Shipman & Goodwin LLP
COUNSELORS AT LAW

WHAT ARE THE RULES FOR MAKING SCHOOL RULES?

Thomas B. Mooney

I. INTRODUCTION

School administrators and board of education members must make rules for the safe and effective operation of the schools. Indeed, the student discipline statutes provide that "any pupil whose conduct on school grounds or at a school-sponsored activity is violative of a publicized policy of [the] board [of education]" may be suspended or expelled. It is therefore important to understand the legal issues that arise in the creation and enforcement of school rules.

II. LEGAL OVERVIEW

A. *In loco parentis*

The traditional view of educators is that they act as "parents" of the students during the school day. As parents, school officials have had the authority to direct the conduct of students as they saw fit. Historically, school teachers and administrators have told students where to sit, what to do, what to say and what to wear. Until the 1960s and 1970s, this view was largely unchallenged.

B. Educators as the government

Starting in 1969, the courts have recognized that educators have dual status. They continue to be able to exercise the responsibilities of parents in the school setting. This authority, however, is now limited by constitutional protections. Since our schools are agencies of government, the Bill of Rights and other constitutional protections apply to issues of student supervision.

C. The evolution of constitutional protections:

1. Free speech

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

School officials may regulate the First Amendment rights of students only when they reasonably forecast that permitting such speech will result in:

- **substantial disruption of the educational process;**
- **material interference with school activities; or**
- **invasion of the rights of others.**

Where school officials reasonably make such a forecast, they may prohibit the particular student speech in question.

Here, the Court first recognized that students are entitled to constitutional protections as follows:

> **"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."**

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

School officials have the right to regulate vulgarity without having to show that it is disruptive to the educational process:

"Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the

schools.' The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

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

Editors of the school newspaper do not have First Amendment rights coterminous with those of the press in general. Rather, since the school newspaper carries the imprimatur of the school, school officials can regulate speech in the school, the Court held that school officials have the right to exercise control over the type and content of student speech in school-sponsored activities such as the school newspaper if such action is reasonably related to legitimate pedagogical concerns.

2. Due Process

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

The Fifth and Fourteenth Amendment prohibits the government from depriving persons of "life, liberty or property, without due process of law." Since education is a property right conferred by state law, students may be deprived of this property right only if they receive due process. The scope of the due process required, however, will depend on the nature of the proposed deprivation: "Due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471 (1972).

The Court stated that a deprivation of less than 10 days warrants less significant procedural protections. Hence, we distinguish between the procedural requirements for a suspension and those for an expulsion.

The courts have also held that school officials must not deny anyone substantive due process. This obligation relates not to procedures, but rather to actions. Violations of substantive due process, however, occur only rarely. "The protections of substantive due process are available only against egregious conduct which goes beyond merely offending some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock

the conscience." *Smith v. Half Hollow Hills Cent. School District*, 298 F.3d 168, 173 (2d Cir. 2002).

3. Corporal Punishment

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

In Florida, school officials have been permitted to paddle students as a disciplinary intervention, subject to procedural protections set out in statute (*e.g.*, limits on the number of strikes, requirement for an observer). Some students who were paddled challenged this action as a violation of the prohibition against "cruel and unusual punishment." The United States Supreme Court, however, rejected this claim, stating that the Eighth Amendment was intended to regulate government action under the criminal laws, and that it does not apply in the school setting. Punishment that is so disproportionate that it shocks the conscience, however, may be a violation of the substantive due process rights of the student punished, as described above.

Corporal punishment is a moot point in Connecticut because Connecticut General Statutes, Section 53a-18 provides that use of physical force against another person that would otherwise be a crime is not if "(6) A teacher or other person entrusted with the care and supervision of a minor for school purposes may use reasonable physical force upon such minor when and to the extent he reasonably believes such to be necessary to (A) protect himself or others from immediate physical injury, (B) obtain possession of a dangerous instrument or controlled substance, as defined in subdivision (9) of section 21a-240, upon or within the control of such minor, (C) protect property from physical damage or (D) restrain such minor or remove such minor to another area, to maintain order."

