Notes

CONSTITUTIONAL RIGHTS OF HIGH SCHOOL STUDENTS

I. INTRODUCTION

The enjoyment of the right of attending the public schools is necessarily conditioned on compliance with reasonable rules, regulations, and requirements of school authorities. Breaches of these rules or regulations may result in disciplinary action against the student such as suspension or expulsion. The enactment of regulations for the administration of public schools and discipline and control of students is primarily a matter for the administrative authorities concerned, who have a wide measure of discretion. Accordingly, review by the courts is limited to the review of such administrative action to protect against arbitrary, capricious, or unreasonable exercise of administrative discretion. The wisdom of school rules will not be questioned but the reasonable use of the administrator's authority and discretion to maintain order may be,[1] but only to the extent that the United States Constitution requires it.[2]

In Iowa, "the operation of the public schools . . . and in accord with applicable statutes is clearly vested in the duly elected directors of the various local school boards. This includes authority to adopt rules for its own government and that of all its pupils."[3] However, this authority to promulgate rules may not be delegated to voluntary associations which schools are free to join.[4] Even in the absence of statutes the Supreme Court has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[5] It has been the job of the courts to attempt to strike a balance between the discretionary control of school authorities and the constitutionally protected rights of public secondary school students. The purpose of this Note is to explore the extent to which the courts, both state and federal, have found it necessary to review broad administrative powers in order to preserve the constitutionally protected rights of public high school students.

Recent years have witnessed an abundance of litigation by students attempting to achieve in the school setting the same constitutional rights which adults enjoy. The doctrine of *in loco parentis* whereby the school assumes the

1. Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966).
2. Whitfield v. Simpson, 312 F. Supp. 889, 896-97 (E.D. Ill. 1970).
3. Board of Directors v. Green, 147 N.W.2d 854, 857 (Iowa 1967). *See* IOWA CODE §§ 277.23-277.30, 274.1, 279.8, 257.25 (1973).
4. Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 562 (Iowa 1972).
5. Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503, 507 (1969).

role of the parent while the child is in school is no longer recognized by the courts.[6] Although courts have not granted full constitutional rights to public secondary students they now generally recognize that these students do have certain rights under the first, fourth, fifth, sixth, ninth, and fourteenth amendments to the United States Constitution. The scope of this Note will be limited to the first and fourteenth amendments, where most of the recent litigation has occurred.

II. First Amendment

Any discussion concerning first amendment rights which may be available to high school students must begin with the landmark case of *Tinker v. Des Moines Independent Community School District*.[7] In *Tinker*, the Court held that the wearing of armbands by public school students during school hours in protest of the Vietnam War was constitutionally protected under the first and fourteenth amendments as a form of expression since it could not be demonstrated by school authorities that such symbolic expression was materially and substantially disruptive of the educational process.[8] Substantially, first amendment rights were extended to students when the Court said:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.
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> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[9]

Thus, the test under *Tinker* is whether a given student expression could reasonably have led school authorities to forecast substantial disruption or material interference with school activities or intrusion into the school affairs or the lives of others.[10] Post-*Tinker* cases, which are numerous, have involved

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6. For a discussion of the concept of *in loco parentis*, *see* 1 W. Blackstone, Commentaries 453 (5th ed. 1773):

> He may also delegate part of his parental authority during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Cf. Boyd v. State, 88 Ala. 169, 7 So. 268 (1890); *but see* People v. Jackson, 65 Misc. 2d 909, 911, 319 N.Y.S.2d 731, 733 (App. T. 1971).

7. 393 U.S. 503 (1969).

8. *Id.* at 514. *But see* Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971) where a similar protest was not allowed because of its disruptive effect at a military high school in which 40% of the students were children of military personnel.

9. Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503, 506, 511 (1969).

10. *Id.* at 509.

such issues as hair style,[11] student demonstrations,[12] and student publications.[13] Although *Tinker* was a form of symbolic expression, most of the litigation has centered on students' rights to actual expression.

The Supreme Court has said that the protection of speech or expression is not absolute.[14] Since *Chaplinsky v. New Hampshire*[15] it has been recognized that:

> Allowing the broadest scope to the languge and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[16]

The "fighting" words exception mentioned in *Chaplinsky* presently falls into the "clear and present danger" exception first expressed by Justice Holmes in *Schenck v. United States*[17] in 1919. In the context of the public school, the *Tinker* decision defined "clear and present danger" as that which materially disrupts classwork or involves substantial disorder or invasion of the rights of others.[18] Accordingly, student expressions which are ruled obscene,[19] "fighting" words,[20] or libelous[21] are not protected by the first amendment.

There is evidence that first amendment rights are not equally available to those of all ages. In a concurring opinion in *Ginsberg v. New York*,[22] Justice Stewart said: "I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition

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11. A "symbolic expression" through hair style is not recognized as a first amendment freedom of expression. Bishop v. Colaw, 450 F.2d 1069, 1074 (8th Cir. 1971). However, it may be protected under the equal protection and due process clauses of the fourteenth amendment.

12. Dunn v. Tyler Ind. School Dist., 460 F.2d 137 (5th Cir. 1972); Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972); Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969).

13. Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970); Egner v. Texas City Ind. School Dist., 338 F. Supp. 931 (S.D. Tex. 1972).

14. *See* Cox v. Louisiana, 379 U.S. 536, 555 (1965); Adderley v. Florida, 385 U.S. 39 (1966).

15. 315 U.S. 568 (1942).

16. *Id.* at 571-572.

17. 249 U.S. 47 (1919).

18. Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503, 513 (1969).

19. Close v. Lederle, 424 F.2d 988, 990 (1st Cir. 1970); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 527 (C.D. Cal. 1969); Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1392 (E.D. Mich. 1969).

20. Norton v. Discipline Comm. of East Tenn. Univ., 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970).

21. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967).

22. 390 U.S. 629 (1968).

of First Amendment guarantees."[23] Thus, the general standard for obscenity[24] is different than that for minors.[25] In *Baker v. Downey City Board of Education*[26] high school students were suspended for distributing an underground publication just outside school grounds. It contained several "four-letter" words, a drawing of President Nixon making an obscene gesture, two drawings of nude women, and two erotic poems. The court stated that: "Neither 'pornography' nor 'obscenity', as defined by law, need be established to constitute a violation of the rules against profanity or vulgarity . . . . The plaintiffs' First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas."[27] The court took the view that the distribution of such literature may be constitutionally proscribed without a showing of substantial distraction attributable to it. In *Vought v. Van Buren Public Schools*,[28] however, a federal district court in Michigan enjoined the suspension of a high school student for having in his possession a tabloid publication containing "four-letter" words because the paper contained some articles of literary merit. *Vought* appears to be the better view. Profanity, as such, is probably not obscene[29] and much of today's worthwhile literature contains "four-letter" words.

In *Eisner v. Stamford Board of Education*[30] the second circuit held that, because of such factors as the large size of university campuses and the tendency of students to spend a greater portion of their time there, the inhibitive effect of a prohibitive policy statement (prohibition of dissemination of literature at the school) might be greater on the university campus than on the premises of a secondary school and the justification for such a policy might be less compelling in view of the greater maturity of college students.[31] In a similar vein, the court in *Baker v. Downey City Board of Education*[32] stated: "The right to criticize and to dissent is protected to high school students but they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults."[33] This view—that minors are treated differently than adults in the eyes of the law—is not unique to the educational

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23. *Id.* at 649-50.
24. A Book Named "John Cleland's Memors of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966).
25. Ginsberg v. New York, 390 U.S. 629, 636 (1968).
26. 307 F. Supp. 517 (C.D. Cal. 1969).
27. *Id.* at 526-27.
28. 306 F. Supp. 1388 (E.D. Mich. 1969).
29. *See* Cohen v. California, 403 U.S. 15 (1971).
30. 440 F.2d 803, 808 n.5 (2d Cir. 1971).
31. The Supreme Court has reversed an Eighth Circuit decision, *Papish v. Board of Curators of the Univ. of Mo.*, 464 F.2d 136 (8th Cir. 1972), which had upheld the dismissal of a graduate student because she had distributed an underground newspaper on the campus. Papish v. University of Mo. Bd. of Curators, 41 U.S.L.W. 3496 (U.S. March 19, 1973). The Court found that Miss Papish had been dismissed merely because of the disapproved content of the newspaper rather than the time, place or manner of distribution.
32. 307 F. Supp. 517 (C.D. Cal. 1969).
33. *Id.* at 527.

scene.[34]

Many of the challenges to the freedom of speech guaranteed in the first amendment involve student publications distributed in or near school buildings. Blanket prohibitions on the distribution of all literature are clearly unconstitutional as violative of the first amendment.[35] Only where school authorities can reasonably forecast a material and substantial disruption of school activity (the *Tinker* test) may school authorities proscribe distribution of literature.[36] Any restriction on dissemination of literature amounts to prior restraint, a practice which has never been favored by the courts.[37] Any attempt at prior restraint on student newspapers requires a heavy burden of justification in order not to violate the first amendment guarantee of freedom of speech.[38] To avoid illegal censorship by using prior restraint schools must insure some specific review procedure by school officials before distribution. For example, the time period in which school officials must decide whether or not to permit distribution should be stated, how the material is to be submitted for clearance, and guidelines defining what is "printed material" should be set up.[39]

It is generally held, however, that the constitutional right to freedom of expression may be modified or curtailed by school regulations "reasonably designed to adjust these rights to the needs of the school environment."[40] Specifically, school officials may exercise a reasonable prior restraint on the content of the publication distributed on school premises during school hours only in those special circumstances where they can "reasonably 'forecast substantial disruption of or a material interference with school activities.' "[41] A similar policy prevails where the printed material is obscene or libelous.[42] However, the judgment of the school authorities must be based on "reasonableness" and not upon the "undifferentiated fear or apprehension of disturbance."[43] If there is no showing that the distribution of literature *would* (not *may*) "materially and substantially" interfere with the operation of the school, the restraint is unconstitutional.[44]

Although schools may not absolutely ban the distribution of student newspapers, school authorities may promulgate reasonable, specific regulations

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34. *See generally* Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37 (1970).
35. Fujushima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973).
36. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971).
37. Freedman v. Maryland, 380 U.S. 51 (1965); Near v. Minnesota, 283 U.S. 697 (1931).
38. *Cf.* New York Times v. United States, 403 U.S. 713 (1971).
39. Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971). *Cf.* Freedman v. Maryland, 380 U.S. 51 (1965). *See* Baughman v. Freienmuth, 41 U.S.L.W. 2664 (U.S. May 17, 1973).
40. Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass. 1970).
41. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971).
42. Shanley v. Northeast Ind. School Dist., 462 F.2d 960, 970-71 (5th Cir. 1972).
43. Tinker v. Des Moines Ind. School Dist., 393 U.S. 503, 508 (1969).
44. *Id.* at 509.

