scope to the circumstances, the court noted certain privacy steps taken by school officials in carrying out the search. In view of this, the district court granted summary judgment to the school.

Constitutional torts invoking discipline initiated under 42 U.S.C. section 1983 have not been frequent cases, but they continue to recur. Several recent cases, while not following the same pattern as Wood and Carey, are illustrative of the ongoing problems with discretion and a school administrator's liability. As an example, a Texas student sued the school board and an administrator to recover damages for his suspension, for selling drugs at school.⁴¹⁹ In various appeals and hearings involving school officials before the litigation was initiated, the punishment was reduced from expulsion to a sixty-day to a thirty-day suspension. The district court examined the due process steps provided the student and found them admissible. The court also reviewed the action in light of a Texas statute involving grounds for removing a student from his/her home campus, which applied to the student. The court required that the district's rule be rationally related to the wrongdoing from which the school district

⁴¹⁹Salazar v. Luty, 761 F. Supp. 45 (S.D. Tex. 1991).

sought protection, that there be protections for a student in enforcing such a rule, and that there be a standard of substantial evidence applied in the school board's decision. Finding the school's rule and the action taken reasonable, the court denied damages to the student. Though not a civil rights lawsuit, a recent case in Massachusetts involved the injury of a special education student in a cafeteria incident.⁴²⁰ The student sued claiming his special programming and the supervision in this incident were both negligent. An appeals court upheld the dismissal of the suit by a lower court, citing the Massachusetts Tort Claims Act as exempting an employee who is exercising a "discretionary function." School discipline and conduct were referred to as exempt discretionary functions.

Two recent liability cases filed under the Civil Rights Act have opposing views of liability and duty of care questions. In a Pennsylvania case decided by the Third Circuit, two female students filing under 42 U.S.C. 1983 and 1985 (2) against the school district and other school personnel, alleged a violation of their civil rights due to repeated incidents of sexual molestation in the bathroom and darkroom of a graphic arts class by other male students.⁴²¹ The court of appeals accepted the school's argument that

⁴²⁰Bencie v. City of Malden, 587 NE.2d 795 (Mass. App. Ct. 1992).

⁴²¹D.R. v. Middle Bucks Area Voc. Tech. School, 972 F.2d 1364 (3rd Cir. 1992).

compulsory attendance laws did not create a special relationship of constitutional dimensions such that a duty of care was implicated in protecting students from certain actions of others. Finding no conspiracy on the part of school personnel to deprive students of their rights and no evidence of an inherently unsafe situation in the classroom, the appeals court affirmed the lower court's finding of immunity for and no claim against school officials. In contrast, the Fifth Circuit reached a different conclusion in a case involving a fourteen-year-old female student molested by her teacher.⁴²² The Fifth Circuit maintained that compulsory attendance requirements did in fact establish a special relationship between students and school personnel of constitutional proportions, with an affirmative constitutional duty on the part of school employees to protect students from being deprived of their liberty interest, implicated in an incident of sexual molestation. Citing a previous 1990 ruling, the appeals court declared that school officials had to substantiate that "reasonable officials . . . could have believed . . . that their conduct comported with established legal standards."⁴²³ The court declared that, in addition, the student's substantive due

⁴²²Doe v. Taylor Independent School District, 975 F.2d 137 (5th Cir. 1992).

⁴²³Id. at 139 (quoting Stoneking v. Bradford Area School District, 882 F.2d 720, 726 (3rd Cir.) cert. denied 493 U.S. 1044 (1990)).

process rights were violated in the incident.

These cases illustrate some of the concepts from the earlier students' rights cases that are currently being hammered out in the courts.

VITA

Thomas E. Biggs was born in Knoxville, Tennessee on October 10, 1946. He graduated from McCallie School in Chattanooga, Tennessee and received a Bachelor of Arts in English from the University of Tennessee--Knoxville (UTK) in 1968.

That same year Mr. Biggs took a position at Lakeshore Mental Health Institute in Knoxville while beginning graduate work in English at UTK. In 1969 he accepted a teaching position in English and Latin at Battle Ground Academy in Franklin, Tennessee. He came back to Knoxville two years later and while working with his father Everett Biggs, completed the Master of Arts degree in English from UTK in 1973.

He returned to Lakeshore Mental Health Institute in 1973 as a Teacher/Counselor at Riverbend School, the child and adolescent program for the hospital. During that time he began a master's degree in Educational Psychology, receiving the Master of Science degree from UTK in 1977. Mr. Biggs became Principal/Inpatient Director of Riverbend School in 1976.

While at Riverbend School, Mr. Biggs began working on administrative certification at UTK and was later admitted to the doctoral program in Educational Administration. In 1983 he left Lakeshore to take a position as Dean of

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