4. Search and seizure

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

- **There must be reasonable grounds at the inception of the search to believe that it will produce evidence that school rules or the law have been violated. What is "reasonable" will depend upon the facts of each case.**

- **The scope of the search must be reasonable, *i.e.* it must be reasonably related to the object of the search reasonable and must not be excessively intrusive in light of the age and sex of the students involved.**

5. Equal Protection

The Fifth and Fourteenth Amendments provide that the government may not "deny to any person within its jurisdiction the equal protection of the laws." The scope of this constitutional protection depends on the nature of the interest affected.

a. Rational relationship test

Normally, the actions of government are measured by a "rational relationship" test. This means that a governmental action (here, school rule) must bear a rational relationship to the goal it is attempting to achieve. The Connecticut Supreme Court has described this test as being satisfied as long as there is a plausible policy reason for the rule. For example, some school districts have adopted policies providing that students may participate in school sports only if they maintain a C average. Similarly, under the rules of the Connecticut Interscholastic Athletic Conference, under some circumstances students may not play sports immediately after transferring from one school to another. There are arguments for and against such rules. Since students have no statutory or constitutional right to participate in sports, however, the courts will consider simply whether such rules have a rational connection to the purpose for the rule. *See, e.g., Wajnowski v. The Connecticut Association of Schools*, 6 Conn. Ops. 35 (Superior Court, January 24, 2000).

b. Heightened Scrutiny

When a governmental action (here, school rule) is based on gender, the courts will apply a higher standard of review. It will not be enough for school officials to show a rational relationship between their rule and purpose. Rather, any rule that distinguishes between persons on the basis of gender will be subject to an intermediate level of scrutiny, *i.e.* whether the rule promotes important governmental objectives and

whether the discriminatory means employed are substantially related to achieving those objectives. Under this higher standard, the United States Supreme Court struck down the rule excluding females from the Virginia Military Academy as a violation of the equal protection rights of females who may wish to attend. *United States v. Virginia*, 518 U.S. 515 (1996).

c. Strict scrutiny

Where school rules infringe upon constitutional rights, such as free expression or free exercise of religion, or when they are based on a suspect classification, such as race or national origin, school officials have a heavy burden to justify the rule. Such a rule will be upheld only if it passes the "strict scrutiny standard," *i.e.* (1) it is necessary to achieve a compelling state interest, and (2) the scope of the rule is drawn as narrowly as possible to achieve that objective.

For example, a school rule that penalizes students for absences would be unenforceable if it were applied to students who were absent because of religious obligations. The legitimate school objective of requiring regular attendance could be achieved less intrusively by penalizing students for unexcused absences. Conversely, a rule against secret societies at the high school level could likely be sustained against challenge, even though it infringes upon the free association rights of students, because such a rule can ultimately be construed as serving the important interest of student safety. *See Passel v. Fort Worth Independent School District*, 453 S.W.2d 888 (Tex. Civ. App. 1970).

6. Involuntary servitude:

***Immediato v. Rye Neck School District*, 73 F.3d 454, 462 (2d Cir. 1996), *cert. denied* 519 U.S. 813 (1996).**

In 1990, the Rye Neck, New York school district adopted a graduation requirement that students perform at least forty hours of community service during their four high school years. A student and his parents claimed that this requirement violated the Thirteenth Amendment prohibition against involuntary servitude, as well as the parents' right to raise their children, and the student's right to privacy and to

personal liberty, both under the Fourteenth Amendment. The Second Circuit Court of Appeals rejected each of these arguments, stating that "we have no trouble concluding that the mandatory community service program does not amount to involuntary servitude in the constitutional sense. The work required is not severe; students must perform only forty hours of service in four years." Furthermore, the court ruled that the requirement is rationally related to a legitimate governmental interest, and it upheld the community service requirement as a legitimate exercise of government authority.

D. The limits of statutory authority.

School districts are creatures of statute and have only those rights given to them by statute. Thus, the jurisdiction of school officials is limited in two important ways.