setting forth the time, manner, and place of any distributions.[45] However, this does not mean that students must get permission each time they want to exercise their first amendment rights. School authorities have the burden of informing students, preferably by rule, as to when, how, and where they may distribute materials.[46]

Students frequently seek to express their opinions in symbolic ways. The right to do this is found in *Tinker*, where the wearing of arm bands in protest of the Vietnam War was held to be a symbolic form of speech. But when the symbolic expression would cause disruptions in the schools they may be proscribed.[47] Two fifth circuit cases decided by the same panel on the same day, and cited with approval in *Tinker*, give some insight into how courts look at these expressions.[48] In both cases students had worn to school "freedom" buttons containing the words "One Man One Vote." In *Burnside v. Byars*[49] the student persisted after being told that he was in violation of school rules. The student was suspended despite the fact no apparent disruptions had occurred. The district court denied relief but the circuit court reversed, holding that where no material disruption occurs, the breach of the school regulation forbidding such expressions was not conduct meriting suspension. In *Blackwell v. Issaquena County Board of Education*,[50] however, there was evidence of "confusion, disrupted class instruction, and . . . a general breakdown of orderly discipline . . . ."[51] The student was suspended. In upholding the district court's denial of injunctive relief, the appellate court said: "It is always within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine. This is not only proper in our opinion but is necessary."[52] The only differance in the two cases was the disruption caused by the expression in *Blackwell*. This is the same "substantial and material" disruption of the educational process which *Tinker* says is the only basis for curtailing otherwise protected rights under the first amendment.

Student demonstrations, by their very nature, are foreseeably disruptive. For this reason, the courts have been reluctant to protect this form of expression as a first amendment right. In *Tate v. Board of Education*[53] the eighth circuit upheld a five day suspension of twenty-nine black students who had

45. Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973).
46. *Id.*
47. In Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3566 (U.S. April 23, 1973), the court upheld the suspension of a student who had worn a confederate flag emblem on his clothing in a school previously disrupted by racial polarization. The suspension was upheld despite the fact that the school conduct code which prohibited wearing of such emblems was found to be unconstitutional in violation of the first amendment.
48. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).
49. 363 F.2d 744 (5th Cir. 1966).
50. 363 F.2d 749 (5th Cir. 1966).
51. *Id.* at 751.
52. *Id.* at 753.
53. 453 F.2d 975 (8th Cir. 1972).

walked out of an assembly in violation of school rules after the song "Dixie" was played. This form of expression was held not to be a protected first amendment right. In *Dunn v. Tyler Independent School District*[54] black students had held a walkout as a protest over the method of selecting school cheerleaders. Most of the protestors were suspended for three days. The fifth circuit reversed the district court's holding that this was a protected form of expression under the first amendment.

In summary, it appears that public secondary school students have been granted significant first amendment rights by the *Tinker* decision. Students may now express themselves, either actually or symbolically, in the school setting. Restraints imposed by school officials will be upheld in the courts only in those rare circumstances where they can reasonably forecast substantial disruption of or a material interference with school activities on account of the student expression. Schools may not put a blanket prohibition on distribution of student newspapers. School officials may, however, proscribe those publications which are obscene, libelous, or would materially and substantially disrupt the educational process. Prior restraint will be closely scrutinized, but the schools may regulate the time, manner, and place in which distribution of written materials may occur. If students choose litigation to secure their first amendment rights, school authorities bear the burden of justifying school action; bare allegations that a basis existed are not sufficient.[55]

III. Fourteenth Amendment

A. *Due Process*

1. *Procedural Due Process*

The fourteenth amendment to the United States Constitution prohibits states from depriving "any person of life, liberty, or property, without due process of law." It is now beyond question that a student's interest in continuing his high school education is within the purview of the fourteenth amendment's due process protection.[56] In addition, the policies, regulations, and acts of local public boards of education are clearly "state action."[57] Thus, local, county, and state public school authorities must observe the requirements of the fourteenth amendment.

Prior to *Dixon v. State Board of Education*[58] in 1961, the due process guaranteed by the fourteenth amendment was generally limited to the area of criminal law. In fact, procedural due process in criminal law has only recently

54. 460 F.2d 137 (5th Cir. 1972).
55. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971); Scoville v. Board of Educ., 425 F.2d 10, 13-14 (7th Cir. 1970); Vail v. Board of Educ., 354 F. Supp. 592, 597 (D.N.H. 1973).
56. Betts v. Board of Educ., 466 F.2d 629, 633 (7th Cir. 1972).
57. Graham v. Knutzen, 351 F. Supp. 642, 664 (D. Neb. 1972).
58. 294 F.2d 150 (5th Cir. 1961).

been extended to minors.[59] While *Tinker* did not directly deal with procedural due process, the assertion of the Supreme Court's concern for the constitutional rights of students within the schools and the explicit statement that the exercise of the rights is not confined to approved classroom activities dealing with non-controversial matters indicates that there is a Supreme Court mandate to provide "fundamental constitutional safeguards." Presumably, this means that public schools must promulgate rules and observe practices that meet the requirements of due process.