First, jurisdiction is limited to conduct that directly affects the educational process. In *Packer v. Thomaston Board of Education*, 246 Conn. 89 (1998), the Connecticut Supreme Court ruled that school officials could not discipline a student for possession of drugs off campus. The Court held that school officials cannot regulate student conduct off-campus unless it "markedly interrupts or severely impedes the day-to-day operation of a school." However, there is separate statutory authority for imposing discipline for such conduct when it triggers the mandatory expulsion provisions of state law.

Second, school officials may impose academic consequences for poor performance, but they must limit disciplinary consequences to those permitted by the statutes. In *Campbell v. New Milford Board of Education*, 193 Conn. 93 (1984), a student claimed that a grade reduction policy was, in effect, a disciplinary policy that was not authorized by statute. However, ruling that school districts have broad discretion in making academic decisions, the court found that the grade reduction policy was one permissible measure of student effort, and it dismissed the student's claim. The key in adopting any such policy is to ensure that the purpose and effect of the policy are academic, not disciplinary. By contrast, there is no authority for imposing community service as a disciplinary consequence. However, it can be offered to students and their parents as an alternative to a longer expulsion.

III. BASIC PRINCIPLES FOR CREATING AND ENFORCING SCHOOL RULES

A. The rule must be clear and understandable, and it must not leave too much discretion to school officials.

B. The rule must reasonably relate to a legitimate educational goal.

C. The rule must not violate constitutional protections.

D. The rule must not limit rights students have under statute.

E. The rule must be enforced as written. If flexibility is needed, it should be part of the rule.

IV. CASE EXAMPLES:

SITUATION ONE:

School officials adopted rule that provides:

> **"Students are to be neatly dressed and groomed, maintaining standards of modesty, and good taste conducive to an educational atmosphere. It is expected that clothing and grooming not be of an extreme style and fashion."**

***Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970). The federal district court in Connecticut held that any grooming and/or dress code must define with reasonable specificity the type of dress that is prohibited. Since different people could have very different ideas of what grooming and/or dress is "neat," the court ruled that the code was unconstitutionally vague and unenforceable as written. However, in *Crossen* the court noted that its ruling was based on the code before it, and it stressed that a school district has the authority to adopt a code regulating student dress as long as the code is sufficiently specific and is reasonably related to legitimate educational concerns.**

SITUATION TWO:

The board of education adopted a dress code that prohibited students in the middle school from wearing blue jeans and imposing a mandatory dress code. Parents challenged the policy as violating their constitutional rights.

***Byars v. City of Waterbury*, 2001 Conn. Super. LEXIS 3313 (Conn. Super. Ct. November 19, 2001). The court affirmed its earlier ruling that school districts in Connecticut may enact mandatory dress codes, and that the provision in the dress code prohibiting baggy blue jeans that impede climbing stairs is authorized because it has a rational basis, safety. The court found that prior to the dress code, student dress issues had caused distractions, confrontations between students, and even thefts. Given the procedural posture of the case, however, the court limited its ruling to the prohibition against wearing blue jeans to school. It found that there is no fundamental right to wear blue jeans to school, and that the dress code was rationally related to reducing actual disruptions and loss of instructional time caused by students' preoccupations with fashionable clothing, including blue jeans. The dress code therefore did not violate the student's right to due process or the parent's right to autonomy in raising children.**

***See also* [*Blau v. Fort Thomas Public School District*], 401 F.3d 381 (6th Cir. 2005):**

This case involved a challenge to a dress code that prohibited middle school students from wearing blue jeans among other things. The parent claimed that the dress code violated student's right of free speech and her right to select clothing, as well as the parent's right to determine the clothing child would wear. The court found no First Amendment violation because the student's wish to choose particular clothing was not a particularized message. In addition, the court held that enforcement of the dress code did not violate the student's substantive due process rights: "Whether it be the right to marry, the right to have children, the right to direct the educational upbringing of one's child, the right to marital privacy, the right to use contraception, the right to bodily integrity or the right to abortion . . . none of these fundamental rights has much, if anything, in common with the right to wear blue jeans."

The parent's claims fared no better: "While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.'"

SITUATION THREE:

A school district in Arkansas adopted a policy that required students to present written parent permission to be able to read Harry Potter books. A group of parents challenged that requirement, claiming a violation of the First Amendment.