Insofar as which specific procedures are necessary to satisfy procedural due process, the college-oriented case of *Dixon v. State Board of Education*[60] set forth the ground rules which have been followed by courts in dealing with secondary school disciplinary actions. In *Dixon* the plaintiff had been summarily expelled from a state supported college without notice as to why and without a hearing. In finding that the university had failed to observe constitutionally guaranteed rights of the student, the court held that (1) a notice, containing a statement of the specific charges and grounds which, if proven, would justify expulsion under the board of education regulation and (2) a hearing which provides the accused an opportunity to be heard are required. In addition, to avoid the constitutional "void for vagueness" problem, the school must promulgate a definite, explicit set of rules which gives the student notice of what conduct is prohibited.[61] However, school officials are not precluded from taking appropriate action in facing problems of discipline or distraction simply because there is no pre-existing rule on the books.[62] Several decisions have hinged on the fact that school regulations were too vague or overbroad.[63] However, courts have upheld regulations which required students to "conduct themselves in such a manner that reflects credit upon the university,"[64] or which warned of discipline for "gross disobedience,"[65] and even a Texas statute which provided a penalty for "incorrigible conduct."[66]

Ordinarily, by affording the student definite notice of the charge against him, by whom it was made, and an opportunity to confront a teacher who has accused him of misconduct, the student receives procedural due process of law in that he has been given notice and an opportunity to be heard. But when a student has been charged with misconduct which might result in expulsion or indefinite suspension, procedural due process requires that a hearing must be held to determine the student's responsibility for the alleged misconduct.[67] The

59. *In re* Gault, 387 U.S. 1 (1967).
60. 294 F.2d 150 (5th Cir. 1961).
61. *See* Connally v. General Const. Co., 269 U.S. 385 (1926).
62. Richards v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970).
63. Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970); Sullivan v. Houston Ind. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968); *see* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 564-65 (Iowa 1972).
64. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).
65. Whitfield v. Simpson, 312 F. Supp. 889 (E.D. Ill. 1970).
66. Southern v. Board of Trustees, 318 F. Supp. 355 (N.D. Tex. 1970).
67. Graham v. Knutzen, 351 F. Supp. 642, 665 (D. Neb. 1972).

required hearing is administrative in nature and not criminal.[68] Therefore, there is no right to counsel[69] unless it is a proceeding for expulsion rather than a suspension.[70] Several states have statutes conferring the right to counsel at a suspension or expulsion hearing.[71] There is no sixth amendment right to confront one's accusers unless expulsion or indefinite suspension is the penalty.[72]

When the penalty imposed is a suspension for a relatively short period of a week or less, procedural due process does not require a hearing at all.[73] But a suspension for thirty days requires a hearing.[74] Even where expulsion is a potential disciplinary action, however, there is no "right" to a public hearing; appointment of counsel at public expense; process to compel the attendance of witnesses; proof of the charges beyond a reasonable doubt; a unanimous decision."[75]

Procedural due process generally is complied with in cases where a student may be expelled or indefinitely suspended if the student (1) has notice of the charges against him, (2) has an opportunity to be heard in an administrative type hearing and (3) has prior notice of specifically prohibited conduct which may lead to disciplinary action. There is no general requirement that procedural due process in disciplnary cases requires legal representation, a public hearing, warnings about constitutional privileges, self-incrimination safeguards, compulsory production of witnesses, or other features of federal criminal procedure.[76]

2. *Substantive Due Process*

Substantive due process emphasizes not methods, as does procedural due process, but basic reasons and motives, *i.e.*, what constitutes proper cause of a dismissal or punishment. Vagueness and overbreadth of rules may result in a denial of substantive due process under the fourteenth amendment.[77] But even specifically stated rules may violate the due process clause if they are not relevant to the lawful objectives, processes and functions of the body promulgating the rules. If the rules promulgated have a reasonable relation to a properly

68. Linwood v. Board of Educ., 463 F.2d 763, 770 (7th Cir. 1972).
69. Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966).
70. Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967).
71. *See, e.g.*, N.Y. EDUC. LAW § 3214.6(3)(c) (McKinney 1970).
72. In Tibbs v. Board of Educ., 114 N.J. Super. 287, 276 A.2d 165 (App. Div.), *aff'd*, 59 N.J. 506, 284 A.2d 179 (1971), the constitutional safeguards of cross examination and confrontation with adverse witnesses were required before the board of education could indefinitely suspend or expel a student. *Cf.* Hasson v. Boothby, 318 F. Supp. 1183 (D. Mass. 1970).
73. Linwood v. Board of Educ., 463 F.2d 763, 768-69 (7th Cir. 1972) (seven day suspension upheld); Banks v. Board of Public Instruction, 314 F. Supp. 285, 296 (S.D. Fla. 1970) (ten day suspension upheld).
74. Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971).
75. Linwood v. Board of Educ., 463 F.2d 763, 770 (7th Cir. 1972).
76. *Id.*
77. Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970); Sullivan v. Houston Ind. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968); *see* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 564-65 (Iowa 1972).

authorized purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.[78] If a duly promulgated standard is challenged in the courts, the board of education bears the burden of demonstrating that the standard is relevant to a lawful objective of the school.

Substantive due process in the public schools has been most often litigated in the area of rules concerning hair length for males and dress codes.[79] In recent years the federal courts have increasingly found themselves embroiled in hair length controversies. The Supreme Court has on several occasions denied certiorari in these cases.[80] What little guidance we have from the Court in this area is conflicting. Justice Black, writing as a Circuit Justice in *Karr v. Schmidt*[81] took the position that state regulation of such matters raises no issue of constitutional dimensions calling for review by federal courts. On the other hand, Justice Douglas, dissenting from a denial of certiorari, argued that state regulation of hair length raises a serious equal protection question.[82] The circuit courts of appeal have considered the problem and are split on the issue. The fifth,[83] sixth,[84] ninth,[85] and third[86] circuits have sustained school codes regulating hair length. However, the seventh,[87] first[88] and eighth[89] circuits have concluded that students possess a constitutional right to wear their hair as they choose. The tenth circuit has refused to set aside school regulations concerning hair length, leaving such power entirely to the states.[90] Even the district courts within a circuit have disagreed on the issue. Two district courts in the eighth circuit, for example, have upheld hair regulations despite the circuit's decisions striking down such regulations.[91] In these two cases, however, the courts made it clear that the burden of demonstrating the reasonableness of the regulations was

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78. *Cf.* Nebbia v. New York, 291 U.S. 502, 537 (1934).

79. *See* Comment, *Public Schools, Long Hair, and the Constitution*, 55 IOWA L. REV. 707 (1970).

80. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), *cert. denied*, 409 U.S. 989 (1972). The Court has also denied certiorari in *Lansdale v. Tyler Junior College*, 470 F.2d 659, 664 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3607 (U.S. May 14, 1973), in which the fifth circuit found a "hair" rule unconstitutional as applied to junior college students but reaffirmed its position in *Karr* as to high school students.

81. 401 U.S. 1201 (1971) (On a motion to vacate a stay of injunction pending appeal. Motion was denied).

82. Ferrell v. Dallas Independent School Dist., 393 U.S. 856 (1968), *denying cert.* to 392 F.2d 697 (5th Cir. 1968).

83. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972); Wood v. Alamo Heights Ind. School Dist., 433 F.2d 355 (5th Cir. 1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968).

84. Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970).

85. King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971).

86. Gere v. Stanley, 453 F.2d 205 (3rd Cir. 1971).

87. Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

88. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

89. Torvik v. Decorah Community Schools, 453 F.2d 779 (8th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971). The fourth circuit has also held hair length regulations unconstitutional. Massie v. Henry, 455 F.2d 779 (4th Cir. 1972).

90. Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971).

91. Carter v. Hodges, 317 F. Supp. 89 (W.D. Ark. 1970); Giangreco v. Center School Dist., 313 F. Supp. 776 (W.D. Mo. 1969).

on the schools. In both cases the courts found that the student's appearance had in fact caused school disruptions. Iowa's federal district courts have ruled similar regulations unconstitutional on the three occasions they have been confronted with the issue.[92]

Those courts which hold that students possess a constitutionally protected right to wear their hair as they please disagree as to the source of that right. It has been found in the ninth and first amendments,[93] the equal protection clause of the fourteenth amendment,[94] the due process clause of the fourteenth amendment,[95] and the group of rights found in the "privacy penumbra" of the Bill of Rights.[96] Some find the protection in both the due process and equal protection clauses of the fourteenth amendment.[97] The better reasoned decisions base the source upon the right of privacy penumbra of the Bill of Rights and the due process clause of the fourteenth amendment.[98] The existence of a constitutional right to privacy was recognized in *Griswold v. Connecticut*[99] which dealt with the right of privacy in marriage. Since the right to privacy is a recognized constitutional right, the states (thus the schools) may not infringe upon it unless a rational relationship exists between the educational goals and the restraint imposed.[100] In *Turley v. Adel Community School District*[101] the defendants attempted to show a correlation between a student's hair length and his academic achievement, discipline, opinions, and general character. The court said:

> In short, defendants' contention that a definite correlation exists between long hair and academic achievement is not only unsupported by any competent evidence but borders on the ridiculous. An argument that long hair produces absenteeism or a lower intelligence level is nothing short of ludicrous.[102]

The court went on to hold that the student had a constitutional right to govern his own appearance without interference from school officials.[103]

Another Iowa case, *Sims v. Colfax Community School Dist.*[104] is unique

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92. Torvik v. Decorah Comm. Schools, 453 F.2d 779 (8th Cir. 1972); Turley v. Adel Comm. School Dist., 322 F. Supp. 402 (S.D. Iowa 1971); Sims v. Colfax Comm. School Dist., 307 F. Supp. 485 (S.D. Iowa 1970).
93. Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969).
94. Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970); *see generally* Comment, *Public School Hair Regulations: Are they Constitutional?*, 16 ST. LOUIS U.L.J. 112 (1971).
95. Sims v. Colfax Comm. School Dist., 307 F. Supp. 485 (S.D. Iowa 1970).
96. Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).
97. Lansdale v. Tyler Junior College, 470 F.2d 659, 664 (5th Cir. 1972).
98. *See* Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).
99. 381 U.S. 479 (1965). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973).
100. Torvik v. Decorah Comm. School Dist., 453 F.2d 779 (8th Cir. 1972).
101. 322 F. Supp. 402 (S.D. Iowa 1971).
102. *Id.* at 407.
103. *Id.* at 411. The right apparently does not apply to exclusion from extracurricular activities, however. Hair regulations as applied to interscholastic athletics, for example, have been upheld. Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970). *See* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 565 (Iowa 1972).
104. 307 F. Supp. 485 (S.D. Iowa 1970).

in that the school rule concerning hair on the forehead was enforced against boys and *girls*! Here, of course, the equal protection argument does not apply because the rule is applied to all students in the school. The court held the rule[105] to be unconstitutional because of the protection of the due process clause. Accordingly, school hair rules are reasonable and thus constitutional only if the school can objectively show that such a rule does in fact prevent some disruption or interference with the school process.[106] This is a substantial burden of justification. As the court observed in *Breen v. Kahl*:[107]

> An effort to use the power of the state to impair this freedom must also bear 'a substantial burden of justification', whether the attempted justification be in terms of health, physical dangers to others, obscenity, or 'distraction' of others from their various pursuits. For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human 'being'. It would violate a basic value 'implicit in the concept of ordered liberty' . . . . It would deprive a man or a woman of liberty without due process of law in violation of the Fourteenth Amendment.[108]