***Counts v. Cedarville School District*, 295 F. Supp. 3d 996 (W.D. Ark. 2003).**
The court held that this requirement violated the First Amendment. It found that there was no reasonable basis for the rule, and it held that it interfered with the students' First Amendment rights.

SITUATION FOUR:

School officials adopted an anti-harassment code that provides:

"District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property, or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred."

***Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002) .The court held that the prohibitions against materials that create "ill will" was too broad. Otherwise, it affirmed the policy, but it rejected the application here, because the district could not show that the Jeff Foxworthy T-shirt ("Top 10 Reasons You Might Be A Redneck Sports Fan") had caused any disruption or that it violated the policy, except perhaps for the "ill will" provision.**

SITUATION FIVE:

School officials adopted a policy prohibiting harassment that includes the following provisions:

> **Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.**

The Policy continues by providing several examples of "harassment":

> **Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, extorting or the display or circulation of written material or pictures.**

***Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), for example, the Third Circuit struck down this policy because it prohibited a great deal of speech that would not be actionable under state or federal law. Therefore, the court applied the *Tinker* standard to the policy, and it held that the policy was unconstitutional because it limited student speech without a showing of a reasonable forecast that such speech would substantially interfere with or materially disrupt the educational process.**

SITUATION SIX:

The Little Rock, Arkansas Public Schools claimed the right to conduct random searches of students and their possessions, and included a provision in the student handbook, which stated:

> **Book bags, backpacks, purses and similar containers are permitted on school property as a convenience for students. [If they are brought onto] school property, such containers and their contents are at all times subject to random and periodic inspections by school officials.**

***Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004). The Eighth Circuit found that random searches of students attending school are unreasonable and thus violate the Fourth Amendment. Moreover, the court held that school officials could not make such searches reasonable (and thus constitutional) simply by announcing them in advance.**

SITUATION SEVEN:

The school district enacted a policy providing that home-schooled students could not participate in extracurricular activities. A home-schooling family challenged the refusal under the policy to permit their child to participate in

extracurricular activities as violating her Free Association, Equal Protection and Due Process rights.

***Angstadt v. Midd-West School District*, No. 03-3912 (3d Cir. 2004). The Third Circuit held the student did not have constitutional right to participate in extracurricular activities if she was not enrolled in the school district. Accordingly, application of this rule, which has a reasonable basis, did not violate the student's rights. *See also Reid v. Kenowa Hills Public Schools*, No. 239473 (Mich. Ct. App. March 2, 2004) (no Equal Protection or First Amendment violation to deny opportunity to home-schooled children to participate in extracurricular activities).**

SITUATION EIGHT:

A student was found to have smoked marijuana with two friends in the school bathroom. A board policy provided that first-time offenders could elect the option of a treatment program instead of suspension or expulsion. School officials decided that this option was not appropriate for this student, and they went forward with expulsion. The parents challenged, claiming that the district's action violated due process requirements.

***Camlin v. Beecher Community School District* (Ill. App. 3d Dist. 2004). The Illinois Appellate court held that the policy provision created a legitimate expectation of having a choice to participate in the treatment program in lieu of school discipline. Expulsion in contradiction to the announced policy violated his due process rights. "The school board, by promulgating the rules, has created an entitlement and a right to certain procedures, on which a student may expect to rely. It may not refuse to apply the rules it has created."**

SITUATION NINE:

The school district adopted a policy requiring students who participate in extracurricular activities or who have a parking pass to submit to suspicionless drug testing. Some affected students and their parents claimed that this policy violated their Fourth Amendment rights.

Based on the United States Supreme Court case, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the New Jersey Appellate Court held that the requirement is permissible. *Joye v. Hunterdon Central School District*, 2033 WL 21537139 (N.J. App. Ct. July 9, 2003). NOTE: the Pennsylvania Supreme Court reached the opposite conclusion, basing its decision on the greater privacy protections it found under the Pennsylvania Constitution. *Theodore*

***v. Delaware Valley School District*, 2003 WL 22736535 (Pa. 2003).**