B. *Equal Protection*

The fourteenth amendment prohibits denial of equal protection of the laws by the states. A classification under the fourteenth amendment's equal protection clause must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .[109] Classifications based on race, nationality, alienage, religion, and marital status are "suspect" and require a compelling state interest to justify them rather than the "rationality" test used for non-suspect classifications.[110] Classifications based on sex, marriage, and age are discussed in this section as they apply to the public secondary schools. Many of the "hair" cases have been decided on equal protection grounds[111] because the hair regulations are usually aimed only at male students. These cases have been considered elsewhere.[112]

1. *Marriage*

It now seems settled that the right to marry is a fundamental one as that term is applied in the area of federal constitutional law.[113] Any infringement on this right is constitutionally impermissible unless it is shown to be necessary

105. The rule stated: "Hair must be kept one finger width above the eyebrows, clear across the forehead." *Id.* at 486.
106. *Id.* at 488.
107. 296 F. Supp. 702 (W.D. Wis. 1969).
108. *Id.* at 706.
109. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
110. Green v. Waterford Bd. of Educ., 472 F.2d 629, 632 (2d Cir. 1973).
111. *See generally* Comment, *Public School Hair Regulations: Are they Constitutional?*, 16 ST. LOUIS U.L.J. 112 (1971).
112. *See generally* part III, section B(2) of this Note.
113. Loving v. Virginia, 388 U.S. 1 (1967).

to promote a compelling state interest. If a public school seeks to punish a student because of marriage by denying him an education it is infringing on *two* protected rights, the right to marry[114] and the right to an education.[115] Many schools today are attempting to infringe upon those protected rights.[116]

There is little doubt now that a school may not permanently expel students from a public education system just because they are married.[117] However, in contrast to the short work courts have made of cases where the school has expelled students because of marriage, no reported *state* decisions have invalidated the practice of barring married students from participation in extracurricular activities.[118] The leading case in Iowa is *Board of Directors v. Green.*[119] The plaintiff, an outstanding basketball player, sought to enjoin school officials from enforcing a board policy of excluding married students from extracurricular activities. In denying the injunction, the Supreme Court of Iowa held that the plaintiff was not being denied equal protection of the laws. The court said: "Mere differentiation is not enough to constitute a denial of equal protection. In fact statutes and school board rules often create classifications which are valid and enforceable. It is only invidious discrimination which offends constitutional rights."[120] The court went on to hold that participation in extracurricular activities was not a right but a privilege which "may be claimed only in accordance with the standards set up for participation."[121]

In contrast to the state courts, recent federal district court decisions have held that discrimination on the basis of marital status violates the equal protection clause of the fourteenth amendment.[122]

In *Rubel v. Iowa Girls' High School Athletic Union*[123] the plaintiff was an Iowa high school girl of outstanding basketball ability who was a mother as well as being married. The defendant was a statewide gir[l]s' athletic association which had promulgated rules of eligibility for female students of member schools. The

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114. *Id.*

115. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

116. In a recent survey, over two-thirds of schools contacted placed restrictions of one sort or another on married students which were not placed on single students. These restrictions ranged from subtle requests to attend adult classes to summary and final dismissal. *See generally* Knowles, *High Schools, Marriage, and the Fourteenth Amendment*, 11 F.L.J. 711 (1972).

117. Nutt v. Board of Educ., 128 Kan. 507, 128 P. 1065 (1929); McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

118. *See* Estay v. Lafourche Parish School Bd., 230 So. 2d 443 (La. App. 1969); Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963); State of Ohio *ex rel.* Baker v. Stevenson, 189 N.E. 181 (Court of Common Pleas, Butler County, Ohio, 1962); Cochrane v. Board of Educ., 360 Mich. 390, 103 N.W.2d 569 (1960); Kissick v. Garland Independent School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959).

119. 259 Iowa 1260, 147 N.W.2d 854 (1967).

120. *Id.* at 1270, 147 N.W.2d at 860.

121. *Id.*

122. Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972); Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972); Romans v. Crenshaw, 354 F. Supp. 868, 871 (S.D. Tex. 1972). Rubel v. Iowa Girls' High School Athletic Union, Civil No. 11-412-C-2 (S.D. Iowa, Dec. 28, 1971).

123. Civil No. 11-412-C-2 (S.D. Iowa, Dec. 28, 1971).

eligibility rules prohibited married female students from participating in extracurricular athletics. A similar rule applied to a student who was "associated with motherhood." The court held the marriage and motherhood rules unconstitutional in violation of the equal protection clause of the fourteenth amendment of the Constitution of the United States. The court also held that such rules "created an unnecessary public interest in and involvement with the plaintiffs' marital status . . . without rational justification and became violative of plaintiffs' rights to privacy and personal freedom."[124]

In *Holt v. Shelton*[125] the court held that a rule which bars participation in extracurricular activities infringes on the right to marry guaranteed in *Loving v. Virginia*[126] and thus violates the equal protection clause unless a compelling state interest is shown. In *Holt*, the defendant board of education failed to show that the regulation was even rationally related to—not to mention "necessary" to promote—any legitimate state interest at all. In *Davis v. Meek*[127] the court found that extracurricular activities are an integral part of the total school program and that such regulations cut off married students from a part of the education which they have a right to receive in view of the landmark *Brown v. Board of Education* decision. The federal cases seem to contain the better reasoning. To satisfy the equal protection clause, schools must show at *least* a rational basis for all discrimination in providing services to students. While the presumption of rationality generally renders the "rational basis" test easy to satisfy, the Supreme Court has held that classifications based on marital status do not enjoy the usual presumption.[128] Although the Court has not treated the married-unmarried distinction with the same suspicion that it reserves for racial classification,[129] it has established that states may not arbitrarily discriminate against individuals on the basis of their marital status. It seems clear that, while some of the school's objectives rest on legitimate concerns, marriage rules are irrational methods for achieving them. Such grounds as discouraging child marriages, avoiding drop outs, avoiding undesirable moral influences on non-married students, and encouraging married students to spend more time with their families do not meet the "rational basis" test required by the fourteenth amendment's equal protection clause.[130] Courts have begun to recognize that extracurricular activities are fundamental ingredients of the educational process. The right to attend school includes the right to participate in extracurricular activities.[131] It is probably safe to say that *Green* is no longer viable in Iowa.[132]

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124. *Id.* at 9.
125. 341 F. Supp. 821 (M.D. Tenn. 1972).
126. 388 U.S. 1 (1967).
127. 344 F. Supp. 298 (N.D. Ohio 1972).
128. Stanley v. Illinois, 405 U.S. 645 (1972) (state may not deny unmarried father a hearing before it takes his children away while granting a hearing to all other parents); Eisenstadt v. Baird, 405 U.S. 438 (1972) (state cannot discriminate against unmarried persons by denying them access to contraceptives).
129. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).
130. Moran v. School Dist. # 7, 350 F. Supp. 1180, 186-87 (D. Mont. 1972).
131. *Id.* at 1184.
132. In a recent Iowa dispute involving a high school student who was barred from

Nevertheless, the lawyer handling such a suit would be well-advised to bring his action in a federal district court in view of the record of most state courts.[138]

2. *Sex*

Three recent federal court cases have challenged the time honored tradition of separation of the sexes in athletic competition.[134] In *Bucha v. Illinois High School Association*[135] the plaintiffs, two female high school students, claimed they had been denied the opportunity to compete in interscholastic swimming on an equal basis with boys because of their sex. Their attack was two-pronged: (1) denial of competition between sexes and (2) restrictions applicable to girls that are not applicable to boys. The court found that participation in interscholastic athletics is not a right guaranteed by the Constitution, therefore only a rational basis, not a compelling interest, need be found.[136] In finding a rational basis, the court took judicial notice of performance levels of girls compared to boys in various contests of strength and endurance. A seemingly opposite result was reached in the case of *Brenden v. Independent School District 742*.[137] There, the court held that a state high school athletic league rule banning participation by girls on boys' teams was arbitrary and unreasonable and a violation of the equal protection clause of the fourteenth amendment.[138] However, the district court specifically limited its findings to the two exceptionally talented plaintiffs (a top-ranked female tennis player and a cross-country runner and skier).[139] The court refused to make any sweeping consti-

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wrestling because he was married, the board of education voluntarily repealed its exclusionary rule after a temporary restraining order was issued in a state district court. Des Moines Tribune, Jan. 25, 1973, at 16, col. 2. *See also* Des Moines Tribune, Jan. 19, 1973, at 2-s, col. 8 (a similar situation involving a high school basketball player in Nebraska).

133. School authorities are granted authority to act by state law, thus their actions are done under color of law and are subject to the fourteenth amendment. Bucha v. Illinois High School Ass'n, 351 F. Supp. 69, 73 (N.D. Ill. 1972). Any violation or deprivation of Constitutional rights by the state may be challenged in a federal court under 42 U.S.C.A. § 1983. Jurisdiction is found in 28 U.S.C.A. § 1343. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961) (prohibition against deprivation of federal rights under color of law).

134. Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972); Brendon v. Ind. School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, No. 72-1287 (8th Cir. April 18, 1973); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973).

135. 351 F. Supp. 69 (N.D. Ill. 1972).

136. *Id.* at 73.

137. 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, No. 72-1278 (8th Cir., April 18, 1973).

138. *Id.* at 1234.

139. The eighth circuit is not alone in having concluded that mixed competition is feasible. In New York, Section 135.4 of the *Regulations of the Commissioner of Education* provides that girls may participate on the same team with boys in interscholastic competition in the sports of archery, badminton, bowling, fencing, golf, gymnastics, riflery, rowing, shuffleboard, skiing, swimming, table tennis and track and field, provided the school does not maintain a girls team in those sports. And a Michigan statute, M.C.L.A. § 340.379(2) (1972), provides that girls may participate in boys' non-contact sports even if the school maintains a girls' program in the sport. *See generally* Note, *Sex Discrimination in High School Athletics*, 57 MINN. L. REV. 339 (1972).

forbids participation in interscholastic athletics upon attaining the age of twenty years.[154] A Polk County District Judge denied a plea for a temporary injunction.[155] The same judge later upheld the rule, finding that a rational basis existed for the rule.[156]

Classifications based on age are not inherently suspect. Many laws, for example, deny young people rights enjoyed by adults.[157] Thus, only a rational basis must be found to sustain such a rule or equal protection has been denied. The defendants pointed out the physical disparity between a "growing boy" of sixteen and a "developed man" of twenty,[158] and the possibilities of injury to the younger participant through physical contact with the older boy. Because the state has the right, indeed the duty, to protect the health, safety and welfare of its citizens, the court may well find that a rational basis exists.

IV. Fourth Amendment

The fourth amendment to the United States Constitution provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[159] The fourth amendment was made applicable to the states through the fourteenth amendment in *Wolf v. Colorado*[160] in 1949. In *Weeks v. United States*[161] the Supreme Court held that in a federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure. This became known as the "exclusionary rule." The Court's decision in *Mapp v. Ohio*[162] made the exclusionary rule stated in *Weeks* applicable to the states. And in *West Virginia State Board of Education v. Barnette*[163] the Court held that a public board of education is an arm of the state and is subject at least to the fourteenth amendment.

An as yet unsettled question is whether school officials, such as a principal, violate the fourth amendment when they search a student's locker without his permission. If there is a violation, the exclusionary rule applies and evidence obtained in the illegal search is not admissible in a criminal proceeding.

Only a few courts have considered the problem. In most of the cases the decision has turned on whether the school official, acting alone, are private persons or government agents. Private persons are not subject to the ex-

154. Des Moines Register, Jan. 19, 1973, at 1, col. 1.
155. *Id.* Iowa is one of seventeen states which have a nineteen year age limit on participation in athletics while thirty-three other states have an eighteen year age limit. Des Moines Register, February 2, 1973, at 3-s, col. 4.
156. Des Moines Register, Feb. 10, 1973, at 1, col. 4.
157. Examples are the right to vote at eighteen, the right to make a will at majority, the right to drive a car at age sixteen, the right to buy alcoholic beverages upon reaching majority, etc.
158. Des Moines Register, February 2, 1973, at 3-s, col. 4.
159. U.S. Const. amend. IV.
160. 338 U.S. 25 (1949).
161. 232 U.S. 383 (1914).
162. 367 U.S. 643 (1961).
163. 319 U.S. 624 (1943).

clusionary rule,[164] but government agents would be, as they are arms of the state. Only one reported decision has held that a high school principal is a state official and are subject to the fourth amendment.[165] However, in that case, the Delaware supreme court held that a principal stands *in loco parentis* to pupils under his charge, and that an unauthorized locker search made on reasonable suspicion should be accepted as necessary and reasonable.[166] Of course, school officials acting in conjunction with the police are subject to the exclusionary rule.[167] The majority of the decisions have held that school officials, acting alone, are private persons and not subject to the exclusionary rule.[168]

Noting that the fourth amendment prohibits only "unreasonable" searches and seizures, several courts have held that even if a school official is considered to be a government agent, unauthorized searches of lockers may be reasonable and not in violation of the fourth amendment.[169] Moreover, the doctrine of *in loco parentis* has been invoked to uphold unauthorized searches of students' lockers as reasonable in the school setting.[170] Moreover, one court has held that the justification for a search of a high school student's person by school authorities "is not measured by the rules authorizing the search of an adult by the police."[171] Thus, it appears that the standard for reasonableness in unauthorized searches and seizures is less for school officials than for police.

Another ground the courts have used for upholding warrantless searches of lockers by school officials is the nature of the student's property right in a rented locker. Noting that a locker is not like a dwelling, motor vehicle, or private locker, all of which carry an exclusive right of possession, the court in *State v. Stein*[172] held that although a student has exclusive possession of his locker against fellow students, his possession is not exclusive against the school and its officials. The right of inspection was said to be inherent in the authority vested in school administrators.

Although the courts are divided on the basis of their decisions, the majority of the cases have upheld the right of school officials to conduct unauthorized searches and seizures of student lockers. The basis for the decisions are (1) that school officials are private persons and not subject to the exclusionary rule or (2) that school officials are acting *in loco parentis*

164. Burdeau v. McDowell, 256 U.S. 465 (1921).
165. State v. Baccino, 282 A.2d 869 (Del. 1971).
166. *Id.* at 872.
167. People v. Overton, 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).
168. Re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (Crim. Ct. of City of N.Y. 1970); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).
169. People v. Lanthier, 5 Cal. 3d 751, 97 Cal. Rptr. 297, 488 P.2d 625 (Sup. Ct. 1971); Re G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (Cal. Ct. App. 1970).
170. State v. Baccino, 282 A.2d 869 (Del. 1971).
171. In Re C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682, 684 (Cal. Ct. App. 1972); *Cf.* State v. Baccino, 282 A.2d 689 (Del. 1971).
172. 203 Kan. 638, 456 P.2d 1 (1969). *Cf.* People v. Overton, 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (Sup. Ct. 1967).

or (3) that such searches are usually done with cause and thus are not unreasonable.

V. Conclusion

The impact of *Tinker* has been significant in the area of students' constitutional rights. There has been more federal litigation since *Tinker* than all similar federal cases prior to 1969. What has heretofore been settled law is undergoing significant changes directed toward recognition of students' constitutional rights on an equal basis with adults and other students.

Students now enjoy extensive first and fourteenth amendment rights. These include freedom of expression which is neither obscene, libelous or which would cause a material and substantial disruption of the educational process. These rights also include the right to due process, both substantive and procedural, before they can be denied "life, liberty, or property" by school authorities. There must be a rational nexus between school rules and the objectives the rules seek to achieve. Moreover, even rational rules may be unconstitutional if they are not equally enforced against all students. Courts are likely to closely scrutinize those rules and regulations which discriminate on the basis of sex, marital status, or appearance.

The school environment is unique, however, and it seems reasonable that the constitutional rights in the school may be different from those in the community at large. Therefore, a large measure of discretion is given to school administrators in dealing with student problems. The courts will not interfere with this discretionary authority unless it appears that protected constitutional rights are being denied.

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